

**Proposal COM(2022) 677** of 30 November 2022 for a **Regulation on packaging and packaging waste**, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC

**Communication COM(2022) 682** of 30 November 2022 for an **EU policy framework on biobased, biodegradable and compostable plastics**

## PACKAGING AND PACKAGING WASTE

cepPolicyBrief No. 3/2023

### LONG VERSION

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## A. Key elements of the EU Proposal

### 1 Context and Objectives: Transition to a circular economy

#### 1.1 Objectives of the new Packaging Regulation

- ▶ In its Action Plan for a Circular Economy, the Commission announced numerous measures to gradually transform the “linear throwaway society” into a circular economy and thus decouple the use of resources from economic growth [COM(2020) 98, see [cepPolicyBrief 5/2020](#)]. To achieve this, it wants, among other things, to replace the EU Packaging Directive [94/62/EC] with a new Packaging Regulation.
- ▶ A circular economy aims to conserve resources, avoid or minimise waste and return materials, including packaging, to the economic cycle, throughout the life-cycle of products – design, production, demand and use, and waste management [Circular Economy Action Plan COM(2015) 614, pp. 2–4, see [cepPolicyBrief 6/2016](#)].
- ▶ The proposed Packaging Regulation [COM(2022) 677]
  - aims to reduce the amount of waste generated by packaging by
    - banning “unnecessary” packaging,
    - ensuring that packaging is re-used and recycled, and
    - increasing the percentage of recycled plastics (“plastic recyclates”) in new plastic products [see [cepStudy Circular Plastics Economy \(2020\)](#), p. 58 et seq.];
  - aims to ensure the functioning of the EU internal market by way of uniform, EU-wide provisions on packaging and packaging waste.
- ▶ The Bioplastics Communication [COM(2022) 682] will establish non-binding guidelines for the use of bio-based, biodegradable and compostable plastics.

#### 1.2 Context: Regulatory approach and shortcomings of the current Packaging Directive

- ▶ The current Packaging Directive is also intended to “contribute to the transition to a circular economy”. In terms of waste policy measures – in line with the EU hierarchy of waste [Waste Framework Directive 2008/98/EC, Art. 4] – the prevention of packaging waste has “first priority”, followed by the re-use of packaging as well as recycling and other forms of recovering packaging waste such as incineration [Packaging Directive, Art. 1 (2)].
- ▶ Packaging placed on the market in the EU internal market must meet “essential requirements”, e.g. regarding its manufacture, composition and recyclability [Packaging Directive, Art. 9 (2) in conjunction with Annex II].
- ▶ Among other things, the Packaging Directive establishes binding recycling targets (“rates”) for the Member States.
  - All packaging waste must be recycled as follows [Packaging Directive, Art. 6 (1)]:
    - at least 65% by weight by no later than the end of 2025;
    - at least 70% by weight by no later than the end of 2030.
  - The new Packaging Regulation retains these objectives [Packaging Regulation Art. 46 (1)].
- ▶ The Commission criticises the fact that the current Packaging Directive has failed to achieve its objectives. It maintains that the various national measures are failing to achieve either the desired environmental protection or a smooth functioning of the EU internal market. The “essential requirements” for packaging are poorly designed and therefore difficult for the Member States to implement. [COM(2022) 677, p. 5]

### 2 Scope

- ▶ “Packaging” has various uses such as the containment, protection, handling, delivery and presentation of products [Art. 3 (1)]. Thus, it can e.g.
  - protect a product throughout its entire lifetime [Art. 3 (1) (a)];
  - be filled with a product at the point of sale [Art. 3 (1) (d)];
  - in the case of tea bags and coffee pods, be used and disposed of together with the product [Art. 3 (1) (f) and (g)];
  - serve as sales packaging for the sale of a product to the final customer [Art. 3 (2)];
  - consist of grouped packaging containing several packages [Art. 3 (2)];
  - provide transport packaging to protect products during transport [Art. 3 (4)].

- ▶ The Packaging Regulation applies (Art. 2 (2))
  - to all packaging, regardless of its material – e.g. glass, cardboard, metal, plastic –, as well as
  - to all packaging waste, regardless of its origin – e.g. industrial, commercial, household.

### 3 Regulatory approach

- ▶ The Packaging Regulation aims to contribute to the transition to a circular economy in that packaging waste should continue to be (1) primarily prevented and only then (2) prepared for re-use or (3) recycled or (4) recovered in some other way, or finally (5) disposed of, in accordance with the order of priority of the EU waste hierarchy [Waste Framework Directive 2008/98/EC, Art. 4] [Art. 1 (2)].
- ▶ In the EU internal market, packaging may [Art. 4 (1) – (3)]
  - only be placed on the market if it complies with requirements regarding its environmental sustainability (“sustainability requirements”) [Art. 5–10] and regarding its labelling [Art. 11];
  - not be prohibited by Member States if it meets these requirements.
- ▶ Member States may introduce additional national requirements for the sustainability and labelling of packaging, provided that these do not conflict with the Packaging Regulation [Art. 4 (4)].

## 4 Packaging requirements

### 4.1 Reduction of the amount of packaging

- ▶ The weight and volume of packaging must be reduced to the minimum necessary for it to fulfil its functions [Art. 9 (1)]. The empty space that must be reduced will be calculated for sales packaging in relation to the total volume of the packaged product and its characteristics [Art. 9 (3)].
- ▶ Packages with features that are solely intended to make the packaged product appear larger, such as double walls or false bottoms, are prohibited [Art. 9 (2)].
- ▶ Packaging that is not necessary to comply with any of the “performance criteria” is prohibited [Art. 9 (2)]. Performance criteria are requirements relating to the protection of the packaged product, the packaging manufacturing and filling processes, logistics, information requirements, hygiene and safety standards, legal requirements as well as recyclability, recycled content and re-use [Annex IV, Part I].
- ▶ The packaging manufacturers and companies that use packaging must justify the required minimum weight and volume in “technical documentation” [Art. 9 (4) in conjunction with Annex VII]. In it, they must substantiate why further reduction is impossible [Art. 9 (4) in connection with Annex IV Part II (a)].
- ▶ Empty space in grouped and transport packaging must be reduced to the minimum necessary, and fillers such as wood wool and polystyrene are deemed to be empty space [Art. 9 (3), Art. 21 (2)].
- ▶ Economic operators supplying products to an end distributor or end user, in grouped packaging, transport packaging or e-commerce packaging, must ensure that the proportion of empty space does not exceed 40% [Art. 21 (1)].
- ▶ Packaging types such as single-use plastic packaging for fruit and vegetables below 1.5 kg, and single-use miniature packaging for hotels such as shampoo bottles, are banned outright [Art. 22 in conjunction with Annex V]. The Commission may prohibit other types of packaging by delegated act [Art. 22 (4) in conjunction with Art. 290 TFEU].

### 4.2 Re-use of packaging

The Packaging Regulation prescribes various binding targets for the use of reusable packaging for numerous product types [Art. 26].

- ▶ From 2030, economic operators, placing large household appliances such as refrigerators or dishwashers on the market for the first time, will have to ship 90% of them in reusable transport packaging that is part of a system for re-use [Art. 26 (1)].
- ▶ From 2030, economic operators, placing non-food products on the market for the first time via e-commerce, must ship 10% of these products in reusable transport packaging that is part of a system for re-use, and 50% from 2040 [Art. 26 (8)].
- ▶ Manufacturers of certain foods and beverages and their retailers must comply with binding targets for the use of reusable packaging [Art. 26 (2)–(6)]. Thus, from 2030, sellers of take-away food consumed directly from the packaging must ensure that 10% of the packaging is reusable as part of a system for re-use, and 40% from 2040 [Art. 26 (3)].

- ▶ The obligations on reusable packaging do not apply to economic operators who
  - place no more than 1,000 kg of packaging on the market per year [Art. 26 (14) (a)] or
  - are “micro companies” [Art. 26 (14) (b) in conjunction with Commission Recommendation 2003/361] or
  - have a sales area – including storage areas – of not more than 100m<sup>2</sup> [Art. 26 (15)].
- ▶ The Commission may use delegated acts to establish [Art. 26 (16) in conjunction with Art. 290 TFEU]
  - binding targets for reusable packaging for more products;
  - exemptions for other economic operators and types of packaging.

### 4.3 Packaging recycling

- ▶ All packaging must be “recyclable” [Art. 6 (1)]. To achieve this, packaging must [Art. 6 (2)]
  - be “designed for recycling” from 2030 so that they can be recycled using “state of the art” collection, sorting and recycling processes;
  - effectively and efficiently separately collected and sorted into waste streams;
  - recycled in such a way that the “secondary raw materials” recovered from waste are of sufficient quality to substitute the “primary raw materials” obtained directly from nature;
  - be recyclable “at scale” from 2035 onwards, so that they can be collected, sorted and recycled by means of installed state-of-the-art infrastructure and processes that [Art. 3 No. 32]
    - cover at least 75% of the EU population and
    - also cover packaging waste exported from the EU.
- ▶ The Commission will determine, by means of delegated acts,
  - criteria for the recyclable design and “recyclability at scale” [Art. 6 (3)];
  - the recyclability of a unit of packaging by way of performance grades A–E for certain packaging categories [Art. 6 (4) in conjunction with Annex II; Art. 3 No. 36]. These range [Art. 6 (5)]
    - from class A with a recyclability of at least 95% of the weight of a packaging unit
    - to class E with a recyclability of less than 70% of the weight of a packaging unit, with class E packaging being considered non-recyclable from 2030 onwards.
- ▶ From 2030, “innovative packaging” that does not meet the recyclability requirements may be placed on the market for a maximum of five years [Art. 6 (9)]. This includes packaging made from new materials or with new design or production processes resulting in a “significant” improvement in function while also providing a “demonstrable environmental benefit” [Art. 3 No. 37].
- ▶ Substances of concern in packaging is to be minimised. The provisions in or on the basis of the Packaging Regulation should aim [Art. 5 (1) and (4), Recital 19],
  - to prevent impairment to the reusability and recyclability of packaging,
  - but not to improve chemical or food safety, as this is covered in other EU legislation.

### 4.4 Percentage of plastic recyclates

- ▶ In future, the plastic part of a packaging unit must contain a minimum percentage of plastic recyclates obtained from “post-consumer plastic waste” [Art. 7 (1)]. Post-consumer plastic waste is waste from plastic products that – unlike waste from production processes – have been placed on the market [Art. 3 No. 39]. This also includes “contact-sensitive packaging”, e.g. for food and animal feed, as well as transport packaging for “dangerous goods” [Art. 3 No. 40].
- ▶ The mandatory minimum percentage of plastic recyclates is as follows
  - from 2030 [Art. 7 (1)]
    - 30% for contact-sensitive packaging made predominantly from polyethylene terephthalate (PET), with higher targets applicable to single-use plastic beverage bottles;
    - 10% for contact-sensitive packaging made of non-PET plastics;
    - 30% for single-use plastic beverage bottles;
    - 35% for all other plastic packaging;
  - from 2040 [Art. 7 (2)]
    - 50% for contact-sensitive packaging;
    - 65% for all other plastic packaging, including single-use plastic beverage bottles.
- ▶ No minimum percentage of plastic recyclates is required for plastic packaging for e.g. medical devices and in vitro diagnostics [Art. 7 (3)].

- ▶ The Commission may adopt delegated acts [Art. 290 TFEU],
  - to reduce the scope, timing and level of the minimum percentage of plastic recyclates for certain types of packaging if an assessment to be carried out by 2028 shows that no suitable recycling processes are available [Art. 7 (9)];
  - to reduce the level of the minimum percentage of plastic recyclates for certain types of packaging if plastic recyclates are not available or are only available at “excessive prices”, which could have adverse effects on human or animal health, security of food supply or the environment [Art. 7 (10)].
- ▶ Eight years after entry into force of the Packaging Regulation, the Commission must review whether the recyclates content of packaging materials other than plastic should be increased [Art. 7 (11)].

## 5 Labelling of packaging

- ▶ 42 months after entry into force of the Packaging Regulation, packaging must carry a label containing information on its material composition [Art. 11 (1)]. This applies
  - to e-commerce packaging,
  - but not to other transport packaging.
- ▶ 48 months after entry into force of the Packaging Regulation, packaging must [Art. 11 (2)]
  - carry a label with information on its reusability, and
  - carry a QR code or other digital data carrier containing further information on its reusability – such as systems for re-use and collection points – and allowing the packaging to be tracked and the frequency of its re-use to be calculated.
  - In addition, reusable packaging must be clearly labelled so that it can be distinguished from single-use packaging.
- ▶ 18 months after entry into force of the Packaging Regulation, the Commission must establish harmonised EU labels for the material composition, recyclability and the percentages of plastic recyclates and bio-based plastic, by means of an implementing act [Art. 11 (5)].

## 6 Extended producer responsibility (EPR)

- ▶ In order to promote the circular economy through the re-use of products and the recycling of waste, Member States will establish “extended producer responsibility” (EPR) schemes [Waste Framework Directive, Art. 8 and Art. 8a].
  - Most notably, EPR schemes may impose obligations to accept returned products and to handle their subsequent waste management, as well as to bear the resulting costs.
  - Member States must establish EPR schemes for all packaging by no later than the end of 2024 [Packaging Directive, Art. 7 (2)].
- ▶ In future, packaging manufacturers will bear EPR for all packaging they place on the market for the first time in a Member State [Art. 40 (1)].
- ▶ From 2030, the EPR fees of packaging manufacturers will be calculated according to a harmonised EU method, graded (“modulated”) according to
  - the performance grades A–E for the recyclability of packaging [Art. 6 (4)];
  - the percentage of plastic recyclates in the packaging [Art. 7 (6)].
- ▶ A packaging manufacturer must appoint an EPR officer for each Member State in which it is not established and in which it places packaging on the market for the first time [Art. 40 (2)].

## 7 Bioplastics

- ▶ The Commission is critical of the increasing promotion and use of “bioplastics” whose environmental properties are unclear to consumers. It therefore wants to create more transparency and combat “greenwashing” with non-binding guidelines [Communication COM(2022) 682].
- ▶ The Commission distinguishes between three types of “bioplastics” [Communication COM(2022) 682, p. 3]:
  - “bio-based” plastics, which – in contrast to conventional plastics made from fossil-based raw materials such as petroleum – are at least partly made from renewable biomass, and can be both biodegradable and non-biodegradable;
  - “biodegradable” plastics that can be broken down by microorganisms into natural substances – such as water and carbon dioxide – and can be made from both bio-based and fossil-based raw materials;
  - “compostable” plastics that are basically biodegradable – but often only in industrial composting plants under special conditions that do not occur in nature.

- ▶ In order to prevent environmental damage caused by the use of natural resources for biobased plastics – e.g. through forest clearing – priority should be given to durable products made from organic waste [Bioplastics Communication COM(2022) 682, p. 6 et seq.].
- ▶ Biodegradable and compostable plastics should be used if they have an environmental benefit:
  - Biodegradable plastics should only be used
    - where the reduction or re-use as well as the collection, sorting and recycling of non-biodegradable plastic products is not practicable; and
    - if they are proven to be biodegradable in nature (“open environment”) within a certain period of time; one possible area of application is mulch films in agriculture [Bioplastics Communication COM(2022) 682, p. 8 et seq.].
  - Compostable plastics should only be used when they do not have a negative impact on the quality of the compost, taking into account consumer behaviour. They can be used for tea bags, coffee pods or fruit and vegetable labels and disposed of separately via bio-waste [Bioplastics Communication COM(2022) 682, p. 12 et seq.].
  - Fruit and vegetable stickers and very light plastic bags must be industrially compostable 24 months after entry into force of the Packaging Regulation [Art. 8 (1)].

## B. Legal and political context

### 1 Legislative Procedure

30.11.22 Adoption by the Commission

Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

### 2 Options for Influencing the Political Process

Directorates General: DG Environment

Committees of the European Parliament: Environment, Public Health and Food Safety (ENVI, leading), Rapporteur: Frédérique Ries (Renew, BE)

Federal Ministries: Environment, Conservation, Nuclear Safety and Consumer Protection (leading)

Committees of the German Bundestag: Environment, Conservation and Nuclear Safety (leading)

Decision-making mode in the Council: Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

### 3 Formalities

Competence: Art. 114 TFEU (Internal Market)

Form of legislative competence: Shared competence (Art. 4 (2) TFEU)

Legislative procedure: Art. 294 TFEU (ordinary legislative procedure)

## C. Perspectives of Member States: Italy<sup>1</sup>

The Commission proposes [Art. 44 (1)] that Member States introduce a deposit and return system (DRS), by no later than 2029, for non-reusable plastic beverage bottles and for non-reusable metal and aluminium beverage containers (maximum capacity of 3 litres each), with an exemption for bottles and containers for wine, aromatised wine products and spirits, and for milk and milk products.

In Italy, this obligation is opposed by both the government<sup>2</sup> and CONAI (Conorzio Nazionale Imballaggi)<sup>3</sup>, which is the organisation legally mandated by packaging manufacturers and users, as well as the vast majority of Italian commercial enterprises, to administer “extended producer responsibility”<sup>4</sup>. In its opinion, the obligation to introduce a DRS excessively restricts the scope for action of the individual Member States as it does not allow them to take sufficient account of individual national circumstances. In addition, it believes that a DRS obligation would represent a clear competitive disadvantage with respect to Member States that have already introduced such a deposit and return system<sup>5</sup>. In particular, it points out that the planned recycling targets could also be achieved with alternative strategies. According to the report, Italy has the highest annual packaging recycling rate to date among the large Member States, thanks to a highly effective and economically efficient consortium system<sup>6</sup> (2020: 72.8%)<sup>7</sup>. The Commission's proposed obligation to introduce a DRS would lead to a duplication of costs and also to multiple environmental conflicts of interest. As a compromise, instead of a mandatory DRS, CONAI has therefore proposed retaining the original recycling targets alongside the introduction of appropriate selective collection systems in cases where there is an increased littering risk<sup>8</sup>.

## D. Assessment

### 1 Economic Impact Assessment

Reducing the use of packaging and designing it in a circular way – which in principle allows it to be re-used and more effectively recycled – will decrease the use of materials and resources. In the long term, decoupling economic growth from resource use is necessary to protect biodiversity<sup>9</sup> and also to reduce emissions of greenhouse gases, other environmental pollutants and the amount of waste generated<sup>10</sup>. However, the volume of all types of packaging has increased significantly in recent years. Whereas, in 2009, the total EU-wide figure was 66 million (m) tonnes (t) – 149.89 kg per capita – by 2020 it had reached 79.29 m tonnes – 177.24 kg per capita. 64.3% of this was recycled in 2020.<sup>11</sup>

#### 1.1 Reduction of the amount of packaging

Reducing “unnecessary packaging” may contribute to a reduction in the volume of packaging generated. Banning packaging that not only fails to meet the “performance criteria” but also misleads the consumer regarding the amount of contents could both help to reduce resource consumption and additionally strengthen consumer protection. However, the requirement that every product must be investigated and documented in detail, as to why a reduction in packaging is not possible, will mean an inordinate amount of red tape for companies and national authorities.

The Commission's proposed 40% maximum limit on empty space in transport packaging or grouped packaging could, in principle, help to conserve resources. However, the design of certain product packaging must be taken into account in this regard. For example, as consumers are becoming increasingly “convenience oriented”,

<sup>1</sup> Author: Dott. Stefano Milia, Direttore esecutivo, Centro Politiche Europee ROMA (cepItalia).

<sup>2</sup> Sole 24 Ore of 9 November 2022, [Pichetto \(Ambiente\): diremo no a regolamento Ue su imballaggi](#); Sole 24 Ore of 4 March 2023, [Auto, packaging, case green: i fronti aperti tra Italia e Ue](#).

<sup>3</sup> CONAI, [Mission Statement](#).

<sup>4</sup> CONFINDUSTRIA (2022), [Pan al Sole24Ore: la proposta di regolamento Ue sugli imballaggi ha un impatto devastante sull'industria](#).

<sup>5</sup> CONAI (2022), [DRS, Deposit Refund Systems for packaging in Europe – Analysis of DRS for Re-use and Re-cycling](#).

<sup>6</sup> Bocconi University and Wuppertal Institut (2022), [Screening the efficiency of packaging waste in Europe](#), Study commissioned by the Consorzio Nazionale Imballaggi (CONAI) and the Extended Producer Responsibility Alliance (EXPRA).

<sup>7</sup> Eurostat (2023), [Recycling rates of packaging waste for monitoring compliance with policy targets, by type of packaging](#).

<sup>8</sup> CONAI, [Press release of 11 November 2022](#).

<sup>9</sup> Reichert, G. / Schwind, S. / DePetris, A. / Jousseume, M. (2020), Biodiversity Strategy 2030, [cepPolicyBrief](#).

<sup>10</sup> Schwind, S. / Reichert, G. (2021), Zero Pollution Action Plan, [cepPolicyBrief 20/2021](#).

<sup>11</sup> Eurostat (2022), [Packaging waste by waste management operations](#).



packaging is being provided with more and more dosing, portioning and handling functions – e.g. handles.<sup>12</sup> These facilitate the use of products but may not allow them to be efficiently stowed in transport packaging if the packaging design creates empty space. In this case, the advantages of packaging that makes product use easier and safer should be weighed against the disadvantages of residual empty space. In addition, the requirement to adapt packaging size to product size, will often be uneconomical, especially for SMEs. They will have to make separate checks for each product category as to whether their respective packaging complies with the requirements. Considering that companies also have a vested interest in keeping their transport costs as low as possible, the 40% maximum limit on empty space should be generally rejected.

## 1.2 Re-use

Reusable packaging is environmentally more beneficial than single-use packaging if the re-use rate is sufficiently high.<sup>13</sup> The threshold beyond which reusable packaging is preferable to single-use packaging varies, however, depending on the area of application. Consequently, it is necessary to consider the benefits of reusable packaging over its entire life-cycle, including transport routes, integration into a standardised system of re-use, return rates, material costs and disposal.<sup>14</sup> It is therefore necessary to take account, not only of the cost to packaging manufacturers and companies that use packaging of switching to reusable packaging but also the behaviour of consumers, who have to be prepared to make their contribution to the re-use of packaging. Ultimately, consumer acceptance is crucial to the implementation of a circular economy. The environmental advantage of reusable packaging is largely influenced by how often it is used. However, if customers throw it away instead of returning it to the circular economy, the contribution to reducing resource consumption decreases as compared with single-use solutions.<sup>15</sup> For example, reusable plastic boxes in e-commerce have to be used 82 times to cause fewer greenhouse gas emissions than a single-use box made from recycled materials. If the cardboard is made from primary raw materials, the reusable plastic box must be used 61 times.<sup>16</sup> In the “take-away food” sector, a reusable plastic container has to be used on average 39 times to be more beneficial than a single-use plastic container. The packaging material also changes the threshold beyond which reusable packaging becomes environmentally more advantageous: On average, reusable glass packaging has to be used 3.5 times more often than reusable plastic packaging.<sup>17</sup>

The environmental benefits of re-use options thus depend heavily on establishing well-functioning systems for re-use that need to be set up in parallel. This could be, for example, a deposit system that gives consumers an economic incentive to leave the reusable packaging in the system and not simply throw it away. The fact that smaller businesses in the take-away food and beverages sector are exempted is appropriate as it is likely that they will often simply lack the space to store the necessary reusable tableware. The exemption of micro-enterprises in the e-commerce sector also makes sense, as establishing a reusable system is not always feasible for small enterprises and could potentially make the distribution of products unprofitable.

Having many different systems of re-use – whether in e-commerce or the take-away food and beverages sector – will also make it unattractive for customers to use them. However, if only a few re-use systems are created, which can be used by other companies, there will be a concentration of the market around large companies which have the resources to set up such systems.

In order to clarify which “large household appliances” must be shipped in reusable transport packaging from 2030, the Commission Proposal [COM(2022) 677, Art. 26 (1)] refers to the list of appliances under “Annex II

<sup>12</sup> Federal Environment Agency (2019), *Aufkommen und Verwertung von Verpackungsabfällen in Deutschland im Jahr 2017*, Abschlussbericht, Texte 139/2019, p. 21; see Voßwinkel, J. S. / Reichert, G. / Schwind, S. / Jousseume, M. (2020), *Circular Plastics Economy for Non-food Packaging, Requirements for the Implementation of the EU Circular Economy Action Plan*, [cepStudy](#) [“cepStudy Circular Plastics Economy (2020)”], p. 4.

<sup>13</sup> Stuber-Rousselle, K. / Prakash, S. / Löw, C. (2021), *Material choices for environment-friendly packaging design – Analysis of existing Life Cycle Assessment (LCA) studies*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

<sup>14</sup> Coelho, P. M. / Corona, B. / ten Klooster, R. / Worell, E. (2020), *Sustainability of reusable packaging – Current situation and trends; Resource, Conservation & Recycling: X 6 (2020) 100037*, p. 5; Stuber-Rousselle, K. / Prakash, S. / Löw, C. (2021), *Material choices for environment-friendly packaging design – Analysis of existing Life Cycle Assessment (LCA) studies*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

<sup>15</sup> Zimmermann, T. / Bliklen, R. (2020), *Single-use vs. reusable packaging in e-commerce: comparing carbon footprints and identifying break-even points*, *GAIA-Ecological Perspectives for Science and Society*, 29(3), 176-183, p. 178.

<sup>16</sup> Zimmermann, T. / Bliklen, R. (2020), *Single-use vs. reusable packaging in e-commerce: comparing carbon footprints and identifying break-even points*, p. 180.

<sup>17</sup> Stuber-Rousselle, K. / Prakash, S. / Löw, C. (2021), *Material choices for environment-friendly packaging design – Analysis of existing Life Cycle Assessment (LCA) studies*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p. 26.

No. 2” of the WEEE Directive [2012/19/EU]. In fact, this contains the list of “small household appliances”, the list for “large household appliances” is set out in Annex II No. 1. This drafting error must be corrected as part of the ongoing legislative process.

### 1.3 Recycling

In principle, for the purpose of creating a circular economy, it is more efficient if plastic packaging is designed to be recyclable from the start. Currently, a product is considered “recyclable” if the waste materials can be reprocessed either into the original product or for other purposes.<sup>18</sup> This also includes plastic recyclates of inferior or unsafe quality, however, which currently can only be used in predominantly simple products – such as flower pots or door mats – which themselves do not have to meet high quality standards (“downcycling”). These are usually no longer recyclable and have to be incinerated. Definitions for “recyclable design” and “recyclability at scale” not only facilitate recycling but also help to ensure that, in particular, high quality recyclates can be obtained. Uniform EU definitions of when packaging is recyclable will facilitate the production of packaging, as well as the trade in packaged products, throughout the EU internal market as it will not be necessary to meet separate requirements for each EU Member State.

However, various conflicts of interest need to be considered regarding the definition of both “recyclable design” and “recyclability at scale”. For example, packaging is generally easier to recycle if it is made of only one material – e.g. uncoated paper or plastic packaging made of only one type of plastic – but currently fibre-based composite packaging, i.e. paper packaging with plastic content, is often used. This uses proportionately less plastic and thus suggest greater environmental value than plastic packaging, but it is more material-intensive and more difficult to recycle.<sup>19</sup> At the same time, uncoated paper cannot be used for the relevant applications to the same extent as fibre-based composite packaging. Banning the latter could therefore result in a return to more plastics being used in packaging. Plastic packaging consisting of several manually inseparable materials (“composites”) can only be processed into high-quality plastic recyclates by way of an energy-intensive process (“chemical recycling”). At the same time, composites are many times thinner and lighter than packaging made from a single type of plastic. Consequently, better recyclability of plastic packaging can result in the higher consumption of materials.<sup>20</sup>

Uniform definitions of “recyclability” firstly present a challenge in that the corresponding specifications may not be compatible with specific packaging and its desired functions. Secondly, they harbour the risk of conflict between the various sustainability goals being pursued. Possible conflicts, such as an increase in plastic consumption, must be taken into account when determining “recyclability”.

Furthermore, achieving recyclability at scale depends not only on packaging producers and companies that use packaging but also on the development of the corresponding infrastructure, which must cover 75% of the EU population. Currently, both the quality and the quantity of plastic waste collected and sorted is not yet sufficient to ensure the consistently high-quality recycling of plastics. By linking the definition of recyclability at scale to the development of infrastructure, the Commission apparently wants to stimulate the development of collection, sorting and recycling infrastructure by Member States. In principle, the transition to a circular economy will be promoted if barriers are removed across the board. The design of packaging plays a fundamental role in how well a product can be recycled. However, as long as there are insufficient collection, sorting and recycling facilities that guarantee high-quality recycling, the packaging manufacturers and companies that use packaging will have no incentive to design packaging in a recycling-friendly way, which will in turn inhibit the expansion of high-quality recycling facilities (“chicken-and-egg problem”).<sup>21</sup> The Commission Proposal fails to solve this problem as ultimately it will affect the packaging manufacturers and companies that use packaging when it bans their packaging even though it meets the requirements on recyclability. There should therefore be no link here between the requirements for packaging manufacturers and companies that use packaging, on the one hand, and the requirements for the expansion of the corresponding infrastructure, on the other.

The Commission also wants to set requirements, by means of delegated acts, for “recyclable design” from 2030 and then again for “recyclability at scale” from 2035. However, a revision of the definition after only five years

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<sup>18</sup> Waste Framework Directive, Art. 3 No. 17.

<sup>19</sup> Stiftung Zentrale Stelle Verpackungsregister, [Zahlen, Daten, Fakten](#).

<sup>20</sup> Umweltbundesamt (2019), *Aufkommen und Verwertung von Verpackungsabfällen in Deutschland im Jahr 2017*, Abschlussbericht, Texte 139/2019, p. 94.

<sup>21</sup> On this see [cepStudy](#) Circular Plastics Economy (2020), p. 55 et seq.

will create planning uncertainty as it is unclear how packaging will have to be designed between 2030 and 2034 and to what extent the requirements will change in 2035.

A ban on certain chemicals in packaging that negatively affect its recyclability may support the production of high-quality recyclates – especially since it is currently not always clear which chemicals are present in packaging. However, the Commission has already called for the value chain to be considered throughout the entire life-cycle of products, including information on the chemicals used, in its proposal for a new Ecodesign Regulation.<sup>22</sup> It also noted at the time that further regulation of packaging was possible by means of delegated acts within the framework of the planned Ecodesign Regulation.<sup>23</sup> In addition, the risk assessment of various chemical substances is already regulated in various pieces of EU legislation and chemical safety assessments are carried out at different times by various EU agencies – e.g. the European Chemicals Agency and the European Environment Agency. Different methods can be used to assess chemicals, and there is sometimes a lack of clarity about what information is already available about the chemicals.<sup>24</sup> If substances that inhibit recycling are banned, then they should certainly not be regulated under any other piece of legislation. The exclusion of chemicals by the Packaging Regulation and, where applicable, by the ecodesign requirements, increases bureaucracy and may potentially lead to either confusing or, in the worst case, even contradictory duplicate regulation, which should be avoided.

#### 1.4 Plastic recyclates

In the long term, a circular economy cannot function without the use of high-quality recyclates. However, uniform EU requirements for a minimum percentage of plastic recyclates in packaging can only lead to the desired smooth functioning of the EU internal market if all companies have the same access to plastic recyclates. Furthermore, barriers to a functioning market for plastic recyclates must be comprehensively dismantled, e.g. the cross-border movement of plastic recyclates and uncertainties about the quality of plastic recyclates.<sup>25</sup> But consumer acceptance is also a part of this. For example, commercial production of transparent lightweight packaging from post-consumer plastic waste is not currently possible.<sup>26</sup> Under the current state of the art, therefore, consumers must also be prepared to accept impairments to visual appearance. Thus, increasing plastic recyclates is not purely a demand problem but must be addressed across the board. This includes not only increasing the percentage of recyclates in packaging but also making more recyclates available on the market. Setting plastic recyclate targets could result in a mismatch between supply and demand.

The Commission recognises this risk and is considering changing the targets if plastic recyclates for certain types of packaging are either unavailable in sufficient quantities or only at “excessive prices”. However, this will create massive planning uncertainty. Packaging manufacturers and companies that use packaging need to invest in the transition to more plastic recyclates before 2030. Equally, investments are needed in existing recycling technologies to enable the market ramp-up of high quality plastic recyclates. Most notably the lack of clarity about what is meant by “excessive prices” could stifle the necessary willingness to invest on the part of packaging producers and operators of sorting and recycling facilities. Currently, high-quality plastic recyclates, which can replace primary raw materials such as petroleum, are more expensive than plastics made from primary raw materials. It is not clear from the vague wording of the Commission Proposal whether these are already “excessive prices” or at what point this will be the case. In the event that the minimum percentage of plastic recyclates is relaxed, those packaging producers and companies that use packaging, who have taken measures to meet the Commission's original targets, will be at a cost disadvantage. This will indirectly result in an incentive not to invest sufficiently in the production and purchase of high-quality recyclates.

#### 1.5 Labelling of packaging

By providing a label for the environmental characteristics of packaging, consumers are informed about the use of plastic recyclates, for example, and thus have the opportunity to make an informed purchasing decision. It should be noted, however, that this does not take account of all the environmentally relevant aspects of

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<sup>22</sup> European Commission (2022), Proposal COM(2022) 142 of 30 March 2022 for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC; see [cepPolicyBrief 10/2022](#), pp. 6 and 11.

<sup>23</sup> Packaging Regulation [Commission Proposal COM(2022) 677], Recital 9.

<sup>24</sup> European Commission (2020), Communication COM(2020) 667 of 14 October 2020, Chemicals Strategy for Sustainability – Towards a Toxic-Free Environment (“Chemicals Strategy”), p. 18 et seq.

<sup>25</sup> On this see [cepStudy Circular Plastics Economy \(2020\)](#), p. 59 et seq.; European Environment Agency (2023), [Investigating Europe's secondary raw material markets](#), p. 23.

<sup>26</sup> Umweltbundesamt (2022), Prüfung konkreter Maßnahmen zur Steigerung der Nachfrage nach Kunststoffzyklen und rezyklathaltigen Kunststoffprodukten, Texte 128/2022, p. 151.

packaging, or all criteria within the framework of the waste hierarchy. An important environmental aspect is also the avoidance of packaging or a reduction in packaging weight – which is also one of the Commission’s goals. This cannot, however, be recorded on the label.

Indicating the options for re-use on the label, as well as providing more information via a QR code, such as the available collection points, will enable the consumer to deal with the product properly with little effort. Since the circular economy is largely dependent on consumer behaviour, this increases the likelihood that the consumer will use the packaging as intended. In addition, a QR code reduces the amount of information that has to be placed directly on the product. It makes sense that less information needs to be placed on packaging, especially considering that the Commission is also aiming to reduce the volume of packaging. The more clearly information can be conveyed, the more likely it is that consumers will take it on board.

A uniform EU label will facilitate distribution in the EU internal market as separate labelling obligations will not have to be met for each Member State<sup>27</sup>. However, the requirements for uniform EU labelling will not be established until 18 months after the Regulation comes into force. The Commission should establish how the labels are to be designed before the Regulation comes into force, in order to shorten the implementation phase. This will enable faster implementation of the uniform EU label and thus support the envisaged harmonisation of the EU internal market.

### 1.6 Extended producer responsibility (EPR)

The Commission wants to establish uniform EU requirements for calculating EPR fees within the framework of “extended producer responsibility” (EPR) on the basis of the recyclability and the recycled content of packaging (“eco-modulation”). If uniform EU eco-modulation is high enough, it could render obsolete the planned requirements for recyclability, as well as the minimum percentage of plastic recyclates, because scaling the cost allocation based on the nature of packaging could significantly influence packaging design. In this context, EPR fees have the advantage over mandatory compliance with recyclability requirements and minimum percentages of plastic recyclate in that unintended negative effects can be prevented. Thus, companies can decide decentrally and on a case-by-case basis, taking account of the EPR cost allocation, when the use of plastic recyclates makes sense and when the additional costs of using primary raw materials are unavoidable.

The obligation for packaging producers to appoint an EPR representative in each Member State where they place a product on the market, represents a disproportionate cost burden for SMEs. While larger companies can manage this more easily or already have branches in different EU Member States, SMEs may find that shipping to additional EU Member States is no longer worthwhile. The very fact that the Commission is seeking, with the Packaging Regulation, to achieve uniform EU rules for the EU internal market, makes it especially difficult to understand why EPR representatives must nevertheless be appointed in every EU Member State. An obligation for importers to have EPR representatives, on the other hand, would ensure that companies from other EU countries also fulfil the EPR requirements of the Packaging Regulation.

### 1.7 Bioplastics

Weighing the pros and cons of bioplastics – whether bio-based, biodegradable or compostable – is difficult because their impact on the environment and society is complex. This includes water consumption, the use of pesticides in agriculture and the use of agricultural land in their production.<sup>28</sup> Prioritising durable products made from bio-based plastics over single-use packaging therefore makes sense in order to reduce the negative impact on the environment. A uniform definition for “biodegradable” and “compostable” plastics, as well as clear labelling on how to dispose of the products, can avoid misleading product information and “greenwashing”, which will also make it easier for consumers to dispose of the products properly. Even if plastics are biodegradable, they should not simply be thrown away in nature. Using them in specific situations, such as agriculture, may reduce the risk from plastics that are disposed of improperly. Using compostable plastics for coffee pods or tea bags, for example, makes it easier for consumers to dispose of them properly.

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<sup>27</sup> In France, for example, packaging must be labelled with the so-called “Triman logo”, while in Italy other environmental labelling must be placed on packaging with instructions for proper disposal. In Germany, there is currently no mandatory labelling for proper disposal on packaging. See Deutsche Industrie- und Handelskammer (DIHK) (2023), Umgang mit Verpackungen in Europa – eine Übersicht der nationalen Umsetzung.

<sup>28</sup> European Commission (2019), A circular economy for plastics – Insights from research and innovation to inform policy and funding decisions, Brussels, p. 79 et seq.

## 2 Legal Assessment

### 2.1 Legislative Competency

Unproblematic. The EU may take measures to regulate packaging and packaging waste in order to create a cross-border circular economy in the EU internal market [Art. 114 TFEU] as well as to protect the environment through a “prudent and rational” use of natural resources and environmentally sound waste management [Art. 192 TFEU].

### 2.2 Subsidiarity.

According to the principle of subsidiarity [Art. 5 (3) TEU], EU measures are justified in order to regulate cross-border issues. This includes the creation of an EU-wide circular economy for packaging, with EU requirements, that are as uniform as possible, throughout the entire life-cycle of packaging – including its design, production, use and waste management. This is the only way that barriers to the development of a profitable circular economy for high-quality plastic recyclates, and distortions of competition between Member States due to differences in the severity of requirements for companies, for example, can be reduced in the EU internal market.<sup>29</sup>

### 2.3 Compatibility with EU Law in other respects

The Commission's authorisations to ban other types of packaging altogether by means of delegated acts [Art. 22 (4)], and to set binding targets for reusable packaging for other products [Art. 26 (16)], violate the concept of reserving essential elements for the EU legislator [Art. 290 TFEU].

The whole purpose of granting power to the Commission to adopt “non-essential elements” by means of delegated acts [Art. 290 TFEU], is to ensure that “EU legislation”, enacted by the EU legislator – in the EU Parliament and the Council – during the complex ordinary legislative procedure, is not overburdened by detailed technical provisions, and to facilitate fast and flexible adaptation to new developments.<sup>30</sup> Under the Packaging Regulation, as a basic legislative act, however, the EU legislator can delegate to the Commission the power to adopt “non-legislative acts of general application” only to “supplement or amend” certain “non-essential elements” [Art. 290 (1) para. 1 TFEU]. On the other hand, the “essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power” [Art. 290 (1) para. 2, sentence 2 TFEU]. The “concept of reserving essential elements” for the EU legislator aims to safeguard the institutional balance between the EU organs and prevent the primary task of the EU Parliament and the Council, as the EU legislator, from being eroded by the transference of legislative powers to the Commission.<sup>31</sup> This arises from the principle of democracy which states that essential decisions should be made by the directly and democratically elected legislator and not by the executive.

Which types of packaging will be banned altogether and which products will be subject to binding targets for reusable packaging are evidently “essential” regulatory elements that should be decided by the EU legislator itself in the Packaging Regulation and not be delegated to the Commission.

## E. Conclusion

Banning unnecessary packaging that also misleads the consumer regarding the amount of contents could both help to reduce resource consumption and additionally strengthen consumer protection. However, the requirement that all packaging must be investigated and documented in detail, as to why a further reduction is not possible, will mean an inordinate amount of red tape especially for small and medium-sized enterprises (SMEs). The requirement to reduce transport packaging and grouped packaging, in order to limit empty space to a maximum of 40%, should be weighed up against the advantages of a packaging design that contributes to easy and safe use of the product. In addition, the requirement to adapt packaging size to product size will often be uneconomical, especially for SMEs. Since companies have a vested interest in keeping their transport costs as low as possible, the 40% maximum limit on empty space should be generally rejected.

Reusable packaging is environmentally more beneficial than single-use packaging if the re-use rate is sufficiently high. The threshold beyond which reusable packaging is preferable to single-use packaging varies, however,

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<sup>29</sup> On this e.g. [cepStudy](#) Non-Food Packaging (2020), p. 16 et seq.

<sup>30</sup> Gellermann, M. in: Streinz, R (2018), EUV/AEUV, 3rd Edn., Art. 290 TFEU, para. 1.

<sup>31</sup> Ibid., para. 7 citing further references.

depending on the area of application. The environmental benefits of re-use options thus depend heavily on establishing well-functioning systems for re-use. While having many different systems for re-use will make their use unattractive for consumers, establishing only a few re-use systems will ensure a concentration in the markets.

Uniform EU definitions of when packaging is recyclable will facilitate the production of packaging, as well as the trade in packaged products, as it will not be necessary to meet separate requirements for each EU Member State. They also facilitate the production of high-quality recyclates. Various conflicting goals must, however, be taken into account. Uniform definitions of “recyclability” present a challenge in that the requirements may not be compatible with specific packaging and its desired functions. Secondly, they harbour the risk of conflicts between the various sustainability goals being pursued.

Uniform EU requirements for a minimum percentage of plastic recyclates in packaging can only lead to the desired smooth functioning of the EU internal market if all companies have the same access to plastic recyclates. With that aim, barriers to a functioning market for plastic recyclates must be completely dismantled. Setting plastic recyclate targets could result in a mismatch between supply and demand. The Commission does account for this risk and is considering changing the targets if not enough plastic recyclates are available for certain types of packaging, or only at “excessive prices”. However, this will create massive planning uncertainty and will indirectly result in an incentive not to invest sufficiently in the production and purchase of high-quality recyclates.

If the uniform EU calculation of the financial contribution via extended producer responsibility (“eco-modulation”) is high enough, it could render obsolete the planned specifications on recyclability, as well as the minimum percentage of plastic recyclates. EPR fees have the advantage, over mandatory compliance with recyclability requirements and minimum percentages of plastic recyclate, that unintended negative effects can be prevented. Thus, companies can decide decentrally and on a case-by-case basis, taking account of the EPR cost allocation, when the use of plastic recyclates makes sense and when the additional costs of using primary raw materials are unavoidable.