

Introduction

On 28 May 2018, the European Commission [proposed](#) a **Directive on the reduction of the impact of certain plastic products on the environment**. If adopted, it would ban six kinds of single-use plastic items and regulate other categories in various ways to reduce their consumption.

The legislative proposal follows a broader [Plastics Strategy](#), adopted by the Commission in January, which presents a wide-ranging set of Circular Economy policy measures.

Summary of the Proposal

I. Legal basis, objective and scope

1. Legal basis and objective pursued

The proposed Directive is **based** on the EU competence for **environmental** action. Its **objective** is to prevent and reduce the impact of certain single-use plastic products (and fishing gear) 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 business models, products and materials, thus also contributing to the efficient functioning of the internal market. The commission has presented its motivation for the measure in a press release and conference.

The transition to recyclable/recycled materials does not seem to be one of the primary objectives that this proposal directly pursues— in contrast to the broader Plastics Strategy that the Commission unveiled in January.

2. Scope – Who and what will be affected?

The proposal **directly affects “producers”**. Producers are effectively everybody who supplies single-use plastic products (or fishing gear that contains plastic) commercially for the first time in the supply chain for distribution, consumption or use on the EU market, whether in return for payment or free of charge, and irrespective of the selling technique used, including mail order.

The Commission has reduced the personal scope of the proposal significantly. In a version leaked to the media in April, it used a broad definition of ‘producer’, including anyone who manufactures, imports, distributes or sells. This definition would have included the points of sale to end consumers, i.e., shops. They would have been caught up in the obligations to cover for considerable costs, including of handling waste.

“**Fishing gear**” is defined as “any item or piece of equipment that is used in fishing and aquaculture to target or capture marine biological resources during a fishing operation, or which is floating on the sea surface and is deployed with the objective of attracting fish”.

“**Plastic**” is defined as polymer within the meaning of the chemicals regulation REACH, “which can function as a main structural component of final products, with the exception of natural polymers that have not been chemically modified”. This definition is meant to exclude from its scope polymeric coatings, paints, inks, and adhesives, but include bio-based and biodegradable plastics.

In order to achieve its objective, the proposal provides a very **broad definition of “single-use plastic product”** as “made wholly or partly from plastic [and] not conceived, designed and placed on the market to accomplish, within its life span, multiple trips or rotations by being returned to the producer for refill or re-used for the same purpose for which it was conceived”. Several kinds of measures would apply to single-use plastic product categories listed in an **Annex**, which insofar actually **defines the scope of the proposal**.

The Commission defined that the trips or rotations have to return the product to “the producer”. This could be interpreted as *the same* producer, excluding return schemes in which multiple producers cooperate. Furthermore, as only ‘upstream’ producers are within the scope of the changed definition of producers, returning products to the point of sale might not suffice.

II. Measures – How would single-use plastic products (and fishing gear) be affected?

The Commission proposes various measures for several product categories that partly overlap, i.e., some product categories are addressed by multiple measures.

1. Consumption reduction

Member States would have to take the necessary measures to achieve a “**significant reduction**” in the consumption of certain single-use plastic products within six years after the new EU rules must be transposed into national legislation.

These products would be:

- Food containers, i.e., receptacles such as boxes, with or without a cover, used to contain food that is ready for immediate consumption from the receptacle either on the spot or take-away, without any further preparation. This includes for instance fast food containers and beverage containers, plates, packets and wrappers containing food
- Cups for beverages

The proposal does not specify what constitutes a “significant” reduction. Whilst the Commission would be tasked with adopting “rules for the calculation and verification of the significant reduction”, it seems unlikely that this delegation is meant to leave the definition of “significant” to the Commission as well.

The proposal does not prescribe exhaustively which measures Member States should take to achieve this consumption reduction. However, such measures may include the use of national consumption reduction targets or targets on a minimum percentage of reusable packaging placed on the market or maintaining or introducing economic instruments such as charges at the point of sale.

2. Restrictions

The Commission plans to **prohibit** the placing on the EU market of the following single-use plastic products:

- Cotton bud sticks (except for swabs intended and used for medical purposes)
- Cutlery (forks, knives, spoons, chopsticks), plates, straws (except for straws intended and used for medical purposes) and beverage stirrers
- Balloon sticks (sticks and their mechanisms, except for products that are not distributed to consumers)

3. Product requirements

The proposal would require Member States to ensure that all single-use plastic **beverage containers** placed on the EU market are designed and manufactured in a way that their **caps and lids** with a significant part made of plastic remain attached to the container during the product’s use. The EU will provide a **standard** for this purpose. Metal caps or lids with plastic seals are effectively exempt from the scope of this provision.

4. Marking requirements

Member States would need to ensure that a series of single-use plastic products placed on the EU market bear a conspicuous, clearly legible and indelible marking, informing consumers of the negative environmental impacts of littering and other inappropriate disposal of waste of those products. The Commission would be empowered to adopt implementing acts laying out the specifications of this marking. The items affected by this provision would be:

- Sanitary towels (pads), tampons and tampon applicators
- Wet wipes, i.e., pre-wetted personal care, domestic and industrial wipes
- Balloons, except for those that are not distributed to consumers

5. Extended producer responsibility

Member States would be required to have set up Extended Producer Responsibility (EPR) schemes for the following single-use plastic products:

- Food containers, as defined above
- Packets and wrappers made from flexible material containing food that is ready for immediate consumption from the packet or wrapper without any further preparation
- Beverage containers, including their caps and lids
- Cups for beverages
- Tobacco products with filters and separately marketed filters for tobacco products
- Wet wipes, i.e., pre-wetted personal care, domestic and industrial wipes
- Balloons used as a toy or a decoration
- Lightweight plastic carrier bags and very lightweight plastic carrier bags

The Commission removed sanitary towels (pads), tampons and tampon applicators from an earlier leaked draft of this category. It has been reported that women’s groups were worried about the additional burden by costs that the producers would pass down to consumers.

Under these EPR schemes, the producers (please see broad definition above) would be required to **cover the costs of collection of waste** from these products and its subsequent transport and treatment, **including the costs to clean up litter and of awareness raising measures**.

The Commission originally wanted to require the producers to cover the cost to clean up *marine* litter. The final proposal does not mention ‘marine litter’ anymore in its *operative* part.

The obligation to bear the costs to clean up litter nonetheless appears to be an extension of producer responsibility to remediation costs of leakage into the environment that is unprecedented in EU law. The proposal does not specify how exactly these costs to be covered are supposed to be calculated.

Member States would also have to ensure that EPR schemes are set up for fishing gear that contains plastic. Those schemes would mostly follow the general rules of the Waste Framework Directive 2008/98 (as amended by the Circular Economy Package). The EPR fees for fishing gear shall cover the costs of the collection of waste fishing gear containing plastic that has been delivered to adequate port reception facilities in to other equivalent collection systems, its subsequent transport and treatment, as well as the costs of the awareness-raising measures.

6. Separate collection

“Member States shall take the necessary measures to collect separately, by 2025,” each year 90% of waste single-use plastic **bottles** by weight of such bottles put on the market. In order to achieve this target, Member States may, among others:

- Establish separate collection targets for relevant EPR schemes, or
- Establish deposit refund systems.

Whilst it appears rather unlikely to be intended, changes in the language from a version leaked earlier could be interpreted as asking the Member States have to *organise* the separate collection *themselves* – as opposed to ensuring that the target is met by adopting the appropriate rules.

7. Awareness raising

“Member States shall take measures to inform consumers” about:

- The available re-use systems and waste management options as well as best practices in sound waste management
- The impact of littering and other inappropriate disposal of waste on the environment, in particular, the marine environment

This obligation applies to all single-use plastic product categories listed for EPR plus sanitary towels (pads), tampons and tampon applicators, as well as and fishing gear containing plastic.

Again, the changed language implies that Member States have to organise these measures themselves. This is particularly relevant because producers would have to cover the costs for these measures.

III. Implementation – What would happen after the entry into force of the Directive?

1. Transposition

Member States would have the regular two years to transpose the Directive into national law. The product design requirements would apply at the latest, one year later. As mentioned above, the consumption reduction target would apply after an additional six years.

2. Enforcement

Member States would be required to lay down **penalties** that are “effective, proportionate and dissuasive”. The proposal also makes the Aarhus Convention on access to environmental justice applicable to national decision within its scope. Hence, it empowers **citizens and NGOs** to ask for a **legal review** of national decisions, actions or omissions related to the implementation of the Directive.

The Commission deleted a reference making criminal law applicable to the proposed obligations.

Next Steps

The proposal **will go through the ordinary legislative procedure involving the European Parliament and Council.**

The Commission **has urged** the other institutions to treat it “as a priority file, and to deliver tangible results for Europeans before the elections in May 2019.” It remains to **be seen** what priority the institutions will give to the proposal. **The time to conclude the legislative procedure**, including so-called trilogues between the co-legislators, before the European Parliament elections in May 2019 **seems rather short**. The fate of a legislative proposal **that has not been approved** by the European Parliament until then would be uncertain.

How We Can Help

For more information about this important new EU initiative and how it relates to other EU policies and regulatory proposals in the Circular Economy and plastics sector, or to discuss how to **best engage** in the legislative process now starting, please get in touch with us.

We can help you understand the impact of the details of this and other proposals on your operations, propose matching legal, regulatory and other risk mitigation measures or devise a strategy to maximise potential opportunities for you.

We have a global network of 47 offices in 20 countries, with 15 of those offices located in Europe. This allows us to combine the expertise of more than 600 lawyers across Europe with our “best in class” Public Policy team in order to help clients successfully navigate their way through complex legal, regulatory and policy matters at a national or EU level.

Key Contacts



Wolfgang Maschek

Partner, Head of European Public Policy
Brussels
T +322 627 11 04
E wolfgang.maschek@squirepb.com



Ken Huestebeck

Public Policy Advisor
Brussels
T +322 627 11 02
E ken.huestebeck@squirepb.com