

A. Introduction

In the morning of 19 December 2018, the EU co-legislators Council and European Parliament (EP) agreed on the text of the so-called Single-use Plastics Directive (Directive) after a negotiating session that had lasted for more than 12 hours. The Directive includes measures that the EU Member States will, in general, have to take **by 2021**¹ regarding specifically identified categories of single-use plastic (SUP) products (and fishing gear containing plastic).

The European Commission (EC) adopted a broader [Plastics Strategy](#) in January 2018. In this context, the [EC proposed the SUP Directive](#) in May 2018. The EP, following the adoption of a draft report by its Environment Committee (ENVI), voted in plenary to enter into negotiations with the Council in October 2018. At the end of the same month, ambassadors of the EU Member States in the Committee of Permanent Representatives (COREPER) gave the Council Presidency a mandate to enter into such negotiations (so-called “trilogues”). In total, Council and EP held three trilogue meetings, with the EC present, and nine technical meetings. The [present text of the SUP Directive](#) is the result of these negotiations.

B. Summary of the Directive

I. Legal basis, Objective, Scope and Relationship to Other EU laws

Legal Basis and Objective Pursued

The Directive is based on the EU competence for environmental action.

As such, it does not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties and notified to the EC (Article 193 of the Treaty on the Functioning of the EU; so-called protection clause). They do not need approval by the EC.

The **objectives** of the Directive are to prevent and reduce the impact of certain SUP products on the environment, in particular, the aquatic environment, and on human health, as well as to promote the transition to a circular economy with innovative and sustainable business models, products and materials, thus also contributing to the efficient functioning of the internal market.

Recital 2 explains that the Directive promotes circular approaches that prioritise sustainable, **non-toxic, re-usable** products over single-use products, aiming **first and foremost at waste prevention**, as well as retaining the value of products and materials for as long as possible. Recital 3 states that the **EU** must play its part in preventing and tackling marine litter and **aim to be a standard setter for the world**.

Scope – Who and What Will Be Affected?

The proposal **directly affects “producers”**. Producers are effectively everybody established in a Member State who professionally manufactures, fills, sells or imports *and* places on the market of that Member State SUP products, as well as those established in another Member State or in a third country who professionally sell SUP products directly to users.

The definition is particularly important to determine who bears the extended producer responsibility under the Directive (see below). The co-legislators extended the definition of producer (again) to points of sale to end consumers, i.e. shops – but only if the placing on the market takes place there, i.e. the first making available of a product on the market.

“**Plastic**” is defined as a material consisting of a polymer within the meaning of Article 3(5) of the REACH Regulation 1907/2006, to which additives or other substances may have been added, and “which *can* function as a main structural component of final products, with the exception of natural polymers that have not been chemically modified” within the meaning of Article 3(40) REACH [emphasis added]. This definition is meant to **exclude** from its scope **polymeric paints, inks and adhesives** but **include bio-based and biodegradable plastics**.

The co-legislators deleted an exclusion of coatings that the EC had proposed.

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 a producer for refill or re-used for the same purpose for which it was conceived* [emphasis added]”.

¹ Assuming that the Directive is adopted as expected, please see section C.

Several kinds of measures would apply to specific SUP product categories listed in an **Annex**, which effectively **defines the scope of the proposal** in the most part and includes specific criteria for some categories to distinguish SUP products from plastic products that do not fall within the scope of the Directive.

As a product made partly from plastic can be a SUP product, even the smallest share of plastic within the provided definition, e.g. coating or the lining of a paper cup makes it a plastic product.

The co-legislators clarified that products that are returned to *another* producer for refill, e.g. in return schemes in which multiple producer cooperate, are multi-use products out of the scope of the Directive.

Recital 12 explains that SUP products “are typically intended to be used just once *or* for a short period of time before being disposed of [emphasis added]”.

This phrasing still, in principle, includes products with a very long use phase, such as insulation, as they are typically intended to be used just once before being disposed of.

Relationship to Other EU Laws (*Lex Specialis*)

The recitals generally explain that proper waste management remains essential for the prevention of all litter. However, the impact of existing EU legislation on marine litter is not sufficient. The Directive provides generally that where its rules *conflict* with the Packaging and Packaging Waste Directive 94/62 or the Waste Framework Directive 2008/98, the rules in the SUP Directive shall prevail. Recital 9 explains that the SUP Directive is *lex specialis* to these other Directives. However, the recital adds: “This is the case for restrictions on placing on the market”, whilst “[i]n particular with regard to consumption reduction measures, product requirements, marking requirements and extended producer responsibility [the SUP] Directive [only] *supplements*” the other two Directives [emphasis added]. Article 4 on consumption reduction provides that Member States may take marketing restrictions, i.e. bans, in derogation from Article 18 of the Packaging and Packaging Waste Directive 94/62 “for the purposes of prevention of littering of *those products* in order to ensure that those products are substituted with alternatives that are reusable or do not contain plastic [emphasis added].”

Article 18 of the Packaging and Packaging Waste Directive enshrines the **freedom to place packaging on the market**, which satisfies the provisions of that directive. The provided grounds for a derogation from Article 18 are narrower than the general objectives of the SUP Directive. Whilst this is not absolutely clear what “those products” refers to – SUP products in general (as referenced in the preceding sentence) or only those SUP products listed in part A of the Annex (please see below) – the better systematic argument is for the latter, as the next sentence refers to only those products listed in part A of the Annex again.

According to Article 11, the measures that Member States take to transpose the Directive shall comply with **EU food law**.

II. Measures – How Will SUP Products Be Affected?

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

Consumption Reduction

Member States will have to take the necessary measures to achieve an “**ambitious and significant**” and “**measurable quantitative**” reduction in the consumption of certain SUP products **by 2026** compared to 2022. To this end, the Directive provides for notification, planning, monitoring and reporting obligations of the Member States – eventually “with a view to the establishment of binding quantitative [EU] targets”. Thus, the Directive does not set specific quantitative consumption reduction targets. The proposal does not proscribe which measures Member States should take to achieve this consumption reduction. However, these 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.

The SUP products whose consumption must be reduced are:

- Cups for beverages, including their covers and lids
- Food containers

Defining SUP food containers and distinguishing them from food packaging outside of the scope of the SUP Directive received particular attention during the legislative process. The **Annex** now includes a uniform description of food containers as: receptacles such as boxes, with or without a cover, used to contain food that is intended for immediate consumption, either on-the-spot or take-away, is typically consumed from the receptacle *and* is ready to be consumed without any further preparation, such as cooking, boiling or heating, including food containers used for fast food or other meal ready for immediate consumption, except beverage containers, plates and packets and wrappers containing food.

In addition to the criteria listed in the Annex, **Article 12** provides that in order to determine whether a food container is to be considered as a SUP product, “its tendency to be littered, due to its volume or size, in particular single-serve portions, plays a decisive role.” **Recital 12** provides as examples for food containers to be considered as SUP products: fast-food containers or meal, sandwich, wrap and salad boxes with cold or hot food, or food containers of fresh or processed food that does not need further preparation, such as fruits, vegetables or desserts, *but not* those for dried food or food that is sold cold requiring further preparation, containers containing food in more than single-serve portions or single-serve portion sized food containers sold in more than one unit.

Restrictions

From two years after the entry into force of the Directive, i.e. likely not before early Q2 2021, Member States will have to **ban all** products made of **oxo-degradable plastic** (irrespective of whether they fit the definition of SUP products or not). The Directive defines oxo-degradable plastic as plastic materials that includes additives which through oxidation lead to the fragmentation of the plastic material into micro-fragments or to chemical decomposition, as well as:

- Cotton bud sticks (except if they fall within the scope of the Medical Devices Directives)
- Cutlery (forks, knives, spoons, chopsticks)
- Plates
- Straws (except if they fall within the scope of the Medical Devices Directives)
- Beverage stirrers
- Food containers, beverage containers and cups for beverages made of **expanded polystyrene**

Whilst the EC proposal did not address any plastic material specifically, the final draft Directive hence insofar addresses specifically oxo-degradable plastic, expanded polystyrene and PET (see below).

Product Requirements, Including Mandatory Minimum Recycled Content

From 5 years after the entry into force, beverage containers with a capacity of up to three litres, which have caps and lids made of plastic, may be placed on the market only if the **caps and lids remain attached** to the container during the product’s intended use stage. For this purposes, metal caps or lids with plastic seals shall not be considered to be made of plastic. Beverage containers are receptacles used to contain liquid such as beverage bottles and composite beverage packaging, including their caps and lids, but not glass and metal beverage containers that have caps and lids made from plastic (with a specific exemption for special medical purposes). The EC is tasked with requesting the European standardisation organisations to develop harmonised standards relating to this within three months after the entry into force.

From 2025, beverage bottles with Polyethylene Terephthalate as the major component (PET bottles) must contain at least **25% recycled plastic**, calculated as an average for all PET bottles placed on the market on the territory of each Member State.

From 2030, all SUP beverage bottles must contain at least **30% recycled plastic**, calculated as before.

Marking Requirements

From two years after the entry into force, the following products must bear a conspicuous, clearly legible and indelible **marking on their packaging or on the product itself**:

- Sanitary towels (pads) and tampons and tampon applicators
- Wet wipes, i.e. pre-wetted personal care and domestic wipes
- Tobacco products with filters and filters marketed for use in combination with tobacco products
- Cups for beverages

The marking must inform consumers of the appropriate **waste management options** or waste disposal means to be avoided for that product, as well as the **presence of plastics** in the product **and** the resulting negative **environmental impacts of littering** or other inappropriate waste disposal of the products.

The EC is tasked to established harmonised marking specifications in an implementing act (see below).

Extended Producer Responsibility (EPR)

The Directive provides for differentiated EPR regimes for packaging and non-packaging SUP products, in general to be implemented by the **end of 2024**. However, existing EPR schemes established before July 2018 must be adapted by 5 January 2023.

The Packaging and packaging Waste Directive 94/62, as recently amended by Directive 2018/852, provides that Member States have to establish EPR schemes for all packaging by the end of 2024.

Producers of:

- Food containers, as defined before
- Packets and wrappers made from flexible material containing food that is intended for immediate consumption from the packet or wrapper without any further preparation
- Beverage containers, as defined before
- Cups for beverages, including their covers and lids
- Lightweight plastic carrier bags as defined in Article 3(1c) of Directive 94/62/EC

shall cover the costs pursuant to the general rules on EPR and, insofar as not already included, (a) the costs of the **awareness raising measures** referred to in Article 10 regarding those products; (b) the costs for the **collection** of waste of those products discarded in public collection systems, including infrastructure and its operation, and its subsequent transport and treatment; and (c) the costs to **clean up** litter of those products and its subsequent transport and treatment.

Producers of:

- Wet wipes, i.e. pre-wetted personal care and domestic wipes
- Balloons, except balloons for industrial or other professional uses and applications, that are not distributed to consumers

shall cover the costs of (a) the **awareness raising** measures referred to in Article 10 regarding those products; (b) the costs to **clean up** litter of those products and its subsequent transport and treatment; and (c) of **data gathering and reporting**.

Hence, the producers of product falling into these two categories do not have to cover the cost of collection, including infrastructure.

By January 2023, the producers of **tobacco** products with filters and filters marketed for use in combination with tobacco products shall, *in addition*, cover the costs of collection of waste of those products discarded in public collection systems, including infrastructure and its operation, and its subsequent transport and treatment. This may include the *setting up of* specific infrastructure for the collection of waste of those products, such as appropriate waste receptacles in common litter hotspots.

The **costs** to be covered shall not exceed the costs that are necessary to provide those services in a cost-efficient way and shall be established in a transparent way between the actors concerned. The costs to clean up litter shall be proportionate and limited to activities undertaken by public authorities or on their behalf. To minimise administrative costs, Member States may determine financial contributions to clean up litter by setting appropriate multiannual fixed amounts.

The Directive introduces a system of **authorised representatives** amongst the Member States for the purpose of producers fulfilling their EPR obligations.

Separate Collection

Member States shall take the necessary measures to collect separately *for recycling*, **no later than by 2025, 77%** of the waste from SUP **beverage bottles** with a capacity of up to three litres, including their caps and lids, but not glass and metal beverage bottles that have caps and lids made from plastic (excluding bottles for special medical purposes). *No later than by 2029, 90%* of the waste from such SUP **beverage bottles** must be collected separately *for recycling*. SUP beverage bottles placed on the market within a Member State may be deemed to be equal to the amount of waste generated of such products, including waste littered. In order to achieve this target, Member States *may, among others*, establish separate collection **targets for relevant EPR schemes** or establish **deposit refund systems**.

Awareness Raising

By two years after entry into force (i.e. the general transposition deadline, see below), Member States shall take measures to inform consumers and to incentivise responsible consumer behaviour, in order to achieve a reduction in the littering of products covered by this Directive.

With regard to:

- Food containers, as defined before
- Packets and wrappers made from flexible material, as defined before
- Beverage containers, as defined before
- Cups for beverages
- Tobacco products with filters and filters marketed for use in combination with tobacco products
- Wet wipes, as defined before
- Balloons, as defined before
- Lightweight plastic carrier bags as defined in Article 3(1c) of Packaging and Packaging Waste Directive 94/62
- Sanitary towels (pads) and tampons and tampon applicators

Member States shall take measures to inform consumers about (a) the **availability of reusable alternatives**, re-use systems and waste management options for those products, as well as best practices in sound waste management carried out in accordance with Article 13 of Waste Framework Directive 2008/98; (b) the **impact of littering** and other inappropriate waste disposal of those products on the environment, and in particular on the marine environment; (c) as well as the **impact on the sewer network** of inappropriate waste disposal of those products.

As with separate collection, the phrasing 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.

C. Adoption, implementation, enforcement and evaluation

Adoption

The SUP Directive has been going through the approval processes in both the Council and EP. COREPER and ENVI endorsed it on 18 and 22 January, respectively. It is expected to be adopted without changes in March 2019. It will enter into force after being published in all official languages of the EU in its Official Journal (OJ).

Implementation

In general, Member States will have **two years** from that date **to transpose it into their national laws**, making the rules of the SUP Directive directly applicable to economic operators.

The SUP Directive gives the EC multiple mandates to adopt **implementing acts** on:

- The methodology for calculation and verification of consumption reduction measures (within 18 months from the entry into force), of the separate collection targets (effectively within 12 months from the entry into force), of recycled content in beverage bottles (January 2022)
- Harmonised specifications for marking requirements (effectively within 12 months from the entry into force)
- The format for reporting data (effectively within 12 months from the entry into force; except for information on recycled content in beverage bottles: January 2022)

The Directive also charges the EC with publishing **guidelines** “including examples of what is to be considered a single-use plastic product” (within 12 months from the entry into force) and for criteria on the cost to clean up litter (no explicit time limit).

Recital 12 indicates that the guidelines on the definition of single-use plastic products should encompass all product categories listed in the Annex, including food containers.

Enforcement

Member States must lay down the rules on effective, proportionate and dissuasive penalties applicable to infringements of national provisions adopted pursuant to the Directive and shall take all measures necessary to ensure that they are implemented. However, the co-legislators deleted specific access to justice rules (in favour of NGOs, amongst others) from the EC proposal.

Evaluation

Within six years after the transposition deadline, i.e. likely **by 2027**, the EC shall carry out an evaluation of the Directive and submit a report, accompanied by a legislative proposal, if appropriate. The report shall include assessments of: (a) the need to review the Annex, including in particular regarding **caps and lids made of plastics used for glass and metal beverage containers**; (b) the change in materials used in the SUP products covered by the Directive, as well as of new consumption patterns and business models based on reusable alternatives; this shall, wherever possible, include an overall **life-cycle analysis** to assess the environmental impact of such products and their alternatives;

(c) the scientific and technical progress concerning criteria or a standard for **biodegradability in the marine environment** applicable to SUP products within the scope of the Directive and their single-use substitutes, which ensure full decomposition into CO₂, biomass and water within a timescale short enough for the plastics not to be harmful for marine life and not lead to an accumulation of plastics in the environment.

With this, the co-legislators set a high bar for biodegradable SUP products to be possibly exempted from the Directive in the future: *marine* biodegradability.

A separate report shall consider the options for binding measures for the reduction of the post-consumption waste of **tobacco** products with filters and filters marketed for use in combination with tobacco products, including the possibility for setting binding collection rates for the post-consumption waste of these products.

How We Can Help

Please get in touch with us for more information about this new EU law and how it relates to other EU initiatives on the Circular Economy in the plastics sector, or to discuss how to best engage during their implementation or in EU legislative processes in general.

We can help you understand the impact of details of this and 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 the national or EU level.

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