



EUROPEAN COMMISSION PROPOSES AMBITIOUS UPDATE TO PACKAGING RULES

The European Commission has [proposed](#)¹ a long-awaited legislative update aimed at reducing packaging waste across the EU as part of efforts to create a circular economy. The proposal will now be the subject of debate in the European Parliament and Council of the EU under the ordinary legislative procedure.

WHY ARE THE RULES BEING UPDATED?

Even though recycling rates have increased in the EU, the amount of waste generated is growing faster than the actual recycling. According to the [impact assessment](#) published alongside the proposal, unless action is taken, the volume of plastic waste would increase by 46% by 2030 and 61% by 2040 compared to 2018.

The original [packaging and packaging waste directive](#)² was adopted in 1994. A 2018 [revision](#) introduced more ambitious targets for recycling of packaging waste. Article 9(5) of the directive³ requires another revision to reinforce the 'essential requirements' with which all packaging material must comply to be placed on the EU market.

WHAT ARE THE OBJECTIVES OF THE NEW RULES?

The proposed update aims to:

- Prevent and reduce packaging waste, including by encouraging more reuse and refill, minimising packaging and banning avoidable packaging
- Make all packaging on the EU market recyclable in an economically viable way by 2030 and boost high quality ("closed loop") recycling
- Increase the use of recycled plastics in packaging in a safe way
- Decrease the use of virgin materials (such as new plastics and paper that are not made of recycled material) in packaging and put the sector on track to climate neutrality by 2050

Key issues

- The European Commission has published a proposal to update legislation on packaging and packaging waste
- There are new targets for reducing packaging waste and mandatory reuse or refill targets
- The Commission is cracking down on "over-packaging" with a maximum allowable empty space in e-commerce packaging and a ban on false bottoms and double walls
- Packaging must be designed for recycling from 2030
- Certain single-use packaging formats will be banned, including hotel miniature toiletries and sugar sachets
- There will be a mandatory deposit return system (DRS) for plastic drinks bottles and cans
- There will be harmonised labels on all packaging and recycling bins to facilitate waste sorting
- The measures will apply to EU and imported products
- The proposal must be adopted by the European Parliament and Council of the EU and is likely to be significantly amended in the process
- New rules will come into effect in 2024 at the earliest

¹ Proposal for a Regulation on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive 2019/904, and repealing Directive 94/62/EC

² European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste

³ Consolidated [text](#): European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste

The objectives are in line with the commitments taken under the [EU plastics strategy](#), and the [European Green Deal's Circular Economy Action Plan](#).

WHY THE SWITCH FROM A DIRECTIVE TO A REGULATION?

The Commission has proposed to repeal the original directive and introduce a new piece of legislation in the form of a regulation as opposed to another directive. This is a trend that can be seen across EU policies from data protection to batteries and e-commerce. Whereas a directive is addressed to member states, which must transpose it into national law⁴, a regulation is "binding in its entirety and directly applicable in all Member States"⁵. Regulations therefore have a direct effect; companies and individuals must directly comply with the rules set out by regulations, and they can also rely on these rules before national courts. Regulations are also more "harmonising" by avoiding differing national approaches to transposition.

Indeed, the Commission justified the switch to a regulation by citing unilateral packaging policy measures by member states which led to uneven national regulatory frameworks. The Commission is seeking to avoid any obstacle to the free circulation of packaging and the goods they contain.

The move to a regulation was apparently supported by business stakeholders during the public consultation ahead of the Commission's proposal being published, but could face pushback from some member states which will object to this more "harmonising" approach.

WHAT ARE SOME OF THE KEY MEASURES?

The proposal is wide ranging but some of the key measures include:

- **Targets for packaging waste reduction and mandatory reuse or refill targets** in sectors such as retail and catering. Packaging must for example be conceived and designed with the objective of being reused or refilled as many times as possible (Article 10).
- **EU-wide standards for "over-packaging"**. This includes a maximum allowable empty space in e-commerce packaging and a ban on certain forms of unnecessary packaging (Article 21). The weight and volume of packaging must be minimised; false bottoms and double walls are banned unless they are necessary for the performance of the packaging (Article 9). Space filled with bubble wrap, polystyrene or other material will be considered empty space.
- **Design criteria for all packaging to increase recycling rates**. From 1 January 2030 packaging will have to comply with the design for recycling criteria and from 1 January 2035 the requirements will be further adjusted to ensure that recyclable packaging is sufficiently and effectively collected, sorted and recycled (Article 6). The Commission is tasked with adopting delegated acts to introduce a new grading system to classify packaging according to its design for recycling.
- **Targets for minimum recycled content in most forms of secondary plastic packaging** from 1 January 2030 of between 10% and 35% depending on the use of the packaging (Article 7).

⁴ Article 288(3) of the Treaty of the Functioning of the European Union.

⁵ Article 288(2) of the Treaty on the Functioning of the European Union.

- **A ban on certain formats including single use packaging** for condiments, preserves, sauces and sugar, and hotel miniature toiletry products (Article 22 and Annex V). The Commission can update the list of banned formats through delegated acts.
- **New targets for reduction of packaging waste of 5%, 10% and 15% by 2030, 2035 and 2040** respectively, while the pre-existing recycling and recovery targets for individual materials (by 2025 and 2030) are retained.
- **Mandatory deposit return system (DRS)** for single use plastic drinks bottles and aluminium cans (with a capacity up to three litres) (Article 44).
- **Mandatory compostability for some packaging types**, where composting is environmentally beneficial. Filter coffee pods, sticky labels attached to fruit and vegetables and very lightweight plastic carrier bags for example must be compostable 24 months after the entry into force of the Regulation (Article 8).
- **Labels on all packaging** to facilitate correct waste sorting by consumers, and the same labels will appear on recycling bins to make it clear where to put each type of packaging (Articles 11 and 12). Reusable packaging will have a QR code or similar to access information that will facilitate its reuse. The Commission will establish harmonised labels through implementing acts.

WHAT ROLE FOR DELEGATED AND IMPLEMENTING ACTS?

The importance of new delegated acts and implementing acts is notable throughout the proposal. As noted above, the Commission will, for example, be empowered to draw up the new grading system for classifying packaging according to its design for recycling, and to update the list of banned formats in Annex V. Whether those elements should indeed be decided by the Commission will be hotly debated in the legislative process. The European Parliament and Council could decide that these elements should instead be set out in the regulation itself, or that any updates to banned formats should go through the full legislative process rather than being delegated to the Commission.

For a useful reminder of the purpose and operation of delegated and implementing acts, please see our [client briefing](#).

WHAT ABOUT THIRD-COUNTRY PRODUCERS?

The measures will apply equally to EU and imported products, i.e., it does not differentiate between EU and third country producers. For example, in line with other EU legislation (such as the REACH chemicals regime), the obligations will be placed on EU manufacturers and importers into the EU to comply with the minimum standards for packaging (Articles 11 and 13), along with separate duties for distributors and fulfilment service providers. The Commission argued the regulation will send "clear signals to non-EU market actors intending to place products on the EU market" and facilitate imports, which will no longer have to comply with diverging requirements in different member states.

ARE THERE ANY EXEMPTIONS?

There are several exemptions dotted throughout the proposal which may reduce the impact of the measures to some degree. For example:

- The re-use and refill targets will not apply to micro companies (as defined in Commission Recommendation 2003/361), to companies with a sales area of less than 100 square metres (including all storage and dispatch areas), or to companies that do not place more than 1000kg of packaging on the market during a calendar year. (Article 26)
- Member states may also exempt micro companies from the ban in Annex V point 3 on disposable plates, cups and other items. (Article 22)
- The rules on excessive packaging will not apply to companies that use sales packaging as e-commerce packaging. (Article 21)
- Where packaging design is subject to geographical indications (GIs) of origin protected under EU legislation, it is exempt from the rules regarding packaging minimisation. (Article 9)
- The DRS does not apply to wine, aromatised wine products, spirit drinks and milk products. (Article 44)
- Immediate packaging of medicinal products, veterinary medicinal products, and contact sensitive plastic packaging of medical devices and in vitro medical devices are exempt from the recyclability requirements until 2034 for health and safety reasons. (Article 6)
These same products are also exempt from the minimum recycled content requirements for plastic packaging. (Article 7)

WHAT HAS BEEN THE REACTION TO THE COMMISSION'S PROPOSAL?

The Commission's proposal was published on 30 November 2022, having initially been expected in the first half of 2022. There was a certain amount of internal pushback; the Regulatory Scrutiny Board issued a negative opinion on the original impact assessment of 13 May 2022. The Commission had to make a number of changes and additions in order to obtain a [position opinion](#) from the Board at the end of September 2022, allowing publication of the proposal in November.

Following publication, stakeholder reactions to the proposal have been mixed. Below are some of the points that will no doubt be discussed during the legislative process:

- **Balance between reusability and recyclability of single use packaging.** The European Paper Packaging Alliance has [argued](#) that "renewable recyclable single-use paper-based packaging has a lower environmental impact than reusable systems in takeaway settings".
- **Targets for reuse and refill.** FoodDrinkEurope has [argued](#): "The targets and timelines set out [...] are well-intended but regrettably unrealistic without appropriate enabling conditions and could even hamper rather than enhance sustainable packaging aims".
- **Impact on branding.** "Marketing" and "consumer acceptance" have been dropped as packaging performance criteria if they add weight.

The spirits sector [argued](#) this could "drastically reduce brand differentiation and product presentation". FEVE, the European Container Glass Federation [stated](#) it would "lead to the standardisation of packaging, with far-reaching negative consequences on consumer-choice, product value, and brand identity".

- **Access to required recycled material by food and drink companies.** UNESDA, the European Soft Drinks Association has [argued](#) companies that need food-grade material should at least have a right of first refusal to the correct kind of recycled material.

HOW CAN BUSINESSES PROVIDE FEEDBACK ON THE PROPOSAL TO THE EUROPEAN COMMISSION?

Stakeholders have until 27 February 2023⁶ to [submit](#) their views on the proposal to the Commission. Should you wish to discuss making a submission to this consultation, please contact a member of the team listed at the end of this briefing, or get in touch with your usual Clifford Chance contact.

WHAT ABOUT BIODEGRADABLE AND COMPOSTABLE PLASTIC?

Alongside the proposal on packaging and packaging waste, the Commission published a [Communication](#) that lays out an EU policy framework on biobased, biodegradable and compostable plastics, detailing when these plastics are truly environmentally beneficial and how they should be designed, disposed of and recycled. According to the Commission, a policy framework is required to ensure biobased, biodegradable and compostable plastics have positive environmental impacts, rather than exacerbating plastic pollution. The Communication will be the starting point for future EU work on these plastics, for example ecodesign requirements for sustainable products, funding programmes and discussions in international fora.

WHAT HAPPENS NEXT?

The proposal will now pass to the European Parliament and Council of the EU for adoption under the ordinary legislative process (formerly known as co-decision) which requires a majority in the European Parliament and a qualified majority of member states in the Council. Both the Parliament and Council must jointly agree the final wording of the legislation before it can be formally adopted.

As regards timing, there are European elections in the spring of 2024 so either the institutions must work quickly to pass the legislation in early 2024 before Parliament breaks, or the work will be carried over to the new legislature. In that scenario, the earliest we can expect a final text is the first half of 2025.

The proposal is likely to undergo substantial changes as part of the legislative process. We should expect a significant amount of lobbying from the different stakeholders.

The decision to propose a Regulation as opposed to a Directive means the new rules will be directly applicable once formally adopted. It also means there

⁶ Deadline may be extended due to a delay in the proposal being available in all official EU languages.

is no additional time required for national transposition before the rules can become applicable.

It will be important to keep an eye on the delegated acts and implementing acts that are proposed by the European Commission following formal adoption of the regulation. As already noted, these relate to some key measures that will be the subject of much lobbying.

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