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[REDACTED]

From: [REDACTED]
Sent: 03 July 2018 12:24
To: 'Tony O'Sullivan'
Subject: RE: SUP Directive

Thanks Tony.

[REDACTED]
From: Tony O'Sullivan [REDACTED]
Sent: 03 July 2018 12:11
To: [REDACTED]
Subject: SUP Directive

Hi [REDACTED]

Following on from our conversation on the draft SUP Directive, attached is a paper from Europen on the above topic.

Europen represents the packaging supply chain in Europe and it is one of the organisations we liaise with.

Our views would be very much aligned to this paper, particularly paragraph 2. Proportionality and responsibility for litter clean up.

Seamus and I are meeting with colleagues from schemes in other EU member states on Thu and Fri next and we will be discussing SUP further so will revert next week with feedback.

Best Regards,

Tony

EUROPEN position on the Proposal for a Directive on the Reduction of the impact of certain plastic products on the environment

22 June 2018

EUROPEN represents the packaging supply chain in Europe, representing not only the plastics packaging supply chain, but also the supply chains for metal, glass and paper packaging. EUROPEN supports the overarching objectives of promoting a transition to a Circular Economy and tackling marine litter, while ensuring the efficient functioning of the Internal Market.

EUROPEN members commit to be part of the solution. To this end, we will support the EU institutions to help ensure that a Single Use Plastics Directive tackles marine litter holistically, incentivising solution-driven innovation with sufficient development time from R&D to commercialised solutions. This approach should help avoid (unintended) disruptive consequences and risky legal precedent-setting which would jeopardise the efforts of the packaging supply chain towards a circular economy. The lack of policy coherence, due to multiple and fragmented policy processes, threatens the adoption of a coherent EU policy framework for packaging. Potential regulatory confusion and various legal interpretations at EU and national level will lead to disruptive effects across the different packaging materials which effectively compete in various markets and applications.

We have the following recommendations to ensure the Commission's legislative proposal meets its intended objectives, while also supporting the EU's objectives for sustainable growth and global competitiveness, in line with the three following interlinked principles: **1. Policy coherence; 2. Proportionality; 3. Better regulation.**

1. POLICY COHERENCE

- **Positive impacts from revised EU waste and packaging rules to be assessed first**

We remain concerned about the coherence of EU packaging policy in terms of timing and content. As for the proposed provisions on plastic packaging specifically – without prejudging the need for legislative action on non-packaging items - the potential positive impacts of measures introduced in the revised EU waste legislation¹ need to be assessed first. The revised rules - including the General Minimum Requirements for Extended Producer Responsibility (EPR) covering all packaging placed on the market - are in the process of being transposed at Member State level and the effectiveness and efficiency of these measures can only be assessed once they have been fully implemented and enforced. Only then would it be possible to assess whether further legal action on packaging is needed to achieve this proposal's objectives, as per the Inter-Institutional Agreement on Better Law-Making² and the opinion of the Regulatory Scrutiny Board³. In addition, the overlap of measures (including EPR related measures) might create confusion and delay the transposition of the adopted Circular Economy Package until a final SUP Directive is adopted.

- **Need for a holistic, life-cycle approach**

The EU must ensure the objective of tackling marine litter is met without compromising the EU's objectives of transitioning to a Circular Economy and its obligations to reduce greenhouse gas emissions under the Paris Agreement on climate change. The measures proposed aim to tackle marine litter by discouraging producers

¹ Including the revised Waste Framework Directive and Packaging and Packaging Waste Directive

² Paragraph 22: "In the context of the legislative cycle, evaluations of existing legislation and policy, based on efficiency, effectiveness, relevance, coherence and value added, should provide the basis for impact assessments of options for further action." <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:3201600012011&from=EN>

³ https://ec.europa.eu/transport/transport/transport/transport/2018/06/14/attachment/CS0186e51ee376b_en

from using single-use plastics and encouraging them to use alternative materials, when feasible. Whether substituting plastic packaging with other packaging materials results in a net environmental improvement must be considered on a case-by-case basis, taking into account the full life-cycle of the individual product and supply chain, including all relevant end-of-life aspects.

- **Packaging design should always be approached holistically**

While packaging's functionalities⁴ have rightly been recognised in Article 11, which requires Member States' measures to comply with Union food law to ensure that food hygiene and food safety are not compromised, they may have been overlooked in Article 5 on Restrictions on placing on the market and Article 6 on Product Requirements.

We acknowledge that caps and lids are among the top 10 most found items on beaches, and impacted companies are prepared to work on a solution. However, we question whether tethering caps and lids will reduce marine litter. Caps and lids that remain tethered to the bottle exist for certain applications, but the Commission's impact assessment has not assessed whether they are suitable for all "beverage containers" and can deliver the same level of quality, product safety and shelf-life. For example, no solution is readily available for carbonated drinks because they do not allow for proper depressurization. The resulting lack of verified tamper evidence is another potential safety issue.

The same is true for straws that are attached to portion-size drink packages mainly for children. These straws serve a packaging function and these specific types of straws are defined as packaging in the PPWD (Article 3(1)). There are no readily available alternatives today that meet the requirements for food safety, child safety and functionality and the Commission's impact assessment has not assessed whether there are suitable alternatives for straws attached to portion-size drink packages.

We are concerned about the proposed and specific prescriptive product (design) requirements and market restrictions targeting one sector and its potential unintended consequences in terms of innovation, global competitiveness and growth. We support the planned review of the Essential Requirements⁵ – which covers all packaging materials - and believe the packaging design requirement referred to in Article 6 should be dealt with under the broader review of the Essential Requirements in the Packaging and Packaging Waste Directive (PPWD) instead⁶. We are prepared to find solutions, and our suggested approach would also give targeted producers the necessary time to assess technical and economic possibilities, as well as sufficient development time for their containers in view of the prescriptive design requirements.

Recommendations

- First ensure full implementation of the revised Waste Framework Directive (WFD) and Packaging and Packaging Waste Directive (PPWD), including the General Minimum Requirements for EPR for packaging prior to considering changing them already for packaging items such as food and beverage containers, packets and wrappers as defined in part E in the Annex of the Proposal.
- Take a holistic approach in policy-making that considers the whole life-cycle of a packaged product,

⁴ Packaging serves many functions. It optimises resource use; helps to minimise product waste and food spoilage; protects products along different value chains and distribution channels plays an important role in food hygiene and the health and safety of citizens; and helps provide consumers with information on the product it contains

⁵ Annex II of the Packaging and Packaging Waste Directive

⁶ The Essential Requirements are covered by the Annex II of the Packaging and Packaging Waste Directive

including all relevant environmental impacts and functionalities, including in particular in Article 5 on Restrictions on the market (e.g. straws attached to drink packages) and Article 6 on Product Requirements (e.g. caps and lids).

- Address packaging design measures as part of the planned Essential Requirements review, as laid down in the PPWD.

2. PROPORTIONALITY

- **Litter clean-up and prevention require shared responsibility**

From the outset, EUROPEAN has advocated for strong and effective EPR legislation to increase separate collection and sorting for packaging waste. This is the scope of producer responsibility which producers have supported for over two decades in Europe and continue to support, as a mechanism to finance the end-of-life of their packaging, in line with their national role and the share of responsibility for waste management that is under the producer's control, alongside the role of all other actors involved in EPR⁷.

The revised WFD recognises that the fight against litter should be a "shared effort between competent authorities, producers and consumers." We stress that litter is beyond a producer's direct control and sole responsibility. The Commission's explanatory memorandum recognises that "a variety of factors linked to inadequate waste infrastructure and inappropriate consumer behaviour will still result in littering and leakage of plastics into the environment." Therefore, requiring producers to pay for litter clean-up through EPR fees will not solve the root causes, which as recognised in the revised WFD⁸, are poor solid waste management practices and infrastructure, littering by citizens and lack of public awareness. Packaging waste management, as well as (marine) litter prevention and clean-up, require multi-faceted and multi-stakeholder approaches and solutions. The accountability to drive structural change should be on all involved stakeholders. Producers require clarity in their legal responsibilities and a long-term stable policy framework to provide clear direction for research, investments and innovations.

- **Support awareness-raising measures as part of a multi-faceted approach**

Awareness-raising measures to change public attitudes towards littering are part of the solution and relevant stakeholders, including producers, need to join forces. Producers are already contributing towards awareness-raising campaigns⁹, but for these campaigns to be effective they must be complemented by public sector activities, such as education, improvements in waste collection systems and sewage systems, and enforcement of anti-littering laws.

We question whether the suggested and prescriptive requirement on tethered caps (Article 6) will reduce marine litter. Prior to considering such mandatory requirement, voluntary label requirements to educate consumers about recycling of caps together with the bottles should be assessed in order to achieve a similar objective at a lower cost-efficiency ratio.

⁷ Revised Waste Framework Directive, Article 8a 1: "define in a clear way the roles and responsibilities of all relevant actors involved, including producers of products placing [...] products on the market of the [...] Member State organisations implementing extended producer responsibility on their behalf, private or public waste operators, local authorities and where appropriate [...] re-use and preparation for re-use operators and social economy enterprises."

⁸ Recital 12c of the revised Waste Framework Directive

⁹ Gestes Propres, Tidyman (a Keep Britain Tidy initiative), An Taisce in Ireland, Indevuibak and BeWaPP in Belgium and the global litter less campaign under the Eco-Schools programme run by a consortium of public and private partners including UNEP and UNESCO

- **Harmonised boundary conditions to ensure proportionate and non-discriminatory measures**

We call on the European Parliament and Council to introduce certain harmonised boundary conditions to ensure that market restrictions under Article 5 of the proposal, and measures listed under Article 4 on Consumption Reduction are proportionate and non-discriminatory. In that respect, before introducing bans on products, Member States should be required to assess the appropriateness of a ban versus other measures, such as voluntary agreements and public-private partnerships. They should verify the presence of fit-for-purpose alternatives and conduct a thorough assessment of the social, economic and environmental impacts of a ban – including how the efficient functioning of the Internal Market would be impacted.

Recommendations

- Tackle the root causes of litter, which, according to the revised Waste Framework Directive¹⁰, are poor waste management practices and infrastructure, littering by citizens and lack of public awareness.
- Putting the financial burden of litter clean-up solely on businesses in Europe via EPR will not solve the root causes. Hence, remove the extension of EPR financial obligations to litter clean-up costs as the sole responsibility of producers (Article 8), especially given the critical role of other actors in littering.
- For litter prevention awareness-raising to work, it must be complemented by public investment in proper collection, sewage systems and waste management infrastructure and services.
- Ensure that measures implemented at national level are proportionate and non-discriminatory by introducing harmonised boundary conditions.

3. BETTER REGULATION

- **Legal uncertainty about the segmentation of packaging and its impacts**

The PPWD was introduced to harmonise national measures and consolidate the EU's rules on packaging and the environment. This directive which is so far *lex specialis* for packaging policy has been recently revised¹¹ and now needs to be implemented and enforced at Member States level (see also point 1 above on Policy Coherence). By including some packaging items within its scope, the proposal on Single Use Plastics introduces legal uncertainty for Member States and businesses, which contrasts with the EU institutions' commitment to the goal of "*simplifying Union legislation and reducing the regulatory burden*"¹². Hence, we urge EU policy-makers to clarify the legal status of the SUP proposal (which has art. 192 TFEU on Environment protection as legal base) vis-à-vis the PPWD (which has art. 114 TFEU on Internal Market as legal base), when it comes to single use plastic packaging items covered within the scope of the SUP proposal. Sector specific approaches in other legislative texts might eventually undermine the effectiveness of the PPWD and add to compliance complexity at EU and national level.

In addition, the absence of a clear definition, scope and demarcation for items listed in the annex, creates legal uncertainty and risks leading to distortive consequences in the implementation of the Directive at national level. There are also a number of uncertainties about the impact of some of the proposed measures, which are not addressed in the Commission's impact assessment. For instance, the definition of SUP, beverage cups and food wrappers; the scope and cost of litter clean-up for producers across Europe; the efficiency of requiring producers to pay for litter clean-up versus other possible measures, and the effect that a 90% collection target for bottles

¹⁰ Recital 12c of the revised Waste Framework Directive

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¹² Paragraph 8 of the Intergovernmental Agreement on Better Law-Making (2016)

would have on the collection of other packaging materials if implemented through deposits and separate collection targets for EPR schemes. EUROPEN urges policymakers to take an evidence-based approach¹³, based on finalised studies to support the Impact Assessment, and to take the necessary time to fully assess the implications and potentially (unintended) disruptive consequences of this proposal and its proposed measures against the objectives of the Circular Economy Package.

- **Safeguard the Internal Market for (single use plastic) packaging and packaged products**

The Internal Market is a cornerstone of the EU's global competitiveness. While the proposal's objective is partially to contribute "to the efficient functioning of the internal market", the requirement for Member States to take "necessary measures" to reduce the consumption of certain single-use products (Article 4) risks creating a proliferation of potentially 27 disparate measures. This risk is exacerbated by proposing TFEU Article 192 (environmental protection) as legal base for the Single Use Plastics Directive. This potential for fragmentation is acknowledged in the Commission's explanatory memorandum as a possible "risk of market fragmentation when Member States take measures in an uncoordinated manner." Therefore, we call on the European Parliament and Council to introduce an amendment to Article 4 on Consumption Reduction and Article 17 on Transposition to ensure Article 16 on Notification and Article 18 of PPWD¹⁴ on Freedom to place on the market are not compromised.

Recommendations

- Clarify that the legal status of the packaging items covered within the scope of the SUP proposal remains the PPWD, which is *lex specialis* and has the Internal Market as its legal base (TFEU Article 114).
- Ensure the impact of all the proposed measures in the Single Use Plastics proposal are supported by an evidence-based and complete impact assessment.
- Clarify definitions and scope of the items listed in the annex of the proposal, and specify that the scope of the proposal is limited to the 10 items most frequently found on European beaches.
- Ensure that national measures do not restrict the free movement of packaged goods in the Internal Market by introducing an amendment to Article 4 on Consumption Reduction to insert "without prejudice to Article 18 of Directive 94/62/EC¹⁵".
- Require Member States to notify draft measures taken within the framework of this Directive to the Commission to ensure they do not impede the Internal Market.

EUROPEN is committed to continue working constructively with the EU institutions to help ensure that the Circular Economy Package, including this proposal, delivers tangible and sustainable benefits for a societal win-win.

¹³ The Commission cites the consultation responses as the basis for attributing litter clean-up costs to producers. The consultation did not allow the issue at hand to be addressed properly and comprehensively. Some questions were leading asking for feelings rather than facts, mixing two topics in one question and providing limited response options. Furthermore, the Commission's impact assessment does not provide evidence of the effectiveness of this measure as a long-term solution to prevent litter from arising in the first place.

¹⁴ Article 18 of Directive 94/62/EC on Freedom to place on the market. "Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive."

¹⁵ Ibid