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**15 February 2024**

**EU Law Compliance of Plastic-Discriminatory Provisions  
in the PPWR**

**- Executive Summary -**

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## EXECUTIVE SUMMARY

### Scope of our legal review.

European Plastic Converters, IK Industrievereinigung Kunststoffverpackungen e.V., and La société ELIPSO LES ENTREPRISES DE L'EMBALLAGE PLASTIQUE ET SOUPLE have asked Dentons Europe (Germany) GmbH & Co. KG to assess the European Union (“EU”) law compliance of certain provisions (the “**Plastic-Discriminatory Provisions**”) in the various drafts of the EU Packaging and Packaging Waste Regulation (“**PPWR**”). We specifically reviewed

- the European Commission’s (“**Commission**”) original proposal on 30 November 2022 (“**PPWR COM**”, [link](#)),
- the amendments proposed by the EU Parliament (“**EP**”) on 22 November 2023 (“**PPWR EP**”, [link](#)) and
- the amendments proposed by the Council of the EU (“**Council**”) on 18 December 2023 (“**PPWR Council**”, [link](#)).

### The Plastic-Discriminatory Provisions in the PPWR.

There are four groups of Plastic-Discriminatory Provisions in the PPWR, which relate to:

Bans only on plastic packaging for example:

- Ban only on single-use *plastic* grouped packaging only for certain retail goods in **Annex V Row 1 Draft PPWR (including for bottles in PPWR Council and PPWR EP)**;
- Ban only on single-use *plastic* packaging for unprocessed fresh fruit and vegetables in **Annex V Row 2 PPWR Council**;
- Exemption from the ban on single-use packaging for on-site consumption only for flexible packaging “*other than plastic packaging*” in **Annex V Row 3 PPWR Council**;
- Ban on XPS (extruded polystyrene *plastic*) food containers, beverage containers and cups in Directive (EU) 2019/904 (Single-Use Plastic Products Directive, “**SUPD**”) pursuant to **Art. 61(d) PPWR Council**.

Exemptions for specific packaging materials from the design for recycling requirements and minimum recycled content quotas:

- Exemptions for sales packaging made from “*lightweight wood, cork, textile, rubber, ceramic or porcelain*” from design for recycling requirements in **Art. 6(10)(cc) PPWR Council**;
- Exception to recycled content quotas for packaging with a plastic content of less than 5% of the packaging weight in **Art. 7(4)(c) PPWR EP**.

Re-use requirements and quotas for plastic packaging only and exemptions for other packaging materials

- Re-use quotas only for *plastic* crates in **Art. 26(7), (12) and (13) Draft PPWR** and only for foldable *plastic* boxes in **Art. 26(7) Draft PPWR**;

- Exemptions for cardboard packaging from the re-use quotas in **Art. 26(1) PPWR EP** and **Art. 26(10), (12) and (13) Draft PPWR**;
- Special rule for cardboard packaging, according to which it must be designed for a minimum of 5 trips/rotations to be deemed reusable, as opposed to the 10 trips/rotations required for the other materials in **Art. 10(1)(b) PPWR Council**.

Waste reduction targets only for plastic packaging:

- Special reduction target for plastic packaging in **Art. 38(1a) PPWR EP**;
- Provision that national measures to reduce packaging “*shall not lead to a shift to lighter packaging material*” in **Art. 38(2) subparagraph 2 PPWR Council**.

## Summary.

We summarize the results of our review as follows:

**Applicable legal standard.** As an EU regulation, the PPWR is secondary EU law and, therefore, it must comply with EU primary law and EU legal principles.

- **Substantive legal standard.** The substantive EU legal principle that is most important for the assessment of the PPWR’s compatibility with EU law is the **principle of equal treatment**, which EU jurisprudence applies to EU legislation in close interrelation with the **principle of proportionality** and with substantive principles such as the **principle of protecting the environment**. Under the principle of equal treatment, comparable circumstances must be treated equally (and different circumstances must not be treated in the same way), unless there is an objective justification for differential (or equal, respectively) treatment. In this regard, the EU legislature has discretion, however, with certain limits. In particular, the **objective justification for differential treatment must be “appropriate to the aim pursued by the legislation in question, [...] taking into account all the available facts and scientific data available”** (ECJ, C-127/07, para. 58, [link](#)).
- **Procedural legal standard.** Under the EU principle of proper legislative procedure, the EU legislature must factually exercise its discretion, which presupposes the “**taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate**” (ECJ, C-5/16, para. 152, [link](#)) and to that end, as a rule, the **preparation of impact assessments**.
- **Consequences.** If any provisions that violate the substantive or procedural legal standards set out above are adopted in the PPWR, the companies affected by them can invoke this illegality before the EU courts – General Court and European Court of Justice – either directly by way of an action for annulment (Art. 263 of the Treaty on the Functioning of the European Union, “**TFEU**”) or an action for compensation for damage suffered (Art. 268 TFEU), or indirectly by way of an action before a national court, which will in turn have to ask the European Court of Justice for a preliminary ruling (Art. 267 TFEU). Due to the economic significance of the Plastic-Discriminatory Provisions and their scant or non-existent justification, it is to be expected that there will be numerous actions against them. The Plastic-Discriminatory Provisions are therefore subject to annulment or clarification by the EU courts.

**Violations of EU law.** All Plastic-Discriminatory Provisions most likely violate both abovementioned legal standards.

The PPWR Council and the PPWR EP deviate significantly from the original, generally **material-neutral approach** to a fundamental change in the EU packaging market, as intended by the Commission in the PPWR COM. The PPWR explicitly aims to prevent or reduce the negative impact of packaging and packaging waste on the environment and human health by reducing the amount of packaging waste and enhancing packaging recycling and the circular economy.

The changes in the legislative process led to numerous **substantial shifts** in material provisions which, **in their entirety**, most likely violate both EU primary law and EU legal principles.

- **Substantive.** All Plastic-Discriminatory Provisions – according to the materials provided – most likely violate the EU principle of equal treatment because they discriminate against plastic packaging without any objective justification. **Studies** indicate that **discriminating against plastic packaging** is neither suitable nor appropriate, as EU jurisprudence would require in order for it to be valid, **and is instead counterproductive to the aims of the PPWR**: Studies have shown that specific rules which only cover plastic packaging and exempt all other packaging materials will lead to an overall increase of the amount of packaging waste and greenhouse gas emissions, hinder the circular economy of plastics, and lead to a switch to other packaging materials with often less favourable characteristics, thereby create new environmental problems.

The EU legislature appears to have **failed to consider** these facts, which are borne out by the scientific data. This is further aggravated by the fact that the Plastic-Discriminatory Provisions effectively implement a **complete reversal of the principle of material neutrality**. Therefore, the Plastic-Discriminatory Provisions are not covered by the EU legislature's discretion.

- **Procedural.** All Plastic-Discriminatory Provisions appear to violate the EU principle of proper legislative procedure. Most of them were neither included in the Commission's Impact Assessment nor specifically justified in the PPWR EP or PPWR Council. Moreover, the **EU legislature evidently did not consider that in their entirety the provisions as changed in the legislative process effectively** contradict the broad support that the principle of material neutrality had received from stakeholders. It is therefore **evident that the EU legislature failed to properly exercise its discretion in full**.

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