AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Updated AmCham EU priorities for the review of the Packaging & Packaging Waste Directive

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive summary

- AmCham EU supports the objectives of the review of the Packaging and Packaging Waste Directive and is concerned with the proliferation of national packaging and labelling requirements that promise to hinder the free circulation of packaged goods in the Single Market alongside negative environmental effects.
- The safety of the product should remain the main purpose of packaging. Therefore, product manufacturers remain the best-placed actors to make waste-related considerations. Prescriptive packaging ratios risk overlooking design considerations that are specific to products and benefit certain sectors over others.
- Availability of recyclates should be a primary consideration when discussing recycled content for plastics. New requirements should take into account the existing sector-specific targets and be mindful that not all Post-consumer recycled plastics (PCR) is used for packaging.
- Reuse targets and requirements should consider the complexity of product value chains and be aligned with existing obligations under EU Law that concern product safety and clearance.
- Provisions on recyclability should focus on identifying common evaluation methodologies and financially incentivise recyclable design and technologies that enable the identification of packaging after its use, such as digital watermarking.

Perspectives on outstanding issues around the review of the PPWD

Members of the American Chamber of Commerce to the EU support the need to improve the EU Packaging and Packaging Waste Directive (P&PWD). However, the Single Market provisions within the P&PWD[1] need to be strengthened and reinforced through this process. The recent proliferation of national packaging measures (principally sorting instruction or symbols) has largely gone unchallenged by the Commission and some Member States are now ignoring the obligations to notify some measures under TRIS (Technical Regulations Information System)[2].

Such measures create barriers to the Single Market and impact the free circulation of all packaged goods. Divergent national provisions on sorting symbols can also have a clear potential for a negative impact on the environment. They risk pushing businesses to make packaging unnecessarily larger to accommodate all obligations (particularly for some smaller items including batteries) and also risk the accumulation of unsold goods if national-made packaging cannot be readily adapted for other EU markets. A proliferation of such obligations can also make packaging confusing to the consumer and distract from appropriate safety warnings (eg, in the case of toys). Finally, they are detrimental to European and corporate sustainability and safety goals.

The revision of the P&PWD should constitute a fully integral measure *per se*, and not be reliant on a multitude of subsequent secondary legislation (ie, Delegated or Implementing Acts) or Commission guidance. This would help reduce regulatory uncertainty and avoid a multi-track Europe as Member States seek to occupy the legislative space through pre-emptive national measures that further fragment the Single Market.

Waste Prevention

Provisions on waste prevention through the optimisation of packaging design are an integral element of the EU ambition to ensure all packaging is recyclable or reusable (and recyclable) by 2030. Any proposed measures should recognise this.

Although we support the elimination of unnecessary packaging and solutions that minimise material use, waste prevention measures need to consider both the resources associated with packaging and those invested in the product (not just end-of-life), as the prime purpose of packaging is the protection of these same resources. If any requirements on packaging reduction were to lead to product damage, waste prevention measures would be counterproductive.

Given the multitude and complexity of the products on the market, manufacturers remain the best judges of what is possible in terms of waste prevention subject to product needs.

There should remain an opportunity for industry actors to explicitly demonstrate (via life-cycle assessment) that packaging solutions are appropriate.

Consequently, we recommend the use of a self-assessment procedure to document and justify the use of minimal packaging material that guarantees hygiene, safety and compliance with all regulatory requirements

[1] i.e., the legal basis under TFEU Article 114 and Article 18 of the directive itself

[2] An example of this is the failure by the French Government to notify the decree banning the use of the Green Dot in the framework of the *Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*

(such as labelling). Such an assessment procedure would place the burden of proof on manufacturers and should be auditable by the competent authorities.

Given the large array of product categories on the market, any attempt to determine prescriptive packaging ratios or other specific design restrictions for all individual product categories will be resource intensive if conducted in a sufficiently granular manner. Any attempt to compromise generic measures would disproportionately favour some categories and disadvantage others. In addition, this would increase the risk of product damage as generic packaging/product ratios cannot accommodate all the different products on the market. Furthermore, individual products within the same product category can differ in terms of shape, weight, materials, etc.

Any limits to potential void space should not ignore the balance between the risk of damage to the significant resources invested in the product and packaging resources. Therefore, while prescriptive packaging/product ratios are not the most suitable solution, if used, they should at least distinguish between product types. For example, the standard GB 23350-2021, adopted last November by the Chinese government, stipulates requirements to restrict excessive package, specifically for foods and cosmetics for sales. The standard foresees a 'necessary spatial coefficient', which is a correction factor by product type, for the measurement of space required to protect the specific product. Such a system allows for the necessary granularity in order to ensure that specific packaging functionalities of the different product categories are reflected.

Enforcement the waste prevention imperative that is based on a '*benchmarking*' approach is therefore preferred over prescriptive restrictions. Under such an approach, products can be assessed against similar ones put on the market by competitors. In-market enforcement would consequently be focused on outliers in the market place, whose design practices would need to be subject to controls. This would help drive optimisation in the marketplace. Such an approach would also need to incorporate protections to accommodate for differences between products within the same categories (eg, heavier products may require different relative amounts or types of packaging compared to lighter products within the same categories).

We understand that the '*consumer acceptance'* caveat within the current essential requirements may be eliminated. This will undoubtedly diminish some manufacturers' arguments for accepting packaging executions as necessary for selling the product. Nevertheless, it will still be necessary to understand and consider how consumer usage practices can impact the design of packaging executions.

Recycled Content

Packaging materials such as glass, metal and paper/board already contain significant amounts of recyclate. Challenges remain for plastics. Many companies have already undertaken voluntary commitments to incorporate more recyclate into their packaging. Demand for suitable recyclate (in terms of quality, quantity and price) is already increasing and potential lack of recyclate may stop companies from meeting such commitments. Going forward, considerations regarding recycled content must consider that producers themselves are the best placed to understand where and how recyclate can be incorporated into their own product portfolio.

Other actors[3] have called for mandatory minimum content for plastic recyclate (30% by 2030) with the obligation placed on product fillers rather than the feedstock suppliers. The overall availability of recyclate needs to be

[3] Plastics Europe has stated that this can include 3.4 million tonnes from chemical recycling by 2030. Such a contribution from chemical recycling is therefore essential to the level of ambition within the CEAP. Recognition of chemical recycling as an adjunct to mechanical

considered if targets for plastic recyclate are implemented. The overall supply required to meet any targets cannot exceed the amount of material that is successfully recycled[4]. The latest Eurostat data reports a 41% recycling rate for plastics across the EU. Achievement of the 2025 (50%) and 2030 (55%) targets for plastic will be compounded by the new harmonised calculation methodology[5] and the relatively poor performance to date on recycling polymers other than PET. Brouwer *et al.* (2020)[6] reports a decrease from 50.4% to 37.0% for plastics in the Netherlands using the new methodology. They also suggest that there are technical limits to circularity for plastic packaging. In a '*utopic scenario*' a maximum net plastic packaging recycling rate of 72% was highlighted[7].

In line with the above, the maximum amount of plastic packaging-derived recyclate in the EU available as secondary raw material would be (assuming the P&PWD targets are met);

- the amount of plastic packaging placed on the market * 50% in (2025 target)
- the amount of plastic packaging placed on the market * 55% (2030 target)
- the amount of plastic packaging placed on the market * 72% ('*utopic scenario*' ceiling)

Such an analysis ignores that not all recyclate from packaging is made available for packaging. Significant re-incorporation into other products such as '*up-cycling*' into textile clothing or '*down-cycling*' into other applications occurs. Strict safety requirements for certain non-food categories (such as cosmetics) will create a high competition with the food sector for appropriate quality PCR. Under European Food Safety Authority (EFSA) rules, the non-food consumer goods industry is currently '*cannibalising*' food grade PET required for food products, which results in an effective downgrading of material[8]. This situation has prompted the beverage sector to call for priority access to recyclate from its own PET bottles[9]. The full potential for re-incorporation into packaging would need to be coupled with measures to preclude (presumably by legislative means) any diversion away from packaging applications or to explicitly limit the scope of such applications. Any direct interference in market forces would still need to be compatible with EU competition law (ie, relating to customer allocation, production limitations, distribution agreements, discrimination between customers, forced trading conditions, etc).

---

recycling is by necessity, a key element to be included in the revised P&PWD which requires a full mass balance attribution model to reach these levels of recycling.
https://plasticseurope.org/knowledge-hub/plastics-europes-position-on-recycled-content-for-plastics-packaging-under-the-review-of-the-directive-94-62-ec-on-packaging-and-packaging-waste-ppwd/

[4] The maximum amount of plastic recyclate available in Europe in 2030 is of the order of 10 million tonnes across all products covered by the CPA (packaging, electronics, construction, automotive). https://ec.europa.eu/growth/industry/strategy/industrial-alliances/circular-plastics-alliance_en

[5] Commission Implementing Decision (EU) 2019/665 of 17 April 2019 amending Decision 2005/270/EC establishing the formats relating to the database system pursuant to European Parliament and Council Directive 94/62/EC on packaging and packaging waste; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019D0665

[6] https://ris.utwente.nl/ws/portalfiles/portal/250554539/Brouwer_2020_Technical_limits_in_circularity_for.pdf

[7] *Ibid.*

[8] EFSA (2011). Opinion on the criteria to be used for safety evaluation of a mechanical recycling process to produce recycled PET intended to be used for manufacture of materials and articles in contact with food (Adopted 6th July 2011) EFSA Journal 2011;9(7): 2184https://www.efsa.europa.eu/en/efsajournal/pub/2184

[9] "*The beverage industry needs priority access to its recycled plastic material to close the bottle loop and accelerate the transition to a more circular economy*"; - see Unesda's paper on priority access for plastics material https://www.unesda.eu/beverage-industry-needs-priority-access-to-its-recycled-plastic-material-to-close-the-bottle-loop-and-accelerate-the-transition-to-a-more-circular-economy/

In the absence of such prescriptive allocation measures, the amount of recycled plastic available to packaging would need to be further modified (downwards) by application of an additional '*circularity factor*'. The maximum amount of plastic recyclate derived from packaging is limited by the total of plastic packaging placed on the market in the first instance. Plastic packaging waste generated in 2019 was 15,350,654 tonnes[10]. The corresponding amount recycled in 2019 was reported as 6,287,032 tonnes or 41% (and likely less under the revised calculation methodology). Any prescriptive measures imposing or mandating PCR use for packaged goods would need to be bounded by such considerations. The maximum amount of plastic recyclate available in Europe in 2030 is projected to be of the order of 10 million tonnes across all products covered by the CPA (packaging, electronics, construction, automotive).[11] Plastics Europe has stated that this can include 3.4 million tonnes from chemical recycling by 2030.[12] Such a contribution from chemical recycling is therefore essential to the level of ambition within the CEAP. Recognition of chemical recycling as an adjunct to mechanical recycling is a key element to be included in the revised P&PWD. It also needs to be emphasised that the plastic packaging supply and recycling chain operates at an EU scale. Member States cannot conceive and achieve targets that ignore this reality. The revised P&PWD should address this point and preclude any national measures that undermine the Single Market in secondary raw materials.

Current (and likely mid-term) recyclate demand is clearly not matched by the actual effective supply. As such, mandated recycled content as a pre-condition of market access (without appropriate safeguards) risks precluding the placing of product on the shelf. Given that the '*Essential Requirements*' apply to packaged goods *per se*, the point of enforcement of any measures contained within the '*Essential Requirements*' relating to recycled content would also then be at the product level (ie, restrictions on placing on the market or potential recalls in event of failure to comply). Restrictions solely focused on the end of the packaging value chain would therefore punish those actors for market failures over which they exercise no control.

Any measures mandating recycled content need to apply to each key stage in the packaging value chain and include appropriate checks and balances to ensure the flow of recyclate. This is necessary so that the final users (ie, packaging fillers) do not bear sole responsibility for market failures (in terms of quantity, quality and price of secondary raw materials) which are not within their control. There should therefore be shared responsibility along the entire recyclate value chain for recycled content to include targets at each consecutive stage that need to be complied with as an enabling condition, before triggering each subsequent target such that there is a virtuous '*cascade*' of mutually enabling obligations along the entire recyclate value chain.

There are several other pertinent observations relating to recycled content:

- Recognition of the need for multiple grades of PCR, rather than one grade, is required. Grades could be tailored to sector needs, potentially by using a toxicological ruleset to facilitate the differentiation/distinction of a scale of grades to help towards ensuring availability of appropriate grade for specific applications. Any prioritisation of product categories for potential recycled content provisions will need to incorporate all the above factors. A hierarchy of consumer 'exposure' risks would need to be clarified and considered.
- There is a need to provide appropriate criteria to enable the use of post-industrial recyclate (PIR) (ie, material flow to third-party reprocessing facility).

[10] Numbers refer to the EU 27 Member States; the dataset is Eurostat (https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=env_waspac&lang=en)

[11] https://ec.europa.eu/growth/industry/strategy/industrial-alliances/circular-plastics-alliance_en

[12] https://plasticseurope.org/knowledge-hub/plastics-europes-position-on-recycled-content-for-plastics-packaging-under-the-review-of-the-directive-94-62-ec-on-packaging-and-packaging-waste-ppwd/

- In the event of any measures on recycled content, there is a need to incentivise the whole '*ecosystem*' to ensure recyclate availability (ie, via complementary research/innovation and taxation policies).
- The regulatory framework for plastic recyclate approved for food contact is deficient and has not sufficiently evolved over the course of the last decade to address industry's needs.

Recyclability

AmCham EU members seek to increase recyclability of their packaging and reduce the use of materials made from non-renewable sources in order to prevent the depletion of finite resources. We believe that that Measures to improve the recyclability of packaging need to focus on effective post-consumer fate and closing-the-loop rather than upfront prescriptive design requirements per se. Any prescriptive restrictions aiming to unify packaging formats, materials usage or otherwise harmonise design would need to define the means rather than the goals. Such rules risk confining innovation and reverse the burden of proof around packaging design decisions that currently rests with producers. Recyclability can be facilitated by various actions;

- There is a need for the recognition of common (cross EU) tools that permit evaluation of recyclability. Where suitable, such tools (eg, RecyClass) need to be recognised by competent authorities for demonstrating compliance with recyclability thresholds.
- Appropriate incentivisation of good packaging design through eco-modulation of Extended Producer Responsibility fees via a renewed focus on '*recyclability*'. Such fees will need to be applied to support the economic viability of recycling operations.
- Higher levels of recyclability need to be accompanied by increased data granularity on packaging characteristics to allow better differentiation into (sub-)material streams such as 'food' and 'non-food'.
- Technologies such as digital watermarking will allow identification of packaging down to Stock Keeping Unit number level in waste processing plants to permit such differentiation and allow *'real-world*' recyclability performance to be validated. Digital watermarking could be an additional focus of EPR fee modulation for early adopters.

AmCham supports and endorses the vision of ensuring that all packaging is recyclable (or re-usable) by 2030. Many member companies have similarly made commitments to strive for 100% recyclability by various dates between now and the end of the decade. We also understand that energy recovery will likely no longer be an option for packaging waste. Such a restriction will need to be implemented at a corresponding timescale.

Re-use

Ill-construed re-use measures could potentially compromise product safety, quality, traceability and regulatory obligations in the pursuit of reuse targets. They could limit the practical scope of product categories suitable for consideration for re-use (and bulk sales) due to the potential for non-compliance with existing safety and regulatory provisions, as well as the need to balance any environmental benefits with risks to consumers and the possibility of non-compliance[13]. An explicit reconsideration of the balance in legal responsibilities between

[13] The same arguments (regarding regulatory, toxicological and microbiological concerns) have been employed by ANSES who have analysed the draft list of product to be excluded from bulk sales in France (issued by DGCCRF). ANSES has suggested that product containing certain classified substances (such as detergents and cleaning products) or hygiene product that cannot be washed before rise (e.g., baby diapers, feminine protection products etc.) should additionally be excluded from the list of products for sale in bulk. Other production which should not be sold in bulk under any circumstances (for reasons of public health or preservation of the intrinsic properties of the product) were also identified in the report. Bulk sale of other products would only be possible with prior verification of the adequacy of the packaging provided by the consumers (for the product in question) and secure delivery in store. The report also stresses that questions around the

the producer, distributor and consumers will also be necessary. Suitable protections will need to be built into all and any re-use models so that all safety and regulatory obligations are not compromised by reuse models that risk an unlabelled or incorrectly labelled product being sold, in-store contamination (allergens/microbial hazards) or spillages, etc. Certain types of products will therefore not immediately lend themselves to obligations on re-use without appropriate and significant protections. These are include:

- products classified under Classification, labelling and packaging regulation (2008)
- products requiring Child Resistant Closures
- products with a Unique Formula Identifier (UFI)
- aerosols
- products with explicit on-pack labelling requirements relating to allergens/potential sensitisers
- products susceptible to microbial contamination
- products with expiry information (eg, linked to microbial hazards)
- products requiring a risk assessment by a qualified expert
- products requiring clearance for placing on the market by a qualified person
- products necessitating Good Manufacturing Practices (GMPs) etc.

Any proposals for reuse should prioritise the potential for beneficial impact on an empirical basis through a consideration of both packaging volume and frequency of product reuse so as to focus on those categories where the cumulative impact might be greatest. All proposed measures should also be guided by life cycle analysis principles that consider the resources invested in the product as well as the packaging and the principal role of the latter in protecting those resources. Any ancillary changes in product formulations that are necessary to meet any re-use targets must be explicitly considered in any decision to mandate such provisions.

Certain re-use models will be highly reliant on value chain cooperation. Packaging return models will need a reverse logistics partner. In-store refill stations will require cooperation between the retailer and product manufacturer. This is not without problems as retailers can be both the customers and competitors of packaged good manufacturers. As such, competition law considerations cannot be ignored when mandating any re-use system. One last consideration relates to obligations around potential recall or similar withdrawal measures. Product in a reuse receptacle that cannot be readily traced back or identified, cannot be successfully withdrawn from the market place. This may compromise consumer safety.

Fully functioning re-use models will entail significant regulatory challenges and will undoubtedly require disruptive changes to current marketing models and an evolution in consumer habits. These will not be easily addressed, cannot be ignored and will take considerable time and effort to overcome.

The revision of the P&PWD is a great opportunity to set clear legal definitions, create voluntary standards and rules on labelling. This would help boost re-use models by giving businesses proper legal basis for a safe and sustainable transition toward more reuse. On the contrary, measures such as reuse targets for specific sectors should be assessed in dedicated pieces of legislation and not in the context of the P&PWD revision. In some cases, such dedicated initiatives are already envisaged in the Circular Economy Action Plan 2.0. This is the case, for example, of the 'Initiative to substitute single-use packaging, tableware and cutlery by reusable products in food services'. It is important that the complexity of each sector is addressed separately to avoid overlap and confusion.

transfer of legal responsibility from the distributor to the consumer should be clarified, in particular with regard to the verification of the suitability of the means of containment provided by the consumer as part of self-service for bulk sales. The same question would of course also apply to any packaging reuse measures. The full report can be found at https://www.anses.fr/fr/system/files/BIORISK2021SA0051.pdf.

Digital Watermarking

Despite efforts along the value chain, there hasn't been significant change in the amount of packaging materials being mechanically recycled. This suggests that current sorting technologies are reaching their limits in terms of added value to the Circular Economy. Since 2010, the total % of all packaging recycled in the EU27 has plateaued at 64 to 67% (Source: Eurostat). The latest data reports a 41% recycling rate for plastics (2019). Achievement of the 2025 (50%) and 2030 (55%) targets for plastic will be compounded by the new harmonised calculation methodology and the relatively poor performance to date on recycling polymers other than PET. Brouwer *et al.* (2020) reports a decrease from 50.4% to 37.0% for plastics in the Netherlands under the new harmonised calculation methodology.

Innovation and a new approach are urgently needed if industry players are to meet the much needed goals on circular economy**.** Digital watermarking provides potentially transformative solutions in respect of some of the key issues to be addressed with the pending revision of the P&PWD. Without new technologies and innovation, the level of ambition within the new P&PWD will be limited and much needed progress impeded. There is a high need for technology-neutral digital means to improve the end-of-life treatment of packaging waste. This would entail a conceptual slot for any technology providing common benefits with equivalent granularity of packaging differentiation (ie, down to specific product level [SKU[14]]). It would also facilitate the creation of new and differentiated streams of high potential value recyclate (ie, food and non-food such as detergent grades, cosmetic grades etc.) and thereby open up more high-value markets for PCR according to customer's fitness for use specifications. Finally, undifferentiated materials will also be reduced as a result.

Moreover, harmonised eco-modulation of EPR fees should include an incentive for early adopters of digital tracing technologies (consistent with Eunomia Measure #23). Given the need for EPR fee modulation to be cost-neutral in order to secure overall operational costs, such an incentive will be transient until the balance of the packaging market tips towards digital watermarking. Digital watermarking can also uniquely provide greater data granularity on recycling fate down to specific product level (SKU) in order to satisfy the potential criterion for '*real-world recyclability*' by 2030 within the revised Essential Requirements (ie, Measure #22c from Eunomia). A potential role for digital watermarking was also highlighted by Eunomia within the context of Design for Recycling (DfR) criteria (Measure #22b).

The potential use of the digital watermarking within the context of harmonised guidance to consumers in order to avoid the proliferation of Member State mandatory requirements has also been recognised by Eunomia (Measure #27c). Dematerialising sorting instructions to consumers by digital means would allow for geographically specific instructions and would avoid barriers to trade within the internal market. There is also potential for indirect benefits of digital watermarking vis-à-vis the availability of recycled content through improvements in recycling efficiency. This would assist with proposed measures on recycled content (ie, Measure #35a '*top-down*', Measure #35b '*bottom-up*' and Measure #34 '*default use unless justified*').

Conclusion

The revision of the Packaging and Packaging Waste Directive can enable a truly circular economy for packaging in the EU.

[14] Stock Keeping Unit

In pursuing this goal, EU institutions should ensure that new rules are applied and implemented consistently across the EU Member States. Clear and predictable provisions with appropriate transition times will allow market actors to adapt and best contribute to the objectives of the PPWD.

In recognition of the diversity of packaging value chains globally, rules should not be overly prescriptive and take into account market dynamics, for instance when it comes to the supply of secondary raw materials.

Finally, research and innovation remain key to enable more cost-efficient ways to treat packaging waste and achieve the EU 2030 objectives.