

Cross-sector business concerns vis-à-vis the French “Loi relative à la lutte contre le gaspillage et à l'économie circulaire” and the corresponding enabling ‘décrets’ or ‘arrêté’

29 July 2020

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We the undersigned trade associations and other bodies wish to highlight our collective concerns to the European Commission and other Member States *vis-à-vis* the French *Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*¹ (Law on the fight against waste and the circular economy, herewith ‘the French law’).

We welcome France’s ambition and efforts to transpose the revised Waste Framework Directive 2018/851 (herewith ‘the WFD’) and Packaging and Packaging Waste Directive 2018/852 (herewith ‘the PPWD’) and recently adopted Single Use Plastics Directive 2019/904 (herewith ‘the SUP’). However, we consider some specific provisions within the law to be;

- i. damaging for the functioning of the EU’s Internal Market as they will create new trade barriers and are disproportionate with regard to the stated policy objectives; and/or
- ii. inconsistent with some provisions of the WFD, PPWD or SUP.

These measures include:

- Article 17: Mandatory use of a sorting logo (‘signalétique informant le consommateur que ce produit fait l’objet de règles de tri’ namely the ‘Triman’ logo) for all products subject to EPR including all packaged goods (with the exception of glass beverage containers)
- Article 62: Penalising the use of other symbols such as the ‘green dot’ that denotes payment of an EPR fee
- Article 62: Modification of EPR schemes in a manner inconsistent with Article 8a (‘General Minimum requirements for extended producer responsibility schemes’) from 2008/98/EC as amended by EU/2018/851
- Article 35: A new requirement that unsold products be re-employed or donated to charitable associations
- Article 61: The ability to impose national recycled content levels for certain products and materials

Our shared concerns in respect of these provisions are further outlined in the attached analysis. We collectively request that;

- 1) The European Commission review the compatibility of the French law (and any ancillary *arrêtés* or *décrets*) with regard to EU harmonized product legislation and internal market rules consistent with the obligations within Article 114.6 TFEU;
- 2) Once the French Government notifies the corresponding measures under the TRIS procedure ((EU/2015/1535), we call upon the Commission and Member States to respond with their opinions on the notified drafts taking into account the concerns highlighted in this submission;

¹ Loi n° 2020-105 du 10 février 2020 relatif à la lutte contre le gaspillage et à l'économie circulaire (TREP1902395L). Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041553759&dateTexte=&categorieLien=id>

- 3) In the event that France adopts any of the measures as highlighted below, we ask the Commission to launch an infringement procedure against France in respect of the Internal Market provisions within the PPWD. We ask this as we believe that we have clearly demonstrated that the underlying rationale of environmental protection is flawed in respect of the imposition of the 'Triman' and penalising of the 'green dot';
- 4) The European Commission review the highlighted French provisions within the context of Article 6 of Directive EU/2015/1535. In particular, the need to postpone adoption for a period of up to 12 months where the Commission has the intention to propose or adopt measures on the same matter. For example, within the recent Circular Economy Action Plan (CEAP), the Commission has signalled the intention of "setting minimum requirements for sustainability labels/logos" and the plan to "assess the feasibility of EU-wide labelling that facilitates the correct separation of packaging waste at source" as part of a future EU-wide harmonised model for separate collection of waste and labelling to facilitate separate collection.
- 5) Members of the World Trade Organization (WTO) oppose the corresponding French draft measures when notified to the WTO².

We thank you in advance for taking our views into consideration and would be happy to further expand upon our views on this matter if necessary.

² The previous attempt to impose the 'Triman' in France was also notified to the WTO Secretariat under Article 2.9.2 of the Agreement on Technical Barriers to Trade (TBT) on November 19th 2013 (G/TBT/N/FRA/153). Other WTO Members then had the possibility to submit their comments on the draft décret. Concerns were raised by the United States, Canada, New Zealand and Mexico. They highlighted the cost of implementation and questioned whether it was proportionate to the objectives and whether it risks hampering trade and fragmenting the internal market in respect of waste recycling. See: 'Minutes of the meeting of 18-19 June 2014' *World Trade Organization Committee on Technical Barriers to Trade*, 19 September 2014. Available at: <https://docs.wto.org/Dol2FE/Pages/FormerScriptedSearch/directdoc.aspx?DDFDocuments/t/G/TBT/M63.DOC>

Supporting Analysis

Article 17: Mandatory use of a sorting logo (*'signalétique informant le consommateur que ce produit fait l'objet de règles de tri'*) for all products subject to EPR including all packaged goods (with the exception of glass beverage containers)

Legislative changes: Art. L. 541-9-3 du code de l'environnement has been amended by the French *Loi n° 2020-105 to require the use of the 'Triman' sorting logo and sorting instructions by the 1st of January 2022. The choice of this logo is confirmed within a draft 'décret' released for public consultation on 22nd May 2020.*³

Fragmentation and erosion of the Internal Market: This measure will undoubtedly impact the free movement of all packaged goods within the internal market in a manner inconsistent with Article 18 (*'Freedom to place on the market'*) of the harmonised Packaging and Packaging Waste Directive (94/62/EC) which itself has an internal market legal basis (i.e., Article 114 TFEU). On the 15th May 2014, Commissioner Barnier similarly acknowledged that imposition of the Triman logo "*might constitute a barrier to the free movement of goods within the internal market.*"⁴ Any such measure needs to be justified by one of the public interest grounds set out in Article 36 TFEU⁵ or by one of the overriding requirements laid down by EU case-law. Such rules must be necessary in order to attain legitimate objectives and be in conformity with the principle of proportionality, whereby the least restrictive measure is to be used.

Proportionality and 'least restrictive': An examination of the separate treatment of glass beverage containers within Article 17 of the French law is instructive in this respect⁶. There is obviously no rational basis for the exclusion of glass rather than other packaging forms. The latest Eurostat data for France (2017) confirms that glass packaging is recovered at a lower rate (77.9%) than either metallic (85.9%) or paper/cardboard packaging (99.3%) (see Annex). If the policy objective of the measure is to encourage efficiency of packaging recovery, then glass would be a more legitimate and appropriate target of the measure before either metallic or paper/cardboard packaging. The derogation for glass is discriminatory and must therefore have another basis that is not linked to sustainability ambitions. It may prove to be a policy concession to the domestic wine industry. The comparative higher recovery rates for other packaging materials relative to glass, therefore brings into doubt the both proportionality of the measure (i.e., why is the legislation necessary to encourage recovery of paper/cardboard and metallic packaging if they are already recovered at greater rates than glass?) and whether it is the least restrictive measure possible (i.e., effectively not because glass packaging is exempt).

Absence of rationale: It is also notable that recovery rates for all packaging materials in France have consistently increased on an annual basis between 2010 and 2017⁷ without the use of a mandated 'Triman' symbol. The overall recovery rate has increased from 70.3% to 78% (+7.7 percentage points) over that period (see Annex). The corresponding percentage point increases for most specific materials are even higher i.e., paper/cardboard +3.5%, metallic +10.3%, plastic +8.6%, glass +8.1% and wood +11.9%. It is also noteworthy that many other member states reported higher rates of recovery than France in 2017 when expressed either as a %⁸ or kg/capita

³ The draft 'décret' is more restrictive than Article 17 of Loi n° 2020-105 as it requires the 'Triman' logo and the sorting instructions to be affixed to the packaging itself, instead of providing the option to affix them on the product, the packaging, or on documents provided with the product.

⁴ 'Answer given by Mr Barnier on behalf of the Commission', *European Parliament*, 15 May 2014, E-002308/2014, available at: <https://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-002308&language=EN>

See also: 'Answer given by Mr Barnier on behalf of the Commission', *European Parliament*, 16 May 2014, E-001922/2014, available at: <https://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-001922&language=EN>

⁵ TFEU Article 36: The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. See: Consolidated version of the Treaty on the Functioning of the European Union, 'Article 36', 2009.

⁶ Art. L. 541-9-3 du code de l'environnement (as amended by French Loi n° 2020-105)

⁷ 'Recovery rates for packaging waste', *Eurostat*, Last update on 24 June 2020. Available at: <https://ec.europa.eu/eurostat/web/products-datasets/product?code=ten00062>

⁸ Eurostat: Belgium, Czech, Denmark, Germany, Estonia, Ireland, Luxembourg, Netherlands, Austria & Finland (total 10 MS).

per annum⁹ without the need for such a mandatory symbol. This creates serious doubt around the proportionality of the measure and whether the 'Triman' is indeed the least restrictive measure. The evidence from other EU countries strongly suggests not, as the policy objective of increasing the packaging recovery and recycling rate can evidently be achieved without recourse to such an onerous measure. In this respect, it is also notable that by 2017 France had already achieved the 2025 recycling targets (under EU/2018/852) for all packaging materials with the exception of plastic¹⁰.

It is also worth highlighting that the 'Triman' logo is being proposed in the absence of any harmonized sorting instructions within France. It can be argued that it is this very absence that results in confusion on the part of consumers regarding sorting. A more appropriate and proportionate action would therefore be to address this failing. France appears to be ready to impose burdens on economic operators in respect of packaging, but not in respect of the public sector. Harmonization of sorting instructions within France would in contrast to the 'Triman' not create any barrier to the free movement of goods between the EU Member States.

Impact: If implemented, the measure will effectively require the introduction of a separate labelling requirement for products placed on the market in France that has no direct equivalence in other EU Member States. They would create new barriers to the free movement of all packaged goods within the European Union as packaging would have to be made specifically for the French market, involving significant administrative burdens and costs associated with the re-labelling, repackaging or updating packaging and even separate production runs. It is regrettable that the impact of the individual measures vis-a-vis the Internal Market is absent from the Impact Assessment accompanying the draft law. Due to this omission, there does not appear to be any compelling evidence presented (vis-à-vis improvements to consumer sorting and recycling outcomes) that can be used to justify the imposition of the labelling requirement. It seems that the French authorities have largely ignored or sought to minimise the costs industry will have to bear to comply with this new piece of legislation and which are ultimately likely to be passed onto consumers. The entry into force of the 'Triman' logo obligation is set for 1st January 2022.

Other Waste Streams besides packaging: Use of the 'Triman' logo will also be required for all other products subject to an EPR scheme in France (i.e., WEEE, batteries, ELV and other national schemes such as for tyres etc.). Disruption in the European internal market for such products can also be envisaged. There are likewise questions around whether the use of the 'Triman' logo is in anyway duplicative of the purpose of the crossed-out wheeled bin symbol that must be applied to batteries and WEEE. The French law seeks to impose a national symbol for the exact same purpose i.e., "*une signalétique informant le consommateur que ce produit fait l'objet de règles de tri*". This national symbol would create a barrier to trade without any environmental benefits as the products in question are already marked with an appropriate symbol mandated at EU level. The underlying rationale and the proportionality of the 'Triman' measure for other waste streams can also be questioned. For example, the collection rate under the French tyre EPR scheme as reported for ADEME is 99% (2016)¹¹.

Article 62: Penalising of alternative symbols such as the 'green dot'

Legislative changes: Art. L. 541-10-3 du code de l'environnement has been amended by the French law to allow for the penalising (through application of financial penalties) of any symbols or markings that may cause confusion with the 'Triman'. The penalty is set at $\geq 100\%$ of the corresponding EPR fee for any given packaged product. The symbols or markings are to be defined "*par arrêté du ministre chargé de l'environnement*". The overall intent is evidently to suppress the use of any symbols other than the 'Triman'.

⁹ Eurostat: Belgium, Denmark, Germany, Ireland, Italy, Luxembourg, Netherlands & Finland (total 8 MS).

¹⁰ Eurostat: All packaging recycling 68.1% versus 2025 target of 65%, plastic 26.5% versus 50%, wood 30.8% versus 25%, ferrous 88.4% versus 70%, aluminium 57.9% versus 50%, glass 77.9% versus 70% and paper 98.4% versus 75% (for year 2017).

¹¹ Deloitte Développement Durable, Katherine SALÈS, Philippe KUCH, Otto KERN. ADEME, Karine FILMON. Octobre 2017. Rapport Annuel de l'Observatoire des Pneus Usagés. 96 pages. Available at ;

https://www.ademe.fr/sites/default/files/assets/documents/observatoire-pneus-usages-donnees_2016-201710-rapport.pdf

Targeting of the 'green dot': Pending publication of the definitive 'décret' we understand that the main target of this measure is the 'green dot'. This was made clear in the presentation of the original bill.¹² The use of the 'green dot' was previously mandated in France, but this obligation was dispensed with from 1st January 2017 onwards. The 'green dot' is employed by most EPR schemes throughout the EU to signal that producers have paid the corresponding EPR fees for the product accordingly marked. The use of the symbol is even mandated in several Member States (such as Spain amongst others). This apparent contrast in the perception and approach of Member States is particularly confusing for industry. Certain stakeholders claim that this symbol is not correctly understood by the consumers in France who may believe that it means that the packaging is recyclable.

Absence of rationale: The recovery rates for all packaging material in France have consistently increased on an annual basis between 2010 and 2016 whilst use of the 'green dot' was mandated in France. The overall recovery rate has increased from 70.3 to 75.6% (+5.3 percentage points) and from 135.8 kg/capita to 143.6 kg/capita (+7.8 kg/capita) over that period. Mandated use of the 'green dot' was clearly not inhibitory to improvement in performance. It is also noteworthy that other member states reported higher rates of recovery than France in 2016 when expressed either as a %¹³ or kg/capita per annum¹⁴ without subsequently seeking to suppress the 'green dot' symbol. This creates serious doubt around the proportionality of the measure and whether it is indeed the least restrictive measure. The evidence from other EU countries strongly suggests not.

Impact: Removal of the 'green dot' from packaging in France would necessitate separate packaging and production of all packaged goods destined for France or the payment of an additional and disproportionate sum set at ≥100% of the corresponding EPR fee. Such a charge should be evaluated within the context of the prohibition of all charges having an equivalent effect to customs duties within Article 28 TFEU as well as the prohibition on quantitative restrictions on imports and all measures having equivalent effect within Article 34 TFEU. As with the 'Triman', there has been no impact assessment for this measure. Given that the quasi-totality of packaged goods within Europe carry the 'green dot', the implications of the prohibition and potential disruption will be significant. This has been ignored by French policy makers. Clarity also needs to be sought in respect of the potential for prohibition of the packaging identification system under Decision 97/129/EC¹⁵.

Article 62: Modification of EPR schemes in a manner inconsistent with Article 8a ('General Minimum requirements for extended producer responsibility schemes') from 2008/98/EC as amended by EU/2018/851

Excessive costs within EPR schemes: Art. L. 541-10-3 du code de l'environnement has been amended and now allows for the possibility for EPR fees to be applied that exceed the cost necessary to manage waste;

"Les primes et pénalités peuvent être supérieures au montant de la contribution financière nécessaire à la gestion des déchets et doivent permettre d'atteindre les objectifs mentionnés au II de l'article L. 541-10."

This is clearly inconsistent with Article 8a(4) of 2008/98/EC as amended by EU/2018/851;

"Member States shall take the necessary measures to ensure that the financial contributions paid by the producer of the product to comply with its extended producer responsibility obligations:

(c) do not exceed the costs that are necessary to provide waste management services in a cost-efficient way. Such costs shall be established in a transparent way between the actors concerned."

¹² 'Projet de loi relative à la lutte contre le gaspillage et à l'économie circulaire – Etude d'impact', *Legifrance : Le service public de la diffusion du droit*, 11 February 2020. Available at:

<https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000038746653&type=general&typeLoi=projet&legislature=15>

¹³ Belgium, Czech, Denmark, Germany, Estonia, Ireland, Spain, Italy, Luxembourg, Netherlands, Austria, Slovenia & Finland (total 13 MS).

¹⁴ Belgium, Denmark, Germany, Ireland, Italy & Austria (total 6 MS).

¹⁵ 'Commission decision of 28 January 1997 establishing the identification system for packaging materials pursuant to European Parliament and Council Directive 94/62/EC on packaging and packaging waste (Text with EEA relevance)', *European Commission*, 97/129/EC, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997D0129>

The purpose of modulation is to better reflect the actual costs of waste management with greater granularity rather than the application of punitive charges *per se*. Any modulation under Article 8a(4)(b) 2008/98/EC still needs to be consistent with the cost efficiency requirement of 8a(4)(c). The proposed punitive charges are limited to 20% of the sales price of the whole product without VAT. Such a limit of 20% of the value of the products is undoubtedly disproportional relative to the value of the packaging as well as being inflationary for consumers. This is likely more than an order of magnitude greater than the typical EPR costs for packaged goods. Linking eco-modulation to a sales price that is not necessarily fixed by the producer is also likely to raise other practical issues (e.g., discrimination between brands and products not based on environmental considerations).

Establishment of ‘funds’ from EPR fees: Art. L. 541-10-4 and Art. L. 541-10-5 du code de l'environnement have been amended to require the establishment of funds supported by obligated sectors via extended producer responsibility schemes to be applied to other activities such as the repair. For some products, there is a requirement to dedicate 5% of contributed fees. This is similarly inconsistent with the requirement in Article 8a(4)(c) of 2008/98/EC to ensure that costs are not greater than those necessary to manage waste in a cost-effective manner.

Creating a role of social economy actors: Art. L. 541-10-I du code de l'environnement makes reference at several points to “*structures de l'économie sociale et solidaire*” within the context of extended producer responsibility and seeks to ascribe a role for them. There are additional references in other articles in the French Law. Social economy enterprises are explicitly mentioned in Article 8(a)(1)(a) of the revised WFD (i.e., defining the roles and responsibilities of relevant actors). Likewise, within the context of a need to foster dialogue in Article 8(a)(6) between stakeholders. There are no other references of any other obligations vis-à-vis social economy enterprise. It is notable that various amendments to articles were considered by the Environment Committee within the EP in relation to the role of “*social and solidarity enterprises and platforms*” within extended producer responsibility schemes (including supporting them via an ascribed a role in EPR schemes via amendments # 95 and 189)¹⁶. But these were not maintained in the final legislative text. The clear intentions of the co-legislators in rejecting a formal role for social enterprises with EPR schemes should therefore be respected. Any provisions in the French law need to be evaluated accordingly.

Harmonised criteria for the eco-modulation of EPR fees: France appears to be proceeding with the obligation to implement for eco-modulation under Article 8a(4)(b) of 2008/98/EC as revised by EU/2018/851;

“(b) in the case of collective fulfilment of extended producer responsibility obligations, are modulated, where possible, for individual products or groups of similar products, notably by taking into account their durability, reparability, re-usability and recyclability and the presence of hazardous substances, thereby taking a lifecycle approach and aligned with the requirements set by relevant Union law, and where available, based on harmonised criteria in order to ensure a smooth functioning of the internal market; and”

However, unilateral national initiatives in this respect risk running counter to the requirement for EPR fee modulation to be “*based on harmonised criteria in order to ensure a smooth functioning of the internal market*” within Article 8a(4)(b). France is currently effectively seeking to pre-empt the current work of the Commission in respect of the obligation under Article 8.5 of 2008/98/EC as revised by EU/2018/851.

Article 35: A new requirement that unsold products be re-employed or donated to charitable associations

Legislative changes: Art. L. 541-15-8.-I du code de l'environnement has been amended to require that unsold products be re-employed and in particular be donated to charitable associations, re-used or recycled. This

¹⁶ S. Bonafe, ‘Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste’ to the Environment Committee (A8-0034/2017), *European Parliament*, 9 February 2020. Available at: https://www.europarl.europa.eu/doceo/document/A-8-2017-0034_EN.pdf

requirement is accompanied by punitive fines for failure to observe this provision. The exact conditions of application of these provisions will be provided by a subsequent 'décret'.

Proportionality and 'least restrictive': There is only mention of 'unsold' food products and their redistribution to charities within recital 32 of EU/2018/851. There is no mention of limits on the destruction/disposal of other 'unsold' products. This likewise does not feature in the economic instruments listed in Annex IVa of 2008/98/EC as amended by EU/2018/851. The limits to which any unsold products can be exported outside France to other EU member states needs to be evaluated and clarified as this provision may well represents a further barrier to the Internal Market for packaged goods and potentially other goods. The draft décret put out to public consultation seeks to place restrictions on products in respect of actions outside the national territory of France (see the second criterion of Art. R. 544-24 du code de l'environnement)¹⁷. There is a clear need here to consider these provision within the context of the tests of 'proportionality' and 'least restrictive measure' (TFEU 36).

Article 61: The ability to impose national recycled content levels for certain products and materials

Legislative changes: Art. L. 541-9-I du code de l'environnement has been amended and will require the incorporation of a minimum amount of recycle in certain categories of products and materials to be defined by a subsequent 'décret' which will also elaborate on appropriate sanctions.

Impact: This would allow France to introduce national requirements on recycled content for packaging materials in addition to the current EU requirements for single-use beverage bottles under the SUP. Whilst the SUP is now the *lex specialis* for the packaging products listed in the Annex (Parts A to G), the P&PWD remains the *lex specialis* for all other packaged goods. The Article 61 provision on recycled content may therefore potentially run contrary to Article 18 of the PPWD ('Freedom to place on the market').

¹⁷ 'Projet de décret relatif à l'interdiction d'élimination des invendus non alimentaires', *Consultations Publiques: Ministère de la transition écologique et solidaire*, 22 June 2020, put out to public consultation until 13 July 2020. Available at: <http://www.consultations-publiques.developpement-durable.gouv.fr/projet-de-decret-relatif-a-l-interdiction-d-a2160.html>

This common position is supported by:



ANNEX

Packaging Recovery and Recycling Rates for France and EU-28 (source: Eurostat)

Packaging (Recovery) ¹⁸	2010		2017	
	France	EU28	France	EU28
Paper & Cardboard	95.8	91.0	99.3	81.5
Plastic	61.2	62.3	69.8	74.6
Metallic	75.6	71.7	85.9	79.9
Glass	69.8	69.4	77.9	74.7
Wood	27.9	67.6	39.8	63.6
All	70.3	76.5	78.0	80

Packaging (Recycling Material)	2010		2017	
	France	EU28	France	EU28
Paper & Cardboard	91.6	83.3	98.1	84.3
Plastic	23.7	32.5	26.5	41.9
Metallic	74.8	71.1	84.9	79.2
Glass	69.8	69.3	77.9	74.1
Wood	19.1	38.2	30.8	39.1
All	61.0	63.2	68	66.5

¹⁸ Eurostat 'recovery' rates includes energy recovery, other forms of recovery, incineration at waste incinerators with energy recovery as well as recycling. It is used here as a proxy for 'collection' as it is likely better reflects the proportion of packaging waste collected than the recycling rate *per se*.