

AmCham EU's position on the proposed Directive on lightweight plastic carrier bags

Emphasising the importance of achieving a reduction in plastic bag littering through consistent and coherent legislation

Executive summary

This AmCham EU position paper concerns the proposed Directive aimed at reducing the consumption of lightweight plastic carrier bags. The proposed Directive would amend the Packaging and Packaging Waste Directive (94/62/EC), on which a vote at plenary session currently scheduled for 17 April 2014.

The American Chamber of Commerce to the European Union (AmCham EU) supports the underlying aims of the proposed Directive, particularly the reduction of plastic bag littering and improved environmental protection. However, AmCham EU has a number of concerns regarding the intended means of achieving these objectives. As outlined below, these concerns include matters surrounding the scope and timing of the proposal, as well as consistency and coherence with existing environmental law and its impact on the Single Market

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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 €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.

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American Chamber of Commerce to the European Union (AmCham EU)
Avenue des Arts 53, B-1000 Brussels, Belgium
Register ID: 5265780509-97
Tel: +32 (0)2 513 68 92 | www.amchameu.eu

Secretariat Point of Contact: [Julie Linde Kjeldsen]; jljk@amchameu.eu +32 (0)2 289 10 15

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Scope of the proposal – Impact on all packaging products

The American Chamber of Commerce to the European Union (AmCham EU) has concerns regarding certain provisions in the proposal which were put forward by some MEPs that are not limited to reducing consumption of lightweight plastic carrier bags. Instead they are designed to impact all packaging products regulated under the Packaging and Packaging Waste Directive. AmCham EU believes that proposals to amend the substantive provisions of the Packaging and Packaging Waste Directive that do not relate to the reduction of consumption of lightweight plastic bags should only be made:

- After the outcome of the general review of EU waste policy and legislation, particularly the fitness check of the Packaging and Packaging Waste Directive and the targets view; and
- In a legislative instrument designed to amend the substantive provisions and scope of the Packaging and Packaging Waste Directive – rather than one which concerns only one specific type of packaging product.

Timing of the proposal

AmCham EU has concerns regarding the timing of this proposal and the fact that it comes before the outcome of the general review of EU waste policy and legislation, particularly the fitness check of the Packaging and Packaging Waste Directive and the targets review expected May/June 2014. AmCham EU believes that any proposals not related to reducing the consumption of plastic carrier bags should be delayed until the outcome of these reviews. Proposals to amend provisions of the Waste Framework Directive/Packaging and Packaging Waste Directive should follow the outcome of relevant Product Environmental Footprint (PEF) pilots. The adoption of a legislative proposal at this stage may be premature for the following reasons:

Overall reduction in packaging

The practical consequences of adopting this legislative proposal may serve to undermine the underlying objectives of the proposal itself. As stated in the initial Commission proposal,¹ one of the fundamental aims of this proposal is to reduce the consumption of plastic carrier bags while, at the same time, ensuring that the overall generation of packaging does not increase. In reality, the current proposal may increase the overall creation of packaging by, for example, encouraging retailers to add weight to their plastic bags or by using alternative packaging such as paper. Both of these alternatives would likely increase the total weight of packaging generated and used within the EU. AmCham EU believes that this issue should be further assessed before any legislative proposal is adopted.

Environmental impact assessment of alternatives to plastic

There is evidence that the use of alternatives to lightweight plastic bags may, in certain circumstances, have a greater environmental impact, particularly with regards to sustainability. In 2011, a Life Cycle Assessment (LCA) conducted by the UK's Environment Agency provided estimates on the number of

¹ Paragraph 7 of Preamble, Commission proposal COM(2013) 0761 final.

times a bag made of other materials would need to be reused as compared to a plastic bag, for environmental equivalency. In particular it stated:

“The paper, LDPE, non-woven PP and cotton bags should be reused at least 3, 4, 11 and 101 times respectively to ensure they have lower global warming potential than conventional HDPE carrier bags that are not reused.”²

AmCham EU does not believe that these issues have been sufficiently assessed in the 2011 study, *Assessment of impact of options to reduce the use of single-use plastic carrier bags*,³ which focused on plastic bags as opposed to possible non-plastic substitutes and emerging technologies for end-of-life.

Given the uncertainty surrounding the practical consequences of this proposal on the overall generation of packaging and the environmental benefits from reducing the use of lightweight plastic bags, more research should be conducted before a legislative proposal is adopted. Further research is needed to determine whether the common alternatives to plastic bags truly have less of an environmental impact. Obtaining clarification to these questions would be in line with the principles of better regulation. In particular, AmCham EU believes that a study should be commissioned into issues such as:

Consumer demand

A study should be initiated to assess consumer preference with regard to the use of lightweight plastic bags versus heavier gauge and reusable plastic bags, and incentives to further expand/improve the recycling infrastructure for lightweight plastics. Consumer behaviour in the food sector is different to that in other fast moving consumer goods sectors, and this insight could indicate to what extent policy options would be successful or require an extensive consumer campaign.

Environmental impact of bags made of alternative materials

There should be a study to assess the practical impact of substituting lightweight plastic bags with paper bags. The underlying presumption that, from an environmental perspective, use of paper bags should be preferred to the use of plastic bags may not be supported by factual evidence, particularly given the issues regarding sustainability and sustainable use of materials.

Available technologies and impact on plastic versus paper bags

A pilot study should be initiated to assess technologies that may facilitate take-back of plastic bags and possible environmental gains associated with mainstreaming that technology versus the downsides to paper bag integration.

Consistency and coherence with other environmental law

AmCham EU encourages the EU institutions to ensure that there is consistency and coherence between EU environmental laws⁴. AmCham EU has concerns that this proposal will not be consistent

² Environment Agency, *Life cycle assessment of supermarket carrier bags: a review of the bags available in 2006*, February 2011

³ http://ec.europa.eu/environment/waste/packaging/pdf/report_options.pdf

or coherent with other environmental laws. In particular, AmCham EU believes that provisions regarding CMRs and endocrine disruptors in this proposal will not be in line with those in Regulation 1907/2006 (REACH) and Regulation 1272/2008 (CLP).

CMRs and endocrine disruptors - 0.01% threshold

AmCham EU has concerns regarding the proposed requirements for Member States to ensure that packaging is 'manufactured in such a way that it does not contain substances in concentrations above 0.01% that are carcinogenic, mutagenic or toxic to reproduction or that are endocrine disruptors'.

Regulation of chemical substances in products should be based on risk assessment of both the hazardous properties of a particular chemical substance and exposure. In the current absence of a risk assessment of these substances in the waste phase of packaging materials, particularly assessment of exposure, the grounds for proposing a 0.01% threshold may not be well-founded, and is not based on sound scientific evidence. The 0.01% threshold is unlikely to be necessary or appropriate to achieve the underlying objectives of the proposal. AmCham EU believes that further work is needed to determine the actual exposures to persons and the environment from substances in plastic bags given the normal and foreseeable use of a lightweight plastic carrier bag. AmCham EU has concerns regarding the ability of industry to ensure compliance with the 0.01% threshold, particularly given the REACH communication in the supply chain obligations.⁵ Questions have also been raised regarding the overall benefit to human health and the environment that this requirement would have compared with the administrative burden and costs this requirement would impose on industry. Additional concerns exist with regard to the ability in practice of enforcement agencies to ensure effective and systematic compliance. AmCham EU is also concerned that this threshold may set a precedent, not merely with regard to EU law, but also to national law, encouraging unilateral action by Member State national authorities applying this threshold.

Endocrine disruptors

AmCham EU has concerns regarding the provisions on 'substances that are endocrine disruptors' and the objective that these substances '(...)be phased out from packaging material so as to avoid unnecessary exposure of humans to such substances and to avoid that such substances enter the environment during the waste phase'. In particular, AmCham EU has concerns regarding the definition of endocrine disruptors as 'substances having endocrine disrupting properties for which there is scientific evidence of possible serious effects to human health or which are identified in accordance with the procedure set out in Article 59 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council *, or which are identified according to Commission Recommendation [...]/EU] **'.

Regulation of chemical substances in products should be based on risk assessment of both the hazardous properties of a particular chemical substance and exposure. In the absence of a risk assessment of endocrine disruptors in the waste phase of packaging materials, AmCham EU questions the approach to endocrine disruptors under this proposal. AmCham EU supports a substance-by-

⁴ See AmCham EU Information Paper 'Consistency necessary in EU environmental policy-making' 25 June 2012 and AmCham EU Position Paper 'Need for greater predictability in targeting substances under REACH' April 2013.

⁵ Particularly given the Article 33 REACH requirement – Duty to communicate information on substances in articles for SVHCs in a concentration above 0.1% w/w etc.

substance approach to the regulation of endocrine disruptors based on exposure, not a standard or *a priori* approach to endocrine disruptors generically.⁶

AmCham EU has concerns regarding the consistency and coherence of the proposed definition of endocrine disruptors in this proposal with article 57(f) REACH. The legal criteria for determining whether substances with endocrine disrupting properties may be included on the candidate list under article 57(f) REACH is not the same as the legal definition of endocrine disruptors in the proposal. The proposal intends to broaden the definition of endocrine disruptors to include not only substances for which there is scientific evidence of 'probable' serious effects to human health or the environment, but also substances for which there is scientific evidence of 'possible' serious effects to human health. Divergence from the legal criteria set out in article 57(f) REACH may be contrary to the better regulation agenda and would lead to a fragmentation of the EU market, encouraging Member States to take unilateral action regarding endocrine disruptors by applying differing and contrasting definitions.

Single Market

AmCham EU has concerns that this proposal will serve to undermine the functioning of the Single Market, restrict free circulation of goods and create barriers to trade.

The proposal requires Member States to take measures to reduce consumption of lightweight plastic carrier bags by 80%. The proposal does not stipulate the measures Member States are required to take in order to reduce consumption of lightweight plastic carrier bags. Instead, the proposal provides examples of measures Member States may take including: national reduction targets, economic instruments such as taxes and levies, as well as marketing restrictions in derogation from article 18 of the Packaging and Packaging Waste Directive'.^{7 8}

National Member State marketing restrictions are not a proportionate means of achieving the underlying objective to reduce consumption of lightweight plastic carrier bags. There are less onerous means of achieving this aim such as obligation-to-pay schemes.

Encouraging Member States to adopt marketing restrictions and prohibitions on the use of lightweight plastic carrier bags may lead to the restriction of circulation of products lawfully placed on the market in other Member States. Unilateral action taken by Member States may lead to the fragmentation of the Single Market with regard to lightweight plastic carrier bags. Perhaps more significantly, Member State prohibitions regarding the use and sale of lightweight plastic carrier bags may set a precedent leading to further fragmentation of the Single Market with regard to packaging materials more generally.

AmCham EU believes that the legal principle of free movement of goods forms a cornerstone of the Single Market. AmCham EU cannot support provisions that may undermine or weaken the Single

⁶ AmCham EU position statement, *AmCham EU calls for a substance by substance approach to regulate Endocrine Disruptors*, 25 June 2013.

⁷ The proposal shall amend article 4 of the Packaging and Packaging Waste Directive.

⁸ Article 18 of the Packaging and Packaging Waste Directive states: 'Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive'.

Market where proven alternatives exist and can be employed.⁹ It is important to identify a consistent approach at EU level to provide robust guidance to Member States to avoid a patchwork of national schemes that engender business uncertainty and confusion for consumers.

⁹ Alternative measures to market bans have been employed in the past which have led to a proven significant reduction in the consumption of lightweight plastic carrier bags. Where MSs wish to employ numerous measures to reduce consumption of lightweight plastic bags, a number of other alternatives to marketing bans can be used.