

EUROPEN's comments on TRIS notification 2025/0279/DK (Denmark)

Amendment on order on certain requirements concerning packaging, extended producer responsibility for packaging, and other waste collected with packaging waste

1. Object of the TRIS contribution

On 04 June 2025, the Danish Government notified to the European Commission a draft amendment order on packaging, Extended Producer Responsibility (EPR) and packaging waste (hereafter “the draft order”).

The draft order introduces several requirements on packaging, packaging waste and EPR. The following provisions are the object of this contribution:

- **Section 1 and Annex 1**, notably the definition of “packaging” and related examples, which deviate, albeit partially, from the provisions of Article 3 and Annex I of Regulation (EU) 2025/40 on Packaging and Packaging Waste (PPWR).
- **Section 2**, specifically the definitions of “distributor”; “economic operator”; “commercial packaging”; “manufacturer”; “distance selling”; “reusable packaging”; “importer”; “composite packaging”; “placing on the market”; “multipack or secondary packaging”; “service packaging”; “end user”; “making available”. Several definitions diverge from those provided under the PPWR. As an example, the definition of “composite packaging” does not include a reference to the PPWR 5% threshold, and the definition of “making available” refers to the *Danish* market only, instead of contemplating a reference to the market of the Union. This is problematic as different definitions will foster the non-harmonised implementation of PPWR, potentially discriminating economic actors operating in Denmark.
- **Chapter 2** of the draft order, establishing unilateral market access conditions, exclusively applicable to packaging to be placed on the Danish market, notably: **Section 4 and Annex 2**, establishing unilateral essential requirements for packaging; **Sections 6 and 7**, foreseeing unilateral requirements for glass packaging; **Sections 8, 9, 10 and 11**, introducing obligations for plastic crates and pallets; **Section 12**, establishing a unilateral levy on certain types of carrier bags. Such provisions are not given in the PPWR, which is set to establish uniform market access conditions for all packaging and packaging waste.
- **Chapter 3**, specifically Sections from 13 to 17, on requirements relating to documentation and examinations, which contradicts those foreseen under Chapter IV of PPWR; **Section 18 and Annex 4**, establishing certain conditions that packaging must meet, in case it bears a label indicating the nature of the packaging materials (e.g. numerical codes). In relation to this, it should be noticed that alphanumeric codes will be repealed under Article 70 of PPWR as of 12 August 2028.
- **Chapter 4 on EPR**, which pre-empts and conflicts with several of the requirements put forward in Section 3 of PPWR. As an example, several requirements related to registration (e.g. registration no later than 14 days before making packaging available on the Danish market; obligation to register changes in the information already registered, no later than one month

after the changes have taken place; information to be reported under **Chapter 5** of the draft order) impose excessive administrative burden on operators, conflicting with the PPWR obligations.

- Further to the above, **Annex 14** to the draft order foresees the introduction of unilateral criteria and methods for the graduation of a producer's economic contribution by collective schemes. The establishment of a traffic light system and design criteria (green, yellow and red levels) for specific packaging materials undermines and pre-empts the PPWR recyclability requirements, set to apply at EU level as of 1st January 2030. It is important to notice that, under Article 6(4) of PPWR, the EU Commission is set to establish an EU-wide framework for the modulation of EPR fees, based on packaging recyclability performance grades. The approach suggested under the draft order will undermine this, risking to create a competitive disadvantage for economic actors operating in Denmark, who will likely be required to pay higher or non-harmonised EPR fees, compared to operators established elsewhere in the Union.

2. Infringement of EU legislation

EUROPEN contests the lawfulness of the above-mentioned measure on the following grounds:

- **Article 4 of Regulation (EU) 40/2025 on Packaging and Packaging Waste (PPWR)** as the proposed measure will impede the placing on the market of packaging that is fully compliant with the provisions of the EU packaging legislation, being contrary to Articles 4(2) and 4(3) of the PPWR. These articles respectively provide that *“Member States shall not prohibit, restrict or impede the placing on the market of packaging that complies with the sustainability, labelling and information requirements laid down in or pursuant to Articles 5 to 12.”* and that *“If Member States choose to maintain or introduce national sustainability requirements, or information requirements additional to those laid down in this Regulation [...] the Member States shall not prohibit, restrict or impede the placing on the market of packaging that complies with this Regulation for reasons of non-compliance with those national requirements.”* Several of the above-mentioned measures will be market access requirements exclusively applicable to packaging placed on the Danish market, and will therefore effectively impede marketing packaged goods in Denmark even when those are fully compliant with the PPWR requirements. Assuming that all economic actors operating in Denmark, including importers, will be subject to the draft order, they will no longer be allowed to place on the Danish market packaging which is fully compliant with the requirement of the PPWR, unless such packaging is manufactured in accordance with the Danish requirements. This represents a clear violation of Article 4.2. and 4.3 of PPWR, which is a directly applicable Regulation with an internal market legal basis.
- **Article 114.5 of the Treaty on the Functioning of the European Union (TFEU)**, which is the PPWR legal basis and foresees that, *“[...] if after the adoption of a harmonisation measure [...] a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.”* Denmark has failed to provide a clear overview of the grounds for introducing the above mentioned requirements and Article 114 being the legal basis of PPWR should further limit the discretion of Denmark vis-à-vis imposing additional requirements on packaging in contradiction with Article 4 of the Regulation.
- > **Article 34 TFEU**, as several of the obligations will create unjustified barriers to intra-EU trade and consequently amount to quantitative restrictions on imports or measures having equivalent effect. The establishment of unilateral packaging requirements, not applicable elsewhere in the EU, will

discriminate economic actors operating in Denmark, requiring them to ensure compliance with the additional requirements set out in the draft order. Since the suggested obligations are to apply to products marketed in Denmark, it is assumed that importers will also be required to comply with these national requirements. As a result, the draft Decree creates obstacles to intra-EU trade, undermines the principle of mutual recognition, and *de facto* imposes quantitative restrictions on imports.

- **Article 36 TFEU**, stating that quantitative restrictions can only be justified by one of the public interest grounds set out in the same Article or by one of the overriding and mandatory requirements developed by case-law in the EU Court of Justice. Such rules must be necessary in order to attain legitimate objectives and be in conformity with the principle of proportionality, which requires that the least restrictive measure be used. The Danish Government has not provided justification on the proportionality of the proposed measure in its notification¹, and the proportionality of the requirement can be questioned on several grounds, notably:
 - by introducing unilateral requirements on packaging applicable solely to the Danish market, the draft order risks undermining the EU-wide approach pursued by the PPWR, thereby compromising its harmonisation objectives, its internal market legal basis, and the ability of economic operators to effectively fulfil their obligations under EU law.
 - it is unclear if the draft order represents a late transposition of Directive (EU) 94/62/EC on Packaging and Packaging Waste (PPWD). In such case, it should be recalled the PPWD will be repealed from 12 August 2026 under Article 70 of the PPWR, at the exception of a few provisions that will continue to apply *ad interim*. Considering the upcoming repeal of the PPWD, the proportionality of the proposed measures is questionable and should be assessed against the compliance costs that economic operators will incur, particularly considering that they might be required to change their packaging again in the near future, to ensure compliance with upcoming PPWR requirements.
- **Article 4(3) of the Treaty on the European Union**. In line with the principle of sincere cooperation, a Member State should refrain from adopting legislation to address an issue which can only be adequately resolved at EU level and in a field which the EU intends to harmonise. This is the case for the packaging legislation. Denmark should not pre-empt the setting of harmonised rules and definitions at EU level, such as provisions relating to EPR, recyclability, or labelling. These matters should be dealt with at the EU level as part of the PPWR implementation.
- **Article 8a(1)(d) of the Waste Framework Directive (2008/98/EC)**, which prevents Member States from “placing a disproportionate regulatory burden on producers” and Article 8(3) of the Waste Framework Directive, which provides that when applying Extended Producer Responsibility (EPR) Schemes, Member States must respect “the need to ensure the proper functioning of the internal market”. This is clearly undermined by several EPR requirements described above.

3. Conclusions

Pursuant to the EU principles of subsidiarity and sincere cooperation, Denmark should abstain from imposing unilateral requirements which will pre-empt forthcoming implementation of EU legislation and create barriers to trade. Based on the findings from our contribution, we submit the following requests to the Commission:

¹ It should be recalled that The burden of proof that the aim cannot be achieved by other means lies with Italy, see C-227/82. In relation to this, there is also case law codifying the need for the purported risks to be well found, serious and real and supported by evidence: C-270/02; C319/05; C-148/15; C-270/02; C-319/05; C-421/09.

- to adopt a detailed opinion concluding that the draft order creates barriers to the free movement of goods in Europe and should not be adopted since it contravenes TFUE Single Market provisions and EU legislation.
