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European Commission
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Reference: PlasticsEurope comments on Swedish notifications 2021/392/S, 2021/393/S and 2021/401/S on packaging and single-use products

Dear Mr. Maly

On 29 June 2021, the Swedish Government notified to the European Commission the following draft measures in accordance with the European Union (EU) Technical Regulations Information System (TRIS) consultation procedure:

- Notification 2021/392/S, which amends the packaging producer responsibility Ordinance and sets out requirements aimed at increasing recycling of packaging. The notified measure would introduce a national packaging design requirement that at least 75% of the material in packaging placed on the Swedish market must be recyclable.
- Notification 2021/401/S, which implements Article 4 of the EU Single-Use Plastics Directive on consumption reduction measures. It includes a ban on single-use plastic cups containing more than 15% plastic from 1 January 2024.

Notifications 2021/392/S and 2021/393/S: Ordinance on producer responsibility for packaging

PlasticsEurope is committed to increasing recycling and recyclability of plastics for packaging, as illustrated by our recent call¹ for a 30% mandatory EU-level plastics packaging recycled content target, subject to the necessary enabling policy framework. Along with other packaging value chain stakeholders, we have been fully engaged in recent public consultations on a forthcoming revision of the EU's Packaging & Packaging Waste Directive (PPWD). A key question that has arisen during these consultations has been how the European Commission should implement its commitment, announced in the Circular Economy Action Plan 2.0, to ensure that all packaging placed on the EU market is reusable or recyclable from 2030.

The European Commission has been clear in the Circular Economy Action Plan of its intention to propose recycled content targets for plastics packaging, and preparation of these targets is underway in the context of the PPWD Impact Assessment study. Paragraph §40 of notification 2021/393/S however creates a national recycled content target for plastics packaging. One key enabling condition of PlasticsEurope's support for a recycled content target is a harmonised internal market approach, allowing industry to benefit from the EU Single Market and its scale to support the investments required to achieve such targets.

¹ <https://www.plasticseurope.org/en/newsroom/news/european-plastics-producers-call-mandatory-eu-recycled-content-target-plastics-packaging-30-2030>

We understand that the impact assessment study on policy options for the PPWD review is nearing completion. During stakeholder consultations on this study, a number of different options has been outlined as to how to define 'recyclable'. They range from a qualitative written definition to design-for-recycling criteria, through to a recycling rate threshold. Whichever option the Commission chooses in its proposal, due in spring 2022, it will take an EU harmonised approach. This is because packaging is a vehicle for the free movement of goods throughout the internal market. Design requirements must be harmonised for packaging of goods which are destined for multiple EU markets.

Paragraph §38 of notification 2021/392/S proposes that 75% of material in a package must be recyclable and sets out conditions for exempting packages that do not meet this threshold. On the one hand, the 75% threshold would imply particular design requirements for packaging for the Swedish market only. On the other, the proposed separate set of criteria to define 'recyclable' for packages exempted from the 75% threshold could create an additional set of national design requirements for these specific packages.

The Swedish government observes in section 9 of the notification that the mutual recognition principle does not need to be invoked. The reason given is that the requirements entail implementation of EU regulations and do not prevent recycling taking place in another EU country. However, the PPWD—which is the relevant EU regulation—is a harmonisation measure with Essential Requirements (Article 9 and Annex II) and a free movement guarantee clause (Article 18). Thus, mutual recognition is indeed not required, but not for the reasons set out in the notification. We believe that the notified measure would breach Article 18 of the PPWD. Whether or not recycling can take place in another country is, in our view, not relevant with regard to mutual recognition.

Mutual recognition does, however, apply to packaged goods. By imposing specific national packaging design requirements, there is a risk that packaged goods freely circulating in the EU would need to be re-packaged for the Swedish market only. This would, in our view, constitute a quantitative restriction, or a restriction having equivalent effect in line with the principle set in the landmark *Cassis de Dijon* ruling that national measures which apply equally to domestic and imported goods are caught by Article 34 TFEU.

Our concern regarding the aforementioned Swedish notifications are therefore two-fold:

1. They are contrary to Articles 9 and 18 and Annex II of the PPWD and would create an immediate fragmentation of the internal market due to the design specifications that they set; this would result in a situation where a package compliant with the PPWD Essential Requirements would be non-compliant in Sweden only.
2. They would appear to pre-empt discussions at EU level on a definition of 'recyclable' and on recycled content requirements for packaging, especially those which will take place in the Council and Parliament once the Commission's proposal has been adopted.

Notifications 2021/401/S: Ordinance on single-use products

In accordance with the Single-Use Plastics Directive (SUPD), Sweden has also notified measures to reduce the consumption of certain single-use plastic products including cups for beverages. The proposed measures include a national ban on single-use cups containing more than 15%

plastic. The SUPD does say that Member States may impose marketing restrictions in derogation of Article 18 of the PPWD, but such measures must be proportionate and non-discriminatory. It also states that national measures should be intended to prevent products becoming litter and to ensure that they are substituted with alternatives that are reusable or do not contain plastic.

Contrary to the conditions set out above, setting a percentage threshold for plastics content in cups is discriminatory and rather arbitrary: aside from the challenges to monitor compliance, it would mean that a cup with 14% plastics content would be allowed on the Swedish market, but a cup with 16% would not. As for the previous measure, we believe that it would also constitute a quantitative restriction, or a restriction with equivalent effect, under Article 34 TFEU. Once again, a cup that is compliant with the PPWD Essential Requirements and the SUPD would be non-compliant in Sweden only.

Conclusion

PlasticsEurope supports the need for a climate neutral and circular economy. We also understand that it will be challenging to achieve the goals being set in legislation, as well as those we are setting ourselves. We are convinced that an essential tool to drive the transformation that is needed to achieve the EU's vision of a circular economy will be the power of the EU's internal market. It is vital that an EU harmonised approach is taken to the types of measures set out in this notification, so that all relevant stakeholders and Member States are driving towards the same sets of criteria and goals.

We therefore call on the Commission to protect the EU Single Market and to create the conditions that will enable forthcoming harmonised measures to unleash change to achieve their intended objectives. We believe that the issues raised above warrant the adoption by the Commission of a detailed opinion, concluding that the draft laws as notified by Sweden would constitute technical regulations contrary to the Essential Requirements set down in Directive 94/62/EC on packaging and packaging waste and Directive (EU) 2019/904 on single-use plastic products, and creating a barrier to the free movement of goods. We wish also to highlight that the Commission may require Member States to postpone the adoption of a draft technical regulation for 12 months from the date of receipt of the notification if, within three months of that date, the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU.

We remain at your disposal for any further information or clarifications related to the issues raised in this submission.

Yours sincerely,



David Carroll
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PlasticsEurope