

TIE COMMENTS

French Decree on consumer information symbols indicating the sorting rule for waste resulting from products subject to the principle of extended producer responsibility

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TIE, Toy Industries of Europe, wishes to comment on Article 17 of the French circular economy and anti-waste law n° 2020-105 ('the Law') and draft implementing Decree ('the Decree'), notified on TRIS¹².

The Law and the Decree create an obligation, applicable by 1st of January 2022, to label all product - including packaging - subject to an Extended Producer Responsibility (EPR) scheme with the so called TRIMAN logo and with waste sorting instructions.

For toys, this means that the TRIMAN logo and sorting instructions need to be included for the packaging, accompanying documents and the toy.

Whereas the Law provided for flexibility to include the TRIMAN logo on the product, accompanying document and the packaging, the Decree goes further by mandating all labelling for packaging to be present on the packaging itself.

While we share the ultimate objective of increasing the recycling rate in France, we question whether affixing both the TRIMAN logo and the sorting instructions on the packaging is necessary to meet France's recycling objectives in conformity with the principle of proportionality:

- It implies that the labelling and even the design of a packaging will have to be adapted specifically for the French market;
- The 2022 deadline is problematic. For many toy companies, the 2022 products launches are already prepared and they need minimum 18 months lead time to redesign packaging. If the packaging cannot be updated on time, they are forced to implement a sticker labelling scheme for all products aimed for the French market. On top of that, the sorting instructions are not yet harmonised in France (expected by end-2020), creating further bottlenecks in timing;
- For toys with small packaging, or with just a hangtag, additional packaging needs to be created. This means an increase of packaging waste;
- Labelling with a logo specific for the French market creates confusion. Companies do not design specific packaging for each country. Additional logos and texts in foreign languages which are unknown in other markets also legitimately raise concerns, e.g. green washing, misleading information for consumers;

¹ Decree on consumer information symbols indicating the sorting rule for waste resulting from products subject to the principle of extended producer responsibility – available [here](#)

² EU's [Technical Regulation Information System](#)

- There will be a risk that other Member States will require translation of the text into their national language if no France-specific packaging is created. Translation in other languages would seriously increase packaging size;
- Mandatory labelling on the packaging risks distracting from other important labelling requirements like warnings and other safety information
- For products like electronic toys, that already need to be labelled with the crossed-out wheeled bin, the TRIMAN logo creates duplication and further confusion.
- Further negative environmental impact is expected if companies create France-specific packaging. This could result in unsold-stock that cannot cross borders within the EU.
- The disproportionate measures contribute to the fragmentation of the internal market, constitute a technical barrier to trade and breach EU law on numerous aspects (Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) on the free movement of goods, the Waste Framework Directive, the Packaging and Packaging Waste Directive, the Waste Electrical and Electronic Equipment (WEEE) and the Batteries Directive).
- It will set a negative precedent. If France will be allowed to impose these labelling requirements, there is a serious risk that other EU Member States will also develop own schemes. As a result, companies will be required to include multiple sorting instructions on pack (with risks of confusion consumers, increasing packaging size and distracting from safety warnings) or create specific packaging for each Member State. This will seriously reduce cross-border sales and will result in even more unsold-stock that cannot cross the EU-border.

We call on:

- The European Commission to closely examine the compatibility of the French notified decree against EU law;
- France to bring the requirements in line with EU legislation;
- France to follow WTO requirements and notify the Law and the Draft Decree as a potential technical barrier to trade;
- EU Member States to raise concerns with the specific French measures that will restrict access to the French market.

Annex:

- [Background on the Triman logo](#)
- [Recent developments](#)
- [Key concerns toy sector](#)
- [Breaches of EU law](#)
- [EU and WTO notification obligations](#)

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BACKGROUND

- In 2010, the French Grenelle law n° 2010-788 imposed that all recyclable products subject to a system of Extended Producer Responsibility (EPR) must have a TRIMAN mark and waste sorting instructions to inform the consumer about which items must be collected.
- In 2012 during the preparatory phase of the implementing Decree [2012/204/F](#), an early draft provided that the TRIMAN logo should be mandatory and affixed on all recyclable products associated with waste-sorting instructions which were subject to a system of extended producer responsibility.
- At that time, the draft Decree raised concerns in Europe during the TRIS consultation 2012/204/F and at the WTO level (G/TBT/N/FRA/153)³
- Responding to a parliamentary question, the European Commission acknowledged that the 'envisaged measure might constitute a barrier to the free movement of goods within the internal market'.
- To meet concerns with breach of EU and WTO requirements, the affixing of the logo and the sorting instructions on the products covered by an EPR scheme themselves became voluntary in its final stage.
- Economic operators have the option to 'dematerialize' the information, e.g. by presenting the information online. The dematerialization was a possible solution accepted by the French administrations.



RECENT DEVELOPMENTS

Article 17 of the anti-waste law n° 2020-105:

- The French circular economy and anti-waste law n° 2020-105 was adopted in February 2020⁴.
- Article 17 of the law indicates that, by the 1st of January 2022, it will become mandatory to include affix a common symbol and waste sorting instructions for all products, including packaging, subject to an EPR scheme (excluding household glass beverage packaging).
- For toys, this means that the common symbol and specific sorting instructions need to be included for the packaging, accompanying documents and the toy itself, as these elements will be subject to an EPR scheme under French law.
- The symbol and instructions should be affixed on the product, the packaging or any other accompanying document, leaving the possibility to affix the symbol and the sorting text on user manuals and safety instruction. The law does not provide for a requirement to include both elements on the same place.
- Article 17 mentions that details would be specified by an implementing Decree.

³ https://www.wto.org/english/news_e/news14_e/tbt_18mar14_e.htm

⁴ https://www.ecologique-solidaire.gouv.fr/sites/default/files/en_DP%20PJL.pdf

- Sorting instructions are at the moment not harmonised within France and more information is expected later in 2020.
- (Article 17 of) the Law was not notified under the TRIS procedure.
- (Article 17 of) the Law was not notified under the WTO Technical Barriers to Trade (TBT) Agreement.

Decree on consumer information symbols indicating the sorting rule for waste resulting from products subject to the principle of extended producer responsibility:

- The French government has submitted the draft implementing Decree under the TRIS procedure. The end of the standstill procedure is 1 October 2020.
- The Decree specifies that the common symbol referred to in Article 7 of the Law is the TRIMAN logo.
- The text of the notified draft implementing Decree is more demanding than the law itself. It stipulates that:
 1. *The sorting instruction shall be « stuck » to the Triman pictogram.*
The possibility given by the law that the sorting instructions « accompany » the Triman pictogram is no longer present. According to the law, the Triman pictogram and sorting instructions could be affixed together to the product or accompanying documents if relevant.
 2. *For packaging covered by the packaging EPR scheme, **the TRIMAN logo shall be affixed on the packaging itself.***
The possibility given by the law to affix the Triman pictogram on the packaging or on the instructions sheet is no longer possible for packaging. The requirement for packaging in the draft decree (TRIMAN logo + sorting instructions affixed on the packaging) is therefore stricter than for all other products that are covered by an EPR scheme (where the information can be 'indicated on the product, its packaging, or on the documents provided with the product')

KEY CONCERNS TOY SECTOR

1. **The draft measure implies that the labelling and even the design of a packaging will have to be adapted specifically for the French market which has huge implications.**
Countries and EU Member States have different waste management systems. Therefore, any changes, such as new logos and texts in foreign languages which are unknown in other markets, legitimately raise concerns, e.g. green washing and misleading information to consumers. Creating specific labelling and packaging for the French market will be unpractical. If France-specific packaging will be created, further negative environmental impact is expected if companies create France-specific packaging. This could result in unsold-stock that cannot cross the borders.
Of companies
2. **The draft Decree does not allow flexibility to decide where to affix the TRIMAN logo and sorting instructions.**
We believe it should allow that for all packaging elements, the TRIMAN logo and the sorting instructions can be affixed on the packaging or on any accompanying document such as the building- and safety instruction.

3. The obligations risk creating confusion with consumers.

Consumers' understanding of generic logos varies considerably which questions the approach chosen to increase recycling rates. The Eurobarometer survey on consumer empowerment published in 2011 tested consumers' ability to recognize the logo for organic farming (16%), the CE logo (66%), the Ecolabel logo (17%), the recyclable paper logo (55%) and the one indicating health hazard (64%). More than one in ten (11%) claimed they did not know the logos. For all the logos, the understanding of their meaning drops considerably. Taking the example of the CE logo which is the most recognized logo by European consumers, only 25% actually understand its meaning.

The requirement risks to be especially be confusing for consumers in other Member States.

4. The 2022 deadline is highly problematic.

France still needs to adopt harmonised sorting instructions. Therefore, our members cannot yet make the necessary adjustments to meet the January 2022 deadline.

For many companies, the 2022 products launches are already prepared and they need minimum 18 months lead time to redesign packaging. If the packaging cannot be updated on time, they are forced to implement a sticker labelling scheme for all products aimed for the French market. The costs for investments in additional labelling facilities, certain equipment and training of staff, extra handling and labelling, should they use the label option, are very high.

We call for an extension of the transition period until January 2023 to permit sufficient time to prepare once the sorting instructions have been agreed.

5. Small items and items sold without packaging, but only with a hangtag, represent a technical challenge.

For these items, there is a lack of space available to display essential information, in particular safety information and warnings which by law are required to be visible at the point of purchase. The unintended consequence of obliging the Triman logo and the sorting instructions to be included on the packaging would be an increase of the size of the packaging. This would undermine the waste hierarchy to prevent and reduce waste.

6. Distraction from other important information

Mandatory labelling on the packaging risks distracting from other important labelling requirements like warnings and other safety information.

7. It will set a negative precedent

If France will be allowed to impose these labelling requirements, there is a serious risk that other EU Member States will also develop own schemes. As a result, companies will be required to include multiple sorting instructions on pack (with risks of confusion consumers, increasing packaging size and distracting from safety warnings) or create specific packaging for each Member State.

BREACHES EU LAW

1. Waste Framework Directive (WFD)

Article 17 of the Law and the Draft Decree do not comply with certain EPR minimum requirements set out in the Waste Framework Directive and create unjustified barriers to trade.

The WFD stipulates that Member States shall take into account, inter alia, the technical feasibility and economic viability impacts, while "respecting the need to ensure the proper functioning of the internal

market”. The specific obligations for labelling and sorting instructions are clearly capable of hindering, “directly or indirectly, actually or potentially”, intra-EU trade as producers subject to EPR will have to change their labelling and packaging functions if they want to sell their products on the French market.

The WFD also specifies that EPR schemes established by the Member States (i) shall “ensure equal treatment”, and (ii) shall not place “a disproportionate regulatory burden on producers”. The measures will infringe both requirements as:

- (i) labelling and sorting instruction requirements do not apply to household glass beverage packaging. There are logical justifications for this exclusion given that glass packaging recycling rates are below those of other waste streams such as metallic or paper and cardboard.
- (ii) They would impose a disproportionate regulatory burden on producers subject to a French EPR scheme. They are disproportionate because they require the introduction of separate labelling and sorting information in material form. Less restrictive measures are already available, namely, providing producers with the alternative opportunity to have the Triman logo and sorting information on their website.

2. Packaging and Packaging Waste Directive (PPWD)

Article 17 of the Law and the draft Decree is in conflict with a core objective of the PPWD, i.e. to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community, as they create obstacles to trade by requiring specific labelling and sorting information in a physical form on the packaging of products subject to EPR intended for the French market.

The measure will also violate Article 18 of the PPWD as, France would be clearly impeding the placing of packaging on the French market which otherwise satisfies the provisions of the PPWD.

3. Waste Electrical and Electrical Equipment (WEEE) Directive and the Batteries Directive

The WEEE Directive requires that electrical and electronic equipment (EEE) has to be marked with the crossed-out wheeled bin. The Batteries Directive requires the same for all batteries, accumulators and battery packs.

By duplicating the requirements in the case of EEE and batteries, the French law can be seen to clearly come into conflict with the WEEE Directive and the Batteries Directive. Affixing two separate symbols is clearly burdensome and unnecessary.

Both Directives also include requirements on informing consumers. However, there is no requirement to provide such information in a particular format and both Directives are flexible on how such information can be communicated, without any emphasis on adding such information on the products themselves, their packaging or the accompanying documents, and with a clear acceptance of public campaigns. Article 17 of the Law and the Draft Decree would nullify this flexibility. This creates unjustified barriers to trade, may lead to an increase in the size of packaging in order to accommodate both sets of requirements (thereby creating more (packaging) waste) and will likely create confusion among consumers rather than properly informing them.

On top of that, Article 6 of the Batteries Directive does not enable Member States to lay down more restrictive or simply different rules from those of the Directive. While the WEEE Directive does not have a similar provision, the CJEU has held that national measures cannot “endanger(s) the objective” of EU legislation “even if the matter in question has not been exhaustively regulated by it”. The duplication of requirements will lead to confusion and thereby endanger the objectives of the WEEE Directive.

4. Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) on the free movement of goods:

Articles 34-36 TFEU which guarantee the free movement of goods, are intended to “eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-[EU] trade”. Therefore, any measure introducing an unnecessary and unjustified technical barrier against the free movement of goods which are lawfully produced and marketed in another Member State is contrary to EU law. The principle of mutual recognition requires Member States to authorise in their territory goods that are legally sold in other Member States

The French measure infringes the principle of free movement of goods if (i) it constitutes a measure having equivalent effect to a quantitative restriction (**MEEQR**) within the meaning of Article 34 TFEU, and (ii) it is **not justified**.

MEEQR

Together, the Law and the Draft Decree provide for labelling requirements specific for France. National labelling requirements typically constitute barriers to intra-EU trade. This is certainly the case here, as traders will need to physically affix, only for the French market, the Triman logo and the sorting instructions to the product, the packaging or accompanying documents and thus change the packaging, accompanying documents and/or appearance of the products. As Article 17 of the Law and the Draft Decree restrict intra-EU trade, **they constitute MEEQRs and infringe the principle of freedom of movement of goods unless they can be justified**.

The measures are not justified

a) They do not pursue legitimate interest.

The exclusion of household glass beverage packaging in both Article 17 of the Law and the Draft Decree appears to pursue a discriminatory objective. Discriminatory objectives are not considered legitimate.

b) They are not appropriate to attain the relevant objective

Article 17 of the Framework Law and the Draft Decree are not suitable or appropriate to attain the legitimate objective of protecting the environment.

First, Article 17 of the Law and the Draft Decree may lead to more waste, which contradicts the objective of reducing waste and protecting the environment. The Framework Law provides that the Triman logo and the relevant sorting instructions can no longer merely be displayed online but must be provided in physical format on the products, the packaging or the accompanying documents (removing the possibility to display them online). As a result, in some cases this will mean that producers will be forced to add packaging where, until now, none was used, in order to be able to attach the Triman logo and sorting instructions. This is likely to be the case where the products' use would be impaired, and for products which would be damaged or lose their value or purpose due to the application of a logo and sorting instructions. Similarly, where the existing packaging is too small, producers may need to make it larger to comply with Article 17 of the Law. Article 17, therefore, in itself may result in the creation of more waste and runs counter to the aim of protecting the environment.

This effect of creating more packaging and thus creating more waste is exacerbated by the Draft Decree which requires that the Triman logo must be “stuck to” (accolé) the sorting instructions and that, in the case of EPR packaging, the logo and sorting instructions must be shown on the packaging itself. The requirement that the sorting instructions and the Triman logo must be presented together is problematic as it will significantly increase the amount of space needed on the product, the packaging or the accompanying documents. This is likely to create additional waste. Even if this additional waste were to be sorted more accurately (the sorting of waste being the immediate

objective), it still runs counter to the ultimate objective of protecting the environment from waste. The requirement to affix the logo and sorting instructions to the packaging itself also removes the remaining flexibility provided by Article 17 of the Framework Law which could have allowed the producer to at least minimise the additional waste created. Although Article 17 of the Framework Law itself already fails to achieve the objective to protect the environment, this is even clearer with regard to the Draft Decree.

Second, the exclusion of household glass beverage packaging from the requirement to affix the Triman logo and sorting instructions under both the Framework Law and the Draft Decree constitutes arbitrary discrimination and therefore is not suitable to achieve the named objective of protecting the environment. As a result of the exclusion, a type of packaging which currently has lower recovery rates (glass packaging) is not covered while other packaging which has comparatively higher recovery rates (e.g., paper) is covered by the Triman logo. The discriminatory nature of Article 17 and the Draft Decree undermines the legitimate objective of protecting the environment as it raises the question whether France is genuinely committed to that objective. Failing to include a product group where a label and sorting instructions could achieve significant improvements, while imposing such requirements on products with already high recovery rates, and products which cannot even be recycled, confirms that the measure is not suitable to produce a genuine improvement.

Finally, it is doubtful that, for products which already carry other symbols, imposing a requirement to affix the Triman logo and sorting instructions will resolve the confusion of consumers. The risk of confusion is particularly high in the case of products which bear an EU-wide, recognisable logo indicating that they should be disposed of separately such as the crossed-out wheeled bin on batteries and electrical and electronic equipment (EEE). This has been confirmed in a recent study requested by the Commission which noted that the number of labels and symbols providing misleading information are a source of confusion. The study mentions the Triman logo explicitly as a commonly highlighted point of confusion.

The Decree specifying that the symbol to be used is the Triman logo, may be a cause of confusion (as set out in the previous paragraph), especially for consumers originating from other Member States, travellers and tourists briefly visiting France. It could also confuse consumers where the products bearing the Triman logo and sorting instructions are sold in another Member State. Consumers will likely be unaware of the specificities of French legislation. As a result, non-French consumers coming across products labelled pursuant to the Draft Decree, whether in France or in other EU Member states, may dispose of products wrongly and cause damage to the environment and public health. To this extent, national logos such as the Triman logo can be counterproductive to the objective of simplifying the information for consumers.

c) They are not proportionate

The newly introduced measures by Article 17 of the Law and by the Draft Decree do not appear to be proportionate. France has not shown that the Triman logo and sorting instructions are more likely to achieve the relevant objectives than less onerous options for at least six reasons.

First, it is excessive to require the Triman logo and the sorting instructions to be attached to the product, its packaging or the accompanying document in physical form. Until now, it has been considered sufficient for the logo to be available in non-material form, e.g., on the producer's website.

Second, the requirement laid down by the Framework Law and the Draft Decree to affix not only the Triman logo, but also potentially extensive sorting instructions is more onerous than is necessary. It might already be less onerous if Article 17 of the Law and the Draft Decree only required the logo to be affixed while displaying the additional sorting instructions on the producer's website. The sorting

instructions could be available online and would be available to the consumer as detailed in the previous paragraph. The obligation to affix the Triman logo can nevertheless also be considered disproportionate to the extent that less onerous options are available, such as guaranteeing its accessibility online, or to strengthen recommendations and develop communication on the Triman logo in order to encourage consumers to look for it, and producers to use it, which was the alternative option considered by the Impact Assessment. Such options have strong merits,

Third, the Draft Decree requires both the Triman logo and the sorting instructions to be affixed to the packaging where the product in question consists of packaging subject to EPR. However, if the product is not packaging subject to EPR, the Triman logo and sorting instructions can be provided on the product, on the packaging or on the accompanying documents. There is no apparent reason why the Draft Decree is more stringent regarding EPR packaging as opposed to other products. Therefore, there is an even stronger argument to say that the Draft Decree is disproportionate when it comes to the requirement to attach the logo and sorting instructions to the EPR packaging itself.

Fourth, other Member States have managed to increase packaging waste recovery rates and now have higher rates than France without such a compulsory common logo. France increased its recovery rates for all packaging materials even before the Triman logo was introduced. It thus seems that even without the logo, consumers became increasingly aware of how to separate packaging waste. Non-compulsory symbols such as those indicating that a product is made out of recyclable aluminium, the label for compostable products, the OPRL label have become widely used and recognised by consumers. These have allowed better information for consumers and better sorting for years, yet are less restrictive as they are non-obligatory. Thus, the mandatory nature of the labelling requirement in the Framework Law and the Draft Decree is excessive as France has not proved that these voluntary labels are ineffective

Fifth, while imposing these measures on a vast range of products, France considered it unnecessary to make them compulsory for household glass beverage packaging even though glass packaging has low recovery rates. The low recovery rates constitute an indication that these measures are even more necessary, if anything, with respect to household glass beverage packaging, in order to achieve the objective of protecting the environment. Yet, such packaging is exempt. On the other hand, products which are not recyclable and products which are already being recycled very widely are subject to the requirements. It is a blanket measure which excludes products it should target and instead requires labelling for products which already benefit from efficient recycling. Therefore, the Framework Law and the Draft Decree are disproportionate also for this reason.

Sixth, in particular with regard to products already marked with other sorting symbols (crossed-out wheeled bin), the new requirements introduced by Article 17 of the Law and the Draft Decree are disproportionate as the aim of these labelling requirements is already achieved by the existing labels.

EU and WTO notification obligations

- France should have notified Article 17 of the Law under the TRIS procedure. Even though Article 17 of the Law does not specify which symbol must be affixed to the product, it is drafted in a manner that will lead to the adoption of implementing measures incompatible with EU law (in the absence of a harmonised EU logo) and it already includes the requirement to affix a sorting symbol and the sorting instructions.
- The WTO Technical Barriers to Trade (TBT) Agreement specifies that technical regulations should be notified at an early appropriate stage, when amendments can still be introduced and comments taken into account. France should therefore notify the Draft Decree under the TBT Agreement without delay.