

**Joint Freshfel Europe-ESSA response to TRIS Notification Number 2021/149/F on ‘Draft decree on the obligation to present for sale fresh unprocessed fruit and vegetables without packaging made up entirely or in part of plastic’**

Freshfel Europe, the European Fresh Produce Association, and ESSA, the European Sprouted Seeds Association, who are the EU representative Associations for the fresh fruit and vegetable sector across the whole supply chain and the sprouted seeds sector respectively, are responding to TRIS Notification Number 2021/149/F on ‘Draft decree on the obligation to present for sale fresh unprocessed fruit and vegetables without packaging made up entirely or in part of plastic’, notified on 12/03/2021. The draft decree pertains to the application of Law No. 2050-105, Article 77 of 10 February 2020 (hereafter AGECE Law). Freshfel Europe and ESSA alert that this draft decree is a significant trade barrier and includes inappropriate provisions for the fresh produce sector.

Article 77 of the AGECE Law specifies that from 1 January 2022:

*“A compter du 1er janvier 2022, tout commerce de détail exposant à la vente des fruits et légumes frais non transformés est tenu de les exposer sans conditionnement composé pour tout ou partie de matière plastique. Cette obligation n'est pas applicable aux fruits et légumes conditionnés par lots de 1,5 kilogramme ou plus ainsi qu'aux fruits et légumes présentant un risque de détérioration lors de leur vente en vrac dont la liste est fixée par décret.”*

The fresh produce sector is committed to enhancing its sustainability to meet societal and environmental needs and requirements. This includes the use of sustainable packaging materials, eliminating unnecessary packaging as well as reducing packaging material use that is less sustainable, especially those that are not recyclable or reusable. This joint Freshfel Europe-ESSA response does not dispute the sentiment of either Article 77 or the draft decree outlined in the TRIS Notification Number 2021/149/F, but alerts that presence of a significant trade barrier and inappropriate provisions for the fresh produce sector.

**Trade barrier and inappropriate provisions of draft decree directly resulting from AGECE Law Article 77**

First, Freshfel Europe and ESSA would like to outline that Article 77 was initially adopted without any prior consultation with the fresh produce sector to enable the identification of trade barriers and inclusion of appropriate provisions. Furthermore, Article 77 was also not notified to TRIS as a standalone measure, insofar that it is a significant general technical measure with widespread consequences for the sector. As a consequence, the draft decree notified with TRIS Notification Number 2021/149/F includes significant trade barriers and inappropriate provisions that stem directly from Article 77 itself. The draft decree, as part of the scope of Article 77 proposing measure by means of temporary exemptions, inherently presents in its current state a significant trade barrier and includes inappropriate provisions because Article 77 is also a significant barrier to trade and is not proportionate.

However, Freshfel Europe and ESSA are not in favour of abolishing the draft decree as this would result in the application of Article 77 as of 1 January 2022 without any exemption, which would be wholly inappropriate and further detrimental to the trade of all those products outlined in the draft decree.

Notably Freshfel Europe and ESSA would like to highlight that:

- Article 77 and its draft decree present a significant trade barrier, whereby they prevent free circulation of goods on the Single Market under Articles 34 and 35 of the Treaty on the Functioning of the European Union, and
- Article 77 and its draft decree do not comply with Article 18 of Directive 94/62/EC on packaging and packaging waste which states that *“Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”*.

High volumes of fresh produce are traded on the Single Market, and consequently Article 77 and its draft decree will have a serious effect on intra-EU trade. This includes but is not limited to:

- Highly unnecessary packaging waste, where plastic-based packaged products will need to be unpacked on entry into France with packaging discarded, and either re-packed in alternative packaging;
- Due to higher packaging investments necessary as result of the need to unpack/repack products on entry into France, many small and medium sized businesses, which make up a large percentage of fresh produce operators, will face an economic barrier to enter the French market, and
- Fresh produce products which currently have no viable alternative to plastic-based packaging materials, and which do not have proportionate and appropriate provisions for packaging research and innovation and development reflected in the draft decree specifications will be barred from the French market when their deadlines in the draft decree enter into force.
- Significantly higher food waste both along the fresh produce supply chain and in the home as products will be contained in lower quality packaging that is not functional for the highly perishable fresh produce products, which is contrary to the aims of the AGECL Law.

Furthermore, Article 77 and its draft decree are a barrier to trade to imports from third countries into France. Operators outside the EU are also moving towards packaging elimination and minimalisation, especially plastic packaging. However, not all packaging products used on imported goods have completely plastic-free solutions for certain products. This is especially the case for products requiring protective packaging, without which a high food safety risk would be present as well as high levels of food waste. For example several plastics accessories are common on paper or wood-based packaging of imported products, including the packaging covering, pallet strapping and girfac on smaller packaging, which are not in direct contact with the product.

#### **Disproportionate and inappropriate provisions outlined in draft decree in TRIS Notification Number 2021/149/F**

Freshfel Europe and ESSA strongly believe the draft decree in TRIS Notification Number 2021/149/F includes disproportionate and inappropriate provisions for the fresh produce sector. Accordingly Freshfel Europe and ESSA would like to make the following remarks concerning Article 1 of the draft decree:

**Article 1.1. “3 “Conditioning”: receptacle, outer cover or closing device, covering the fruit and vegetables in whole or in part to constitute a unit of sale to the consumer and to ensure its presentation at the point of sale;”**

Article 77 of the AGECL Law transposes Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment into French national legislation. Under Directive (EU) 2019/904 there are no ban or consumption reduction targets specified for “closing device[s]”, which is included in the scope of packaging products under the draft decree Article 1, I point 3 definition “Conditioning”. “Closing device[s]” are also not included in the recently adopted C(2021) 3762 Commission notice on ‘Commission guidelines

on single-use plastic products in accordance with Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment'. As such there is no European legal basis for this inclusion, and therefore this definition is disproportionate. We therefore strongly advise that "closing device" should therefore be removed from the definition of "Conditioning" in the draft decree.

**Article 1.II. "5. Ripe fruit, i.e. fruit harvested at full maturity, with their retail packaging so indicating, until 30 June 2026;"**

The definition of Article 1.II.5 implies that fresh produce products that have undergone a ripening process are not exempt from Article 77. This definition is entirely inappropriate to the fresh produce supply chain's operations as fresh produce are living products where the maturation process continues after harvesting. That is to say, a product harvested at full maturity may no longer fit for consumption when offered to the consumer, except in special cases.

Consequently, to avoid significant volumes of food waste both along the supply chain and in the home, many fruit products are picked at the exact maturation stage (i.e. the right maturity) to initiate a post-harvest maturation process during a stage further along the supply chain in a ripening facility. This enables the products to be at a perfect maturation stage at retail and in the home to avoid excessive food waste. Post-harvest maturation is also a commercial necessity for imported fruit into France, which is imported in high volumes and using low-environmental impact transport routes (i.e. not by air freight). Consequently, these fruit products which reach "full maturity" post-harvest should also be included in the definition of Article 1.II.5 of the draft decree.

We therefore propose an alternative and appropriate definition to be used in Article 1.II.5 of the draft decree: *"5. Fully ripe fruit, i.e. fruit exhibiting the characteristics of products picked at full maturity and fruit whose packaging when presented for sale indicates such a statement, until 30 June 2026;"*.

**Article 1.II. "6. Sprouted seeds, until 30 June 2026" and "3. bean sprouts"**

The listings under Article 1.II. of "6. Sprouted seeds, until 30 June 2026" and "3. bean sprouts, until 31 December 2024" are wholly inappropriate. The sprouted seeds sector, which includes "bean sprouts" as written in Article 1.II.3, both in Europe and globally relies heavily on functional packaging that meets very high food safety standards. Sprouted seeds are not sold loose to maintain high food safety levels and prevent rapid loss of shelf life resulting in extremely high food waste levels.

Currently, no viable packaging alternatives exist that do not contain at least a small percentage of plastic material. The moisture content of sprouted seeds is exceptionally high, resulting in rapid packaging material disintegration and food spoilage when plastic is not used, for example in the case of wood or paper-based packaging. For this specific reason, currently sprouted seeds are sold either in plastic containers or cardboard carrier trays with a plastic lining covered in a plastic film. This maximizes shelf life by preventing the delicate cell structure of the sprouted seeds from drying out, while also permitting the consumer to identify the product.

The sprouted seeds sector has already conducted extensive testing of alternative materials currently available on the packaging market in an effort to boost packaging sustainability beyond recyclability. All these tests have been unsuccessful. Currently there is no viable alternative packaging on the market to materials using plastic. The only moderately successful materials identified have been glass and PLA made from sugar cane fibre. However, both of these materials incur significant negative environmental consequences including energy-intensive manufacturing and transport. Additionally, PLA made from sugar cane fibre is not widely available for sector use.

Due to the lack of viable alternative packaging materials, we strongly believe that the deadlines of 31 December 2024 and 30 June 2026 are wholly inappropriate. The sprouted seeds sector must be provided

with a more appropriate deadline schedule to find a viable, functional alternative packaging solution to plastic materials. We propose an alternative exemption deadline for “sprouted seeds” of 31 December 2029, where “sprouts” are included in the definition of “sprouted seeds”. This would provide adequate time and long-term financial investment in research and development to obtain a viable and functional alternative packaging solution.

**Fruits and vegetables that should be included in the draft decree according to their risk of deterioration, bulk sale and current availability and viability of alternative packaging**

Freshfel Europe and ESSA understand that the specific fruit and vegetable products included in the draft decree have been identified according to their risk of deterioration, their bulk sale and/or current availability and viability of alternative packaging. However, the list of products identified is not consistent. It does not treat all fruit and vegetable products equally in so far as a number of products should be included on the list using the identification logic applied to those products already included on the list.

If the same identification logic is applied to all fruit and vegetable products, Freshfel Europe and ESSA strongly believe the following amendment must be made to the products included in the draft decree:

- “Cocktail tomatoes”, “vine tomatoes” and “round tomatoes” must be included in the products listed under Article 1.II.1.
- “Plums” and “sour cherries” must be included in the products listed under Article 1.II.4.
- “Bean sprouts” as currently described under Article 1.II.3 must instead be identified in the products specified as “sprouted seeds” and therefore be included in Article 1.II.6. The term “sprouted seeds” is widely acknowledged to include all types of sprouts and sprouted seeds.
- “Gooseberries”, “blackcurrants” “goji berries” and must be included in the products listed under Article 1.II.7.

Furthermore, the deadline of “30 June 2023” under Article 1.II.1 is not appropriate. The products under Article 1.II.1 will be in the middle of their production year at 30 June 2023. In order to avoid a change of legislation in the middle of a production season, which will be extremely difficult for operators, we strongly advise that the deadline specified for products in Article 1.II.1 is amended to 31 December 2023.

**Information provision to fresh fruit and vegetable operators before the entry into force of the decree**

As the measures contained in the draft decree in TRIS Notification Number 2021/149/F are a significant trade barrier, adequate information should be provided to all fresh fruit and vegetable operators in Europe before the entry into force of the decree. This will enable operators to adjust operations where possible and make business decisions to redirect their products to other markets if they consequently cannot enter the French market.

Freshfel Europe and ESSA strongly believe that the significant trade barrier originating from Article 77 of the AGECLaw and thus also manifested in the draft decree must be removed. While fully supporting a more sustainable trading environment in the fresh produce sector, Freshfel Europe and ESSA are highly concerned by the significant trade barriers created by the AGECLaw, including Article 77 as well as Article 80 regarding the banning of all fruit and vegetable stickers, except if home compostable and partially or wholly composed of bio-based materials, as of 1 January 2022.

Thank you for taking Freshfel Europe and ESSA’s perspective into account, and we remain available for further information and consultation.