

Interzero d.o.o. position on Draft proposal for the Ordinance on packaging and waste packaging, single-use plastic products and fishing gear containing plastic

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Summary:

Directive 2008/98/EC on waste¹ in Article 8a states that where EPR schemes are established (in accordance with Article 8(1)), including pursuant to other legislative acts of the Union, Member State shall define in a clear way the roles and responsibilities of all relevant actors involved, including producers of products placing products on the market of the Member State, organisations implementing extended producer responsibility obligations on their behalf, private or public waste operators, local authorities and, where appropriate, re-use and preparing for re-use operators and social economy enterprises.

Although, in the Croatian Waste Management Act (OG 84/21)² is stated in Article 95. and 96. that in order to achieve the waste management objectives, the Fund and the Organisation shall ensure the execution of waste management services, and that the Ministry shall reject an application for the granting of the Organisation status if it is determined that the establishment of an Organization would not improve the waste management system for a special category of waste, the proposed draft of in secondary legal acts makes this impossible.

Croatia has officially started negotiations on joining the Organization for Economic Cooperation and Development (OECD), but it still does not respect the highest global standards, is not committed to the values of democracy and the rule of law, does not respect the principles of an open and transparent market economy and, together with other member states, does not share the common goal of sustainable economic growth.

With the implementation of EU initiatives and the current shortage of recycled materials, we are faced with an even greater challenge of keeping up with the ever-increasing amounts of waste, with ever-higher recycling targets, and the lack of favorable raw materials needed for production.

The new secondary legal acts that are in the drafting and adoption phase, instead of opening up the opportunity for Croatia to open the market, introduce new processes and enable producers to actively participate in waste management, completely violate the rights of market competition and are not in accordance with Croatian and EU legislation.

The market model and Organizations should be a lever that will ensure and accelerate the development of primary selection in all areas of the Republic of Croatia, encourage the construction of waste sorting plants and thereby provide raw materials to the recyclers. That same waste will thus be turned into raw material and returned to the Croatian economy, thereby reducing the need for imports, or enabling Croatian companies to obtain materials more favorably.

In short – Draft proposal for the Ordinance on packaging and waste packaging, single-use plastic products and fishing gear containing plastic proposed by the Croatian Ministry is not in accordance with the law passed by the same Ministry or with the EU legislation.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008L0098-20180705&qid=1691049515706>

² https://narodne-novine.nn.hr/clanci/sluzbeni/2021_07_84_1554.html

The situation in the Croatia

The Ministry of Economy and Sustainable Development has published the Report on Waste Packaging Management³ in Croatia in 2021, which is based on data from the Extended Producer Responsibility (EPR) system organized by the Environmental Protection and Energy Efficiency Fund (FZOEU) and represents official data for monitoring the fulfillment of the goals set by Directive 94/62/EC on packaging and packaging waste (PPWD).

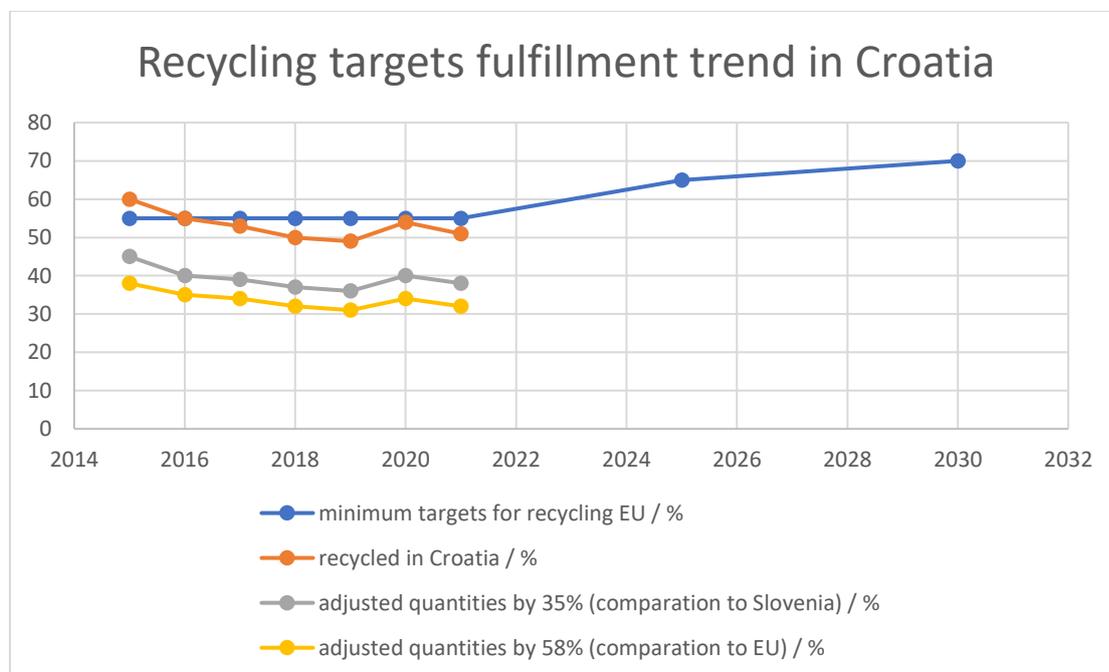
According to data received from FZOEU during 2021, the Ministry states that 291,631 t of packaging (including newly acquired reusable, i.e. returnable) packaging was placed on the Croatian market, i.e. 75 kg/inhabitant.

Through the FZOEU system, 156,227 tons of packaging waste were collected, which is 53.6% of the amount placed on the market, and 51% of the packaging waste was recovered/recycled.

The goal of recovery is 60% and it was not achieved in 2021. Recovered quantities are mostly materially recovered, i.e. recycled, so the recycling rate of 55% in 2021 was also not achieved.

In the future period, it is planned to increase the set goals and prescribe only goals for recycling in accordance with the Circular Economy Package adopted by the European Union (EU) in 2018. Taking into account that recycling rates in Croatia are falling every year instead of increasing, it can be assumed that Croatia will not achieve the set goals with the existing system in the future either.

If we compare the presented data with neighboring countries, for example Slovenia, which has a very similar standard to Croatia, and at the same time puts on the market 35% more packaging by inhabitant per year (115 kg), by simple simulation we arrive at more realistic numbers that Croatia put 35% more packaging on the market, which reduces recycling rates and the probability of meeting targets even more. The average amount of packaging placed on the market in the EU is 177.2 kg / inhabitant.



Even in Decision on adoption of Amendments to the Waste Management Plan of the Republic of Croatia for the period 2017-2022⁴ it is stated that one of the sub-goals that must be implemented is the improvement of the waste packaging management system.

Official warnings by EU

In 2018. Croatia is warned by the European Commission that there is risk of missing the 2020 preparation for re-use/recycling target on municipal waste⁵. One of the key findings were that the EPR schemes in Croatia do not fully cover the costs of separate collection; and in overview of possible actions to improve performance it is stated that Croatia must improve functioning of the EPR by specifying in detail a minimum level of collection service that producers are required to fund for the local self-government units or by restructuring the existing approach by making producers set up their own not-for-profit PRO, which would be tasked with collecting the fees from producers and distributing them to LSGUs, while ensuring these fees are not more than necessary for the service.

Additionally, in June 2021 European Commission pursues legal action against Croatia for failing to comply with their obligations under the EU law⁶:

- Commission urges Croatia to fully enact new EU rules on waste streams into national legislation
- Commission urges Croatia to fully enact new EU rules on waste management into national legislation
- Commission urges Croatia to fully enact new EU rules on preventing of the packaging waste

The Croatian Competition Agency evaluation / opinion

The Croatian Competition Agency (CCA) warned⁷ Ministry of Economy and Sustainable Development as the provisions of the Draft Ordinance on packaging and waste packaging, single-use plastic products and fishing tools containing plastic divide the implementation of waste management services between the Fund and the Organization, depending on whether it is waste that is regulated by the Waste Catalog and the Draft Ordinance as non-hazardous waste (managed by the Fund) or hazardous waste (managed by the Organization), while The Waste Management Act does not provide for the specified division of service implementation. CCA proposes to additionally consider the possibility of including the Organization in the waste management system, unless there are justified reasons for only the Fund to perform this activity.

Also, CCA points out that from the perspective of regulations on market competition protection, it is desirable to organize the system in such a way that a body with public powers performs exclusively regulatory tasks prescribed by special regulations as a regulatory body (e.g. keeping records, registers, issuing permits, supervision, etc.) while jobs performed on the free market are usually performed by entrepreneurs according to market principles with equal and transparent conditions.

⁴ https://narodne-novine.nn.hr/clanci/sluzbeni/2022_01_1_1.html

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0414&qid=1690894880660>

⁶ https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743

⁷ <https://www.aztn.hr/ea/wp-content/uploads/2023/07/Memorandum-za-digitalni-potpis-prav-ambal147.pdf>

In the past, the CCA also warned⁸ the Ministry on a possible violation of regulations on the protection of market competition even during the adoption of the old Law on sustainable waste management, but their opinion was never taken into account.

Examples from other countries

The Commission has fined Altstoff Recycling Austria (ARA)⁹ €6 million for blocking competitors from entering the Austrian market for management of household packaging waste from 2008 to 2012, in breach of EU antitrust rules. The fine was reduced by 30% due to ARA's cooperation with the Commission. Margrethe Vestager, Commissioner in charge of competition policy said: "The waste management sector is an important part of the circular economy. Effective competition is vital for making recycling affordable for consumers. ARA was preventing competitors from accessing essential infrastructure and blocking them from entering the waste management market. "

In Germany, packaging for EPR was managed through a single centralised PRO, the Dual System Deutschland (DSD), from the initiation of EPR in 1991 until the beginning of the 2000s when the system shifted to multiple packaging PROs (10 as of 2015). The introduction of multiple PROs occurred in response to decisions by the German Federal Cartel Office¹⁰ and European Commission regarding anti-competitive practices (OECD, EXTENDED PRODUCER RESPONSIBILITY - UPDATED GUIDANCE, 2011).

From EPR - UPDATED GUIDANCE; 12-Apr-2016; OECD

In OECD guidance for EPR is stated that an important means for minimising anti-competitive behaviour is to consult competition authorities when EPR systems are being established, and to require them periodically to provide guidance or information concerning their consideration of EPR systems. Services such as waste collection, sorting, as well as material recovery and disposal should be procured by transparent, non-discriminatory and competitive tenders. EPR schemes should allow single PROs only when it can be demonstrated that the benefits (e.g. the capacity to manage the waste would otherwise not be built) outweigh the costs of less competition.

In order to promote competition in the markets served by EPRs, the 2001 Manual recommends that, where possible, competition authorities should be invited to provide advice on the likely impact on competition of alternative EPR approaches – as well as alternatives to EPR. The potentially anti-competitive behaviour of PROs was highlighted in this regard. By establishing PROs, producers can achieve significant economies of scale and even help smaller companies to stay in business. However, PROs may also provide opportunities for producers to collude illegally in order to eliminate competition among themselves, or to disadvantage their competitors. Thus competition authorities could help:

- to ensure that PROs do not abuse market power through excessive or opaque pricing or other anti-competitive practices
- to avoid regulatory barriers to entry in post-consumer materials markets, including barriers to other PROs entering an EPR market

⁸ <https://www.aztn.hr/ea/wp-content/uploads/2015/07/034-082014-01391.pdf>

⁹ https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3116

¹⁰

https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Duale%20Systeme%20-%20Abschlussbericht.pdf;jsessionid=E1DB754C6BE8BBAD13D0998FC6B83FA7.1_cid362?__blob=publicationFile&v=7

- to require the PRO to contract out collection and recycling services on a competitive basis; to establish contracts that are not unduly long; and to use bidding procedures that are open, competitive and fair.

In Croatia:

The drafts of new Ordinances in Croatia, which prevents Organizations from accessing the waste packaging market by maintaining the monopoly of a body that has public authority, has strong features of violating EU anti-monopoly rules.

The Croatian Competition Agency (CCA) warned Ministry of Economy and Sustainable Development by letter Class: 011-01/23-02/001; Registration number: 580-12/26-23-009 of July 14, 2023, <https://www.aztn.hr/ea/wp-content/uploads//2023/07/Memorandum-za-digitalni-potpis-prav-ambal147.pdf> as the provisions of the Draft Ordinance on packaging and waste packaging, single-use plastic products and fishing tools containing plastic divide the implementation of waste management services between the Fund and the Organization, depending on whether it is waste that is regulated by the Waste Catalog and the Draft Ordinance as non-hazardous waste (managed by the Fund) or hazardous waste (managed by the Organization), while The Waste Management Act does not provide for the specified division of service implementation. CCA proposes to additionally consider the possibility of including the Organization in the waste management system, unless there are justified reasons for only the Fund to perform this activity.

Also, CCA points out that from the perspective of regulations on market competition protection, it is desirable to organize the system in such a way that a body with public powers performs exclusively regulatory tasks prescribed by special regulations as a regulatory body (e.g. keeping records, registers, issuing permits, supervision, etc.) while jobs performed on the free market are usually performed by entrepreneurs according to market principles with equal and transparent conditions.

We remind that in the past, the CCA also warned the Ministry on a possible violation of regulations on the protection of market competition even during the adoption of the old Law on sustainable waste management by letter Class: 034-08/2014-01/391 Registration number: 580-12/26-15-011 of July 17, 2015, <https://www.aztn.hr/ea/wp-content/uploads/2015/07/034-082014-01391.pdf>, but their opinion was never taken into account.

Therefore, a body with public authorities like the Fund should not even be an actor in the market.

EPR schemes can be designed so that product markets may be served by individual or multiple PROs. Since the publication of the 2001 Manual, concerns about anti-competitive behaviour by monopolistic PROs has fostered the development of more multiple-PRO EPRs. Of 36 EPR systems in the European Union that were reviewed (European Commission, 2014), all of the EPR systems for e-waste were managed by multiple PROs. (1.3.1.3)

An important trend in markets with multiple PROs has been the establishment of clearinghouses. These are neutral bodies that help to coordinate the work of PROs by ensuring that collection is provided everywhere that it is needed, that “cherry picking” is avoided, and that there is a level playing field for all competitors. Coordination can enhance efficiency by ensuring that competing PROs do not duplicate each other's' activities. Clearinghouses often collect data from producers or service providers and provide a mechanism for managing proprietary data. (1.3.1.3)

In Croatia:

On several occasions we wrote to the Ministry of Economy and Sustainable Development asking that multiple PROs be allowed in Croatia, and that the Environmental Protection and Energy Efficiency Fund take over the supervisory function that would help to coordinate the work of PROs by ensuring that collection is provided everywhere that it is needed, that "cherry picking" is avoided, and that there is a level playing field for all competitors.

By submitting the new Draft Ordinance on packaging and waste packaging, single-use plastic products and fishing tools containing plastic for public consultation, we reiterated our concern and our comment, and although the report on the comments should have been submitted by 10.01.2023. the same has not yet been made public.

The 2001 Manual emphasises that the governance arrangements should be determined as a function of objectives, coverage of the EPR, the instruments used, and context.

- Given their technical and managerial know-how, the leadership role of producers is fundamental to the success of any EPR. Producers are usually ultimately responsible for achieving EPR policy objectives, whether individually or collectively, and whether through a single or competing PROs.
- National governments are generally, though not always, responsible for providing the legal framework, as well as for monitoring and enforcement. They can also contribute to the effectiveness of EPR by eliminating conflicting policies and implementing supportive policies. (1.4.2.)

In Croatia:

Although the Proposal for a Regulation on packaging and packaging waste predicts (EU):

1) Producer Responsibility Organisations

2) The market surveillance authority

in the proposals for Croatian secondary legal acts, both bodies are representatives of the state, which leads to a strong conflict of interests.

Updated recommendations on the design and governance of EPRs (stated in Box 1.6.)

- *Fully implement the recommendations on the good governance of EPR systems in the 2001 OECD Guidance Document, particularly concerning the need to establish clear objectives, to specify the roles and responsibilities of stakeholders, and to establish platforms for dialogue among stakeholders.*
- *Periodically review the targets of EPR policies and adjust their ambition in line with waste management and resource productivity policy objectives; take account of the costs and benefits of proposed targets and establish them in consultation with stakeholders.*
- *Consider extending the scope of EPRs, particularly to cover more environmentally sensitive end-of-life products which are inappropriate for landfill disposal or incineration.*
- *In mandatory systems, governments should establish consistent and credible means for enforcing EPR obligations, including registers of producers, accreditation of PROs and appropriate sanctions.*
- *Governments and industry should cooperate to establish effective, adequately-resourced monitoring systems; in some circumstances, they may consider establishing an independent monitoring body financed by a tax on PROs.*
- *Mandatory EPR systems should be required to report regularly on the technical and financial aspects of their operations; their performance should be regularly audited, preferably independently; to the extent possible, definitions and reporting modalities for EPR systems operating in the same jurisdiction should be harmonised, and a means for checking the quality and comparability of data established; voluntary EPR systems should be encouraged to be as transparent as possible and periodically to undergo independent evaluations of their operations.*

- *The sharing of experience among EPRs, nationally and internationally, should be encouraged with a view to improving collection and recycling rates, disseminating information on eco-design, and enhancing the cost-effectiveness of EPR systems.*

In Croatia:

- *the recommendations on the good governance of EPR systems in the 2001 OECD Guidance Document are not implemented – the roles and responsibilities of stakeholders are not clearly specified – Waste Management Act (OG 84/21) prescribed that in order to achieve the waste management objectives, the Fund and the Organisation shall ensure the execution of waste management services, but this possibility is not possible in the proposals of secondary legal acts; there is no platforms for dialogue among stakeholders,...*
- *The targets of EPRs policies are not periodically reviewed - the results of the packaging waste management system in Croatia are significantly below the goals set by the Directives. Therefore, it is very certain that in the coming years, Croatia will move further away from the set goals if it does not improve the system and open the packaging waste market in accordance with EU standards. This statement is supported by the statement in the Waste Management Plan of the Republic of Croatia 2017-2022. "that the goals stipulated in the Directive on packaging and waste packaging 94/62/EC have not been achieved and that there is a danger that without market opening, and in accordance with the Waste Directive 2008/98/EC (introduction of Organizations) as one of the ways of improving the system, the goals will not be achieved in the future either". In 2020, the European Commission also expressed concern about the achievement of the goals by offering a proposal to improve the performance of the system of extended producer responsibility by "restructuring the existing approach so that it is prescribed that producers must establish their own non-profit organization for producer responsibility whose task would be to collect fees from producers and distribute them to local self-government units, while ensuring that these fees are not more than what is needed for a specific service".*
- *In draft version on new secondary legal acts in Croatia, the Fund (as a state body) continues to be an actor on the market as a monopolist for non-hazardous packaging, and the possibility for the Organization to take responsibility for packaging is only hazardous waste, whose disposal has been the manufacturer's obligation until now. The amount of packaging that is hazardous waste is only 1.5% of the total packaging that was collected in 2020 (<http://roo.azo.hr/rpt.html#>). Leaving the market for only this part of packaging waste will not solve the problem of insufficient and declining collection and recycling rates of packaging waste, nor will it improve the overall system. The disposal of hazardous packaging waste is the most ecologically sensitive segment of waste packaging management, so in the context of the discriminatory and restrictive provisions of the draft Ordinance, it is not clear why the state leaves an activity of general health and environmental interest to the market, i.e. to the Organization, and at the same time prevents the management of non-hazardous packaging waste from taking place within the framework of free competition and the market, maintaining the monopoly of the Fund, i.e. the effectiveness and responsibility of the Organization in other segments of packaging waste.*
- *Our government still did not established consistent and credible means for enforcing EPR obligations, including registers of producers, accreditation of PROs and appropriate sanctions.*
- *Government do not cooperate with the industry to establish effective, adequately-resourced monitoring systems*
- *Considering that in Croatia we have a single PRO operating as a monopoly and who is a representative of the state their performance are not regularly audited and certainly not independently*
- *Croatia refuses to apply the experiences of other EU countries, and together with Hungary, we are the only country in the EU where waste packaging management is managed by a state*

monopolist, and together with Denmark, we are the only EU countries without a conventional EPR scheme.

The OECD Council adopted a Recommendation on Competition Assessment in 2009. Amongst other things it states, in the section on revision of public policies that unduly restrict competition, that “Governments should adopt the more pro-competitive alternative consistent with the public interest objectives pursued and taking into account the benefits and costs of implementation”. This recommendation is relevant when considering possible trade-offs between competition policy and EPRs. (1.4.5.4)

In Croatia:

Without the conventional EPR scheme, opening the market and allowing the work of Organizations and restrictive and complex national rules, and without the possibility of free market formation as in other EU countries, economic entities in Croatia as well as the general public in Croatia are prevented from fully utilizing all the advantages of the free market that economic entities and the general public of other EU member states have. As there is a free market in the EU, Croatian businessmen compete with their "tied hands".

Updated recommendations to further promote the integration of competition policy and EPRs (stated in Box 1.12):

- EPR schemes should allow single PROs only when it can be demonstrated that the benefits (for example the capacity to manage the waste would not otherwise be built) outweigh the costs of less competition; the operations of monopoly PROs should be kept under review and competition encouraged when the benefits of single PROs no longer outweigh their costs.

In Croatia:

After several years of state monopolistic PRO it is not demstrated that the benefits outweigh the costs of less competition. Exactly the opposite Croatia is moving further away from fulfilling the goals it undertook as a full member of the EU.

In Germany, packaging for EPR was managed through a single centralised PRO, the Dual System Deutschland (DSD), from the initiation of EPR in 1991 until the beginning of the 2000s when the system shifted to multiple packaging PROs (10 as of 2015). The introduction of multiple PROs occurred in response to decisions by the German Federal Cartel Office and European Commission regarding anti-competitive practices (OECD, 2011). (2.2.2.)

In Croatia:

We still have state monopolistic centralised PRO which violates the open market and fair market competition.

In summary, a monopoly that is not subject to a real competitive threat—or regulation—can exercise market power by *inter alia* charging high prices and not tackling inefficiency. Such a monopoly is under less pressure to lower costs, to adopt cost saving technology, and to pass on any cost savings to users (see paragraphs 53, 54). Similar arguments apply to single buyers, or monopsonists. While these have been more theoretical arguments, there is some empirical support. One study found that self-provision of collection-recycling was not a realistic threat (OECD, 2006, p. 146). Another study found that certain monopoly PROs incurred excess costs. (OECD, 2006, p. 135) A merger decision found that a monopoly provider of a legally required service would be able to raise prices to an extreme level (Baterpol Sp. Zoo by Orzel Bialy S.A., cited in OECD 2010, p. 81). Together, these suggest that, if a PRO is a monopoly, it will have and exercise market power. Where a monopoly PRO is owned and run by the obligated industry, then there is a risk that it be used to exercise market power by raising prices, and a risk that free-riding by individual firms within the obligated industry will reduce the PRO’s efficiency. (3.3.1.1)

Invitation to the opening of the PRO market

A lot of other business entities at the public consultation on the draft proposal for the Ordinance on packaging and waste packaging, single-use plastic products and fishing gear containing plastic, commented that they believe that the proposed Ordinance is not in accordance with the Waste Management Act and lot of comments were about the need for opening market and enabling multiple PROs.¹¹

Independent of the public consultation on the draft proposal for the Ordinance on packaging and waste packaging, single-use plastic products and fishing gear containing plastic some business entities as well as various associations sent comments to the Ministry related to the needs of market opening and enabling multiple PROs. For Example – AmCham¹² was one of them.

¹¹ <https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=22312>

¹²

https://www.amcham.hr/storage/upload/doc_library/komentari_na_nacrt_pravilnika_o_ambalazi_i_otpadnoj_ambalazi_163143.pdf

Conclusion:

Croatia is a full member of the EU and as such is obliged to implement EU legislation into the national legislation.

It is not enough to do it only at the highest levels, i.e. only theoretically to implement the provisions of the Directive into Croatian laws.

It is very important, if not more important, to include the mentioned provisions in secondary legal acts, because, secondary legal acts are the one that technically prescribe their enforcement and the implementation of certain EU Directives.

Considering that after several official warnings to Croatia (CCA, EU Commission) that the secondary legal acts are not in accordance with the law and that without significant changes in the Croatian legislation, the assumed EU goals will not be met, the Croatian Ministry of Economy and Sustainable Development still continues to propose and insist on this draft proposal we conclude that there is no desire to comply EU legislation and the achievement of assumed goals in future.

We believe that it is necessary to insist from the Croatian government and the competent Ministry to amend this draft proposal so it is compliant with both Croatian law and EU legislation.