

## EUROPEN's comments on TRIS notification 2024/0707/NL (Netherlands)

Amendment of the Environmental Management Act in connection with the introduction of an annual obligation for circular polymers, circular polymer units, and a register of circular polymer units (legal amendment for a Circular Plastic Standard).

### 1. Object of the TRIS contribution

On 19 December 2024, the Dutch Government notified to the European Commission a legal amendment for a Circular Plastic Standard, amending the Environmental Management Act ([TRIS Notification 2024/0707/NL](#)).

The notified draft bill aims to oblige all processors of polymers established in the Netherlands, from 1 January 2027, to replace a minimum percentage of fossil polymers with recycled or bio-based polymers. The obligation will initially be imposed on polymers that are used in plastic parts and end products.

To achieve an average annual minimum share of circular plastic in the Netherlands, the draft bill also regulates a trading system, with which the market must achieve an average minimum share of circular plastic. For the processing of circular polymers, polymer processors receive administrative, tradable circular polymer units (CPEs) and can sell these CPEs to other polymer processors, so that, for example, polymer processors that process more than the legal minimum of circular polymers can sell CPEs to polymer processors that process less than the mandatory minimum share of circular polymers.

To adequately carry out supervision and enforcement, the draft bill further regulates an information and reporting obligation for all polymer processors in the Netherlands. Circular polymers must demonstrably comply with the sustainability, scheme management and chain management requirements<sup>1</sup> by means of a valid certificate from a certification scheme recognised by the relevant Ministry. Rules on the recognition of certification schemes will be included in the general administrative order.

Finally, it should be noted that several substantial aspects related to the concrete implementation and enforcement of the standards (e.g. the exact scope of the obligation, the level of the threshold for determining the target group, the level of the mandatory minimum share of circular polymers to be processed) will only be defined at a later date, by means order in Council. It is unclear if further TRIS notifications of such measures will follow.

All the above-mentioned draft measures (Title 9 of the draft bill) represent the object of this contribution. EUROPEN appreciates their notification through the TRIS notification system, however we contest their lawfulness on the grounds that they infringe TFEU provisions on Single Market and EU legislation.

<sup>1</sup> Articles 9.11.1 to 9.11.6, which are added to the Environmental Management Act, provide such requirement, which are summarised hereafter for information. Sustainability requirements: for recyclate, the material shall only come from plastic waste (post-consumer recyclate) and shall not come from a production process (pre-consumer recyclate); For bio-raw materials, the requirements relate to the prevention of adverse effects on the environment (referring to the Bio-raw Materials Sustainability Framework). Scheme management and chain management requirements: in order to ensure the reliability of the certificates, requirements will be imposed on the scheme management (on the functioning of the scheme and on certification bodies, auditors and economic operators working for or using the scheme) and chain management (on a set of rules, procedures and documents with which a link is made between the source of the material and the point in the chain where a claim is made about the material; determines which chain of custody models are permitted).

## 2. Infringement of TFEU provisions and EU legislation

- > **Article 34 TFEU** prohibits “*quantitative restrictions on imports and all measures having equivalent effect between Member States*”. Although the draft bill does not forbid the imports of polymers or plastic products in scope of the standard, the obligations included in the draft bill are expected to:
  - Could create distortions of EU trade and the functioning of the Single Market and potentially result in measures having equivalent effect to quantitative restrictions on imports, which are prohibited by Article 34 of the TFEU.
- > **Article 36 TFEU.** Quantitative restrictions can only be justified by one of the public interest grounds set out in Article 36 TFEU or by one of the overriding and mandatory requirements developed by case-law of the EU Court of Justice. Such rules must, however, be proportionate and non-discriminatory. The proportionality and non-discriminatory nature of the proposed measures is questionable given that:
  - As recalled in the explanatory memorandum and impact assessment accompanying the draft bill, there are still significant uncertainties regarding expected environmental gains and several substantial elements of the measures, such as the exact scope of the obligation or the level of the mandatory minimum share of circular polymers to be processed, are yet to be clarified, which does not allow a full and thorough assessment of their proportionality.
  - The accompanying impact assessment seems insufficient as limited to no information is provided regarding, for instance, the consideration of different policy options and related outcomes, how cost derived from the use of higher-value recyclates will be passed on to consumers, the impacts on competitiveness, Single Market and trade, and whether similar or greater environmental gains could be achieved by pursuing an EU-wide approach<sup>2</sup>.
- > **Article 6(3) of Directive (EU) 2015/1535 on TRIS**, which prescribes that Member States shall postpone the adoption of a draft technical regulation for 12 months when the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU.

According to the explanatory memorandum accompanying the draft bill, the proposed circular plastic standard aims to complement EU regulations that are being prepared. The Packaging and Packaging Waste Regulation (PPWR) and the Ecodesign for Sustainable Product Regulation (ESPR) are expressively mentioned, stressing that the standard will apply at polymer level instead of at the product level, thus avoiding possible overlaps with those regulations. We contest this assumption and consider that the draft bill will pre-empt the PPWR and ESPR, thus breaching Article 6(3) of the TRIS Directive, based on the following reasons:

- The PPWR, expected to enter into force in Q1 2025, sets recycled content targets *per polymer*, applicable to different packaging applications by 1<sup>st</sup> January 2030. While indeed, the PPWR targets are set to apply at product level, the obligation for Dutch converters to fulfil a national circular plastic standard at polymer level by 1<sup>st</sup> January 2027 could be considered as a pre-emption of the PPWR as the regulation’s objectives will likely drive the demand for recycled materials between now and 2030. Indeed, at this stage, the PPWR is the only EU legislation

<sup>2</sup> It should also be noted that, based on Article 5(1) third subparagraph, of Directive (EU) 2015/1535, [...] Where, in particular, the draft technical regulation seeks to limit the marketing or use of a chemical substance, preparation or product on grounds of public health or of the protection of consumers or the environment, Member States shall also forward either a summary or the references of all relevant data relating to the substance, preparation or product concerned and to known and available substitutes, where such information may be available, and communicate the anticipated effects of the measure on public health and the protection of the consumer and the environment, together with an analysis of the risk carried out as appropriate in accordance with the principles provided for in the relevant part of Section II.3 of Annex XV to Regulation (EC) No 1907/2006 of the European Parliament and of the Council.

establishing recycled content targets by 2030<sup>3</sup>. In this sense, the decision to set a standard at polymer level to be applied by converters, instead of a standard at product level, is a legal construe. The requirement will inevitably have impacts on the packaging value chain and the chain of custody based on which manufacturers and importers of packaging will prove compliance with the PPWR requirements.

- Considering the above-mentioned legal construe and the fact that Article 114 is the legal basis of the PPWR, it should be recalled that Member States can only introduce national provisions in an area where the EU has harmonised *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* (see [Article 114.5 TFEU](#)). The need to reduce GHGs emissions at national and EU level was well known to the Dutch Government at the time of the PPWR negotiation and approval, when all EU Member States agreed with the EU Commission's approach to, *inter alia*, reduce EU total annual GHGs emissions by using resources more efficiently and introducing, as an example, packaging minimisation measures and recycled content targets *at product level*. This puts into question the possibility for Dutch authorities to use Article 114.5 as a legal basis to justify the introduction of the draft bill.
  - Further to the above, the standard is expected to impose the application of a minimum proportion of bio-based polymers in sub-products and end products. This clearly anticipates Article 8 of the PPWR, under which the EU Commission is expected to present a legislative proposal to (a) lay down sustainability requirements for biobased feedstock in plastic packaging; (b) lay down targets to increase the use of biobased feedstock in plastic packaging.
  - Similarly, the obligation to comply with the sustainability, scheme management and chain management requirements introduced by the draft bill by means of a valid certificate from a recognised certification scheme, anticipates and potentially conflicts with Article 7(8) of the PPWR, based on which the EU Commission is expected to establish the methodology for the calculation and verification of the PPWR recycled content targets, including a possible third-party audit.
- > **Article 4(3) TEU.** As recognised in the explanatory memorandum accompanying the draft bill, the EU Commission is currently considering the inclusion of different intermediate products (including plastic & polymers) under the scope of the ESPR, a regulation with an internal market legal basis. Considering the EU intention to potentially harmonise in this area, in line with the principle of sincere cooperation set in Article 4(3) TEU, the Netherlands should refrain from adopting national legislation to regulate an issue which can be more adequately addressed at EU level as part of the ESPR.

### 3. Conclusions

Pursuant to the EU principles of subsidiarity and sincere cooperation, the Netherlands should abstain from adopting a unilateral standard and trading system for circular polymers, as those will contravene Single Market principles and the TRIS Directive. Based on the findings from our contribution, we submit the following requests to the European Commission:

- > to adopt a detailed opinion, before 20 March 2025, concluding that the notified text creates barriers to the free movement of goods in Europe and that the Netherlands should refrain from adopting measures that will contravene TFEU Single Market provisions and EU legislation.

<sup>3</sup> The 2030 recycled content targets established by the Single-use Plastics Directive will be amended with the entry into force of the PPWR and, currently, other recycled content targets are only being considered as part of a revision of the Vehicles and Construction Products Regulation.