

European Commission

Ljubljana, 10 October 2023

Notification Number: 2023/0419/HR (Croatia)

**Position on Draft Proposal of the Regulation on packaging and packaging waste, single-use plastic products and fishing gear containing plastic**

**INTRODUCTION**

1. On behalf of our client INTERZERO Trajnostne rešitve za svet brez odpadkov d.o.o., Ljubljana, Slovenia, we hereby submit our position on the Croatian "*Draft Proposal of the Regulation on packaging and packaging waste, single-use plastic products and fishing gear containing plastic*" (hereinafter: "**Regulation**").
2. We believe that the Draft Proposal contravenes EU law as it hinders trade, the free movement of services, the freedom of establishment for service providers and competition rules.
3. We shall focus on the part of the Regulation that governs the area of Extended Producer Responsibility (hereinafter: **EPR**) in the field of waste packaging, single-use plastic products, and fishing gear containing plastic.
4. The Regulation stipulates that every producer is obliged to pay a management fee for waste management to the state-owned fund "FOND" for products that result in non-hazardous waste packaging. Such packaging constitutes the vast majority (98.5%).



Together as One. We are a Member of the  
Alliott Global Alliance of independent  
professional firms.

**Law Firm Brezavšček Žgavec Ltd.**  
Vilharjeva cesta 27, 1000 Ljubljana, Slovenia  
e: [info@bzlaw.si](mailto:info@bzlaw.si) | t: +386 1 444 00 80

Registration No. 8853100000 | Tax No. SI 26822245  
SI56 0310 0100 3607 593 | Share Capital: EUR 15,000  
The Firm is entered in the court registry of District Court of Ljubljana

Regarding products that result in hazardous waste packaging, producers shall enter into a contract with the organization, which is a private legal entity (“Organisation”).

5. The activity of managing the EPR system for almost the entire quantity of packaged products is thus carried out by the state owned FOND. Hence, FOND shall have a monopoly over EPR system management for packaged products resulting in non-hazardous waste (which is a vast majority).
6. To assess whether the services to be carried out by FOND under the Regulation are subject to the rules of the EU internal market, it is first necessary to evaluate whether it concerns an economic or commercial activity:
  - An activity *can be* commercial in terms of EU free movement rules if it involves the provision of goods or services that are typically (in the EU in general, but not necessarily in the case at hand) carried out for a payment. An activity can be commercial in terms of EU competition rules if it consists of providing services or goods that can be offered on the market (meets the comparative test from *Höfner*);<sup>1</sup>
  - An activity *is* commercial in terms of free movement rules if it actually (in the specific case at hand) consists of providing goods or services for a payment. An activity is commercial in terms of EU competition rules if it actually consists of offering goods or services on the market in the specific case (meets the definition from the *Pavlov*).<sup>2</sup>
7. If the activity *can be* commercial, EU free movement rules apply. If the activity is not commercial, competition rules generally do not apply. However, if it concerns a commercial activity, national rules must comply with EU rules on free movement and competition protection.
8. In the specific case, we assess that the services supposed to be provided by FOND represent commercial services. Producers will pay FOND a fee for waste management, and FOND will order the services of collecting and processing waste from providers of these services which are private entities in exchange for a payment. These services are commercial in most of the EU member states.
9. The Court of Justice of the European Union (hereinafter: the “Court”) has allowed for a very broad application of competition rules when it decided that “any entity that carries out an

---

<sup>1</sup> C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, ECLI:EU:C:1991:161.

<sup>2</sup> C-180/98 to C-184/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, ECLI:EU:C:2000:428.

economic activity, regardless of its legal status and the way it is financed" (*Höfner*).<sup>3</sup> Even though FOND is a public law entity, this does not exclude TFEU rules on the free movement of services and freedom of establishment and competition.

10. Companies from the INTERZERO group exercise the freedom of establishment, which is a fundamental freedom of the EU free market, by establishing their companies in individual member states. INTERZERO is also present in Croatia among other countries: the sole shareholder of the Croatian company Interzero društvo s ograničenom odgovornošću za gospodarenje otpadom is the Austrian company INTERZERO Circular Solutions Europe GmbH. This company is also the sole shareholder of the Slovenian company INTERZERO Trajnostne rešitve za svet brez odpadkov d.o.o., Ljubljana, Slovenia.

### **EPR SERVICES AS SERVICES OF GENERAL ECONOMIC INTEREST**

11. State measures, which charge producers for negative externalities or enforce the polluter pays principle, are necessary. The obligations that producers must fulfill within the EPR system are undoubtedly prescribed in the public interest.
12. However, the way in which producers will fulfill their obligations in the EPR system is a matter of free entrepreneurial discretion and free economic initiative. While obligations within the EPR system are imposed on producers in the public interest, once prescribed, producers fulfill these obligations in their own interest as they neutralize the negative externalities their products cause to society, thereby fulfilling their obligations.
13. According to the case law of the Court, Member States have broad discretionary power to define a certain service as Service of General Economic Interest (hereinafter: "SGEI"), which the Commission can challenge only in case of manifest error. However, Member States cannot have unlimited discretion in defining SGEI.<sup>4</sup>
14. The Regulation stipulates that producers who place packaging on the market from which hazardous waste arises can contract with an organization, which can be a private company (second indent of paragraph 1 of Article 11). However, for most packaging that results in non-hazardous waste, the producer must pay a waste management fee to the state owned FOND.

---

<sup>3</sup> C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, ECLI:EU:C:1991:161.

<sup>4</sup> T-462/13, *Comunidad Autónoma del País Vasco in Itelazpi, SA v European Commission*, EU:T:2015:902, para. 51.

15. Given that EPR systems managed by private companies operate in comparable countries (e.g., Germany, Austria, Slovenia), in our opinion, there is no reason why such a system could not also operate in Croatia.
16. Regarding waste management services, the Court has allowed SGEI in several different areas of waste management, namely regarding the collection of construction waste,<sup>5</sup> the removal or incineration of waste,<sup>6</sup> including hazardous waste,<sup>7</sup> and the removal and processing of household waste.<sup>8</sup> Handling of individual types of waste can also be considered SGEI, especially when the activity is aimed at solving an environmental problem.<sup>9</sup>
17. However, the above-mentioned services are directly related to waste management services in the narrower sense, that is with collection, processing, and recycling. These services represent direct waste management with direct effects on the environment. Providers of these services have waste management infrastructure, such as collection centers, sorting lines, recycling facilities, and other waste processing facilities. On the other hand, FOND, which shall manage the EPR system, merely performs services of an office character. FOND will, on the one hand, collect waste management fees from producers and, on the other hand enter into contracts with waste processing operators (Article 27 of the Regulation).

## **FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES**

18. The Court has taken a broad interpretation of the activities that can be considered to fall within the scope of Article 49 TFEU.<sup>10</sup> The decisive factor for an activity to fall under the provisions of Article 49 TFEU is its economic character, that is, the activity is not performed for free.<sup>11</sup> This implies that even activities carried out entirely on a non-profit

---

<sup>5</sup> Ibidem

<sup>6</sup> C-480/06, *Commission v Germany*, ECLI:EU:C:2009:357.

<sup>7</sup> C-203/96, *Chemische Afvalstoffen Dusseldorf BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, ECLI:EU:C:1998:316.

<sup>8</sup> C-360/96, *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV.*, ECLI:EU:C:1998:525.

<sup>9</sup> C-209/98, *Entrepreneurforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune*, EU:C:2000:279, para. 75.

<sup>10</sup> Manuel Kellerbauer and Others, *The EU Treaties and the Charter of Fundamental Rights, A Commentary*, Oxford University Press, 2019, page 654.

<sup>11</sup> C-281/06, *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*, ECLI:EU:C:2007:816, para. 32–33.

basis fall within the scope of Article 49 TFEU if payment is received for the services provided.<sup>12</sup>

19. The Court has already judged that national measures establishing a monopoly in relation to issuing meal vouchers fall within the scope of EU law and can be assessed concerning the right of establishment, even if such activity is carried out on a non-profit basis. The crucial criterion is that the service must not be provided free of charge.<sup>13</sup>
20. A regulation of a Member State that imposes a limitation or establishes a monopoly in favor of an individual, private, or public operator represents a restriction on the freedom of establishment, which is prohibited unless justified by one of the Treaty's derogations or a prevailing reason of public interest.<sup>14</sup>
21. National measures that may hinder trade within the Union can be justified by essential environmental requirements provided that the measures in question are proportionate to the pursued objective; however, it is still necessary to check not only whether the measures were suitable for achieving the set objectives but also whether they do not exceed the frameworks necessary to achieve these objectives (proportionality).<sup>15</sup> It is up to the Member State to prove the proportionality of measures affecting the right of establishment.<sup>16</sup>
22. The measure granting the state owned FOND the exclusive right to manage the EPR system for a large majority of waste packaging undoubtedly prohibits, hinders, or diminishes the attractiveness of exercising the freedoms ensured in Articles 49 and 56 TFEU.<sup>17</sup> The restriction of the freedom of establishment and the freedom to provide services could only be justified if such a measure is non-discriminatory,<sup>18</sup> if it corresponds to necessary

---

<sup>12</sup> Manuel Kellerbauer and Others, *The EU Treaties and the Charter of Fundamental Rights, A Commentary*, Oxford University Press, 2019, page 655.

<sup>13</sup> C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, ECLI:EU:C:1994:119, para. 35, and C-179/14, *Commission v Hungary*, ECLI:EU:C:2016:108, para. 157.

<sup>14</sup> C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio*, EU:C:1999:435, para. 29, 30.

<sup>15</sup> C-309/02, *Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg*, ECLI:EU:C:2004:799, para. 75, 79.

<sup>16</sup> C-576/13, *European Commission v Kingdom of Spain*, ECLI:EU:C:2014:2430

<sup>17</sup> C-322/16; *Global Starnet Ltd v Ministero dell'Economia e delle Finanze in Amministrazione Autonoma Monopoli di Stato*, ECLI:EU:C:2017:985, para. 35; C-463/13, *Stanley International Betting Ltd and Stanleybet Malta Ltd v Ministero dell'Economia e delle Finanze and Agenzia delle Dogane e dei Monopoli di Stato*, EU:C:2015:25, para. 45.

<sup>18</sup> C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, para. 37.

reasons of general interest, if it is suitable for achieving the set objective, and if it does not exceed what is necessary for its achievement,<sup>19</sup> particularly ensuring that the national regulation in question genuinely ensures that these objectives are achieved consistently and systematically.<sup>20</sup>

23. Given that the Regulation opens the market in the field of waste packaging that is considered hazardous, there seems to be no reason why the market should not also be opened for the field of non-hazardous waste packaging. Especially since hazardous waste poses a greater threat to the environment and health than non-hazardous waste.

## COMPETITION

24. Given the development of the Court's case law regarding Articles 106 and 102 TFEU, we believe that a state measure, on the basis of which permission to manage the common waste management plan for a particular waste stream will be managed by only one organization, is not compatible with the aforementioned provisions of TFEU.<sup>21</sup>

25. The granting of exclusive rights in accordance with Article 106(2) TFEU could only be justified if such a measure were necessary for the holder of the exclusive right to perform its task in the general interest, and particularly to benefit from economically acceptable conditions.<sup>22</sup>

26. In this specific case, however, the services of the state owned FOND, which would manage the EPR system in the field of waste packaging based on the Regulation, are limited to office operations, as it is not a waste processing operator itself. FOND will perform these services through its contractual operators (Article 27 of the Regulation). Therefore, FOND does not need an exclusive right to be able to perform these services.

---

<sup>19</sup> C-212/06, *Communauté française and Gouvernement wallon v Gouvernement flamand*, ECLI:EU:C:2008:178, para. 55.

<sup>20</sup> C-225/15, *Criminal proceedings against Domenico Politanò*, EU:C:2016:645, para. 44

<sup>21</sup> C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, ECLI:EU:C:1991:161, C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, ECLI:EU:C:1991:254, C-553/12, *European Commission v DEI*, ECLI:EU:C:2014:2083

<sup>22</sup> C-320/91, *Criminal proceedings against Paul Corbeau*, ECLI:EU:C:1993:198, para. 16.

## **CIRCULAR ECONOMY**

27. The EPR system is an important tool with which the European Union aims to achieve the goal of a circular economy. The European Commission, in the European Commission's Action Plan for a Circular Economy (A new Circular Economy Action Plan For a cleaner and more competitive Europe, hereinafter referred to as "Action Plan"),<sup>23</sup> has presented a policy to achieve a cleaner and more competitive Europe in co-creation with economic actors, consumers, citizens, and civil society organizations. Numerous elements of the EPR system are highlighted in the Action Plan: circularity, closing material loops, reducing waste quantities.
28. The transition to a circular economy and sustainable growth policies will, accordingly, be linked to the efficient use of waste materials, reuse, and recycling. The Commission intends to take measures to increase market demand for recycled materials, for example by increasing the mandatory content rate of recycled material in products. Directive (EU) 2019/904 (so-called 'Single Use Plastic' or "SUP Directive"), already requires member states to have a mandatory content of recycled plastic in certain bottles, specifically containing at least 25 and 30 percent recycled plastic from 2025 and from 2030, respectively (fifth paragraph of Article 6 of the SUP Directive).
29. Due to increased demand for recycled materials, it is important for manufacturers that a suitable supply of recycled materials is also formed in the market. Access to these materials from products subject to EPR obligation will be enabled precisely through producer responsibility organizations that will control the waste stream generated from products. Therefore, the market for secondary materials should not be limited only to the state owned FOND, which will control the market for recycled material according to the Regulation.
30. The European Green Deal is based on the approach that products should be handled responsibly in all their life stages and that products have market nature in all stages. The law and policy of the EU in general aim at ensuring that waste-related activity has a market nature.

---

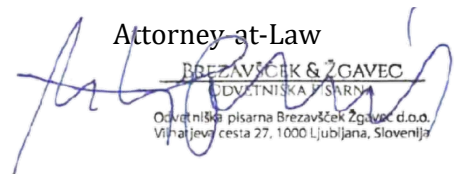
<sup>23</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, A new Circular Economy Action Plan, For a cleaner and more competitive Europe, COM(2020) 98 final, Brussels, 11.3.2020; <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0098>>

31. The first and second recitals of Directive (EU) 2018/851 and the twenty-seventh recital of Directive 2008/98/EC emphasize that the principle of free movement of goods in the internal market also applies to waste, and the importance of the functioning of the internal market.
32. The Court already took the position that free movement of goods also applies to waste, 24 which is why we believe that the Regulation also distorts the competition in trading recycled materials in the internal market of the EU.
33. All of the above leads to the conclusion that waste, besides having an environmental function, also has a significant economic function, and the general rules of the internal market apply to them, which is why such important services, such as managing the EPR system in the field of waste packaging and single-use products, should not be carried out (only) by the state owned FOND.

INTERZERO d.o.o.

Andrej Brezavšček

Attorney at-Law

  
BREZAVŠČEK & ŽGAVEC  
ODVETNIŠKA PISARNA  
Odvetniška pisarna Brezavšček Žgavec d.o.o.,  
Viharnjeva cesta 27, 1000 Ljubljana, Slovenija

---

<sup>24</sup> C-2/90 – *Commission v Belgium*, ECLI:EU:C:1992:310, para. 21



**POWER OF ATTORNEY**

*I, the undersigned:*        **INTERSEROH d.o.o., Beograjska 4, 1000 Ljubljana, Slovenia**

*hereby grant power of attorney to:*

**Law firm Brezavšček Žgavec Ltd. | Odvetniška pisarna Brezavšček Žgavec d.o.o.,**

**Attorney-at-Law Andrej Brezavšček and Attorney-at-Law Simon Žgavec**

To provide me with legal assistance in accordance with regulations on the legal profession, and especially to represent me in proceedings before courts and other state bodies, in matters involving legal persons, institutions, institutes, and private legal and natural persons, to conclude settlements and contracts in my name and on my behalf, and to confirm the satisfaction of my claims.

The power of attorney shall also extend to the receiving the legal decisions, invitations, applications filed by opposing parties, and other documents, after the power of attorney is granted and in connection with the matters for which the power of attorney is granted.

The power of attorney shall also extend to the receiving of money and other assets for the client and an explicit authorization to represent the client at settlement hearings and to conclude court settlements.

The power of attorney shall not extend to the verification of data in bankruptcy procedures, forces settlement procedures or liquidation procedures, unless explicitly stated in the power of attorney.

*I hereby specifically authorize the attorney to:*

*I hereby attest* that the attorney has notified me that I must inform him/her of all facts and circumstances in connection with the matter at hand and to submit all evidence upon the signing of the power of attorney, that I am aware of the approximate cost of representation and that I have been informed of the consequences which will arise in the case that the statements and evidence are not made and submitted within the time limits determined by law.

If I fail to state all of the facts and submit all of the evidence at my disposal to the attorney within the time limits stated in the previous paragraph, the attorney shall not be obliged to represent me, i.e. may terminate the power of attorney.

*I hereby undertake*, upon demand and without delay, to settle all attorney fees in accordance with the schedule of attorney fees as well as costs and expenditures for services rendered.

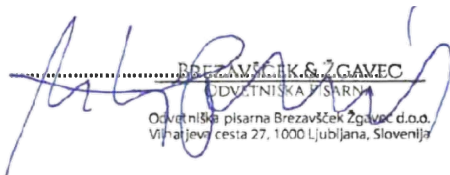
I also hereby accept the calculation of services rendered at increased or foreign prices for all services for which the schedule of attorney fees allows such calculation.

Other agreements on the level of the attorney fees are permissible only in the case that they are concluded in writing, and in that case the provisions of the written agreement shall be applied.

The client and the attorney hereby agree that any disputes which arise with respect to this power of attorney shall be resolved by the court competent with respect to the registered place of business of the attorney's office, and the laws of the Republic of Slovenia shall be applied.

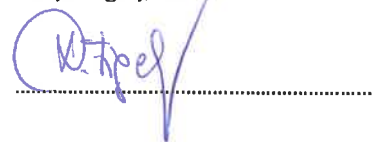
Date: January 21, 2022

*I hereby accept the power of attorney:*

  
Brezavšček & Žgavec  
ODVETNIŠKA PISARNA  
Odvetniška pisarna Brezavšček Žgavec d.o.o.,  
Vilharjeva cesta 27, 1000 Ljubljana, Slovenija

  
**interseroh**  
Interseroh d.o.o.  
Beograjska ul. 4, 1000 Ljubljana

*Client:*  
Darja Figelj, CEO



Suzana Smrekar, procurator





Together as One. We are Member of the  
Alliott Global Alliance of independent  
professional firms.

**Law Firm Brezavšček Žgavec Ltd.**  
Vilharjeva cesta 27, 1000 Ljubljana, Slovenia  
e: [info@bzlaw.si](mailto:info@bzlaw.si) | t: +386 1 444 00 80

Registration No. 8853100000 | Tax No. SI 26822245  
S156 0310 0100 3607 593 | Share Capital: EUR 15,000  
The Firm is entered in the court registry of District Court of Ljubljana