

EUROPEN's comments on TRIS notification 2022/863/F (France)

Decree on the obligation to offer for sale unprocessed fresh fruit and vegetables without packaging made entirely or in part of plastic

1. Object of the TRIS contribution

On 14 December 2022, France notified to the TRIS portal a [Decree on the obligation to present unprocessed fresh fruit and vegetables for sale without packaging made entirely or partly of plastic](#) (hereafter 'the draft Decree'). The draft Decree, adopted in the context of the [AGEC law](#) of 10 February 2020, defines the list of fruit and vegetables that present a risk of deterioration when sold in bulk and which are therefore exempted from this obligation. The list, defined in Article 1, includes the following items:

- *lamb's lettuce, young shoots, aromatic herbs, edible flowers, mung bean sprouts; sprouted seeds; ripe fruit; cranberries, lingonberries, physalis, blueberries, raspberries, strawberries, blackberries, redcurrants, elderberries, lingonberries and gooseberries, blackcurrants and kiwi; chicories; mushrooms; baby carrots; spinach and sorrel.*

Article 2 of the draft Decree foresees a measure for the exhaustion of packaging stocks, whereby the following fruit and vegetables may be displayed for sale with packaging made entirely or partly of plastic until 31 December 2023:

- *ribbed tomatoes, elongated tomatoes in the heart segment, cherry or cocktail tomatoes (miniature varieties); asparagus; broccoli; and early potatoes and early carrots; lettuce; spring onions; early turnips; Brussels sprouts, green beans; cherries; grapes; peaches, nectarines, and apricots.*

Background to the draft Decree:

The [AGEC law](#) of 10 February 2020 forbids the sale of fresh fruits and vegetables in packaging that is entirely or partly made of plastic from 1 January 2022. However, the law foresees exemptions, including for fruit and vegetables that risk to deteriorate when sold in bulk, leaving it to the government to identify them.

On 8 October 2021, the French government published a [Decree](#) bringing into force the obligation to sell fresh unprocessed fruit and vegetables without packaging made up entirely or partly of plastic. The Decree listed all fruit and vegetables which would temporarily be exempted from the ban, establishing until when those could still be sold in packaging made up entirely or partly of plastic. Once adopted, the list has been challenged by several associations before the Council of State.

On 9 December, the [Council of State announced its decision](#) to annul the list of fruit and vegetables adopted by the French government, considering that the latter exceeded its powers: the AGEC law gave the government the task of listing the fruit and vegetables that would be at risk of deterioration if sold in bulk, in order to exempt them from the plastic packaging ban permanently.

We contest the lawfulness of the draft Decree on the following grounds:

- > The draft Decree **pre-empts the forthcoming revision of the Directive 94/62/EC on Packaging and Packaging Waste**, for which the EU Commission has published a [legislative proposal](#) on 30 November 2022.

The Royal Decree therefore infringes Article 6 (3) of Directive (EU) 2015/1535 on Technical Regulations Information System (TRIS)¹.

- > **The proposed measures will impede the placing on the market of packaging that is fully compliant with the provisions of the EU packaging legislation currently in force**, thus being contrary to article 18 of the PPWD. Similarly, **it will create unjustified barriers to intra-EU trade** and consequently amount to quantitative restrictions on imports or measures having equivalent effect, which are prohibited by article 34 of the TFEU.
- > **The requirements in the draft Decree do not find a legal basis in any of the currently enforced EU legislations or depart from already adopted EU laws.** We would like to recall that the proposed ban is beyond the scope of Article 4 (consumption reduction) and Article 5 (restrictions on placing on the market) of Directive 2019/904 on the reduction of the impact of certain plastic products on the environment. The latter only targets single-use plastic products intended for on-the-go consumption and does not include in its scope packaging made partly or entirely of plastic used to sale unprocessed fresh fruit and vegetables. Similarly, the requirement is not justified by any of the Essential Requirements listed in Annex II of the PPWD.
- > **If adopted, the draft Decree will have potentially adverse implications for food waste without added environmental value.** Packaging plays a central role in extending food life shelf, thus minimising food losses and preventing the waste of resources and the greenhouse gases emissions associated with discarded food. In relation to this, we would like to stress that Article 9 (1) (g) of Directive 2008/98/EC on Waste (WFD) requires Member States to take measures to prevent the generation of waste, including to “reduce the generation of food waste in [...] retail and other distribution of food, [...] as a contribution to the United Nations Sustainable Development Goal to reduce by 50% the per capita global food waste at the retails and consumer level [...] by 2030”. Similarly, the revision of the WFD, currently ongoing, also aims to set food waste reduction targets.

2. Infringement of EU legislation

The measure proposed by the French Government infringe EU legislation and TFEU provisions on Single Market and Directive (EU) 2015/1535 on the Technical Regulations Information System.

Infringement of EU legislation, TFEU provisions on Single Market and TEU provisions

The draft Decree infringe the following EU legislation and TFEU provisions:

- > **Article 18 of the Packaging and Packaging Waste Directive (94/62/EC)**, which provides that, even if Member States are allowed to go beyond the requirements laid down in its provisions, they “shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”. Since the proposed ban will effectively impede the marketing of packaged goods in France that are fully compliant with the PPWD, this requirement violates Article 18. We challenge the proportionality of the measure in light of the fact that economic operators will have to comply with a requirement set unilaterally. It is also noteworthy that the legal basis of the PPWD is Article 114 of the TFEU. This further limits the discretion of France vis-à-vis imposing additional requirements on packaging in contradiction to Article 18 of the PPWD.
- > **Article 8a(1)(d) and Article 9 (1) (g) of the Waste Framework Directive (2008/98/EC)**, which prevents Member States from “placing a disproportionate regulatory burden on producers” and requires Member States to take measures to prevent the generation of waste, respectively

¹ Article 6 (3) of Directive (EU) 2015/1535 on TRIS states: “[...] Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 5(1) of this Directive, if, within three months of that date, the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU.

- > **Article 34 TFEU**, which prohibits “quantitative restrictions on imports and all measures having equivalent effect between Member States”. 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 in the EU Court of Justice. Such rules must be necessary in order to attain legitimate objectives and be in conformity with the principle of proportionality, which requires that the least restrictive measure be used. The proportionality of measures mandated by the draft Decree can be questioned. France has failed to provide adequate justification on the need and proportionality of the proposed measure. Even if the intended objective to prevent and reduce the impact of plastic packaging and plastic packaging waste on the environment would be considered legitimate, the measures are not proportionate as this objective can be achieved by less restrictive measures and better addressed by an EU-wide approach, which the draft Decree currently undermines.
- > **Article 4(3) TEU**: In line with the principle of sincere cooperation, a Member State should refrain from adopting legislation to address an issue which can only be adequately resolved at EU level and in a field which the EU intends to harmonise. This is the case for the packaging legislation. France should not pre-empt the setting of harmonised rules at EU level. These matters should be dealt with at the EU level as part of the ongoing revision of the Packaging and Packaging Waste Directive.

Infringement of Directive (EU) 2015/1535 on the Technical Regulations Information System

We welcome the submission from the French Government of the draft Decree to the Technical Regulations Information System (TRIS).

The draft Decree, however, infringes Art. 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. The EU Commission intention to revise the Packaging and Packaging Waste Directive and the Waste Framework Directive was well known to France at the time of elaboration of the draft Decree. Such intention was publicly announced by the Commission as part of the New Circular Economy Action Plan², adopted in March 2020, and has been the object of several consultations at EU level³.

It is notable to observe that, despite the above, France has decided to proceed with the transposition of a ban that clearly pre-empt harmonisation efforts at EU level.

3. Environmental impacts

The ban proposed in the draft Decree overlooks the important role of packaging in the prevention of food waste and cross-contamination and need to be carefully assessed to prevent unintended consequences for consumers' health and food safety. This assessment does not appear to have been made in the formulation of the proposal as France provided limited justification, and only after specific request from the EU Commission, as to the proportionality of the ban.

With regards to food waste in particular, Article 9 (1) (g) of the WFD requires Member States to take measures to prevent the generation of waste, including food waste. The adoption of packaging bans in the food sector runs counter to this provision. The [Food Waste Index Report 2021](#), developed by the United Nations Environment Programme (UNEP) and partner organisation [WRAP](#), found that retail outlets produce around 2% of food waste. In

² 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, p. 8 “[...] the Commission will review Directive 94/62/EC to reinforce the mandatory essential requirements for packaging to be allowed on the EU market and consider other measures [...]” and p. 13 “[...] In addition, the Commission will put forward waste reduction targets for specific streams as part of a broader set of measures on waste prevention in the context of a review of Directive 2008/98/EC.”

³ As an example, a formal public consultation on the revision of the PPWD has been conducted by the European Commission between September 2020 and January 2021.

the EU alone, annual waste per capita generated by the retail sector alone corresponds to 9% of all food waste, equal to nearly 9 billion euro. The proposal to introduce a ban on the sale of fresh fruit and vegetables would have the potential effect of creating additional food loss in the mentioned sector and to further worsen food waste in households too, adding to the 57 million tonnes of food waste that are already generated annually in the European Union with associated costs of 130 billion euros ([EUROSTAT latest figures](#)) and no real environmental benefit.

Preventing avoidable product losses and food waste at all stages of the supply chain is an important part of delivering a circular economy. Food waste represents a missed opportunity to feed the growing world population, a major waste of resources and a major source of greenhouse gas emissions accounting for 6% of total EU GHGs emissions.

Packaging has an essential role to play in the prevention of food waste, protecting products and minimising waste at all stages of the value chain. To this end, the French ban overlooks how high performance packaging solutions and technologies can preserve food safety by minimising sources of contamination and reduce food waste from spoilage. Innovative packaging designs also help consumers buy and use food in portions that match their needs and reduce food waste from leftovers.

4. Conclusions

Pursuant to the EU principles of subsidiarity and sincere cooperation, France should abstain from imposing unilateral requirements which will pre-empt forthcoming EU legislation and create barriers to trade. Based on the findings from our contribution, we submit the following requests to the Commission:

- to adopt a detailed opinion concluding that the draft Decree may create barriers to the free movement of goods in Europe and should not be adopted since it contravenes TFUE Single Market provisions and EU legislation.
- to inform France that the Royal Decree is in breach of Article 6 (3) of Directive (EU) 2015/1535 on TRIS.
