

Position Paper

Implementation of the Single Use Plastics Directive (EU) 2019/904

Phase 1: General and product specific definitions,
explanations, criteria, and product markings

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Background

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On June 12, 2019, the Single-Use Plastics Directive (SUPD) on the reduction of the impact of certain plastic products on the environment was published in the European Union's Official Journal. Adoption of the SUPD by the EU represents an important step forward in the reduction of single use plastics, and the transition towards a circular economy that is aligned with key EU priorities, including jobs and growth.

Over the next several months, the European Commission will be tasked with developing a series of implementing acts relating to the various obligations set out in the SUPD. These pertain to product definitions and scope, new labelling guidelines, and the development of robust methodologies for performance reporting with transparent processes and data oversight.

We provide the following comments on part 1 of this consultation.

1 Overview

The objectives of the Directive (Article 1) are:

The objectives of this Directive are to prevent and reduce the impact of certain plastic products on the environment, in particular the aquatic environment, and on human health, as well as to promote the transition to a circular economy with innovative and sustainable business models, products and materials, thus also contributing to the efficient functioning of the internal market.

We take the view, therefore, that the discussion around definitions must be contextualized by an understanding of the effect of each decision regarding definitions on the likely effects of the Directive.

It would be tragic if littering or inappropriate disposal of items was allowed to continue, or if producers were entitled to evade their responsibility for such, by 'innovating around' a set of definitions. Article 12 may be helpful in this regard:

One concern we have, regarding the consultation, therefore, is its apparent lack of link to the objectives of the Directive, and expected outcomes: instead, the Directive looks at definitions in isolation, so we are concerned that a desire for precision in definition will over-ride common sense in coming to conclusions that will ensure the Directive has the intended effect.

Rather than considering this from the perspective of specific definitions, therefore, we believe it makes more sense to consider the Articles of the Directive that are intended to give rise to action.

2 Overarching definitions

We have some overarching comments on the definitions of terms such as ‘natural polymer’, and ‘not chemically modified’.

2.1 IS THE TERM “NATURAL POLYMER” CLEAR AND CONSISTENT?

In our view, the answer to this is ‘no’.

The Directive relies on the definition of “not chemically modified” in Article 3 (40) of REACH to define natural polymers which are exempt from the Directive. This is problematic because claims can be (and are being) made that some man-made cellulosic fibres, although not “substances which occur in nature” (and therefore natural substances) within the meaning of Article 3 (39) of REACH, are “not chemically modified” within the strict definition of Article 3 (40) of REACH. This presents the possibility of exemption for some man-made cellulosic fibres and perhaps other polymers which although derived from natural polymers, do not qualify under REACH as natural substances. If, as seems highly likely, these non-natural but not chemically modified polymers will persist in the environment to an extent that is likely to cause harm and damage amenity to a significant degree, their exemption risks seriously undermining the Directive. This potential loophole should be decisively closed by giving Member States clear and strong guidance that all polymers that are not natural substances are fully covered by the requirements of the Directive.

2.2 IS THE TERM “NOT CHEMICALLY MODIFIED” CLEAR AND CONSISTENT, PARTICULARLY IN RELATION TO NATURAL POLYMERS?

In our view, the answer to this question might best be given as ‘No... well yes, but...’

The term “not chemically modified” is clearly defined in REACH, but does not provide adequate clarity as to the scope of the Directive, as it covers all substances “whose chemical structure remains unchanged”. Some polymerisation and depolymerisation processes do not rely on change in chemical structure and as such some polymers could be unintentionally exempted, despite their being used in the production of products such as wet wipes and cigarette filters that are clearly within the scope of the Directive. These non-chemically modified substances are not proven to be substantially less harmful to the environment when littered than chemically modified alternatives and will clearly have very similar impacts in terms of the disamenity they cause as litter, and in terms of their impacts on sewerage systems. So, although the term “not chemically modified” is, in itself, clear, its interpretation may be problematic in relation to the definition of natural polymers that will be exempt from the Directive.

Article Specific Implications

2.3 CONSUMPTION REDUCTION (ARTICLE 4)

The items referred to under Article 4 are those in Part A of the Annex.

The intent, presumably, was to reduce use of these single-use items, which are widely littered, and rarely well recycled, and which have ready substitutes in terms of reusables, or durable means of delivery to the consumer.

The material basis for some of these items – whether they are plastic or not – is believed to have limited bearing on the impact they have as items littered as long as the litter remains on land. The main effect is in the form of loss of amenity.

It would have been desirable to cover materials of all types where these items are concerned (littered paper cups are likely to have a similar impact to littered plastic ones where they remain on land) not least to ensure the incentive is strengthened in favour of reuse, in line with Article 4 of the WFD. Indeed, in our view, Member States should be encouraged to seek a reduction in the use of single use items of the type identified under Part A, irrespective of the material type.

A focus on seeking to delineate what constitutes ‘a plastic’ in this context may be counterproductive. To the extent that the Directive is required to do this, however, the effect will be significantly diluted the more the scope of the definition is narrowed.

The more problematic question relates to the scope of items, notably the food containers, which should be considered under Part A of the Annex. In this regard, the application of a definition would logically be related closely to the capacity of a Member State to take measures which would reduce the use of such items, consistent with Article 4. Article 4 mentions that

measures may vary depending on the environmental impact of those single-use plastic products over their life cycle, including when they become litter

One way of addressing the littering question is, as per the Directive, through requiring a clean-up cost to be imposed on those whose items contribute to litter: the items under Part A also appear under Part E(I), and so a question arises as to whether the definitions of the single-use items appearing under Part A and those appearing under Part E(I) could be different. Whatever the definition applied in Part A (and producers will want it narrowly defined), the definition used under Part E(I) should be as broad as possible for reasons explained below.

It should also be noted, however, that Article 12 states:

Specifications and guidelines on single-use plastic products

In order to determine whether a food container is to be considered as a single-use plastic product for the purposes of this Directive, in addition to the criteria listed in the Annex as regards food containers, its tendency to become litter, due to its volume or size, in particular single-serve portions, shall play a decisive role.

By 3 July 2020, the Commission shall publish guidelines, in consultation with Member States, including examples of what is to be considered a single-use plastic product for the purposes of this Directive, as appropriate.

This would tend to argue for inclusion, at the very least under Part E(I) of the Annex, and potentially also, under Part A, of the widest definition of single-use plastic food containers as being targeted for reduction. This definition, moreover, should anticipate the likelihood of substitute products being littered where they emerge on the market.

2.4 RESTRICTIONS ON PLACING ON THE MARKET (ARTICLE 5)

In respect of Article 5, the restrictions on placing on the market of single-use plastic products of the type listed in Part B of the Annex are clearly intended to reduce the flow into the environment, and specifically, the marine environment, of products which contribute to marine plastic pollution. These products are all single-use items which are littered and whose presence in the marine environment can be assumed to be often a result of littering which happens on land.

Recognising the points already made above, the intent of the Directive will be significantly weakened if terms are defined in such a way that producers escape the restrictions implied by Article 5 by using materials which could not be assumed to have a significantly diminished impact when they are littered. Indeed, in the case of many of these items, a more general quantitative restriction in their use, irrespective of the material being used, might have been useful. To this end, we would suggest that the Definitions used should be broad, not narrow, so as to give maximum effect (and minimum dilution of effect) to the Directive.

Furthermore, Member States ought, in our view, to consider measures which reduce use of all the products listed in Part B of the Annex irrespective of the material from which they are made.

2.5 EXTENDED PRODUCER RESPONSIBILITY (ARTICLE 8)

The requirements set out under Article 8 affect a range of products in slightly different ways. As indicated in the preceding discussions, the effect of the Directive will be significantly diminished if, for example, producers can avoid their responsibility for dealing with litter, or with items discarded in public collection systems, through manufacturing their products from materials whose use causes no significant change in the environmental outcome.

For this reason, becoming bogged down in the minutiae around what definition should be applied in line with a strict interpretation of the wording may be counterproductive. In order to ensure maximum likelihood of the Directive achieving its expressed objectives, the definitions deployed should be broader rather than narrower. This is especially true for this part of the Directive. It would run counter to the spirit of producer responsibility if, for example, the clean-up of littered wet wipes could be avoided through relatively minor modifications of the material used in their manufacture. Similar comments might be made in respect of cigarette butts. The likelihood is that items would still be littered, and still cause impacts in the environment, but producers might avoid being made financially responsible for clean-up. Note that where there were genuine advantages in the use of one polymer as opposed to another in any of these applications, Article 8 of the Directive, and Article 8a of the Waste Framework Directive, to which Article 8 refers, permit the use of fee modulation to reflect environmental characteristics of the different polymers to be used. It would seem, therefore, logical to use a definition that minimizes the extent to which avoidance of responsibilities occurs, recognizing the scope for using fee modulation to encourage the use of plastics which are demonstrated to have particular environmental benefits.

In respect of food products, the Consultation asks how the ‘tendency to become litter’ should influence the definitions. In principle, where there is a tendency for a product to become litter, the argument for ensuring the scope of definitions is as broad as is reasonable becomes compelling.

3 Product Specific Remarks

3.1 WET WIPES

3.1.1 *SHOULD ALL MAN-MADE CELLULOSIC FIBRES BE CONSIDERED ‘CHEMICALLY MODIFIED POLYMERS’? WHAT ABOUT OTHER TYPES OF FIBRES, SUCH AS LYOCELL, MODAL AND VISCOSE?*

In our view, the answer to this question is that all the above should be included.

Following previous remarks, and taking into account the objectives of the Directive, it is our view that all man-made cellulosic fibres should be within the scope of the Directive. Not only have none of these materials been shown to be substantially less harmful to the environment than synthetic polymers, they are likely to have an almost identical impact in terms of the disamenity caused by their littering and their potential to block sewerage systems.

Exempting these materials could result in significant substitution of synthetic polymers for man-made cellulosic fibres and through that, a substantial reduction in the impact of the Directive since the effects will be largely the same for products defined as within, and outside, the Directive’s scope. Indeed, the opposite may be true. Given the recent growth in consumer interest in the environmental impacts of plastic waste, it is not unreasonable to envisage a scenario where flushing or littering of these products actually increases, as manufacturers and brands make claims regarding the biodegradability of these materials, giving consumers the impression that they can be less careful about their disposal.

Our view is that ensuring that the Directive’s objectives are secured is of greater importance than the strict accuracy of the interpretation of the definition of the term “chemically modified”. However, there does seem to be a real risk, currently being exploited by some players in the wet wipe market, that the Directive will be seriously undermined unless the Commission’s guidance gives Member States an unambiguous steer on this issue.

3.1.2 *ARE THERE MAN-MADE CELLULOSIC FIBRES WHICH QUALIFY AS “NATURAL POLYMERS?”*

In our view, the answer to this question is one which is best understood in the context of the Directive’s objectives. Strictly interpreting the wording of the Directive, it might be considered that some man-made cellulosic fibres could qualify as natural polymers, but from the perspective of the Directive, whether or not that strict definitional hurdle is overcome, they probably should not be exempted from the Directive’s scope.

The definition of “plastic” in the Directive creates an exception for “natural polymers that have not been chemically modified”, but does not go into further detail as to the meaning of a “natural polymer” and does not define these separately. The only other part of the Directive that assists in defining “natural polymers” is Recital 11, but this refers to the REACH definition of “not chemically modified substances” (Article 3 (40)) rather than “substances which occur

in nature” (Article 3 (39)). This is unfortunate, as it may open loopholes in the Directive, causing polymers that are “not chemically modified” to be classified as “natural polymers” despite not being “substances which occur in nature” (and therefore, by definition, natural substances).

In our view, this ambiguity has to be addressed by clear guidance to Member States that all man-made cellulosic fibres are to be treated as ‘plastics’ for the purposes of the Directive, and are, therefore, fully within the scope of the Directive, thereby maintaining the likelihood of its objectives being met. To do otherwise would likely compromise the likelihood of these objectives being met through substitution of existing ‘plastics’ by other ‘non-plastic’ products whose impacts are very similar.

4 Marking Requirements (Article 7)

Article 7 notes that:

1. Member States shall ensure that each single-use plastic product listed in Part D of the Annex placed on the market bears a conspicuous, clearly legible and indelible marking on its packaging or on the product itself informing consumers of the following:

(a) appropriate waste management options for the product or waste disposal means to be avoided for that product, in line with the waste hierarchy; and

(b) the presence of plastics in the product and the resulting negative impact of littering or other inappropriate means of waste disposal of the product on the environment.

The items referenced in Part D of the Annex are:

(1) Sanitary towels (pads), tampons and tampon applicators;

(2) Wet wipes, i.e. pre-wetted personal care and domestic wipes;

(3) Tobacco products with filters and filters marketed for use in combination with tobacco products;

(4) Cups for beverages.

To varying degrees, the single-use nature of these items has been fuelled by a desire for convenience, albeit that 3) above has a longer history. The question of need arises, and it is our view that it would be in line with Article 7(1)(a) to require that the marking requirements include elements that challenge the consumer as to whether they really need the item being purchased. This is especially true in respect of items 2) and 4) above, but in respect of item 1), the challenge might be in the form of the availability of alternatives¹. In respect of 3) above, existing labelling in respect of health might actually serve the same purpose.

¹ <https://reloopplatform.eu/plastic-free-periods-menstrual-products-plastic-pollution/>