Brussels, 17 April 2020

SUBJECT: EUPC COMMENT TO THE DRAFT GUIDANCE ON IDENTIFYING AND DESCRIBING THE PRODUCTS COVERED BY THE SUP DIRECTIVE (WP1)

European Plastics Converters thank DG Environment and the Consultants for the opportunity to provide their comment to the draft Guidance document containing the possible definitions on the products and concepts of the Single-Use Plastics Directive 2019/904. We appreciate that many observations that EuPC has provided in the consultation and the workshop have been taken into consideration, however, some have not been taken on board convincingly or have been disregarded.

The present comment is a combination of different feedbacks received by the association from its members and is organised following the order of appearance in the two documents sent to all stakeholders.

As an overall premise, we consider that the Guidance must be a clarifying document of the SUP Directive for Member States, national public authorities and companies. "*The guidelines aim to provide national authorities and economic operators with technical and legal clarifications in relation to the definitions and requirements posed by the SUP Directive, along with illustrative examples, to ensure harmonised interpretation of single-use plastic products in accordance with the SUP Directive*". In particular, we stress the need to ensure **harmonised interpretation** via numerical or standard references that leave no doubt to the reader.

Many comments in this document are based on this principle and reiterate the need for more objectivity, considering the expected value of this Guidance and the differences in products and packaging existing among Member States today. Also, the draft Guidance uses criteria, such as durability, reparability or perishability, which do not provide any additional clarity, are not mentioned in the Directive nor are accompanied by clear legislative references. These are essential elements to understand the exact scope of the directive and the impact on manufactured products.

Furthermore, as a general observation, in the light of one comment raised during the webinar of April 3rd, we think that the draft Guidance rightfully makes references to the Preamble of the Directive as a way to interpret its Articles. In fact, in the European case law, **recitals are used as interpretative tools** in the EU legal order (as in legal orders in general for that matter) and can help to explain the purpose and intent behind a normative instrument. Recitals are taken into account to resolve ambiguities in the legislative

provisions to which they relate1. Therefore, the draft Guidance correctly refers to the Preamble to assist in the interpretation of the Articles of the Directive.

PART A - OBJECTIVES AND SCOPE OF THE SUP DIRECTIVE

Paragraph 2.1 (SUP Products)

Figure 2.1 is clear and easy to apply; we have some remarks on the concept of single-use vs multiple-use explained below under Paragraph 4.

According to the Article 3 definition, products such as pharmaceutical packaging, cosmetic packaging and detergent packaging would be defined as single-use products. However, the SUP Directive is not imposing any measures on those SUP. Since some countries like France are trying to ban SUP packaging in the future, non-targeted SUP should be clearly addressed in the guidance. Section 2.1 is addressing what is listed in the Annex i.e. which products would have certain requirements under the Directive. However, it is not clear that certain SUP such as pharmaceutical/cosmetic/detergent packaging are exempted from these measures. Some examples of SUP products exempted from those measures should be listed in the guidance (see below on medical devices).

In addition to medical devices, the Guidance should explicitly exclude any application related to healthcare in hospitals, care homes or at home as part of a medical treatment, even if these products contain food, beverages or disposable cutlery. The Directive directly impacts catering in transport (trains and flights) where food safety and hygiene are essential guarantees of services and mandatory. Just as straws as a medical device are excluded from the Directive, hygienically packaged disposable cutlery used in hospitals, medical facilities, etc. should also be excluded from the Directive (the current situation with the Coronavirus is proof of the necessity of such products).

Paragraph 2.2 (specific policy measures)

We understand that the Directive makes simple reference to the availability and/or affordability of suitable and more sustainable alternatives, but still, the draft Guidance contains references to these **"alternatives" without specifying which ones.** Consumption reduction measures apply where suitable and more sustainable alternatives are not yet readily available. It is necessary to have objective criteria to decide whether alternatives are or are not readily available.

Unfortunately, we are aware that we work with a Directive which has made certain decisions and assumptions. But still, this Guidance document should be the occasion to "improve" the text whenever possible.

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[1] Case C-244/95, Moskof, [1997] ECR I-6441, paras. 44-45. Recitals can help to establish the purpose of a provision (Case C-173/99 BECTU [2001] ECR I-4881, paras 37-39) or its scope (Case C-435/06, C [2007] ECR I-10141, paras. 51-52).

PART B - GENERAL TERMS AND DEFINITIONS

Paragraph 3.1 (plastics definition)

The draft Guidance is still not sufficiently clear about the fact **that bio-based and biodegradable plastics are in the scope of the Directive**. Many Member States have believed that these types of plastics are exempted. It is important to reiterate again this concept to avoid that in the future Member States repeat the same mistake.

The **definition of plastic or natural polymer should be in line with the goal of the SUP directive**. The definition should reflect back to the original intention. A cardboard or paper packaging with a liquid prove layer, no matter if it falls under the definition of plastic or natural polymer, should be considered under the directive, if there is a chance of the container to be littered on European beaches and the layer is not denaturizing e.g. within one year.

Also, the Guidance should **make reference to oxodegradable plastic**. That a complete restriction to products containing even small amounts of oxodegradable material fall into the restriction of Article 5 of the Directive.

Paragraph 3.2.1 (polymer definition)

If we stick to the literal reference of Article 3(5) of REACH, there could be products such as multi-layer, multi-material that can be produced with a recycled and foamed polyester layer. If they use a polyester instead of standard polyester would include already 3 monomers MEG, DEG, IPA bound to PTA, but it would be easy to include one or more other diols or dicarbionic acids. All the monomers and the polymer chains would have a different molecular weight. Therefore, we wonder whether such polymer would fall under the polymer definition; if not, the above polymer definition may not cover all the polymers.

Paragraph 3.2.2 (function as main structural component)

We completely agree with this interpretation. The analysis made in the draft Guidance is correct and the most coherent in reaching the objective of the Directive: a key element to be considered in regard to determining whether a (plastic) polymer can function as a main structural component is whether the SUP product can fulfil its intended function without the polymer(s). Therefore, we reiterate that the Guidance must be clearer in this regard to avoid misunderstandings and the fact that **paper/pulp products lined or coated with plastics as well as aluminium cans (for example) that have a plastic coating fall into the scope** of the Directive.

On plastic coating/lining on paper, cardboard and cellulose, it is clearly stated in case of the "beverage cups" that this is not allowed, while for food containers it is not clear. This is clearly an unequal treatment of food cups and containers. This is an aspect for clarification in the Guidance.

Moreover, varnishes and coatings are often taken as similar in EU legislation. Regulation (EU) 2018/213 states: "*varnishes' or 'coatings' means materials or articles composed of one or more non-self-supporting layer or layers*" while Commission decision 2014/312/EU states that: *"'Varnish' means a clear coating material which, when applied to a substrate forms a solid transparent film having protective, decorative*

or specific technical properties and after application dries to a solid, adherent and protective coating". **Therefore, any doubt about varnish and coating should be lifted on the matter.**

Paragraph 3.3 (natural polymers that have not been modified)
We think that a **stringent application of the ECHA approach should apply**, meaning that if there is a modification (whether at the source, by adding some additives or making an industrial modification) then the polymer is not natural.

Paragraph 4 (Single use Vs multiple use)
The document refers to some product design characteristics ("*intended use and purpose of the product during its life span, anticipated performance and technical characteristics such as expected number of washing or dishwasher cycles; expected number of times the product could be used, etc*.") that the product must fulfil to be considered reusable ("*intentionally designed to fulfil its original purpose multiple times without losing original product functionality, physical capacity or quality*") during its life cycle. However, there is **no objectivity in all of these concepts**, and they are very open to interpretation. Manufacturers often sell through distribution channels, which makes it impossible for them to be able to define the intended use.

The consequence of the rationale suggested in the draft Guidance is that a plastic cup used in connection with a coffee vending machine is not SUP, while the same plastic cup used during a picnic becomes SUP. This means that it is not the plastic product that makes the SUP status, but the use and the ease of access to disposing and collection systems, and consumers education. In fact, the definition of single-use plastics here seems to mostly dig in the concept of "tendency to become litter". Such tendency is only partially implied in the product design, while the "tendency to become litter" for a SUP food container is described through the consumption of the food that is contained in it: "intended for immediate consumption", "consumed from the receptacle", and "ready to be consumed without any further preparation". **The Guidelines should specify that the "tendency to become litter" depends on (i) the education of consumers, and (ii) ease of access to disposing facilities.**

Washing machine cycles

We appreciate the reference to the French test on **washing machine cycles** for the multiple-use concept, but it is left as a possibility. The references to "product durability", ''shelf life" and "expected useful or functional life" are too vague as references. We recommend reverting to EuPC comments to the stakeholders' consultation for anchoring these concepts to existing standard or numerical values. The design features shall indicate the functional size of the product and, consequently, the expected number of washing cycles in which the product should maintain its properties. Re-washing should be understood as a waste prevention measure and not as a waste management operation.

Packaging set-up

Also, shelf life of a product packaged in an industrial set-up or by a shop (maximum 3 days) is a discriminatory factor in order to demonstrate immediate consumption and therefore included in the Directive. This is an aspect where clarification or consultation should be requested from the consultants

who drafted the guidelines. Furthermore, there is no reference to food containers for dry products (which are allowed in the SUP text in Article 12). Also, this point should be clarified in the Guidance.

We expect that the Guidance gives clear indications of how to distinguish single-use from multiple-use in a scientific way. The Plastic carrier bags Directive 2015/720 draws a line with the use of microns. The same rationale should apply in this context to **draw a clear line between single-use and multiple-use**.

Multiple trips/rotations

Moreover, the principle of multiple trips and rotations does cover logistics and the capability of the material or the product to be reused for the same purpose. Per se, the guidance may suggest that the cleaning process could be excluded.

There is currently no guidance on how to assess the "design for repeated use". Moreover, the number of rotation/trips/reuse must be clarified as part of the design for repeated use.

Ramboll refers to the reuse concept of the Waste Framework Directive (WFD). In the WFD, the reuse has a broad sense which implies that washing may occur and that a waste status may be acquired. In the SUP Directive, the product does not end as a waste to be reused. Therefore, the multiple trips and rotation criterion should be defined in detail, including its logistic aspects and washing requirements.
One should also note that, in this case, packaging is not a packaging anymore but kitchen equipment, utensils, and cutlery. These are not defined. Multiple trips and rotation are therefore not defined.

Life Span

Life Span is clearly associated with Life Cycle Assessment and not to the expected useful or functional life as stated in Ramboll's report. Life span is not similar to lifetime but to life span. This is stated in 2013/179/EU: Commission Recommendation of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations.

Ramboll cannot conclude that life span is associated with lifetime or to product durability as this association is not mentioned anywhere. By doing so, Ramboll suggests that the Ecodesign directive applies while none of the products in scope are covered by the Ecodesign directive.

However, by referring to the EU Ecolabel, Ramboll admits the applicability of 2013/179/EU. **Life span definition remains therefore unclear.**

SUP Directive and Packaging and Packaging Waste Directive

Table 5-1 is confusing as the same articles are found in both columns. The SUPD seems to address product as a whole including container and content, while PPWD focuses on container only. This is confusing. One may understand that the intention of the SUPD may be to reduce content as well, which is obviously false. **This must be clarified**

PART C – SINGLE-USE PLASTIC PRODUCT DEFINITIONS

As a general comment, we think that the consultants have failed to define the scope of the directive and have chosen to build a list of exemplary cases. Part C also assumes that undefined concepts of Part A are valid (e.g. reuse, etc…).

Such a list may be considered as a closed list of possible applications. If so, a mind mapping process should describe it. This is actually missing from the study, leading to further interpretations.

Part C relies on answering questions for food and beverages related containers

1. Is it a plastic product? For which open questions remain.
2. Is it single-use? For which some definitions are missing
3. Is it intended for immediate consumption? While this is not related to the container but to the content for which no definition exists
4. Is it typically ready to be consumed without further preparation? What does typically mean? The conviction?
5. Is it portion size? How is this defined?

These are all open questions.

FOOD CONTAINERS

Paragraph 1.3.1
Here, we refer to the comments listed above on the need to have numerical references for the concept of reusability: reference to one criterion would be desirable; also, the reference to volume and size for single or multi-size portion serving are too vague as they are indicated. Here, there should be reference to existing industrial value.

Paragraph 1.3.2 and Table 1-2
On the concept of immediate consumption, we think that small portions of sauce or bread spread cannot be intended to be eaten immediately, especially if provided with a container that does not come with cutlery. In turn, these sauces are sold alone in order to be eaten at another moment (for example when not sold together with a salad in a bowl).

Therefore, the inclusion of seasoning and flavouring without the inclusion of disposable cutlery does not make the food container as intended to be for immediate consumption (see Table 1-2, page 15).

In reference to the product-specific criterion "*intended for immediate consumption*", specifically on the guidance indicator under "*Nature of packaging*", "*The time that a food container is intended to remain in contact with the foodstuff is an indication of whether the foodstuff is typically consumed immediately*", we think that the presence of technical features in the packaging that enable longer shelf life such as oxygen-barriers, EVOH- barriers, semi-permeable sealing (e.g. in cups for sour cream) should be added. Such criterion would then exclude the article from being "intended for immediate consumption".

With regard to the criterion "*typically consumed from the receptacle*", on the guidance indicator "*Nature of packaging/ receptacle*", the document states "*The shape / type of packaging used allows consumers to eat directly from the receptacle by simply removing the lid or cap, without requiring the foodstuff to be placed in another receptacle before consumption e.g. a plate or a bowl*." On this, we are of the opinion (see above under Par. 4) that the reference to the shape allowing the consumer to eat directly by removing a lid is too wide. Every cup or bottle by their geometry principally allows that. It is therefore the eating habit that counts too, not only the principal allowance of the geometry. Hence, we suggest applying a combination of both criteria.

The packaging is excluded when it is needed to wash and/or cut or peel salad or fruits. For some fruits, this is clear (for example cubes of cut melon, pineapple), but for other kinds of fruits, the need to be peeled is subjective/personal (for example whole apple or pear).

Under the criterion, "*Ready to be consumed without any further preparation*" subsection "*No need to wash, cut, peel or slice the product*", we think that for staple food such as sour cream or plain yogurt, they normally are prepared further. They are cooked with, they are mixed with sauces or dressings or salads manually they are used for refining dishes or to supplement meals. Hence, we suggest that criterion should be rephrased as follow: "no need to wash, cut, peel or slice the product AND not cooked with, manually mixed with, not used for refining or supplement dishes".

As for the multi-pack portion being excluded, we fully agree on this interpretation as the Directive and its Preamble must be read and interpreted in conjunction. Moreover, such interpretation would be in line with the spirit of the Directive, i.e. to avoid items to be littered.

As for the difference between food containers and beverage containers, the lack of rigorous, numeric reference affects an easy identification of the items at stake, like for the single-use vs multi-use discussion. It seems that milk and dairy products are beverage, and soups, fruits and vegetable purees or similar are food. Hence, the same packaging, if it contains milk or dairy or vegetable puree, can in turn be considered in different ways in this context.

Food and beverages are defined by the **Codex Alimentarius** and the Guidance should refer to it. The Directive has not the purpose of changing these well-established definitions but rather must align with it. Drinkable yoghurt, milk and plant-based beverages are consequently food and not beverage.

BEVERAGE CONTAINERS, BEVERAGE BOTTLES, CUPS FOR BEVERAGES (INCL. THEIR CAPS, COVERS AND LIDS)

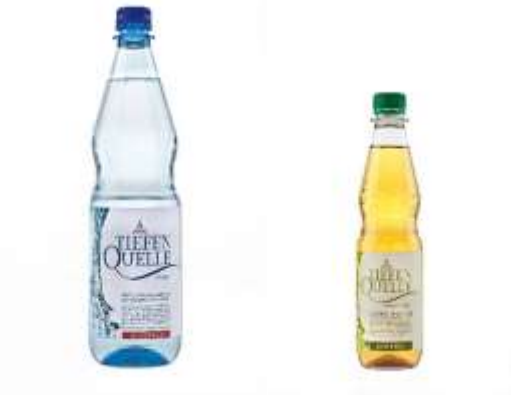
The explanation on paragraph 2.3. in guide C is not clear. It establishes that beverage bottles and cups for beverages are beverage containers, so besides their own requirements they both (beverage bottles and cups for beverage seems to be obliged to the requirements for beverage containers.

Also, looking at the images provided for caps and lids, when for example a bottle has both a cap and a lid, it is not clear whether only one of the two must be tethered and not necessarily both.

The Directive excludes "glass and metal beverage containers" from the requirements under the Article 6 (Part C and F of the Annex). However, definitions of glass and metal beverage bottles are not clearly written. In our view, single-use glass/metal bottles with a functional plastic layer (for protecting the metal from corrosion and for light-weighting for glass bottles) can be defined as single-use beverage containers. Questions to be considered are whether a multilayer polyester container with a metal layer is a metal beverage bottle or rather a SUP bottle; similarly, whether a multilayer polyester container with a glass layer can be regarded as a glass bottle.

On paragraph 2.4.1 "How to distinguish between single and multiple-use beverage containers; beverage bottles; and cups for beverages? For volume it says "It should be noted that any receptacles with the capacity over 3 litres is considered as not intended for single-use. Even if receptacles with a capacity below 3 litres might include multiple-sized servings, they are likely to be consumed "on-the-spot or take-away". Receptacles with a capacity of less than 3 litres, although they may contain multiple portion sizes, are unlikely to be consumed on-the-spot.

Among the pictures of refillable bottles, Table 2-4 should also show a typical refillable bottle that is returned to the beverage filler. Here are some pictures (available here):



PACKETS AND WRAPPERS

It would be good to add examples of ‘paper-like’ wrappers in the pictures.

The Annex of the Directive specifies that only packets and wrappers containing food fall under the scope of the Directive. It is therefore important to emphasize this point by including the term “food” in front of the term packets and wrappers and flexible material.

This in turn also means that packets & wrappers are a type of food container for which the exemption applies when sold in multipacks.

Proposed visual examples should also always correspond to the criteria referred in the Annex. For example, visuals of food containers with no disposable cutlery and seasoning/flavouring (in page 14) and of chewing gum blister and waffle wrap with cardboard tray (in page 56) do not fulfil the criteria set for food containers and packets and wrappers and therefore should not be included in Part C of the Guidelines.

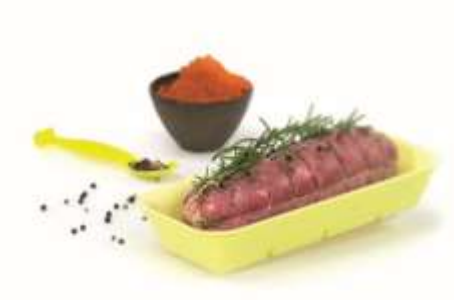
CUTLERY, PLATES, STRAWS, STIRRERS

For both cutlery and plates, it is essential to understand what technical conditions are required to declare the product as reusable (thickness or/and mechanical properties, thermal properties, resistance to washing, acceptable thermomechanical deterioration after x wash cycles in the dishwasher). In Part C. Table 6-3 The main criteria for not including a product in the scope of the SUP should specify that all or a substantial part of the product should be made of durable plastic, allowing multiple-use (as defined by the Certificates).

Further remarks

EPS distinguished from XPS

Additionally, the Guidance should provide clarification on expanded polystyrene products and how to distinguish from other polystyrene objects. These below are containers made of XPS, extruded polystyrene, which are excluded from restriction measures:



Food waste prevention

Food waste prevention is not addressed as a priority. The existence of single-use packaging containing single portions serves food prevention, hygiene and health. The EU framework clearly states that Human Health and Food Waste Prevention must be enforced on top of other considerations.

Therefore, the guidance must clarify what is important between restricting to banning products and enforcing Health, hygiene, and food waste prevention

Medical devices

The SUPD foresees exception for medical devices. Regulation (EU) 2017/745 explains what a medical device is.

> *"'medical device' means any instrument, apparatus, appliance, software, implant, reagent, material, or other article intended by the manufacturer to be used, alone or in combination, for human beings for one or more of the following specific medical purposes:*
>
> - *diagnosis, prevention, monitoring, prediction, prognosis, treatment, or alleviation of disease,*
> - *diagnosis, monitoring, treatment, alleviation of, or compensation for, an injury or disability,*
> - *investigation, replacement, or modification of the anatomy or of a physiological or pathological process or state,*
> - *providing information by means of in vitro examination of specimens derived from the human body, including organ, blood, and tissue donations,*
>
> *and which does not achieve its principal intended action by pharmacological, immunological, or metabolic means, in or on the human body, but which may be assisted in its function by such means".*

According to this regulation, the following items are out of scope of the medical devices

- Food (178/2002)
- In vitro diagnostic (2017/746)

Therefore, single-use items used in a medical environment for food or in vitro diagnostic are covered by the SUPD. On the contrary of what has been repeatedly said, straws in medical environments may be under the scope of the SUPD. Sterile packaging as well.

Similarly to the food waste prevention, the EU framework clearly states that Human Health must be enforced on top of other considerations.

The geographic scope of the legislation is the medical devices and not the Healthcare sector,

- genuine healthcare institutions,
- carehomes,
- domestic healthcare
- or office/industry/school healthcare units.

Carehomes share medical practices with healthcare institutions (hospitals, clinics, etc…). And some care may be provided and performed at home for which single-use products may be necessary to avoid contamination and ensure accurate restoration of health.

According to Directive 2011/24/EU, healthcare is

> *"'healthcare' means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices;"*

This is therefore neither restricted to medical devices nor geographically restricted.

Aside of the medical devices, there is a SUP Directive reference to special medical purposes, according to Regulation (EU) No 609/2013. This is covering the following type of food and beverages

- infant formula and follow-on formula;
- processed cereal-based food and baby food;
- food for special medical purposes;
- total diet replacement for weight control.

The SUP Directive excludes by omission any other relevant and required applications of medical single-use items, such as equipment or packaging ensuring save use and sterility

According to the actual possible interpretations, emergency relief materials and products are also in the scope of the directive

- Emergency ration of food
- Emergency blankets

The SUP Directive interpretation may lead to endanger the life of humans and the population by increasing healthcare practices to an unacceptable level of risks.

The guidance failed to address this essential point.

On some images

On page 44, a RECUP cup is photographed and can be clearly identified as such. For reasons of neutrality, no brand names may be shown.

On pages 47/48 there is no addition that a reusable cup lid is not covered by the guideline. This should be handled in the same way as for cups, where one example is given for disposable and one for reusable cups.

EuPC remains at your disposal for any need, request of information and clarification.