



**Memorandum assessing the incompatibility with EU Law of Articles 7, 66 and 77 of the French Law on Circular Economy and the Draft Implementing Decree providing for the prohibition of specific single-use plastic products**

Submitted by *EUROPEN* and *FoodDrinkEurope*

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## Memorandum

To:	Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs DG GROW/B/2 – N105 4/66	European Commission
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### **Incompatibility with EU Law of French Law on Circular Economy and Draft Implementing Decree providing for reduction and prohibition of specific single-use plastic products (notification number 2020/401/F)**

On 26 June 2020, France notified to the European Commission (the **Commission**) a draft measure through the European Union (**EU**) Technical Regulations Information System (**TRIS**) consultation procedure, pursuant to Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (**TRIS Directive**).<sup>1</sup>

The measure notified is a Draft Implementing Decree which provides for the prohibition of specific single-use plastic (**SUP**) products (*Décret relatif à l'interdiction de certains produits en plastique à usage unique*) (the **Draft Implementing Decree**). The Draft Implementing Decree is planned to enter into force on the day following its publication, with the exception of certain provisions which will enter into force on 1 January 2021 and 3 July 2021.

The Draft Implementing Decree mainly implements Article 77 of the Law 2020-105 of 10 February 2020 on waste prevention and the circular economy (*Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*) (the **Law on Circular Economy**). However, the Draft Implementing

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<sup>1</sup> This notification is available on the TRIS platform of the Commission: [https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search\\_detail&year=2020&num=401](https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search_detail&year=2020&num=401)

Decree also implements, and must therefore be read together with, other provisions of the Law on Circular Economy which establish a gradual reduction and ultimately a ban on SUP products. This is the case of Article 66 of the Law on Circular Economy, which reduces by 50% the number of SUP beverage bottles placed on the market by 2030, and of Article 7, which bans all SUP packaging by 2040. Since the Law on Circular Economy was not notified to the Commission as provided for in Directive 2015/1535 (see section 5), these sets of provisions must be assessed together.

We were requested by the European Organization for Packaging and the Environment (EUROPEN) and FoodDrinkEurope to explain why these measures are incompatible with EU law.

In our view, Articles 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree create unjustified obstacles to trade between Member States of the EU which breach the Packaging and Packaging Waste Directive and the SUP Directive and are incompatible with the free movement of goods. Our conclusion rests on the following steps and reasoning:

- First, an analysis of the objectives and content of Articles 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree (section 1);
- Second, the finding that the issues tackled by Articles 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree would be best dealt with at the EU level (section 2);
- Third, the lack of compliance of Articles 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree with the Packaging and Packaging Waste Directive and the SUP Directive (section 3);
- Fourth, the incompatibility of Articles 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree with the EU Internal Market rules (section 4); and
- Fifth, Articles 7, 66 and 77 of the Law on Circular Economy should have been notified to the Commission pursuant to the TRIS notification system (section 5).

Section 6 contains a brief conclusion and a list of measures requested from the Commission.

### **1. DESCRIPTION OF ARTICLES 7, 66 AND 77 OF THE LAW ON CIRCULAR ECONOMY AND DRAFT IMPLEMENTING DECREE**

The Draft Implementing Decree defines the conditions of application of Articles 7, 66 and 77 of the Law on Circular Economy and should be read and understood in conjunction with these statutory provisions.

#### **1.1 Articles 7, 66 and 77 of the Law on Circular Economy**

Article 7 of the Law on Circular Economy sets out the far-reaching objective of removing all SUP packaging from the French market by 2040.<sup>2</sup> According to the same provision, a decree will define (i) a target for the

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<sup>2</sup> Free translation from the original French text: « Art. L. 541-10-17. La France se donne pour objectif d'atteindre la fin de la mise sur le marché d'emballages en plastique à usage unique d'ici à 2040. Un objectif de réduction, un objectif de réutilisation et de réemploi et un objectif de recyclage sont fixés par décret pour la période 2021-2025, puis pour chaque période consécutive de cinq ans. [...] »

reduction of the use of SUP packaging; (ii) a reuse target; and (iii) a recycling target for the period 2021-2025 and additional targets for each consecutive five-year period.

Article 66 of the Law on Circular Economy constitutes an intermediary step towards the completion of this broader objective. It provides that France sets itself *"the objective of reducing by 50% the number of single-use plastic beverage bottles placed on the market by 2030"*.<sup>3</sup>

Article 77 of the Law on Circular Economy and the Draft Implementing Decree impose a series of prohibitions in preparation for the complete ban on SUP packaging set out in Article 7 of the Law on Circular Economy.

Along with several other provisions of the Law on Circular Economy (which are less relevant to the Draft Implementing Decree), Article 77 of the Law on Circular Economy amends Article L541-15-10 of the French Environmental Code. As it currently stands, Article L541-15-10 of the French Environmental Code prohibits the placing on the market of forms of SUP bags and packaging (see, L541-15-10-II) and several SUP products (see, L-541-15-10-III).

Article 77 of the Law on Circular Economy introduces different problematic measures:

- It provides that, as of 1 January 2021, the importation and production of certain SUP bags<sup>4</sup> for use on the national territory, and the transfer of such bags to natural and legal persons established on the national territory will be prohibited.<sup>5</sup> The supply of these SUP bags had already been banned by earlier legislation, but the prohibition has now been extended to their importation and production.
- It introduces a ban on the following SUP products:
  - As of 1 January 2020, cups, glasses and kitchen disposable plates;<sup>6</sup>
  - As of 1 January 2021, straws, except those intended for medical purposes, plastic confetti, steak pikes, disposable glass lids, plates (other than those banned as of 1 January 2020 including those with plastic film), cutlery, beverage stirrers, food containers or receptacles made of expanded polystyrene intended for consumption on-the-spot or as take-away, beverage containers made of expanded polystyrene and sticks to be attached to balloons,

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<sup>3</sup> Free translation from the original French text: « La France se donne également pour objectif de réduire de 50 % d'ici à 2030 le nombre de bouteilles en plastique à usage unique pour boisson mises sur le marché. »

<sup>4</sup> "Single-use plastic checkout bags intended for the packaging of goods at the point of sale" (free translation of the French original version: "sacs de caisse en matières plastiques à usage unique destinés à l'emballage de marchandises") and "single-use plastic bags intended for the packaging of goods at the point of sale other than checkout bags, except for bags that can be composted in domestic composting and are made up, in whole or in part, of bio-sourced materials" (free translation of the French original version: "sacs en matières plastiques à usage unique destinés à l'emballage de marchandises au point de vente autres que les sacs de caisse, sauf pour les sacs compostables en compostage domestique et constitués, pour tout ou partie, de matières biosourcées").

<sup>5</sup> Free translation from the original French text: « A compter du 1er janvier 2021, sont également interdites l'importation et la fabrication à des fins de mise à disposition sur le territoire national ainsi que la cession auprès de personnes physiques et morales établies sur le territoire national, des sacs en plastique à usage unique mentionnés aux 1° et 2° du présent II. »

<sup>6</sup> Free translation from the original French text: « Il est mis fin à la mise à disposition des produits en plastique à usage unique suivants : [...] A compter du 1er janvier 2020, pour les gobelets et verres ainsi que les assiettes jetables de cuisine pour la table ».

except sticks and mechanisms for industrial or professional uses that are not distributed to consumers;<sup>7</sup>

- As of 1 January 2021, beverage plastic bottles offered for free in public places and on professional premises (with exceptions in specific cases);<sup>8</sup>
  - As of 1 January 2022, packaging made up in whole or in part of plastic for unprocessed fresh fruits and vegetables displayed for sale, excluding fruits and vegetables packed in batches of 1.5 kg or more and fruits and vegetables presenting a risk of deterioration when sold in bulk;<sup>9</sup>
  - As of 1 January 2022, non-biodegradable plastic tea and herbal tea bags.<sup>10</sup>
- It provides that contractual provisions providing for the supply or use of single-use plastic bottles in festive, cultural, or sporting events will be deemed void as of 1 January 2021, except if it is impossible to replace these bottles with reusable products.<sup>11</sup>

### 1.2 Draft Implementing Decree

The Draft Implementing Decree lays down definitions and specifies the exact scope of the ban by including plastic products with “*durability, resistance and solidity properties comparable to those of single-use products*”.<sup>12</sup> Conversely, products “*designed, created and placed on the market to fulfil several journeys or cycles*” do not fall under this prohibition.<sup>13</sup>

The Draft Implementing Decree thus amends Article D543-294 of the French Environmental Code, which lays down the definitions of the concepts used in Article L541-15-10.

In addition, the Draft Implementing Decree amends D543-295 as follows: “[t]he prohibition on making available single-use plastic products that is mentioned in subparagraphs 1 and 2 of paragraph III of Article L541-15-10 does not apply to products classed as packaging within the meaning of Article R543-43 of the

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<sup>7</sup> Free translation from the original French text: « Il est mis fin à la mise à disposition des produits en plastique à usage unique suivants : [...] A compter du 1er janvier 2021, pour les pailles à l'exception de celles destinées à être utilisées à des fins médicales, confettis en plastique, piques à steak, couvercles à verre jetables, assiettes autres que celles mentionnées au 1° du présent III y compris celles comportant un film plastique, couverts, bâtonnets mélangeurs pour boissons, contenants ou récipients en polystyrène expansé destinés à la consommation sur place ou nomade, bouteilles en polystyrène expansé pour boissons ainsi que les tiges de support pour ballons et leurs mécanismes, à l'exception des tiges et mécanismes destinés aux usages et applications industriels ou professionnels et non destinés à être distribués aux consommateurs ».

<sup>8</sup> Original French text: « A compter du 1er janvier 2021, il est mis fin à la distribution gratuite de bouteilles en plastique contenant des boissons dans les établissements recevant du public et dans les locaux à usage professionnel. Cette disposition ne s'applique pas aux établissements non desservis par un réseau d'eau potable, à la distribution gratuite de bouteilles en plastique lorsqu'elle répond à un impératif de santé publique, ou lorsqu'une restriction de l'eau destinée à la consommation humaine pour les usages alimentaires est prononcée par l'autorité administrative compétente. »

<sup>9</sup> Original French text : « A compter du 1er janvier 2022, tout commerce de détail exposant à la vente des fruits et légumes frais non transformés est tenu de les exposer sans conditionnement composé pour tout ou partie de matière plastique. Cette obligation n'est pas applicable aux fruits et légumes conditionnés par lots de 1,5 kilogramme ou plus ainsi qu'aux fruits et légumes présentant un risque de détérioration lors de leur vente en vrac dont la liste est fixée par décret. »

<sup>10</sup> Original French text : « A compter du 1er janvier 2022, la mise sur le marché de sachets de thé et de tisane en plastique non biodégradable au sens du 16 de l'article 3 de la directive (UE) 2019/904 du Parlement européen et du Conseil du 5 juin 2019 relative à la réduction de l'incidence de certains produits en plastique sur l'environnement est interdite. »

<sup>11</sup> Original French text : « A compter du 1er janvier 2021, les clauses contractuelles imposant la fourniture ou l'utilisation de bouteilles en plastique à usage unique dans le cadre d'événements festifs, culturels ou sportifs sont réputées non écrites, à l'exception des cas où la substitution de ces bouteilles par des produits réutilisables est impossible. »

<sup>12</sup> See, Article 1, 7° of the Draft Implementing Decree: “L'interdiction de mise à disposition de produits en plastique à usage unique mentionnée aux 1° et 2° du III de l'article L. 541-15-10 s'applique également aux produits en plastique qui présentent des performances de durabilité, de résistance, et de solidité comparables à celles de produits à usage unique. Les produits conçus, créés et mis sur le marché pour accomplir, pendant leur durée de vie, plusieurs trajets ou rotations en étant retournés à un producteur pour être remplis à nouveau ne sont pas concernés par cette interdiction”.

<sup>13</sup> Ibidem.

*Environmental Code*".<sup>14</sup> However, in an apparent contradiction, another provision of the same Draft Implementing Decree provides that "*in Article D543-295, the phrase 'does not apply' is replaced by the words 'also applies'*".<sup>15</sup>

Finally, the Draft Implementing Decree provides that "[t]he prohibition on making available single-use plastic products that is mentioned in subparagraphs 1 and 2 of paragraph III of Article L541-15-10 also applies to plastic products with durability, resistance and solidity properties comparable to those of single-use products. Products designed, created and placed on the market to fulfil several journeys or cycles during their lifetime by being returned to a producer for refilling are not affected by this prohibition"<sup>16</sup>.

## **2. INCOMPATIBILITY OF ARTICLES 7, 66 AND 77 OF THE LAW ON CIRCULAR ECONOMY AND OF DRAFT IMPLEMENTING DECREE WITH PRINCIPLE OF PRECEDENCE OF EU LAW, PRINCIPLE OF SUBSIDIARITY AND PRINCIPLE OF SINCERE COOPERATION**

Article 18 of the Packaging and Packaging Waste Directive obliges Member States to allow the placing on the market of their territory of packaging which satisfies the provisions of the Packaging and Packaging Waste Directive. By prohibiting SUP products which are allowed in other Member States, France disregards existing EU legislation.

This violation of EU law exposes France to infringement proceedings in accordance with Article 260 of the Treaty on the Functioning of the European Union (*TFEU*). In addition, the French measures cannot be enforced by the courts pursuant to the principle of precedence of EU law over national law established in *Costa v. E.N.E.L.* In that landmark judgment, the Court of Justice of the European Union (*CJEU*) held that "[t]he integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws without jeopardising the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7".<sup>17</sup>

In addition, Article 5 of the Treaty on the European Union (*TEU*) provides that "[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

The TRIS notification of the Draft Implementing Decree explains that "[i]n the European Union, 80 to 85% of litter in the marine environment is plastic, of which 50% is single-use plastic items".<sup>18</sup> As a result, France pursues the aim of "fighting plastic pollution" as "part of a broader strategy of transition to the circular

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<sup>14</sup> Article 1(6) of the Draft Implementing Decree amending Article D543-295 of the French Environmental Code.

<sup>15</sup> Article 2(2) of the Draft Implementing Decree amending Article D543-295 of the French Environmental Code.

<sup>16</sup> Amendment to Article D543-296 of the French Environmental Code.

<sup>17</sup> Judgment of 15 July 1964, *Flaminio Costa v. E.N.E.L.*, Case 6/64, ECLI:EU:C:1964:66

<sup>18</sup> See, point 9 of the TRIS notification of the Draft Implementing Decree ("*Brief Statement of Grounds*") available on the following website: [https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search\\_detail&year=2020&num=410](https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search_detail&year=2020&num=410).

economy”.<sup>19</sup> However, this important objective can only be adequately pursued at the EU level. The issue of plastic pollution is not specific to a Member State.

The EU has asserted that, due to the transboundary nature of this problem, it is better placed to address it and has already taken action. The SUP Directive was adopted with the agreement of the Member States, which are represented in the Council of the EU. The reduction of plastic pollution in the aquatic environment features among the objectives mentioned in Article 1 of the SUP Directive. As explained below (section 3.3), the SUP Directive has already prohibited a series of SUP products.

While France must of course implement the SUP Directive, going above and beyond the requirements of the SUP Directive is likely to undermine the system established by the SUP Directive (section 3.2 to section 3.4) and to be disproportionate with the objectives pursued (section 4.2.3).

In addition, by taking unilateral action going far beyond the SUP Directive, France may not comply with the principle of sincere cooperation. This principle, which is enshrined in Article 4(3) TEU, reads as follows:

*“the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

*The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”*

Attempting to outpace the EU by adopting SUP bans while the EU is still defining the scope of its own SUP measures (which pursue the same objectives) is not consistent with France's duty of sincere cooperation. The Commission recently indicated in an answer to a parliamentary question that SUP guidelines, which will include “examples of what is to be considered as a single-use plastic product for the purposes of [the SUP Directive]”,<sup>20</sup> are “currently under preparation”.<sup>21</sup> France is aware of this development since, pursuant to Article 12 of the SUP Directive, these guidelines are adopted “in consultation with Member States”.

Finally, while both the French measures and the SUP Directive seek to promote the environment, they differ on an important issue. Article 1 of the SUP Directive expressly provides that the measures taken to fight against plastic pollution will also be “contributing to the efficient functioning of the internal market”. By contrast, France disregards this objective by unilaterally blocking a series of SUP products from its national market. It is therefore questionable whether France assists the EU in protecting the internal market and fulfils its obligation to ensure the free movement of goods under Articles 34-36 TFEU. In other words,

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<sup>19</sup> See, point 9 of the TRIS notification of the Draft Implementing Decree (“Brief Statement of Grounds”) available on the following website: [https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search\\_detail&year=2020&num=410](https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search_detail&year=2020&num=410).

<sup>20</sup> Article 12 of the SUP Directive.

<sup>21</sup> See, parliamentary question E-003229/2020 of 27 May 2020 and its answer provided on 12 August 2020, available on the website of the European Parliament: [https://www.europarl.europa.eu/doceo/document/E-9-2020-003229-ASW\\_EN.html#ref3](https://www.europarl.europa.eu/doceo/document/E-9-2020-003229-ASW_EN.html#ref3).

France's decision to impose unilaterally a broader ban on SUP products does not comply with its duty to cooperate sincerely with the EU.

The principle of precedence of EU law over national law, the principle of subsidiarity and the principle of sincere cooperation therefore require that this issue be dealt with at the EU level.

### **3. INCOMPATIBILITY OF THE LAW ON CIRCULAR ECONOMY AND OF DRAFT IMPLEMENTING DECREE WITH EU SECONDARY LEGISLATION**

The Law on Circular Economy and the Draft Implementing Decree depart from the following directives:

- European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (*Packaging and Packaging Waste Directive*); and
- Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (*SUP Directive*).

#### **3.1 The restrictions and complete ban on plastic packaging violate the Packaging and Packaging Waste Directive**

Article 7, Article 66 and Article 77 of the Law on Circular Economy all include significant restrictions on the placing on the French market of packaging authorised in other Member States:

- Article 7 of the Law on Circular Economy lays down a general ban on all single-use plastic packaging on the French market by 2040;
- Article 66 of the Law on Circular Economy decreases by half the number of SUP beverage bottles placed on the French market by 2030; and
- Article 77 and the Draft Implementing Decree bans several products, some of which are packaging. It provides that, as of 1 January 2022, unprocessed fresh fruit and vegetables displayed for sale will be displayed without packaging made up in whole or in part of plastic. In addition, Article 77 will also prohibit, as of 1 January 2022, the placing on the French market of non-biodegradable plastic tea and herbal tea bags.

These provisions constitute a clear violation of the free movement clause spelled out in Article 18 of the Packaging and Packaging Waste Directive which states that "*Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive*".

Article 18 of the Packaging and Packaging Waste Directive must be regarded as laying down a form of maximum harmonisation in that it does not enable Member States to adopt more restrictive or simply different rules from those of the Directive.<sup>22</sup> As a result, Member States cannot ban unilaterally forms of packaging which satisfies the Packaging and Packaging Waste Directive.

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<sup>22</sup> Judgment of 11 December 2003, *Deutscher Apothekerverband*, Case C-322/01, ECLI:EU:C:2003:664, para. 144. See also, judgment of 5 April 1979, *Tullio Ratti*, Case 148/78, ECLI:EU:C:1979:110, para. 33, where the CJEU held that Directive 73/173 on the packaging and labelling of dangerous substances precluded Member States from prescribing "*obligations and limitations which are more precise and detailed than, or at all events different from, those set out in the directive*".

Additionally, Article 18 of the Packaging and Packaging Waste Directive does not allow the reduction by half of the number of SUP beverage bottles by 2030 as this measure necessarily entails that obstacles will prevent producers from freely placing forms of legitimate packaging on the French market. While some packaging will still be allowed, some will be blocked in one way or another in order to reach the 50% reduction objective. As a result, producers will not be allowed to freely market in France packaging that complies with the Packaging and Packaging Waste Directive and that is legally sold in other Member States.

It results from established case law of the CJEU that if a European Union legislative instrument provides for maximum harmonisation, Member States cannot rely on Article 36 TFEU or on the mandatory requirements recognised by the case law of the CJEU to justify any deviation from EU harmonised legislation.<sup>23</sup> Since the French measures deviate from the harmonised provision set out in the Packaging and Packaging Waste Directive, they are unlawful, and it is not necessary to assess whether they can be justified on environmental grounds.

Therefore, the Law on Circular Economy and the Draft Implementing Decree violate Article 18 of the Packaging and Packaging Waste Directive and this breach cannot be justified by the objective of protecting the environment.

### 3.2 The SUP Directive does not allow for a blanket prohibition on all SUP packaging

In Article 66 of the Law on Circular Economy, France has set itself “*the objective of reducing by 50% the number of single-use plastic beverage bottles placed on the market by 2030*”.<sup>24</sup> Moreover, Article 7 of the Law on Circular Economy provides that “*France aims to put an end to the commercialisation of single-use plastic packaging by 2040*”.<sup>25</sup>

These objectives do not appear anywhere in the SUP Directive.

While Article 4(1) of the SUP Directive imposes a “*sustained reduction in the consumption*” of certain SUP products, the list of products concerned does not include SUP beverage bottles, for which the SUP Directive recognises that the solution is “*to promote more effective separate collection systems*” (see, below, section 3.4).<sup>26</sup>

More generally, Article 1 of the SUP Directive provides that “[t]he 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”.

While the objective of preserving the environment implies avoiding to a large degree the disposal of plastic (or any other non-degradable substance) in nature, it does not necessarily require a ban on all SUP

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<sup>23</sup> Judgment of 5 October 1977, *Tedeschi v. Denkavit*, Case C-5/77, ECLI:EU:C:1977:144; judgment of 14 July 1998, *Aher-Waggon*, Case C-389/96, ECLI:EU:C:1998:357.

<sup>24</sup> Free translation from the original French text: « *La France se donne également pour objectif de réduire de 50 % d'ici à 2030 le nombre de bouteilles en plastique à usage unique pour boisson mises sur le marché.* »

<sup>25</sup> Free translation from the original French text: « *La France se donne pour objectif d'atteindre la fin de la mise sur le marché d'emballages en plastique à usage unique d'ici à 2040* ».

<sup>26</sup> Recital 27 of the SUP Directive.

products. This is precisely why the SUP Directive does not impose a ban, except for a limited number of products.

Additionally, Article 1 of the SUP Directive explicitly indicates that while protecting the environment is important, this should not be done in disregard of the rules of the TFEU establishing the internal market. Article 1 specifies that Member States must adopt measures “*also contributing to the efficient functioning of the internal market*”. As explained below (section 4.1), a measure as far-reaching as a complete ban on types of products not listed in the SUP Directive significantly impedes the functioning of the internal market and therefore does not “contribute to its efficient functioning”.

### **3.3 The scope of the ban established by the Law on Circular Economy and the Draft Implementing Decree is much broader than what the SUP Directive permits**

The number of products covered by the ban on SUP introduced by the Law on Circular Economy and the Draft Implementing Decree is much larger than the range of products banned by the SUP Directive.

Article 5 of the SUP Directive provides for an EU wide ban by 3 July 2021 on selected plastic products listed in Part B of the Annex to the SUP Directive. This list includes (1) cotton bud sticks, (2) cutlery (forks, knives, spoons, chopsticks), (3) plates, (4) straws, (5) beverage stirrers, (6) sticks to be attached to and to support balloons, (7) food containers made of expanded polystyrene, (8) beverage containers made of expanded polystyrene, including their caps and lids, and (9) cups for beverages made of expanded polystyrene, including their covers and lids.

By contrast, Article L541-15-10 of the Environmental Code (as amended by Article 77 of the Law on Circular Economy) establishes a ban not only on these products but also:

- as of 1 January 2020, on all beverage cups and glasses (and not only beverage containers made of expanded polystyrene);
- as of 1 January 2021, on (i) plastic confetti (*confettis en plastique*), (ii) steak spikes (*piques à steak*), (iii) disposable glass lids, and (iv) table utensil similar to forks, knives, spoons, chopsticks used to pick up, cut or mix food; and
- as of 1 January 2022, on (i) packaging for unprocessed fresh fruit and vegetables displayed for sale, and (ii) non-biodegradable plastic tea and herbal tea bags.

And, as explained above, this ban will be extended to a reduction of half the SUP beverage bottles by 2030 (Article 66 of the Law on Circular Economy) and to a complete ban on all SUP packaging by 2040 (Article 7 of the Law on Circular Economy).

This extension of the list of banned SUP products is unlikely to satisfy the proportionality principle. As explained above, the ban provided for by the SUP Directive pursues the same objective as the French measures, *i.e.*, the prevention of plastic pollution and the transition to a circular economy. The SUP Directive thus harmonised this matter.

In addition, the SUP Directive is not yet applied in the Member States of the EU. As a result, there can be no evidence at this stage that the provisions of the SUP Directive do not suffice to reach this objective.

Deciding to impose stricter – and thus more burdensome – measures without assessing first the effectiveness the measures already adopted at the EU level is disproportionate.

### **3.4 SUP beverage bottles do not feature in the list of products for which sustained reduction should be pursued by Member States under the SUP Directive**

Article 4(1) of the SUP Directive provides that:

*“Member States shall take the necessary measures to achieve an ambitious and sustained reduction in the consumption of the single-use plastic products listed in Part A of the Annex”.*

The objective of sustained reduction is therefore limited to products included in Part A of the Annex to the SUP Directive.

Part A of the Annex to the SUP Directive concerns cups for beverages and certain types of food containers. This list does not include SUP beverage bottles.

Nonetheless, France decided to halve the number of SUP beverage bottles on the French market by 2030, as set out in Article 66 of the Law on Circular Economy. This amounts to adding SUP beverage bottles to Part A of the Annex to the SUP Directive.

This unilateral choice made by France of adding SUP beverage bottles to a category where it does not belong is inconsistent with the SUP Directive. SUP beverage bottles are already regulated in the SUP Directive. They are included in four of the seven parts of the Annex to the SUP Directive. Under the SUP Directive, SUP beverage bottles are subject to product requirements (Article 6), to the principle of extended producer responsibility (Article 8(2)), to a separate collection objective (Article 9) and to awareness raising measures (Article 10).

By subjecting SUP beverage bottles to a further type of regulation, France disrupts the system established by the SUP Directive and undermines the harmonisation sought by the European legislator. France therefore does not appropriately implement the SUP Directive.

In doing so, France also adds an unnecessary burden on the producers concerned as they would not only be subject to the existing obligations applicable to SUP beverage bottles under the SUP Directive but to the obligations and restrictions inherent to other categories of products to which SUP beverage bottles do not belong. A half-ban on already heavily regulated products is not consistent with the findings of the Impact Assessment on the SUP Directive, which reads: *“for items for which legislation already exists (bottles) or without substitutes (cigarette butts, ...) then the best measures may be soft measures such as awareness raising and producer’s responsibility to pay for clean-up”*.<sup>27</sup>

Finally, the reduction by 50% of the number of SUP beverage bottles is not justified by the objective stated in the TRIS notification of decreasing marine litter. As mentioned in the SUP Directive, marine pollution linked to SUP beverage bottles *“is due to ineffective separate collection systems and low participation in*

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<sup>27</sup> Commission Staff Working Document, *Impact Assessment “Reducing Marine Litter: action on single use plastics and fishing gear” Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment*, SWD(2018) 254 final, 28.5.2018, p. 44.

*those systems by consumers*".<sup>28</sup> As explained below (section 4.2.2), and as indicated in the SUP Directive, solving this problem therefore requires "*to promote more effective separate collection systems*".<sup>29</sup>

### **3.5 The Law on Circular Economy and its Draft Implementing Decree prohibit SUP products at an earlier time than is required by the SUP Directive**

The Law on Circular Economy prohibits the placing on the market of several SUP products covered by Article L541-15-10 on 1 January 2021. By contrast, Article 17 of the SUP Directive provides that Member States must apply the measures necessary to comply with Article 5 (which prohibits the placing on the market of the SUP products included in Annex B of the SUP Directive) from 3 July 2021 onwards.

Article 17 of the SUP Directive must be interpreted as preventing Member States from imposing a ban on SUP products before 3 July 2021. In any case, the date provided for in the Law on Circular Economy (1 January 2021) is unreasonable and disproportionate in that it does not enable producers of such products to prepare for the entry into force of the ban.

### **3.6 The Draft Implementing Decree infringes the principle of legal certainty**

The Draft Implementing Decree provides that the scope of the ban established by Article 77 of the Law on Circular Economy extends to plastic products with "*durability, resistance and solidity properties comparable to those of single-use products*".<sup>30</sup> However, the Draft Implementing Decree makes clear that products "*designed, created and placed on the market to fulfil several journeys or cycles*" do not fall under this prohibition.<sup>31</sup>

However, the Law on Circular Economy and the Draft Implementing Decree do not specify what constitutes a degree of durability, resistance or solidity which is "comparable" to that of SUP products. In addition, while it seems logical to consider that products that were created to fulfil several journeys or cycles should not be considered to be single-use products, it is unclear how this exclusion from the scope of the Law on Circular Economy intersects with the inclusion of products "comparable" to single-use products in the scope of the Law on Circular Economy.

This legal uncertainty is even more detrimental to the producers concerned as the Law on Circular Economy includes bans which start to apply on 1 January 2021, *i.e.*, in less than four months, which increases the pressure placed on producers (see, section 3.5 above).

## **4. INCOMPATIBILITY OF THE DRAFT IMPLEMENTING DECREE AND THE LAW ON CIRCULAR ECONOMY WITH EU INTERNAL MARKET RULES**

Articles 34-36 of the TFEU prohibit national measures that create unnecessary and unjustified technical barriers to trade within the EU. The following sections show that the measures adopted by France and

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<sup>28</sup> Recital 27 of the SUP Directive.

<sup>29</sup> *Ibidem*.

<sup>30</sup> See, Article 1, 7° of the Draft Implementing Decree: "*L'interdiction de mise à disposition de produits en plastique à usage unique mentionnée aux 1° et 2° du III de l'article L. 541-15-10 s'applique également aux produits en plastique qui présentent des performances de durabilité, de résistance, et de solidité comparables à celles de produits à usage unique. Les produits conçus, créés et mis sur le marché pour accomplir, pendant leur durée de vie, plusieurs trajets ou rotations en étant retournés à un producteur pour être remplis à nouveau ne sont pas concernés par cette interdiction*".

<sup>31</sup> *Ibidem*.

described in section 1 create obstacles to intra-EU trade and cannot be justified based on a legitimate objective.

#### **4.1 The Draft Implementing Decree and the Law on Circular Economy restrict the free movement of goods within the EU**

National measures that are capable of hindering, directly or indirectly, actually or potentially, trade between Member States are deemed to be measures having an effect equivalent to quantitative restrictions and are therefore prohibited.<sup>32</sup> The following measures laid down in the Draft Implementing Decree and in the Law on Circular Economy affect companies active in intra-EU trade and thus constitute measures equivalent to a quantitative restriction:

- The general ban on all SUP packaging set out in Article 7 of the Law on Circular Economy;
- The reduction by half (in other words, the ban on half) of the SUP beverage bottles placed on the French market provided for in Article 66 of the Law on Circular Economy; and
- The ban on several selected products listed in Article 77 of the Law on Circular Economy (described in section 1.1).

Prohibiting the commercialisation of specific goods is the measure most restrictive of the free movement of goods. Producers established outside of France will be unable to market their products in France under any circumstances, while such restrictions do not exist in other countries. The French provisions thus disregard the principle of mutual recognition, according to which Member States must authorise in their territory products which are lawfully manufactured and marketed in other Member States of the EU.

The case law of the CJEU makes it clear that, when a Member State adopts a measure equivalent to a quantitative restriction (in other words, a measure which restricts the freedom of movement within the internal market), it bears the burden to prove that this restriction is justified.<sup>33</sup>

It is established case law that, when a Member State adopts a measure restricting intra-EU trade, such restriction can be justified only when (i) the Member State has a legitimate reason to adopt it, (ii) the measure is suitable to achieve the legitimate objective pursued, and (iii) the measure is proportionate. These conditions are analysed below.

#### **4.2 The restrictions of the free movement of goods cannot be justified**

Measures which have an effect equivalent to quantitative restrictions of intra-EU trade may be allowed if they are justified by the non-economic considerations of general interest included in Article 36 TFEU or established in the case law of the European Courts (the so-called “mandatory requirements”). These exceptions are interpreted strictly and must be suitable and proportionate to attain the legitimate objective. Nonetheless, the restrictions created by the Law on Circular Economy and the Draft Decree are not justified.

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<sup>32</sup> Judgment of 11 July 1974, *Dassonville*, Case 8/74, ECLI:EU:C:1974:82; judgment of 15 November 2005, *Commission v. Austria*, Case C-320/03, ECLI:EU:C:2005:684.

<sup>33</sup> Judgment of 23 December 2015, *Scotch Whisky Association and Others*, Case C-333/14, ECLI:EU:C:2015:845, paras 51-54 and case law cited.

#### 4.2.1 Legitimate objective

As regards the objective of the measures introduced by France, the presentation of the Draft Implementing Decree on the TRIS platform of the Commission provides that: “[t]he main way of fighting plastic pollution is by taking action to prevent the production of waste. Reducing the use of single-use plastic products, which is part of a broader strategy of transition to the circular economy, is a priority for the French authorities. Since 2018, several laws have strengthened the legislation introduced by the Law of 17 August 2015 on the energy transition for green growth by aiming to prohibit the making available of a number of single-use plastic products. The Law of 10 February 2020 against waste and for a circular economy includes various measures to eliminate disposable, single-use plastic products.”<sup>34</sup>

Hence, by adopting Article 77, and probably also Articles 66 and 7 (since these provisions only expand on the ban provided for by Article 77), of the Law on Circular Economy and by adopting the Draft Implementing Decree, France seeks to contribute to the transition to a circular economy. It can be inferred from this short explanation that France seeks to protect the environment, which has been recognised as a legitimate objective (called “mandatory requirement”) in the case law of the CJEU.<sup>35</sup> However, France does not demonstrate that the restrictions are suitable and proportionate to achieve the legitimate objective of protecting the environment (see, sections 4.2.2 and 4.2.3).

#### 4.2.2 The restrictions are not suitable to achieve the legitimate objective

France does not show that the measures contained in Articles 7, 66 and 77 of the Law on Circular Economy and in the Draft Implementing Decree are suitable to achieve the objective of protecting the environment.

Products banned under Article 5 of the SUP Directive are clearly listed as constituting the products that are found the most on beaches in the Union.<sup>36</sup> France provides no explanation as to why it has chosen to ban the marketing of the specific products listed in Article 77 of the Law on Circular Economy or as to why this extensive ban is suitable to attain the wider objective of contributing to the development of the circular economy or to the protection of the environment.

Likewise, France does not explain how a 50% reduction of the number of SUP beverage bottles on the French market by 2030 will prevent marine litter. Producing or selling SUP products does not necessarily mean that these products will end up in the seas or wash up on beaches. A robust collecting and recycling system may be a more suitable measure to ensure that SUP products are being appropriately disposed of. This is confirmed by Recital 27 of the SUP Directive, which explains that SUP beverage bottles found on the beaches of the EU are “*due to ineffective separate collection systems and low participation in those systems by consumers. It is necessary to promote more effective separate collection systems*”.

The same can be said of the general ban of all SUP packaging by 2040. France does not establish that all types of SUP packaging are found in the seas and oceans. As a result, banning all SUP does not seem appropriate. And again, while banning all SUP packaging may seem at first sight to constitute an effective solution to marine litter, this SUP packaging will be replaced by alternatives which may end up in seas and

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<sup>34</sup> See, <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=400>

<sup>35</sup> Judgment of 1 July 2014, *Alands Vindkraft*, Case C-573/12, ECLI:EU:C:2014:2037, para. 77; judgment of 20 September 1988, *Commission v Denmark*, Case 302/86, ECLI:EU:C:1988:421, para. 9; judgment of 14 July 1998, *Aher-Waggon*, Case C-389/96, ECLI:EU:C:1998:357, para. 19.

<sup>36</sup> See, SUP Directive, recital 7.

oceans in the absence of a well-functioning collecting and recycling system. In other words, marine litter can only be avoided by ensuring that waste does not end up in nature.

Finally, the protection of the environment cannot be achieved by EU Member States alone in the absence of EU harmonisation measures. The SUP Directive states that *“the objectives [...], namely to prevent and to reduce the impact of certain single-use plastic products, products made from oxo-degradable plastic and fishing gear containing plastic on the environment and on human health, and to promote the transition to a circular economy, including the fostering of innovative and sustainable business models, products and materials, thus also contributing to the efficient functioning of the internal market, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level”*.<sup>37</sup>

### 4.2.3 The restrictions are not proportionate

Even if they rely on a mandatory requirement (such as environmental protection), measures restricting the free movement of goods must comply with the principle of proportionality. The Member State concerned bears the burden of proving that the objective pursued by the ban cannot be achieved by any other means that has a less restrictive effect on intra-EU trade. This raises several issues.

First, according to established case law of the CJEU<sup>38</sup>, the Member States must demonstrate that the justification on which they rely cannot be achieved through less restrictive means. France cannot simply argue that the protection of the environment constitutes an overriding mandatory requirement. It must rather offer *“an analysis of the appropriateness and proportionality of the measure adopted”* and *“specific evidence substantiating its arguments”*.<sup>39</sup> The TRIS notification, the Draft Implementing Decree and Article 77 of the Law on Circular Economy do not offer any explanation for the choice made by France to resort to these significantly restrictive measures. The objective of protecting the environment is better served through the solid common ground of established EU legislation and principles, of which the free movement of goods is a cornerstone.

Second, the SUP Directive is still being transposed in the Member States. It will only begin to apply as of 3 July 2021 (as regards Article 5, which bans several SUP products). It is therefore much too early to reach the conclusion, as France seems to do, that the SUP Directive is insufficient and does not reach its objective. Acting prematurely to adopt stricter measures before having fully tested the effects of the SUP Directive results in unnecessarily burdens on the companies affected by these measures.

Third, if France considers it necessary to act beyond the scope of the SUP Directive (despite the above considerations), it can resort to viable and less restrictive alternatives which include, for instance, the following approaches:

- Strategies to reduce littering.
- Measures encouraging investments in collection, sorting and recycling technologies and infrastructure.

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<sup>37</sup> Recital 36 of the SUP Directive.

<sup>38</sup> Judgment of 23 December 2015, *Scotch Whisky Association and Others*, Case C-333/14, ECLI:EU:C:2015:845, paras 51-54 and case law cited.

<sup>39</sup> Judgment of 26 April 2012, *ANETT*, Case C-456/10, ECLI:EU:C:2012:241, para. 50.

- Consumer information campaigns on France's recycling system to avoid that single-use plastic products end up in the environment because of inappropriate disposal.

In particular, regarding the prohibition to distribute free plastic bottles in public places and at professional premises and the invalidity of contractual clauses providing for the supply of SUP bottles in festive, cultural or sporting events, the SUP Directive notes that plastic bottles are frequently found on beaches in the Union "*due to ineffective separate collection system and low participation in those systems by consumers*".<sup>40</sup> Therefore, investing in the development of separate collection systems and ensuring that consumers are adequately informed about these systems represents an adequate alternative means to reach the objective of contributing to the circular economy.

Fourth, the timing of the measures taken by France is extremely tight. The Law on Circular Economy prohibits the placing on the market of several SUP products targeted by Article L541-15-10 as of 1 January 2021 or 1 January 2022. The Draft Implementing Decree that lays down the exact definitions of some of these SUP products has not yet entered into force. Many producers are therefore completely unaware if they are affected by these provisions, even though some of them will enter into force in only a few months. This schedule does not serve legal certainty. In addition, the date of 1 January 2021 is disproportionate as it does not enable producers active in intra-EU trade to take the appropriate steps to prepare for the national marketing restrictions imposed by France.

Given the above, France has not shown that the measures introduced by the Draft Implementing Decree and by Articles 7, 66 and 77 of the Law on Circular Economy, which constitute obvious restrictions to the free movement of goods, are proportionate with the objective of protecting the environment.

## 5. ARTICLES 7, 66 AND 77 OF THE LAW ON CIRCULAR ECONOMY SHOULD HAVE BEEN NOTIFIED TO THE COMMISSION

### 5.1 The obligation to notify technical regulations to the Commission

Pursuant to Article 5 of Directive 2015/1535<sup>41</sup>, Member States must notify to the Commission any national measure that constitutes a technical regulation before its adoption in national law. Technical regulations include (i) technical specifications<sup>42</sup>, (ii) other requirements<sup>43</sup>, (iii) rules on services<sup>44</sup> and (iv) regulations prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use

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<sup>40</sup> Recital 27 of the SUP Directive.

<sup>41</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, *OJ L* 241, 17.9.2015, p. 1-15.

<sup>42</sup> Defined in Article 1(1)(c) of Directive 2015/1535 as "*a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures*".

<sup>43</sup> Defined in Article 1(1)(d) of Directive 2015/1535 as "*a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing*".

<sup>44</sup> Defined in Article 1(1)(e) of Directive 2015/1535 as a "*requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b) [Information Society service], in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point*".

of a service, or establishment as a service provider.<sup>45</sup> Articles 7, 66 and 77 of the Law on Circular Economy should have been notified to the Commission

It results clearly from the above definitions that Articles 7, 66 and 77 of the Law on Circular Economy, constitute a regulation “*prohibiting the manufacture, importation, marketing or use of a product*”.

While Article 7 of the Law on Circular Economy is rather broadly drafted and requires the adoption of other implementing decrees, its objective is clear: the removal of all SUP packaging from the French market by 2040. The CJEU held that the need to define a measure in more detail through implementing measures does not imply that this measure can escape the notification obligation: the Court held that a rule is “*classified as a technical regulation for the purposes of Directive 83/189 [current Directive 2015/1535] if it has legal effects of its own.*”<sup>46</sup> The CJEU also ruled that a national measure “*which includes a prohibition on the marketing of products which are not manufactured in accordance with a national standard*” constitutes a technical regulation.<sup>47</sup> Article 7 prohibits all SUP packaging by 2040, which corresponds to this definition of prohibition on the marketing of products. It is even stricter as France prohibits all SUP packaging by 2040 irrespective of its compliance with any standard.

The same can be said of Article 66: it provides for a drastic reduction (by half) of the number of SUP beverage bottles by 2030. This measure entails a ban on half the SUP beverage bottles, which constitutes a prohibition on the marketing of products which will be removed from the French market.

Likewise, Article 77 is a technical regulation that should have been notified to the Commission. The Draft Implementing Decree amends Article D543-294 of the French Environmental Code, which lays down the definitions of the concepts used in Article L541-15-10 and the exact scope of the ban laid down by that provision. However, it is in fact Article 77 of the Law on Circular Economy which lays down the ban on the marketing of several SUP products.

Consequently, Articles 7, 66 and 77 of the Law on Circular Economy constitute a technical regulation. Limiting the notification to the Draft Implementing Decree therefore violates the TRIS Directive. It also prevents the Commission and the interested parties willing to make comments from expressing a comprehensive view on the measure introduced by France, the key content of which is contained in Articles 7, 66 and 77 of the Law on Circular Economy. This, in turn, jeopardises the effectiveness of the TRIS consultation procedure, which is intended to help the Commission and stakeholders identify the measures which create obstacles to trade within the EU.

### **5.2 Articles 7, 66 and 77 of the Law on Circular Economy cannot be enforced against individuals**

The CJEU has consistently held that technical regulations which were not notified to the Commission cannot be applied to or enforced against individuals. In *CIA Security*, the CJEU held that the “*breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals*”.<sup>48</sup> It also results from *Sapod Audic* that the inapplicability of a technical regulation which

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<sup>45</sup> Commission, TRIS, *What is a technical regulation?*, available at <https://ec.europa.eu/growth/tools-databases/tris/en/about-the-20151535/what-is-a-technical-regulation/>.

<sup>46</sup> Judgment of 30 April 1996, *CIA Security International*, Case C-194/94, ECLI:EU:C:1996:172, para. 29.

<sup>47</sup> Judgment of 8 September 2005, *Lidl Italia*, Case C-303/04, ECLI:EU:C:2005:528, para. 14.

<sup>48</sup> Judgment of 30 April 1996, *CIA Security International*, Case C-194/94, ECLI:EU:C:1996:172, paras 48-54, *see also*, judgment of 19 December 2019, *Airbnb Ireland*, Case C-390/18, ECLI:EU:C:2019:1112, para. 88.

was not notified may be invoked in legal proceedings opposing private parties and relating to their contractual rights and duties.<sup>49</sup> Consequently, companies affected by this measure are entitled to invoke the inapplicability and unenforceability of a law that was not notified under the TRIS procedure if they are affected by some provisions of that law.

Thus, since France failed to notify Articles 7, 66 and 77 of the Law on Circular Economy to the Commission, neither France nor individuals can invoke that provision against other individuals or businesses. Since the Draft Implementing Decree is based on these provisions, it becomes equally unenforceable and inapplicable.

## **6. CONCLUSION AND REQUEST TO THE COMMISSION**

Our findings can be summarised as follows:

Article 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree go beyond the requirements of both the Packaging and Packaging Waste Directive and the SUP Directive. They impose unilateral restrictions on the placing of products on the French market and constitute clear violations of the free movement clause spelled out in Article 18 of the Packaging and Packaging Waste Directive which states that “*Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive*”. The principle of precedence of EU law prohibits national legislation that contradicts EU Treaties or EU legislation. As a result, France infringed EU law by adopting Articles 7, 66 and 77 of the Law on Circular Economy (and will infringe EU law if it adopts the Draft Implementing Decree) and these provisions cannot be applied by the French courts.

- The TRIS notification shows that France’s objective is to fight marine pollution. However, this important objective can only be adequately pursued at the EU level. The issue of plastic pollution is not specific to a Member State. The EU has asserted that, due to the transboundary nature of this problem, it is better placed to address it and has already taken action. The EU has adopted the SUP Directive to pursue the same objectives as the French Law on Circular Economy and the Draft Implementing Decree. In addition, the European Commission and the Member States are currently working on a definition of SUP products subject to the SUP Directive. France should support this harmonising effort to address marine pollution. Adopting measures in parallel at the national level, before the SUP guidelines are adopted and before the SUP Directive is applied by the Member States, does not comply with France’s duty of sincere cooperation.
- Articles 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree infringe several provisions of the Packaging and Packaging Waste Directive and the SUP Directive.
  - These provisions manifestly infringe Article 18 of the Packaging and Packaging Waste Directive which prohibits restrictions to the placing on the market of packaging which satisfies the conditions of the directive.

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<sup>49</sup> Judgment of 2 June 2002, *Sapod Audic*, Case C-159/00, ECLI:EU:C:2002:343, paras 50 and 53.

## VAN BAEL & BELLIS

- Articles 7 and 66 of the Law on Circular Economy also set out a blanket prohibition of all SUP packaging and a reduction by half of SUP beverage bottles that do not appear anywhere in the SUP Directive.
  - The scope of the ban established by the Law on Circular Economy and its Draft Implementing Decree is much broader than what the SUP Directive permits.
  - Article 66 of the Law on Circular Economy applies to SUP beverage bottles a 50% reduction while the SUP Directive excludes SUP beverage bottles from the sustained reduction objective set out in its Article 4(1).
  - The Law on Circular Economy and the Draft Implementing Decree prohibit SUP products at an earlier time than the SUP Directive, which is not proportionate.
  - The Draft Implementing Decree extends the application of the Law on Circular Economy to products with durability, resistance and solidity properties “*comparable to those of single-use products*”, while excluding products designed, created and placed on the market “*to fulfil several journeys or cycles*” without specifying how these two provisions intersect. This creates a level of legal uncertainty for producers which is particularly unacceptable considering that some of the bans included in the Law on Circular Economy start applying on 1 January 2021.
- Articles 7, 66 and 77 of the Law on Circular Economy and the Draft Implementing Decree infringe the internal market rules. Bans (or partial bans, such as provided by Article 66) are the most extreme form of obstacle to trade possible and France has not established that such a significant restriction is justified. While the protection of the environment is indeed a legitimate objective (“mandatory requirement”), France has not established that a prohibition of SUP products is suitable to achieve this objective. In addition, this objective has already been served by the recent adoption of the SUP Directive, which is still in the implementation stage and has thus not yet had a chance to curtail pollution. As a result, the French measures are disproportionate.
  - Articles 7, 66 and 77 of the Law on Circular Economy were not notified to the Commission and other interested parties through the TRIS system, in breach of the TRIS Directive. As a result, not only these provisions but also the Draft Implementing Decree that relies on them, are unenforceable and inapplicable.

We therefore submit the following requests to the Commission:

- We request the Commission to adopt a detailed opinion concluding that the notified Draft Implementing Decree may create barriers to the free movement of goods and violates EU secondary legislation. By extending the standstill period by six months following the TRIS notification in accordance with Article 6(2) of the TRIS Directive (*i.e.*, three months following the end of the three-month standstill period), this detailed opinion will provide France with the opportunity to explain how it intends to address the issues identified above.
- Additionally, considering that (i) the Draft Implementing Decree implements measures that are more stringent than the SUP Directive; (ii) the SUP Directive, which pursues the same objectives as the French measures, has not yet started to apply; and (iii) the Commission is currently preparing guidelines defining the scope of the SUP Directive, we request the Commission to ask France to refrain from adopting the Draft Implementing Decree for a period of twelve months following the TRIS notification, in accordance with Article 6(3) of the TRIS Directive.

## **VAN BAEL & BELLIS**

- Finally, we request the Commission to inform France that Articles 7, 66 and 77 of the Law on Circular Economy infringe EU law and to request France to explain (i) why it did not notify the Law on Circular Economy following the TRIS procedure despite the fact that it restricts intra-EU trade; and (ii) the measures which it intends to take in order to make the Law on Circular Economy compatible with EU law.
-