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**15 February 2024**

**EU Law Compliance of Annex V Rows 1 and 2  
to the PPWR**

**- Executive Summary -**

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## EXECUTIVE SUMMARY

### Scope of our legal review.

European Plastic Converters, IK Industrievereinigung Kunststoffverpackungen e.V. and La société ELIPSO LES ENTREPRISES DE L'EMBALLAGE PLASTIQUE ET SOUPLE have asked Dentons to assess the European Union (“EU”) law compliance of Annex V Rows 1 and 2 in the various drafts of the EU Packaging and Packaging Waste Regulation (“PPWR”). Insofar as the initial Commission proposals have been retained (in exact wording or in spirit) by the Council and the EP with respect to measures regarding plastics, reference is made to “Draft PPWR”. We specifically reviewed

- the European Commission’s (“**Commission**”) original proposal on 30 November 2022 (“**PPWR COM**”, [link](#)),
- the amendments proposed by the EU Parliament (“**EP**”) on 22 November 2023 (“**PPWR EP**”, [link](#)) and
- the amendments proposed by the Council of the EU (“**Council**”) on 18 December 2023 (“**PPWR Council**”, [link](#)).

### Summary.

We summarize the results of our review as follows:

**Applicable legal standard.** As an EU regulation, the PPWR is secondary EU law and must therefore comply with EU primary law and EU legal principles.

- **Substantive legal standard.** The substantive EU legal principle that is most important for the assessment of the PPWR’s compatibility with EU law is the **principle of equal treatment**, which EU jurisprudence applies to EU legislation in close interrelation with the **principle of proportionality** and with substantive principles such as the **principle of protecting the environment**. Under the principle of equal treatment, comparable circumstances must be treated equally (and different circumstances must not be treated in the same way), unless there is an objective justification for differential (or equal, respectively) treatment. In this regard, the EU legislature has discretion, however, with certain limits. In particular, the **objective justification for differential treatment must be “appropriate to the aim pursued by the legislation in question, [...] taking into account all the available facts and scientific data available”** (ECJ, C-127/07, para. 58, [link](#)). When implementing environmental policies, the legislature is obliged to respect the EU’s environmental principles, objectives and criteria set out in, inter alia, Art. 11, 191 of the Treaty on the Functioning of the European Union (“**TFEU**”), Art. 3(3) of the Treaty on European Union, Art. 37 of the Charter of Fundamental Rights of the European Union, which closely relate to the principles of equal treatment and proportionality.
- **Procedural legal standard.** Under the EU principle of proper legislative procedure, the EU legislature must **factually exercise its discretion**, a prerequisite for which is “*taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate*” (ECJ, C-5/16, para. 152, [link](#)) and to that end, as a rule, the **preparation of impact assessments**.

- **Consequences.** If any provisions that violate the substantive or procedural legal standards set out above are adopted in the PPWR, the companies affected by them can invoke this illegality before the EU courts – General Court and European Court of Justice – either directly by way of an action for annulment (Art. 263 TFEU) or an action for compensation for damage suffered (Art. 268 TFEU), or indirectly by way of an action before a national court. The court in question will in turn have to ask the European Court of Justice for a preliminary ruling (Art. 267 TFEU). Due to the economic significance of the provisions in Annex V Rows 1 and 2 PPWR and their scant or non-existent justification, it is to be expected that there will be numerous actions against them. The provisions in Annex V Rows 1 and 2 PPWR are therefore subject to annulment or clarification by the EU courts.

**Violations of EU law.** Annex V Row 1 Draft PPWR and Annex V Row 2 PPWR Council most likely violate both abovementioned legal standards.

- **Substantive.** According to the materials provided, Annex V Row 1 Draft PPWR and Annex V Row 2 PPWR Council most likely violate the EU principle of equal treatment, the principle of proportionality and EU's fundamental environmental principles because they discriminate against plastic packaging without any objective justification. The EU legislature has not demonstrated objective criteria for a ban on plastic packaging only. Contrary to the overarching initial approach of the PPWR COM, Annex V Row 1 Draft PPWR and Annex V Row 2 PPWR Council provide restrictive bans for plastic packaging but distinguish single-use grouped and fruit/vegetable packaging from other materials. This runs counter to the initial goals of the planned regulation, as well as EU's environmental principles. It will not induce a shift to multi-use packaging in those sectors, but instead to single-use packaging made of other materials, e.g., paper and cardboard packaging, which are often less sustainable compared to plastic packaging and which utilize significantly more resources and greenhouse gas emissions in single-use applications. Furthermore, the legislature has not considered less burdensome measures for economic operators in either case. Therefore, Annex V Row 1 Draft PPWR and Annex V Row 2 PPWR Council are not covered by the EU legislature's discretion.
- **Procedural.** Annex V Row 1 Draft PPWR and Annex V Row 2 PPWR Council appears to violate the EU principle of proper legislative procedure. The EU legislature has not considered all the relevant facts of the situation at hand. Specifically, with respect to B2B requirements in the case of Annex V Row 1 Draft PPWR (palletisation and safe transport) and B2C requirements in the case of Annex V Row 2 PPWR Council (food waste and related GHG emissions), the legislature has neither taken into account nor assessed whether imposing bans solely on plastic packaging will lead to a multitude of adverse ecological effects should it be replaced with paper and cardboard. It is therefore **evident that the EU legislature failed to properly exercise its discretion in full.**

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