

German (IK) /French (Elipso) Joint Opinion on the draft Commission guidance on the scope of the Single-Use Plastic Products Directive 2019/904 (as of April 2021)

We welcome the fact that the Commission is willing to adopt the guidelines, which should have been published in July 2020. Unfortunately, the current draft hardly differs from the previous draft on which we had already commented. In order to ensure a harmonised, compliant and proportionate application throughout Europe, the following aspects should be included or amended in the guidelines:

1. According to Article 12(1) of the Directive, only food packaging that has a "**tendency to become litter**, due to its volume or size, in particular single-serve portions" is covered by the Directive. We welcome the fact that the Commission - unlike in the previous version - now addresses the additional criterion for food packaging under Article 12 of the Directive. Unfortunately, the proposal on how to implement the criterion is neither in line with the Directive nor practicable: The idea to apply the 3-litre threshold for beverage containers "by analogy" also to rigid and flexible food packaging (see p. 12 and 15) raises the question of how a volume criterion should be applied to foodstuffs that are usually measured in grams and kilograms. Do three litres correspond to three kg or does the specific density of the food play a role? Moreover, there is not a single known case where the volume of a "single-serve portion", i.e. the "portion typically consumed by one person in one meal session" (see p. 12) even comes close to the three litre threshold. Instead, all single-serve portions have a much smaller volume. Therefore, the 3-litre threshold is unsuitable as a criterion for the "tendency to become litter". An interpretation of the Directive based on this proposal could lead to a drastic expansion of the scope of the directive, far beyond the area defined by the European legislator. We consider the proposal to be disproportionate and a danger to the free movement of goods in the internal market.

Due to the delay of the guidelines and the lack of a proper criterion, there is, in our opinion, a danger that the national implementation and application of the Directive will either neglect the criterion or apply it in different ways which would lead to distortions of competition and restrictions on the free movement of goods in the internal market. Regardless of the current draft, Member States and later the national courts do have to apply the additional criterion in Article 12(1) of the Directive.

Even though fixed limit values for single portions would be desirable in the sense of a harmonised application, the Directive does not prescribe limit values for single portions, but only mentions single portions as an example for the criterion of the tendency to become litter. Difficulties in measuring individual portions should therefore not lead to the criterion in Article 12(1) being practically ignored. For an application in conformity with the Directive, it is therefore imperative that the criterion of the tendency to become litter is listed in the tables of the guidelines.

The additional criterion of Article 12(1) of the Directive is also indispensable to ensure the proportionality of the rules on food packaging in Articles 4, 5, 8 and 10 of the Directive as well as the constitutionality of the corresponding national implementation measures. Without this criterion, national measures would be subject to considerable doubt as to their necessity and proportionality in the strict sense. For example, it would be disproportionate if distributors

of products that have a very low probability of being littered, such as yoghurt pots (see example on page 28), had to contribute to the costs of cleaning up public spaces (see Article 8 of the Directive).

We call on the Commission to introduce the criterion of the littering tendency, as explicitly provided for in Article 12(1) of the Directive, into the tables of the Guidelines 4-2 and 4-3.

2. Accordingly, the guidelines should clearly point out that **packaging with more than one portion** and so-called **multi-packs**, i.e. sales units of several single-portions, are excluded from the scope of the Directive. Recital 12 clearly states that “containers containing food in more than single-serve portions or single-serve portion-sized food containers sold in more than one unit [so called multipacks] are *not* to be considered single-use plastic products for the purposes of this Directive”. Therefore, a column should be added to the tables 4-2 and 4-3 where the criteria “more than one portion” and “multi-packs” are mentioned as exclusion criteria. The examples 2 and 3 in table 4-3 should be corrected accordingly and marked “EXCLUDED”. There is no reason for treating flexible food packaging different from rigid packaging. In order to apply a consistent approach, also multi-packs of beverage containers should be excluded in table 4-7.

3. The criterion "*intended for immediate consumption, either on-the-spot or take-away*" for food containers (p. 11) should be clarified as "*intended for immediate consumption **after purchasing***". Furthermore, the following sentence should be reintroduced: "***The product is sold on-the-spot or as take-away (e.g. fast-food restaurants, food trucks, vending machines) and therefore more prone to becoming litter.***" (cf. September version). Otherwise, products sold for consumption at home or at work, where there is no tendency for them to be littered into the environment, would also be included (see No. 1). Such an extension of the scope would not be covered by the purpose of the Directive to prevent littering and the impact assessment.

4 For these reasons, "**washing, peeling and cutting**" should also be considered as further preparation of the food (p. 11).

5. Unfortunately, a **differentiation between beverage cups and beverage containers** is still missing. However, unlike the previous versions, the draft contains a detailed overview of types of beverage cups (p. 28 f.). The third example in table 4-8 ("Cups sold in retail and wholesale stores made of 100% plastic for juices or alcohol containing drinks") is wrong in our view, as such pre-filled and sealed cups with beverages in retail stores are not beverage cups but beverage containers in the sense of the directive.

6. The example of a **yoghurt cup** on p. 30 should be deleted because such yoghurt cup is neither intended for immediate consumption after purchase (see no. 3 above), nor does it tend to be littered (see no. 1 above).

In view of the clear requirements in Article 3 No. 1 of the Directive, it is consistent that the guidelines cover single-use paper and board packaging coated with plastic if the coating has a specific function.