

**DG Environment study on the ex-post evaluation of the Packaging & Packaging Waste Directive (as part of the fitness check)
EUROPEN's preliminary response,
26 July 2013**

1. Has progress made in relation to the Packaging Directive dual objective (prevention of environmental impacts and functioning of the internal market) been in line with initial expectations?

Yes, the dual objective of the Packaging and Packaging Waste Directive's (PPWD) has generally been met. Studies carried out by the European Commission (EC) on the implementation of the PPWD¹ confirm that the PPWD has largely been correctly implemented. BIOIS 2011² concluded that the PPWD, and indeed the other waste stream directives, "appear to have provided significant environmental benefits at reasonable cost." BIOIS 2011 added that these directives also seemed to be flexible enough to take account of future technical and scientific advances, such as new waste streams or materials, new evidence on the environmental impacts of waste, or new treatment technologies.

Nevertheless, EUROPEN suggests that whatever measures are adopted, the revised Directive should contain a clause which says that after 5 years there should be a review which:

- Sets out the objectives intended to be achieved by the measures adopted;
- Assesses the extent to which those objectives have been achieved; and
- Assesses whether those objectives remain appropriate and, if so, whether they could be achieved with a system that imposes less regulation.

Environmental impact:

EUROSTAT data confirm that by 2010, 76% of packaging waste was being recovered and 63% recycled. In 2010, a few of the Member States that joined the EU in or after 2004 still had some way to go to meet the targets set by Directive 2004/12/EC, but these targets were not applicable until 2012 at the earliest. The Commission has recently published roadmaps to help improve the waste management performance of the ten Member States with the lowest scores in a recent screening exercise and although the roadmaps are not specific to packaging, they should contribute to higher packaging waste recycling and recovery.

Meanwhile, the quantity of packaging placed on the market has been decoupled from GDP growth in Europe. If wood is excluded (not all Member States reported on wood packaging until 2003), packaging in EU-15 increased by just 8.2% between 1998 and 2010, an annual average increase of 0.7%, while reported consumption of non-wood packaging in the 12 "new" Member States fell by 1.0% between 2005 and 2010, an average annual reduction of 0.2%. Although the economic recession saw a fall in packaging consumption from its peak in 2007 so that 2010 consumption was back at the 2005 level, this is still a remarkable achievement.

¹ *Study on the Implementation of Directive 94/62/EC on Packaging and Packaging Waste and Options to Strengthen Prevention and Reuse of Packaging*, Ecolas/Pira Final Report, February 2005. *Study on the Progress of the Implementation and the Impact of Directive 94/62/EC on the Functioning of the Internal Market*, Perchards, FFact Management, SAGIS. Final Report, May 2005. *Study on coherence of waste legislation*, BIO Intelligence Service (BIOIS), Final Report, August 2011.

² Op. cit.

We do however have some concerns about the accuracy of the EUROSTAT data. There are some cases of wide fluctuations from one year to the next in the tonnages reported on packaging placed on the market or packaging recycled, and these should be investigated. We are aware that EUROSTAT does question Member States about data in their submissions that seem anomalous, but a clear answer is not always received. EUROPEN believes that EUROSTAT should be given the resources to pursue these issues in more depth, and that the explanations received should be published.

Functioning of the internal market:

Perchards 2005³ concluded that while some national measures aimed at beverage containers had undoubtedly resulted in discrimination between domestic producers and importers of packaging, there had been little evidence of this outside the beverage sector. The Commission's Communication C(2009) 3447 final on beverage packaging, deposit systems and free movement of goods has been helpful in this respect.

However, more recently, the proposed French symbol (Triman) for sorting recyclable products is an illustration of a potential trade barrier and could distort competition within the internal market. French producers will have to comply with this additional obligation as a matter of course, but producers of products exported to France may have to redesign their labels to find space for a symbol that will be meaningless for consumers in their home market and in all other markets. The French decree will follow the principle of mutual recognition by allowing producers to mark their packaging with another symbol intended for the same purpose which has been prescribed by legislation in another member state, but this will make no practical difference as no other member state has indicated that it sees the need for such a symbol.

Also, Member States have been permitted to adopt national legislation imposing discriminatory taxes and similar economic instruments on packaging. Up to now, the Commission's only challenge to such measures has been the infringement proceedings launched in 2006 against Hungary's legislation which established the proportion of refillable bottles in their packaging mix as the criterion of exemption from the environmental product charge on the packaging of beverages. EUROPEN encourages the Commission to continue to be vigilant about discriminatory economic instruments in order to establish the same level of legal certainty as that already achieved with regard to other quantitative and non-fiscal measures.

Ideally, companies would have access to a large market with a single set of rules which would allow the economies of scale that generate environmental efficiencies. EUROPEN believes that cases concerning packaging should be given priority because it is packaging which moves goods across borders.

Has the internal market objective stood in the way of achieving the environmental one?

The PPWD has a dual objective, and implementation has to find a balance between the functioning of the internal market (which is the Treaty base of the PPWD) and environmental protection. The free movement of goods is a fundamental principle underpinning the European Union, and the internal market and environmental objectives are not incompatible, as our answer to the first part of Q1 has shown.

For instance, some Member States believe that there is environmental benefit in promoting the use of refillable beverage containers. However, it is generally agreed⁴ that reusable packaging performs best where transport

³ Op. cit.

⁴ See for example the report from the Commission to the Council and the European Parliament on the *implementation of Directive 94/62/EC on packaging and packaging waste and its impact on the environment, as well as on the functioning of the internal market*, COM(2006) 767 final.

distances are low, and non-reusable packaging where distances are high, so the free movement protection that the PPWD and CJEU case law provides supports rather than impedes the PPWD's environmental objectives.

Without the internal market objective of the PPWD, Germany for instance would almost certainly be doing more to protect its refillable bottle system. In recent years many fillers have abandoned the standard pool refillable bottle in favour of proprietary bottles with stronger branding, and these need to be transported further for refilling. Thus, the environmental balance is less favourable to refillables now than it was when the German Packaging Ordinance was adopted.

2. Do you think that the prevention and reuse of packaging has been addressed adequately in relation to recycling, which has specific targets?

Yes, it has. Prevention is addressed via the essential requirements. Reuse cannot be addressed via an EU target for two main reasons: reuse of packaging can be a viable option for local/regional distribution but has proven as environmentally disadvantageous for longer distances (> 100 km, see footnote 6 for more information). 2) Where applied by Member States – e.g. Germany – reuse / refill quotas tend to pose a barrier to trade within the EU = a barrier to internal market objectives of the directive. They tend to be used to create trade barriers rather than meeting environment objectives.

Prevention:

Prevention measures to reduce the environmental impact of packaging should be assured by enforcement of the PPWD's Essential Requirements and through consideration of packaging as part of the broader waste prevention strategies now in place.

Prevention targets are impracticable. Attempts to measure prevention have not been successful, as studies⁵ have shown. Quantified prevention targets in Dutch and Spanish legislation were abandoned some years ago. Enforcement was a problem because it is always unclear how targets can be translated to individual companies' performance, as this needs to take account of specific protection requirements related not only to the contents and distribution channels, technological feasibility and demand but also to the timing of replacement of manufacturing equipment.

A rigorous target, for example one based on the ratio between the total weight of packaging placed on the market and the total weight of packaged products placed on the market, would depend on reliable information on the weight of packaged products placed on the market. It is difficult enough to measure the amount of packaging placed on the market, and estimating the amount of packaged products would in our view be far more challenging.

In any case, the demand for packaging is linked to the demand for packaged goods, and changes in the structure of demand for packaged goods will determine the types of packaging placed on the market and the amount of protection that their contents need.

The Commission's December 2006 report to the other EU institutions on the progress of implementation of the PPWD made the same point. In general, it concluded, packaging is not produced as a good in itself but as a tool to allow the distribution of other packaged goods. "Packaging is a cost factor, so preventing packaging is in the interest of the producer of the packaged good. Taking all the functions of packaging into account, it is often difficult to draw an exact line between the acceptable use of packaging as a marketing tool and unnecessary 'over-packaging'."

⁵ For example, *Analysis of the evolution of waste reduction and the scope of waste prevention*, Arcadis, October 2010.

Reuse:

EUROPEN believes that targets for reuse are neither feasible nor necessary. Producers employ reusable packaging where this is efficient, and the market will be the best guide.

Reuse of packaging can be a viable option for local or regional distribution, but has proved environmentally disadvantageous for longer distances.⁶ Where applied by Member States, reuse / refill quotas have tended to pose a barrier to trade within the EU and thus a barrier to the internal market objectives of the PPWD. There is reason to believe that such quotas have sometimes been used to create trade barriers rather than to meet environment objectives.⁷

The PPWD says that Member States may encourage reuse systems; they are not obliged to do so. This means that any measures taken must not discriminate against imports and any aid granted through state resources must not distort or threaten to distort competition by favouring certain companies or the production of certain goods.

Reuse targets are difficult to measure. Data on the proportion of packaging placed on the market that is reusable is meaningless unless information is also available on how many times that packaging is actually reused. Without a clear picture of the amount of reusable packaging placed on the market for the first time, the rate of rotation and the amount of equivalent non-reusable packaging employed, it is very difficult to establish the market share of reusable packaging in any given sector. Rotation rates may vary greatly from one product, system or country to another, so there is no real possibility of quantifying reuse in the market as a whole.

Market share quotas are relatively straightforward to measure and enforce, insofar as enforcement means the imposition of penalties for non-compliance. They have however been ineffective in protecting the market share of refillable containers, as the consumer preference for non-refillables has proved stronger. And the Commission's Communication⁸ interpreting the legal position on beverage packaging, deposit systems and free movement of goods commented that national provisions linking the proportion of refillable packaging used for specific beverages and the need to establish a deposit and return system for one-way packaging (i.e. German law between 1993 and 2002) had to be regarded with particular caution from an Internal Market perspective.

[See also the answer to the second part of Q1]

3. Is packaging well defined in the Packaging Directive? Do the different definitions which have been set in Member States impose difficulties in companies, particularly in those operating in different Member States?

For the vast majority of applications, it is clear what is packaging and what is not. The list of illustrative examples in Annex I of the PPWD is helpful. There are areas where clarification has been necessary (e.g. CD cases – packaging or part of the product?), but some ambiguities are unavoidable as products change and evolve.

The borderline items which might be packaging or non-packaging form too small a part of the market to skew data which are reported to the nearest tonne. Uncertainties and errors in the reported data are of a far greater order of magnitude. While it is not ideal that there are still some inconsistencies in Member States' definitions of what is packaging and what is non-packaging, these differences have been in place for so long that producers have long

⁶ A review of LCA studies by Ecolas/Pira 2005 (op. cit.) concluded that for distances of less than 100 km, reusable packaging was generally found to be environmentally advantageous, and above 1000 km it was generally found to be disadvantageous. Within the 100-1000 km range, different studies produced differing results depending on the particular packaging systems investigated.

⁷ Perchards 2005 provided evidence of this.

⁸ C(2009) 3447 final.

since adjusted to them. In the FMCG sector, where products are often tailored to national markets and where arrangements have long been made to accommodate inconsistencies between national requirements, the disruption created by changes to the definitions in some Member States may well outweigh any savings from increased harmonisation, at least in the short term.

Also, it would be disproportionately time-consuming and expensive if the Commission and national government officials were to discuss and arrive at a consensus on every individual case.

4. Should the 2008 targets on packaging recycling and recovery increase further? Would this be feasible for all materials and for all Member States?

In the long run, the goal must be to optimise recycling rates across the EU, but EUROPEN urges caution. The 2004 revision of the Directive set new targets for the recovery and recycling of used packaging to be achieved by end 2008, with derogations for some Member States, but it should not be assumed that a continuous increase in these targets in future is feasible or indeed desirable.

First of all, it is important to implement and enforce existing legislation in all Member States. Looking at the current level of target achievement, we see three groups of countries:

- the overachievers. These Member States do not need higher targets, but must just be encouraged to maintain the current levels of recycling and recovery;
- the Member States with well-developed recycling schemes, which will be able to improve further over time;
- the low performing Member States that will have difficulties to catch up with the front runners in the foreseeable future.

These three sets of performance levels correlate to a large extent with levels of economic development (economic crisis) and the purchasing power of citizens. We suggest that targets should be achievable for all, which could mean having different targets for different groups of Member States. Perhaps scenario building with all relevant actors could be a good way forward. In any case we would expect the European Commission to carry out a rigorous impact assessment before increasing recycling and recovery targets.

Member States are free to set higher national targets than those set in the PPWD.

5. Should material-based targets be set for metal packaging to give more transparency for the environmental effectiveness of materials?

Material based targets exist already in the Packaging and Packaging Waste Directive, further differentiation at EU level may not be the prime need/priority given the above (Q4). Disaggregation would add to the cost of data collection and would reduce the accuracy of the data. The more sub-divisions there are, the greater the danger of results being skewed by companies, compliance schemes or governments putting some items into the wrong category. And if aluminium and steel packaging are reported separately, why not different polymers, or different coloured glass?

Member States are free to set more differentiated targets at national level according to local conditions, if they wish.

6. Do you think that the differentiation of household or commercial/industrial packaging in the national measures or when monitoring the implementation of prevention measures and recovery/recycling targets would increase its effectiveness?

Yes it would. It would shift the focus towards the separate collection of post-consumer packaging, particularly in those Member States which are achieving lower levels of recycling today. Post-consumer packaging is the fraction that is the most difficult to collect, because it is generated in relatively small quantities in a large amount of households and, particularly in the case of beverage packaging, out-of-home and at events.

Some Member States rely on recycling ICI (industrial, commercial and institutional) packaging to reach their targets, as this is generated in fewer places (e.g. shops, offices) and is relatively cheap to collect. This overlooks the considerable recycling potential still available from the household wastes stream.”

EUROPEN would like to see a specific post-consumer packaging recycling and recovery target in the PPWD to incentivise collection and recycling / recovery of post-consumer packaging. The scope of this target should be specified and should apply EU-wide.

We would add that in giving Member States four choices as to how they define the Waste Framework Directive’s target of preparing for reuse or recycling 50% of household waste by 2020, Commission Decision 2011/753/EU is extremely unhelpful. The option chosen will have a major influence on the extent to which that target impacts on the management of household packaging waste and of out-of-home packaging.

EUROPEN believes that reporting should be based on standardised definitions and calculation methodologies. However, the existing definitions should be kept for a time so as to be able to track progress towards the next set of targets. That means either using both methodologies simultaneously and producing two sets of reports, or else delaying the introduction of a new standard methodology until close to the next deadline year.

7. Are you aware of any initiatives between producers and recyclers (including voluntary agreements) taken in Member States?

Corporate and voluntary collective actions are continuously being developed for packaging to further promote recycling of used packaging, and should be further encouraged. For instance, quality specifications for recyclable materials (e.g. PET bottles) have been drawn up and implemented by some recovery organisations on the basis of recyclers’ requirements.

EUROPEN stresses that quality specifications must be set by the market, and not by national authorities.

8. Are you aware of any programmes / initiatives developed by economic operators to improve their environmental performance taken in Member States?

Yes of course. EUROPEN members have corporate sustainability programmes in place. See EUROPEN website (www.europen-packaging.eu) for links to their websites.

It is wrong to assume that legislation is the main driver of improved environmental performance. Improved design (e.g. packaging design) comes from technological advances, an awareness of them and willingness to implement them. The Commission's 2009 review of the Integrated Product Policy (IPP) programme⁹ concluded that while the member states had been slow to act on IPP, trade and industry had taken a lead in making it a reality. “Increasingly, industry sectors apply life-cycle thinking to inform their approaches towards product policy and communication with

⁹ COM(2009) 693 final.

customers and authorities,” said the Commission. Any survey of the environmental reports on major companies’ websites will reveal how much is happening independently of legislation.

9. Have other aspects related to environmental effectiveness that go further than the amounts of packaging recovered or prevented (particularly the reduction of GHG emissions) been addressed?

These are addressed by EUROPEAN members – see answer to Q8. Most EUROPEAN members use tools such as LCA to continuously reduce the environmental impact of their packaging. They agreed a common language for communicating packaging sustainability along global value chains via the Global Protocol on Packaging Sustainability (GPPS)¹⁰. There is no need for regulatory measures in this area.

In any case, there are serious practical difficulties in devising targets relating to environmental impact that would be applicable to all types of packaging regardless of its source. For example, the packaging tax introduced in The Netherlands in 2008 was originally structured so as to reflect the environmental impact of different materials. The resulting complexity added significantly to administrative costs, especially for smaller companies, the tax rates were simplified and any relationship with environmental impact was lost. The Dutch government abolished the tax at the end of 2012.

It is difficult and very expensive to determine environmental costs accurately and to keep these calculations up to date. Denmark’s packaging eco-tax introduced in 1999 was based on lifecycle analysis, but the data and thus the rates have not been updated since 2001.

Real greenhouse gas emission savings will depend on the source of the packaging which gets recycled (e.g. produced in plants powered by hydro, nuclear or fossil fuels?), but in reality it is inevitable that if GhG metrics are used, one-size-fits-all average conversion factors will be set, either at national level or at EU level. The proposed French obligation to display information about environmental impact will be based on generic information as it would not be practicable to demand that smaller companies collect data specific to their products. And for cost reasons, some Member States are likely to “borrow” conversion factors from others (just as the carbon tax on packaging in Belgium, proposed in 2006 but never adopted, was to have been based on Danish weightings).

It is true that the PPWD treats ‘waste avoidance’ as a synonym for reduction of environmental impact. This reflects the mid-1990s’ overriding concern with waste. Sustainable Consumption and Production cannot be regulated in such detail, so the EU and individual Member States are rightly moving on to a complex mix of instruments and metrics for continuous environmental improvement of products throughout their lifecycle; wide-ranging environmental information requirements; and reliance on business to drive through improvements. At EU level, collaborative efforts are being pursued through multi-stakeholder groups such as the European Food SCP Round Table and the European Retail Forum. More and more companies are seeing environmental sustainability as an issue which will help win competitive advantage, and as the Commission has already admitted, businesses are moving way ahead of the legislators in ‘greening’ their supply chains (see answer to Q8).

Targets can be helpful in focusing corporate decision-makers’ attention, but when companies have to make case-by-case decisions on how to maximise the resource-efficiency of their products and processes throughout the supply chain, binding targets relating to the amount of packaging placed on the market are not appropriate. A good compromise might be for the updated PPWD to include a statement encouraging member states to include non-binding prevention targets in voluntary agreements. These have already been set in the UK by the Courtauld Commitments and in France by an agreement with the FCD (Fédération des Entreprises du Commerce et de la Distribution).

¹⁰ More information can be found at the following link: <http://globalpackaging.mycgforum.com/>.

These targets should be the responsibility of a government agency with industry support, not the responsibility of the packaging supply chain itself. Thus, the targets would not relate to individual companies' performance.

10. To what extent have costs of packaging products been lowered/stabilised by the increased supply of recycled material? What is the role of the Packaging Directive in this evolution?

The packaging component of product prices have been increased due to implementation of the PPWD, as the costs of collection, sorting and recycling have been internalised (e.g. via Green Dot fees). The use of recycled materials has not reduced material cost for packaging,¹¹ as market prices for recycle fluctuate in response to those for virgin raw materials.

However, the recycling of packaging waste into new packaging or non-packaging products will increase security of supply in the long term, provided this recycling takes place in Europe.

11. What is the potential for more recycled material content in the packaging products, from the perspective of the material or type of producer you are representing? Are we near to the technical limit at this moment?

The answer to this question will be different for each material, but in principle EUROOPEN supports the principle of a circular economy, whereby materials are kept as long as possible in the economy and are used as secondary materials for new products, including packaging. Given the threats of resource scarcity, we expect the demand for secondary materials to increase.

However, although there is a long tradition of using recycled materials in the manufacture of new packaging where this results in reduced cost and environmental impact, closed-loop recycling is not always appropriate. The most cost-effective markets for some recycled materials may be in non-packaging applications, where less demanding specifications may be acceptable.

The use of recycled materials in plastic or board packaging can sometimes add significantly to its weight, if more material is needed to produce the same strength than if virgin material was used. The resultant weight increase may sometimes more than cancel out any environmental gain from using the recycled material.

End-use demand for recycled material needs to increase, and packaging manufacturers and their suppliers are continuously looking for ways of incorporating more recycle in new packaging. But used packaging materials should be free to go wherever they can find a market, and not necessarily into new packaging.

12. What is your opinion on the contribution of the Essential Requirements to resource efficiency and costs reduction?

Cost reduction has been and will remain the main driver for resource efficiency. For packaging producers, material cost ranks among their top cost factors and expenditures. Thus, resource efficiency is key to remaining competitive.

The Essential Requirements and the CEN standards help to integrate resource efficiency in packaging development processes in a systematic way, and they have proved very important in tapping into hidden improvement potential. The principles underlying these European standards have been taken up by ISO and turned into global standards. EUROOPEN believes that it is important to keep them as a recognised part of the EU regulatory system applicable for all packaging types and materials.

¹¹ Commodity prices for primary and secondary materials are publicly available.

13. Are you aware of good practices on enforcement of the Essential Requirements which are specified in the Packaging Directive?

EUROPEN members typically comply with the Essential Requirements by integrating them into their product development processes. In fact, EUROPEN is working on a set of practical case studies to illustrate how different companies comply/apply the Essential Requirements, and we will share these with the Commission later this year.

In the UK, the Department for Business Innovation and Skills (BIS) publishes guidance notes on the national Packaging (Essential Requirements) Regulations. This guidance is regularly updated. In addition, INCPEN (the Industry Council for Packaging and the Environment) collaborated with trading standards officers responsible for enforcing the Regulations to produce a guidance document¹² aimed at ensuring consistent enforcement by local regulatory authorities throughout the UK. More recently, LACORS (now Local Government Regulation) and BIS published a guidance tool¹³ for enforcement officers which explains how to ask companies appropriate questions that allow enforcement officers to understand what the packaging is for and to obtain the necessary information or compliance evidence that is needed. This helps them create a dossier of evidence about the packaging and ultimately make an informed decision about whether or not the packaging complies with the Regulations.

Seven companies have been prosecuted for over-packaging in the UK, but no case law has developed as none of the cases were contested. Three other companies admitted breaches of the Essential Requirements and were asked to sign a caution rather than being prosecuted. The caution can be cited in any future prosecution (as with a previous conviction). They were not prosecuted as there were mitigating circumstances, such as that the company had already changed its packaging policy.

14. Do you think the Essential Requirements should be further clarified?

No. EUROPEN believes that the Essential Requirements are well-defined in the PPWD. However, enforcement mechanisms in all MS must be put in place. Enforcement of the Essential Requirements would contribute to packaging prevention and reduction of hazardous substances in packaging,¹⁴ but perhaps more importantly it would enhance the credibility of the legislation.

Use of the EU harmonised CEN packaging standards as a means of showing conformity should be encouraged. No additional packaging prevention measures should be considered until this legislation has been enforced and its effectiveness evaluated by all Member States.

Enforcement:

In 2010 Arcadis assessed the state of compliance and enforcement throughout EU-27.¹⁵ Some public authorities told the consultants that they were not enforcing the Essential Requirements due to lack of resources or to more important enforcement priorities such as food safety. This suggests that they do not see packaging as a real problem. It also indicates that amending the Essential Requirements to make them more restrictive would conflict with the proportionality principle.

¹² *Common Understandings and Common Sense*, INCPEN and Local Government Regulation, January 1999 (updated 2010), <http://www.incpen.org/docs/Common%20Understandings%20and%20Common%20Sense%202011.pdf>.

¹³ *The Packaging (Essential Requirements) Regulations (PERR) Guidance Tool for Enforcement Officers*, LACORS and BIS, September 2009, <http://www.lacors.gov.uk/lacors/NewsArticleDetails.aspx?id=22412>.

¹⁴ Report from the Commission to the Council and the European Parliament on the implementation of Directive 94/62/EC on Packaging and Packaging Waste and its impact on the environment, as well as on the functioning of the internal market, 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0767:FIN:EN:PDF>.

¹⁵ *A survey on compliance with the Essential Requirements in the Member States*. Arcadis nv, 2010.

In their responses to Arcadis 2010,¹⁶ a number of Member States said that the Essential Requirements were unenforceable. However, a survey undertaken by EUROPEN in March 2011 indicated that there has been more activity by the enforcement authorities than has perhaps been generally realised. One member reported that there had been audits in Austria; another had been asked to supply documentation to the Bulgarian, Czech and Romanian authorities; and we were told about enquiries to companies in Austria, Hungary and Sweden about possible over-packaging (the first two of these related to gift packaging at Christmas). We were also told that there had been challenges under parallel legislation such as the French food contact decree and the deceptive packaging provisions of the German Food Law.

But so far as EUROPEN is aware, the only Member States where there have been prosecutions for non-compliance with the Essential Requirements have been the UK (see answer to Q13) and the Czech Republic (three prosecutions for failure to produce evidence of compliance).

The success or otherwise of the Essential Requirements legislation cannot be measured by the number of prosecutions, however. In several Member States, the enforcement authorities have visited companies to discuss examples of possible over-packaging. This serves to ensure that companies understand their legal obligations; it also helps to educate the enforcement authorities in how packaging design decisions are taken and why packaging is designed the way it is. If companies are persuaded that change is needed, they will redesign their packaging without any need for prosecution. Thus, prosecutions are the last resort.

Nevertheless, it is clear that the low level of enforcement activity across the EU is in sharp contrast to the large number of political statements about alleged over-packaging. EUROPEN's concern is that the Essential Requirements will not have credibility among policymakers unless they are *seen* to be enforced. Prosecutions are on the official record; informal contacts between enforcement authorities and companies to monitor compliance are much more difficult to check and quantify.

The absence of measurable, quantifiable pass/fail requirements need not be a barrier to effective implementation if the authorities' focus is on market surveillance rather than on prosecution. Member States should have procedures in place to follow up complaints, conduct spot checks and verify that corrective action has been taken in cases of non-compliance. This should be done with qualified technical staff.

The PPWD made Member States responsible for ensuring that only compliant packaging was on the market, and Member States that have no enforcement regime are in breach of that requirement. EUROPEN recommends that national authorities be required to report to the Commission each year on the measures taken to enforce the Essential Requirements and the results of those actions. This means that even if enforcement is left in the hands of local government, central government must take responsibility for the outcome.

Undoubtedly there are operators who are still unaware of or who choose to ignore the Essential Requirements. EUROPEN member companies are keen for this to stop, and would welcome more action to ensure compliance. EUROPEN and CEN have consistently offered to run workshops and provide training for enforcement officers at national level to help them understand packaging design issues, but few have taken up this offer.

Why pass/fail measures would not work:

The Essential Requirements in the PPWD define the environmental criteria that packaging must fulfil in order to be allowed to move freely throughout the EU. They are based on the 'New Approach', under which requirements are

¹⁶ Ibid.

limited to relatively general provisions which are universally applicable. The standards need to be relevant to any type of packaging, from a flexible wrapper to a bottle or can, to a plastic tray, a corrugated box or a wooden pallet.

It has been suggested that the CEN standards should be replaced by pass/fail provisions based on a ratio between the volume or surface area of the packaging and the volume of the contents. This was discussed extensively by the CEN experts while the standards were being developed, but was rejected as impracticable. It would not be feasible to develop appropriate ratios for every situation, and those that were developed might well prevent worthwhile product or packaging innovations (modified atmosphere packaging is one example).

Arcadis 2010¹⁷ suggests that a maximum weight and/or volume ratio between the packaging and its contents would be feasible for simple packaging such as drinks and cereal boxes. The report pointed out that Taiwan has such ratios for certain products and also limits the number of packaging layers for some products. This is true. South Korea has similar rules. But there is really no point in regulating the fill volume of products like drinks and cereals, where the fill level is determined by filling speeds – a high fill level would mean slowing down the filling line which would consume more energy. The products most likely to be overpackaged are items like toys which are often an irregular shape and therefore impossible to regulate in this way.

The Essential Requirements are a tool for continuous environmental improvement of packaging and reduction of environmental impact. There is constant innovation in the packaging sector, driven by keen competition between suppliers and between different packaging materials. With environmental and technical improvements constantly being introduced alongside developments aimed at keeping pace with economic, social and political changes, measurable and quantifiable requirements would quickly become outdated.

Effectiveness of the Essential Requirements:

There is no evidence that the Essential Requirements are ineffective. BIOIS 2011¹⁸ notes that the weight of individual packs has been reduced over the years, and while it is not possible to say how far this is due to implementation of the Essential Requirements, it is undeniable that the Essential Requirements, and the CEN standards mandated by the Commission as a means of demonstrating compliance, have had a positive effect in the marketplace:

- the standards have provided expert guidance on packaging eco-design, and have been the basis for a number of more specific design guides produced by various industry and public-sector bodies and by EUROOPEN itself;¹⁹ many companies now have procedures in place which make packaging minimisation a normal part of their day-to-day business.²⁰
- many distributors and packaged goods producers make it a contractual requirement that their suppliers guarantee compliance.

¹⁷ Ibid.

¹⁸ *Awareness and Exchange of Best Practices on the Implementation and Enforcement of the Essential Requirements for Packaging and Packaging Waste*, BIO Intelligence Service, August 2011.

¹⁹ There are too many national examples to cite here, but EUROOPEN alone has published *Essential Requirements for Packaging in Europe: A Practical Guide to Using the CEN Standards* (1999, revised 2005) and *Packaging in the Sustainability Agenda: A Guide for Corporate Decision Makers* (2009).

²⁰ Arcadis 2010 (op.cit.) commented that “the main message of the industry, as captured in the stakeholder workshop, was that Member States take only limited steps to implement the Essential Requirements other than realising the legal transcription in national legislation. The industry itself, however, has incorporated the idea of the Essential Requirements and the methods of the CEN standards into its own working procedures.” However, Arcadis added that “packaging imported from the far-east, mainly China, is less compliant to all three Essential Requirements than EU-made packaging.”

Market forces reinforce the Essential Requirements:

- Packaging is a service which enables products to reach the final user in good condition and to carry information for the purchaser and user rather than a product in its own right. Thus, packaged goods producers do not use more packaging than they need.
- Companies are under constant pressure to reduce costs, which means minimising the amount of material used (thus reducing the weight of the packaging) and maximising the amount which can be carried on a delivery vehicle (thus minimising the volume of the packaging). In addition, many packaging developments are specifically aimed at demonstrating concern for the environment, and where one company leads, its competitors must follow.
- Major retail customers demand less packaging, for cost reasons and/or to demonstrate their own environmental credentials. Corporate initiatives have been led by WalMart and Tesco, and there have been collective voluntary agreements by the FCD in France and through WRAP (the Courtauld Agreement) in the UK.

Some EUROPEAN members have commented that since they use the same packaging in all European markets, their procedures are designed to meet the strictest compliance standards. Conversely, it has been said that as far as intra-Community trade is concerned, since packaging placed on the market in one Member State is entitled to free circulation throughout the EEA, enforcement in Europe is only as strong as enforcement in the weakest country.

15. Are there any gaps where further EU waste legislation is required including to achieve the objectives set out in the Resource Efficiency Roadmap?

Yes. In some Member States there are multiple packaging collection and compliance schemes competing with each other—some on a profit-making basis (or as subsidiaries of profit-making enterprises) and others on a not-for-profit basis. While competition is helpful in driving costs down it may cause some schemes to limit the services they provide, such as restricting the types of packaging that they collect or minimising collection in rural areas in order to avoid the most difficult and costly post-consumer packaging fractions. Since this phenomenon did not exist when the PPWD was adopted in 1994, there is no legal framework to ensure a level playing field for the operation of existing competing schemes.

From a packaging value chain perspective, it would be important for the Commission to secure fair competition among compliance schemes, e.g. by setting minimum requirements and authorisation rules which Member States must transpose.

16. What potential is there for eco-design introduced as a mandatory requirement to enhance the waste hierarchy?

Very limited potential. A one-fits-all approach to eco-design for packaging would be very general and would not add much to the Essential Requirements we have today. Alternatively, it would require specific eco-design requirements for thousands of product groups – a Herculean challenge to develop and enforce.

This is why EUROPEAN suggests that the EU promotes voluntary industry/sector initiatives, perhaps with the Essential Requirements as a reference.

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