



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
ENVIRONMENT  
Circular Economy & Green Growth  
Waste Management & Secondary Materials

**Subject: Updated explanations concerning the concept of “placing on the market” in Directive (EU) 2019/904 on single use plastic products in view of the Commission’s Blue Guide (COM Notice on the implementation of EU products rules 2016, COM 2016/C 272/01), and related questions on stock clearing, marking and bans of SUP products.**

### **1. Background - TAC Meeting January and March 2021**

During the Waste Committee Meeting with the Member States, which took place in January and March 2021, a number of issues were discussed around the concept of ‘placing on the market’ of single use plastic (SUP) products in the context of Directive (EU) 2019/904. The questions that were raised mainly concerned the issue of stock clearing before the 3<sup>rd</sup> of July 2021 (i.e. the date from when the bans on certain SUP products and the marking requirements enter into effect<sup>1</sup>).

It was noted that the definition of ‘placing on the market’ in the SUPD deviates from the definition given in the Blue Guide on the Implementation of EU product rules (2016/C 272/01). This is because Article 3(6) of the SUP Directive defines “placing on the market” as “the first making available of a product on the market of a Member State” and not “EU market”.

In reply to some Member States’ comments, DG ENV would like again to explain that it is the Directive itself that refers to the national markets, hence the Commission’s interpretation is based on that legislative decision. The original proposal from the Commission<sup>2</sup> referred to the EU market, however, during the negotiations in the Council it was changed to the Member States markets. Consequently, this is the conscious decision and will of the Council (hence Member States) and the European Parliament. The Commission therefore can only interpret these provisions of SUPD in a way that is in conformity with the will of the co-legislators.

In consultation with the Commission’s Legal Service it was clarified that the bans on SUP products (article 5) and the marking requirements (article 7) for certain SUP items apply as of 3 July 2021, also for stocks of those products already placed on the market before that date, when those products move across the Member States.

As far as the concept of “placing on the market” is concerned, we suggested to follow *mutatis mutandis* the Blue Guide on the Implementation of EU product rules (2016/C 272/01). However, the Blue Guide cannot apply absent any specific legal requirements in SUPD. This is also included in the disclaimer of the Blue Guide, that it intends to help interpreting legislation but that the provisions of the legislation prevail.

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<sup>1</sup> Articles 5 and 7 of Directive (EU) 2019/904 respectively.

<sup>2</sup> COM(2018) 340 final

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Accordingly, the Blue Guide should be used for inspiration and clarifications. MS can use the explanations in the Blue Guide for the concept of placing on the market, but then it needs to be adapted to the Member State territory as opposed to the EU territory.

When first placing on the market is concerned in the first Member State the Blue Guide is applicable, while for the subsequent placing on the markets in other MS (the subsequent intra-EU movements), that guidance needs to be adapted.

After the meetings, a number of additional questions were received from MS in relation to placing on the market and importers / manufacturers and suppliers / retailers. An overview of those questions and suggested reply is provided below.

## **2. Overview of all questions received from MS on the concept of “placing on the market” of SUP products**

*(With response from DG ENV in RED)*

### **Manufacturers (stock clearing)**

- 1) If SUP products, which are subject to the ban in Article 5, are produced by the manufacturer, and then stored in its warehouse before 3 July 2021, can the manufacturer sell these products after 3 July 2021 (in other words can they be considered as having been placed on the market before 3 July 2021)?
  - *Blue Guide (2016) states that “placing on the market is not considered to take place where a product is in the stocks of the manufacturer or the importer, where the product is not yet made available, that is, when it is not being supplied for distribution, consumption or use, unless otherwise provided for in the applicable Union legislation”.*
- 2) Would it be possible to introduce stock clearance period to allow manufacturers to market unmarked cups after July 2021 if produced before that date?
  - *No, the implementation deadlines are foreseen in the SUPD by the co-legislators (Council and EP) and the Commission is not in a position to unilaterally change them. However in that regard, the Marking Regulation foresees the possibility for the marking of SUP products placed on the market before 4 July 2022 to be affixed by means of stickers.*
- 3) As regards plastic cups, which are produced *before* and used *after* the July deadline: for some companies, it is their logistic and wholesale partners who procure the cups on their behalf and distribute them to our markets on the basis of need. If the cups have been delivered to their partners ahead of the deadline of July 2021, but they then supply them to the company’s markets afterwards, can we still consider that they were ‘first placed on the market’ when they were **procured by these partners**?
  - *The first placing on the market would take place when those cups are delivered to the wholesale partners. Nevertheless, if the wholesale partner in question distributes the cups to another MS after 3 July 2021, the cups are then placed on the market of that other MS after 3 July 2021.*

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- 4) Can you confirm that all stocks that companies have in a Member State subject to the requirements of Articles 5 and 7 of the SUP Directive can be sold after 03.07.2021?
  - *The stock that has already been 'placed on the market' in a MS before 3 July 2021 can be sold in that MS after 03.07.2021, however if it would be placed on the market in another MS for the purposes of SUPD that would be the first placing on the market in that other MS.*

### **Physical handover**

- 5) Is a written agreement between producer/importer and distributor/retailer for selling the products and transfer the ownership can be consider as “placing on the market” and does not require the physical handover of the product” (according to Blue Guide)?The moment when the product is transferred (irrespective of the technique used, including by means of distance contracts) from a producer's warehouse in a Member State to another natural or legal person in a Member state, does there need to be a physical transfer of the products to be considered ‘placing on the market’? If so, would a contract dating before 3 July 2021 for transfer of ownership be enough or, does an invoice (as evidence of payment) need to be delivered before 3 July 2021 as well?
  - *In this case it is the date of transaction that matters.*
  - *In general placing a product on the market requires an offer or an agreement (written or verbal) between two or more legal or natural persons for the transfer of ownership, possession or any other property right concerning the product in question after the stage of manufacture has taken place. This transfer could be for payment or free of charge. It does not require the physical handover of the product. However, the transaction needs to refer to existing products (not a contract saying that they will deliver 100 cups which have not yet been manufactured). As the Blue Guide mentions, placing on the market can only take place after the stage of manufacture.*
- 6) What is the answer to the question above in case products are transferred from the distributor’s warehouse?
  - *They were already placed on the market by the producer/importer when sold to the distributor.*
- 7) In case that one company owns the product brand, but another company does the physical manufacturing of the products, which one is seen as ”manufacturer” and thus responsible for SUPD compliance?
  - *The economic operator who manufactures a product, or has a product manufactured and markets it under its name or trademark. Therefore, the manufacturer is the company who puts its name on the product, presenting itself as the manufacturer, even if the actual manufacturing is done by somebody else.*
- 8) This is important to know, because if the brand owner is not considered as the manufacturer, the products produced to their warehouse before 3 July 2021 are considered to have been placed on the market.
  - *Having regard to the answer above, the products in the warehouse of the brand owner, if they are not subject of an offer or an agreement for the transfer of ownership, they are not to be considered as placed on the market, since they are still with the manufacturer, not yet supplied for distribution.*

- 9) If a manufacturer of cleaning wipes makes these products available to the supply chain before 3 July 2021 and does not label it with a sticker with the wording "product contains plastic", will these further links in the supply chain have to label unmarked products after 3 July 2021?
- No, because they are in distribution phase and therefore already placed on the market, unless the products are moved to another MS after 3 July 2021, in which case they are placed on the market again in that other MS after 3 July 2021, so that they need to fulfill the marking requirements of the SUPD.

### **Concept of “offer”**

- 10) According to Blue Guide a product is considered placed on the market when made available through an offer or an agreement. We would appreciate if the Commission could clarify what the concept of “offer” covers in this context. In the Blue Guide’s explanation of making available on the market it says that the offer can be “an invitation to purchase and advertising campaigns”. We would be grateful if the Commission could clarify if “offer” can also include other examples and if so, what these examples might be.
- An offer is a clear proposal to sell or buy a specific product or service under specific conditions. Offers are made in a manner that a reasonable person would understand its acceptance and will result in a binding contract.
  - According to Blue Guide, a product is made available on the market when supplied for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge. Such supply includes any offer for distribution, consumption or use on the Union market which could result in actual supply (e.g. an invitation to purchase, advertising campaigns).
  - The reference to the “offer” relates to the product having to enter the distribution phase - it is being supplied for distribution, consumption or use. This is also the case if it is sent to the distribution branch of the manufacturer (see footnote 50 of the Blue Guide).
  - The examples of offer could include online offer, advertising campaigns, emails with invitation to purchase, delivery of quotes, information to purchasers and distributors on the products available and their price or any other proposal to sell specific product (that is already manufactured).
- 11) For example, if a manufacturer of wet wipes produces wet wipes without labelling before the 3rd July 2021 and makes them available for purchase on their website before the 3rd July 2021, have they then been made placed on the market even if no buyer has made an offer / bought them by the 3rd July 2021?
- If the website is in the EU, it must concern existing and identifiable products. If so, those products which are being sold online have already entered the distribution phase as they are being offered, then they are placed on the market.
- 12) A product has been placed on the market, when it is supplied for distribution, consumption or use on the Union market for the first time. This should include any **offer** of a product intended to be placed on the market, which could result in such supply, e.g. a written, oral or electronic advertising campaign or invitation, directed towards distributors, consumers or users on the EU market, according to the blue guide. It would also mean that all stocks that companies might have in the MS and that are subject to the ban and marking requirements can be sold after the 3rd July. Can you confirm?

- Yes, as long as they are in the distribution phase and are not moved to another MS.

### **Importers (from third countries)**

- 13) In the case of a supplier that imports the goods with the intention to sell to retailers: when the goods are being imported, should they be considered as ‘placed on the market’ of the country of import? Or only when the products are sold to retailers?
- 14) Cases where products have been imported accompanied by the relevant documentation issued before the 3<sup>rd</sup> of July, but have not been further distributed (to the shops)
- 15) A retailer imports the goods and then redistributes them (internal redistribution within the company or company branches). When it is considered placed on the market?
- 16) If the products have been imported into the importer’s warehouse before 3 July 2021, can the importer also sell these products to retailers after 3 July 2021 (it means these products are considered to have been placed on the market before 3 July 2021)?
- 17) Where a company imports products from a subcontractor from another country outside the EU, and then sells these to clients on the EU market, can the selling of products on the EU market be considered ‘placing on the market’?
- 18) Please confirm the following interpretation: if a tobacco producer meets the requirements of placing on the market (the transaction has taken place but the physical transfer has not yet taken place) before 3 of July but free circulation has not yet taken place before 3 of July, these products cannot be considered as ‘placed on the market’ before 3 of July. Do both ‘placing on the market’ and ‘free circulation procedures’ have to be achieved before 3 of July?
- 19) Please confirm whether SUP products, which have not been placed on the market (i.e. the transaction hasn’t taken place yet) before 3 of July, and are in the importer warehouse, cannot be considered to have been ‘placed on the market’, even after being repacked into smaller unit packages by the importer?
  - In general, an imported product is placed on the market at the time of release for free circulation.
  - The Blue Guide lays down: *“The purpose of release for free circulation is to fulfil all import formalities so that the goods can be made available on the EU market like any product made in the EU. Therefore, when products are presented to customs under the release for free circulation procedure, it can generally be considered that the goods are being placed on the EU market and so they will need to be compliant with the applicable Union harmonisation legislation. However, it may also be the case that the release for free circulation and the placing on the market do not take place at the same time. The placing on the market is the moment in which the product is supplied for distribution, consumption or use for the purposes of compliance with Union harmonisation legislation. Placing on the market can take place before the release for free circulation, for example, in the case of online sales by economic operators located outside the EU, even if the physical check of the compliance of the products can take place at the earliest when they arrive at the customs in the EU. Placing on the market can also take place after release for free circulation.”* For example, where stockpiling is done by the importer and the products are brought into the Union without the intention for them to be distributed immediately. In that regard, the Blue Guide (2016) states that *“placing on the market is not considered to take place where a product is in the stocks of the manufacturer or the*

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*importer, where the product is not yet made available, that is, when it is not being supplied for distribution, consumption or use, unless otherwise provided for in the applicable Union legislation”.*

- However, the default position is that when an imported product is released for free circulation, it is brought into the EU for the purposes of further distribution, consumption or use.
  - From the custom point of view for the goods to be released for free circulation in the EU, they have to be introduced physically into the EU territory, presented to customs, declared for the customs procedure “release for free circulation”, checked by customs for the non-fiscal purposes (to see if they are allowed to be in a free circulation in the EU) and discharged from the fiscal point of view.
- 20) If the restricted products have been purchased by the importer before 3 July 2021, can the importer repack them in his own warehouse after 3 July 2021 and sell them to retailers (it means consider that these products were placed on the market before 3 July 2021)?
- The individual product is placed on the market upon release for free circulation. It is possible for another economic operator to change the packaging for as long as compliance with the legislation of the product is not affected. However, any subsequent placing on the other MS market will be considered first placing on the market and the products will have to comply with SUPD.
- 21) In case products are imported from 3<sup>rd</sup> countries, should the release for free circulation be requested before 3 July 2021, and would there be a need to have the imported products checked by the authorities responsible for border control before 3 July 2021?
- According to the Blue Guide “when products are presented to customs under the release for free circulation procedure, it can generally be considered that the goods are being placed on the EU market and so they will need to be compliant with the applicable Union harmonisation legislation”
- 22) “Importer” in the blue guide refers to the economic operator which places the products to the market for the first time in EU. In the SUP-directive placing on the market happens in each member state. The products, which are imported from other member states, already have free movement according to customs procedures. Imported products from outside of EU and stored in the importer’s warehouses are placed on the market since those are released for free circulation. However, the imported products from another EU country and stored in the importer’s warehouses, are not placed on the market, since the products are not (again) released for free circulation. This means that for a while the SUP-products do not have free movement in the EU. (See question and answer: - If the products have been imported into the importer’s warehouse before 3 July 2021, can the importer also sell these products to retailers after 3 July 2021 (it means these products are considered to have been placed on the market before 3 July 2021)?
- 23) If in a member state there is a manufacturer of the same kind of products, but the manufacturer cannot sell their products in stock after 3 July 2021 because the products are not placed on the market. If company has imported the products outside of EU, the products have been released for free circulation, the company can repack and sell those products after 3 July 2021.
- 24) The interpretations concerning importers creates an unequal situation between products manufactured or imported outside of EU and the products manufactured in EU or imported from

other EU member states. FI does not approve the unfair and unequal handling of products manufactured in EU.

- Firstly, placing on the market takes place when the product is released for free circulation but not when the importer is only doing stockpiling, without any intent to distribute it further.
- Secondly, after 3 July 2021 both manufacturer and importer will abide the same rules once they are placing the product for the first time in the other MS.

## **Retailers and distributors**

- 25) If the restricted products are in the retailer's warehouse after 3 July 2021, can the retailer still sell them to the final consumer after 3 July 2021 (it means these products were considered to have been placed on the market before 3 July 2021)?
- *Yes if it is done in the same MS, as they have already been placed on the market before 3 July 2021.*
- 26) According to the definition of 'Placing on the market' from the EU Directive 2019/904, do you confirm that plastic stirrers which are still in stock, remain in the Member State and which were already placed on the market before the 3<sup>rd</sup> of July can still be sold by the final customer?
- *Yes, if they have already been placed on the market before the 3<sup>rd</sup> of July 2021.*
- 27) According to the definition of 'Placing on the market' from the EU Directive 2019/904, do you confirm that plastic cups without marking requirements which are still in stock, **remain in the Member State** and which were already placed on the market before the 3<sup>rd</sup> of July can still be sold by the final customer?
- *Yes, see reasoning above (so as long as they are not supplied/made available in another MS).*
- 28) If the purchase of products from a company based outside the territory of state X and their delivery to distribution warehouses in state Y, belonging to a company based in state Y, takes place before 23h59 on 2 July 2021, should we assume that each product delivered to the distribution warehouse in state Y is a product 'placed on the market' and may be sold after this date until its stocks are exhausted in the territory of the Member State where the distribution warehouse is located (state Y), even if it does not meet the requirements which will come into force on 3 July 2021?
- *Yes. However, it is also important to note that it is not the physical delivery of the product that is important, as a product is considered placed on the market when supplied for distribution, consumption or use (see above).*
- 29) Who will be responsible for placing the appropriate graphics if the product was placed on the market before the date of July 3, 2021, and on this date the distributor begins to make the product available on the market of other Members State?
- 30) We understand that when the products have been placed on the market, some obligations lie with the next levels in the value chain. Specifically, we understand that Member States have to ensure that the distributors have an obligation to **ensure compliance with national implementation of article 5 and 7** for the products they make available (after they have been placed on the market). E.g. a distributor must be legally obliged not to supply products that they find or have reason to

believe do not comply with the Commission Implementing Regulation (EU) 2020/2151 on harmonised marking specifications or with national implementation of Article 5 or 7. Furthermore, the distributor must in this case be legally obliged to inform the producer and the market surveillance authority of the non-compliance. The same applies to other obligations described in the Blue Guide e.g. distributors are obliged to abstain from making the product available, if it is not in compliance, and are obliged make sure that corrective measures are taken by the manufacturer/producer. Can you confirm?

- As explained above the Blue Guide as well as Decision 768/2008 is not directly applicable absent any specific legal requirements in SUPD. The SUPD does not foresee any specific legal requirements for the distributors in this regard, it is therefore left for the Member States to determine, how article 5 and article 7 of SUPD will be implemented and enforced in their Member State. Having said that for the sake of more aligned implementation the Member States could use the Blue Guide for inspiration in that regard.

31) In the Directive, placing on the market is defined as ‘the first making available of a product on the market of a Member State’. Our question is, whether in the implementation of the Directive, the MS need to **take legal measures** not only vis-à-vis companies placing said products on the market, **but also as regards companies established in the MS placing products on the market in other member states**, either by selling directly to end users in those MS or for distribution. Likewise, whether the bans of certain SUP products should be absolute and apply regardless of whether the producer intends to market the product in his or her own country or in any other Member State. Given that article 5 and 7 do not require companies to appoint and authorize representatives, not covering Danish companies marketing products in other MS would limit enforceability for other MS on their markets. Could you please advise whether this would be going beyond the scope of the Directive?

- Article 5 and 7 of SUPD refer to Member States prohibiting or ensuring markings affixed on the products “placed on the market”. The directive does not refer to a particular market of that Member State. However, SUPD does not place any obligations on distributors or manufacturers in that regard, while for example concerning the extended producer responsibility the specific obligations for producers were laid down in Article 8. Accordingly, DG ENV does not think that SUPD should be interpreted as asking MS to take legal measures not only vis-à-vis companies placing said products on its market, but also as regards companies established in the MS placing products on the market on other member states.

### **Placing on the market of particular SUP products**

32) Food containers: what moment has to be considered as the moment of ‘placing food containers on the market’ in the context of SUPD? Is it the moment when the food is packaged in the container by the producer? Or the moment when the food container with the food is sold to the final consumer by a retailer? (ie some retailers buy packaged food from other companies).

- *When the food container is supplied/sold empty to a distributor or producer that then fills the container.*

33) Comment and question: This explanation is very confusing because at the moment when the container is supplied for distribution, consumption or use in the context of a commercial activity,



we don't know yet whether it will be used for 'ready to eat' food or raw food. If those containers are used with raw food, they don't have to be considered as SUPD products. This only becomes clear when the food is packed in the container.

- In the context of "placing on the market" from the SUPD perspective, the food containers concerned are "food containers made of expanded polystyrene, i.e. receptacles such as boxes, with or without a cover, used to contain food...". As the from 3 July 2021 in accordance with Article 5 of the SUPD they will not be allowed to be placed on the market.
- As far as food containers are concerned the Guidelines<sup>3</sup> foresee, that "food containers used to contain food meeting the requirements set out in the Directive, which are sold empty and not intended to be filled at the point of sale, are also covered by the Directive".
- Accordingly, all the food containers made of expanded polysterene placed on the market empty before the 3 of July 2021 are already placed on the market in the MS so they can be used for "ready to eat" food or "raw" food or sold empty, it does not matter. As from 3 July 2021 the food containers made of expanded polysterene empty or filled with "ready to eat" food will not be allowed to be placed on the market of MS.

34) Single use-plastic cutlery attached to/integrated into food packaging/beverage container: when should the cutlery be considered to have been 'placed on the market'? E.g: A spoon is manufactured by a producer of spoons, and supplied/sold to a producer of yoghurt who fills a container with yoghurt, attach the spoon, and deliver the product to the food-chains/supermarkets who will sell this to consumers. When is the spoon placed on the market? Is this when the producer of the spoons supplies/sells the spoons to the yoghurt producer, or when the yoghurt is supplied/sold to the food-chains/stores?

- *When the cutlery/spoon is supplied/sold to a distributor or producer that then fills the container.*

35) **Comment and question**: When the producer of yoghurt is also the importer for spoons, does it mean that this yoghurt producer is the one who places the plastic spoon on the market? Does it mean that after 3 of July this producer cannot sell products with plastic spoons anymore? There is a similar situation with the producer of juice, who sells juice packs with integrated straws. They are the importers for their own straws. Similar situation is with ice-cream sellers who sell unpacked ice-cream in an ice cream parlor, and they want to add plastic spoons on products they have imported.

- See above in the Imports section. Normally, if the product was imported (i.e. from third countries), once in was released for free circulation the products would be placed on the market.

36) When can the wet wipe be considered as 'placed on the market'? E.g. a wipe is manufactured by a producer of wipes and supplied/sold to a producer of wet wipes that "moistens" the wipes with the chemical mixture (cosmetics or cleaning product mixture) and then packs the products and sells it to a retailer who will sell the product to a consumer. When is the wet wipe placed on the

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<sup>3</sup> Section 4.1 of the Commission guidelines on single-use plastic products in accordance with 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, that are foreseen to be adopted on 31 May.

market? Is it when a producer of wipes sells wipes to the wet wipe producer, or when the wet wipe producer supplies/sells wet wipes to the retailers?

- From the point of view of the SUPD the product that has to be marked in accordance with the Article 7 are wet-wipes and therefore when wet-wipes are placed on the market they should comply with the applicable legislation.

#### **Export of SUP products to third countries:**

37) A company based in the European Union buys plastic straws from another company based in the European Union. These straws will be placed in beverage packages and the entire production is exported to a third country. Would this possible in the context of the SUP Directive?

- These are not placed on the Union market/MS market if they will not be supplied for distribution, consumption or use on the Union market/MS market. See section 2.2 of the Blue Guide on Making available and in particular the following paragraph (second paragraph in that section) : *“Supplying a product is only considered as making available on the Union market, when the product is intended for end use on the Union market. The supply of products whether for further distribution, for incorporation into a final product, or for further processing or refinement with the aim to export the final product outside the Union market is not considered as making available.”*

38) A company based in the European Union buys plastic straws from another company based in the European Union. These straws will then be sold to a company in a third country. Is this possible in the context of the SUP Directive?

- See the answer above