

January 2011

**Views on the Italian ban on non-biodegradable bags
applicable as from 1 January 2011**

With a view to reducing CO2 emissions, protecting the environment and supporting the agricultural sector with the commercialisation of bio-materials, Italy had foreseen in its so-called "Budget Law" (Legge finanziaria 2007¹) to progressively ban carrier bags which do not meet the biodegradability requirements laid down in standard EN 13432:2001 as from 1 January 2010, and subsequently postponed to 1 January 2011.

The Italian blanket Decree "Mille Proroghe", approved by the Italian Council of Ministers² on 22 December 2010 confirms, among other things, this ban on the use of non-biodegradable carrier bags to end consumers as of 1 January 2011.

To our knowledge, the Decree has not been notified to the European Commission. In our view, not only does the measure not comply with Directive 94/62 on packaging and packaging waste³ (hereafter referred to as 'the Directive') for the reasons outlined below, but it also goes against general principles of Community law and disregards the obligations imposed on, and the efforts being made by the plastics industry in order to contribute to proper waste management of its products at the end-of-life stage.

1. Free movement clause (Article 18 of the Directive)

PlasticsEurope considers that the ban on non-biodegradable carrier bags in Italy is in violation of the free movement clause under Article 18 of the Directive, whereby "*Member States shall not impede the placing on the market (in) their territory of packaging which satisfies the provisions of this Directive.*"

Packaging complies with the Directive if it is part of a recovery system and if it fulfils the Directive's essential requirements⁴ on the composition, reusability, recyclability and recoverable nature of packaging.

According to the Directive⁵, plastic carrier bags are considered packaging. Plastic carrier bags currently used in Italy meet the Directive's essential requirements and can therefore not be banned outright.

This interpretation of the free movement clause of the Directive has been confirmed in the past by the European Commission specifically as regards biodegradable packaging. Indeed

¹ "Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)", Articles 1129, 1130, 1131

² 22 December 2010 - <http://www.governo.it/Notizie/Ministeri/dettaglio.asp?d=61669>

³ Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste

⁴ Articles 9, 11 and Annex II of the Directive 94/62 on packaging and packaging waste as amended

⁵ Article 1.3 (c) and Annex I thereof

this was the case in its response to written parliamentary question⁶, where it stated that *“although Member States may not prohibit the use of non-biodegradable plastics in packaging if it is in line with the essential requirements of Directive 94/62/EC [...] on packaging and packaging waste, they may encourage the use of bioplastics, e.g. by educational campaigns”*. An outright ban would thus contravene the above.

2. Waste management options available under the Directive

To impose biodegradable packaging to the detriment of recyclable/recoverable bags also violates the Directive’s waste management options which are clearly set out according to the overarching Waste Framework Directive 2008/98/EC⁷.

According to the hierarchy therein, reuse and recycling are the preferred waste management options following prevention.

Furthermore, the burden of proof of whether biodegradable bags are better than non biodegradable bags from an environmental point of view, thereby potentially justifying a measure, and whether such a measure is proportionate to the aim pursued, lies with Italy. To our knowledge, no such evidence has been put forward.

Moreover, under Directive 98/34 on technical standards and regulations⁸, where a draft measure seeks to limit the marketing or use of a chemical substance, preparation or product on grounds of public health or of the protection of consumers or the environment – which we consider to be the case here – the Member State must provide the Commission with either a summary or the references of all relevant data relating to the substance, preparation or product concerned and to known and available substitutes, and communicate the anticipated effects of the measure on public health and the protection of the consumer and the environment, together with an analysis of the risk carried out as appropriate in accordance with the general principles for risk evaluation of chemical substances under Regulation 793/93/EEC⁹ on the evaluation and control of the risks of existing substances.

3. Principle of Proportionality

According to standing European Court of Justice case law, the principle of proportionality requires that a measure is appropriate for attaining the objective pursued, and that it does not go beyond what is necessary to achieve the objective.¹⁰

⁶ Commission response dated 4 Oct 2006 to Parliamentary question n°E-3665/06 NL

⁷ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives

⁸ Article 8 (1) § 4 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations

⁹ Council Regulation (EEC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances.

¹⁰ See, inter alia, Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-0000, paragraph 68; and Case C-344/04 *IATA and ELFAA* [2006] ECR I-0000, paragraph 79).

The ECJ has also consistently held that before adopting a measure as radical as a total ban, national authorities have the duty to carefully examine the possibility of using measures less restrictive to the free movement of goods, and discount them only if their inadequacy, in relation to the objective pursued, is clearly established.¹¹

It is our view that to impose biodegradable bags to the detriment of traditional plastic bags is not proportionate to the rightful overarching aim pursued, which is to safeguard the environment.

Although in this case there are two main objectives: protecting the environment and promoting bio-materials, there are clearly less restrictive and more suitable measures available in order to reach these objectives. For the latter, as stated by the Commission itself in its response a few years ago (cf. point 1 above), Italy may instead encourage the use of biodegradable bags through educational campaigns or similar action.

4. Impact on plastics recycling

Finally, not only would an outright ban have a huge impact on the recent efforts undertaken by the waste management industry and public organisations including municipalities, all of which has invested millions in equipment in order to abide by the obligations under the Directive, but such a measure also disregards the fact that traditional non-biodegradable plastic bags are reusable, recyclable and recoverable.

Furthermore, such a restriction will hamper innovation in the waste management sector, here again, putting to a halt a number of ongoing projects.

A further aspect to be kept in mind is that of the management of the waste generated by these biodegradable bags – indeed, in order not to undermine the recycling capacity of traditional plastic waste, such biodegradable bags will have to be collected and recycled separately.

5. Considerations on Bioplastics

PlasticsEurope acknowledges that biodegradability and compostability are features which make so-called bioplastics beneficial in specific cases. From an environmental perspective, however, decisions in favour of any material or product must be based on sound scientific criteria and a lifecycle approach. Neither traditional plastics nor bio-based, biodegradable, or compostable plastics should be discriminated against, and economic and social perspectives should also be taken into account.

PlasticsEurope supports the development and application of EU standards on biodegradable or compostable plastics conducive to creating a fair competitive environment for the development of such materials. Nevertheless, PlasticsEurope disagrees with arguments and expectations which are unrealistic in nature, including the idea that biodegradable plastics represent a solution to the litter problem or that bio-based plastics are a credible short-term replacement of traditional fossil-based plastics.

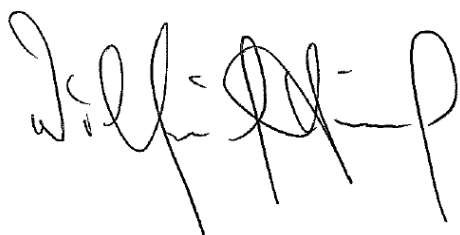
¹¹ C-320/03; judgment of November 15, 2005 Commission of the European Communities vs Republic of Austria; at para. 87.

It should be noted that some fossil materials meet biodegradable criteria and that, conversely, not all renewable-based materials are biodegradable. It should also be kept in mind that for plastic bags to be considered as biodegradable according to standard EN 13432:2001, they must degrade under industrial composting conditions, i.e. 60°C and a humidity level of >90%.

6. Conclusion

As outlined above, not only does the Italian ban on non-biodegradable bags contravene the Packaging and Packaging Waste Directive, but it also goes against the principle of proportionality. Furthermore, although such a ban could appear to be a simple way to meet the aims stated by the Italian government, the particular waste management structure and environment required in order for biodegradable bags to have any potential positive impact on the environment as well as the detrimental effect on already existing waste management systems leads us to truly question the initiative.

Besides, back in 2006, a similar proposal emanated from France when it notified¹² to the Commission a draft Decree which determined the conditions of prohibition, as of 1 January 2010 of the distribution to the end consumer of single-use carrier bags made of non-biodegradable plastic. In this case, single-use carrier bags were defined as bags that were not reusable according to the definition under standard EN 13429, and the biodegradability requirements were those under standard EN 13432 as are in our current case. ADEME, the French Environment and Energy Agency, commissioned a study on the environmental benefits of bio-plastic bags versus traditional plastic bags and concluded that the former were not environmentally preferable¹³. The Commission and a number of Member States issued detailed opinions and France rightly ended up abandoning the project.



Wilfried Haensel
Executive Director

PlasticsEurope is one of the leading European trade associations with centres in Brussels, Frankfurt, London, Madrid, Milan and Paris. We are networking with European and national plastics associations and have more than 100 member companies, producing over 90% of all polymers across the EU27 member states plus Norway, Switzerland, Croatia and Turkey. www.plasticseurope.org

¹² Notification 2006/433/F of 14 August 2006

¹³ ADEME's conclusions are based to a large extent on a life cycle analysis undertaken by Carrefour, audited by ADEME and WWF: Evaluation des impacts environnementaux des sacs de caisse Carrefour; Analyse de cycle de vie des sacs de caisse en plastique, papier et matériaux biodegradables (Ecobilan 2004)