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Memorandum

Legal Assessment of Article 17 of the French Law on Waste Prevention and the Circular Economy and its Draft Decree regarding the Triman Logo

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1. EXECUTIVE SUMMARY

- The Decree on consumer information symbols indicating the sorting rule for waste resulting from products subject to the principle of EPR (***Draft Decree***) exceeds the requirements set out by Article 17 of the Law 2020-105 on Waste Prevention and the Circular Economy (*Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*) (***Framework Law***). In addition to what the Framework Law provides, the Draft Decree requires (i) the affixing of the sorting symbol on the packaging where the EPR product concerned is packaging, and (ii) the attaching of the Triman logo to the sorting instructions. However, a decree is supposed to implement a piece of legislation without amending its content. Therefore, by adopting the Draft Decree, the French Prime Minister will exceed his powers of implementation.
- EU law has primacy over national law, which means that national law must comply with EU law. However, Article 17 of the Framework law and the Draft Decree do not comply with EU secondary law. First, Article 17 and the Draft Decree do not comply with certain EPR minimum requirements set out in the Waste Framework Directive and create unjustified barriers to trade. Second, Article 17 and the Draft Decree do not comply with the Packaging and Packaging Waste Directive as they create unjustified barriers to trade and do not comply with the free movement clause of this Directive. Lastly, Article 17 and the Draft Decree come into conflict with the Waste Electrical and Electrical Equipment Directive and Batteries Directives by creating unjustified barriers to trade for producers of electrical and electronic equipment and batteries.
- France has breached its obligations under Articles 34-36 of the Treaty on the Functioning of the European Union (***TFEU***) on the free movement of goods. Article 17 of the Framework Law and the Draft Decree are measures having equivalent effect to quantitative restrictions and are therefore prohibited by the TFEU. Although both conceivably pursue the legitimate objectives of protecting the environment and public health, they are neither suitable to achieve these objectives nor proportionate. Article 17 of the Framework Law and the Draft Decree may confuse consumers, lead to the production of more waste and are in any case discriminatory. The requirement to affix the Triman logo and sorting instructions to all EPR products, including EEE and batteries is disproportionate, as are the requirements to attach sorting information to the Triman logo and to affix the Triman logo and sorting instructions to the packaging itself.
- France failed to notify the Framework Law under the TRIS procedure which requires Member States to notify technical regulations to the European Commission. Article 17 of the Framework Law arguably constitutes a “technical specification” which is binding on producers of EPR products as it requires affixing a sorting symbol and information on sorting instructions on all EPR products. In the alternative, Article 17 of the Framework Law could arguably fall under the definition of “other requirements” as it requires, for the purpose of protecting the environment, the affixing of a sorting symbol and sorting instructions, which may affect the conditions of use and recycling of products subject to EPR, and could significantly influence the marketing of these products. Lastly, other provisions of the Framework Law may be regarded as constituting “technical regulations”, which should have led France to notify the full text of the Framework Law to the Commission.

2. INTRODUCTION

1. In this memorandum, we assess certain aspects of the French Framework Law on Waste Prevention and the Circular Economy, and the French Draft Decree on consumer information symbols indicating the sorting rule for waste resulting from products subject to the principle of extended producer responsibility (***EPR***).[1] The Draft Decree was notified through the European Union (***EU***) Technical Regulations Information System (***TRIS***) on 30 June 2020 (the ***Draft Decree***). This Draft Decree introduces an obligation to affix the Triman logo to any products generating waste placed on the market for household use and subject to EPR.

2. The scope of this memorandum is as follows. We provide the interpretation of Article 17 of the Framework Law and of certain relevant provisions of the Draft Decree. We then assess whether the Draft Decree exceeds the requirements of the Framework law, and in so doing can be viewed as an excess of power of the French Government. Next, we assess whether Article 17 of the Framework Law and the Draft Decree infringe secondary EU law (such as the Framework Waste Directive among others) to the extent that the secondary law comprises full harmonisation. Thereafter, insofar as the secondary law does not comprise full harmonisation, we assess the extent to which France has breached the EU's internal market rules, as laid down in the Treaty on the Functioning of the European Union (***TFEU***) and in the case law of the Court of Justice of the European Union (***CJEU***). Lastly, we analyse France's failure to notify the Framework Law (before it was adopted) under the Technical Regulation Information System (***TRIS***), and the consequences of its failure to so notify. In that final section, we also touch upon relevant proposed actions of the European Commission's own Circular Economy Action Plan (***CEAP***), and whether France ought to set aside or at the very least wait before adopting the Draft Decree in light of these proposed actions.

3. BACKGROUND AND INTERPRETATION OF THE FRAMEWORK LAW

3.1 Legislative background

3. On 10 February 2020, France adopted Law 2020-105 on Waste Prevention and the Circular Economy (*Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*) (***Framework Law***).[2] The Framework Law modifies various provisions of the French Environmental Code.

4. Article 17 of the Framework Law contains an obligation to label any product placed on the market for household use generating waste and subject to EPR[3] (excluding glass packaging) with a common sorting symbol. That Article also provides that a decree of the Council of State ("*décret en Conseil d'État*") will set down the detailed provisions for the implementation of the Framework Law. To this effect, on 30 June 2020, France notified the Draft Decree through the EU TRIS system. The Draft Decree specifies that

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1 Free translation of the original French text: [*Décret n° XX du XX relatif à la signalétique d'information des consommateurs sur la règle de tri des déchets issus des produits soumis au principe de responsabilité élargie du producteur*]

2 Free translation of the original French text: [*LOI n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*]

3 Article L541-10-I of the Environmental Code defines the EPR principle, according to which "persons responsible for placing certain products on the market may be responsible for financing or organising the management of end-of-life waste from these products"; Article L. 541-10-1 of the Environmental Code is the provision that lists that the products that fall within the EPR principle.

the sorting symbol referred to in Article 17 of the Framework Law is the so-called Triman logo. Initially, the amendment introduced by Article 17 of the Framework Law to the Environmental Code (*i.e.*, the creation of a new Article L. 541-9-3) was planned to enter into force on 1 January 2021 but the entry into force was postponed to 1 January 2022.[4]

5. The Triman logo was already introduced in 2014 when France, by amending its Environmental Code, imposed an obligation for standard labelling of products which could be recycled effectively and were subject to EPR,[5] except for household drinks packaging made from glass.[6] The Triman logo was chosen to simplify labelling for citizens and ensure that they know when a product is subject to a special sorting rule. The requirement to affix the Triman entered into force on 1 January 2015[7] and since then applies to all products subject to EPR with the exception of single use and rechargeable batteries, waste electrical and electronic equipment (***WEEE***)[8] and waste of chemical products posing a risk to health and environment (***diffuse waste specific to households***).[9] These products are subject to other labelling requirements, pursuant to Article R. 541-12-18 of the Environmental Code.[10] Accordingly, where the products are not recyclable or where they bear another recycling symbol such as the crossed-out wheeled bin, producers are not required to apply the Triman logo. In other words, under the 2014 legislation, the Triman logo is not compulsory when the crossed-out wheeled bin is affixed on the product.[11] Under the Decree 2014-1577, the Triman logo can be displayed on the product or, failing that, on the packaging, the notice or in any other form, including in a paperless format.[12]

6. The preparatory work preceding the adoption of the Framework Law indicates that labels related to the sorting rule are varied and that the Triman logo is not used systematically.[13] The diversity of markings on products, including packaging, related to the sorting of waste on the one hand, and the absence of a common signage systematically visible on the other hand are, according to France, confusing for consumers and detrimental to the performance of separate waste collection and the operation of recycling facilities.[14] The French legislator explains that the existence of these different rules made it necessary to harmonise the applicability of the sorting rules and to make them more visible for the consumer. The purpose of the Framework Law is therefore to make it mandatory to affix the Triman logo on all products covered by EPR and to supplement it with "*simple and non-misleading information on the nature of the sorting action to be carried out*".[15]

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4 *See* Article 130 of the Framework Law.
5 Current Article L. 541-10-5; Article R. 541-12-17 of the Environmental Code; implementing Decree 2014-1577 of 23 December 2014 regarding common labelling of recyclable products subject to a sorting rule.
6 Article L. 541-10-5 of the Environmental Code.
7 Article 2 of Decree 2014-1577.
8 Article R. 541-12-18-I of the Environmental Code; Decree 2014-1577.
9 Article R. 541-12-18-II of the Environmental Code; Decree 2014-1577.
10 Article R. 541-12-18-I and Article R. 543-127 of the Environmental Code for EEE and batteries (subject to the crossed-out wheeled bin logo); Article R. 541-12-18-II and the previous version of Article L. 541-10-4 of the Environmental Code for diffuse waste specific to household.
11 Point 1.2.4. of Etude d'Impact, *Projet de loi relative à la lutte contre le gaspillage et à l'économie circulaire*, 9 July 2019, available at https://www.legifrance.gouv.fr/affichLoiPubliee.do?type=general&idDocument=JORFDOLE000038746653 (***Impact Assessment***) p. 43.
12 Article R. 541-12-18-III of the Environmental Code; Article 1 of Decree 2014-1577.
13 Point 1.2.4. of Impact Assessment, pp. 43-44.
14 Impact Assessment, pp. 43-45.
15 Point 2.1 of Impact Assessment, p. 46.

3.2 Interpretation of Article 17 of the Framework Law and of the relevant provisions of the Draft Decree

3.2.1 Interpretation of Article 17 of the Framework Law

7. Article 17 of the Framework Law provides that Article L.541-9-3 of the Environmental Code will be inserted as follows:

> "*Any product placed on the market for household use subject to I of Article L. 541-10*[16]*, excluding household glass drinks packaging, is subject to a signage informing the consumer that this product is subject to sorting rules.*
>
> *This signage is accompanied by information specifying the methods for sorting or bringing in waste resulting from the product. If several components of the product or waste from the product are sorted differently, these procedures are detailed item by item. This information appears on the product, its packaging or, failing that, in the other documents supplied with the product, without prejudice to the symbols affixed in application of other provisions. All of this signage is grouped together in a dematerialised form and is available online to facilitate its assimilation and to explain its methods and meaning.*
>
> *The eco-organisation in charge of this signage ensures that the information written on household packaging and specifying the methods of sorting or supplying the waste from the product evolves towards standardisation when more than 50% of the population is covered by a harmonised system.*
>
> *The conditions of application of this article are specified by decree in Council of State*."[17]

8. The English version of Article 17 of the Framework Law must be read in parallel with its French version, which is drafted as follows:

> *"Tout produit mis sur le marché à destination des ménages soumis au I de l'article L. 541-10, à l'exclusion des emballages ménagers de boissons en verre, fait l'objet d'une signalétique informant le consommateur que ce produit fait l'objet de règles de tri.*
>
> *Cette signalétique est accompagnée d'une information précisant les modalités de tri ou d'apport du déchet issu du produit. Si plusieurs éléments du produit ou des déchets issus du produit font l'objet de modalités de tri différentes, ces modalités sont détaillées élément par élément. Ces informations figurent sur le produit, son emballage ou, à défaut, dans les autres documents fournis avec le produit, sans préjudice des symboles apposés en application d'autres dispositions. L'ensemble de cette signalétique est regroupé de manière dématérialisée et est disponible en ligne pour en faciliter l'assimilation et en expliciter les modalités et le sens.*

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16 Article L. 541-10-I of the Environmental Code lists the different products subject to a French EPR scheme.

17 Free translation of the original French text: [*LOI n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire*].

L'éco-organisme chargé de cette signalétique veille à ce que l'information inscrite sur les emballages ménagers et précisant les modalités de tri ou d'apport du déchet issu du produit évolue vers une uniformisation dès lors que plus de 50 % de la population est couverte par un dispositif harmonisé.

Les conditions d'application du présent article sont précisées par décret en Conseil d'Etat."[18]

9. Pursuant to Article 17 of the Framework Law, any product generating waste placed on the market for household use and subject to EPR, excluding household glass beverage packaging, will therefore have to be labelled with a sorting symbol informing the consumer that the product is subject to a sorting rule and accompanied by information specifying the methods for sorting or bringing in waste ("*apport de déchets*") resulting from the product (***sorting instructions***).

10. Article 17 of the Framework Law makes four main changes to the legislation currently in place:

- First, Article 17 of the Framework Law provides that the sorting symbol must be accompanied by information on sorting instructions. This goes further than what is currently provided for in Article L-541-10-5 of the Environmental Code, which imposes the use of the sorting symbol for certain products, without reference to the need to add information on sorting instructions.[19]

- Second, while the Decree 2014-1577 currently allows producers to use the sorting symbol on the product or, failing that, on the packaging, the notice or in any other form, including in a paperless format (*i.e.*, online), producers will now be obliged to display both the sorting symbol and the sorting instructions on a physical medium, namely on the product, its packaging or, failing that, in the other documents supplied with the product (*e.g.*, instruction sheets). It derives from the French version of Article 17 of the Framework Law that the requirement set out in Article 17 to display the "information" on a physical medium, namely the product, its packaging or other documents supplied with the product, applies both to the sorting symbol and the sorting instructions. More precisely, while the first sentence of the second paragraph of Article 17 (relating to the obligation to add information on sorting instructions) uses the word "information" in the singular form ("*une information*"), the third sentence of that paragraph (relating to the place where the information must appear) uses the word "information" in the plural form ("*ces informations*"). It results from the wording used by the French legislator that where Article 17 of the Framework Law states that "[t]*his information appears on the product, its packaging or, failing that, in the other documents supplied with the product*", the term "information" must be understood as including both the sorting symbol and the information on sorting instructions. Accordingly, it will no longer be possible for the sorting symbol (nor, indeed, the sorting instructions), to appear only on the producers' website. In addition, the fourth sentence of the second paragraph of Article 17 requires that all this information ("*l'ensemble de cette signalétique*"), understood as including both the sorting symbol and the sorting instructions, must also "*be available in a dematerialised form and available online*".[20]

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18 Article 17 of *Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire.*

19 *See* Article 17 of the Framework Law : « *Cette signalétique est accompagnée d'une information précisant les modalités de tri ou d'apport du déchet issu du produit.* »

20 *See* Article 17 of the Framework Law : *« Ces informations figurent sur le produit, son emballage ou, à défaut, dans les autres documents fournis avec le produit, sans préjudice des symboles apposés en application d'autres dispositions. L'ensemble de cette signalétique est regroupé de manière dématérialisée et est disponible en ligne pour en faciliter l'assimilation et en expliciter les modalités et le sens. »*

Consequently, producers will have to make this information (*i.e.*, the sorting symbol and the sorting instructions) available both on a physical medium and on an electronic medium.

- Third, the Framework Law makes the use of the sorting symbol systematic for all products subject to EPR (only excluding household glass beverage packaging).[21] This departs from the current legislation where the sorting symbol (*i.e.*, the Triman logo) is only mandatory for sectors other than EEE, batteries and diffuse waste specific to households,[22] which are subject to additional marking requirements, namely, for instance, the crossed-out wheeled-bin logo applicable to EEE and batteries. Products can be subject to EPR by virtue of European or national law. Under French law, products that are (or will become) subject to EPR are categorised per sector. The new version of Article L541-10-1 of the Environmental Code specifies the sectors: packaging; printed paper; construction products or materials from the building sector; electrical and electronic equipment; batteries and accumulators; content and containers of chemical products; medicinal products; perforating medical devices used by patients in self-treatment and users of self-tests; furnishing elements; new textile clothing products; shoes or household linen intended for private use; toys; sporting and leisure articles; do-it-yourself and garden articles; certain vehicles and motorbikes; tyres; certain oils; pleasure or sports boats; tobacco products equipped with filters made wholly or partly of plastic; non-biodegradable synthetic chewing gums; disposable sanitary textiles and fishing gear containing plastic.

- Fourth, the Framework Law extends the scope of application of the Triman logo. While current Article L-541-10-5 of the Environmental Code (introduced in 2014) provides that any recyclable product subject to EPR is subject to the sorting symbol, Article 17 of the Framework Law makes the sorting symbol mandatory for EPR products[23], irrespective of whether they are recyclable or not. This is justified by the objective of Article 17 of the Framework Law, which is to impose a common labelling systematically visible on all EPR products.[24]

3.2.2 Interpretation of the relevant provisions of the Draft Decree

11. Article 1 of the Draft Decree provides that Articles R. 541-12-17 and R. 541-12-18 of the Environmental Code will be replaced as follows:

> "Article R. 541-12-17. - *The symbol provided for in Article L.541-9-3* [inserted by Article 17 of the Framework Law] *is defined in the Annex to this Article and attached to the information referred to in Articles R.541-12-18 and R.541-12-19.*

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21 *See* Article 17 of the Framework Law : *« Tout produit mis sur le marché à destination des ménages soumis au I de l'article L. 541-10, à l'exclusion des emballages ménagers de boissons en verre, fait l'objet d'une signalétique informant le consommateur que ce produit fait l'objet de règles de tri. »*

22 Article R. 541-12-18-I and Article R. 543-127 of the Environmental Code for EEE and batteries; Article R. 541-12-18-II and the previous version of Article L. 541-10-4 of the Environmental Code for diffuse waste specific to household.

23 *See* Article 17 of the Framework Law : *« Tout produit mis sur le marché à destination des ménages soumis au I de l'article L. 541-10, à l'exclusion des emballages ménagers de boissons en verre, fait l'objet d'une signalétique informant le consommateur que ce produit fait l'objet de règles de tri. »*

24 Point 1.2.4. of Impact Assessment, p. 43.

For the packaging mentioned in paragraph 1 of L.541-10-1 and the packaging made available to consumers by a catering business as referred to in paragraph 2 of L.541-10-1, and excluding glass drinks packaging, this symbol shall be affixed to the packaging."

"Article R. 541-12-18. – *Any producer responsibility organisation set up pursuant to Article L. 541-10 shall draw up the information specifying the methods for sorting or bringing in waste resulting from the product, as mentioned in the second paragraph of Article L.541 -9-3, within three months from the date of its first approval* (…)".

12. It is again important to read the English version of the Draft Decree in parallel with its French version, which is drafted as follows:

"Article R. 541-12-17. - *La signalétique prévue en application de l'article L. 541-9-3 est définie à l'annexe au présent article et accolée à l'information visée aux articles R. 541-12-18 et R. 541-12-19.*

Pour les emballages mentionnés au 1° du L. 541-10-1 et ceux mis à disposition des consommateurs dans le cadre d'une activité de restauration visés au 2° du L. 541-10-1, et à l'exclusion des emballages de boissons en verre, cette signalétique est apposée sur l'emballage."

"Article R. 541-12-18. – *Tout éco-organisme mis en place en application de l'article L. 541-10 élabore l'information précisant les modalités de tri ou d'apport du déchet issu du produit qui est mentionnée au deuxième alinéa de l'article L. 541-9-3 dans un délai de trois mois à compter de la date de son premier agrément* (…)".

13. First, it results from the first paragraph of the new version of Article R. 541-12-17 (as amended by the Draft Decree), that the sorting symbol referred to in Article 17 of the Framework Law is the Triman logo, as illustrated in the Annex to the Draft Decree.

14. Second, the English version of the Draft Decree which amends Article R.541-12-17, as notified to the Commission, states that the Triman logo will have to be "*attached to*" the sorting instructions. According to the French version of the same provision, the Triman logo and the sorting instructions will have to not only accompany one another, but be "stuck together". This can be inferred from the use of the French adjective "*accolée*", which can be translated as "contiguous". In other words, the sorting instructions and the Triman logo will have to be displayed together and therefore also on the same medium.

15. Third, it derives from the second paragraph of the new version of Article R. 541-12-17 (as amended by the Draft Decree) that for packaging subject to EPR[25], excluding glass beverage packaging, the Triman logo will have to be affixed on the packaging itself. Accordingly, since, as noted in the previous paragraph, the Triman logo and the sorting instructions must be "stuck together", this means that for packaging subject to EPR, both the sorting instructions and the Triman logo will have to be displayed on the packaging itself.

[25] §1 of Article L. 541-9-3 of the Environmental Code refers to "packaging used to market products consumed or used by households, including those consumed away from home" and §2 of Article L. 541-9-3 refers to "packaging made available to consumers by a catering business" and which are already covered" by the first paragraph of Article L. 541-9-3 [*i.e.*, other packaging used to market products consumed or used by professionals].

16. These additional requirements raise some issues regarding the compatibility of the Draft Decree with the Framework Law, which lays down less stringent requirements. This will be further detailed in section 4 below.

4. LEGAL ASSESSMENT OF THE FRAMEWORK LAW AND THE DRAFT DECREE UNDER FRENCH LAW

17. The purpose of this section is to analyse the compatibility of the Draft Decree with the Framework Law. In particular, the question arises whether French law allows the Draft Decree to exceed the requirements set out in the Framework Law or whether exceeding such requirements can be deemed to constitute an excess of power by the French Government.

4.1 The Draft Decree exceeds the requirements of the Framework Law

18. The purpose of the Draft Decree is to determine the conditions governing the application of several provisions of the French Environmental Code, including Article L541-9-3 of the Environmental Code, which was introduced by Article 17 of the Framework Law. However, the Draft Decree contains more stringent requirements than Article 17 of the Framework Law.

4.1.1 The requirement to affix the sorting symbol on the packaging for packaging subject to EPR

19. In the context of products covered by the EPR packaging scheme, Article 17 of the Framework Law allows producers to affix the sorting symbol wherever they want, provided that it accompanies the product (*i.e.*, on the product, the packaging or any other document supplied with the product). Conversely, the Draft Decree states that the Triman logo must appear on the packaging itself (as explained above in paragraph 14) and therefore eliminates the possibility to affix the Triman logo on other documents supplied with the product (*e.g.*, a separate notice).

20. In practice, this means that where a product has a packaging subject to EPR, the Triman logo relating to the packaging must be affixed on the packaging itself, while the Triman logo relating to the packaged product can appear either on the product, its packaging or on any other document supplied with the product.

4.1.2 The requirement to attach the Triman logo to the sorting instructions

21. As explained in section 3.2.1, Article 17 provides that the sorting symbol must be supplemented by sorting instructions. Yet, while Article 17 of the Framework Law allows producers to affix the sorting instructions and the sorting symbol wherever they want as long as all this information accompanies the product and is displayed on a physical medium (*i.e.*, on the product, packaging or any other document supplied with the product such as instruction sheets), the Draft Decree requires the Triman logo and the sorting instructions to be “stuck together” and therefore also on the same medium (as explained above in paragraph 14). In other words, while Article 17 imposes that both the sorting symbol and the sorting instructions are displayed on a physical medium, the Draft Decree goes further by imposing that the Triman logo and the sorting instructions must be displayed on the same physical medium.

22. In practice, this therefore means that for packaging covered by an EPR scheme, both the Triman logo and the sorting instructions will have to be affixed on the packaging itself. This is because the Draft Decree provides that (i) for packaging covered by EPR, the Triman logo must be affixed to the packaging and (ii) for all EPR products, the instructions must be attached to the Triman logo. On the other hand, the Draft Decree does not deal with the place where the Triman logo (and hence the sorting instructions that must be stuck to it) must appear for those EPR products which are not packaging. For these products, producers will retain the option laid down in Article 17 of the Framework Law to affix the logo and the sorting instructions on the product, its packaging or any other document supplied with the product (*e.g.*, instruction sheets). However, the Draft Decree is still more restrictive that the Framework Law since the logo and the sorting instructions will have to appear on the same medium.

23. It results from the above considerations that the Draft Decree exceeds the requirements set out in the Framework Law. It can thus be argued that the French Government exceeded its powers when it adopted the Draft Decree (see section 4.2 below).

4.2 Excess of powers under French law

24. In its judgment of 17 February 1950 "*Dame Lamotte*", the French Council of State established a general principle of law according to which any administrative decision may be subject to an administrative appeal where the administrative authority has exceeded its powers.

25. While the Framework Law was adopted by the Parliament, the implementing decree is a governmental act. More precisely, the Draft Decree is a "*décret en Conseil d'Etat*", which is a type of decree that must be subject, before its adoption, to the opinion of the Council of State. Since a decree is adopted without Parliament's involvement, it cannot be stricter than the enabling legislation. It is clear from French law and from the principle of the separation of powers that implementing decrees cannot modify or create additional measures to the enabling (framework) legislation.[26]

26. Article 21 of the French Constitution provides that the Prime Minister ensures the implementation of laws. It also provides that a decree that implements a piece of legislation remains subordinated to it. Accordingly, while decrees may specify the details of a law, they cannot amend the content of that law.[27] The legislator often provides that implementing decrees need to be adopted in order to determine the conditions of application of the legislation. The decrees are then supposed to flesh out the law, but they cannot take anything away from it.[28]

27. In the present case, the Draft Decree provides for stricter requirements than Article 17 of the Framework Law. First, it makes it mandatory for packaging subject to EPR that the Triman logo appears on the packaging itself (and therefore not, for example, on a separate instruction sheet). Second, the Draft Decree requires that the Triman logo sticks together with the sorting instructions, while Article 17 only states that the sorting symbol must be accompanied by information on sorting instructions, thus allowing the sorting symbol and the sorting instructions to be displayed on a different physical medium, provided that

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[26] Vie publique, *Comment l'administration participe-t-elle à l'application des lois ?*, available at https://www.vie-publique.fr/fiches/20219-le-role-de-ladministration-dans-lapplication-des-lois.

[27] Valérie Lasserre, « Loi et règlement – Naissance des lois et des réglements », in *Répertoire du droit civil*, 2015, Dalloz, No 75.

[28] Jean-Claude Venezia, « Mesures d'application », in *Mélanges Chapus*, 1992, Montchrestien, as from p. 673.

the latter accompanies the product (*i.e.*, on the product, its packaging or any other document supplied with the product).

28. Therefore, by adopting stricter requirements than Article 17 of the Framework Law, the Draft Decree has taken away some of the possibilities offered to producers by the Framework Law. In other words, the Draft Decree has amended the content of Article 17 of the Framework Law. Accordingly, it can be argued that the Prime Minister has exceeded his powers of implementation.

5. LEGAL ASSESSMENT OF ARTICLE 17 OF THE FRAMEWORK LAW AND THE DRAFT DECREE UNDER EUROPEAN UNION LAW

29. EU law consists of EU primary law, *i.e.*, the EU Treaties,[29] and of EU secondary law, *i.e.*, regulations, directives and decisions, which are based on the EU Treaties. Both EU primary law and EU secondary law have primacy over national law.[30] This means that national law must comply with EU law. [31]

30. When EU secondary law provides for full harmonisation, Member States have to comply with that law and cannot rely on the EU Treaties to justify any deviation from that law. Therefore, section 5.1 will first analyse the compatibility of Article 17 of the Framework Law and the Draft Decree with relevant EU secondary law. Thereafter, insofar as no full harmonisation exists, section 5.2 will analyse whether Article 17 of the Framework Law and the Draft Decree constitute barriers to trade, both under the internal market rules enshrined in the Treaty on the Functioning of the European Union (***TFEU***) and the case-law of the Court of Justice of the European Union (***CJEU***).

31. The analysis below will assess Article 17 of the Framework Law and the Draft Decree together (unless otherwise specified). This is because the Draft Decree is intended to only further specify the general obligation enshrined in Article 17 of the Framework Law, *i.e.*, to display separate labelling and sorting information in material form on products subject to EPR. The Draft Decree's further specifications are interlinked and dependent on the general obligation.

5.1 Compatibility with EU secondary law

32. Article 17 of the Framework Law and the Draft Decree do not comply with EU secondary legislation on certain aspects of waste management. In particular, Article 17 of the Framework Law and the Draft Decree violate provisions of (i) the Waste Framework Directive 2008/98/EC, [32] (ii) the Packaging and Packaging Waste Directive 94/62/EC, [33] (iii) the Waste Electrical and Electronic Equipment Directive

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29 There are two EU Treaties, namely (i) the Treaty on the European Union, and (ii) the Treaty on the Functioning of the European Union.

30 Case 6/64, *Costa v. ENEL*, ECLI:EU:C:1964:66.

31 *Ibid.*

32 Directive 2008/98 of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22.11.2008.

33 Directive 94/62/EC of the European Parliament and Council of 20 December 1994 on packaging and packaging waste, OJ L 365, 31.12.1994.

2012/19/EU (***WEEE***), [34] and (iv) the Batteries Directive 2006/66/EC. [35] The specific violations of these directives by Article 17 of the Framework Law and the Draft Decree will be analysed below.

5.1.1 The Waste Framework Directive

33. Article 17 of the Framework Law and the Draft Decree are part of France's EPR as they place additional regulatory requirements on producers that are subject to EPR. As the Waste Framework Directive lays out requirements for EPR established by the Member States, Article 17 of the Framework Law and the Draft Decree have to comply with these EU requirements on EPR.

34. The Waste Framework Directive sets the parameters for EPR.[36] This Directive entails minimum harmonisation regarding EPR, which means that Member States are allowed to maintain more stringent regulatory standards than those prescribed by the Directive, provided that they are compatible with the EU Treaties.[37] This means that this Directive sets the floor and the EU Treaties the ceiling. Member States are free to set their policies within those boundaries. However, Article 17 of the Framework Law and the Draft Decree violate both of those boundaries. This is because they fail to comply with EPR obligations imposed on Member States by the Waste Framework Directive and because they breach internal market rules as enshrined in the TFEU (see section 5.2).

35. Article 8 of the Waste Framework Directive lays down the basic rules for EPR. In particular, Article 8(3) requires that when Member States apply EPR they shall take into account, *inter alia*, the technical feasibility and economic viability impacts, while "*respecting the need to ensure the proper functioning of the internal market*". This is also clearly reflected in Recital 27 of the Directive which states that the introduction of EPR shall be done "*without compromising the free circulation of goods on the internal market*". France has not met this requirement. Article 17 of the Framework Law and the Draft Decree create barriers to trade by requiring the Triman logo and the sorting instructions in a physical format on products subject to EPR. As explained below (section 5.2), it is settled EU case law that an "obstacle" to trade is to be understood as those trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-EU trade. The specific obligations for labelling and sorting instructions enacted by France can be seen as clearly capable of hindering, "*directly or indirectly, actually or potentially*", intra-EU trade as producers subject to EPR will have to change their labelling and packaging functions if they want to sell their products on the French market.

36. Article 8a of the Waste Framework Directive lays down the general minimum requirements for Member States' EPR schemes. In particular, Article 8a(1)(d) sets out two obligations: EPR schemes established by the Member States (i) shall "*ensure equal treatment*", and (ii) shall not place "*a disproportionate regulatory burden on producers*". [38] Article 17 of the Framework Law and the Draft Decree do not comply with either of these minimum requirements.

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34 Directive 2012/19 of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE), OJ L 197, 24.7.2012.

35 Directive 2006/66 of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157, OJ L 266, 26.9.2006.

36 Recital 27 and Articles 8 and 8a of the Waste Framework Directive.

37 Case C-2/97, *Società italiana petroli SpA (IP) v Borsana Srl*, ECLI:EU:C:1998:613.

38 Even without this provision, France is obliged to comply with the EU principles of non-discrimination and of proportionality (see, e.g., Takis Tridimas, "The general principles of EU law : who needs them?", in Cahiers de Droit Europeén, 2016, from p. 419.

37. First, Article 17 of the Framework Law and the Draft Decree do not ensure equal treatment. The labelling and sorting instruction requirements do not apply to household glass beverage packaging. There are no objective reasons for this exemption. There is no logical justification enunciated for the exclusion of household glass beverage packaging by France, given that glass packaging recycling rates are below those of other waste streams such as metallic or paper and cardboard.[39] Hence, the exclusion of household glass beverage packaging from Article 17 of the Framework Law and the Draft Decree creates unjustified discrimination and does not guarantee equal treatment as required by the Directive.

38. Second, Article 17 of the Framework Law and the Draft Decree impose a disproportionate regulatory burden on producers subject to a French EPR scheme. The new requirements are disproportionate because they require the introduction of separate labelling and sorting information in material form. This means that producers who want to sell their products on the French market will have to change their packaging and labelling. This might even result in the necessity for producers to change their production for the French market. Such requirements thus lead to significant disproportionate administrative burdens and costs for producers. It should equally be noted that less restrictive measures are already available, namely, providing producers with the alternative opportunity to have the Triman logo and sorting information on their website.

39. In conclusion, Article 17 of the Framework Law and the Draft Decree do not comply with certain provisions of the Waste Framework Directive as enunciated above. Further, to the extent that the Waste Framework Directive does not provide for full harmonisation, Article 17 of the Framework Law and the Draft Decree do not comply with the internal market rules as enshrined in the TFEU. This will be elaborated below in section 5.2.

5.1.2 The Packaging and Packaging Waste Directive

40. Article 1 of the Packaging and Packaging Waste Directive sets out the objectives of this Directive. These objectives are to "*harmonize national measures concerning the management of packaging and packaging waste*", and at the same time "*to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community*". These two objectives are on an equal footing.[40] However, Article 17 of the Framework Law and the Draft Decree do not comply with the second objective as they create obstacles to trade by requiring specific labelling and sorting information in a physical form on the packaging of products subject to EPR intended for the French market.

41. The Packaging and Packaging Waste Directive also requires Member States to establish EPR schemes for packaging. Those EPR schemes must be established in accordance with Articles 8 and 8a of the Waste Framework Directive.[41] As established in section 5.1.1 above, Article 17 of the Framework Law and the Draft Decree do not comply with those Articles.

42. Furthermore, Article 18 of the Packaging and Packaging Waste Directive states that "*Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive*" (emphasis added). Article 18 comprises a free movement clause and constitutes maximum harmonisation because the provision does not enable Member States to lay down more

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39 Eurostat, 'Packaging Recovery and Recycling Rates France', 2017.
40 Case C-246/99, Opinion of 13 September 2001, *Commission v. Denmark*, ECLI:EU:C:2001:441, para 28.
41 Article 7(2) of the Waste Framework Directive.

restrictive or simply different rules from those of the Directive.[42] This means that, because of Article 18, the Directive's provisions are the floor and the ceiling, and therefore national legislation cannot deviate from this Directive. In the realm of marking obligations, the Directive's Article 8(2) requires that, to facilitate collection, reuse and recovery including recycling, packaging shall indicate for the purposes of its identification and classification by the industry concerned the nature of the packaging material(s) used. Such marking is however distinct from the one required by France: the Directive does not contain a labelling and sorting instructions requirement and merely imposes an obligation to identify the "materials"[43] used in the packaging. Therefore, Article 17 of the Framework Law and the Draft Decree deviate from the Directive because they add different labelling requirements. Hence, Article 17 of the Framework Law and the Draft Decree violate Article 18 of the Directive as, by their implementation, France would be clearly impeding the placing of packaging on the French market which otherwise satisfies the provisions of the Packaging and Packaging Waste Directive. Lastly, it is established case law that because there is maximum harmonisation, Member States cannot rely on Article 36 TFEU nor the mandatory requirements (explained below under section 5) to justify any deviation from the EU harmonised legislation.[44] In sum, Article 17 of the Framework Law and the Draft Decree do not comply with the Packaging and Packaging Waste Directive.

5.1.3 The WEEE and Batteries Directives

43. The WEEE Directive requires that electrical and electronic equipment (***EEE***) has to be marked with the crossed-out wheeled bin.[45] This symbol is required "[w]*ith a view to minimising the disposal of WEEE as unsorted municipal waste and to facilitating its separate collection*".[46] The symbol is intended for "*users in private households*". While this marking is mandatory, the WEEE Directive does not expressly prohibit the use of other markings.[47] In addition, the WEEE Directive also requires Member States to ensure that users of EEE in private households are given the necessary information about, *inter alia*, the requirement not to dispose of WEEE as unsorted municipal waste; the return and collection systems available; their role in contributing to re-use, recycling and other forms of recovery of WEEE; the potential effects on the environment and human health as a result of the presence of hazardous substances in EEE; and the meaning of the crossed-out wheeled bin symbol.[48] Member States may require that some or all of the above information is provided by producers and/or distributors, *e.g.*, in the instructions for use, at the point of sale and through public awareness campaigns[49].

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42 Case C-246/99, Opinion of 13 September 2001, *Commission v. Denmark*, ECLI:EU:C:2001:441, para; Case C-322/01, *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, para. 144; *See also* Case 148/78, *Tullio Ratti,* ECLI:EU:C:1979:110, para. 33 where the Court of Justice held that Directive 73/173 on the packaging and labelling of dangerous substances precluded Member States from prescribing "*obligations and limitations which are more precise and detailed than, or at all events different from, those set out in the directive*".

43 Decision 97/129/EC of the Commission of 28 January 1997 establishing the identification system for packaging materials pursuant to European Parliament and Council Directive 94/62/EC on packaging and packaging waste, OJ L 50, 20.2.1997.

44 Case C-5/77, *Tedeschi v. Denkavit*, ECLI:EU:C:1977:144; Case C-389/96, *Aher-Waggon*, ECLI:EU:C:1998:357.

45 In exceptional cases, where this is necessary because of the size or the function of the product, the symbol may be printed on the packaging, on the instructions for use and on the warranty of the EEE (Article 14(4) of the WEEE Directive).

46 Article 14(4) and Annex IX of the WEEE Directive.

47 Such omission is noteworthy, given that other product-related directives, which require the CE marking (the EU mark demonstrating that a product is in conformity with EU legislation), allow additional markings and marks, provided that they fulfil a different function from that of the CE marking, are not liable to cause confusion with it, and do not reduce its legibility and visibility (see, in this regard, the Blue Guide on the implementation of product rules 2016, at p.63).

48 Article 14(2) of the WEEE Directive.

49 Article 14(5) of the WEEE Directive.

44. The Batteries Directive requires that all batteries, accumulators and battery packs (together referred to as ***batteries***) are marked with the crossed-out wheeled bin symbol.[50]The symbol indicates "*separate collection*".[51] The Directive also requires that end-users are fully informed, in particular through information campaigns, of, *inter alia*, the desirability of not disposing of waste batteries as unsorted municipal waste and of participating in their separate collection so as to facilitate treatment and recycling; the collection and recycling schemes available to them; their role in contributing to the recycling of waste batteries; and the meaning of the symbol of the crossed-out wheeled bin.[52] Member States may require economic operators to provide some or all of the above information[53].

45. Given the above-mentioned symbol and information obligations, it is baffling that Article 17 of the Framework Law and the Draft Decree require that the Triman logo and sorting information be affixed in the case of EEE and batteries (among other product sectors). On the one hand, both symbols are intended to have the same effect on consumers, *i.e.*, provide them with the knowledge about separate collection and sorting. This is all the more illogical when one considers that the Triman legislation currently in force expressly exempts both EEE and batteries from being marked with the Triman logo. On the other hand, making end-users aware of the sorting instructions is covered by the above information obligations laid down in the WEEE and Batteries Directive. It is correct that such provisions could be read as allowing Member States to require producers and/or distributors to provide sorting information. However, there is no requirement to provide such information in a particular format and both Directives are flexible on how such information can be communicated, without any emphasis on adding such information on the products themselves, their packaging or the accompanying documents, and with a clear acceptance of public campaigns.

46. Given that Article 17 of the Framework Law and the Draft Decree essentially duplicate the requirements in the case of EEE and batteries, the French law can be seen to clearly come into conflict with the WEEE Directive and the Batteries Directive. Affixing two separate symbols can be seen as clearly burdensome and unnecessary. Moreover, the information obligations laid down in the WEEE Directive and the Batteries Directives already address the need to provide end-users with sorting information with a flexibility that Article 17 of the Framework Law and the Draft Decree would nullify. This creates unjustified barriers to trade, may lead to an increase in the size of packaging in order to accommodate both sets of requirements (thereby creating more (packaging) waste) and will likely create confusion among consumers rather than properly informing them.

47. Furthermore and importantly, Article 6 of the Batteries Directive comprises a free movement clause which constitutes maximum harmonisation because the provision does not enable Member States to lay down more restrictive or simply different rules from those of the Directive.[54] According to Article 6(1), "*Member States shall not, on the grounds dealt with in this Directive, impede, prohibit, or restrict the placing on the market in their territory of batteries and accumulators that meet the requirements of this Directive*." The Batteries Directive deals with rules on recycling and the promotion of a high level of collection and

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50 Where the size is such that the symbol would be smaller than 0.5 × 0.5 cm, the product need not be marked but a symbol measuring at least 1 × 1 cm shall be printed on the packaging (Article 21(5) of the Batteries Directive).

51 Annex II of the Batteries Directive.

52 Article 20(1) of the Batteries Directive.

53 Article 20(2) of the Batteries Directive.

54 Case C-322/01, *Deutscher Apothekerverband*, ECLI:EU:C:2003:664; Case 148/78, *Tullio Ratti,* ECLI:EU:C:1979:110; Case C-150/88, *Provide*, ECLI:EU:C:1989:594.

recycling of waste batteries.[55] Article 6(1) constitutes maximum harmonisation, meaning that the rules of the Directive are the floor and the ceiling and that the Member States cannot deviate from those rules. However, Article 17 of the Framework Law and the Draft Decree violate Article 6(1) of the Directive by restricting the placing on the French market of batteries that meet the requirements of this Directive. As a result of this breach, the French measures cannot be justified by any legitimate objective such as the protection of the environment.[56]

48. Lastly, while the WEEE Directive does not have a similar provision and does not achieve full harmonisation, the CJEU has held that national measures cannot "*endanger(s) the objective*"[57] of EU legislation "*even if the matter in question has not been exhaustively regulated by it*".[58] The WEEE Directive already foresees the crossed-out wheeled bin and information obligations. The labelling requirement and sorting information foreseen by Article 17 of the Framework Law and the Draft Decree, when added to EEE products, clearly endangers the objective from the WEEE Directive as it will lead to confusion. Moreover, although the WEEE Directive does not expressly exclude other markings, by analogy with the case of CE marking, it could be argued that other markings could be accepted but only as long as the interests covered by those additional marks are not already covered by Union harmonisation legislation and that no confusion is created with the EU marking.[59] These requirements would clearly not be met in this case due to the duplication derived from the use of the Triman logo and the sorting instructions. Therefore, Article 17 of the Framework Law and the Draft Decree are contrary to the WEEE Directive also for these reasons.

5.2 Compatibility with EU primary law (internal market rules)

49. As explained above, with the exception of Article 18 of the Packaging and Packaging Waste Directive and Article 6 of the Batteries Directive, the relevant EU secondary legislation does not constitute full harmonisation. Thus, with regard to all matters and products not covered by these two directives, we have to consider whether Article 17 of the Framework Law and the Draft Decree qualify as obstacles to trade contrary to EU primary legislation, *i.e.*, the TFEU, which could nevertheless be justified by France pursuant to any of the exemptions foreseen by TFEU or the EU case law, such as the protection of the environment. Such justification is not relevant for those products where EU secondary legislation amounts to full harmonisation but is decisive in those cases where EU secondary legislation does not amount to full harmonisation or for those products where there is no EU legislation addressing the concerns covered by Article 17 of the Framework Law and/or the Draft Decree.

50. This section will therefore examine the Framework Law and the Draft Decree in relation to their compatibility with the general EU Treaty provisions in the absence of full harmonisation. Articles 34-36 TFEU which guarantee the free movement of goods, are intended to "*eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra*-[EU] *trade*".[60] Therefore, any measure introducing an unnecessary and unjustified technical barrier against the free movement of goods which are lawfully

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55 Article 1 Batteries Directive.

56 More specifically, France cannot rely on Article 36 TFEU nor the mandatory requirements laid out by the Court of Justice to justify the deviation from the Directive because the rules of the Directive are the ceiling. See section 5. See also, Case C-5/77, *Tedeschi v. Denkavit*, ECLI:EU:C:1977:144; Case C-389/96, *Aher-Waggon*, ECLI:EU:C:1998:357.

57 Case C-223/78, *Grosoli*, ECLI:EU:C:1979:196, para. 13.

58 Case C-507/99, *Denkavit,* ECLI:EU:C:2002:4, para. 32.

59 Please see above footnote 47 on CE marking.

60 Case C-320/03, *Commission v Austria*, ECLI:EU:C:2005:684, para. 67.

produced and marketed in another Member State is contrary to EU law. The principle of mutual recognition requires Member States to authorise in their territory goods that are legally sold in other Member States.[61]

51. Article 17 of the Framework Law breaches the principle of free movement of goods if (i) it constitutes a measure having equivalent effect to a quantitative restriction (***MEEQR***)[62] within the meaning of Article 34 TFEU, and (ii) it is not justified. These two conditions are examined in turn below.

5.2.1 Article 17 of the Framework Law and the Draft Decree restrict the free movement of goods

52. Together, the Framework Law and the Draft Decree provide for labelling requirements: the Framework Law contains a requirement to affix a common symbol and sorting instructions and the Draft Decree specifies that this common label must be the Triman logo, as well as certain further conditions on the placing of the logo and the sorting instructions. Although both provisions are interconnected, the Framework Law, as currently adopted and even if the Draft Decree were amended, is likely to lead in most cases to the adoption of labelling implementing measures incompatible with EU law. For this reason, the Framework Law, also on its own, and despite the need for a decree, contains questionable labelling requirements.

53. On the one hand, the requirement to affix a common symbol accompanied by sorting instructions to certain products laid down in Article 17 of the Framework Law does not specify that a particular national symbol must be used or that a specific national authority must issue such a symbol. Based on its wording, Article 17 of the Framework Law could also refer to a compulsory symbol already recognised at EU level and make it applicable only to the products covered by that EU legislation. If recognised at EU level, of course, it would not present a barrier to trade between Member States, although the requirement to add sorting instructions would still constitute such a barrier. It is, however, the Draft Decree which designates the Triman logo as the symbol to be used and confirms the incompatibility with EU law. France could on this basis argue that the Framework Law on its own does not necessarily infringe any EU law. On the other hand, even if the Framework Law cannot be applied without an implementing decree, as provided for in the last sentence of Article 17 of the Framework Law, it is drafted in a way that will most likely have to lead to the adoption of implementing measures incompatible with EU law. Not only because the requirement to add sorting instructions is already included in the Framework Law, but also because, since there is no EU-wide symbol for all products subject to EPR,[63] any logo introduced by a revised decree will most likely have to be a new one, specific to France, and will therefore constitute an obstacle to trade, since producers will have to comply in order to market their products in France.

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61 *See* case 8/74, *Dassonville*, ECLI:EU:C:1974:82, para. 5, Case 120/78, *Rewe v Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*"), para. 15. *See also* Recitals 1 and 3, Regulation 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation No 764/2008 (***Regulation 2019/515***).

62 A measure having equivalent effect to quantitative restriction on imports from other EU Member States (see section 5).

63 *See* section 5.3.4 for plans to consider such a common symbol at EU level.

54. As stated above, the Draft Decree specifies that the symbol to be affixed is the Triman logo and that the sorting instructions must be stuck to it. It thus requires that producers marketing their products lawfully in other Member States where the Triman logo and sorting instructions are not mandatory, must modify their products, packaging or accompanying documents in order to market their products in France. Furthermore, the Draft Decree also requires that, in the case of EPR packaging, the Triman logo and sorting instructions must appear on the packaging itself. This requires further adaptation to market products in France. Therefore, the Draft Decree also and undoubtedly contains a labelling requirement on its own.

55. National labelling requirements typically constitute barriers to intra-EU trade. Even labelling requirements that apply indistinctly to all products, whether produced domestically or abroad are considered to "*render the marketing of those products more difficult or more expensive*".[64] This is certainly the case here, as traders will need to physically affix, only for the French market, the Triman logo and the sorting instructions to the product, the packaging or accompanying documents and thus change the packaging, accompanying documents and/or appearance of the product. The requirements imposed by the Framework Law and the Draft Decree thus constitute a labelling requirement which hinders trade between Member States.[65]

56. Labelling requirements on the packaging, marking and presentation of goods have been held to constitute MEEQRs on trade between Member States on multiple occasions as they are capable of hindering, directly or indirectly, actually or potentially, intra-EU trade by running counter to the presumption of equivalence (mutual recognition) derived from Article 34 TFEU.[66]

57. For example, in *Juvelta*,[67] a requirement to stamp precious metals with a hallmark awarded by an authority accredited by the importing Member State was held to be an MEEQR by the Court of Justice of the EU (*CJEU*). Likewise, in *Fietje*,[68] a requirement to alter a label to show information in a specific language was considered to be an MEEQR. In *Dynamic Medien,*[69] the CJEU found that a national provision requiring, *inter alia*, that video cassettes could not be marketed if they did not bear an age rating label qualified as an MEEQR. Similarly, in a case between the European Commission (the ***Commission***) and Germany,[70] a requirement to add a specific mention that a certain additive was used to place products on the market was found to constitute an MEEQR. This is also reflected in Commission Directive 70/50[71] which requires Member States to abolish pre-existing MEEQRs, including measures "*which deal, in particular, with* [inter alia] *presentation, identification or putting up and which are equally applicable to domestic and imported products*".[72]

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64 Case C-261/81, *Rau v De Smedt*, ECLI:EU:C:1982:382, para. 13.

65 *See also* European Commission, *Free movement of goods: Guide to the application of Treaty provisions governing the free movement of goods*, Ref. Ares (2013) 3759436, 18.12.2013, p. 15 and 19.

66 Joined cases C-267/91 and C-268/91, *Keck and Mithouard*, ECLI:EU:C:1993:905, para. 1, case C-123/00, *Bellamy and English Shop Wholesale*, ECLI:EU:C:2001:214, para. 18, case C-51/94, *Commission v Germany, ECLI:EU:C:1995:352,* para. 30. *See* also Article 2(c)(i) of Regulation 2019/515. This is also reflected, for example in Recital 2, Directive 2000/13 of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs OJ L 109 , 06.05.2000 p. 29 which makes clear that the trade barriers caused by different labelling is the reason this had to be harmonised for food.

67 Case C-481/12, *Juvelta*, ECLI:EU:C:2014:11.

68 Case 27/80, *Fietje*, ECLI:EU:C:1980:293.

69 Case C-244/06, *Dynamic Medien*, ECLI:EU:C:2008:85.

70 Case C-51/94, *Commission v Germany*, ECLI:EU:C:1995:352.

71 Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, OJ L 013 , 19.01.1970 p.29.

72 Article 3 of Commission Directive 70/50/EEC.

58. The Draft Decree[73] provides for the possibility to attach, "*another common symbol regulated by another Member State* […] *provided that this other symbol informs the consumer that these products are subject to sorting rules and that its application is compulsory*".[74] This appears to be an attempt to bring the Draft Decree (and, by extension, Article 17 of the Framework Law which it implements) in compliance with EU internal market rules. However, in the context of assessing a Spanish regulation which set out certain conditions to be complied with for a label to be recognised in Spain, [75] the CJEU held that where the national law sets down conditions for the recognition of symbols from other Member States, this still constitutes an MEEQR. The Spanish regulation, *inter alia*, required that the label must be of a voluntary nature and awarded by a certifying body fulfilling certain requirements.[76] The CJEU concluded that "[t]*he imposition of all of those requirements may result in rejection of an application for recognition of quality certificates granted in a Member State other than the Kingdom of Spain*" (emphasis added).[77] As a result, the CJEU continued, "*the requirements at issue are capable of restricting access to the Spanish market* [for goods] *manufactured and certified in a Member State other than the Kingdom of Spain, in so far as they may not necessarily be fulfilled by the certifying body of the producing State*" (emphasis added).[78] Thus, "*economic operators based in the Kingdom of Spain are discouraged from importing* [goods] *produced in another Member State,* […] *the national legislation at issue must be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU*."[79] The CJEU appears to consider that the fact that the Member State has the possibility or discretion to refuse the recognition of a label from another Member State, is capable of restricting access to the market of a Member State. In the case of the requirement to affix the Triman logo and sorting instructions, the necessary condition in the Draft Decree that a symbol or sorting information from another Member State must essentially have the meaning that is attributed to the French-imposed logo and sorting instructions, may also result in France rejecting the foreign symbol and sorting information. This, in turn, is capable of restricting access to the French market for goods lawfully manufactured and marketed in another Member State.

59. As Article 17 of the Framework Law and the Draft Decree restrict intra-EU trade, they constitute MEEQRs and infringe the principle of freedom of movement of goods unless they can be justified.

5.2.2 The MEEQRs created by Article 17 of the Framework Law and the Draft Decree are not justified

60. As a preliminary comment, it should be noted that the CJEU has sometimes recognised the use of labels and information to accompany products as valid means to achieve legitimate aims and often recommended that Member States adopt labelling requirements rather than certain other more restrictive MEEQRs.[80] France may arguably try to rely on such case law to justify the imposition of the Triman logo

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73 Article 1, Draft Decree regarding Article R.541-12-20, Environmental Code.
74 *Ibid*.
75 Case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113, paras. 54-57.
76 *See* Case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113, para. 20.
77 Case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113, para. 55.
78 Case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113, para. 56.
79 Case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113, para. 57.
80 Labelling was recognised as a less onerous alternative to other product requirements. See, for example, Case 178/84, *Commission v Germany*, ECLI:EU:C:1987:126, para. 35 where the CJEU stated that it would be more proportionate to require a label which indicates the ingredients of beer to the consumer than a ban on marketing beer which was not manufactured in line with German traditional beer recipes because the label sufficiently informed the consumer. In Case C-220/98, *Estée Lauder*, ECLI:EU:C:2000:8, para. 32, a German measure requiring importers to adapt labels in order not

itself but will still need to provide stronger reasons to also impose the additional sorting instructions. Moreover, as will be further explained in this section, regardless of this case law, some serious doubts can be raised on whether France could invoke a valid justification of the MEEQR in the particular circumstances of this case. These doubts are strongest where it can be shown that the rules discriminate (in the case of the exclusion of household glass beverage packaging) and in the case of products which are already subject to other EU-harmonised labels.

61. In spite of their restrictive effects on intra-EU trade, MEEQRs can be justified if (i) they pursue the legitimate interests listed in the first sentence of Article 36 TFEU and/or any of the overriding reasons of public interest recognised by the case law of the CJEU (these overriding reasons are called "mandatory requirements"); (ii) they are appropriate to attain the relevant objective; and (iii) they are no more restrictive than necessary (the proportionality requirement).[81] As these are exceptions to the fundamental principle of free movement of goods, they must be interpreted strictly.[82] The Member State, here France, bears the burden of proving that the measure can be justified.[83] It must provide evidence or an analysis of the appropriateness and proportionality of the MEEQR.[84]

62. However, first it is important to note that the exclusion of household glass beverage packaging in both the Framework Law and the Draft Decree appears to pursue a discriminatory objective. Discriminatory objectives are not considered legitimate. This is clear from the second sentence of Article 36 TFEU which provides that "[s]*uch prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*" Thus, if it is established that an MEEQR falls under the second sentence of Article 36, there is no need to examine whether it is legitimate under the first sentence (*i.e.*, pursues a legitimate aim, is suitable and proportionate).[85] Indeed, the exclusion of household glass beverage packaging appears to aim at protecting the French beverage (and in particular the wine) industry. The exception was not included in the initial bill that led to the adoption of the Framework Law. If one reads the preparatory works of the Framework Law, and in particular, the public session of the Senate of 24 September 2019,[86] one notes that there was some opposition to the obligation to affix the Triman logo on glass drinks packaging. Speaking for the wine sector, one member of the French parliament argued that the new obligation would constitute "*a technical barrier to trade, which will penalise highly exporting winegrowing companies by multiplying the number of labels*" and "[i]*mposing this new constraint on winegrowing companies*". Following these discussions, a proposed amendment to delete the exclusion of household glass beverage packaging was rejected. This is a clear sign that the exclusion was in fact intended to exempt the domestic wine industry from the extended labelling requirement.

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to confuse the German consumer was held to be justified in order to avoid consumers being mislead given that the world "lifting" raises certain expectations for consumers. In Case 120/78, *Rewe v Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*"), para. 13, the CJEU made clear that it would have been more proportionate to label the fruit wines than to require a minimum alcohol content. In C-221/00, *Commission v Austria*, the CJEU also indicated that labelling would be preferable to a general prohibition of health-related information on the labelling of foodstuffs for general consumption as imposed by Austria, ECLI:EU:C:2003:44, para. 49 in order to protect public health and the consumer. In Case C-261/81, *Rau v De Smedt*, ECLI:EU:C:1982:382, para. 17-20, the CJEU held that labelling would be more proportionate than requiring a specific shape of packaging in which margarine or butter is package. .

81 Case C-573/12, *Ålands Vindkraft*, EU:C:2014:2037, para. 76. Case C-6/02, *Commission v France*, ECLI:EU:C:2003:136. *See also* Recital 4, Regulation 2019/515.

82 Case 46/76, *Bauhuis*, ECLI:EU:C:1977:6, para. 12.

83 Case C-254/05, *Commission v Belgium*, ECLI:EU:C:2007:319, paras 33-34 and case law cited.

84 Case C-333/14, *Scotch Whisky Association and Others*, ECLI:EU:C:2015:845, paras. 51-54.

85 Case 8/74, *Dassonville*, ECLI:EU:C:1974:82, para.7.

86 Public session of the Senate, 24 September 2019, available here.

(i) Existence of a legitimate objective

63. The objectives of the Framework Law are found in the general section of the relevant chapter of the Environmental Code. Article L. 541-1 II of the Environmental Code sets out the general objectives of the chapter on the prevention of waste (which includes Article L. 541-9-3 added by Article 17 of the Framework Law). It lists nine specific objectives, namely to (i) prevent and reduce the production and harmfulness of waste; (ii) implement a hierarchy of waste treatment methods (first reuse, then recycling, recovery and, as the least preferred option, disposal); (iii) ensure that waste management is carried out without endangering human health and without harming the environment (in particular, in avoiding risks for water, air, soil, flora and fauna); (iv) organise the transport of waste and limit it in terms of distance and volume; (v) ensure information to the public on the effects for the environment and public health of waste production and management; (vi) ensure respect for the principle of self-sufficiency; (vii) contribute to the transition to a circular economy; (viii) save finite resources and improve the efficiency of resource use; and (ix) remove dangerous substances from the waste stream.[87] These are the objectives for the whole chapter, *i.e.*, not just for Article 17 of the Framework Law. The two overall ultimate objectives underlying all of these more specific objectives are the protection of the environment and the protection of public health.

64. The Draft Decree's objective is the "*implementation of consumer information symbols indicating the sorting rule for waste*",[88] according to its introductory paragraph. As the Draft Decree is merely an implementing measure of the Framework Law, it can, however, be assumed that it pursues the same general objectives as the enabling law, *i.e.*, the Framework Law. As a result, the objectives pursued by the Framework Law and the Draft Decree can be examined together.

65. Environmental protection has been recognised as a legitimate objective under Article 36 TFEU as part of the protection of the health and life of humans, animals or plants[89] and as a mandatory requirement by the CJEU.[90] As the CJEU usually treats Article 36 justifications and mandatory requirements together this approach is also adopted here. In particular, the objective of reducing waste was recognised as part of the more general objective of protecting the environment.[91] Objectives (i), (ii), (vii) and (ix) of the Environmental Code support that the legitimate objective of the Framework Law and the Draft Decree is

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87 Free translation of the original French text: "*Les dispositions du présent chapitre et de l'article L. 125-1 ont pour objet : 1° En priorité, de prévenir et de réduire la production et la nocivité des déchets, notamment en agissant sur la conception, la fabrication et la distribution des substances et produits et en favorisant le réemploi, ainsi que de diminuer les incidences globales de l'utilisation des ressources et d'améliorer l'efficacité de leur utilisation ; 2° De mettre en œuvre une hiérarchie des modes de traitement des déchets consistant à privilégier, dans l'ordre : a) La préparation en vue de la réutilisation ; b) Le recyclage ; c) Toute autre valorisation, notamment la valorisation énergétique ; d) L'élimination ; 3° D'assurer que la gestion des déchets se fait sans mettre en danger la santé humaine et sans nuire à l'environnement, notamment sans créer de risque pour l'eau, l'air, le sol, la faune ou la flore, sans provoquer de nuisances sonores ou olfactives et sans porter atteinte aux paysages et aux sites présentant un intérêt particulier ; 4° D'organiser le transport des déchets et de le limiter en distance et en volume selon un principe de proximité ; 5° D'assurer l'information du public sur les effets pour l'environnement et la santé publique des opérations de production et de gestion des déchets, sous réserve des règles de confidentialité prévues par la loi, ainsi que sur les mesures destinées à en prévenir ou à en compenser les effets préjudiciables ; 6° D'assurer, notamment par le biais de la planification relative aux déchets, le respect du principe d'autosuffisance ; 7° De contribuer à la transition vers une économie circulaire ; 8° D'économiser les ressources épuisables et d'améliorer l'efficacité de l'utilisation des ressources ; 9° De retirer, avant ou pendant la valorisation, les substances dangereuses, les mélanges et les composants de déchets dangereux lorsque cela est nécessaire au respect des dispositions mentionnées aux 2° et 3° du présent II*."

88 Introductory paragraphs to the Draft Decree.

89 Case C-573/12, *Ålands Vindkraft*, EU:C:2014:2037, para. 77, Case 302/86, *Commission v Denmark*, ECLI:EU:C:1988:421, para. 9, case C-389/96, Aher-Waggon v Germany, para. 19, case C-309/02, Radlberger Getränkegesellschaft and S. Spitz, ECLI:EU:C:2004:799, para. 75-78 and case law cited.

90 Case C-573/12, *Ålands Vindkraft*, EU:C:2014:2037, para. 77, Case 302/86, *Commission v Denmark*, ECLI:EU:C:1988:421, para. 9, case C-389/96, Aher-Waggon v Germany, para. 19.

91 Case C-2/90, *Commission v Belgium ("Walloon Waste")*, ECLI:EU:C:1992:310, para. 30, case C-309/02, *Radlberger Getränkegesellschaft and S. Spitz*, ECLI:EU:C:2004:799, para. 75-78 and case law cited.

protecting the environment. Furthermore, objectives (i), (iii), (v) and (ix) could support that the Framework Law and the Draft Decree also pursue the legitimate objective of the protection of the health and life of humans specifically as they seek to protect public health.[92] However, in order to claim the public health objective, France must establish that the goods concerned present a direct and demonstrable threat to human health.[93] This may be plausible in the case of, for example, goods containing hazardous substances recognised as being health hazards. It may be more difficult to establish this for other products, such as cardboard packaging, toys or textiles which comply with all product legislation. There is, thus, some doubt whether this objective would be legitimate for the MEEQR created by Article 17 of the Framework Law and the Draft Decree with respect to these goods.

66. Therefore, it appears that the Framework Law and the Draft Decree pursue the primary legitimate objective of the protection of the environment. This is because the protection of public health is more difficult to argue as it is only applicable to some waste, namely waste which poses a threat to human health.

67. As explained above, the exclusion of household glass beverage packaging seems to pursue the objective of protecting the French wine industry, which is completely unrelated to the protection of the environment or the protection of public health. It is a discriminatory objective and thus not a legitimate objective (see paragraph 62).

(ii) The MEEQRs are not suitable/appropriate to attain these legitimate objectives

68. Article 17 of the Framework Law and the Draft Decree are not suitable or appropriate means of achieving the aims stated above.

69. First, Article 17 of the Framework Law and the Draft Decree may both in fact lead to more waste, which contradicts the objective of reducing waste and protecting the environment. The Framework Law provides that the Triman logo and the relevant sorting instructions can no longer merely be displayed online but must be provided in physical format on the products, the packaging or the accompanying documents[94] (removing the possibility to display them online). As a result, in some cases this will mean that producers will be forced to add packaging where, until now, none was used, in order to be able to attach the Triman logo and sorting instructions. This is likely to be the case where the products' use would be impaired, and for products which would be damaged or lose their value or purpose due to the application of a logo and sorting instructions. Similarly, where the existing packaging is too small, producers may need to make it larger to comply with Article 17 of the Framework Law. Article 17, therefore, in itself may result in more waste being created and thus runs counter to the aim of protecting the environment.

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92 Case C-270/02, *Commission v Italy*, ECLI:EU:C:2004:78, para. 22. Case C-320/03.

93 *Ibid.*

94 In repealing Decree 2014-1577, the Draft Legislation removed the possibility for producers to display the Triman logo in paperless format. *See* section 3.2 above.

70. This effect of creating more packaging and thus creating more waste is exacerbated by the Draft Decree which requires that the Triman logo must be "stuck to" (*accolé, see* section 3.2) the sorting instructions and that, in the case of EPR packaging, the logo and sorting instructions must be shown on the packaging itself. The requirement that the sorting instructions and the Triman logo must be presented together is problematic as it will significantly increase the amount of space needed on the product, the packaging or the accompanying documents. This is likely to create additional waste. Even if this additional waste were to be sorted more accurately (the sorting of waste being the immediate objective), it still runs counter to the ultimate objective of protecting the environment from waste. The requirement to affix the logo and sorting instructions to the packaging itself also removes the remaining flexibility provided by Article 17 of the Framework Law which could have allowed the producer to at least minimise the additional waste created. Although Article 17 of the Framework Law itself already fails to achieve the objective to protect the environment, this is even clearer with regard to the Draft Decree.

71. Second, the exclusion of household glass beverage packaging from the requirement to affix the Triman logo and sorting instructions under both the Framework Law and the Draft Decree constitutes arbitrary discrimination and therefore is not suitable to achieve the named objective of protecting the environment. As a result of the exclusion, a type of packaging which currently has lower recovery rates (glass packaging) is not covered while other packaging which has comparatively higher recovery rates (*e.g.*, paper) is covered by the Triman logo. Eurostat statistics on waste show that recovery rates for glass packaging stood at 77.9% in 2017 while the recovery rate for paper and cardboard packaging was at 99.3% in the same year.[95] Thus, if the legitimate objective is to improve recovery rates of waste in practice, the requirements of Article 17 of the Framework Law and of the Draft Decree should have included household glass beverage packaging. The exclusion of household glass beverage packaging is based on an unjustified distinction between household glass beverage packaging and other packaging subject to EPR and hinders the effectiveness of Article 17 of the Framework Law and of the Draft Decree to achieve the aim of protecting the environment. The discriminatory nature of Article 17 and the Draft Decree undermines the legitimate objective of protecting the environment as it raises the question whether France is genuinely committed to that objective. Failing to include a product group where a label and sorting instructions could achieve significant improvements, while imposing such requirements on products with already high recovery rates, and products which cannot even be recycled, confirms that the measure is not suitable to produce a genuine improvement.

72. Fourth and with regard to the suitability of the Draft Decree to achieve the objective of protecting the environment, it is doubtful that, for products which already carry other symbols, imposing a requirement to affix the Triman logo and sorting instructions will resolve the confusion of consumers. The requirement is thus unlikely to increase sorting rates. As the impact assessment for the Framework Law confirms, consumers are faced with a multitude of different symbols indicating various sorting rules[96] which has been found to lead to confusion.[97] The Triman logo may be perceived as indicating that all products bearing that logo must be disposed of in the same manner or, due to the curved arrows, suggest to consumers that it indicates that a product is recyclable. This, of course, is not the case as the Triman logo merely indicates that special sorting rules apply. The risk of confusion is particularly high in the case of products which bear

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95 Eurostat, Recovery rates for packaging waste, available here, last accessed 24 August 2020.

96 Impact Assessment, p. 43-45. An overview of many common symbols can be consulted here.

97 *See*, European Commission, 'Effectiveness of the essential requirements for packaging and packaging waste and proposals for reinforcement', 2020, p. 170, available at https://op.europa.eu/en/publication-detail/-/publication/05a3dace-8378-11ea-bf12-01aa75ed71a1.

an EU-wide, recognisable logo indicating that they should be disposed of separately such as the crossed-out wheeled bin on batteries and electrical and electronic equipment (*EEE*).[98] This has been confirmed in a recent study requested by the Commission which noted that the number of labels and symbols providing misleading information are a source of confusion.[99] The study mentions the Triman logo explicitly as a commonly highlighted point of confusion.[100]

73. In addition, the Draft Decree specifying that the symbol to be used is the Triman logo, may be a cause of confusion (as set out in the previous paragraph), especially for consumers originating from other Member States, travellers and tourists briefly visiting France. It could also confuse consumers where the products bearing the Triman logo and sorting instructions are sold in another Member State. Consumers will likely be unaware of the specificities of French legislation. As a result, non-French consumers coming across products labelled pursuant to the Draft Decree, whether in France or in other EU Member states, may dispose of products wrongly and cause damage to the environment and public health. To this extent, national logos such as the Triman logo can be counterproductive to the objective of simplifying the information for consumers.

74. The Triman logo, as provided for in the Draft Decree, therefore adds complexity rather than simplifying consumer information. This argument also shows that the Framework law is unsuitable to achieve the objective of protecting the environment insofar as it covers all EPR products and not only those EPR products which are not yet subject to the compulsory application of the crossed-out wheeled bin. After all, the WEEE Directive introduced the requirement to mark EEE with the crossed-out wheeled bin symbol, and provide information to consumers, from 2002[101] to indicate that WEEE may not be disposed of as unsorted waste but is to be collected separately. The Batteries Directive did this from 2006. (See, also, section 5.1.3 above). Consumers are used to this symbol and aware that products bearing it need to be disposed of subject to a specific sorting rule. Consumers are also unlikely to read any amounts of text containing the sorting instructions which are to be attached to the Triman logo in addition to the existing logo and information. Therefore, the requirement to add the Triman logo and sorting instructions cannot adequately counteract the potential confusion caused to consumers. Thus, it is clear that with respect to products already bearing a uniform symbol recognised across the EU, the Triman logo is unsuitable to simplify what is already as simple as it can get. With regard to products not subject to labelling yet, the criticism that it duplicates labels is not applicable. In respect of those products, any challenge must rely on the other arguments raised in this section, such as the increase of packaging waste and the discriminatory exclusion of glass beverage packaging, as well as the lack of proportionality discussed in the following section.

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98 Directive 2012/19 of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE), OJ L 197, 24.7.2012, p. 38. Article R. 541-12-18-I and Article R. 543-127 of the Environmental Code for EEE and batteries; Article R. 541-12-18-II and the previous version of Article L. 541-10-4 of the Environmental Code for diffuse waste specific to household.

99 *See* European Commission, 'Effectiveness of the essential requirements for packaging and packaging waste and proposals for reinforcement', 2020, p. 170, available at https://op.europa.eu/en/publication-detail/-/publication/05a3dace-8378-11ea-bf12-01aa75ed71a1.

100 *Ibid.*

101 Article 14 and 24, Directive 2012/19.

(iii) The MEEQRs are not proportionate

75. The MEEQRs newly introduced by Article 17 of the Framework Law and by the Draft Decree do not appear to be proportionate.

76. First, it is excessive to require the Triman logo and the sorting instructions to be attached to the product, its packaging or the accompanying document in physical form. Until now, it has been considered sufficient for the logo to be available in non-material form, *e.g.*, on the producer's website. A direct link could be created between the packaging and the website of the producer through a QR code which could be scanned by the consumer using a smartphone. The vast majority of consumers nowadays use a smartphone daily and would have access to the relevant information on the producer's website. This would also provide the possibility to refer the consumers to their local sorting instructions via a link to the relevant municipal authorities. What is crucial is to make the consumer aware that a certain product needs to be disposed of separately which online information could provide. In any case, due to varying local sorting systems, the sorting instructions in their physical form could not be so specific as to inform the consumer of the correct local disposal options.

77. Second, the requirement laid down by the Framework Law and the Draft Decree to affix not only the Triman logo, but also potentially extensive sorting instructions is more onerous than is necessary. It might already be less onerous if Article 17 of the Framework Law and the Draft Decree only required the logo to be affixed while displaying the additional sorting instructions on the producer's website. The sorting instructions could be available online and would be available to the consumer as detailed in the previous paragraph. The obligation to affix the Triman logo can nevertheless also be considered disproportionate to the extent that less onerous options are available, such as guaranteeing its accessibility online, or to strengthen recommendations and develop communication on the Triman logo in order to encourage consumers to look for it, and producers to use it, which was the alternative option considered by the Impact Assessment. Such options have strong merits, as less onerous and more proportional measures, when the alternative is to introduce a measure which hinders trade between EU Member States at a great cost, and affects many different types of products due to the broad scope of application of Article 17 of the Framework Law and the Draft Decree, namely all products subject to EPR in France (see paragraph 10, third bullet point), with very doubtful real benefits.

78. Third, the Draft Decree requires both the Triman logo and the sorting instructions to be affixed to the packaging where the product in question consists of packaging subject to EPR.[102] However, if the product is not packaging subject to EPR, the Triman logo and sorting instructions can be provided on the product, on the packaging or on the accompanying documents. There is no apparent reason why the Draft Decree is more stringent regarding EPR packaging as opposed to other products. Therefore, there is an even stronger argument to say that the Draft Decree is disproportionate when it comes to the requirement to attach the logo and sorting instructions to the EPR packaging itself.

79. Fourth, other Member States have managed to increase packaging waste recovery rates and now have higher rates than France without such a compulsory common logo.[103] France increased its recovery

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102 Article 1 Draft Decree modifying L. 541-10-1, Environmental Code.

103 Eurostat, Recovery rates for packaging waste, available here, last accessed 24 August 2020. For example, Belgium had a packaging waste recovery rate of 99.6% in 2017 up from 95.5% in 2010, Finland's rate increased from 85% in 2010 to 112.1% in 2017.

rates for all packaging materials even before the Triman logo was introduced.[104] It thus seems that even without the logo, consumers became increasingly aware of how to separate packaging waste. Non-compulsory symbols such as those indicating that a product is made out of recyclable aluminium,[105] the label for compostable products,[106] the OPRL label[107] have become widely used and recognised by consumers. These have allowed better information for consumers and better sorting for years, yet are less restrictive as they are non-obligatory. Thus, the mandatory nature of the labelling requirement in the Framework Law and the Draft Decree is excessive as France has not proved that these voluntary labels are ineffective.

80. Fifth, while imposing these measures on a vast range of products, France considered it unnecessary to make them compulsory for household glass beverage packaging even though glass packaging has low recovery rates. The low recovery rates constitute an indication that these measures are *even more necessary*, if anything, with respect to household glass beverage packaging, in order to achieve the objective of protecting the environment. Yet, such packaging is exempt. On the other hand, products which are not recyclable and products which are already being recycled very widely are subject to the requirements. It is a blanket measure which excludes products it should target and instead requires labelling for products which already benefit from efficient recycling. Therefore, the Framework Law and the Draft Decree are disproportionate also for this reason.

81. Sixth, in particular with regard to products already marked with other sorting symbols, the new requirements introduced by Article 17 of the Framework Law and the Draft Decree are disproportionate as the aim of these labelling requirements is already achieved by the existing labels. As explained above, the WEEE Directive introduced the requirement to mark EEE with the crossed-out wheeled bin symbol[108] to indicate that WEEE may not be disposed of as unsorted waste but is to be collected separately. Directive 2006/66[109] did the same for batteries.[110] Both Directives also require sorting-related and other environmental-impact information addressed to consumers (see section 5.1.3 above). It is therefore unnecessary to require producers to affix another symbol and further sorting instructions in the case of these products. Consumers in the EU have grown accustomed to the existing symbol and are aware that products bearing it need to be disposed of separately. Both the crossed-out wheeled bin and the Triman logo (accompanied by sorting instructions) are intended to signal the same information to the consumer, *i.e.*, that the products are subject to a particular sorting rule. Therefore, the crossed-out wheeled bin fulfils the same objectives as Article 17 of the Framework Law and the Draft Decree.

82. In fact, the current French legislation explicitly exempts goods carrying the crossed-out wheeled bin in recognition of this unnecessary duplication.[111] The background documents to the Framework Law do not provide a clear explanation of why products carrying the crossed-out wheeled bin are now also subject

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104 Eurostat, Recovery rates for packaging waste, available here, last accessed 24 August 2020. This shows that the recovery rate for packaging in France had increased from 70.3% in 2010 to 74.6% in 2014. However, it only increased from 75.5% in 2015 to 78% in 2017 with the Triman logo being compulsory.

105 Two black arrows forming a circle with "alu" written in black font inside the circle.

106 Compostable symbol showing a plant growing in a loop above the writing "compostable EN13432" shows that a product is compostable according to European standard EN 13432/14955.

107 Showing which parts of a product are widely recycled, recycled locally or not yet recycled with an arrow in the shape of a circle and the relevant words below.

108 Article 14, Directive 2012/19.

109 Annex II, Directive 2006/66 of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157, OJ L 266, 26.9.2006, p. 1.

110 Article R. 541-12-18-I and Article R. 543-127 of the Environmental Code in France.

111 Article R. 541-12-18-II of the Environmental Code; Decree 2014-1577.

to the requirement to attach the Triman logo and sorting instructions. They merely state that France aims for a uniform symbol for all products subject to EPR.[112] Having a uniform system, however, is not a reason to impose unnecessary burdens on producers. The CJEU has held that there is no need to change the label "*if the details given on the original label of the imported product have as their content information on the nature of the product and that content includes at least the same information, and is just as capable of being understood by consumers in the importing State, as the description prescribed by the rules of that State*".[113] This is even more true where the symbol is mandatory under EU law and thus used in all Member States as in the case of the crossed-out wheeled bin. The crossed-out wheeled bin symbol is, therefore, sufficient in itself and makes the labelling requirement imposed by Article 17 of the Framework Law and the Draft Decree unnecessary and disproportionate.

83. Given the above, it is clear that France has not shown that the Triman logo and sorting instructions are more likely to achieve the relevant objectives than less onerous options. As a result, Article 17 of the Framework Law and the Draft Decree are not proportionate to the objective of protecting the environment (and to any possible human health objective, if applicable).

84. In summary, both the framework Law and the Draft Decree are MEEQRs and therefore contrary to the internal market rules unless justified. Neither is likely to be justifiable insofar as they both exclude household glass beverage packaging as this exclusion amounts to arbitrary discrimination. Both the Framework Law and the Draft Decree will most likely be considered to otherwise pursue the legitimate objective of the protection of the environment and possibly the protection of public health. However, it can be argued that the Framework Law is unsuitable to achieve these objectives, notably because it could cause more waste to be produced, fails to cover household glass beverage packaging which has low recovery rates, because it includes products which already carry other symbols seeking the same objective, and in some cases as required by EU legislation, and it may confuse consumers. The same arguments can be made with regard to the Draft Decree. As the Draft Decree imposes even stricter requirements, these arguments have even greater force. Further doubts exist with regard to the proportionality of the two provisions. The Framework Law may be more than necessary as less onerous alternatives exist which are capable of achieving the same objectives. The Triman logo and the sorting instructions can be made available in non-material form, combined with the necessary information and promotion campaigns, and voluntary labels as in other Member States appear to be sufficient, in particular when the alternative is to introduce a considerable obstacle to trade between EU Member states, which concern many different products. Moreover, if France considers it unnecessary to subject household glass beverage packaging to the same requirements, it is unlikely that they are necessary for other products, in particular other packaging, and with respect to products already carrying the crossed-out wheeled bin which is already sufficient to achieve the Framework Law's objective. The Draft Decree's stricter provisions, of course, require even better reasoning by France to satisfy the proportionality requirement.

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112 Point 1.2.4. of Impact Assessment, p. 43.
113 Case 27/80, *Fietje*, ECLI:EU:C:1980:293, para. 12.

(iv) Burden of proof

85. It must be noted that according to settled case law of the CJEU, it is the Member State adopting the contested measure which must provide evidence to support its claim that an MEEQR is justified.[114] This requires that the justification put forward should be accompanied by "*an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments*".[115] This could be statistical information or other tangible evidence that attaching the common symbol, and the Triman logo specifically, as well as the sorting instructions in a physical format is necessary to achieve the legitimate objectives pursued and proportional.

86. As regards the requirements set out in Article 17 of the Framework Law, namely a sorting symbol to be affixed on a physical medium, the Impact Assessment of the Framework Law contains some statistics and surveys regarding the recognisability of the Triman logo and the alleged insufficiency of the current labelling.[116] Should France invoke the Impact Assessment as sufficient justification, its content would need to be reviewed more in detail.

87. However, regardless of the Impact Assessment, France would still need to address the concerns expressed in sections (ii) and (iii) above regarding the suitability/appropriateness and proportionality of the Framework Law and the Draft Decree.

88. Moreover, as regards the requirements laid down in the Draft Decree, section 4.1 above has extensively demonstrated which conditions the Draft Decree imposed in addition to those of Article 17 of the Framework Law. However, those stricter rules are not addressed in the Impact Assessment accompanying the Framework Law.

89. While the Impact Assessment discusses the economic and financial impact of the new legislation, it does not adequately take into account the interests of producers. The French legislator, in that regard, deems it sufficient to grant the producers time to adapt by providing that the new measure will only come into force in 2021 (which was later changed to 2022). According to the legislator, this period will allow the newly introduced requirements to be incorporated (*i.e.*, amending the packaging and the information it contains).[117] However, this does not consider the economic interests of stakeholders in other EU Member States having to adapt their products, packaging and accompanying documents for the French market only and the compatibility of the proposed measures with EU law.

90. Based on the above, it can be argued that, regardless of the information provided by France to support the adoption of Article 17 of the Framework Law in the Impact Assessment, further explanations will have to be provided by France to justify the MEEQRs. This will clearly be the case regarding the additional requirements introduced by the Draft Decree, which have not been sufficiently explored in the Impact Assessment. France will also have to provide further explanations to justify the disproportionate burden imposed on economic operators wishing to market their products in France, in particular when taking

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114 Case C-333/14, *Scotch Whisky Association and Others*, ECLI:EU:C:2015:845, paras. 51-54 and case law cited.
115 Case C-456/10, *ANETT*, EU:C:2012:241, para. 50.
116 See section 3, Impact Assessment.
117 See section 3, Impact Assessment, pp. 46-47.

into account the very broad portfolio of products concerned due to the vast scope of application of Article 17 of the Framework Law and the Draft Decree.

5.3 Obligation of France to notify according to the TRIS procedure

91. Under the TRIS procedure, established by Directive 2015/1535[118] (formerly Directive 98/48/EC[119]), Member States must notify to the Commission any measure that lays down technical regulations before its adoption in national law. The TRIS procedure aims at preventing potential obstacles to trade before their adoption at national level.

5.3.1 Introduction: obligation to notify draft technical regulation to the Commission

92. Article 5 of Directive 2015/1535 states that Member States "shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard". "Technical regulations" include four categories of measures:[120]

- **technical specifications** defined in Article 1(1)(c) of Directive 2015/1535 as "*a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures"*;

- **other requirements** defined in Article 1(1)(d) of Directive 2015/1535 as "*a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing*";

- **rules on services** defined in Article 1(1)(e) of Directive 2015/1535 as "*requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b)* [Information Society service]*, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point*"; and

- **regulations prohibiting** the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider (Article 1(1)(f) of Directive 2015/1535).

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118 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, *OJ L* 241, 17.9.2015, p. 1-15.

119 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, *OJ L* 217, 5.8.1998, p. 18–26.

120 European Commission, TRIS, *What is a technical regulation,* available at https://ec.europa.eu/growth/tools-databases/tris/en/about-the-20151535/what-is-a-technical-regulation/.

5.3.2 Obligation to notify the Framework Law pursuant to Directive 2015/1535

93. In view of the definitions provided for above, it is possible to argue that Article 17 of the Framework Law should have been notified to the Commission:

- First, following the case law of the CJEU, provisions such as Article 17 of the Framework Law could be deemed to fall under the category of "**technical specifications**". In *Schwibbert,* national provisions requiring the affixing of a distinctive sorting symbol on products for the purposes of their marketing in the Member State concerned was found to constitute a technical regulation.[121] Further, in *Sapod Audic*, the CJEU found that it is for a national court to assess whether the national provision at issue "*must be interpreted as imposing on producers an obligation to mark or label the packaging, although not specifying what sign must be affixed*". In that case, "*even though the detailed rules regarding the marking or labelling remained to be defined, marking or labelling would, in itself, be compulsory*" (emphasis added).[122] Likewise, even though Article 17 of the Framework Law does not specify which symbol must be affixed to the product, it already includes the requirement to affix a sorting symbol and the sorting instructions.

  In addition, the CJEU has already dealt with the issue of TRIS notification in situations where national legislation provided for the adoption of implementing acts. In that respect, it held that "[a] *rule is classified as a technical regulation for the purposes of Directive 83/189* [now Directive 2015/1535] *if it has legal effects of its own. If, under domestic law, the rule merely serves as a basis for enabling administrative regulations containing rules binding on interested parties to be adopted, so that by itself it has no legal effect for individuals, the rule does not constitute a technical regulation within the meaning of the directive*".[123] Article 17 of the Framework Law can be regarded as a technical regulation. While Article 17 of the Framework Law provides that its details and conditions of application are to be defined in an implementing decree, that provision already imposes on producers the obligation to affix a sorting symbol on all EPR products, as well as to accompany it with sorting instructions. It also provides that the sorting symbol and the sorting instructions must be displayed in a physical form. In other words, the Framework Law is, in itself, compulsory for producers and therefore has legal effects within the meaning of the case law.

  Although France could be likely to argue that only the Draft Decree may have to be notified due to the general nature of Article 17 of the Framework Law, which requires implementing measures before it can have effects, the above case law together with the objective of the TRIS procedure, which is to facilitate the exercise by the Commission of a preventive control, would reinforce the requirement to have notified also Article 17 of the Framework Law. Moreover, as explained above at paragraph 53, Article 17 of the Framework Law is drafted in a manner that is most likely to

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121 Case C-20/05, EU, *Schwibbert*, EU :C:2007:652, para 45.

122 Case C-159/00, *Sapod Audic,* EU:C:2002:343, paras 32-34. The case concerned the interpretation of Article 4 of the French Decree No 92-377 of 1 April 1992 implementing Law No 75-633 relating to the disposal of waste and the recovery of materials, stating as follows: "*Any producer or importer ... is required to contribute to or organise the disposal of all of its packaging waste .... To that end, it shall identify the packaging, the handling of which it has entrusted to a body or an undertaking which has been granted the approval referred to in Article 6 below, under the arrangements they determine, as provided for in Article 5 below. The remaining packaging shall be recovered in accordance with the conditions laid down in Article 10 below."*

123 Case C-317/92, *Commission v. Germany*, EU:C:1994:212, paras. 25-26. Directive 83/189 (in force between March 1983 and June 1998) was replaced by Directive 98/34/EC (in force between June 1998 and October 2015) then replaced by Directive (EU) 2015/1535 which is currently in force.

necessarily lead to the adoption of implementing measures incompatible with EU law, which would also support the need of its prior notification as part of the preventive control.

- Second, and in the alternative, were Article 17 of the Framework Law not to be considered a "technical specification", it could fall under the definition of "**other requirements**" provided for in Article 1(1)(d) of Directive 2015/1535:

  - Article 17 of the Framework Law contains requirements for the purpose of protecting the environment;

  - Article 17 of the Framework Law imposes requirements related to a sorting symbol and sorting instructions which may affect the conditions of use and recycling of the product, and;

  - the conditions imposed by Article 17 of the Framework Law significantly influence the marketing of EPR products for which the sorting symbol is mandatory.

  As regards this third requirement, the CJEU has not yet given a general definition of what should be understood from conditions that "*can significantly influence the composition or nature of the product or its marketing*".[124] However, Article 17 of the Framework Law requires producers of EPR products to (i) affix a sorting symbol on the product, their packaging or the documents supplied with the product, and (ii) accompany this symbol with information on sorting instructions, also affixed to the product, their packaging or the documents supplied with the product. This means that producers wishing to place products subject to EPR on the French market will have to bear an additional burden (*e.g.*, additional work and expenses to make new packaging compliant with the Framework Law, prepare instruction sheets specifying sorting instructions, ensure that these sorting instructions are adequately translated), whereas they were previously allowed to do so on their website.

  In addition, in practice, if a producer is used to selling his product without packaging, he will now have to choose between (i) putting the sorting symbol as well as the sorting instructions on the product; (ii) putting the sorting symbol and the instructions on the packaging, and hence create packaging for this specific purpose; (iii) putting the sorting symbol and the instructions on a separate instruction sheet, and hence create specific packaging and a specific instruction sheet for this purpose. As producers may want to avoid labelling the product itself with the sorting symbol and the sorting instructions to avoid damaging it or changing its appearance, they are likely to opt

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[124] It has dealt with the definition of "other requirements" in some cases related to the gambling sector and reiterated the condition that, in order to constitute a technical regulation within the meaning of Article 1(1)(d) of Directive 2015/1535, the national measure must contain conditions which can "significantly influence the nature or marketing of the products concerned" (Case C-213/11, C-214/11 and C-217/11, *Fortuna and Others*, ECLI:EU:C:2012:495, para. 36; Case C-307/13, *Ivansson and Others*, ECLI:EU:C:2014:2058, para 26; Case C-98/14, *Berlington Hungary and Others*, ECLI:EU:C:2015:386, para. 98). In *Berlington Hungary and Others*, the CJEU held that "*a prohibition on operating slot machines outside casinos could significantly influence the nature or the marketing of the products used in that context, which constitute goods that may be covered by Article 34 TFEU, by reducing the outlets in which they can be used*." (para. 99). See also Case C-299/17, *VG Media Gesellschaft*, ECLI:EU:C:2018:1004, para. 26: by analogy to *Berlington Hungary and Others*, provisions that expose "*the operators of search engines to either a prohibitory order or a claim for damages where the internet search enables the reader to access more than a few words or a very short excerpt from the press product in question*" could have the effect of significantly affecting the nature or marketing of these internet services. See also Case C-213/11, C-214/11 and C-217/11, *Fortuna and Others*, ECLI:EU:C:2012:495, para. 36: "*The prohibition on issuing, extending or amending authorisations for activity relating to gaming on low-prize machines outside casinos is such as to directly affect trade in low-prize gaming machines*."

for option (ii) or (iii) and thus create additional packaging to ensure compliance with the Framework Law. Consequently, the Framework Law is likely to significantly influence the behaviour of producers placing products subject to EPR on the French market.

Moreover, as explained in section 5, the requirements set out in Article 17 of the Framework Law have a serious impact on the free movement of goods within the internal market and constitute measures having an equivalent effect to quantitative restrictions. This means that non-French producers wishing to enter the French market will have to comply with the new French requirements that are only mandatory for products subject to French EPR schemes that are put on the French market. Even though the Draft Decree provides for the principle of mutual recognition of symbols regulated by other Member States, [125] it remains that if the sorting symbol and information on sorting instructions available in the other Member State do not meet the requirements set out in this provision, the producer of products subject to a French EPR scheme will be restricted in its freedom to put products on the French market. Hence, the restriction on the free movement of goods introduced by Article 17 of the Framework Law will influence producers' behaviour when placing their products subject to EPR on the French market.

Therefore, the requirements set out in Article 17 of the Framework Law may significantly influence the sale of EPR products on the market, and hence the marketing of EPR products.

- Third, besides Article 17, other provisions of the Framework Law contain technical regulations subject to the TRIS procedure. The CJEU has held that Member States must not only notify the provision that contains a technical regulation but also the full text of the draft act. This is "*to enable the Commission to have as much information as possible on any draft technical regulation with respect to its content, scope and general context*". [126] Hence, since other provisions of the Framework Law could amount to technical regulations, the Framework Law itself should have been notified to the Commission. Below are some examples of such potential technical regulations:

  - **Article 13 of the Framework Law** imposes specific requirements in terms of information that must appear on plastic products and packaging (*e.g.*, "*plastic products and packaging that can be composted in domestic or industrial composting are labelled "do not throw into nature"*"). In this regard, the CJEU indicated that "[a] *provision of national law laying down an obligation to identify packaging constitutes a technical regulation to be notified insofar as it implies an obligation to mark*

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125 The Draft Decree provides that "[p]*roducers of products subject to an extended liability system in France may replace the* ***symbol*** *referred to in Article R.541-12-17 with another common symbol regulated by another Member State of the European Union, in accordance with the principle of mutual recognition, provided that this other symbol informs the consumer that these products are subject to sorting rules and that its application is compulsory. Producers may also replace the* ***information*** *referred to in Article R.541-12-18 with other common information regulated by another Member State of the European Union, provided that this other information specifies the methods for sorting or bringing in waste resulting from the product, that it is compatible with the conditions provided for in Article R.541-12-18, and that its application is compulsory."* Free translation of the original French text: *"Les producteurs de produits soumis à un dispositif de responsabilité élargie en France, peuvent remplacer la signalétique visée à l'article R. 541-12-17 par une autre signalétique commune encadrée réglementairement par un autre Etat membre de l'Union européenne, conformément au principe de reconnaissance mutuelle prévu par les articles 34 et 36 du Traité sur le fonctionnement de l'Union européenne, dès lors que cette autre signalétique informe le consommateur que ces produits font l'objet de règles de tri et qu'elle est d'application obligatoire. Les producteurs peuvent également remplacer l'information visée à l'article R. 541-12-18 par une autre information commune encadrée réglementairement par un autre Etat membre de l'Union européenne, dès lors que cette autre information précise les modalités de tri ou d'apport du déchet issu du produit, qu'elle est compatible avec celle fixée dans les conditions prévues à l'article R. 541-12-18, et qu'elle est d'application obligatoire."*

126 Case C-279/94, *Commission v. Italy,* EU:C:1996:396, paras. 38-42; Case C-145/97, *Commission v. Belgium*, EU:C:1998:212.

or label that packaging".[127] In another case, the CJEU stated that national provisions introducing *"the obligation to affix […] the distinctive sign 'SIAE' to CDs of works of figurative art for the purposes of marketing them in the Member State concerned constitute a technical regulation which, if not notified to the Commission, cannot be invoked against an individual*".[128] It results from this case law that the obligation to label products with text such as "do not throw in nature" should be regarded as a technical regulation subject to a notification obligation under Directive 2015/1535.

- **Article 16 of the Framework Law** states that producers, importers, distributors or other persons placing EEE on the *market* must communicate to the sellers of their products and to any person requesting it, the index of reparability of such equipment and the parameters on the basis of which it was established. It adds that sellers of EEE must inform consumers, at the time of their purchase, by means of marking, labelling, display or any other appropriate process, of the reparability index of the equipment sold. This obligation to inform consumers about the reparability index of EEE namely through marking or labelling could be qualified as a technical regulation on the basis of the *Sapod Audic* case according to which "[a] *provision of national law laying down an obligation to identify packaging constitutes a technical regulation to be notified insofar as it implies an obligation to mark or label that packaging*".[129]

5.3.3 Legal consequences of the failure to notify national measures under Directive 2015/1535

94. While Directive 2015/1535 does not expressly state the consequences resulting from the failure to notify, the CJEU has consistently held that technical regulations which were not notified to the Commission cannot be applied to or enforced against an individual.

95. In *CIA Security*, the CJEU held that the "*breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals.* […] *Individuals may rely on Articles 8 and 9 of Directive 83/189* [now Articles 5 and 6 of Directive 2015/1535] *before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive*".[130] That case law was recently confirmed in *Airbnb Ireland*, where the CJEU recalled that "*a Member State's failure to fulfil its obligation to give prior notification of the technical rules, laid down in Article 5(1) of Directive 2015/1535, has that consequence*" of "*render*[ing] *the legislation concerned unenforceable against individuals*".[131]

96. It results from this case law that companies can invoke the plea of "inapplicability" and "unenforceability" if they are affected by a national provision which was not notified. However, that plea of "inapplicability" and "unenforceability" will only affect a national provision that qualifies as a "technical regulation" under Directive 2015/1535 and not the entire statute or national law in which that provision appears. In *Ince*, the CJEU held that "*the non-applicability which results from the breach of obligation* [to

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127 Case C-159/00, *Sapod Audic,* EU:C:2002:343, paras. 30 and 39.
128 Case C-65/05, *Commission v. Greece,* EU:C:2006:673, para11.
129 See Case C-159/00, *Sapod Audic,* EU:C:2002:343.
130 Case C-194/94, *CIA Security International,* EU:C:1996:172, paras. 48-54.
131 Case C-390/18, *Airbnb Ireland*, EU:C:2019:1112, para. 88.

notify the measure] *extends not to all of the provisions of such a law, but only to the technical regulations contained therein*".[132]

97. With regard to the effects of invoking the plea of "inapplicability" and "unenforceability", the CJEU confirmed in *Sapod Audic* that the inapplicability of a technical regulation which was not notified may be invoked in legal proceedings between individuals in relation to their contractual rights and duties. The CJEU explained that "[i]*t is then for the national court to refuse to apply that provision*" and that "*the question of the conclusions to be drawn from the inapplicability of that national provision as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of a contract*" are to be decided in accordance with national law.[133]

98. Thus, if it is found that France was under an obligation to notify the Framework Law but failed to do so, persons, including any business putting a product without the Triman logo on the market will be able to invoke, as a defence in the context of legal proceedings against the French authorities or against other economic operators, the non-application of the Framework Law resulting from France's failure to notify it to the Commission under the TRIS procedure. This would however be seen as a last resort remedy since the economic operators concerned may during litigation be prevented from marketing their products in the French market, litigation will have to determine if the inapplicability of the technical regulation is justified, and the national surveillance authorities may also in the meantime impose sanctions.

5.3.4 Legal consequence of notified technical matters that the Commission will propose at EU level

99. The Commission's own Circular Economy Action Plan[134] expressly states that the Commission will propose the harmonisation of separate waste collection systems, and, in this regard, will consider other aspects that facilitate consumer involvement. In particular, such aspects will include harmonised symbols for key waste types, product labels, information campaigns and economic instruments. This action of an EU-wide harmonised model for separate collection of waste and labelling to facilitate separate collection is to be done in 2022. Separately, regarding packaging, the action plan indicates that the Commission will assess the feasibility of EU-wide labelling which facilitates the correct separation of packaging waste at source. The Action Plan also notes that the Commission will consider setting minimum requirements for sustainability labels/logos.

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132 Case C-336/14, *Ince*, EU:C:2016:72, paras. 67-68; *See* also Case C-144/16, *Municipio de Palmela*, EU:C:2017:76, paras. 35-38.

133 Case C-159/00, *Sapod Audic,* EU:C:2002:343, paras. 50 and 53. That conclusion is, however, subject to the condition that the applicable rules of national law are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Union law.

134 Circular Economy Action Plan COM(2020) 98 final, 11 March 2020.

100. Article 6(3) of Directive 2015/1535 requires Member States to postpone the adoption of a draft technical regulation for 12 months if, within three months of receiving a draft technical regulation, the Commission announces its intention to propose a legal act on the matter. Given that France notified its Draft Decree after the Commission's presentation of its Circular Economy Action Plan (which revealed the above-mentioned actions), France should be made to set aside its Draft Decree, or, at the very least, suspend its intention to adopt the Draft Decree for a 12 month period. Such setting aside (or at least suspension) is logical especially given that the above-mentioned actions are to be formulated at the EU level, and due to the fact that France's Article 17 and Draft Decree have a marked similarity to these actions.

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