



# Addressing Fragmentation for a Global Circular Economy

Lessons from the EU Single Market

2024



## Foreword

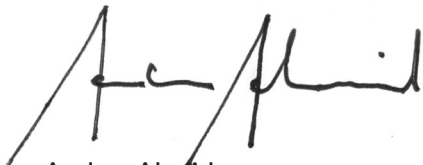
It is clear that our current patterns of consumption and production are not sustainable. It is only natural that international bodies, such as the European Union and many national governments, are attempting to tackle this issue. One approach is the adoption of rules to promote the shift to a circular economy. But, if this is done in an uncoordinated manner, it will create a fragmented legal landscape. Fragmentation, where different rules apply in different countries, means that those who sell goods cross-border must adapt their goods to each new market. This risks disrupting trade, as it leads to both increased costs and administrative burdens.

The EU has a long history of addressing fragmentation in the EU Single Market. In recent years, EU Member States have made efforts to reach EU targets relating to the circular economy, for example, on waste reduction and recycling. In addition, EU Member States continue to adopt national measures to accelerate the transition to a more circular society. Such measures indeed have a legitimate objective and aim to promote the EU's own goal to transition to a circular economy. However, we see that the proliferation of national measures can have a negative impact on the free movement of goods within the EU.

In this study, we analyse the fragmentation caused by national or regional regulatory action aiming to promote more circular products. This analysis draws on experiences in addressing fragmentation from the Single Market. We also discuss tools that can be used to create more uniform rules, both in the Single Market and internationally. These are tools that the EU can use to achieve its objective of supporting the transition to a global just, climate-neutral, resource-efficient and circular economy.

This study has been written by Hanna Pettersson, Felinda Wennerberg and Katarina Paul. Valuable advice and comments have been provided by Anna Graneli, Neil Swanson and Linda Bodén. We wish to extend a special thanks for helpful comments and input provided by the Swedish Environmental Protection Agency. Lastly, we wish to express our gratitude to the companies who have generously shared their experiences and knowledge with us throughout this study.

Stockholm, April 2024



Anders Ahnrid  
Director-General  
National Board of Trade Sweden



## Summary

The shift to a new economic model requires new regulations. Many countries have already adopted or are in the process of adopting regulations, strategies and plans to promote the transition to a more circular society.

In trade law, national regulations based on environmental concerns have traditionally been seen as potential barriers to the free flow of goods. While the protection of the environment has long been considered a ‘legitimate objective’, both within the European Union (EU) and in the World Trade Organization (WTO), the fact remains that the free trade in goods and regulations safeguarding the protection of the environment have often been considered opposing objectives. However, this study shows that this contentious relationship has less to do with the fact that trade and the protection of the environment are mutually exclusive objectives and more to do with the fact that different jurisdictions find different solutions to the same problem. It is not the objective itself, but the fragmented approach to achieve it, that creates trade irritants.

In this study, we look at experiences at EU level and the Member States’ experiences of attempting to preserve a well-functioning EU Single Market while transitioning to a circular economy. We also explore how different tools of international regulatory cooperation can be used to address fragmentation globally as the international community shifts towards a circular economy.

We use four cases to illustrate the regulatory interplay that takes place between the EU and its Member States as they attempt to manage the transition to a circular economy while simultaneously preserving the free movement of goods in the EU Single Market. The cases are also used to illustrate the effectiveness of different tools of regulatory cooperation.

With these lessons in mind, the study goes on to explore how the EU can promote regulatory convergence internationally. Here we look at different ways the EU can exert influence: unilaterally by relying on the ‘Brussels effect’, bilaterally by using free trade agreements and other forms of cooperation and multilaterally through the WTO and international standard setting.

Based on our findings, we present several recommendations to the Member States, to the Commission and to the EU as a regulatory influencer. Below is a selection of our recommendations:

### **Recommendations to the EU Member States**

- EU Member States should consider including a section in the impact assessments that accompany national regulation that assesses the potential impact the regulation will have on the functioning of the Single Market.

### **Recommendations to the European Commission**

- The Commission should proactively monitor regulatory trends among Member States, for example, through the TRIS database, to identify harmonisation needs. Priority could be given to ex post follow-up of ‘target-based’ EU acts. Digital tools, such as artificial intelligence, could potentially be used.
- The Commission should consider notifying initiatives that it expects to result in technical regulations to the WTO at an earlier stage, for example, when initiatives are published on the Have Your Say portal.

## Recommendations to the EU as an international regulatory actor

- The EU should contribute to the development of common international definitions and a shared understanding of basic concepts within the circular economy. Widely accepted international standards are a great tool for this. The establishment of a ‘Codex Circularis’ should be explored.
- The EU should explore new forms of cooperation outside of traditional free trade agreements, such as policy labs.

### List of abbreviations

<b>WTO</b>	World Trade Organization	<b>PPWD</b>	Packaging and Packaging Waste Directive
<b>EU</b>	European Union	<b>SUP</b>	Single-use Plastics
<b>UN</b>	United Nations	<b>PPWR</b>	Packaging and Packaging Waste Regulation
<b>OECD</b>	Organisation for Economic Co-operation and Development	<b>ESPR</b>	Ecodesign for Sustainable Products Regulation
<b>TEU</b>	Treaty on European Union	<b>MRA</b>	Mutual Recognition Agreement
<b>TFEU</b>	Treaty on the Functioning of the European Union	<b>TTC</b>	Trade and Technology Council
<b>TRIS</b>	Technical Regulation Information System	<b>SPS</b>	Sanitary and Phytosanitary
<b>TBT</b>	Technical Barriers to Trade	<b>TESSD</b>	Trade and Environmental Sustainability Structured Discussions
<b>WFD</b>	Waste Framework Directive	<b>ISO</b>	International Organization for Standardization
<b>EPR</b>	Extended producer responsibility	<b>WHO</b>	World Health Organization
<b>CJEU</b>	Court of Justice of the European Union		

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# 1 Introduction

## 1.1 Purpose and scope

Over the last 50 years, global material use has tripled, and this trend does not appear to be slowing down. Instead, global material consumption is expected to double within the next four decades,<sup>1</sup> and as soon as 2050, the world will be consuming as if we had three planets.<sup>2</sup> These unsustainable patterns of consumption and production are the root causes of climate change, biodiversity loss and pollution.<sup>3</sup>

Countries and regions are attempting to decouple growth from the use of resources and virgin materials through the promotion of reuse, refurbishment, remanufacturing, repair and recycling. Such actions are often seen as aspects of a circular economy. The concept ‘circular economy’ is subject to debate, and there is no international consensus on its meaning. On the contrary, there are hundreds of definitions of the concept ‘circular economy’<sup>4</sup> that have been developed and applied by both public and private actors. A wide variety of measures, ranging from rules on product content to treatment of waste, could potentially fall under the circular economy umbrella. However, most definitions imply that in a circular economy, products do not become waste, but are reused, refurbished and recycled.<sup>5</sup>

Already in 2015, the European Union (EU) adopted an action plan for a transition to a circular economy.<sup>6</sup> Many Member States have adopted their own strategies and laws to speed up this transition, as have countries outside the EU.

Under both World Trade Organization (WTO) rules and EU Single Market rules, protection of the environment is a legitimate ground for adopting potentially trade-restrictive measures.<sup>7</sup> Non-discriminatory and proportionate measures may remain lawful even if they increase trade costs or have a negative effect on trade. Thus, WTO Members and EU Member States remain relatively free to adopt measures intended to promote the transition to a circular economy, even if they risk negatively affecting trade.

As this study will show, there is an emerging patchwork of different rules on circularity in different countries, regions and continents. This is often referred to as ‘fragmentation’. Fragmentation increases the cost of trading across borders since the cost of compliance rises. National and regional rules that hinder cross-border trade can also prove to be stumbling blocks for new, circular business models and products.

Over the years, the EU has made efforts to reduce fragmentation in the Single Market caused by national circular economy initiatives. At the same time, the EU has acknowledged that it can only succeed in shifting to a circular economy if such a transition happens on a global scale. Against this background, the two aims of this study are:

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1 Janez Potočnik, Co-Chair, International Resource Panel at the session Building blocks for a circular future: trends, policies and solutions at the World Circular Economy Forum 2023 on 31 May 2023, available at [Building blocks for a circular future: trends, policies and solutions - WCEF2023](#).

2 [Sustainable consumption and production \(un.org\)](#)

3 <https://unstats.un.org/sdgs/report/2022/Goal-12/>

4 Kirchherr, J. et. al. (2017)

5 See, e.g. the International Resource Panel’s glossary: [Glossary | Resource Panel](#), EU 2020 CEAP and the Ellen MacArthur Foundation: [What is a circular economy? | Ellen MacArthur Foundation](#). See also Yamaguchi, S. (2021), p. 12.

6 European Commission (2015).

7 See for example Article XX GATT 1947 and Article 2.2 of the WTO Technical Barriers to Trade (TBT) Agreement. For the EU, see, e.g. Article 36 TFEU.

- to see what lessons can be drawn from experiences at EU level and Member State level in preserving a well-functioning Single Market while promoting the transition to a circular economy, and
- to explore how different tools of international regulatory cooperation can be used to mitigate trade barriers or trade irritants while the international community transitions to a circular economy.

As mentioned, circular economy initiatives include a vast number of different regulatory measures. In this study, we will limit the discussion to a selection of measures that we have observed on the EU Single Market. We believe these measures are illustrative of both the effects of fragmentation and the EU response to fragmentation. The measures we have selected include rules on waste and waste transport, deposit return systems,<sup>8</sup> labelling of packaging and products, and labelling related to extended producer responsibility (EPR) schemes.<sup>9</sup> We will make no assessment of how effective a certain national or EU rule is to the actual achievement of a more circular society.

## 1.2 Method

This study is primarily a desk study. We have gathered information from reports, preparatory works and legal documents from the EU, the WTO, the Organisation for Economic Co-operation and Development (OECD)<sup>10</sup> and others, as well as from academic and trade literature.

One of our primary sources of information for chapters 2 and 4 is the database EU Technical Regulation Information System (TRIS).<sup>11</sup> In the EU, the Single Market Transparency Directive<sup>12</sup> obliges Member States to notify draft national technical rules, i.e. rules regulating products, to the Commission. These notifications are published publicly in TRIS. The notification procedure allows other Member States and the Commission to react to proposals for new national rules. Stakeholders also have the opportunity to submit comments. The TRIS database is an excellent tool for monitoring trends and patterns in goods-related regulations within EU Member States. The National Board of Trade Sweden is responsible for coordinating and administering Sweden's notifications.

During the study, we also conducted interviews with a small number of companies to learn more about their experiences of trade inside and outside the EU Single Market. We have also asked these companies to clarify how they are affected by EU rules, or by the lack of common EU rules.

Some EU legal acts referenced in this study were still being negotiated at the time of writing. References are primarily made to the Commission's proposals for new legal acts and, where possible, changes and amendments made by the Council or the European Parliament during the co-legislative process.

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8 See section 2.3 below

9 See section 2.3 below.

10 For information; complementary work on related topics from the OECD will be forthcoming during 2024.

11 [Prevention of technical barriers to trade | TRIS - European Commission \(europa.eu\)](#)

12 Directive 2015/1535.

## 2 Fragmentation caused by circular economy initiatives

### 2.1 Introduction

Apart from the EU, many, if not all, countries in the world, have rules in place that could be said to relate to the circular economy.<sup>13</sup> For example, Japan adopted its basic legislation on the circular economy as early as in 2000.<sup>14</sup> China has introduced a new development plan to advance the circular economy agenda and make it a national priority by 2025.<sup>15</sup> The United States is developing a national strategy to encourage circularity and recycling.<sup>16</sup>

EU Member States also play an active role in regulating matters related to the circular economy. This increases fragmentation and leads to barriers to trade, both on the EU Single Market and globally. Companies that export to the EU will have to adapt not only to EU legislation but also to divergent rules in the Member States.

Different national rules and EU rules together create a fragmented regulatory landscape that businesses trading both inside and outside the EU Single Market must navigate. This has an impact on international trade. Preliminary findings from the WTO Secretariat indicate that between 2000 and 2020, the value of imports related to the circular economy that were subject to trade concerns raised by WTO Members in the Committee established under the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) amounted to USD 105 billion.<sup>17</sup> To date, at least three disputes relating to circular economy product rules and trade have been brought before the dispute settlement bodies of the WTO.<sup>18</sup>

This chapter will explore the effects of fragmentation further, primarily on the EU Single Market. The focus is on rules relating to waste, product and packaging requirements and labelling requirements.

There is a certain degree of overlap between this chapter and parts of Chapter 4. Some of the national measures mentioned in this chapter will also be described in Chapter 4. However, these chapters have different objectives. The current chapter aims to describe the effects of circular economy regulations and the fragmentation they can create in the area of trade. The aim of Chapter 4 is to describe the regulatory interplay between the EU legislature and lawmakers in Member States.

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13 See also WTO (2020), pp. 4–6.

14 [Circular Economy in Japan | Sustainability from Japan - Zenbird](#). See also Japan's circular economy plan, [Circular Economy Vision 2020](#), May, 2020, Japan Ministry of Economy, Trade and Industry, available at [Circular Economy Vision 2020 \(meti.go.jp\)](#)

15 [Circular economy gets 5-year regulator boost \(www.gov.cn\)](#)

16 United States Environmental Protection Agency, [National Recycling Strategy](#), available at [National Recycling Strategy | US EPA](#). There are also many initiatives on state level to address issues such as littering. See, e.g. California Beverage Container Recycling & Litter Reduction Act (DRRR-2013-1478) and the code of the city of Austin, Texas, Article 7 (on single-use carrying bags).

17 WTO (2022), p. 15.

18 Canada - Import, distribution and sale of certain alcoholic drinks by provincial marketing agencies, Report by the Panel adopted on 18 February 1992 (DS17/R - 39S/27), DS332, Brazil — Measures Affecting Imports of Retreaded Tyres, December 2007 and DS462 and DS463 Russian Federation — Recycling Fee on Motor Vehicles (ongoing).





## 2.2 Trade in waste

It is perhaps not immediately obvious why anyone would want to trade in waste. In fact, the Basel Convention bans certain exports of hazardous waste.<sup>19</sup> However, waste can sometimes be transformed into secondary raw materials. While trade undoubtedly has an impact on resource use in the world,<sup>20</sup> restricting trade in waste may prevent the production of secondary raw materials.<sup>21</sup>

Not all countries in the world have the necessary infrastructure and technologies in place to extract usable materials from waste or to transform waste into secondary raw materials. Restrictions on trade in waste can cause countries with a limited domestic capacity to treat waste to dispose of it through landfill, stockpiling or incineration rather than exporting waste for material extraction or recycling to countries with more advanced technologies. Conversely, a national ban on the import of waste in a country with advanced waste treatment facilities may divert trade flows to countries with weaker trade management systems.<sup>22</sup> Export restrictions on scrap metal can affect prices in a way that makes scrap less attractive than virgin materials.<sup>23</sup> Cross-border trade can also be a way to diffuse new technologies that reduce environmental impact.<sup>24</sup>

However, there are challenges to trade in waste. Within the WTO, Members have expressed concern over Chinese rules on imports of solid waste.<sup>25</sup> In Europe, Swedish waste management company Ragn-Sells has encountered difficulties in moving waste across borders for research purposes. Bans on imports of waste also restrict the ability to use certain waste streams as input in the production of new goods.<sup>26</sup>

Another issue that complicates trade in waste is that there is no agreed international definition of what constitutes ‘waste’. The lack of a common definition and clear classification of waste and second-hand products can lead to more cumbersome customs procedures, as customs officials may have to decide on a case-by-case basis how imported goods

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19 Article 4 A and Annex VIII of the Basel Convention.

20 UNEP (2015).

21 See, for more on this topic, National Board of Trade (2023c).

22 Yamaguchi, S. (2021), p. 19–23.

23 WTO (2020), p. 7–8.

24 See for example National Board of Trade (2023a). See also WTO (2020), p. 8.

25 WTO document G/TBT/M/74.

26 Interview with Ragn-Sells on 10 October 2023.

should be classified. The lack of common classifications can also make it difficult to track and analyse trade flows.<sup>27</sup> Box 1 shows two examples of issues caused by the lack of common rules on the definition or classification of waste.

### Box 1. Two examples on need for common rules

**Återvinningsindustrierna** is a Swedish business organisation that represents Swedish businesses in the recycling sector. Some smaller EU countries currently lack recycling capacity, whereas there is a higher degree of specialisation in waste treatment in some EU countries. Återvinningsindustrierna believes that this will require an increase in trade in waste, which in turn will require greater harmonisation, for example, of waste classification codes. Some of the organisation's members are eager to test waste treatment facilities in other EU Member states, but so far this has proved challenging.

Interview with Återvinningsindustrierna on 7 September 2023.

**Swedish company Renewcell AB\*** specialises in making new textile fibre from used clothing and textiles, waste from the clothing industry, yarn, etc. The textile fibre is then used to make dissolving pulp. The pulp can be used as new raw material to make clothing and other textile products. The company primarily sources its raw material – textile waste – from outside the EU. If the exporting country classifies the material as 'waste,' it becomes subject to very burdensome administrative procedures. Each shipment must be accompanied by a physical document that must be signed by every individual actor in the supply chain. The document must also be signed on the inside of the freight container, which is then sealed. This makes signing the document exceedingly difficult. Meanwhile, a freight container travelling the same route, from the same factory, that contains new products made from the same material is not subject to these strict rules. As a result, two freight containers, one carrying denim jeans and the other denim waste left over from the production of those jeans, are subject to different rules during transport.

Interview with Renewcell on 26 June 2023.

\* On 26 February 2024, Swedish media outlets reported that Renewcell AB had filed for bankruptcy, SVT (2024).

In the EU, there has been a common definition of waste since 1975.<sup>28</sup> 'Waste' means any substance or object which the holder discards or intends or is required to discard.<sup>29</sup> This definition is referenced in many other pieces of EU legislation, notably the directives on specific waste streams<sup>30</sup> and the Waste Shipment Regulation.<sup>31</sup> However, even with the common definition, EU Member States are still not necessarily clear on what waste is. The Court of Justice of the European Union (CJEU) has been asked to interpret the definition of waste at least 14 times since 1988.<sup>32</sup>

To further complicate matters, it is in principle left for EU Member States to decide when waste ceases to be waste. Rules of this type are known as 'end-of-waste criteria'. These are criteria that waste must fulfil to be considered something other than waste and be used as, for example, input in a new product. The EU's Waste Framework Directive (the WFD) lays

27 Yamaguchi, S. (2021), pp. 25-28.

28 Directive 75/442.

29 See Article 3.1 Directive 2008/98.

30 Article 3.2 Directive 94/62, Article 3.7 Directive 2006/66 (Article 3.50 Regulation 2023/1542) and Article 3.1 e Directive 2012/19.

31 Article 2.1 Regulation 1013/2006.

32 C-206/88 Vessoso and Zanetti, C-359/88 Zanetti et. al., C-418/97 ARCO Chemie Nederland et al., C-129/96 Inter-Environnement Wallonie v. Région wallonne, C-9/00 Palin Granit and Vehmassalon kansaterveystyön kuntayhtymän hallitus, C-114/01 AvestaPolarit Chrome, C-1/03 Van de Walle et. Al., C-194/05 Commission v. Italy, C-195/05 Commission v. Italy, C-263/05 Commission v. Italy, C-188/07 Commune de Mesquer, C-283/07 Commission v. Italy, C-624/17 Tronex, C-629/19 Sappi Austria Produktion och Wasserverband 'Region Gratkorn-Gratwein'.



down a general framework for end-of-waste criteria<sup>33</sup> and empowers the Commission to adopt Union-wide criteria.<sup>34</sup> However, Union-wide end-of-waste criteria only exist for iron, steel, aluminium and copper scrap, and glass cullet,<sup>35</sup> and may be developed for plastics and textiles.<sup>36</sup> This means that for most waste materials, it is left to the Member States to develop their own specific national end-of-waste criteria. National end-of-waste criteria only apply in one Member State.<sup>37</sup> Since the adoption of the WFD, EU Member States have notified at least 60 regulations to the Commission regarding when waste ceases to be waste. These measures cover waste from very diverse materials, such as asphalt (bitumen), concrete, paper, rubber, and plastic.<sup>38</sup> Diverging end-of-waste criteria has been identified as a barrier to trade in the Single Market.<sup>39</sup>

## Box 2. A fictional example on fragmentation

The following is a fictional example to illustrate how national end-of-waste criteria create fragmentation:

A Member State has determined that waste derived from asphalt concrete that has undergone certain processes is no longer 'waste'. The product is therefore eligible to be used in road construction in a Member State. However, if a neighbouring country has no national end-of-waste-criteria for waste from asphalt concrete, or different criteria, the same product may not be allowed for use in road construction there, since it will still be considered waste.

## 2.3 Product and packaging requirements

Measures to make products and packaging more circular often include rules on *product characteristics* (eco-design<sup>40</sup>, recyclability, repairability) or on *waste-related information requirements*, such as labelling with information on how to dispose of the product or packaging once it has become waste or information related to extended producer responsibility (EPR) schemes.

Under EPR schemes, producers are responsible for their products once they become waste. This means producers can be responsible for, e.g. the collection, take-back and treatment of waste. In practice, producers' responsibilities are often assumed by EPR organisations (where producers are members), and the producer's actual responsibility is limited to paying fees to the organisation. EPR schemes are often specific to the country where they apply, and the cost of participating in such schemes can vary. There can also be labelling requirements associated with EPR schemes.<sup>41</sup> In the EU, EPR obligations exist on EU level for batteries, packaging, electrical and electronic waste and end-of-life vehicles.<sup>42</sup> The Commission has recently proposed to introduce EPR obligations for textiles, textile-related products and shoes.<sup>43</sup> EU Member States have also introduced, or are

33 Articles 6.1 and 6.3 Directive 2008/98.

34 Article 6.2 Directive 2008/98.

35 Regulation 333/2011, Regulation 715/2013 and Regulation 1179/2012.

36 [The Commission starts to develop end-of-waste criteria for plastic waste \(europa.eu\)](#)

37 Cf. Dahlberg et. al (2020) pp. 41-42.

38 Data yielded from a manual search in the TRIS database. The number is only based on the number of notified regulations with the words 'end-of-waste criteria', 'ceases to be waste', 'waste status' or similar in the title. The real number is most likely higher. The number also includes notifications from the United Kingdom.

39 European Commission (2020c). See also Dahlberg et al. (2020), pp. 41–42.

40 Eco-design refers to designing products in a way that makes them easier to repair, recycle, reuse, etc.

41 See further in Section 4.3.4 below.

42 Directive 94/62, Directive 2000/53, Directive 2006/66 (Regulation 2023/1542) and Directive 2012/19.

43 COM(2023) 420 final.



proposing to introduce, EPR obligations on national level for waste mattresses,<sup>44</sup> textiles, agricultural plastics, pharmaceutical products, toys, sports equipment, furniture, light electrical vehicles and electric bicycles,<sup>45</sup> medical waste from household medicines,<sup>46</sup> printed materials and newspapers,<sup>47</sup> and textiles.<sup>48</sup>

Product or packaging requirements related to the circular economy often require producers to alter either their products or their packaging when selling to different markets. Disparate rules in different countries may require traders to set up different production lines, meaning they lose out on benefits of scale. This was confirmed by the Swedish company Orkla Confectionary & Snacks Sweden AB, a Swedish company with a Norwegian parent company that sells food products both inside and outside the Swedish market. The company described that the cost of packaging goes down as volumes increase. When you launch a new packaged product, you often produce smaller volumes. If you can launch the same product with the same packaging in several countries, you can produce larger volumes of packaging and hence reduce the cost of production.<sup>49</sup>

In fact, concerns that producers would need to alter their products and packaging was one of the reasons that the Commission and some Member States questioned the operation of deposit return systems by a smaller group of Member States in the mid-1990s and early 2000s.<sup>50</sup> A deposit return system is a system in which a fee – a deposit – is charged on top of a product's sales price. The deposit is reimbursed to the customer once they bring the waste generated from that product to a separate collection system. Such systems often include labelling requirements, for example, an obligation to label products and packaging with the amount of the deposit. Deposit return systems can be established for any product or packaging, but perhaps the most familiar deposit return systems in the EU are those established for beverage packaging, such as bottles and cans. The Commission even (unsuccessfully) brought Germany and Denmark to court over their respective deposit return systems.<sup>51</sup>

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44 TRIS case number 2022/153/B.

45 Article 10 of the Greek law 4819/2021, available at [Law 4819/2021 \(Government Gazette 129/A' 23.7.2021\)](#) | ELINYAE

46 TRIS case number 2003/398/F.

47 TRIS case number 2001/198/F.

48 TRIS case number 2007/483/F. See also Bird&Bird (2023).

49 Interview with Orkla Confectionary & Snacks Sweden AB on 18 September 2023.

50 See, e.g. TRIS case number 1993/227/NL, 1999/85/NL, 2002/98/DK, 2006/135/NL, 2006/369/DK, 2007/144/DK, 2001/128/D, 2003/232/D, 2004/446/D, 2009/512/D and 2019/115/SK.

51 C-302/86 Commission v. Denmark, C-463/01, Commission v Germany. The CJEU also addressed the issue in C-309/02, Radlberger Getränkegesellschaft and S. Spitz.



Figure 1. Photograph of a label on a water bottle sold in the EU



Figure 1 shows a photograph of a label on a water bottle sold in the EU, which displays no less than five deposit return system labels (including the Swedish label) and one label indicating that the bottle is made of polyethylene terephthalate (PET).

Labelling requirements are generally good examples of cases where producers are required to alter their products or packaging. The European business community has often complained about the impact of different types of labelling requirements.<sup>52</sup> For example, when France introduced new labelling rules relating to product characteristics in 2021,<sup>53</sup> over 20 European business organisations protested, claiming, among other things, that the rules would restrict the free movement goods. Many advocated for the introduction of common EU rules instead.<sup>54</sup>

Similarly, when several large Member States, including Spain,<sup>55</sup> Italy<sup>56</sup> and France<sup>57</sup> introduced new rules on packaging labels with waste sorting instructions, the Commission and many European and international business organisations opposed the rules as overly restrictive to trade. The French waste sorting instructions have also been the subject of trade concerns raised by WTO Members in the TBT Committee.<sup>58</sup>

### Box 3. Fragmented packaging and labelling requirements

**Husqvarna, a Swedish manufacturer of outdoor products for forest, park and garden care, as well as equipment for the construction industry, expressed that the proliferation of national requirements within the EU has meant that they need to repeatedly change their packaging to accommodate all the required labels. It can even be difficult to find space for the various labels on the packaging of some smaller products. It is possible to add a sticker to packaging, but that negatively impacts the recyclability of the packaging. The company also describes a situation where some Member States have proposed contradictory rules: one Member State prohibits a label that is mandatory in another Member State.**

Interview with Husqvarna on 16 May 2023.

52 See, e.g. BusinessEurope (2023), BusinessEurope (2022), DigitalEurope (2022) and ERT (2021).

53 See TRIS case number 2020/832/F, 2020/833/F, 2023/116/F, 2023/117/F, TRIS case number 2021/644/F, 2023/25/F and 2023/26/F.

54 Orgalim (2021). See the contributions from business organisations in the TRIS database, 2021/644/FR.

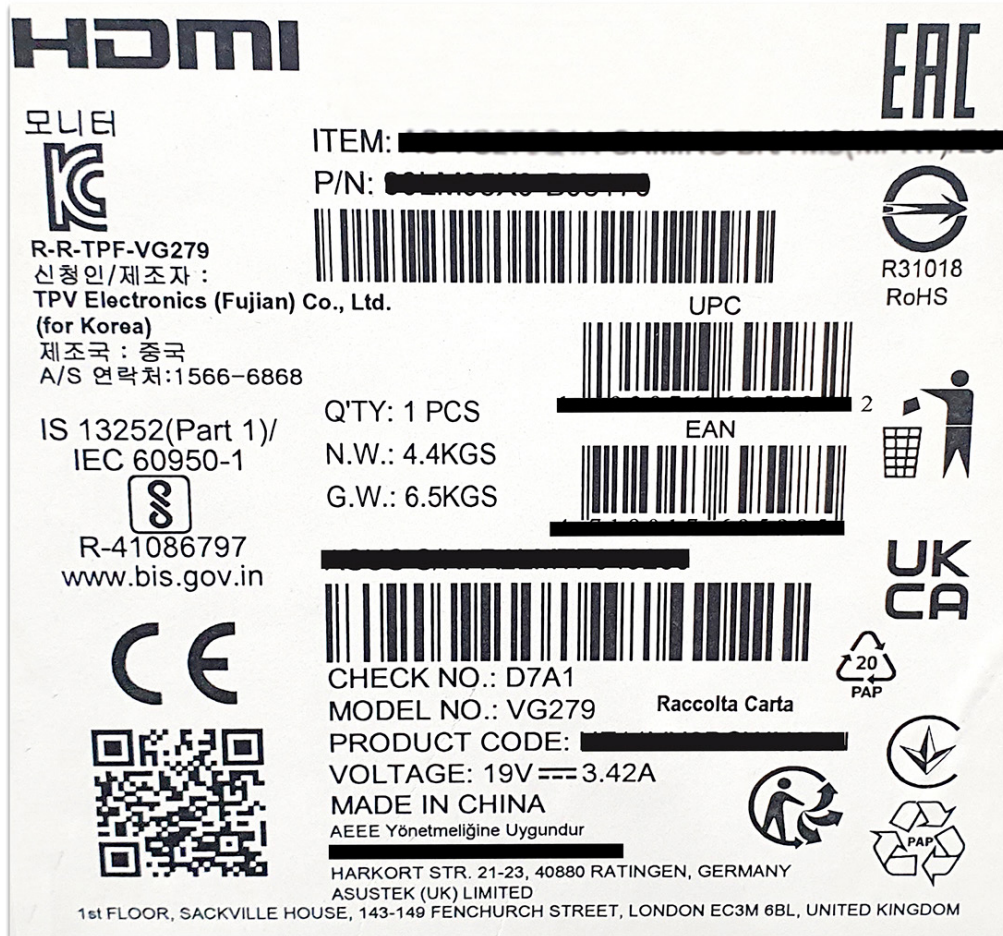
55 See TRIS case number 2022/325/E. See the contributions from business organisations in the TRIS database.

56 See TRIS case number 2022/18/I. See the contributions from business organisations in the TRIS database.

57 See TRIS case number 2020/410/FR. See the contributions from business organisations in the TRIS database. See also DigitalEurope, 2022.

58 WTO document G/TBT/M/62. For more information about sorting instructions on packaging, see Section 4.3.2 below.

Figure 2. Photograph of a label on packaging for an electronic product sold in the EU



Label on packaging for an electronic product sold within the EU and on other markets. The label has only one marking that is required by EU law, namely the CE marking (required by the Eco-Design Directive). Other markings on the label include sorting instruction labels required by EU Member States, such as the French and Italian sorting instruction labels and markings required by third-country jurisdictions, such as the CE marking equivalents required by South Korea, Ukraine and the United Kingdom.

Apart from the costs that producers incur when they have to alter or modify a product or packaging to comply with a specific rule, there is also a cost involved with finding out what the product and packaging requirements are. Time and human resources must be allocated to find what rules apply. Difficulties with finding information on applicable rules is often put forward as an example of a barrier to trade in the Single Market.<sup>59</sup>

#### Box 4. Difficulties to find information

When Orkla Confectionary & Snacks Sverige AB recently wanted to explore new business opportunities in another EU Member State, they struggled to find information on applicable rules on labelling with sorting instructions. It was difficult to find information in a language other than the national language and to find detailed information. The company estimates that in total, it took at least a couple of months to find the right information.

Interview with Orkla Confectionary & snacks Sverige AB on 18 September 2023.

<sup>59</sup> European Commission (2020b), pp. 3–4 and Eurochambres (2019), p. 6.

## 3 Toolbox for regulatory convergence

### 3.1 Introduction

Chapter 2 has shown how regulatory initiatives to promote the transition to a circular economy can cause disruptions to trade through fragmentation.

As mentioned, both WTO trade rules and EU Single Market rules allow regulatory measures that aim to protect a legitimate interest, including protection of the environment.<sup>60</sup> As an example, the CJEU has declared that while deposit return systems for beverage packaging could constitute a restriction on the free movement of beverage packaging, such systems can be justified with reference to protection of the environment, provided that their conditions are proportionate.<sup>61</sup>

Consequently, countries and regions are often the competent bodies when it comes to adopting rules aimed at improving circularity, even if this leads to fragmentation that negatively impacts trade. If we want the shift to a global circular economy to occur while creating a regulatory environment that is still conducive to trade, we need to use other tools to complement WTO and EU Single Market trade rules.

Regulatory cooperation is a collective term for a range of actions that may be taken when states or regions work together, e.g. in order to facilitate information exchange, to promote a certain issue or to reduce barriers caused by national or regional rules. The most commonly thought-of relationship between trading partners is a formal free trade agreement.<sup>62</sup> However, regulatory cooperation take many different shapes and forms. These include cooperation bilaterally between two trading partners or in multilateral settings, such as in the WTO.<sup>63</sup>

There is a lot to be gained by reducing regulatory divergence. The United Nations Conference on Trade and Development (UNCTAD) estimates that reducing regulatory divergence can reduce trade costs by 25 per cent.<sup>64</sup>

This chapter will give an overview of three tools that are widely recognised as especially effective in limiting technical barriers to trade and promoting regulatory convergence.<sup>65</sup>

### 3.2 Transparency

One of the most basic forms of regulatory cooperation is the adherence to transparency provisions and sharing information between trading partners. For example, the WTO TBT Agreement, much like the Single Market Transparency Directive,<sup>66</sup> obliges WTO Members to notify draft technical regulations in a publicly available WTO database.<sup>67</sup> This is essentially a basic form of regulatory cooperation between Members.

Trading partners can also commit, for example, in free trade agreements, to adhere to enhanced transparency provisions and extend transparency measures between trading

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60 See Article XX GATT 1947 and Article 2.2 of the WTO Technical Barriers to Trade (TBT) Agreement. For the EU, see, e.g. Article 36 TFEU.

61 C-302/86 Commission v. Denmark, C-463/01, Commission v Germany. The CJEU also addressed the issue in C-309/02, Radlberger Getränkegesellschaft and S. Spitz.

62 The National Board of Trade (2022a).

63 OECD (2021).

64 7th Trade Policy Dialogue: Tear down this wall: Challenges with trade-related regulations | UNCTAD

65 See also National Board of Trade (2022b).

66 Directive 2015/1535. See also Section 1.2 above.

67 [Search notifications – ePing SPS&TBT platform \(wto.org\)](#)



partners.<sup>68</sup> Thus, transparency measures do not have to be limited to sharing draft regulations or standards with trading partners. They can also be extended to sharing impact assessments, research and scientific evidence, or the initiation of dialogue with trading partners in the early stages of a national regulatory process.

A key purpose of transparency measures when developing regulations is to encourage dialogue between trading partners by creating an opportunity to respond to requirements that can affect cross-border trade. This in turn can contribute to better regulatory outcomes and help limit fragmentation.<sup>69</sup> Transparency is also an important tool for gaining the acceptance of trading partners.

### 3.3 Mutual recognition

Mutual recognition is not a tool for regulatory convergence in the same way as transparency and harmonisation. However, mutual recognition does have the potential to reduce the effects of regulatory fragmentation between trading partners.<sup>70</sup> Mutual recognition can take many different forms. It can include the recognition of test results from the trading partner's conformity assessment bodies. Within the EU, mutual recognition goes as far as to allowing products lawfully sold in another Member States' territory to be sold in the domestic market without any additional testing.<sup>71</sup> EU Member States, in principle, recognise other Member States' rules as equivalent to their own. The decisive factor in determining how extensively the principle can be applied between two trading partners is the level of trust between them.<sup>72</sup>

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68 See, e.g. Articles 2.9.2 and 2.10.1 in the WTO TBT Agreement.

69 National Board of Trade Sweden (2022b).

70 National Board of Trade Sweden (2022b).

71 The principle of mutual recognition was laid down by the CJEU in the late 1970s. See C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein*. However, its application in practice within the Union can be debated. In 2019, the EU legislature adopted procedural rules on how to apply the principle of mutual recognition of goods in the hopes of improving its effectiveness; see Regulation 2019/515. See also Correia de Brito, Kauffmann and Pelkmans (2016).

72 National Board of Trade Sweden (2022b).





### 3.4 Harmonisation

Harmonisation is the most extensive form of regulatory cooperation. As with transparency and mutual recognition, there are a range of measures available to achieve harmonisation.

Within the EU, harmonisation refers to the adoption of binding legislation at EU level, usually in the form of Regulations or Directives<sup>73</sup> that must be implemented and enforced in the EU Member States.

Within the WTO, the TBT Agreement obliges members to use international standards as a basis for their technical regulations, except in cases where this would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives.<sup>74</sup> This is also a way to promote harmonisation and limit regulatory fragmentation between trading partners.

Another form of harmonisation is when trading partners agree to use and apply the same international standard for certain products or to recognise the same standardisation organisation as ‘international’. For example, the EU and the United States have, under the auspices of their Trade and Technology Council (TTC), promoted cooperation on transatlantic technical recommendations for electric vehicle charging with the goal of creating joint standards and removing barriers to transatlantic trade.<sup>75</sup>

When asked about solutions that would help resolve trade barriers, European businesses often refer to harmonisation.<sup>76</sup> The majority of those interviewed for this study have pointed to the need for regulatory convergence. They expressed that the most desirable solution is the establishment of harmonised rules, and many prefer requirements that are harmonised globally. As an example, the food packaging and processing equipment company TetraPak, which is active in over 150 countries worldwide, would prefer to see more harmonised EPR schemes, preferably schemes supported by governments as these are more effective.<sup>77</sup>

The EU’s trading partners also see harmonisation as a desirable solution to trade barriers. For example, the United States has suggested that harmonisation at EU level could help address trade barriers caused by regulations at Member State level.<sup>78</sup>

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73 Article 288 TFEU.

74 Article 2.4 WTO Agreement on Technical Barriers to Trade (TBT).

75 European Commission (2023a).

76 Eurochambres (2019), p. 14. See also Eurocommerce (2023).

77 Interview with TetraPak Group, 22 May 2023.

78 At the TBT Committee meetings in June and November 2023, the United States asked whether harmonisation at EU level on rules on labelling of alcoholic beverages was foreseen, after having raised a specific trade concern against Ireland for its national rules on such labelling. See US statement for Ireland – Draft Regulations Under section 12 of the Public Health (Alcohol) Act 2018 (ID 794), available at Trade concern details - ePing SPS&TBT platform (wto.org)

# 4 The interplay between EU and Member State circular economy rules

## 4.1 Introduction

Now that we have described the tools for regulatory convergence, we will turn to regulatory convergence, specifically within the EU Single Market. One of the premises of this study is that there are lessons to be learned from the EU experience in regulating circular economy issues and that these lessons can inform international regulatory cooperation. In this chapter, we will look at how EU and Member State regulation interact and influence each other and how EU law can both cause and mitigate fragmentation in the Single Market. This interplay between Member State lawmakers and the EU legislature in different areas of EU law has been extensively outlined by Bradford in 2020.<sup>79</sup>

This chapter will begin with a brief overview of the right (and obligation) of the EU and Member States to regulate the circular economy. The remainder of this chapter will present four cases, which we will use to illustrate the regulatory interaction between the EU and its Member States.

## 4.2 EU and Member State regulation of the circular economy

The scope of the EU's mandate to regulate differs depending on the topic at hand.<sup>80</sup> The EU can only act to the extent that it is authorised, and it must respect the principles of subsidiarity and proportionality.<sup>81</sup> However, it follows both from EU Treaties and CJEU case law that once the EU has adopted a regulation in a certain area, Member States are not allowed to adopt their own rules regulating the same aspects as the EU rules.<sup>82</sup> Thus, EU rules have a harmonising effect.

The harmonising effect of EU legislation can differ depending on the area that it regulates,<sup>83</sup> choice of legislative instrument,<sup>84</sup> level of political agreement, level of detail, the application of the principles of subsidiarity, proportionality, etc.

When it comes to EU product legislation, the level of detail is normally quite high. This means that such legislation normally has a higher harmonising effect, since there is little room for Member States to adopt national rules. However, EU product rules for the circular economy contain few examples of legislation with a high harmonising effect. The current Eco-design Directive<sup>85</sup> mandates the Commission to adopt delegated acts with a relatively high harmonising effect for certain product aspects. Still, as we will see in Section 4.3.3, there is still room for Member States to take their own actions in this area.

In most areas where the EU has rules relevant to the circular economy, it is more common for EU legislation to lay down a legal framework and set goals to be achieved. It is then for the Member States to work out ways to achieve those goals. The WFD is a good example.<sup>86</sup>

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79 Bradford, A. (2020).

80 See Articles 4–5 TEU and Articles 2–4 and 6 TFEU.

81 Article 4 TEU.

82 See Article 2.2 TFEU and C-6/64 *Costa v E.N.E.L.*

83 See for example Article 114 TFEU (legal basis for the internal market) and Articles 191–193 TFEU (legal basis for the protection of the environment).

84 See Article 288 TFEU on the difference between Directives and Regulations.

85 Directive 2009/125.

86 Directive 2008/98.

The Directive lays down minimum rules on, e.g. the waste hierarchy, waste treatment and extended producer responsibility. It also lays down targets to be achieved by the EU Member States. Such targets include, inter alia, targets for preparing waste materials for reuse and for recycling.

The binding nature of all EU law means that even if Member States are free to decide how to meet a target set by EU law, the target itself is non-negotiable. If a Member State does not reach the target, it can face infringement proceedings and ultimately, fines. This creates a strong incentive for Member States to develop solutions to reach the targets and objectives set out in EU law. There is no real obligation for Member States to coordinate their national measures to achieve EU targets, although this is sometimes encouraged.

National solutions to achieve common goals create fragmentation. Within the EU, fragmentation not only creates a need for harmonisation, it is also the legal basis for harmonisation. The ‘Single Market clause’ in Article 114 TFEU provides that the EU can adopt legislation to ‘approximate’ national laws. Thus, differences between national laws allows the EU to adopt harmonising legislation.

The following cases will illustrate the regulatory interplay described above in the circular economy. The studies will show how the design of EU rules on single-use plastics, waste, eco-design, etc. have impacted Member State regulation and vice versa.

The studies will also show how the EU uses the tools for regulatory convergence in different ways to try to address and prevent barriers to the free movement of goods in the Single Market. Section 4.4 provides a summary of the key findings from our cases.

## 4.3 Single Market cases on the circular economy

### 4.3.1 Deposit return systems

Originally, there were no EU rules on deposit return systems. However, Member States in northern Europe (e.g. Sweden, Denmark, the Netherlands and Germany) were early adopters of deposit return systems for beverage packaging and have operated such systems since the mid-1980s. In one Member State, Germany, the deposit return system originally inadvertently encouraged retailers to only sell specially designed bottles from their own suppliers.<sup>87</sup>

The EU Directive on Packaging and Packaging Waste (the PPWD)<sup>88</sup> was adopted in 1994. While the Directive did not mention deposit return systems, it obliged Member States to meet targets for the recovery and recycling of packaging waste and to ensure that systems for return, collection, reuse and recovery were set up.<sup>89</sup>

Over time, more Member States introduced deposit return systems for drinks packaging.<sup>90</sup> In 2018, the PPWD was amended to expressly list deposit return systems as one of several

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87 TRIS case number 2003/232/D.

88 Directive 94/62.

89 Articles 6 and 7 of Directive 94/62 (initial act).

90 Croatia established its deposit return system in 2006 before joining the EU ([Deposit Refund System in Croatia | Interreg Europe](#)). It notified new rules in 2017 (TRIS case number 2017/245/HR). Estonia was the first Baltic country to notify rules on a deposit return system for beverage packaging in 2006 (TRIS case number 2006/623/EE). Slovakia notified rules on establishing a mandatory deposit return system in 2009 (TRIS case number 2009/195/SK) and again in 2019 (TRIS case number 2019/115/SK). Lithuania notified its system in 2013 (TRIS case number 2013/605/LT). Finland has operated a deposit return system for beverage packaging since at least 2005 (see [Statsrådets förordning om retursystem för vissa dryckesförpackningar of 23 March 2005](#); cf. Directive - 94/62 - EN - EUR-Lex (europa.eu)).



permissible measures available to Member States to encourage reusable packaging.<sup>91</sup> The subsequent Single-use Plastic (SUP) Directive also suggests establishing a deposit return system as a measure to achieve separate collection for single-use plastic bottles.<sup>92</sup>

The SUP Directive prompted several Member States to announce the establishment of deposit return systems for single-use plastic bottles and metal cans.<sup>93</sup> In 2022, the Commission presented its proposal for a new Regulation on Packaging and Packaging Waste, the PPWR.<sup>94</sup> Here, the Commission for the first time proposes to introduce mandatory<sup>95</sup> EU-wide deposit return systems for single-use plastic beverage bottles and metal beverage cans. The PPWR proposal also encourages Member States to adopt such systems for other types of packaging and lays down minimum rules that all deposit return systems must adhere to.<sup>96</sup> It seems the Commission has learned from the German mistake and has opted for a Danish-style system, requiring a single system operator to be established.<sup>97</sup> However, in its general approach to the proposal for a PPWR, the Council has made an amendment to this provision. It now states that there should be either a single operator or a system to ensure coordination between different operators.<sup>98</sup>

This case shows two things. First, it illustrates how Member States can act as regulatory innovators.<sup>99</sup> There is more room for a trial-and-error approach in national regulation,

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91 Article 1 of Directive 2018/852 and Article 5 of the current Directive 94/62. Seemingly, the amendment of this Article and the addition of deposit return schemes to the list were done by the European Parliament; see ST 7276 2017 INIT – 2015/0276 (OLP).

92 See Article 9 in and Part F of the Annex to Directive 2019/904. See also the Commission's proposal for Directive 2019/904, COM /2018/340 final.

93 Latvia and Malta notified their respective deposit return systems in 2019 (TRIS case numbers 2019/542/LV and 2019/431/MT), while Romania and Spain introduced systems in 2022 (TRIS case number 2022/56/RO and 2022/325/E). Greece has also adopted rules on a deposit return system ([Law 4819/2021 \(Government Gazette 129/A' 23.7.2021\) | ELINYAE](#)). The Netherlands changed its deposit return system to only include single-use plastic bottles and metal cans in 2019 and 2020 (TRIS case numbers 2019/342/NL and 2020/841/NL). It has been reported that Poland will introduce a deposit return system (NFP [2023]). Austria notified new rules on a deposit return system in 2023 (TRIS case number 2023/0148/A). Portugal and Ireland are considering introducing such systems (Investigate Europe [2023]).

94 COM(2022) 677 final.

95 Under the Commission's original proposal, the Member States will only be exempt from introducing deposit return systems if they meet the target of 90% collection of packaging in 2026 and 2027 (see Article 44.1 of COM (2022) 677) final).

96 Article 44.8 COM (2022) 677) final.

97 Annex X (a) of the COM (2022) 677) final.

98 ST 16946 2023 INIT.

99 See for a similar view, see Bradford, A. (2020) p. 10, and Dalhammar, C. (2023).



especially in previously unregulated areas. When the EU adopts legislation, it must be implemented across the Union, and may involve hundreds of national and local governments and agencies. Withdrawing or changing EU legislation that has already been introduced requires greater effort than taking these measures in a single Member State. Conversely, if a certain method or measure has proven successful in one or more Member States, it is an indication that it could potentially work for other Member States as well. In this case, it is apparent that the Commission learned from Germany's mistake and opted for a different approach when designing an EU-wide deposit return system. It remains to be seen whether the Council's amendments in this regard will make it into the final version of the text.

Second, the case also shows the limits of relying solely on the EU Treaty provisions on free movement of goods and the mutual recognition tool to prevent barriers to trade. Deposit return systems are legitimate measures to protect the environment, and Member States are allowed to establish these systems and operate them even if they disrupt trade on the EU Single Market. In this case, the Commission opted to use harmonisation through the PPWR to ensure the free movement of beverages and beverage packaging.

### 4.3.2 Sorting instructions on packaging

Another example of how Member States can act as regulatory innovators and develop ideas that are picked up at EU level is the case of sorting instructions for packaging waste.

Both the PPWD and the WFD set out waste reduction and recycling targets for Member States. There is a voluntary system for identification and marking of packaging set up under the PPWD,<sup>100</sup> but there are no common rules on labelling to instruct consumers on how to sort packaging.<sup>101</sup>

Sorting waste properly is an important step in reuse and recycling as it reduces the risk of contamination and facilitates further treatment of specific waste streams.<sup>102</sup> Several Member States have therefore proposed or introduced rules on mandatory labelling for packaging (and in some cases other products) with instructions on how to sort packaging once it has become waste. This is the case with France,<sup>103</sup> Spain,<sup>104</sup> Portugal,<sup>105</sup> Italy,<sup>106</sup> Bulgaria,<sup>107</sup> Cyprus<sup>108</sup> and Luxembourg<sup>109</sup>. These national rules on sorting instructions range from obliging producers to affix specific symbols on packaging to making the voluntary EU identification system for packaging mandatory. In some Member States, the sorting instructions must be physically affixed to the product, while in other Member States, it can be provided online and made accessible through a data carrier (such as a QR code) on the product.

Portugal and Spain have proposed systems where matching symbols or colours would be used on packaging with corresponding symbols or colours on waste receptables.<sup>110</sup> In the

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100 Article 8 of Directive 94/62 and Decision 97/129.

101 There are, however, EU rules on sorting instructions for sanitary products, batteries and electrical and electronic waste; see Directive 2006/66/EC, Directive 2012/19/EC and 2019/904/EU.

102 Albizzati, P. et al (2023).

103 TRIS case numbers 2012/204/F and 2020/410/F.

104 TRIS case number 2022/325/E.

105 TRIS case number 2021/118/P.

106 TRIS case numbers 2022/18/1 and 2022/196/1

107 [Lex.bg - Закони, правилници, конституция, кодекси, държавен вестник, правилници по прилагане](#)

108 [Ο περί Συσκευασιών και Αποβλήτων Συσκευασιών Νόμος του 2002 – 32\(Ι\)/2002 \(cylaw.org\)](#)

109 TRIS case number 2020/485/L.

110 TRIS case numbers 2022/325/E and 2021/118/P.

Nordic countries, municipal waste organisations, EPR organisations and other stakeholders have developed a common, voluntary pictogram system for waste sorting.<sup>111</sup>

In the impact assessment that accompanied the Commission’s proposal for the PPWR, the Commission pointed to what it called an ‘increasing trend for mandatory labelling requirements’ and stated that this posed challenges to the ‘integrity’ of the Single Market.<sup>112</sup> As we have seen in Section 2.3, many different stakeholders have argued that Member State labelling requirements on sorting instructions risk disrupting trade on the EU Single Market.

The PPWR proposal contains a provision on a mandatory label with information about the packaging’s material composition, which is to be paired with mandatory matching labels on waste receptacles.<sup>113</sup> This system would thus mimic the systems proposed by Spain and Portugal. A Commission official has mentioned that the Commission is considering adopting the Nordic pictogram as the new EU system under the PPWR.<sup>114</sup>

This case is a clear example of how target-based EU legislation prompts Member States to adopt nation-specific solutions to achieve those targets. The case also illustrates how national initiatives, including joint initiatives that have been proven to work in several Member States, can be picked up at EU level.

### 4.3.3 Repairability and durability scores

The WFD obliges the Member States to take measures to prevent waste generation, including encouraging the design, manufacture and use of products that are resource-efficient, durable, repairable, re-usable and upgradable and measures to enable repair.<sup>115</sup>

The EU Eco-design Directive has been in force since 2009.<sup>116</sup> As the Eco-design Directive only applies to energy-related products, its primary focus is on improving the energy-efficiency of products. Since the adoption of the 2015 Circular Economy Action Plan, steps have been taken to introduce other parameters of eco-design for products, such as repairability.<sup>117</sup>

In 2020, France notified a repairability score for a wide range of products, including washing machines, dryers, lawn mowers, TVs, laptops and smartphones.<sup>118</sup> The repairability score is not in itself a requirement that a product must be repairable. Instead, it is a way to inform consumers about how easy or difficult it is to repair a product if it breaks. The objective is to allow consumers to make an informed decision and to indirectly push manufacturers to make more repairable products. In its notification, France expressly referred to the obligation on Member States in the WFD to prevent waste generation and to the objective stated in the 2020 Circular Action Plan regarding the repairability of products.

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111 [Common Symbols for waste sorting — Sverige sorterar \(eupicto.com\)](#)

112 European Commission (2022a).

113 See articles 11.1 and 12 of COM (2022) 677 final. See also preambles 44–45. The provision on matching waste receptacles remains largely the same after amendments by the European Parliament (TA/2023/0425) and the Council (ST 16946 2023 INIT).

114 Statement by a Commission official at DG ENV at the 3rd Meeting of the Trade Specialised Committee on Technical Barriers to Trade (18 October 2023) established between the EU and the United Kingdom under the Trade and Cooperation Agreement. The European Commission’s Joint research Centre has also used the Nordic pictogram as a model for its own research on harmonised sorting labels; see Albizzati, P. et al (2023).

115 Article 9 Directive 2008/98.

116 Directive 2009/125.

117 European Commission (2022b). See, e.g. Commission Regulations 2019/2023, 2019/2021 and 2023/1670.

118 TRIS case numbers 2020/468/F – 2020/476/F. See also TRIS case number 2021/387/F where France notified rules on the availability of spare parts for multifunctional mobile phones and laptops. Greece also has rules on obligations to provide spare parts; see European Commission (2022c), Table 25, 220–224. In 2022, France extended the scope of the score; see TRIS case numbers 2022/30/F to 2022/35/F.

The Commission expressed concern that the French repairability score could constitute a restriction on trade in the goods covered by the French regulations. However, France still went ahead and adopted the rules.

Belgium<sup>119</sup> and Spain have since also proposed repairability scores, and Slovenia and Finland both have rules relating to information about spare parts, although these are not repairability scores.<sup>120</sup>

In 2023, France upgraded its repairability score to a durability score.<sup>121</sup> The score will be based on, inter alia, criteria relating to a product's robustness, maintenance, and service. The product's repairability will be one of the elements that form the basis for the score. That same year, the Commission adopted rules on labelling under the current Eco-design Directive for mobile phones and slate tablets that include a 'repairability class'.<sup>122</sup> The rules also include a score on 'free fall reliability',<sup>123</sup> which is one aspect of durability.

The European Green Deal<sup>124</sup> and the 2020 Circular Economy Action Plan<sup>125</sup> both foresaw the adoption of EU legislation to promote more sustainable products. The result is the proposal for a Regulation on Eco-design for Sustainable Products (the ESPR).<sup>126</sup> The ESPR will replace the Eco-design Directive, but its scope is broader as it will also apply to other products in addition to energy-related products.

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119 TRIS case numbers 2022/634 to 2022/637/B.

120 European Commission (2022c) Table 25 pp. 220–224.

121 TRIS case number 2023/477/FR–2023/481/FR. France and Belgium have previously notified rules on the obligation to inform customers about the duration of software compatibility in smartphones and tablets and goods with digital elements (TRIS case number 2020/0830/F and 2022/0636/B). France, Belgium, Italy and Portugal all either have banned or have proposed banning planned obsolescence (European Commission [2022c] Table 25, p. 220–224).

122 Regulation (EU) 2023/1669.

123 See Article 3.2 and Annex II of Regulation 2023/1669.

124 European Commission (2019).

125 European Commission (2020a).

126 COM(2022) 142 final





The Commission's ESPR proposal contains a provision that allows the Commission to establish classes of performance for products to facilitate comparison between products.<sup>127</sup> In the provisionally agreed text between the Council and the European Parliament, the text specifically states that the ESPR should enable the establishment of repairability or durability scores where appropriate.<sup>128</sup>

First, and similar to the case on sorting instructions, this case shows how Member State legislation can influence and inspire EU legislation. The national legislative process is less cumbersome and moves faster than the EU legislative process, which involves two co-legislators and negotiations between Member States. A shorter legislative procedure allows Member States to overtake the EU in the regulation race. This in turn provides the opportunity for Member States to shape EU legislation.

Second, this case also demonstrates that the EU transparency tool, the notification procedure for national technical regulation, is not always sufficient to prevent a Member State from taking action or attempting to influence national legislation. This latter finding will also be explored in the following case.

#### 4.3.4 The Green Dot

The Green Dot (pictured in Figure 3 below) is a symbol used by producers to show that they have fulfilled their EPR obligations.<sup>129</sup> In most Member States, the use of the symbol is voluntary and sometimes managed by EPR organisations.

**Figure 3. The Green Dot**



In 1996, Spain notified its first law on packaging and packaging waste. In its notification message, Spain explicitly stated that the newly adopted law had to be implemented quickly, since Germany and France, both important markets for Spanish producers, had already adopted their own national laws on packaging.

The Commission raised several objections to the Spanish rules. Among these was the fact that Spain had made it mandatory for producers to be members of an EPR organisation *and* to label the packaging with a label showing that the producer was a member of an EPR organisation. Consequently, the Spanish marking requirements became mandatory. The Commission asked Spain to consider the effects these mandatory requirements would have on the Single Market and questioned whether they were really proportionate and necessary.<sup>130</sup>

For many years, the Green Dot was the only symbol used in Spain to show that a producer was a member of an EPR organisation, since the two existing Spanish EPR organisations used this symbol. The Green Dot was also used in many other EU Member States.<sup>131</sup>

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<sup>127</sup> Article 7.4 and preamble 24 of the Commission's proposal for the ESPR. The wording of these provisions relating to classes of performances remains largely the same in the text provisionally agreed upon by the Council and the European Parliament; see 2022/0095(COD).

<sup>128</sup> Preamble 24a and Article 7.1a. b) i) of the provisionally agreed text; see 2022/0095(COD).

<sup>129</sup> [The Green Dot Trademark \(pro-e.org\)](https://www.pro-e.org/)

<sup>130</sup> TRIS case number 1996/6001/E.

<sup>131</sup> See Spain's reply in TRIS case number 1998/90/E.

In 2020, France introduced new legislation that meant that the use of the Green Dot would be subject to a fine.<sup>132</sup> The Green Dot was considered to be misleading and confusing for consumers. However, several French organisations challenged the legality of the French rules, and in 2023, the rules were annulled.<sup>133</sup>

As it turns out, Spain was also concerned about the way consumers perceived the Green Dot. In 2022, Spain notified new rules on packaging,<sup>134</sup> effectively banning the symbol. Spain stated that there was a widespread misconception among consumers that the Green Dot symbol indicated that packaging was recyclable. Just like France, Spain decided it would ban misleading labels and expressly named the Green Dot as a misleading label. This time, the Commission, which three decades earlier had been concerned about the effects of a mandatory marking requirement on the Single Market, opposed the banning of the Green Dot symbol. The Commission claimed that the Spanish ban would conflict with rules in other Member States, since the Green Dot was used by producers in other EU Member States. Reluctantly, Spain decided to alter its rules to simply state that markings must not be misleading, without mentioning the Green Dot.

Nevertheless, the Commission seems to have been impressed by the Spanish (and French) arguments. The PPWR proposal also contains a ban on misleading labels.<sup>135</sup> In the Commission's proposal, a preamble expressly lists the Green Dot as a misleading label.<sup>136</sup> However, both the European Parliament and the Council seem to have deleted references to the Green Dot as a misleading label in their respective amendments to the Commission's proposal.<sup>137</sup>

In contrast to the case on repairability and durability scores, this case shows the strength of the transparency tool – the notification procedure – in the EU. It is true that Spain kept its mandatory labelling requirement scheme long after the Commission expressed concern about it through the notification procedure. However, in 2022, Spain *did* change its regulation after a reaction from the Commission. This was not done because the Commission's arguments made Spain doubt that its proposed ban was justified. Instead, Spain expressly stated that it changed its rules to 'prevent this prohibition from being considered as a measure that could impede the free movement of goods, in breach of [the Treaty]'.<sup>138</sup> Consequently, the notification procedure fulfilled its purpose as a preventive tool.

Finally, this case is another example of how the Commission is inspired by the Member States when it drafts legislative proposals. We will have to wait to see if the Green Dot is mentioned in the final version of the PPWR.

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132 See Arrêté du 30 novembre 2020 relatif aux signalétiques et marquages pouvant induire une confusion sur la règle de tri ou d'apport du déchet issu du produit available at [Arrêté du 30 novembre 2020 relatif aux signalétiques et marquages pouvant induire une confusion sur la règle de tri ou d'apport du déchet issu du produit - Légifrance \(legifrance.gouv.fr\)](#).

133 Décision nos 449872, 450134 & 450158 du 30 juin 2023 du Conseil d'Etat statuant au contentieux. See also SGS (2023) and DigitalEurope (2022).

134 2022/325/E.

135 Article 11.8 of COM (2022) 677 final.

136 Preamble 49 of COM (2022) 677 final.

137 TA/2023/0425 and 2022/0396 (COD).

138 Spain's reply to the Commission in TRIS case 2022/325/E.

## 4.4 Key takeaways from the cases

All four cases show how the EU and the Member States engage in a continuous regulatory dialogue, influencing each other to adopt and adjust technical rules.

Naturally, the interplay between the EU and its Member States is driven by many considerations, such as economic and political considerations, geopolitical developments and other external factors. But we argue that the design of EU legislation – and in particular the level of detail in harmonising legislation, has a significant impact on the need for future EU legislation. Based on the first three cases, we believe that the adoption of a general framework or target-based legislation at EU level can trigger a future need for harmonisation. We also see that there is something to be said for leaving Member States room for regulatory innovation.

The EU legislature can use the experience of Member States to avoid certain types of regulation that could be detrimental to the functioning of the Single Market. The sorting instructions case also shows how Member State action and cooperation, such as the Nordic pictogram, can inspire the Commission's legislative proposals.

Another takeaway from these cases, notably the case on the Green Dot, is that market size matters.<sup>139</sup> German and French regulation prompted Spain to develop new rules. Concerns raised by the European business community over national labelling rules in some of the EU's biggest countries (e.g. France and Italy) also indicate that when big economies introduce new regulation, the calls for harmonised measures grow louder. At the same time, the case on deposit return schemes shows that smaller economies, such as Denmark, can still impact European regulation. Being a big and attractive market for sellers is not the only factor in deciding whether a Member State will be successful in elevating its rules to EU level.<sup>140</sup>

Lastly, the cases present somewhat mixed results on what tools for regulatory convergence work best to reduce barriers to trade. The transparency tool is certainly a very useful tool to identify the need for harmonisation. It can be a good tool to avoid infringement proceedings, as reactions from the Commission and other Member States can influence regulating Member States to adjust their legislative proposals. However, the cases also show that if a Member State firmly believes that its measures are justified, the Member State will stand its ground. In such cases, the transparency tool has its limits.

The trend we see in regulating circular products is that the EU legislature is moving towards greater harmonisation through EU legislation. This indicates that harmonisation is the most effective tool in the EU's toolbox and is also in line with what the European business community often calls for. However, recently proposed measures in this area still leave room for Member State regulation, which ensures that the EU and its Member States will continue their regulatory dialogue on the circular economy going forward.

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<sup>139</sup> For a similar view, see Bradford, A. (2020), pp. 27–30.

<sup>140</sup> C.f. Bradford, A. (2020), Chapter 2.



# 5 The EU as an international regulatory actor

## 5.1 Introduction

We will now turn to how the EU can learn from its experiences and use different tools of international regulatory cooperation to achieve its goals in the circular economy. The EU aims to transform itself ‘into a modern, resource-efficient and competitive economy’.<sup>141</sup> As previously stated, the EU recognises that it cannot do this by acting in isolation from the rest of the world.

The 2020 Circular Economy Action Plan contains a list of efforts that the EU aims to make at global level.<sup>142</sup> Some of these efforts are proposals to introduce multi- and plurilateral legally binding measures, such as a global agreement on plastics, while others are softer tools, such as a proposal for a Global Circular Economy Alliance.

In this chapter, we will explore the tools that are available to the EU to achieve regulatory convergence on the international level. We have divided these tools into three main categories: unilateral tools, bilateral or regional tools, and multilateral tools.<sup>143</sup>

### 5.1.1 Unilateral tools: the ‘Brussels effect’

Bradford introduced the notion of the ‘Brussels effect’ in 2012 and later developed her theory further in 2020.<sup>144</sup> We will not repeat her arguments here. We simply remind the reader that the ‘Brussels effect’ refers to the indirect way in which EU legislation influences actors outside of the EU. This effect occurs when businesses outside of the Union adapt their products or services to EU rules to be able to sell, or continue to sell, these products or services on the EU market.<sup>145</sup> In this way, EU legislation effectively transforms market standards outside its own borders.

The ‘Brussels effect’ also occurs when countries outside the EU voluntarily and by their own initiative decide to adopt EU rules as their own. This has been the case with multiple different legal acts developed by the EU within the area of environmental regulation. Two examples include the Directive on Restriction of Hazardous Substances in Electrical and Electronic equipment<sup>146</sup> and the Directive on Waste from Electrical and Electronic Equipment.<sup>147</sup> These two Directives have inspired third countries to adopt similar requirements.<sup>148</sup>

This type of voluntary harmonisation or adoption of EU rules is, however, not without its challenges. Firstly, it presupposes that there are sufficiently harmonised EU rules in place. If not, there is little incentive for outside actors to adapt their products or services.

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141 European Commission (2019)

142 European Commission (2020a).

143 GACERE | UNEP - UN Environment Programme

144 Bradford (2020).

145 Where such an approach is possible. As discussed by Bradford, this is only possible when markets regulations are not in conflict with each other. Companies also do this to avoid having to make market-specific adjustments. By adapting to the highest standards on the market, it is unlikely that other parts of the production would adhere to lower standards.

146 Directive 2011/65.

147 Directive 2012/19.

148 Bradford (2020), pp. 222–225.



Secondly, unilateral action with extraterritorial effect can be sensitive for trade partners. In the WTO TBT Committee, the EU has received repeated criticism for taking measures that negatively affect exporters based in third countries, not least developing countries. This has been the case with, for example, EU rules on maximum residue levels of two active substances used in certain pesticides, which were introduced to protect the global population of pollinators such as bees.<sup>149</sup> A similar example is the objections raised by WTO Members to the recently adopted EU Deforestation Regulation.<sup>150</sup> The Regulation prohibits the sale of certain products in the EU unless they are ‘deforestation free’, i.e. that the products do not contain or have not been made using commodities that were produced on land subject to deforestation.<sup>151</sup> Here, WTO Members have argued that the EU should choose international cooperation on this global issue rather than unilateral action with extraterritorial effects.<sup>152</sup> Recently, the G90 group, which is made up of developing and least-developed countries, presented a proposal in the WTO Development Committee to amend the TBT Agreement. The proposal specifically mentions regulations with an environmental or sustainability objective as a threat to export from developing countries, including least-developed countries.<sup>153</sup>

When the EU decides to adopt harmonising measures, it must be mindful of the effects such legislation has both inside and outside of the EU. The EU must consider concerns raised by trading partners when developing new legislation, especially those voiced by developing countries.<sup>154</sup> A good place to start could be to conduct more thorough impact assessments of proposed legislation. The Commission has developed both *Better Guidelines*<sup>155</sup> and a *Better Regulation Toolbox*.<sup>156</sup> These two documents, especially the toolbox, contain very useful guidance on how to consider many different aspects, including the impact of measures on the Single Market as well as on third countries. The Commis-

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149 The EU has set the maximum residue levels of these substances to the level of detection. In practice, this means that fruits, vegetables, crops, etc. grown outside of the EU cannot be sold to the EU if they have been treated with pesticides containing these two substances.

150 Regulation 2023/1115.

151 See Articles 2.13 and 3 Regulation 2023/1115. See also National Board of Trade (2023b).

152 See, e.g. statements by the US, Colombia, Paraguay, New Zealand, Argentina and Indonesia at the TBT Committee meeting in November 2023. Available at [Trade concern details – ePing SPS&TBT platform \(wto.org\)](#)

153 WTO (2023).

154 Cf. target 17.11 (to double exports from developing countries) of the 2030 Agenda on Sustainable Development Goals.

155 European Commission (2021).

156 European Commission (2023b).

sion should make good use of these tools during the impact assessment phase when developing new legislative proposals. The EU could also increase transparency during its legislative process by, for example, notifying initiatives earlier on in the regulatory process to the WTO.<sup>157</sup> For example, the Commission could consider notifying calls for evidence and inception impact assessments that are published on the Have Your Say portal<sup>158</sup> if it expects such initiatives to lead to the adoption of technical regulations. This would increase transparency and allow stakeholders outside the EU to learn about the initiative and provide input at an early stage.

### 5.1.2 Bilateral or regional tools: free trade agreements and beyond

The EU 2020 Circular Economy Action plan expressly lists ensuring ‘that Free Trade Agreements reflect the enhanced objectives of the circular economy’ as one of the tools the Commission intends to use to promote a global circular economy.<sup>159</sup>

The EU is party to a multitude of regional and bilateral free trade agreements. In some of these agreements, the EU and its partners have agreed to high levels of harmonisation, as the other parties have agreed to adopt and implement EU legislation. This is the case, for example, with the countries in the European Economic Area (the EEA), Norway, Liechtenstein and Iceland,<sup>160</sup> and with Ukraine,<sup>161</sup> Moldova<sup>162</sup> and Georgia.<sup>163</sup> These countries have all agreed, to varying degrees, to adopt EU legislation into their own jurisdictions. This means that there are no negotiations between the EEA countries and the EU, or Ukraine, Moldova and Georgia and the EU on the content of the legislation. The EU adopts legislation which in principle is introduced into the jurisdiction of the respective third country without changes.

There are other examples where the EU and third countries have agreed on harmonising provisions in free trade agreements. One example is the free trade agreement with South Korea. The EU and South Korea have both undertaken to harmonise certain technical regulations in the automotive sector with specified international standards.<sup>164</sup>

Another form of binding agreement between trading partners is a mutual recognition agreement (MRA); see Section 3.3 above. The EU has concluded several MRAs with different trading partners covering different areas.<sup>165</sup> However, the EU currently has no MRAs specifically for circular products. This could be explained by the fact that there are still very few rules on, for example, recycled content in products, refurbished products, etc. This could change with the ESPR, and we could see more MRAs targeting circular products in the future.

Apart from free trade agreements and MRAs, the EU also engages in other forms of bilateral or regional regulatory cooperation. One previously mentioned example is the Trade and Technology Council (the TTC) established between the EU and the United States. The EU and the United States have announced that they plan to launch a transatlantic circular economy initiative and action plan to facilitate the conditions for bilateral trade

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157 Other WTO members, e.g. the United States sometimes notify information about public consultations to the WTO; see, e.g. G/TBT/N/USA/2095.

158 [Have your say \(europa.eu\)](https://europea.eu)

159 European Commission (2020a).

160 See Article 7 of the Agreement on the European Economic Area.

161 See, e.g. Article 56 and Annex III of the EU–Ukraine Association Agreement.

162 See, e.g. Article 173 and Annex XVI of the EU–Moldova Association Agreement.

163 See, e.g. Article 47 and Annex III of the EU–Georgia Association Agreement.

164 See Article 3.a.iii of Annex 2-C to the EU–South Korea FTA.

165 [Mutual Recognition Agreements - European Commission \(europa.eu\)](https://europea.eu)



in reusable, repairable, refurbished or remanufactured products.<sup>166</sup> The details of this initiative are yet to be discussed. However, this form of ‘softer’ commitments can bring trading partners closer together and help solve barriers at a technical level. It can also provide a basis for enhanced cooperation.<sup>167</sup>

Commitments to regulatory convergence in the form of harmonisation in free trade agreements or in other constellations (e.g. TTCS), or through the conclusion of MRAs, presupposes a high degree of trust and acceptance between the signatories. In some cases, the EU has been successful in promoting its own legislation through free trade agreements. This has certainly been the case with countries who wish to join the EU or otherwise have strong incentives to align their legislation with the EU for geographical and trade-related reasons. However, in forms of cooperation that are less formal than free trade agreements, it is not clear what a trade partner stands to lose if they choose not to abide by the commonly agreed rules. For example, the joint statements from the EU and the United States do not elaborate on what would happen if either party failed to engage properly in the commonly agreed circular economy initiative.

### 5.1.3 Multilateral tools: international standardisation?

As mentioned in Section 3.4, the TBT Agreement contains provisions designed to promote regulatory convergence through a form of harmonisation. It obliges WTO Members to base their technical regulations on international standards, except in cases where such standards constitute an ineffective or inappropriate mean for the fulfilment of the objectives pursued.

There are multiple international, regional and national forums that are currently working on standards and cooperation related to the circular economy. The activities range from concrete ‘formal’ standardisation initiatives and the development of technical specifications on the circular economy, to facilitating dialogue on the circular economy or mapping barriers.<sup>168</sup> For example, the International Organization for Standardization (ISO) has a technical committee on circular economy.<sup>169</sup> The European standardisation organisation CEN/Cenelec has a Circular Economy Topic Group that coordinates all CEN/Cenelec standardisation activities related to the circular economy.<sup>170</sup> Work is also ongoing in organisations such as the United Nations Economic Commission for Europe (UNECE)<sup>171</sup> and the American standardisation organisation ASTM,<sup>172</sup> to mention a few.

WTO Members also discuss circular economy issues in different WTO fora, such as the informal Working Group on Circular Economy – Circularity set up under the Trade and Environmental Sustainability Structured Discussions (TESSD). For example, in 2021, Members participating in TESSD agreed to compile best practices and explore voluntary actions related to trade and the circular economy.<sup>173</sup> The TBT Committee has also held thematic sessions devoted to discussion and knowledge sharing related to circular economy.<sup>174</sup>

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<sup>166</sup> European Commission (2023c).

<sup>167</sup> National Board of Trade (2022a).

<sup>168</sup> Organisations working on initiatives related to the circular economy in a multilateral setting include the Global Alliance on Circular Economy and Resource Efficiency (GACERE), World Circular Economy Forum (WCEF), Platform for Accelerating the Circular Economy (PACE), the Circular Economy Coalition of Latin America and the Caribbean, Partnership for Action on Green Economy (PAGE) and the African Circular Economy Alliance (ACEA).

<sup>169</sup> ISO/TC 323 – Circular economy.

<sup>170</sup> CE-TG – Circular Economy Topic Group – CEN-CENELEC (cencenelec.eu).

<sup>171</sup> CIRCULAR ECONOMY | UNECE.

<sup>172</sup> Standards for the Circular Economy | ASTM Standardization News.

<sup>173</sup> WTO document WTO/MIN(21)/6/Rev.

<sup>174</sup> WTO | Thematic session on regulatory cooperation between members (Climate Change) and WTO | Thematic session on regulatory cooperation between members (Plastic Regulation).



There are benefits to using internationally agreed standards as a basis for technical regulations. Internationally agreed standards are widely accepted and are a foundation for achieving harmonisation internationally, even though they are voluntary in nature.

However, international standardisation as a convergence tool is not always straightforward. Firstly, trading partners do not always agree on *what* constitutes an international standard and who should be considered an international standardisation body. Is it sufficient that the standards have a widespread global use? Should only standards that have been developed by an international standardisation organisation (such as ISO) be recognised as international standards or can standards developed by international intergovernmental organisations (such as the United Nations, the World Health Organization, etc.) also be considered international standards? There is also a growing number of private standard-setting forums and trans-governmental networks engaging in standard-setting activities, and this is also the case at an international level.<sup>175</sup> The proliferation of different standards in different standard-setting organisations could actually contribute to fragmentation in the global market, rather than to convergence. It is only once members can agree on the application of the *same* standards to support their regulations that standards have a harmonising effect.

Secondly, the TBT Agreement also allows members to pursue a higher level of protection than those set by international standardisation organisations. This can be compared with partial or minimum harmonisation in the EU, where Member States are still allowed to impose stricter rules to ensure higher protection for, e.g. the environment, public health, consumers, etc. This means that even if international standards exist and have been issued by the recognised standardisation bodies, members can still deviate from these standards if they are not suitable to achieve a regulatory or policy goal.<sup>176</sup>

Thirdly, participation in international standardisation organisations can be challenging for developing countries, given the technical competence and financial resources that are required in order to be an active participant in setting global standards.<sup>177</sup>

Fourthly, much like the development of harmonising EU legislation, the development of standards at an international level can take time. As a result, countries may opt for quicker

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<sup>175</sup> OECD/ISO (2016) and OECD (2016).

<sup>176</sup> WTO(2013).

<sup>177</sup> The World Bank (2002) [03--CH3--000-000 \(worldbank.org\)](https://doi.org/10.1896/03--CH3--000-000).

solutions, such as national technical regulations, rather than waiting for the completion of an international standard.

WTO Members have adopted an agreement on so-called sanitary and phytosanitary measures (SPS measures). Such measures are imposed to safeguard human, animal or plant life and health. Examples include measures to control pesticides or prevent disease from spreading between animals or from animals to humans. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) expressly refers to the ‘Codex Alimentarius Commission’ (the Codex Commission) as an international standardisation organisation.<sup>178</sup> The Codex Commission is a body established in the early 1960s by the Food and Agriculture Organization of the United Nations (FAO) and the WHO to ensure consumer safety and tackle emerging barriers to trade caused by fragmented food safety standards.<sup>179</sup> The Codex Commission currently has 188 member countries. The EU is the only member organisation, but international organisations, including standardisation organisations such as ISO, are observers in the Codex Commission.<sup>180</sup> The standards, guidelines and codes of practice developed by the Codex Commission are referred to as the ‘Codex Alimentarius’. The standards are openly available online.<sup>181</sup> The reference to the Codex Commission as an international standardisation organisation in the SPS Agreement means that WTO Members who want to deviate from standards developed by the Codex and set stricter standards must provide scientific evidence to support their national policies. Codex standards can provide a basis for national or regional legislation. The Codex standards have proved successful as they are widely recognised and accepted by WTO Members.

The transition to a global circular economy presents challenges similar to those faced when implementing food safety standards over 60 years ago. The shift to more circular societies will require new regulation, and this study has shown the risks a fragmented regulatory environment can have for businesses that trade cross-border. Members of the WTO, including the EU, should consider setting up a structure similar to the Codex Alimentarius Commission for the circular economy. A ‘Codex Circularis’ that is recognised by all WTO Members as open international standards would promote regulatory convergence and reduce barriers to trade.

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178 See the preamble to the SPS Agreement.

179 [About Codex | CODEXALIMENTARIUS FAO-WHO](#).

180 At this time there are 240 observers in the Codex Commission. [About | CODEXALIMENTARIUS FAO-WHO](#)

181 [All standards | CODEXALIMENTARIUS FAO-WHO](#)

## 6 Discussion of findings

In trade law, national regulations based on environmental concerns have traditionally been seen as potential barriers to the free flow of goods. While protection of the environment has long been considered a ‘legitimate objective’, both within the EU and in the WTO, the fact remains that the free trade in goods and regulations safeguarding the protection of the environment have often been considered opposing goals. However, this contentious relationship has less to do with the fact that trade and protection of the environment are mutually exclusive and more to do with the fact that different jurisdictions find different solutions to the same problem. It is not the objective itself, but the fragmented means employed to achieve it that create trade irritants.

This study shows that with a greater convergence of rules, free trade and sound environmental protections can go hand in hand. Lawmakers should therefore not look at goals in the area of trade and sustainability/circular economy as polar opposites. Instead, they should aim to create a regulatory landscape that is conducive to both trade and sustainability.

Regulatory cooperation allows for a high degree of flexibility and can be adapted depending on the needs and ambitions of the trading partners. Cooperation is therefore an effective tool in achieving a less fragmented regulatory landscape.

The EU Single Market experience tells us that convergence does not have to mean a ‘race to the bottom’ or accepting a lower level of protection. Furthermore, Bradford has shown that a high degree of regulation does not automatically make a market less attractive.<sup>182</sup> Some European businesses that we have had contact with, have expressed that they want strict regulations and high standards, as this will ensure a level playing field. What they do not want are different rules in every market.

Looking at experience on EU level, we see that harmonisation is often the preferred line of action to deal with trade disruptions on the Single Market. While harmonisation undoubtedly has clear advantages, we have seen throughout this study that EU Member States have an important role to play as regulatory innovators. Member State regulations provide inspiration for supranational regulation. However, it is important that the quest for convergence does not stifle the opportunity for regulatory innovation at national level. However, the EU legislature should always be attentive to the need to introduce new harmonising measures to avoid trade barriers.

The EU has access to vast amounts of data on the regulatory trends in the Member States through its many databases. One such database is the TRIS database, from which we have gathered data for this study. These data should make it possible for the Commission to assess the state of the Single Market and the need for harmonisation. However, given the large number of notifications (around 800 notifications per year) in the TRIS system alone, it is very challenging for the Commission to analyse all the data it collects. One solution could be to explore digital tools for compilation, structuring and analysis of data, such as artificial intelligence. Better use of the data could result in better and more accurate EU regulation.

The transition to a circular economy is not something that affects only a small number of trade partners. It is a transition that must be made by the entire international community. Much like in the EU, the world’s countries must find ways to regulate this shift in a way that does not inadvertently create trade barriers for sustainable, circular goods. Similarly,

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<sup>182</sup> Bradford, A. (2020), see, e.g. pp. 4–6 and chapters 1–3.



countries should avoid regulations that can be counter-productive to objectives related to the circular economy.

At the international level, conditions for convergence are different than those that prevail in the EU Single Market. The EU Member States are countries with similar levels of development and similar legal and political systems. This is not the case for all WTO Members. The EU also has a very advanced structure in place to enforce its commonly agreed rules. The WTO has mechanisms in place to ensure adherence to its rules, but these are less advanced.

Still, there are tools that can be used to achieve greater convergence among trading partners. The EU has explicitly stated that it wants to promote its circular economy objectives internationally. While it is true that the EU has enough market power to exert some regulatory influence outside its borders, the ‘Brussels effect’ will not achieve regulatory convergence on an international scale. Nor is it likely that all the EU’s existing and future trade partners will be willing or able to accept commitments in free trade agreements on circular economy.

There are other ways to cooperate with trading partners than through free trade agreements and formalised agreements. The EU could benefit from exploring new forms of cooperations with trading partners, such as the TTCs with India and the United States. The National Board of Trade has previously proposed setting up policy labs with the United States.<sup>183</sup> Such policy labs, consisting of representatives from the business community, research and the public sector, could allow for discussions on concrete problems and the identification of solutions on a technical level. If the EU is successful in building a circular economy alliance with another large economy like the United States, for example, by agreeing on common rules or definitions related to the circular economy, exporters in other markets would most likely adapt to these rules and definitions to be able to continue selling products to these two markets.

The TBT Agreement promotes international harmonisation by encouraging WTO Members to base their technical regulations on international standards. The international standardisation system plays an important role in contributing to regulatory convergence. However, one challenge it faces is disagreement between WTO Members on what constitutes an international standard. If the international community could agree on what standards within the circular economy qualify as international standards, it would be highly beneficial. The Codex Alimentarius Commission could serve as a model for the creation of a new forum for discussions between countries on common standards and guidelines in the circular economy.

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<sup>183</sup> National Board of Trade (2022a).

## 7 Recommendations

Based on the findings in this study, we make the following recommendations to the EU Member States, the Commission and the EU as an international regulatory actor.

### To the EU Member States

- EU Member States should consider **including a section in the impact assessments** that accompany national regulation that assesses the potential impact the regulation will have on the functioning of the Single Market.
- EU Member States should **apply the EU notification procedures properly** in order to give the Commission, other Member States and other stakeholders the opportunity to comment on national regulation and its potential impacts on the Single Market.

### To the European Commission

- The Commission should **proactively monitor regulatory trends among Member States**, for example, through the TRIS database, **to identify harmonisation needs**. Priority could be given to ex post follow-up of ‘target-based’ EU acts. Digital tools, such as artificial intelligence, could potentially be used.
- The Commission should also **use its existing and future channels**, such as expert groups, committees and stakeholder dialogues (including the Eco-design Forum foreseen in the ESPR), **to identify both new innovative solutions and the need for harmonisation**.
- The Commission should **use the Better Regulation Guidelines and the Better Regulation Toolbox** when it conducts impact assessments for new harmonising legislation. Impacts on both the EU Single Market and on third countries, especially developing countries, should always be thoroughly assessed.
- The Commission should consider **notifying initiatives that it expects to result in technical regulations** to the WTO **at an earlier stage**, for example, when initiatives are published on the Have Your Say portal.

### To the EU as an international regulatory actor

- The EU should **contribute to the development of common international definitions and a shared understanding of basic concepts within the circular economy**. Widely accepted international standards are a great tool for this. The establishment of a ‘**Codex Circularis**’ should be explored.
- The EU should strive to be as inclusive as possible, for example, by **consulting with developing countries at an early stage of the regulatory process and/or by offering technical assistance** in order to facilitate adherence to EU requirements.
- The EU should explore **new forms of cooperation outside of traditional free trade agreements**, such as policy labs.

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# Treaties, case law and secondary legislation

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WTO Agreement on Technical Barriers to Trade (TBT Agreement)

Treaty on the European Union (TEU)

Treaty on the Functioning of the European Union (TFEU)

Agreement on the European Economic Area

Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (EU-Ukraine Association Agreement)

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (EU-Moldova Association Agreement)

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (EU-Georgia Association Agreement)

Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (EU-South Korea FTA)

Basel Convention on the control of transboundary movements of hazardous wastes and their disposal

Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part (Trade and Cooperation Agreement)

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Proposal for a Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste COM(2023)420 final

# Sammanfattning på svenska

## Summary in Swedish

Övergången till en cirkulär ekonomi kräver ny lagstiftning. Många länder har redan antagit eller håller på att anta regler, strategier och planer för att främja omställningen till en cirkulär ekonomi.

Traditionellt sett har nationell reglering som syftar till att skydda miljön setts som hinder för fri rörlighet för varor, inom EU, men också inom WTO. Även om sådan reglering varit tillåten, eftersom syftet är legitimt, har alltså fri rörlighet och miljöskydd setts som varandras motsatser. Den här studien visar emellertid att miljöskydd och fri rörlighet inte står i motsats till varandra. Problemet är snarare att lagstiftare i olika länder finner olika lösningar på samma utmaning. Det är inte målsättningen att skydda miljön som i sig skapar handelshinder. Det är att regler och kriterier skiljer sig åt som orsakar hinder för handeln. Värdekedjor är globala – därför måste också omställningen till en cirkulär ekonomi vara så global som möjligt.

I den här utredningen analyserar vi EU:s och medlemsstaternas erfarenheter av att upprätthålla den fria rörligheten för varor, samtidigt som ny lagstiftning för en cirkulär ekonomi tas fram. Vi har bland annat särskilt tittat på regler som rör pantsystem och sorteringsanvisningar. Vi har kunnat se hur regler som antagits av EU:s medlemsstater skapat hinder för den fria rörligheten på den inre marknaden men också att de har kunnat fungera som en drivkraft och inspiration för EU-gemensamma regler.

Vi diskuterar också hur verktyg för internationellt regulativt samarbete kan användas för att främja harmonisering och samarbete regionalt och globalt, exempelvis genom att använda internationella standarder och att öka transparensen när nya regler tas fram.

Mot bakgrund av dessa lärdomar utforskar vi hur EU kan främja mer likartade regler (regulativ konvergens) på ett internationellt plan. Här pekar vi på hur EU kan utöva inflytande: ensidigt (genom den så kallade Brysseleffekten som innebär att länder utanför EU använder EU:s reglering som utgångspunkt för sin egen), bilateralt (genom till exempel frihandelsavtal och andra samarbetsformer) och multilateralt (genom WTO och internationell standardisering).

Baserat på våra slutsatser ger vi flera rekommendationer till EU:s medlemsstater, till kommissionen och till EU som internationell regulativ aktör. Nedan ges ett urval av dessa:

### Till EU:s medlemsstater

- EU:s medlemsstater bör överväga att inkludera ett avsnitt om hur förslag till nya regler påverkar den inre marknadens funktion i de konsekvensutredningar som de tar fram när de utformar ny lagstiftning.

### Till EU-kommissionen

- Kommissionen bör aktivt övervaka regulativa trender i medlemsstaterna för att identifiera på vilka områden det finns behov av harmoniseringsåtgärder.
- Kommissionen bör överväga att notifiera initiativ som kan leda till tekniska regler i ett tidigare skede till WTO.

### Till EU som internationell regulativ aktör

- EU bör bidra till att ta fram gemensamma internationella definitioner och grundläggande koncept inom cirkulär ekonomi. Internationella standarder är ett bra verktyg för att åstadkomma detta.
- EU borde utforska nya former av samarbete utanför traditionella frihandelsavtal.

**The National Board of Trade Sweden** is the government agency for international trade, the EU internal market and trade policy. Our mission is to facilitate free and open trade with transparent rules as well as free movement in the EU internal market.

Our goal is a well-functioning internal market, an external EU trade policy based on free trade and an open and strong multilateral trading system.

We provide the Swedish Government with analyses, reports and policy recommendations. We also participate in international meetings and negotiations.

The National Board of Trade, via SOLVIT, helps businesses and citizens encountering obstacles to free movement. We also host several networks with business organisations and authorities which aim to facilitate trade.

As an expert agency in trade policy issues, we also provide assistance to developing countries through trade-related development cooperation. One example is Open Trade Gate Sweden, a one-stop information centre assisting exporters from developing countries in their trade with Sweden and the EU.

Our analyses and reports aim to increase the knowledge on the importance of trade for the international economy and for global sustainable development. Publications issued by the National Board of Trade only reflect the views of the Board.

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