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*French law suspending the use of Bisphenol A (BPA) in food contact:*

## **French Conseil d'État accepts PlasticsEurope request for priority ruling on constitutionality of the law and refers it to the French Constitutional Court**

On June 17, 2015, the French Conseil d'État accepted the request for priority ruling (QPC, Question Prioritaire de Constitutionnalité) put forward by PlasticsEurope, the European Association of Plastics Manufacturers. With its decision, the Court follows the recommendation of the rapporteur that had been presented at the respective public hearing on June 3, 2015 at the Conseil d'État in Paris.

## **PlasticsEurope questions the constitutionality of the French law suspending the use of BPA in food contact**

On February 9, 2015, PlasticsEurope filed a case at the French Conseil d'État requesting the annulment of the clarification note of the French authority DGCCRF\*<sup>1</sup> ("Circulaire" dated 8 December 2014, on the law for implementation as of 1 January 2015), related to the law of December 2012 banning the use of BPA in food contact applications<sup>2</sup>. PlasticsEurope questions the compliance of the law with the French Constitution regarding the constitutional imperative of free trade (entrepreneurial freedom of action), its proportionality, and the coherence of the law. The QPC is part of this process.

In its decision, the Conseil d'État specifies that the provisions of Article 1 of the Law "... are applicable for litigation; [...] as they bear unjustified burden for the entrepreneurial freedom which is not justified by the precautionary principle as set out in Article 5 of the Charter of the environment."<sup>3</sup>

If the Constitutional Court follows the request of PlasticsEurope and abandons article 1 of the Law of 24 December 2012, the consequence could be a short-term lifting of the suspension.

## **PlasticsEurope welcomes the decision of the Conseil d'État to refer the case to the Constitutional Court**

The European Food Safety Authority (EFSA) in January 2015 unequivocally concluded that there is no consumer health risk from BPA in food contact for all age groups, including unborn children, infants and adolescents. The dietary exposure to BPA is considerably lower than the safe level defined by EFSA. "The French measure should be removed", says Jasmin Bird of the PC/BPA-group of PlasticsEurope. "It ignores existing harmonised EU food contact regulations, it is disproportionate, and it provides no additional safety benefit for consumers."

PlasticsEurope awaits the decision of the Constitutional Court on the QPC, which is expected mid-September 2015.

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<sup>1</sup> DGCCRF: Direction générale de la concurrence, de la consommation et de la répression des fraudes, une direction du ministère de l'Économie, de l'Industrie et du Numérique

<sup>2</sup> Law of December 2012 suspending the manufacture, import, export and placing on the market of any food packaging containing bisphenol A (Act No. 2012-1442).  
<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026830015&categorieLien=cid>

<sup>3</sup> <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-17-juin-2015-Association-Plastics-Europe>

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## Background information:

### **A measure taken in the name of the precautionary principle that must now be removed**

In the explanatory note to the draft French law<sup>4</sup>, the legislator clearly explained its position invoking the precautionary principle: "... it was considered that the "red flags" expressed by the safety authorities on bisphenol A were sufficiently alarming to justify, under a precautionary approach, to implement the suspension on the use of BPA in baby bottles. It is now necessary to go further in the application of this principle by extending the prohibition to all food containers."

Since then, the French Food Safety Authority (ANSES), and the European Food Safety Authority (EFSA), in March 2013 and January 21, 2015, respectively, adopted their scientific opinion on BPA.

EFSA unequivocally concluded that there is no consumer health risk from BPA in food contact. BPA presents no risk to the health of consumers of all age groups (including unborn children, infants and adolescents). Exposure to BPA from food contact materials via the diet is considerably lower than the safe level as defined by EFSA in its most recent comprehensive assessment.

The 2015 EFSA conclusions are based on a broader scientific database than the one on which ANSES based its opinion of March 2013: EFSA takes into account additional studies that became available after 2012, as well as studies cited in the public consultation (until March 2014). With the scientific opinion of EFSA confirming no risk from BPA exposure for consumers it becomes clear that the French law of 2012, which was passed in a context of strong political and media activity, is a disproportionate measure.

*"The fact that any realistic exposure to BPA is well below even the conservative safety threshold established by EFSA shows that blanket restrictions being applied at national level, in particular in France, are unjustified and should be withdrawn,"* says Jasmin Bird of the PC/BPA-group. *"The EFSA conclusion on BPA should be used as the basis for consistent and harmonised European food safety regulation, and should be respected by all EU Member States."*

Now that EFSA has finalized its comprehensive safety review, it is logical that France should remove its precautionary measures taken at a time when it was awaiting further scientific advice.

### **French unilateral initiative undermines the reliability of food safety regulations in Europe**

All actors in the food safety arena need a stable regulatory framework, built on scientific expertise, applied without exception across the European Single Market. Harmonized European regulations prevent arbitrariness and confusion, which can erode consumer confidence. In this context, the French law not only unnecessarily damages one product on the market, but also has far reaching consequences for the functioning of the European institutions and for consumer trust.

The French law unduly limits the free movement of goods in the European Union and weakens companies operating in France and beyond. The law is in contradiction with the valid European legislation on food contact materials. For these reasons, PlasticsEurope filed a formal complaint at the European Commission in March 2013. The formal complaint is currently being addressed under the EU-PILOT<sup>5</sup> platform at the European Commission.

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<sup>4</sup> Draft law No. 3584, registered at the Presidency of the National Assembly 22 June 2011

<sup>5</sup> The "EU Pilot" is a platform which Member States and Commission's services use to communicate and clarify the factual and legal background of problems arising in relation to the **conformity** of national law with EU law or the **correct application of EU law**. As a general rule, EU Pilot is used as a **first step to try to resolve problems**, so that, if possible, formal infringement proceedings are avoided. Currently all 28 Member States are participating in EU Pilot.

Member States have primary responsibility for the correct and timely application of EU Treaties and legislation, and the Commission monitors the application of Union law. The Commission may take action if a Member State:

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The pre-litigation phase was opened in September 2014. It is now up to the Commission to initiate a formal infringement procedure against France – which could result in serious financial penalties.

Michel Loubry, Head of PlasticsEurope, Western Europe, is convinced: "This law was initiated by French Parliamentarians based on a very broad application of the precautionary principle. But today, health authorities in Europe and around the world repeatedly confirm that the use of BPA-based products in food contact presents no risk to consumers. It is therefore time to end the isolation of France in the European market, and restore the confidence of all partners in high quality and safely packaged food products, and in the European safety system, which has one of the most demanding regulatory requirements in the world."

### EFSA assessment of BPA

The EFSA opinion on BPA is the result of a comprehensive assessment of a large amount of available data by a group of independent scientific experts in a transparent process with external stakeholder consultation:

- As a basis for their recent weight-of-evidence approach, EFSA included the conclusions of their previous comprehensive assessments (2006, 2010), studies that appeared 2010-2012, studies included in the report of the NGO Réseau Environnement Santé (2012), as well as the assessments of other global safety authorities, such as Health Canada, the US FDA and NTP, FAO/WHO, and ANSES (2011, 2013).
- More than 450 studies published since the last EFSA assessment of BPA were also evaluated, including small, exploratory studies, large-scale multi-generation studies funded by industry and executed according to international quality standards, and studies and evaluations by national authorities.
- The opinion was developed by a group of 22 independent scientific experts from across the EU Member States, called the CEF Panel<sup>6</sup>. Their work took two years. A draft opinion was issued on January 13, 2014. It was available for public consultation for 90 days.
- More than 250 contributions from 40 different stakeholders (national safety authorities, non-governmental organisations, industry, public and private research institutions, consumer associations, etc.) were received and considered<sup>7</sup>.
- ANSES, the Danish DTU, the U.S. FDA, the German BfR, the UK's FSA and other global counterparts provided comments. All contributions were analyzed and taken into account. Moreover, representatives of ANSES are also part of the EFSA working group on BPA which supported the CEF Panel.
- Industry participated along with other stakeholders (including ANSES) in the dialogue process. It sent its comments during the public consultation and attended meetings of the expert group (CEF Panel) as an observer.

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- fails to incorporate EU directives into its national law and to report/communicate to the Commission what measures it has taken
  - or is suspected of breaching Union law.

If no solution can be found at an early stage, the Commission can open formal infringement proceedings and eventually refer the Member State to the European Court of Justice.

<sup>6</sup> <http://www.efsa.europa.eu/de/fip/cefpanelmembers>.

<sup>7</sup> The feedback received in the public consultation are summarized in the document "Technical report on the public consultation" available on <http://www.efsa.europa.eu/de/supporting/pub/740e.htm>