

Commission Decision of 24 March 2009 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste (notified under document number C(2009) 1959) (Text with EEA relevance) (2009/292/EC)

## COMMISSION DECISION

of 24 March 2009

establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste

(notified under document number C(2009) 1959)

(Text with EEA relevance)

(2009/292/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste<sup>(1)</sup>, and in particular Article 11(3) thereof,

Whereas:

- (1) Commission Decision 1999/177/EC of 8 February 1999 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC on packaging and packaging waste<sup>(2)</sup> expired on 9 February 2009.
- (2) At the expiry of Decision 1999/177/EC, a considerable amount of plastic crates and plastic pallets containing heavy metals whose concentration level exceeds that provided for by Directive 94/62/EC were still on the market. Given the lack of capacity of the industry to replace all such crates and pallets, there is a high risk that those crates and pallets will be disposed of through land filling or incineration. Both solutions would have harmful impacts on health and the environment.
- (3) Directive 94/62/EC aims at limiting the presence of heavy metals in packaging as well as at providing a high level of environmental protection, including reuse and recycling.
- (4) In order to give time to the industry to replace those plastic crates and plastic pallets using the best available techniques, it is appropriate to adopt conditions for a derogation relating to those crates and pallets which are in product loops in a closed and controlled chain. The scientific reports submitted to the Commission recommend that such derogation should be granted.

**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 24 March 2009 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste (notified under document number C(2009) 1959) (Text with EEA relevance) (2009/292/EC). (See end of Document for details)

- (5) Since the Commission intends to review the functioning of the system provided for in this Decision and the progress made in phasing out plastic crates and plastic pallets containing heavy metals after five years, it is necessary that Member States submit the relevant information. In order not to increase the existing administrative burden by imposing a specific reporting obligation on the Member States, it is sufficient that such information is included in the reports to be submitted to the Commission under Article 17 of Directive 94/62/EC.
- (6) For reasons of legal certainty, this Decision should apply with effect from the date following that of the expiry of Decision 1999/177/EC in order to avoid any possible negative effects resulting from that expiry.
- (7) The measures provided for in this Decision are in accordance with the opinion of the Committee established pursuant to Article 21 of Directive 94/62/EC,

HAS ADOPTED THIS DECISION:

*Article 1*

For the purposes of this Decision, the following definitions shall apply:

1. ‘heavy metals’ means lead, cadmium, mercury and hexavalent chromium;
2. ‘intentional introduction of heavy metals’ means the act of deliberately utilising a substance containing heavy metals in the formulation of a packaging or a packaging component where its continued presence is desired in the final packaging or packaging component to provide a specific characteristic, appearance or quality;
3. ‘incidental presence of heavy metals’ means the presence of heavy metals as an unintended ingredient of a packaging or packaging component.

*[<sup>F1</sup> Article 1A*

1. In this Decision, “Directive 94/62/EC” means European Parliament and Council Directive 94/62/EC on packaging and packaging waste, as last amended by Directive (EU) 2018/852 of the European Parliament and of the Council, and read in accordance with paragraphs 2 and 3.
2. Article 3 is to be read as if, in paragraph 2, for “Article 3 of Directive 2008/98/EC” there were substituted “Article 3(1) of the Waste Framework Directive, as read with Articles 5 and 6 of that Directive”.
3. Article 11(1) is to be read as if—
  - a in the words before the first indent, for “Member States” there were substituted “The Secretary of State”;
  - b in the first, second and third indents, for “the date referred to in Article 22(i)” there were substituted “30th June 1996”.
4. In paragraph 2, the “Waste Framework Directive” means Directive 2008/98/EC of the European Parliament and of the Council on waste, as last amended by Directive (EU) 2018/851, and read in accordance with paragraphs 5 and 6.
5. Article 5 is to be read as if—
  - a in paragraph 1, “Member States shall take appropriate measures to ensure that” were omitted;

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- b after paragraph 1 there were inserted—

*IA*

Any decision as to whether a substance or object is a by-product must be made—

- a in accordance with any regulations setting out detailed criteria on the application of the conditions in paragraph 1 to specific substances or objects; and
  - b having regard to any guidance published by the appropriate authority or the appropriate agency for the purposes of this Article.;
  - c paragraphs 2 and 3 were omitted.
6. Article 6 is to be read as if—
- a in paragraph 1, “Member States shall take appropriate measures to ensure that” were omitted;
  - b after paragraph 1 there were inserted—

*IA*

Any decision as to whether a substance or object has ceased to be waste must be made—

- a in accordance with any regulations or retained direct EU legislation setting out detailed criteria on the application of the conditions in paragraph 1 to specific types of waste; and
- b having regard to any guidance published by the appropriate authority or the appropriate agency for the purposes of this Article.;
- c in paragraph 2—
  - i the first subparagraph were omitted;
  - ii in the second subparagraph, for “Those detailed criteria” there were substituted “Any detailed criteria set out in guidance as referred to in paragraph 1A”;
  - iii the third and fourth subparagraphs were omitted;
- d paragraph 3 were omitted;
- e in paragraph 4—
  - i in the first subparagraph—
    - aa in the first sentence, for the words from the beginning to “Member State”, there were substituted “Where criteria have not been set out as referred to in paragraph 1A(a), the appropriate agency”;
    - bb the second sentence were omitted;
  - ii in the second subparagraph—
    - aa for “Member States” there were substituted “The appropriate agency”;
    - bb “by competent authorities” were omitted.

7. In this Article—

“appropriate agency” means—

- a in relation to England, the Environment Agency;
- b in regulation to Wales, the Natural Resources Body for Wales;
- c in relation to Scotland, the Scottish Environment Protection Agency;

“appropriate authority” means—

- a in relation to England, the Secretary of State;
- b in relation to Wales, the Welsh Ministers;
- c in relation to Scotland, the Scottish Ministers.]

**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 24 March 2009 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste (notified under document number C(2009) 1959) (Text with EEA relevance) (2009/292/EC). (See end of Document for details)

#### Textual Amendments

- F1** Art. 1A inserted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(2)** (as amended by S.I. 2020/1540, regs. 1(3), **14(12)(a)**); 2020 c. 1, Sch. 5 para. 1(1)

#### Article 2

The sum of concentration levels of heavy metals in plastic crates and plastic pallets may exceed the applicable limit laid down in Article 11(1) of Directive 94/62/EC provided that those crates and pallets are introduced and kept in product loops which are in a closed and controlled chain under the conditions set out in Articles 3, 4 and 5.

#### Article 3

1 Plastic crates and plastic pallets containing an excessive amount of heavy metals, as referred to in Article 2, shall be manufactured or repaired in a controlled recycling process in accordance with paragraphs 2, 3 and 4 of this Article.

2 The material used for recycling shall originate only from other plastic crates or plastic pallets.

The introduction of other material shall be limited to the minimum technically necessary and, in any case, shall not exceed 20 % by weight.

3 The intentional introduction of heavy metals as an element during the recycling, as opposed to the incidental presence of heavy metals, shall not be allowed.

The use of recycled materials as feedstock for the repair of packaging materials, where some portion of the recycled materials can contain heavy metals, shall not be considered to be intentional introduction of heavy metals.

4 The sum of concentration levels of heavy metals in plastic crates and plastic pallets may exceed the applicable limit laid down in Article 11(1) of Directive 94/62/EC only as a result of the use of materials containing heavy metals in the recycling process.

#### Article 4

1 Plastic crates and plastic pallets containing an excessive amount of heavy metals, as referred to in Article 2, shall be identified in a permanent and visible way.

2 [<sup>F2</sup>The Secretary of State] shall ensure that within the life cycle of the plastic crates and plastic pallets concerned, at least 90 % of the dispatched plastic crates and plastic pallets containing an excessive amount of heavy metals, as referred to in Article 2, are returned to the manufacturer, the packer or the filler or to an authorised representative.

3 Without prejudice to the measures taken pursuant to Article 6, all plastic crates and plastic pallets returned pursuant to this Article that are no longer suitable or intended for reuse shall either be disposed of in accordance with a procedure specifically authorised by the competent authorities <sup>F3</sup>... or be recycled in a controlled recycling process in accordance with paragraphs 2, 3 and 4 of Article 3.

#### Textual Amendments

- F2** Words in Art. 4(2) substituted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(3)(a)**; 2020 c. 1, Sch. 5 para. 1(1)

**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 24 March 2009 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste (notified under document number C(2009) 1959) (Text with EEA relevance) (2009/292/EC). (See end of Document for details)

**F3** Words in Art. 4(3) omitted (31.12.2020) by virtue of The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(3)(b)**; 2020 c. 1, Sch. 5 para. 1(1)

### Article 5

1 <sup>F4</sup>The Secretary of State] shall provide for a system of inventory and record keeping and a method of regulatory and financial accountability that enable compliance with the conditions laid down in this Decision to be documented.

The system shall account for all plastic crates and plastic pallets containing an excessive amount of heavy metals, as referred to in Article 2, which are put into, and removed from, service.

2 Unless otherwise specified in a voluntary agreement, <sup>F5</sup>the Secretary of State] shall ensure that the manufacturer or his authorised representative draws up on an annual basis a written declaration of conformity and an annual report demonstrating how the conditions laid down in this Decision have been complied with. The report shall contain possible changes to the system and authorised representatives.

3 <sup>F6</sup>The Secretary of State] shall ensure that the manufacturer or his authorised representative keeps the relevant technical documentation at the disposal of the competent authorities for inspection purposes for at least four years.

Where neither the manufacturer nor his authorised representative is established within <sup>F7</sup>Great Britain], the obligation to keep the relevant technical documentation available shall lie with the person who places the product on the <sup>F8</sup>... market.

#### Textual Amendments

- F4** Words in Art. 5(1) substituted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(4)(a)**; 2020 c. 1, Sch. 5 para. 1(1)
- F5** Words in Art. 5(2) substituted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(4)(b)**; 2020 c. 1, Sch. 5 para. 1(1)
- F6** Words in Art. 5(3) substituted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(4)(c)(i)**; 2020 c. 1, Sch. 5 para. 1(1)
- F7** Words in Art. 5(3) substituted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(4)(c)(ii)(aa)** (as amended by S.I. 2020/1647, regs. 1(3), **17(3)(a)(ii)**); 2020 c. 1, **Sch. 5 para. 1(1)**
- F8** Word in Art. 5(3) omitted (31.12.2020) by virtue of The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(4)(c)(ii)(bb)**; 2020 c. 1, Sch. 5 para. 1(1)

### Article 6

<sup>F9</sup>The Secretary of State] shall take measures to encourage manufacturers to investigate methods to progressively achieve the applicable limit of heavy metals contained in plastic crates and plastic pallets laid down in Article 11(1) of Directive 94/62/EC, including the best available techniques on the extraction of heavy metals.

#### Textual Amendments

- F9** Words in Art. 6 substituted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(5)**; 2020 c. 1, Sch. 5 para. 1(1)

**Changes to legislation:** There are currently no known outstanding effects for the Commission Decision of 24 March 2009 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste (notified under document number C(2009) 1959) (Text with EEA relevance) (2009/292/EC). (See end of Document for details)

### Article 7

[<sup>F10</sup>1] [<sup>F11</sup>The Secretary of State must publish, in a manner which the Secretary of State considers appropriate,] a detailed report on the functioning of the system provided for in this Decision and on the progress made in phasing out plastic crates and plastic pallets which are not in conformity with Article 11(1) of Directive 94/62/EC [<sup>F12</sup>in respect of Great Britain].

[<sup>F13</sup>2 The first report under paragraph 1 must be published before the end of the period of 3 years beginning with IP completion day.

3 Subsequent information must be published at intervals not exceeding 3 years.]

#### Textual Amendments

- F10** Art. 7 renumbered as Art. 7(1) (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(6)(a)**; 2020 c. 1, **Sch. 5 para. 1(1)**
- F11** Words in Art. 7(1) substituted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(6)(b)(i)**; 2020 c. 1, Sch. 5 para. 1(1)
- F12** Words in Art. 7(1) inserted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(6)(b)(ii)** (as amended by S.I. 2020/1647, regs. 1(3), **17(3)(b)**); 2020 c. 1, **Sch. 5 para. 1(1)**
- F13** Art. 7(2)(3) inserted (31.12.2020) by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(6)(c)** (as amended by S.I. 2020/1540, regs. 1(3), **14(12)(b)**); 2020 c. 1, **Sch. 5 para. 1(1)**

### <sup>F14</sup>Article 8

#### Textual Amendments

- F14** Art. 8 omitted (31.12.2020) by virtue of The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(7)**; 2020 c. 1, Sch. 5 para. 1(1)

### <sup>F15</sup>Article 9

#### Textual Amendments

- F15** Art. 9 omitted (31.12.2020) by virtue of The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620), regs. 1(2)(b), **16(7)**; 2020 c. 1, Sch. 5 para. 1(1)

Done at Brussels, 24 March 2009.

*For the Commission*

Stavros DIMAS

*Member of the Commission*

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**Changes to legislation:** *There are currently no known outstanding effects for the Commission Decision of 24 March 2009 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste (notified under document number C(2009) 1959) (Text with EEA relevance) (2009/292/EC). (See end of Document for details)*

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- (1) OJ L 365, 31.12.1994, p. 10.
- (2) OJ L 56, 4.3.1999, p. 47.



**Changes to legislation:**

There are currently no known outstanding effects for the Commission Decision of 24 March 2009 establishing the conditions for a derogation for plastic crates and plastic pallets in relation to the heavy metal concentration levels established in Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste (notified under document number C(2009) 1959) (Text with EEA relevance) (2009/292/EC).