

TradeWatch



EY Global Trade
– Sustainability

Issue 2 2022

EY

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EU: Final legislation on CBAM expected soon

The European Union (EU) Carbon Border Adjustment Mechanism (CBAM) will be a novel policy instrument in the field of emissions trading.¹ Based on the processes, data requirements and cost effectiveness of this measure as currently envisaged, it will also be significant from the perspective of customs and supply chain planning.

The EU Emissions Trading System

The background for the implementation of CBAM is the changes planned in relation to the EU Emissions Trading System (EU-ETS). Put simply, the release of emissions by regulated industries comes with a cost, and the EU manufacturers that operate in emissions-intensive industries need to purchase emission certificates (allowances) to cover their emissions. These allowances are generally auctioned unless a part or full release of these emissions is not priced (depending on the industry sector). Companies receive emission allowances free of charge up to industry emission benchmarks.

Since the EU-ETS is a cap-and-trade system, companies emitting less than the benchmark are in a position to sell their excess allowances on the market, while companies emitting more than the benchmark need to purchase from the market.

One of the key ambitions of the EU Green Deal is to fundamentally revise the EU-ETS and charge a price for all emissions. Key changes of the reform are a progressive path of reduction of free EU-ETS allowances until free allowances are phased out, an extension of the system to additional sectors and an increase in the price of emissions.

Macroeconomic implications

The extension of EU-ETS is likely to mean that the manufacturing of goods in the EU will become more costly for targeted industry sectors (and all operators down the value chain for goods that use components that attract higher carbon pricing). The concern is that this impact may lead to the economic risk of “carbon leakage.” EU manufacturers may



¹ Related articles on this topic are available in previous editions of *TradeWatch* – “CBAM and its impact on EU cross border imports” from *TradeWatch* Issue 1, 2022, page 61, *EY website* and “EU: Emissions – Europe’s new frontier” from *TradeWatch* Issue 3 2021, page 36, *EY website*.

aim to adapt to the new regulatory situation by relocating their emissions-intensive manufacturing outside the EU in countries that impose no or lower carbon pricing and then simply export the same products to the EU market. Also, high carbon pricing in the EU may cause significant competitive disparities between manufacturers operating in markets that have carbon pricing (such as the EU, United Kingdom (UK)², Switzerland and others) and manufacturers operating in countries with lower or no carbon pricing.

The CBAM aims to create a level playing field for the products covered by the EU-ETS in the EU market. In addition, it will require importers to purchase CBAM certificates for the emissions that have occurred during the manufacturing process for products covered by the new regime. In effect, both locally produced and imported products in the EU market will bear the same level of carbon cost. The EU intends to motivate foreign jurisdictions to implement similar systems of carbon pricing with a simple measure. Businesses will have an opportunity to deduct carbon prices paid in the country of origin (if they are properly certified and evidenced), and the hope is that this will motivate exporting countries to implement carbon prices and keep the funds in their own budgets. The EU will, however, not fill its own budgets with CBAM proceeds. Instead, a financial amount at least equivalent in value to the revenues generated by the sale of CBAM certificates will be provided to support the efforts of the least developed countries to decarbonize their manufacturing sectors.

EU carbon measures: the legislative process

In recent months, the EU carbon legislative process has overcome its highest hurdles to implementation. In June 2022, after an unsuccessful first attempt, the EU Parliament adopted a package of carbon legislation, including revision of the EU-ETS, the CBAM and the Climate Social Fund with a large majority of votes. In July 2022, the EU Council (which includes the EU Member States) also finalized its position.³ The EU Parliament and EU Council are now working to achieve a consensus. It is important to note that all relevant parties in the legislative process have now confirmed the intended legal revisions, and the negotiations simply involve the details. The final legislation likely will be published in the third quarter of 2022 to continue the legislative process. In addition, the EU Commission is currently in the process of drafting additional implementing regulations that will supplement the primary legislative acts.

Products covered by the CBAM

The first proposals for a CBAM regulation provided by the EU Commission included a large range of goods in the categories of iron and steel, cement, fertilizers, aluminum and electric energy. There are discussions about extending the product coverage, either from the introduction of the CBAM or after further evaluation at the end of the transition phase. Industry sectors in the scope of the measure include organic chemicals, base chemicals, plastic polymers, hydrogen and refinery products. In the future, products originating from all the sectors covered by

the EU-ETS may become subject to CBAM to achieve a level playing field with imports of those goods from countries with lower or no carbon pricing.

Emissions covered by the CBAM

The calculation of CBAM will cover the Scope 1 emissions deriving from the manufacturing process. The issue is still under discussion, but it seems likely that indirect emissions deriving from the electricity used by manufacturers may also be considered for inclusion at some point. The scope of emissions may even be further extended in the future.

Timelines

The EU Parliament and EU Council have emphasized that the transitional period in which importers will be obliged to report emissions contained in imported products (but with no need to purchase CBAM certificates) will start in 2023.⁴

The final CBAM system may be implemented in 2026 or 2027 based on current discussions at the political level. The CBAM will be slowly phased in over a period of multiple years with a progressive curve. The CBAM phase-in will mirror the changes in the EU-ETS, as EU manufacturers' receiving free allowances is phased out. The application of full CBAM cost may happen between 2032 and 2035. These changes are made in parallel to ensure that

² The UK proposals are discussed in our article "What UK carbon leakage mitigation measures mean for business" in this publication, [page 60](#).

³ "Draft regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism", *Council of the European Union website*, 15 March 2022. [Find it here](#)

⁴ "Revision of the EU Emissions Trading System", *European Parliament website*, accessed 28 September 2022. [Find it here](#)

both the EU-ETS and CBAM adhere to the legal principles established in the agreements of the World Trade Organization (WTO).

Reporting obligations

During the transitional period, companies will have to submit quarterly reports. These reports will provide detail on the level of customs import duties for which emissions have occurred in the manufacture of the goods, the weight of the imported goods, the facility and country of origin for the goods and the carbon cost (if any) paid at origin.

Upon final implementation of the CBAM (expected in 2026 or 2027), an annual declaration will be required, with the importer providing the same data as that provided in the transitional period. In addition, CBAM certificates that the importer has purchased during the prior year for its import of goods will have to be surrendered after the CBAM has been implemented.

How the CBAM cost occurs

After the CBAM system is up and running (likely in 2026 or 2027), the customs declarants for products covered by the CBAM will need to have previously registered with the CBAM authorities. Registration will only be allowed for companies that have a clean track record, offer guarantees for compliance and provide financial guarantees covering the fiscal risk of CBAM payables. The importers (i.e., the customs declarants) will have to plan and monitor their imports in accordance with the new rules and schedule the timing of purchasing the required CBAM certificates.

CBAM cost

The price of CBAM certificates will derive from the weekly average auction prices of EU-ETS certificates.

Impact on businesses

The goals of the EU energy and emission policies are clear, and they reflect the urgent need to reduce carbon emissions and meet overall climate goals. The carbon package aims to transform the EU economy to one of zero emissions by 2050, and some EU Member States have even more ambitious national goals and additional national carbon taxes.

Despite the upcoming negotiations between the EU Parliament and the EU Council (and the changes that may occur), the uncertainty about the EU's future climate and emissions policy has almost ended, providing a solid basis for impact assessment and planning.

Initial measures such as the CBAM reporting period for imported goods will commence soon (likely in 2023). Businesses that may be impacted by these measures need to start analyzing and planning for their impact. Effective measures to reduce and finally fully avoid emissions, through innovation and advances in infrastructure and technology (which will be required all along the supply chain) can many take years from planning to realization in many industry sectors. Therefore, the time for impact assessment, strategy planning and execution of preparatory measures is now. This will help organizations both prepare for new compliance obligations and develop long-term strategic considerations. In addition, the CBAM's impact is

not limited to new data and reporting requirements. For example, there also could be additional costs for businesses in terms of emissions occurring during product manufacture, which can heavily impact on product competitiveness, sourcing, supply chain and investment strategy and corporate value, among other things.

These changes to carbon policy are not limited to the EU. Many jurisdictions around the globe are progressing in the same direction, albeit some at a different pace and with a different approach. In any case, given the importance of the EU economic zone for global trade lanes, the changes occurring in the EU will have an impact across the global sourcing and distribution footprints of many businesses. The EU's new emission policy can also be expected to increase the drive to implement similar measures in other jurisdictions. As such, international businesses should proactively address these changes and prepare to align their business strategies and models accordingly. ■

Countdown to the EU Carbon Border Adjustment Mechanism

26 September 2022

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What UK carbon leakage mitigation measures mean for businesses

Following in the footsteps of the EU¹, the UK is considering how to respond to the problem of carbon leakage, with a planned public consultation later this year.²

What is carbon leakage?

Carbon leakage is the displacement of economic activities, and associated greenhouse gas (GHG) emissions, from one jurisdiction to another as a result of different levels of carbon pricing and climate regulation across those jurisdictions.

As an example, if a business was to move its emissions footprint away from a jurisdiction with a developed system of carbon pricing (e.g., the EU and its Emissions Trading System (EU-ETS))³ to one without such cost-driving measures (e.g., Brazil⁴). This could result in goods being imported into the EU without being subject to the carbon pricing measures they would have faced had they been manufactured domestically.

Current and historic approaches to carbon leakage mitigation

Historically, jurisdictions such as the EU and UK have turned to free allocation⁵ within their carbon pricing regimes to reduce the likelihood of businesses displacing their manufacturing as a result of carbon pricing.⁶ Free allocation, however, can weaken the effective cost of the carbon price for businesses, thus reducing the incentive to decarbonize for impacted businesses.

In response to this, the EU has turned to a new type of measure – a Carbon Border Adjustment Mechanism (CBAM).⁷ This measure will apply a carbon price to certain products being imported into the EU, thus mitigating the risk of carbon leakage. More details about the policy proposals can be found here.



The UK considers its options

In May 2022, the UK government announced an intention to consult on carbon leakage mitigations, following a recommendation from the UK government Environmental Audit Committee (EAC).⁸ This was supported by the annual report⁹ of the UK Climate Change Committee which urged the government to take stronger measures to tackle carbon leakage in the UK.

1 The EU Carbon Border Mechanism is discussed in detail in our article "EU: Final legislation on CBAM expected soon" in this publication, [page 57](#).

2 "Update on carbon leakage mitigations," *UK Parliament website*, 16 May 2022. [Find it here](#)

3 "EU Emissions Trading System (EU ETS)," *EU website*. [Find it here](#)

4 "Carbon pricing in Brazil," *Organisation for Economic Co-operation and Development website*. [Find it here](#)

5 "Free allocation," *EU website*. [Find it here](#)

6 "Carbon leakage," *EU website*. [Find it here](#)

7 "Council agrees on the Carbon Border Adjustment Mechanism (CBAM)," *European Council website*, 15 March 2022. [Find it here](#)

8 "Ministers to consult on implementing CBAM following EAC recommendation," *UK Parliament website*, 21 June 2022. [Find it here](#)

9 "Progress in reducing emissions: 2022 Report to Parliament," *UK Parliament website*, June 2022. [Find it here](#)

This follows a consultation earlier this year¹⁰ on changes to the UK Emissions Trading Scheme (UK ETS), which included a review of the role of free allocation policy as a carbon leakage mitigation tool in the UK.

While there is currently political uncertainty in the UK, it remains likely that the carbon leakage mitigation consultation will take place, which provides an opportunity for businesses and the public to engage with the policymaking process.

Implications of the UK consultation process

The UK government may select a carbon leakage mitigation process that differs from that of the EU CBAM regime. However, it is certainly a possibility – given the UK's previous approach in aligning its carbon pricing mechanisms with the EU – that the UK will look to a policy measure that applies a carbon price to imports in a similar fashion to that of the EU.

As the EU regime will apply both cost and compliance obligations to EU Importers, it is likely that similar impacts would arise for UK importers if a UK regime were implemented.

Now is the time for businesses to consider the potential impact of UK carbon leakage mitigation measures

By applying the EU CBAM features to their operating models, businesses can evaluate the potential impact of a future UK CBAM, assuming that the principles of such a regime would be similar to the EU proposals.

Considering the economic and operational impact of a future UK CBAM can help the business to:

▶ Engage with the policymaking process

As the UK government seeks to define policy and release a consultation, businesses that have considered the implications of carbon leakage mitigation options available – such as a CBAM – should actively engage with the planned consultation and subsequent policy development. This is an opportunity for businesses to support the development of an effective carbon leakage mitigation regime and raise awareness among policymakers of any particular unintended business impacts of any proposed policies.

▶ Improve long-term and strategic decision-making

Carbon leakage measures may affect the future competitiveness or cost associated with prospective or existing investments. Ensuring that the prospect of a highly significant carbon pricing measure is considered in long-term decision-making will be key to protect the value of investments and the business more widely.

▶ Build an effective response team

Increasingly, governments are using fiscal policy as a key lever to move toward their sustainability goals. This means that in markets across the world, new policy measures, including CBAMs, are being implemented to apply a charge to carbon emissions and other polluting or extractive activities. Despite this, many businesses do not have clear responsibilities assigned for management of these new regimes. Understanding future cost and compliance implications will enable the business to identify the right people to be responsible for these issues and take action accordingly – for example, by upskilling tax and customs teams. ■

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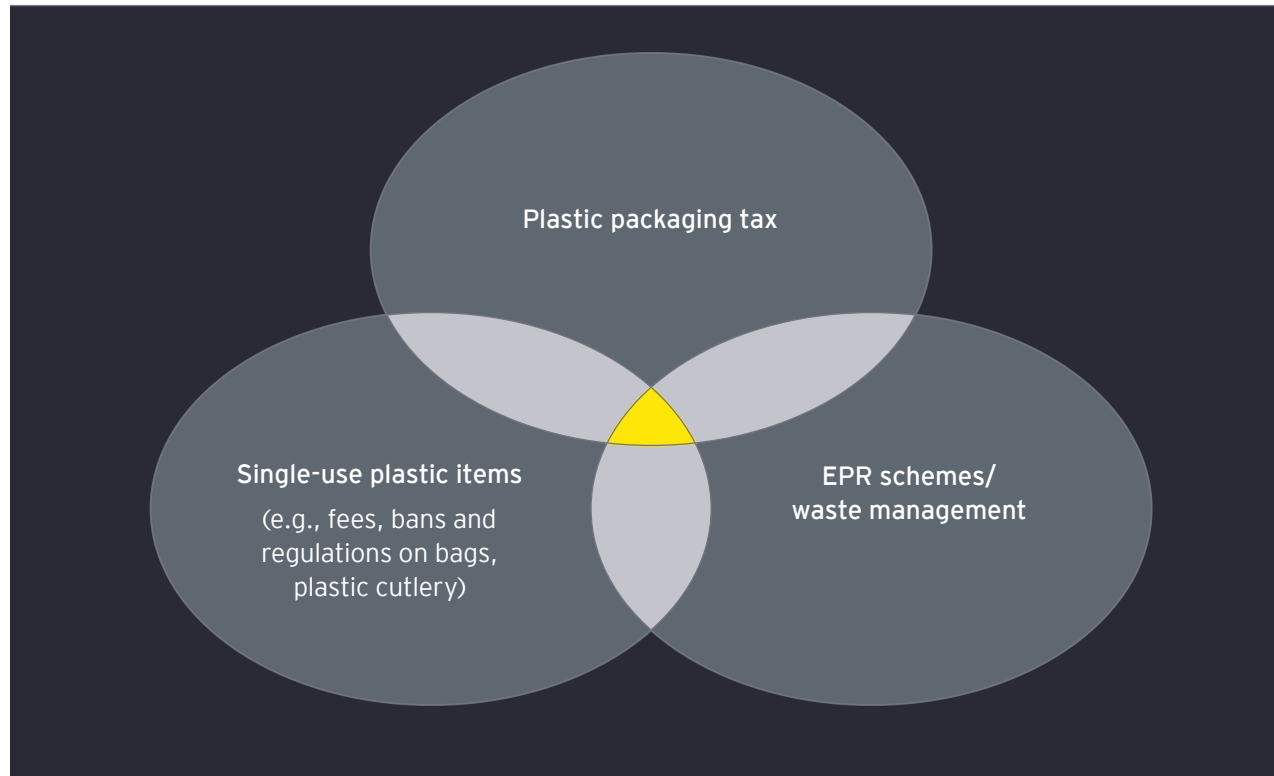
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¹⁰ "Developing the UK Emissions Trading Scheme (UK ETS)," *UK government website*, 25 March 2022. [Find it here](#)

EU: New plastic packaging measures offer businesses an opportunity to innovate

Businesses globally are preparing for a raft of measures aimed at combating the world's plastic pollution problem.

The European Union (EU) Action Plan for key commitments around plastic pollution (also called A European Strategy for Plastics in a Circular



Economy¹⁾) is one of several plans to reduce plastic production. It requires all plastic packaging to be recyclable by 2030 and aims to spark improved design, innovative products and new business models to drive sustainability.

To accelerate this process, the EU implemented the Plastic Levy in 2020 by virtue of which EU Member States mandatorily must pay a contribution of €0.80 calculated on the non-recycled plastic packaging waste being introduced in each respective country. Each Member State can choose how to finance this levy, whether by directly taxing the plastics sector or through other methods of taxation.

However, tax is only one of the several initiatives the European Commission has outlined as part of its strategy to transform the way products are designed, produced, used and recycled. Extended Producer Responsibility (EPR) schemes, as introduced by the Single Use Plastic Directive in 2019, are intended to encourage producers of plastic to improve design.

These measures drive legislative changes across Europe, whereby each Member State decides how to implement these commitments into their local legislation. This lack of harmonization means that businesses must stay up to date on all new legislative developments and all the different rules in the various Member States.

1 'Circular economy action plan', *European Commission website*, 11 March 2020. [Find it here](#)

UK legislation prescribes a threshold of 30%, so to the extent that a business can demonstrate that more than 30% of the plastic packaging it uses is recycled, it may rely upon an exemption. By contrast, Spain and Italy have an all-or-nothing approach whereby plastic must be either 100% recycled or



reusable to be eligible for an exemption. A recent FAQ published by the Spanish government provided more than 50 examples of product categories that were within or outside the scope of the new tax.

Further, each country establishes different documentary requirements to prove that the plastics used have been recycled. Although the Recycled Plastics Traceability Certification is a new certification scheme that provides proof of the traceability of recycled plastic material from the source, as well as the specific recycled content of each product, tax authorities have not yet decided whether this would be considered sufficient proof that plastics have been recycled.

Spain has already acknowledged in its last communication that this standard of proof would be acceptable, but the country will, in the first 12 months following the introduction of the tax, allow businesses to prove that plastics have been recycled through a statement signed by the manufacturer. It remains unclear whether this would also create joint and several liability of the latter, as it does in the UK. As Italy only recently announced the entry into force of its new tax, no detailed administrative comments have been released.

To identify, communicate and record the relevant information, businesses will also need to engage and involve numerous stakeholders, both inside the organization and beyond.

Given this background, businesses need to revisit their EPR status by the end of 2024. The proposal amending the Packaging Directive indeed sets new targets to be met by 2025 and 2030 for the share

of packaging waste prepared for reuse and recycling (65% and 75%, respectively), with specific targets for various packaging materials (including plastic, wood, ferrous metal, aluminum, glass, paper and cardboard). Although no 2030 target is proposed for plastic packaging, the European Commission may propose one at a later stage.

France, Germany, Portugal, Poland and others have begun developing strategies to meet these targets. From a business perspective, e-commerce platforms and online marketplaces (both of which are growing) are now seeking explicit confirmation from their retailers that they are duly registered and connected with a Producer Responsibility Organization.

Challenge or opportunity?

Although it is clear that these changes bring challenges for businesses, at the same time they can be a key driver of innovation. These taxes are designed to drive different behavior and encourage more sustainable packaging. As such, businesses should consider innovating their packaging material strategies (for example, only using recycled material in the near future), which also can help strengthen their brands. ■

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Italy: New plastic tax applies from 1 January 2023

Plastics are an important material in our economy and daily lives. However, the way plastics are currently designed, produced, used and discarded have a negative impact on the economy and the environment.

In line with the recent European strategy for plastics,¹ to curb plastic waste, several European Union countries have decided to strengthen the role of taxation as a key factor in transitioning toward a more circular economy. In this respect, from 1 January 2023, Italy is expected to introduce a new plastic tax on a wide range of single-use plastic products known as *Manufatti Con Singolo Impiego* (MACSI). In addition to having a significant financial impact throughout the entire business supply chain, this tax will lead to an increased administrative reporting burden for business, in addition to those already in place around managing plastic packaging waste.

In this article, we describe key provisions of this upcoming tax and provide an overview of a number of relevant challenges that businesses may face.

Legal background

In Italy, the plastic tax was originally introduced by the Budget Law for fiscal year 2020.² After being postponed several times,³ Italy's Budget Law for fiscal year 2022⁴ finally set the date for its entry into force on 1 January 2023. Businesses are still waiting for publication of the implementing rules issued by Italian Customs and Revenue Agencies in the Official Gazette.

¹ See Communication from the European Commission, *A European Strategy for Plastics in a Circular Economy*, Brussels, 16 January 2018.

² Law n. 160 of 27 December 2019.

³ Although it has been delayed several times, the plastic tax is finally coming into force with effect from 1 January 2023. Implementing rules, issued by Italian Customs and Revenue Agencies, will be published in the Official Gazette by the end of 2022.

⁴ Law n. 234 of 30 December 2021.

Amount of the tax and products included in the new law

The Italian plastic tax will be charged at a rate of €0.45 per kilogram of virgin plastic included in MACSI items that are composed totally or partially of organic polymers of synthetic origin that provide (or are meant to provide) the function of containment, protection, manipulation or delivery of goods or foodstuffs, and that are not designed to be used repeatedly.

As such, the tax is intended to apply to a wide range of plastic products, including bottles, bags, food containers, tetra pack containers, packaging, rolls of pluri-ball plastic, caps and similar items that are made even partially, of plastic materials consisting of organic polymers of synthetic origin.

Conversely, the tax is not applicable to MACSI items designed to have a long-lasting use or in specific cases and circumstances. In particular, based on the primary law, the tax is not due on plastic material contained in MACSI items that come from recycling processes, and on MACSI items exported or sold directly by the manufacturer to be consumed in another EU Member State. In addition, the following goods are excluded from the application of the tax:

1. MACSI items that are compostable in accordance with UNI EN 13432:2002
2. Medical devices classified by the Single Commission on Medical Devices, established pursuant to Art. 57 of Law n. 289 of 27 December 2002
3. MACSI items used to contain and protect medicinal preparations

Taxable persons

Depending on the country where the MACSI items are produced or are shipped from, persons subject to the plastic tax are:

- ▶ For MACSI items manufactured in Italy:
 - ▶ The manufacturer or the person (resident or nonresident) who intends to sell the MACSI, obtained on its behalf in a production plant, to other resident persons.

- ▶ A producer of MACSI who uses MACSI on which plastic tax is due by another person, without adding any further plastics subject to the tax, is not considered to be a manufacturer.
- ▶ For MACSI items shipped from other EU Member States (intra-Community transactions):
 - ▶ The person responsible for the tax could be the purchaser or the seller depending on whether the MACSI is purchased for the purpose of an economic activity.
- ▶ For MACSI items shipped from non-EU countries (imports):
 - ▶ The importer.
 - ▶ Although official clarification is lacking, plastic tax should not be due in cases where special customs regimes (such as customs warehouse, transit and inward processing relief) allow MACSI to be under customs suspension (and thus not in free circulation).

Taxable event

The relevant tax obligation arises in connection with the production, the importation or the introduction of the goods from the EU, of MACSI. The tax is due at the moment of release into consumption of the single good in the Italian territory, as defined by the law.

Compliance

Depending on who is assigned as the taxpayer and the supply chain, different requirements may have to be met (e.g., registration, accounting entries, quarterly tax returns, payments, and separate storage).

Non-established entities will have to appoint a tax representative who will be jointly and severally liable for the tax due. The Italian Customs Authorities are in charge of any audit activities for all MACSI items subject to the plastic tax.

For MACSI items coming from non-EU countries, the tax is assessed and collected at the time of customs clearance into Italy.

Where the amount of plastic tax due does not exceed €25, the plastic tax return is not to be submitted and the relevant payment is not due.

Businesses are advised to prepare for the new plastic tax process in a timely manner to avoid penalties, to enable their customers to be compliant and to prevent goods being blocked by the Italian Customs Authorities.

Penalties

Failure to pay the plastic tax is subject to the application of a penalty ranging from two to five times the unpaid tax, with a minimum penalty of €250. In the event of late payment, an administrative penalty applies, equal to 25% of the tax due, with a minimum penalty of €150. The late filing of the relevant quarterly returns is subject to a penalty ranging from €250 to €2,500.

Possibility of refund

Depending on the supply chain, plastic tax is not due or can be reimbursed for MACSI items that are transferred for consumption in other EU countries or for export, if certain requirements are met.

For this purpose, businesses must ensure full traceability of all the persons involved in the supply chain and proof of the plastic tax actually paid. A refund is allowed for amounts higher than €10.

Recommendations to businesses

Italy's plastic tax has been delayed several times, but it is now becoming a concrete reality as it will apply from 1 January 2023. This new tax follows the adoption of similar plastic taxes in the United Kingdom and Spain.

It is fundamental that businesses prepare now and, in doing so, take into account the fact that the new plastic tax is one of the most complex indirect taxes in Italy.

As such, the implications of the new tax will go far beyond the tax or customs function of the business. In preparing for the new obligations, businesses should engage across the enterprise and with the wider supply chain. In particular, economic operators should consider this new tax in their pricing policies and its impact on supply chains and processes. For example, affected businesses, depending on their profile within the supply chains, may want to engage with their suppliers for data or consider setting up robust systems to measure the virgin content of MACSI needed to determine and compute the plastic tax. The impact on customers should also be considered.

For example, wholesalers and distributors may prefer to purchase goods from suppliers that are able to guarantee the full traceability of MACSI items and their correct tax compliance to avoid goods being blocked at the Italian borders or to recover plastic tax already paid on goods that are then consumed outside of Italy.



Planning for plastic packaging taxes in Italy and Spain

27 September 2022

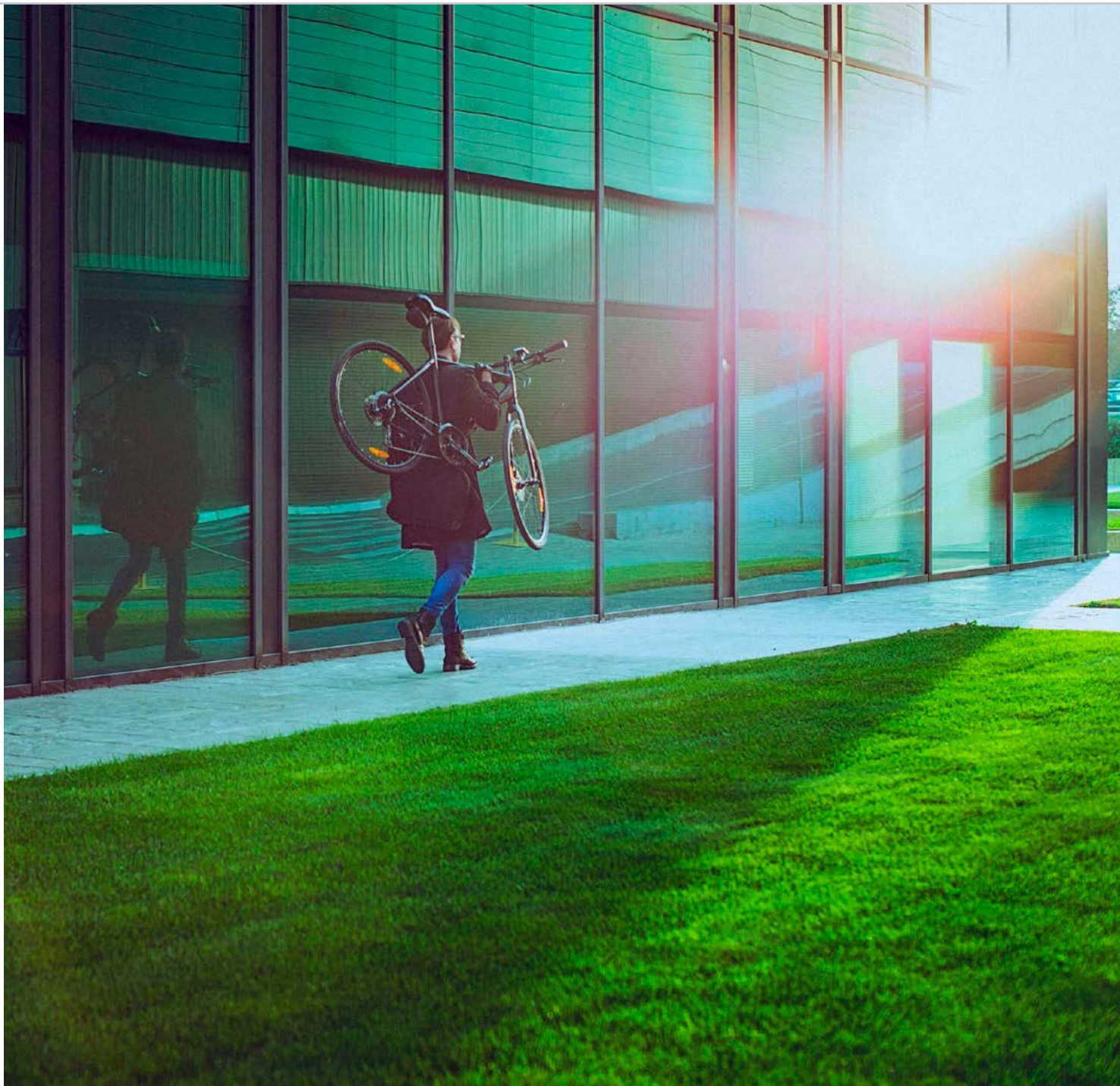
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EYG no. 008556-22Gbl
ED None

UKC-024498.indd 09/22.
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