

# MAKING THE ENVIRONMENTAL PROTECTION ACT MATTER

Recommendations for stringent environmental legislation on plastics in Switzerland

November 2024



# EXECUTIVE SUMMARY

Next year, in 2025, the Environmental Protection Act (EPA) in Switzerland will celebrate its 40<sup>th</sup> anniversary. Over this period, the law, which entered into force in 1985, has been the cornerstone of Swiss Environmental legislation. As such it operationalises art. 74 of the Swiss Constitution by defining the basic principles and rules for the “*protection of the population and its natural environment against damage or nuisance*”, “*ensur[ing] that such damage or nuisance is avoided*”.

The original aim of the Environmental Protection Act was to protect natural resources such as water, air, soil and individual biotopes, animal and plant species in Switzerland. Therefore, **both the Federal Council and Parliament explicitly recognised at the time of its introduction that environmental protection could ultimately take precedence over other considerations, including economic**. On this basis and during its further development, both a number of basic principles and specific legal instruments were included in the Act – in particular Art. 30a let. a EPA – which enable the Federal Council to introduce prohibition measures and thus ban products that cause environmental problems (Chapter 1).

However, **since the 1990s, the possible use of such prohibitive instruments has been faced with generalised reluctance by federal authorities**. This came in line with a considerable change in the approach and application of the EPA. Following an extensive reform, the law has given expression to a more economy-oriented focus. Instead of being the primordial concern of the EPA, **henceforth environmental considerations had to be looked upon in the context of a balance with economic demands**. And, in reference to [art. 41a EPA](#), the private economy has been given an important role in the execution of the law through a focus on *own initiatives* and *voluntary agreements*. With some nuances introduced under the latest ‘circular economy’ reform confirmed in March 2024, this has remained the dominant approach on environmental protection in Switzerland and the application of the EPA (Chapter 2).

This decision to rely on the private sector as a key player in environmental policy is usually presented as a sensible and neutral choice and the best way to achieve effective environmental protection. In practice, however, without explicitly recognising this, it is much more of an ideological decision determined by the beliefs and (predominantly economic) interests of its proponents, making environmental policy subordinate to the primacy of the economy (section 3.1).

This becomes notably clear when looking closer at the **common arguments invoked to justify this economy-oriented approach**. First, it is repeated that self-regulation and voluntary initiatives by the private sector would work well and should therefore be retained as the preferred approach. In addition, it is argued that this predominant involvement of the private sector is in line with the principle of subsidiarity and thus with Swiss principles. Finally, reference is made to the supposed successes of Swiss environmental protection legislation, according to which the environment is doing quite well and steady progress is being made. The ‘progress’ is justified by the strong involvement of the private sector and the voluntary nature of the measures. However, a closer look at these arguments leads to the conclusion that none of them are factually tenable, especially as on closer inspection many of the ‘advances’ turn out to be myths that do not stand up to scientific scrutiny.

While often cited as the way forward, **self-regulation and voluntary measures by the private economy in practice turn out to have little real-world impact in tackling – let alone solving environmental problems**. And it is questionable whether the voluntary measures are actually supported by the economy itself. To begin with, the number of sector agreements in accordance with the EPA, is limited. In 2021, the Federal Office for the Environment (FOEN) counts but 10 of them<sup>1</sup>, and no further agreement seems to have become operational since. As such, also the national plastic collection under auspice of RecyPack is until further notice still not fully operational at country level. Besides, as pointed out by the FOEN, very few sectoral agreements are truly voluntary, i.e. without some form of incentive or political pressure<sup>2</sup>. Finally, the real effectiveness of such agreements is confusing and limited, as both the examples of the national plastic waste collection and of the plastic bag agreements show (section 3.2.1).

As to claims that the preponderant involvement of the private sector in the execution of the EPA would be but about “*rightfully understood **subsidiarity***”<sup>3</sup>, this concerns a problematic reading of what subsidiarity is about. Basically,

subsidiarity concerns empowering individual citizens and enhancing democracy<sup>4</sup>. But **private sector actors do not represent general, civil society interests, though only their own economic interests**. Therefore, their strong involvement in the execution of the EPA cannot be understood in such terms, even more so as other, civil society representations do not have the same access and involvement. This is democratically questionable. The delegation of environmental policy measures to (individual) representatives of the private sector, taking economic interests into account, is therefore problematic in two respects: firstly, continuous inaction is legitimised on the basis of the Environmental Protection Act, which, according to Art. 74 of the Federal Constitution, unequivocally and exclusively stipulates the ‘protection of man and his natural environment from harmful or annoying effects’, thus defying the Federal Constitution. On the other hand, this also negatively affects the (economic) interests of citizens who are not protected by it (section 3.2.2).

Finally, **arguments as if environmental protection is all-in-all doing well – and this would largely be due to strong private economy involvement – are simply at odds with reality and scientific facts**. Already decades ago, many voices, including in the Swiss Parliament, warned clearly about the degrading state of the environment. Since then, and notwithstanding all knowledge available and many promises, things have unquestionably worsened further and new environmental problems and climate policy challenges have arisen (section 3.2.3).

In view of these observations, this report concludes that **the current approach taken under the EPA in Switzerland over the last 30 years is no longer tenable**. In response, it advocates for Swiss federal authorities to take up (again) a stronger proactive – and if reasonably necessary – a prohibitive role, including through bans, to protect the environment (Chapter 4).

**This becomes all the more important in the context of the now much-cited circular economy**. Until not even 30 years ago, Switzerland still used to have a circular economy *avant-la-lettre* (only not to be called so at the time) in the form of well-developed reuse systems for glass bottles. Though back then indubitably promoted and defended by the Federal Council for its obvious environmental virtues; under pressure from private economy interests, this almost entirely disappeared (section 5.1). This is not without relevance in view of the current debates on circularity. Circular economy discussions in practice preponderantly focus on (how to improve) recycling. However, to really be an effective way towards decreasing environmental nuisance and a smaller impact of the overall economic activity on the environment, **circularity must be built around the 4 R-hierarchy of first reduction and reuse, followed by recycling and energetic valorisation**. In the context of the recent circular economy modifications to the EPA, this means that these first two concepts of reduction and reuse need to be more explicitly considered as part of the law’s further operationalisation (section 5.2). In that regard – and keeping in mind the above-mentioned ‘circularity *avant la lettre*’ – it is important to examine how a circular economy (especially in relation to its dimension of reduction and reuse) would be able to take hold and have long-term environmental benefits under an unchanged economic growth paradigm (section 5.3).

All this must be taken into consideration throughout the further operationalisation of the renewed EPA. **This operationalisation must fully incorporate the concepts of reduction and reuse in the practical on-the-ground implementation of the law**. This report substantiates that among others, **this also will have to happen through prohibitive measures**, the use of which is made possible through different dispositions of the EPA, notably art. 30a and the new art. 35i. It is important to recognise that some products – especially those intended for once-only, short-term use – are causing environmental harm that cannot be justified, even when measured against any eventual benefit from their use. To unambiguously and preferably swiftly realise their disappearance, **State-imposed bans are reasonably appropriate and most adequate**. (section 5.4).

Considering the **many and far-reaching problems with plastic, also in Switzerland** (section 6.1), the report argues that an important focus should go to products made from this material. In terms of recycling, **plastic is an inherently non-circular material**. Thus, the implementation of the EPA should strictly follow the hierarchy of first reduce – then reuse. Only by limiting the use of (especially) disposable and unnecessary plastic products at source will such reduction be obtained, and a comprehensive upscaling of reusable alternatives be given space to develop. In accordance with dispositions available under the EPA, this needs the use of proactive, prohibitive policy measures (section 6.2).

Unfortunately, in practice, **Swiss authorities continue to remain reluctant to deploy prohibitive measures, including for plastic products.** Building on previous research conducted by OceanCare and published in the report “Plastic Matters” in 2021, there is a recurring set of arguments that continues to suggest that any bans would be inappropriate.

First, claims are made about the **lack of scientific evidence.** This argument is not new and hinders the application of the **precautionary principle.** The intrinsic shortcomings of this argument become blatantly clear where it concerns human health. Question should urgently be asked what is considered ‘enough’ evidence for decisive action to protect the public’s health. Currently, the approach is still too much one in which harm must be proven in retrospect (that is after products have already become widely present in the public space), and mainly at the expense of those suffering this harm. **To protect Swiss citizens, it is crucial to consider the application of this well-established principle in environmental law.** The burden of proof that an activity or product does not harm the environment, humans included must be placed on those who want to bring a product to the market (section 6.3.1).

Second, **the argument of proportionality too is questionable.** This argument centres around the idea of balancing environmental harm against private economic benefits. Though, **in line with the original intention of the law, the focus of the EPA should lie more with the first, taking precedence over the second if necessary** (section 6.3.2).

A third argument for inaction surrounds the notion that Switzerland should wait for other actors to “move first”. While in some cases it may be beneficial for Switzerland to align with neighbours, and the country might have to respect international obligations, this should not prevent it to exercise its sovereign rights, even setting an example for others to follow, especially as Swiss environmental policy has long since adopted a global approach. If they elaborate well on their motivation, European States not always must await ‘Brussels’ to act in the interest of their environment, human health included. This not only applies to EU Member States, but also to associated countries like Switzerland. For instance, both Belgium and France addressed the threat posed by e-cigarettes, to the environment and health, without waiting for the EU to become active (section 6.3.3).

Finally, the **‘leaving it to the private sector’** is justified in reference to the constitutional guarantee of economic freedom (art. 27 Const.). Nevertheless, the same Constitution also stipulates that the Confederation shall ensure that damage or nuisance to the population and its natural environment is avoided (Const., art. 74). Besides, as already noted in relation to the subsidiarity argument (cf. *supra*), **the preponderant role of private economy actors in the execution of the EPA raises considerable questions of democratic legitimacy.** The manner in which private initiatives and voluntary measures are organised – i.e. with little to no control and evaluation of their effectiveness by federal authorities – does **injustice to the initially communicated intention of art. 41a EPA**, the legal disposition on which this approach is said to be based (section 6.3.4).

In consideration of the above, decisive policy action, including through bans on targeted plastic products are appropriate and necessary. Even more so considering the interaction of plastic (and the multiple problems correlating with it) with other global problems (section 6.4.1) and national challenges (section 6.4.2), the plastic problem must be addressed by **prohibiting problematic plastic products and drastically limiting the use of those that can be avoided or replaced.**

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1 BAFU (08.02.2021), Branchenvereinbarungen: Übersicht und Frage der Allgemeinverbindlichkeit Faktenblatt zuhanden der Subkommission 20.433 Parlamentarische Initiative «Schweizer Kreislaufwirtschaft stärken», pp. 4-8.

2 *Ibid.*, p. 2.

3 93.053 Umweltschutzgesetz. Änderung > Ständerat 2. Juni 1994 > Bruno Frick.

4 Evans & Zimmermann (eds.), Global Perspectives on Subsidiarity, Springer Link, 2014.

## CONCLUSION AND RECOMMENDATIONS

The Swiss Environmental Protection Act soon will exist 40 years. However, for much of its existence the application of this law essentially followed a ‘leave it to the economy approach’. Federal authorities refrain from proactive policy interventions, including bans. Instead, they choose to leave the initiative to the private sector. This might well assure economic freedom (art. 27 Const.). But **it fails to fully ensure the EPA’s most central objective, i.e., to protect the Swiss population and its natural environment against damage or nuisance** (art. 74 Const.).

This report makes a compelling argument for this to change.

In their application of the EPA, federal authorities should return to **the law’s initial objective: to protect the environment**; if need be, in priority over other, economic, interests.

In this regard, **the debate should distance itself from erroneous arguments to justify the continuing preponderance of the private sector**. After 3 decades of *trying*, enough time has been left to the private sector through ‘self-regulation’ and ‘voluntary measures’. **The state of the environment, including in Switzerland, has overall not improved over these years; much to the contrary**. This should be argument enough to drastically reorient towards proactive, State-involved environmental protection.

This becomes even more relevant in the context of the recent modifications of the EPA. If Switzerland truly intends to develop a ‘circular economy’ to protect the environment; a **preponderant focus should go to the first two steps of such circularity: reduction and reuse**. To truly realise reduction and consistently promote reuse, products which by their inherent nature hinder these objectives should be faced out. To do so, **public authorities can no longer refrain from taking strong proactive policy action, including the banning of products that unquestionably cause considerable environmental harm**.

An important product category that should be at the centre of attention as a first priority is that of unnecessary disposable products made of or containing plastic. **In terms of recycling, plastic is an inherently non-circular material**. The environmental harm of plastic is not just a matter of waste. **Harm and nuisance occur along its whole lifecycle**. Therefore, if ever the material was to be a part of a truly circular economy, first its production and use must be drastically reduced. To start – but not limited to – this concerns disposable plastic products, intended for once-only, short term use.

To some, prohibitive policy measures might well seem ‘unswiss’... But **it should not be ‘unswiss’ to decisively protect the Swiss environment and the people living in it**. Therefore, if it is Switzerland’s sincere intention to really protect the environment in line with dispositions already available under the EPA, **a more proactive policy approach on plastic is needed and bans on specific plastic products must be put in place**.

In summary,

### **This report recommends that:**

- Swiss environmental protection reorients itself away from a preponderant ‘leave it to the economy’ approach in the implementation of the EPA.
- In their implementation of the EPA, authorities return to the law’s initial objective: protect the environment, if need be, in precedence over other, economic, interests.
- Debates on the role of the private economy in the protection of the environment should reflect with honesty on the arguments repeatedly made in that regard:
  - Being promoted for 30 years as a key avenue for environmental protection, self-regulation and voluntary measures by the private economy have little to show for.
  - Claims as if such strong private sector involvement is but about ‘rightfully understood subsidiarity’ are flawed and democratically problematic.

- The state of the environment, also in Switzerland, continues to deteriorate. A strong private sector involvement over the last 30 years has not turned this around.

It furthermore calls upon federal authorities to

- Take all the above into account in the further implementation of the ‘circular economy reform’ of the EPA.
- Implement a circular economy which fully integrates ‘reduction’ and ‘reuse’ and put them before ‘material valorisation’ and – only in last resort – ‘energy recovery’.
- Recognise the need for more proactive policy action under the EPA, including bans to realise this.

Finally, the report makes the case that,

- Plastic products cause harm and nuisance along their whole lifecycle, not just at their final waste stage. A fact that should be fully recognised by public authorities.
- In this light, classical arguments for limited State-intervention must be re-evaluated:
  - The ‘science is not yet in’ cannot justify ongoing inaction on evidently problematic plastic products. A more proactive, precautionary approach must be adopted.
  - In reference to proportionality, the economic benefit of *the few* should never be more important than the environmental harm inflicted on *the many*.
  - Though indeed acting in a broader international setting, Switzerland can and should take decisive action within its own competencies and scope.
  - Especially about plastic, a continuous ‘leave it to the private sector’ does not work.
- The plastic problem is linked to international developments and does not stop at national borders. By acting at the national level to protect the environment, Switzerland is in turn helping to solve a global problem at its own level.

Therefore, the report urges that:

- A first focus of prohibitions in line with the EPA must be on plastic (containing) products; especially unnecessary disposable products intended for once-only, short term use.

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