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NOTE

From: Presidency
To: Delegations
Subject: ESPR: Discussion note

In view of the upcoming Working Party for Competitiveness and Growth (Internal Market – Ecodesign) on 03 April 2023, delegations will find in Annex a Presidency discussion note.

The Presidency has prepared this discussion note to guide a further round of discussion on Article 20 and Destruction of Unsold Consumer Products and Article 5.9 and 7.2., 7.5 as regards Substances of Concern.

We use bold and underlined for adding text and strikethrough and bold for removing text.

Article 20

1. Prohibition against Destruction of Unsold Consumer Products

Following the discussions on Article 20 we have developed the below new proposal for compromises These are preliminary and we ask for your input on the below to guide our work going forward.

1.1. Maintaining implementing acts for the prohibition against the destruction of unsold consumer products

When Article 20 was discussed the last time, at the working party on 28 of February, several Member States welcomed that the delegation to the Commission on the prohibition against the destruction of unsold consumer products under Article 20 had been transformed into an implementing act. Several Member States however raised that the Article – as framed in the new proposal – seemed too complex. While it is true the Article has become very long and that there is room for improvement, detailed and precise drafting is needed for legal reasons. As previously discussed, implementing acts require a “full legal framework” to enable the uniform conditions of application. Furthermore, the exception for SMEs was unclear.

Our proposal would be to maintain the empowerment on the prohibition against the destruction of unsold consumer products under Article 20 as an implementing act . We would also propose to split the article into several Articles to make it easier to read.

1.2. Clarifying definitions

Several Member States wanted a definition of the term “discarding”. “Discarding” has no independent definition under the Waste Framework Directive but it is a core element in the definition of “waste” under Article (1) of the WFD: “ *‘waste’ means any substance or object which the holder **discards** or intends or is required to **discard***” (emphasis added). To avoid interfering with the WFD, we would propose some wording in a recital explaining that the interpretation under ESPR should be aligned with the WFD.

[Recital 47]

When determining the scope of the obligations as regards destruction of unsold consumer products, guidance should be found in the reference to the term ‘discard’ in the definition of waste in the [Waste Framework Directive [2008/98/EC]].

Several Member States furthermore asked for a change of the definition of “destruction”, with several different suggestions as to how this should be done. Following discussions with the Commission, we decided to keep the definition of “destruction” from the original proposal as it appeared to be the best compromise solution. However, we propose to clarify the relationship with the waste hierarchy in a recital.

[Recital 46]

“The concept of destruction as outlined in this Regulation should cover the last three activities on the waste hierarchy as defined in the Waste Framework Directive: recycling, other recovery (e.g. energy recovery) and disposal. Remanufacturing shall furthermore not be considered destruction.”

1.3. Enshrining the principle according to which destruction should be avoided

Most Member States have so far agreed that discarding of products which are fit for use should not take place, where opinions have differed are instead on what kind of exceptions to this principle are reasonable and to what extent this practice requires us to intervene as legislation. We propose to enshrine a principle according to which destruction of unsold consumer products should be avoided in a new Article. This would set a basic obligation for economic operators and is a clear political statement guiding current and future policies. This is in line with the WFD, in particular waste prevention, and also gives a signal that economic operators should adapt their production from the outset, to avoid being in a situation where they would have to destroy unsold products.

[Article 20aa]

Economic operators shall take necessary measures to prevent the need to discard unsold consumers products that are fit for use.

Several Member States have also asked for language to be added regarding the waste hierarchy. We consider this would fit best in a recital.

[Recital 46a]

Nothing in this Regulation should be construed as contradicting the order of the waste hierarchy under the Waste Framework Directive (2008/98/EC).

1.4. Making the obligation to have a policy more enforceable

Many MS wanted the obligation to have a policy to prevent destruction (Article 20.a.) to be clarified and made more enforceable. We would propose that economic operators subject to this obligation report on their results on a regular basis, possibly through the mechanism provided in the CSRD. We also suggest SMEs should be exempted from this obligation. The notion of what “an easily accessible page of their website” could be clarified in a recital.

- Article 20a - Policy of management of unsold **consumer** products

An economic operator that **repeatedly** discards unsold consumer products, or has unsold consumer product discarded on their behalf, shall set up

- **a) policy for minimizing waste generation of unsold consumer products and promoting and supporting sustainable production and consumption models**
- **b) a policy limiting preventing the number destruction of unsold consumer products and waste generation of unsold consumer products, including**

an implementation strategy. Such economic operators shall also provide a description of the status of the implementation and results achieved by the policy, updated on a yearly basis.

The information referred to above shall be disclosed on an easily accessible page of a website.

Economic operators that are subject to the obligation to publish the sustainability reporting in their management report pursuant to Article 19a of Directive 2013/34/EU shall have the possibility of including the information referred to above in that sustainability reporting.

This article shall not apply to SMEs.

We also propose that a recital could be added referring to that economic operators should not try to circumvent the regulation through shipping products to third countries under the false pretense the products are being sold or donated when they are in fact destined for destruction, referring to the Waste shipment regulation.

1.5. Introducing a direct prohibition against destruction in Article 20 for certain groups of products

Following discussions with Member States and the Commission, we would propose to introduce a direct prohibition against the destruction of unsold consumer products under the ESPR. This direct prohibition would only apply to certain product groups where there is already some evidence on destruction taking place, such as apparel, clothing accessories, shoes and electronics [see note of 20 January for reference].

Our proposal would be that such a direct prohibition would not apply to small and micro enterprises. Such a direct prohibition should naturally be subject to certain exceptions, which should be aligned with the exceptions for products being subject to implementing acts. These exceptions would have to be further specified by the Commission through the adoption of implementing acts. We propose the list of the products concerned to be specified in an Annex. Below we propose a preliminary wording of such an article to consider, which would be scrubbed if delegations agree with the direction of work.

- **[Article X] Prohibition against destruction of unsold consumer products that are [XX, for example clothing]**
- **1. From [XX] months after entry into force of the Regulation, destruction of unsold [XX, for example clothing] is prohibited.**
- **2. By way of an exception to paragraph 1, unsold consumer [XX, for example clothing] may be destroyed if it is proven that the product concerned cannot be used to any of the following reasons:**
 - **a) health and safety reasons;**
 - **b) the products are damaged as a result of their handling or detected after a product has been returned by a consumer;**

- c) fitness of the product for the purpose for which it is intended, taking into account, where applicable, Union and national law and technical standards;
- d) refusal of products for donation, preparing for re-use or remanufacturing;
- e) products which are illegal under national or EU law including non-compliant products, counterfeit products or products rendered unsaleable due to infringement of intellectual property rights;
- f) products exceeding their expiry dates;
- The Commission shall adopt an implementing act specifying how these exceptions shall apply.
- 3. When unsold consumer [XX, for example clothing] are destroyed under an exemption referred to in paragraph 2, the responsible economic operator shall disclose:
 - (a) the number of unsold consumer products units destroyed;
 - (b) the reasons for their destruction, referring to the applicable exemption;
 - (c) the proportion of the delivery of the products destroyed to each of the following activities: recycling, other recovery, including energy recovery and disposal operations in accordance with the exemption and the waste hierarchy as defined by Article 4 of Directive 2008/98/EC.

The information referred to above shall be disclosed at least on an easily accessible page of the economic operator's website. Economic operators that are subject to the obligation to publish the sustainability reporting in their management report pursuant to Article 19a of Directive 2013/34/EU shall have the possibility of including the information referred to above in that sustainability reporting.

The Commission shall adopt an implementing act to specify the details and format for the disclosure of information.

- **4. When unsold consumer [XX, for example clothing] are destroyed under an exemption referred to in paragraph 2, the economic operator shall, upon request from a competent national authority, provide all the information and documentation necessary to demonstrate**
- **(i) the applicability of an exemption from a prohibition to destroy, and**
- **(ii) the delivery and reception of the products as disclosed pursuant to paragraph 3(c)**
- **Such information and documentation shall be provided within [30 days] of receipt of a request by a competent national authority.**
- **5. Paragraph 1 shall not apply to small or micro enterprises[...]**

1.6. Clarifying the empowerment to adopt implementing acts prohibiting destruction for other products

For products other than the ones covered by the direct prohibition (such as clothing and electronics), our proposal is that the Commission will still be empowered to adopt implementing acts. Below we have come up with a preliminary proposal how the Article regarding this (originally Article 20.3) would be construed, which would however need further legal scrubbing and calibrating, where delegations to agree with the direction of work.

Our proposal would be to strengthen the language of when such implementing acts should be developed, clarifying the default is that product groups should be subject to implementing acts if certain criteria are fulfilled. As in the Commission proposal, the implementing acts would be based on an impact assessment and consultation of stakeholders, including the Ecodesign Forum and Ecodesign Expert Group. The implementing act would furthermore still define how the prohibition shall apply (e.g. precise definition of the product scope, the possible exemptions, the format for reporting, and the implementation date).

As it might take time before such implementing acts are adopted, we propose to specify that Member States may maintain or introduce national measures as regards destruction of unsold consumer products for products which are not yet covered by an implementing act containing a prohibition, if such national measures are in compliance with Union law. Our proposal is that the wording regarding this should be left for a recital.

Article XX

1. Empowerment to the Commission adopt implementing acts setting out prohibitions against destruction of unsold consumer products

2. The Commission shall propose implementing acts setting out a prohibition against the destruction of unsold consumer products, other than those subject to the above direct prohibition under Article X, by economic operators when the following criteria are fulfilled:

(a) destruction of the type of unsold consumer products is taking place and has a negative environmental impact,

(b) a prohibition would not lead to significant disproportionate administrative burdens.

3. The implementing acts shall specify:

(a) the type of unsold consumer products that shall fall into the scope of the act, ensuring products are not treated in a discriminatory manner

(b) the applicable exemptions

(c) the details and format of the reporting obligation of economic operators when destroying unsold consumer products under an exemption.

(d) the implementing date, and where appropriate, any tiered or transitional measures or periods. Such dates shall be fixed taking account, in particular, of possible impacts on SMEs or on specific product groups manufactured primarily by SMEs.

4. When preparing an implementing act referred to in paragraph 1, the Commission shall:

(a) carry out an impact assessment based on best available evidence and analyses, and on additional studies as necessary;

(b) carry out appropriate consultation with stakeholders, the Ecodesign Forum referred to in Article 17a and the Ecodesign Expert Group referred to in Article 17a;

5. The Commission shall in the implementing act setting out the prohibition establish all the relevant exemptions. Exemptions from the prohibition shall respect the following principles:

(a) The exemption shall apply to all or part of the prohibition,

(b) The exemption shall be adapted to the specificities of the type of unsold consumer products in the scope

(c) the exemption can apply for a limited or unlimited time

(d) The exemption shall allow recycling or energy recovery as appropriate and in line with the waste hierarchy, in the event that any preparation for re-use is not appropriate.

6. The exemptions shall not constitute a means of arbitrary discrimination and shall be based on one of the following justifications:

(i) health and safety concerns;

(ii) damage to products as a result of their handling, or detected after a product has been returned by a consumer;

(iii) fitness of the product for the purpose for which it is intended, taking into account, where applicable, Union and national law and technical standards;

(iv) refusal of products for donation, preparing for re-use or remanufacturing.

(v) products illegal under national or EU law including non-compliant products, counterfeit products, or products rendered unsaleable due to infringement of intellectual property rights.

(vi) products exceeding their expiry dates.

7. When unsold consumer products are destroyed under an exemption referred to in paragraph 5 and 6, the responsible economic operator shall disclose:

(a) the number of unsold consumer products units destroyed;

(b) the reasons for their destruction, referring to the applicable exemption;

(c) the proportion of the delivery of the products destroyed to each of the following activities: recycling, other recovery, e.g. energy recovery and disposal operations in accordance with the exemption and the waste hierarchy as defined by Article 4 of Directive 2008/98/EC.

The information referred to above shall be disclosed on an easily accessible page of a website. Economic operators that are subject to the obligation to publish the sustainability reporting in their management report pursuant to Article 19a of Directive 2013/34/EU shall have the possibility of including the information referred to above in that sustainability reporting.

The details and format for the disclosure of information shall be provided in the implementing act adopted pursuant to paragraph 1.

8. When unsold consumer products are destroyed under an exemption referred to in paragraph 5 and 6, the economic operator shall, upon request from a competent national authority, provide all the information and documentation necessary to demonstrate

(i) the applicability of an exemption from a prohibition against destruction, and

(ii) the delivery and reception of the products as disclosed pursuant to paragraph 7(c)

Such information and documentation shall be provided within [30 days] of receipt of a request by a competent national authority.

8. This Article shall not apply to small and micro enterprises [....]

9. Implementing acts according to this Article shall be adopted in accordance with the examination procedure referred to in Article 67(3).

(Recital Y)

Member states should not be precluded from introducing or maintaining national measures as regards destruction of unsold consumer products for products which are not subject to the direct prohibition or not yet covered by an implementing act setting out a prohibition, provided that such measures are in line with the EU law.

2. Transparency obligation regarding Destruction of Unsold Consumer Products

Several Member States during the last working party meeting raised concerns that the transparency obligation will constitute a significant administrative burden given its broad scope, will require economic operators to disclose sensitive information, and will be unfair because it requires economic operators to report destruction that is obligatory pursuant to other legal obligations. We thus propose that the Commission could provide some support for enterprises in fulfilling the transparency obligation and that some other adjustments can be made to the transparency obligation.

We propose that economic operators can disclose the information required under the transparency and reporting obligations in Article 20 via the reporting mechanism in the CSRD, if they fall under the scope of the said directive.

We would also propose, in line with some Member States suggestions, that the transparency obligation does not apply to unsold consumer products that have become non-compliant with national or EU legislation after the date of their manufacture because new law has entered into force.

We also propose that the Commission, when preparing implementing acts on the format of the reporting obligation, shall take into consideration the need to protect sensitive information and trade secrets.

3. Prioritisation

We propose to add a specific Article regarding how the Commission will prioritise which products a prohibition should be developed for.

[Article XXXX Prioritisation of unsold consumer products for setting a prohibition against destruction]

1. The Commission shall, 18 months after entry into force of this Regulation and once every 12 months thereafter, publish an indicative list of product groups for which it intends to carry out impact assessments for under Article XX, taking into account:

- (a) the prevalence of the destruction of specific consumer products;**
- (b) comparative environmental impact resulting from such destruction.**
- (c) the information available including the information disclosed by economic operators pursuant to Article 20;**

2. The Commission shall when preparing the list referred to paragraph 1 consult the Ecodesign Forum referred to in Article 17 and the Ecodesign Expert Group referred to in Article 17a, and take account of their its views on the prioritisation of products subject to possible prohibitions of destruction of unsold consumer products referred to in Article XX.

Substances of Concern

1 Information requirements

Some MS support a wide definition of substances of concern and thereby a wide scope of the information requirement in Articles 7(2), point a) and 7(5), referring to the Chemicals strategy and the importance of tracking chemicals for circularity, while other MS have raised concerns about the definition of substances of concern and the information requirement being too extensive and the risk that these become too burdensome.

Although it is true Articles 7(2) point a) and 7(5) are framed in such a way that substances of concern *as a default option* should always be tracked if present in products or used during the life cycle of products, this requirement to track substances will not be applied automatically:

- The requirement under Article 7(5) to track chemicals is an ecodesign requirement and could thus only be established if the criteria in Article 5(5) are fulfilled, including the criterion according to which there should be no disproportionate administrative burden on manufacturers.
- There are provisions relating to verifiability of ecodesign requirement, which would apply also to requirements on chemicals.
- The Commission will in practice in many cases have to set thresholds for when the requirement will apply.
- The Commission will furthermore always have to follow the process outlined under Article 5(4) before setting out the information requirement e.g. do an impact assessment and consult with Member States Expert Group and the Stakeholder Forum, where Member States could advocate for duly motivated exceptions.
- The Commission retains the possibility to adopt no information requirements.

We propose to clarify that the Commission may set thresholds for when the information requirements apply. It could furthermore be clarified that information requirements on substances of concern for the product groups concerned will be set unless exceptions apply. The wording on exceptions could in line with Article 5 be changed to clarify how the Commission will always assess if exceptions are to be adopted.

[Article 7.5]

Unless otherwise provided for under the second paragraph of this Article, point (c), the information requirements referred to in paragraph 1 shall, enable the tracking of **all** substances of concern throughout the life cycle of products, unless such tracking is already enabled by another implementing **delegated** act adopted pursuant to Article 4 covering the products concerned and shall include at least the following:

- (a) the name of the substances of concern present in the product;
- (b) **where relevant**, the location of the substances of concern within the product;
- (c) the concentration, maximum concentration or concentration range of the substances of concern, at the level of the product, its main **relevant** components, or spare parts;
- (d) relevant instructions for the safe use of the product;
- (e) information relevant for disassembly, **recycling, re-use and end of life management**.

The Commission may, as appropriate for the product groups concerned, set thresholds for when the information requirements on substances of concern shall apply.

Where the Commission sets out information requirements in an implementing **a delegated** act adopted pursuant to Article 4, it shall **assess and where relevant**:

~~(a) where applicable, establish which substances fall under the definition in Article 2(28), point (e), for the purposes of the product groups covered;~~

(b) lay down deadlines for the entry into application of the information requirements referred to in the first subparagraph, with possible differentiation between substances; and

(c) provide **duly justified** exemptions for substances of concern or information elements from the information requirements referred to in the first subparagraph based on the technical feasibility or relevance of tracking substances of concern, the need to protect confidential business information or in other duly justified cases. Substances of concern falling under Article 2(28), within the meaning of point (a), paragraph 28 of Article 2, shall not be exempted if they are present in products, their relevant components or spare parts in a concentration above 0,1 % weight by weight.

(d) where relevant, refer to existing information requirements under Union law, or if not possible, ensure consistency with those requirements.

Exemptions referred to in the second subparagraph, point (c), may be provided based on the technical feasibility or relevance of tracking substances of concern, the need to protect confidential business information and in other duly justified cases.

In order to better reflect the meaning of Article 7(5), the Presidency proposes to amend recital 25 as follows:

Recital 25

[.....The Chemicals Strategy for Sustainability calls for minimising the presence of substances of concern in products, and ensuring the availability of information on chemical content and safe use, by introducing information requirements and tracking the presence of substances of concern throughout the life cycle of materials and products.Therefore, this Regulation should allow for the setting of requirements related to the tracking and communication of sustainability information, including the presence of substances of concern in products throughout their life cycle, including with a view to their decontamination and recovery when they become waste. Such a framework should aim to progressively cover all substances of concern in all products listed in working plans setting out the product groups the Commission intends to tackle.

Such requirements on the tracking of substances of concern should by default be included where an information requirement is to be set under this Regulation, after relevant impact assessment and consultation with stakeholders and experts has taken place. Such a requirement on substances of concern should always be specified in such a way that ensures the criteria applicable to ecodesign requirements . In order for the Commission to make sure such an information requirement does not entail disproportionate administrative negative impact on economic operators, the Commission should be allowed thus, amongst other, to lay down longer deadlines for the entry into application of the information requirements on certain substances of concern. The Commission should also be able to, in duly justified cases, provide exemptions from the requirements. For instance, an exemption based on technical feasibility may apply in cases where the presence of a substances in a product cannot be verified with the current available technologies. Threshold might also be relevant to set due to such reasons.

2 Ecodesign requirements

Article 5(9)

Article 5(9) aims at clarifying how the Commission will determine which substances fall under point c) of the definition of substances of concern in Article 2(28) by establishing criteria for this assessment. The intention is not to narrow the scope of the definition of substances of concern. Article 5(9) only refers to point c) of the definition of substances of concern and does not affect point a) or b) of the definition. With this proposal, we aim to bring more clarity on which substances are subject to the information requirements set out in Article 7(5). Furthermore, the identification of substances falling under point c) of the definition of substances of concern in Article 2(28) may be used as a basis for the Commission to establish restrictions on substances in accordance with Article 6(3). However, this will not be the only basis for restrictions as Article 6(3) applies to “substances” in general and not only to “substances of concern”.

MS have asked for more linguistic and legal clarity in Article 5(9). MS have also proposed to introduce a mechanism to consult MS experts and to consider technical aspects when determining which substances may negatively affect recycling. Based on these comments, and after further clarifications by the Commission, the Presidency proposes to amend Article 5(9) as follows:

For each In case the product group concerned contains substances by ecodesign requirements, the Commission shall **determine**, where relevant which substances is a substance of concern within the meaning of fall under the definition in point (c) of paragraph 28 of Article 2(28) taking into account, whether:

- (a) based on the state-of-the-art technologies, the substances make the re-use, **[remanufacturing, repairing]** or recycling process **substantially** more complicated, **costly, environmentally impactful** or energy- **or resource-demanding**,
- (b) the substances impair the technical properties or functionalities, the usefulness or the value of the recycled material or products manufactured from this recycled material,
- (c) the substances negatively impact cosmetic, aesthetic or **olfactory** properties of the recycled material. e.g. through its colour and smell,

In order to better reflect the wording of Article 5(9), the Presidency proposes to amend recital 22 as follows:

In particular, this Regulation should enable the Commission to set requirements which prevent substances that hinder circularity from being included in a product. The identification of such substances should be part of the Commission's assessment prior to the establishment of ecodesign criteria for a specific product group. When determining which substances that hinder circularity the Commission should, for instance, take into account whether a substance make the re-use or recycling more complicated or negatively affects the properties of the recycled material, e.g. through its colour or smell. Where a substance has already been established as being a substance that hinders circularity for another product group, this can give an indication that it also hinders circularity for other product groups. The identification of a substance as being a substance that hinders circularity could be used as a basis for analysing the introduction of restrictions in accordance with this Regulation. When determining which substances is of concern, the Commission should, as appropriate, consult stakeholders and the Member States Expert Group.
