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Cosmetics Europe Position Paper on the trilogue on the Ecodesign for Sustainable Products Regulation (ESPR) proposal

Cosmetics Europe represents the cosmetics and personal care industry in Europe. The vast majority of Europe's 500 million consumers use cosmetic and personal care products every day. Ranging from dermo-cosmetics, antiperspirants, fragrances, make-up and shampoos, to soaps, sunscreens and toothpastes, these products play an essential role in all stages of our life, contributing to their quality of life, health, hygiene and mental well-being, self-esteem, and social interactions.

Cosmetics Europe fully supports the objectives of the Ecodesign for Sustainable Products Regulation (ESPR) proposal and stresses that its measures must be implementable from an operational point of view and do not compromise the intellectual property and competitiveness of European companies. Accordingly, we suggest the following recommendations, further explained in the sections below:

1. The **definition of 'unsold consumer product'** (art. 2(37)) should only encompass products that are "fit for consumption or sale".
2. 'Recycling' should be excluded from the **definition of 'destruction'** (art. 2(35)) to avoid a ban on the recycling, running counter other Green Deal objectives.
3. Companies should be allowed to **not publicly disclose commercially sensitive information** with regard to the destruction of unsold consumer products (art. 20).
4. Companies should not be obliged to disclose information on the destruction of unsold consumer **products that are exempted from a destruction ban** (art. 20(5)).
5. **Additional elements** on transition periods, definitions, substances of concern, supply chain communication, and product groups prioritisation are included in the last section of the paper.

1. The definition of ‘unsold consumer product’ should only encompass products that are “fit for consumption or sale”

Cosmetics Europe stresses that the definition of ‘unsold consumer goods’ should be limited to products that is fit for consumption or sale. This definition encompasses **any lawful consumer products that are offered for sale and consumption**, excluding on the contrary products not intended for sale (e.g., samples or prototypes) and counterfeit products.

<u>COM Proposal</u>	<u>Council General Approach</u>	<u>EP adopted position</u>	<u>Cosmetics Europe recommendation</u>
Article 2(37) ‘unsold consumer product’ means any consumer product that has not been sold or that has been returned by a consumer in view of their right of withdrawal in accordance with Article 9 of Directive (EU) 2011/83/EU;	Article 2(37) ‘unsold consumer product’ means any consumer product that has not been sold or that has been returned by a consumer in view of their right of withdrawal in accordance with Article 9 of Directive (EU) 2011/83/EU or, where applicable, in view of the commercial guarantee for withdrawal provided by the retailer regarding the product concerned.	Article 2(37) ‘unsold consumer product’ means any consumer product <i>fit for consumption or sale</i> that has not been sold <i>including surplus, excessive inventory, overstock and deadstock, including products</i> returned by a consumer in view of their right of withdrawal in accordance with Article 9 of Directive (EU) 2011/83/EU;	Article 2(37) ‘unsold consumer product’ means any consumer product <i>fit for consumption or sale</i> that has not been sold or that has been returned by a consumer in view of their right of withdrawal in accordance with Article 9 of Directive (EU) 2011/83/EU;

2. ‘Recycling’ should be excluded from the definition of ‘destruction’ to avoid a ban on the recycling, running counter other Green Deal objectives.

Cosmetics Europe fully supports the ban on the unjustified destruction of unsold goods. However, **manufacturers should be able to choose the alternative treatments to destruction best suiting the characteristics of their products**. In this respect, both the EP (AM 62) and the Council (recital 46) treat recycling as a destruction operation. **Equating ‘recycling’ to ‘destruction’ would have the direct negative consequence of prohibiting the recycling of**

unsold goods falling under product groups subject to a ban on the destruction of unsold consumer products. The assumption behind the EP and Council's position¹ is that certain products are manufactured for immediate recycling and that banning recycling would be the only way to limit ex-ante companies' production. This assumption finds no ground for many product categories, including cosmetics and personal care products. We understand that the problem of overproduction and massive recycling of unsold products may be a real issue in certain sectors, but **it seems extremely dangerous to allow for a horizontal ban on recycling without an appropriate sectoral/product group impact assessment.**

For these reasons, **Cosmetics Europe suggests excluding recycling from the definition of 'destruction'** to ensure that future prohibitions on the recycling of unsold goods is avoided; or **in alternative clarify that a ban on recycling will be assessed on a case-by-case basis for each product group** falling under the ESPR, through delegated acts as per article 20.3 and after an impact assessment.

<u>COM Proposal</u>	<u>Council General Approach</u>	<u>EP adopted position</u>	<u>Cosmetics Europe recommendation</u>
Article 2(35) 'destruction' means the intentional damaging or discarding of a product as waste with the exception of discarding for the only purpose of delivering a product for preparing for re-use or remanufacturing operations;	Article 2(35) 'destruction' means the intentional damaging or discarding of a product as waste with the exception of discarding for the only purpose of delivering a product for preparing for re-use or remanufacturing operations;	Article 2(37) 'destruction' means the intentional damaging or discarding of a product as waste with the exception of discarding for the only purpose of delivering a product for preparing for re-use, refurbishing or remanufacturing operations;	Article 2(37) 'destruction' means the intentional damaging or discarding of a product as waste with the exception of discarding for the only purpose of delivering a product for preparing for re-use, refurbishing, recycling or remanufacturing operations;
	Recital (46) <i>The concept of destruction as outlined in this</i>		Deleted.

¹ Council general approach on ESPR 9014/23, recital 46, 15 May 2023.

	<i>Regulation should cover the last three activities on the waste hierarchy as defined in Directive 2008/98/EC: recycling, other recovery and disposal. Remanufacturing and preparation for re-use should furthermore not be considered destruction. While recycling is an important waste treatment activity for a circular economy, it is unreasonable that products are manufactured only to immediately be recycled, hence the inclusion of recycling in the concept of destruction.</i>		
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3. Companies should be allowed to not publicly disclose commercially sensitive information with regard to the destruction of unsold consumer products

Cosmetics Europe acknowledges the two-step approach to first mandate economic operators to disclose the quantity of unsold consumer products discarded and, afterwards, to prohibit the destruction of unsold consumer products in the sectors where this practice is more widespread and unjustified. However, **the ESPR should not require companies to publicly disclose business sensitive information which may impact their competitiveness.** For instance, providing the number of unsold products and their weight (as per Council's General Approach article 20(1)(a)) or their percentage (as per EP's AM156), or all the three of them, could enable

competitors to find out, by product category, the quantities produced and sold, the company's commercial strategy, and other commercially sensitive information. As an alternative, Cosmetics Europe suggests that **companies should be obliged to disclose the requested information only to the European Commission and at the request of the national competent authorities, while releasing more general, non-sensitive information (for instance, only one of the indicators mentioned above) to the public.**

<u>COM Proposal</u>	<u>Council General Approach</u>	<u>EP adopted position</u>	<u>Cosmetics Europe recommendation</u>
Article 20(1)(a) the number of unsold consumer products discarded per year, differentiated per type or category of products;	Article 20(1)(a) the number and weight of unsold consumer products discarded per year, differentiated per type or category of products;	Article 20(1)(a) the number and percentage of unsold consumer products discarded per year, differentiated per type or category of products;	Article 20(1)(a) (a) the number or percentage of unsold consumer products discarded per year, differentiated per type of category of products;

4. Companies should not be obliged to disclose information on the destruction of unsold consumer products that are exempted from a destruction ban

Disclosure obligations on the destruction of unsold consumer goods as of article 20 of the Commission proposal do not apply to products if and when they are subject to a destruction ban. However, the Commission proposal includes a provision requiring companies to disclose information on the destruction of unsold consumer products exempted from a destruction ban (art. 20(5)). This provision is supported by both the EP and Council (art. 20c(2)(c) in the General Approach). Cosmetics Europe considers that **if a product is exempted from a destruction ban, its destruction would be fully justified under the EU law by virtue of one of the reasons listed in art. 20(3) of the Commission proposal and therefore the related information should not be subject to a disclosure requirement.** In fact, the principle behind disclosing this information is to appreciate whether a destruction ban for a given product group should be adopted or not. Therefore, Cosmetics Europe suggests removing the obligation to disclose information on the destruction of unsold consumer products exempted under article 20(5) of the Commission proposal. In any event, this information would be available to the competent authorities for the purpose of verifying compliance with the regulation's requirement.

<u>COM proposal</u>	<u>Council General Approach</u>	<u>EP adopted position</u>	<u>Cosmetics Europe recommendation</u>
Article 20(5) Where unsold consumer products are destroyed under an exemption referred to in paragraph 3, second subparagraph, the responsible economic operator shall disclose on a freely accessible website or otherwise make publicly available: (a) the number of unsold consumer products destroyed; (b) the reasons for their destruction, referring to the applicable exemption; (c) the delivery of the products destroyed to recycling, energy recovery and disposal operations in accordance with the waste hierarchy as defined by Article 4 of Directive 2008/98/EC. The details and format for the disclosure of information provided in the	Article 20c(2)(c) (c) the details and format of the reporting obligation of economic operators when destroying unsold consumer products under an exemption;	Article 20(5) Where unsold consumer products are destroyed under an exemption referred to in paragraph 3, second subparagraph, the responsible economic operator shall disclose on a freely accessible website or otherwise make publicly available: (a) the number <i>and percentage</i> of unsold consumer products destroyed; (b) the reasons for their destruction, referring to the applicable exemption; (c) the delivery of the products destroyed to recycling, energy recovery and disposal operations in accordance with the waste hierarchy as defined by Article 4 of Directive 2008/98/EC. The details and format for the disclosure of information	Article 20(5) <i>Deleted.</i>

implementing act adopted pursuant to paragraph 2 shall apply to the information to be disclosed pursuant to this paragraph, unless the delegated act adopted pursuant to paragraph 3 provides otherwise.		provided in the implementing act adopted pursuant to paragraph 2 shall apply to the information to be disclosed pursuant to this paragraph, unless the delegated act adopted pursuant to paragraph 3 provides otherwise.	
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Moreover, Cosmetics Europe agrees with the EP proposal to include **hygiene as an exemption reason (AM 168) as well as with the Council's inclusion of exemptions** for products not fit for sale/consumption, expired products, and products for which the destruction is the option with the least negative environmental impact (Council's General Approach art. 20c(5)(b), (c), (d), (f), and (g)).²

<u>COM proposal</u>	<u>Council General Approach</u>	<u>EP adopted position</u>	<u>Cosmetics Europe recommendation</u>
Article 20(3) (a) health and safety concerns; (b) damage to products as a result of their handling or detected after a product has been returned by a consumer; (c) fitness of the product for the	Article 20c(5) a) health and safety reasons; <i>b) the products are damaged as a result of their handling or detected after a product has been returned by a consumer, despite the measures taken</i>	Article 20(3) (a) health, <i>hygiene</i> and safety concerns; (b) damage to products <i>that cannot be repaired in a cost-effective manner</i> as a result of their handling or detected after a product has been returned;	Support a mix between the Council General Approach and the EP suggestion related to hygiene reasons: a) health, <i>hygiene</i> and safety reasons; (b) damage to products as a result of their handling or

² Point (e) in the Council General Approach is not supported as CE suggests that counterfeit products are excluded from the definition of "unsold consumer product" – see section 2 in this paper – and therefore an exemption addressing them is not required.

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, remanufacturing or recycling.	<i>in accordance with Article 20aa;</i> 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 or recycling; <i>e) products which are illegal under national or Union law including non-compliant products, counterfeit products, or products rendered unsellable due to infringement of intellectual property rights;</i> <i>f) products exceeding their expiry date;</i> <i>g) products for which destruction is the option with the least negative environmental impact.</i>	(c) refusal of products for donation, preparing for re-use or remanufacturing; <i>(d) counterfeit products.”</i>	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 or recycling; <i>e) products exceeding their expiry date;</i> <i>g) products for which destruction is the option with the least negative environmental impact.</i>
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5. Additional elements

- a. Cosmetics Europe agrees with the Council position (art. 7a(f)) to ensure a **minimum transition period of at least 18 months** between the adoption of ecodesign requirements and their application.
- b. Sufficient time transition time should also be granted to companies to get ready to disclose information on the destruction of unsold goods. Cosmetics Europe supports the Council proposal **requiring companies to start disclosing information on a financial year basis, starting in 2026** for financial year 2025 (art.20).
- c. We also support the EP suggestion (AM57) that the **definition of ‘environmental footprint’ should include methodologies based on the PEF or other scientific methods**, which is also in line with the reasoning behind the Commission’s Green Claims Directive proposal.
- d. Cosmetics Europe believes that transparency along the supply chains is paramount to allow manufacturers to integrate relevant data in the digital product passport but at the same time that confidential business information should be protected. **Suppliers of substance or mixtures or articles shall share free-of-charge relevant information to downstream economic operators to facilitate compliance with the ecodesign requirements, in a non-discriminatory way and without creating administrative burdens.** Therefore, we suggest a mix between the Council’s General Approach (art31(a)) and the EP position (AM183).
- e. In view of prioritising products group as per art. 16 of the ESPR proposal, Cosmetics Europe agrees with the Council that **prioritisation should be based on an impact assessment, as it is already happening via the JRC. Cosmetic and personal care products should not be prioritised** because the levels of impact and potential for improvement in relation to most environmental categories identified by the JRC do not justify their prioritisation in the first wave of sectors. In particular, those considered as “highly or medium impacted” – water, biodiversity, waste generation and management, air – by the JRC³ have already been addressed through legislative or voluntary initiatives (e.g., revisions of CLP and REACH, REACH restriction on intentionally added microplastics, the proposal on Urban Wastewater Treatment Directive, ABS regulation, Packaging and Packaging Waster Regulation, VOC Paints directive); while “low impacted” areas – climate change, soil, and lifetime extension – per se do not justify a prioritisation.
- Concerning substances of concern (SoC), Cosmetics Europe support a refined definition clarifying that **SoC are those hazardous substances that hinder reuse or recycling of materials based on the available recycling technologies** (addition at the end of art.2(27)(i)). This will ensure coherence between the ESPR (focusing on regulating substances that hinder recycling) and existing EU chemical legislation, primarily REACH (regulating Substances of Very High Concern (SVHCs) and hazardous substances based on

³ JRC Report – Ecodesign for Sustainable Products Regulation - preliminary study on new product priorities, 2023.

chemical safety). For the same reasons, Cosmetics Europe also suggests supporting the Council proposal on art. 6(3) clarifying that ecodesign requirements can “restrict the presence of substances in products for reasons relating primarily the improvement of the environmental sustainability of the product”. Finally, Cosmetics Europe supports the combined EP and Council amendments to art. 7(5): **the tracking of SoC should be focused on key substances for each product group and that are present in products in concentrations above a certain threshold**. The identification of these key SoC should take place in cooperation with the relevant industry and value chain actors. This would ensure a practical and scientifically justified way to check for all of these substances.