To the attention of the European Commission

Prevention of technical barriers

Brussels, 22 March 2021

Cosmetics Europe comments on the draft decree on the identification of hazardous substances in waste-generating products, submitted by France to the European Commission (TRIS notification 2020/833/F)

Cosmetics Europe, the European trade association representing the cosmetics and personal care industry, recognizes the strength of the EU chemicals regulation and the cosmetics sectorial legislation as effective tools to protect consumers and the environment from the potential risk of certain chemical substances. Cosmetics Europe also fully supports the development of the new European chemicals policy.

Cosmetics Europe would like to raise its concerns regarding the draft decree on the identification of hazardous substances in waste-generating products (the "Draft Decree") submitted by France through TRIS (notification number 2020/833/F). This Draft Decree provides definitions for the terms "hazardous substances" as referred to in article 13-I of the French law n° 2020-105 of 10 February 2020 against waste and for a circular economy (the "AGEC Law").

Objectives of article 13-I of the AGEC Law and the Draft Decree

The objective of article 13-I of the AGEC Law and the Draft Decree is to enhance information towards consumers in France regarding in particular the presence of dangerous substances in waste-generating products. In the section dedicated to the brief statement of grounds of the Draft Decree as indicated on the webpage of the TRIS notification 2020/833/F, it is mentioned that "*in order to allow consumers to make informed choices, the* [French] *legislator wished to improve information on the presence of dangerous substances that could have an impact on health and the environment*".

Article 13-I of the AGEC Law provides that manufacturers and importers of waste-generating products have to inform consumers on the presence of dangerous substances, in coherence with the law of the European Union, by marking, labelling, displaying or any other appropriate means, as well as in an electronic format, visible or accessible to consumers when they buy the product.

The Draft Decree, in its article 1, defines the terms "dangerous substances", for that purpose, as:

- substances of very high concern ("SVHC") included in the list mentioned in article 59(1) of Regulation (EC) No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals ("REACH"), and published in accordance with that list; and

- substances presenting a level of concern comparable to SVHC which are not on the list mentioned in article 59(1) REACH, but which are listed by a French ministerial order after consulting the French Agency for Food, Environmental and Occupational Health and Safety ("ANSES").

It has not be noted that the ministerial order defining the content of that list has not been adopted yet.

Concerns related to the impact on the internal market of the requirements imposed by article 13-I of the AGEC Law and the Draft Decree

Cosmetics Europe considers that article 13-I of the AGEC Law and its Draft Decree are not in line with several initiatives adopted at the EU level, go beyond the existing EU harmonized legislations and could impair the free movement of goods by creating unjustified barriers to the EU internal market.

These elements are developed further in the following analysis.

1. **Absence of consistency with several EU initiatives**

The obligation imposed on manufacturers and importers of waste-generating products to inform consumers on the presence of dangerous substances does not seem in line neither with the European Chemicals Strategy for Sustainability ("CSS") nor with the announced revision of REACH. The adoption of national measures will lead to a fragmentation within the EU internal market in the absence of and ahead of clear rules still to be further defined.

2. **Requirements beyond EU harmonized legislations**

Despite the fact that article 13-I of the AGEC Law mentions that the additional national information requirements are in coherence with the law of the European Union, it has to be noted that both article 13-I of the AGEC Law and the Draft Decree go beyond the EU harmonized legislations by extending the information requirements on the presence of hazardous substances in products.

On the one hand, these French regulations go beyond the information requirements laid down in REACH in several ways. First, while article 33.2 REACH states that the information to be provided to consumers is upon request, the AGEC Law and the Draft Decree impose that the information is to be provided proactively to all consumers when they buy a product on the French market. Second, neither the AGEC Law nor the Draft Decree refer to the threshold specified in article 33.2 REACH for the obligation of informing consumers. Third, the new French communication requirements will not only concern SVHC as listed in article 59(1) REACH, but will also be imposed on other substances that the French government will list in a ministerial order after consulting the ANSES. Fourth, despite article 33.2 REACH is not prescriptive on the way to provide information to consumers, the French legislations impose that the information is communicated by marking,

labelling, displaying or any other appropriate means, as well as in an electronic format and is visible or accessible to consumers when they buy the product.

On the other hand, the (EC) No 1223/2009 of 30 November 2009 on cosmetic products ("Cosmetic Products Regulation" or "CPR"), which is a *lex specialis*, lays down for cosmetic products the labelling requirements (article 19 CPR) and the requirements related to the access to information to the public (article 21 CPR), in compliance with its objective of ensuring the functioning of the internal market and a high level of protection of human health (article 1 CPR).

3. Breach of the EU internal market rules

As developed hereunder, by imposing additional national information requirements, article 13-I of the AGEC Law and its Draft Decree create unjustified restrictions to the free movement of goods (article 28 of the TFEU) and must be considered as measures having an effect equivalent to quantitative restrictions (article 34 TFUE).

a. Barriers to the EU internal market

The fact that the new information requirements imposed by article 13-I of the AGEC Law the Draft Decree are only applicable in one Member State will have as a consequence that manufacturers and suppliers of products willing to place their products on the French market will have to comply with specific additional requirements only for the French market.

Besides, these additional requirements, as explained above under section 2, are not in line with the applicable EU regulatory framework. As stated in the second recital of REACH, "*the efficient functioning of the internal market for substances can be achieved only if requirements for substances do not differ significantly from Member State to Member State*" and as provided in article 128.1 REACH, "*Member States shall not prohibit, restrict or impede the manufacturing, import, placing on the market or use of a substance, on its own, in a mixture or in an article, falling within the scope of this Regulation, which complies with this Regulation and, where appropriate, with Community acts adopted in implementation of this Regulation*". Article 9 of the Cosmetic Products Regulation mentions that "*Member States shall not, for reasons related to the requirements laid down in this Regulation, refuse, prohibit or restrict the making available on the market of cosmetic products which comply with the requirements of this Regulation*".

b. Unjustified restrictions to trade in the EU internal market

The restrictions on free movement of good resulting from the new information requirements imposed by France cannot be justified, because these restrictions (i) are not suitable to achieve the objective of better informing consumer on the presence of dangerous substances in products and (ii) are not proportionate. Therefore, article 13-I of the AGEC Law and its Draft Decree infringe the EU internal market rules.

The restrictions are not suitable to achieve the objective of enhancing consumer information on the presence of dangerous substances

The objective pursued by article 13-I of the AGEG Law and its Draft Decree is to provide consumers with transparent information on the presence of dangerous substances in products in the French market with the objective of allowing "*consumers to make informed choices*" on "*dangerous substances that could have an impact on health and the environment*".[1]

It has first to be underlined that the purpose of REACH "*is to ensure a high level of protection of human health and the environment* […] *as well as the free circulation of substances on the internal market*".[2] It is for manufacturers, importers and downstream users[3] to comply with the provisions laid down in REACH[4] and to ensure that they manufacture, place on the market or use substances that do not adversely affect human health or the environment.[5]

Besides, the Cosmetic Products Regulation establishes rules to be complied with by any cosmetic product made available on the market, in order to ensure the functioning of the internal market and a high level of protection of human health (article 1 CPR). As a result, only safe cosmetic products for human health can be placed on the European market, based on scientific evidence available (article 3 CPR). Further, the combination of the obligations of the responsible person[6] (articles 4 and 5 CPR) and distributors (article 6 CPR) and the in-market controls (article 22 CPR) contributes to having only safe cosmetic products on the market.

Having regard to the solid EU legal framework ensuring that substances manufactured, placed on the market or used in accordance with REACH do not adversely affect human health or the environment and that only cosmetic products safe for human health are placed on the market, it is worrying that the national ANSES, in its opinion of 5th October 2020, indicates that based on its experience on health security with respect to exposure to chemical substances, the list of hazardous substances communicated to consumers should be supplemented by other mechanisms of actualization, on the basis of ANSES recommendations for SVHC or for substances not falling within the scope of REACH.[7]

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[1] See the section dedicated to the brief statement of grounds of the Draft Decree on the provision of information identifying of hazardous substances in waste-generating products, as indicated on the webpage of the TRIS notification 2020/833/F.

[2] Article 1.1 REACH.

[3] A downstream user is defined under article 3.13 REACH as a natural or legal person who uses a substance in the course of its industrial or professional activities. A distributor or a consumer is not a 'downstream user' under REACH.

[4] Article 1.2 REACH.

[5] Article 1.3 REACH.

[6] For each cosmetic product placed on the EU market, a responsible person is designated within the EU in order to ensure compliance of the cosmetic product with the relevant obligations set out in the Cosmetic Products Regulation (article 4 CPR).

[7] ANSES, *Note d'appui scientifique et technique de l'Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail relatif à la mise en œuvre des dispositions relatives à l'information des consommateurs sur les substances chimiques dans les produits, prévues à l'article 13 de la loi n°2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire dite « loi AGEC »*, 5 October 2020.

Providing consumers with additional information on dangerous substances when they buy a product will not enhance consumer information but will to the contrary create confusion for consumers by giving them the wrong indication that the products might be unsafe, whilst it is not the case as the EU regulatory framework ensures that only cosmetic products safe for human health are placed on the market.

Surprisingly, the new information requirements imposed by article 13-I of the AGEG Law and its Draft Decree on the manufacturers and importers of products in France will not be requested to the other actors of the supply chain.

The restrictions are not proportionate

The restrictions on trade between Member States resulting from the new information requirements imposed by article 13-I of the AGEG Law and its Draft Decree are not proportionate to the objective pursued and go beyond what is necessary to achieve this objective.

First, these new information requirements will create disproportionate burden on the manufacturers and importers which place products on the French market as they will have to provide extra information in addition to the EU requirements only for those products placed on the French market.

Second, these new obligations adopted at the French level, while creating a fragmentation within the EU internal market, will not enhance consumers information or comprehension, to the contrary.

Third, article 13-I and its Draft Decree create several legal uncertainties, in particular the absence of criteria on which the lists of dangerous substances will be adopted by the ANSES.

Requests to the European Commission

Cosmetics Europe asks the European Commission to examine the Draft Decree on the identification of hazardous substances in waste-generating products towards the EU internal market rules and to extend the standstill period as necessary.

France should also be requested to postpone the adoption of its national measures related to information requirements on the identification of hazardous substances in waste-generating products and await harmonized approached to be defined under the Chemicals Strategy for Sustainability (CSS).