

Brussels, 20th December 2021

Cosmetics Europe comments on the draft decree on consumer information on the environmental qualities and characteristics of waste-generating products (TRIS notification 2021/644/F)

Cosmetics Europe represents the cosmetics and personal care industry in Europe. Ranging from antiperspirants, fragrances, make-up and shampoos, to soaps, sunscreens and toothpastes, cosmetics and personal care products play an essential role in all stages of our life. European citizens use cosmetic products as part of their daily lives, serving their essential needs and expectations. These needs and expectations drive our industry as well as delivering innovative products that enhance consumers' well-being and quality of life and boost their self-esteem.

Cosmetics Europe supports the objectives of the European Green Deal and Digital transition.

Within this European context, Cosmetics Europe has concerns regarding the French draft implementing decree on environmental qualities and characteristics of waste-generating products, submitted by France through TRIS with notification number 2021/644/F (the "Draft Decree"). The Draft Decree lays down the conditions for the application of article L. 541-9-1 of the French Environmental Code and article 13-I of the Anti-Waste Law for a Circular Economy of 10 February 2020 (the "AGEC Law").

The below developments focus on the biodegradability claims related to formula and on consumer information related to hazardous substances.

Cosmetics Europe considers that, by prohibiting biodegradable claims related to formula and by imposing additional consumer information requirements on the presence of hazardous substances for products present on the French market (i.e. in physical shops and online), the Draft Decree is not in line with several EU's initiatives, goes beyond and is in breach with existing EU harmonised legislation and could impair the free movement of goods by creating unjustified barriers to the EU internal market.

BIODEGRADABLE CLAIMS RELATED TO THE FORMULA

1. Absence of consistency of national requirements with an EU initiative

The French national measures banning the biodegradation claims referring to the biodegradability content of organic ingredients in a formulation with main emission path to waste water, are contrary to the European Commission's vision on sustainability.

Indeed, the use of biodegradable substances in formulated products meets the objective of the Chemical Strategy for Sustainability (“CSS”) which aims to *“promote and mainstream the sound management of chemicals through their life cycle and the transition to a toxic-free and circular economy”* in the context of which the European Commission will *“ensure the development, commercialisation, deployment and uptake of ‘safe and sustainable by design’ substances, materials and products”*, by encouraging industry to formulate products without hazardous substances.

It is therefore questionable that the Draft Decree prohibits biodegradable claims while the use of biodegradable substances is in line with the CSS. Adoption of national measures whilst an EU initiative is being developed is contrary to the principle of sincere cooperation between Member States and the EU as laid down in article 4(3) of the Treaty on the EU (“TEU”) and will lead to the fragmentation of the EU Internal Market.

2. National requirements in contradiction with EU harmonised legislation

Overly general and vague prohibition of biodegradable claims is contrary to the 2005/29 Unfair Commercial Practices Directive (“UCPD”). This directive establishes 'maximum harmonisation' as regards consumer information. The Court of Justice of the EU states that national regulations stricter than this directive are inevitably incompatible with it.¹

3. Breach of the EU Internal Market rules

As developed hereunder, a national measure prohibiting biodegradable claims related to formula creates 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 TFEU). Article 1 of the Draft Decree therefore infringes the EU Internal Market rules.

a. Barriers to the EU Internal Market

Producers, importers, distributors or other parties willing to place products on the French market (i.e. in physical shops and/or on-line) will need to have these products adapted specially for the French market by removing any biodegradability claims related to formula. This will create disproportionate administrative burden and costs due to relabeling and organization of separate production runs.

Such specific national requirements would result in a barrier to trade within the EU, and would not be in line with the free movement of goods principle.

b. Unjustified restrictions to trade in the EU Internal Market

A national prohibition of biodegradable claims related to the formula would neither be beneficial for the environment nor for consumers.

¹ See for example, decisions C-261/07 and C-299/07 of 23 April 2009 ; C-304/08 of 14 January 2010 ; C-540/08 of 9 November 2010 ; C-288/10 of 30 June 2011.

To the contrary, biodegradability claims could help consumers in their purchase decisions, for example by selecting products with high biodegradability content. Indeed, products with high biodegradability content degrade easily in sewage treatment plants and consequently, contribute to improve water quality in effluent receiving environments. Such products contribute to water resources protection and any potential environmental impact of these products is reduced.

Besides, biodegradability of formula is not linked to inappropriate behaviour of consumers in terms of waste sorting. As some cosmetic products could end in waste water (e.g. soap, toothpaste and shampoo), it is important to encourage innovation and the development of biodegradable formula.

Scientifically based and internationally ratified and harmonised methods exist to assess the biodegradation of substances used in formulated products, such as the Organization for Economic Co-Operation and Development (“OECD”) guidelines on biodegradability² and the European Chemicals Agency (“ECHA”) suggested test methods listed in the ECHA Persistence, Bioaccumulation, Toxicity (“PBT”) guidance³.

In addition, EU consumers are familiar with biodegradable claims, as indicated in a study made by the European Commission on environmental claims.⁴

HAZARDOUS SUBSTANCES

The Draft Decree lays down the rules related to the information to be provided to consumers regarding the environmental qualities and characteristics of consumer goods, including cosmetic products. In particular, the Draft Decree imposes additional information requirements related to the presence of hazardous substances, defined as substances of very high concern (“SVHC”) listed in REACH candidate list.^{5 6}

The fact that France adopts national measures imposing additional consumer information on hazardous substances while there is an upcoming revision of the Regulation (EC) No 1907/2006 of on the Registration, Evaluation, Authorisation and Restriction of Chemicals (“REACH”) is contrary to the principle of sincere cooperation (article 4(3) of TEU) and would lead to the fragmentation of the EU Internal Market.

Furthermore, the requirements imposed by the Draft Decree go beyond REACH. First, while article 33.2 of REACH specifies information requirements for hazardous substances in articles under specific conditions, France extends such obligations to mixtures and other substances.

² OECD, Guideline for Testing of Chemicals, Ready Biodegradability, adopted on 17th July 1992.

³ ECHA, Guidance on Information Requirements and Chemical Safety Assessment, Chapter R.7b: Endpoint specific guidance, Version 4.0, June 2017.

⁴ European Commission, Consumer Market Study on Environmental Claims for non-food products, 2014.

⁵ <https://echa.europa.eu/candidate-list-table>

⁶ This is stated by the decree 2021-1285 of 1st October 2021 which completes the Draft Decree.

https://www.legifrance.gouv.fr/download/pdf?id=qRpFOTNcN_R1TAogK7qOOostvrbVw7vibSIX3L_C8eE=

Second, whereas article 33.2 REACH states that the information to be provided to consumers is upon request, the Draft Decree imposes that information is to be provided proactively to all consumers with the words “contains a hazardous substance” or “contains a substance of very high concern” accompanied by the name of each hazardous substance present in the product.

Moreover, the Draft Decree creates legal uncertainty by leaving to the French environment minister the possibility to determine whether the additional information on hazardous substances will have to be displayed physically on the label or in a digital way.

These national requirements would result in a barrier to trade within the EU, and would not be in line with the free movement of goods provisions in particular of REACH⁷.

Finally, these restrictions are not proportionate and will create a fragmentation within the EU Internal Market.

Requests to the European Commission

Cosmetics Europe calls on the European Commission to examine the Draft Decree towards the EU Internal Market rules, the EU initiative CSS and the upcoming revision of REACH and to extend the standstill period as necessary.

⁷ 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”.