To the attention of the European Commission

Prevention of technical barriers

Brussels, 22 March 2021

Cosmetics Europe comments on the draft decree on the provision of information identifying endocrine disruptors in a product, submitted by France to the European Commission (TRIS notification 2020/832/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 provision of information identifying endocrine disruptors in a product (the "Draft Decree"), notified by France through TRIS (notification number 2020/832/F). This Draft Decree specifies the type of information on endocrine disruptors in products to be communicated to the public by electronic means according to article L. 5232-5 of the French Public Health Code, introduced by article 13-II of the law against waste and for a circular economy (the "AGEC Law").

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

The objective of article 13-II of the AGEC law is to provide consumers in France with transparent information on the presence of a substance with endocrine-disrupting properties in products. Article 13-II of the AGEC Law provides that anyone placing on the French market products intended for consumers which contain at the end of the manufacturing process, substances which the French Agency for Food, Environment and Occupational Health & Safety ("ANSES") has indicated as having proven, presumed or suspected endocrine-disrupting properties, shall make publicly available by electronic means, for each of the concerned product, the information needed to identify the presence of these substances in the products.

The Draft Decree inserts in the French Public Health Code a new section[1] dedicated to the information on endocrine disruptors in products. This new section provides that the French government shall lay down, through ministerial orders, the lists of substances with proven, presumed or suspected endocrine-disrupting properties, after consultation of the ANSES and that such information shall be available on a public database accessible via the Internet.

[1] This new Section 3 is inserted after Section 2 of Chapter II of Title III of Book II of Part 5 of the Public Health Code.

This new section in the French Public Health Code also specifies that the French government shall adopt a ministerial order, after consulting the ANSES, laying down the categories of products presenting a particular exposure risk (in the case of substances with suspected endocrine-disrupting properties) with regard to the populations exposed, the conditions of use and disposal of these products and other relevant criteria.

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

Cosmetics Europe considers that article 13-II of the AGEC Law and its Draft Decree are not in line with several initiatives adopted at the EU level, go beyond 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 operators willing to place products on the French market to communicate to consumers substances, identified at national level as having proven, presumed or suspected endocrine-disrupting properties and products containing suspected endocrine-disrupting substances does not seem in line neither with the European Chemicals Strategy for Sustainability ("CSS") nor with the announced revision of Regulation (EC) No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals ("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**

Although information requirements on endocrine disruptors are harmonized at the EU level and laid down in article 33 REACH, article 13-II of the AGEC Law and its Draft Decree extends the information requirements for market operators willing to place products on the French market.

The fact that article 13-II of the AGEG Law and its Draft Decree do not expressly mention that the identification of known/presumed/suspected substances containing endocrine disruptors are to be made in compliance with the EU harmonized criteria raise concerns.

Furthermore, neither article 13-II of the AGEG nor its Draft Decree mention the concentration threshold by which the information requirements are applicable.

3. Breach of the EU internal market rules

As developed hereunder, by imposing national additional information requirements, article 13-II 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 requirements imposed by the Draft Decree do not exist in other Member States will have as a consequence that operators 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*".

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 endocrine disruptors and (ii) are not proportionate. Therefore, article 13-II 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 endocrine disruptors

The objective pursued by article 13-II of the AGEG Law and its Draft Decree is to provide consumers in France with transparent information on the presence of a substance with endocrine-disrupting properties in products.

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

[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.

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 (EC) No 1223/2009 of 30 November 2009 on cosmetic products ("Cosmetic Products Regulation" or "CPR"), 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.

Providing consumers with lists of substances having proven, presumed or suspected endocrine-disrupting properties and with categories of products containing suspected endocrine-disrupting substances will not enhance consumer information but will to the contrary create confusion for consumers by giving them the wrong indication that these substances and 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.

Further, such additional information could be confusing not only for French consumers but also for consumers present in other Member States and even outside the EU, as the information will be available on the Internet.

Surprisingly, the new information requirements imposed by article 13-II of the AGEG Law and its Draft Decree on the operators who placed products on the French market are not 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-II 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 operators 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, article 13-II and its Draft Decree create several legal uncertainties, in particular the absence of criteria on which the lists of substances and categories of products will be adopted.

[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).

Requests to the European Commission

Cosmetics Europe asks the European Commission to examine the Draft Decree on the provision of information identifying endocrine disruptors in a product towards the EU internal market rules and to extend the standstill period as necessary.