EBCA EUROPEAN BRANDED CLOTHING ALLIANCE

CONTRIBUTION TO THE CONSULTATION ON THE DRAFT DELEGATED ACT: BAN ON THE DESTRUCTION OF UNSOLD GOODS AND DEROGATIONS

30 September 2024

Introduction

EBCA – the European Branded Clothing Association - representing leading global retail clothing brands welcome the work by the European institutions to determine exemptions to the prohibition to destroy unsold goods. This will ensure that no products will be destroyed without substantiate reasons.

While unsold goods have the potential to greatly contribute to the circularity of the sector if the right approach is implemented, always prioritizing reusability and ensuring the potential of pre-consumer goods in fiber-to-fiber recyclability, EBCA would like to recall that the goal and ambition of commercial practices are to keep the stock of unsold products at a minimum or to avoid it altogether. This is a fundamental interest of the companies to ensure commercial profitability. Destruction comes with a cost. No product is made just to be destroyed at a later stage. Before sending products for destruction (incl. recycling), the possibility of reprocessing is always evaluated.

EBCA would like to highlight that equating recycling with destruction is conceptually incorrect. Recycling is a recovery operation, unlike incineration and landfilling, which are both disposal operations.

In accordance with the waste hierarchy, the following options are prioritized by brands, in order:

1- Repackaged and sold as usual: If the damage is minimal, the garment is repackaged and sold at its regular price. At the end of the season, these garments are offered at discounted prices through internal sales or sold in outlet stores.
2- Repaired: Products with minor defects, such as small stains, loose threads, buttons, zippers, are typically sent for repair. This includes processes like cleaning, sewing, and minor shoe repairs. These products reenter the consumer market.
3- Donation: Where not possible due to economic, technical, operational or environmental reasons, products that did not find a market and remain fit for use are donated to charity partners.
4- Recycling: Where donations are rejected, the waste hierarchy is followed and the garment is recycled if possible.
5- Incineration: Garments exhibiting risks that cannot be corrected are incinerated as a last resort.

Summary of key principles

- **We welcome the recognition by the background document that derogations should not be only assessed in the light of economic viability or "cost-effectiveness" as there can be technical limitations.** Derogations should rather

be assessed if they are fit for purpose. If products cannot be reprocessed/repaired due to technical, operational or environmental reasons, appropriate waste management practices such as recycling should be allowed to be employed.

- **International regulations and standards should be considered.** As multinational companies, we suggest to recognize international and voluntary standards, especially when they provide stricter rules. We welcome the recognition of such under derogation health (a), but should also be recogniesed under Safety.

- **Administration costs and burdens should be limited and be included in annual reporting**

In most cases, it falls under the **responsibility of the economic operator t**o provide documentation justifying derogation (ranging from self-assessment to test results). We recognise the attempt to try and specify the type of documentation per derogation. Yet, the amount of evidence and information is concerning and will generate administrative burden on economic operators.

Compilation and storage extensive documentation on existing and future preventive measures are often recommended as part of the verification process. Adopting such approach for each product or lot under would be extremely burdensome and inefficient, duplicate reporting requirements and not bring any added value. Instead, **the reporting requirements on preventive measures should be left to the Commission's forthcoming implementing act, as described under Article 24 of the ESPR.** This reporting should focus on the existence and effectiveness of an internal compliance system to properly manage unsold goods, including horizontal considerations of the measures taken to prevent destruction and measures planned to improve moving forward in different scenarios. Furthermore, such assessment should only be **included in the annual reporting required in Article 23 of the ESPR on the general principle of prevention of destruction**

- **Companies should receive legal certainty on how to handle unsold goods and recycled raw materials.**

The interplay between the ESPR and the WFD where discarded unsold goods should be separately collected in national collection EPR system should be clarified. There seems to be uncertainty as whether companies will be required to pre-sort their goods if fit for re-use. We welcome the recognition of setting a single market for secondary material and believe that the upscaling of recycled materials should be promoted; following the waste hierarchy.

Comments to the specifications and operationalization of each derogation

1. **Derogation as a result of non-conformity of products**

Hygiene (derogation a): applies when contamination cannot be removed but does not refer to specific legislation. It mainly relates to mould, etc.

Criteria for the derogation:

Hygiene issues under derogation (a) should not be conflated with damages under derogation (b). Hygiene concerns, such as persistent odors, mold, insect infestations often affect entire shipments or lots and require specialized treatments or disposal. These issues present health risks or technical challenges, distinct from remediable damages like dirt, makeup stains, or perfume smells, which typically affect individual products due to handling or try-ons and can potentially be resolved through cleaning methods.

Operationalization:

As there is no standardised guideline to assess hygiene issues and their severity depends on factors like size, location, and garment type, the proof of compliance will be case-specific. We agree with a self-assessment approach. The economic operator shall maintain track record of these information. Records can be evaluated during the surveillance process that they may have to conduct to assess the annually reported levels of unsold goods, as well as their weight and their destination.

Recommendation on the operationalization approach and criteria for derogation

In line with this, waste treatment operators should not be responsible of managing and verifying compliance information. Such approach would create an unproportionate bureaucratic burden, and remarkable red tape on waste treatment operators, who are mainly SMEs and lack the required resources to fulfil these functions. This will involve processing and verifying all the supporting documentation.

Health (derogation a):

We welcome the recommendation to rely on international statutory requirements, corporate policy/rules and voluntary standards if they are stricter than EU legislation. The textile sector, for instance, complies with voluntary Restricted Substance Lists broader than the EU legislation.

However, we do not support to systematically provide information to waste handlers. Where preventative and corrective measures are needed; it can one-offs incidents where the root cause is unlikely to happen again. Therefore, such assessment should only be included in the annual reporting required in Article 23 of the ESPR on the general principle of prevention of destruction as well as under the disclosure obligation according to Article 24(1)(d).

Our recommendation on the operationalization approach and criteria for derogation

Proof of compliance based on health reasons must cover test reports based on worldwide regulation, including EU regulation (REACH, POP or Biocidal Products), and industry-specific Restricted Substance Lists (RSLs). Internal reports must also be valid. Economic operators can keep internal records documenting the basis for their decision, including testing results –based

on e.g. ISO/EN standards– and other documentation that forms part of a compliance system. This documentation can be made available for audits to verify compliance.

The verification process should be consistent with what is foreseen under ESPR Article 24 on discarded unsold goods– and the WFD review. It is essential to implement a coherent system capable of reporting the same data for both purposes. Guidance is need to understand to how In line with this, waste treatment operators and service providers can manage, verify and share compliance information without creating an unproportionate bureaucratic burden, and red tape on waste treatment operators, who are mainly SMEs and lack the required resources to fulfill these functions.

Safety (derogation a)

The background report suggests providing a declaration to the waste operators. This is not consistent with our recommendation that records and proof of compliance should be evaluated during the annual reporting period of the amount of unsold goods.

We adhere to various international and non-EU safety regulations and standards. During product development, companies operating globally strive to harmonise requirements across different markets, ensuring compliance with both global standards and EU legislation. As a result, even safety aspects not directly regulated by EU laws are often regulated by EU-based companies, aligning their practices to maintain consistency and meet the expectations of global markets

There are numerous safety issues to be addressed and we recommend some flexibility in the possibility to destroying products exceeding internal safety standards even if they comply with EU regulations. Here are some examples:

- Safety risks related to the flammability of apparel and footwear, which may exceed regulatory thresholds in certain markets or pose inherent risks based on product design or material composition.
- Physical/mechanical hazards such as sharp points/edges or small parts, especially in children's clothing where safety standards are particularly stringent.
- Physical/mechanical hazards that lead to entrapment, strangulation, or similar hazards due to their size and position in the garment.
- Other safety concerns arising from product damages (which not all have been through risk assessment and tests), e.g. heels break off.

Our recommendation on the operationalization approach and criteria for derogation

We recommend making documentation available for audit and aligning the verification process with art. 24 of the ESPR and WFD review and product safety procedure. Brands agree to keep records of proof of compliance, including risks assessments according to the existing safety standards (e.g. General Product Safety Regulation) and reports to justify destruction of a products when reprocessing or remanufacturing is not possible.

The economic operator shall also maintain track record information for compliance with obligations regarding unsold goods addressing the possibility of implementing corrective measures.

Damages occuring in transportation and storage or during improper unpacking or trying by the consumer (derogation b)

Criteria for the derogation:

It is an impact on the physical integrity of the product that does not constitute damages as described under derogation a). The derogation applies when damaged products cannot be repaired due to technical or economic considerations. The report refers to 15 euros.

Operationalization:

We welcome the inclusion of technical justifications along with economic considerations. However, simply defining cost-effectiveness on a set retail value, by setting a limit of 15 euros, would be misleading. This would indirectly benefit more expensive products and seems arbitrary. Also, the cost of repair depends highly in the actual damage that must be repaired (e.g. only a button to sew back on, or replacement of zipper requires different resources). In addition, the cost of repair depends on the labour cost in the specific country.

Moreover, there is little reference to repair feasibility due to technical limitations in the background document.

Our recommendation on the operationalization approach and criteria for derogation

Criteria for the derogation:

We recommend aligning the proposed ESPR derogation with existing trader rights under the Consumer Rights Directive.

Operationalization:

We welcome the proposal to allow for self-assessments to demonstrate unrepairable damage and the lack of feasibility of corrective measures.

However, economic operators cannot be required to report on existing and future preventive measures for every discarded product or lot. In addition to the reasons outlined above, which are common to other derogations, this approach would be problematic for damaged items because these are often in small quantities, making individual reporting impractical. Also, damages are typically caused during handling by suppliers or consumers, making it difficult for retailers to plan effective preventive measures.

Unfitness of products (derogation c)

Criteria for the derogation:

According to the background document, unfitness of products relates to two situations: inherent design flaws, and major defects detected after being placed on the market (manufacturing errors). However, it remains unclear what constitutes a functional defect or what reclassification operations entail.

Moreover, the derogation does not apply to non-compliance with social or cultural norms. While these are limited, they are highly context-dependent and unpredictable. Specific examples would include cultural or historical nuances, such as symbols, colors, or patterns, that may hold deep significance in one context but be harmless or even desirable in another.

Operationalization:

Here again economic operator could be requested to provide evidence why corrective measures cannot be taken or to describe the assessment on unfitness on the functionality of the product. Requirements to company should be put in place to strengthen internal process and avoid derogation c, especially in line with art. 23 of the ESPR.

Regarding case I (3.2) specifically, it must be stresses that quality issues are diverse, and it is not always feasible to perform a technical test on every product or lot deemed unfit. In some cases, assessments must rely on practical evaluations, visual inspections, or expert judgment rather than standardized tests, especially when dealing with large quantities or complex defects.

Our recommendation on the operationalization approach and criteria for derogation

Criteria for the derogation:

Concerning case II (3.2), clearer guidelines are needed to define the terms "functional" or "reclassification" to ensure practical and consistent application.

In addition, the specification of the derogation (3.2) should encompass non-compliance with policies and guidelines that reflect social, cultural, and regional norms, as well as values such as diversity, equity, and inclusion. As discussed, these are limited but highly context-dependent and unpredictable, underscoring the challenge of anticipating such sensitivities across diverse markets.

Operationalization:

Reporting and keeping evidence of specific product quality defects at the item level would create a significant burden and cost (especially for the recycling fraction, which is already a cost for the company).

Regarding case I (3.2), flexibility in the type of documentation required should be considered to reflect the diverse nature of quality assessments, in line with the concerns raised above.

2. **Derogations where an extension of the service life is addressed**

Derogation when derogation can be linked to the extension of service life (derogation d)

Criteria for derogation:

Donations of apparel and footwear are not always feasible and the most common reasons for rejections are that products are unsuitable for the intended beneficiaries of the donee; oversupply for product types and lack of storage capacity, as well as absence of charity in the geographical area.

In addition, handling costs for donations can be very high, linked to logistical challenges, including storage, sorting, and transport. Those costs are absorbed by retailers as part of their commitment to responsibly managing unsold products.

Operationalization:

While we support the proposed operationalisation (proof of rejection of the donation), we believe that the requirement of going through 3 potential donees may be excessive. In some countries, there are not so many organisations retailers can work with. Additionally, by focusing on the quantity of donees rather than the quality, the risk of donations being mismanaged or diverted for unintended purposes increases, as parties may feel obliged to accept subpar recipients simply to meet the numerical obligation. This could result in donations being accepted by entities that may not have the appropriate distribution programs, potentially leading to improper use, export, or the creation of waste.

Lastly, we strongly question the relevance of implementing design improvement and facilitating donation in future. Companies design products for consumers, not with the expectation that they will eventually be donated. Market factors such as oversupply or a mismatch between products and beneficiaries' needs are often unpredictable. Additionally, issues like seasonal demand, where items may be out of season and unwanted, and geographic relevance, where products may not fit local needs, make it impractical to base design decisions on potential donations.

Our recommendation on the operationalization approach and criteria for derogation

Criteria for the derogation:

The costs and resources related to donations - logistical challenges, including storage, sorting, and transport, human capital and time - may exceed a reasonable threshold, making donations unviable. Those aspects should be considered in the specification, and an operationalization must be developed accordingly.

Operationalization:

Prioritizing rigorous assessment of one or two suitable recipients is more effective in ensuring the donations fulfill their intended charitable purpose. We, therefore, invite to reconsider the minimum requirement of three rejection letters.

In addition, we warn against mandating an analysis of product design flaws and an action plan to improve design for future donations. As discussed, retailers cannot reasonably account for all variables in their design process, as their focus is on meeting consumer demands and preventing products from remaining unsold. We support proof of rejection as adequate documentation, but the format of the rejection statement must be flexible.

Unsuitability of product for preparing for reuse or remanufacturing (derogation e)

Reuse or remanufacturing applies in two cases: when it is technically unfeasible to prepare the product or when the economic operation is unable to find a third party that can prepare the product. Evidence to be provided by the economic operator relates a self declaration and rejection statements of at least 3 potentially suitable third party.

Given that unsold products are typically in new, unused condition and have not entered the consumption cycle, the terms "re-use" or "preparing for re-use" are not legally applicable.

Remanufacturing of apparel and footwear poses many technical and economic challenges. A primary hurdle arises from their complexity, as they incorporate a wide range of materials and components. This variability complicates the establishment of standardised remanufacturing processes capable of efficiently handling and refurbishing diverse product types.

Moreover, the industry's stringent standards impose additional barriers. Apparel and footwear must adhere to health and safety standards, as well as upcoming ecodesign requirements, necessitating comprehensive testing and rigorous compliance efforts that apply not only to new products but also to those that are remanufactured. This will mandate that remanufactured products undergo thorough assessment and documentation for a second time, significantly increasing their cost, which may likely exceed the profit margin.

Operationalization

Companies should not be required to provide proof of compliance to waste treatment operators as it presents extensive challenges. Suitability assessments for reuse or remanufacturing often involve third party service providers. These operators will assess the suitability for preparing for reuse or remanufacturing, therefore the proposed documentation burden will fall on them. These are often SMEs that have limited capacities. In cases where suitability for repair would have to be assessed on a product by product basis, the proposed documentation burden is extremely high. In cases where assessing the possibilities for repair would have to be conducted for a batch of products (e.g, a stopped order), some form of economics of scale would be possible, but also in this case burdensome.

Furthermore, not all unsold products go through waste handlers. Residual materials might be sent directly to recyclers as by-products, falling outside the scope of waste management. The proposed approach could create an administrative burden for waste treatment operators and third party providers, especially small and medium-sized enterprises (SMEs) lacking the resources to verify documentation.

Our recommendation on the operationalization approach and criteria for derogation

Instead, enforcement authorities or external auditors should act as the verifying entity, using a risk-based approach to assess economic operators' internal compliance system for managing unsold goods and the steps taken by economic operators. This includes reviewing internal testing procedures, the volume of unsold products reported, the destination of these items, as well as performing random sampling.

3. Derogation why products can be directly sent to destruction

Intellectual property (derogation f):

Criteria for the derogation:

The current framework requires further clarification and expansion to ensure it adequately covers all relevant scenarios. This would help improve legal certainty, ensure coherence with existing laws, and provide clearer guidelines for economic operators.

Firstly, as pointed out in the background document (6.3, I), contractual licensing agreements are not only restricted in terms of time but also distribution channels (i.e. products cannot be legally distributed via external channels or donated).

Moreover, products potentially infringing IPR identified by internal controls or external audits (6.2, II) do not necessarily qualify as counterfeit. Distributors of counterfeit products are not expected to have internal controls specifically designed to detect potential infringements. This distinction is important for situations involving distributors who were unaware of potential IPR violations—such as trademark, design, or patent infringements, copyright issues, or unfair competition—and who seek to address these issues before bringing the products to market.

Furthermore, while the background document refers to correspondence or notifications received from intellectual property right holders and or competent authorities in the operationalization section (6.3, II), the identification of potentially infringing products by these actors is not foreseen in the specification of the derogation (6.2, II).

Operationalization:

The primary concern for economic operators is preventing IP infringements and ensuring compliance with legal standards. IP infringements can lead to significant legal and reputational consequences. The risk of legal proceedings, fines, and damage to brand reputation serves as a powerful deterrent against non-compliance. A detailed analysis of what went wrong, once an infringement is identified, seem excessive and without added value compared with the already established obligation to include a description of preventive measures at company level in the reporting obligations (Article 24).

In addition, for products in a company's stock, any issues related to hazardous chemicals have already been addressed through internal compliance mechanisms and regulatory requirements, including but not limited to REACH. Otherwise, such issues would fall under derogation (a) on health, which covers products failing to meet safety standards due to hazardous substances. Also, ECHA's guidance documents indicate that testing should only be conducted when necessary and that existing data and alternative methods should be prioritized.

By mandating tests specifically for IPR-infringing products, the proposal not only disregards REACH's principle of testing as a last resort but also risks double-regulation by going beyond the purpose of ESPR.

In some cases, infringement is detected after placement on the market by right holders or through other competent authorities at EU, national or local level after customs controls. These cases should fall in the scope of the derogation, unlike suggested in the background document.

Our recommendation on the operationalization approach and criteria for derogation

Criteria for derogations:

A more comprehensive and precise specification is needed to address the various legal and practical challenges associated with managing IPR-infringing goods. For this purpose, we recommend the following changes:

- It is important that the specification on licenses (6.2, I) is sufficient comprehensive and not only refers to the duration of the license or its expiry.

- The term used in the specification on products identified by internal controls or external audits (6.2, II) should be 'products potentially infringing intellectual property rights (IPR)' rather than 'counterfeit products.'

- In addition to the cases addressed above, the specification must cover products potentially infringing IPR, including counterfeit products, that are either detected by competent authorities or subject to claims by rightsholders.

- We recommend to distinguish between counterfeit products and those under IP rights. The latter are perfectly fine to be recycled, while brands have no knowledge of the composition of counterfeit products

Operationalization:

We support the type of documentation proposed as proof of compliance with this derogation. However, it is important that the reporting requirements on preventive measures is left to the Commission's forthcoming implementing act, as described under Article 24 of the ESPR, and not be addressed in the Delegated Act on derogations. requiring documentation for bulk not individual products.

Destruction as the most sustainable option (derogation g) introduces some heavy work for economic operators as documentation includes the description and quantification of the environmental impacts based on third-party verification, documentation and reporting.

Operationalisation:

The document specifically refers to the PEFCRs, uses of primary activity data. The proposed approach would require extensive resources in terms of time and skills, LCA tools, creating an unproportionate administrative burden for economic operators and authorities alike.

The required process is extremely burdensome. Also, the proposed approach (i.e. non-standarised, comparative LCAs) demands a comprehensive and detailed approach. It is also important to note that the current PEFCR is not yet finalsied. The recommended documentation, requires Economic operators must gather and analyse extensive data to cover the entire lifecycle of a product, from raw material extraction to the finished product. This process requires specialised knowledge and tools, contributing to the complexity and scope of the assessment and thereby increasing the administrative burden, as well as the operational costs and resources required to meet the compliance standard.

It is important to find a feasible solution for cases where products cannot find a market, even after an economic operator has explored all feasible options, in order to prevent the indefinite or prolonged storage. Without this option, we risk products deteriorating over time, leading to even greater environmental impacts, including increased waste, energy use for prolonged storage, and resource depletion due to obsolescence.

Our recommendation on the operationalization approach and criteria for derogation

We support economic operators conducting self-assessments demonstrating why recycling is the best environmental solution with a special focus on the impact of destruction versus other options. For this purpose, economic operators should maintain records documenting prolonged storage periods of unsold products and outline the efforts made to explore all feasible options for the products before determining recycling as the most suitable end-of-life solution.

This moreover requires some guidance on what 'exhausting all options' would imply in the legislation.