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# Circular textiles: policy options against product destruction

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## Circular textiles: policy options against product destruction

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# Executive summary

The growing global textile industry poses an increasing waste problem, with significant negative environmental impacts. One aspect of this waste problem is the destruction of unsold or returned textile products by manufacturers and retailers. Both the European Union and some of its national Member States are taking or considering regulatory initiatives to halt this destruction and, more broadly, to enhance the circularity of textiles.

A first goal of this research report is to map out the various (possible) policy responses to product destruction and to suggest an appropriate response by the Flemish policy level. To this end the research report analyzes the current regulatory initiatives found at the level of the European Union and in most of the countries that neighbor Belgium (France, Germany, and the Netherlands). In this analysis the advantages and disadvantages of these initiatives are weighed, building on earlier research by Roberts *et al.* A second goal is to assess the efficacy of policy responses in terms of their enforcement. By evaluating the enforcement mechanisms and practices associated with various policy interventions, the study aims to determine their effectiveness in achieving their intended goals. The policy recommendations are also meant to improve enforcement.

From this analysis, clear patterns in the foreign and multinational policy responses emerge. The research report identifies four shared steppingstones. Most measures focus on economic operators in the value chain of textiles, in particular manufacturers. The research report also suggests a fifth category of measures, focused on consumers. Putting together the strengths of the analyzed policy responses, it is possible to suggest a comprehensive framework to address the circularity of textiles. The analysis also showed two points of attention as concerns enforcement: internal market fragmentation and the global and online nature of the value chain of – in particular – consumer textiles. An European Union-wide implementation of the framework could help mitigate those issues. The policy recommendations for the Flemish policy level can be summarized as follows.

- *Ecodesign requirements.* Advocate stringent ecodesign requirements in the Ecodesign Forum of the Ecodesign for Sustainable Products Regulation, building on the research that has already been done for OVAM on voluntary ecodesign criteria. Regarding textiles, focus on requirements on repairability and recyclability. To ease their circular processing after they have been discarded, textiles should be designed ‘for sorting’ and ‘for recycling’.
- *Extended producer responsibility.* Support the European Union-wide implementation of an extended producer responsibility scheme for textiles with harmonized definitions and rules, complemented by ecodesign measures and flanking measures, both for substantive and enforcement goals. This scheme should be based on a life cycle assessment approach.
  - Leverage fiscal legislation to incentivize circular practices. Implement differentiated taxation rates based on environmental impact for disposal methods, promoting reuse before recycling.

- Support the proposed European Union approach to enforcement of extended producer responsibility obligations on online platforms. Propose minimum eco-modulation requirements to prevent oversimplified compliance models.
  - Consider demanding the introduction of a more far-reaching approach, where the online platform is alternatively considered to be the manufacturer and can be held responsible for compliance with all extended producer responsibility rules, as is the case in France.
  - Ask for (1) an adjustment of the Waste Framework Directive that allows for exceeding the amount that is strictly necessary for waste management and (2) sufficiently high base fees, drawing inspiration of the existing French extended producer responsibility scheme for textiles.
  - Demand the introduction of a binding target for fiber-to-fiber recycling of the amount of materials destined for recycling. When setting this target, loss of materials throughout the lifecycle of textiles products and technical limitations of the fiber-to-fiber recycling process should be taken into account. Care should be taken not to overstimulate recycling practices – a lower ranking R-strategy – to avoid that products that could have been used in a different manner are directed towards recycling in order to meet binding targets.
- *Prohibition of product destruction.* Support the European Commission in its implementation of prohibitions on the destruction of unsold consumer textile products via the Ecodesign for Sustainable Products Regulation. Policy measures should be taken to avoid attempts to misuse charitable donations (e.g., volume limits).
- *Used textiles/textile waste.*
  - Support the enactment of harmonized definitions of and criteria for ‘used textiles’ and ‘textile waste’ at the EU level.
  - Drawing inspiration from the regulatory framework on waste shipments, policy makers could consider creating obligations for any economic operator wishing to export used textiles not meant to be textile waste (i.e., used textiles that have lost their status as waste before shipping, following a recovery operation). In the first place, an operator should provide sufficient guarantees that the textiles will actually be reused in the third country before a shipment can be signed off by national authorities. In the second place, an operator should obtain proof of the processing of the used textiles after shipment.
- *Consumer behavior.* Address the 'returns culture' driving product destruction in the textile industry by advocating an adaptation or even limitation of the consumer right of withdrawal under the Consumer Rights Directive (for example, by allowing price differentiation between purchases with and those without right of withdrawal, by analogy with hotel reservations with and without cancellation insurance).

# Samenvatting

De textielindustrie kampt met een toenemend afvalprobleem met aanzienlijke negatieve milieueffecten. Eén aspect van dit afvalprobleem is de vernietiging van onverkochte of teruggestuurde textielproducten door fabrikanten en verkopers. Zowel de Europese Unie als enkele van haar nationale lidstaten nemen of overwegen regelgevende initiatieven om deze vernietiging te stoppen en, meer algemeen, de circulariteit van textiel te verbeteren.

Een eerste doel van dit onderzoeksrapport is om de (mogelijke) beleidsmaatregelen tegen productvernietiging in kaart te brengen en een passend antwoord op het Vlaamse beleidsniveau voor te stellen. Hiertoe analyseert het onderzoeksrapport de huidige regelgevende initiatieven op het niveau van de Europese Unie en in de meeste landen die aan België grenzen (Frankrijk, Duitsland en Nederland). In deze analyse worden de voor- en nadelen van deze initiatieven afgewogen, voortbouwend op eerder onderzoek van Roberts *et al.* Een tweede doel van dit rapport is om de doeltreffendheid van beleidsmaatregelen in termen van handhaving te beoordelen. Door de handhavingsmechanismen en -praktijken te evalueren die zijn gekoppeld aan verschillende beleidsmaatregelen, heeft het onderzoeksrapport tot doel om hun effectiviteit bij het bereiken van hun beoogde doelen te bepalen. De beleidsaanbevelingen zijn eveneens bedoeld om de handhaving te verbeteren.

De analyse legt vier rode draden doorheen de buitenlandse en supranationale initiatieven bloot. De meeste maatregelen zijn gericht op de economische operatoren in de waardeketen van textielproducten, in het bijzonder producenten. Het onderzoeksrapport stelt voor om ook maatregelen gericht op consumenten op te nemen. Door de sterktes van de bestudeerde initiatieven samen te leggen, kan een alomvattend kader om de circulariteit van textielproducten te verhogen worden geschetst. Uit de analyse volgt ook dat er twee aandachtspunten inzake handhaving zijn: de fragmentering van de interne markt en het mondiale en online karakter van de waardeketen van – in het bijzonder – consumententextiel. Het beleidskader introduceren op het niveau van de Europese Unie zou kunnen helpen om die pijnpunten te verzachten. De beleidsaanbevelingen ten aanzien van het Vlaamse beleidsniveau op basis van de analyse kunnen als volgt worden samengevat.

- **Ecodesignvereisten.** Pleit voor strenge ecodesignvereisten voor textiel in het Ecodesign Forum van de *Ecodesign for Sustainable Products Regulation*, voortbouwend op het onderzoek dat al is uitgevoerd voor OVAM over vrijwillige criteria. Specifieke vereisten voor repareerbaarheid en recycleerbaarheid zouden moeten worden geformuleerd. Om hun circulaire verwerking op het einde van hun levensduur te vergemakkelijken, zouden textielproducten zo moeten worden ontworpen dat hun sortering en recycling optimaal kunnen verlopen.
- **Uitgebreide producentenverantwoordelijkheid.** Ondersteun de implementatie van uitgebreide producentenverantwoordelijkheid voor textiel op het niveau van de Europese Unie met geharmoniseerde definities en regels. Deze regeling moet worden aangevuld met ecodesignmaatregelen en flankerende maatregelen, zowel voor inhoudelijke als handhavingsdoelen. Zij moet gebaseerd zijn op een levenscyclusbeoordelingsbenadering.

- Fiscale stimulansen kunnen circulaire praktijken aanmoedigen. Voer gedifferentieerde belastingtarieven in op basis van de milieueffecten van de verschillende methoden van afvalverwerking, waarbij hergebruik de voorkeur krijgt boven vóór recycling wordt bevordering.
- Ondersteun de voorgestelde benadering van de wetgever van de Europese Unie inzake de handhaving van de verplichtingen inzake uitgebreide producentenverantwoordelijkheid op online platforms. Stel minimale eco-modulatieregels voor om te vermijden dat platforms aan hun gebruikers te sterk vereenvoudigde modellen om naleving te verzekeren zouden aanbieden.
- Overweeg om een meer verstrekkende benadering te eisen, waarbij het online platform alternatief wordt beschouwd als de producent en aansprakelijk kan worden gesteld voor de naleving van alle regels inzake uitgebreide producentenverantwoordelijkheid, zoals in Frankrijk het geval is.
- Vraag om (1) een aanpassing van de Kaderrichtlijn Afvalstoffen die het mogelijk maakt om het strikt noodzakelijke bedrag voor afvalbeheer te overschrijden en (2) voldoende hoge basisvergoedingen, geïnspireerd door het bestaande Franse regeling voor uitgebreide producentenverantwoordelijkheid voor textiel.
- Eis de invoering van een bindende doelstelling voor vezel-naar-vezel-recycling. Bij de bepaling van die doelstelling moet rekening worden gehouden met het onvermijdelijke verlies van materiaal gedurende de levenscyclus van textielproducten en de technische beperkingen van het vezel-naar-vezel-recyclingproces. Recyclingpraktijken – een lager aangeschreven R-strategie – mogen niet overmatig worden gestimuleerd om te voorkomen dat producten die op een andere manier hadden kunnen worden gebruikt, naar recycling worden geleid om aan bindende doelstellingen te voldoen.
- *Verbod op productvernietiging.* Bied ondersteuning bij de invoering van een verbod op de vernietiging van onverkochte textielconsumentenproducten op basis van de *Ecodesign for Sustainable Products Regulation*. Beleidsmaatregelen om misbruik van donaties te voorkomen (bijvoorbeeld, volumelimieten) zijn aangewezen.
- *Gebruikt textiel/textielafval.*
  - Ondersteun de invoering van geharmoniseerde definities en criteria voor 'gebruikt textiel' en 'textielafval' op het niveau van de Europese Unie.
  - Beleidsmakers zouden kunnen overwegen om verplichtingen in te voeren voor elke economische operator die gebruikte textielproducten wil exporteren die niet bedoeld zijn als textielafval (dat wil zeggen eerder gebruikte textielproducten die hun afvalstatus hebben verloren vóór verzending, na een terugwinningsoperatie), naar analogie met het regelgevende kader voor afvaltransport. In de eerste plaats zou de operator voldoende garanties moeten bieden dat het textiel in het derde land daadwerkelijk zal worden hergebruikt voordat de nationale autoriteiten toestemming geven voor de verzending. In de tweede plaats zou de operator bewijs moeten vergaren van de verwerking van het gebruikte textiel na de verzending.
- *Consumentengedrag.* Pak de 'retourcultuur' aan die productvernietiging in de textielindustrie stimuleert, door te pleiten voor een aanpassing of zelfs beperking van recht op herroeping in de Richtlijn Consumentenrechten (bijvoorbeeld door prijsdifferentiatie toe te staan tussen aankopen met en zonder recht van herroeping, analoog aan hotelreserveringen met en zonder annuleringsverzekering).

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# 1 Introduction

The environmental impact of the textile<sup>1</sup> industry is a pressing concern in the European Union. From a global life cycle perspective, the production and consumption of textiles account on average for the third highest impact on water and land use, the fourth highest on climate and environment and the fifth highest on the use of raw materials and greenhouse gas emissions.<sup>2</sup> The use of synthetic fibers by the fashion industry represents 1,35% of global oil consumption<sup>3</sup>, with the share of synthetic fibers in clothing on the rise<sup>4</sup>. Moreover, textiles are a major source of microplastics in waterways (16-35% of microplastics)<sup>5</sup> as well as clean water pollution by hazardous chemicals<sup>6</sup> (20% of pollution)<sup>7</sup>. These significant environmental impacts raise alarms, given the continuous growth in the production and consumption of textile products. Global textiles production almost doubled between 2000 and 2015, and the consumption of clothing and footwear is expected to increase by 63% by 2030, from sixty-two million tons in 2022 to one hundred two million tons in 2030.<sup>8</sup>

Currently, the textile industry is an epitome of the traditional linear economy model of 'take, make, use, and dispose'.<sup>9</sup> Each year 92 million tons of textile products are discarded globally (of which 5,8 million tons in the European Union<sup>10</sup>), while less than 1% of this amount is recycled into new products worldwide.<sup>11</sup> A driving factor of unsustainable patterns of overproduction

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<sup>1</sup> 'Textile' is a notion that covers a broad array of products. Textiles are used as apparel (i.e., clothing and footwear), household textiles (i.e., products such as mattresses, curtains, towels) and in furniture (i.e., upholstery). They are also used in products such as medical and protective equipment, buildings and vehicles (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - European Union Strategy for Sustainable and Circular Textiles, 30 March 2022, COM(2022) 141 final (hereinafter abbreviated as 'Sustainable Textiles Communication'), p. 1). In essence, 'textile' refers to materials that are created through the weaving, knitting, crocheting, or felting of fibers. There are different sources of fibers. 'Natural' fibers are derived from plant (e.g., cotton, linen, hemp), animal, (e.g., wool, silk, angora) or mineral sources (e.g., metals). 'Synthetic' fibers are created through chemical processes in which monomers are joined into polymers (e.g., nylon, polyester, elastane). Some fibers are also called 'semi-synthetic', because they have a natural occurring long-chain polymer structure (e.g., cellulose fibers such as rayon, modal and bamboo viscose).

<sup>2</sup> Sustainable Textiles Communication, p. 1. European Parliament resolution of 1 June 2023 on an European Union Strategy for Sustainable and Circular Textiles (2022/2171(INI)) (hereinafter abbreviated as 'EP Resolution Sustainable Textiles'), paragraphs J and 16. See also the EEA briefing 'Textiles and the environment: The role of design in Europe's circular economy', available at <https://www.eea.europa.eu/publications/textiles-and-the-environment-the/textiles-and-the-environment-the>.

<sup>3</sup> EP Resolution Sustainable Textiles, paragraph E.

<sup>4</sup> S. MANSHOVEN *et al.*, *Textiles and the environment in a circular economy. Eionet Report - ETC/WMGE 2019/6*, Mol, European Topic Centre on Waste and Materials in a Green Economy, 2019, p. 8.

<sup>5</sup> Sustainable Textiles Communication, p. 5; EP Resolution Sustainable Textiles, paragraph L. See also the EEA briefing 'Microplastics from textiles: towards a circular economy for textiles in Europe', available at <https://www.eea.europa.eu/publications/textiles-and-the-environment-the/textiles-and-the-environment-the>.

<sup>6</sup> Around sixty chemicals in textile products placed on the European market are considered as carcinogenic, mutagenic, or toxic to reproduction (Sustainable Textiles Communication, p. 4; EP Resolution Sustainable Textiles, paragraph 33). Per- and polyfluorinated substances (PFAS), continue to play a role in the production of textiles, which as 'forever chemicals' result in severe contamination of soil, water and food (EP Resolution Sustainable Textiles paragraphs M and 34).

<sup>7</sup> EP Resolution Sustainable Textiles, paragraphs M and 23.

<sup>8</sup> Sustainable Textiles Communication, p. 1; EP Resolution Sustainable Textiles, paragraph A.

<sup>9</sup> Roberts *et al.*, whose work will be highlighted in more detail later in this section, describe how the destruction of textile products "is an extreme expression of the linearity of the current production-consumption system, representing the antithesis of sustainable resource use", see H. ROBERTS, L. MILIOS, O. MONT and C. DALHAMMAR, "Product destruction: Exploring unsustainable production-consumption systems and appropriate policy responses", *Sustainable Production and Consumption* 2023, Vol. 35 (hereinafter abbreviated to 'Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35'), p. 310.

<sup>10</sup> This amounts to 11 kg per capita.

<sup>11</sup> Sustainable Textiles Communication, p. 3; EP Resolution Sustainable Textiles, paragraph C.

and overconsumption is the trend of using clothing<sup>12</sup>, which comprises the lion's share of European Union textile consumption (81%), for ever shorter periods.<sup>13</sup> The timespan during which clothing is used decreased by 36% between 2000 and 2015, while the average household expenditure on clothing increased by 14% between 1996 and 2018 even though prices have dropped by more than 30% relative to inflation.<sup>14</sup> On average, a piece of clothing is worn only seven to eight times.<sup>15</sup> Fueling this phenomenon is the concept of 'fast fashion', which entices consumers to buy continuously clothing of inferior quality and lower price, produced rapidly in response to the latest trends.<sup>16-17</sup> Combined, a high purchase rate and a low rate of product utilization by consumers drive textile waste.<sup>18</sup> This trend can also be observed in parts of the world other than the European Union.<sup>19</sup>

One aspect of this waste problem is the destruction of unsold or returned textile products by manufacturers and retailers, even though they are still fit for purpose.<sup>20</sup> Fashion brands are secretive regarding the number of unsold products.<sup>21</sup> Still, the Australian Circular Textile Association estimates that 30% of all clothes made around the world are never sold.<sup>22</sup> Both the European Union and national Member States are taking or considering regulatory initiatives to halt this destruction and, more broadly, to enhance the circularity of textiles.

A first goal of this research report is to map out the various possible policy responses to product destruction and to suggest an appropriate response by the Flemish policy level. To this end, the research report analyzes the current regulatory initiatives found at the level of the European Union and in most of the countries that neighbor Belgium (France, Germany, and the Netherlands). In this analysis the advantages and disadvantages of these initiatives are weighed. To assess the (dis)advantageousness of an initiative, it is examined whether it can adequately address one or more reasons why the destruction of a product is favored over strategies to extend its lifespan. These reasons have been summarized by Roberts, Milios, Mont and Dalhammar and checked against the experiences of experts from the textiles and electronics

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<sup>12</sup> While clothing is mostly textile, other materials are also used. For instance, leather is a common material, which can be derived from 'natural' sources (i.e., tanned animal hides) or be created 'synthetically' (i.e., plastic-based materials such as polyurethane or polyvinylchloride). Metals are also used, for example in zippers, metallic foil prints and sequins and beads. These different materials can pose challenges to the circular waste management of textiles due to differences in composition, recyclability, and processing methods. For example, they pose sorting challenges. Non-textile components may not be easily separable from textiles during sorting processes.

<sup>13</sup> Sustainable Textiles Communication, p. 1; EP Resolution Sustainable Textiles, paragraph A.

<sup>14</sup> Sustainable Textiles Communication, p. 1; EP Resolution Sustainable Textiles, paragraph A.

<sup>15</sup> EP Resolution Sustainable Textiles, paragraph C.

<sup>16</sup> Sustainable Textiles Communication, p. 1; EP Resolution Sustainable Textiles, paragraphs 9-10 and 12.

<sup>17</sup> There is also an important link between fast fashion and microplastics pollution. Most microplastics from textiles are released into wastewater during the first five to ten times that they are washed. Thus, new clothes shed more microplastics, see EP Resolution Sustainable Textiles, paragraph 29.

<sup>18</sup> M.I. KHAN, L. WANG and R. PADHYE, "Textile waste management in Australia: A review", *Resources, Conservation & Recycling Advances* 2023, Vol. 18, 200154, p. 9.

<sup>19</sup> For example, Australians purchase 60% more clothing than they did fifteen years ago and keep them for only half as long. Moreover, 62% of Australian women have items that have never been worn or still have the tags on. In addition, 83% of Australian women have clothing that they have worn only once or twice, see M.I. KHAN, L. WANG and R. PADHYE, "Textile waste management in Australia: A review", *Resources, Conservation & Recycling Advances* 2023, Vol. 18, 200154, p. 4.

<sup>20</sup> Not all destruction of textile products is inherently worrisome. Health and safety considerations can warrant the destruction of products. Medical textiles, for example, can become contaminated with pathogens, which renders them unfit for purpose.

<sup>21</sup> A. ELIA, "Fashion's Destruction of Unsold Goods", *Intellectual Property, Media & Entertainment Law Journal*, 2020, p. (539) 543.

<sup>22</sup> N. ŠAJN, *Textiles and the environment (EPRS\_BRI(2022)729405)*, Brussels, European Parliamentary Research Service, 2022, p. 2.

sectors.<sup>23</sup> It should be noted from the outset that the outcome of this analysis can be believed to entail that strong points of several initiatives should be combined. As the European Parliament notes, ensuring sustainable and circular textiles “requires a holistic approach progressively covering the whole value chain of textile products.”<sup>24</sup>

A second goal is to assess the efficacy of policy responses in terms of their enforcement. By evaluating the enforcement mechanisms and practices associated with various policy interventions, the study aims to determine their effectiveness in achieving their intended goals. The interventions need to deter non-compliance sufficiently, to ensure that their addressees take, on the one hand, all corrective measures to eliminate the non-compliance of the products and, on the other, all possible steps to prevent any further non-compliance from occurring. This analysis includes an examination of regulatory frameworks, monitoring and compliance systems, penalties and incentives, and overall enforcement strategies. Here too, policy recommendations for improving enforcement are offered. There are several reasons why it is relevant to analyze whether a risk of unenforceability exists.<sup>25</sup> First, the objectives of public interest of regulatory measures (i.e., the protection of the environment, protection of the interests of consumer, protection of individuals’ health) are undermined when there is a lack of enforceability. Second, it is important to ensure a level playing field on the internal European market. All those who manufacture or distribute compliant, sustainable products should be protected against unfair competition by those who do not adhere to regulatory measures and who save costs unfairly. In particular, the European market should be protected against an influx of third country products that are not up to the environmental standard of the European Union. This could threaten the viability of the European Union textile industry, which would be highly problematic given its economic importance (e.g., the fashion industry contains 850 000 European Union companies that directly employ 5 million European Union citizens who provide an important contribution to the European Union economy with an annual turnover of €525 billion<sup>26</sup>).

This research report focusses mostly on household textiles and in particular clothing and footwear.<sup>27</sup> These are most relevant to the business-to-consumer context, on which the regulatory initiatives at the European Union and national level focusses as well. Issues of overproduction can be seen the sharpest on the consumer market.<sup>28</sup>

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<sup>23</sup> Roberts *et al.*, *Sustainable Production and Consumption 2023*, Vol. 35, p. 300-312. See for similar research specifically in the Dutch context, M. KORT, R. VAN DER VUSSE and M. VAN GROOTEL, *Ongebruikt textiel. Onderzoek naar de wijze waarop de textielketen omgaat met ongebruikt en nieuw textiel*, Rebel, Rotterdam, 2020, p. 19. See for similar research specifically in the French context, ADEME, *Etude des gisements et des causes des invendus non alimentaires et de leurs voies d'écoulement*, available at <https://librairie.ademe.fr/consommer-autrement/5035-etude-des-gisements-et-des-causes-des-invendus-non-alimentaires-et-de-leurs-voies-d-ecoulement.html>, p. 27-28.

<sup>24</sup> EP Resolution Sustainable Textiles, paragraph 3.

<sup>25</sup> Regarding these reasons when it comes to market surveillance in general, see Commission Staff Working Document, Impact assessment accompanying the document ‘Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products (...)’, SWD(2017) 466 final (part 3/4), 19 December 2017, p. 643 (Annex 13).

<sup>26</sup> Action Plan for Fashion and High-end Industries, 24 January 2014, Ref. Ares(2014)159968, p. 1.

<sup>27</sup> Regarding these notions, see footnote 1.

<sup>28</sup> See for a similar delineation of the research structure, M. KORT, R. VAN DER VUSSE and M. VAN GROOTEL, *Ongebruikt textiel. Onderzoek naar de wijze waarop de textielketen omgaat met ongebruikt en nieuw textiel*, Rebel, Rotterdam, 2020, p. 9.

# 2 Reasons for product destruction

The main types of products subject to product destruction are:

- overstock;
- obsolete products<sup>29</sup>;
- consumer returns;
- damaged products (i.e., damaged during transit and handling or damaged during return by consumer); and
- recalled/defective (i.e., mismade) products.

For the purpose of this research report, these types of products can be collectively seen as ‘excess products’.

By checking the results of a literature study against the experiences of experts from the textiles and electronics sectors Roberts *et al.* have identified several reasons why the destruction of these excess products is favored over strategies to extend their lifespan.<sup>30</sup> The factors influencing this choice are divided into upstream and downstream factors. Upstream factors are those which determine the overall volumes of excess stock and customer returns, which are the root causes of product destruction.<sup>31</sup> Downstream factors refer to the factors that influence the businesses’ decisions to dispose of products rather than choosing more sustainable alternatives.<sup>32</sup>

Upstream factors are divided into three categories: business models, product characteristics and consumer behavior.

- Concerning business models, tendencies to overstock, bulk-purchase and overproduce together with liberal return policies for consumers, especially in the online e-commerce environment, significantly contribute to the volumes of unsaleable and returned products.<sup>33</sup> These tendencies towards excess can be partly explained as a result of miscalculations of consumer shopping habits. Producers have to increase production

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<sup>29</sup> Regarding the topic of premature obsolescence, see A. MICHEL, *Premature obsolescence: in search of an improved legal framework*, Antwerp, Intersentia, 2023, xv + 672 p. In the context of clothing, relative premature obsolescence is most relevant. With relative premature obsolescence a product does not lose its inherent functionality, but it loses its usefulness to the end-user. The end-user considers clothing outdated because of a desire for a new product (aesthetic, societal, and psychological obsolescence). Regarding this categorization of types of obsolescence, see A. ZEEUW VAN DER LAAN and M. AURISICCHIO, “Archetypical consumer roles in closing the loops of resource flows for Fast-Moving Consumer Goods”, *Journal of Cleaner Production* 2019, Vol. 236, 1174752; J. BACHÉR, Y. DAMS, T. DUHOUX, Y. DENG, T. TEITTINEN and L.F. MORTENSEN, *Eionet Report - ETC/WMGE 2020/3- Electronics and obsolescence in a circular economy*, European Topic Center on Waste and Materials in a Green Economy, Mol, 2020, p. 14-15.

<sup>30</sup> These reasons for product destruction correspond with the ‘general barriers’ for an evolution towards a circular economy in the textile industry. For a detailed review of those barriers, see F. JIA *et al.*, “The circular economy in the textile and apparel industry: A systematic literature review”, *Journal of Cleaner Production* 2020, 120728.

<sup>31</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 307.

<sup>32</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 308.

<sup>33</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 305 and 307

levels and retailers stock to respond to the dynamics of clothing trends, which can evolve rapidly.<sup>34</sup>

- Product characteristics have a significant impact on those volumes as well. There are two issues. First, cheaply made products tend to be of lower quality and are less likely to meet consumer expectations, which increases the chance that they are returned. Also, cheaply made products are more susceptible to damage during transit and handling. This is problematic as damaged products often become unsaleable, in particular where they are not easy to repair. Second, fast fashion leads to premature obsolescence.<sup>35</sup> Rotating product cycles change trends, leading to a fall in demand of older products that have fallen out of style.<sup>36</sup>
- Consumer behavior underlies the two other categories.<sup>37</sup> Those operating in the textile industry respond to consumer expectations. A fear of losing customers disincentivizes changes to the *status quo*.<sup>38</sup> Roberts *et al.* have confirmed the rise of a ‘returns culture’ in which consumers purchase beyond their needs, knowing that unnecessary products can be returned.<sup>39</sup> In parallel, consumer expectations regarding on-demand access to a wide product range contribute to the volumes of unsaleable stock.<sup>40</sup> Thus, actors such as retailers are forced to offer choice between many different products.

There are several downstream factors. Roberts *et al.* summarize these as follows.

- Brand integrity.<sup>41</sup> Particularly in the clothing sector, brand integrity is central to product destruction considerations. Brands with trademarks find it difficult to find alternative disposal routes for their products, as these would require the capabilities to de-tag and de-brand products so that they are no longer easily recognizable.
  - In general, businesses fear cannibalizing their own sales if products find their way into second-hand markets. This fear is not unfounded, as the circular economy essentially requires market cannibalization, through the displacement of primary production by secondary production. The circular economy requires secondary production to outperform primary production in competition to avoid a ‘rebound effect’, which occurs when an increase in environmental efficiency is canceled out because of a, absolute increase in production and consumption.<sup>42-</sup><sup>43</sup> The fashion industry is particularly vulnerable to a rebound effect.<sup>44</sup>

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<sup>34</sup> E. NAPIER and F. SANGUINETI, “Fashion Merchandisers’ Slash and Burn Dilemma: A Consequence of Over Production and Excessive Waste”, *Rutgers Business Review* 2018, Vol. 3, p. (159) 161.

<sup>35</sup> See earlier, footnote 29.

<sup>36</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 305 and 307-308.

<sup>37</sup> For a detailed analysis of the role of consumer behavior, see M. KOSZEWSKA, “Circular economy in textiles and fashion—the role of a consumer” in S.S. MUTHU (ed.) *Circular Economy in Textiles and Apparel*, Elsevier, Kidlington, 2019, p. 183-206.

<sup>38</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 305.

<sup>39</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 305 and 307.

<sup>40</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 305 and 307.

<sup>41</sup> See for the detailed analysis of this factor Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 306 and 308.

<sup>42</sup> T. SIDERIUS and K. POLDNER, “Reconsidering the Circular Economy Rebound effect: Propositions from a case study of the Dutch Circular Textile Valley”, *Journal of Cleaner Production* 2021, Vol. 293, article 125996, p. 3 and 9 (hereinafter abbreviated as ‘Siderius & Poldner, *Journal of Cleaner Production* 2021’).

<sup>43</sup> This is known as the Jevons’ paradox. Jevons formulated his paradox in the mid-19th century based on observations of the coal industry in England. He noticed that as technological innovations improved the efficiency of coal use, such as more efficient steam engines, the overall consumption of coal increased instead of decreasing, because of the lowered cost and increased demand for coal-powered activities.

<sup>44</sup> Siderius & Poldner, *Journal of Cleaner Production* 2021, p. 2.

- Also, brands wish to protect their intellectual property rights.<sup>45</sup>
  - In the same vein, brands wish to protect their reputations.<sup>46</sup> Especially luxury brands wish that products are used by consumers who reflect the brand image.<sup>47</sup> Moreover, scarcity supports these luxury brands' images of exclusivity.<sup>48</sup>
  - Finally, brands are reluctant to offer discounts on their surplus products. Luxury brands fear a devaluation of prices, while fast fashion brands fear that customers would delay purchases were they to believe clothes are always discounted at some point in time.
- Profit margin considerations.<sup>49</sup> In general, disposal is more likely for low-value products or high-value products with a small profit margin, because of the costs of alternative disposal routes (in terms of handling and storage) and the limited resale value of these products. When it comes to reusing, repairing, or refurbishing products, two factors come into play. First, there is a high volume of consumer returns. Given that the processes of grading a returned product to determine whether it is suitable for resale or needs repair or refurbish and to prepare the returned the product for resale are costly, businesses opt out of these economically unfeasible processes for low-value/low-margin products. Second, even high-value products that have been damaged (e.g., during handling or during return by the consumer) are costly to repair because they are often not designed to allow easy repair. Retailers with a wide product portfolio in particular often lack the knowledge, tools or expertise to repair (or reuse in any other way) all products in their product range.
- Economic incentives.<sup>50</sup> Being exempt of paying VAT if clothing is given a second life (e.g., donations to charities) or, conversely, being subject to the payment of VAT in this case influences the decision to destroy products. Exemptions boost the rate of donations, to the detriment of product destruction.
- Legal restrictions and liability concerns.<sup>51</sup> Slightly less relevant for fashionable clothing and footwear, product safety concerns can influence the decision to destroy products. This factor can come into play when textiles contain hazardous chemicals. For example, firefighting clothing often contains per- and polyfluorinated substances (PFAS), which are used as a durable water repellent coating applied to provide water and oil repellency. An example of a legal restriction is the ban on selling police clothing to non-police actors (article 3 act of 21 December 2013 containing various provisions on interior

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<sup>45</sup> A. ELIA, "Fashion's Destruction of Unsold Goods", *Intellectual Property, Media & Entertainment Law Journal*, 2020, p. (539) 557-558. Regarding the juxtaposition between intellectual property rights and sustainability, see N.Q. DORENBOSCH, "Upcycling - op het snijvlak van duurzaamheid en intellectuele eigendom", *IER* 2022, Vol. 18, p. 147-151.

<sup>46</sup> A. ELIA, "Fashion's Destruction of Unsold Goods", *Intellectual Property, Media & Entertainment Law Journal*, 2020, p. (539) 557-558.

<sup>47</sup> Regarding reputation, product destruction can have adverse consequences as well. Elia notes that as societal norms are shifting, businesses would do well to consider the detrimental effect that being exposed of destroying unsold products can have on their reputation, citing real-life examples of public backlash (A. ELIA, "Fashion's Destruction of Unsold Goods", *Intellectual Property, Media & Entertainment Law Journal*, 2020, p. (539) 556, 559 and 590). Businesses do in fact respond to negative media coverage (E. NAPIER and F. SANGUINETI, "Fashion Merchandisers' Slash and Burn Dilemma: A Consequence of Over Production and Excessive Waste", *Rutgers Business Review* 2018, Vol. 3, p. (159) 164-165).

<sup>48</sup> E. NAPIER and F. SANGUINETI, "Fashion Merchandisers' Slash and Burn Dilemma: A Consequence of Over Production and Excessive Waste", *Rutgers Business Review* 2018, Vol. 3, p. (159) 161.

<sup>49</sup> See for the detailed analysis of this factor Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 306 and 308.

<sup>50</sup> See for the detailed analysis of this factor Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 306 and 308.

<sup>51</sup> See for the detailed analysis of this factor Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 306 and 308.

affairs), to lower the risk of fraudulent impersonation. Thus, there simply is no alternative market (not even for donation) of police clothing as that could lead people to falsely identify others as police officers.

- Redistribution networks.<sup>52</sup> Even when companies make arrangements to give a second life to clothing, this potential sustainability can only be realized if there is sufficient demand for second-hand products. Fast fashion products are harmful to the market for such products. These products, which are already eyed as low quality when they are virgin products, are difficult to resell to consumers aware of their original price and quality. The drop in quality of fast fashion products can be seen – together with a general increase in the amount of textiles – in the global price for used textiles, which has fallen from €0.95 per kilogram of textiles in 2013 to €0.70 in 2020.<sup>53</sup> This price drop is also driven by the trend that consumers increasingly sell their highest quality textiles independently via peer-to-peer second-hand platforms (e.g., Vinted), leaving only lower quality clothing for the rest of the used textiles market.<sup>54</sup> Even where there is sufficient demand, actors involved with reusing the products need to have the necessary capacity and infrastructure, often involving reverse logistics networks, storage facilities and digitalized inventory systems to be able to absorb the surplus volumes observed in e-commerce. Overall, efforts to reuse clothing are hampered by the absence of industrial-scale reuse actors.
- Management issues.<sup>55</sup> Finally, the structure of businesses can affect the decision to destroy products. Businesses are often siloed, meaning that those working in operations with unsaleable and returned products do not necessarily engage with the departments responsible for sustainable conduct.

These factors can be addressed with several policy interventions. The following section goes into detail which measures are currently being taken or considered.

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<sup>52</sup> See for the detailed analysis of this factor Roberts *et al.*, *Sustainable Production and Consumption 2023*, Vol. 35, p. 306-307 and 308.

<sup>53</sup> S. TRZEPACZ *et al.*, *LCA-based assessment of the management of European used textiles*, January 2023, [https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles\\_corrected.pdf](https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles_corrected.pdf), p. 11-12.

<sup>54</sup> S. TRZEPACZ *et al.*, *LCA-based assessment of the management of European used textiles*, January 2023, [https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles\\_corrected.pdf](https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles_corrected.pdf), p. 12.

<sup>55</sup> See for the detailed analysis of this factor Roberts *et al.*, *Sustainable Production and Consumption 2023*, Vol. 35, p. 307 and 308.

# 3 Regulatory framework

## 3.1 Preliminary: *de facto* extra-territorial reach of European Union and (global) enforcement

When conceptualizing the policy measures that could be taken against the unnecessary<sup>56</sup> destruction of products at the European Union level and assessing their possible enforcement, it is useful to map out to whom these interventions could be addressed. Several remarks can be made about the multifaceted processes of production and consumption of textile products.

First, the textile industry operates on a global scale. The global textile value chain<sup>57</sup> is considered complex and diverse by the European Commission.<sup>58-59</sup> Most of the final clothing and household textiles consumed in Europe are imported from third countries (52%).<sup>60</sup> The global character of this value chain is also evident at its tail end. Exports of textile waste outside the European Union have been steadily increasing to reach 1.4 million tons in 2020.<sup>61</sup> Thus, a major part of the textile industry is located outside of the European Union. Accordingly, the bulk of the environmental pressures of European Union textiles take place outside of the European Union.<sup>62</sup>

The European Union has no jurisdiction outside of its territory.<sup>63</sup> It cannot directly intervene in the production processes in third countries to limit their environmental impacts. However, the European Union can enforce higher environmental standards indirectly via the access to its market. By making this access conditional on adherence to European Union legislation, the European Union can *de facto* force operators in the textile industry in third countries to comply

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<sup>56</sup> The term 'unnecessary' should be understood within the context of a circular economy, where the destruction of products is ideally avoided altogether. The focus of this research report is on destruction of textiles that could still serve their original intended purpose for economic reasons and not, for example, on destruction for reasons of safety.

<sup>57</sup> The value chain of a product consists of all activities and processes that are part of the life cycle of a product, as well as its possible remanufacturing, see for example the definition of this notion in the Sustainable Products Initiative (more on this initiative to follow).

<sup>58</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - European Union Strategy for Sustainable and Circular Textiles, 30 March 2022, COM(2022) 141 final, Sustainable Textiles Communication, p. 1 (hereinafter referred to as 'Sustainable Textiles Communication').

<sup>59</sup> This complexity is highlighted by literature as one of the barriers for a circular fashion industry, see C.W. KI, S.M. CHONG and J.E. HA-BROOKSHIRE, "How fashion can achieve sustainable development through a circular economy and stakeholder engagement: a systematic literature review" *Corporate Social Responsibility and Environmental Management* 2020, Vol. 27, p. (2401) 2402.

<sup>60</sup> Sustainable Textiles Communication, p. 12, with reference to Eurostat dataset DS-645593. Clothes are imported mainly from China (29%), Bangladesh (19%) and Turkey (11%).

<sup>61</sup> Sustainable Textiles Communication, p. 13.

<sup>62</sup> Explanatory memorandum to proposal for a directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, 5 July 2023, COM(2023) 420 final, p. 2.

<sup>63</sup> With the exception of nationality-based jurisdiction, i.e., jurisdiction over the foreign conduct of European Union nationals.

with such higher standards (the so-called 'Brussels effect').<sup>64</sup> Conversely, to regulate the export of used textiles, specifically textile waste, exiting the market, the European Union can impose export restrictions on the national Member States directly. The indirect effect on third countries is that they are to comply with certain standards before the restriction can be lifted. The context of textiles provides a good example thereof. The European Union has enacted a new regulation on shipments of waste ('Waste Shipments Regulation (2024)'), which contains export restrictions.<sup>65</sup> The export of textile waste to non-OECD countries is allowed only under the condition that such countries notify to the Commission their willingness to import specific types of waste and demonstrate their ability to manage it in an environmentally sound manner (see articles 37 and following Waste Shipments Regulation (2024)).

Regarding enforcement, the global context comes with challenges. In today's age consumers can buy directly from foreign manufacturers via the internet, which enlarges these challenges. The efficacy of European Union legislation greatly depends on having a 'anchor point' in the European Union on which corrective measures can be imposed.<sup>66</sup> For this reason, when it comes to market surveillance, article 4 of Regulation 2019/1020 requires the presence of an economic operator established in the European Union as a condition for placing certain products (i.e., products covered by certain sectoral legislation) on the market. Article 4(5) lists eighteen regulations and directives to which article 4 applies. The European Union's ecodesign legislation is an example thereof.

Second, within this global value chain various actors play roles. These roles can be interdependent. For example, manufacturers closely observe consumer preferences, trends, and demands to produce textile products that align with their expectations. Manufacturers aim to meet those expectations to ensure market demand and to maintain their competitiveness. Consumer feedback and market trends drive manufacturers' decisions on fabric choices, styles, designs, and, ultimately, sustainability practices. The following persons are relevant:

- suppliers;
- manufacturers;
- retailers (distributors);
- online marketplaces;
- customers (both consumers and other businesses);
- end-of-life actors (i.e., actors active in the reusing, repurposing, recycling, recuperation and finally discarding of products).

From an enforcement perspective, the online nature of some of these actors can pose difficulties. For example, multi-seller platforms such as Amazon, bol.com, or Coolblue do not

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<sup>64</sup> A. BRADFORD, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, New York, 2012, 424p. referenced by Roberts *et al.*, *Sustainable Production and Consumption 2023*, Vol. 35, p. 309. On the topic of this *de facto* extra-territorial 'reach' or 'extension' of legislation see in more detail, J. SCOTT, "Extraterritoriality and Territorial Extension in European Union Law", *The American Journal of Comparative Law* 2014, Vol. 62, p. 87-125; N. KRISCH, "Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance", *European Journal of International Law*, 2022, Vol. 33, p. 481-514.

<sup>65</sup> Regulation (EU) 2024/1157 of the European Parliament and of the Council of 11 April 2024 on shipments of waste, amending Regulations (EU) No 1257/2013 and (EU) 2020/1056 and repealing Regulation (EC) No 1013/2006, *OJ L* 30 April 2024, vol. 1157.

<sup>66</sup> Regarding market surveillance in general, see Commission Staff Working Document, Impact assessment Impact Assessment accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products (...)', SWD(2017) 466 final (part 3/4), 19 December 2017, p. 643 (Annex 13).

exclusively sell products themselves, but also facilitate sales by third-party sellers. Within the global market for consumer textile consumer goods, the Chinese platforms Shein and Temu are among the largest online marketplaces for fast fashion products. The decentralized nature of these platforms, coupled with a large number of sellers and a wide range of products, makes it difficult to track and ensure that all actors active on the platform adhere to the required standards. Additionally, jurisdictional issues may arise when sellers are based in different countries, further complicating enforcement.

## 3.2 Overview of measures at European Union level (Sustainable Textiles Communication)

One of the aims of the European Circular Economy Action Plan is to focus on the sectors that consume the most resources and where the potential for circularity is high. Textiles are a main target<sup>67</sup>, leading the European Commission to conceive a strategy to make textiles in the European Union sustainable and circular (which it has formulated in its ‘Sustainable Textiles Communication’). The European Parliament endorses this strategy and welcomes the fact that textiles have been identified as a priority.<sup>68</sup>

With this strategy, the European Commission wishes to achieve the following main goal. “By 2030 textile products placed on the European Union market are long-lived and recyclable, to a great extent made of recycled fibers, free of hazardous substances and produced in respect of social rights and the environment. Consumers benefit longer from high quality affordable textiles, fast fashion is out of fashion, and economically profitable reuse and repair services are widely available. In a competitive, resilient, and innovative textiles sector, producers take responsibility for their products along the value chain, including when they become waste. The circular textiles ecosystem is thriving, driven by sufficient capacities for innovative fibre-to-fibre recycling, while the incineration and landfilling of textiles is reduced to the minimum.”<sup>69</sup>

To this end, the European Commission has taken and will continue to take the following actions that are relevant to product destruction and enhanced circularity.

- Introducing mandatory ecodesign requirements, via the Ecodesign for Sustainable Products Regulation (hereinafter ‘ESPR’).<sup>70-71</sup> Products will only be allowed to enter the European Union market or be put into service for the first time if they comply with these design requirements (article 3(1) ESPR). Article 18(5) ESPR obligates the European Commission to include textiles in the first working plan for product groups that have priority as regards the establishment of ecodesign requirements. Several examples of mandatory ecodesign requirements are thinkable. For example, to tackle microplastics pollution binding ecodesign requirements regarding the amount of synthetic fiber content could be imposed (on the basis of article 6 ESPR). As other examples, the European Commission can enhance the reparability of products by requiring sufficient ease of repair and maintenance (e.g., via use of standard materials such as standard sizes and types of fastenings such as zippers to enhance the familiarity with the product

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<sup>67</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan - For a cleaner and more competitive Europe, 11 March 2020, COM(2020) 98 final, p. 4 and 10.

<sup>68</sup> EP Resolution Sustainable Textiles, paragraphs 1 and 4.

<sup>69</sup> Sustainable Textiles Communication, p. 2-3.

<sup>70</sup> Regulation (European Union) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (European Union) 2020/1828 and Regulation (European Union) 2023/1542 and repealing Directive 2009/125/EC, OJ L 28 June 2024, vol. 1781.

<sup>71</sup> On this legislation see in greater detail publication no. 31 of the CE Center available at <https://ce-center.vlaanderen-circulair.be/nl/publicaties/publicatie-2/31-lifespan-extension-of-products-european-and-national-initiatives>.

for repairers and to ensure that repair materials are easy to source) and can enhance the recyclability of products by prohibiting mixed materials content or even banning certain types of textile fibers entirely<sup>72</sup>. Regarding repairability, the Right to Repair Directive (hereinafter 'R2RD') is relevant as well.<sup>73-74</sup> This directive is meant to stimulate the repair of goods in the European Union. It should be noted that there is a clear trade-off between increased standardization of the materials used in textile products and freedom of design, which particularly in respect to consumer goods is something to consider. Clothes are a means to express individual identity. An effort to facilitate repair, for instance, by not allowing the use of oversized zippers reduces a design choice. This issue could be overcome by mandating producers to make 'non-standard spare parts' such as oversized zippers available after production (i.e., via the R2RD), rather than limiting the design freedom preemptively.

- Directly stopping the destruction of unsold or returned textile products via the possibility to ban this destruction in the ESPR (articles 23 and following ESPR).
- Introducing information requirements and a digital product passport. The Commission believes that clear, structured, and accessible information on the environmental sustainability characteristics of products empowers businesses and consumers to make better, more sustainable choices. Via the ESPR the European Commission can obligate manufacturers to inform other actors in the value chain of a product for example on substances of concern, on repair or on the fiber composition (article 7 ESPR). The digital product passport can be found in articles 9 and following ESPR and is meant as a means to improve this communication along the value chain. Moreover, Empowering Consumers for the Green Transition Directive (hereinafter 'ECGTD')<sup>75-76</sup> includes several obligations to inform consumers (e.g., displaying a repairability score). Finally, the Commission will also review the Textile Labeling Regulation.<sup>77</sup>
- Enabling green claims for truly sustainable textiles and combatting greenwashing. because of growing awareness of the environmental impact of their behavior among consumers, businesses like to market their products and services as sustainable. Through marketing with 'green claims' they create the impression that a product or service has a positive or no influence on the climate or the environment or causes less harm to the climate or the environment than competing products or services. Those claims are not problematic in and of themselves. As attention to 'corporate social

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<sup>72</sup> For example, elastane is commonly found in textile products that require elasticity (e.g., sports clothing). However, the presence of elastane fibers makes it difficult to recycle textiles. For instance, the elasticity of the fibers can lead to blocked machines, see E. BOSCHMEIER et al., "New separation process for elastane from polyester/elastane and polyamide/elastane textile waste", *Resources, Conservation and Recycling* 2023, vol. 198.

<sup>73</sup> Directive (European Union) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (European Union) 2017/2394 and Directives (European Union) 2019/771 and (European Union) 2020/1828, *OJ L* 10 July 2024, vol. 1799.

<sup>74</sup> On this legislation see in greater detail publication no. 31 of the CE Center available at <https://ce-center.vlaanderen-circulair.be/nl/publicaties/publicatie-2/31-lifespan-extension-of-products-european-and-national-initiatives>.

<sup>75</sup> Directive (European Union) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU of the European Union as regards empowering consumers for the green transition through better protection against unfair practices and through better information, *OJ L* 6 March 2024, vol. 8.

<sup>76</sup> On this legislation see in greater detail publication no. 31 of the CE Center available at <https://ce-center.vlaanderen-circulair.be/nl/publicaties/publicatie-2/31-lifespan-extension-of-products-european-and-national-initiatives>.

<sup>77</sup> Regulation (European Union) No 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fiber names and related labelling and marking of the fiber composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council, *OJ L* 18 October 2011, Vol. 272, p. 1–64. Labeling is relevant to the ESPR (as a means of displaying information) and the ECGTD (as regards the transparency of labels).

responsibility' grows, an increasing number of businesses, aware of their impact, are honestly taking measures to make themselves more sustainable. However, environmental claims that are false or unverifiable are less innocent. A business that relies on such claims is 'greenwashing' and misleading the consumers. With the ECGTD and the Green Claims initiative (hereinafter 'GCI')<sup>78-79</sup> the European Commissions wishes to weed such misleading claims out of truly sustainable claims. Claims are to be substantiated (article 3(1) GCI) and certain rules on communicating explicit claims are to be followed (article 5 GCI). Also, the ECGTD and GCI curb the use of sustainability labels.

- Extending producer responsibility and boosting reuse and recycling of textile waste. The European Commission wishes to address textile waste by implementing extended producer responsibility (EPR) requirements for textiles with a revision of the Waste Framework Directive<sup>80</sup> (hereinafter 'Revision WFD').<sup>81</sup> EPR is a policy approach that holds manufacturers responsible for – ideally<sup>82</sup> – the entire life cycle of their products, including post-consumer waste management.<sup>83</sup> This means they are obligated to take responsibility for collecting, recycling, or disposing of their products in an environmentally sound manner. The Revision WFD contains harmonized European Union rules, along with eco-modulated fees, to incentivize circularity and encourage collection, sorting, reuse, and recycling. A notable share of contributions to EPR schemes will be dedicated to waste prevention measures and preparing for reuse. (in accordance with the waste hierarchy of the European Union). The proposal also requires that separately collected textile waste from households and similar waste is prepared for reuse as a necessary first step. Finally, by 31 December 2024 the European Commission shall consider the setting of targets for reuse, preparation for reuse and recycling regarding textile waste (article 11(6) Waste Framework Directive). By January 2025, all Member States are obligated to set up a separate collection for textiles (article 11(1) Waste Framework Directive). All these measures are meant to create and/or boost a thriving economy in the post-consumer stage of a product's life cycle.
- Addressing the challenges from the export of textile waste. To avoid that waste streams are falsely labelled as second-hand products when exported from the European Union and in this way circumvent the legal requirements for waste shipments, the Commission

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<sup>78</sup> Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims, 22 March 2023, COM(2023) 166 final.

<sup>79</sup> On this initiative see in greater detail publication no. 31 of the CE Center available at <https://ce-center.vlaanderen-circulair.be/nl/publicaties/publicatie-2/31-lifespan-extension-of-products-european-and-national-initiatives>.

<sup>80</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, *OJ L* 22 November 2008, Vol. 312, p. 3-30 (hereinafter abbreviated as 'Waste Framework Directive').

<sup>81</sup> Proposal for a directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, 5 July 2023, COM(2023) 420 final. For the latest position of the Council of the European Union, see Proposal for a Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste - General approach, <https://data.consilium.europa.eu/doc/document/ST-11300-2024-INIT/en/pdf>.

<sup>82</sup> As will be noted later in this report, criticism has been voiced against the current form of EPR in the European Union. To some authors it focuses too much on the end-of-life stage in the life cycle of a product.

<sup>83</sup> Lindhqvist is called the founding father of the concept, see T. LINDHQVIST and K. LIDGREN, "Modeller för förlängt producentansvar", in Ministry of the Environment (ed.), *Från vaggan till graven - sex studier av varors miljöpåverkan*, Stockholm, Regeringskansliets offsetcentral, 1990. See also the following, highly influential work of the OECD on this subject, OECD, *Extended Producer Responsibility A Guidance Manual for Governments* 2001, DOI: <https://doi.org/10.1787/9789264189867-en>, 159p. The European Union defines EPR in article 3(21) Waste Framework Directive as: set of measures taken by Member States to ensure that producers of products bear fiscal responsibility or financial and organizational responsibility for the management of the waste stage of a product's life cycle.

will consider the development of specific European Union level criteria to make a distinction between waste and certain second-hand textile products.

The actions proposed by the European Commission in its Sustainable Textiles Communication target several actors. However, they are mostly focused on the supply side of the textile value chain and hone in less on the consumers. Hereinafter the actions focused on manufacturers are discussed first. Next, the different actions focused on economic operators in general are explained. Finally, the research report turns its attention to the consumer side of the European market.

## 3.3 Actions focused on manufacturers

### 3.3.1 Steppingstone 1: mandatory ecodesign requirements

#### 3.3.1.1 European Union ecodesign measures in the ESPR

Four main steppingstones can be identified in the European Union's strategy towards sustainable textiles, namely (1) mandatory ecodesign requirements, (2) extended producer responsibility requirements, (3) a ban on the destruction of unsold products, and (4) greater attention to the export of used textiles and waste shipments.<sup>84</sup>

It is no coincidence that mandatory ecodesign requirements are put front and central in that strategy. They are (or at least they should be) the foundation of any policy regarding product destruction for five reasons.<sup>85</sup>

- First, ecodesign that extends the usefulness of a product in its use stage (e.g., via good reparability) addresses one of the root causes of product destruction: overproduction. From a sustainability perspective it is sensible to prevent the unnecessary use of resources.<sup>86</sup> In a 2023 life cycle assessment (LCA) commissioned by EuRIC, the European Recycling Industries' Confederation, the authors of the report found that the LCA results clearly demonstrate that avoiding the production of clothing provides the largest savings on both climate change and water use and illustrate that avoiding production has a more significant impact than recycling processes, transport, and waste treatment<sup>87</sup> Moreover,

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<sup>84</sup> The European Commission itself flags the first two measures as the steppingstones towards “a new paradigm of attractive alternatives to fast changing fashion trends”, see Sustainable Textiles Communication, p. 8.

<sup>85</sup> These reasons are focused on product destruction. It should be noted, however, that good ecodesign mitigates other environmental problems as well. As noted earlier, good ecodesign could lead to less microplastics pollution. As will be explained later, the fast fashion industry leads to a waste problem in third countries. Better ecodesign resulting in higher quality clothing can reduce this problem, see K. DISSANAYAKE and R. PAL, “Sustainability dichotomies of used clothes supply chains: a critical review of key concerns and strategic resources”, *The International Journal of Logistics Management* 2023, Vol. 34, p. (75) 89-90.

<sup>86</sup> More on this to follow in the discussion of extended producer's responsibility (EPR).

<sup>87</sup> S. TRZEPACZ *et al.*, *LCA-based assessment of the management of European used textiles*, January 2023, [https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles\\_corrected.pdf](https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles_corrected.pdf), p. 54. See for a description of similar findings by several other authors, K. DISSANAYAKE and R. PAL, “Sustainability dichotomies of used clothes supply chains: a critical review of key concerns and strategic resources”, *The International Journal of Logistics Management* 2023, Vol. 34, p. (75) 82.

the interviewees in the study conducted by Roberts *et al.* all agreed that upstream interventions focused on the main causes for product destruction are needed.<sup>88</sup>

- Second, building further on the previous reason, good ecodesign addresses the upstream factor ‘consumer behavior’. The disposal of textiles by consumers begins with a consumer’s decision to stop using a textile that no longer satisfies the owner.<sup>89</sup> Bad ecodesign is an external barrier that disempowers consumers to prolong that satisfaction. Consumers recognize the convenience of replacing textiles with cheap new ones as a disabling effect. Because of the diminishing necessity for textile repair or reuse skills, consumers have gradually become incapable of effectively engaging in these practices, which leads to less reuse and repair of textile products.<sup>90</sup> Lowering the barrier for repair can mitigate this problem and re-empower consumers. Of course, ecodesign by itself is no cure-all. Consumers also experience internal barriers (e.g., lack of time, patience and energy) and the availability of cheap, low-quality fast fashion drives many consumer decisions in the context of the disposal of textile products by consumers.<sup>91</sup>
- Third, good ecodesign is also crucial to enhance the circularity of products once they have reached the utter end of their usefulness to consumers and are discarded as waste. As things stand, the cost of recycled materials is often higher than virgin materials as a result of processing complexities.<sup>92</sup> However, with good ecodesign requirements, the cost of recycled materials can be reduced, making them more competitive in the market and encouraging their adoption by manufacturers. An essential condition for reaching a fully circular textile industry is that secondary production with recycled materials becomes a true alternative for primary production with virgin materials, with comparable quality and price.<sup>93</sup> Products from secondary production needs to be able to compete seriously with their primary alternatives or meaningful substitutions. Otherwise, their environmental benefits are unlikely to occur.<sup>94</sup>
  - One major roadblock for competitive textile recycling is the persistent presence of hazardous substances in clothing. This problem is enlarged by enforcement issues regarding imported goods, as evidenced by the European Commission’s recent consumer protection probe into the Chinese Shein and Temu platforms for alleged failure to comply with EU standards.<sup>95</sup> Banning substances from the production of textile goods as part of renewed ecodesign requirements, while adequately enforcing those bans, could take away this barrier for competitiveness. A dialog with industry stakeholders in the textile sector will be necessary to ensure a sufficiently tailor-made approach wherein the ecodesign requirements are sufficiently stringent yet technically feasible. Blanket bans on

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<sup>88</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 307.

<sup>89</sup> R. PERA and E. FERRUCCI, “Consumers’ textile disposal practices and their perceived value in the circular economy: A platform focused ethnography approach”, *Business Strategy and the Environment*, 2023, p. (1) 12 (hereinafter abbreviated as ‘Pera & Ferrulli, *Business Strategy and the Environment*, 2023’).

<sup>90</sup> Pera & Ferrulli, *Business Strategy and the Environment*, 2023, p. (1) 12.

<sup>91</sup> Pera & Ferrulli, *Business Strategy and the Environment*, 2023 p. (1) 12.

<sup>92</sup> The costs connected to logistics, especially, pre-sorting and sorting operations, are significant. Combined with textile-specific requirements, such as the need for the separation of fibers, dyes, hardware (e.g., zippers), and chemicals, the recycled textile materials are expensive compared to the use of virgin textile materials, see I. DUKOVSKA-POPOVSKA, L. KJELLSDOTTER IVERT, H. JONSDOTTIR, H. CARIN DREYER and R. KAIPIA, “The supply and demand balance of recyclable textiles in the Nordic countries”, *Waste Management* 2023, Vol. 159, p. (154) 161. See also CE Delft, *Potentieel beschikbaar recycelaat uit post-consumer textiel*, juli 2024, Publicatienummer: 24.240185.090 Oprachtgever: Ministerie van Infrastructuur en Waterstaat & Rijkswaterstaat.

<sup>93</sup> Siderius & Poldner, *Journal of Cleaner Production* 2021, p. 3.

<sup>94</sup> Siderius & Poldner, *Journal of Cleaner Production* 2021, p. 3.

<sup>95</sup> [Temu, Shein targeted as EU cracks down on unsafe e-commerce imports | Reuters](#)

classes of chemicals would likely be partially effective in reducing the presence of such substances but could also lead to increased use of ‘regrettable substitutions’ with unforeseen implications.<sup>96</sup> Blanket bans could hinder progress in areas where these substances are useful and – importantly – no alternatives exist.<sup>97</sup> In this regard the ‘essential use’ approach that has piqued the interest of the European Commission is of interest.<sup>98</sup> Within the category of consumer textile products it is unlikely that the currently known or potential hazardous substances are of essential use, but it is not impossible that the requirements for technical textile products might require an approach wherein certain high-risk chemicals require a gradual phase-out to allow the development and integration of safer alternatives (e.g., as a result of expectations regarding fire retardancy). The reason why (blanket) bans can only be partially effective in reducing the presence of hazardous substances – particularly short-term – is that they work for the future and not retroactively. Recycling facilities process both relatively recently marketed textile products and products that could be decades old. Older fabrics could contain hazardous substances banned in more recent times. Recyclers face the challenge of identifying and removing such substances from the recycle.

- A second hurdle for recyclability is mixed fiber content. When textiles are made from a blend of different types of fibers, such as natural fibers (e.g., cotton) and synthetic fibers (e.g., polyester), the sorting and recycling processes becomes more intricate and less straightforward. Several factors come into play.<sup>99</sup> To start, mixed fiber contents complicate the sorting of used textiles and lead to complex waste streams (while clothing already is a complex waste stream in and of itself because of the materials used besides textile such as metal zippers, plastic buttons and leather details<sup>100</sup>).<sup>101</sup> Moreover, different types of fibers have distinct properties, including melting points, chemical compositions, and physical characteristics. When fibers with varying properties are mixed, it becomes difficult to process them uniformly during recycling.<sup>102</sup> Uneven

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<sup>96</sup> See in detail M. SHARKEY and M. COGGINS, “The Invisible Barrier to Safe Textile Recycling”, *Frontiers in Sustainability* 2022, article 876683, p. 1-6.

<sup>97</sup> Forever chemicals serve as an example of this caveat. The German economy and climate minister Robert Habeck has expressed reservations regarding an European Union-wide ban of forever chemicals, even though such a ban was proposed by the German environmental agency itself in January 2023. Habeck stressed that this group of chemicals plays a key role in ‘technologies of the future’ such as semiconductors and electric engines, many of which are key for the green transition. Thus, over-regulation might hamper this transition. In Habeck’s view forever chemicals should be banned wherever they are not used in a way that is safe for humans and the environment and where they can be well replaced by other substances, see <https://www.euractiv.com/section/health-consumers/news/berlin-split-over-eu-forever-chemicals-ban-it-helped-propose/>.

<sup>98</sup> Communication from the Commission – Guiding criteria and principles for the essential use concept in EU legislation dealing with chemicals (C/2024/2894), *Pb. C* 26 April 2024.

<sup>99</sup> These factors are well-established in literature on the sorting and recycling processes of used textiles. See as an example of such literature, T. WAGAW and K. MURUGESH BABU, “Textile Waste Recycling: A Need for a Stringent Paradigm Shift”, *AATCC Journal of Research*, 2023.

<sup>100</sup> See footnote 12.

<sup>101</sup> Particularly in the case of manual sorting, which is – as things stands – inevitable, prone to misclassifications since it depends on the material content listed on the product labels (which might be faulty) and the expertise of the workers, who in turn experience high intensity and poor working conditions, see S. BIANCHI, F. BARTOLI, C. BRUNI, C. FERNANDEZ-AVILA, L. RODRIGUEZ-TURIENZO, J. MELLADO-CARRETERO, D. SPINELLI and M.-B. COLTELLI, “Opportunities and Limitations in Recycling Fossil Polymers from Textiles”, *Macromol* 2023, p. (120) 127.

<sup>102</sup> There are two major methods of recycling textiles. ‘Physical’ or ‘mechanical recycling’ involves physically breaking textiles down into smaller fibers or pieces. This method does not involve the use of chemicals or alterations to the textile’s molecular

processing can lead to a loss of quality in the resulting recycled fibers. Moreover, some fiber types can also be incompatible with each other during recycling. There are also separation difficulties. Effective recycling often requires separating fibers according to their type. Mixed fiber textiles make it challenging to separate individual fibers efficiently. Thus, it is important that textiles are designed 'for sorting' and 'for recycling'.<sup>103</sup>

- A third and similar hurdle is the presence of non-fiber materials such as zippers, sequins and beads. Those materials have to be removed.
- Fourth, good ecodesign addresses the downstream factor 'profit margin considerations'. With good ecodesign, the price of investments in the processes necessary to prepare a damaged unsold product or, in general, a returned product is driven down. Products that are designed to be repaired easily make this process more economically feasible.
- Fifth, many policy measures envisioned by the European Commission are interconnected. For example, ecodesign requirements regarding recycled content and EPR go hand in hand, as reusing post-consumer materials in the production stage requires collecting and handling products after their use stage. This interconnectedness is unsurprising. The proposed actions of the European Commission all work towards a common goal: closing the loop in the textile industry. Thus, measures that target the – in a linear model – end of the value chain (the 'grave'), are meant to feed back into and support measures aimed at the start of the value chain (the 'cradle'), in an effort to create a cradle-to-cradle cycle.

Currently, the textile industry finds itself in somewhat of a stalemate. There exists no market that can sufficiently handle the circular processing of textile products among others for reason of a lack of demand-side interest.<sup>104</sup> In turn, several hurdles hamper the development of such a market on the supply-side, such as products that are difficult to repair because of the use of non-standard components, products that contain substances of concern such as carcinogens, products that are hard to recycle because of mixed fiber content, etc. Thus, nearly all policy measures are fundamentally rooted in ecodesign. Roberts *et al.* stress that ensuring the quality and sustainability of products entering the internal European market is the starting point for these other policy measures.<sup>105</sup> This opinion is corroborated by other literature. For example, the authors of a 2022 study by Eunomia on EPR commissioned by the Changing Markets Foundation and the European Environmental Bureau regard ecodesign as an essential measure

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structure. Instead, it relies on physical techniques such as shredding, cutting, and carding to transform textiles into reusable raw materials. Mechanical recycling is commonly used for cotton and other natural fibers, as well as some synthetic fibers like polyester. 'Chemical recycling' involves breaking down textiles using chemical processes to recover the fibers in their original state or transform them into new materials. Chemicals are used to break down polymers into monomers. Chemical recycling is commonly used for synthetic fibers (A. BARTL, "Textiles production and end-of-life management options" in T.M. LETCHER (ed.), *Plastic Waste and Recycling. Environmental Impact, Societal Issues, Prevention, and Solutions*, Amsterdam, Elsevier, 2020, p. (251) 269 and following). In physical recycling, different fibers have distinct mechanical properties, making uniform processing challenging. In chemical recycling, the diverse chemical compositions of mixed fibers require tailored processes that may not work equally well for all components, leading to incomplete or inefficient breakdown and hindered conversion into usable raw materials.

<sup>103</sup> C.A. HALL, K. GOLDSWORTHY and R. EARLEY, "Design for sorting knitwear: Exploring blended textile wastes and the relationship between sorting, recovery, and recycled blending in yarn manufacture", *Materials Open Research* 2022. See also the PhD of C.A. HALL for more detail, *Design for recycling knitwear a framework for sorting, blending and cascading in the mechanical textile recycling industry*, PhD University of the Arts London Chelsea College of Arts, 2021, 468p.

<sup>104</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 308.

<sup>105</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 308

to support EPR.<sup>106</sup> The Ellen MacArthur Foundation reaches a similar conclusion in a 2022 report.<sup>107</sup> This opinion is also backed by relevant actors in the textile (waste) industry. For example, FEAD, the European Waste Management Association, strongly supports the introduction of mandatory ecodesign requirements.<sup>108</sup> EuRIC, the European Recycling Industries' Confederation, calls such requirements of paramount importance.<sup>109</sup>

Consequently, the policy intervention of the European Union to introduce ecodesign requirements through the ESPR can be flagged as advantageous. Flanders has already laid the groundwork for introducing mandatory ecodesign requirements. The Public Waste Agency of Flanders (OVAM) has requested Centexbel<sup>110</sup> and VITO<sup>111</sup> to study which ecodesign requirements should be voluntarily adopted by the textile industry today. This has resulted in two reports, one on consumer textiles and one on industrial textiles, and accessory practical guidelines for actors in the industry.<sup>112</sup> **A policy recommendation for the Flemish policy level is to support the introduction of mandatory ecodesign requirements for textiles at the European Union level through the ESPR, which focus on reparability and recyclability in particular (more on the advantageousness of either R-strategy to follow in the section on EPR). Flanders can advocate stringent ecodesign requirements in the Ecodesign Forum, building on the research on voluntary requirements that has already been done for OVAM and adapting those voluntary requirements to the context of a mandatory approach.** The European Commission will elaborate the ecodesign requirements for specific products/product groups by delegated act after consultation with this Ecodesign Forum (article 19 ESPR). Representatives of the Member States are part of this expert group. To determine the Belgian position in this European forum, consultation and cooperation at the national level between the governmental entities is necessary.

### **3.3.1.2 Dutch and German inspiration: fiber-to-fiber recycled content as ecodesign requirement**

One ecodesign requirement is of particular interest: the mandatory inclusion of recycled content in new textiles. The inspiration for a suggestion in that sense in this research report was found in a suggestion thereto during the conception of the Dutch approach to circular textiles and a similar provision that can be found in Germany.

In the Netherlands<sup>113</sup>, the Ministry of Infrastructure and Water Management has adopted a policy program for circular textiles (2020-2025), on which the secretary of state publishes a

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<sup>106</sup> L. LONG and K. LEE-SIMION, "Driving a Circular Economy for Textiles through EPR", Bristol, Eunomia Research & Consulting Ltd., 2022, p. 49.

<sup>107</sup> V. BOITEN, "Building a circular economy for textiles supported by common rules on Extended Producer Responsibility (EPR) in the European Union", Ellen MacArthur Foundation, Cowes, 2022, 15 and 17.

<sup>108</sup> <https://fead.be/position/fead-welcomes-the-eu-strategy-on-sustainable-textiles/>.

<sup>109</sup> [https://euric-aisbl.eu/images/Position-papers/EuRIC\\_Textiles\\_Strategy\\_2022.pdf](https://euric-aisbl.eu/images/Position-papers/EuRIC_Textiles_Strategy_2022.pdf).

<sup>110</sup> Centexbel is the Belgian 'Textile Competence Centre', founded in 1950 at the initiative of Fedustria, the Belgian professional organization of the textile industry.

<sup>111</sup> The Flemish Institute for Technological Research (VITO) is an independent Flemish research organization in the area of cleantech and sustainable development.

<sup>112</sup> OVAM, *Circulair bedrijfstextiel. Een praktische gids*, Malines, OVAM, 2020, 46p.; E. MAES *et al.*, *Ecodesign criteria for consumer textiles*, Malines, OVAM, 2021, 84p.

<sup>113</sup> For the factual background of the Dutch textile market, see Massabalans textiel 2018. Onderzoek naar de massabalans van het in Nederland ingezamelde afgedankte textiel en de route en resultaten van de verwerking, FF/19.011, 27 maart 2020. Regarding industrial textiles, see Massabalans Bedrijfsmatig textiel 2020. Onderzoek naar afdanking en verwerking van bedrijfsmatig textiel – nulmeting 2020, FF/21.015, 8 augustus 2022.

yearly monitoring report.<sup>114</sup> In December 2024 the policies have been updated in a program spanning from 2025 to 2030.<sup>115</sup> The Dutch ambition is to develop gradually a fully circular economy in the textile industry by 2050, with the following milestones.<sup>116</sup>

- 2025:
  - 25% of materials used in textiles are recycled or sustainable<sup>117</sup>.
  - 30% of resources, materials and products put on the Dutch market are recycled after collection if direct reuse is no longer possible.
  - 10% of all textile products are reused.<sup>118</sup>
- 2030:
  - 50% of materials used in textiles are recycled or sustainable, with at least 30% being recycled materials and at most 20% being sustainable.
  - 50% of resources, materials and products put on the Dutch market are recycled after collection if direct reuse is no longer possible.
  - 15% of all textile products are reused.<sup>119</sup>
- 2035: halving of the negative environmental impacts of the textile industry regarding emissions, water use, hazardous chemicals and microplastics.

A main measure in the Dutch strategy is the implementation of a new<sup>120</sup> EPR scheme for textiles in the Netherlands.<sup>121</sup> From 1 July 2023 onwards, producers are responsible for ensuring the recycling and reusing of their textile products. They need to ensure that each calendar year a certain percentage of the total weight of all textile products put on the market the preceding calendar year (note: not the total weight of discarded textiles) is (1) prepared for reuse and recycling (2025: 50% → 2030: 75%) and (2) prepared for reuse (2025: 20% → 2030: 25%) (articles 3-4 EPR scheme). Of all products of the preceding calendar year that are recycled, the producer ensures that a certain percentage of their total weight is recycled fiber-to-fiber (2025: 25% → 2030: 33%) (article 5 EPR scheme). Fiber-to-fiber recycling is the process of converting used textiles back into fibers, which can then be spun into new yarns and fabrics. This high-grade recycling method preserves the material's quality, allowing the creation of new textiles from old ones, thus maintaining the fibers' value. Unlike low-grade recycling, where recycled fibers are downcycled into non-textile products like insulation or padding, high-grade recycling

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<sup>114</sup> Beleidsprogramma van 14 april 2020 circulair textiel 2020 – 2025, IENW/BSK-2020/70651.

<sup>115</sup> Beleidsprogramma van december 2024 circulair textiel 2025–2030.

<sup>116</sup> To measure the progress towards the objectives of the policy program, a set of indicators has been developed for each goal. These indicators cover the various stages of the textile chain: the design and production stage, the purchase and usage stage and the waste stage. For the latest data see rapport monitoring beleidsprogramma circulair textiel (peiljaar 2020), 21 April 2021, BH3288-MI-RP-220421-1403.

<sup>117</sup> The secretary of state van Veldhoven - Van der Meer notes that the notion of sustainable is ever-evolving. For the time being, the Dutch regard as sustainable alternatives for conventional virgin materials: bio/organic and 'better' cotton (BCI), lyocell from sustainable cellulose sources (e.g., Tencel), and the bio-based alternatives to oil-based synthetic yarns (e.g, PLA and bioPES, PEF), see Beleidsprogramma van 14 april 2020 circulair textiel 2020 – 2025, IENW/BSK-2020/70651, p. 2, footnote 3.

<sup>118</sup> This goal was added in the yearly monitoring report of 2021, see voortgangsrapportage 2021 beleidsprogramma circulair textiel 2020 – 2025, p. 2.

<sup>119</sup> This goal was added in the yearly monitoring report of 2021, see voortgangsrapportage 2021 beleidsprogramma circulair textiel 2020 – 2025, p. 2.

<sup>120</sup> For the already existing general legislative framework on EPR, see besluit van 18 september 2020, houdende regels voor een regeling voor uitgebreide producentenverantwoordelijkheid voor het beheer van afvalstoffen, *Dutch Official Journal (Staatsblad)* 2020, Vol. 375.

<sup>121</sup> Besluit van 14 april 2023, houdende regels voor uitgebreide producentenverantwoordelijkheid voor textielproducten, *Dutch Official Journal (Staatsblad)* 2023, Vol. 132.

focuses on producing high-quality textile. From 2025 onward, producers have to report on how they have fulfilled this obligation. Producers are tasked with verifying that the person whom they have employed to create recycle has in fact recycled their textiles fiber-to-fiber. This means that the report of the producer and the documents attached thereto are to demonstrate that the textile waste destined for recycling has been converted back into textile fibers through chemical or mechanical recycling, for example, via a declaration by the recycler or other proof that spinnable textile fibers have been produced.<sup>122</sup> Notably, proof of actual use of the recycle is not required.<sup>123</sup>

The research report deals with EPR schemes in more detail in a following section. The relevance of the Dutch EPR scheme here is that the Dutch government also introduces a general ‘duty of care’ regarding the fiber-to-fiber recycling in the regulatory framework of the EPR scheme. Producers are to take measures aimed at incorporating as many recycled textile fibers, derived from post-consumer textile products, as possible into the textile products that they place on the market (article 6 EPR scheme). From 2025 onward, they are to report which measures they have taken to fulfill this duty of care.<sup>124</sup> Additionally – prior to the EPR scheme – the Dutch Ministry of Infrastructure and Water has worked out the ‘Denim deal’, which is a voluntary instrument relating to ecodesign (more specifically post-consumer material content).<sup>125</sup> The signatories of the Denim Deal aim to connect the demand and supply sides of the denim market by promoting the use of high-grade post-consumer recycled cotton fibers in new jeans and other denim garments. Since the start in October 2020, the number of signatories of the Denim Deal has grown to fifty.<sup>126</sup>

The statutory duty of care and this Denim Deal are both meant to ‘close the loop’. The obligation to recycle fiber-to-fiber at the tail end of a product’s lifespan can only be truly successful in practice if there is a market waiting to use the high-grade recycled material. The duty of care stimulates producers to become part of that market themselves. Whereas the obligation to

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<sup>122</sup> See the explanatory memorandum to regeling van de Staatssecretaris van Infrastructuur en Waterstaat, van 10 december 2024, nr. IENW/BSK-2024/339548, tot wijziging van de Regeling uitgebreide producentenverantwoordelijkheid textiel in verband met aanpassing van het verslagleggingsformulier, *Staatscourant* 2024, 41749.

<sup>123</sup> The Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*) is the agency tasked with the enforcement of the obligations of the EPR scheme. The inspectorate noted that a declaration or proof of the production of spinnable yarn does not guarantee that these yarns are actually used in textile products. The Ministry of Infrastructure and Water Management held discussions with industry stakeholders following this remark. The decision to request proof of fiber-to-fiber recycling rather than proof of real application can be explained by the costly nature of the recycling process. It is assumed that fiber-to-fiber recycling will not be pursued if there is no clear prospect of application in new textile products. At present, there are insufficient indications to determine whether recycled material is actually being used in new clothing and household textiles, see the explanatory memorandum to regeling van de Staatssecretaris van Infrastructuur en Waterstaat, van 10 december 2024, nr. IENW/BSK-2024/339548, tot wijziging van de Regeling uitgebreide producentenverantwoordelijkheid textiel in verband met aanpassing van het verslagleggingsformulier, *Staatscourant* 2024, 41749

<sup>124</sup> Producers have to fill out a mandatory form. In ‘part C’ of that form, the producers have to answer how they have fulfilled all the obligations of the EPR scheme. Question no. 7 is : "Indicate how you strive to use recycled textile fibers. What measures do you take to ensure that the textile products you place on the market contain as many recycled textile fibers as possible from post-consumer discarded textile products? (Original in Dutch: *Geef aan op welke wijze u zich inspant om gerecyclede textielvezels toe te passen? Welke maatregelen neemt u om ervoor te zorgen dat in de textielproducten die u in de handel brengt zo veel mogelijk gerecyclede textielvezels afkomstig van na gebruik afgedankte textielproducten worden toegepast?*)", see regeling van de Staatssecretaris van Infrastructuur en Waterstaat, van 10 december 2024, nr. IENW/BSK-2024/339548, tot wijziging van de Regeling uitgebreide producentenverantwoordelijkheid textiel in verband met aanpassing van het verslagleggingsformulier, *Staatscourant* 2024, 41749.

<sup>125</sup> <https://www.afvalcirculair.nl/onderwerpen/afvalstromen-ketens/textiel/green-deal-circular-denim/>

<sup>126</sup> Mededeling van het Ministerie van Infrastructuur en Waterstaat inzake de publicatie van een geactualiseerde Bijlage 1 bij de Denim Deal, *Dutch Government Gazette (Staatscourant)* 2023, Vol. 6076.

recycle fiber-to-fiber in article 5 of the EPR scheme uses firm targets in the form of percentages of total weight produced, the duty of care in article 6 is worded vaguely. It can be seen as an obligation of means obligating producers to use all reasonable efforts to incorporate ‘as many recycled fibers’ as possible, without clear cut targets. Originally, the draft EPR scheme did contain the possibility to set percentage targets by ministerial decree (draft article 6(2)<sup>127</sup>), but this was removed following the advice of the Advisory Division of the Dutch Council of State that a ministerial decree would not be a suitable instrument in light of the Dutch division of competences to different regulatory levels.<sup>128</sup> In essence, such targets would have been an ecodesign obligation.

Similarly, the German Circular Economy Act (*Kreislaufwirtschaftsgesetz*), stipulates that product stewardship (*Produktverantwortung*) includes the “use of recyclable waste or secondary raw materials, in particular recycles<sup>129</sup>, in the manufacturing of products” (article 23(2)(2)).<sup>130</sup>

The explanatory memorandum to the Dutch EPR scheme does not go into much detail on what is to be understood as reasonable efforts by producers. The Dutch EPR scheme also does not contain detailed rules for recycled content accounting. It does not explain explicitly which chain-of-custody model should be followed. The chain-of-custody is the process of following materials through every step of the supply chain. Different models exist for documenting specific materials (e.g., segregation, controlled blending, and mass balance with free attribution) (see SO 22095-2020 (Chain of custody — General terminology and models)). Awareness of differing models is important in the context of products made from different materials such as recycled and virgin materials. The models do not provide equal levels of traceability (which is, for example, the reason why – in the context of European Union legislation – the Deforestation Regulation does not allow any type of mass balance accounting but requires greater traceability of individual wood products to specific plots of lands<sup>131</sup>). This is not without relevance for this research report, as setting targets for recycled content without specifying which method should be followed can result in a discrepancy in the levels of recycled contents in products when comparing different performances among players in the supply chain or even within the same organization.<sup>132</sup> The risks of consumer confusion (specifically, possible greenwashing) and market disruption is real.<sup>133</sup>

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<sup>127</sup> Ontwerpbesluit uitgebreide producentenverantwoordelijkheid textiel (6 July 2022).

<sup>128</sup> See advice W17.22.00077/IV.

<sup>129</sup> See article 3(7)(b) of the Act: “recycles (...) are secondary raw materials that have been obtained through the recycling of waste or are produced during the disposal of waste and are suitable for the manufacture of products”.

<sup>130</sup> Ministerialrat F. PETERSEN calls this ‘obligation’ a central lever for promoting recycling, see F. PETERSEN, “Die Produktverantwortung im Kreislaufwirtschaftsrecht”, *NVwZ* 2022, 921.

<sup>131</sup> Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, *Pb. L* 9 June 2023, vol. 150, 206-247.

<sup>132</sup> See, for example, in the context of plastic waste recycling F. CARACENI, E. ABBATE, C. BRONDI, M. COLONNA, G. DOTELLI, A. BALLARINO, “Variability of the declared recycled content by changing allocation methods: A case study on plastic waste recycling”, *Resources, Environment and Sustainability* 2024, 100154.

<sup>133</sup> Below the new Packaging Regulation, which contains mandatory recycled content targets for packaging on the European market, is explained in more detail. The European Union legislature is mindful of the pitfalls of consumer confusion as regards recycled content. Recital 157 of the Packaging Regulation reads: “Claims on packaging characteristics for which legal requirements are set out in this Regulation, such as recyclability, the level of recycled content and reusability, should only be made in relation to packaging properties exceeding the applicable minimum requirements set out in this Regulation and in accordance with the methodologies and rules established under this Regulation. Such claims should also specify whether they relate to the packaging unit, part of the packaging unit or to all packaging placed on the market by the economic operator”

Despite the foregoing, the duty of care in the Netherlands (and in Germany) can serve as an inspiration at the European Union level to introduce an ecodesign requirement mandating recycled content (as a sidenote it can be mentioned that harmonized product requirements at the level of the European Union – in lieu of national requirements – avoid fragmentation of the internal market). Making fiber-to-fiber recycling a cornerstone of ecodesign would signal a clear market direction towards ‘upcycling’<sup>134</sup> of textiles rather than ‘downcycling’<sup>135</sup>. It helps to break up the stalemate in the circular processing of textiles by stimulating demand of recycled fibers at the side of manufacturers.<sup>136</sup> **Thus, a policy recommendation for the Flemish policy level is to, when it supports the introduction of mandatory ecodesign requirements at the European Union level, attempt to introduce binding targets for fiber-to-fiber recycling.**

Mandatory recycled content targets would not be unheard of at the level of the European Union. For their practical implementation inspiration can be drawn elsewhere. For example, this type of targets can be found in the new Packaging Regulation.<sup>137</sup> Article 7(1) of the Packaging Regulation mandates that by certain dates every plastic part of certain types of packaging placed on the European market shall contain a certain minimum percentage of recycled content recovered from post-consumer plastic waste (e.g., 30 % for single use plastic beverage bottles by – in theory – 1 January 2030).<sup>138</sup> The European Commission is tasked with implementing acts establishing the methodology for the calculation and verification of the percentage of recycled content, recovered from post-consumer plastic waste recycled and collected within the European Union by 31 December 2026 (article 7(8)). Moreover, the European Commission has been granted the power to implement acts establishing the chain of custody mechanism to ensure that recyclable packaging is effectively recycled at scale by 1 January 2030 (article 6(5)). The European Commission will have to reflect on the different possibilities for recycled content accounting rules. The same would have to happen in the context of the ecodesign requirements adopted on the basis of the ESPR. It falls outside of the scope of this research report to go into great detail about the suitability of the different chain-of-custody models in the context of textiles. This could be seen as an opportunity for further interdisciplinary research, which would bridge the legal field and scientific fields dealing with supply chain management. To conclude this paragraph, it can be noted, however, that the

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<sup>134</sup> Upcycling involves the transformation of waste materials into products of equal or higher value or quality than the original materials. When textiles are upcycled, they are creatively repurposed or transformed into new products with enhanced aesthetics or functionality. For instance, old clothing might be turned into new, trendy clothing, see T. WAGAW and K. MURUGESH BABU, “Textile Waste Recycling: A Need for a Stringent Paradigm Shift”, *AATCC Journal of Research*, 2023.

<sup>135</sup> Downcycling refers to the recycling process where materials are recycled into products of lower quality or value compared to the original material. In the case of textiles, downcycling occurs when textiles are recycled into products with reduced functionality or desirability. For example, old clothing might be shredded and turned into low-grade materials like composites, cleaning rags or insulation. The original quality and value of the textiles are not fully retained in the downcycling process, and the recycled products often have limited uses, see T. WAGAW and K. MURUGESH BABU, “Textile Waste Recycling: A Need for a Stringent Paradigm Shift”, *AATCC Journal of Research*, 2023.

<sup>136</sup> V. VERMEYEN, L. ALAERTS, E. WORRELL and K. VAN ACKER, “Threads untangled: Regional mapping of post-consumer textile management”, *Cleaner Waste Systems* 2024, no. 100181, p. (1) 7: “If closed-loop textile recycling is to succeed, targets aimed at increasing closed-loop recycling need to be complemented with requirements on using recycled content in products to reassure sorters and recyclers that there will be a market for their product.”

<sup>137</sup> Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, *OJ L* 2025, vol. 40.

<sup>138</sup> Notably, financial contributions paid by producers in order to comply with their extended producer responsibility obligations may be modulated based on the percentage of recycled content used in the packaging (article 7(7)). The research report goes into greater detail on eco-modulation of fees below.

European Commission does not dismiss the possibility of allowing the mass balance approach, at least not in certain sectors.<sup>139</sup>

The suggestion to include binding recycled content targets comes with an important caveat. Care must be taken to avoid setting overly stringent binding targets. While increased recycling is desirable in a circular economy, which aims to create a closed-loop system, the primary goal is to slow the flow of materials.<sup>140</sup> This typically means prioritizing higher-ranking R-strategies, as lower-ranking strategies often – in normal circumstances – result in greater material loss and increased use of new natural resources. Ideally, products should change hands as infrequently as possible. Even the reuse of a product by another person can lead to material losses (e.g., selling a coat second-hand requires energy, such as the energy used during transport by a delivery service but even the kinetic energy generated from digested food if the buyer picks it up by bicycle can be seen as a material loss, and often packaging material, for instance when shipping the coat by mail). Although it is possible to work towards a slower flow of materials, it is impossible to halt it entirely.<sup>141</sup> Material loss is inevitable (e.g., certain textile products suitable for recycling or reuse may end up in non-sorted waste streams because of consumer behavior, diminishing their potential for high-value recovery). Additionally, there are technical limitations to fiber-to-fiber recycling that result in losses (e.g., the shortening of end-product fibers). This creates pressure on the availability of recyclable materials and the amount of possible recyclate. An unintended consequence of stringent recycled content targets is that products suitable for higher-ranking R-strategies may be diverted to recycling to meet ecodesign obligations. This can undermine the overall effectiveness of the circular economy by prioritizing lower-ranking strategies over more sustainable options.

### **3.3.1.3 Informational ecodesign requirements (e.g., repairability score)**

#### **3.3.1.3.1 Ecodesign requirements proper and the French example**

In the ESPR ‘information requirements’ are placed under the umbrella of ecodesign. Obligations to inform can be translated into ecodesign requirements in the form of visual design elements such as labels. An example thereof is the ‘repairability score’ mentioned in the ESPR and the ECGTD. One of the reasons why the European Union has sought to enact harmonized rules on informational ecodesign requirements is national initiatives in that sense, in particular in France.

In 2020 France adopted legislation meant to give shape to a system-wide transition towards a circular economy. The *Loi Anti-Gaspillage* (anti-waste act) contains several measures that are

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<sup>139</sup> E.g., as regards single-use plastic beverage bottles see consideration 10 Commission implementing decision (EU) 2023/2683 of 30 November 2023 laying down rules for the application of Directive (EU) 2019/904 of the European Parliament and of the Council as regards the calculation, verification and reporting of data on recycled plastic content in single-use plastic beverage bottles, *OJ L* 1 December 2023, vol. 2683 (“In order to take into account also recycled plastic in beverage bottles that has not been obtained by mechanical recycling of PET waste, the Commission plans to draft an amendment of this Decision to include a methodology to calculate, verify and report recycled plastic content in beverage bottles that is based on the application of certain chain of custody models as defined in ISO 22095-2020 (Chain of custody — General terminology and models). In particular, controlled blending, which allows to account also for non-mechanically recycled PET, is a possible chain of custody model. In addition, a mass balance approach may be included as an admissible chain of custody model to also account for plastic in non-PET bottles resulting from feedstock recycling.”).

<sup>140</sup> W. MCDONOUGH and M. BRAUNGART, *Cradle to Cradle: Remaking the Way We Make Things*, New York, North Point Press, 2002, 208p.

<sup>141</sup> See in detail V. VERMEYEN, L. ALAERTS, E. WORRELL and K. VAN ACKER, “Threads untangled: Regional mapping of post-consumer textile management”, *Cleaner Waste Systems* 2024, no. 100181, p. (1) 5 and following.

relevant to the topic of product destruction.<sup>142</sup> The act contains several provisions on ecodesign and informing consumers that aim to extend the useful lifetime of products and to combat premature obsolescence. For example, the law introduces a ‘repairability score’ (*indice de réparabilité*) (article L. 541-9-2 *Code de l’environnement*) (which has inspired Belgian draft legislation).<sup>143</sup> The persons who place certain electrical or electronic products on the French market must affix this score to their products (mandatorily from 2022 onwards). The reasoning behind this score is to inform consumers of the repairability of products, in the hope of promoting repair and, thus, to keep products at their highest value for longer. Another example is an interdiction of all techniques that hamper non-proprietary, independent repair (article L. 441-3 *Code de la consommation*).

In October 2023, the *Direction interministérielle de la transformation publique* published a report that evaluates the impact of the repairability score.<sup>144</sup> The main research question of this report is whether the introduction of the score has encouraged purchases of products that are more easily repairable. ‘More easily repairable products’ are defined as products with a repairability score of 6.5 or higher. To answer this main research question, the authors could rely on data of two traders. The repairability score has only been introduced in 2021 and mandated in 2022. Thus, the authors of the report have not been able to investigate quantitatively whether the repairability score has led to an increase in actual repair activities. The authors indicate that it is too early to conduct such research because (1) the need for repair only arises when products break down after, in general, several years and (2) many of the products put into circulation after the introduction of the repairability score still fall under the statutory guarantee of the Sale of Goods Directive, which could influence consumer choices to have products repaired.

- A first major conclusion of the report is that the introduction of the repairability score has had a positive effect on the uptake of more easily repairable products, but that this effect is not statistically significant. From the data it cannot be inferred with sufficient confidence that the increased sales of more easily repairable products is solely caused by the introduction of the repairability score.
- A second major conclusion of the report is that the introduction of the repairability score has had a positive and statistically significant effect on online sales. On in-store sales, it has had a positive effect, but one that is not statistically significant. This difference could be explained by better visibility of the repairability score online than in-store. Observations of the authors made in-store showed a less systematic display of the index in-store compared to online.
- A third major conclusion is that the average repairability score of products sold increases over time. In other words, the products sold over the observed period are increasingly repairable. Concretely, the average increase is 3% for computers, 4% for front-loading washing machines, 9% for televisions, and 12% for smartphones between January 2021

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<sup>142</sup> Article 16 Loi Anti-Gaspillage. For the ministerial implementing decree on how the score is to be calculated and displayed in general, see arrêté du 29 décembre 2020 relatif aux modalités d’affichage, à la signalétique et aux paramètres généraux de calcul de l’indice de réparabilité, *French Official Journal (Journal officiel de la République française)* 31 December 2020, n° 0316.

<sup>143</sup> Article 16 Loi Anti-Gaspillage. For the ministerial implementing decree on how the score is to be calculated and displayed in general, see arrêté du 29 décembre 2020 relatif aux modalités d’affichage, à la signalétique et aux paramètres généraux de calcul de l’indice de réparabilité, *French Official Journal (Journal officiel de la République française)* 31 December 2020, n° 0316.

<sup>144</sup> Available at [https://www.modernisation.gouv.fr/files/2023-12/evaluation\\_impact\\_indice\\_de\\_reparabilite.pdf](https://www.modernisation.gouv.fr/files/2023-12/evaluation_impact_indice_de_reparabilite.pdf).

and December 2022. Furthermore, traders are selling a proportionally larger share of more repairable products compared to less repairable ones.

Thus, the French evaluation of its repairability score cautiously shows positive outcomes. However, it is too early to state that it unequivocally has an impact on the French textiles market as there might be confounding factors that may not be overlooked lest there be a false attribution of positive effect to the French repairability score. From the results of the evaluation it can be inferred that informational ecodesign requirements, in particular a repairability score, first and foremost might have the potential to influence consumer behavior (and thus affect an upstream factor identified by Roberts *et al.*), given the difference in statistical significance between online sales and in-store sales that is possibly explained by greater visibility of the score for consumers.

From a sustainability perspective it is too early to evaluate the repairability score as effective. However, in the context of the European Union there are other reasons why policy makers could consider endorsing the European Union's policy measure and stimulating its practical implementation. As the French measures impact the internal European market, a harmonized approach to product design is preferable for several reasons. A unified European Union-wide strategy that considers the experiences and successes of the French initiatives could help to ensure consistency in regulations and promotes a level playing field for businesses across the European market and lower transaction costs for businesses that are active in several member states of the European Union. Also, enforcement mechanisms can be strengthened, ensuring consistent application of regulations and facilitating effective monitoring and control of cross-border textile flows. A unified approach has the potential to enhance enforcement capacity, minimize regulatory gaps, and bolster the overall effectiveness of circular economy initiatives in the textile sector throughout the European Union.

#### 3.3.1.3.2 French ban on publicity for fast fashion products (including influencers)

In the context of informing consumers, it is also worth mentioning that a French draft act aimed at reducing the environmental impact of the textile industry – adopted at first reading by the French Chamber of Representatives on 14 March 2024 and now under consideration by the French Senate – would introduce a ban on publicity for fast fashion products.<sup>145</sup> Such a ban exceeds the context of mere ecodesign.

Article 3 of the draft act would introduce article L. 229-61-1 *Code de l'environnement* prohibiting advertising products that fall under the commercial practice of fast fashion or promoting directly or indirectly businesses, brands or trademarks engaging in fast fashion insofar as the excessive production of clothing, home textiles, and footwear undermines the goal of environmental protection and the fight against climate change. A new article L. 541-9-1-1 *Code de l'environnement* would define 'fast fashion' as the provision or distribution of a large number of new products exceeding thresholds set by decree in the French *Conseil d'État*.

The ban would also apply to influencers, defined as all persons who, against compensation, use their fame with their audience to communicate electronically to the public content aimed at

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<sup>145</sup> Proposition de loi, adoptée par l'Assemblée nationale après engagement de la procédure accélérée, visant à réduire l'impact environnemental de l'industrie textile le 14 mars 2024, T.A. n° 258.

promoting, directly or indirectly, goods, services, or any cause and who engage in the activity of commercial influence through electronic means.

#### **3.3.1.4 Conclusion**

For the reasons outlined above the foundation of the European Union's policy approach should always be the establishment of mandatory ecodesign requirements. By focusing on improving the design and repairability of products, overproduction can be curbed. Overproduction is a root cause of product destruction.

## **3.3.2 Steppingstone 2: extended producer responsibility**

### **3.3.2.1 EPR in general**

#### **3.3.2.1.1 Theoretical framework**

The second main pillar of the European Union's strategy towards sustainable textiles is extended producer responsibility (EPR). In essence, EPR is a policy approach that holds manufacturers accountable for the entire lifecycle of their products, including the take-back, recycling, and disposal stages, thereby incentivizing more sustainable waste management practices.

The main framework for EPR in the European Union is the Waste Framework Directive, as EPR in its current state is fundamentally a matter of waste management in the European Union.<sup>146</sup> Article 14(2) of the Directive stipulates that it is for the Member States to decide that the costs of waste management are to be borne partly or wholly by the manufacturer of the product from which the waste came and that the distributors of such products may share these costs. The Member States may decide that the manufacturer of a product has extended producer responsibility and is required to take appropriate measures to encourage the design of products to reduce their environmental impacts and the generation of waste during the production and subsequent use of products (article 8(1) Waste Framework Directive).<sup>147</sup> The European Union legislature has enacted a more specific framework for certain waste streams. EPR is organized

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<sup>146</sup> Regarding this character, see the following in-depth analysis, E. MAITRE-EKERN, "Re-thinking producer responsibility for a sustainable circular economy from extended producer responsibility to pre-market producer responsibility", *Journal of Cleaner Production* 2021, Vol. 286, no. 125454 (hereinafter abbreviated as 'Maitre-Ekern, *Journal of Cleaner Production* 2021, Vol. 286'), p. (1) 3-5.

<sup>147</sup> For an overview of existing EPR schemes in the European Union (and broader in Europe), see J. AHLERS, M. HEMKHAUS, S. HIBLER, J. HANNAK, *Analysis of Extended Producer Responsibility Schemes*, Berlin, Adelphi consult GmbH, 2021, p. 7-11.

at various degrees by directives for among others packaging<sup>148</sup>, waste electrical and electronic equipment<sup>149</sup>, end-of-life vehicles<sup>150</sup> and batteries and accumulators<sup>151</sup>.

The European Union legislature now wants to introduce an EPR scheme for textiles through its revision of the WFD (see article 22a). The Revision WFD would introduce an EPR scheme applicable to all producers of textile, textile-related and footwear products listed in Annex IVc. Enterprises employing fewer than ten persons and whose annual turnover and balance sheet total does not exceed €2 million and self-employed tailors producing customized products are excluded from the scope of the scheme (see the definition of ‘producer’ in the proposed article 3(4b)).

Manufacturers bound by EPR legislation have to handle the end-of-life waste management of products properly. This is an individual obligation. In practice, however, manufacturers often work collectively to exert this responsibility by setting up producer responsibility organizations (PROs). EPR models vary between Member States and between waste streams. For example, the collection and handling of products may be entirely in the hands of the obligated industry or be a shared responsibility between manufacturers and local municipalities.

Regarding the latter, by January 2025 all Member States are obligated to set up a separate collection for textiles (article 11(1) Waste Framework Directive). With this separate waste stream, the European Union legislature wishes to ensure that textile waste is not mixed with other types of waste, making it easier to recover and recycle textiles without contamination by other materials. Keeping textile waste separate from other waste streams helps to maintain the quality of the materials and facilitates high-quality R-strategies (e.g., the reusability of an item of clothing is affected if it has been stained).

### 3.3.2.1.2 Impact of EPR on waste prevention & eco-modulation of fees

While EPR has been successful in increasing recycling rates – in particular when coupled with mandatory recycling rates – its impact on waste prevention is unclear (because of confounding

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<sup>148</sup> European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, *OJ L* 31 December 1994, Vol. 365, p. 10–23. Currently, there is no obligation to set up EPR schemes for packaging. However, most Member States have chosen to do so. This directive might be replaced by a regulation containing an obligation to set up an EPR scheme, see for the latest version of the proposal for this regulation, proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (European Union) 2019/1020 and Directive (European Union) 2019/904, and repealing Directive 94/62/EC, COM(2022) 677 final, 30 November 2022.

<sup>149</sup> Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment, *OJ L* 24 June 2012, Vol. 197, p. 38–71. Several European NGOs launched a call to revise this European Union legislation. One of the measures which they advocate is to reinforce the existing EPR obligations, see DEUTSCHE UMWELTHILFE *et al.*, Call to revise European Union legislation for Waste Electrical and Electronic Equipment (WEEE), 11 March 2022, [https://ecostandard.org/wp-content/uploads/2022/03/20220311\\_Background\\_Paper-WEEE\\_final.pdf](https://ecostandard.org/wp-content/uploads/2022/03/20220311_Background_Paper-WEEE_final.pdf).

<sup>150</sup> Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles, *OJ L* 21 October 2000, Vol. 269, p. 34–43. An inception impact assessment was launched for a possible revision of this Directive. According to this call, the provisions in the Directive concerning EPR are not sufficiently detailed, specific and measurable, see Inception Impact Assessments – Revision of Directive 2000/53/EC on end-of-life vehicles, Ares(2020)5755999 - 22/10/2020, p. 3.

<sup>151</sup> Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, *OJ L* 26 September 2006, Vol. 266, p. 1–14. This directive will probably be replaced by a regulation containing more stringent minimum EPR requirements, see for the latest version of the proposal for this regulation, European Parliament legislative resolution of 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (European Union) 2019/1020 (COM(2020)0798 – C9-0400/2020 – 2020/0353(COD)), A9-0031/2022, 14 June 2023.

factors such as ecodesign obligations).<sup>152</sup> However, this impact seems limited.<sup>153</sup> There are several reasons why EPR schemes have little influence on waste prevention.<sup>154</sup> In general, from an European Union perspective, EPR in its current state predominantly addresses a product's end-of-life stage. Literature has questioned whether an approach based on waste law is sufficiently equipped to guide a transition to a circular economy.<sup>155</sup> Although EPR schemes hold producers accountable for product-generated waste they might not encompass the entire product life cycle and all of its environmental impacts. Embracing a more proactive approach via legislation on product requirements, specifically ecodesign requirements, should be welcomed.

EPR schemes can strengthen that proactive approach by aiding in closing the loop in the lifecycle of textile products, which is a main pillar of the circular economy.<sup>156</sup> The potential of EPR schemes in this regard lies in creating a positive feedback loop. This can be achieved by mandating, through the EPR scheme, that a certain amount of textile products destined for recycling (i.to be understood as products for which no higher-ranking strategy is viable) must be recycled fiber-to-fiber. Additionally, ecodesign requirements should ensure that textile products are produced with a certain amount of recycled content. As mentioned before, EPR schemes can help to break the stalemate currently existing in the market for recycled textile fibers as a result of low demand on the producers' side. For more details and an important caveat, see the earlier section on 'steppingstone 1: mandatory ecodesign requirements'.

A holistic approach is sensible to ensure environmental protection and resource management effectively.<sup>157</sup> However, implementing a holistic strategy raises certain complexities because of the varying legal grounds for European Union competencies in waste management and product requirements. The Waste Framework Directive derives from the environmental competence of article 192 TFEU, whereas the soon to be replaced Ecodesign Directive and the ESPR are based on the internal market competence of article 114 TFEU. This has two consequences. First, the difference in bases influences the extent to which Member States are allowed to take national

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<sup>152</sup> Maitre-Ekern, *Journal of Cleaner Production* 2021, Vol. 286, p. (1) 2 and 6-7; Lifset et al., *Waste Management* 2023, Vol. 168, p. (189) 190.

<sup>153</sup> Maitre-Ekern, *Journal of Cleaner Production* 2021, Vol. 286, p. (1) 2 and 6-7; Lifset et al., *Waste Management* 2023, Vol. 168, p. (189) 190.

<sup>154</sup> For an overview of these reasons, see Maitre-Ekern, *Journal of Cleaner Production* 2021, Vol. 286, p. 6-7.

<sup>155</sup> Maitre-Ekern, *Journal of Cleaner Production* 2021, Vol. 286, p. (1) 1-11. The author notes that improving design for the prevention of waste is crucial but might not need to be the task of EPR schemes. Rather, it seems more fitting to the author to improve design through *product* legislation, shifting the focus from 'extended' producer responsibility to 'pre-market' producer responsibility. Other authors also identify the shortcomings of European Union waste law when it comes to prevention, see, for example, L. PEYEN, "Du droit des déchets au droit de l'économie circulaire dans l'Union européenne", *Revue de l'Union européenne* 2022 ("However, this evil is already done; waste law is here only a makeshift, a necessary patch, but too insufficient"). Thus, across the European Union literature is advocating a more holistic approach, that does not understand extended producer responsibility in a narrow sense as a mere 'waste take-back instrument', see, e.g., F. PETERSEN, "Die Produktverantwortung im Kreislaufwirtschaftsrecht", *NVwZ* 2022, p. (921) 930. Still, in Germany the Circular Economy Act is mostly focused on waste treatment. This has led to criticism of the act in literature, as while waste treatment is part of the circular economy, the concept of the circular economy is larger and involves earlier stages of the value chain (e.g., ecodesign). In those earlier stages the performance of Germany falls behind in comparison with other countries, see M. KRUSE and J. WEDEMEIER, *Circular economy in Germany: A methodology to assess the circular economy performance of NUTS3 regions*, HWWI Working Paper, No. 199, Hamburgisches WeltWirtschaftsinstitut (HWWI), Hamburg, 2022, available at <http://hdl.handle.net/10419/250068>.

<sup>156</sup> Regarding this pillar of the circular economy, see W. MCDONOUGH and M. BRAUNGART, *Cradle to Cradle: Remaking the Way We Make Things*, New York, North Point Press, 2002, 208p.

<sup>157</sup> E. MAITRE-EKERN, "The Choice of Regulatory Instruments for a Circular Economy" in K. MATHIS and B. HUBER (eds.), *Environmental law and economics*, p. (305) 312 and 319.

measures in addition to the European Union framework, in particular when the European Union legislature opts for exhaustive harmonization.<sup>158</sup> Second, the goals of avoiding market fragmentation (which has an ‘economic’ rationale) and the protection of the environment do not always overlap neatly.<sup>159</sup> Thus, it is important to ensure that a ‘holistic’ approach does not inadvertently lead to a ‘fragmented’ approach, which could lead to regulatory gridlock. The goals of sustainability might require sufficient leeway for experimentation by the national Member States.<sup>160</sup>

It is advisable to keep waste law in the tool belt and search for ways to improve it. One major reason why the upstream impact can be limited is that the financial contributions in EPR schemes often rely on overly broad bases. Typically, producers pay for PRO services according to the share by weight of their products put on the market each year, rather than according to the actual recyclability or other environmental characteristics of their product.<sup>161</sup> This approach does not benefit sustainability goals. A manufacturer who invests in making products more recyclable, for example, will not see the fees payable to a PRO decline.<sup>162</sup> To address this issue, some EPR schemes introduce ‘eco-modulation’.<sup>163</sup> Eco-modulation operates through differentiation of types of products and their associated PRO fees and through bonuses and penalties.<sup>164</sup> Discounts for environmentally preferable product attributes (e.g., lack of hazardous substances) and penalties for environmentally detrimental product attributes create or amplify financial incentives for improving the environmental performance of products.<sup>165</sup> Article 8a(4)(b) of the Waste Framework Directive contains a general foundation for eco-modulation in the European Union. Member States are to ensure that the fees in national EPR schemes modulate fees based on a life cycle approach, taking into account the durability, repairability, reusability, recyclability and presence of hazardous substances in products. There is one important restriction: the Waste Framework Directive stipulates that financial contributions to fulfill EPR obligations may not exceed the costs that are necessary to provide the end-of-life services cost-efficiently. This limit is meant to restrict the overall revenues of PROs, but indirectly it might also hamper efforts to align fees with the appropriate magnitude of externalities and restrict the size of penalties.<sup>166</sup> Only through sufficiently high fees, can an EPR scheme deliver on the intended incentive effects for ecodesign.<sup>167</sup> In the Sustainable Textiles Communication, the European Commission already announced its ambition to include eco-modulated fees for textiles. Article 22c(3) Revision WFD includes the obligation to ensure eco-modulated fees to PROs in order to incentivize circularity and encourage collection, sorting, reuse, and recycling. The ecodesign requirements of the ESPR shall serve as a basis for the

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<sup>158</sup> Regarding this topic, see E. TERRY and E.V. IRAMBONA, "Schurend Europees recht. Duurzame consumptie en maximumharmonisatie: water en vuur?", to appear.

<sup>159</sup> Regarding this topic, see N. DE SADELEER, "Environmental Measures as an Obstacle to Free Movement of Goods in the Internal Market", in C. DALHAMMER, E. MAITRE-EKERN en C. BUGGE (eds.), *Preventing environmental damage from products*, Cambridge, CUP, 2018, p. 125-149.

<sup>160</sup> Regarding this topic, see E. TERRY and E.V. IRAMBONA, "Schurend Europees recht. Duurzame consumptie en maximumharmonisatie: water en vuur?", to appear.

<sup>161</sup> R. LIFSET, H. KALIMO, A. JUKKA, P. KAUTTO and M. MIETTINEN, "Restoring the incentives for ecodesign in extended producer responsibility: The challenges for eco-modulation", *Waste Management* 2023, Vol. 168 (hereinafter abbreviated as 'Lifset et al.', *Waste Management* 2023, Vol. 168'), p. (189) 189.

<sup>162</sup> Lifset et al., *Waste Management* 2023, Vol. 168, p. (189) 189.

<sup>163</sup> OECD, *Extended producer responsibility: Updated guidance for efficient waste management*, OECD Publishing, Paris, p. 52.

<sup>164</sup> Lifset et al., *Waste Management* 2023, Vol. 168, p. (189) 190.

<sup>165</sup> Lifset et al., *Waste Management* 2023, Vol. 168, p. (189) 190.

<sup>166</sup> Lifset et al., *Waste Management* 2023, Vol. 168, p. (189) 194.

<sup>167</sup> V. BOITEN, "Building a circular economy for textiles supported by common rules on Extended Producer Responsibility (EPR) in the European Union", Ellen MacArthur Foundation, Cowes, 2022, 15.

setting of harmonized eco-modulated fees. The European Commission is empowered to adopt harmonized rules for the fee modulation to ensure the alignment of the fee modulation criteria with those product requirements (article 22c(4) Revision WFD). Notably, article 7(7) of the new Packaging Regulation stipulates that financial contributions paid by producers in order to comply with their extended producer responsibility obligations under the regulation may be modulated based on the percentage of recycled content used in the packaging. This means that producers who use a higher percentage of recycled materials in their packaging may pay lower fees, while those who use less recycled content may pay higher fees. To that end, the new Packaging Regulation empowers the European Commission to harmonize modulation criteria. The modulated fees are to be based on the ‘recyclability performance grade’ (expressed in grades A, B or C.), which is obtained through a harmonized ‘recyclability assessment’. This mechanism found in the new Packaging Regulation could serve as an example for a similar approach in the context of textile products.

Again, a harmonized approach is to be welcomed to avoid fragmentation of the internal European Market which hinders in particular waste management businesses active in several Member States. As mentioned, the Member States of the European Union will have to introduce an EPR scheme for textiles. Some Member States have been proactive in that regard and show how eco-modulation in the context of textiles could work. In France, the Loi Anti-Gaspillage creates new EPR schemes (*responsabilité élargie des producteurs*) and extends the scope of existing ones. Prior to the Loi Anti-Gaspillage fourteen compulsory schemes already existed, including one for textiles and footwear. The law introduces a new scheme for single-use sanitary textiles (e.g., pre-impregnated wipes for disinfection of surfaces), that started on 1 January 2024 (article L. 541-10-1, 21° *Code de l’environnement*).

Whenever a PRO is created to fulfill the EPR obligations collectively, the fees to the PRO are to be eco-modulated (article L. 541-10-3 *Code de l’environnement*). The French government has enacted a ‘*bonus-malus* system’: a bonus is granted by the PRO if the product meets environmental criteria and a penalty is payable if it does not. Several environmental criteria for this system exist, such as the quantity of materials used in the product, the incorporation of recycled material, the use of sustainably managed renewable resources, durability, reparability, opportunities for reuse or reutilization, recyclability, and the presence of hazardous substances. Thus, the French eco-modulation moves away from a criterion that is solely based on the difficulty of processing the waste (the end-of-life approach), to criteria based on the product’s entire environmental performance (the life cycle approach). Specifically with regard to textiles, a draft act aimed at reducing the environmental impact of the textile industry – adopted at first reading by the French Chamber of Representatives on 14 March 2024 and now under consideration by the French Senate – would add “the environmental impact, particularly the threats to biodiversity and the carbon footprint” to the list of environmental criteria.<sup>168</sup>

The fees and the penalties for failure to meet the obligations of the EPR scheme may exceed the amount that is strictly necessary for waste management in order to meet the objectives of

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<sup>168</sup> Proposition de loi, adoptée par l'Assemblée nationale après engagement de la procédure accélérée, visant à réduire l'impact environnemental de l'industrie textile le 14 mars 2024, T.A. n° 258. See also Proposition de loi visant à démoder la mode éphémère grâce à un système de bonus-malus, n° 2268, déposée le mardi 5 mars 2024, which is another draft act that would require eco-modulation whenever a manufacturer puts more than 1000 new products per day on the market.

waste reduction, reuse, reutilization, repair, recycled content targets, recyclability, and recycling (see for these objectives article L. 541-10, II *Code de l'environnement*). Conversely, bonuses may also exceed the fee paid. Moreover, the French have set much bigger base fees. In the past, Jacques Verneir, the president of the extended producer responsibility waste schemes commission (*commission des filières de responsabilité élargie des producteurs*), lamented that any contribution owed under the French EPR schemes represented an infinitesimally small amount, doing nothing to encourage ecodesign.<sup>169</sup> The renewed base fees should change that.

**It is advisable that the Flemish policy level asks the European Union to follow this French example and asks for (1) an adjustment of the Waste Framework Directive that allows for exceeding the amount that is strictly necessary for waste management and (2) sufficiently high base fees.** In doing so, the European Union could take away one of the hurdles for efficient eco-modulation that fully internalizes negative environmental externalities identified by Lifset *et al.*<sup>170</sup> Moreover, only through sufficiently high fees, can an EPR scheme deliver on the intended incentive effects for ecodesign.<sup>171</sup>

### 3.3.2.1.3 Personal scope: exclusion of second-hand clothing sellers in the Netherlands

In the Netherlands a new<sup>172</sup> EPR scheme for textiles has been introduced as well.<sup>173</sup> From 1 July 2023 onwards, producers are responsible for ensuring the recycling and reusing of their textile products. They need to ensure that each calendar year a certain percentage of the total weight of all textile products put on the market the preceding calendar year (note: not the total weight of discarded textiles) is (1) prepared for reuse and recycling (2025: 50% → 2030: 75%) and (2) prepared for reuse (2025: 20% → 2030: 25%) (articles 3-4 EPR scheme). Of all products of the preceding calendar year that are recycled, the producer ensures that a certain percentage of their total weight is recycled fiber-to-fiber<sup>174</sup> (2025: 25% → 2030: 33%) (article 5 EPR scheme).

Regarding the personal scope of application, the EPR scheme applies to Dutch businesses that, as manufacturer or importer, are the first to offer a textile product on the Dutch market and sell it to someone as well as international parties who are the first to offer a textile product on said market. Materially, both consumer clothing and household textiles and industrial clothing fall under the EPR scheme in general. However, not all products in both categories are covered by the EPR scheme (e.g., bedding is covered by the EPR scheme, but blankets are not).<sup>175</sup> Second-hand clothing is excluded from the scope. The reasoning behind this exclusion is to

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<sup>169</sup> J. VERNEIR, "Extended producer responsibility (EPR) in France", *Field ACTions Science Reports* 2021, Vol. 23, p. (22) 24. In the past, for textiles the contribution only amounted to 0.04% of the average product price.

<sup>170</sup> Lifset *et al.*, *Waste Management* 2023, Vol. 168, p. (189) 194.

<sup>171</sup> V. BOITEN, "Building a circular economy for textiles supported by common rules on Extended Producer Responsibility (EPR) in the European Union", Ellen MacArthur Foundation, Cowes, 2022, 15.

<sup>172</sup> For the already existing general legislative framework on EPR, see besluit van 18 september 2020, houdende regels voor een regeling voor uitgebreide producentenverantwoordelijkheid voor het beheer van afvalstoffen, *Dutch Official Journal (Staatsblad)* 2020, Vol. 375.

<sup>173</sup> Besluit van 14 april 2023, houdende regels voor uitgebreide producentenverantwoordelijkheid voor textielproducten, *Dutch Official Journal (Staatsblad)* 2023, Vol. 132.

<sup>174</sup> Fiber-to-fiber recycling is the process of converting used textiles back into fibers, which can then be spun into new yarns and fabrics. This high-grade recycling method preserves the material's quality, allowing the creation of new textiles from old ones, thus maintaining the fibers' value. Unlike low-grade recycling, where recycled fibers are downcycled into non-textile products like insulation or padding, high-grade recycling focuses on producing high-quality textile

<sup>175</sup> For a detailed overview, see the table under heading § 9.1.2 in the explanatory memorandum to the 'besluit van 14 april 2023'.

avoid any discussion on the question when the seller of second-hand clothing is to be viewed as a producer (with extended responsibility). The explanatory memorandum to the EPR scheme explains how such discussion could arise. There can be no discussion if the clothing is intended for ‘continued use’ (*voorgezet gebruik*), meaning that the clothing never leaves the use stage and that there is no waste phase preceding the sale (for example, on an online platform that is a marketplace for second-hand clothing the sale of singular articles of worn clothing by one consumer to another can be assumed to ensure continued use<sup>176</sup>). In such a case, the seller does not put the clothing on the market for the first time and could not be considered a producer. However, if the clothing is being prepared for reuse, there has been a waste phase preceding the sale, and it can be argued that the reused clothing is being placed on the market for the first time. In this situation, the seller could be considered a producer. The new EPR scheme does not intend for second-hand clothing sellers to be classified as producers, as the sale of second-hand clothing contributes to the promotion of reuse, which is one of its main objectives.<sup>177</sup> Thus, to ensure that the seller cannot be considered a producer in the sense of the EPR scheme, second-hand clothing is excluded from its scope.

The Dutch EPR scheme prioritizes reuse over recycling, in line with the waste hierarchy of the European Union and the general R-strategies ladder. That is sensible. In a 2023 life cycle assessment (LCA) commissioned by EURIC, the authors of the report found that the LCA results confirm that – for different grades of quality of clothing – reuse avoids more negative environmental impacts than recycling and is therefore environmentally beneficial. However, if the reuse does not to a large degree replace the production of new garments, recycling can be slightly more environmentally beneficial.<sup>178</sup> Thus, the Dutch exclusion of second-hand clothing sellers serves a legitimate aim in accordance with general environmental principles of the European Union. There is also an objective criterion for differentiation with regard to manufacturers of new clothing. Thus, it might be of interest for the European Union to explore a similar scope of the EPR scheme at the European Union level.

#### 3.3.2.1.4 Conclusion

While EPR is not explicitly mentioned as a policy intervention by Roberts *et al.* the general objectives that the European Commission wishes to reach with EPR tie in with one of the main hurdles for non-destruction identified by the authors. The sustainability benefits of prolonging a product’s life will not be realized unless there is sufficient demand for such products.<sup>179</sup> The EPR obligations envisioned by the Commission and its flanking measures (e.g., investing fees collected through the EPR schemes into circular processing and requiring that separately collected textile waste from households and similar waste is prepared for reuse as a necessary first step) are meant to create and/or boost a thriving economy in the post-consumer stage of a product’s life cycle. **For this reason, this policy intervention can be regarded as advantageous, given that it is, first and foremost, preceded by ecodesign requirements (including requirements that mandate recycled content (e.g., at least x percentage of synthetic fibers in new clothing should be sourced from post-consumer resources and/or at**

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<sup>176</sup> See heading § 9.1.3 in the explanatory memorandum to the ‘besluit van 14 april 2023’.

<sup>177</sup> See heading § 9.1.1 in the explanatory memorandum to the ‘besluit van 14 april 2023’.

<sup>178</sup> S. TRZEPACZ *et al.*, *LCA-based assessment of the management of European used textiles*, January 2023, [https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles\\_corrected.pdf](https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles_corrected.pdf), p. 57.

<sup>179</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 307.

**least y percentage of synthetic fibers should be sourced from post-industrial resources<sup>180</sup>) and, moreover, sufficiently flanked with additional measures that serve both substantive and enforcement goals.** There should be a focus on reuse as direct competition for recycling in these measures (in accordance with the Waste hierarchy of the European Union). In a 2023 life cycle assessment (LCA) commissioned by EURIC, the authors of the report found that the LCA results confirm that – for different grades of quality of clothing – reuse avoids more negative environmental impacts than recycling and is therefore environmentally beneficial. However, if the reuse does not to a large degree replace the production of new garments, recycling can be slightly more environmentally beneficial.<sup>181</sup>

Substantively, EPR schemes pose challenges and practical difficulties, specifically regarding eco-modulation.<sup>182</sup> Several authors note that eco-modulation as an incentive for producers to invest in better product design can only be successful if the implementation and criteria are sufficiently harmonized at the European Union level.<sup>183</sup> This harmonization would relate to such unified definitions and, additionally, to matters such as fee structures and technical assessment metrics. Individual solutions differing from Member State to Member State risk disincentivizing manufacturers and fragmentizing the functioning of the European Union’s single market. Concerning the question how to determine effective criteria for eco-modulation, Lifset *et al.* suggest adopting a life cycle assessment approach (or similar techniques), referring to examples thereof in Italy and the American state Oregon.<sup>184</sup> **Thus, a policy recommendation for the Flemish policy level is to support the introduction of harmonized EPR rules on the European level, while calling for a life cycle assessment approach.**

**As concerns other types of flanking measures, fiscal legislation could be a potent tool to promote reuse first and recycling second.** By implementing differential taxation rates based on the environmental impact of different disposal methods, such as recycling and incineration, governments can incentivize businesses to opt for more sustainable practices – as should be the case given the waste hierarchy of the European Union. Higher taxes on waste disposal methods with greater environmental harm can encourage businesses to explore recycling and reuse alternatives. Additionally, offering tax deductions or tax credits for businesses engaged in the circular processing of textiles (e.g., regarding labor tax<sup>185</sup>) can foster a conducive

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<sup>180</sup> On average, about 15 % of fabric used in garment production is cut, discarded, and wasted in the process, which contributes to post-industrial waste, see K. LEONAS, “The Use of Recycled Fibers in Fashion and Home Products” in S.S. MUTHU (ed.), *Textiles and Clothing Sustainability*, Singapore, Springer, 2016, p. (55) 62.

<sup>181</sup> S. TRZEPACZ *et al.*, *LCA-based assessment of the management of European used textiles*, January 2023, [https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles\\_corrected.pdf](https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles_corrected.pdf), p. 57.

<sup>182</sup> For an overview of these practical difficulties, see Lifset *et al.*, *Waste Management* 2023, Vol. 168, p. (189) 193-196.

<sup>183</sup> J. AHLERS, M. HEMKHAUS, S. HIBLER, J. HANNAK, *Analysis of Extended Producer Responsibility Schemes*, Berlin, Adelphi consult GmbH, 2021, p. 83-85; V. BOITEN, “Building a circular economy for textiles supported by common rules on Extended Producer Responsibility (EPR) in the European Union”, Ellen MacArthur Foundation, Cowes, 2022, 15; Lifset *et al.*, *Waste Management* 2023, Vol. 168, p. (189) 197-198.

<sup>184</sup> Lifset *et al.*, *Waste Management* 2023, Vol. 168, p. (189) 196-197.

<sup>185</sup> The circular processing of used textiles is labor-intensive. For example, the sorting of textiles requires manual labor. Even if automated sorting systems, commonly based on near infrared spectroscopy technology, are developed, these systems are not able to determine whether a textile is clean, fully functional, or corresponds to current fashion trends. Thus, manual sorting is inevitable and requires a skilled workforce. The labor costs can be steep. For example, in Vilnius the total costs for sorting one ton of collected end-of-life textiles was 161 euro in 2016, with labor costs amounting to 147 euro (i.e., 91% of total costs) (A. BARTL, “Textiles production and end-of-life management options” in T.M. LETCHER (ed.), *Plastic Waste and Recycling. Environmental Impact, Societal Issues, Prevention, and Solutions*, Amsterdam, Elsevier, 2020, p. (251) 267). Reducing the rate

environment for these sustainable practices (in addition to the direct investment in infrastructure envisioned by the European Union).<sup>186</sup> Fiscal legislation can also be applied as a behavioral nudge towards consumers. For instance, a lower VAT on clothing that has been repaired and/or is meant for reuse or that contains recycled content might steer some consumers towards this type of product<sup>187</sup> as well as tax incentives for retailers that sell this type of product insofar the price reflects this fiscal advantage. However, from a strictly financial point of view such clothing might still face competition with very cheap virgin clothing items, in particular those bought online and imported from abroad. Fiscal advantages might not be sufficient to offset the price difference. Introducing stricter regulations on imported fast fashion items that do not meet European standards could level the playing field, albeit that adequate enforcement thereof would be key.

### 3.3.2.2 Enforcement of EPR schemes, particularly in the online sphere

#### 3.3.2.2.1 Theoretical framework

Regarding enforcement, EPR schemes that allow producers to fulfill the obligations based on their extended responsibility collectively run the risk of free riders.<sup>188</sup> Failure to provide consistent enforcement undermines the performance of the EPR scheme and creates unfair advantages for those who do not meet their obligations.<sup>189</sup> This in turn threatens the overall financial viability of the scheme. Moreover, unregistered sales can lead to under-estimation of the number of products placed on the market and, therefore, overestimates of national recycling rates.<sup>190</sup> The risk of free riding grows when (1) non-European Union actors are concerned and/or (2) online sales take place.<sup>191</sup> Hilton *et al.* and Hermann *et al.* have identified several regulatory solutions to these issues. Their main suggestion is to establish a harmonized framework for registration.<sup>192</sup> A minor suggestion is to enable private enforcement public in addition to enforcement by regulatory authorities. Private enforcement of market regulations

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of the labor tax could help lower these labor costs. Still, the method of manual sorting will always remain expensive and time-consuming and will always demand high training of the manual sorters. This is why a fast, non-destructive, and reliable method that is able to analyze large volumes of textile materials and can be implemented in-line is needed for the waste textile recycling industry (S. BIANCHI, F. BARTOLI, C. BRUNI, C. FERNANDEZ-AVILA, L. RODRIGUEZ-TURIENZO, J. MELLADO-CARRETERO, D. SPINELLI and M.-B. COLTELLI, "Opportunities and Limitations in Recycling Fossil Polymers from Textiles", *Macromol* 2023, p. (120) 128). This goes to show *ad nauseam* that the transition towards a circular textile industry requires a multi-pronged approach, combining regulatory ecodesign requirements (to simplify sorting) with regulatory fiscal measures and investments in research, development and infrastructure.

<sup>186</sup> Currently, article 12, §1(1)(2)(c) of the Belgian VAT Act allows for an exemption of VAT for the donation (fully free of charge) to recognized charity organizations of certain products that meet vital needs and whose resale value significantly diminishes after their first use. Clothing is an example of such products (see Circulaire 2020/C/116 betreffende het verstrekken voor liefdadigheidsdoeleinden van voedingsmiddelen en levensnoodzakelijke niet-voedingsmiddelen).

<sup>187</sup> Currently, a reduced VAT rate of 6% applies to the service of repair of bicycles, shoes, and textiles in Belgium. Also, certain entities with a recognized social purpose can apply the 6% VAT rate to the supply of specific goods that they collect for free from individuals or businesses at home or in another manner (royal decree no. 20 of 20 July 1970, Annex, Table A, XXIIIbis) and to certain service provisions (royal decree no. 20 of 20 July 1970, Annex, Table A, XXXV) if certain conditions are met. The application of this reduced rate is reserved for entities whose purpose is to employ and ensure employment for low-skilled or moderately skilled jobseekers who have trouble being traditionally employed. Thus, second-hand shops called 'kringwinkels' can sell second-hand textiles at the reduced rate. Policy makers could consider widening the scope of these examples.

<sup>188</sup> A. ATASU and R. SUBRAMANIAN, "Extended Producer Responsibility for E-Waste: Individual or Collective Producer Responsibility?", *Production and Operations Management* 2012, p. (1042) 1053.

<sup>189</sup> M. HILTON *et al.*, *Extended Producer Responsibility (EPR) and the Impact of Online Sales*, *OECD Environment Working Papers*, No. 142, OECD Publishing, Paris, 2019 (hereinafter Hilton *et al.*, *OECD Environment Working Papers* no. 142), p. 13.

<sup>190</sup> Hilton *et al.*, *OECD Environment Working Papers* no. 142, p. 13.

<sup>191</sup> Hilton *et al.*, *OECD Environment Working Papers* no. 142, 57p.; A. HERMANN, P. GAILHOFER and T. SCHOMERUS, *Producer responsibility of third-country producers in e-commerce*, Dessau-Roßlau, Umweltbundesamt, 2020, 147p.

<sup>192</sup> Hilton *et al.*, *OECD Environment Working Papers* no. 142, p. 49.

refers to the ability of private individuals to take legal action to enforce compliance with said regulations. It allows individuals or organizations, such as consumers or competitors, to seek remedies and hold market participants accountable for any violations or harm caused by non-compliance.<sup>193</sup>

Specifically, when it comes to enforcement regarding multi-seller platforms such as Amazon, bol.com or Coolblue, literature suggests to enact at the very least an independent verification obligation for the platforms to verify whether sellers are sufficiently registered and comply with EPR obligations and to restrict sales by unregistered and unverified sellers.<sup>194</sup> A more far-reaching approach would be to extend the EPR obligations of the producers to the platform, thus introducing the legal fiction that they are to be regarded as the (alternative) producer.<sup>195</sup> A potential downside to the approach of placing the burden of verification of registration on the multi-seller platforms is that they are likely to want to simplify the compliance procedure to the largest extent possible, which might hinder eco-modulation. For example, the online marketplace Amazon has proposed a simplified compliance model that would streamline the fee structure and the implementation of EPR obligations. However, the calculation of the fee in this compliance model would be based on elements that would be aggregated across sellers on the platform, making subsequent eco-modulation difficult.<sup>196</sup> To mitigate this risk, the European Union could establish minimum eco-modulation requirements that must be met within simplified compliance procedures on online platforms. This ensures that even with streamlined processes, a baseline level of environmental consideration is maintained. To enable online platforms to distinguish the environmental aspects of products on their platforms effectively, the European Union could require all those who wish to use the platforms to provide information about the environmental attributes of their products when listing them for sale. This information could include details about materials used, recyclability, energy consumption during production, and other relevant factors. This requirement fits in with the proposed digital product passport.

#### 3.3.2.2.2 EU and national approaches to the free-rider problem & multi-seller platforms

In the Revision WFD, the European Commission opts for the less far-reaching approach to multi-seller platforms.<sup>197</sup> Today, article 30(1) of the Digital Services Act already obligates certain providers of online platforms allowing consumers to conclude distance contracts with producers offering textile, textile-related and footwear products to consumers located in the European Union, prior to allowing a producer to use its services, to obtain certain identification information from that producer and a self-certification by the producer committing to offer only products or services that comply with the applicable rules of European Union law.<sup>198</sup> Article 22a(f) Revision WFD specifies that online platforms falling within the scope of chapter 3, section

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<sup>193</sup> Hilton *et al.*, *OECD Environment Working Papers* no. 142, p. 49.

<sup>194</sup> Hilton *et al.*, *OECD Environment Working Papers* no. 142, p. 37-39; A. HERMANN, P. GAILHOFER and T. SCHOMERUS, *Producer responsibility of third-country producers in e-commerce*, Dessau-Roßlau, Umweltbundesamt, 2020, p. 49-51.

<sup>195</sup> Hilton *et al.*, *OECD Environment Working Papers* no. 142, p. 49-50; A. HERMANN, P. GAILHOFER and T. SCHOMERUS, *Producer responsibility of third-country producers in e-commerce*, Dessau-Roßlau, Umweltbundesamt, 2020, p. 18.

<sup>196</sup> Lifset *et al.*, *Waste Management* 2023, Vol. 168, p. (189) 195.

<sup>197</sup> The same approach can be seen in other legislative initiatives such as the regulation of the European Parliament and of the Council concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (European Union) 2019/1020 and repealing Directive 2006/66/EC and the proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (European Union) 2019/1020 and Directive (European Union) 2019/904, and repealing Directive 94/62/EC, 30 November 2022, COM/2022/677 final.

<sup>198</sup> Regulation (European Union) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, *OJ L* 27 October 2022, Vol. 277, p. 1-102.

4 of said regulation are to obtain from those producers information on the registration in the textile producer register that Member State are obligated to set up pursuant to article 22b of the revision, as well as the registration number(s) of the producer in that register, and a self-certification by the producer committing itself to offer only textile, textile-related and footwear products to which the extended producer responsibility requirements apply.

The suggested approach of the European Union is similar to the approach adopted earlier in the Netherlands. To mitigate the free rider problem of EPR associated in particular with third-country producers and with e-commerce, a producer who is not established in the Netherlands is obligated to appoint an authorized representative established in the Netherlands to fulfill the producer's obligations. This requirement enhances supervision over the compliance of non-established producers who predominantly sell their products in the Netherlands through e-commerce. An authorized representative is considered established in the Netherlands if they are registered in the trade register of the Chamber of Commerce (*Kamer van Koophandel*).

A more far-reaching approach can be found in France. The French government mitigates the free riding problem associated with e-commerce by making all natural and legal persons who facilitate, with an electronic interface such as an electronic marketplace, platform, portal, or similar device, the sale at a distance or the delivery of products falling under the principle of extended producer responsibility co-responsible for the obligations of the manufacturer. These persons are required to carry out or contribute to the prevention and management of the resulting waste in accordance with the provisions of articles L. 541-10 and L. 541-10-8 *Code de l'environnement* (article L. 541-10-9 *Code de l'environnement*). This includes the obligations to join and report to an approved PRO for the relevant sector, and to pay all fees. These facilitating persons do not have to meet these obligations if they can prove that the manufacturer has already fulfilled them. To simplify matters, the act states that the manufacturer's compliance with the EPR obligation is satisfied when a unique EPR identifier for the products has been issued by the 'Agence de la transition écologique'. However, the facilitating persons have an obligation of due diligence. They could be held liable if it were found that they have not acted with care to ensure that the unique identifier provided by the manufacturer has a consistent format and that it corresponds to the type of product sold. To ensure that PROs are able to verify the accuracy of the information reported by the manufacturer PROs may require the facilitating persons to report the quantities of products, by category, sold under the EPR scheme by the manufacturer seller via, for example, the electronic marketplace. This should allow the PRO to check whether the quantities of products placed on the market (i.e., quantities that may pass through several electronic platforms) correspond to the quantities reported to the PRO. The French administrative authorities also have access to this information.

### 3.3.2.2.3 Conclusion

**A policy recommendation for the Flemish policy level is to support the proposed European Union approach to enforcement of EPR obligations on online platforms. It would be advisable to advocate minimum eco-modulation requirements to ban simplified compliance models on such platforms that are too simple. Moreover, Flanders could consider demanding the introduction of a more far-reaching approach, where the online platform is alternatively considered to be the manufacturer and can be held responsible for compliance with all EPR rules.**

An example of a more far-reaching approach can be found in France. The personal scope of the EPR scheme in France is more expansive. The French approach is to make all natural and legal persons facilitating sales via electronic interfaces co-responsible for EPR obligations of the manufacturer, whereas the European Union would only require verification of registration. The European Union could expand the scope of its planned EPR scheme as well to enhance compliance and aid enforceability. **Thus, a policy recommendation for the Flemish policy level is to demand such expansion.** The following reasons can be cited for this proposition.

- France's approach significantly broadens accountability. By holding all entities involved in sales co-responsible, France's model minimizes the risk of free riders who evade EPR obligations. This comprehensive coverage discourages unregistered or non-compliant sellers from using online platforms to circumvent their responsibilities. The European Union could benefit from similar measures to ensure fair and widespread participation in EPR schemes.
- France's approach acts as a powerful incentive for online platforms to monitor and encourage EPR compliance among sellers actively.
- Platforms have a vested interest in maintaining a reputation for responsible product management, which can translate into better consumer trust and stronger market positioning. The European Union can adopt a similar strategy to motivate online platforms to engage in EPR enforcement proactively.
- France's approach simplifies enforcement by shifting some of the burden of compliance verification from regulatory authorities to online platforms. This can lead to more efficient oversight and enforcement, as online platforms have direct insights into the activities of the sellers using their platforms.

## 3.4 Actions focused on economic operators in general

### 3.4.1 Steppingstone 3: ban on product destruction and transparency regarding destruction

#### 3.4.1.1 Introduction

The European Union legislature regards the destruction of unsold consumer products by economic operators as a widespread environmental problem in the European Union, particularly as regards textiles and footwear (recital 55 ESPR). According to the European Union legislature, an important cause for this phenomenon is the rapid growth in online sales (recital 55 ESPR). This destruction of unsold consumer products leads to a loss of valuable resources. To discourage overproduction and reduce the generation of waste, the European Union legislature intends to identify and, where necessary, limit this destruction. Some Member States have already taken this step, so that harmonized rules are required according to the European Commission.<sup>199-200</sup>

#### 3.4.1.2 National front runners: Germany and France

##### 3.4.1.2.1 German Ban

A first example of a national measure can be found in Germany. In 2016 the German federal government adopted a National Program for Sustainable Consumption.<sup>201</sup> This program contains a separate chapter on clothing. In 2021 it was decided to halve consumption-related greenhouse gas emissions by 2030, with a significant focus on the consumption of clothing.<sup>202</sup> The German Circular Economy Act (*Kreislaufwirtschaftsgesetz*), which was updated in 2020, contains the current tools for reaching this goal.

The act contains a regulative framework to address the destruction of overproduced, unsold, and returned products. It does so by means of a duty of care (*Obhutspflicht*) for all products (food and non-food) and a reporting obligation (*Berichtspflicht*). The duty of care (article 23(2)(11) of the German Circular Economy Act (see also article 24(10)), enhances the ‘product stewardship’ (*Produktverantwortung*) that is expected from producers in Germany.<sup>203</sup> A pivotal obligation is to ensure product durability and usability and to prevent products from becoming waste. In this context, the legislation distinctly mentions returned products: “(...) duty of care regarding the distributed products, particularly the obligation to ensure, when distributing the products, including in connection with their return or disposal, that the usability of the products

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<sup>199</sup> In France, from 1 January 2022, the ‘Loi Anti-Gaspillage’ prohibits the destruction of non-food-related products covered by an extended manufacturer responsibility policy, see article 35 loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillagellage et à l'économie circulaire, *JORF* 11 February 2020, n°0035 (hereinafter abbreviated as 'Loi Anti-Gaspillagellage').

<sup>200</sup> On this necessity, see explanatory memorandum to the ESPR, p. 5. and recital 55 ESPR.

<sup>201</sup> Die Bundesregierung, *Nationales Programm für nachhaltigen Konsum*, Berlin, Publikationsversand der Bundesregierung, 2014, 69p.

<sup>202</sup> Staatssekretärsausschuss für nachhaltige Entwicklung, Nationales Programm für Nachhaltigen Konsum - Beschluss vom 3. Mai 2021.

<sup>203</sup> The German product stewardship encompasses EPR, which translates to ‘erweiterte Herstellerverantwortung’ in German. There is no EPR scheme for textiles currently active in Germany.

is maintained and that they do not become waste (...)”<sup>204</sup> What does it mean to prevent a product from becoming waste? After all, is this concept not somewhat in the eye of the beholder?<sup>205</sup> And how does the concept relate to the notion of ‘waste’ that is autonomous in the European Union legislation, where the concept means all materials discarded by their holder (more on this concept to follow in the section on the export of used textiles and textile waste)? The explanatory memorandum to the German act explains: “In accordance with the directive to use resources as efficiently as possible, the responsible party is, therefore, obligated to maintain the functionality of the product within its original intended purpose when organizing and designing its distribution. If this is not feasible, alternative uses may be considered. If the original intended purpose cannot be preserved and no other reasonable alternative purpose is achievable, disposal of the product as waste may be contemplated. The same applies if objective reasons, such as health or environmental risks, necessitate the disposal of the product. The act grants the product steward the discretion to determine how to maintain the product's functionality.”<sup>206</sup> Thus, in the context of the *prevention* of the waste status, the meaning of ‘waste’ is somewhat decoupled of the intention of the holder of the product. For example, in its European Union meaning a product can become waste even if it is still fit for its original intended purpose as soon as its holder intends to discard it. Even if an economic operator would want to discard a product for economic reasons, the German *Obhutspflicht* prevents that intention from turning the product into waste. The economic operator is forced to continue to treat the product as a product and not as an item of waste. As will be explained in more detail in the section on the export of used textiles and textile waste (specifically where the general definition of waste and its relationship to the European Union product destruction are discussed) this is also how the product destruction ban works at the level of the European Union.

To support the enforcement of the duty of care, the German Circular Economy Act contains the competence of the Federal Government to determine a reporting obligation for manufacturers or distributors. Article 25(1)(9) stipulates: “[manufacturers or distributors] are to create a report to ensure adequate transparency for certain products falling under the duty of care, which shall include the use of the products, in particular their type, quantity, fate, and disposal, as well as the measures taken and planned to implement the duty of care. It can also be determined whether and how the report should be verified by third parties (...)”<sup>207</sup>

The duty of care is formulated broadly. As a ‘latent’ obligation, it is meant to be translated into more concrete obligations by the German legislature (article 23(4) of the German Circular Economy Act) (e.g., an obligation to donate products).<sup>208</sup> Even though concrete obligations have not yet been defined, the duty of care already has effect. Businesses active in Germany, such as Amazon and Nike are reportedly carrying out the destruction of products in other Member

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<sup>204</sup> “(...) eine Obhutspflicht hinsichtlich der vertriebenen Erzeugnisse, insbesondere die Pflicht, beim Vertrieb der Erzeugnisse, auch im Zusammenhang mit deren Rücknahme oder Rückgabe, dafür zu sorgen, dass die Gebrauchstauglichkeit der Erzeugnisse erhalten bleibt und diese nicht zu Abfall werden.”

<sup>205</sup> Landmann/Rohmer UmweltR/Beckmann, 100. EL Januar 2023, KrWG § 23 Rn. 30-33.

<sup>206</sup> Explanatory memorandum to ‘Entwurf eines Gesetzes zur Umsetzung der Abfallrahmenrichtlinie der Europäischen Union’ of 20 May 2020, *Drucksache* 19/19373, P. 59.

<sup>207</sup> “(...) zur Gewährleistung einer angemessenen Transparenz für bestimmte, unter die Obhutspflicht fallende Erzeugnisse einen Bericht zu erstellen haben, der die Verwendung der Erzeugnisse, insbesondere deren Art, Menge, Verbleib und Entsorgung, sowie die getroffenen und geplanten Maßnahmen zur Umsetzung der Obhutspflicht zum Inhalt hat; es kann auch bestimmt werden, ob und in welcher Weise der Bericht durch Dritte zu überprüfen (...)”

<sup>208</sup> Landmann/Rohmer UmweltR/Beckmann, 100. EL Januar 2023, KrWG § 23 Rn. 38.

States of the European Union. Literature notes that this possible because of differing environmental standards and highlights the need to introduce the concept of the duty of care at the European Union level.<sup>209</sup> The German *Bundesministerium für Umwelt, Naturschutz, nukleare Sicherheit und Verbraucherschutz* notes, first, that that the duty of care in the German Circular Economy Act works. According to the agency, many manufacturers and traders have already changed the way they handle returns “thanks to the clear signal from the legislature and the dialogue with companies and business associations”.<sup>210</sup> The agency also notes that a uniform European Union-wide regulation is more effective than a purely national one in making it more difficult for companies to relocate the destruction of goods to other countries where federal German authorities cannot take action. Even though it has prepared legislation meant to enact more concrete obligations, it has stopped this process. Instead, it is “now orienting its work towards proactive participation at European Union level and is committed to demanding Union-wide regulations.”<sup>211</sup>

#### 3.4.1.2.2 French ban

A second example of a national measure can be found in France. The Loi Anti-Gaspillage bans the destruction of new unsold non-food<sup>212</sup> products (article L. 541-15-8 *Code de l’environnement*). All products are to be ‘reutilized’ (meaning sold off or donated<sup>213</sup>), reused or recycled, taking into account the waste hierarchy, unless their material valorization is prohibited, their discarding is mandatory or their reutilization, reuse or recycling entail serious risks to health or safety. It is mandatory to reutilize ‘essential goods’, such as hygienic or childcare products<sup>214</sup>, for example by donation to charitable organizations, unless their expiration date is less than three months away or reutilization turns out to be impossible after reaching out to charitable organizations. In case of non-compliance, the violator may be subject to an administrative fine, the amount of which can be up to €3 000 for a natural person and €15 000 for a juridical person.

Concerning the personal scope, this obligation applies to manufacturers, importers, and distributors from 1 January 2024 onwards (between 1 January 2022 and 1 January 2024 only products covered by an EPR scheme fell under the obligation). Moreover, all natural and juridical persons who facilitate, with an electronic interface such as a marketplace, platform, portal, or similar device, the sale at a distance or the delivery of products are obligated to keep the unsold products in their possession.

As regards the material scope, it should be noted that the obligation only applies to ‘new’ products. Thus, second-hand products are excluded from the scope. Lepla notes that products returned by a consumer in execution of the right of withdrawal, could fall under the definition

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<sup>209</sup> F. PETERSEN, “Die Produktverantwortung im Kreislaufwirtschaftsrecht”, *NVwZ* 2022, p. (921) 928.

<sup>210</sup> <https://www.bmuv.de/faqs/warenvernichtung>.

<sup>211</sup> <https://www.bmuv.de/faqs/warenvernichtung>.

<sup>212</sup> For food products an earlier ban is in place, see loi n° 2016-138 du 11 février 2016 relative à la lutte contre le gaspillage alimentaire, *French Official Journal (Journal officiel de la République française)* 12 February 2016.

<sup>213</sup> Regarding the notion of ‘reutilization’, see C. LEPLA, “L’obligation de gestion des invendus non alimentaires”, *Revue juridique de l’environnement* 2022, Vol. 47, p. (81) 86-87.

<sup>214</sup> For a list of these products, see article D. 541-320 Code de l’environnement (introduced by article 3 décret n° 2020-1724 du 28 décembre 2020 relatif à l’interdiction d’élimination des invendus non alimentaires et à diverses dispositions de lutte contre le gaspillage, *French Official Journal (Journal officiel de la République française)* 30 December 2020.

of second-hand products, as is stated in article L. 321-1 of the Commercial code.<sup>215</sup> That article states that second-hand products are products that, at some stage of production or distribution, have come into the possession of individuals for their own use, through any act, whether by gratuitous or by onerous title.

The introduction of this prohibition by France is based on the results of a 2014 research report by the *Agence du don en nature* in collaboration with the *Agence de la transition écologique* (ADEME), to which the impact study preceding the Loi Anti-gaspillage refers.<sup>216</sup> That report found that in the market of durable non-food consumer goods worth €140 billion, €800 million worth of products is not sold (0.6% of the market). Close to €630 million worth of products is destroyed, while €140 million is given away as charitable donation. Specifically, €49 million worth of clothing and footwear is destroyed.<sup>217</sup> This research was redone by ADEME in a report of 2021.<sup>218</sup> It is not yet certain to what extent the Loi Anti-gaspillage has been effective to reduce those numbers. On 8 November 2023, the *Commission du développement durable et de l'aménagement du territoire* has created a mission to evaluate the act.<sup>219</sup> The mission to evaluate its predecessor, the prohibition on the destruction of food products, found it too challenging to assess its effects quantitatively, given the lack of data.<sup>220</sup> Qualitatively, through interviews with stakeholders, it found that the French legislation has 'without a doubt' had effect, but that actual reductions of the number of destroyed food products stems mostly from voluntary initiatives. The reason therefor is the limited governmental capacity to control and enforce regulatory obligations. These findings are corroborated by other qualitative research.<sup>221</sup> The 2021 report by ADEME found, regarding the prohibition of destruction of non-food products, stakeholders in key sectors expected, on average, that the prohibition would diminish the occurrence of destruction and increase the number of donations.<sup>222</sup>

### 3.4.1.3 Harmonized rules at EU level

#### 3.4.1.3.1 Important definitions

The national measures in Member States such as Germany and France have spurred the adoption of harmonized rules at the level of the European Union. The harmonized rules of the European Union legislature can be found in articles 23 and following ESPR.

Three definitions are of great importance for those articles.

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<sup>215</sup> C. LEPLA, "L'obligation de gestion des invendus non alimentaires", *Revue juridique de l'environnement* 2022, Vol. 47, p. (81) 84.

<sup>216</sup> Etude d'impact de projet de loi relatif à la lutte contre le gaspillage et à l'économie circulaire, 11 July 2019, NOR : TREP1902395L/Bleue-1.

<sup>217</sup> Electronic products destroyed: 10 million euro. Hygiene and beauty products: 180 million.

<sup>218</sup> ADEME, *Etude des gisements et des causes des invendus non alimentaires et de leurs voies d'écoulement*, available at <https://librairie.ademe.fr/consommer-autrement/5035-etude-des-gisements-et-des-causes-des-invendus-non-alimentaires-et-de-leurs-voies-d-ecoulement.html>.

<sup>219</sup> <https://www.assemblee-nationale.fr/dyn/16/organes/commissions-permanentes/developpement-durable/missions-de-la-commission/me-lutte-gaspillage-economie-circulaire>.

<sup>220</sup> Rapport d'information déposé en application de l'article 145-7 alinéa 1 du règlement, par la commission des affaires économiques sur la mise en application de la loi n° 2016-138 du 11 février 2016 relative à la lutte contre le gaspillage alimentaire, n° 2025, déposé le mercredi 12 juin 2019, rapporteurs: G. MELCHIOR and G. GAROT.

<sup>221</sup> M. MOURAD, "Did France really ban food waste? Lessons from a pioneering national regulation" in S. Buseti and N. Pace (eds.), *Food loss and waste policy*, Abingdon, Routledge, 2022, p. 109-123.

<sup>222</sup> ADEME, *Etude des gisements et des causes des invendus non alimentaires et de leurs voies d'écoulement*, available at <https://librairie.ademe.fr/consommer-autrement/5035-etude-des-gisements-et-des-causes-des-invendus-non-alimentaires-et-de-leurs-voies-d-ecoulement.html>, p. 118.

- Article 2(37) ESPR defines ‘unsold consumer product’ as any consumer product that has not been sold including surplus, excessive inventory, overstock and deadstock, including products returned<sup>223</sup> by a consumer in view of their right of withdrawal in accordance with article 9 Consumer Rights Directive, or, where applicable, during any longer withdrawal period provided by the trader.
- Article 2(36) ESPR defines ‘consumer product’ as any product, excluding components and intermediate products, primarily intended for consumers. In the context of clothing, regular everyday apparel in all likelihood belongs to consumer products. Even though regular clothing is sold to ‘customers’ at large, as regular clothing is also used in trade-related settings, it is primarily intended for consumers. Examples of textiles that are probably not consumer products are industrial textiles (i.e., equipment used in manufacturing processes or industrial applications, such as safety shoes or medical clothing) and laboratory textiles (i.e., textiles used in scientific research, such as lab coats). It goes without saying that the inclusion of the adverb ‘primarily’ leaves some room for ambiguity regarding products where it might not be so clear whether they are mostly intended for consumers or for businesses. Does, for example, construction gear belong to the category of consumer products or not? Obviously, this type of clothing is used in abundance in the construction trades, but many hardware stores also cater to the DIY enthusiast. This somewhat opaque definition in the ESPR stands in contrast to, for example, the Sale of Goods Directive that defines goods broadly as any tangible movable item (article 2(5)(a)).
- Article 2(34) ESPR defines ‘destruction’ as the intentional damaging or discarding of a product as waste with the exception of discarding for the only purpose of delivering the discarded product for preparing for reuse, refurbishing or remanufacturing operations. Recycling is not included in those exceptions. Thus, unlike reuse, refurbishing and remanufacturing, recycling is always seen as a form of ‘destruction’. The reasoning behind the inclusion of recycling in the concept of destruction can be found clearly in the version of the ESPR proposed by the Council of the European Union.<sup>224</sup> Recital 46 in this version explains that while recycling is an important waste treatment activity for a circular economy, it is unreasonable that products are manufactured only to be recycled immediately. The products would have served no purpose.

#### 3.4.1.3.2 General duty of care (article 23 ESPR)

Articles 23 and following ESPR contain the following obligations. First, article 23 ESPR introduces a ‘general principle to prevent discarding’. Economic operators are to take necessary measures which can reasonably be expected to prevent the need to discard unsold consumer products that are fit for use (see also recital 55 ESPR).<sup>225</sup>

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<sup>223</sup> The material scope of the prohibition on the destruction of products in the European Union is broader than the scope of the French prohibition as it also includes returned products. Against the backdrop the ‘returns culture’ in the textile industry, the European Union approach seems more sensible.

<sup>224</sup> See Council of the European Union, general approach to Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, (2022/0095(COD), no. 7854/22 + ADD 1-8 (hereinafter referred to as ‘Amendments ESPR Council of the European Union’).

<sup>225</sup> The origin of this article can be found in the amendments of the Council of the European Union, see Amendments ESPR Council of the European Union, p. 126.

This provision is similar to the German duty of care (*Obhutspflicht*) that can be found in article 23(2)(11) of the German Circular Economy Act (*Kreislaufwirtschaftsgesetz*) (see also article 24(10)). A pivotal obligation in that German Act is to ensure product durability and usability and to prevent products from becoming waste. The explanatory memorandum to the German Act explains that obligation as follows: “In accordance with the directive to use resources as efficiently as possible, the responsible party is therefore obligated to maintain the functionality of the product within its original intended purpose when organizing and designing its distribution. If this is not feasible, alternative uses may be considered. If the original intended purpose cannot be preserved and no other reasonable alternative purpose is achievable, disposal of the product as waste may be contemplated. The same applies if objective reasons, such as health or environmental risks, necessitate the disposal of the product. The act grants the product steward the discretion to determine how to maintain the product's functionality. (translated)”<sup>226</sup> German literature has noted that there is a need to enact a general duty of care in a harmonized manner at the level of the European Union to ensure its effectiveness (more on this to follow in the section explaining the extent of harmonization of articles 23 and following ESPR).<sup>227</sup>

As is the case in Germany, this general duty of care in the ESPR supplements more specific obligations. It makes clear to all economic operators that, at all times, they are to use all reasonable efforts to maintain the usability of a product. It also burdens them with the obligation to justify why a product should be destroyed (more on this to follow in the section on the transparency obligation).

#### 3.4.1.3.3 Transparency obligation (article 24 ESPR)

Second, article 24 ESPR contains a 'transparency obligation' (recital 56 ESPR), that can be imposed by the European Commission on product types or categories by implementing act (article 24(3) ESPR). Article 24(1) ESPR obligates any economic operator who discards unsold consumer products directly or has unsold consumer products discarded on their behalf, to disclose annually the following information via an easily accessible page of their website or through mandatory sustainability reporting (if applicable):

- the number and weight of unsold consumer products discarded per year, differentiated per type or category of products;
- the reasons for the discarding of products, and where applicable the relevant exemption to the prohibition of destruction (found in article 25(5) ESPR);
- the proportion of the delivery of discarded products, whether directly or through a third party, to each of the following activities: preparing for reuse, remanufacturing, recycling, other recovery including energy recovery and disposal operations in accordance with the waste hierarchy as defined by article 4 Waste Framework Directive;
- measures taken and measures aimed at preventing the destruction of unsold consumer products.

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<sup>226</sup> Explanatory memorandum to ‘Entwurf eines Gesetzes zur Umsetzung der Abfallrahmenrichtlinie der Europäischen Union’ of 20 May 2020, *Drucksache* 19/19373, P. 59.

<sup>227</sup> F. PETERSEN, “Die Produktverantwortung im Kreislaufwirtschaftsrecht”, *NVwZ* 2022, p. (921) 928.

Notably, the obligation to disclose all measures taken to prevent the destruction of unsold consumer products, entails that indirectly economic operators will have to justify why they are left with unsold consumer products.

This transparency obligation typically does not apply to micro and small enterprises (but there is a nuance that will be explained later on). However, six years after entry into force of the ESPR, it will apply to medium-sized enterprises.

There exists an interesting difference between the harmonized European Union ban and the German transparency obligation. The latter requires transparency not only regarding the number of products that have been discarded, but more generally also regarding the total number of products used by an economic operator. The advantage of additionally requiring disclosure of the total volume of stock is that national authorities (and, ultimately, consumers) can assess whether an economic operator is exceptionally wasteful with resources. The proportion of destroyed products to the total amount of products can help to gauge whether an economic operator destroys comparatively few products or vice versa. This could positively influence consumer behavior (and thus affect an upstream factor identified by Roberts *et al.*).

Similarly, the European Parliament had wished to amend the transparency obligation proposed by the European Commission by adding that economic operators are not only obligated to disclose the number of unsold products destroyed, but also the 'percentage'.<sup>228</sup> This requirement is not part of the final version of the ESPR.<sup>229</sup> This seems to be a missed opportunity. Incorporating the percentage of destruction into the transparency obligation would have provided even greater insight into the magnitude of product destruction but with a different focus. Whereas data on number and weight could be seen as information that allows to assess the 'absolute' magnitude of destruction, focused on the physical volume and actual mass of destroyed products and the meaning thereof for resource depletion, waste generation et cetera, the data on number and percentage is more of a 'relative' yardstick. Including the percentage of destroyed products in transparency reporting would provide a more nuanced understanding of the scale of destruction relative to the total production volume of the product itself. The relative numbers can expose problematic business practices that lead to the destruction of a disproportionately large share of produced products, even if the product type in question by itself does not represent a huge market share of products and/or the manufacturing of the product type does not require large amounts of resources when compared to other product types. For example, the destruction of one hundred units of a product may not sound significant. However, if this number represents 25% of the total volume of produced products, it becomes clear that a substantial portion of the products has been wasted. Thus, insight into the relative magnitude of product destruction could have revealed excesses in certain sectors, enabling the European Commission to prioritize analyzing the reasons for product destruction in these sectors and if necessary regulating them.

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<sup>228</sup> Amendments ESPR Parliament, amendment 166.

<sup>229</sup> Amendments ESPR Parliament, amendment 166.

### 3.4.1.3.4 Actual prohibition of destruction (article 25 ESPR)

#### 3.4.1.3.4.1 Products that fall under the ban

Third, article 25 ESPR contains the actual ban on the destruction of unsold consumer products in a two-tiered manner. The prohibition applies to the destruction of all product groups listed in Annex VII to the ESPR. That Annex VII is not a blank slate. The European Union legislature has already added some groups to the annex, namely categories of textiles and footwear. The reason therefor is the large environmental impact of the fashion industry because of the unnecessarily high production volumes and short use phases of textiles as explained by the European Commission in great detail in its Sustainable Textiles Communication (see also recital 57 ESPR<sup>230</sup>). The destruction of those products will be prohibited twenty-four months after the entry into force of the ESPR (19 July 2026). This is a first tier. The second tier consists of all products added to Annex VII by the European Commission via delegated act (article 25(3) ESPR).<sup>231</sup>

#### 3.4.1.3.4.2 Exemptions

To ensure that prohibitions remain proportionate, the European Commission may lay down specific exemptions, where this would be appropriate in view of (article 25(5) ESPR):

- health, hygiene and safety reasons;
- damage to products as a result of their handling or detected after a product has been returned, that cannot be repaired in a cost-effective manner;
- fitness of the product for the purpose for which it is intended, taking into account, where applicable, European Union and national law and technical standards;
- refusal of products for donation, preparing for reuse or remanufacturing;
- products rendered unsellable due to infringement of intellectual property rights, including counterfeit products; and
- products for which destruction is the option with the least negative environmental impact.

#### 3.4.1.3.4.3 Extent of harmonization regarding prohibitions

As mentioned, the European Union legislature saw it fit to enact articles 23 and following ESPR given the risk of fragmentation of the internal market because of national legislation containing similar prohibitions to destroy unsold consumer products (e.g., France's Loi Anti-Gaspillage).

Recital 59 ESPR states that Member States should not be precluded from introducing or maintaining national measures as regards destruction of unsold consumer products for products that are not subject to the prohibition under the ESPR, provided that such measures

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<sup>230</sup> This recital can be traced back to the amendments of the Council of the European Union, see Amendments ESPR Council of the European Union, p. 46. Like the Council of the European Union, the European Parliament wished to enact a mandatory prohibition of the destruction of unsold textiles and footwear. It proposed an article 20a.1 ESPR stipulating that one year after the date of entry into force of the ESPR, the destruction of unsold consumer products by economic operators shall be prohibited for these product categories, see Amendments adopted by the European Parliament on 12 July 2023 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC (COM(2022)0142 – C9-0132/2022 – 2022/0095(COD)) (first reading), P9\_TA(2023)0272, amendment 168 (hereinafter referred to as 'Amendments ESPR Parliament').

<sup>231</sup> The Council of the European Union had wished to amend this empowerment into an implementing see Amendments ESPR Council of the European Union, p. 130.

are in line with European Union law.<sup>232</sup> In essence, this recital states that the ESPR does not harmonize to the extent that the competence of national authorities to set out prohibitions is fully subordinated by the ESPR. The ESPR only precludes national measures once the European Commission has decided on the desirability of a prohibition.<sup>233</sup>

This recital might come across as peculiar, given the acknowledgment by the European Union legislature that the existing national legislation on the destruction of unsold consumer products creates market distortions, necessitating harmonized rules to ensure that economic operators are subject to the same rules and incentives across Member States.<sup>234</sup>

However, from a sustainability perspective, leaving the competence to take national measures to Member States could be beneficial. Granting autonomy to Member States encourages experimentation and innovation in sustainability policies, with the development of targeted measures in line with local needs and priorities. Different regions may adopt diverse approaches, allowing for the identification of best practices and the dissemination of successful initiatives across the European Union.<sup>235</sup> Moreover, by retaining the flexibility to enact national measures, Member States can respond to emerging sustainability issues in their own jurisdictions, thus keeping pace with environmental concerns.

There is an important caveat though. National measures are beneficial if a sufficiently large portion of the Member States enact them. Evidence suggests that stand-alone national measures might miss their mark, rendering them ineffective to an extent. Businesses active in Germany, such as Amazon and Nike are reportedly carrying out the destruction of products in other European Union countries. Literature notes that this is possible because of diverging environmental standards and highlights the need to introduce the German concept of the duty of care at the European Union level (cfr. article 23 ESPR).<sup>236</sup>

From an internal market perspective, disparities in the treatment of unsold consumer products across member countries, could potentially impede the free flow of products within the single market. This fragmentation may complicate compliance for businesses operating across borders and undermine the overarching objective of a harmonized and integrated European Union market.

#### 3.4.1.3.5 Exemption of SMEs from transparency obligation and prohibition of destruction

To avoid unnecessary administrative burdens for SMEs, they are exempted from the transparency obligation and the prohibition of destruction. Micro and small enterprises are

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<sup>232</sup> This recital can be traced back to the amendments of the Council of the European Union, see Amendments ESPR Council of the European Union, p. 44.

<sup>233</sup> Given the empowerment to the European Commission and the goals of the ESPR it is to be assumed that a decision to not impose a prohibition (i.e., a general exemption) precludes any national prohibitions.

<sup>234</sup> Amendments ESPR Council of the European Union, p. 43.

<sup>235</sup> Regarding the possibility of 'experimentation' in the context of sustainability, see E. TERRY and E.V. IRAMBONA, "Schurend Europees recht. Duurzame consumptie en maximumharmonisatie: water en vuur?", in N. HOEK, C. JANSSEN, A. JANSSEN, P. KUYPERS, *Spanningen tussen duurzaamheid en Europees recht*, Wolters Kluwer, 2024, 211-242.

<sup>236</sup> F. PETERSEN, "Die Produktverantwortung im Kreislaufwirtschaftsrecht", *NVwZ* 2022, p. (921) 928.

exempted indefinitely. The exemption of medium-sized enterprises is limited in time and will remain in effect for six years after the entry into force of the ESPR.<sup>237</sup>

However, the European Commission may declare both provisions of the ESPR applicable to SMEs by delegated act where there is sufficient evidence that they may be used to circumvent the prohibition to destroy unsold consumer products or the disclosure obligation (article 25(5) ESPR).<sup>238</sup> This prevents economic operators from abusing a corporate structure to circumvent the obligations in the ESPR. This empowerment of the European Commission is mirrored by an obligation for all economic operators that are not subject to the prohibition of destruction (i.e., not merely SMEs) not to destroy unsold consumer products supplied to them with the purpose to circumvent that prohibition (article 25(2) ESPR).

#### **3.4.1.4 Analysis of ban on product destruction & conclusion**

Intuitively, it seems straightforward that the policy intervention of the ban on product destruction can be flagged as advantageous.<sup>239</sup> However, in the study conducted by Roberts *et al.* the interviewees express skepticism regarding the efficacy of a ban on destroying unsold products. As mentioned, there is not always a suitable disposal route or reuse case for the volumes of unsold or returned textile products, particularly low-value products. The interviewees fear that a ban could lead to the dumping of undesirable products on reuse organizations or charities.<sup>240</sup> Therefore, even though a ban can have a direct impact on the upstream factor ‘business model’, policy makers should take care that it adequately addresses the tendencies towards overstocking, bulk-purchasing, and overproduction. This may not be the case if donation to charitable organizations offers an escape route for dumping excess volumes.

The Council of the European Union had suggested that the European Commission should set a minimum effort threshold for companies wishing to rely on the exemption ‘refusal of donations’ to adhere to before destruction is allowed. This threshold could require for instance that several recipients should have been contacted (see the amended recital 48 in the version of the ESPR of the Council of the European Union).<sup>241</sup> This explicit requirement has not found its way into the final version of the ESPR. There is no indication in the ESPR that it would be impossible for the European Commission to regulate prohibitions by implementing a minimum effort threshold. At the same time, it is not crystal clear whether the empowerment of the European Commission extends so far.

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<sup>237</sup> In the original version of the ESPR the European Commission empowered to apply the transparency obligation and the prohibition of destruction to ESPR to medium-sized enterprises (micro and small enterprises are not mentioned) where there is sufficient evidence that they account for a substantial proportion of unsold consumer products being destroyed (article 26.6. 2), a) in the version of the ESPR proposed by the European Commission). This facultative competence has been turned into an automatic application. This change is the result of the amendments of the Council of the European Union, see Amendments ESPR Council of the European Union, p. 130.

<sup>238</sup> Even though the text of article 25(5) ESPR reads that the provisions may be declared applicable “to micro and small enterprises”, it is to be assumed that the European Commission may declare them applicable to all types of SMEs, including medium-sized enterprises, lest there be an inexplicable hiatus. Presumably, this wording was chosen because medium-sized enterprises will automatically be required to adhere to existing prohibitions six years after the entry into force of the ESPR.

<sup>239</sup> Note that the competent Dutch secretary of state Heijnen fully endorses this policy measure of the European Union. Therefore, the secretary of state is voicing support for a ban on the destruction of unused goods, including returned items, at the European Union level, see Tweede Kamer, vergaderjaar 2022–2023, 36 254 (Initiatiefnota van het lid Hagen over een nieuw ontwerp voor de kledingindustrie: van wegwerpmatenschap naar circulaire economie), no. 15 brief van de staatssecretaris van infrastructuur en waterstaat.

<sup>240</sup> Roberts *et al.*, *Sustainable Production and Consumption* 2023, Vol. 35, p. 307.

<sup>241</sup> Amendments ESPR Council of the European Union, p. 47.

In any case, a minimum effort threshold seems a sensible requirement that ensures that this exemption cannot be abused. **Policy makers could consider the following additional flanking measures that could help to deter attempts to misuse charitable donations.**

- Volume limits (general): policy makers could set maximum thresholds for the number of products that can be donated to charitable organizations by any one economic operator within a specific time period to prevent excessive dumping.
- Volume limits (exports): exports to third countries are another point of attention for the efficacy of a ban on destroying unsold products. Instead of destroying the products locally, manufacturers and retailers may wish to donate them to charitable organizations in third countries (particularly African countries).<sup>242</sup> In general, this could seem like a responsible action. The authors of the 2023 life cycle assessment commissioned by EURIC, found that the LCA results confirm that the reuse of clothes has less negative environmental impacts than other R-strategies and is therefore environmentally beneficial. Thus, donating textiles to third countries so that they may be reused is sensible. However, the LCA results merit caution. If the reuse does not to a large degree replace the production of new garments, other R-strategies become more environmentally beneficial.<sup>243</sup> As regards the export other countries specifically, the replacement rate in the receiving country should at least pass 10%. Otherwise, it becomes beneficial to limit the export of used textiles to third countries. It should be noted that the risk that the replacement rate is lower than that threshold is greatest where used textiles are of too low quality to be reused at all or cannot be reused for a long time.<sup>244</sup> Given the nature of unsold consumer products, their quality can be assumed to be particularly high (note: not in comparison to ‘better’ products, given the issue of fast fashion, but rather in comparison with other types of used textiles). This is certainly the case for overproduced products, which in theory never leave the hands of the manufacturer or trader and are thus brand-new (the same holds true for mismade products, but these do not seem to fall under the definition of ‘unsold consumer product’). The quality of returned products depends on the state in which they were sent back by the consumer. Dutch research suggests that maximally 1% of items of clothing returned by consumers are unfit to be resold, indicating that the quality of returned products that the manufacturer or trader wishes to discard is high.<sup>245</sup>
- Quality standards<sup>246</sup>: establishing (harmonized) quality criteria for donated products can help ensure that only suitable products are donated, preventing the disposal of

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<sup>242</sup> For an extensive report on the export of used textiles in the European Union’s circular economy, see D. LINGAS *et al.*, *European Union exports of used textiles in Europe’s circular economy. Eionet Report - ETC CE report 2023/4*, Mol, European Topic Centre on Circular economy and resource use, 2023, 25p. The authors note that reuse is the main aim of African receiving countries, while recycling and processing for re-export is on the rise in Asian receiving countries.

<sup>243</sup> S. TRZEPACZ *et al.*, *LCA-based assessment of the management of European used textiles*, January 2023, [https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles\\_corrected.pdf](https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles_corrected.pdf), p. 57.

<sup>244</sup> D. LINGAS *et al.*, *European Union exports of used textiles in Europe’s circular economy. Eionet Report - ETC CE report 2023/4*, Mol, European Topic Centre on Circular economy and resource use, 2023, p. 19.

<sup>245</sup> M. KORT, R. VAN DER VUSSE and M. VAN GROOTEL, *Ongebruikt textiel. Onderzoek naar de wijze waarop de textielketen omgaat met ongebruikt en nieuw textiel*, Rebel, Rotterdam, 2020, p. 16.

<sup>246</sup> Compare with the existing framework for the quality assessment of food products put up for donation, Commission Regulation (European Union) 2021/382 of 3 March 2021 amending the Annexes to Regulation (EC) No 852/2004 of the European Parliament and of the Council on the hygiene of foodstuffs as regards food allergen management, redistribution of food and food safety culture, *OJ L 4* March 2021, Vol. 74, p. 3-6.

unsaleable or low-quality items. Both expert input and feedback from recipients of donated goods can provide insights into the quality and relevance of donated goods. Some of the key elements that could be considered are (1) the physical condition of the donated goods, including factors such as cleanliness, structural integrity, and absence of damage; (2) safety (i.e., absence of potential health risks); (3) durability (i.e., evaluation of the expected lifespan of the donated products to ensure they can be used for a reasonable period without significant wear and tear); (4) functionality (i.e., fitness to serve intended purpose and suitability to be repurposed for other applications).

- Clear eligibility criteria: policy makers can define (harmonized) eligibility criteria for charitable organizations, ensuring that only legitimate (non-profit) entities receive the donated products.<sup>247</sup>
- Mandatory reporting: manufacturers and retailers could be required to submit regular reports on the quantity and nature of products donated to charities, ensuring transparency and monitoring for potential abuses.
- Incentives for responsible practices: offering tax benefits or other incentives to manufacturers and retailers that responsibly manage their surplus products can encourage compliance.<sup>248</sup>
- Fines: implementing strict penalties for non-compliance with the ban on destruction of unsold products and the misuse of donation routes can act as a deterrent.

Furthermore, the French evaluation of the prohibition on the destruction of food products serves as a cautionary tale. When the European Union-wide ban on the destruction of products is introduced, the European Union should take care to ensure sufficient governmental capacity to control and enforce this prohibition. The European Union will have to ensure that the Member States allocate sufficient financial resources and personnel to their market authorities responsible for enforcing the prohibition on the destruction of products. International cooperation will be particularly important, to avoid cross-border issues of enforcement.

## 3.4.2 Steppingstone 4: export of used textiles and waste shipments

### 3.4.2.1 Export of textiles in general

Another aspect of the circularity of textiles related to their ‘destruction’ in a large sense, is their treatment once they are no longer fit for the purpose originally intended by manufacturer and trader and, in particular, once they have become waste. Within this context, one problem highlighted by the European Commission in its Sustainable Textiles Communication, is the export of what it calls ‘second-hand textiles’.

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<sup>247</sup> Currently, article 12, §1(1)(2)(c) of the Belgian VAT Act allows for an exemption of VAT for the donation (fully free of charge) to recognized charity organizations of certain products that meet vital needs and whose resale value significantly diminishes after their first use. Clothing is an example of such products (see Circulaire 2020/C/116 betreffende het verstrekken voor liefdadigheidsdoeleinden van voedingsmiddelen en levensnoodzakelijke niet-voedingsmiddelen). According to current Belgian legislation, the organization must commit to the fight against poverty.

<sup>248</sup> Currently, article 12, §1(1)(2)(c) of the Belgian VAT Act allows for an exemption of VAT for the donation (fully free of charge) to recognized charity organizations of certain products that meet vital needs and whose resale value significantly diminishes after their first use. Clothing is an example of such products (see Circulaire 2020/C/116 betreffende het verstrekken voor liefdadigheidsdoeleinden van voedingsmiddelen en levensnoodzakelijke niet-voedingsmiddelen).

Today, the export of second-hand textiles to third countries leads to severe environmental issues in local environments as a significant portion of these textiles are shipped as used products that are fit for reuse, even though – in reality – they are far from reusable.<sup>249</sup> Up to 40% of global ‘reusable second-hand clothing’ arriving in African countries is of such poor quality that it ends in a landfill, is dumped in a river or is burnt in the open within a week of arrival.<sup>250</sup> Some call this phenomenon ‘waste colonization’ by the global north.<sup>251</sup>

Even though the current European Union legislation on waste prohibits such outcomes of the export of second-hand textiles, the policy documents of the European Commission show an acknowledgment that, in practice, some illegal shipments slip through the net. The need to strengthen the enforcement of the Waste Shipment Regulation is well-established in literature, which offers some suggestions to better this enforcement.<sup>252</sup> With its proposal to revise the Waste Shipment Regulation, the European Union legislature is working towards a stronger framework for waste shipments. In a complementary fashion, the Revision WFD contains new rules to ensure that waste streams are not falsely labelled as second-hand products.

### 3.4.2.2 Legal background

#### 3.4.2.2.1 The general definition of ‘waste’

In principle, second-hand textiles fall under the definition of waste in article 3(1) Waste Framework Directive. ‘Waste’ means any substance or object which the holder discards or intends or is required to discard. The Court of Justice of the European Union has stated that, to ensure the highest level of environmental protection, it is required to interpret the concept of ‘waste’ widely.<sup>253</sup> The Court has repeatedly stated that the classification of a substance or object as ‘waste’ is to be inferred primarily from the holder’s actions and the meaning of the term ‘discard’.<sup>254</sup> The concept of ‘waste’ does not exclude substances or objects which are capable of economic reuse (as many articles of used clothing and footwear are). The Waste Framework Directive covers all substances and objects discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation, or reuse.<sup>255</sup> Particular attention must be paid to the fact that the object or substance in question is not or is no longer of any use to its holder, such that that object or substance constitutes a burden which the holder will seek to discard. If that is indeed the case, there is a risk that the

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<sup>249</sup> See, for example, the effects on Accra, the Ghanaian capital city, <https://www.abc.net.au/news/2021-08-12/fast-fashion-turning-parts-ghana-into-toxic-landfill/100358702>.

<sup>250</sup> K. DISSANAYAKE and R. PAL, “Sustainability dichotomies of used clothes supply chains: a critical review of key concerns and strategic resources”, *The International Journal of Logistics Management* 2023, Vol. 34, p. (75) 76; L.A. MANIESON and T. FERRERO-REGIS, “Castoff from the West, pearls in Kantamanto? A critique of second-hand clothes trade”, *Journal of Industrial Ecology* 2023, Vol. 27, p. (811) 814-815.

<sup>251</sup> See, for example, K. DISSANAYAKE and R. PAL, “Sustainability dichotomies of used clothes supply chains: a critical review of key concerns and strategic resources”, *The International Journal of Logistics Management* 2023, Vol. 34, p. (75) 83.

<sup>252</sup> See, for example, M. MORGANTI, S. FAVARIN and D. ANDREATTA, “Illicit Waste Trafficking and Loopholes in the European and Italian Legislation”, *European Journal on Criminal Policy and Research* 2020, Vol. 26, p. 105–133; K. OLLEY, “Illegal waste shipment: an overview”, *Field ACTions Science Reports* 2021, Vol. 23, p. (26) 27-29.

<sup>253</sup> See for recent examples of this vested case law, CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §18; CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §41.

<sup>254</sup> See for a recent example of this vested case law, CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §33.

<sup>255</sup> See for recent examples of this vested case law, CJEU 14 October 2020, , C-629/19, ECLI:EU:C:2020:824, §48; CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §37.

holder will dispose of the object or substance in its possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner.<sup>256</sup>

A substance or object that has become waste can lose this status of waste if (1) it has undergone a recovery operation (e.g., preparing for reuse or recycling) and (2) it meets specific end-of-waste criteria set at the level of the European Union or by the national Member States (article 6(1) Waste Framework Directive). Article 3(15) defines ‘recovery operation’ as any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. If no specific end-of-waste criteria are set at the level of the European Union or by the Flemish region, the waste is to meet the general criteria in article 6(1) Waste Framework Directive, which the specific criteria are meant to elucidate (see also articles 2.6.1. and 2.6.2. of the order of the Government of Flanders adopting the Flemish regulation on the sustainable management of material cycles and waste, referring to articles 36 and 37 of the Materials Decree). One of those general criteria is, for example, that a market or demand exists for the substance or object that has gone through a recovery operation. Currently, there are no European Union-wide end-of-waste criteria for textiles, but the European Commission has announced that it will introduce such criteria, starting their development in 2023.<sup>257</sup> Thus, used textiles that have been prepared for reuse or that have been recycled can cease to be waste. This is, for example, the case if textile waste is sorted to be sold in a thrift store (i.e., prepared for reuse), as, among others, a demand exists for second-hand clothing in such thrift stores.

#### 3.4.2.2.2 How does the prohibition on the destruction of unsold products relate to existing legislation?

It is of note that there is case law of the Court of Justice of the European Union that is highly relevant to ‘unsold products’ (the anchoring point for the ban on the destruction of products in the ESPR) and in particular to the question whether the export of such products is subject to the regulations on waste shipments.

In the *Tronex* case, an enterprise’s export consignment was stopped by Dutch customs authorities. The consignment consisted of electronic appliances that were, first, no longer saleable because of a change in the range of products and, second, returned by consumers under the statutory guarantee of the (then applicable) Consumer Sales Directive. Some of the products were defective. The shipment was to take place without notification or consent in the meaning of the Waste Shipment Regulation. The question at hand was whether the batch of products had to be viewed as ‘waste’ and, thus, subject to that regulation.

A first aspect of this case law relates to ‘obsolete products’ (part of the larger concept of ‘excess’ products mentioned in the section on the reasons for product destruction). In the *Tronex* case the Court of Justice of the European Union held that these products that are ‘new’ yet have become no longer fit for the originally intended purpose can be considered to be market products amenable to normal trade. In principle, they do not represent a burden for their holder

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<sup>256</sup> See for recent examples of this vested case law, CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §22; CJEU 17 November 2022, C-238/21, ECLI:EU:C:2022:885, §38.

<sup>257</sup> [https://environment.ec.europa.eu/news/commission-starts-develop-end-waste-criteria-plastic-waste-2022-04-05\\_en](https://environment.ec.europa.eu/news/commission-starts-develop-end-waste-criteria-plastic-waste-2022-04-05_en).

which entails that they are not waste.<sup>258</sup> It is nevertheless for the referring national court to verify that there is nothing that raises doubts as to the good working condition of this type of products.<sup>259</sup>

A second aspect of this case law concerns ‘reverse logistics’, where products that have been distributed are returned to the manufacturer or trader, for example, because they are off-specification or following reliance by a consumer on the statutory guarantee in sales contracts.<sup>260</sup> Within the concept of ‘excess’ products, these are the ‘mismade’ and ‘damaged’ products. In the *Tronex* case the Court of Justice of the European Union ruled out that products returned under the statutory guarantee could be regarded as having been discarded, as the consumer cannot be regarded as having wished to carry out a disposal or recovery operation of the products.<sup>261</sup> Thus, at this stage they cannot be considered waste. However, such a return operation under the guarantee does not provide certainty that the returned product will be reused. It is, therefore, necessary to verify, for the purposes of determining the risk of the holder discarding them in a way likely to harm the environment, whether products returned, where they show defects, can still be sold without being repaired to be used for their original purpose and whether it is certain that they will be reused. If, however, the products suffer defects that require repair, such that they cannot be used for their original purpose, they constitute a burden for their holder and must thus be regarded as waste, insofar as there is no certainty that the holder will actually have them repaired. If there is no certainty that the holder will actually have the products repaired, they have to be considered a waste. To prove that malfunctioning products do not constitute waste, it is for the holder of the products in question to demonstrate not only that they can be reused, but that their reuse is certain, and to ensure that the prior inspections or repairs necessary to that end have been done.<sup>262</sup>

It should be noted that the Court’s considerations on the statutory guarantee are formulated broadly. Its *obiter dictum* states that products that have undergone a return transaction carried out in accordance with a contractual term and in return for the reimbursement of the purchase price cannot be regarded as having been discarded. A consumer return on the basis of the right of withdrawal granted by the Consumer Rights Directive (i.e., a contractual term implied by any and all European Union consumer contracts concluded at a distance or off-premises) can be regarded as a return transaction in the sense of that consideration. Thus, this second aspect of the *Tronex* case law also relates by analogy to ‘consumer returns’ (part of the larger concept of ‘excess’ products mentioned in the section on the reasons for product destruction).

To conclude, it follows from the *Tronex* case law that the items of clothing and footwear that would fall under the prohibition to destroy them in the ESPR do not constitute waste and, thus, are not subject to the Waste Framework Directive and the Waste Shipment regulation. One sidenote is that there is a duty for the holder of returned textiles to inspect them. If they do not need repair, they are not waste. If they do need repair, there has to be certainty that the holder will repair them, lest they be considered as waste.

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<sup>258</sup> CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §32.

<sup>259</sup> CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §33.

<sup>260</sup> Regarding this topic see extensively, G. VAN CALSTER, *European Union waste law*, Oxford, Oxford University Press, 2015, p. 35, nos. 1.149 and following.

<sup>261</sup> CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §34.

<sup>262</sup> CJEU 4 July 2019, C-624/17, ECLI:EU:C:2019:564, §35-40.

The previous might seem obvious. After all, the prohibition to destroy in article 25 ESPR is only relevant insofar the products that fall under it are not yet waste. Article 2(35) ESPR defines 'destruction' as the *intentional damaging or discarding of a product as waste* except for discarding for the only purpose of delivering a product for preparing for reuse or remanufacturing operations. Thus, the prohibition is meant to prevent their status as waste. Still, it is important to understand how the ESPR would relate to existing legislation (as it stands to be revised). An assessment of how neatly it fits with that legislation, helps to uncover whether there might be a risk of loopholes.

The waste status of an item of clothing or footwear that is unsold to consumers can be determined as follows.

- The starting point from a legal point of view is that unsold products (both products that have never been distributed to consumers (obsolete products) and returned products (consumer returns)) are not waste. This legal point of view corresponds to the actual practice of unsold consumer products, in particular textiles. As manufacturers and traders wish to maximize the economic value of clothing and footwear, they strive to sell their textile items through many different methods before considering donation and physical destruction. Their intention is, thus, opposite to the intention to discard. A study from the Netherlands found that 6% of all clothing items placed on the Dutch market remained unsold (after methods such as selling at reduced prices). From that percentage of unsold clothing items, 18% remains in-store stock (with the intention of re-attempting to sell these items at a later time), 35% is sold in other countries and 6% is sold to bulk purchasers (e.g., outlet stores).<sup>263</sup> Thus, these items of clothing remain part of 'normal trade'. The numbers in this Dutch study are similar to German numbers on unsold products (i.e., broader than textiles). Of all returned packages, 79% is resold as is, 13% is resold as B-grade products and 2% is sold to bulk purchasers.<sup>264</sup>
- Products that are returned in too poor of a state by the consumer can be seen as waste. Article 25(5) ESPR explicitly clarifies that products that have been returned damaged and that are not suitable for cost-effective repair, should not constitute an unsold consumer product within the meaning of the ESPR and can be exempted from the prohibition of destruction (see also recital 55 ESPR). This means that these items do not necessarily fall under the prohibition to destroy unsold consumer products in the ESPR. They can become waste once an economic operator intends to discard them. This is in line with the case law of the Court of Justice of the European Union, which holds that if returned products need repair, there has to be certainty that the holder will repair them for the waste status to not apply.
- Once economic operators have explored all options to sell their products, the items of clothing become a burden. They will wish to discard them. The Dutch study found that of the amount of unsold clothing items 36% is donated to charities and 5.8% is 'destroyed', with 3% being shredded to fibers (i.e., prepared for recycling) and 2.8%

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<sup>263</sup> M. KORT, R. VAN DER VUSSE and M. VAN GROOTEL, *Ongebruikt textiel. Onderzoek naar de wijze waarop de textielketen omgaat met ongebruikt en nieuw textiel*, Rebel, Rotterdam, 2020, p. 18.

<sup>264</sup> P. SPREER, T. PFRANG and M. LINZMAJER, *Die Psychologie der Retoure. Wie Behavioral Design die Rücksendequote im E-Commerce senken kann*, München, elaboratum, 2021, p. 4.

being burned.<sup>265</sup> In Germany, 4% of returned products is destroyed.<sup>266</sup> The prohibition to destroy unsold consumer products in the ESPR prevents textile items from being destroyed. In the future this would entail that the remaining items of clothing cannot become waste if their holder intends to do anything other with them than delivering them for preparing for reuse or remanufacturing operations.

- If the holder of the unsold consumer products intends to donate them, they become waste. They will lose their status as waste once they have gone through preparation for reuse (e.g., sorting of clothing in a thrift store). As in the past, the manufacturers and traders of textile items will be able to donate unsold consumer products.
- If the holder of the unsold consumer products intends to have them remanufactured, they become waste. They will lose their status as waste once they have gone through the remanufacturing process (e.g., by cutting up T-shirts and recoupling them in a different design).<sup>267</sup>
- If the holder of the unsold consumer products intends to do anything else with them, such as recycling, the ESPR prohibits a change in their status to waste. The Council of the European Union explains why recycling is included in the definition of ‘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 (see the amended recital 46 in its version of the ESPR<sup>268</sup>). Thus, unlike in the past, the manufacturers and traders of textile items will not be able to have unsold consumer products shredded into fibers.

#### 3.4.2.2.3 The Waste Shipments Regulation (2024) & Revision WFD and the distinction between ‘used textiles’ and ‘textile waste’

With the Waste Shipments Regulation (2024) and the Revision WFD, the European Commission wishes to crack down on the illegal shipments of textile waste. The European Commission intends to create clearer categories of ‘used textiles’ and ‘textile waste’.

As a starting point, the European Commission confirms that all discarded textiles are to be regarded as waste. All separately collected discarded textile items, textile-related items and footwear items are regarded as waste and subject to European Union waste legislation, including on the shipments of waste (article 22d(3) and recital 32 Revision WFD). The Revision WFD states that such items can only lose their status as waste and become ‘used textiles’ if (1) they have undergone a sorting operation by a trained sorting for reuse and recycling operator and (2) they are professionally assessed as fit for reuse. This sorting should be carried out in accordance with the harmonized sorting requirements that deliver high quality re-usable fraction that meet the needs of the receiving second-hand textile markets in the European Union and globally and by establishing criteria to distinguish between used products and waste. Member states will have to ensure that the sorting operations sort textile items at an

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<sup>265</sup> M. KORT, R. VAN DER VUSSE and M. VAN GROOTEL, *Ongebruikt textiel. Onderzoek naar de wijze waarop de textielketen omgaat met ongebruikt en nieuw textiel*, Rebel, Rotterdam, 2020, p. 18.

<sup>266</sup> P. SPREER, T. PFRANG and M. LINZMAJER, *Die Psychologie der Retoure. Wie Behavioral Design die Rücksendequote im E-Commerce senken kann*, München, elaboratum, 2021, p. 4.

<sup>267</sup> See for an example thereof, A. ZETHRAEUS, A.VELLESALU, *Remanufacturing of deadstock and customer claims apparel. Perspectives on business strategy adoption, consumer perceived value, and economic feasibility*, ISBN 978-91-88838-94-0, p. 37.

<sup>268</sup> Amendments ESPR Council of the European Union, p. 43.

appropriate level of granularity, separating fractions that are fit for direct reuse from those that are to be subject to further preparation for reuse operations (article 22d(5) Revision WFD). In view of the greater environmental benefits associated with extending the lifetime of textiles, reuse should be the main objective of the sorting operations followed by sorting for recycling where the items are professionally assessed as not reusable (recital 31 Revision WFD). Thus, Member States have to ensure that items that are assessed as not suitable for reuse are sorted for recycling and, where technological progress allows, specifically for fiber-to-fiber recycling<sup>269</sup>. Note that these separately sorted items remain 'waste' and not used textiles. The emphasis placed by the European Union legislature on the possibility of reuse, entails that 'used textiles' stands for 'textiles suitable for reuse'.

Furthermore, the Waste Shipments Regulation (2024) empowers the European Commission to adopt implementing acts setting criteria to differentiate between used products and waste, to avoid waste being smuggled as used products, for specific categories of commodities for which this distinction is of particular importance for the export of waste from the European Union (article 29(3)).<sup>270</sup> The Commission would also be able to harmonize the classification of waste at the European Union level, notably by adopting delegated acts to set criteria, such as thresholds for contamination in waste streams, in order to determine how harmful this contamination is (article 29(6)). The Revision WFD stipulates regarding the shipments of used textiles, textile-related and footwear products that these shipments should be accompanied by information demonstrating that those items are the output of a sorting or a preparing for reuse operation and that the items are suitable for reuse. The Revision WFD also obligates the Member States to ensure that, to distinguish between used and waste textiles, shipments of used textiles, textile-related and footwear products suspected of being waste may be inspected by the competent authorities of Member States (article 22d(7)).

### 3.4.2.3 Analysis of export measures

#### 3.4.2.3.1 General perspectives on exports and the internal European market

From an environmental perspective<sup>271</sup>, it could be beneficial to limit the export of used textiles to third countries and focus instead on a more integrated internal market for used textiles

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<sup>269</sup> Fiber-to-fiber recycling is the process of converting used textiles back into fibers, which can then be spun into new yarns and fabrics. This high-grade recycling method preserves the material's quality, allowing the creation of new textiles from old ones, thus maintaining the fibers' value. Unlike low-grade recycling, where recycled fibers are downcycled into non-textile products like insulation or padding, high-grade recycling focuses on producing high-quality textile

<sup>270</sup> Both the European Council and the European Parliament endorse this power, see proposal for a regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (European Union) No 1257/2013 and (European Union) No 2020/1056 - Mandate for negotiations with the European Parliament, 25 May 2023, COM (2021) 709 FINAL, p. 14 and 92; Report on the proposal for a regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (European Union) No 1257/2013 and (European Union) No 2020/1056, 8 December 2022, COM(2021)0709, amendments 73 and 74.

<sup>271</sup> There is also a social aspect to the export of textiles and/or textile waste to third countries. It is not straightforward to state that limiting the export to third countries is also socially sustainable. On one hand, the export of used textiles to poorer countries can create economic opportunities and support local industries, providing affordable clothing options for people with limited means. It may also generate jobs in the recycling and second-hand markets, contributing to livelihoods and income generation in those countries. However, one should be cautious about overstating these social benefits. While the export of used textiles can provide access to affordable clothing, it can also have detrimental effects on local textile industries in the recipient countries (see K. DISSANAYAKE and R. PAL, "Sustainability dichotomies of used clothes supply chains: a critical review of key concerns and strategic resources", *The International Journal of Logistics Management* 2023, Vol. 34, p. (75) 76 and references therein). Cheap imported second-hand clothes can flood the market and compete with domestically produced textiles, leading to the decline of local businesses and potential job losses. This can perpetuate a cycle of reliance on external

within the European Union. As mentioned before, for the export of used textiles to other countries to make environmental sense, the replacement rate of the production of new clothes in the receiving country should at least pass 10%.<sup>272</sup> When the exported textiles are of low quality there is a risk that that rate is not surpassed. The professional sorting process envisioned by the European legislature in the Revision WFD should at least lower the amount of low-quality used textiles in batches of solely used textiles.

Moreover, it could also make sense to limit the shipment of textile waste to third countries and instead focus on a more integrated internal market for waste shipments within the European Union (as is what the European Union intends, in part, with the Waste Shipments Regulation (2024)<sup>273</sup>). It is clear from the Sustainable Textiles Communications that the European Commission regards textile waste as a potential source of valuable raw materials on European soil (ideally for new clothing or at the very least as a source for lower grade downcycled<sup>274</sup> applications). In the Waste Shipments Regulation (2024), the European Union wishes to facilitate the shipment of waste for reuse and recycling within the European Union. This could potentially lead to between 2.4 and 6 million tons of waste being retained in the European Union each year, which would be treated according to European Union standards and processed into secondary materials. The European Union estimates that the benefits linked to a better treatment of residual waste in the European Union and to avoiding shipping this waste to third countries would range from €266 to €666 million a year. Moreover, the treatment in the European Union of waste that used to be exported should lead to the creation of 9 000 to 23 000 jobs in the European Union's recycling and reuse sector. Growing such an industry that can process a larger number of used textiles circularly takes time. It also requires major investments in collection, sorting, preprocessing and fiber-to-fiber recycling facilities. The consulting firm McKinsey has calculated that for such facilities to scale up and be able to ensure that 18 to 26 percent of gross textile waste in 2030 can be recycled fiber-to-fiber, capital expenditure investments in the range of €6 billion to €7 billion would be needed by 2030.<sup>275</sup> Its analysis indicates that once this industry has scaled, it could become a self-standing, profitable industry with a €1.5 billion to €2.2 billion profit pool by 2030.<sup>276</sup> In its Sustainable Textiles Communication, the European Commission announces several measures to enable the

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sources rather than encouraging local innovation. Also, the great negative environmental impacts can negate social benefits. Thus, it is essential to strike a balance between supporting social and economic development in third countries and ensuring responsible waste management and sustainable practices. Implementing regulations and standards for the export and recycling of textiles can help mitigate the negative impacts while still allowing for beneficial aspects.

<sup>272</sup> S. TRZEPACZ *et al.*, *LCA-based assessment of the management of European used textiles*, January 2023, [https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles\\_corrected.pdf](https://euric.org/images/Position-papers/lca-based-assessment-of-the-management-of-european-used-textiles_corrected.pdf), p. 57.

<sup>273</sup> See explanatory memorandum to the Proposal Waste Shipments Regulations, p. 13-14 (proposal for a regulation of the European Parliament and of the Council on shipments of waste and amending Regulations (EU) No 1257/2013 and (EU) No 2020/1056, COM(2021) 709 final).

<sup>274</sup> Downcycling refers to the recycling process where materials are recycled into products of lower quality or value compared to the original material. In the case of textiles, downcycling occurs when textiles are recycled into products with reduced functionality or desirability. For example, old clothing might be shredded and turned into low-grade materials like composites, cleaning rags or insulation. The original quality and value of the textiles are not fully retained in the downcycling process, and the recycled products often have limited uses, see T. WAGAW and K. MURUGESH BABU, "Textile Waste Recycling: A Need for a Stringent Paradigm Shift", *AATCC Journal of Research*, 2023.

<sup>275</sup> McKinsey & Company, *Scaling textile recycling in Europe—turning waste into value*, <https://www.mckinsey.com/industries/retail/our-insights/scaling-textile-recycling-in-europe-turning-waste-into-value#/>.

<sup>276</sup> McKinsey & Company, *Scaling textile recycling in Europe—turning waste into value*, <https://www.mckinsey.com/industries/retail/our-insights/scaling-textile-recycling-in-europe-turning-waste-into-value#/>.

conditions for such growth (inter alia, supporting research, innovation and investments in infrastructure and skills) with an eye on creating local jobs in the European Union.<sup>277</sup>

Alternatively, the European Union could consider stimulating investments in proper recycling facilities in third countries as a means of retaining certain economic benefits of the export to these countries, for example, through lending money via the European Investment Bank (EIB). An example of this approach is the partnership between the EIB and Morocco to improve the circular economy in this third country.<sup>278</sup> Capital could be invested in infrastructure (e.g., industrial recycling facilities, wastewater management plants and low-carbon energy production sites), the development of skills and research. The European Union could also transfer technology and knowledge. In doing so, the European Union could aid these third countries in meeting the standards regarding the environmentally sound handling of textile waste that are necessary to lift the export restrictions that the European wishes to set with the Waste Shipments Regulation (2024).<sup>279</sup> Promoting closed-loop processing of exported used textiles with high-value resources as end result in third countries, aiming to strengthen their economies, aligns with the European Union's social fairness agenda.<sup>280</sup>

The European Union could also encourage the national Member States to allocate part of the fees collected through the EPR scheme for textiles to investments in processing facilities in third countries. The French offer an example of this approach. A French draft act aimed at reducing the environmental impact of the textile industry – adopted at first reading by the French Chamber of Representatives on 14 March 2024 and now under consideration by the French Senate – would require PROs to use a fraction of the fees collected of its members for the financing of waste management infrastructure (proposed article L. 541-10-27(IV) *Code de l'environnement*).<sup>281</sup>

#### 3.4.2.3.2 Harmonized criteria for 'used textiles' and 'textile waste'

It would be advisable to enact harmonized definitions of and criteria for 'used textiles' and 'textile waste' at the European Union level as to not disrupt the internal market. Differing national (or even regional, cfr. the Belgian division of competences) regulations hamper the development of an integrated internal market in which used textiles can be more easily treated and shipped as a resource, rather than as waste. Disparate classification standards across European regions could lead to confusion and inefficiencies in cross-border trade, hindering the smooth flow of used textiles for reuse or recycling. Disparities may also result in increased administrative burdens and costs for businesses operating within the European market. Of particular importance is that disparities prevent the use of the potential size of the European

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<sup>277</sup> Communication Sustainable Textiles, p. 10-12.

<sup>278</sup> For example, in 2023 the EIB has assisted the municipality of Chefchaouen in gaining technical assistance provided by the City Climate Finance Gap Fund to improve organic waste management, treatment and recovery services, see <https://www.eib.org/en/press/all/2023-175-maroc-bei-monde-et-le-city-climate-finance-gap-fund-s-associent-pour-ameliorer-la-gestion-des-dechets-a-chefchaouen> (reference: 2023-175-EN). This is in line with its 2016 project to co-finance solid waste management sector investments by private promoters in Morocco, see <https://www.eib.org/en/projects/pipelines/all/20160434> (reference: 20160434).

<sup>279</sup> See articles 37 and following of the regulation.

<sup>280</sup> Regarding this social fairness, see Communication Sustainable Textiles, p. 12-13. See also earlier footnote 271.

<sup>281</sup> Proposition de loi, adoptée par l'Assemblée nationale après engagement de la procédure accélérée, visant à réduire l'impact environnemental de l'industrie textile le 14 mars 2024, T.A. n° 258.

internal market to realize sufficient economies of scale for high-quality circular processing of resources/waste.<sup>282</sup>

Hence, it is positive that the European Commission will develop specific European Union level criteria to make a distinction between used textiles and textile waste. **A policy recommendation for the Flemish policy level is to support this European Union approach.**

Literature offers some quality assessment methods to divide textile waste into different streams<sup>283</sup>, which can serve as an inspiration for definitions and qualifications regarding ‘used textiles’ for policy makers.<sup>284</sup> As a reminder: the emphasis placed by the European Union legislature on the possibility of reuse, entails that ‘used textiles’ stands for ‘textiles suitable for reuse’. The qualification of ‘used textiles’ can include factors such as the condition of the textile (e.g., no considerable damage or wear; sufficient cleanliness (i.e., ensuring the textile is free from contaminants, stains, or odors that could affect its suitability for reuse)), the quality of the materials used (e.g., their durability), its ability to be used for its original purpose or be repurposed for other applications, etc.

### 3.4.2.3.3 Greater scrutiny of export of used textiles

It is of paramount importance to ensure that the trade of used textiles that are not meant to be textile waste (i.e., used textiles that have lost their status as waste before shipping, following a recovery operation) to third countries is driven by actual demand in these countries and is not merely a means of dumping unwanted textiles that – even though they might be of good quality – end up being dumped because they flood the local market.<sup>285</sup> The European Union legislative initiatives would ensure that shipments of what is effectively textile waste are not disguised as shipments of used textiles, but this advancement alone does not guarantee that the used textiles are not still dumped once they have arrived in a third country.

**Drawing inspiration from the regulatory framework on waste shipments (i.e., Basel Convention<sup>286</sup> and the Waste Shipments Regulation (2024)), policy makers could consider creating an obligation for any economic operator wishing to export used textiles not meant to be textile waste (i.e., used textiles that have lost their status as waste before shipping, following a recovery operation) to provide sufficient guarantees that the textiles will actually**

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<sup>282</sup> C. NUSS *et al.*, “Eine quantitative Analyse europäischer Richtlinien und Verordnungen zur Abfall- und Kreislaufwirtschaft am Beispiel der Elektro- und Elektronikindustrie Implikationen und Empfehlungen für eine transnationale Umweltpolitik”, *Zeitschrift für Umweltpolitik & Umweltrecht* 2016, p. (37) 60.

<sup>283</sup> Literature notes that textile waste is often considered to be a single waste fraction. This assumption is wrong as three fractions can be identified: reusable, recyclable and non-recyclable textiles (see A. ZHURAVLEVA and A. AMINOFF, “Emerging partnerships between non-profit organizations and companies in reverse supply chains: enabling valorization of post-use textile”, *International Journal of Physical Distribution & Logistics Management* 2021, Vol. 51, p. (978) 980). These three categories can be further subdivided in subfractions according to the quality of the textiles (see A. BARTL, “Textiles production and end-of-life management options” in T.M. LETCHER (ed.), *Plastic Waste and Recycling. Environmental Impact, Societal Issues, Prevention, and Solutions*, Amsterdam, Elsevier, 2020, p. (251) 266).

<sup>284</sup> N. NØRUP, K. PIHL, A. DAMGAARD, C. SCHEUTZ, “Development and testing of a sorting and quality assessment method for textile waste”, *Waste Management* 2018, Vol. 79, p. 8-21; S. WEBER, O. WEBER, K. HABIB and G.M. DIAS, “Textile waste in Ontario, Canada: Opportunities for reuse and recycling”, *Resources, Conservation and Recycling* 2023, Vol. 190, 106835. The second journal article contains a more comprehensive approach. The authors of the second journal article note that one of the shortcomings of the first journal article is that the definition of ‘textile waste’ used does not sufficiently encompass the broad application of textiles and the possibility of replacing fibers, yarn, and fabrics with other materials such as leather.

<sup>285</sup> See earlier footnote 271.

<sup>286</sup> Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, *OJ L* 16 February 1993, p. 3-22.

**be reused in the third country before a shipment can be signed of by national authorities and to obtain proof of the processing of the used textiles after shipment.** The regulatory framework on waste shipments places a significant responsibility on the notifier of a planned waste shipment to ensure the correct disposal of waste in the receiving country. The notifier is obligated to provide accurate and comprehensive information in the notification about the nature of the waste, its characteristics, and the intended disposal or recovery methods. The notifier has take-back obligations when a shipment, including its recovery or disposal, cannot be completed as intended or when a shipment is illegal. The costs for this take-back are to be borne by the notifier. To this end, the notifier is required to subject the shipment to a financial guarantee or equivalent insurance covering the costs of transport, costs of recovery or disposal, including any necessary interim operation and costs of storage for 90 days. The notifier is to conclude a contract with the consignee that include these obligations, as well as an obligation for the receiving facility to provide a certificate that the waste has been recovered or disposed in accordance with all legal requirements.

Similar obligations could be created for the export of used textiles. The obligation to submit proof of actual reuse holds exporters accountable for the destination and treatment of the exported textiles. Exporters would be required to submit detailed documentation outlining the planned processes in the third country prior to shipment. This could include an obligation to ensure that the facilities which will process the used textiles in the country of destination have been subject to an audit by an independent and accredited third party with appropriate qualifications (compare with article 46(3) Waste Shipments Regulation (2024)). Afterwards, exporters would be required to submit verification of the process. Similar to the export of waste, exporters could be obligated to give a financial guarantee or equivalent insurance covering the retrieval of dumped used textiles. Regarding enforcement, policy makers could consider imposing penalties and fines on exporters found in breach of their obligations. They could also consider suspending or revoking export privileges for repeat offenders, who are put on a 'blacklist'.<sup>287</sup> Creating these obligations would ensure that both the export of used textiles that are not meant to be waste and the export of waste are subject to similar stringent requirements, which should temper the attractiveness of abusing either framework to circumvent the obligations of the other. The significant environmental impact of textiles could warrant a sectoral piece of legislation, as is the case with the Revision WFD, which focusses on two main issues of losses in resources: food waste and textile waste.

Creating an analogous framework for the export of used textiles has some weaknesses.

- First, verifying whether the exported textiles are actually reused in the third country may be difficult and cumbersome, especially if the third country's processing systems are not well-established or transparent. Cross-checking information provided by the exporting economic operator would require close collaboration with third-country

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<sup>287</sup> The regulatory framework of such a blacklist could include (1) criteria for listing (i.e., the material scope of the blacklist, such as consistent non-compliance, evidence of dumping, etc.), (2) consequences of listing, which can be modulated according to the severity of non-compliance in order to safeguard proportionality (e.g., mandatory compliance plan that is to be submitted by exporters outlining how they intend to rectify non-compliance and including specific actions, timelines and milestones, additional scrutiny with stricter export controls, temporary/permanent export bans, etc.), (3) appeal criteria (i.e., circumstances in which exporters may challenge their listing and rectify their non-compliance), (4) a review mechanism (i.e., implementation of review process to assess exporters' progress toward compliance and remove them from the blacklist if they demonstrate sufficient improvement). Making the blacklist publicly available to enhance transparency could serve to discourage non-compliance.

national authorities. Insufficient exchange of information can hinder the effectiveness of this obligation. Traceability of items of clothing is key. The European Commission has launched a call under the European LIFE program to improve the traceability of exports of used textiles (and textile waste).<sup>288</sup> In a more general sense, the digital product passport envisioned by the European Commission in the ESPR is meant to enhance the traceability of products in their value chain. Currently, this traceability proves to be difficult because supply chains of used clothing are long and convoluted.<sup>289</sup> A particular difficulty is that the end of the supply chain in third countries is underpinned by informal relationships in a mostly unorganized sector.<sup>290</sup> A very practical sidenote is that as regards clothing ensuring the physical durability of the digital passport is something to consider. If the key to access the digital passport (e.g., a QR-code) is printed on clothing labels, there is no guarantee that the digital passport will survive being handed down through the supply chain. Customers themselves might already have removed the clothing labels (e.g., because the labels are considered itchy). If the key is directly printed on the clothing the printing method needs to ensure that the key does not become washed-out after possibly many wash cycles.

- Second, lack of traceability can also severely hinder any retrieval efforts towards dumped textiles. In the same vein as verification, retrieval could be difficult and resource intensive.
- Third, implementing a clear and standardized system to determine and prove actual reuse can be complex, especially when dealing with multiple third countries with different regulations and capabilities to process the used textiles.
- Finally, these obligations could increase costs for exporters, particularly small and medium-sized businesses, who may struggle to comply with the requirements. In part, these costs can be mitigated by creating a list of pre-consented facilities that, for example, do not require individual auditing each and every time (compare with article 14 Waste Shipments Regulation). An example of that approach can be found in the Dutch organization ‘Vereniging Herwinning Textiel’. This industry organization represents 95% of the professional textile recycling companies in the Netherlands that focus on the collection, sorting, processing, and treatment of used textiles. Textile companies affiliated with the organization who wish to export used clothing can only sell it to established trading partners. The textiles are to be sorted according to the specific preferences of these trading partners in advance. Creating a list of established trading partners, similar to the Dutch approach, could be a proactive measure for the European Union to mitigate some of the environmental problems associated with the export of textile waste to third countries. The European Union can ensure that textile waste is only exported to countries that have demonstrated their commitment to environmentally responsible waste management practices. This helps prevent the transfer of waste to countries with lax regulations, reducing the risk of environmental pollution and improper disposal. This is what the European Union wishes to enact with

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<sup>288</sup> <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/topic-details/life-2021-prep-environment>.

<sup>289</sup> L.A. MANIESON and T. FERRERO-REGIS, “Castoff from the West, pearls in Kantamanto? A critique of second-hand clothes trade”, *Journal of Industrial Ecology* 2023, Vol. 27, p. (811) 814.

<sup>290</sup> K. DISSANAYAKE and R. PAL, “Sustainability dichotomies of used clothes supply chains: a critical review of key concerns and strategic resources”, *The International Journal of Logistics Management* 2023, Vol. 34, p. (75) 80.

the revision of the regulation on shipments of waste.<sup>291</sup> It should be duly noted, however, that the environmental impact of these shipments cannot be solely ascribed to the receiving countries. As mentioned before, stricter regulations (containing, e.g., clearer definitions of textile waste) and enforcement of regulations regarding used textiles before shipments in the European Union is necessary.

#### **3.4.2.4 Conclusion**

The export of used textiles falls outside of the scope of the study conducted by Roberts *et al.*, so that the policy measures in this context cannot be viewed through its lens. They do not relate to any of the upstream or downstream factors identified by the others. Thus, they do not interact with the hurdles for the voluntary uptake of more sustainable business practices. However, it is possible to regard those interventions as advantageous from a broader perspective. Greater scrutiny regarding the export of used textiles ensures that businesses have less room to circumvent any framework mandatorily imposing more sustainable business practices.

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<sup>291</sup> The European Commission has proposed a new regulation on shipments of waste (COM/2021/709 final), which contains export restrictions. The export of textile waste to non-OECD countries would be allowed only under the condition that such countries notify to the Commission their willingness to import specific types of waste and demonstrate their ability to manage it in an environmentally sound manner (see articles 36 and following from the proposal).

## 3.5 Actions towards consumers<sup>292</sup>

Regarding actions towards consumers, it should be noted that this research report adopts the lens of regulatory actions. While the European Union is working on legislation, traders active in the clothing sectors (both in and outside of the European market) are themselves also experimenting with methods to halt the returns culture. They target these methods mainly at ‘chronic’ or ‘serial’ returners, who return clothes at a significantly higher rate than the average consumer. For example, to counteract ‘wardrobing’, where a consumer buys clothes with the intention to only wear them once at a specific event such as a wedding and to return them immediately afterwards, some traders are experimenting with large, notable stickers or tags on the clothes (‘ruining the picture’) that may not be removed lest the right to return be voided (which would not be possible under the current legislation of the European Union).<sup>293</sup> To lower the need for ‘fitting rooming’, where a consumer buys several pieces of the same article of clothing to try on different sizes, traders are attempting to enhance the information given to the consumer before the purchase. Methods are, for example, the development of ‘right fit technologies’ to assist consumers in assessing whether clothes will fit them before making a purchase online. One exemplary tool is a ‘virtual try-on’ where a visual representation through augmented reality allows customers to visualize how a particular garment will look and fit on their body by using their smartphone or computer camera.<sup>294</sup> There is no doubt that altering the behavioral choice architecture of consumers can have effect. Psychological interventions (i.e., mere changes in choice architecture, so not monetary or restrictive measures) hold significant potential to influence consumer choices. Spreer *et al.* found that such interventions reduced return rates by 4% (which translates into 5.75 million fewer return packages in Germany every year and therefore around 13 000 metric tons less CO<sub>2</sub>) and could reduce rates up to 5%.<sup>295</sup> As an example of an intervention, the authors confronted consumers with a message that stated that many other consumers behave sustainably by avoiding returns and motivated readers to follow suit (this is a reference to ‘social norms’).

Of course, these self-regulating measures could benefit from being supplemented by regulatory actions. The need for fitting rooming can be diminished with something as simple as uniform European Union standards for sizes and measurements.<sup>296</sup> Moreover, one could argue that one method of regulatory action is to raise such private initiatives to the level of regulatory action, by mandating them through legislation.

In any case, the regulatory actions towards consumers taken by the European Union today in the ESPR and ECGTD are mostly of the informative type. The employment of consumer behavior to stimulate more sustainable purchases hinges on obligations to inform consumers before

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<sup>292</sup> For the reasoning behind the positions taken in this section, see publication no. 31 of the CE Center available at <https://ce-center.vlaanderen-circulair.be/nl/publicaties/publicatie-2/31-lifespan-extension-of-products-european-and-national-initiatives>.

<sup>293</sup> See also Expertgroep GetRidofReturns, ‘Blue Paper’, 2020, p. 15, available at [shoppingtomorrow.nl/nl/themas/logistics/delivery-distribution/get-rid-of-returns](https://shoppingtomorrow.nl/nl/themas/logistics/delivery-distribution/get-rid-of-returns).

<sup>294</sup> See Expertgroep GetRidofReturns, ‘Blue Paper’, 2020, p. 14, available at [shoppingtomorrow.nl/nl/themas/logistics/delivery-distribution/get-rid-of-returns](https://shoppingtomorrow.nl/nl/themas/logistics/delivery-distribution/get-rid-of-returns).

<sup>295</sup> P. SPREER, T. PFRANG and M. LINZMAJER, *Die Psychologie der Retoure. Wie Behavioral Design die Rücksendequote im E-Commerce senken kann*, München, elaboratum, 2021, p. 4.

<sup>296</sup> E. TERRYEN and E. VAN GOOL, “The Role of European Consumer Regulation in Shaping the Environmental Impact of E-Commerce”, *EuCML* 2021, Vol. 3, p. (89) 100.

purchasing products. The European Commission intends for consumers to be better able to compare products before purchasing them, as regards their expected useful lifespan (including the possibility to extend this lifespan through repair). The Commission hopes that informed consumers will opt for products with a longer lifespan, which will outcompete less sustainable products.<sup>297</sup> The Commission has also launched a behavioral campaign (ReSet The Trend) to influence consumers under the motto ‘#ReFashionNow’.

The prohibition of the destruction of unsold consumer products in the ESPR is aimed at the side of the businesses. The ESPR does not pay much attention to consumers, even though their behavior is – at least in part – a cause of the quantity of unsold consumer products.<sup>298</sup> The Consumer Rights Directive<sup>299</sup> gives consumers great freedom to exercise their right to withdraw from an online purchase and return the purchased products. For example, they do not have to justify why they exercise this right. Often, consumers can exercise this right without additional costs (based on 'free return policies', which in any case do not *visibly* affect the pricing of products). The Consumer Rights Directive offers consumers strong protection, but does not encourage them to reduce the environmental impact of their purchases and reduce impulsive purchases.<sup>300</sup> **It could, therefore, be advisable to adapt or even limit the right of withdrawal of consumers under the Consumer Rights Directive (for example, by allowing price differentiation between purchases with and those without right of withdrawal, by analogy with hotel reservations with and without cancellation insurance).**<sup>301</sup> The same holds true as regards the possibility for national Member States under article 3(7) Sale of Goods Directive<sup>302</sup>

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<sup>297</sup> In the Consumer Agenda Sustainable Recovery, the European Commission indicates that it wants empower consumers “to play a more active role in the circular economy”. Consumers should receive trustworthy and relevant information to choose reusable, durable, and repairable product, see Communication from the Commission to the European Parliament and the Council - New Consumer Agenda. Strengthening consumer resilience with a view to sustainable recovery, 13 November 2020, COM(2020) 696 final).

<sup>298</sup> In recital 46 of the version of the ESPR proposed by the European Commission, the Commission explicitly mentions textiles and footwear as examples of unsold consumer products. In its policy paper on sustainable textiles, it addresses the need to ban the destruction of unsold or returned textiles (p. 4) and the need to reduce overproduction and overconsumption of clothing (p. 8-9). In this document on textiles, one of the main reasons for the ban, the Commission does not discuss ways of reducing overconsumption on the consumer side through a change in consumers' legal rights, see Communication Sustainable Textiles.

<sup>299</sup> Directive (European Union) 2011/83/European Union of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (*OJ L* 22 November 2011, Vol. 304, p. 64-88 (hereinafter abbreviated as 'Consumer Rights Directive')

<sup>300</sup> B. KEIRSBILCK, E. TERRY, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO)*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 20.

<sup>301</sup> See about this recommendation and see for an overview of methods how to possibly adjust this right, B. KEIRSBILCK, E. TERRY, A. MICHEL and I. ALOGNA, *Sustainable Consumption and Consumer Protection Legislation, In-Depth Analysis for the Committee on Internal Market and Consumer Protection (IMCO)*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 22; E. TERRY and E. VAN GOOL, “Kunnen we e-commerce vergroenen door het consumentencontractenrecht te herzien?”, *TvC* 2021, Vol. 1, p. (15) 21-27; E. TERRY, “Overeenkomsten op afstand en buiten de verkoopprijzen na de omzetting van de Omnibusrichtlijn”, *DCCR* 2022, Vol. 2-3, p. (133) 149-150, no. 30. Some of these suggested methods have already been adopted in a resolution of the federal Chamber of Representatives, see voorstel van resolutie van 23 november 2021 betreffende de evolutie naar een duurzaam en evenwichtig herroepingsrecht in het kader van e-commerce (proposal for a resolution of 23 November 2021 on the evolution towards a sustainable and balanced right of withdrawal in the context of e-commerce), *Parliamentary Documents* Chamber of Representatives 2021-2022, no. 2335/1.

<sup>302</sup> Directive (European Union) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (European Union) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (*OJ L* 22 May 2019, Vol. 136, p. 28-50 (hereinafter abbreviated as 'Sale of Goods Directive').

**to allow specific remedies for conformity defects thirty days after purchase (for example, the right to reject known in Ireland), which can also encourage impulsiveness.<sup>303</sup>**

However, this view is not shared by all.<sup>304</sup> Santos Silva and Gabriel García-Micó wish to leave the right to withdrawal intact in order to ensure its protective function, in particular towards consumers acting in good faith. Instead, they propose to target those abusing the right to withdrawal: the chronic returners. They advocate legislatively mandating ‘green sludges’, which are alterations to the behavioral architecture of decisions meant to introduce friction so that decision processes become more cumbersome. The authors only suggestion in this regard is to mandate a ‘pre-cooling off period’ which would obligate chronic returners to confirm their intention of purchasing a product after a certain time for reflection upon the purchase has elapsed. However, the framework of mandatory green sludges could be expanded to other types of private initiatives. For example, many traders ask consumers to state the reason of return, which can be seen as a form of green sludges. That requirement and other types of green sludges could be mandated as well. Note that such a requirement does not equate to an abolishment of the right to withdrawal of the consumer without justification, as giving any reason or refusing to state any reason suffices to jump this hurdle.

Even though the European Commission wishes to ‘empower’ consumers and gives great weight to the protection of consumer interests (culminating in the ECGTD), the time may be ripe to restrict the aforementioned rights. The initiatives taken by the European Commission to enact the Green Deal are meant to protect the environment. The protection of the environment is an objective of general interest capable of justifying a restriction on the use of those rights. An element of inter-generational solidarity can be noted as well. Ensuring a healthy living environment in the European Union, is necessary to ensure the well-being of future European Union citizens (the ‘consumers of the future’). Eventually, putting an end to the throw-away culture in the clothing industry, as it is exacerbated by the right of withdrawal, is beneficial to consumers because of an increase in quality and longevity of consumer textiles. One should take care to transcend the false dichotomy between consumer rights and sustainability considerations. They are not necessarily conflicting priorities. Sustainability measures are not in opposition to consumer rights. Rather they are complementary to them.

An adjustment of consumer rights is not mentioned as a policy intervention by Roberts *et al.* Nonetheless, it can be expected to be advantageous according to the authors’ framework. It has a direct impact on the upstream factor ‘consumer behavior’ (as demonstrated by the study of Spreer *et al.*). It can adequately address the returns culture identified in literature and stunt its rise.

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<sup>303</sup> E. VAN GOOL, A. MICHEL, B. KEIRSBILCK and E. TERRY, *Public consultation as regards the Sustainable consumption of goods – promoting repair and reuse initiative*, 2022, <https://lirias.kuleuven.be/retrieve/674960>, p. 6.

<sup>304</sup> M. SANTOS SILVA and T. GABRIEL GARCÍA-MICÓ, “Cooling-off hot deals. a plea for green sludge in distance sales contracts” in M. SANTOS SILVA *et al.* (eds.), *Routledge Handbook of Private Law and Sustainability*, Abingdon, Routledge, 2024 (forthcoming).

# 4 General conclusion

The ESPR's multi-pronged approach, encompassing ecodesign, EPR, a ban on product destruction and ways to alter consumer behavior, demonstrates a comprehensive effort to transition the textile industry towards sustainability. Many of the measures proposed and taken at the level of the European Union can be flagged as advantageous as they address one or more reasons why the destruction of a product is favored over strategies to extend its lifespan. However, attention should be devoted to (1) ensuring a holistic approach does not fragmentize the European Union's policy response, nor lead to regulatory gridlock and (2) creating sufficient flanking measures.

The foundation of the European Union's policy approach should always be the establishment of mandatory ecodesign requirements. By focusing on improving the design and repairability of products, overproduction can be curbed. Overproduction is a root cause of product destruction. These ecodesign requirements are to align with EPR measures, ensuring that manufacturers take responsibility for the entire life cycle of their products. EPR schemes, when coupled with mandatory recycling rates, ecodesign requirements imposing recycled content and eco-modulated fees, can incentivize sustainable design and proper end-of-life management.

A crucial aspect is the ban on product destruction, primarily aimed at manufacturers. However, concerns arise regarding the potential unintended consequences, such as dumping unwanted products on charitable organizations. To address this, policy makers could introduce volume limits, quality standards, and clear eligibility criteria for donated products. Moreover, attention is required for the export of second-hand textiles, which can perpetuate waste issues in recipient countries. The European Union could attempt to stimulate investment in local European circular processing facilities and limit exports or the European Union could try to stimulate investments in third countries' industries and allow more strictly regulated exports.

In recognition that consumer behavior contributes to the unsold products issue, adjustments to consumer rights could be explored. Revising the right of withdrawal after purchase might discourage impulsive and environmentally detrimental purchasing behavior. Such a change would align with the broader environmental goals of the Green Deal.

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