

24 July 2024, Brussels

FEAD responses stakeholder consultation on possible derogations for a prohibition on the destruction of unsold apparel and footwear

Derogation (a) Health, hygiene, and safety reasons

Derogation (a) lists three different reasons, namely **health, safety and hygiene**. These are dealt with separately below, as different reasons, evidence and possible corrective measures are considered in each case. The operationalisation as well as impacts of these different reasons can also vary.

The delegated act on derogations will not necessarily include all the possible derogations listed in the [ESPR legal text](#), but only those (as a whole, or in a more targeted manner) that are considered appropriate.

Do you see a clear added value for the inclusion of this derogation in the delegated act?

Yes

No (please specify)

Please enter your comment here:

As the European Parliament stated (2022/2171(INI), EU Strategy for Sustainable and Circular Textiles), hazardous chemicals are widely used in various textile production processes and they have severe impacts on the environment and workers, and can remain in garments and household textiles, impacting consumers. In fact, around 60 chemicals in textile products placed on the EU market are considered carcinogenic, mutagenic or toxic to reproduction. This is something that is to be addressed under REACH and ecodesign requirements. However, research may always show new cases for which a derogation to the prohibition to the destroy unsold goods in relation to health will always be needed because it may affect products already placed on the market. More concerning and relevant for such derogation is that we actually face the situation today that many products, including textile products, sold to European consumers do not even comply with EU chemicals legislation such as REACH.

Health

It is proposed that this derogation refers to chemical content that is not in compliance with the provisions in the REACH regulation ([EC 1907/2006](#)), the POPs regulation ([EU 2019/1021](#)) or the Biocidal Products Regulation (EU 528/2012).

Are there additional health concerns that should be added to the specification (e.g health concerns not amounting to regulatory non-compliance)?

If you see the need to specify additional health reasons please provide information with regards to a specification, proof of compliance and additional compliance costs.

Is it possible to carry out corrective measures to address the reported health hazard?

An operationalisation of this derogation could be as follows:

As proof of compliance, test results of sampled unsold products should be provided.

The unsold products should be provided with a statement to the waste treatment operator collecting the discarded unsold product, describing the health concern to ensure appropriate treatment.

As proof of compliance, the economic operator will have the obligation to keep records (including the statement to the waste treatment operator).

Do you agree with this formulation?

Yes

No: The proof of compliance should be mandatorily provided ('must/shall be provided')

Is it necessary to demand that the tests shall be conducted by laboratories complying with the principles of good laboratory practice provided for in [Directive 2004/10/EC](#) or other international standards recognised as being equivalent by the Commission or the European Chemicals Agency or accredited to [ISO 17025](#)?

Yes

No

Is it correct that tests of the products are part of the usual compliance costs?

- Yes
- No

Safety

It is proposed that this derogation applies where standards in the context of the general safety regulations (e.g. in relation to children’s clothing) are not met.

Furthermore, it is proposed to add a formulation comparable to derogation b): “if corrective measures necessary to address the reported safety issue cannot be taken in a cost-effective manner”. It is proposed to specify cost-effectiveness as the cost of corrective measures for a particular product not outweighing the profit margin of this product.

Are there additional safety reasons that should be added to the specification? (e.g. safety concerns not amounting to regulatory non-compliance)

- Yes (please specify in the comment box)
- No

Please enter your comment here:

If you see the need to specify additional safety reasons please provide information with regards to a specification, possible repair, proof of compliance and additional compliance costs.

An operationalisation could be as follows:

The economic operator shall provide a statement to the waste treatment operator collecting the discarded unsold product describing the safety concern, to ensure appropriate treatment.

As proof of compliance, the economic operator will have the obligation to keep records (including the cost-effectiveness check and the statement to the waste treatment operator).

Do you agree?

- Yes
- No

What kind of evidence could contribute to support a self-declaration or proof about corrective measures for products not being cost-effective as part of the operationalisation of this derogation?

What compliance costs do you expect to occur for economic operators?

Hygiene

Hygienic issues in apparel and footwear are understood to appear by e.g. mould that is concluded to be repairable by cost effective measures, such as cleaning processes.

It is proposed to add a formulation under this derogation comparable to derogation b) “if corrective measures necessary to address the reported hygiene issue cannot be taken in a cost-effective manner”.

It is proposed to specify cost-effectiveness as the cost of corrective measures for a particular product not outweighing the profit margin of this product.

What kind of hygiene reasons do appear in apparel and footwear that cannot be rectified by cost effective measures? e.g. products with expensive cleaning methods, outweighing the profit margins.

An appropriate operationalisation could be as follows:

The economic operator shall provide a statement to the waste treatment operator collecting the discarded unsold product describing the hygiene concern, to ensure appropriate treatment.

As proof of compliance, the economic operator will have the obligation to keep records (including the cost-effectiveness check and the statement to the waste treatment operator).

Do you agree?

- Yes
- No

What compliance costs do you expect to occur for economic operators?

Higher administrative costs, also for waste management operators linked to record keeping obligations of separate collection and treatment.

Derogation (b) damage caused to products as a result of their handling, or detected after products have been returned, which cannot be repaired in a cost-effective manner

The delegated act on derogations will not necessarily include all the possible derogations listed in the [ESPR legal text](#) , but only those (as a whole, or in a more targeted manner) that are considered appropriate.

Do you see a clear added value for the inclusion of this derogation in the delegated act?

- Yes
- No (please specify)

Please enter your comment here:

It is proposed to specify damage caused to products as a result of their handling, as damage that occurs in transportation or storage and that impacts the physical integrity of the product and that do not constitute damages amounting to health, hygiene or safety reasons, as described under derogation (a).

What types of damages could occur during handling? How often do these occur?

Are there specific product types within apparel and footwear more prone to damages during handling? If so, please specify or provide examples.

What currently happens with these damaged products? Which criteria are used to determine whether these products are repaired? Please specify if there are different routes for different degrees of damages

It is proposed to specify damage detected after a product has been returned as damage occurred during unpacking or trying of the product by the consumer and that impacts the physical integrity of the product

What type(s) of damages could be detected after a product has been returned? Please specify, including how often these occur.

Stains, humidity, tears...

Are there specific product types within apparel and footwear more prone to damages detected after being returned? If so, please specify or provide examples.

What currently happens with these damaged products? Which criteria are used to determine whether these products are repaired? Please specify if there are different routes for different degrees of damages.

For commercial entities it really depends on how visible the damage is and if anybody would be interested in buying an apparel product with visible sown up tears. Garments with defects or damage will likely not be repaired since it would not justify the additional costs, instead most of them will be given to recycling. This has partly to do with the extensive perforation of fast fashion in the textile industry, which means not only the quality of the garments has been reduced but also the quantity increased. This, in turn, means that repair becomes more unlikely the cheaper the product becomes.

It is proposed that derogation (b) applies when damaged products, as specified above, cannot be repaired in a cost-effective manner. It is proposed to specify cost-effectiveness as the cost of repair for a particular product not outweighing the profit margin of this product.

Do you agree with this specification?

Yes

X No: in the case of repairing apparel and footwear, it is not only about the cost but also about considering the outlet. As explained above, if you mend an item but it will no longer 'look good' because the previous damage is still visible, nobody will buy it, and it will make no sense to repair. Thus, it would be much more sensible and cost effective to recycle the product.

An operationalisation could be as follows:

The economic operator shall provide a statement to the waste treatment operator collecting the discarded unsold product describing the damage to the product, to facilitate appropriate treatment.

As proof of compliance, the economic operator will have the obligation to keep records (including the cost-effectiveness check and the statement to the waste treatment operator)

Do you agree?

Yes

No

Which kind of alternative evidence could contribute to support a self-declaration or proof that repair of damaged products is not cost-effective as part of the operationalisation of this derogation? Please provide a detailed argumentation / evidence to support your statement.

What compliance costs do you expect to occur for economic operators?

For mechanical recycling operators the damage of products is likely to have little impact since the process of mechanical recycling would require the tearing of them anyway.

What kind of benefits do you see regarding this derogation? Which stakeholder(s) would benefit in case this derogation is in place?

The benefits would clearly be that products that won't be bought on the market can be otherwise utilised instead. This will aid all parts of the value chain, including consumers.

What kind of negative consequences, costs or potential loopholes do you see regarding this derogation? How could these be avoided or prevented?

Derogation (c) unfitness of products for the purpose for which they are intended, taking into account, where applicable, Union and national law and technical standards

The delegated act on derogations will not necessarily include all the possible derogations listed in the [ESPR legal text](#) , but only those (as a whole, or in a more targeted manner) that are considered appropriate.

Do you see a clear added value for the inclusion of this derogation in the delegated act?

Yes

- No (please specify)

Please enter your comment here:

Unfitness of products for the purpose for which they are intended can occur due to defects, resulting from design flaws or quality control problems which prevent the product to perform specific intended functions or deviates from the product description and, in any case, do not constitute health or safety issues, as described under a).

Do you agree with this definition?

- Yes
- No

Furthermore, it is proposed to add a formulation comparable to derogation b) “if corrective measures necessary to address the reported unfitness cannot be taken in a cost-effective manner”. It is proposed to specify cost-effectiveness as the cost of corrective measures for a particular product not outweighing the profit margin of this product.

Could you provide information about cases in which unfitness for purpose of apparel and footwear products has been identified? Please provide details about the type(s) of product and reason(s) for unfitness for purpose as well as the possibility for corrective measures.

Are there specific terms used in the apparel and footwear sector or specifically in your organisation to refer to these kinds of production failures or non-conformities? If so, please provide information on these terms.

Are there specific product categories within the apparel and footwear sector for which the occurrence of product defects or design failures resulting in unfitness for purpose is more frequent ? for example: outdoor clothing and footwear, sportswear, beachwear, functional clothing, etc.

- Yes
- No

Are there cases where it would be possible to reclassify a product for which unfitness for purpose has been identified into alternative categories (or product lines) which do not require the function?

For example: a product described as “waterproof” which does not comply with this function, might be reclassified into another product category which does not require performing said function.

- Yes
- No

Please enter your comment here:

Are there specific aspects related to quality controls resulting in a product being unfit for purpose that should be added to the specification of this derogation?

If you see the need to specify additional reasons why a product might deviate from the purpose for which it was intended, please provide information with regard to a specification, proof of compliance and related compliance costs.

An operationalisation could be as follows:

The economic operator shall provide a statement to the waste treatment operator collecting the discarded unsold product describing the safety concern, to ensure appropriate treatment.

The records may include documentation of the deviations between the product description and functionality intended in the original design and the detected unfitness and of efforts taken to clarify ex-post the errors in quality control that led to the occurrence of the unfitness of the specific product).

The economic operator will have the obligation to keep records (including the cost-effectiveness check and the statement to the waste treatment operator).

Do you agree with this formulation?

- Yes
- No: there seems to be a mistake. Safety concern is mentioned while the derogation is supposed to address wider cases of unfitness. Otherwise, the approach is ok.

Which kind of technical tests could contribute to support a self-declaration about unfitness for purpose as part of the operationalisation of this derogation? Please provide evidence to support your statement.

Which other proof of compliance would be relevant to support the verification of cases falling under this derogation?

What compliance costs do you expect to occur for economic operators?

Which impacts in terms of costs and / or benefits do you foresee in a scenario as described above?

Derogation (d) non-acceptance of products offered for donation

The delegated act on derogations will not necessarily include all the possible derogations listed in the [ESPR legal text](#) , but only those (as a whole, or in a more targeted manner) that are considered appropriate.

Do you see a clear added value for the inclusion of this derogation in the delegated act?

- Yes
- No (please specify)

Please enter your comment here:

Unsold products can be donated to donees (e.g. social economy actors, charities, social organisations, etc.) to be further sold/donated. It can however occur that donees refuse the donated goods. Product donations can be refused due to a variety of reasons, such as:

- For health, safety and hygiene reasons, due to damages or unfitness of the products (situations described under derogation (a), (b) and/or (c))

- Infringement of intellectual property rights (situations described under (f))
- Products unsuitable for the intended beneficiaries of the donee (e.g. men's apparel for charities targeting women)
- Oversupply of certain product types

Are there other reasons for non-acceptance of donations of unsold goods that are not mentioned above? Please, specify.

On average, what % of donations of unsold apparel and footwear are rejected?

- 0-10%
- 10-20%
- 20-50%
- >50%

I do not know

What are the main reasons for rejection?

Are there specific product categories (e.g. formal footwear, underwear, winter clothes,...) that are more prone to being rejected for donation? If so, for what reasons?

What criteria are considered by charities or social economy entities to decide upon acceptance or non-acceptance of a donation of unsold goods?

How do you determine the handling costs (including cleaning or repair) of donated clothing and footwear? Please specify when the handling is considered cost-effective

On average, what % of accepted donations of apparel and footwear eventually turn out to be unsuitable, not usable or waste, including due to situations described under derogation (a), (b), (c) or (f)?

According to Article 25(5) possible derogations for the prohibition on the destruction of unsold apparel and footwear are:

- (a) health, hygiene and safety reasons;
- (b) damage caused to products as a result of their handling, or detected after a product has been returned, which cannot be repaired in a cost-effective manner;
- (c) unfitness of products for the purpose for which they are intended, taking into account, where applicable, Union and national law and technical standards;
- (d) non-acceptance of products offered for donation;
- (e) unsuitability of products for preparing for reuse or for remanufacturing;
- (f) products are unsellable due to infringement of intellectual property rights, including counterfeit products;
- (g) destruction is the option with the least negative environmental impacts for such products.

- 0-10%
- 10-20%
- 20-50%
- >50%

- I do not know

What are the procedures in place to detect these situations?

An operationalisation could be as follows:

Option 1: *As proof of compliance with this derogation, non-acceptance from at least 3 potential donees may be collected in the context of market surveillance actions, stating the reason for non-acceptance. Additionally, the economic actor may be required to provide the criteria for selecting the identified donees as potentially suitable.*

Option 2: *As proof of compliance the economic actor should provide evidence that the product has not been accepted for donation after having been offered on a freely accessible website for at least 4 weeks.*

Do you agree with this operationalisation approach?

- I prefer option 1
- I prefer option 2
- Both option 1 and 2 would be suitable
- I don't agree with either option

How could an economic operator prove that suitable charities or organisations have been requested for accepting the donation? What could be suitable selection criteria?

Are there specific conditions that apply when unsold goods are donated? Please specify. (e.g. removal of original tags or brand labels)

Which economic actor bares the costs of cleaning, repair or other preparation-for-reuse activities?

What compliance costs do you expect to occur for economic operators? e.g. costs associated with:

- The economic actor will need to contact at least 3 donees, provide an argumentation for their choice and keep proof of the non-acceptance of the donation of each.
- Donees will have to document their refusal
- Other

Please enter your comment here:

Are the proposed options to prove compliance a higher administrative burden compared to the current corporate practice for donation, if any?

- Yes
- No

Derogation (e) unsuitability of products for preparing for reuse or for remanufacturing

Unsold products can be prepared for reuse (e.g. cleaning, repair) or remanufactured (e.g. disassembly and reassembly into new products) by the economic actors themselves or 3rd parties that perform such actions. The resulting products are then resold or offered for donation.

The delegated act on derogations will not necessarily include all the possible derogations listed in the [ESPR legal text](#) , but only those (as a whole, or in a more targeted manner) that are considered appropriate.

Do you see a clear added value for the inclusion of this derogation in the delegated act with a focus on unsuitability for preparing for reuse?

Yes

No (please specify)

Please enter your comment here:

Do you see a clear added value for the inclusion of this derogation in the delegated act, with a focus on unsuitability for remanufacturing?

Yes

No (please specify)

Please enter your comment here:

Products can be unsuitable for preparation for reuse or remanufacturing, due to a variety of reasons, such as:

- Situations described under (a), (b) and/or (c)
- Situations described under (f) or potential infringement of IP rights, as perceived by the economic operator
- Situation described under (g), i.e. products requiring preparation for reuse or remanufacturing activities that entail environmental impacts that outweigh the benefits of reuse or remanufacturing.

Are there other reasons for unsuitability for preparation for reuse or remanufacturing that are not mentioned above? Please, specify.

According to Article 25(5) possible derogations for the prohibition on the destruction of unsold apparel and footwear are:

(a) health, hygiene and safety reasons;

(b) damage caused to products as a result of their handling, or detected after a product has been returned, which cannot be repaired in a cost-effective manner;

(c) unfitness of products for the purpose for which they are intended, taking into account, where applicable, Union and national law and technical standards;

(d) non-acceptance of products offered for donation;

(e) unsuitability of products for preparing for reuse or for remanufacturing;

(f) products are unsellable due to infringement of intellectual property rights, including counterfeit products;

(g) destruction is the option with the least negative environmental impacts for such products.

Since the advent of fast fashion, the price of clothing has continuously decreased. This means smaller profit margins for producers and less incentives for the consumers to repair old clothing/for economic entities to perform remanufacturing. The business case is thus extremely poor - in addition to difficulties in using the remanufactured/recycled product.

On average, what % of unsold apparel and footwear are unsuitable for preparation for reuse or remanufacturing?

- 0-10%
- 10-20%
- 20-50%
- >50%

I do not know

Please specify the main reasons for this unsuitability

Are there specific product categories (e.g. formal footwear, underwear, winter clothes, ...) that are more prone to being unsuitable for preparation for reuse or remanufacturing? If so, what are the main reasons?

Lower value clothing and workwear is generally less suitable to be re-used.

Do you have examples where remanufacturing of unsold apparel and footwear currently occurs in practice?

What criteria are considered by actors performing preparation for reuse or remanufacturing activities to decide upon the suitability of products and the viability of the process?

In general, that the products are clean and do not have any defects. Als fashion aspects play a role, a cheap t-shirt from a fast fashion brand will be less desirable for re-use compared to a t-shirt from an expensive brand.

How do you determine the cost effectiveness of preparation for reuse or remanufacturing activities?

How do you determine the environmental impact of preparing for reuse or remanufacturing activities? Please specify when the burdens are considered to outweigh the benefits

An operationalisation could be as follows:

Option 1: The economic operator shall provide a statement to the waste treatment operator collecting the discarded unsold product describing the unsuitability for preparing for reuse or for remanufacturing. As proof of compliance, the economic operator will have the obligation to keep records

Option 2: The unsold product is offered to a suitable supplier of preparation for reuse or remanufacturing activities. In case of refusal, a proof of refusal from this supplier stating the reason for unsuitability shall be documented. Additionally, the economic actor should be able to explain why the contacted suppliers were considered potentially suitable.”

Do you agree with this operationalisation approach?

- I prefer option 1

- I prefer option 2
- Both option 1 and 2 would be suitable
- I don't agree with either option

Are there specific conditions that apply when unsold goods are offered for preparation for reuse or remanufacturing? Please specify (e.g. removal of brand labels).

What compliance costs do you expect to occur for economic operators?

Is the proposed proof of compliance a higher administrative burden compared to the current corporate practice for preparation for reuse and/or remanufacturing, if any?

- Yes

- No

Derogation (f) unsaleability of products due to infringement of intellectual property rights, including counterfeit products

The delegated act on derogations will not necessarily include all the possible derogations listed in the [ESPR legal text](#) , but only those (as a whole, or in a more targeted manner) that are considered appropriate.

Do you see a clear added value for the inclusion of this derogation in the delegated act?

- Yes
- No (please specify)

Please enter your comment here:

It is important to note that economic operators are not obliged to check products for infringement of intellectual property rights. Only online platforms that enable consumers to conclude distance contracts with traders shall make reasonable efforts according to the Digital Services Act to randomly check in any official, freely accessible and machine-readable online database or online interface whether the products or services offered have been identified as illegal (Regulation 2022/2065 on a Single Market For Digital Services).

Therefore, situations of detected infringement of IP rights can take place when:

- A court has found that the goods infringe an IP right;
- The economic operator becomes otherwise aware of such infringement through proactive or preventive measures (including from competent authorities) or through notifications from right holders.

Customs authorities, for example, are competent to enforce intellectual property rights in relation to goods due to Regulation 608/2013 on the customs enforcement of intellectual property rights.

Are there additional situations where economic operators identify apparel and footwear infringing intellectual property rights / counterfeit products that should be specified in this derogation?

Cases where it is obvious to the economic operator without having to be notified by holders or authorities.

How do you see the implementation of recommendation 45 of the [COMMISSION RECOMMENDATION \(EU\) 2024/915](#) of 19 March 2024 on

measures to combat counterfeiting and enhance the enforcement of intellectual property rights, in particular in relation to preparation for re-use?

An operationalisation could be as follows:

The economic operator shall provide a statement to the waste treatment operator collecting the discarded unsold product describing the IPR infringement, to ensure appropriate treatment.

As proof of compliance, the economic operator will have the obligation to keep records (including the cost-effectiveness check and the statement to the waste treatment operator).

Do you agree with this proposal?

- Yes
- No

What compliance costs do you expect to occur for economic operators?

Derogation (g) destruction is the option with the least negative environmental impacts

The delegated act on derogations will not necessarily include all the possible derogations listed in the [ESPR legal text](#) , but only those (as a whole, or in a more targeted manner) that are considered appropriate.

Do you see a clear added value for the inclusion of this derogation in the delegated act?

- Yes
- No (please specify)

Please enter your comment here:

Recycling processes fall under the ESPR definition of destruction and, therefore, recycling is prohibited as a default management option for unsold products covered by the prohibition on destruction.

However, there could be situations where destruction, particularly recycling, is the preferred option because it has the least environmental impact. In such cases, a derogation could apply. It is necessary to identify under what circumstances this could occur.

Unsold products can be prepared for reuse (e.g. cleaning, repair) or remanufacturing (e.g. disassembly and reassembly into new products) by the economic actors themselves or 3rd parties that perform such actions. The resulting products are then resold or offered for donation.

It is proposed to specify that derogation g) applies when the environmental impacts of reselling/reuse/remanufacturing activities are higher than those occurring when the products are sent to destruction (e.g. recycling).

Recycling technologies for (waste) textiles rely on mechanical, chemical and thermal material transformation pathways. At present, mainly mechanical and, to a smaller extent, chemical recycling is being implemented in the EU at a relevant scale. The outputs from mechanical recycling techniques mostly find further use as e.g. cleaning wipe or insulation material (downcycling 'open-loop recycling').

Do you think there is enough demand for recycled materials from unsold textiles for application in new products?

- Yes
- No

Unsold textile products often possess a higher quality compared to post-consumer textile waste. This superior quality can potentially impact the recycling yields and the quality of the recycled materials.

Do you see any environmental benefits and/or technical improvement in targeting unsold textile products to recycling compared to the post-consumer textile waste? If so, what are they?

Yes, the obvious advantages are that the recycling input then has a higher quality, since no contamination or customer use occurred. This will improve the recycling outcome. It also means that the preparatory steps before recycling can be abbreviated.

Footwear

What products/parts are typically unsuitable for recycling and for what reasons?

Today recycling of footwear is almost nonexistent to our knowledge, so in general footwear is unsuitable for recycling today.

Mixed fibres generally also present a problem for mechanical recycling since fibre composites can often not be separated by mechanical means while simultaneously being economically viable. Chemical recycling can be successful here but has a much greater environmental footprint/negative impact due to energy-intensive processes and the use of (toxic) chemicals.

Apart from that, footwear (but also garments) with electronics presents a serious hazard for recycling. Mostly because they're not discarded correctly (i.e. the electronics/batteries are still in the garment/footwear when they get thrown away) and then cause fires in our recycling plants. This is not only extremely dangerous for the employees of the plants but also causes significant damage to the machinery.

What products/parts/fractions of footwear are potentially suitable for (mechanical and/or chemical) recycling and could be recycled in the near future, with the technologies under development?

Could you mention an existing example of footwear recycling?

An operationalisation for derogation (g) could be as follows:

Statement to the waste treatment operator collecting the discarded unsold product describing the environmental impact assessment, to facilitate appropriate treatment.

As proof of compliance, the economic operator will have the obligation to keep records (including the statement to the waste treatment operator).

The operationalisation criteria are based on the environmental impacts related to the product's production and on those of the destruction technologies (including recycling), considering the net impact deriving from both positive and negative effects. The assessment covers a set of environmental indicators.

The economic operator may be required, in the context of market surveillance actions, to provide evidence of the environmental impacts of the unsold textiles and footwear, from the fibers/raw materials extraction to finished product, based e.g. on the product environmental footprint methodology.

The environmental impacts will be compared to a provided environmental threshold representing the impact and benefits of destruction. In those cases where destruction is demonstrated to be the option with the least negative environmental impact, derogation (g) applies.

Do you agree with the proposed approach?

- Yes
- No

What compliance costs do you expect to occur for economic operators?

Do you see the proposed proof of compliance as a high administrative burden?

Yes

No

Please enter your comment here: