Steptoe

A Coherent EU Product Policy under Circular Economy requirements:

Legal Challenges

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Today's Topics

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1. **The Circular Economy Package**
    - Origins
    - State of Play
    - Key Ideas & Targets

2. **EU Product Policy Impacts**
    - Raw Materials
    - Ecodesign
    - Energy labelling
    - Manufacturing

3. **Encouraging Coherence - Examples in Some Priority Areas**
    - Waste Framework Directive Database
    - Microplastics Restriction

Circular Economy
~ Origins, State of Play, Key Ideas & Targets

Origins

- **Nov 1999 EC Comm**: "***Europe's Environment: What directions for the future?*** *The Global Assessment of the European Community Programme of Policy and Action in relation to the environment and sustainable development, 'Towards Sustainability'*" *COM(1999) 543 final*

- **Feb. 2001, Green Paper** COM(2001) 68 final: "*Integrated Product Policy is an approach which seeks to reduce the life cycle environmental impacts of products from the mining of raw materials to production, distribution, use, and waste management.*"

- **Sept. 2002, 6th EAP** aimed for "*a decoupling between environmental pressures and economic growth*" through "*an integrated product policy approach*".

- **Jun. 2003, EC Comm** "*Integrated Product Policy - Building on Environmental Life-Cycle Thinking*", COM (2003)302 final: Voluntary pilot projects.

- **Dec. 2009, EC Report** "*on the state of Implementation of Integrated Product Policy*" (integrated it into "Sustainable Consumption and Production/Sustainable Industrial Policy (SCP/SIP) framework"), COM/2009/0693 final.

Origins

- **Product policy creates obvious scope for tension between Treaty Objectives:**
    - Envi Protection (Art. 192 TFEU)
    - Internal Market Harmonization for Goods (Art. 114 TFEU)
    - **And issues of legal basis...**

- **EU intervention might overcome tensions between EU & MS actions:**
    - Free movement of Goods (Art. 34 & TRIS standstill procedure)

State of Play (2019)

"*It is **clear that no overarching, integrated EU policy instrument** exists that covers the sustainable production and consumption of all products and/or the availability and reliability of information on these products to consumers. Instead, the EU product policy framework consists of **a wide range of EU legislative instruments and other policy tools.** The policy tools contribute, through varying approaches, to ensuring safety of products and/or promoting sustainable production, consumption, reuse, repair, remanufacturing and/or recycling of products, in different phases of the product life cycle. **Together they form a patchwork providing a substantial contribution to circular economy...***

*The deployment of different policy tools allows for tailoring them to the specificities of the products they cover and the way they do this. However, **to optimize their efficiency and contribution to circular economy, it requires regular consideration of overall consistency of the policy interventions.** This begins with considering which products to cover, and how. When multiple policy tools apply to the same products, there should be consideration of possible synergies and avoidance of overlap or inconsistencies*".

"*Sustainable Product in a Circular Economy – Towards an EU Product Policy Framework contributing to the Circular Economy*",

SWD(2019)91 final

State of Play (2019)

	EU policy tools on safety, including sectoral legislation (non–exhaustive)	EU policy setting minimum requirements for circular design	EU policy tools promoting Sustainable production and/or consumption	EU policy tools on waste handling/recycling
Packaging	PPWD	PPWD SuP Directive[199]	EPR under WFD EU Ecolabel	PPWD
Food	Food safety policy (incl. information to consumers)		Organic Label WFD (measures to prevent food waste)	WFD
EEE (including batteries)	RoHS Directive Low Voltage Directive GPSD Batteries Directive	Ecodesign Directive RoHS Regulation	Energy Labelling EU Ecolabel GPP EPR (under WEEE and Batteries Directives)	WEEE Directive Batteries Directive
Transport[200]	Type approval requirements[201]		Tyre Labelling Regulation EPR (under ELV Directive and waste from ships)	WFD (for waste oils) ELV Directive PRF Directive[202]
Furniture	REACH Regulation GPSD		EU Ecolabel GPP EU Timber Regulation	
Buildings and Construction[203]	CPR	Level(s)	EPBD EED Level(s)	WFD (Recovery target and selective demolition obligation)
Textiles	REACH Regulation GPSD		Textiles Regulation EU Ecolabel GPP	WFD (separate collection by 1/1/2025)
Chemical products[204]	REACH Regulation CLP Regulation		EU Ecolabel	WFD

PPWD: Packaging and Packaging Waste Directive **WFD**: Waste Framework Directive **GPSD**: General Products Safety Directive
CLP: Classification, Labelling and Packaging **GPP**: Green Public Procurement **CPR**: Construction Products Regulation
WEEE: Waste Electrical and Electronic Equipment **ELV**: End-of-Life Vehicles **EED**: Energy Efficiency Directive
EPR: Extended Producer Responsibility **RoHS**: Restriction of Hazardous Substances
REACH: Registration, Evaluation and Authorisation of Chemicals

"Sustainable Product in a Circular Economy – Towards an EU Product Policy Framework contributing to the Circular Economy",
SWD(2019)91 final

Circular Economy: Key Ideas & Targets

- Dec 2015 – EC adopts ambitious **Circular Economy** Package, COM(2015) 614 final with 54 Actions , declared *"completes or are being implemented"* on 4 March 2019 in EC Report on implementation.

WHAT IS THE CIRCULAR ECONOMY?
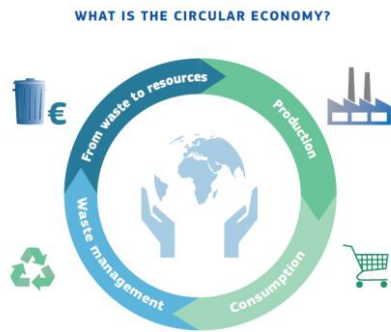
"Closing the loop"

Source: EC Circular Economy Fact Sheet

Key drivers, included:

- Linear 'take-make-dispose' model of economic growth is no longer suited (on average <12% EU materials are recycled).
- **Natural resources are finite** ("*the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimized*").
- A boost to EU's **competitiveness.**
- Concern about **plastics** in the environment (particularly marine litter).

Product Policy & Circular Economy

Today's Product Policy Focus

Aspects of:

1. Raw Materials
2. Eco-design
3. Eco-labelling
4. Manufacturing

Circular Economy: Raw Materials

- **So far: Very low percentage of recycled material is used as raw materials**
  - Uncertainty in quality
  - No link of input (legislation on chemicals) to output (waste)
  - Low prices for input materials vs. expensive recycling processes

Waste

Use

Closing
the loop

Manufacturing

Raw
materials
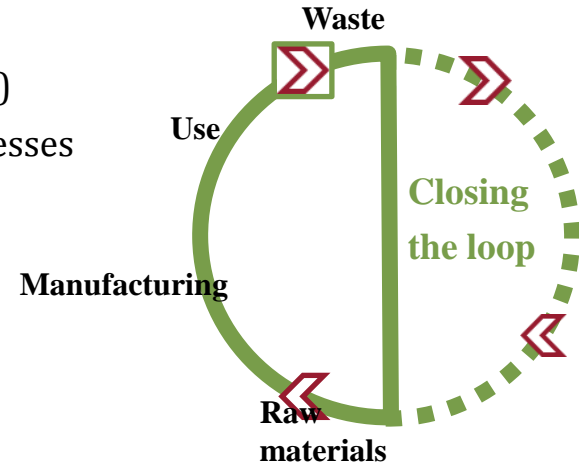
Circular Economy: Raw Materials

- **Circular Economy Approach**
    - Promotion of voluntary schemes for developing verification of treatment facilities for key types of recyclates/waste containing significant amounts of critical raw materials: CEWASTE H2020 project.
    - Quality standards for secondary raw materials, e.g. recycled food contact materials

    - Focus on interface between chemicals, products and waste legislation: **Comm adopted Jan 2018 identifying barriers to Circular Econom**y:
        o information on presence of substances of concern "*not readily available to those who handle waste and prepare it for recovery*", (Compulsory EU Info System and Imports System – feasibility study due end of 2019)?
        o waste may contain substances that are no longer allowed in new products, (Tension between waste as a resource and need for safe reuse where substances of concern)
        o EU's rules on end-of-waste are not fully harmonised, making it uncertain how waste becomes a new material and product, (Which waste streams need a more harmonised approach? EC to centralise current information in accessible database.)
        o rules to decide which wastes and chemicals are hazardous are not well aligned and this affects the uptake of secondary raw materials, (EC technical guidance on the classification of waste (2018/C 124/01)

   See results of Public Consultation on issues: 4 March 2019: "*...general agreement among the stakeholders on the relevence of the issues identified...*"

Circular Economy – Product Design

"*Better design can make products more durable or easier to repair, upgrade or remanufacture.*"

Product design currently addressed on a <u>mandatory</u> basis in **Eco-design requirements for energy related products** Directive 2009/125/EC, setting minimum requirements for the energy efficiency of products. Energy efficiency + energy labelling of household appliances = savings for consumers.

Push / Stick

Pull / Carrot

Figure 1: Illustration of policy instruments aimed at sustainable products

Source: SWD(2019) 91 final   **14**
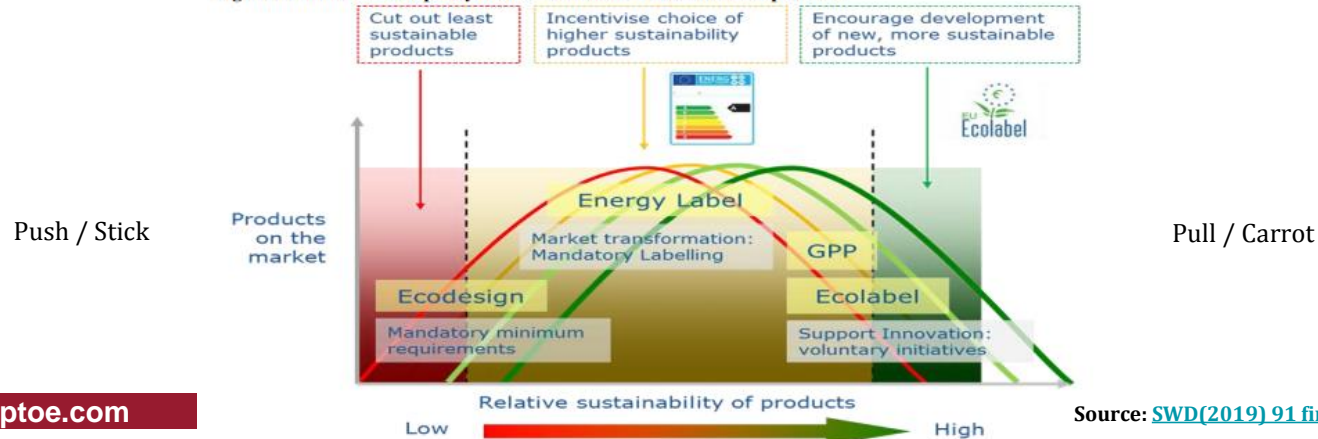
Circular Economy – Product Design

Circular Economy Approach

- Eco-design requirements on durability, reparability, recyclability and content in recycled materials of products

- Eco-design Working Plan 2016-2019

- New categories of products, e.g. solar panels, lifts

- Review clause for existing products

- First of "Circular Economy" inspired measures adopted in Reg. (EU) 2019/424 (15 March 2019) on ecodesign requirements for servers and data storage products: "

"*In accordance with the Union action plan for the Circular Economy the Commission should make sure that special emphasis is placed on aspects relevant to the circular economy, such as durability and reparability, when setting out or revising ecodesign criteria. Therefore requirements should be laid down on non-energy related aspects, including extraction of key-components and of critical raw materials (CRMs), availability of functionality for secure data deletion and provision of latest available version of firmware.*"

Circular Economy – Product Design

Circular Economy Approach

- A series of draft measures pending adoption, e.g. <u>draft Reg.</u> laying down ecodesign requirements for welding equipment:

  "...this Regulation lays down requirements on non-energy related aspects, including:

  (a)disassembly;

  (b)reparability;

  (c)the extraction of key components and critical raw materials; and

  (d) the availability of built-in softwarebased datadeletion tools.

  In addition, it requires that welding equipment be accompanied by <u>information on the use of shielding gases</u> during welding <u>and the quantities of welding wire or filler</u> material used."

Circular Economy – Product Design (& Consumption)

Product design currently addressed on a <u>voluntary basis</u> in the **Eco-Label under** Regulation 66/2010, providing a recognized label for products with reduced environmental impact *throughou*t their whole life cycle ("best of category" approach).

The EU Ecolabel shall take the following form:

Label:

Optional label with text box (the possibility for the operator to use this text box and the text used shall be that specified in the relevant product group criteria):

Better for the environement…
- [text specified in with criteria]
- [text specified in with criteria]
- [text specified in with criteria]

…better for you.

The EU Ecolabel registration number shall also appear on the product. It shall take the following form:

EU Ecolabel: xxxx/yyy/zzzzz

Where 'xxxx' refers to the country of registration, 'yyy' refers to the product group and 'zzzzz' refers to the number given by the competent body.

Choices made by millions of consumers → Green/Environmental product claims
- Products, e.g. household appliances and items, personal care products, textile and footwear
- What does it mean? Reduced impact on aquatic ecosystems; Fulfills strict biodegradability requirements and Limits packaging waste
- Criteria: Com decisions for each category of product
- E.g. Rinse-off cosmetic products (2014/893/EU)
- Hundreds of other voluntary labels in Member States, e.g. *Blaue Engel*, Nordic Swan, etc.

Circular Economy - Product Design (& Consumption)

Circular Economy Approach

- Fitness check in June 2017, confirmed usefulness but need for expansion.

- Suggests that "greenwashing" is a barrier. EC promise to "*…work towards better enforcement of the guarantees on tangible products, examine possible options for improvement, and tackle false green claims*".

    - Updated guidance on the Unfair Commercial Practices Directive, published in May 2016.
    - Consumer Protection Cooperation provisionally agreed (deter unfair commercial practices such as misleading and unfounded environmental claims – enables consumer protection authorities to cooperate in case of trans-border infringements).

- Ongoing work on development of criteria for financial products: to allow retail investors to reply on trusted 3rd party verifies labels when investing in green financial products.

- Study launched on how to identify elements for a "strategic approach to EU Ecolabel", including promising product group (request for Toys) and synergies with GPP, Ecodesign and Energy Labels.

Circular Economy – Manufacturing / Production Process

Important not to forget the importance of HOW things are produced:

- "**Ket4CleanProduction**" has established a platform – for SME users and suppliers to grants access to a network of experts that can provide support for the transition to a "Factory of the Future".

- "**i4R**" platform launched to allow the exchange of information between producers of electrical and electronic equipment and recyclers of WEEE.

- **BREFS** to include guidance on Circular Economy (e.g. water use and reuse), already reflected for:
  - Non-ferrous metals
  - Common Waste Water and waste Gas Treatment / Management Systems in the Chemical Sector
  - Intensive Rearing of Poultry and Pigs
  - Large Volume Organic Chemicals
  - Large Combustion Plants

# Encouraging Coherence
~ Examples in Some Priority Areas

Waste Framework Dir Database: Co-opting REACH

| WFD	REACH
Art. 9, Prevention of Waste 1. **Member States shall** take measures to prevent waste generation. Those measures shall, at least: (i) ...any **supplier of an article** as defined in point 33 of Article 3 of Regulation (EC) No 1907/2006...[REACH] provides the **information pursuant to Article 33(1)** [SVHCs in Candidate List] of that Regulation **to the European Chemicals Agency** as from 5 January 2021; 2. The **European Chemicals Agency shall establish a database for the data to be submitted to it** pursuant to point (i) of paragraph 1 by 5 January 2020 and maintain it. The European Chemicals Agency shall **provide access to that database to waste treatment operators**. It shall also provide access to that database **to consumers upon request**.	Art. 33(1), REACH, Duty to communicate information on substances in articles 1. Any **supplier of an article** containing a substance meeting the criteria ...[SVHC in Candidate List]... in a concentration above 0,1 % weight by weight (w/w) shall **provide the recipient of the article with sufficient information, available to the supplier, to allow safe use of the article including, as a minimum, the name of that substance.** 2. **On request by a consumer** any supplier of an article containing a substance meeting the criteria... shall provide the consumer with **sufficient information, available to the supplier, to allow safe use of the article including, as a minimum, the name of that substance.** The relevant information shall be provided, free of charge, **within 45 days** of receipt of the request.

Waste Framework Dir Database
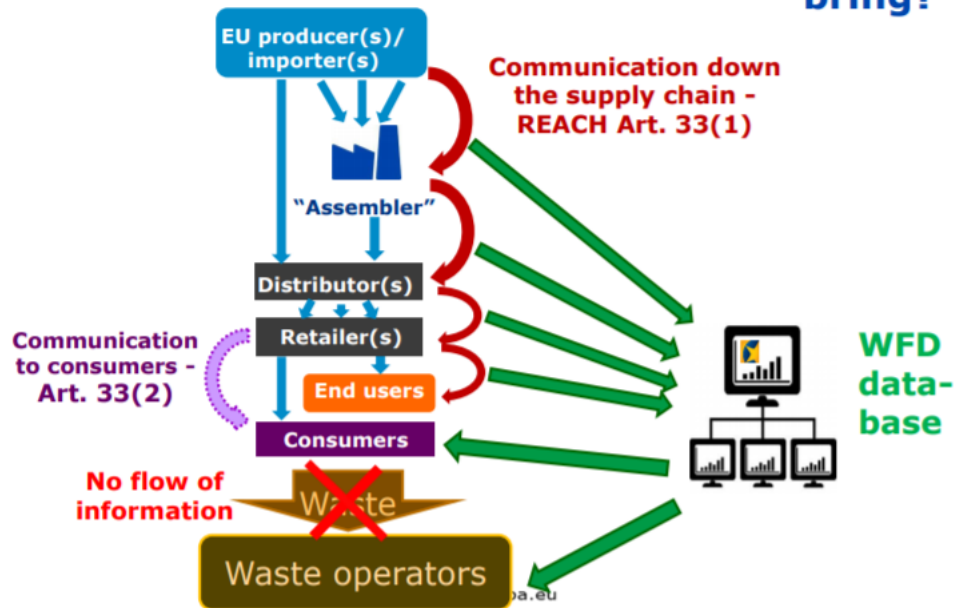
Coherence?

- Last minute measure not in Comm. Proposal but inserted in trialogue, so no impact assessment and no feasibility study.

- A centralised system but MS responsible for gathering information from suppliers (who have a consequent obligation). Consistency of approach in MSs?

- No legal framework for subsequent articulation (eg. Implementing regulation, w/ scrutiny). Articulation left to ECHA guidance:

    - inversion of substance focused REACH approach to articles-centric approach

    - unique identifiers for articles?

    - public access to data in a centralized manner – reverse engineering of supply chain information (CBI protection)

    - effective remedies against CBI disclosures (see ECHA dissemination efforts on BPR)?

Microplastics Restriction

European Commission tasked ECHA with developing a restrictions proposal: on "*intentionally added microplastics*".
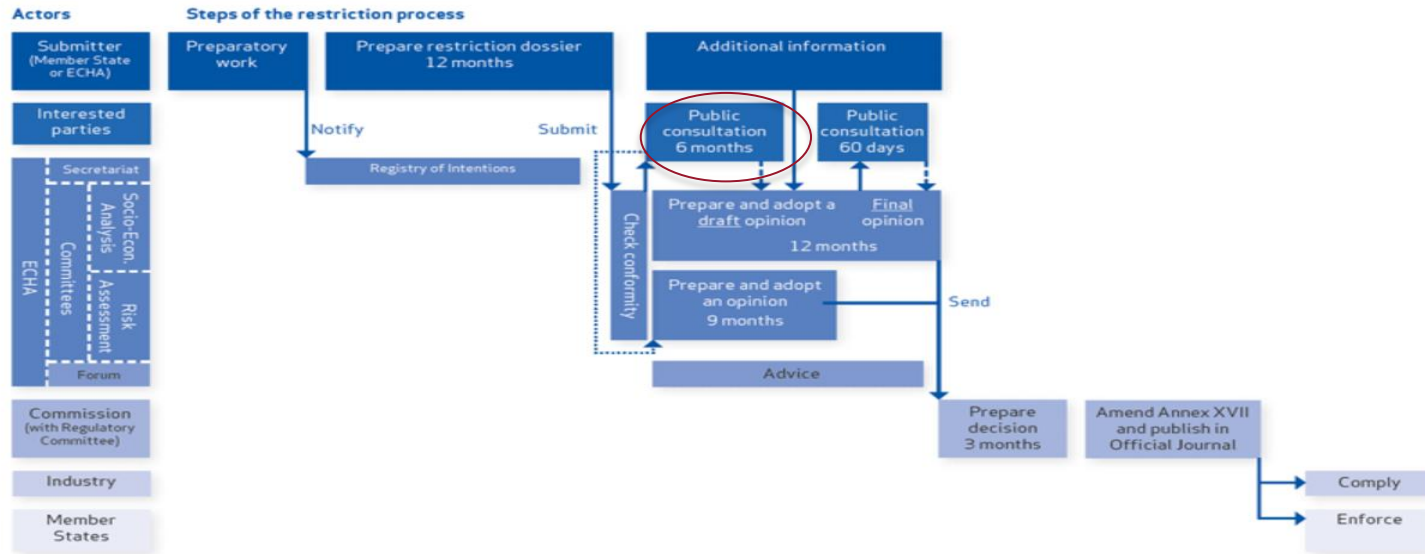
What is a Microplastic?

a material consisting of:

- **solid polymer** containing particles,
- to which additives or other substances may have been added, **and**
- where ≥ 1% w/w of particles have (i) **all dimensions** 1nm ≤ x ≤ 5mm, or (ii), for fibres, a length of 3nm ≤ x ≤ 15mm and length to diameter ratio of >3.

Restriction on the placing on the market of microplastics on their own or in mixtures where their use will inevitably result in releases to the environment, irrespective of the conditions of use or technical function (from agriculture to medical devices etc.). For some of these uses, a *transitional period* is proposed to allow sufficient time for stakeholders to comply with the restriction.

Coherence?

Have we torn up the REACH restrictions rulebook (Article 69(1) of REACH)?

- Where is the substantiation of the specific "*risk to human health that is not adequately controlled*"? Needs to be hazard recognized in REACH/CLP and linked to intrinsic properties.

- Where are the "substances" – these are articles.

- Even if substances – need to be identified . If grouped, this needs to be justified (not arbitrary).

- Remedy available only on adoption – is this effective?

Conclusions

Conclusions

- Circular Economy is about systemic change. But we have a series of parallel, intertwined and sometimes conflicting EU regulatory regimes.

- Holistic approach required – non-legislative and legislative measures. Perhaps more and better articulated law is required.

- Commercial supply chain impacts create inevitable tensions, include - information transparency and allocation of responsibilities in supply chains.

- Strong temptation to act quickly – for very good reasons – has to be balanced with acting smartly and always in compliance with EU law.

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"exceptional expertise on EU regulations on chemicals...and a great ability to understand the complexity of businesses."
Chambers & Partners Europe, 2019

- **English barrister,** *Avocat* **at the Brussels Bar**, partner resident in Brussels.

- Darren enables clients throughout the chemicals and life sciences supply chain to **get and keep their products on the EU market**.

- He focuses on **defence of products** through strategic advice, **advocacy** before institutions and agencies, and **litigation** before EU and national courts and tribunals.

- He has a **wealth of experience with EU regulation** of biocidal products, plant protection products (agrochemicals), REACH, CLP, GM food and feed, cosmetics, endocrine disruptors and Brexit.