AK EUROPA

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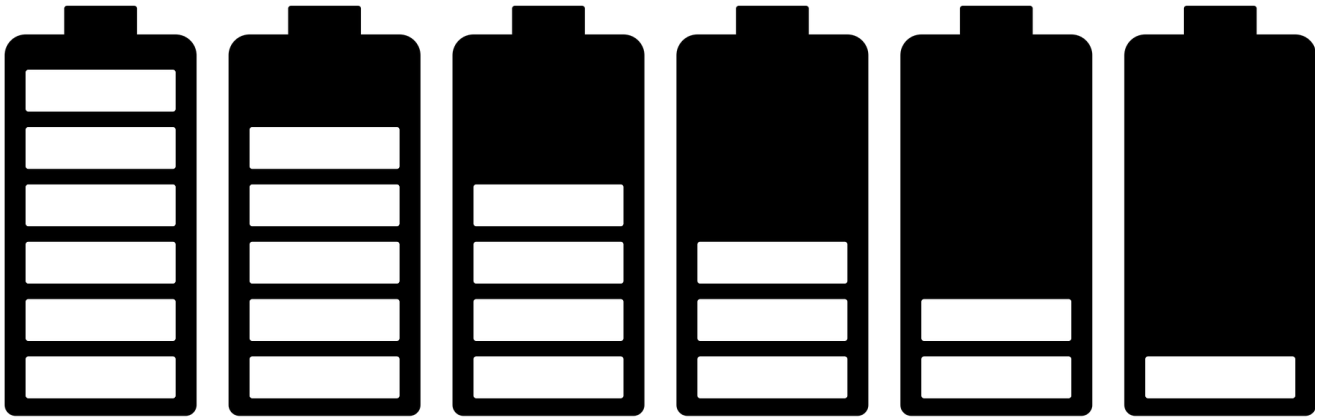

Directive on batteries and waste batteries

COM (2020) 798

Executive summary

The new Directive on batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) 2019/1020, is intended to support the European Union (EU) in its efforts to achieve its climate goals in the transport sector and in the transition to a low carbon economy. It is one of the integral parts of the Green Deal, based on the Strategic Action Plan for Batteries, the Circular Economy Action Plan, and the New Industrial Strategy for Europe. It takes an integrative approach, encompassing all aspects in the life cycle of batteries, with ambitious targets.

Batteries are to become sustainable, efficient, durable, and safe throughout their life cycle and must be produced causing the minimum of environmental impact and made of materials that are sourced in a manner that fully ensures compliance with human rights, as well as social and ecological standards.

AK welcomes this integrative approach and the ambitious goals; however, there is considerable need for improvement:

- Our doubts concern internal market competence, the legal form, and the excessive powers granted to the European Commission in its scope for action.
- Clear end-of-life requirements based on the general framework created by the EU Waste Framework Directive (WFD) are needed.
- Establishing responsibility within the supply chain is welcomed but has many flaws.

The AK's position

The European Commission assumes that by 2030 **global demand for batteries will rise** fourteen times the level of 2018; this is mainly due to e-mobility. The EU could account for 17% of global demand by 2030, putting it in second place in global terms. The EU would become the second largest battery market in the world, including battery production. The number of batteries used in electric cars would mean that the EU would need 18 times more lithium by 2030 and 60 times more by 2050. The demand for cobalt would rise to fifteen times its current level by 2050 and the demand for rare metals used in magnets, for example in electric cars, digital technologies, or wind generators, could rise to ten times the current level by 2050. It is obvious that this strategy is not only an environmental challenge, but also a challenge in terms of development, the economy, investment, and trade policy.

The priorities of the proposed directive are, therefore, to bring about a reduction of 90% in transport emissions by 2050 and build up sustainable value-added chains for batteries in Europe, as well as support the transition to e-mobility and zero carbon energy storage.

This initiative focuses in particular on three issues that are closely linked in connection with batteries:

1. The lack of necessary general conditions and incentives for investing in manufacturing capacities.

2. The suboptimal functioning of recycling markets and the gaps in material flows.

3. The social and economic risks associated with production.

The AK welcomes the **integrative approach that encompasses all aspects in the life cycle of batteries, and the ambitious targets set**. Batteries are to become sustainable, efficient, durable and safe throughout their life cycle and must be produced causing the minimum of environmental impact and be made of materials that are sourced in a manner that fully ensures compliance with human rights, as well as social and ecological standards. It should be possible to use batteries for another purpose at the end of their primary useful life and at the end of their life cycle to reprocess or recycle them so that valuable raw materials flow back into the economy.

In the opinion of AK the **industrial and investment goals** in particular are to be welcomed. In order to secure and expand employment and added value within Europe, the circular economy and the creation of sustainable value-added chains are key elements for a prosperous low-carbon economy. As mentioned in the text of the Directive itself, nothing less than scaling up global battery production by a factor of 19 is needed to achieve the climate and energy targets in the transport sector. European industry can make a significant contribution as well as create added value and jobs because the greater part of added value in an electric car (around 70%) lies in the battery. The aim of increasing resource efficiency throughout the whole life cycle of batteries will increase pressure to innovate. The resulting progress in resource efficiency, in terms of technology or processes, will also help to boost the competitiveness and cost efficiency of European companies. Furthermore, the importance of further developing battery and battery cell production in regional terms and its significance for industrial policy in Europe should not be underestimated in view of the rapid rise in global demand. The goal of creating closed or almost closed value-added chains within Europe therefore calls for our support.

The fact that the Directive is integrated and linked within the **European Green Deal** is also important to generate positive medium- to long-term prospects for income and employment through structural change. As a component, the Directive will help to create a framework for support schemes (such as that of the European Investment Bank). Of course, the ambitious goals and measures to use more **recycled materials in battery production** and to **stimulate secondary raw materials markets** are also positive aspects. Same can be said about the intention of introducing targeted measures to **encourage the re-use of traction and industrial batteries** after their primary

use. Naturally, precautions must be taken to ensure that the pressure of demand created by this planned regulation, combined with the associated opportunities for investment, do not result in **oligopolistic conditions in the (not very limited) hands of market-dominant companies**, as can be seen in the packaging waste disposal industry. Above all, we should remember that **the incentives and the interest they create are all the greater**, the higher the ambitions and requirements set by regulations and the costs this entails, and we can be certain this will be the case here.

From the very beginning AK has followed the implementation of EU regulations and national implementing regulations on packaging and, later on, used electrical appliances, batteries and accumulators, assessing them and presenting its concerns and wishes in its position paper on the new Circular Economy Action Plan. AK supports all the proposed elements for a new regulatory framework for batteries contained in the plan. However, the present proposal gives rise to critical comment and concerns which have to be addressed so that the high goals proposed can in fact be achieved.

1. Internal market competence and the legal form give rise to doubts

In contrast, we have significant concerns about the fact that that the proposal is to be based on internal market competence in accordance with Article 114 TFEU. The choice of legal form is also problematic. The arguments presented for both are only superficially convincing. It is hardly convincing to put forward the argument for a regulation by saying that the plan can be implemented faster that way, because a regulation needs accompanying provisions in the Member States since it can scarcely be implemented without them. The argument in favour of internal market competence and the choice of legal form is that guidelines under environmental competence readily result in special rules at the national level. Reference is made to the current EU Battery Directive and that this is no longer applicable; that of course is right, strictly speaking. However, this masks the reasons why these special rules came about. EU directives bring about more stringent national implementing regulations when they lag behind the actual need for regulations with merely basic stipulations. The best examples are the merely **rudimentary requirements in product-related EU directives on packaging or used electrical appliances which by no means ensure that the need for clarification is addressed and that no limitations to competition occur in end-of-life management**. This is illustrated, for example, by the lawsuit of DG Comp against the German Duales System for recycling and the Austrian system Altstoff Recycling Austria. DG Comp was successful in its lawsuit against the latter due to abuse of market power. The evident need for regulation is a result of the directives providing incentives to create collective near-monopoly systems, which resulted in DG Comp taking action, and that there is a need for clarification of the relationships to municipal collection systems. It is, of course, a question of subsidiarity as to where such regulations should be implemented most effectively. The EU Waste Framework Directive is still not overly clear on this point and does not address the heart of the problem, namely, the risk of self-dealing to the benefit of powerful market players in the value-added chain.

It is by no means acceptable to omit to introduce the necessary rules and, via the form of a regulation, in practical terms to remove batteries from the scope of application of the WFD with its subsidiary directives, while at the same time prohibiting national regulations. Article 47 para 13 states expressly that Articles 8 and 8a WFD shall not apply. It is the opinion of AK that this undertaking is **best covered by the environmental competence of Article 191 TFEU**, even though it is intended to go beyond all previous product-relation waste rules and cover the whole life cycle of batteries. It is possible to consider dividing this proposal - as in the case of used electrical appliances or the current EU Battery Directive 2006/66/EC - where only the regulations necessary for the manufacture (and approval for secondary use) of batteries are issued in the form of a directive based on internal market competence, while end-of-life management is addressed by a guideline under the authority for environmental matters.

2. Overly large scope for action of the European Commission through delegated legal acts

There are also concerns about the hitherto overly large scope for action which is to be granted the European Commission via delegated legal acts or implementing acts. To name some examples:

1. **Article 7** - From 1st January 2026 power ratings and from 1st July 2026 a maximum value for carbon footprints is to be determined via a delegated legal act.

2. **Article 8** - From 1st January 2030 or 1st January 2035 targets for the percentage of recycled materials will be introduced. The European Commission can change them via a delegated legal act.

3. **Articles 9 and 10** - From 1st January 2026 requirements will be introduced for the electrochemical output and service life of all-purpose appliance batteries and rechargeable traction and industrial batteries; the actual minimum values will be determined by the European Commission via a delegated legal act (with great scope for action, where the cost to the economy should be considered).

4. **Article 39 para 7** - The European Commission will elaborate guidelines for the application of the due diligence requirements stipulated in paras 2 and 3.

5. **Article 39 para 8a** - The European Commission can alter the lists of raw materials and risk categories in Annex X through a delegated legal act (in any direction).

6. **Article 39 para 8b** - The European Commission can amend the due diligence requirements stipulated in paras 2 to 4, taking into account amendments to Regulation (EU) 2017/821 on minerals from conflict-affected areas and the relevant OECD Guidance, via a delegated legal act.

7. **Article 56** - The European Commission can adapt the general requirements for treatment in light of scientific progress via a delegated legal act.

8. **Article 72 paras 2 and 3** - The European Commission recognises "supply chain due diligence schemes" and also determines the relevant criteria and methods in an implementing act in accordance with the examination procedure set out in Article 74 para 3.

9. **Article 72 paras 3 to 7** - The European Commission will examine the "schemes" and, if necessary, will revoke the "recognition of equivalence" of the scheme in an implementing act in accordance with the examination procedure set out in Article 74 para 3.

Examples 1 to 3 and 7 show that we can no longer say that the European Commission has a clear mandate to deal exclusively with scientific/technical questions because here - formulated very loosely - the concerns of companies are to be considered, which can result in widely differing evaluations. AK does not deny that this proposal is extremely ambitious in terms of time and that certain provisions can only be formulated when initial experience has been gathered. However, this cannot lead to the situation where a scope of action that reaches into the political sphere is largely transferred to the European Commission.

The authority conferred in examples 4 to 6 and 8 and 9 is especially problematic (virtually without limits), where not even the European Parliament can exert even partial influence. In the opinion of AK, it is essential that ways are found here to ensure fair participation of the representative bodies of workers and civil society. It is clear that there is currently no "philosopher's stone" for **strengthening the "supply chain due diligence"** requirements, but that **content and methods have to be developed first**. However, **this process must not happen without the participation of representative bodies of workers and civil society**. Participation must also include petition rights of workers' representative bodies and civil society and be accompanied by effective penalties, which must also include liability under civil law where necessary.

3. General framework in the Waste Framework Directive (WFD)

3.1. Article 47 et seq. - Clearer end-of-life requirements are needed

From the very beginning we have intimated that the legal form of a "directive" apparently means that the recently defined requirements of the WFD for extended producer responsibility schemes (hereinafter called EPR schemes) for batteries will no longer apply (as stated expressly in Article 47 para 13) and that the legal requirements governing waste are to be redefined and formulated completely independently. **We categorically reject this approach. It is neither efficient nor effective. It is prone to gaps and contradictions and could nullify the efforts of the WFD to strengthen and standardise the requirements concerning EPR schemes across products and materials**. Furthermore, the proposal **could undermine various national regulations that aim to secure a high ecological level**.

We can assume that national environmental authorities will soon come across numerous unresolved questions when implementing the new rules. **Article 47 para 6 and Article 47 para 11** (the European Commission issues guidelines on Article 47 para 4 lit a) fall far short on this point.

The coexistence of several EPR schemes on which the proposal is apparently based (Article 47 para 6) alone raises the **question of how authorities are to proceed if EPR systems do not comply with the call to collaborate as expressed in Article 47**. Nor is it clear how the interface with municipal waste management systems is to function. It should be noted that the proposal describes the desired situation from many angles. However, legal norms are needed when players do not want to comply with this ideal of their own accord. Such norms are missing.

In the opinion of AK **the WFD requirements should also apply to EPR schemes**. The proposal should only **include the special rules needed for batteries**. Furthermore, the consequences of **Article 58 (Shipments) and Article 59 (Repurposing and remanufacturing of traction and industrial batteries)** are not clear: It would not be justified if these regulations were to **cancel the protection offered by the current regulations on ending waste**.

3.2. Addressing the basic weaknesses of the Waste Framework Directive (WFD)

At this point AK wishes to point out once more the need to supplement the WFD, which we stated exhaustively in AK's position paper on the new Circular Economy Action Plan. The need to supplement the WFD is significant here too:

Specifically, first of all, **as a result of measures on the circular economy, we need all the more consumer information that is independent of manufacturers' interests and the corresponding inclusion of consumer organisations in the PR work of the EPR schemes**. This is largely missing in this proposal. The necessary sensitivity for these concerns is lacking:

- The **question of "information"** is addressed only cursorily in Article 47 para 1 lit d, as though everything else would be self-explanatory.
- The necessary **participation of consumer organisations within EPR schemes** is defined as vaguely in Article 47 para 11 as in Article 8a para 6 WFD.

Secondly, **the proposal should state unambiguously that inconsistencies and conflicts of interest are not desirable in EPR schemes and must be prevented**.

The stipulation in Article 8a para 1 lit a) WFD to define in a clear way the roles and responsibilities in EPR schemes is unfortunately far too vague. If companies which are active as service providers of EPR schemes in the collection, sorting or re-use of waste also have decisive influence in the boards of company owners in EPR schemes, it will not only have a negative effect on competitiveness in the relevant markets, but will lead to a rise in costs and the environmental objectives may even be undermined. **Above all, powerful companies in the market's value-added chain will attempt to exert the corresponding influence over EPR schemes, which will lead to cartel-type decision-making structures in those schemes**.

The ARA packaging collection system is a negative - and still unresolved - example in Austria's view; the European Commission investigated it and in 2016 imposed a fine of 6 million euros for abusing its dominant market position. It is clear that the economic incentive for such behaviour in the market is the greater the more demanding the ecological goals of a regulation are, which is certainly the case here for batteries. Numerous examples of the looming dangers and distortions were evident from the very **beginning of the implementation of the EU Packaging Directive – especially through the so-called Green Dot System**. The need to prevent self-dealing in the context of collective EPR schemes, as mentioned above, is only one aspect of many of this problem.

The importance of cartel authorities taking forceful action against such cartel-like ownership structures was demonstrated by the example of the ARA's sister system, the Duales System Deutschland (DSD), when the Bundeskartellamt (German Federal Cartel Authority) took action, starting in 2003, against the cartel-like ownership structure (similar to ARA in Austria) in DSD and issued a prohibition order. The players (large companies in the food trade, paper, and glass industries, etc.) had to leave DSD, which broke DSD's monopoly in Germany over the collection of household packaging. Since then, the costs of the (German) Packaging Ordinance for consumers have almost halved **from around 2 billion euros/year to less than 1 billion euros/year**. However, cartel authorities do not take such action as a matter of course because markets in the waste sector are relatively small scale and so often do not come to the authorities' notice until it is too late.

We should always remember that it is the actual manufacturers of batteries and battery cells who should sponsor EPR schemes. However, it is clear that this proposal will also awaken the interest of large automotive manufacturers to become active both in the manufacture of batteries and in their end-of-life management. This means that all the problems that were observed on implementation of the EU End of Life Vehicles Directive will re-emerge, in particular the danger that companies not linked to a particular brand

will not be included in recording and consequently excluded from the area of second life use for traction batteries.

4. General comments form the consumer´s perspective

4.1. Article 9 et seq.

From the point of view of the consumer, regulatory measures that protect consumers and help them to use consumer goods for a long time are welcomed. This means that the following measures are important:

- We recommend that mandatory **minimum service life terms** are set for batteries. The best batteries currently on the market could provide the basis for a minimum service life. Non-rechargeable single-use batteries are to be completely removed from the market in the foreseeable future.

- Batteries and accumulators can still not or can no longer be replaced in many consumer goods. However, battery output often diminishes rapidly, and satisfactory wireless use is often no longer possible after only a short time. Therefore, in addition to the service life, **the replaceability of batteries/accumulators should be made mandatory for all devices**.

- In order to increase the useful life of consumer goods, the **interoperability of batteries** should be ensured so that batteries no longer needed in one device can be used in another.

- **Information for consumers** is an accompanying measure that can help consumers to make purchase decisions based on sustainability. However, this should only be viewed as a complementary measure to the points mentioned above.

4.2. Article 50 et seq. - Obligations of (private) end users must be appropriate

AK recognises that both **commercial and private end users** of batteries and accumulators will have to make their contribution to achieving these goals. However, it must be ensured that they have access to sufficient, coherent, and plausible information and that the structures for collection are correspondingly easy to access. Neither is by any means self-evident, particularly for private end users, as can be seen from the experience hitherto with collection and recycling systems. In Austria, the national battery regulation is currently being reviewed. The intention is to make it obligatory for dealers to provide "information for end users on the options for returns within commerce" because not even something as trivial as this is self-evident.

It is not at all acceptable that end users - almost as a means of precaution - will be required to separate waste 100% and apparently will be subject to penalties, while manufacturers, for example, only have to achieve a certain quota for portable batteries - specifically 45% by 2023 and 70% by 2030 (Article 48 para 4). Manufacturers will tailor their efforts to these goals. Vague obligations for waste collection for all traders to ensure an adequate network for returns will have no effect as long as the enforcement agencies do not have any effective handle to ensure mandatory coordination. The **exceptions from traders' take-back requirement are formulated too loosely in Article 50.**

It could be a good idea to consider additional incentives for end users, such as a deposit, primarily with regard to the considerable risk of fire posed by lithium batteries and accumulators if they are not properly disposed of, particularly with residual waste. The growing prevalence of lithium batteries and accumulators means a massive rise in the problems facing the waste industry. The question must be asked whether this risk requires 100% separate collection of the lithium batteries and accumulators in the market (possibly with a deposit system); certainly above a certain power rating. At least a really noticeable warning notice for end users appears to be necessary. AK described the critical points of a deposit system in its position paper on the new Circular Economy Action Plan. The errors made in connection with the Austrian "fridge label" and the "bulb deposit" must not be repeated.

4.3. Article 61: Reporting to the competent authorities

The reporting obligation for the waste management industry should be linked to "taking charge" of used batteries and not merely to their "collection". It cannot generally be assumed that used batteries are collected by waste management companies.

5. Supply chain responsibilty – positive aspects but many weaknesses remain

The system to ensure **supply chain responsibility described in Article 39 in combination with Annex X and Articles 69 and 72** is not yet able to properly fulfil the promise made by the proposal. AK welcomes the efforts made by this proposal; however, these efforts require considerable corrections. The last time AK expressed its basic views on the relevant subject was in December 2020 during the consultations of the European Commission on the proposed initiative for sustainable corporate governance. This proposal falls short of the requirements outlined for that initiative: A more ambitious approach is needed to ensure an effective and efficient solution. The application of the provisions in this proposal alone gives rise to many questions; above all the following are missing:

- specific petition rights for workers' representative bodies or organisations of civil society organisations,
- effective penalties and
- liability under civil law for economic operators.

Specifically we can say:

- **Article 39 para 1 of the proposal, in combination with Article 2 No 14**, specifies the first economic operator that places the batteries in the market as the entity bearing supply chain responsibility. The text does not make it clear which companies are meant by that today and which will be meant in the coming years. The **question arises whether a meaningful implementation of supply chain due diligence can even be expected if the company in question has little power in the market**. It is a question of economic power whether companies can require their suppliers and upstream suppliers to assume their responsibilities. What happens if a specific company does not see itself in a position to be able to do that?
- Regarding **Art. 39 para 3 sub-para 1 lit a**: The risk categories listed in Annex X No 2 should be specified further. For example, the right of association of workers affected should be covered.
- Regarding **Article 39 para 3 sub-para 2** the question arises with whom the **strategy for measurable risk management measures should be agreed**. With all the parties mentioned? What will happen if one player refuses their agreement?
- Article 39 para 5 states that the market surveillance authorities should receive **reports and verification only "upon request". That is unreasonable**. It must be mandatory for companies to send the authorities their reports and verification unbidden and promptly. Furthermore, the authorities should make these available to the public.
- We have already expressed our **fundamental concerns regarding Article 39 paras 7 and 8**. It is not acceptable that this scope for action granted to the European Commission does not include any fair participation by workers' representative bodies or civil society.
- The provisions on implementation by the market surveillance authorities (Article 66 et seq.) do not contain **any express obligation to conduct checks**, which appears to us to be completely inadequate. We should consider here that traditional market surveillance reaches its limits when genuine environmental requirements (e.g. a maximum value for carbon footprint) or due diligence have to be implemented in the supply chain. In contrast to standard product-related technical prerequisites, product-related requirements are by no means "self-executing". A paradigm shift is needed with regard to checks: **The surveillance authorities must act proactively and systematically**. An aggravating factor is that the authorities in Member States have a natural tendency anyway not to make any unnecessary difficulties for resident companies. In the opinion of AK, an express **obligation to conduct systematic checks, as is stipulated, for example, in Article 11 of the Conflict Minerals Regulation (EU) 2017/821**, is required.
- The proposal provides for a single **penalty for non-compliance with the obligations according to Article 39, namely a prohibition of bringing a product to market** and only if non-compliance is "serious". (**Article 69 para 3**). The reticence and vagueness here can scarcely be overbid and could fully paralyse the implementation of Article 39. Furthermore, the key **obligations under Article 39** (supply chain due diligence) also require penalties.
- We have already expressed above our **fundamental concerns regarding Article 72 ("Supply chain due diligence schemes")**. Apart from the fact that here, too, the European Commission is granted de facto extremely wide

discretionary powers for intervention, it is not acceptable that this scope for action granted to the European Commission does not include any fair participation by workers' representative bodies or civil society.

5.1. Such an ambitious project requires effective penalties for companies

First of all we wish to reiterate that the **obligations under Article 39** (Supply chain due diligence) also require penalties. That must be made clear.

Furthermore, Article 76 does not provide for any penalties against companies. That is out of touch with reality. Apart from possible contraventions by private end users, the active players will always be companies, mostly in the form of legal entities. Standard penalties in administrative law **tend to shift criminal liability downwards. That makes the threat of penalties ineffective. Penalties must be imposed expressly on companies** to be effective, as, for example, in the Council Framework Decision 2003/80/JHA dated 27 January 2003 on the protection of the environment through criminal law; though this is no longer in force, but in Article 6 can still act as an example of what is needed.

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About us

The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 3.8 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant Information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.