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## REVIEW

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### Evaluating the draft of the European Battery Regulation – from an end-of-life perspective to a lifecycle approach

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#### Abstract

The draft of a European Regulation concerning batteries and waste batteries and repealing Battery Directive 2006/66/EC was published by the EU Commission in December 2020. From then on, there were ongoing intense discussions among lawmakers, member states and the affected industries. The draft's life-cycle regulation is an unprecedented approach in European product law and raises many questions due to numerous technical, structural and content-related deficits that urgently need to be clarified before adoption. In order to ensure that the adoption of the revolutionary new requirements for batteries will become not only a political success but an actual contribution to a more sustainable and environment friendly life-cycle of batteries, critical voices should be heard and considered in the course of the ongoing discussions. Otherwise, the highly welcomed ambition to make the EU a leader in battery technology and electrified mobility might end in a regulatory landscape which prevents innovations and investments in the European battery sector.

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## Evaluating the draft of the European Battery Regulation – from an end-of-life perspective to a lifecycle approach

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### 1 Introduction

With the ‘European Green Deal’, which is the strategy of the European Commission to transform the EU into a modern, resource-efficient and competitive economy, ensuring to achieve the aims of no net emissions of greenhouse gases by 2050, economic growth decoupled from resource use and that no person and no place left behind, the European Commission has introduced the most ambitious goals for the protection of human health and the environment, by addressing issues like resource shortage and efficiency, climate change and the lack of sustainability and circularity in many European industry sectors.<sup>1</sup> Besides more general, not as such product oriented measures, like the protection of the air, water, soil and biodiversity, the Green Deal will lead to substantial changes of the regulatory landscape for a lot of different products as well. The key instrument for a more sustainable and resource-efficient manufacturing, distribution, use and disposal of products is considered by the European Commission to be a lifecycle approach instead of a mere end-of-life perspective. The first ever European legislative act which tries to implement such a lifecycle approach is the present Draft European Battery Regulation, which is intended to supersede Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators with its end-of-life perspective. Although the concept of a lifecycle perspective seems to open the doors for a unique and revolutionary approach to environmentally driven product legislation, it faces numerous challenges, which have to be considered by lawmakers, in order to ensure the constructive success of the new legislation and to avoid unintended but far-reaching negative consequences.

On 10.12.2020, the European Commission published 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 (EU) No 2019/1020<sup>2</sup>. In the explanatory memorandum to the proposal, the European Commission puts it into the framework of the EU Green Deal, which is “*the EU's new growth strategy [and] aims to transform the EU into a modern, resource-efficient and competitive economy where: (i) there are no net emissions of GHGs by 2050; (ii) economic growth is decoupled from*

*resource use; and (iii) no person and no place is left behind*”.<sup>3</sup> Against the background of the fact that batteries and accumulators are considered as key drivers for the reduction of emissions in the mobility sector and are massively present in the daily life of European citizens, the predicted and already identifiable growth of the demand for batteries and battery technology raises severe concerns about the environmentally sound, resource-efficient and social, ecologic and economically sustainable manufacturing, use and disposal of batteries. With the intention to untangle the positive effects of the use of batteries in many different sectors from the negative effects of the exploitation of raw materials, the precarious social and environmental conditions primarily in the first manufacturing steps of a battery (including mining and further procession of raw materials) and the not always clear handling of end-of-life batteries, the European Commission proposed a new Battery Regulation.

The present proposal is not only framed by the very broad EU Green Deal, but also by further, more detailed and sector specific assessments and strategies like the strategic action plan on batteries<sup>4</sup>, the circular economy action plan<sup>5</sup>, the new industrial strategy for Europe<sup>6</sup> and the sustainable and smart mobility strategy<sup>7</sup>.

### 2 Regulatory background – present Battery Directive

As already indicated, the present Battery Directive, as amended, is end-of-life focused and thus, can be considered as waste legislation within the extended producer responsibility framework<sup>8</sup>. Thus, besides limited chemicals related design requirements, the main principle of the current Battery Directive is that the producer of a battery is responsible for (the financing of) the environmentally sound collection, treatment, recycling and disposal of waste batteries and accumulators (Art. 1(1) of the Battery Directive). When applying the Battery Directive, a clear distinction has to be made between the scope of

<sup>1</sup> COM(2019) 640 final.

<sup>2</sup> COM(2020) 798 final.

<sup>3</sup> COM(2020) 798 final, p. 1.

<sup>4</sup> Annex 2 to COM(2018) 293 final.

<sup>5</sup> COM(2020)98 final.

<sup>6</sup> COM(2020)102 final.

<sup>7</sup> COM(2020) 789 final.

<sup>8</sup> Cf. Sachdev et al., 2021.

application of the Battery Directive and the scope of application of other legislative acts concerning devices which use the energy of the battery for their proper functioning (i. e. electrical and electronic equipment governed by Directive 2012/19/EU on waste electrical and electronic equipment, WEEE, and by Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment on the one hand and vehicles governed in the area of interest by Directive 2000/53/EC on end-of life vehicles on the other hand). As a rule, based on the definitions of the scopes of applicability of the relevant legal acts, battery legislation is not applicable on electrical and electronic equipment and electrical and electronic equipment legislation is not applicable on batteries, although Art. 2(1) of the Battery Directive lays down that it is applicable to all types of batteries and accumulators, regardless of their shape, volume, weight, material composition or use and irrespective of whether the battery is supplied as such, integrated into a device, or supplied together with a device.

In fact, the Battery Directive has only four major legal instruments concerning manufacturers of batteries:

- Registration as a placing on the market requirement
- Compliance with substance restrictions for cadmium and mercury
- Collection, treatment and recycling of waste batteries, including financing rules
- Information rules (marking/labelling and end-user information).

Thus, from a circular economy perspective, the Battery Directive can be stated as forming predominantly only the last quarter of the whole circle consisting of the sourcing, the manufacturing, the use and the end-of-life phase. In order to close the loop, the European Commission decided to propose the Battery Regulation.<sup>9</sup> Hereinafter, several selected provisions of the proposal will be assessed in detail.

### 3 Jungle of new definitions

Whereas there is no doubt that a clear and comprehensive understanding of the terms used in binding legislation is essential for the success of the compliance with applicable or agreed requirements, it is obvious that misleading or poorly worded definitions of relevant terms may endanger the whole understanding and correct application of a legislative act from the beginning. Apparently, the European Commission acted upon the principle 'the more, the better' and proposed more than 60 definitions in total, however missed to focus on an unambiguous and practically manageable wording of the definitions.

The first example to be mentioned in order to substantiate this statement, is the definition of the term 'light means of transport' in Art. 2(9)<sup>10</sup>, which is in direct contradiction to recital (12), which describes the intention for the inclusion of this new definition. According to recital (12), batteries used in light means of transport should in particular be batteries in e-bikes and scooters. However, the definition of 'light means of transport' states the criterion that such means of transport are vehicles "*on which travellers are seated when the vehicle is moving*", although a real life view obviously shows that scooters are driven standing and not seated.

The second example is a little different but contains a preprogrammed source of confusion among affected market actors. This issue concerns the definitions of the terms 'manufacturer' in Art. 2(27) and the term 'producer' in Art. 2(37). Whereas both terms are used synonymously in general language<sup>11</sup>, these terms are given a completely different meaning in the proposed Battery Regulation. A 'manufacturer' is defined as "*any natural or legal person who manufactures a battery or has a battery designed or manufactured and markets that battery under its own name or trademark*". In the latter scenario, one market actor uses another as an extended workbench and therefore becomes the so-called 'quasi-manufacturer', although no own manufacturing activities are performed. On the contrary, a 'producer' is defined as "*any manufacturer, importer or distributor who, irrespective of the selling technique used [...] supplies a battery for the first time for distribution or use, including when incorporated into appliances or vehicles, within the territory of a Member State on a professional basis*". First, it has to be noted that it is indeed possible that the manufacturer and producer of a battery is the same market actor, which is the case if the same market actor actually manufactures and supplies the battery for the first time on the European market on a professional basis.

However, the source of confusion from a practical perspective results from the fact that importers and distributors are explicitly referred to be potential 'producers', namely in case these are the actors which supply the battery for the first time on the European market. Admittedly, with regard to the aspect in question here, this is the same definition as already used in Art. 3(12) of the Battery Directive, but even there it is in practice a source of confusion for affected companies, which can be identified when advising them on how to act in a given supply chain

<sup>9</sup> Cf. European Commission press release, 10.12.2020.

<sup>10</sup> All articles and recitals without a reference to a legislative act refer to the proposal of the Battery Regulation, *supra* note 2.

<sup>11</sup> Cf. Thesaurus in the Merriam-Webster online dictionary.





perspective, in order to ensure that the dependency on third countries will be reduced as much as possible.

The last requirement of Chapter II which should be analyzed is Art. 11. Art. 11 requires the removability and replaceability of portable batteries incorporated into appliances. The relevant market actor to comply with this obligation is the manufacturer of the battery (Art. 38(1) a)). First of all, it has to be noted that a similar removal obligation is already laid down in Art. 11 of the Battery Directive and thus already applicable for several years. However, there is a big difference for such an obligation being contained in a European Directive or in a European Regulation. Currently, the removability obligation is for example transposed into German law not within the German Battery Act, but within the German Act on Electrical and Electronic Equipment and this for a reason: the manufacturer of a battery has no influence on how the manufacturer of an appliance incorporates the battery into this appliance (apart from the scenario in which the battery manufacturer builds a battery which can only be incorporated into appliance without any removability option). Therefore, the removability and replaceability obligation concerns (in general only) manufacturers of electrical and electronic equipment but not battery manufacturers. As already mentioned, as long as this obligation was contained in the European Battery Directive, the national lawmakers had flexibility where and how to transpose it into national law, in order to ensure that it targets the actually responsible market actors. Now, in case such an obligation would be contained in the European Battery Regulation, there would be no more flexibility and battery manufacturers would be bound by an obligation which is impossible for them to fulfil and which is consequently an alien element within a mere battery focused legislative framework.<sup>24</sup>

## 5 Labelling requirements

Compared to Art. 21 of the Battery Directive, the proposed labelling requirements according to Art. 13 in conjunction with Annex VI are much more extensive. Although most of the new labelling elements are only obligatory starting from 2027 and thus, there will be a long transition period, this aspect will not reduce the flood of information to be printed or engraved visibly, legibly and indelibly on the battery. From a practical perspective, it should be considered to use the newly introduced obligation to print or engrave a QR code on the battery to avoid extensive information on the battery as such.

According to the current proposal, all the information to be directly printed or engraved on the battery shall, besides other information, be accessible via the QR code as well and thus, there will be an unnecessary doubling of information. From a practical perspective, it seems to be sufficient to have the most important information for users and authorities on the battery itself, which is the name, registered trade name or trademark of the manufacturer<sup>25</sup>, the chemistry and the symbol for separate collection of batteries (i. e. the symbol of the crossed-out wheeled bin), and the other information elements would be accessible via the QR code.

Another aspect which should be mentioned here is that the manufacturer of the battery, who is responsible for the correct and comprehensive labelling of the battery according to Art. 38(1) (b), does at least not necessarily have the information about the date of the placing on the market of the specific battery, although this is a mandatory labelling requirement according to Art. 13(1) in conjunction with No. 6 Part A of Annex VI. According to Art. 2(14), “*placing on the market*’ means making available a battery for the first time on the Union market” and in Art. 2(15), the term ‘making available on the market’ is defined as “*any supply of a battery for distribution or use on the market in the course of a commercial activity, whether in return for payment or free of charge*”. In other words, neither the production of the battery as such, nor its mere storage, nor its mere transport into the territory of the EU can be considered as placing on the market, but only the first actual supply. Against this background, it is obvious that in almost all cases, irrespective the fact whether the battery was manufactured within or outside the EU, its manufacturer will not be able to print or engrave the date of the placing on the market on the battery, since this will not be known by anyone at the point in time the battery is manufactured and labelled. In combination with the fact that the actual date of placing on the market is of very limited value for all actors concerned, it should be considered to delete this requirement in total or at least to introduce reasonable and proportionate limitations in the implementing acts to be adopted according to Art. 13(7).

As a final remark, it has to be noted that both the criteria for the exemptions from the obligation to directly label the battery and the location(s) for the alternative labelling are unclear. Art. 13(6) allows the alternative labelling on the packaging and the accompanying documents, where the direct labelling of the battery is not possible or not warranted on account of its nature and size. Whereas the impossibility criterion is objectively determinable, it

<sup>24</sup> The same objective should be considered with regard to the obligation to equip rechargeable industrial and electric vehicle batteries with an accessible battery management system. In practice, the accessibility will strongly depend on the interfaces provided for by the manufacturer of the appliance in which the battery is incorporated and not so much on the battery technology as such.

<sup>25</sup> In the current proposal, there is no obligation to indicate the address and further contact details of the manufacturer on the battery.

remains completely unclear which constellations should be covered by the alternative ‘not warranted’.<sup>26</sup> In addition, as already mentioned, the locations for the alternative labelling are not harmonized. Art. 13(3) allows the symbol indicating ‘separate collection’ to be printed only on the packaging, in case there is not enough space on the battery as such. Contrary to this, Art. 13(7) requires the alternative labelling with the elements according to paragraphs 1 to 5, and thus obviously including the aforementioned paragraph 3, on the packaging and the accompanying documents, which is an obvious contradiction, which should be resolved in the final legislative act.

## 6 Conformity assessment

Another completely new concept in the field of battery regulation is that batteries will become subject to conformity assessment according to Chapter IV in conjunction with Annex VIII and consequently, an EU declaration of conformity has to be drawn up by the manufacturer (cf. Art. 38(3)) and each battery has to be CE-marked. The only aspect which should be mentioned here is that it has to be ensured that enough notified bodies will be notified in time, in order to ensure that there will be no shortage of batteries on the European market just because of a shortage of notified bodies.<sup>27</sup>

## 7 Supply chain due diligence

One of the most far reaching provisions within the proposal is the supply chain due diligence obligation according to Art. 39 in conjunction with Annex X. First of all, it has to be noted that this obligation not only concerns the manufacturer of a battery, but the economic operator that places a rechargeable industrial batteries and electric-vehicle batteries with internal storage and a capacity above 2 kWh on the market, which can be the manufacturer, the authorized representative of the manufacturer, the importer or even a distributor. Secondly, it has to be noted that the supply chain due diligence measures do not only demand for a mere information collection and reporting, but also for the establishment of risk mitigation strategies, a grievance mechanism, a system for the control of risk mitigation efforts and the contractual safeguarding of supply chain due diligence. Thirdly, the supply chain due diligence policies have to be verified by a notified body (“*third-party verification*”), which is a completely new phenomenon, since neither the already mentioned Regulation (EU) 2017/821 on conflict minerals nor

other supply chain due diligence legislation demands for such a third-party verification.

## 8 Status of the legislative procedure

The Battery Regulation will be adopted in the ordinary legislative procedure according to Art. 294 TFEU. Thus, after the proposal has already be submitted by the European Commission, the next step will be the vote of the European Parliament in the first reading, which is expected to take place in the plenary session of February 2022.<sup>28</sup> In preparation of the vote of the European Parliament, several Committees provided their opinions on the initial proposal and proposed for more than 1,500 amendments in total.<sup>29</sup> Whereas all Committees propose for different amendments in detail, they point in general in the same direction, which is the extension of the obligations in the initial proposal to other battery categories than initially foreseen, the shortening of transitional periods for a more ambitious transposition of the obligations with regard to timing and the inclusion of further definitions, which are intended to clarify open aspects. From an overall perspective, the proposed amendments are characterized by a spirit of unconditional protection of the environment, the natural resources and the climate, with a clear lack of a sense for the needs of the affected market actors and for contextualised and timewise proportionality.

As already mentioned, the next step of the legislative procedure, the first reading in the European Parliament, is expected to take place in February 2022 and thus, it is already clear now, that the intended entry into force of the Battery Regulation on 01.01.2022 (cf. Art. 79) cannot be upheld. Based on the massive amendment proposals by the Parliament Committees and the massive caveats by several Member States in the European Council, it can be expected that the Battery regulation, will enter into force with a delay of at least one year in 2023 and with further transitional periods, in order to allow affected market actors to prepare themselves and their supply chains for the new, lifecycle spanning requirements.

## 9 Conclusion

From an overall perspective, the intentions and goals which guided the European Commission (and the parliamentary Committees) in drafting its proposal for the Battery Regulation are without doubt

<sup>26</sup> Which is translated in the German version of the draft by “*nicht rechtfertigt*”, which would however be “*not justified*” in English.

<sup>27</sup> Similar experiences have been made in the context of the introduction of Regulation (EU) 2017/745 on medical devices, and the shortage of notified bodies, inter alia, led to the postponement of the entry into force of this Regulation (EU) 2017/745.

<sup>28</sup> Cf. for this timeline the European Council, 2021, page 3. In addition, this progress report shows several areas of major concerns expressed by several Member States.

<sup>29</sup> Cf. draft opinions by the [Committee on Transport and Tourism](#) (TRAN), by the [Committee on Industry, Research and Energy](#) (ITRE), by the [Committee on the Internal Market and Consumer Protection](#) (IMCO), by [IMCO with further amendments](#) and by the [Committee on the Environment, Public Health and Food Safety](#) (ENVI), which is responsible for the proposal.

comprehensible, widely accepted and necessary, in order to keep on track with the rapid and massive innovations within the battery sector. Thus, the major aims of the regulatory proposal – to preserve the nature, to untangle economic growth from the use of resources and to avoid the replacement of technologies unfriendly to the environment by other technologies with the same total effects – cannot be questioned at all. However, the saying “*The end does not justify all means*” is more than worth to be quoted here, when looking at the massive deficiencies of the present proposal. Besides the abovementioned deficiencies regarding the wording, the structure and the content of several key provisions of the proposal, which are all sources of misinterpretation, the more than 30 provisions to allow the European Commission to adopt implementing as well as delegated acts will transform the battery regulatory framework into a regulatory jungle. Combined with the fact that several provisions of the present proposal already contain extraneous provisions directly linked to electrical and electronic equipment, but on the other side, the European Commission in principle decided to uphold the strict delimitation between battery and electrical and electronic equipment regulation, the relevant obligations and responsibilities will become unclear for all market actors concerned.

Consequently, the present proposal should undergo a detailed provision-by-provision assessment, in order to ensure a coherent set of obligations, which are not only coherent internally, but which are also coherent with other regulatory instruments in place or to be adopted in future. In addition, the proposed extensive obligations give at least rise to the fear that small and medium sized businesses in the battery sector, which are often highly innovative and the engine of our European economy, will not be able to keep on track. This is because the draft Battery Regulation proposes for several obligations which require extensive supply chain communication and internal data processing, and practice shows that both instruments are highly demanding for SMEs because of often limited personal and financial resources. On the other hand, SMEs tend to be more flexible to adapt to regulatory or factual changes due to their flat decision making and implementation processes than huge companies. Only in case this piece of legislation will be coherent, practicable, well-balanced and widely accepted, it can become a (global) success and pioneer in product related regulation.

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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

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Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstadt University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

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The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review ([info@elni.org](mailto:info@elni.org)) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

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elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

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### elni Website: elni.org

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