AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

# Our position

# Proposal for a new Ecodesign for Sustainable Products Regulation

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# Executive summary

The proposal for a new Ecodesign for Sustainable Products Regulation (ESPR) seeks to create a Single Market for sustainable products and improve access to sustainability information through the Digital Product Passport (DPP). The Regulation will only be successful if it ensures full harmonisation across Member States and drives competitiveness for European industry. We recommend to: keep the product-specific approach, include a provision on transition time, keep DPP provisions workable and clarify provisions on substances of concern, broaden the definition of environmental footprint, align the ESPR with other legislation, strengthen harmonization and improve the provisions on unsold consumer products.

The table below highlights key recommendations to strengthen the proposal, which are further outlined in this paper.

Table 1: Key recommendations

| Issues | Recommendations |
|---|---|
| **Ecodesign requirements** (art. 5) | Keep the **product-specific approach** of the ESPR to ensure that ecodesign requirements are tailored to the unique characteristics of each product group.<br><br>Provide for a **transition time** that is proportional **the significance and complexity of the ecodesign requirement**.<br><br>Avoid **double-regulation**. |
| **Information requirements and Digital Product Passport** (art. 7 to 13) | Ensure the Digital Product Passport only contains the most **impactful information** for each product group.<br><br>Include an obligation on **suppliers** to provide all required information to manufacturers, while ensuring protection of Confidential Business Information (CBI)<br><br>Further clarify the procedure for a non-disclosure request due to Intellectual Property/Confidential Business Information reasons.<br><br>Ensure that manufacturers are not liable for missing or incorrect information given by suppliers, provided that manufacturers **exerted reasonable care to ensure that information is correct**.<br><br>Support the EU Commission's proposal that the **unit of reference** should depend on the characteristics of the specific product.<br><br>Ensure the Digital Product Passport is a tool to fight **counterfeits**.<br><br>Restrict the collection of **'track-and-trace information'** to the circumstances where this is absolutely essential to improve the environmental sustainability of a product. |

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| **Provisions on substances of concern** (art. 2 [28], Preamble 22, art. 7 [5] and art.8) | **Qualify point *c* of the definition of substances of concern (Art. 2 (28) to link it to the evolution of recycling technologies.**<br><br>Focus **tracking on substances of concern on critical substances** for each product group to be defined through a multi-stakeholder platform including industry and value-chain actors.<br><br>Ensure suppliers **pass on information on substances of concern** throughout the value-chains.<br>Support the EU Commission proposal to keep **REACH as the tool to restrict substances for chemical safety reasons**. If the EU Commission intends to restrict substances of concern for reasons other than chemical safety, we recommend setting up a procedure allowing the involvement of ECHA, as well as the JRC and EU industry stakeholders in the Ecodesign Forum. |
| **Definition of environmental footprint** (art. 2 [23]) | Broaden the definition of **environmental footprint** beyond the Product Environmental Footprint (PEF) methodology, so that other scientifically-based methodologies can also be used. |
| **Provisions on unsold consumer products**<br><br>(art. 20) | Exclude recycling operations from the definition of 'destruction'.<br><br>Support the EU Commission's **two-step approach** to first mandate economic operators to disclose the quantity of unsold consumer products discarded and, afterwards, to prohibit the destruction of unsold consumer products in the sectors where this practice is more wide-spread and unjustified.<br><br>Provide for an **adequate transition time** between the implementing act setting out the format for disclosure of unsold consumer products and the application of the requirement.<br><br>Ensure future delegated acts prohibiting the destruction of unsold consumer products include some exemptions for circumstances when a product presents **safety or health concern**, is **expired, damaged, or is a counterfeit**. |
| **Harmonisation** (art 3) | Ensure no national provisions are set on products regulated by the ESPR, as a way to preserve the internal market.<br><br>Deviate from the existing **EU new legislative framework (NLF)** only where absolutely essential to improve the environmental sustainability of a product. |

# Introduction

The European Commission proposed the Ecodesign for Sustainable Products Regulation (ESPR) as part of the Sustainable Policy Initiative (SPI) in the Circular Economy Action Plan (CEAP). The ESPR proposal aims to stimulate the production and consumption of sustainable products that are (energy) efficient in use, last longer, rely on recycled materials instead of primary raw.

We recommend EU policy-makers to take into account the following recommendations to ensure the ESPR will improve product sustainability while enhancing the competitiveness of the EU industry.

# Ecodesign requirements (article 5)

As sustainability impacts vary across product categories, it is essential that ecodesign requirements are **tailored to the unique characteristics of each product group** while targeting the main environmental impacts associated with a certain product group. For example, while reparability is a significant aspect for appliances, this would not be the case for formulated products. Therefore, ecodesign requirements should be as clear and product-specific as possible. On the contrary, 'horizontal rules would create legal uncertainty regarding what this would mean in practice for a particular product (...)'.

Additionally, it would be favourable to provide **sufficient transition time** (proportionate to the significance and complexity of the requirement) between the adoption and the application of the new requirement. Transition times are essential to provide the industry with the legal certainty and adequate time to make the necessary product design changes and scale them up, as well as to adapt supply chains while minimising the generation of waste associated with the transition to new ecodesign standards. An appropriate transition time is also essential to preserve the competitiveness of EU industry and thousands of jobs for highly qualified workers. This is particularly relevant given that many European plants have highly automated production lines for which adapting to new production processes is time-consuming and cost-intensive. Without an appropriate transition time, there is significant risk of relocation of manufacturing facilities to non-EU countries.

Ecodesign requirements should also exclusively **focus on aspects that are not covered by existing legislation**, both on chemical safety and sustainability-related issues. Beyond the Ecodesign Directive, there are various pieces of legislation regulating product sustainability. Therefore, ecodesign requirements should take into account existing sector-specific frameworks to avoid double regulation or conflicting legal norms. This would include packaging (currently regulated by the Packaging and Packaging Waste Directive), substance restrictions for chemicals (dealt by Registration, Evaluation, Authorisation and Restriction of Chemicals [REACH] and the Restriction of Hazardous Substances Directive) and provisions on human rights and due diligence (covered by the Proposal on Corporate Sustainability Due Diligence and the Proposal on Deforestation-Free Value Chains).

Finally, ecodesign requirements should be developed in close **collaboration with the industry**, making use of its expertise and knowledge.

# Information requirements and Digital Product Passport (articles 7 to 13)

The Digital Product Passport (DPP) is an opportunity to make product information available and accessible online. It prevents excessive use of on-pack information and the need for additional packaging materials, lowering costs and waste associated with packaging and label changes. The EU Commission's approach successfully tailors information requirements to different product categories, but to make the DPP effective and cost-efficient, the proposal should include certain key principles.

The DPP should only contain **the most impactful information** on product parameters as a way to prevent unnecessary costs linked to increases in data-gathering and processing as well as information overload for consumers. Impactful information is either necessary to ensure end-of-life treatment of the product or related to the main environmental impacts of a product based on a life-cycle assessment The delegated acts should specify what information will be required in the DPPs and for which stakeholders in the value chain (eg supplier vs final consumer). Information requirements should further respect intellectual property rights and cybersecurity concerns. Finally, the DPP should be interoperable with other datasets, including the database for information on Substances of Concern (SCIP) in articles as such or in complex objects (products) to limit duplications.

The DPP should **ensure protection of intellectual property (IP) and confidential business information (CBI),** as this is crucial for business competition and is a continuous driver for innovation. The ESPR already considers some provisions that allow for the protection of IP/CBI (eg article 5 [5] [e], article 10 [h]). However, policymakers should further clarify the procedure for a non-disclosure request due to IP/CBI reasons.

Given the long value chains for most product categories, manufacturers that place products on the EU market depend on the information provided by their suppliers. Suppliers of articles (eg product components), substances or mixtures are best placed to provide sustainability information to manufacturers, who can then integrate it into the DPP as appropriate. The ESPR should **require suppliers**, including those outside of the EU, **to disclose to manufacturers all relevant information required under the DPP,** while ensuring protection of CBI when justified. The EU Commission should explore legal instruments or technological platforms to ensure suppliers disclose such information up to manufacturers. The ESPR should also clarify that the supply chain's obligation to provide relevant information for the DPP is balanced against the need to protect CBI as well as the complexity of gathering data across long international value chains.

Much information for the DPP will originate from suppliers located outside of the EU, while the obligation to provide such information will rest on manufacturers placing the final product on the EU market. Manufacturers may not be able to control whether all the information they receive from suppliers is correct. For example, manufacturers will have to rely on suppliers for information on recycled content, since there are often no analytical techniques to distinguish virgin material from recycled material. For this reason, **manufacturers should not be liable for missing or incorrect information given by suppliers,** provided that manufacturers exert reasonable care to ensure that information is correct. Similarly, online marketplaces should not be held liable for incorrect information provided by third-party sellers.

Policymakers should **introduce clear obligations on individual economic operators** to avoid the entire supply chain carrying out similar due diligence. Joint liability provisions that apply to all EU economic operators (eg for labelling requirements or display of batch/serial numbers) should be avoided, as they create uncertainty and risk of joint liability amongst economic operators. As an alternative, an EU-based responsible person, as introduced in the EU Market Surveillance Regulation 2019, should be appointed by the manufacturer to fulfil such requirements.

As outlined in the EU Commission's proposal, the unit of reference for the DPP should be established through product-specific delegated acts. Most **information requirements** (eg carbon and environmental footprint) should be **set at the level of the product model** (ie a specific group of products that are highly similar in performance and features) since in most cases products belonging to the same product model share similar environmental characteristics. This would facilitate the uptake of the DPP, as companies can use existing data systems to implement it, thereby avoiding a heavy administrative burden and unnecessary complexities associated with individual product information.

The DPP **should become a tool to fight counterfeiting and counterfeit products** that undermine companies' sustainability efforts to reduce their products' life cycle environmental impacts. Counterfeit products are illegally manufactured without regulation throughout supply chains. Counterfeit producers do not follow responsible environmental and human rights practices, leading to, for instance, water and air polluting production processes, unsustainable sourcing of materials and minerals or excessive energy and water use. This problem is especially relevant at a time when the EU has implemented initiatives to make sustainable products the norm and reduce products' environmental footprint along the value chain. To address this, **a new point (l) 'a digital certificate of product authentication' must be added under Annex III 'Digital Product Passport'.** This would give consumers reassurance about the product's legitimate manufacturer/importer and access to the manufacturer's official product web platform. Such a digital certificate would provide consumers with instant verification of the product's authenticity before purchase, including through distance sales, thus ensuring they buy original and sustainable products. At the same time, it would support brand owners to effectively combat counterfeiting and maintain their brand reputation.

The DPP should remain a tool to provide value chain actors and consumers with relevant information on product sustainability. The DPP should not become a full-fledged 'track and trace' system for products. Such a system would:

- Require economic operators to determine and record the intended, current or past locations of a unique item along the supply chain;
- Fall outside the scope of the Regulation, which, as described in art. 1(1), is '[…]to improve the environmental sustainability of products and to ensure free movement in the internal market by setting eco-design requirements that products shall fulfil to be placed on the market or put into service.'; and
- Impose a heavy and unnecessary administrative burden, including all related costs, on companies, thus undermining their sustainability efforts.

Therefore, the collection of 'track-and-trace information' must be limited circumstances where it is absolutely essential to improve the environmental sustainability of certain product groups.

# Substances of concern (art. 2 [28), Preamble 22, art. 7 [5] and art.8])

The EU Commission proposal enables the adoption of delegated acts setting out restrictions on substances of concern and tracking of such substances through the DPP. Nonetheess, we must ensure that all efforts are targeted to the key substances of concern for each product group.

Point c of the definition of **substances of concern** in article 2 (28) defines it as a 'substance that negatively affects the re-use and recycling of materials in the product in which it is present'. This definition is too broad because every company has its own proprietary technology that can handle and recycle contaminants differently. In addition, companies can institute a decontamination step (post-treatment) to purify or install more efficient sorting technologies to better detect contaminants.[1] The **definition must be more precise and be linked with the evolution of recycling technologies**. This could be done by:

- Replace the expression 'negatively affecting' with 'impeding', as the current definition is vague and substances that 'impede' recycling or reuse should be considered as a substance of concern.
- Hold a multi-stakeholder consultation that includes product manufacturers to clarify the definition of substances that impede recycling.
- Ensure that the list of substances is dynamic and accommodates the evolution of recycling methods and technologies. More advanced recycling technologies – both mechanical and chemical – will likely allow for more substances to be recycled in the future.

The proposal tries to avoid double-regulation for products that are already subject to product-specific legislation, therefore the restriction of chemical substances primary for chemical safety reasons should be regulated entirely through REACH. However, more **clarity is needed on the interface between REACH and the ESPR.** For instance, we need to clarify under what conditions can be restricted under the ESPR. If the Commission intends to restrict substances of concern for reasons other than chemical safety, a procedure must be implemented to allow for participation from the EU Chemical Agency (ECHA), as well as the Joint Research Centre and EU industry stakeholders in the Ecodesign Forum. Additionally, the ESPR should not regulate those substances used in manufacturing process that do not end up in products placed on the European market (ie neither exposure for consumers nor for end-of-life operators). This would disadvantage EU producers since substances in production processes outside the EU cannot be checked by EU authorities.

While recognising the importance of value chain transparency for substances of concern, policymakers must **ensure that the new requirements can be implemented in practice, are focused on the key substances of concern related to each product group and developed in cooperation with all stakeholders**, including ECHA and industry stakeholders. Furthermore, the requirements should:

[1] For instance, one Member company has invested in a post-treatment purification process to reduce the amount of limonene, which impacted the product performance such as odor. The company has successfully reduced the amount of limonene to the extent that the plastic resin became almost odorless. The process took about a year

- Be focused on critical substances of concern for each product group and defined via a multi-stakeholder platform, including at least industry and value chain actors. Information requirements should apply to substances of concern that are present above a certain threshold (eg above 0.1% by weight or – where no analytical method exists – at a threshold determined by a delegated EU act. Finally, requirements should apply to substances of concern that can be detected through existing analytical methods.

- Ensure that suppliers pass on information on substances of concern to manufacturers of final products. This is the only way to ensure that communication flows seamlessly throughout the value chain. This is also in line with the information requirements for Substances of Very High Concern (SVHC) under REACH (article 33).

- Ensure coherence between information shared under other legislative frameworks (eg Poison Center notifications, SCIP notifications) and the ESPR to avoid duplication of requirements so that Better Regulation principles are well implemented.

Focusing attention on key substances of concern for each product group is the only way to implement a feasible system. It is neither realistic nor scientifically justified to track all substances of concern. For instance, more than 12,000 substances of concern may be identified in upcoming years.[2] It is not practical to check for all of these in each product or component. This is especially the case for articles for which there are no EU legal requirements on the communication of substances of concern throughout the value chain (with the exception of SVHC from the Candidate list at >0.1%, which represents only a small subset of substances of concern, [ie, so far, around 215 substances]). Finally, there are no analytical methods to track several substances of concern.

## Definition of environmental footprint (article 2[23])

The ESPR proposal enables the Commission to adopt delegated acts setting performance and information requirements for product groups' environmental footprint. Although the Commission correctly intends to use scientifically based methodologies, the proposed definition of 'environmental footprint' is too restrictive, as it only considers the use of the Product Environmental Footprint (PEF) methodology. Other scientifically robust life cycle assessment methodologies already exist, are currently in development or will be developed in the future. The PEF should not be the only methodology used, as it only covers 16 impact categories and leaves out several key environmental impact categories (eg biodiversity, material efficiency, reparability, etc.) that may be relevant for the many complex products currently covered by the EU Ecodesign Directive. Additionally, the PEF databases and Category Rules (PEFCRs) still need further development. Currently, these PEFCRs are only available or in development for around 25 product categories, and establishing new PEFCRs will require considerable time and effort.

Even where a PEFCR has been developed for a specific product category, the outcome may not offer sufficient granularity to permit comparative quantitative assessments between individual products if it is overly reliant on the use of generic secondary data for key phases of a product's lifecycle. As such,

[2] See Economic Analysis of the Impacts of the Chemicals Strategy for Sustainability Phase 1 Report Report for the European Chemicals Industry Council (Cefic), p. XI https://cefic.org/app/uploads/2021/12/Economic-Analysis-of-the-Impacts-of-the-Chemicals-Strategy-for-Sustainability-Phase-1.pdf

**EU policymakers should broaden the definition of environmental footprint** to environmental impact categories based on the PEF or other scientifically validated standards (for example, ISO 14040 series).

## Harmonisation

Policymakers must strengthen harmonisation provisions by clarifying that Member States cannot restrict placing products on the market on grounds of ecodesign requirements relating to any of the product parameters referred to in Annex I and not covered by EU delegated acts. This is in line with the current text of the Ecodesign Directive.

The current wording of the proposal will lead to significant market fragmentation. Article 3 (4) gives Member States the ability to set ecodesign requirements for product parameters not covered by EU delegated acts whenever the Commission has not explicitly stated that ecodesign requirements are not necessary for that product parameter.[3] This would give leeway for Member States to set national rules for specific product parameters, which risks the fragmentation of the Single Market. Not only does this go against the spirit of the Commission proposal, but it would also negatively impact sustainability and competitiveness.

Policymakers are also encouraged to align the ESPR with the existing New Legislative Framework (NLF) as much as possible. The EU Declaration of Conformity, CE marking, presumption of conformity through harmonised standards and other features of the NFL are well known and established methods. Alternatives should not be introduced.

Furthermore, the existing strategy whereby economic operators provide technical documentation to market surveillance authorities upon request has previously succeeded in ensuring product compliance. Customs controls relating to the DPP are unnecessary. Requiring verification by customs authorities against the DPP registry before releasing a product to the market would place undue burden on manufacturers, with the potential to delay the delivery of the most state-of-the-art products to local consumers through limited understanding and inconsistent implementation by customs authorities. Due to the large portion of products manufactured within the EU, this burden would be placed unfairly on non-EU-based manufacturing while also not eliminating the need for ongoing market surveillance.

## Provisions on unsold consumer products (article 20)

The Commission's objective to prevent destruction of unsold consumer products is positive. This is an important step to keep resources in the material loop - in line with circular economic principles. At the same time, destruction of unsold consumer products that are not compliant with EU or national law, have expired or pose health and safety risk for consumers may, in certain circumstances, be needed to protect consumers.

Therefore, policymakers should support the option to **recycle unsold consumer products** by excluding recycling operations from the definition of 'destruction'. Since recycling allows for the creation of new

[3] 'Member States shall not prohibit, restrict or impede the placing on the market or putting into service of products on grounds of non-compliance with national requirements relating to product parameters referred to in Annex I, for which a delegated act adopted pursuant to Article 4 provides that no performance, no information or neither performance nor information requirements are necessary'

products, it cannot be classified as destruction in the same way as incineration or landfilling. In addition, recycling would be the preferred way to treat unsold consumer products that are not suitable for consumer use or donation due to qualify defects affecting products' safety or performance.

Policymakers should also support the Commission's **two-step approach** to first mandate that economic operators disclose the quantity of unsold consumer products discarded and then prohibit destruction of unsold consumer products in the sectors where this practice is more widespread and unjustified. This would lead to better information on which sectors discard unsold consumer products to a significant degree, as well as the reasons for discarding them. It would also be the most cost-effective option to allow the Commission to focus on the destruction of unsold consumer products in the most relevant sectors without imposing an unnecessary burden on other sectors.

The EU should also **provide for an adequate transition time** between the publication of the implementing act setting out the format for disclosure of unsold consumer products and the application of the requirement. This time is key for companies to adapt their systems to account for the appropriate disclosure in line with the Regulation. As the final text of the Regulation will only be known a few weeks before its entry into force, a transition period is needed. To provide companies with legal certainty on how to report, the transition period should start when the Commission publishes the implementing act on the reporting format .

There should also be a distinction between **new vs. used and/or damaged unsold goods**. Reporting on the destruction of counterfeit goods, or products posing risks (suppressed/recalled) or not compliant with applicable legislation should be accounted for separately.

It would be beneficial to also include **specific exemptions** to future requirements on prohibition of destruction of unsold consumer products to protect consumer safety. When exemptions apply, unsold consumer products should be treated in line with the waste hierarchy, with recycling prioritised over energy recover or disposal whenever possible. Exemptions should apply to:

- Products suspected of giving rise to health or safety concerns.
- Products that have exceeded their expiry date or shelf life.
- Products that are not fit for the purpose for which they are intended.
- Damaged products.
- Products that are not compliant with applicable legislation or technical standards.
- Products for which donation or reuse/remanufacturing/recycling is impossible or that are rejected.
- Counterfeit items.
- Spare parts identified under product-specific delegated acts that have been refused for reuse or recycling, and once a minimum period for their provision has been exceeded.

# Conclusion

This paper outlines AmCham EU's recommendations for the successful implementation of the Ecodesign Sustainable Products Regulation. We look forward to partner with EU institutions to make the ESPR a success.