

Our position

Voting recommendations on the amendments proposed to the Ecodesign for Sustainable Products Regulation

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.4 trillion in 2021, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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.

Introduction

The European Commission's Ecodesign for Sustainable Product Regulation (ESPR) proposal aims to enable the establishment of EU-wide harmonised provisions ensuring sustainability of products placed on the EU market.

Below are recommendations for the European Parliament to consider when assessing recently released amendments from the Committee on the Environment, Public Health and Food Safety (ENVI) and the Committee on the Internal Market and Consumer Protection (IMCO).

Recommendations

1. Avoid double regulation (Art. 1, Art. 2, Art. 4, Art. 5, Art. 7 and Recitals)

ENVI: Oppose amendments 4, 5, 19, 21, 171, 191, 260, 261, 284, 473, 537 and 654.

IMCO: Oppose amendments 26, 27, 224, 231 and 234.

These amendments broaden the ESPR's scope to include supply chain due diligence and packaging. If included, these would lead to unnecessary double regulation because due diligence and packaging are already regulated under other EU legislative frameworks, notably:

- The **Corporate Sustainability Due Diligence Directive** that requires companies to carry out due diligence to prevent potential adverse impacts on human rights and the environment across the value chain.
- The **Regulation on deforestation-free products** that requires companies to conduct due diligence to ensure that sourcing of certain raw materials is deforestation-free and legal according to sourcing country regulations.

- The Regulation on prohibiting products made with forced labour setting out corporate due diligence rules to ensure production is not linked with forced labour.
- The **Digital Services Act (DSA)** and the **E-Commerce Directive** regulating digital services.
- The **Packaging and Packaging Waste Regulation** that is currently under revision.

Regulating due diligence and packaging through the ESPR would add unnecessary duplication and likely lead to conflicting rules on due diligence across different pieces of legislation. If companies are unsure about which legislation applies to them, it could hinder the effectiveness of EU legal requirements and create market distortions.

2. Keep a product-specific approach (Art. 1, Art. 5 and Recitals)

ENVI: Oppose amendments 125, 134, 265, 266, 267, 277, 281 and 543.

IMCO: Oppose amendments 49, 260, 262, 263 and 278.

These amendments set out objectives applicable to all product groups and run against the product-specific approach chosen by the Commission.

These horizontal objectives would not be relevant to all product groups. As an example, while reparability is a significant aspect for electrical appliances, it is not applicable to detergents or cosmetics. At the same time, making all products reusable may lead to a ban on many products that by their very nature, cannot be reused (eg hygiene products such as handkerchiefs, toilet papers, etc.).

Furthermore, requirements are too vague and do not give economic operators any legal certainty.

3. Internal market (Art. 3 and Recitals)

ENVI: Oppose amendments 138, 458 and 471.

IMCO: Oppose amendments 40 and 41, 199, 204 and 205.

The essence of the Single Market is allowing economic operators to place products on the EU market under a uniform set of rules that apply across Member States. This principle should be at the heart of the ESPR, as it was under the Ecodesign Directive. However, these amendments would weaken the Single Market and risk undermining the free circulation of goods across the EU.

As such, the ESPR should firmly remain under the internal market legal basis (Art. 144 of the Treaty on the Functioning of the European Union), as also stated by the Commission in its proposal: 'the issues tackled by this initiative are related to the internal market, including the uneven playing field for companies attempting to implement more sustainable approaches'.

4. Definition of environmental footprint (Art. 2 (23))

ENVI: Support amendments 24, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342 and 343.

The definition of environmental footprint should go beyond replicating the Product Environmental Footprint (PEF) method for the following reasons:

- PEF only covers 16 impact categories and leaves out several key environmental impact categories (eg biodiversity, circularity, etc.) that may be relevant for the many complex products covered by ESPR.
- PEF is not presently supported by enough scientific data.
- PEF does not allow for products' performance differentiation during the in-use phase and thus risks incentivising the manufacture of less sustainable products. For example, PEF penalises detergents that perform well at low temperatures, as these contain more sophisticated ingredients (eg enzymes) compared to poorer performing detergents. By pushing consumers to use poorer performing detergents, consumers would compensate by re-washing clothing, increasing the washing temperature or using more of the product. This would significantly increase the CO₂ emissions associated with laundry and increase washing machines' electricity consumption.

The definition of environmental footprint should be broadened to mirror other scientifically validated life-cycle methods (for example, those based on International Organization for Standardization 14040 series).

5. Substances of concern (SoC) (Art. 2 (28), Art. 6 and Recitals)

ENVI: Support amendments 154, 155, 157, 158, 159, 349, 350, 351, 357, 359, 362, 365, 366, 381, 382, 385, 386, 388, 637 and 638.

The Commission proposal enables the adoption of delegated acts setting out restrictions on SoC and the tracking of such substances through the Digital Product Passport (DPP).

The amendments that define SoC as hazardous substances that hinder reuse or recycling of materials based on the available recycling technologies are key:

- They ensure **coherence** between the ESPR and existing EU chemical legislation, including the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation and other product-specific rules (eg the Restriction of Hazardous Substances Directive for electrical equipment [RoHS]). Because of chemicals safety concerns, chemical legislation, primarily REACH, should exclusively regulate Substances of Very High Concern (SVHCs) and hazardous substances. This is also acknowledged by the ESPR proposal: 'this Regulation should not enable the restriction of substances based on chemical safety, as done under other Union legislation' (Recital 22).

On the other hand, the ESPR should focus on regulating substances that hinder recycling and should define clear criteria for this category of substances.

- By linking the list of SoC to state-of-the-art recycling technology, this definition would encourage the evolution of recycling methods and technologies. More advanced recycling technologies – both mechanical and chemical – would likely allow for more substances to be recycled in the future.

ENVI: Oppose amendments 354, 355, 356, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 383, 384, 387, 389, 390, 391 and 392.

The amendments above extend the definition of SoC to substances regulated by other legislation (eg substances restricted under REACH), hereby creating double regulation. In some cases, this could create conflicting requirements since such substances are already regulated and their use is already subject to limitation or application-specific restriction.

ENVI: Oppose amendments 142, 156, 632, 633, 634, 636 and 640.

These amendments are aimed at restricting SoC under ESPR. As also acknowledged by the Commission proposal, REACH should be the primary framework for restrictions because of chemical safety concerns. The amendments above would create legal uncertainty since it would not be clear whether REACH or the ESPR would determine chemical restrictions.

6. Tracking of SoC (Art. 7)

ENVI: Support amendments 178, 179, 180, 182, 183, 187, 646, 663, 664, 665, 666, 668, 671, 675, 676, 677, 678, 684, 685, 686, 687, 690, 696, 697, 698, 699, 703, 704, 705, 706, 713, 714, 715, 719 and 720.

ENVI: Oppose amendments 670, 672, 673, 707, 708, 709 and 710.

While recognising the importance of value chain transparency for SoC, policymakers must ensure that the tracking of SoC: can be implemented practically with reasonable effort; is focused on the key substances related to each product group; and is developed in cooperation with all stakeholders, including the European Chemicals Agency and industry. Tracking should therefore be focused on **relevant SoC** for each product group and defined via a multi-stakeholder platform, including minimally industry and value chain actors. Information requirements should apply to SoC 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 act). These requirements are the only way to implement a feasible system. For instance, more than 12,000 SoC may be identified in upcoming years while only a handful are relevant to track for a specific product group. It is not practical nor scientifically justified to check for all of these in each product or component.

7. Ecodesign requirements (Art. 1, Art. 2, Art. 4, Art. 5, Annex I and Recitals)

ENVI: Support amendments 475, 476, 477, 478, 498, 615, 616, 617 and 1091.

IMCO: Support amendments 209 and 222.

These amendments provide industry a minimum transition time to adapt to ecodesign requirements. A **minimum transition time of 24 months would preserve:**

- **The competitiveness of the European industry.** European plants generally have highly automated production lines compared to non-European ones, which rely more on manual processes. As a result, adaptation to new design requirements takes significantly more time in Europe and requires the purchase, delivery and assembly of new manufacturing equipment. Nowadays, re-design takes even more time than in the past due to the volatile geopolitical environment and the uncertain energy supply as well as the unprecedented global semi-conductor shortage, where global demand significantly outstrips supply. This shortage is due to the impact of the pandemic on semiconductor production capacity, increased demand for electronics, automotive demand and global logistics challenges. Given the scarcity of semi-conductors and the prolonged delivery time for electronic components, re-designing manufacturing equipment takes significantly more time than in the past.
- **Legal certainty.** It is important that the transition period starts from the moment the final text is adopted. Companies can only complete technology and product development and start mass production once they know the final regulatory requirements. Without those, they risk making incorrect product design choices and investing in manufacturing equipment that they may then need to discard, leading to significant waste of resources.

ENVI: Support amendments 108, 126, 132, 140, 141, 143, 145, 499, 500, 502, 503, 519, 550, 551, 552, 553, 566, 568, 569, 570, 571, 572, 592, 593, 594, 613 and 614.

IMCO: Support amendments 225, 226, 227, 240, 241, 241, 245, 246, 247 and 250.

These amendments ensure that the ESPR's requirements:

- Are practically and economically feasible and in line with available technology;
- Account for the availability of recycled materials of the right quality for each application (eg certain applications in direct contact with skin require a polymerase chain reaction of higher quality);
- Are based on comprehensive impact assessments;
- Align with existing EU legislation to avoid any contradictory requirements; and

- Assess the trade-offs between the different product parameters (eg requirements on recyclability or substance content may negatively impact durability, etc.) and ensure the solution provides the best overall environmental impact.

ENVI: Support amendments 600, 602, 603, 604, 605, 606, 607 and 608.

The amendments ensuring that ecodesign rules would not have disproportionate impacts on all companies – not only on small and medium-sized enterprises – are crucial.

ENVI: Support amendment 595.

IMCO: Support amendment 252 and 253.

Ecodesign requirements should not compromise consumer safety.

IMCO: Oppose amendment 48

IMCO amendment 48 removes the clause specifying product-specific ecodesign regulations '*shall have no significant negative impact on the functionality of the product, from the perspective of the user.*'

This clause should be included because of its functionality, which goes hand in hand with sustainability. Marketing non-functional products may have a negative sustainability impact: if a product is not functioning well, a consumer may be tempted to use more of it, leading to increased consumption.

8. Digital Product Passport (DPP) (Art. 2 [4a] (new), Art. 7, Art. 8, Art. 9, Art. 10, Art. 25 (a) new, Art. 26, Annex II and Recitals)

ENVI: Support amendments 87, 736, 741, 742, 743, 774, 775, 808, 811, 1008, 1010, 1016, 1017 and 1022.

IMCO: Support amendment 258.

Given most product categories' long value chains, manufacturers that place products on the EU market depend on the sustainability information (eg recycled content percentage) provided by their suppliers of articles (eg product components), substances or mixtures, who are best placed to know. Manufacturers can then integrate it into the DPP as appropriate. The ESPR should require suppliers to disclose to manufacturers all relevant information required under the DPP, while ensuring protection of critical business information (CBI) when justified. The Commission should explore legal instruments or technological platforms to ensure suppliers disclose such information to manufacturers.

ENVI: Support amendments 734, 735, 1011, 1013, 1014 and 1015.

Amendments aimed at prioritising the use of digital carriers for data whenever possible are necessary. The 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.

ENVI: Support amendments 824, 826, 827, 829, 831 and 832.

IMCO: Support amendments 322, 324, 325, 327 and 331.

The DPP needs to be coherent and leverage existing databases, such as the Substances of Concern in articles as such or in complex objects (products) database (SCIP database), for communication on the presence of SVHCs.

ENVI: Support amendments 748, 750, 751, 752, 816, 817, 818, 819, 820, 821, 822, 823, 828, 850, 851, 852 and 853.

ENVI: Oppose amendment 802.

The DPP should **ensure the protection of intellectual property (IP) and CBI**, as these are crucial for business competition and are continuous drivers of innovation. The ESPR already considers some provisions that protect IP and CBI (eg Art. 5 [5] (e), Art. 10 [h]). However, because of the sensitivity of the information policymakers should further clarify the procedure for a non-disclosure request.

ENVI: Support amendment 1132.

It should be possible for the Commission to develop **‘a digital certificate of product authentication’ as part of the DPP as a tool to combat counterfeits**. This would reassure consumers that a product was legitimately manufactured and imported, and give them 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, ensuring they buy original and sustainable products. At the same time, it would help brand owners effectively combat counterfeiting and maintain their brand reputation.

9. Digital services (Art. 2 and Art. 7 (c) new)

ENVI: Oppose amendment 302 and 746.

IMCO: Oppose amendments 1, 4, 25, 28, 58, 104,112, 157, 164 and 281.

The ESPR’s success stems from its focus on product sustainability, and the Commission should be cautious in extending this scope beyond the product level. Moreover, the ESPR is a framework legislation and should remain as such, leaving product-specific regulation to be developed in

delegated acts. The inclusion of digital services into the scope of the ecodesign regulatory framework risks creating considerable overlaps with dedicated EU legislation regulating digital services such as the DSA. Furthermore, digital services include a vast range of services that function in a variety of ways (eg products or software as a service) but all rely on a physical product (eg devices and data centres).

Therefore, including digital services in the ESPR could result in double regulation because devices and data centres are already regulated under existing EU legislation (Ecodesign Directive, Energy Efficiency Directive and upcoming sustainability criteria for data centres).

10. Unsold consumer products (Art. 2 (35), Art. 2 (37), Art. 20 and Recitals)

ENVI: Support amendments 394, 395, 396, 397, 399 and 400.

Since recycling allows for the creation of new products, it cannot be classified as destruction in the same way as incineration or landfilling. In addition, recycling is the preferred way to treat unsold consumer products that are not suitable for consumer use or donation due to quality defects affecting safety or performance.

ENVI: Support amendments 402, 404 and 406.

The term ‘unsold consumer products’ should be understood as ‘unused’ products. If the definition of unsold consumer products includes products that were already used by consumers and later returned, it may create safety and hygiene risks. Because used products may be damaged or contaminated, an obligation to donate them may be detrimental to the health and safety of the recipients. This is particularly true for personal care products that have been in contact with other peoples’ skin.

ENVI: Support amendments 25, 405 and 407.

It is important to add that ‘unsold consumer products’ must be fit for consumption and sale. As it is not possible to sell products that are unfit for sale and consumption, these products cannot be considered as unsold because of the legal requirements to take such products off the market (eg in the case of counterfeits).

ENVI: Oppose amendment 403.

IMCO: Oppose amendment 37.

Samples should not be included in the definition of unsold consumers products, as suggested by the draft opinion, because it would contradict the concept of ‘unsold products’ from a legal point of view. Samples are given for free and therefore, cannot constitute an ‘unsold good’ as they are not for sale. The concept of unsold goods, according to the European Commission definition, implies ‘a product that has not been sold’ and – by definition – a sample is never sold.

ENVI: Support amendments 959, 960, 961, 996, 997 and 998.

IMCO: Support amendments 345, 346, 351, 352 and 354.

IMCO: Oppose amendments 67, 348, 349 and 350.

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 and in line with circular economy principles. At the same time, destroying unsold consumer products which are not compliant with EU or national law, have expired or pose health and safety risks for consumers may, in certain circumstances, be required to protect consumers. These features are particularly important:

- Use the **two-step approach** to first mandate that economic operators disclose to authorities, on request, 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 for focusing on the destruction of unsold consumer products in the most relevant sectors without imposing an unnecessary burden on other sectors.
- 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. As the final text of the Regulation will only be known a few weeks before its entry into force, this time is key for companies to adapt their systems to account for the appropriate disclosure in line with the Regulation.
- Allow for the possibility of destroying products based on **hygiene concerns and noncompliance with EU legislation**. Damaged products may pose safety or health risks for consumers. As such, they are not fit for re-use or donation, so it is important to maintain the option to destroy damaged unsold consumer products.

ENVI: Oppose amendments 17, 25, 79, 80, 994, 999, 1001, 1002, 1003 and 1004.

The Commission should reject amendments calling for an immediate ban on the destruction of unsold consumer products for specific types of products; at this stage, such a ban would not be based on EU-wide objective evidence. Instead, the Commission should conduct an assessment of which sectors are most likely to destroy unsold products before implementing a ban.

11. Self-regulation (Art. 18 and Recitals)

ENVI: Oppose amendments 13, 43, 73, 74, 75, 76, 77, 78, 88 and 915.

Self-regulation measures are best placed to accommodate and regulate fast-moving sectors such as that of game consoles that upgrade and evolve in timeframes that cannot be matched by legislative timelines. Such self-regulatory efforts have proven to be less costly for the EU and Member States and

require less European Commission resources compared to the implementation of regulation. Although the results of evaluations of certain self-regulation measures have been mixed, this is not a sufficient reason to remove the possibility of self-regulatory measures. Rather, these weaknesses should be addressed with mechanisms for continued improvement. Moreover, self-regulation measures could accelerate progress for tangible goods not currently covered by the ESPR and of low priority in the Ecodesign Work Plan roadmap.

12. Prioritisation (Art. 16)

ENVI: Oppose amendment 68, 892, 893 and 894.

In line with the Commission proposal and the current ecodesign directive, prioritisation of product groups for the upcoming Ecodesign Work Plan should be based on a thorough impact assessment that is already under way by the Commission and the Joint Research Centre. Prioritisation should account for, amongst other factors:

- Economic relevance.
- Environmental impacts and potential for significant environmental impacts.
- The extent to which a product is already regulated by other legislation.

A defined list of products should not be prioritised for political reasons and would be redundant considering the Commission's current consultation process.

13. Online marketplaces liability (Art. 2)

ENVI: Oppose amendment 26, 27, 28 and 29.

Marketplace liability is not an appropriate policy solution to address the issue of non-compliant products in the EU as it is not proportionate given the role of marketplaces (ie online marketplaces do not sell products or act as authorised representatives for the products). Given the challenges of enforcing liability on out-of-region marketplaces, a marketplace liability regime will likely push noncompliant or unsafe products to marketplaces that do not have robust compliance programmes in place. For marketplace liability to be feasible, it requires a clear enforcement regime covering all marketplaces, including those with no physical presence in Europe, which presents a plethora of complicated political challenges.

The E-Commerce Directive already states that online intermediary service providers are not required to carry out general monitoring of third-party content and offers and are merely required to apply a notice-and-takedown process. Therefore, online intermediaries, like Amazon's online marketplace, are only liable if on obtaining knowledge of illegality, they fail to remove the relevant content or offers.

The EU also acknowledged in the final DSA, the GPSR and the Commission proposal for the Product Liability Directive that marketplace liability does not fit with the actual role of online marketplaces as

intermediaries. The DSA also reaffirms the prohibition on general monitoring from the E-Commerce Directive. Further regulation in any specific policy area should be consistent with these provisions.

14. Software updates (Art. 33)

ENVI: Oppose amendments 1047, 1048, 1049 and 1050.

Operating system updates improve user experience and extend a device's lifetime by maintaining a safe, stable and seamless environment. They aim to support compatibility with new devices and applications, address unintended functional issues and protect society against threats by mitigating security vulnerabilities. Software and operating system support is thus a key factor in ensuring a device's longevity. The Commission should consider that manufacturers are often faced with difficult trade-offs where a device's vital security updates may come at the expense of device performance. Manufacturers must have the ability to prioritise device security updates where appropriate and proportionate. The regulation should exempt performance impacts related to operating system security updates. This would also ensure alignment with the ecodesign requirements for mobile phones, smartphones and tablets.

ENVI: Oppose amendment 627.

The proposal should **not** separate functionality and security updates, as it is impossible to do so in some cases. Some security vulnerability mitigation will require changes to functionality: as an example, consider a bug in the 'find my device' feature that causes an adversary to identify the user and their device. A security update for such an issue could conceivably disable certain functions of 'find my device' in order to prevent adversaries from learning the identity of the user or the device. Along with the problems that would arise from unbundling, it is also challenging to clearly define an update as a security update.

15. Search engines (Art. 29)

ENVI: Oppose amendment 239, 1027 and 1036.

Including search engines in the scope of the Regulation would place obligations on non-monetised web results. Market surveillance regulators do not need special access to search engines as they provide publicly available information that is open to everyone with access to the internet and a web browser. In addition, Article 29 (3) requires 'online marketplace[s] to remove specific illegal content referring to a non-compliant product from its online interface'. If applied to search results, the following issues would arise:

- Expanding this obligation to search engines would prevent them from displaying results that do not carry the required information. This would lead to far-reaching censorship. For example, European users searching for non-European products would not be able to find information

about these products if the provider located outside the EU does not provide the required online electronic information. Consequently, this regulation could significantly limit access to information for European consumers. Similarly, pages that have 100 products listed but one that is 'covered by a relevant delegated act' would therefore need to be delisted from the search engine entirely.

- It is unclear whether this requirement would amount to a general monitoring provision; if so, this would create a conflict of law with the DSA. If general monitoring is not envisioned, then this would simply be a notice-and-takedown obligation, which search engines already abide by via their legal removals process.

Conclusion

As the European Parliament reviews the ESPR proposal, it is critical that legislators consider the wide-ranging issues identified above. If incorporated, these recommendations would ameliorate many potential problems and strengthen the EU's ability ensure the sustainability of products placed on the EU market.