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SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Position on the Committee on the Environment, Public Health and Food Safety (ENVI) amendments on 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.

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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.

Introduction

The EU Commission's ESPR proposal will enable the establishment of EU-wide harmonised provisions ensuring sustainability of products placed on the EU market.

As compromise amendments are developed, please find below Amcham EU recommendations.

Recommendations

1. Avoid double regulation

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

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

- The **Corporate Sustainability Due Diligence Directive (CSDD)** 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** requiring 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.
- The **Digital Services Act (DSA),** the **E-Commerce Directive** and the **General Product Safety Regulation (GPSR).**
- The **Packaging and Packaging Waste Regulation** currently under revision.

Regulating due diligence and packaging through the ESPR would only 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, this may hinder the effectiveness of legal requirements and create market distortion.

2. Keep a product-specific approach

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

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

- These horizontal objectives would not be adapted to all product groups. As an example, while reparability is a significant aspect for electrical appliances, this would not be the case for detergents or cosmetics. At the same time, making all products reusable may lead to an actual ban on many products that, by their very nature, cannot be reused (eg hygiene products such as handkerchiefs, toilet papers, etc.).
- These horizontal requirements are too vague and do not give any legal certainty to economic operators.

3. Internal market

Oppose amendments 138, 458 and 471.

These concerning amendments would weaken the Single Market and risk undermining the principle of free circulation of goods across the EU. 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.

As such, the ESPR should firmly remain under the internal market legal basis (Article 144 of the Treaty on the Functioning of the European Union), as also stated by the Commission in the 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

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 ready from a scientific point of view.
- 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.

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

5. Substances of concern

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 substances of concern and tracking of such substances through the Digital Product Passport (DPP).

The amendments that define substances of concern as those 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 (e.g. the Restriction of Hazardous Substances Directive for electrical equipment - RoHS). It should be exclusively up to chemical legislation (primarily REACH) to regulate Substances of Very High Concern (SVHCs) and hazardous substances for reasons related to chemicals safety. This is also acknowledged by the ESPR proposal, according to which '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 hindering recycling and should define clear criteria for this category of substances.
- By linking the list of substances of concern 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.

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 substances of concern (SoC) to substances regulated by other legislation (eg substances restricted under REACH) and thus create double regulation. In some case, this could create conflicting requirements since such substances are already regulated, and their use is already subject to limitation or application-specific restriction.

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

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

6. Tracking of Substances of Concern

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.

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

While recognising the importance of value chain transparency for SoC, policymakers must ensure that tracking of SoC can be implemented in practice 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 (e.g. above 0.1% by weight or – where no analytical method exists – at a threshold determined by a delegated act). Focusing attention on key SoC for each product group is 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 is 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

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

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

- **Competitiveness of the European industry** - European plants generally have highly automated production lines compared to non-European ones relying more on manual processes. As a result, adaptation to new design requirements takes significantly more time in Europe, as this requires the purchase, delivery and assembly of new manufacturing equipment. Nowadays, re-design takes even more time than in the past due to the uncertain geopolitical and energy supply situation as well as the unprecedented global semi-conductor shortage, where global demand significantly outstrips supply. A combination of multiple factors explains this: 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 of 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/product development and start mass production once they know the final regulatory requirements. Not knowing the final regulatory requirements could risk incorrect product design choices and investing in manufacturing equipment that they may then need to discard, leading to significant waste generation.

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.

These amendments ensure that 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 PCR of higher quality);
- Are based on comprehensive impact assessments;
- Align with existing EU legislation to avoid any contradictory requirements;
- 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.

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 SMEs – as implied by this proposal are crucial.

Support amendment 595.

Ecodesign requirements should not compromise consumer safety.

8. Digital Product Passport (DPP)

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

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 (eg recycled content percentage), who then can 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.

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.

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

The DPP needs to be coherent and not 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.

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

Oppose amendment 802.

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

Support amendment 1132.

It should be possible for the Commission to set a **'a digital certificate of product authentication' as part of the DPP as a tool to combat counterfeits.** This would give consumers reassurance about a product's legitimate manufacturer or 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.

9. Digital services

Oppose amendment 302 and 746.

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. Besides, digital services include a vast range of services that run in a variety of ways (eg products or software as a service), but all rely on a physical product (e.g. 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

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.

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, this may cause safety and hygiene risks. Used product may either be damaged or contaminated. As such, an obligation to donate such products could expose the recipients of such donations to safety or hygienic risks. This is particularly the case for personal care products that have been in contact with other peoples' skins.

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).

Oppose amendment 403.

Samples should not be included in the definition of unsold consumers products, as suggested by the draft opinion. Including samples in the definition of unsold consumer products 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.

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

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 economic principles. At the same time, destruction of 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:

- 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 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.
- 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.

- Allow for the possibility to destroy products based on **hygiene concerns.**

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

In line with the Commission's proposal, a ban on the destruction of unsold consumer products should occur after an assessment of which sectors are the most prone to utilise destruction. The Commission should reject amendments calling for an immediate ban on the destruction of unsold consumer products for specific types of products as this is not, at this stage, based on EU-wide objective evidence.

11. Self-regulation

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 game consoles that upgrade and evolve in timeframes that cannot be matched by legislative timelines. Such self-regulatory efforts have also proven to be less costly for the EU and Member States, and require less European Commission resources compared to the implementation of regulation. The cost of administration, monitoring and reporting, and auditing by a third-party independent inspector (selected with the European Commission) is borne by the Signatories. Mixed results in the evaluation of certain self-regulation measures is not a sufficient reason to remove the possibility of self-regulatory measures, but rather, these weaknesses should be addressed with mechanisms for continued improvement. Moreover, self-regulation measures could be a mechanism to accelerate progress for tangible goods not currently covered by the ESPR and of low priority in the roadmap.

12. Prioritisation

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 (already under way by the Commission and the Joint Research Centre), considering amongst others:

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

For this reason, a defined list of products should not be prioritised for political reasons. This would also be redundant to the current consultation process initiated by the Commission.

13. Online marketplaces liability

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 Authorized Representative 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

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 also 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.

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 differentiate the nature of an update as a security update.

15. Search engines

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, which seems to be an unintended consequence. 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.