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Ecodesign for Sustainable Products and the EU Digital Product Passport

The Commission's ESPR Proposal of 30 March 2022 – Game-changer or Slow Burner?

On 30 March 2022, the European Commission issued an ambitious proposal for an Ecodesign for Sustainable Products Regulation (ESPR). It suggests a significant extension of the existing Ecodesign Directive 2009/125/EC, to cover “the broadest possible range of products”. Main novelties include the creation of an EU “digital product passport” and provisions to address “substances of concern”, raising questions on the interface with REACH and WFD/SCIP. The article aims to provide a structured overview and initial assessment of the proposed ESPR scope, key new requirements and next steps.

I. Introduction

On 30 March 2022, the European Commission issued an ambitious proposal for an Ecodesign for Sustainable Products Regulation (ESPR).¹ It suggests a significant extension – both in scope and requirements – of the existing Ecodesign Directive 2009/125/EC, which is limited to energy-related products.²

The proposal governs virtually all products placed on the market or put into service in the European Union (EU), in order to make them more environmentally sustainable and circular. The possible scope of the ESPR ranges from more simple products typically used by consumers such as textiles and furniture to paints, electronics and to the most sophisticated and complex systems such as military equipment, space technologies or medical devices (see recital (16) of the ESPR proposal).

Only gradually, companies in different sectors are becoming aware of this initiative and its possible future impacts on their activities, such as needed changes to their products and enhanced information reporting duties for the benefit of other actors in the value chain, consumers and authorit-

ies. In the latter regard, the EU “digital product passport” (hereafter also “EU DPP”) as a proposed new information tool deserves special attention.

With a view to reporting and possible circularity-based restrictions for the new category of “substances of concern” and potentially other substances now tackled in the ESPR framework, this wide-scope initiative also raises questions on possible overlaps with other EU legislation governing chemicals and (other) products, such as the REACH Regulation³ and pursuant to Art. 9 of the revised Waste Framework Directive (WFD)⁴, which introduced disclosure rules on “substances of concern in articles as such or in complex objects (products)” („SCIP“)⁵ in 2018.

The present article, based on the EU policy context (Section II.), aims to provide a structured overview of the scope and key new requirements pursuant to the Commission's ESPR proposal in comparison with the existing Ecodesign Directive, including ecodesign requirements and the EU DPP (below III.). A special focus will then be placed on provisions governing “substances of concern”, in comparison with corresponding requirements already in force under REACH and the WFD (SCIP) (Section IV.). Finally, the status

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1 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC; hereafter also “ESPR proposal”, COM(2022) 142 final, 2022/0095 (COD), available together with its related Annexes and Commission Staff Working Documents at https://environment.ec.europa.eu/publications/proposal-ecodesign-sustainable-products-regulation_en (accessed 1.9.2022).

2 Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products; latest consolidated ver-

sion of 4.12.2012 available at <http://data.europa.eu/eli/dir/2009/125/oj> (accessed 1.9.2022).

3 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH); latest consolidated version of 1.5.2022 available at <https://eur-lex.europa.eu/eli/reg/2006/1907/2022-05-01> (accessed 1.9.2022).

4 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, last amended by Directive (EU) 2018/851; latest consolidated version of 5.7.2018 available at <http://data.europa.eu/eli/dir/2008/98/2018-07-05> (accessed 1.9.2022).

5 This broader term was coined by the European Chemicals Agency (ECHA), even though the requirements are strictly limited to “substances of very high concern” included in the REACH Candidate List; see <https://echa.europa.eu/scip>.

of the legislative procedure will be summarized (Section V.), followed by conclusions and an outlook (below VI.).

II. EU Policy Context

The European Green Deal of 11 December 2019⁶, with its key ambitions to make Europe the first climate-neutral continent by 2050 and accelerate the transition to a circular economy model, is described by the Commission as the “bed-rock”⁷ of the ESPR initiative. Together with the Circular Economy Action Plan (CEAP) comprising the Sustainable Products Initiative (SPI)⁸ and the European Industrial Strategy⁹, both announced in the European Green Deal and published together in March 2020, they form the core rationale for the ESPR proposal, as evident from its recitals (1) to (3).

The CEAP for its part recalls that up to 80 % of products’ environmental impacts are determined at the design phase; it further concludes that *“there is currently no comprehensive set of requirements to ensure that all products placed on the EU market become increasingly sustainable and stand the test of circularity”*.¹⁰

In addition, the European Commission’s Chemicals Strategy for Sustainability (CSS)¹¹ – also announced in the European Green Deal – is cited in the ESPR proposal (recital (25)), as it

*“calls for minimising the presence of substances of concern in products and ensuring the availability of information on chemical content and safe use, by introducing information requirements and tracking the presence of substances of concern throughout the life cycle of materials and products.”*¹²

Against this backdrop, and with view to some already diverging national approaches to improving the environmental

sustainability of products,¹³ the Commission considers that *“there is a need for a regulatory framework to progressively introduce ecodesign requirements for products”*. Building on the ecodesign approach initially set out in Directive 2009/125/EC, the ESPR should provide such an EU-harmonised framework, to be *“applicable to the broadest possible range of products”*.¹⁴

The ESPR proposal is part of a broader package of Commission initiatives under the European Green Deal and the CEAP published together on 30 March 2022 – incl. sector-specific measures for textiles and construction products – which aim to *“make sustainable products the norm and boost Europe’s resource independence”*.¹⁵

III. Overview of the Proposal

The ESPR proposal is a comprehensive document of 122 pages, including an explanatory memorandum, the proposed regulation text (close to 80 pages) and the legislative financial statement. 105 recitals prior to the core legal text with 71 articles show that the Commission has made a substantial effort to justify the rationale for the new provisions.¹⁶ Eight annexes complement the core legal text, including a final correlation table with Directive 2009/125/EC (Annex VIII).¹⁷ The overall comprehension of the proposal is complex, as the different elements have to be read altogether, with frequent cross-references to other articles and annexes while the recitals are not always reflected in those.

1. Subject Matter and Scope

Art. 1 of the ESPR proposal¹⁸ titled ‘Subject matter and scope’ sets out in a nutshell in its para. 1 what the draft ES-

6 European Commission, The European Green Deal, COM(2019) 640 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN> (accessed 1.9.2022).

7 European Commission, footnote 1, p. 3.

8 European Commission, A new Circular Economy Action Plan for a cleaner and more competitive Europe, COM(2020) 98 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A98%3AFIN> (accessed 1.9.2022).

9 European Commission, A new industrial strategy for Europe, COM(2020) 102 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0102> (accessed 1.9.2022).

10 European Commission, footnote 8, under 2. A Sustainable Product Policy Framework.

11 European Commission, Chemicals Strategy for Sustainability towards a toxic-free environment, COM(2020) 667 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A667%3AFIN> (accessed 1.9.2022).

12 European Commission, footnote 1, p. 24.

13 Examples according to the European Commission: Information requirements on the duration of software compatibility of electronic devices; reporting obligations on handling unsold durable goods.

14 European Commission, footnote 1, p. 17, recital (4).

15 European Commission, Green Deal: New proposals to make sustainable products the norm and boost Europe’s resource independence, 30 March 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2013 (accessed 1.9.2022).

16 By comparison, the Ecodesign Directive to be repealed by ESPR has just 44 recitals and 26 articles.

17 European Commission, Annexes 1 to 8, COM(2022) 142 final, available at https://environment.ec.europa.eu/document/download/37bb0b5d-4fd0-43f9-a9d0-e420bcb304a5_en?filename=COM_2022_142_1_EN_annexe_proposition_part1_v4.pdf (accessed 1.9.2022).

18 “Articles” quoted in this contribution are those of the Commission’s ESPR proposal (COM(2022) 142 final, 2022/0095 COD, footnote 1), unless mentioned otherwise.

PR is all about and how the system is basically to function. Accordingly, the Regulation

“establishes a framework to improve the environmental sustainability of products and to ensure free movement in the internal market by setting ecodesign requirements that products shall fulfil to be placed on the market or put into service. Those ecodesign requirements [...] shall be further elaborated by the Commission in delegated acts [...]”

This framework architecture corresponds to the current approach under Directive 2009/125/EC. It means that any ecodesign requirements are not applicable to any products by virtue of the ESPR (once in force), but only subject to Commission delegated acts adopted based on Art. 4 (see below Section III.5.).

New is the choice of the instrument, i.e. a regulation instead of directive. This trend, proven successful with other large-scope pieces of EU legislation such as REACH and CLP¹⁹, eliminates the transposition duty for Member States, provides a better level playing field and legal certainty for businesses operating on the internal market based on EU-harmonised requirements.²⁰

Art. 1(1) points (a) to (i) list the nine ‘product aspects’ to be improved by such ecodesign requirements;²¹ they are

further broken down into 14 categories in Art. 5(1) points (a) to (n), as presented in Table 1 below.

Table 1: Product aspects for ecodesign requirements

| |
|---|
| Durability |
| Reliability |
| Reusability |
| Upgradability |
| Reparability |
| Possibility of maintenance and refurbishment |
| Presence of substances of concern |
| Energy use or energy efficiency |
| Resource use or resource efficiency |
| Recycled content |
| Possibility of remanufacturing and recycling |
| Possibility of recovery of materials |
| Environmental impacts, including carbon and environmental footprint |
| Expected generation of waste materials |

19 Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006; latest consolidated version available at http://publications.europa.eu/resource/cellar/e3f31046-b274-11eb-8aca-01aa75ed71a1.0013.02/DOC_1 (accessed 1.9.2022).

20 See also *European Commission*, footnote 1, p. 6.

21 See also Art. 5(1).

22 *Social* aspects are not covered in the ESPR proposal, due to the proposed Directive on Corporate Sustainability Due Diligence (COM(2022) 71 final). In its opinion of 14.7.2022 the European Economic and Social Committee criticised this (point 1.8), see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_11495_2022_INIT&from=EN (accessed 1.9.2022). The absence of *economic* sustainability considerations was also criticised, see *Verband der Chemischen Industrie (VCI)* feedback on the ESPR proposal, p. 2, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative/F3316865_en (accessed 1.9.2022). However, see also Art. 5(5) in this respect.

23 See Section III.3. below for further details.

24 The latter two aspects are not further discussed in this contribution. More details can be found in Art. 58 ‘Green public procurement’ and Chapter VI (Art. 20) ‘Destruction of unsold consumer products’.

25 According to Art. 2(2) 2nd sentence the ESPR shall not apply to food and feed (covered by Regulation (EC) No 178/2002); medicinal products for human use (covered by Directive 2001/83/EC); veterinary medicinal products (covered by Regulation (EU) 2019/6); living plants, animals and micro-organisms; products of human origin; and products of plants and animals relating directly to their future reproduction.

26 *“Product’ means any physical good that is placed on the market or put into service”.*

Many of those product aspects or elements (such as durability, reliability, maintenance) are proposed to be legally defined in Art. 2; for some others (waste, re-use, recovery, recycling) reference is made to the WFD. Altogether, they represent a major extension to “encompass all aspects of circularity” (recital (103)) as compared to Directive 2009/125/EC which is focused on increasing energy efficiency.²² They can also be seen as a kind of “proxy” describing the elements of “environmental sustainability”, which is – somewhat surprisingly – not defined in the proposal.

Art. 1(1) 2nd subpar. continues by setting out that the ESPR also establishes a (digital) product passport²³, provides for the setting of mandatory green public procurement criteria and creates a framework to prevent unsold consumer products from being destroyed.²⁴

With regard to its scope, Art. 1(2) 1st sentence states that the ESPR shall apply to “any physical good that is placed on the market or put into service, including components and intermediate products.” Only very few exclusions from the scope are foreseen.²⁵

Accordingly, the definition of ‘product’ in Art. 2(1)²⁶ is conceivably wide, being identical with the ESPR general scope set out above. With regard to the objects subject to the EU REACH Regulation, the ESPR proposal hence in-

cludes not only articles and assemblies thereof (complex objects), but also substances and mixtures.²⁷ On the other hand, unlike in REACH and CLP but consistent with Directive 2009/125/EC, the proposed definition for ‘placing on the market’ (Art. 2(40)) is restricted to the *first* making available of a product on the Union market.²⁸

2. Ecodesign Requirements

Ecodesign requirements are at the core of the ESPR proposal. They are included in Chapter II (Art. 4–7) of the ESPR proposal. ‘Ecodesign’ is proposed to be legally defined as “the integration of environmental sustainability considerations into the characteristics of a product and the processes taking place throughout the product’s value chain” (Art. 2(6)). ‘Ecodesign requirements’ comprise two types of requirements aimed at making a product more environmentally sustainable: Performance requirements and/or information requirements (Art. 2(7)).

a. Product-specific Approach

Ecodesign requirements always require the adoption of a Commission delegated act including the elements listed in Annex VI to the ESPR proposal and its Art. 4. Importantly, eco-design requirements shall be established for a specific product group, to be defined in the delegated act (Art. 5(2) 1st subpar., Annex VI(1)). This corresponds to the product-specific approach already applied under Directive 2009/125/EC.

However, a ‘horizontal eco-design requirement’ covering two or more product groups displaying technical similarities may also be established (Art. 5(2) 2nd subpar.). The ESPR proposal (recital (13)) mentions electronic appliances and textiles as examples.

Art. 5 of the ESPR proposal contains a number of further conditions and criteria to be observed by the Commission when establishing eco-design requirements. To name a few: Due consideration shall be given for all stages of the product life cycle (Art. 5(1)). Relevant Union priorities and legislation shall be taken into account (Art. 5(4) point (a)) and dedicated impact assessments be carried out (Art. 5(4) point (b)). Art. 5(5) lists several ‘negative’ criteria for eco-design requirements, which may appear quite obvious but are useful reminders (e.g. there shall be no adverse effect on the health and safety of persons).

b. Product Parameters

Annex I to the ESPR proposal sets out the (17) ‘product parameters’ that may, as appropriate, be used as a basis for improving the different product aspects (see Table 1) via the setting of eco-design requirements.²⁹ For example, the durability and reliability of a product may be expressed through

the product’s guaranteed lifetime or technical lifetime, among others (Annex I point (a)); the ease and quality of recycling may be expressed through the use of easily recyclable materials or the safe, easy and non-destructive access to recyclable components and materials, among others (Annex I point (d)).

c. Performance Requirements

‘Performance requirement’ is proposed to be defined in Art. 2(8) as “a quantitative or non-quantitative requirement for or in relation to a product to achieve a certain performance level in relation to a product parameter referred to in Annex I”. According to the ESPR proposal performance requirements will be used to ensure the removal of the worst performing products from the market (recital (20)).

Art. 6 of the ESPR proposal provides some basic provisions on performance requirements. Notably, quantitative requirements can take the form of minimum and/or maximum levels (Art. 6(2) point (a)), such as a limit on the energy consumption in the use phase, quantities of a given material incorporated in the product or minimum quantities of recycled content (recital (20)).

Performance requirements shall be established following the procedure in Annex II, which requires a ‘technical, environmental and economic analysis’.

d. Information Requirements

‘Information requirement’ is proposed to be defined in Art. 2(9) as “an obligation for a product to be accompanied by information as specified in Article 7(2)”. Art. 7(2) distinguishes two types of information requirements, i.e. “minimum” requirements and “appropriate” requirements. Minimum requirements (point (a)) include the requirements related to the (digital) product passport and requirements related to substances of concern (reference to Art. 7(5)). “Appropriate” requirements (point (b), points (i)–(iv)) are other types of information that may be set out by the Commission in a delegated act; they may include for example the performance of a product³⁰ and how to handle it, including at end-of-life. Information requirements should relate to a selected product parameter relevant to the product aspect, such as the product’s environmental footprint or its durability (recital (23) of the ESPR proposal).

27 See REACH Art. 3(1) to (3).

28 Similarly, the proposed definition of ‘putting into service’ (Art. 2(41)) is restricted to a product’s *first* use, for its intended purpose, in the Union.

29 Conversely, the delegated act may also specify the product parameters for which *no* eco-design requirement is necessary (Art. 4(1) 1st subpar., 3rd sentence; Annex VI(3)).

30 Including, as appropriate, ‘classes of performance’ (Art. 7(4)).

Additional provisions are proposed to ensure that the information is made available in an appropriate manner (e.g. free access website, product passport, label) and language which can be easily understood by consumers and other end-users (Art. 7(6) and (7)).

e. Self-regulation Measures

Art. 18 of the ESPR proposal sets out the possibility for industry to submit a self-regulation measure³¹ establishing codesign requirements for products as an alternative to a delegated act. Such self-regulation measure is subject to strict criteria, transparency requirements and formal recognition by the Commission, as further detailed in Art. 18 and Annex VII.

Notably, it requires that *“the market share in terms of volume of the signatories to the self-regulation measure in relation to the products covered by that measure is at least 80 % of units placed on the market or put into service”* (Art. 18(3), point (b)). This clause raises questions regarding the proper reference for the calculation of the market share. Besides, the high threshold of 80 % may not be achievable for many products, especially where the market is very fragmented.³²

Such self-regulation measures are already possible under Art. 17 of Directive 2009/125/EC, but have only been used and recognised in a limited number of cases (for complex set-top boxes, imaging equipment and game consoles). It remains to be seen, whether their relevance will increase under the ESPR; however, this is considered a possible scenario given the wide scope of the proposed Regulation and inclusion of very complex objects requiring highly sophisticated knowledge and expertise. Industry associations are expected to have an important role to play here.

3. EU Digital Product Passport

The (digital) product passport is a central novelty in the ESPR proposal. As a market access requirement for each regulated product (Art. 8(1)) it is attracting a lot of interest of authorities, NGOs and industry. However, the latter also have several concerns, notably regarding costs, complexities and confidentiality.

‘Product passport’ is proposed to be defined as

“a set of data specific to a product that includes the information specified in the applicable delegated act adopted pursuant to Article 4 and that is accessible via elec-

tronic means through a data carrier in accordance with Chapter III” (Art. 2(29)).

It is thus an electronic tool to facilitate access to sustainability-related information for a product along the value chain, in particular for consumers, economic operators and authorities; facilitate the verification of product compliance; and improve traceability of products (Art. 8(3)).

Chapter III (Art. 8–13) and Annex III contain more detailed provisions on the EU DPP.

a. Contents

Annex III to the ESPR proposal lists the information that shall or may be included in the EU DPP, as set out in the delegated act. It is reflected in summary form in Table 2 below.

Table 2: Possible contents of the digital product passport

| |
|---|
| Information required under ESPR Art. 7(2) and 8(2) or by other applicable Union law |
| Unique product identifier at the level indicated in the delegated act |
| Global Trade Identification Number |
| Relevant commodity codes, such as a TARIC code |
| Compliance documentation and information required under ESPR or other applicable Union law |
| User manuals, instructions, warnings or safety information, as required by other Union legislation |
| Information related to the manufacturer, such as its unique operator identifier, information in Art. 21(7) |
| Unique operator identifiers (non-manufacturer) |
| Unique facility identifiers |
| Information related to the importer, including information in Art. 23(3) and EORI number |
| Name, contact details and unique operator identifier code of the economic operator established in the Union responsible for carrying out the tasks set out in Art. 4 of Regulation (EU) 2019/1020, or Art. 15 of Regulation (EU) [...] on general product safety, or similar tasks pursuant to other EU legislation |
| Additional information relevant to codesign requirements, including on specific voluntary labels (e.g. EU Ecolabel) |

Importantly, the information included in the EU DPP shall refer to the product model, batch, or item level, as specified in the delegated act (Art. 9(1) point (e), Art. 8(2) point (d), Annex III point (b)). The applicable level would depend for example on the complexity of the value chain, the size, nature or impacts of the products considered (recital (27)).

31 Draft definition in Art. 2(38): ‘Self-regulation measure’ means a voluntary agreement or codes of conduct, concluded by industry sectors on their own initiative, which they are responsible for enforcing.

32 In this sense also *Federation of German Industries (BDI)*, Position on the ESPR proposal, 22.6.2022, p. 4, available at <https://bdi.eu/artikel/news/ecodesign-for-sustainable-product-regulation> (accessed 1.9.2022).

b. Data Carrier

To allow digitalised access to its contents, a product passport requires the use of a 'data carrier', i.e. an automatic identification data capture medium that can be read by a device (Art. 2(30)). The requirements related to the EU DPP in a delegated act should specify the permitted types (e.g. bar code to be scanned), layout and positioning of the data carrier, which shall be physically present on the product, its packaging or on documentation accompanying the product.³³

c. Unique Product Identifier

According to recital (30) of the ESPR proposal unique identification of products is a fundamental element to enable traceability across the supply chain. Therefore, the product passport should be linked to a unique *product* identifier.³⁴ To this end the data carrier shall enable connection to the identifier (Art. 9(1) point (a)).

In addition, 'unique *operator* identifiers' and 'unique *facility* identifiers' may be required to allow for the tracing of the actors and manufacturing facilities related to a product (recital (30), Art. 11).

d. Access Rights and Registry

The ESPR proposal contains provisions allowing differentiated access to the information included in the product passport depending on the type of information and the typology of stakeholders (recital (27)). Accordingly, delegated acts should specify the manner in which the product passport shall be made accessible to customers before they are bound by a sales contract (Art. 8(2) point (e)), the actors that shall have access to information in the product passport and to what information they shall have access (Art. 8(2) point (f)). The access to information included in the product passport shall be regulated in accordance with the 'essential requirements' set out in Art. 10 for the passport's technical design and operation (Art. 9(1) point (f)); this includes according to point (b) that consumers, economic operators and other relevant actors shall have *free* access to the product passport based on their respective access rights.

The European Commission shall set up and maintain a product passport registry storing information included in the product passports (Art. 12). Such registry shall at least include a list of the data carriers and unique product identifiers. The registry shall be accessible to the Commission, competent national authorities and customs authorities for carrying out their duties pursuant to Union legislation.³⁵

e. Relationship with REACH Art. 33 and SCIP

The proposed core legal text (Article part) does not describe how the product passport should relate to non-digital forms

of transmitting information (e.g. product manual, label). However, recital (26) clarifies that the passport should not replace but complement those. This also means, that reporting obligations such as under REACH Art. 33 in the supply chain and pursuant to WFD/SCIP to ECHA continue to co-exist, at least initially, side by side with the possible third related requirement to have an EU DPP.

However, based on recital (26), "*it should be possible for the product passport to be used for information on other sustainability aspects applicable to the relevant product group pursuant to other Union legislation*". This raises the question whether for example a REACH Art. 33 declaration could be part of such passport in the future; a clarification in the respective delegated act would be useful.

With regard to the ECHA SCIP database³⁶ it is an open question today, whether and how it would interact with the EU DPP. The ESPR proposal (p. 106) notes that the preparation of the digital product passport may require IT developments for the SCIP database. This is somewhat surprising because "*the data included in the product passport shall be stored [by] the economic operator responsible for its creation [...]*" (Art. 10, point (c)) and the product passport registry will be with the Commission, whereas the SCIP database is established and maintained by ECHA (WFD Art. 9(2)). Nonetheless, some industry stakeholders ask that synergies with the SCIP database be explored for the EU DPP, either by relying on the SCIP database for the passport,³⁷ harmonising the reporting into the different tools³⁸ or a future exemption from SCIP notification with regard to the passport.³⁹

In its ESPR impact assessment, the Commission has also recognised the risk of possible overlap of the existing REACH Art. 33, SCIP and new EU DPP requirements in relation to reporting on substances of (very high) concern in articles; (three) different paths of integration with the SCIP

33 See Art. 8(2) point (b) and (c) and Art. 9(1) point (b).

34 Art. 2(31) defines 'unique product identifier' as a unique string of characters for the identification of products that also enables a web link to the product passport.

35 See also Art. 13 on customs controls relating to the product passport.

36 ECHA, SCIP database, available at <https://echa.europa.eu/scip-database> (accessed 1.9.2022).

37 See e.g. APPLiA - Home Appliance Europe, Recommendations on the ESPR Proposal, 9.6.2022, p. 6, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative/F3298030_en (accessed 1.9.2022).

38 AeroSpace and Defence Industries Association of Europe (ASD), Comments on ESPR proposal, p. 3, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative/F3316273_en (accessed 1.9.2022).

39 In this sense see e.g. Deutscher Industrie- und Handelskammertag (DIHK), Position of 21.6.2022, p. 6 (point 9), available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative/F3316445_en (accessed 1.9.2022).

database are discussed.⁴⁰ It therefore openly considers a progressive phase-out of the existing duties:

“For reasons of legislative efficiency and to remove administrative burden, it will be envisaged to progressively lift the REACH and WFD obligations for products that are SPI-compliant and accompanied by a digital product passport. This decision would be taken only when the implementation of the European digital product passport has shown to be equally or even more effective in meeting the current REACH Art 33 and WFD Art 9 objectives.”⁴¹

Seen in this light, the EU DPP appears like the third attempt to make reporting on substances of concern in products finally workable and fit for purpose for different products; this ambition will remain very challenging to achieve.

4. Commission Working Plan

For the purpose of planning which products will be prioritised to be covered by ecodesign requirements, including the EU DPP, the Commission shall adopt and regularly update a working plan, covering a period of at least three years. A similar approach is already applied under Directive 2009/125/EC; the Commission has published its latest working plan under the Ecodesign Directive running from 2022 until 2024 together with the ESPR proposal.⁴² For the ESPR, the prioritisation shall take into account the criteria set out in Art. 16(1); these include for example the potential contribution to achieving Union climate, environmental and energy efficiency objectives, the potential for improving the product aspects listed in Art. 5(1) (see Table 1 above), and

40 *European Commission*, Commission Staff Working Document – Impact Assessment Part 4, SWD(2022) 82 final, Annex 9, p. 257 = PDF p. 21, available at https://environment.ec.europa.eu/document/download/09e359a3-a63f-4f9f-9808-f0df995ecc33_en?filename=SWD_2022_82_1_EN_impact_assessment_part4_v2.pdf (accessed 1.9.2022).

41 *European Commission*, footnote 40, Annex 14, p. 543 et seqq. (546) = PDF p. 307 et seqq. (310).

42 *European Commission*, Ecodesign and Energy Labelling Working Plan 2022–2024, 30 March 2022, available at https://energy.ec.europa.eu/ecodesign-and-energy-labelling-working-plan-2022-2024_en (accessed 1.9.2022).

43 Currently, this role is assumed by the ‘Consultation Forum’ (Art. 18 of Directive 2009/125/EC).

44 See *European Commission*, On making sustainable products the norm, COM(2022) 140 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0140&qid=1649112555090> (accessed 1.9.2022).

45 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29> (accessed 1.9.2022).

46 *European Commission*, footnote 1, p. 12.

the volume of sales and trade of the product within the Union. In addition, the Commission shall consult the ‘Ecodesign Forum’ to be established by the Commission, an expert group of Member States’ representatives and all interested parties involved with the product or product group in question (Art. 17).⁴³

Based on a preliminary assessment by the Commission the following product categories are considered for the first ESPR working plan, given their high environmental impact and potential for improvement: Textiles, furniture, mattresses, tyres, detergents, paints, lubricants, iron, steel and aluminium.⁴⁴ Hence, the candidates range from consumer products to raw materials and mixtures used by professionals and in industry.

5. Delegated Acts

Commission delegated acts are required to establish ecodesign requirements, including the EU DPP (Art. 4). Art. 66 describes how the Commission should exercise this important delegation. The power to adopt delegated acts is initially given for a period of six years, after which it may be tacitly extended (par. 2). Before adopting a delegated act, the Commission shall consult experts designated by each Member State acting in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making⁴⁵ (par. 4). A delegated act shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council, with a possible extension by further two months (par. 6).

The Committee procedure in Art. 67 would only apply to implementing acts, such as an implementing act containing a list of self-regulation measures established as valid alternatives to a delegated act adopted pursuant to Art. 4 (Art. 18(3), 2nd subpar.).

6. Obligations of Economic Operators

Chapter VII (Art. 21–31) of the ESPR proposal addresses the respective compliance obligations of economic operators, where there is a delegated act. They are based on standard provisions from Decision 768/2008/EC⁴⁶ and adapted to their respective roles in the supply chain (recital (49)).

a. Manufacturer

‘Manufacturer’ is defined in Art. 2(42) as

“any natural or legal person who manufactures a product or who has such a product designed or manufactured, and markets that product under its name or trademark or, in the absence of such person or an importer, any natural or

legal person who places on the market or puts into service a product”.

This wide definition is comparable with that under Art. 2(6) of Directive 2009/125/EC, but different from the narrow manufacturer definition in the REACH Regulation, which refers to production or extraction activities (of substances) within the EU by an EU-based legal entity.⁴⁷ Art. 2(42) of the ESPR proposal does not require that the manufacturer is established in the EU.

Additionally, Art. 28 specifies cases in which obligations of manufacturers apply even to importers and distributors.

Art. 21 sets out the obligations of manufacturers of products covered by a delegated act. They shall ensure that (par. 1) the products have been designed and manufactured in accordance with applicable performance requirements (Art. 6), are compliant with any specified information requirements (Art. 7) and a product passport is available (Art. 8). To this end (par. 2) – before placing on the market – manufacturers shall carry out the conformity assessment procedure specified in the delegated acts and draw up the required technical documentation (or have it carried out on their behalf). Where compliance of a product with the applicable requirements has been demonstrated by that procedure, manufacturers shall draw up an EU declaration of conformity and affix conformity marking (normally according to Art. 37 and Art. 39, respectively). Par. 3–9 of Art. 21 contain additional obligations on record keeping, re-assessments, information to be indicated on or accompanying the product, corrective measures and information to and cooperation with authorities.

b. Authorised Representative

‘Authorised representative’ is defined in Art. 2(43) as

“any natural or legal person established in the Union who has received a written mandate from the manufacturer to act on its behalf in relation to specified tasks with regard to the manufacturer’s obligations under this Regulation”.

The authorised representative is already foreseen in Art. 2 point 7 of Directive 2009/125/EC, where it can be mandated to perform all or part of the obligations and formalities connected with the Directive. The ESPR proposal (Art. 22) is more restrictive in that the obligations in Art. 21(1) (i.e. ensure compliance with ecodesign requirements and availability of the EU DPP) and the drawing up of technical documentation *cannot* form part of the authorised representative’s mandate. On the other hand, Art. 22(2) specifies the minimum tasks of an authorised representative, including some record keeping, cooperation with and information provision to competent national authorities. Thus, the main role of the authorised representative is to act as an EU counterpart for national authorities and the Commission with regard to the provision of relevant information.

c. Importer

Importers⁴⁸ have somewhat similar obligations in Art. 23 to those of manufacturers, but adapted to their specific role. Notably, conformity assessment and the drawing up of the technical documentation remains with the manufacturer (see also recital (50)), while the importer shall ensure that these have been done by the manufacturer.

d. Other Operators and Obligations

Obligations are further adapted for distributors⁴⁹, by setting out special requirements to act with due care, verify the availability of conformity marking and other required information (Art. 24). Art. 25–31 contain further obligations of specific actors (e.g. dealers, fulfilment service providers) and on specific aspects (e.g. labels, monitoring and reporting).

IV. Substances of Concern (SoC)

The ESPR proposal introduces a new category of substances to be regulated in products, the so-called “substances of concern”. The presence of substances of concern in products forms a key proposed part of the product aspects for the setting of ecodesign requirements.⁵⁰ Provisions on such substances of concern – but apparently also on other substances (see below under 2.) – are spread throughout the ESPR proposal and its annexes. They are presented in this section, including their interface with other EU legislation governing chemicals, such as REACH, CLP and WFD/SCIP.⁵¹

1. Definition

‘Substances of concern’ are defined in Art. 2(28) of the ESPR proposal. This term comprises not only certain substances hazardous to human health or the environment, but

47 REACH Art. 3 points 9 and 8. As an example, the REACH definition of ‘manufacturer’ includes an EU toll manufacturer, but excludes its principal, i.e. the company procuring the tolling service. For more information see ECHA, Toll manufacturer under the REACH Regulation, Factsheet ECHA-13-GF-06-EN; available at https://echa.europa.eu/documents/10162/17226/factsheet_toll_manufacturer_en.pdf (accessed 1.9.2022).

48 Art. 2(44) defines ‘importer’ as any natural or legal person established in the Union who places a product from a third country on the Union market.

49 Art. 2(45) defines ‘distributor’ as any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market.

50 See Art. 1(1) point (d) and Art. 5(1) point (g).

51 See already above Section III.3.e. The information requirements for substances of concern are to be combined with the EU DPP, as both are “minimum requirements” according to Art. 7(2) point (a) of the ESPR proposal.

also those considered as detrimental to the circular use of materials. Table 3 below provides an overview of the substances, as defined in Art. 2(28).

Table 3: Substances of concern (ESPR proposal Art. 2(28))

| |
|---|
| (a) substance of very high concern included in the REACH Candidate List |
| (b) substance with the following harmonized classification in CLP Annex VI (Part 3): |
| – carcinogenicity categories (cat.) 1 and 2 |
| – germ cell mutagenicity cat. 1 and 2 |
| – reproductive toxicity cat. 1 and 2 |
| – [Persistent, Bioaccumulative, Toxic (PBTs)]* |
| – [very Persistent very Bioaccumulative (vPvBs)]* |
| – [Persistent, Mobile and Toxic (PMT)]* |
| – [very Persistent very Mobile (vPvM)]* |
| – [endocrine disruption]* |
| – respiratory sensitisation cat. 1 |
| – skin sensitisation cat. 1 |
| – chronic hazard to the aquatic environment cat. 1 to 4 |
| – hazardous to the ozone layer |
| – specific target organ toxicity – repeated exposure cat. 1 and 2 |
| – specific target organ toxicity – single exposure cat. 1 and 2 |
| *to be added in the course of the legislative procedure once Regulation (EC) No 1272/2008 contains these hazard classes |

52 ECHA, Candidate List of substances of very high concern for Authorisation, available at <https://echa.europa.eu/candidate-list-table> (accessed 1.9.2022). As of 10.6.2022 the Candidate List had 224 entries. These correspond to 460 reference substances for WFD/SCIP notifications; see <https://echa.europa.eu/candidate-list-package> (accessed 1.9.2022).

53 Currently twice per year, in June/July and December/January.

54 ‘Substance’ is separately defined in Art. 2(27), using the REACH definition.

55 See the introductory sentence in Annex I.

56 Cefic therefore advocates that ESPR should only allow for restriction of substances that remain in the end product; see Cefic, Response to Public Consultation, June 2022, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative/F3316680_en (accessed 1.9.2022).

57 Following the general principle of law, *lex specialis derogat legi generali* (more specific rules will prevail over more general rules); see *European Commission*, footnote 1, p. 2 and 23 (recital (22) on chemical safety).

(c) substance that negatively affects the re-use and recycling of materials in the product in which it is present

Hence, the SoC definition is very wide, for example if compared to the REACH Regulation (Art. 7(2) and 33) and WFD/SCIP where reporting obligations for the presence in articles are only triggered for substances included in the REACH Candidate List⁵².

The notion of substances of concern as such is also dynamic with regard to REACH and CLP. New substances will be covered under the term as the Candidate List is updated⁵³ or new harmonised CLP classifications for the hazard classes or hazard categories mentioned in Art. 2(28) point (b) are adopted.

2. SoC in Performance Requirements

As already mentioned in Section III.2.c. and set out in Art. 6(2), performance requirements under the ESPR shall be based on the product parameters referred to in Annex I.

Annex I does not explicitly mention “substances of concern”, but makes reference more broadly to “hazardous substances” or “substances”⁵⁴: Annex I point (f) contains a dedicated product parameter “*use of substances, on their own, as constituents of substances or in mixtures, during the production process of products, or leading to their presence in products, including once these products become waste*”. Furthermore, Annex I point (d) on ‘ease and quality of recycling’ includes “[...] *safe, easy and non-destructive access to [...] components and materials containing hazardous substances, [...]*”.

This clear wording suggests that performance requirements may also address other substances than “substances of concern”, even though the product parameters are to “*be used as a basis for improving the product aspects referred to in Article 5(1)*”⁵⁵, which includes “*presence of substances of concern*” as one product aspect (Art. 5(1) point (g)) – among several others. Notably also, this restriction option is not limited to substances present in products, but also extends to their use “*during the production process of products*”⁵⁶.

The Commission proposal also includes provisions to address the interface with chemical safety requirements (such as the REACH Regulation) for the setting of performance requirements based on the aforementioned product parameter in Annex I, point (f): According to Art. 6(3) such performance requirements “*shall not restrict the presence of substances in products for reasons relating primarily to chemical safety*”. This reflects the general approach followed by the Commission, that the ESPR would set requirements only where existing legislation does not, or where it insufficiently addresses environmental sustainability aspects.⁵⁷

However, it has been criticised that it is not clear how to draw the line when interpreting “*reasons primarily relating*”

to *chemical safety*” and that there is no defined restriction procedure under the ESPR proposal.⁵⁸ This concern is also supported by the fact that Annex II (containing the procedure for defining performance requirements) requires chemical safety related considerations for performance requirements on substances on the basis of Annex I, point (f).⁵⁹ Practical examples of possible ESPR-based substance restrictions would be helpful to evaluate how the interplay with REACH could work in practice.

3. SoC in Information Requirements

Contrary to *performance* requirements, the scope of *information* requirements is focused more clearly on “substances of concern”. This is also reflected in recital (25) which concludes that

*“this Regulation should allow for the setting of requirements related to the tracking and communication of sustainability information, including the presence of substances of concern in products throughout their life cycle, including with a view to their decontamination and recovery when they become waste [...]”*⁶⁰

As already mentioned (see Section III.2.d. above), the requirements related to “substances of concern” referred to in Art. 7(5) form part of the “minimum” information requirements that regulated products shall normally comply with (Art. 7(2), point (a)). However, it is important to note that no such information requirements (including “minimum” requirements) would exist directly according to Art. 7(5); instead, they will always require a delegated act to become applicable to certain product groups.⁶¹

Art. 7(5) is the key provision on information requirements to be specified for substances of concern in regulated products, initially setting out the wide objective to “enable the tracking of all substances of concern throughout the life

cycle of products.” Accordingly, Art. 7(6), 3rd subpar. proposes that information ensuring the traceability of substances pursuant to para. 5 shall be given either on the product or be accessible through a data carrier included on the product.

Furthermore, the minimum information elements are listed in subpar. 1. as well as the possible scope and exemptions in subpar. 2–4 of Art. 7(5).

a. Minimum Information Elements

The following five information elements are at least required for substances of concern (Art. 7(5), subpar. 1):

- (a) name of the substance present in the product;
- (b) location within the product;
- (c) the concentration, maximum concentration or concentration range, at the level of the product, its main components, or spare parts;
- (d) relevant instructions for the safe use of the product;
- (e) information relevant for disassembly.

Importantly, these requirements will go beyond the existing reporting obligations for articles under REACH Art. 33 (duty to communicate information on substances in articles) and WFD/SCIP notification, which are limited to Candidate List substances. REACH Art. 33 only requires the declaration of “sufficient information, available to the supplier, to allow safe use of the article including, as a minimum, the name of that substance”, thus addressing points (a) and (d) above. Location information (point (b) above) shall also be given for complex objects, according to ECHA and the Commission.⁶² However, information on concentration and disassembly (points (c) and (e) above) is not legally mandatory under these provisions.⁶³ Hence, the ESPR information requirements for SoCs would allow the Commission to close perceived gaps, which cannot be requested under the existing REACH Art. 33 and WFD/SCIP requirements.⁶⁴

58 See e.g. *Cefic*, footnote 56.

59 See Annex II (1), 5th subpar.

60 *European Commission*, footnote 1, p. 24–25. Recital (25) further states that users of substances and mixtures should also be informed about pertinent sustainability-related information “not primarily related to hazards to health or the environment”, whereas users of products other than substances and mixtures, and managers of waste from such products, should also receive sustainability-related information, “including information primarily related to chemicals’ hazards to health or the environment”. It is not obvious nor reflected in the Article part of the ESPR proposal why such a differentiation is made. In fact, REACH Art. 33 and WFD/SCIP already generate such hazard-related information, as do REACH safety data sheets and CLP labels for classified substances and mixtures. The only possible explanation is the objective stated in the ESPR impact assessment to eventually replace REACH Art. 33 and SCIP for articles by the EU DPP (see above Section III.3.e.).

61 So also, while not discarding the other interpretation: *Nusser/Friebel*, *Stoffrechtliche Informationspflichten nach dem Entwurf der neuen*

Ökodesign-Verordnung, REACH plus Online 7/2022, p. 7 et seqq. (8–9) (accessed 1.9.2022).

62 See *ECHA*, Requirements for SCIP notifications, October 2020, p. 10, 21, 36, 45; available at https://echa.europa.eu/documents/10162/6205986/information_requirements_for_scip_notifications_en.pdf (accessed 1.9.2022).

63 Information on the concentration range (incl. > 0.1% weight by weight (w/w) and ≤ 100 % w/w) is though “required” for submission to ECHA, while disassembling instructions are “optional”; see *ECHA*, footnote 62, p. 20 (Table 4), p. 27 (Table 6) and 29.

64 See *European Commission*, Non-paper on the implementation of articles 9(1)(i) and 9(2) of the revised Waste Framework Directive 2008/98/EC, ref. Ares(2019)3936110, 20.6.2019, available at <https://eurospace.org/wp-content/uploads/2019/09/annex-3-com-non-paper-wfd-20062019.pdf> (accessed 1.9.2022). Page 2 of the non-paper contains a list of elements comparable to Art. 7(5), subpar. 1 of the ESPR proposal of “the minimum available information which the supplier has to communicate to ECHA” for its SCIP database. However, not all of these elements were retained as legally mandatory in ECHA’s final requirements for SCIP notifications.

It is also notable that the concentration information may be required “at the level of the product, its main components, or spare parts”, while it principally relates to the (component) article “as such” defined in REACH Art. 3(3) for the purpose of REACH Art. 33 and WFD/SCIP reporting, following the landmark “once an article, always an article” judgment of the European Court of Justice from September 2015.⁶⁵ Hence, the required level to determine the concentration of a substance of concern may be different (higher) under ESPR (delegated act) than under these existing provisions.

b. Scope and Exemptions

In terms of scope and exemptions, a very flexible approach is allowed based on Art. 7(5), subpar. 2 and 3. This means that a substance of concern in one product (group) is not necessarily a substance of concern in another one.

For the purposes of defining the relevant substances of concern for a regulated product group, the Commission has to establish foremost which substances would negatively affect re-use and recycling and hence fall under the definition in Art. 2(28), point (c) (see Art. 7(5), 2nd subpar., point (a)). This is not a trivial question, given that related technologies (e.g. recycling methods) may evolve over time.⁶⁶

The other substances listed in Art. 2(28) (i.e. Candidate List substances under REACH and those with a certain harmonized CLP classification) are to be subject to the ESPR information requirements, unless the Commission provides exemptions in a delegated act (Art. 7(5), 2nd subpar., point

(c), 1st alt.). Such exemptions may be provided “based on the technical feasibility or relevance of tracking substances of concern, the need to protect confidential business information and in other duly justified cases” (3rd subpar.). However, such exemptions shall not be possible for Candidate List substances present in the relevant products, their main components or spare parts in a concentration above 0.1 % w/w (4th subpar.).⁶⁷

Further flexibility is given with regard to deadlines for the entry into application of the minimum information requirements (Art. 7(5), 2nd subpar., point (b)) and the possibility of providing exemptions for certain information elements only (Art. 7(5), 2nd subpar., point (c), 2nd alt.).

Somewhat contrary to the exemption mechanism in the ESPR proposal, the Commission’s ESPR impact assessment states that SoCs to be tracked for groups of products would “initially [be] limited to substances for which information requirements exist already (substances identified as SVHC under REACH), to be gradually increased if needed”.⁶⁸ Such an approach would make the exemption for CLP-hazardous substances according to Art. 2(28) point (b) initially the rule. This intention by the Commission to use caution before subjecting such a large group of substances to the ESPR information requirements deserves support, even more given the challenges already encountered today by industry when identifying Candidate List substances in products, especially complex ones, for the application of REACH Art. 33 and SCIP reporting duties.

V. Status of the Legislative Procedure

The Commission proposal has been forwarded to the Council and European Parliament as the co-legislators for the ordinary legislative procedure.⁶⁹ Within the European Parliament, the Committee on the Environment, Public Health and Food Safety is responsible; a “briefing” paper is already available, noting that the Commission proposal is in line with previous requests by Parliament to broaden the scope of the ecodesign legislation to cover all main product groups, and to introduce a digital product passport.⁷⁰ Within the Council, the policy debate has been launched; it raises the important question – already concerning the implementation of this framework regulation (once adopted) – what should be the role of the key players (i.e. EU institutions, Member States and stakeholders) and how the relevant competencies should be divided.⁷¹ The adoption and entry into force of the Regulation is expected in 2024 at the earliest.⁷² After adoption, the Commission will draw up an implementation strategy.⁷³

In its opinion of 14 July 2022⁷⁴ the European Economic and Social Committee has welcomed the ESPR proposal as an opportunity to create a new “Made in Europe” standard, but also notes that the draft Regulation is complex and still vague for the most part, because of the large number of del-

65 Judgment of the Court (Third Chamber) of 10.9.2015 – C-106/14, esp. par 84, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0106> (accessed 1.9.2022).

66 See *Cefic*, footnote 56.

67 Based on the current wording, this could still permit exemptions for Candidate List substances present above 0.1 % w/w in articles “as such” (as defined in REACH Art. 3(3)), but not above that threshold in the relevant higher-level products, main components or spare parts.

68 *European Commission*, footnote 40, Annex 14, p. 543 et seqq. (546) = PDF p. 307 et seqq. (310).

69 See status at https://eur-lex.europa.eu/procedure/EN/2022_95 and European Parliament procedural file at [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0095(COD)&l=en).

70 *European Parliament*, EPRS, Ecodesign for sustainable products, Briefing, EU Legislation in Progress, May 2022, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733524/EPRS_BRI\(2022\)733524_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733524/EPRS_BRI(2022)733524_EN.pdf) (accessed 1.9.2022).

71 *Council of the European Union*, Document ST_12197_2022_INIT, 9.9.2022, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST_12197_2022_INIT (accessed 12.9.2022).

72 The Commission estimates that the first delegated acts would be adopted in 2024; *European Commission*, footnote 1, p. 103.

73 *European Commission*, footnote 1, p. 10.

74 *European Economic and Social Committee*, Opinion, Sustainable products initiative, including Ecodesign Directive, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil%3AST_11495_2022_INIT (accessed 7.9.2022).

egated acts; such delegated acts should then be accompanied by a more detailed Commission action plan.

VI. Conclusions and Outlook

The Commission proposal for an Ecodesign for Sustainable Products Regulation is a very comprehensive, yet flexible and forward-looking, framework in response to the European Green Deal. Its product-specific approach to be underpinned by dedicated impact assessments and expert consultation via the Ecodesign Forum appears to be a proper way forward, considering the required specialised expertise and complexities involved.

Given this, as well as the wide scope and product aspects covered, the ESPR does have the potential to be a “game changer” for the design of more sustainable and circular products, at least in the longer term.

On the other hand, given its high ambitions and possible impact it is expected that the ESPR will create a lot of public debate in the months and years to come. The key decisions on the exact definition of product groups and eco-design requirements are deferred to the delegated act procedure during the implementation phase. And the digital product passport will still have to stand the test of reality. Also, it is not clear today, whether the planned Commission resources will be commensurate with the ambitions. In particular, 18 new delegated acts are planned between 2024 and 2027, and 12 more between 2028 and 2030, as well as implementing acts (on average one per year as from 2024) and horizontal tasks related to the digital product passport.⁷⁵

Furthermore, as shown, the possible regulation of substances, including substances of concern, via ESPR may range from information requirements to restrictions (the latter if not primarily related to chemical safety). This raises

questions on the proper interface with existing legislation such as REACH and may be an additional cause of obsolescence of materials and processes in the future.

Looking at the information requirements for substances of concern and the EU DPP, the ESPR may even render existing reporting obligations (such as REACH Art. 33 and WFD/SCIP) redundant, in favor of more tailored and digital solutions for the benefit of customers and waste treatment facilities. However, this is expected to take many years, would require legislative changes and may not be a complete replacement, because the existing obligations are in force and wide in scope, while the ESPR will be implemented by product group and may not always result in delegated acts (especially if there are self-regulation measures).

Already now, it could be worth for companies (or their associations) to be proactive by taking a look at the draft rules and evaluate how their substance reporting and eco-design requirements could be adapted in the future, including whether a self-regulation measure could be a valid alternative; this is a very complex and time-consuming exercise which cannot be started early enough.

Industries are advised to closely monitor the adoption of the legislation, possibly participate in the Commission’s working plan development and future implementation steps affecting their products. As a next step – even though the ESPR is still to be adopted – the Commission is already planning a public consultation on the categories of products to be selected under the first ESPR working plan before the end of 2022.

⁷⁵ The Commission considers that the proposal has “*limited budgetary implications for the Commission*”; see *European Commission*, footnote 1, p. 9 under 4. (somewhat contradictory on p. 98 at the end: call for strengthening of Commission and Member States resources).