

Position on the Ecodesign requirements for Sustainable Products Regulation (ESPR) by the Confederation of Swedish Enterprise

This document contains Swedish Enterprise's *initial* comments on the Sustainable Product Initiative and the Ecodesign requirements for sustainable products regulation (ESPR) presented on March 30 by the European Commission. Confederation of Swedish Enterprise is Sweden's largest business federation, representing 60 000 member companies in all sectors with almost 2 million employees. We bring together 49 industry and employer organisations, and this position has been produced in close cooperation with our members.

Our key messages

- The Confederation of Swedish Enterprise welcomes the proposed Regulation and sees this as an important step towards a more circular economy in Europe and an enabler to reach climate and other sustainability goals.
- Swedish Enterprise welcomes that the Commission's legislative proposal is in the form of a regulation, as this provides increased harmonisation in the EU single market which is a prerequisite for the development of the circular economy.
- The usage of Delegated Acts to produce product-specific legislation deviates from standard procedures used when developing regulations covering products, as well as from the current process used in the Ecodesign Directive. The process for setting the ecodesign requirements needs to be clarified further in the Regulation.
- Establishing circular economy policies demands the involvement of actors who represent the product's whole value chain and a wide representation of the business community in the Ecodesign forum therefore needs to be ensured. The process for setting up the forum and deciding its members needs to be clarified in the Regulation.
- The Regulation is interlinked with several other current or coming European legislation (for example Chemicals legislation) and it is crucial to avoid double regulation when setting the requirements in the ESPR. The interlinkage with other legislations in general needs to be clarified in the Regulation.
- The regulation includes numerous definitions and these needs will need to be aligned with applicable definitions in other European legislations and relevant EN and ISO standards.
- The process for selecting products, for drafting future product-specific legislation based on environmental performance, needs to be further clarified in the Regulation. It is important to use an LCA-based perspective to ensure priority based on total environmental benefit.
- The performance requirements set out in the upcoming product-specific legislation must promote and enable innovation and technological development, as well as safeguard

technological neutrality. Furthermore, it must be possible to comply with and verify, the requirements.

- The information requirements in the Digital Product Passport must be set on a need-to-know basis in relation to the purpose of the passport. The requirements also need to be closely intertwined with other initiatives under the EU's digital agenda and must safeguard knowledge-based assets. All this must be further clarified within the Regulation.
- The information requirements on Substances of concern (SoC) needs to be product-specific and they should be conducted in a systematic and stepwise manner, based on relevant and requested information. The Regulation needs to be complemented with information on the process for defining reporting requirements for SoCs.
- Swedish Enterprise is generally positive to the proposal for a ban on the destruction of unsold consumer goods. However, there is a need of clarifying and complementing the Regulation on this topic regarding reporting requirements and exemptions.
- Standardisation must continue to have a central role in both defining the methods and in demonstrating compliance with the upcoming product requirements. This is central in enabling further technical development and innovation. Thus, the European Commission should refrain from setting common specifications.
- Swedish Enterprise supports the proposed efforts to increase and coordinate market surveillance throughout the European Union.
- Swedish Enterprise sees that the Regulation and the coming product specific legislation, could prove challenging for SME's and stresses the need to support them. The Confederation sees it as positive that the Regulation suggestions for how Member States and the Commission can support SMEs.

In general

Swedish Enterprise welcomes the European Commission's work on the Sustainable Product Initiative and sees the Ecodesign requirements for sustainable products regulation (ESPR) as a key step towards a more circular economy in Europe. As a more circular economy – where materials and products are managed more resource-efficiently – is a core aspect of achieving the climate goals, the Regulation is also an important contribution to the work of achieving these goals.

Swedish Enterprise welcomes that the Commission's legislative proposal is in the form of a regulation, as this provides increased harmonisation in the EU single market. The efficient functioning of the single market is vital to business and the development of the circular economy. It is therefore important that product requirements are set at EU level and that specific national rules are avoided. Swedish Enterprise is in general positive to the Regulation, but also sees a number of challenges that needs to be addressed in the legislation and future product regulations. It is crucial that the Regulation strengthens the competitiveness of European business.

It is currently difficult to overview what the legislation will mean in practice, as many details are to be specified in future product-specific regulations. It is therefore difficult in several respects to take a position on the Regulation as a whole.

In the Regulation, the Commission proposes that future product-specific requirements be developed through delegated acts where an Ecodesign forum, that would involve representatives from, inter alia, the business community, will contribute. The use of delegated acts to set product-specific requirements deviates from the standard procedure that is usually applied for the drafting of product-specific legislation and the existing process in the Ecodesign Directive. Swedish Enterprise sees it as absolutely crucial that the process in the current legislation, for the production of product-specific acts, is inclusive, transparent and that this is clearly stated in the Regulation.

Swedish Enterprise would like to emphasize the importance of applying the Commission's Better Regulation Principles in setting ecodesign requirements and in producing impact assessments for product-specific requirements. It must also be possible to verify, follow up and set future ecodesign requirements in such a way that they maintain technological neutrality and not limit or counteract innovation. If this is not addressed, Swedish Enterprise sees a risk that the Regulation may result in the opposite effect to that intended.

The primary focus of the regulatory framework is on original manufacturers and on new production of materials and products. In many respects, there are no wordings on how existing products on the market, which are repaired, remanufactured or upgraded and then reintroduced to the market, are affected by the regulations, including how economic actors who perform these services are covered by future performance and information requirements. It is vital that this is clarified in the Regulation.

The Regulation includes the term *nature of the product*. It is unclear what is meant by this term and instead one should use terms such as *function of a product* linked to a product's scope and/or area of use. Innovation often leads to new types of products and services, which changes the prerequisites for product-specific legislation. An example is the mobile phone which today has replaced functions that other products previously provided. It is important that the ESPR and future product-specific regulations promote and enables innovation and technological development and safeguard technological neutrality.

In the Regulation, the Commission states that product-specific legislation will be produced for specific product groups. How the Commission intends to divide products into product groups and which products are considered to be similar, (in terms of purpose, use, function etc., from a consumer perspective), that they may end up in the same product legislation – is unclear and needs to be clarified. How these divisions are to be made needs to be discussed with stakeholders, especially business, which will be primarily applying the Regulations in practice.

Comments on specific parts of the Regulation by chapters and specific articles are presented below. Suggested changes to articles are in red text.

Chapter 1: General provisions

Article 1: Subject matter and scope

Swedish Enterprise welcomes the ESPR's essentially broad area of application and that it clearly states that certain products are not covered by the Regulation. The Commission also states in the Regulation that additional product groups may be exempted when appropriate or when other legislation allows for corresponding requirements, which is again positive.

In **Article 1.2**, the Commission states that the legislation shall also apply to components and intermediate products. Setting requirements on components and intermediate products can be complicated, risk leading to sub-optimisation, as the total environmental impact of the final product or system is central and may also hamper innovation. To minimise the environmental impact at system level, flexibility is required in system design in terms of choice of technology and materials. It should therefore be carefully considered whether it is appropriate to introduce ecodesign requirements for products that constitute parts of a system.

The scope of the legislation is very extensive; and the way in which the product groups that will receive Ecodesign requirements in the near future are to be prioritised needs to be analysed carefully according to clearly set criteria and with a high degree of transparency and inclusion.

Article 2: Definitions

Swedish Enterprise notes that the Regulation contains numerous new definitions compared to the current Ecodesign Directive. It is important that new definitions are clear and align with other legislation and any existing standards where definitions are stated.

Swedish Enterprise also notes that several definitions regarding products and economic actors differ in the ESPR compared to definitions in, for example, the *Regulation (EU) 2019/1020 on market surveillance and compliance of products and the Directive 2001/95/EC on general product safety*. Harmonised definitions in various legislations are desirable for greater clarity, to avoid misunderstandings and to facilitate concrete application. Definitions in the circular economy should advantageously be developed in line with the ISO, (since many material and product flows are global), where work is now underway to produce a large number of definitions which are expected to be established in 2023. Some definitions found in the Regulation appear in standards at EU level, for example the EN 4555x series. Swedish Enterprise can state that several definitions, such as those on durability and reliability, comply with this standard and the proposed ISO standard on circular economy to a large extent, but not entirely. Swedish Enterprise believes that the Commission should work to ensure that definitions used in the ESPR are harmonised as far as possible with relevant established definitions in international standards.

Swedish Enterprise also considers it unclear which requirements in the ESPR that apply to businesses that renovate, repair, upgrade or remanufacture products and then put those products back on the market. It is not obvious where such actors would be included in the list of set definitions of economic actors. It is positive that Article 28 states that importers and distributors shall be defined as manufacturers and subject to the requirements as manufacturers if they place a product covered by a delegated act on the market and if they modify a product already placed on the market in a way that affects compliance with the requirements set out in the delegated act. However, it is unclear whether economic actors that renovate, repair, upgrade or remanufacture products fall within the definition of *Distributor*. Swedish Enterprise therefore believes that this must be clarified. Either with an addition

to Article 2 and the definition of distributor, (see below in red text); alternatively separate definitions should be included for these economic actors.

Art 2. " 'distributor' means any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market; **for example also remanufacturers and companies who repairs and upgrades products.**"

The use of renewable materials is an important aspect of the circular economy. The list of definitions in the Regulation, however, lacks definitions for renewability and renewable materials. The draft law should therefore be supplemented by the following definitions in Article 2:

'renewability' means the ability for a natural resource to replenish and recover over time and thereby is infinite when growth is greater than consumption.
'renewable raw materials' means a material with the quality of renewability.

Article 3: Free movement

Article 3.1. This article should be supplemented to clarify that the requirements in the Regulation are only applicable when there is a delegated act for ecodesign requirements for a product. The current text is too general. Swedish Enterprise therefore believes it important that Article 3.1 is supplemented as shown below in red:

Art 3.1. "Products shall only be placed on the market or put into service if they comply with the ecodesign requirements set out in the delegated acts, **to the extent that delegated acts exist for ecodesign requirements for the specific product**, adopted pursuant to Article 4 applicable to those products."

Chapter 2: Ecodesign requirements

Article 4: Empowerments to adopt delegated acts

In **Article 4** of the Commission's proposal, the Commission proposes that product-specific requirements are developed with delegated acts. An Ecodesign forum, with representatives from business and other actors is suggested to contribute to this work. The fact that delegated acts are to be used to set product-specific requirements deviates from the procedure that is usually used for preparation of product-specific legislation and the existing process in the Ecodesign Directive. Swedish Enterprise has the following comments on the proposed process.

The approach used with implementing acts in the current Ecodesign Directive has worked well with broad representation from business, which has meant that the directive has contributed to increased environmental benefits in combination with a continued highly competitive European business community. The process with an expert group, (in which business is well represented), and a committee consisting of member states has worked well. *Swedish Enterprise therefore advocates the continued use of implementing acts for the product-specific legislation under the ESPR*, rather than delegated acts as in the Commission's proposals.

Expert groups set up by the Commission are covered by the horizontal rules laid down in Commission Decision C(2016) 3301, i.e., the same rules apply to expert groups, irrespective of whether they are established to contribute to the drafting of delegated acts or implementing acts. Work in the current Consultation Forum on the Ecodesign Directive has worked well with broad representation from business and the opportunity for input continuously. The horizontal rules for expert groups also apply to other advisory bodies to the Commission, for example the platform for sustainable financing. Unlike how well the expert group's work has been conducted under the current Ecodesign Directive, Swedish Enterprise is strongly critical of how the process and work within the platform for sustainable financing has been conducted, where affected parts of the business community have been excluded or not sufficiently represented. Neither has there been an opportunity to provide input due to strict confidentiality rules. This has resulted in the platform's proposals for criteria in many cases not being relevant or at risk of leading the wrong direction. It is important that the future expert group within ESPR receives a structure that has a broad representation of the business community, as well as a high level of transparency to enable ongoing concrete and constructive input.

Swedish Enterprise would like to highlight an example of an expert forum that has a process that functions well and that has a broad representation of the business community. It is the steering group and the "technical secretariat" that the Commission set up during pilot tests of environmental footprints (2013-18). The secretariat was responsible for developing PEFCR (Product Environmental Footprint Category Rules) for "its" sector/product group. At least 51% of the EU market for the relevant sector/product group was represented in the secretariat. In addition, researchers/experts in life cycle analysis, consumer/environmental NGOs and representatives from other parts of the value chain participated in technical secretariats and/or in reviewing the data produced. Participation from Small Medium Enterprises (SMEs) has also been made possible, (under parts of the pilot scheme), with the option of financial support. The approach has worked well, and this example of the composition of forums and approaches should serve as a model for other activities.

In the event that the Commission's proposals on the use of delegated acts remains in the final Regulation, Swedish Enterprise believes that the following points need to be clarified in the Regulation.

- The description of the Ecodesign Forum in Article 17 is brief and general, (in accordance with the wording of the current Ecodesign Directive). ***The forms of the Expert Group (the Ecodesign Forum)***, including the appointment of participants, the design of mandates, tasks, and rules regarding confidentiality/transparency are central to a well-functioning process for the drafting of product-specific delegated acts. As the horizontal rules for expert groups are general and the forms for expert groups appointed by the Commission have differed to such an extent, Swedish Enterprise believes that the Regulation needs to be clarified regarding the forms for the Ecodesign Forum. Swedish Enterprise also calls on the Commission to obtain input from stakeholders prior to the preparation of the rules of procedure for the forum to give the forum a high degree of legitimacy.
- ***There is a need in the Regulation to further clarify how the Commission will use the Ecodesign Forum*** in the drafting of delegated acts. The horizontal rules for expert groups are general and it is important that the Regulation states how the Commission intends to use the forum. It is important that the forum can contribute to the delegated acts on an ongoing basis during drafting work and that it is able to contribute to the setting of all product-specific requirements, see amendments in Article 17 (addition 3 below).

- ***The process must be transparent and there must be opportunities for a wide range of businesses involved to submit comments before the delegated act is adopted.*** The process for this needs to be clearly stated in the Regulation. Delegated acts were established to deal with “non-essential elements”, (the same applies to implementing acts). The process of delegated acts has often had limited transparency and interaction with various stakeholders. As delegated acts are now proposed to be used for much more than to amend or supplement “non-essential elements” of the legislation, the process must also be adapted by ensuring increased transparency and the opportunity to provide information and input during the work. This needs to be clarified, see amendments in Article 17 (addition 2 below). For example, a four-week consultation period is insufficient, which is the procedure currently used to obtain views from relevant actors
- ***When appointing members to the Ecodesign forum, it is important to have a broad representation from business.*** A breadth of expert knowledge from the business community is crucial in order to be able to set ecodesign requirements that are relevant, possible to comply with and that enable continued innovation. Furthermore, it is central that all parties in the value chain are represented in the Ecodesign forum, which needs to be clarified in the Regulation. Setting requirements for circular economy especially requires a value chain perspective since economic actors in the value chain are more dependent on each other. As sector organizations represent the entire sector, and both large and small companies, these should be given a designated and clear role in the forum. This needs to be clarified in the Regulation, see addition in Article 17 (addition 1 below). It is unclear whether the Commission plans to set up an Ecodesign forum with subgroups or separate Ecodesign forums for each product group. How the Commission plans to organise and design this should be clarified in the Regulation.

Swedish Enterprise proposes the following changes to **Article 17**, see addition in red text below.

Art 17. “The Commission shall ensure that when it conducts its activities, it observes a balanced participation of Member States’ representatives and all interested parties involved with the product or product group in question, such as **a broad representation of industry including sector organisations and the whole value chain**, including SMEs and craft industry, trade unions, traders, retailers, importers, environmental protection groups and consumer organisations. These parties shall contribute in particular to preparing ecodesign requirements, examining the effectiveness of the established market surveillance mechanisms and assessing self-regulation measures **in a transparent process.**”

To that end, the Commission shall establish an expert group, in which those parties shall meet, referred to as the ‘Ecodesign Forum’.

The Forum will have the opportunity to contribute to the delegated acts throughout the work and will be consulted regarding all product-specific requirements.”

Swedish Enterprise calls on the council and the parliament to carefully analyse the delegation proposed by the Commission in the Regulation and to consider whether the proposed delegation is reasonable or whether it should be adjusted.

Article 5: Ecodesign requirements

It is vital that established performance requirements in the delegated acts enable continued technology-neutral development and innovation and that they do not go into detail and determine product design. Swedish Enterprise believes that policymakers should set clear and ambitious goals and then hand over to businesses to develop products that enable such goals to be met. In this way, technology neutrality can be safeguarded in conjunction with future product-specific ecodesign requirements. Furthermore, it must be possible to comply with, verify and follow up set requirements.

In connection with the setting of ecodesign requirements, it is also important to have a holistic perspective where all, for materials and products, important parameters are considered and analysed. There may be requirements that can counteract each other, even if they individually can contribute to the overall goal, for example, requirements that increase the product's durability can make it more difficult to disassemble during recycling.

Article 5.1. In addition to the use of recycled materials, the use of renewable materials is an important aspect of the circular economy. In addition to the parameters listed in Article 5.1, renewable materials should also be included in the overarching list of requirements so that they can be used in future product-specific legislation where appropriate. This would facilitate the transition from today's linear, fossil-based economy to a circular, bio-based economy. The development of new products from renewable resources is accelerating in several sectors such as textiles, chemicals, vehicles and construction. The following additions are therefore proposed to the list in Article 5.1.

(new) products' renewability content;
(new) renewable raw material used in products;

Article 5.4. It is positive that the Commission states that the setting of requirements will take into account other relevant legislation. On the other hand, there are no provisions that generally regulate the relationship with ESPR and other applicable legislation. As it is crucial that future requirements do not lead to duplicate or conflicting regulation, this needs to be clarified, for example in Article 5.4 (a); see proposals below in red.

Art 5.4 (a) "When preparing ecodesign requirements, the Commission shall:

(a) take into account the following elements:

(i) Union climate, environmental and energy efficiency priorities and other related Union priorities;

(ii) relevant Union legislation, including the extent to which it addresses the relevant product aspects listed in paragraph 1, *to ensure harmonization and assure the avoidance of double or overregulation;*

(iii) self-regulation measures, as provided for in Article 18;

(iv) relevant national environmental legislation;

(v) relevant European and international standards;"

Article 5.4 (b) It is positive that the Commission writes in Article 5.4.b that an impact assessment must be carried out when drafting Ecodesign requirements. However, compared to the corresponding wording in the current Ecodesign Directive, there are a number of key aspects that are missing from the new Article regarding assessment of the how requirements affect the environment, consumers, manufacturers etc. The inclusion of these impacts is listed later in Article 5.5, but they should be stated in the Article which describes the requirements for impact assessment, see below, (the addition in red text is taken from the current Ecodesign Directive Art. 15.4.b). An alternative might be to outline in Article 5.4.b that the impact assessment criteria in Article 5.5 should be analysed; it is not clear in Article 5.5 how the criteria are to be evaluated. An outstanding question is also who will review the impact assessments that are produced.

Art 5.4 b) *“carry out an impact assessment, **which shall consider the impact on the environment, consumers and manufacturers, including SMEs, in terms of competitiveness — including in relation to markets outside the Community — innovation, market access and costs and benefits**, based on best available evidence and analyses, and as appropriate on additional studies and research results produced under European funding programmes. In doing so, the Commission shall ensure that the depth of analysis of the product aspects listed in paragraph 1 is proportionate to their significance. The establishment of ecodesign requirements on the most significant aspects of a product among those listed in paragraph 1 shall not be unduly delayed by uncertainties regarding the possibility to establish ecodesign requirements to improve other aspects of that product;”*

Article 5.4 c This paragraph proposes that ecodesign requirements can be set based on technical screening criteria in the taxonomy. Swedish Enterprise considers this inappropriate for several reasons, and the reference in Article 5.4.c should be removed. The criteria in the taxonomy have been developed for a different purpose. The Ecodesign requirements, in ESPR, cover all products on the market, while the taxonomy defines what is to be significantly “better” than basic legal requirements. Furthermore, ESPR covers products while the taxonomy covers “activities”. In addition, the criteria in the taxonomy have been drafted in a non-transparent process with in many cases limited participation of business. A concrete example showing that the taxonomy criteria should not be used when setting requirements in ESPR is the minimum requirements in the “Do No Significant Harm” criteria for Pollution Prevention¹. The limitation of which substances that may be used is far-reaching, difficult to interpret and in our opinion impossible to comply with in practice.

As a result of the above, Swedish Enterprise considers it inappropriate to use the taxonomy’s technical screening criteria as a basis for Ecodesign requirements. However, the opposite is reasonable, i.e., that technical screening criteria in the taxonomy take into account the requirements of the ESPR. Swedish Enterprise proposes that Article 5.4.c be changed as follows:

¹ Appendix C of the Annex of the Commission Delegated Regulation, supplementing Regulation (EU) 2020/852

Art 5.4(c) “take into consideration relevant technical information used as a basis for or derived from Union legislation or instruments, including Regulation (EC) No 66/2010, Directive 2010/75/EU, ~~technical screening criteria adopted pursuant to Regulation (EU) 2020/852~~ and green public procurement criteria;

Article 5.5 It is good that the Commission states in Article 5.5d that the requirements should not have a disproportionate impact on competitiveness and that SMEs are highlighted. However, Swedish Enterprise believes that this should apply in general, i.e., to larger companies, and therefore proposes the following amendment to the Article, see below. It is central that the ESPR is developed with the perspective to strengthen the competitiveness of European businesses.

Art 5.5 (d) “there shall be no disproportionate negative impact on the competitiveness of any economic actors, ~~at least of SMEs;~~”

It is unclear how the criteria in Article 5.5 are to be evaluated. A reference should be made to the impact assessment in Article 5.4b, or alternatively described in Article 5.5 how these should be verified.

Article 6: Performance requirements

In recital 22 and **Article 6.3**, the Commission states that the requirements shall not limit the presence of substances with regard to chemical safety, and that this shall instead continue to be addressed in the chemical legislation. However, the wording of the Regulation on the demarcation of REACH needs to be clarified. Swedish Enterprise considers that concrete provisions that legally regulate this in the Regulation need to be introduced in the Regulation. It is important that there is a clear demarcation between chemicals legislation and the ESPR and that duplication and over-regulation are avoided.

Article 7: Information requirements

In the Regulation, the Commission proposes that information on Substances of Concern (SoC) must be shared. The definition of SoC found in Article 2, paragraph 28, includes more than 4,000 substances excluding substances that may be defined as SoCs that hamper recycling. Recital 25 states that “Such a framework should aim to progressively cover all substances of concern in all products listed in working plans setting out the product groups the Commission intends to tackle”. This is an extremely high ambition level and Swedish Enterprise does not see the benefit of such a broad approach. It is important that information requirements relating to SoC are introduced systematically based on relevant and requested information.

Article 7.5. This Article outlines the information to be shared in the product passport regarding SoC. Depending on what SoC covers for a product group, this reporting may be extremely extensive. It is crucial that the information required to be reported about SoC in the product passport is product-specific, and based on the relevance, usefulness and need of the actors in the value chain. Swedish Enterprise therefore proposes the following addition to Article 7.5 (addition 1 see below). It is positive that the Commission states that exceptions can be made for SoC, e.g. to protect commercially-sensitive information.

The Regulation does not clarify how SoC that hamper recycling, are to be defined in future product-specific delegated acts. The Regulation needs to be supplemented with a reference to the development

of horizontal criteria for how this selection is made, to enable predictability and clear systematics. Among other things, it is important to take into account continuous technological development in the recycling sector to reduce the risk of unnecessarily limiting material recycling. Swedish Enterprise develops this further in the Position Paper: [Position on Substances of concern that hamper recycling](#). Swedish Enterprise proposes a supplement to Article 7.5 (addition 2) to clarify this, see below.

The Commission's impact assessment (pp. 543-546) describes the problem of non-compliance and the difficulty of meeting current requirements under REACH Article 33 and the SCIP Database. It is proposed that information requirements for substances under the ESPR are introduced gradually, where substances that need to be reported according to REACH Article 33 are the first to be introduced in the product passport for the products concerned. The ESPR would thus increase compliance with products in accordance with current requirements. According to the Commission's impact assessment, it is appropriate to first ensure that the digital product passport works effectively before adding information requirements for additional substances, where relevant. This is a reasoning that Swedish Enterprise supports. It should therefore be made clearer in the articles of the Regulation that the information requirement for SoC should be introduced gradually. Swedish Enterprise proposes a supplement in Article 7.5 (supplement 3) to address this, see below.

Art 7.5: *“The information requirements referred to in paragraph 1 shall enable the tracking of all substances of concern throughout the life cycle of products, unless such tracking is already enabled by another delegated act adopted pursuant to Article 4 covering the products concerned, and shall, **for relevant substances of concern**, include at least the following:*

- (a) the name of the substances of concern present in the product;*
- (b) the location of the substances of concern within the product;*
- (c) the concentration, maximum concentration or concentration range of the substances of concern, 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.*

Where the Commission sets out information requirements in a delegated act adopted pursuant to Article 4, it shall:

- (a) establish which substances fall under the definition in Article 2(28), point (c), for the purposes of the product groups covered; **this evaluation should be based on horizontal criteria developed in dialogue with stakeholders.***
- (b) lay down deadlines for the entry into application of the information requirements, **in a step by step process**, referred to in the first subparagraph, with possible differentiation between substances; and*

Chapter 3: Digital product passport

Article 8: product passport

Information sharing is an important part of the circular economy and for the functioning of circular business models. Swedish Enterprise welcomes the introduction of a digital product passport (DPP) as a tool to promote the circular economy. Swedish Enterprise welcomes the basic structure of the digital product passport in the proposed legislation. As the product passport is proposed to be based on competition-neutral standards, data that is generic, built on pre-existing solutions, and be decentralised, the overall framework in the legislative proposal is in line with Swedish Enterprise's position paper from autumn 2021: [Swedish Enterprise's detailed position on digital product passports](#).

For businesses, sharing information involves legal, technical, contractual and commercial – often complex – considerations. The result may be that, based on such considerations, certain information cannot be shared. It is of considerable importance that information that is to be included in the product passport is proportionate, justified, and relevant to its objective. Information must be based on the principle of “need to know” rather than “nice to know”. To ensure that the product passport is limited to only relevant and necessary information that companies can share, it is important that the interests of the business community are fully taken into account in future product legislation, e.g., through broad representation of the business community in the Ecodesign Forum.

The product passport needs to be closely intertwined with other initiatives under the EU's digital agenda. The Data Act and Data Governance Act are crucial legislative pillars for data spaces and data sharing. Chapter III of the Data Act (proposal from the European Commission on 23 February 2022) contains general provisions on how data is to be made available if a data holder, (micro and small companies are excluded), is deemed obliged to make data available. The Data Act leaves the door open for sectorial legislation that can go further depending on the specific problems in a given sector/market. The product passport in the ESPR goes further in especially two aspects; businesses may not be compensated for data sharing and micro and small businesses will also be covered by the requirements. In this regard, it is even more important that only information that is necessary should be reported, and that product-specific legislation provides sufficient safeguards to make companies feel comfortable about sharing information.

In its current form, the Regulation is not compatible with the need to protect knowledge-based assets in terms of information that according to the proposal may be shared in the product passport. Such protection is crucial for the competitiveness of European businesses, which is also demonstrated in the Commission's Intellectual Property Action Plan, which is part of its Industrial strategy. Knowledge-based assets are crucial for the competitiveness in the knowledge economy. The European Union Intellectual Property Office and the European Patent Organization have published several reports on the importance of registered intellectual property rights as patents and trademarks. Before the EU's Directive on the Protection of Trade Secrets (Directive 2016/943) was adopted, Baker McKinsey

conducted a survey[1] on the importance of trade secrets, in which 48% of respondents answered that they are more important than either patents or trademarks.

For something to be a trade secret, it must be kept secret. What constitutes a trade secret is a strategic choice that businesses make and can be different types of information for different companies. If the DPP forces businesses to share this type of information, they cannot say that it remains secret in accordance with Article 2 of the Trade Secrets Directive. It is difficult to see how this can be handled in the product passport, especially when it comes to sharing information between different economic actors. This also applies if different access rights are implemented. Trade secrets may then end up with competitors in foreign countries. One consequence of lost possibilities to protect trade secrets could be that businesses switch to patenting, in cases where it is possible, which could lead to the creation of monopolies.

Article 8.3. It is not clear from the Regulation how different access rights are to be handled in practice and how trade secrets – if it is even to be shared – can be shared securely. To strengthen the text on the protection of trade secrets, especially in the B2B information sharing, Swedish Enterprise proposes the following additions to Article 8.3 of the Regulation, see below. The sharing of this type of information must be based on the actor in the value chain that needs information about a product for e.g., remanufacturing, requesting it and making information available in a secure manner, similar to source code escrow.

Art 8.3. *“The requirements referred to in paragraph 2 shall:*

*(a) ensure that actors along the value chain, in particular consumers, economic operators and competent national authorities, can access product information relevant to them; **In order to protect confidential business information, actors in the value chain should make a specific information request to the manufacturer and the information need to be shared in a secure way, similar to source code deposition.***

(b) facilitate the verification of product compliance by competent national authorities; and

(c) improve traceability of products along the value chain.”

Article 10: Technical design and operation of the product passport

The protection of trade secrets needs to be clarified in several places in the Regulation. To increase the protection of such information, Article 10.10f needs to be amended as follows:

Art 10.10 f) *“ the rights to access and to introduce, modify or update information in product passport shall be restricted based on the access rights specified in delegated acts adopted pursuant to Article 4, **with specific consideration of information that constitutes trade secrets;**”*

² <https://www.bakermckenzie.com/-/media/files/insight/publications/2017/trade-secrets>

Chapter 5: Prioritisation, planning and consultation

Article 16: Prioritisation and planning

Swedish Enterprise believes that Chapter 5 needs to be supplemented in several ways to increase clarity regarding the selection of products and the process for drafting future product-specific legislation. It is positive that the Commission sets criteria for how product groups should be prioritised within the framework of the legislation, but how that selection takes place needs to be further clarified.

Swedish Enterprise considers that an additional parameter should be included in the introduction to Article 16.1, see below.

Art 16. *“When prioritising products to be covered by ecodesign requirements in accordance with this Regulation, the Commission shall take into account their potential contribution to achieving Union climate, environmental and energy efficiency objectives, **their contribution in fostering EU resilience** as well as the following criteria”:*

Article 16.1 c. It is not sufficiently clear in the Regulation how products should be selected with regard to the improvement of environmental performance that can be achieved with Ecodesign requirements. It is important that the selection of the products to be covered by product-specific legislation under ESPR is made from a life-cycle perspective to ensure that product groups that are to be covered by ecodesign requirements are selected on the appropriate basis. Article 16.1c needs to be supplemented in this regard, see below.

Art 16.1 (c) *“the distribution of the environmental impacts, energy use and waste generation across the value chain **by using an LCA-based approach, and also in particular whether they take place within the Union;**”*

Swedish Enterprise also believes it is necessary to clarify Article 17, see above reference Article 4.

Article 19: Micro, small and medium-sized enterprises

It is positive that the Commission states a number of ways for SMEs to obtain support following the introduction of legal requirements. In many cases, it is likely that the legislation will be challenging for SMEs and micro-enterprises. It is vital that performance requirements and information requirements are set at a reasonable and manageable level. Collecting, administering and making large amounts of information available is demanding and special consideration must then be given to SMEs' limited resources. SMEs may need special guidance, skills development and access to administrative tools to effectively manage and administer information without adversely affecting their competitiveness. On this point, it is important that sufficient resources are made available at the Commission and in the member states to enable this support.

Chapter 6: Destruction of unsold consumer products – Article 20

Swedish Enterprise is generally positive to the proposal for a ban on destruction of unsold consumer goods but sees a need for further clarification of the Regulation.

Article 20.1. Article 20.1 states that an economic operator that discards unsold goods shall report information about such activity on a publicly available website or otherwise make the information available to the public. Swedish Enterprise considers that the text on this point is too general and needs to be clarified with regards to: are these information requirements applicable to all products within the Union until product-specific delegated acts have been produced for the product? What applies in a longer perspective for those products that will not receive a product-specific act? What type of website should such information be published on? These points need to be clarified in the Regulation.

Article 20.3. Despite high sustainability ambitions in the business sector and that the destruction of goods is to be avoided as far as possible, there will be situations where companies have no choice but to destruct goods. Swedish Enterprise therefore sees it as positive that the Commission is proposing certain exemptions from the ban on destroying of unsold consumer goods. In conjunction with this, it is important that related legislation is adapted to the various exceptions so that they may be invoked, (e.g. EU waste legislation and national tax and VAT rules). There may also be additional situations where exceptions are needed in addition to those proposed in the Regulation. For example, there may be cases where products, which for various reasons cannot continue to be used, and where there is currently a lack of recycling technology. Exceptions may also be needed for products that are defective when delivered to the company.

Article 20.5. Swedish Enterprise considers that it needs to be clarified in the Regulation what is meant by the websites that the Commission says are to be used to share information easily, transparently, and accessibly, about destroyed products in accordance with specified exceptions. Is it a central website; are these sites to be provided by member states or should businesses own websites be used? This needs to be clarified.

Article 20.6. It is positive that in Article 20.6 the Commission proposes that SME companies be exempted from the requirements in Article 20. However, it is unclear what is meant by substantial contribution in point a); this needs to be clarified.

Chapter 7: Obligations of economic operators

The Regulation is primarily focused on original manufacturers or those that are the first to place a product on the EU Single Market, and on the production of new products. It is in many respects unclear which responsibilities lie with other players in the value chain and how existing products on the market are affected by the Regulation and how these are to be covered and managed with regards to future performance and information requirements. This needs to be clarified.

Swedish Enterprise states that market players who make products available have different responsibilities for complying with ESPR requirements. This applies in particular to online marketplaces, based on the ESPR proposal and in combination with how the Digital Services Act turned out.

Article 23: Obligations of importers

It is essential that the requirements of the Regulation must also be applied to importers and imported products and it is positive that this is clarified in Article 23. The Article should state that disproportionate burdens/distortions for importers/declarants, in relation to domestic EU producers, should be avoided.

Article 28: Cases in which obligations of manufacturers apply to importers and distributors

It is positive that Article 28 states that importers and distributors shall be considered as manufacturers and subject to the requirements that apply to manufacturers – if they place a product on the market and if they modify a product already placed on the market in a way that affects compliance with the requirements set out in the product-specific legislation. However, Swedish Enterprise considers that it is unclear which economic actors are included by the definition “distributor”, i.e., if the actor renovating, repairing, upgrading or remanufacturing a product is also covered by the requirements for manufacturers. This needs to be clarified in the Regulation by changing the definition of “distributor” in Art 2 Definitions, see proposed changes above.

Article 29: Obligations of on-line marketplaces and on-line search engines

In Article 29.2, the Commission refers to the not-yet-adopted Digital Services Act (DSA). While Article 22 of the DSA, for example, uses the term “traders”, Article 29 (and 25) of the ESPR refers to “dealers”. Different terms create legal uncertainty, and the Regulation must be compatible with the final text of the DSA.

Chapter 8: Conformity of products

In the broadened Ecodesign regulation, the principles for conformity assessment in the Ecodesign Directive should remain, i.e., that minimum requirements are established in the legal text and then combined with harmonised standards where the measurement methods are set out. This method has worked well for the products currently covered by the Directive.

It is crucial that the methods for assessing conformity are developed correctly in a transparent process and that reference is made to harmonised or international standards. Standardisation in the form of technical standardisation and the setting of international standards has a strategic significance for the global competitiveness of European industry and enables adaptation to global technological development. It is therefore crucial that standardisation continues to play an important role linked to the evaluation and control of established requirements.

Article 32: Test, measurement and calculation methods

Article 32.2 proposes the development of on-line tools for calculating product performance linked to the requirements. It is important that these on-line tools are developed in a transparent process with the participation of a broad representation of the business community in order to obtain a fair and robust method of verification. These online tools should also be developed taking into account existing or future harmonized or international standards. Swedish Enterprise proposes the following supplement to Article 32.2, see below.

Art 32.2 *“Where necessary to ensure compliance with ecodesign requirements set out in delegated acts adopted pursuant to Article 4, third subparagraph, point (e), the Commission may require the use of online tools for the calculation of the performance of products in relation to the relevant product parameter referred to in Annex I reflecting the applicable calculation requirements. **The methods should be based on harmonised or international standards.**”*

Where setting such requirements for the use of online tools, the Commission shall take into account the following criteria:

(a) the need to ensure the harmonised application of calculation requirements;

(b) the need to minimise administrative burden imposed on economic operators complying with the relevant requirements.”

Article 35: Common specifications

In Article 35, the Commission proposes that common specifications should be developed by the Commission as a fall-back solution when harmonised standards are lacking. Swedish Enterprise believes that the Commission should generally refrain from issuing its own technical specifications in implementing acts. This approach may only be used in exceptional cases, as it deviates from the approach in the New Method and risks limiting technological development and innovation. In drafting any common specifications, it must also follow strict criteria that are established in close dialogue with the stakeholders, primarily the standardisation organisations and the industries concerned.

Instead of the Commission producing technical specifications, joint efforts should be made to remove bottlenecks in the process of developing harmonised standards to make the process more efficient. Swedish Enterprise proposes that the Commission initiates dialogue with standardisation organisations and business to identify and eliminate bottlenecks in the system. The use of market-based standards to verify compliance with requirements is crucial if Europe is to be a leader in setting global standards and for the standards to keep pace with the latest technological developments. Swedish Enterprise considers that point a) of Article 35 should be deleted, (see below), as delays in the process or standardisation organisations rejecting dialogue is no justification for the Commission to produce technical specifications. This point should instead be replaced by a new point, (see text below), which states that technical specifications should only be drawn up when there is agreement with the standardisation organisations that it is appropriate.

Article 35.1 should also include text stating that any technical specifications that are drafted should be withdrawn when a new standard is introduced.

Art 35.1 “The Commission may adopt implementing acts laying down common specifications for ecodesign requirements, the essential requirements for product passports referred to in Article 10 or for test, measurement or calculation methods referred to in Article 32, in the following situations:

- ~~(a) it has requested one or more European standardisation organisations to draft a harmonised standard in relation to an ecodesign requirement or method that is not covered by a harmonised standard or part thereof, the references of which have been published in the Official Journal of the European Union, and there are either undue delays in the standardisation procedure or the request has not been accepted by any of the European standardisation organisations;~~
- (b) where there is agreement with the standard organisations that it is appropriate
- (c) the Commission has decided in accordance with the procedure referred to in Article 11(5) of Regulation (EU) No 1025/2012 to maintain with restriction or to withdraw the references to the harmonised standards or parts thereof by which an ecodesign requirements or method is covered.”

Chapter 9: Notification of conformity assessment bodies

This chapter sets out the conditions under which third-party verification is required in a delegated act. The Confederation of Swedish Enterprise would like to emphasise that requirements for third-party verification should not be set as a general requirement, only if necessary for specific reasons. This should be clarified in the Regulation in Article 41.

Article 41. The approach used in the Ecodesign Directive to demonstrate conformity should continue to be used, i.e., enable companies to choose the method of verifying legal requirements by following the methods in harmonised standards and/or by third party verification. Therefore, additions should be made to Article 41 to clarify that this should only be done if it has been deemed necessary in the delegated act.

Art 41. “Member States shall notify the Commission and the other Member States of bodies authorised to carry out the third-party conformity assessment tasks **when** provided for under the delegated acts adopted pursuant to Article 4.”

Chapter 10: Incentives

Article 58 – Green public procurement

Swedish Enterprise welcomes the proposal that mandatory GPP requirements can be set in delegated acts where relevant. Mandatory requirements contribute to the circular transition by making it easier for companies to develop and commercialise circular solutions as basic requirements in procurements are the same and known. At present, it is often problematic that different requirements are set in different countries, regions and municipalities – greater uniformity is therefore positive provided that criteria are set in such a way that also enables new innovative solutions.

Chapter 11: Market surveillance

Swedish Enterprise is positive about the Commission proposing a strengthening of market surveillance linked to future ecodesign requirements (performance and information requirements). Well-functioning and effective market surveillance are crucial to ensure a level playing field in the market and to ensure the competitiveness of European business.

Swedish Enterprise supports the Commission's proposals for strengthened market surveillance and measures for increased co-ordination of market surveillance within the Union through joint projects, improved digital management, training and guidance for market surveillance authorities.

It is positive that the Commission is proposing that member states should draw up action plans for market surveillance, and that these should then be shared with the Commission and other member states. It is also welcomed that the Commission may make demands on what, (products and requirements), member states must at least control. For market surveillance to work well, it is crucial that member states provide sufficient resources for this.

For market surveillance to function well and fulfil its purpose, it is important that market surveillance authorities have sufficient and correct competence about the materials and products to be controlled. Market surveillance in Sweden, for the existing Ecodesign Directive, has worked well with a well-established authority in the form of the Swedish Energy Agency. When effectively all products will be covered by ecodesign requirements, it must be ensured that the authority or authorities that are given this responsibility have sufficient competence to be able to verify that the requirements are met. Swedish Enterprise urges the Swedish government to carefully consider how market surveillance authorities for controls linked to this regulatory framework should be appointed in Sweden to ensure this.

It is vital that the appropriate authorities control imported goods to ensure compliance with the requirements and thereby maintain competitive neutrality for all EU-produced goods.

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