

PRODUCT LIABILITY AND REGULATORY

The EU Digital Product Passport

The future of free movement of goods and a sustainable Europe

8 MIN READ

As Europe moves towards a green future, consumers are actively seeking out product sustainability information to allow them make more conscientious purchases. A key EU initiative that will assist them in doing so is the planned introduction of 'digital product passports' (**DPPs**).

In short, DPPs will provide information about a product's sustainability profile throughout the supply chain cycle – such as its carbon footprint, percentage of recycled materials used, battery durability, repurposing and recycling guidelines.

DPPs will be rolled out under the proposed Ecodesign for Sustainable Products Regulation (**ESPR**). A proposal for the ESPR was published in March 2022 and on 31 January 2023, the European Commission (**the Commission**) launched an online public consultation on the categories of new products and measures that the ESPR should address first. The public consultation will remain open until 31 May 2023 and it is expected that the final proposed text of the ESPR will be adopted in the first quarter of 2024.

Once adopted, the ESPR will enable the Commission to adopt further delegated legislation dealing with design standards for certain textiles, construction and electronic products, as they relate to the environment (although it will exclude certain products including food, feed and medicinal products).

Responsibility for affixing DPPs to relevant products, uploading the relevant information to them and ensuring that the design of a DPP is fully compliant, will rest with the economic operator placing the product on the market.

The introduction of DPPs will create some challenges for economic operators, including a lack of clarity on the specific information that must be included in a DPP, costly data infrastructure and burdensome data-sharing requirements.

Introduction:

A key focus of the Commission is improving transparency, empowering consumers to make sustainable choices and ensuring various industries improve their environmental impact and are contributing to a circular economy.

The introduction of DPPs is a Commission initiative and forms part of the proposed ESPR. The ESPR will repeal the existing Ecodesign Directive and will enable the Commission to adopt further legislation establishing eco-design requirements covering performance and information obligations for certain specific product groups with the aim being to significantly improve their circularity, energy performance and other aspects of their environmental sustainability. This proposal will be complementary to the existing EU Ecolabel scheme. This scheme currently enables producers, importers and others offering specific types of products and services within the European Economic Area (EEA) to voluntarily apply to obtain a label for such products and services. In order for

the Ecolabel to be awarded, it is necessary for the relevant Ecolabel criteria to be met to ensure that it is granted to sustainably designed products that reduce their environmental impact across their lifecycle.

DPPs will provide specific product information relating to the products' sustainability to different stakeholders in the supply chain, including the end consumer. While there is still a level of uncertainty in respect of which products will require a DPP and when, it is anticipated that a wide range of products requiring batteries will be impacted, including smartphones, electric bikes and e-scooters.

In this briefing, we look at:

- What a DPP is and what it will look like
- What products will need a DPP
- Economic operator obligations
- Industry reaction to the DPP
- Challenges facing economic operators
- Timeline for finalising the ESPR
- Practical considerations for businesses in preparing for the DPP



What is a DPP and what will it look like?

In simple terms, the DPP is a method of digitally recording information about a product through a medium that can record and convey data.

The current text of the ESPR defines 'DPP' as a *"set of data specific to a product that includes the information specified in the applicable delegated act adopted [under the ESPR] and that is accessible via electronic means through a data carrier."*

The ESPR defines 'data carrier' as *"a linear bar code symbol, a two-dimensional symbol or other automatic identification data capture medium that can be read by a device"*.

While little information is provided in the ESPR around what the DPP will likely look like, this is expected to be addressed in product specific supplemental legislation. For example, under the [New EU Battery Regulation](#) it will be a requirement that every industrial and electric vehicle battery comes with a DPP, which can be identified through a unique identifier that economic operators must print or engrave on the individual battery.

Although the Commission has not specifically referenced the use of a QR code in the ESPR, it has been discussed by industry stakeholders as a possible mechanism for conveying the required data.

What information will a DPP contain?

The particular data requirements for each individual product category have yet to be determined following industry-wide stakeholder consultations led by the Commission. The New EU Battery Regulation is however instructive in this regard. Under this Regulation, industrial and electric vehicle battery DPPs must include information on material sourcing, carbon footprint, percentages of recycled materials used, battery durability, repurposing and recycling guidelines.

What products will need to have a DPP?

The Commission indicated via a press release on its sustainable products initiative in March 2022 that the ESPR will apply to all physical goods in due course, including for example, textiles, construction products and chemicals,

placed on the market or put into service, including components and intermediate products. This will include all products manufactured in Europe or imported into the EU. It will therefore have a global impact.

It is expected that some exemptions may be made for certain categories of products where eco-design requirements would not be suitable or where other frameworks provide for the setting of such requirements. Such products are likely to include food, feed, medicinal products for human use, veterinary medicinal products, living plants, animals and micro-organisms, products of human origin and products of plants and animals relating directly to their future reproduction.

The gradual introduction of a DPP has already begun in the textile, construction and electric vehicle battery markets e.g. DPPs will be mandatory by 2026 under the New EU Battery Regulation.

Economic operator obligations

Under the current text of the ESPR, an 'economic operator' is defined as a manufacturer, authorised representative,

importer, distributor, dealer and fulfilment service provider.

It appears that the economic operator placing the product on the market will be responsible for affixing the DPP. It will also need to ensure the product DPP complies with certain requirements including:

- it has a data carrier that is physically present on the product, its packaging or on documentation accompanying the product
- it is connected through a unique product identifier
- compliance with ISO 15459:2015 standard on unique identification
- all information included is machine readable, structured and searchable
- information refers to the product model, batch or item
- ensure that access by different stakeholders to the information complies with the essential requirements under the ESPR.

The economic operator placing the product on the market will also need to ensure

that the technical design and operation of the DPP also complies with certain requirements:

- be fully interoperable with other product passports required under EU law
- data must remain available for a specified period, including after a liquidation or cessation of activity
- ensure data authentication, reliability and integrity
- be designed and operated so that a high level of security and privacy is ensured and fraud is avoided.

The relevant economic operator placing the product on the market or putting it into service will be required to upload the information in the DPP to a decentralised data system, set up and maintained by the responsible economic operator.

It is unclear from the current text of the EPR what responsibilities each different economic operator in the supply chain will have. However, the EPR has confirmed that product specific supplemental legislation will set out responsibilities

and accessibility for relevant economic operators. This product specific supplemental legislation will also specify the economic operators that may introduce or update the information in the DPP. Such economic operators could include customers, end-users, manufacturers, importers and distributors, dealers, repairers, remanufacturers, recyclers, competent national authorities, public interest organizations and the Commission, or any organization acting on their behalf.

Reaction to the DPP

Overall, it appears that DPPs will be welcomed by stakeholders. By providing information about a product's environmental sustainability, the DPP will help consumers and businesses make informed choices when purchasing products, facilitating repairs and recycling and improving transparency of a product's life cycle impact on the environment. The DPP will likely also assist regulatory and public authorities to improve monitoring and controls.

However, while it is acknowledged that the EPR provides a solid starting point for the introduction of DPPs, there is also broad consensus that further information and improvements are required, as explored further below.

In the meantime, however, certain businesses are already trialling and embracing product passports with a view to increasing transparency and information on sustainability for consumers.

A recent survey revealed that 64% of European adults surveyed consider that companies are responsible for protecting the environment and 69% wish more companies were transparent about their practices. However, while there is a clear shift in consumer focus, a recent consumer survey suggests that 1 in 2 consumers lack trust in businesses regarding their commitments to climate change and sustainable issues. The DPP will hopefully assist in addressing such issues.



Challenges facing economic operators

While there is broad support for the proposal, putting DPPs in place will be onerous and present practical challenges for economic operators. A number of concerns have been raised to date, including the following:

Applicability of the DPP to Europe only

Certain stakeholders have expressed concerns regarding the applicability of the DPP, noting that circularity does not stop at the EU border. As such, it is argued that setting European product identification rules “*would create a barrier to the free movement of goods*” globally. The DPP will potentially be an additional burden for companies who already apply global standards in their business operations and at the point of sale.

Lack of clarity on the precise information to be included in the DPP

Annex III of the ESPR lists the information that can be included in the DPP and specifies certain obligatory information to be included. However, most economic operators will need to wait for their relevant

industry specific legislation to see what specific information they will need to include in the DPP for their products e.g. whether the information in the DPP has to be model, batch or item specific.

Choosing the most appropriate data carrier

This will be a challenge for most businesses, given that the use of a QR code, for example, may exclude certain categories of consumers who may not have / are unable to use the technology to scan a code.

Costs

Concerns have been expressed that the development of the DPP will require specific and costly data infrastructure. A lack of funds or skills may prevent SMEs or start-ups from complying with DPP requirements.

Potentially burdensome data sharing requirements

Economic operators responsible for creating DPPs will also be required to ensure that different stakeholders along the supply chain including consumers, different economic operators and competent

national authorities, can freely access product information relevant to them. The requirement to provide access to different information depending on who the stakeholder is could potentially be very onerous and may pose technical challenges for responsible economic operators.

Decentralised data registry vs Centralised data registry

The Commission still needs to clarify its proposed approach to the storage of data for DPPs in data registries. The ESPR proposes that, for enforcement and monitoring purposes, certain regulatory authorities including the Commission, competent authorities and customs authorities will have direct access to a record of all data carriers and unique identifiers linked to products placed on the market through a centralised registry.

However, the ESPR also proposes that the DPP should be based on a decentralised data system, set up and maintained by the relevant economic operator placing the product on the market. The Commission has said this will ensure the DPP is “*flexible,*

agile and market-driven and evolving in line with business models, markets and innovation”. A preference for a single centralised database has been expressed by industry stakeholders.

Timeline for next stage of finalising the ESPR

The draft ESPR still needs to undergo legislative scrutiny by the Parliament and the Council prior to being adopted so it is likely to be at least the first quarter of 2024 before the final text is adopted.

In parallel, the Commission recently launched a [public consultation](#) on the categories of products to be selected under the first ESPR working plan. The feedback and consultation period is due to close on 31 May 2023. While the feedback from this consultation is still awaited, a preliminary assessment by the Commission has identified that product categories such as textiles, furniture, mattresses, tyres, detergents, paints, lubricants, as well as intermediate products like iron, steel and aluminium, have high environmental impact

and potential for improvement, and are therefore suitable candidates for the first working plan.

The ESPR is only the first stage of the process as sector specific legislation will also be required to introduce DPPs for specific product categories. It is currently estimated that the Commission will introduce 18 new delegated acts between 2024 and 2027, and a further 12 between 2028 and 2030, in order to give full effect to the DPP across a number of industries.

Practical considerations for businesses in preparing for the DPP

While the adoption of the ESPR and sector specific legislation still has some distance to go, businesses should begin to prepare for the introduction of DPPs by doing the following:

- track the progress of the ESPR, Commission consultations and adopted acts, being alert for developments in respect of their relevant product categories
 - review sustainability practices and commence collating and centralising relevant information
 - review and learn from businesses who are already trialling DPPs
 - consider current transparency practices
 - engage with technical developers in developing a suitable data carrier
- consider whether the maintenance of the DPP and data registry will be managed internally or whether it will need to be outsourced
 - carry out a cost analysis for implementing a DPP for each product /product category
 - consider how the data carrier will be affixed/accompany products and associated labelling, packaging and marketing implications

For further information or assistance in dealing with any product regulatory requirements in Ireland, please contact [Katie O'Connor](#), Partner, [Róise Nic Ghráinne](#), Senior Associate, [Éanna Ní Néill](#), Solicitor, or any other member of the ALG's [Product Regulation and Liability](#) or [Disputes and Investigations](#) team.

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