

THE GLOBAL TRADE LAW JOURNAL

Volume 2, Number 1

January–February 2025

Editor's Note: No, It's Not Academic

Victoria Prussen Spears

Bureau of Industry and Security Issues New Guidance to Academic Institutions on Complying with U.S. Export Controls

Katherine D. Brodie, Geoffrey M. Goodale, Brian S. Goldstein, and Lauren E. Wyszomierski

U.S. Department of State Publishes International Traffic in Arms Regulations Amendments to Implement the AUKUS Exemption

Maria Alejandra "Jana" del-Cerro and Dilan Wickrema

U.S. Consumer Product Safety Commission Finds Amazon Responsible for Hazardous Products Sold by Third-Party Sellers

Robert E. Tonn and William A. Ringhofer

Companies Selling Consumer Products in the European Union (Particularly Clothing, Apparel, and Footwear Companies) Beware: The New ESPR Rules on Unsold Consumer Products Have Now Entered into Force

Marcus Navin-Jones and Eline Van Bogget

European Court of Justice Finds European Commission Review of Below-Threshold Mergers Unlawful

Timothy McIver, Sergej Bräuer, Anne-Mette Heemsoth, Kayleigh Anderson, and Lina Hamidou

China's Data as a Fifth Market Production Factor—An Asset on Your Balance Sheet

Liza L.S. Mark, Tianyun "Joyce" Ji, and Maisy Chang

Opportunities and Threats for the Blue Economy in Relation to the United Nations' Sustainable Development Goals

Mohammad Belayet Hossain

THE GLOBAL TRADE LAW JOURNAL

Volume 2, No. 1

January–February 2025

- 5 Editor’s Note: No, It’s Not Academic**
Victoria Prussen Spears
- 9 Bureau of Industry and Security Issues New Guidance to Academic Institutions on Complying with U.S. Export Controls**
Katherine D. Brodie, Geoffrey M. Goodale, Brian S. Goldstein, and
Lauren E. Wyszomierski
- 15 U.S. Department of State Publishes International Traffic in Arms Regulations Amendments to Implement the AUKUS Exemption**
Maria Alejandra “Jana” del-Cerro and Dilan Wickrema
- 23 U.S. Consumer Product Safety Commission Finds Amazon Responsible for Hazardous Products Sold by Third-Party Sellers**
Robert E. Tonn and William A. Ringhofer
- 27 Companies Selling Consumer Products in the European Union (Particularly Clothing, Apparel, and Footwear Companies) Beware: The New ESPR Rules on Unsold Consumer Products Have Now Entered into Force**
Marcus Navin-Jones and Eline Van Bogget
- 33 European Court of Justice Finds European Commission Review of Below-Threshold Mergers Unlawful**
Timothy McIver, Sergej Bräuer, Anne-Mette Heemsoth, Kayleigh Anderson,
and Lina Hamidou
- 39 China’s Data as a Fifth Market Production Factor—An Asset on Your Balance Sheet**
Liza L.S. Mark, Tianyun “Joyce” Ji, and Maisy Chang
- 49 Opportunities and Threats for the Blue Economy in Relation to the United Nations’ Sustainable Development Goals**
Mohammad Belayet Hossain

EDITOR-IN-CHIEF

Steven A. Meyerowitz

President, Meyerowitz Communications Inc.

EDITOR

Victoria Prussen Spears

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

Jen Fernandez

Partner

Sidley Austin LLP

Robert A. Friedman

Partner

Holland & Knight LLP

Geoffrey M. Goodale

Partner

Duane Morris LLP

Renée Latour

Partner

Clifford Chance

Britt Mosman

Partner

Willkie Farr & Gallagher LLP

Anthony Rapa

Partner

Blank Rome LLP

Brooke M. Ringel

Partner

Kelley Drye & Warren LLP

Samir D. Varma

Partner

Thompson Hine LLP

Timothy C. Welch

Partner

Weil, Gotshal & Manges LLP

THE GLOBAL TRADE LAW JOURNAL (ISSN 2995-1089) at \$495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. Copyright 2025 Fastcase, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff

Publisher: Leanne Battle

Production Editor: Sharon D. Ray

Cover Art Design: Morgan Morrisette Wright and Sharon D. Ray

This journal's cover features a 1855 depiction of the American clipper ship *Red Jacket* on her journey from Melbourne, Australia, to Liverpool, England. The artwork was originally created by Charles Parsons and Joseph B. Smith, and later lithographed and published by Nathaniel Currier. It is reproduced courtesy of The Met Museum's public domain library.

Cite this publication as:

The Global Trade Law Journal (Fastcase)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2025 Full Court Press, an imprint of Fastcase, Inc.

All Rights Reserved.

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005

<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE GLOBAL TRADE LAW JOURNAL, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@
meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to international attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and others interested in global trade law.

This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Leanne Battle, Publisher, Full Court Press at leanne.battle@vlex.com or at
202.999.4777

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2995-1089

Companies Selling Consumer Products in the European Union (Particularly Clothing, Apparel, and Footwear Companies) Beware: The New ESPR Rules on Unsold Consumer Products Have Now Entered into Force

Marcus Navin-Jones and Eline Van Bogget*

In this article, the authors review new European rules regarding unsold consumer products under the new Ecodesign for Sustainable Products Regulation.

Over the 2024 summer, new EU rules entered into force regarding unsold consumer products under the new ESPR (i.e., the Ecodesign for Sustainable Products Regulation—Regulation (EU) 2024/1781). The legal obligations themselves are relatively concise and short in number and therefore perhaps easy to overlook. However, companies selling or supplying consumer products in the EU/EEA (European Economic Area)—particularly companies in the clothing, footwear, apparel, textile, and retail sectors—should beware and not underestimate their importance or impact.

Aim

In essence, the rules on unsold consumer products aim to stop companies from destroying or discarding unsold consumer products. The European Commission (EC) has identified the destruction of unsold consumer products by companies, particularly the destruction of unsold textiles and footwear, as a “widespread environmental problem.”¹ The underlying objective is therefore to prevent companies from destroying or discarding unsold consumer products in the future, to eradicate this environmental issue.² Some

EU member states have also recognized this as an environmental problem, and taken steps in this regard.³ Therefore, the new EU rules aim to harmonize the rules across the EU/EEA in this area.

Scope and Overview

The requirements relate to unsold “consumer products,” meaning, in principle, any product primarily intended for consumers, excluding component and intermediate products. Certain categories of products are excluded from the scope of the ESPR (e.g., food, feed, and medicinal products) and therefore not generally impacted by the ESPR provisions on unsold consumer products—although related and associated products, including packaging products, may fall within the scope. “Unsold” consumer products generally means all products that have not been sold due to surplus stock, excess inventory and deadstock, and products returned by a consumer on the basis of their right of withdrawal. This may include, for example, product returns, samples, test kits, and packaging.

“Destruction” is not confined to meaning the complete ruin or demolition of a product. Instead, it is particularly wide in its scope, including intentional damaging or discarding of a product as waste, with only certain, limited exceptions. Interestingly, “recycling” is not generally regarded as outside the scope of the general Article 25 ESPR ban on the destruction of unsold consumer products. Therefore, products within the scope of the general ban (see below) cannot, per se, be recycled, but must, instead, be “prepared for re-use” in the meaning of the relevant definitions, or otherwise processed in accordance with ESPR and other relevant EU law.

Legal obligations concerning the prevention of destruction of unsold consumer products extend to companies located outside of the EU/EEA in certain circumstances. Companies outside the EU/EEA selling or supplying products, or making them available, in the EU/EEA must, therefore, fully assess these ESPR legal obligations, including compliance strategies such as documentation retention policies.

Core Requirements

There are essentially three core requirements under the ESPR regarding unsold consumer products.

The first applies to all relevant companies and organizations (i.e., “economic operators”), regardless of their size, and obliges them to take “necessary measures” that can be reasonably expected to prevent the need to destroy unsold consumer products. Companies will, therefore, generally be required to identify at least some measures that prevent the need to destroy unsold consumer products. This may include, for example, an effective and constantly improved returns policy and/or predictive models to hold less unsold stock.

The second core requirement—often referred to as the “transparency obligation”—requires companies of a certain size to disclose certain information on the amount of unsold consumer products destroyed per year on their website. In addition, certain companies should provide this information in reports, such as management reports required under the Corporate Sustainability Reporting Directive and related law. The EC is required to adopt implementing measures setting out the details and format for disclosure of information within the next months. By 19 July 2027, and every three years after that, the EC is required to publish consolidated information on the destruction of unsold consumer products.

The third core requirement is perhaps the most significant and impactful. In short, the ESPR introduces a general prohibition (ban) on the destruction of certain categories of unsold consumer products. The ban applies as of 19 July 2026. At present, only a limited number of categories of unsold consumer products are included in the ESPR ban.⁴ More specifically, these categories currently relate to apparel, clothing, and footwear alone. However, the EC has been granted legal powers to expand the list of categories of unsold consumer products in Annex VII ESPR. Therefore, other categories of consumer products are likely to be included in the scope of the ban in the future.⁵

There are a number of exceptions and exclusions to the general ESPR prohibition on the destruction of unsold consumer products. Within the next 12 months the EC is set to adopt a Delegated Act regarding the derogations from the general ban on the destruction of consumer products on the basis of health and other grounds. There are also other exceptions (e.g., relating to small and medium-sized enterprises) and transitional provisions concerning the general ban. In addition, the EC is currently preparing guidance (by way of a Q&A document) regarding these provisions, which is expected to be published in the coming weeks.

General Context

On 18 July 2024, the ESPR entered into force. The ESPR is described by the EC as the cornerstone of the EU’s approach to more environmentally sustainable and circular products. It aims to significantly improve the circularity, energy performance, and other environmental sustainability aspects of products placed on the EU market. The ESPR forms part of the European Green Deal and the EC’s broader strategy for a circular economy in Europe (the Circular Economy Action Plan or CEAP).

Moving Forward: What Must Companies Do Now?

The ESPR contains a number of important legal provisions including, among others, those that set out a legal framework for the adoption of ecodesign requirements, introduce the “Digital Product Passport” or “DPP,” and concerning green public procurement. Given the importance of these provisions, and given the significant amount of commentary and information on these issues, it is easy to overlook the ESPR provisions on the prevention of destruction of unsold consumer products.

However, companies that sell or supply consumer products in the European Union—particularly those that sell or supply clothing, apparel, and footwear in the European Union—will overlook and underestimate these obligations at their peril.

EU authorities may take a particularly active stance on enforcement and penalties, without first engaging in dialogue with companies, not least as the ESPR empowers the EC (not merely EU national enforcement authorities) to require companies to provide documentary proof of information and compliance. Penalties may include, among other things, forfeiting the ability to access, or retain access, to public and private contracts that include green procurement criteria and/or requirements to comply with relevant EU law. Companies should therefore take action now to ensure they comply. Moreover, companies will need to understand how these ESPR provisions intersect with existing and future national law requirements in relevant EEA states (including, for example, Germany and France).

In Summary

Key Takeaway 1

The ESPR is a new EU Regulation that entered into force in July 2024 and which, among other things, aims to stop companies from destroying unsold consumer products.

Key Takeaway 2

All relevant companies that sell or supply consumer products in the European Union are now legally required to take certain measures to prevent the need to destroy unsold consumer products.

Key Takeaway 3

Certain companies that operate in the European Union are now required to publicly disclose information on the destruction of unsold consumer products on their website annually.

Key Takeaway 4

Perhaps most significantly, as from July 2026 there will be a complete ban on certain companies destroying unsold apparel, clothing, and footwear products. That ban may be expanded in the future to include other categories of consumer products.

Notes

* The authors, attorneys with Crowell & Moring LLP, may be contacted at mnavinjones@crowell.com and evanbogget@crowell.com, respectively.

1. Paragraph 55, Preamble ESPR.

2. According to the information from the EC, although information is scarce, an estimated 4% to 9% of unsold textiles never reach a consumer, the destruction of unsold products in France alone estimated to amount to a value of €630-800 million per year, and in Germany an estimated 10% to 20% of returned clothing and between 4% to 10% of returned electronics are destroyed. (Source: Webinar on 22 May 2024, <https://commission.europa.eu/energy-climate-change-environment/standards-tools-and-labels/>)

products-labelling-rules-and-requirements/sustainable-products/eco-design-sustainable-products-regulation_en. https://commission.europa.eu/document/download/c5db3b9e-23ae-42c8-a50a-b549f20a377d_en?filename=2024_05_22_EC%20Presentation%20ESPR%20Webinar_final.pdf).

3. E.g. Germany and France. In France, see “Loi anti-gaspillage,” <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041553759?r=C3q8dVQuQS>. In Germany, The German Federal Government has agreed on a draft bill amending the Circular Economy Act (Kreislaufwirtschaftsgesetz, “KrWG”). Germany intends to introduce a so-called duty of care (Obhutspflicht), which will require distributors in case of distance sales to ensure that the products remain usable if returned by the customer and do not become waste.

4. See Annex VII ESPR.

5. The scope of this prohibition is initially limited because, according to the recitals to the ESPR, the unnecessarily high production volumes and short use phase of textiles, of which clothing comprises the largest share of consumption in the European Union, cause a significant environmental impact. Newly produced but unsold textiles and especially clothing are among the items reportedly being destroyed. According to the EC, clothing should be given a higher value, and be worn longer and cared for more, than is the case in today’s fast-fashion culture.