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Clothes Captioning: The Demand for a Sustainable Fashion Industry and the European Union's Push for Digital Product Passports

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CLOTHES CAPTIONING: THE DEMAND FOR A SUSTAINABLE FASHION INDUSTRY AND THE EUROPEAN UNION’S PUSH FOR DIGITAL PRODUCT PASSPORTS

GRACE BAER*

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I. INTRODUCTION

From consumer consumption to production rates, the impact of the fashion industry continues to grow, but with this growth comes increased scrutiny. Faced with an uncertain global climate and more insight into the poor working conditions of textile facilities, the average consumer skeptically views the fashion industry as a usurper of resources. Consumers, investors, and governments have begun demanding assurances from brands that their payments do not contribute to human rights violations. Even further, they want to know that these brands are adopting environmentally conscious practices to lessen their impact on the global climate crisis. To force this transparency, customers are re-evaluating their purchases, investors are re-allocating their funds, and governments are reviewing their regulatory frameworks with the aim of overhauling standard business practices.

Under the “European Green Deal,” the European Commission (“Commission”) announced a collection of new proposals and strategies to render its economy more sustainable, circular, and transparent.¹ Its multi-faceted approach aims to transform the predominant linear business model and improve working conditions in supply chains through the traceability of products.² At the foundation of its green movement is the Proposal for

1. See European Commission Press Release IP/22/2013, Green Deal: New Proposals to Make Sustainable Products the Norm and Boost Europe’s Resource Independence (Mar. 30, 2022); *The European Green Deal*, EUR. COMM’N https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en (last visited Feb. 12, 2023); see, e.g., *Commission Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and Repealing Directive 2009/125/EC*, COM (2022) 142 final (Mar. 30, 2022) [hereinafter *ESPR*]; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy for Sustainable and Circular Textiles*, at 1, COM (2022) 141 final (Mar. 30, 2022) [hereinafter *SSCT*]; *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022); Commission Regulation 305/2011 O.J. (L 88) 5 (EU).

2. *SSCT*, *supra* note 1, at 1 (highlighting how the negative environmental effects of the textile industry derive from its linear business model); see, e.g., *2021 Annual Report*, ADIDAS, at 133 (2022), <https://report.adidas-ygroup.com/2021/en/servicepages/downloads/files/annual-report-adidas-ar21.pdf>

Ecodesign for Sustainable Products Regulation (“ESPR” or “Proposal”), which mandates certain design and information requirements for all products placed on the European Union (“EU”) Single Market.³ A key aspect of the EU’s movement is the digital product passport, which luxury fashion brands have started to use independently.⁴ The Commission intends to apply the ESPR incrementally, prioritizing certain industries, like textiles, over others.⁵ The Strategy for Sustainable and Circular Textiles (“SSCT”) is one of the Commission’s first industry-specific applications of the ESPR, but taken together, they leave a lot up for interpretation.⁶

First, this Comment will provide background on the demand for transparency on the fashion industry, its response, and the regulatory framework proposed by the EU. Then, Part III will argue that the ESPR and the SSCT fall short of meeting the EU’s objectives because their requirements, as applied to textiles, are too stringent; their enforcement and effect on trade partners too disparate; and the risk of businesses’ intellectual property too high. In Part IV, this Comment will recommend that the EU strengthen its proposals by providing guidance on enforcement, equal treatment of small and medium-sized enterprises (“SMEs”) in the textile industry, and an exemption process for trade secret holders.

[hereinafter ADIDAS] (illustrating Adidas’s commitment to mitigating the risk of human rights violations by increasing transparency into its supply chain).

3. See *ESPR*, *supra* note 1, at art. 5, para. 3 (“Ecodesign requirements shall, as appropriate, include: (a) performance requirements as set out in Article 6; [and] (b) information requirements as set out in Article 7.”); see also Jean-Philippe Montfort & Pavlina Chopova-Leprêtre, *EU Proposal on New Ecodesign Requirements for Sustainable Products*, MAYER BROWN, LLP (Apr. 6, 2022), <https://www.mayerbrown.com/en/perspectives-events/publications/2022/04/eu-proposal-on-new-ecodesign-requirements-for-sustainable-products> (dividing the ESPR’s eco-design requirements into performance and information requirements); *Single Market*, EUR. UNION, https://european-union.europa.eu/priorities-and-actions/actions-topic/single-market_en (last visited Feb. 12, 2023) (describing the EU Single Market as “[a] single internal market without borders” that enables the free movement of goods).

4. See *ESPR*, *supra* note 1, at 9 (explaining that the digital product passport is intended to increase transparency and efficiency); *The State of Fashion 2022*, BUS. FASHION & MCKINSEY & CO., at 89 (2022), <https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/state%20of%20fashion/2022/the-state-of-fashion-2022.pdf> (last visited Feb. 12, 2023).

5. *ESPR*, *supra* note 1, at 1 (explaining that the ESPR is a “framework” to be applied to various products through delegated acts, starting with those with the most significant impact on the environmental and climate, like textiles and construction products).

6. See Rupert Bellinghausen et al., *The Upcoming Ecodesign Regulation — New Rules for More Sustainable Products*, LINKLATERS, LLP, at 2 (Mar. 31, 2022) (critiquing the ESPR as a regulation with direct effect that lacks detailed provisions).

II. BACKSTAGE: THE FASHION INDUSTRY'S ENVIRONMENTAL AND SOCIAL IMPACT AND THE RESULTING OUTCRY FOR CHANGE

The fashion industry has a reputation for its lack of environmental and social concern that is not unwarranted. Under the pressure to keep up with ever-changing trends and the unsatiated demand from consumers for more styles of clothing, fashion brands demand that their producers increase their output.⁷ As a result, products are made in less time, with less detailed techniques, and are constructed out of cheaper materials that require a substantial amount of water, land, and fossil fuels to make.⁸ This recurring cycle of high demand and cheap clothes with a short lifespan is known as “fast fashion,” and the fashion industry as a whole is engaged in it.⁹ To keep production costs low, fashion companies also outsource their value chain to countries where regulation is more lax and they have less direct supervision over the process, creating space for human rights violations and counterfeit goods.¹⁰ With awareness of the depreciated quality of both the goods and the working conditions for those who make them, consumers now evaluate the conscience of brands and the impact of their products before clicking “purchase.” As a result, some fashion companies are slowly changing their practices, like providing conscious clothing lines or offering certified secondhand goods.¹¹ They also grant customers a peek behind the curtain

7. See Emma Ross, *Fast Fashion Getting Faster: A Look at the Unethical Labor Practices Sustaining a Growing Industry*, GEO. WASH. U. L. SCH. INT’L L. & POL’Y BRIEF (Oct. 28, 2021), <https://studentbriefs.law.gwu.edu/ilpb/2021/10/28/fast-fashion-getting-faster-a-look-at-the-unethical-labor-practices-sustaining-a-growing-industry/>.

8. See Rachael Dottle & Jackie Gu, *The Global Glut of Clothing Is an Environmental Crisis*, BLOOMBERG (Feb. 23, 2022), <https://www.bloomberg.com/graphics/2022-fashion-industry-environmental-impact/#xj4y7vzkg>.

9. See Katrina L. Wilkinson, *A Legal Solution to a Fast Fashion Problem*, 11 ARIZ. J. ENV’T L. & POL’Y 186, 186 (2021) (defining fast fashion as “the rapid production of inexpensive clothing to mimic the ever-changing trends of high-fashion labels”); Solene Rauturier, *What Is Fast Fashion and Why Is It So Bad?*, GOOD ON YOU, <https://goodonyou.eco/what-is-fastfashion/#:~:text=When%20Zara%20landed%20in%20New,to%20being%20sold%20in%20stores> (last visited Jan. 22, 2022) (explaining that fast fashion was originally coined in the 1990s by the *New York Times* to describe Zara’s quick and novel manufacturing and distribution process).

10. See Roberto Fontana et al., *How Luxury Brands Can Beat Counterfeiters*, HARV. BUS. REV. (May 24, 2019), <https://hbr.org/2019/05/how-luxury-brands-can-beat-counterfeiters>; *Economic Impact of Counterfeit Products for Luxury Goods*, STEFANINI GROUP (May 6, 2022), <https://stefanini.com/en/insights/news/economic-impact-of-counterfeit-products-for-luxury-brands> [hereinafter STEFANINI GROUP].

11. See Andrea Cheng, *Luxury Brands Are (Finally) Tapping into Resale — What Does that Mean for the Secondhand Market?*, FASHIONISTA (Feb. 1, 2022), <https://fashionista.com/2022/02/luxury-brands-clothes-resale-secondhand-market>; see,

into their supply chains, like through digital product passports, to provide their customers with information that will entice them into buying.¹² However, these changes are slowly evolving as many companies need to first adopt better business practices, or else the transparency they provide will deter rather than encourage their consumer base. The European Commission intends to mandate this change toward transparency, traceability, circularity, and sustainability by closing its doors to its lucrative Single Market to any product that does not conform to its requirements under its Green New Deal.¹³

A. *The Impact of the Fashion Industry on the Environment*

Mass consumption is rising, the fashion industry produces more clothes than ever before, and the environment is suffering because of it.¹⁴ The average consumer now buys sixty percent more clothes than it did twenty years ago, resulting in a 400 percent increase in clothing consumption since 2000.¹⁵ As both a response to and a cause of the increased demand, clothing companies offer more garments than ever before and produce two times the amount of clothing than they did twenty years ago.¹⁶ This increase in

e.g., Mark Faithfull, *After London Debut, Uniqlo to Roll Out Sustainable Re.Uniqlo Studio*, FORBES (Sept. 11, 2022, 1:00 AM), <https://www.forbes.com/sites/markfaithfull/2022/09/11/after-london-debut-uniqlo-to-roll-out-sustainable-reuniqlo-studio/?sh=186ed8a27426>; Mili Godio, *Amazon Aware is the Retail Giant's New Eco-Friendly Private Brand*, NBC NEWS (Mar. 2, 2022, 1:00 PM), <https://www.nbcnews.com/select/shopping/amazon-aware-ncna1290663>.

12. See, e.g., Sarah Kent, *Where Does Your Necklace Come From?*, BUS. FASHION (Oct. 10, 2022), <https://www.businessoffashion.com/articles/sustainability/monica-vinader-traceability-ethical-passport-digital-blockchain-gem-gold-silver-diamond/> (documenting Monica Vinader's digital product passport that provides customers with information on which suppliers contributed to crafting the related jewelry product); Rachel Cernansky, *Chloé Launches 'Instant Resale' Using Digital IDs on Vestiaire Collective*, VOGUE BUS. (Feb. 9, 2023), <https://www.voguebusiness.com/sustainability/chloe-launches-instant-resale-using-digital-ids-on-vestiaire-collective> (explaining that Chloé's new digital identification program will track key raw materials and provide details on the related product's manufacturing process).

13. European Commission Press Release IP/22/2013, *supra* note 1.

14. See Ross, *supra* note 7; Dottle & Gu, *supra* note 8 (suggesting that garment production has doubled since 2000 and describing the fashion industry's negative impact on water, land, and climate change).

15. Ross, *supra* note 7; see also SSCT, *supra* note 1, at 1 (explaining that the consumption of clothing and footwear is projected to increase by sixty-three percent in the next eight years).

16. See Rauturier, *supra* note 9 (explaining that fast fashion coerces consumers into "throw away culture" by providing short-term products and eliciting a constant feeling of dissatisfaction thanks to the continual emergence of new trends); see also Ross, *supra*

production is only exacerbating the fashion industry's negative impact on the environment, as their methods and materials value cost over sustainability.¹⁷

From sourcing raw materials, to manufacturing a garment, to delivering the product to the ultimate consumer, the fashion industry uses significant amounts of natural resources, contributing to the ongoing climate crisis.¹⁸ The fashion industry consumes the same amount of water as five million people, and it is responsible for roughly twenty percent of global industrial water pollution.¹⁹ Additionally, the industry cuts down seventy million tons of trees per year.²⁰ As a result, the fashion industry is a significant player in deforestation and the contamination of marine ecosystems, especially due to their reliance on cheap textiles.²¹

As garment manufacturers increase production, they lower the quality of the clothing materials to keep overhead costs low.²² Most brands, and fast fashion brands in particular, make their clothing with synthetic fibers, specifically polyester, which is a form of plastic made from oil.²³ As

note 7 (describing the creation of clothing “micro-seasons” to produce more clothing and increase demand); *SSCT*, *supra* note 1, at 1 (explaining that, while the cost of clothing has decreased by thirty percent, household spending on clothing has increased by fourteen percent). *But see* Olivia Baggott, *A History of Consumerism and Our Fashion Consumption*, CUROBE (June 9, 2022), <https://www.curobe.com/blog/2022/06/a-history-of-consumerism-and-our-fashion-consumption/> (arguing that fast fashion is a result of mass consumption and consumers' dependence on material goods for satisfaction); Hanalei Potempa, *The Dangers of Fast Fashion, Consumer Culture and Microtrends*, ARBITER (Apr. 27, 2022), <https://arbiteronline.com/2022/04/27/the-dangers-of-fast-fashion-consumer-culture-and-microtrends/> (explaining that fast fashion benefits from consumerism and that its constantly-changing trends are a response to consumer demands).

17. *See* Renee Cho, *Why Fashion Needs to be More Sustainable*, COLUM. CLIMATE SCH. (June 10, 2021), <https://news.climate.columbia.edu/2021/06/10/why-fashion-needs-to-be-more-sustainable/>.

18. *See id.* (describing the fashion industry's negative environmental impact, like its significant consumption of water and its emission of greenhouse gases, which is projected to almost triple by 2050); *Environmental Sustainability in the Fashion Industry*, GENEVA ENV'T NETWORK (Nov. 19, 2021) (finding that the fashion industry is responsible for twenty percent of global industrial wastewater pollution and for producing more greenhouse gas emissions than France, Germany, and the United Kingdom combined).

19. Cho, *supra* note 17; *Environmental Sustainability in the Fashion Industry*, *supra* note 18.

20. Cho, *supra* note 17.

21. *See* Jennifer Greggs, *Is Fashion Causing a Biodiversity Crisis?*, REAL SUSTAINABILITY CTR., <https://realsustainability.org/is-fashion-causing-a-biodiversity-crisis/> (last visited Feb. 12, 2023).

22. Ross, *supra* note 7.

23. Dottle & Gu, *supra* note 8.

polyester-made clothes are washed, both during the manufacturing process and by the average person at home, their microplastics enter the ocean and eventually end up in our food chain.²⁴ As the most used textile, polyester production is not projected to slow down, with an estimated forty-seven percent increase in the next ten years.²⁵ This growing proclivity for polyester will affect generations to come as the fashion industry currently relies on ineffective plastic disposal methods, and the long-term presence of plastics in our food chain can result in human DNA fragmentation and male infertility.²⁶

With the increase in consumption comes an increase in waste. An average consumer wears a product half as long as they did in 2000, if at all.²⁷ Only one percent of clothing is recyclable, and recycling itself requires both a significant energy commitment and fiber-specific chemicals to break down the item to be repurposed.²⁸ Therefore, most discarded clothing is either incinerated, further emitting greenhouse gases into the air, or sent to a landfill.²⁹ Often located in countries that did not produce the waste in the first place, landfills are unable to store this influx as the materials can take up to 200 years to decompose.³⁰ Even more, the business practices of some companies, in particular luxury fashion brands, involve routinely burning

24. Cho, *supra* note 17 (finding that microplastics are concentrated as they are passed through the food chain, causing the most harm to humans); *Environmental Sustainability in the Fashion Industry*, *supra* note 17 (stating that the annual number of microfibers released into the ocean by the fashion industry is equivalent to 50 billion plastic bottles).

25. Dottle & Gu, *supra* note 8.

26. See Zhang et al., *Microplastics May Be a Significant Cause of Male Infertility*, *AM. J. MEN'S HEALTH*, May-June 2022, at 2–3 (attributing male infertility to the presence of microplastics in the food chain).

27. Cho, *supra* note 17 (finding that forty-one percent of young women do not want to re-wear clothes and fifty percent of clothing in the UK is never worn).

28. Cho, *supra* note 17; see also *SSCT*, *supra* note 1, at 3 (stating that less than one percent of textile waste is reused in new textiles).

29. See, e.g., Cho, *supra* note 17; Ngan Le, *The Impact of Fast Fashion on the Environment*, *PRINCETON STUDENT CLIMATE INITIATIVE* (JULY 20, 2022), <https://psi.princeton.edu/tips/2020/7/20/the-impact-of-fast-fashion-on-the-environment> (explaining that fifty-seven percent of discarded clothing ends up in a landfill and that when the landfills meet capacity, the clothing is incinerated, which results in poisonous gases in nearby communities).

30. Cho, *supra* note 17; see also Natalie Obiko Pearson et al., *Fast Fashion's Recycling Myth Buries Developing World in Waste*, *BLOOMBERG L.* (Nov. 2, 2022, 08:00 AM), https://www.bloomberglaw.com/bloomberglawnews/class-action/X8SD6EQC000000?bna_news_filter=class-action#jcite (illustrating the impact of exporting used clothing to landfills in other countries).

unsold inventory to maintain the exclusivity of their products and their brand.³¹

B. The Fashion Industry's Reliance on Outsourcing and What it Means for Their Workers, Goods, and Reputation

To meet the increased demand, fashion companies outsource their production, manufacturing, and design to cost-effective operations in foreign countries.³² As a result, brands lose insight into and control of their supply chain, effectively turning a blind eye to the forced labor creating their products and risk the devaluation of their brand through counterfeit goods.³³

By choosing to relocate operations to countries with relaxed safeguards, fashion companies fund forced labor.³⁴ Clothing is the second most likely product to have been made with forced labor as fifty-eight percent of the estimated 48.5 million modern-day slaves work in the cotton and garment industry.³⁵ The Clean Clothes Campaign found that ninety-three percent of brands do not pay their workers a living wage.³⁶ Almost the entire apparel industry has profited from the forced labor of the Uyghur people in the Xinjiang region of China, the largest cotton producer in the world; therefore, forced labor produces one in five cotton products.³⁷ According to the 2021 Fashion Transparency Index, only twenty-four percent of brands disclose where their materials are processed and only seven percent publish where they source their raw materials.³⁸ With companies turning a blind eye to the

31. See Cho, *supra* note 17 (stating that Burberry burned thirty-seven million dollars' worth of unsold products in one year alone).

32. STEFANINI GROUP, *supra* note 10.

33. STEFANINI GROUP, *supra* note 10; Fontana, *supra* note 10 (“[O]utsourcing [to low-cost countries] led to relaxed control over supply chain, design, and manufacturing.”)

34. See *Human Rights in Supply Chains*, HUM. RTS. WATCH (May 30, 2016), <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence> (tying companies' failure to mitigate human rights abuses and the abundance of forced labor to the increased reliance on and complexity of global supply chains).

35. Chelsea Caplinger, *Fast Fashion in Your Closet: What Your Clothes Say About Your Choices*, HUM. TRAFFICKING SEARCH (Nov. 23, 2021), <https://humantraffickingsearch.org/fast-fashion-in-your-closet-what-your-clothes-say-about-your-choices/>.

36. *Id.*

37. See Annie Kelly, ‘Virtually Entire’ Fashion Industry Complicit in Uighur Forced Labour, *Say Rights Groups*, THE GUARDIAN (July 23, 2020, 12:00 AM), <https://www.theguardian.com/global-development/2020/jul/23/virtually-entire-fashion-industry-complicit-in-uighur-forced-labour-say-rights-groups-china>.

38. *Fashion Revolution Statement on Uyghur Forced Labor*, FASHION REVOLUTION

forced labor responsible for their products and profits, their lack of insight into these facilities can result in unauthorized production and counterfeit goods.³⁹

A decentralized supply chain provides outside actors with the knowledge and tools to imitate authentic products under the brand's nose, and purchases of these counterfeit goods are only becoming more widespread due to increased accessibility over the internet and the increased pressure on consumers to keep up with trends.⁴⁰ The Organisation for Economic Cooperation and Development estimates that the value of counterfeit goods tripled in the past decade, totaling three trillion dollars in 2022.⁴¹ The luxury goods market in particular is overrun with fake goods, totaling an estimated sixty to seventy percent of the \$4.5 trillion-industry.⁴² As luxury brands continue to increase their prices, younger consumers are more willing to buy fake goods because their purchases are driven by short-lived fashion trends.⁴³ Counterfeiters also have an easier time accessing customers now that they

(2020), <https://www.fashionrevolution.org/fashion-revolution-statement-on-uyghur-forced-labour/>.

39. See ORG. FOR ECON. COOP. & DEV., THE ECONOMIC IMPACT OF COUNTERFEITING 12 (1998) (“Very often the fakes [in luxury goods and fashion clothes] are made by the same manufacturer that is contracted to produce the original items. The copies are therefore indistinguishable from the genuine item, but are sold for less than half the price.”); STEFANINI GROUP, *supra* note 10; Steve Hargreaves, *Counterfeit Goods Becoming More Dangerous*, CNN BUS. (Sept. 27, 2012, 11:48 AM), <https://money.cnn.com/2012/09/27/news/economy/counterfeit-goods/> (attributing the growth in fake goods to outsourcing).

40. See Elizabeth Segran, *The Volume of the Problem is Astonishing: Amazon's Battle Against Fakes May be Too Little, Too Late*, FAST CO. (May 17, 2021), <https://www.fastcompany.com/90636859/the-volume-of-the-problem-is-astonishing-amazons-battle-against-fakes-may-be-too-little-too-late> (crediting overseas manufacturing centers as a catalyst for counterfeit goods because factory workers use the knowledge and equipment provided to them by the brand's legitimate facilities); Cathaleen Chen, *Why Luxury's Counterfeit Problem Is Getting Worse*, BUS. FASHION (Oct. 18, 2022) (tying the increase in purchases of counterfeit goods to the pressure of trends, the cost of goods, and the accessibility of the internet).

41. See Chen, *supra* note 40.

42. See Fontana, *supra* note 10.

43. See Chen, *supra* note 40 (illustrating the mindset of younger consumers through the account of a woman, who buys counterfeit goods because she does not expect to wear products long-term because she shops “on trend”); Don-Alvin Adegeest, *More Young Europeans are Buying Counterfeit Goods, Says Report*, FASHIONUNITED (June 13, 2022), <https://fashionunited.com/news/fashion/more-young-europeans-are-buying-counterfeit-goods-says-report/2022061348104> (stating that the EU Intellectual Property Office found that thirty-seven percent of the fifteen to twenty-four year olds surveyed intentionally bought fake products within the preceding year, which is a twelve percent increase from 2016, and that one-third of these customers would not have bought fake products if the authentic item was less expensive).

can use the internet or even a company's pre-existing supply chain to sell their goods.⁴⁴ This results in higher safety concerns as counterfeit products, including cosmetics and perfume, circulate on the legitimate market without satisfying safety regulations.⁴⁵

C. The Demand for Transparency, Traceability, Circularity, and Sustainability

The everyday consumer desires more insight into a company's business practices, and many customers prefer to buy from brands that align with their personal values.⁴⁶ While about forty percent of U.S. online consumers prefer to buy environmentally sustainable products, more consumers share this sentiment in Metro China, at eighty-two percent, and in France, with sixty percent.⁴⁷ Executives at consumer product companies that recognize this preference as a dominant market trend state that sustainability issues are a top concern at all stages of their supply chain, and they believe that accountable sustainability would benefit them financially in the long run.⁴⁸ Popular demand for sustainable practices has extended beyond the business-

44. Segran, *supra* note 40 (attributing the increase in counterfeit goods to counterfeiters' use of e-commerce rather than in-person stores); Chen, *supra* note 40 ("One reason for the explosion in counterfeiting is easy access to these goods online."); U.N. OFF. ON DRUGS & CRIME, THE ILLICIT TRAFFICKING ON COUNTERFEIT GOODS AND TRANSNATIONAL ORGANIZED CRIME 1, https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf (last visited Feb. 11, 2023) ("Criminals also feed fake goods into the legitimate supply chain which provides them with 'clean' money.").

45. See STEFANINI GROUP, *supra* note 10; U.N. OFF. ON DRUGS & CRIME, *supra* note 44, at 1, 5 (stating that counterfeit goods put the health and safety of consumers at risk).

46. See AVERY DENNISON & GWI, DIGITAL CONSUMER BEHAVIOR REPORT 32-33 (2021) (finding that more than fifty percent of fashion buyers in China, Europe, and the U.S. value transparent fashion companies and that sixty-nine percent of Chinese and forty-six percent of European and American fashion buyers care about a fashion brand's values and the causes they support); Fiona Swerdlow & Rebecca Rose, *Global Consumers Drive The Market Toward Sustainable Retail*, FORRESTER RSCH., INC. (Oct. 29, 2021) (finding that almost half of U.S. consumers want to buy from brands that align with their personal values).

47. Swerdlow & Rose, *supra* note 46.

48. Susan Galer, *Sustainability Trends 2022: A Make or Break Moment for Consumer Product Supply Chains*, FORBES (Feb. 15, 2022, 8:15 AM) (finding that executives at consumer-product companies are more apt to prioritize sustainability, totaling seventy-three percent, over other companies); see also James Cascone et al., *Driving Accountable Sustainability in the Consumer Industry*, DELOITTE (June 9, 2022), <https://www2.deloitte.com/us/en/insights/industry/retail-distribution/accountable-sustainability-consumer-industry.html>.

buyer relationship, and the public financial market similarly wants to capitalize on value-driven dollars.⁴⁹

Investors are reallocating their global capital to sustainable funds and more investment funds are dedicated to environmental, social, and governance (“ESG”) issues and general ESG-friendly investors.⁵⁰ This consumer- and investor-driven trend in the public market has arguably even debunked the previous belief that sustainable investments are disadvantageous to investors.⁵¹ Data now shows that these ESG-friendly investments produce risk-adjusted returns at least equivalent to less-sustainable investments.⁵²

49. *ESG Explained, 7 Essentials You Need to Know*, J.P. MORGAN ASSET MGMT., <https://am.jpmorgan.com/us/en/asset-management/adv/insights/market-insights/esg-explained-7-essentials-you-need-to-know/> (explaining that consumers “voting with their dollars” has a ripple effect on the regulatory framework and landscape of investments) (last visited Feb. 11, 2023); Larry Fink, *Larry Fink’s 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (last visited Feb. 12, 2023) (describing the reallocation of funds to sustainable investing as a “tectonic shift” that has only just begun).

50. Cascone et al., *supra* note 48 (predicting that roughly fifty percent of personally managed assets will be invested in ESG by 2024); *What is ESG Investing and Analysis?*, CFA INST., <https://www.cfainstitute.org/en/research/esg-investing> (describing ESG as three non-financial factors of a business, like its environmental impact, relationship with its staff, vendors, and community, and its standards for running the company) (last visited Feb. 12, 2023); *#1 What is ESG?*, DELOITTE, <https://www2.deloitte.com/hu/en/pages/energy-and-resources/articles/esg-explained-1-what-is-esg.html> (last visited Feb. 11, 2023) (“More and more investors are incorporating ESG elements into their investment decision making process, making ESG increasingly important from the perspective of securing capital, both debt and equity.”).

51. See Robert Clark & Declan Harty, *ESG Investment Returns Starting to Outperform Other Mutual Funds, ETFs*, S&P GLOB. (July 2, 2018), <https://www.spglobal.com/en/research-insights/articles/esg-investment-returns-starting-to-outperform-other-mutual-funds-etfs#:~:text=Since%20their%20introduction%20more%20than,means%20leaving%20money%20on%20the> (stating that the positive performance of ESG funds contradict the industry assertion that sustainable investment vehicles are less lucrative than non-ESG funds). *But see Does ESG Investing Generate Higher Returns?*, KENAN INST. PRIV. ENTER. (Apr. 20, 2022), <https://kenaninstitute.unc.edu/kenan-insight/does-esg-investing-generate-higher-returns/#:~:text=For%20example%2C%20in%20the%20short,driving%20up%20their%20stock%20prices> (stating that studies have conflicting findings on ESG returns).

52. See *7 Insights from Asset Owners on the Rise of Sustainable Investing*, MORGAN STANLEY: INST. FOR SUSTAINABLE INVESTING (May 28, 2020), <https://www.morganstanley.com/ideas/sustainability-investing-institutional-asset-owners>; Clark & Harty, *supra* note 51. *Contra* Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), <https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing> (arguing that ESG funds are less successful because “none of the highest sustainable funds outperformed any of the lowest rated funds” in a study conducted by University of Chicago researchers).

With an eye on conscious spending and awareness of the evils of fashion production, consumers are redirecting their dollars toward the resale market, resulting in a boom in the secondhand industry.⁵³ According to the 2022 Resale Report by thredUP and GlobalData, a majority of the next generation of consumers, known as “Gen Z,” look for a secondhand item before purchasing one new, and almost half consider the resale value of a product before executing a purchase.⁵⁴ Now, the resale market outpaces the traditional retail market and is projected to be worth eighty-four billion dollars by 2030 in the United States alone.⁵⁵ To adapt to this trend, traditional retail actors are entering the resale market by launching their own consignment sites or allowing luxury pre-owned goods on their sites.⁵⁶ Retail executives now consider offering resale programs as important or even essential to their business.⁵⁷

D. How the Fashion Industry is Responding

Players in the fashion industry are adjusting their practices to give consumers what they want by conforming to better practices even if it means raising prices.⁵⁸ Entrepreneurs are starting entirely sustainable brands and

53. See Amy De Klerk, *Secondhand Clothing Market Set to be Twice the Size of Fast Fashion by 2030*, HARPER'S BAZAAR (June 23, 2021), <https://www.harpersbazaar.com/uk/fashion/fashion-news/a36810362/secondhand-clothing-boom/> (stating that the number of first-time consumers who conducted a transaction in the resale market increased by about thirty-three percent in one year, from 36.5 million consumers in 2020 to 118 million in 2021); *The Secondary Market Watch: A Running Timeline of Resale Investments and M&A*, TFL MEDIA, INC. (Nov. 10, 2022), <https://www.thefashionlaw.com/the-resale-market-watch-a-running-list-of-funding-and-ma/> (citing a study by Boston Consulting Group finding that the pre-owned apparel market generates forty billion dollars per annum); *Apparel Resale Market Size and Trend Analysis by Category, Segments and Region, Consumer Attitudes and Competitive Landscape, 2016–2026*, GLOBALDATA (Sept. 22, 2022) (finding that the size of the global apparel resale market is expected to grow by sixteen percent by 2027).

54. THREDUP INC., 2022 RESALE REPORT (2022), <https://www.thredup.com/resale/2022/> (stating that almost sixty-six percent of fast fashion consumers want to shop the secondhand market).

55. De Klerk, *supra* note 53 (stating that the secondhand market is growing eleven times faster than the traditional retail market).

56. See, e.g., Catherine Erdly, *The Resale Market Is Booming: Here's How Small Businesses Can Benefit*, FORBES (June 27, 2021, 3:31 PM), <https://www.forbes.com/sites/catherineerdly/2021/06/27/the-resale-market-is-booming-heres-how-small-businesses-can-benefit/?sh=65dd8e3a7c62> (describing new secondhand offerings by Gucci, Levi's, and ASOS).

57. THREDUP INC., *supra* note 54 (finding that fifty-two percent of retail executives without resale programs view offering resale as “table stakes”).

58. *Id.* (“[R]etail giants on all ends of the market have been strengthening their position in resale.”).

pre-existing companies are releasing eco-friendly clothing lines alongside aggressive marketing campaigns.⁵⁹ Some fashion houses are providing their consumers with unprecedented transparency into their practices and products through new technologies, like digital product passports.⁶⁰ However, other companies, whose practices would be unattractive to this conscientious consumer base, are misrepresenting their efforts so they can still benefit from the trend.⁶¹

Some major luxury fashion groups, like LVMH and Richemont, have already begun using these product passports to provide their customers and partners with information on their products.⁶² With the scan of a QR code, a near-field communication tag, or similar technology, a consumer can learn the history and nature of a product.⁶³ This can include where the designer sourced the material, the amount of carbon dioxide emissions produced during the manufacturing process, or the authenticity of the product both after its first transaction and throughout its life in the resale market.⁶⁴ To provide this information, some of these luxury brands have formed blockchain consortiums to protect the data from alterations.⁶⁵

59. See, e.g., Amanda Breen, *This Fashion Founder's Company Will Take Back Any Piece of Clothing at Any Time for Any Reason. Here's Why.*, ENTREPRENEUR (Dec. 31, 2021), <https://www.entrepreneur.com/leadership/this-fashion-founders-company-will-take-back-any-piece-of/379572> (describing the closed-loop clothing company For Days); Emily Farra, *H&M Takes a Step Toward Circularity with a Collection of Garments Made from Waste*, VOGUE (Nov. 18, 2020), <https://www.vogue.com/article/hm-conscious-collection-recycled-waste-circularity> (highlighting H&M's adoption of a "conscious" clothing line).

60. See BUS. FASHION & MCKINSEY & CO., *supra* note 4, at 89 (explaining that fashion businesses are using product passports centered around blockchain "to tackle significant industry pain points, such as counterfeiting and the need for more responsible and transparent business practices amid rising consumer engagement with climate change and labour conditions in fashion"); see also, e.g., Ioana Zamfirescu, *Digital Product Passports and the Future of Fashion*, MOINCOINS (July 27, 2022), <https://moincoins.com/blog/digital-product-passports>.

61. See, e.g., Matthew Stern, *H&M Case Shows How Greenwashing Breaks Brand Promise*, FORBES (July 13, 2022, 12:03 PM), <https://www.forbes.com/sites/retailwire/2022/07/13/hm-case-shows-how-greenwashing-breaks-brand-promise/?sh=7642c1ce1171> (describing H&M's misrepresentation of its "conscious" clothing line).

62. BUS. FASHION & MCKINSEY & CO., *supra* note 4, at 93.

63. *Id.* at 89.

64. *Id.*

65. *Id.* at 93 (Aura Blockchain Consortium); see generally Neo C. K. Yiu, *Toward Blockchain-Enabled Supply Chain Anti-Counterfeiting and Traceability*, FUTURE INTERNET (Mar. 29, 2021), <https://www.mdpi.com/1999-5903/13/4/86> (describing blockchain as a distributed ledger technology that provides a chronological, decentralized system of data recording that is not susceptible to after-the-fact alterations).

The fashion industry's application of blockchain in its internal systems works to counteract the prevalence of counterfeit luxury goods, a six-hundred-million-dollar industry.⁶⁶ Blockchain also provides credibility to the reputation of an industry that is rightfully tainted by its negative environmental impact because it allows buyers to trace their product and have confidence in the brand's business practices.⁶⁷ However, the value of blockchain is limited to the accuracy of the information provided, and some companies are willing to exaggerate their sustainability efforts, a technique known as "greenwashing."⁶⁸

E. The European Union's Legislation for a Greener EU

Faced with the threat of climate change to Europe, the European Commission adopted a set of policy initiatives called the European Green Deal on July 14, 2021, to improve the health and well-being of its citizens by reducing its negative impact on the environment.⁶⁹ With the goal of modernizing the European Union as a resource-efficient economy, the European Green Deal aims to reduce the EU's net greenhouse gas emissions by at least fifty-five percent by 2030 and render Europe the first climate-neutral continent by 2050.⁷⁰ Through legislative proposals that are backed by impact assessments across various sectors, the EU hopes that its comprehensive initiative will be an example for non-EU countries, who will

because it requires multiple computers across the network and globe, known as "nodes," to transmit, verify, and store data that is linked to previous transactions in "blocks").

66. See BUS. FASHION & MCKINSEY & CO., *supra* note 4, at 11 ("[Product passports supported by blockchain] contain coded information that can add value, support supply chain transparency, and ensure authentication – a significant advantage tackling counterfeiting.").

67. *Id.* at 89 (explaining that blockchain is not an all-encompassing solution because the information from suppliers must be accurate, which is an added challenge for companies).

68. See Mehar Mehar, *The Deception of Greenwashing in Fast Fashion*, DOWN TO EARTH (Feb. 16, 2021), <https://www.downtoearth.org.in/blog/environment/the-deception-of-greenwashing-in-fast-fashion-75557> (explaining that "greenwashing" is a term originally coined by Jay Westervelt in 1986 to describe claims by companies that misrepresent their business practices as more eco-friendly than they are); Kate Abnett, *EU Plans Law Forcing Companies to Prove Green Claims are Real – Draft*, REUTERS (Jan. 13, 2023, 3:36 PM), <https://www.reuters.com/business/sustainable-business/eu-plans-law-forcing-companies-prove-green-claims-are-real-draft-2023-01-13/> (citing a study by the European Commission that found that fifty-three percent of environmental claims were misleading).

69. EUROPEAN COMM'N, *supra* note 1.

70. *Id.*; *Delivering the European Green Deal*, EUROPEAN COMM'N, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en (last visited Nov. 13, 2022).

then implement their own climate goals, ameliorating climate change on a global scale.⁷¹ Under this strategy and its Circular Economy Action Plan, the Commission released a set of proposals “to make sustainable products the norm in the EU, boost circular business models and empower consumers for the green transition.”⁷² At the foundation of these proposals is the ESPR, which sets forth information and design requirements for all goods placed on the Single Market.⁷³ Through its incremental application via delegated acts, it serves as a framework for all products across all industries.⁷⁴ One of the first industries targeted by the ESPR is textiles because the European Union estimates that the textile industry has the fourth most significant impact on the environment.⁷⁵ The EU Strategy for Sustainable and Circular Textiles would directly affect the textile industry, and therefore, the fashion industry, if the EU were to adopt it.⁷⁶

1. *The Proposal for the Ecodesign for Sustainable Products Regulation*

The ESPR is a set of proposed rules that would make products more circular and efficient.⁷⁷ Encouraged by the success of the Ecodesign Regulation for energy-related products in reducing energy consumption and increasing consumer savings, the Commission adopted the ESPR to extend the EU’s current framework to all products.⁷⁸ Through the ESPR, the

71. *Delivering the European Green Deal*, *supra* note 70.

72. European Commission Press Release IP/22/2013, *supra* note 1.

73. *ESPR*, *supra* note 1, at 49–51, 52–53 (providing the ecodesign and information requirements under Articles 5 and 7, respectively).

74. *Id.* at 1 (“[The ESPR] lays down a framework for setting ecodesign requirements based on the sustainability and circularity aspects listed in the Circular Economy Action Plan[.]”).

75. *SSCT*, *supra* note 1, at 1.

76. *Legislative Powers*, EUR. PARL.: ABOUT PARL., <https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/legislative-powers> (last visited Feb. 12, 2023) (explaining that in the ordinary legislative procedure, the European Commission proposes legislation that the European Commission and the European Parliament must both adopt for it to be enacted into law); *see also Sources and Scope of European Union Law*, EUR. PARL.: FACT SHEETS ON EUR. UNION, <https://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law> (last visited Feb. 11, 2023) (explaining that EU regulations are binding on all Member States as soon as they go into effect, while directives need to be independently adopted by national legislators to be applicable).

77. *See ESPR*, *supra* note 1, at 1 (listing reparability, reusability, recycling, and energy efficiency as purposes of the ESPR).

78. *Id.*; Montfort & Chopova-Leprêtre, *supra* note 3 (“The ESPR extends the scope of the Ecodesign Directive[.]”); *see also* Council Directive 2009/125, 2009 O.J. (L 285) 10 (EC).

Commission proposes performance and information requirements to meet its goal of only allowing environmentally-friendly products on the EU market and banning any non-compliant goods.⁷⁹ In the absence of a conflicting provision in a pre-established act that sufficiently meets the same objective, the ESPR's two prongs (product requirements and information requirements) impose obligations on all economic operators with any product on the EU market.⁸⁰ The product requirements provide a product design framework to address the EU's environmental and sustainability concerns.⁸¹ The information requirements ensure that all economic operators and consumers have access to the appropriate details of that product's production and performance.⁸² The information requirements also contain provisions intended to prevent economic operators from destroying unsold goods.⁸³

To relay the required information, the ESPR introduces the digital product passport ("DPP"). The DPP is "a set of data specific to a product that includes the information specified in the applicable delegated act . . . and that is accessible via electronic means through a data carrier."⁸⁴ To ensure that all actors in the stream of commerce have access to relevant product information, the data carrier must be physically present on the product, its information must be free to access, and the responsible party must store the data for the time specified in the legislation.⁸⁵ The ESPR works in conjunction with a proposal focused on the textile industry that the European Commission released at the same time.⁸⁶

2. *The Strategy for Circular and Sustainable Textiles*

Under the SSCT, the European Union intends to modernize the textile industry and require environmentally-conscious business practices from the production stage through to its consumption and waste.⁸⁷ The objective of

79. Montfort & Chopova-Leprêtre, *supra* note 3.

80. *ESPR*, *supra* note 1, at 2; see Montfort & Chopova-Leprêtre, *supra* note 3; Bellinghausen, *supra* note 6.

81. *ESPR*, *supra* note 1, at 3.

82. *Id.* at 5.

83. *Id.* at 74 (discussing Article 19); Bellinghausen et al., *supra* note 6.

84. GÖTZ ET AL., DIGITAL PRODUCT PASSPORT: THE TICKET TO ACHIEVING A CLIMATE NEUTRAL AND CIRCULAR EUROPEAN ECONOMY?, UNIV. CAMBRIDGE INST. FOR SUSTAINABILITY LEADERSHIP (CISL) & WUPPERTAL INST. 15 (2022).

85. *Id.* at 16.

86. Bellinghausen et al., *supra* note 6.

87. *Questions and Answers on EU Strategy for Sustainable and Circular Textiles*, EUR. COMM'N (Mar. 30, 2022), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_2015 [hereinafter

the SSCT is that all textile products placed on the EU market will have increased longevity and recyclability by 2030.⁸⁸ The SSCT requires textiles to contain recycled fibers, minimizes the release of textile microplastics, controls greenwashing through transparency, and discloses the destruction of unsold products, which is a norm in luxury fashion.⁸⁹ It also extends the EU's pre-existing waste management responsibility scheme in the Waste Framework Directive by making the manufacturer of a product ultimately responsible for the product's end-of-life cycle.⁹⁰ Through the DPP of the ESPR, consumers will receive more information on the textiles in their purchases, like where that product was produced, its fiber composition, and repair and care services.⁹¹ Despite the EU's efforts for a more circular, sustainable, traceable, and transparent market, these provisions may fall short of meeting that objective if their enforcement is inconsistent, the information provided removes the value of the intellectual property of the business, and the result is a disproportionate treatment of World Trade Organization ("WTO") trade partners.

III. CURTAIN CALL: THE PROPOSALS PRESENT CONFLICTS IN ENFORCEMENT, TRADE, AND TRADE SECRETS

While the EU has yet to finalize the ESPR and apply it to an industry, an analysis of its skeleton through the lens of the objectives of the European Green Deal, the SSCT, and pre-existing legislation illuminates its shortcomings. By encouraging individual Member States to monitor their national borders and assess the compliance of products, the Commission opens the door to inconsistent enforcement across the Single Market.⁹²

Q&A on SSCT]; see also *SSCT*, *supra* note 1, at 1 (explaining that the purpose of the *SSCT* is to change the textile industry's linear model, which results in a negative environmental impact).

88. See GÖTZ ET AL., *supra* note 84.

89. *SSCT*, *supra* note 1, at 1; European Commission Press Release IP/22/2013, *supra* note 1.

90. See Directive 2008/98, of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives, 2008 O.J. (L 312) 3; GÖTZ ET AL., *supra* note 84.

91. GÖTZ ET AL., *supra* note 84; *SSCT*, *supra* note 1, at 5 ("[T]he Commission will introduce mandatory disclosure of other types of information, such as sustainability and circularity parameters, products' size, and, where applicable, the country where manufacturing processes take place ('made in'). See generally EUR. UNION, SUSTAINABLE AND CIRCULAR TEXTILES BY 2030 (Mar. 30, 2022), https://www.interregeurope.eu/sites/default/files/2022-05/Textiles_Factsheet_EC.pdf.

92. See, e.g., LEGAL OBSTACLES IN MEMBER STATES TO SINGLE MARKET RULES, EUR. PARL.: POL'Y DEP'T ECON., SCI. QUALITY LIFE POLICIES 16–17 (2020), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658189/IPOL_STU\(2020](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658189/IPOL_STU(2020)

Trade partners across the globe who profit from the large EU consumer base may also experience inconsistent treatment through the Commission's carveout for small and medium-sized enterprises, which dominate the EU textile market.⁹³ Further, the rigid disclosure requirements of certain information in the DPP without an avenue for exemptions fails to contemplate the value of trade secrets and their irreparability if exposed.⁹⁴ Although the Commission does not intend for the ESPR to be a market barrier, its enforcement, disproportionate treatment of trade partners, and take-it-or-leave-it approach to trade secrets could result in an inhospitable market for outside actors.⁹⁵

A. Disproportionate Enforcement and Discrimination

The ESPR and the SSCT are aggressive measures to combat climate change. However, both documents lack details on how economic operators can comply with the regulations, who is responsible for enforcing compliance, and what those enforcement measures are.⁹⁶ The ESPR risks inconsistent enforcement throughout the Single Market by permitting individual Member States authority and discretion without appropriate guidance.

First, the ESPR establishes a burden on economic operators to ensure compliance, but the Commission does not provide a method for economic operators to assess or establish compliance.⁹⁷ Based on the actor's role in the distribution chain, an economic operator is only responsible for taking "appropriate measures" to ensure that only conforming products are made

)658189_EN.pdf (detailing "the prevalence of national legislation, regulations or enforcement practices that contradict or counteract Single Market rules" and individual Member States' lack of concern for "the impact of their actions on the free movement of goods and services.").

93. See, e.g., Reuters, *EU, South Korea Say U.S. Plan for EV Tax Breaks May Breach WTO Rules*, AUTOMOTIVE NEWS EUROPE (Aug. 11, 2022, 9:58 AM), <https://europe.autonews.com/automakers/eu-south-korea-say-us-plan-ev-tax-breaks-may-breach-wto-rules> (demonstrating how the effect of legislation can be discriminatory and violate trade partnerships).

94. See Erik Oskarsson, *How the New ESPR Legislation Will Impact Intellectual Asset Protection*, OPEN ACCESS GOV'T (Jan. 23, 2023), <https://www.openaccessgovernment.org/new-espr-legislation-impact-intellectual-asset-protection/151774/> (presenting the concern that the ESPR puts trade secrets at risk).

95. *ESPR*, *supra* note 1, at 34 (emphasizing that the ecodesign requirements are not meant to be a barrier to trade); see also *id.* at 48 (mandating that individual Member States cannot interfere with compliant products entering the Single Market).

96. See generally *ESPR*, *supra* note 1; *SSCT*, *supra* note 1.

97. See *ESPR*, *supra* note 1, at 49. See generally *id.* at 64–73 (Ch. VII — Obligations of Economic Operators).

available on the market.⁹⁸ Importers in particular have the responsibility of ensuring that manufacturers use the “appropriate conformity assessment,” without any guidance on how the importer would gain insight into the manufacturer’s practices.⁹⁹ They must also ensure that “the CE marking and documentation drawn up by manufacturers are available for inspection by the competent national authorities.”¹⁰⁰ Without establishing best practices, the ESPR leaves the scope of an importer’s responsibility ambiguous, declining to create mechanisms for acquiring that information if the manufacturer(s) did not provide it initially.¹⁰¹

Second, the ESPR allows individual Member States to monitor compliance, survey the market, and prevent non-compliant products on the EU market, both online and at the border, leaving room for inconsistent enforcement procedures and effects.¹⁰² Chapter XI of the ESPR requires individual Member States to establish a market surveillance plan, with a minimum number of market checks for specific products.¹⁰³ They must also submit a report describing the frequency of those checks and any resulting penalties.¹⁰⁴ With each of the twenty-seven Member States establishing their own parameters and punishments, enforcement of non-compliant products would be inconsistent throughout the EU with economic operators questioning which States would permit their products, potentially hindering a goal of the ESPR: the free movement of products.¹⁰⁵ Further, the ESPR recognizes that the requirements of individual Member States might conflict with those under the ESPR.¹⁰⁶ When an individual market surveillance authority finds that a product is non-compliant with a national requirement, those market authorities cannot “restrict or impede the placing on the market

98. See *ESPR*, supra note 1, at 31 (“Economic operators intervening in the supply and distribution chain should take appropriate measures to ensure that they only make available on the market products that are in conformity with this Regulation and the delegated acts adopted pursuant to it.”).

99. *ESPR*, supra note 1, at 66–67 (Article 23 — Obligations of importers).

100. *Id.* at 31.

101. *Id.* at 31–32.

102. *Id.* at 71 (“Member States shall confer on their market surveillance authorities the power, for all products covered by a relevant delegated act adopted pursuant to Article 4, to order an online marketplace to remove specific illegal content referring to a non-compliant product from its online interface[.]”).

103. *Id.* at 14.

104. *Id.*

105. See *id.* at 49 (stating that economic operators must ensure the free movement of products in the EU market).

106. See *id.* at 48 (“Member States shall not prohibit, restrict or impede the placing on the market or putting into service of products on grounds of non-compliance with national requirements[.]”).

[a non-compliant product]” if a delegated act provides that that product can enter the market without that requirement.¹⁰⁷ Therefore, the ESPR permits inconsistency in its treatment of Member States’ individuality and discretion in enforcement.

Third, the exemption for SMEs could disproportionately benefit EU-based businesses and discriminate against non-EU trade partners. As a net-importer, the EU’s imposition of new design requirements on all goods placed on the EU market would affect its trade relationships with non-EU countries and their textile business practices.¹⁰⁸ According to the European Commission, the EU imports approximately seventy-three percent of the clothing and household textiles it consumes, making it one of the largest importers of clothing, valued at about eighty billion euros.¹⁰⁹ Under the ESPR, the EU leverages its strong importing position to require its textile and clothing partners in trade to similarly adapt to a more sustainable future.¹¹⁰ Now, trade partners with the EU will have to augment their products to the ecodesign requirements and provide a compliant digital product passport; otherwise, they will lose out on the EU’s Single Market.¹¹¹

107. *Id.*

108. See *Euro-Mediterranean Dialogue on the Textile and Clothing Industry*, EUR. COMM’N, https://single-market-economy.ec.europa.eu/sectors/fashion/textiles-and-clothing-industries/international-trade/euro-mediterranean-dialogue-textile-and-clothing-industry_en (last visited Feb. 12, 2023) (stating that the EU imported €48 billion more in textiles than it exported in 2019 and it predominantly imports its clothes from China, Bangladesh, and Turkey); see also Saddam Hossain, *Bangladesh Ready as EU Moves to Legislate on Sustainable Fashion*, DHAKA TRIBUNE (June 6, 2022, 6:42 PM), <https://www.dhakatribune.com/business/2022/07/06/bangladesh-ready-as-eu-moves-to-legislate-on-sustainable-fashion> (stating Bangladesh is the EU’s second largest apparel importer and apparel manufacturers must become more sustainable and energy efficient out of necessity).

109. *Q&A on SSCT*, *supra* note 87.

110. See *id.* (attributing the EU’s large importing position as a means for the SSCT to “promote[] international collaboration to reduce negative environmental and social impacts.”)

111. See *ESPR*, *supra* note 1, at 48, 50, 54 (“Products shall only be placed on the market or put into service if they comply with the ecodesign requirements Ecodesign requirements shall, as appropriate, include: (a) performance requirements as set out in Article 6; (b) information requirements as set out in Article 7 The information requirements . . . shall provide that products can only be placed on the market or put into service if a product passport is available”); see also EUR. COMM’N, DIRECTORATE-GEN. FOR TRADE, EUROPEAN UNION, TRADE IN GOODS WITH BANGLADESH (Aug. 2, 2022) https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_bangladesh_en.pdf (summarizing the EU’s imports and exports with Bangladesh according to category of goods); EUR. COMM’N, DIRECTORATE-GEN. FOR TRADE, EUROPEAN UNION, TRADE IN GOODS WITH CHINA (Aug. 2, 2022) https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_china_en.pdf

As a member of the WTO, the EU and its new circular strategy must conform to the WTO's global rules for trade.¹¹² On its face, the ESPR does not violate the WTO's Technical Barriers to Trade ("TBT") Agreement, which aims to ensure nondiscriminatory trade practices by Member States.¹¹³ By preventing all noncompliant products regardless of their country of origin, the EU appears to not provide favorable treatment to one country over another.¹¹⁴ However, the ESPR's carveout for SMEs may disproportionately benefit producers from the EU.¹¹⁵

The ESPR and the SSCT provide protections for and assistance to economic actors who are SMEs.¹¹⁶ Under Article 5 of the ESPR, ecodesign requirements cannot negatively impact the competitive position of SMEs in the market, and under Article 19, Member States are required to assist SMEs in their implementation of the requirements.¹¹⁷ According to the European Commission, the EU's clothing and textile ecosystem is "economically significant" and is "[c]omposed essentially of [SMEs]."¹¹⁸ Therefore, by providing SMEs additional assistance to conform to the requirements outlined in the ESPR and the SSCT, businesses in the EU may not face the same hurdles in placing their textile products on the EU market.¹¹⁹ The effect of the ESPR may actually violate the EU's and its individual Member States'

(providing that the EU imported over €33 billion in textiles from China in 2021).

112. See *The EU and the WTO*, EUR. COMM'N, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-and-wto_en (last visited Dec. 4, 2022) (stating that the EU and its individual Member States are members of the WTO).

113. *Technical Barriers to Trade*, WORLD TRADE ORG. https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited Feb. 12, 2023); Agreement on Technical Barriers to Trade, Dec. 4, 1979, 1868 U.N.T.S. 120 [hereinafter TBT Agreement] (providing that no WTO Member State can provide preferential treatment to products due to its originating country).

114. See *ESPR*, *supra* note 1, at 48.

115. See *id.* at 51 (providing that the ecodesign requirements cannot hurt the ability of SMEs to compete); see also *id.* at 62 (requiring assistance to SMEs).

116. See *id.* at 9 (explaining that the Commission considered the ESPR's potential of negatively impacting SMEs and encourages mitigating measures, so SMEs are not disproportionately affected).

117. *Id.* at 51 ("Ecodesign requirements shall meet the following criteria: . . . (d) there shall be no disproportionate negative impact on the competitiveness of economic actors, at least of SMEs[.]"); *id.* at 62 (listing financial support, training, and technical assistance as appropriate measures for Member States to meet their obligation of assisting SMEs).

118. *SSCT*, *supra* note 1, at 1–2; see also *SME Definition*, EUR. COMM'N: INTERNAL MKT, INDUS., ENTREPRENEURSHIP AND SMES, https://single-market-economy.ec.europa.eu/smes/sme-definition_en (last visited Jan. 22, 2022) ("Small and medium-sized enterprises (SMEs) represent 99% of all businesses in the EU.").

119. See *SSCT*, *supra* note 1, at 1–2; TBT Agreement, *supra* note 113.

duties under the TBT Agreement by providing an unlawful preferential treatment to EU products due to their country of origin.¹²⁰

B. Destruction of Unsold Goods

The Commission's proposals aim to prevent the significant environmental impact caused by the destruction of unsold goods by deterring economic operators from the harmful business practice.¹²¹ To disincentivize these players, the ESPR imposes transparency obligations that require them to "disclose the amount of products they discard per year, provide reasons for the discarded volumes and information on the volume of discarded products sent out for [disposal and reuse]."¹²² However, while recognizing the importance of harmonized rules and the risk of fragmented approaches to the destruction of unsold consumer products by the EU's Member States, the Proposal neither states what reasons are acceptable for discarding a good nor identifies which waste treatment methods are sufficient for discarding the unsold goods in accordance with the purpose of the ESPR.¹²³ Further, it permits economic operators to determine how to disclose the information without any restrictions, ensuring that the consumer and the enforcing authorities have access to the information.¹²⁴ Also, the Proposal again carves out an exception for SMEs, entirely exempting them from this transparency obligation.¹²⁵ While the Commission recognizes that SMEs could be used to circumvent this obligation, the ESPR does not establish criteria to identify a non-SME operating under the SME loophole.¹²⁶

120. See, e.g., AUTOMOTIVE NEWS EUROPE, *supra* note 93 (illustrating how legislation that provides a competitive disadvantage to WTO trade partners, like the U.S. energy bill that does not grant a tax credit to vehicles assembled outside of the U.S., can violate WTO compliance).

121. See ESPR, *supra* note 1, at 43 ("This Regulation . . . creates a framework to prevent unsold consumer products from being destroyed."); SSCT, *supra* note 1, at 4 ("As a disincentive for [destroying unsold goods], under the [ESPR], the Commission proposes a transparency obligation requiring large companies to publicly disclose the number of products they discard and destroy, including textiles . . .").

122. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions On making sustainable products the norm* at 6, COM (2022) 140 final (Mar. 30, 2022).

123. See generally ESPR, *supra* note 1, at 62–64; SSCT, *supra* note 1, at 4.

124. See generally ESPR, *supra* note 1, at 63 (only requiring that the economic operator makes the information available to the public).

125. *Id.*; see also Commission Recommendation 2003/361 of 6 May 2003 Concerning the Definition of Micro, Small and Medium-sized Enterprises, 2003 O.J. (L 124) 36, 39–41 (providing the recognized definition of SMEs by the Commission and several Member States).

126. See ESPR, *supra* note 1, at 64.

Similarly, the Commission does not address how this possible prevention of the destruction of unsold goods can stand in light of established property law in the EU. Article 17 of the EU Charter of Fundamental Rights establishes that each individual can use or dispose of their own possessions.¹²⁷ While that same article recognizes that the public interest can supersede an individual's right to property, it states that an individual would be fairly compensated for that loss.¹²⁸ For luxury fashion brands, the destruction of their unsold products ensures limited supply, high demand, and, therefore, the brand's exclusivity.¹²⁹ If the Commission were to prevent the burning of unsold textiles, as it suggests in the ESPR and the SSCT, it fails to reference how that party would be made whole for their loss in property.¹³⁰

C. Trade Secrets and Digital Product Passports

Without specificity in the ESPR or the SSCT, the trade secrets of fashion brands are at risk of exposure to third parties, eliminating the value of the secret and, potentially, a company's competitive edge. Trade secrets are "valuable know-how and business information[] that [are] undisclosed and intended to be confidential."¹³¹ Trade secrets in the fashion industry include fashion designs, but also business practices, distribution and manufacturing methods, and key supplier lists and sources — all of which are not protected by patents.¹³² This valuable information can contribute to the success or

127. Charter of Fundamental Rights (EU), art. 17, 2007 O.J. (C 303) 6.

128. *Id.*

129. See Rachel Cernansky, *Why Destroying Products is Still an "Everest of A Problem" for Fashion*, VOGUE BUSINESS (Oct. 18, 2021), <https://www.voguebusiness.com/sustainability/why-destroying-products-is-still-an-everest-of-a-problem-for-fashion> (explaining that the value of a brand can be tied to its ability to destroy unwanted products).

130. See generally ESPR, *supra* note 1, at 62–64; SSCT, *supra* note 1, at 4.

131. Directive 2016/943, of the European Parliament and of the Council of 8 June 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure, 2016 O.J. (L 157) 1, 1 [hereinafter EUDPTS].

132. See Denisse Garcia, *Trade Secrets: The Fashion Industry's Trendiest Secret*, AM. BAR ASS'N (Apr. 5, 2022), <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/articles/2022/trade-secrets-fashion-industry/>; Florian Tannen et al., *Protecting Trade Secrets in Your Manufacturing Global Supply Chain*, BAKER MCKENZIE, LLP (July 8, 2021), <https://www.bakermckenzie.com/en/insight/publications/2021/07/protecting-trade-secrets> (stating that manufacturing companies now rely on trade secrets more, that manufacturing processes derive more of their value from trade secrets, and that the location of trade secrets within a supply chain are crucial to their value); *Trade Secrets*,

competitive advantage enjoyed by a company.¹³³ Whereas previous trade secret litigation has often focused on a cyberattack or a violated non-disclosure agreement, now the EU and its individual Member States may require companies to disclose their highly-coveted trade secrets.¹³⁴ Under Chapter 3 of the ESPR, the EU will require all covered products on the EU market, including textiles, to have a DPP containing “mandatory information on circularity and other key environmental aspects,” but the regulation currently lacks any specificity on what information companies will need to disclose and who will receive that information.¹³⁵

The Commission’s demand for increased visibility into and among the fashion company’s own operators and vendors puts companies at risk for trade secret disclosure.¹³⁶ The ESPR requires each economic operator along the supply chain, including the manufacturer or its representative (Articles 21 and 22), distributor (Article 24), and importer (Article 23), to input and verify the information on the DPP.¹³⁷ While fashion companies have opted for a fragmented supply chain to prioritize cost efficiency and reduced regulations in foreign countries, the ESPR will connect its overseas workers

YOUR EUR. https://europa.eu/youreurope/business/running-business/intellectual-property/trade-secrets/index_en.htm (last visited Jan. 4, 2022) (describing manufacturing processes and client and supplier lists as not sufficiently protectable through patents).

133. See Riccardo Vecellio Segate, *Securitizing Innovation to Protect Trade Secrets Between “The East” and “The West”: A Neo-Schumpeterian Public Legal Reading*, 37 UCLA PAC. BASIN L.J. 59, 62, 68 (2020) (citing Agreement on Trade-Related Aspects of Intellectual Property Rights Art. 39(2)(b), Apr. 15 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 187) (asserting that the commercial value of a trade secret is the fact it is a secret and that trade secrets are the most valuable type of IP across industries); *IP and Business: Intellectual Property in the Fashion Industry*, WIPO MAGAZINE (May 2005), https://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html (“[T]he primary source of competitive advantage for all businesses, including those in the fashion industry, is innovation and original creative expressions. Business managers need to identify such valuable intangible assets in a timely manner, determine their business relevance, and agree on those to be protected and leveraged through the intellectual property (IP) system.”).

134. See Oskarsson, *supra* note 94 (highlighting that the ESPR’s digital product passport may track trade secrets that are essential to a business’s competitive edge, removing its status as a trade secret).

135. See *ESPR*, *supra* note 1, at 54 (citing Chapter III — Digital Product Passport) (stating that the delegated acts will specify which actors will have what information); *SSCT*, *supra* note 1, at 5 (stating the digital product passport requirement under the ESPR will apply to textiles); see also Bellinghausen et al., *supra* note 6 (criticizing the ESPR as a regulation with direct effect that lacks detailed provisions).

136. See Oskarsson, *supra* note 94.

137. *ESPR*, *supra* note 1, at 64, 66–67, 68; see also *id.* at 69 (providing dealers with the responsibility for customers’ access to the product passport).

with information and visibility into the chain to which they may not have had previous access.¹³⁸ Downstream vendors will need insight into the manufacturing processes of the product it received in order to comply with Articles 21–24 and to ensure the product meets the environmental goals of the ESPR.¹³⁹ These processes can be the confidential key to a brand’s low prices, high demand, and position within the market, and now, outside parties may know that information, too.

Under the SSCT, the Commission intends economic operators to disclose the manufacturing country of a textile, which could expose a company’s entire value chain. The SSCT vaguely states that a textile disclosure must include “the country where manufacturing processes take place.”¹⁴⁰ With increased reliance on supply chain globalization, fashion brands can use numerous manufacturers, suppliers, and distributors across multiple countries and continents for a single product.¹⁴¹ For instance, H&M, a major fast-fashion house with uncommon transparency into its supply chain, uses about 600 suppliers, over 1500 factories, and 394 mills to produce ninety-nine percent of its products across three continents.¹⁴² If the DPP contains who each of these actors are or where these actors are located, a company’s entire supply chain could be exposed to competitors, who can then exploit that information and set up its chain similarly.

The Commission states that the purpose of the DPP is not only to assist agencies in enforcing the ESPR requirements but to provide transparency for consumers so they may make informed purchasing decisions.¹⁴³ Part of that informed decision is knowing where that product was manufactured.

138. See Brianna Wren, *Sustainable Supply Chain Management in the Fast Fashion Industry: A Comparative Study of Current Efforts and Best Practices to Address the Climate Crisis*, 4 CLEANER LOGISTICS & SUPPLY CHAIN, Feb. 2022, at 1, 3; Esmee Blaazer, *Everything About the (Traditional) Supply Chain and the Core Players of Fashion Industry*, FASHION UNITED (Oct. 20, 2022), <https://fashionunited.com/news/background/everything-about-the-traditional-supply-chain-and-the-core-players-of-fashion-industry/2022102050277>.

139. *ESPR*, *supra* note 1, at 64, 66–67, 68.

140. *SSCT*, *supra* note 1, at 5.

141. See Dawn Downes, *What You Need to Know About Fashion and Apparel Supply Chain Management*, PUROLATOR INT’L (July 2, 2021), <https://www.purolatorinternational.com/what-to-know-about-fashion-apparel-supply-chain-management/> (finding that the average fashion company has more than twenty thousand suppliers, if including sub-suppliers); see, e.g., ADIDAS, *supra* note 2, at 135 (documenting 509 Tier 1 supplier facilities across 46 countries in addition to 418 licensee factories located in 39 countries).

142. H&M GROUP, *Supply Chain*, <https://hmgroupp.com/sustainability/leading-the-change/transparency/supply-chain/> (last visited Jan. 4, 2023).

143. *SSCT*, *supra* note 1, at 4.

Therefore, anyone from the initial manufacturer to the end consumer could have access to a company's coveted supply chain information through the DPP, eliminating any protections available to the confidential information holder.

The ESPR and the SSCT require companies to provide transparency into their practices for their product to be permitted into the EU market, but they ignore that the required information could be confidential.¹⁴⁴ Under paragraph 59 and Article 29 of the ESPR, the Commission proposes that online marketplaces should provide market surveillance authorities access to their interfaces and should permit these monitoring bodies to scrape data from their sites.¹⁴⁵ Crucial information relevant to the success of a business could be revealed, and the Commission fails to mandate certain data protections of that information. A business would have to choose between keeping its EU consumers or risking their business, being that the Commission does not address trade secrets in any of the proposed Green Deal legislation.¹⁴⁶

The ESPR's information disclosure requirements are inflexible, and companies are unable to petition for trade secret exemptions, leaving all companies vulnerable to disclosing essential information for their company's success.¹⁴⁷ As currently written, the ESPR is black and white: either the product is compliant with a product passport that contains the mandatory information or the DPP lacks the essential information and the product is barred from the EU.¹⁴⁸ The ESPR does not include a carveout from the mandatory disclosures for trade secrets and the ESPR lacks a process for a company to apply for an exemption. The EU's current trade secrets protections, the EU Directive on the Protection for Trade Secrets ("EUDPTS"), would also not provide any preemptive protections or effective remedies.¹⁴⁹

144. *ESPR*, *supra* note 1, at 54.

145. *Id.* at 70–71.

146. *See* Tannen et al., *supra* note 132.

147. *See ESPR*, *supra* note 1, at 64 (providing that the information requirements are mandatory for any product on the EU market).

148. *Id.* at 54 ("The information requirements referred to in Article 7(1) shall provide that products can only be placed on the market or put into service if a product passport is available in accordance with the applicable delegated act adopted pursuant to Article 4 and Articles 9 and 10.")

149. *See generally* EUDPTS, *supra* note 131, at 2–3 (explaining the purpose of the EUDPTS is to standardize trade secret treatment across the EU Member States in the wake of the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights Agreement).

A trade secret disclosed through the DPP would not fall under the purview of the EUDPTS because its use or acquisition may not be unlawful. The EUDPTS prohibits “the unlawful acquisition, use and disclosure of trade secrets.”¹⁵⁰ A trade secret is defined as a secret with commercial value due to its secretive nature that a trade secret holder has taken reasonable steps to keep secret.¹⁵¹ Under Article 4, the acquisition, use, or disclosure of the trade secret is unlawful if the alleged infringer gained unauthorized access to it, committed dishonest commercial practices, or breached a contractual duty or confidentiality agreement.¹⁵² If the Commission requires disclosure to the public or to actors who are not prevented from disseminating that information, then an outsider with access to the DPP would have lawful access and can, therefore, acquire and use the trade secret lawfully, unless they are contractually prevented from doing so.

The EUDPTS is a retrospective measure that only aids victims once they perceive or a judicial authority concludes that their trade secret has been infringed.¹⁵³ The EUDPTS states that “trade secret holders are entitled to apply for the measures, procedures and remedies provided for in [the EUDPTS].”¹⁵⁴ Then, a judicial authority can order the cessation or prohibition of using the unlawfully acquired trade secret and the prevention of an infringing good on a market.¹⁵⁵ While the Commission considers these “precautionary measures” under Article 10 of the EUDPTS, any infringement of the trade secret has already occurred, and being that the value of the secret is the fact that it is confidential, the damage occurs regardless of these measures.¹⁵⁶

Even if the trade secrets were protected from unlawful acquisition, use, and disclosure, the ESPR could supersede the EUDPTS. Under Article I, the EUDPTS does not impact “the application of Union or national rules requiring trade secret holders to disclose, for reasons of public information, including trade secrets, to the public[.]”¹⁵⁷ It also carves out an exception for

150. *Id.* at 8.

151. *Id.* at 9.

152. *Id.* at 10.

153. *Id.* at 13 (Provisional and precautionary measures); *id.* at 15 (Injunctions and corrective measures); *see also* *Trade Secrets*, WIPO, <https://www.wipo.int/trademarks/en/> (last visited Jan. 4, 2022) (explaining that trade secrets do not provide “‘defensive’ protection”).

154. EUDPTS, *supra* note 131, at 10.

155. *Id.* at 8, 13.

156. *Id.* at 10.

157. *Id.* at 3 (“The Directive should not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities.”); *id.* at 9 (stating that the EUDPTS shall not affect applicable EU

legislation that requires or allows EU or national authorities to disclose information submitted by businesses.¹⁵⁸ Therefore, the ESPR could supersede the EUDPTS if it requires the public disclosure of a trade secret.

IV. FINAL FITTING: STRENGTHENING THE REGULATIONS

The package of proposals under the Green Deal are a novel effort to redefine the fashion industry and require its actors to change their approach from design to production to distribution to final consumption. Despite the Commission's reliance on the ESPR and the SSCT to pave the way for a sustainable, circular, and transparent EU, the Commission failed to render these strategies wholly effective, consistent, and realistic. In light of the real-world application of these regulations on the fashion industry, the Commission should strengthen the effect of the proposals by providing uniformity in their application and enforcement, an application process for trade secrets exemptions, and definite parameters for the storage, maintenance, and protection of the mandated information on the DPP.

A. Application and Enforcement

The ESPR should not permit individual Member States to establish their own enforcement and punishment procedures. Instead, the ESPR should establish specific procedures for assessing compliance, a range of punishments based on the nature of the infringement, and a body to monitor compliance. This would allow predictability and reliability in the system. Consolidation of the enforcement responsibilities would also limit the number of actors with access to the required information, further shielding trade secrets from public exposure. Similarly, all producers, regardless of size, should be prevented from discarding unsold products, due to the environmental impact of destroying unsold goods, the fashion industry's reliance on this destruction, the predominance of SMEs in the clothing industry, and the lack of guidance on the use of SMEs as a circumvention tool.

B. Digital Product Passports Protection

The Commission should establish how the information on the digital product passport is acquired and what standard should be used for that type of product. Once the accuracy of the information is established, the Commission should follow the emerging trend of fashion companies and

and national rules requiring trade secret holders to disclose trade secrets or EU institutions and bodies or national authorities from disclosing information submitted by businesses).

158. *Id.* at 9.

store the data of the digital product passport on a distributed ledger so the information can be trusted and cannot be altered down the line. The distributed ledger should be encrypted so the data can only be accessed by the economic actors who are required to input the information and the government agency responsible for monitoring the compliance of the information.

V. CONCLUSION

The Commission's efforts for a circular, sustainable, and traceable economy are admirable, but without definite guidelines that ensure uniform compliance and enforcement, the proposals are insufficient to overhaul the business practices of the fashion industry. The SSCT as applied through the ESPR is both too flexible and too stringent. The Commission prescribes SMEs with regulatory support and an exemption to the weight of the ESPR's transparency obligations so they can remain competitive. Companies that rely on the exclusivity of their intellectual or real property for their competitive advantage, however, are not given the same gift. This leniency afforded to SMEs could actually result in a competitive advantage for small EU-based textile businesses because they would receive financial and technical support, while foreign trade partners could be deterred from competing on the EU market entirely. With enforcement subject to the discretion of individual EU nations, foreign manufacturers, importers, and distributors could be left wondering the compliance of their products at each border and evaluating whether the risk is worth the reward. The proposals' disparate effect could be mitigated if the EU provided more guidance on enforcement, uniformly treated all companies in the textile industry, regardless of size, and permitted exemptions for qualified trade secret holders.