

January 2010

EXECUTIVE SUMMARY

Legal briefing: The potential for EU Member States to adopt national measures stricter than those established in the EU legislation based on Article 114 of the Treaty on the Functioning of the European Union (ex Article 95 of the EC Treaty) – study of the Ecodesign¹ and Energy Labelling² Directives

The purpose of this legal briefing is to reply to the question of whether EU Member States can adopt measures stricter than required under the directive and its implementing measure, when the directive is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which corresponds to Article 95 of the old EC Treaty (TEC). This issue is assessed in the context of the Eco-design³ and Energy Labelling Directives⁴ which are both adopted on the basis of Article 114.1 TFEU (ex Article 95.1 TEC). Taking into account the fact that the Ecodesign and Energy Labelling Directives have the character of framework directives, they both require adoption, via the comitology procedure, of some implementing measures. While the main Directives establish a general framework guiding ecodesign and energy labelling, their implementing measures contain detailed requirements for particular products.

In addition, this briefing also discusses whether it is possible for EU Member States to adopt measures stricter than provided in voluntary agreements and other self-regulation measures foreseen in Articles 15 and 17 and Annex VIII of the Ecodesign Directive.

The objective of Article 114 TFEU (ex Article 95 TEC) is to harmonise national laws and to ensure that the same rules are applicable throughout the whole EU preventing discrimination against equivalent goods from any Member State. Such an application of common rules throughout the whole EU is designed to contribute to the establishment and good functioning of the internal market (which is explicitly required by Article 114.1 TFEU). This also implies that, once the deadline for transposition expires, Member States are in principle not allowed to maintain any national legislation or any other measure which is inconsistent with the Directive.

However, there are exceptions to that rule and in some cases Member States may adopt measures different to those provided in the EU harmonisation directive based on Article 114.1 TFEU and in its implementing measure (including national measures additional to and different from EU acts). These exceptions apply also to the Ecodesign and Energy Labelling Directives, which are adopted on the basis of Article 114.1 TFEU.

In that respect there are two kinds of situations which must be distinguished:

- when a Member State wishes to legislate in areas covered by the Ecodesign and Energy Labelling Directives and their implementing measures and

¹ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast), OJ L 285, 31.10.2009, p. 10.

² Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, OJ L 297, 13.10.1992, p.16, as amended.

³ See footnote 1.

⁴ See footnote 2.

- when a Member State wishes to legislate in areas not covered by Ecodesign and Energy Labelling Directives and their implementing measures.

The areas covered by the Ecodesign or Energy Labelling Directive are the ones where the Directive or other act (in the case of the Ecodesign Directive: Commission working plan 2009 – 2011 under the Ecodesign Directive⁵) requires an adoption of the implementing measure concerning particular product and where such a relevant implementing measure has been adopted. In such a case it can be assumed that a complete system of common Union-wide rules for this product has been established in relation to the area regulated under the Directive.

However, although in such a case Member States in principle cannot adopt measures differing from those in the Directive and its implementing measure, they may adopt additional national measures to the extent that these national measures are compatible with the system of common Union-wide rules for a product and do not jeopardise its aims or compromise its function. They shall neither impede the functioning of the internal market nor run counter to Article 34 TFEU (ex Article 28 TEC).

In the case of the Ecodesign Directive, examples of such possible national measures additional to the common EU-wide rules for a product could be, for example, a requirement concerning the heavy metal content of the product or its noise level.

However, proving compliance of such additional requirements with the product's common ecodesign or energy labelling EU-wide rules as well as internal market requirements may be cumbersome and difficult to justify. The most appropriate option would be using the procedure of Article 114.4 – 114.6 TFEU allowing for derogations to harmonisation measures adopted under Article 114.1 TFEU. The use of this procedure is the most appropriate also because it was established especially for the purpose of providing derogations to Article 114.1 TFEU harmonisation measures and therefore, it would be difficult to justify not using it.

It is also worth mentioning that under the Technical Standards and Regulations Directive⁶ Member States are obliged to inform the Commission about their national technical standards and regulations.

Article 114.4 – 114.5 TFEU lists special cases when national legislation different from the EU measure adopted on the basis of Article 114.1 TFEU may be maintained or introduced. That possibility does not only concern additional national measures but also measures different from those established in the EU legislation. Article 114.6 TFEU establishes a special approval procedure operated by the Commission applicable in such situations. In situations and under conditions provided in these paragraphs it is possible for a Member State to request the European Commission to authorise that an existing national measure be maintained or a new measure, different from the one adopted at the EU level under Article 114.1 TFEU, be introduced. This derogation procedure may be used in relation to the Ecodesign and Energy Labelling Directives and their implementing measures.

⁵ “Communication from the Commission to the Council and the European Parliament - Establishment of the working plan for 2009-2011 under the Ecodesign Directive”, COM (2008)660 final, 21.10.2008.

⁶ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services; OJ L 24, 21.7.1998, p. 37, as amended.

A Member State may also establish specific national rules, when this is allowed by the Directive itself. This applies to a certain extent to the Ecodesign Directive but does not seem to be applicable under the Energy Labelling Directive.

Areas **not** covered by Ecodesign and Energy Labelling Directives and their implementing measures, are:

- the ones in relation to which neither the Ecodesign and Energy Labelling Directives, nor the Commission working plan for 2009-2011 under the Ecodesign Directive require adoption of the implementing measures for a product; or
- the ones for which an implementing measure under the Ecodesign or Energy Labelling Directives is requested to be adopted but this has not happened yet.

In both these cases Member States are free to adopt their own national legislation for the product.

In a special case of voluntary agreements and other self-regulating measures foreseen in Articles 15 and 17 and Annex VIII of the Ecodesign Directive, it can be deduced from point 9 of Annex VIII that Member States are advised not to adopt measures different from those agreed in such a self-regulating measure. However, taking into account a non-binding legal form of such industry agreements and an indicative character of the Annex VIII criteria (mentioned explicitly in the Annex), Member States are not legally deprived of such a possibility.

Therefore, as described above and provided in detail further in the main text of the legal briefing, it is possible for EU Member States to adopt product measures stricter (including both different and additional national measures) than established by the Ecodesign and Energy Labelling Directives, their implementing measures and self-regulating measures adopted under the Ecodesign Directive. However, with the exception of self-regulating measures under the Ecodesign Directive, this is not automatic and applies only to particular cases and under particular conditions. One must also not forget about the Member States' obligation to notify the Commission about technical standards and regulations it plans to adopt.

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Legal briefing: The potential for EU Member States to adopt national measures stricter than those established in the EU legislation based on Article 114 of the Treaty on the Functioning of the European Union (ex Article 95 of the EC Treaty) – study of the Ecodesign⁷ and Energy Labelling⁸ Directives

I. INTRODUCTION

ClientEarth is a non-profit environmental law and policy organisation based in London and Brussels. The charitable objectives of the organisation include promoting and encouraging the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit. We provide dedicated public interest legal capacity, working with environmental NGOs and others and acting as legal advocates for the environment.

The purpose of this legal briefing is to reply to the question of whether EU Member States can adopt measures stricter than required under the directive and its implementing measure, when the directive is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which corresponds to Article 95 of the old EC Treaty (TEC). In addition, the briefing will also discuss the potential for EU Member States to adopt measures stricter than provided in voluntary agreements and other self-regulation measures foreseen in Articles 15 and 17 and Annex VIII of the Ecodesign Directive.

Before starting any assessment, it is important to mention the Lisbon Treaty, which entered into force on the 1 December 2009. The Lisbon Treaty amends the content of the Treaty on European Union (EU Treaty) and the EC Treaty and changes the name of the EC Treaty to the Treaty on the Functioning of the European Union.

Articles 94 to 97 TEC on the approximation of laws for the purposes of the internal market have been included in the Treaty on the Functioning of the European Union without major changes under Articles 114 to 117. There are only three differences, which should be mentioned. The first difference is the change of Article numbers. For instance, **Article 95 TEC became Article 114 TFEU**. The second difference is the change of order between Article 94 and 95 TEC (now: Articles 115 and 114 TFEU). By now, unanimity voting on the approximation of laws having as their object the internal market was a rule (Article 94 TEC), while qualified majority was an exception (Article 95 TEC). Now, this order has been changed and the ordinary legislative procedure became a rule (Article 114 TFEU), while the special legislative procedure and unanimity, an exception (Article 115 TFEU). The third difference, although not really relevant for the subject of this briefing, is that a new provision on intellectual property rights has been added into the chapter.

⁷ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast), OJ L 285, 31.10.2009, p. 10.

⁸ Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, OJ L 297, 13.10.1992, p.16, as amended.

Taking into account that the Lisbon Treaty has already entered into force and is now legally binding, this legal briefing will further use legal references to the new TFEU and only in very few cases, when considered necessary, will we indicate in brackets a legal base from the old EC Treaty.

- **Character of the harmonisation under Article 114 TFEU**

As this legal briefing will analyse legislation adopted on the basis of Article 114 TFEU, first it is necessary to summarise this provision.

Article 114.1 TFEU serves as legal basis for adopting *the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

Therefore, the objective of Article 114.1 TFEU is to harmonise national laws and to ensure that the same rules are applicable throughout the whole EU so that goods of one Member State are not discriminated against because of, for instance, higher production costs resulting from the country's regulatory requirements. Such an application of common rules throughout the EU contributes to the creation and good functioning of the internal market (which is explicitly required by Article 114.1 TFEU). It also implies that, in principle, once the deadline for transposition expires, Member States are not allowed to maintain any national legislation or any other measure which is inconsistent with the Directive.

- **Article 114 TFEU harmonisation in relation to the Ecodesign and Energy Labelling Directives**

The question of the potential for EU Member States to adopt measures that are stricter than required under the directive, when this directive is based on Article 114 TFEU, has been asked in the context of the Ecodesign and Energy Labelling Directives. Both these directives have been adopted on the basis of Article 114 TFEU. The aim of the Energy Labelling Directive is to ensure consumers are provided with information on the consumption of energy and of other essential resources for certain types of household appliances. The aim of the Ecodesign Directive is to set ecodesign requirements for energy-using products so that their environmental performance is optimised, while maintaining their functional qualities.

Although both these directives also aim to protect the environment, the emphasis of each is placed on ensuring the free movement of goods and the creation and smooth functioning of the EU internal market.⁹ Under the old EC Treaty, all product-related measures were in principle based on ex Article 95 TEC (now: Article 114 TFEU) (with the exception of agricultural measures).¹⁰ It can be expected that this will not change under the new Article 114 TFEU.

On the other hand, measures adopted under Article 114 TFEU do not concern only and purely the free movement of goods, persons, services and capital. They can also relate to environmental

⁹ For the Ecodesign Directive see also: Article 1.1 of the Ecodesign Directive: *'This Directive establishes a framework for the setting of Community ecodesign requirements for energy-using products with the aim of ensuring the free movement of those products within the internal market.'*

¹⁰ 'EC Environmental Law, Fifth Edition' Ludwig Krämer, London Sweet & Maxwell, 2003.

protection¹¹ (while also intending to create a functioning internal market) as can be deduced from Article 114.3 TFEU.¹² The Ecodesign and Energy Labelling Directives are also based on environmental concerns as mentioned in their respective preambles (recital 3 of the Energy Labelling Directive and recitals 2 – 5 of the Ecodesign Directive).¹³

- **Article 114 TFEU in relation to the implementing measures adopted on the basis of the Ecodesign and Energy Labelling Directives and, in case of the Ecodesign Directive, self-regulation measures**

Both Ecodesign and Energy Labelling Directives require some further issues be regulated in implementing measures adopted via comitology procedure – in particular, detailed rules for certain products.¹⁴ Products for which implementing measures are to be adopted are listed in Article 16.2 of the Ecodesign Directive, Article 1.1 of the Energy Labelling Directive and in the Commission working plan 2009-2011 under the Ecodesign Directive¹⁵.

While the main Directives establish a general framework (on ecodesign for energy using products in case of the Ecodesign Directive and on energy labelling for particular household appliances in case of the Energy Labelling Directive), implementing measures (the Commission's directives and regulations) contain detailed requirements for particular products.

¹¹ In this case, adopted environmental legislation shall be of a high standard - the three main EU institutions participating in the legislative process shall take as a base a high level of protection, taking into account in particular of any new development based on scientific facts.

¹² Article 95.3 TEC: *'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'*

¹³ **Energy Labelling Directive, recital 3 of the preamble:** *'Whereas Article 130r of the Treaty requires prudent and rational utilization of natural resources; whereas the rational use of energy is one of the principal means by which this objective can be achieved and environmental pollution reduced';*

Ecodesign Directive, recitals 2 – 5 of the preamble: **(2)** *Energy-using products (EuPs) account for a large proportion of the consumption of natural resources and energy in the Community. They also have a number of other important environmental impacts. For the vast majority of product categories available on the Community market, very different degrees of environmental impact can be noted though they provide similar functional performances. In the interest of sustainable development, continuous improvement in the overall environmental impact of those products should be encouraged, notably by identifying the major sources of negative environmental impacts and avoiding transfer of pollution, when this improvement does not entail excessive costs. (3) The ecodesign of products is a crucial factor in the Community strategy on Integrated Product Policy. As a preventive approach, designed to optimise the environmental performance of products, while maintaining their functional qualities, it provides genuine new opportunities for manufacturers, for consumers and for society as a whole. (4) Energy efficiency improvement — with one of the available options being more efficient end use of electricity — is regarded as contributing substantially to the achievement of greenhouse gas emission targets in the Community. Electricity demand is the fastest growing energy end use category and is projected to grow within the next 20 to 30 years, in the absence of any policy action to counteract this trend. A significant reduction in energy consumption as suggested by the Commission in its European Climate Change Programme (ECCP) is possible. Climate change is one of the priorities of the Sixth Community Environment Action Programme, laid down by Decision No 1600/2002/EC of the European Parliament and of the Council (OJ L 242, 10.9.2002, p. 1.). Energy saving is the most cost-effective way to increase security of supply and reduce import dependency. Therefore, substantial demand side measures and targets should be adopted. (5) Action should be taken during the design phase of EuPs, since it appears that the pollution caused during a product's life cycle is determined at that stage, and most of the costs involved are committed then.'*

¹⁴ Article 15 of the Ecodesign Directive and Article 2.2 of the Energy Labelling Directive.

¹⁵ 'Communication from the Commission to the Council and the European Parliament - Establishment of the working plan for 2009-2011 under the Ecodesign Directive', COM (2008)660 final, 21.10.2008'

It is worth mentioning at this point that the ongoing revision of the Energy Labelling Directive aims to extend the scope of the Directive from 'household appliances' to 'energy-related products'.

Implementing Commission directives and regulations are based on the relevant Articles of the main Directives (Ecodesign or Energy Labelling Directive). For example, Commission Regulation No 643/2009 implementing the Ecodesign Directive with regard to ecodesign requirements for household refrigerating appliances¹⁶ is based on Article 15.1 of the Ecodesign Directive.¹⁷

The fact that the implementing measure is based on a particular article of the main directive (in the above quoted case on the Ecodesign Directive) implies that rules applicable to the Ecodesign Directive apply also to its implementing measure. The implementing measure adopted under the Ecodesign Directive is therefore in fact indirectly based on Article 114.1 TFEU. The same applies to implementing measures adopted on the basis of the Energy Labelling Directive.

It will be discussed in this legal briefing whether a particular EU Member State can decide to fix product requirements at a higher level than provided in the implementing measure.

This question arises as a result of NGO concerns that the common product standards may be fixed at an unsuitably low level (and possibly even lower than already applied by some Member States).

As already mentioned, the briefing will also refer to voluntary agreements and other self regulation measures that can be used as alternatives to implementing measures under the Ecodesign Directive (this form of self regulation is allowed by Articles 15 and 17 and Annex VIII of the Ecodesign Directive).

Therefore, summarising what has been stated above, this legal briefing will reply to the question of whether an EU Member State can decide to apply rules stricter (including both national measures additional to and different from EU measures) than established in:

- an EU directive based on Article 114 TFEU (in this case: Directives on Ecodesign and Energy Labelling) and an implementing measure adopted on the basis of such a Directive and
- only in case of the Ecodesign Directive, a voluntary agreement or other self-regulation measure.

Chapter II of this legal briefing will concentrate on the Ecodesign and Energy Labelling Directives and their implementing measures. Although, as stated above, in principle Member States cannot legislate in areas covered by these acts, some exceptions do exist. They will be discussed in Chapter II in relation to two situations:

¹⁶ Commission Regulation (EC) No 643/2009 of 22 July 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for household refrigerating appliances; OJ L 191, 23.7.2009, p. 53.

¹⁷ See: the 2nd paragraph preceding recitals of the preamble of the Commission Regulation 643/2009: 'Having regard to Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council, and in particular Article 15(1) thereof'

- under point 1, situations when a Member State wishes to legislate in areas covered by the Ecodesign and Energy Labelling Directives and their implementing measures and
- under point 2, situations when a Member State wishes to legislate in areas not covered by Ecodesign and Energy Labelling Directives and their implementing measures.

Chapter III of this legal briefing will assess the issue of voluntary agreements and other self-regulating measures adopted on the basis of the Ecodesign Directive.

II. THE POTENTIAL FOR EU MEMBER STATES TO ADOPT NATIONAL MEASURES STRICTER¹⁸ THAN THOSE ADOPTED UNDER THE ECODESIGN AND ENERGY LABELLING DIRECTIVES AND THEIR IMPLEMENTING MEASURES

1. Situations when a Member State wishes to legislate in areas covered by the Ecodesign and Energy Labelling Directives and their implementing measures

This point will provide an assessment of the possibility for EU Member States to adopt national measures differing from or additional to those in the Ecodesign and Energy Labelling Directives and their implementing measures when the Directive requires adoption of an implementing measure and this implementing measure has been adopted. It will describe both when a Member State wishes to legislate in addition to what has been established by the Directive and its implementing measure (e.g. additional ecodesign energy efficiency requirement for a product regulated under the Ecodesign Directive) and when it wishes to establish national requirements different from those established under the Directive and its implementing measure (e.g. higher levels for the requirements established under the Directive and its implementing measures). This chapter will be divided into three parts describing:

- A. Exceptions to the Article 114.1 TFEU harmonisation resulting from the common EU internal market rules
- B. Explicit Treaty exceptions to the Article 114.1 TFEU harmonisation
- C. Exceptions to the Article 114.1 TFEU harmonisation allowed by the harmonisation measure itself.

A. Exceptions to the Article 114.1 TFEU harmonisation resulting from the common EU internal market rules

This section discusses the potential for Member States to establish additional rules when a complete system of EU-wide rules (total harmonisation) has been established under the Directive and its implementing measures.

Due to the fact that a directive based on Article 114 TFEU seeks to harmonise national laws and provide common standards for the whole EU, particular EU Member States are not allowed to introduce national standards different from those established by the directive (including stricter national standards).¹⁹ This implies that *once a common Community organisation for a particular*

¹⁸ Including both national measures additional to and different from EU measures

¹⁹ Confirmed by the ECJ in e.g.: case 60/86 Commission v. United Kingdom, (Dim-Dip Lights) – related to Directive 76/759.

*product*²⁰ has been set up, Member States are no longer entitled to maintain in force provisions or adopt practices which are incompatible with the scheme of common organisation or which jeopardise its aims or functioning.²¹ According to the ECJ case law (case C-52/00)²² this applies also to situations where higher standards established by the Member State benefit individuals (e.g. consumers).

Therefore, if a Directive establishes a complete system of EU-wide rules in a particular domain (total harmonisation), Member States are in principle not allowed to establish rules either stricter or additional to the ones provided by the Directive. However, there are exceptions to this prohibition in relation to additional rules. Member States may adopt their own additional national measures to the extent that they do not impair the effective functioning of the system of common EU-wide rules established by the Directive, do not jeopardise its aims or functioning, do not impede the functioning of the internal market and do not run counter to Article 34 TFEU (ex Article 28 TEC).²³ Establishment of a complete system in a particular domain (total harmonisation) means that the EU establishes common rules in the particular domain and these common rules regulate all aspects of this particular domain so that there is no space for a separate national legislation.

The Ecodesign and Energy Labelling Directives both establish such a complete system in a particular domain. In case of the Ecodesign Directive it is a complete system of eco-design requirements for energy using products and in case of the Energy Labelling Directive it is a complete system for household appliances of labelling and standard product information of energy and other resources consumption.

It should be noted that in the case of the Ecodesign Directive, specific eco-design requirements are introduced only for selected environmental aspects which have significant environmental impact (Article 15.6).

Moreover, the systems of common EU-wide rules under the Ecodesign and Energy Labelling Directives concern only particular products for which implementing measures are required to be adopted under Articles 15 and 16 of the Ecodesign Directive and Article 2.2 of the Energy Labelling Directive. A system for a particular product can be considered complete only when necessary implementing measures have been adopted and when they regulate all aspects relating to the area. Therefore, it applies only to cases when the Directive or other relevant legal act²⁴ requires the adoption of an implementing act which, together with the directive, regulates all aspects relating to the subject area, and the act has been adopted. For products for which such implementing measures are established, Member States in principle cannot adopt additional rules and regulations in relation to the subject area covered under the EU legal measure.²⁵

²⁰ A common Community organisation for a particular product shall mean a complete system of common Union-wide rules for the product.

²¹ 'EU Law', 9th edition, Josephine Steiner, Lorna Woods, Christian Twigg - Flesner, Oxford University Press, first published 2006, p. 328.

²² Case C-52/00 Commission v. France – related to the Directive 85/374 (Product Liability Directive) [1985] OJ L 210/29.

²³ Article 34 TFEU: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

²⁴ In case of the Ecodesign Directive: the Commission working plan 2009-2011 under the Ecodesign Directive (see: footnote 15)

²⁵ Ecodesign Directive: eco-design requirements for energy using products; Energy Labelling Directive: indication by labelling and standard product information of the consumption of energy and other resources by household appliances.

That means that, in principle, a Member State cannot establish additional energy efficiency requirement for refrigerating appliances,²⁶ electric motors²⁷ or other products regulated by implementing measures adopted under the Ecodesign Directive.

However, exceptions to this rule are possible. According to these exceptions, a Member State may adopt additional national rules if they do not impair the effective functioning of the complete system established by the Directive and its implementing measures nor run counter to the Treaties' requirements, and in particular Article 34 TFEU (ex Article 28 TEC).

Compliance with these conditions is difficult to prove as it can be easily argued that the imposition by a Member State of an additional requirement (e.g. additional energy efficiency requirements for products regulated under the Ecodesign Directive) can disadvantage certain products in comparison with products originating from other Member States (e.g. because of product's higher production costs).

It is important to remember that a Member State cannot impose additional requirements on the products of other Member States before admitting them to its market if these products were admitted to the market of the first Member State.

Moreover, the Ecodesign and Energy Labelling Directives, both contain particular provisions establishing that Member States are not allowed to prohibit or restrict placing on the market of a product covered by an implementing measure adopted on the basis of these Directives if the product satisfies provisions of this measure (Article 6 of the Ecodesign Directive²⁸ and Article 8.1 of the Energy Labelling Directive).²⁹ Therefore, if a product complies with the requirements of the Directives and their implementing measures, a Member State cannot prohibit its access to its market on the basis of additional stricter ecodesign or energy labelling requirements. These provisions are assessed more in detail below.

- In relation to the Ecodesign Directive, an EU Member State cannot restrict access to the market of products regulated by the Ecodesign Directive and its implementing measures on the grounds

²⁶ Commission Regulation (EC) No 643/2009 of 22 July 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for households refrigerating appliances; OJ L 191, 23.7.2009, p. 53.

²⁷ Commission Regulation (C) No 640/2009 of 22 July 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for electric motors; OJ L 191, 23.7.2009, p. 26.

²⁸ Article 6 of the Ecodesign Directive: '1. Member States shall not prohibit, restrict or impede the placing on the market and/or putting into service, within their territories, **on grounds of ecodesign requirements relating to those ecodesign parameters referred to in Annex I, Part 1 which are covered by the applicable implementing measure**, of an EuP that complies with all the relevant provisions of the applicable implementing measure and bears the CE marking in accordance with Article 5. 2. Member States shall not prohibit, restrict or impede the placing on the market and/or putting into service, within their territories, of an EuP bearing the CE marking in accordance with Article 5 **on grounds of ecodesign requirements relating to those ecodesign parameters referred to in Annex I, Part 1 for which the applicable implementing measure provides that no ecodesign requirement is necessary**. 3. Member States shall not prevent the display, for example at trade fairs, exhibitions and demonstrations, of EuPs which are not in conformity with the provisions of the applicable implementing measure, provided that there is a visible indication that they may not be placed on the market and/or put into service until brought into conformity.'

²⁹ Article 8.1 of the Energy Labelling Directive: '1. Where the provisions of this Directive and of the implementing directives are satisfied, Member States shall neither prohibit nor restrict the placing on the market of the household appliances covered by an implementing directive.'

of ecodesign requirements relating to ecodesign parameters listed in part 1 of Annex I of the Directive if these products are covered by an implementing measure and if they comply with provisions of this implementing measure (also when the relevant implementing measure provides that no ecodesign requirement is necessary). Potentially it could be concluded then that revoking ecodesign parameters different from the ones included in Annex I part 1 of the Ecodesign Directive or not covered by the implementing measure can be the reason for a Member State to prohibit, restrict or impede the placing on the market and/or putting into service, of a particular product. However, this could be done only if imposing an additional requirement would not impair effective functioning of the product market from the point of view of the internal market perspective.³⁰

- The similar provision of the Energy Labelling Directive explicitly prohibits any restrictions to placing on the market products that comply with this Directive and its implementing measures. The same conclusions as those reached by analysing the Ecodesign directive are made here, in a more straightforward way.

However, as the preamble of the Ecodesign Directive shows, the Directive has tried to prevent situations when Member States would need to invoke requirements additional to the ones established under the directive and its implementing measures. Recital 23 provides that when preparing implementing measures, the Commission should also take due account of existing national environmental legislation, which Member States have indicated that they consider should be preserved, without reducing the existing and justified levels of protection in the Member States. In other words, when the implementing measure is initially formed through the legislative process, the relevant legislation already in operation in individual Member States should be taken into account. This should avoid the need for country-specific measures to be considered once the implementing measures have been established, as they will already have been taken into account.³¹ Although no similar provision is included in the Energy Labelling Directive, it can be logically considered that in this case the same approach would be followed by the Commission.

One must bear in mind that it may be difficult to provide a sufficient and convincing justification for establishment of additional specific ecodesign requirements for products regulated under the Ecodesign Directive and its implementing measure. In this case it is necessary to prove compliance with conditions preventing the impediment of the common system of EU-wide and internal market rules, as well as complying with the Treaty provisions, in particular Article 34 TFEU.

In such a situation the appropriate course of action would be to use the procedure of Article 114.4 – 114.6 TFEU described further in section B (below). This procedure has been established specifically to provide derogations to the Article 114.1 TFEU harmonisation measures, and is the most appropriate and the most efficient in such cases. The use of this procedure is also the most appropriate because it was established especially for the purpose of providing derogations to Article 114.1 TFEU harmonisation measures and therefore, it would be difficult to justify not using it.

³⁰ Creation and good functioning of the internal market is the main objective of this directive.

³¹ Ecodesign Directive, preamble, recital 23: *'When preparing implementing measures, the Commission should also take due account of existing national environmental legislation, in particular concerning toxic substances, which Member States have indicated that they consider should be preserved, without reducing the existing and justified levels of protection in the Member States.'*

It is also important to remember that the Ecodesign and Energy Labelling Directives and their implementing measures are not the only pieces of EU legislation imposing certain product requirements. A product may need to comply with EU requirements concerning, for instance, the use of lead or mercury as required by the WEEE Directive.³² These existing EU instruments shall be taken into account already during the legislative process as can be deduced from Recital 33 of the preamble to the Ecodesign Directive.³³ In this case these are additional EU requirements and not separate Member States' rules. Member States are obliged to comply with them in the same way as with obligations resulting from the Ecodesign and Energy Labelling Directives and their implementing measures.

It is also important to mention at this point the Technical Standards and Regulations Directive,³⁴ which in particular establishes a requirement for national standardisation bodies to inform the European Commission and other standardisation bodies about any intention to introduce new national or international technical standards. The Commission shall also be notified by a Member State of any draft technical regulation, except where it merely transposes the full text of an international or European standard. The adoption of such a draft technical regulation shall be postponed for three months from the date of receipt by the Commission of the draft (in some particular cases mentioned in Article 9.2 of the Directive, this can be four or six months). If, within the three months of receipt of the draft, the Commission announces its finding that the draft technical regulation concerns a matter covered by a proposal for a directive, a regulation or a decision presented to the Council, Member State shall postpone the adoption of the draft technical regulation for 12 months.

It can be assumed that such national standards shall comply with the EU rules and in particular the internal market requirements. Otherwise, the Commission would be obliged to ask a Member State to request derogation under Article 114.4 – 114.6 TFEU (described in detail further in this briefing) or would have to initiate an infringement procedure under Article 258 TFEU.

Therefore, this Directive ensures supervision by the European Commission of the adoption or amendment by EU Member States of national technical standards. It allows the Commission to follow up national situations and when necessary propose an EU harmonisation measure related to particular standards.

B. Explicit Treaty exceptions to the Article 114.1 TFEU harmonisation

As indicated above, the TFEU (and before, the TEC) allows Member States in certain situations to maintain or introduce measures different from those established under Article 114.1 TFEU. These

³² Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ L 37, 13.2.2003, p.19, as amended.

³³ Ecodesign Directive, preamble, recital 33: *'This Directive is complementary to existing Community instruments such as (...). Synergies between this Directive and the existing Community instruments should contribute to increasing their respective impacts and building coherent requirements for manufacturers to apply.'*

³⁴ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services; OJ L 24, 21.7.1998, p. 37, as amended.

national measures may be simply different from the EU rules or, similarly to the case described above, may be additional to the complete system of the organisation of the market.

These possible derogations to the harmonisation rules of Article 114.1 TFEU are provided in paragraphs 4 to 6 of Article 114 TFEU.

Paragraphs 4 and 5 of Article 114 TFEU indicate situations in which derogations to harmonisation under Article 114.1 TFEU are possible. These are:

1. When a Member State wants to maintain existing national provisions different from the EU harmonising legislation adopted on the basis of Article 114.1 TFEU
2. When a Member State wants to introduce new national provisions different from the EU harmonising legislation adopted on the basis of Article 114.1 TFEU.

Paragraph 4 of Article 114 TEC allows a Member State to **maintain** national provisions when, after the adoption of the harmonisation measure, a Member State deems it necessary on grounds of major needs referred in Article 36 TFEU (ex Article 30 TEC),³⁵ or relating to protection of the environment or the working environment.

Paragraph 5 allows a Member State to **introduce** its own national provisions when, after the adoption of a harmonisation measure, a Member State deems it necessary based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.

Therefore, it is possible for a Member State to maintain or introduce national measures additional or different from those adopted at EU level under Article 114.1 TFEU. However, possibilities for introducing such special national measures are limited. It is possible in the area of the environmental protection but, as explained above, there are additional conditions with which Member States must also comply.

In both above mentioned cases (paragraphs 4 and 5), the Member State shall notify the Commission of the relevant provisions and the grounds for maintaining or introducing them (therefore, providing justification is necessary). The procedure following such notification is established in paragraph 6 of Article 114 TFEU and is the same for maintaining the existing (Article 114.4 TFEU) and introducing the new (Article 114.5 TFEU) national provisions. The Commission shall verify whether these notified provisions are not means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they do not constitute an obstacle to the functioning of the internal market. Following this examination and in any case within six months of the notification (possible to be prolonged by another six months in cases of complex matters and in the absence of danger for human health), the Commission shall approve or reject notified national provisions. In the absence of a decision by the Commission within this period the national provisions notified by a Member State shall be deemed to have been approved.

³⁵ Article 30 TEC: 'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, export or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasure possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

In case of the Ecodesign Directive, application of these TFEU provisions is confirmed by the Directive itself. Recital 9 of the preamble expressly mentions the use of ex Article 95.4 – 95.6 TEC (now replaced by Article 114.4 – 114.6 TFEU).³⁶

Therefore, according to the TFEU, in case of environmental protection legislation based on Article 114.1 TFEU and in situations and under conditions listed in Article 114.4 – 114.6 TFEU it is possible for a Member State to keep specific existing national provisions or establish new ones. In case of the Ecodesign Directive this is also confirmed in the Recital 9 of the preamble. Logically, these national provisions can establish protective measures more stringent than provided in the Directive and its implementing measures.

However, it should be emphasised that these derogations are exceptional to the general rule of Article 114.1 TFEU. Their exceptionality is underlined in practice by the fact that Member States do not use this provision very often.³⁷

In addition, if the Commission or any Member State considers that another Member State is making improper use of its powers to look for derogation to the Article 114.1 TFEU harmonisation measure, according to Article 114.9 TFEU, it may bring the case directly to the Court of Justice without following an infringement procedure under Articles 258 and 259 TFEU (ex Articles 226 and 227 TEC).

Article 114.7 TFEU provides also that when a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

It is worth presenting here some examples of the Commission's derogation decisions to Article 114.1 TFEU, namely:

- Commission decision 2002/884/EC on the marketing and use of creosote-treated wood³⁸
- Commission decision 2008/448/EC on the addition of nitrate to certain meat products³⁹
- Commission decision 2003/1/EC on importation and placement on the market of certain NK fertilisers of high nitrogen content and containing chlorine⁴⁰
- Commission decision 2003/829/EC on the use of azodyes⁴¹.

³⁶ Ecodesign Directive, Preamble, recital 9: 'A Member State deeming it necessary to maintain national provisions on grounds of major needs relating to the protection of the environment, or to introduce new ones based on new scientific evidence relating to the protection of the environment on grounds of a problem specific to that Member State arising after the adoption of the applicable implementing measure, may do so following the conditions laid down in Article 95(4), (5) and (6) of the Treaty, that provides for a prior notification to and approval from the Commission.'

³⁷ P.Craig, G. de Burca 'EU Law. Text, cases and materials' Third edition, Oxford University Press, p. 1189: 'concerns that Member States would routinely seek to invoke the Article [114.4 TFEU] to prevent the application of harmonisation measures have proven to be unfounded.'

³⁸ Commission decision 2002/884/EC of 31 October 2002 concerning national provisions on restrictions on the marketing and use of creosote-treated wood notified by the Netherlands under Article 95(4) and (5) of the EC Treaty (notified under document number C(2002) 4116); OJ L 308, 9.11.2002, p.30.

³⁹ Commission decision 2008/448/EC of 23 May 2008 concerning national provisions notified by Denmark on the addition of nitrate to certain meat products (notified under document number C(2008) 2168); OJ L 157, 17.6.2008, p. 98.

⁴⁰ Commission decision 2003/1/EC of 18 December 2002 relating to national provisions on limiting the importation and placement on the market of certain NK fertilisers of high nitrogen content and containing chlorine notified by France pursuant to Article 95(5) of the EC Treaty (notified under document number C(2002) 5113); OJ L 1, 4.1.2003, p. 72.

The two first examples (decisions 2002/884/EC and 2008/448/EC) illustrate cases where the Commission accepted a Member State's request for derogation. In the last two quoted cases (decisions 2003/1/EC and 2003/829/EC) the Commission did not accept the derogation request.

The first of the quoted decisions, decision 2002/884/EC granting derogation to the Netherlands is a good illustration of the assessment carried out by the Commission in order to decide on derogation.

First, the Commission assessed, as it does in all similar cases, admissibility of the request. In this case the Commission considered that the Dutch provision introducing a total ban on the marketing and use of creosote-treated wood for applications involving contact with groundwater went beyond the measures provided for in Directive 2001/90/EC and therefore justified the Netherlands' request for derogation under Article 114.4 TFEU (then Article 95(4) TEC).

Then, the Commission assessed the justification by the Netherlands with regard to the need to protect the environment. In that respect the Commission based its decision on the documentation provided by the Netherlands (scientific data available only after the adoption of the Directive) as to the grounds relating to the protection of the aquatic environment from the risks posed by creosote-treated wood in contact with surface water and groundwater and the specific exposure situation prevailing in the Netherlands. This and other decisions show the importance of providing a thorough justification. The burden of proof relies on the Member State requesting derogation. In its other decision, namely decision 2003/829/EC, the Commission rejected the request for derogation by Germany. The Commission considered that the material and data submitted in support to the request were limited and not convincing (the decision contains detailed arguments of the reasons the Commission considered them insufficient) and that the German authorities did not provide any element to demonstrate the existence of a known risk going beyond the risk already identified by the Community legislature. Further, it considered that the national measures concerned did not go beyond what is necessary to attain the objective pursued.

The next issues assessed in relation to a derogation request are the absence of: arbitrary discrimination, a disguised restriction on trade and obstacles to the functioning of the internal market. In the case discussed here the national provisions were intended to apply in the same way to the national and imported creosote-treated wood for the applications concerned and the Commission found that the reason for asking for derogation was without doubt environmental protection. Consequently it considered that the above mentioned conditions were respected. It must be stressed that when assessing these elements the Commission took into account the specificity of derogations under Article 14.4 – 114.5 TFEU (then Article 95.4 - 95.5 TEC). Therefore, the concept of creating an *obstacle to the functioning of the internal market* was interpreted as a disproportionate effect in relation to the pursued objective. Otherwise the Dutch derogation, like any other national act derogating from a harmonisation measure, would have to be considered as constituting in substance a measure likely to affect the internal market. Such a literal interpretation would not allow for adopting any derogation and would make Article 114.4 - 114.5 TFEU inefficient. Therefore, in other derogation cases the interpretation of these three requirements (the absence of

⁴¹ Commission decision 2003/829/EC of 25 November 2003 concerning national provisions on the use of azodyes notified by Germany under Article 95(4) of the EC Treaty (notified under document number C(2003) 4356); OJ L 311, 27.11.2003, p. 46.

arbitrary discrimination, disguised restriction on trade and obstacles to the functioning of the internal market) is carried out in compliance with the spirit of Article 114.4 – 114.6 TFEU.

To sum up, the above mentioned derogation rules of Article 114.4 – 114.6 TFEU apply to all the legislation adopted on the basis of Article 114.1 TFEU and therefore also to the Ecodesign and Energy Labelling Directives. Member States wishing to maintain or introduce requirements higher (including different and additional national measures) than in these Directives and their implementing measures may be allowed by the Commission to do so on the grounds of and following procedure foreseen in Article 114.4 – 114.6 TFEU.

C. Exceptions to Article 114.1 TFEU harmonisation allowed by the harmonisation measure itself

The third type of situation when a Member State can establish national rules different from those in the Directive based on Article 114.1 TFEU and its implementing measures, is when this is expressly allowed by the Directive itself.

As established by the European Court of Justice in its decision in the case *Prantl* (case 16/83) 'once rules on the common organisation of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise.'

In its decision in case C-52/00, the ECJ held that '*The margin of discretion available to the Member States ... is entirely determined by the directive itself and must be inferred from its wording, purpose and structure*' (para. 16). It can be deduced from this Court argumentation that an EU Member State can derogate from the provisions of the harmonisation directive when allowed by the directive itself. Case *Grunert*⁴² serves as a good example to illustrate situations where a directive leaves Member States certain flexibility while at the same time providing certain harmonisation. This case concerned Community Directives 64/54⁴³ and 70/357.⁴⁴ These directives on one hand allowed the use of lactic and citric acids for protecting food against deterioration but, on the other hand, also stated that they (the directives) were not to affect national laws which specify the foodstuffs to which these additives could be added. As a result of this last argument, the French measure prohibiting the use of these two acids for certain pork meats was justified and legally correct.

In the case of the Ecodesign Directive, one could invoke Article 15.6 which specifies that *specific ecodesign requirements shall be introduced for selected environmental aspects which have a significant environmental impact*. That implies that Member States are free to establish their own legislation for other ecodesign requirements. If such an additional requirement concerned issues falling outside the Directive, and in particular did not relate to energy efficiency, Member State would be allowed to do that. On the other hand, if a Member State wished to introduce an

⁴² Case 88/79, *Ministère Public v. Grunert* [1980] ECR 1827.

⁴³ Council Directive 64/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption, OJ 12, 27.1.1964, p. 161–165 (DE, FR, IT, NL) English special edition: Series I Chapter 1963-1964 p. 0099.

⁴⁴ Council Directive 70/357/EEC of 13 July 1970 on the approximation of the laws of the Member States concerning the antioxidants authorized for use in foodstuffs intended for human consumption, OJ L 157, 18.7.1970, p. 31–35 (DE, FR, IT, NL) English special edition: Series I Chapter 1970(II) p. 0429.

additional ecodesign requirement related to energy efficiency, it could do so under condition that it would not impair the effective functioning of the complete system of EU-wide rules established by the Directive and its implementing measure, nor run counter to Treaties' provisions and in particular Article 34 TFEU (ex Article 28 TEC). However, taking into account the whole construction of Article 114 TFEU, the most appropriate way would be asking for derogation as described above in Section B.

The Energy Labelling Directive does not contain a provision similar to the one featured in the Ecodesign Directive.

2. Situations when a Member State wishes to legislate in areas not covered by Ecodesign and Energy Labelling Directives and their implementing measures

This part will concern situations when a particular product is not regulated under the Ecodesign and Energy Labelling Directives and their implementing measures. Such cases arise when:

- The product is mentioned neither in the Ecodesign and Energy Labelling Directives, nor in the Commission working plan for 2009-2011 under the Ecodesign Directive.⁴⁵ In cases where a Directive does not contain a requirement to adopt an implementing measure for a particular product Member States are free to adopt their own national legislation for this product.
- An implementing measure under the Ecodesign or Energy Labelling Directives is requested to be adopted but this has not happened yet. In this case Member States are also free to adopt their own national measures.

Areas falling outside the field regulated by the Directive based on Article 114 TFEU remain the Member States' responsibility. The case *Inspire Art (case C-167/01)* provides a good illustration of what should be meant by 'areas outside the field regulated by the Directive'. This case concerned Directive 89/666/EC⁴⁶ establishing Community rules on disclosure obligations in relation to branches of foreign companies. The fact that this directive regulated only a very specific issue of disclosure obligations implied that any other requirements concerning the establishment of a branch of a foreign company were to be regulated by Member States in compliance with the EC Treaty provisions. Therefore, the minimum capital requirements could be imposed by a Member State if they were not in conflict with the Treaty provisions and in this particular case with the 'freedom of establishment' principle (Article 43 TEC).

This rule has practical implications in relation to the Ecodesign and Energy Labelling Directives. Some aspects (namely, the possibility of adopting national measures falling within the remit of the EU directive and its implementing measures) have already been discussed in the previous chapter. This chapter concentrates on implementing measures for particular products and the potential for EU Member States to legislate on products not covered by the EU directive and its implementing measures.

⁴⁵ See: footnote 15.

⁴⁶ Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, OJ L 395, 30.12.1989, p. 36 (ES, DA, DE, EL, EN, FR, IT, NL, PT).

The Ecodesign Directive, as indicated in its full title,⁴⁷ is a framework directive. According to Article 16.1 of the Directive, an indicative list of products to be considered as priorities for the adoption of implementing measures within the three first years of the Directive's implementation shall be set up in the working plan established following the criteria of Article 15 of the Directive. Such a list has been established in the Commission working plan for 2009 – 2011 under the Ecodesign Directive. Before such a list was established, during the transitional period, the Commission had an obligation to establish implementing measures for products listed in Article 16.2 of the Directive.

If, in spite of the obligation imposed by the Directive on the Commission, implementing measures were not established for a product listed in Article 16.2, each Member State would be free to legislate in relation to such product.

Products included in the Commission working plan for 2009 – 2011 under the Ecodesign Directive (the list of products to be regulated by the implementing measures has been included with this Working plan) have not yet all been regulated by the relevant product implementing measures. Until such implementing measures are established at EU level, these products can be regulated by the EU Member States.

The Energy Labelling Directive contains a list of household appliances to which Directive applies. Similarly to the Ecodesign Directive, when implementing measures are adopted for a product, an EU Member State cannot establish its own rules for it unless a derogation described above in Part 1 of this chapter is applied. However, EU Member States can establish their own rules for products for which implementing measures have not yet been adopted.

Products not mentioned at all by these two directives and in the Commission working plan for 2009 – 2011 under the Ecodesign Directive can be regulated by the EU Member States.

As a result of the above, in the absence of implementing measures (either because not requested or because not adopted), Member States can establish their own product measures concerning ecodesign and energy labelling.

III. PARTICULAR CASE UNDER THE ECODESIGN DIRECTIVE – VOLUNTARY AGREEMENTS AND OTHER SELF-REGULATION MEASURES

According to Articles 15 and 17 of the Ecodesign Directive it is possible for the industry to present voluntary agreements or other self-regulation measures as alternatives to the implementing measures. Such measures are then assessed on the basis of criteria of Annex VIII to the Directive. Recitals 16 – 18 of the preamble to the Directive indicate that such self-regulation measures should even be given priority over mandatory implementing measures. Recital 18 of the preamble and Annex VIII to the Directive present assessment criteria of such measures, which should be carried out by the Commission in cooperation with a Consultation Forum described in Article 18 of the Directive.

⁴⁷ See: footnote 7.

Point 9 of Annex VIII⁴⁸ indicates that the Member States' national legislation should not send contradictory signals to participants in the commitment, implying that the national legislation should not contradict the voluntary agreement or other self-regulation measure. However, an EU Member State is not obliged by any legal means to comply with this requirement. Provision of point 9 of Annex VIII can serve as guidance but is not a binding requirement. That is confirmed by the fact that Annex VIII states clearly that its criteria are indicative and that voluntary agreements between industry representatives do not have a binding legal form.

Therefore, Member States are advised to comply with voluntary agreements and other self-regulation measures under Annex VIII of the Ecodesign Directive and Article 4.3 TEU but are not under an obligation to respect conditions of such agreements; therefore they can adopt measures stricter than provided in the voluntary self-regulation measure.

IV. CONCLUSION

As described above, it is possible for EU Member States to adopt measures stricter (including different and additional measures) than established by the Ecodesign and Energy Labelling Directives, their implementing measures, and self-regulating measures adopted under the Ecodesign Directive. This is (except in the case of self-regulating measures under the Ecodesign Directive) not automatic, however, and applies to particular cases under particular conditions.

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⁴⁸ Annex VIII, point 9: *'Incentive compatibility: Self-regulatory initiatives are unlikely to deliver the expected results if other factors and incentives — market pressure, taxes, and legislation at national level — send contradictory signals to participants in the commitment. Policy consistency is essential in this regard and shall be taken into consideration when assessing the effectiveness of the initiative.'*