

November 2010

Legal briefing

Self-regulation measures under the Ecodesign Directive

EXECUTIVE SUMMARY

The Ecodesign Directive¹ is a framework directive. While the Directive establishes some general requirements concerning ecodesign of energy-related products, it requires the adoption of implementing measures in order to be fully implemented. Each of these implementing measures establishes detailed requirements for a particular energy-related product. According to Articles 15, 16 and 19 of the Ecodesign Directive, implementing measures are adopted through a comitology procedure.

As an alternative to an implementing measure, it is also possible for the Commission to admit industry self-regulatory initiative. Recital 18 of the Ecodesign Directive provides that such self-regulation measures by the industry should be given a priority where they are likely to deliver the policy objectives faster or in a less costly manner than mandatory requirements.²

These industry self-regulations are unilateral commitments by industry and do not have legally binding character at EU level. Neither Member States nor manufacturers that are not parties to the agreement are bound by it.

However, taking into account that self-regulations are alternatives to EU legislation and that they must comply with several conditions in order to be admitted by the Commission, they are not at the complete discretion of industry.

They are formally acknowledged by the Commission. This acknowledgement should in principle have a legal form of a Commission recommendation similarly to other self-regulation measures presented further in this briefing and taking into account that self-regulations under the Ecodesign Directive are alternatives to legislation. The European Parliament and the Council must be informed about the conclusion of voluntary agreements as well as their development throughout their life-time. Certain involvement of the Consultation Forum³ should also be considered and civil society consultation must be ensured at different stages of the process.

Self-regulation measures should be adopted formally as civil law agreements of the parties to it. That means that even though self-regulation measures are not legally binding under the EU law, they should be so, for the contracting parties, under the relevant national law. The Commission, before acknowledging a self-regulation measure, should verify that it is concluded by industry as a binding civil law agreement which ensures i.a. judicial control of compliance with the obligations and commitments resulting from the agreement.

According to Article 17 of the Directive, to be admitted by the Commission, self-regulation measures must be assessed *at least* on the basis of Annex VIII of the Ecodesign Directive with

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, OJ L 285, 31.10.2009, p. 10.

² On the other hand, Article 15.3(b) states that the Commission shall 'take account' of a self-regulation measure when preparing a draft implementing measure – therefore, a priority of a self-regulation measure is not imposed on the Commission when it prepares an implementing measure.

³ Consultation Forum was set up under Article 18 of the Ecodesign Directive.

regard to the following criteria: openness of participation, added value, representativeness, quantified and staged objectives, involvement of civil society, monitoring and reporting, cost effectiveness of administering a self-regulatory initiative, sustainability and incentive compatibility. These criteria are the same as the criteria for environmental agreements included in the Commission Communication on environmental agreements of 2002⁴. Based on the Annex VIII criteria, the following conclusions can be drawn:

- **Representativeness:** Representativeness means that the entire or almost the entire (meaning not less than 90%) product sector should be covered by a self-regulation, including not only EU manufacturers but also manufacturers from outside the EU, importers and authorized representatives. The representativeness issue also brings into discussion the compliance of a particular self-regulation measure with EU competition law and WTO rules, which is beyond the scope of this paper.
- **Consultation with civil society:** Involvement of civil society means that it must be consulted before a self-regulation is admitted by the Commission. Its comments must be taken into account. Civil society consultation must be also ensured at further stages of the process; in particular, in relation to monitoring and reporting.
- **Administrative cost-effectiveness:** Cost-effectiveness of administering a self-regulatory initiative by the Commission does not take away the Commission's responsibility to base its assessments on reliable and thorough data and information but rather means that part of work may be delegated to industry and/or to independent experts (while ensuring their objectivity); moreover, it must be stressed that the 2002 Commission Communication highlights importance of administrative cost-effectiveness especially in relation to the enforcement phase.
- **Monitoring and reporting:** If the objectives of a voluntary measure are not attained, the Commission may propose to adopt implementing measure which is legally binding at EU level. Therefore, the Commission has to ensure a constant assessment of such self-regulation measures based on data provided by industry and/or independent experts. This is possible through reporting and monitoring mechanisms linked to clear objectives, indicators and deadlines for their achievement as well as interim reports. Mid-term evaluation of the potential for additional improvements should also be envisaged. It is recommended that these elements are included in the Commission recommendations which admit self-regulations, as this was practiced in cases of some already existing industry voluntary agreements⁵.

The Commission must also assess whether a self-regulation measure will achieve the policy objectives more quickly and at the less expense than mandatory requirements.

All these assessments must be carried out ex-ante and be thorough enough and well documented to allow the Commission to decide whether an industry self-regulation can be admitted as an alternative to a legally binding implementing measure.

In fact the requirements of an ex-ante assessment of a self-regulation measure are not lower than those of the legally binding implementing measure.

⁴ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 'Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment', COM(2002)412 final, 17.7.2002.

⁵ In that respect see Commission recommendations 1999/125/EC, 2000/303/EC and 2000/304/EC.

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In case the Commission does not exercise its right of legislative initiative to replace an industry self-regulation by an implementing act, the European Parliament or the Council may request the Commission to do so. If the request is not followed or the reasons for it are not convincing, the institution which made a request could envisage to bring a case to the Court of Justice of the European Union for failure to act (Article 265 of the Treaty on the Functioning of the European Union (TFEU)).

Taking into account the numerous examples of unsuccessful EU self-regulation measures, it is crucial that voluntary agreements under the Ecodesign Directive and EU acts acknowledging such agreements are concluded in a way which guarantees that the expected results will be achieved.

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I. Introduction

The Ecodesign Directive⁶ is a framework directive. While the Directive establishes some general requirements concerning ecodesign of energy-related products, it requires the adoption of implementing measures in order to be fully implemented. Each of these implementing measures establishes detailed requirements for a particular energy-related product⁷. According to Articles 15, 16 and 19 of the Ecodesign Directive, they are adopted through a comitology procedure.

However, according to the Ecodesign Directive, it is also possible for the Commission to admit industry self-regulatory initiative as an alternative to an implementing measure. As provided in recital 18 of the Ecodesign Directive, such self-regulation measures by the industry should be given a priority where they are likely to deliver the policy objectives faster or in a less costly manner than mandatory requirements.

These industry self-regulations are unilateral commitments by industry. However, taking into account that they are alternatives to legislation and that, in order to be admitted they must comply with several conditions, they are not at the complete discretion of industry.

This paper addresses questions of what the voluntary character of self-regulation measures under the Ecodesign Directive means in practice, to which extent self-regulations should be treated differently than legally binding implementing measures and what powers the Commission holds in relation to these industry agreements.

The assessment will be carried out in the light of the Ecodesign Directive but also of the 2002 Commission Communication on environmental agreements⁸ (the 2002 Commission Communication), which is mentioned in recital 21 of the Ecodesign Directive as the guidance document for assessing self-regulation by industry under the Ecodesign Directive.

Occasionally, the assessment will also be based on the 1996 Commission Communication on environmental agreements (the 1996 Commission Communication).⁹ The reason for this is that the 2002 Commission Communication refers in many places to its 1996 predecessor and interpretation provided there.

⁶ 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, OJ L 285, 31.10.2009, p. 10.

⁷ Such implementing measures have been established for a number of products, e.g. circulators (Commission Regulation No 641/2009), electric motors (Commission Regulation No 640/2009), refrigerators and freezers (Commission Regulation No 643/2009).

⁸ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 'Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment', COM(2002)412 final, 17.7.2002.

⁹ Communication from the Commission to the Council and the European Parliament on Environmental Agreements; COM(96)561 final; 27.11.1996.

II. Voluntary character of industry self-regulation measures under the Ecodesign Directive

The industry self-regulations are described in recital 19 of the Ecodesign Directive as unilateral commitments by industry.

The 2002 Commission Communication on environmental agreements provides some further guidance on the legal status of self-regulation measures. This guidance applies also to measures under the Ecodesign Directive.

The Communication provides that self-regulation measures do not have legally binding effects at EU level and do not involve EU legislative acts. It also provides that they are not negotiated with the Commission but may be acknowledged by the Commission either by an exchange of letters, by a Commission Recommendation or by a Recommendation accompanied by a Parliament and Council Decision on monitoring the measure¹⁰.

Although the Commission only accepts the voluntary agreements, it acknowledges them by a non-binding act which may be published in the Official Journal. Similarly to other self-regulation measures presented further in this document and because self-regulation measures under the Ecodesign Directive are alternatives to legislation, it can be expected that the acknowledgement by the Commission will have a legal form of a Commission recommendation. The Commission can acknowledge self-regulation measures only when they comply with certain conditions provided in the Ecodesign Directive and the 2002 Commission Communication (see further in this document). It is for the industry to ensure compliance with these requirements. In other cases, a self-regulation cannot be accepted by the Commission as an alternative to a legally-binding implementing measure. This implies that even though the Commission does not formally negotiate voluntary agreements, it can in fact provide comments to a draft proposal of an industry self-regulation measure. This seems to be the case in practice.

Some examples of acknowledgements by the Commission of self-regulations were mentioned in the 2002 Commission Communication, namely Commission Recommendations 1999/125/EC¹¹, 2000/303/EC¹² and 2000/304/EC¹³. These recommendations acknowledged at the EU level some industry environmental agreements, namely agreements by the carmaker associations (respectively: European Automobile Manufacturers Association ACEA, the Korea Automobile Manufacturers Association KAMA and the Japan Automobile Manufacturers Association JAMA) on the reduction of carbon dioxide (CO₂) emissions from passenger cars. The agreements were all adopted on the basis of the 1995 Community strategy to reduce CO₂ emissions from passenger cars and improve fuel economy¹⁴. This Community Strategy¹⁵ explicitly proposed the conclusion of such agreements with the car industry. The agreements on the fuel consumption of new cars

¹⁰ Self-regulation measures could possibly also be part of coregulation decided by the Community legislators. However, the self-regulation measures under the Ecodesign Directive do not correspond to the requirements of coregulation as described in the 2002 Commission Communication.

¹¹ Commission Recommendation 1999/125/EC of 5 February 1999 on the reduction of CO₂ emissions from passenger cars (notified under document number C(1999) 107); OJ L 40, 13.2.1999, p. 49.

¹² Commission Recommendation 2000/303/EC of 13 April 2000 on the reduction of CO₂ emissions from passenger cars (KAMA) (notified under document number C(2000) 801); OJ L 100, 20.4.2000, p. 55.

¹³ Commission Recommendation 2000/304/EC of 13 April 2000 on the reduction of CO₂ emissions from passenger cars (JAMA) (notified under document number C(2000) 803); OJ L 100, 20.4.2000, p. 57.

¹⁴ Communication from the Commission to the Council and the European Parliament – A Community strategy to reduce CO₂ emissions from passenger cars and improve fuel economy; COM(95) 689 final, 20.12.1995.

¹⁵ point 29 of the Community strategy to reduce CO₂ emissions from passenger cars and improve fuel economy (see footnote 14)

were to include the commitment by vehicle manufacturers to gradually reduce the average CO₂ emissions of all new cars marketed in the EU over a fixed period of time in order to achieve a specific target. The Commission recommendations established this CO₂ emissions target at 140 g/km CO₂ to be achieved by 2008 (for ACEA) or 2009 (for KAMA and JAMA). They also provided an intermediate CO₂ emissions target and requested a mid-term evaluation of the potential for additional fuel-efficiency improvements.

All these three agreements and corresponding Commission recommendations established clear final and intermediate targets as well as deadlines for their achievement.

They also described, as will be discussed further in this document, what Commission action should be taken in the case when the objectives of the self-regulation measure were not achieved and/or sufficient progress was not made.

These industry self-regulations on CO₂ reductions from passenger cars, similarly to future industry self-regulations under the Ecodesign Directive are not spontaneous initiatives of the industry but are proposed in the EU acts to be used as alternatives to legally binding legislation. Although the legal basis are different in the two cases (a communication from the Commission for the CO₂ reductions from passenger cars and a directive of the European Parliament and of the Council for ecodesign), the adoption of industry self-regulation measures is explicitly mentioned in each of them.

Another example of acknowledgement by the Commission of industry self-regulation is Commission Recommendation 2009/39/EC on the safe storage of mercury¹⁶. This recommendation has been based on the Community Strategy Concerning Mercury by the Commission¹⁷. In the Mercury Strategy the Commission expressed its plans to explore the scope for agreements with the industry on the storage of mercury from the chlor-alkali industry with the intended phase out of mercury exports by 2011.

However, already in 2008 the European Parliament and the Council had adopted Regulation N° 1102/2008 on the banning of exports and the safe storage of mercury.¹⁸ The subsequent self-regulation is a complement to this regulation.

It is important to underline that the Commission is not the only EU institution involved in the process of self-regulations which are adopted by industry. According to the Interinstitutional Agreement on better law-making¹⁹, the European Parliament and the Council must also be informed about self-regulation initiatives²⁰. This implies that these two institutions may also make comments on drafts or otherwise intervene in the process.

¹⁶ Commission Recommendation 2009/39/EC of 2 December 2008 on the safe storage of metallic mercury no longer used in the chlor-alkali industry ; notified under document number C(2008) 8422 ; OJ L 14, 20.1.2009, p.10.

¹⁷ Communication from the Commission to the Council and the European Parliament - Community Strategy Concerning Mercury COM(2005) 20 final, 28.1.2005; SEC(2005) 101.

¹⁸ Regulation (EC) N° 1102/2008 of the European Parliament and of the Council of 22 October 2008 on the banning of exports of metallic mercury and certain mercury compounds and mixtures and the safe storage of metallic mercury; OJ L 304, 14.11.2008, p. 75.

¹⁹ European Parliament, Council, Commission Interinstitutional Agreement on better law-making; 2003/C 321/01, 31.12.2003.

²⁰ Point 23 of the IIA: *Commission will notify the European Parliament and the Council of the self-regulation practices which it regards, on the one hand, as contributing to the attainment of the EC Treaty objectives and as being compatible with its provisions and, on the other, as being satisfactory in terms of the representativeness of the parties concerned, sectoral and geographical cover and the added value of the commitments given. It will, nonetheless, consider the possibility of putting forward a proposal for a legislative act, in particular at the request of the competent legislative authority or in the event of a failure to observe the above practices.*

Moreover, because the Ecodesign Consultation Forum, which was set up under Article 18 of the Ecodesign Directive, is involved in the preparation and periodical amendment of the Working Plan setting out an indicative list of product groups considered as priorities for the adoption of implementing measures²¹, it can be considered that the Consultation Forum could also be involved in any decision on replacement of a binding implementing measure by a self-regulation, even if this is not explicitly mentioned in the Ecodesign Directive.

Taking into account the legal status of the above-mentioned already existing self-regulation measures, guidance provided by the 2002 Commission Communication on environmental agreements and the provisions of the Ecodesign Directive, there is no doubt that voluntary agreements and other self-regulation measures do not have legally binding character at EU level. Indeed, legally binding measures can only be adopted by public authorities. A self-regulation by industry is a measure which is adopted by industry. The fact that there is some form of 'acknowledgement' by the Commission does not change the nature of the measure.

The non-legally binding character has various consequences. One of them is that, in principle, EU Member States may adopt measures which are different from those contained in the self-regulation measure. It is true that point 9 of Annex VIII of the Ecodesign Directive mentions that there should be compatibility between an industry self-regulation measure and other factors and incentives such as market pressure, taxes and legislation at national level. However, this does not constitute an obligation imposed on an EU Member State; rather it is a requirement to be respected by the industry and assessed by the Commission when it considers whether a self-regulation measure could be an alternative to a legally binding implementing act.

Member States which wish to legislate in an area that is covered by self-regulation measures by industry, would need to notify any relevant national measure to the Commission according to Article 8 of the Directive 98/34/EC on the provision of information in the field of technical standards and regulations²². Such notification is required, but is also sufficient for a Member State to comply with a requirement of sincere cooperation between the Union and the Member States, which is established in Article 4.3 of the Treaty on European Union (TEU).²³

Self-regulation measures should be adopted formally as civil law agreements of the parties to it. A civil law agreement involves that it is binding on parties to the agreement under the relevant national civil law. This can be deduced from the Communication's requirement that a self-regulation measure has a binding form²⁴ and that the judicial control of compliance with the obligations and commitments resulting from such an agreement is ensured at national and, in accordance with the Treaty on the Functioning of the European Union, at EU level²⁵. Moreover, the 2002 Commission Communication also mentions that "*the identification of individual and*

²¹ See Article 16 of the Ecodesign Directive.

²² 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.

²³ Article 4.3 TEU:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

²⁴ Point 6 of the 2002 Commission Communication on Environmental Agreements (see footnote 4)

²⁵ Point 5 of the 2002 Commission communication on Environmental Agreements (see footnote 4)

*collective responsibilities [in the agreement] should also be ensured in order to allow for any sanctions which may be necessary*²⁶.

That means that even though self-regulation measures are not legally binding under EU law, they should be binding on the parties of the agreement under the relevant national law.

The Commission, before an official acknowledgement of an industry self-regulation measure, should verify that a civil law agreement establishing a self-regulation measure complies with the above-mentioned requirements of the 2002 Commission Communication. In other case, the self-regulation should not be admitted as an alternative to a legally-binding implementing measure as not complying with formal requirements.

To provide a full picture of self-regulations, mention should also be made of the End-of-life Vehicles Directive²⁷, the WEEE Directive²⁸ and the Batteries and Accumulators Directive²⁹. They all provide for voluntary agreements between the competent authorities and economic operators concerned to be used as means of national transposition of some specific, individually enumerated Articles. Such voluntary agreements at national level shall meet some further requirements (be enforceable, specify objectives with the corresponding deadlines and be published in the national official journal or an official document equally accessible to the public and transmitted to the Commission; the results achieved must be monitored regularly, reported to the competent authorities and the Commission and made available to the public under the conditions set out in the agreement; the competent authorities shall ensure that the progress made under such agreements is examined). These national self-regulations transposing EU legislation are not the subject of this paper and will not be discussed further.

III. Conditions to respect when adopting and implementing self-regulation measures under the Ecodesign Directive

The industry self-regulations are described in the Ecodesign Directive as unilateral commitments by industry. However, as mentioned above, even though they are unilaterally adopted by industry, they have to comply with certain requirements, in order to be able to serve as an alternative to implementing legislation. This is only consequent, when one realises that the legislator agrees to them under the condition that, as stated in Article 15.3(b) of the Ecodesign Directive, they *are expected to achieve the policy objectives more quickly or at lesser expense than mandatory requirements*.

1. Ex-ante assessment on the basis of Annex VIII of the Ecodesign Directive

First, according to Article 17 of the Ecodesign Directive, self-regulation measures must be assessed *at least* on the basis of Annex VIII of the Ecodesign Directive, in order to be admitted by the Commission.

The criteria of Annex VIII of the Ecodesign Directive are the following: openness of participation, added value, representativeness, quantified and staged objectives, involvement of civil society,

²⁶ Idem.

²⁷ Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles; OJ L 269, 21.10.2000, p.34, as amended.

²⁸ Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE); OJ L 37, 13.2.2003, p. 24, as amended.

²⁹ Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC; OJ L 266, 26.9.2006, p. 1, as amended.

monitoring and reporting, cost effectiveness of administering a self-regulatory initiative, sustainability and incentive compatibility. These criteria are the same as the criteria for environmental agreements included in the above-mentioned 2002 Commission Communication³⁰.

As stated in Annex VIII to the Ecodesign Directive, its criteria have to be assessed in order to evaluate the admissibility of self-regulatory initiatives; this has as a consequence that this assessment must take place before the admission decision is taken.

It is important to underline that the criteria of Annex VIII are not exhaustive. This results from the above-quoted Article 17 (self-regulations are to be assessed 'at least' on their basis) and from the text of Annex VIII which states that the list it includes is a "*non-exhaustive list of indicative criteria which may be used to evaluate the admissibility of self-regulatory initiatives as an alternative to an implementing measure*".

Even though the Ecodesign Directive does not clearly specify who should carry out the Annex VIII criteria assessment, it is logical to assume that the industry has to use these criteria when preparing a self-regulation and then the Commission will use them when deciding whether a self-regulation can be admitted as an alternative to an implementing measure.

A closer look will be taken here at some elements of Annex VIII assessment elements, namely representativeness, openness of participation, involvement of civil society and cost-effectiveness of administering a self-regulatory initiative. Some other elements, i.e. added value, monitoring and reporting and quantified and staged objectives, are discussed further in this document.

A. Representativeness and openness of participation

Both the Ecodesign Directive and the 2002 Commission Communication state clearly that the participants to a self-regulatory action must represent a large majority of the relevant economic sector, with as few exceptions as possible.

That is consistent with the objective of self-regulations which shall replace implementing measures that otherwise would be adopted under the TFEU³¹ legal basis for internal market measures. These legal bases provide for the total harmonization of the relevant sector. Therefore, when an implementation measure is adopted for a particular product group, any derogation to the common EU rules is considered very exceptional and requires special assessment and approval by the Commission.

It is only consequent that the same approach should be applied in case of industry self-regulation measures. As they are replacing legislation, they should comply with at least certain requirements applicable to this legislation which result directly from the Treaty.

It can be deduced from the above that the self-regulation should ideally represent 100% of the industry and products it regulates. If in practice this is impossible to achieve and/or to verify, these figures could be a bit lower but still as close as possible to 100% (meaning not less than 90%).

³⁰ See footnote 4.

³¹ Treaty on the Functioning of the European Union.

This representation shall also include third country operators, importers and authorised representatives.

Article 4 of the Ecodesign Directive imposes certain obligations on importers, namely to ensure that the product placed on the market and/or put into service complies with the Directive (and the applicable implementing measure) and to keep and make available the EU declaration of conformity and the technical documentation.

Obviously, as industry self-regulation measure applies only to the parties to the agreement and only to the extent that was agreed by the parties to such an agreement, the above requirements of Article 4 would not apply to importers of products covered by self-regulation unless these importers decide to participate in the agreement. Therefore, the importers could and should be encouraged to become a party to a self-regulation and be taken into account when assessing its representativeness.

As to the authorised representatives, it seems that, according to the Ecodesign Directive (in particular, see Article 4 of the Ecodesign Directive), they are assimilated to the manufacturers and therefore, the same rules apply to them.

The representativeness requirement may be difficult to comply with when there are hundreds or thousands manufacturers, importers and authorised representatives of a particular product group. In the case of above-mentioned self-regulations on the reduction of CO₂ emissions from passenger cars, the voluntary agreements were concluded by the car associations, each representing its members, i.e. particular car manufacturers; overall there were less than 25 car manufacturers involved. However, the representativeness of a producer or trade association may change at any time as there is always a risk that some manufacturers step out of the association.

Discussions on representativeness lead to another issue, namely the compliance with the EU competition law and WTO rules. This issue will not be discussed here in any detail but shall be mentioned as an important element of an ex-ante assessment of a self-regulation. It is possible that, if voluntary self-regulation is not designed correctly, manufacturers who do not participate in the self-regulation bring accusations of being excluded from the EU market in breach of the EU and international competition rules.

B. Involvement of civil society

Both the Ecodesign Directive and the 2002 Commission Communication state that self-regulation measures should not only be publicized but also that stakeholders should be invited to comment on them. In that respect the Commission provides that "*all stakeholders – industry, environmental NGOs and civil society in a broad sense – should be informed of – and have the possibility to comment on – an environmental agreement*".³² Accordingly, consultation with stakeholders on industry self-regulation is obligatory, if, at the later stage, this self-regulation measure is to be admitted as an alternative to legislation.

The possibility for stakeholders to comment on a self-regulation measure logically involves that the consultation should take place before the measure is finalized and admitted by the Commission. In other case any commenting would simply not make sense.

³² Point 6.iv. of the 2002 Commission Communication on Environmental Agreements (see footnote 4)

Further arguments confirming this position can be deduced from the White Paper on European Governance³³ (the White Paper) and the Commission Communication on minimum standards for consultations^{34 35}.

The Commission Communication on minimum standards for consultations provides that the Commission, when adopting Commission official documents, weighs up the pros and cons put forward in a consultation process and on the basis of that assessment adopts a final position, which it believes is in the EU interest.

It could be expected that the same weighing up is carried out by the Commission in relation to self-regulations and that both industry and the Commission should carry out the consultation process and then take into account the comments submitted by stakeholders.

Moreover, according to the Communication on minimum standards for consultation, the feedback on stakeholders' comments on the Commission official documents, is to be included in the Commission documents, e.g. in explanatory memoranda accompanying legislative proposals. In case of self-regulations such feedback could be included in the self-regulation agreement and relevant Commission recommendations.

As discussed later in this document, involvement of civil society is also crucial in the process of reporting and monitoring of a self-regulation measure.

C. Cost-effectiveness of administering a self-regulatory initiative

The Ecodesign Directive provides little detail on cost-effectiveness of administering a self-regulatory initiative. In particular it does not specify to whom it applies. However, useful interpretation is provided by the 2002 Commission Communication. The Communication makes it clear that the cost-effectiveness of administration in this context should be understood as the comparative administrative costs for the EU institutions. In particular, the EU costs of administering should not be particularly significant when it comes to monitoring and compliance assessment in the enforcement phase.

The concept of cost-effectiveness of agreements for industry, as described in the 1996 and 2002 Commission Communications is in fact not related to costs of administering a self-regulation measure by industry. It should be interpreted as a requirement to ensure greater freedom for business on how to reach environmental objectives and provide room for creative tailor-made solutions.

This implies that part of the preparatory work for a self-regulation measure, including necessary studies, could be carried out by industry or by independent experts contracted by the Commission. The necessary condition would be to take measures ensuring the objectivity of such studies. Independent expertise could also be envisaged in case of doubts or disagreement on the results of an industry study.

³³ 'European Governance – a White Paper', COM(2001)428 final; 25.7.2001.

³⁴ Communication from the Commission 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission'; COM(2002) 704 final; 11.12.2002.

³⁵ They serve here for further guidance for the following reasons: the Commission Communication on Environmental Agreements refers directly to the White Paper, while the Commission Communication on minimum standards for consultation is directly based on and resulting from this White Paper.

It would be difficult to consider that thorough ex-ante preparatory studies and other ex-ante assessments of a planned self-regulation measure are not necessary. As described in this and further sections, the Commission must have sufficient evidence for taking a sound decision regarding admission of industry self-regulation instead of a legally-binding implementing act.

It must also be stressed that the 2002 Commission Communication highlights importance of administrative cost-effectiveness especially in relation to the enforcement phase.

2. Ex-ante assessment of whether a self-regulation measure will achieve the policy objectives more quickly and at lesser expense than mandatory requirements

According to Article 15.3(b) of the Ecodesign Directive, self-regulation by industry should be expected to achieve the policy objectives more quickly and at lesser expense than mandatory requirements. The assessment of these two elements (*more quickly* and *at lesser expense*) is linked to the previously mentioned assessment of Annex VIII criteria as can be deduced from Article 15.3 (b) ("*...which, following an assessment in accordance with Article 17, are expected to achieve the policy objectives more quickly or at lesser expense than mandatory requirements.*")

Taking into account, as stated above, that this assessment is linked to the assessment of the Annex VIII criteria, it is obvious that it must also be carried out before a self-regulation measure is admitted by the Commission as an alternative to a legally binding implementing measure.

Moreover, this assessment is very much linked to the Annex VIII assessment of added value ("*self-regulatory initiatives must deliver added value (more than 'business as usual') in terms of the improved overall environmental performance of the product covered*") which also adds to the arguments of having it carried out in parallel to Annex VIII assessment, i.e. before admission of a measure by the Commission.

In relation to this element, similarly to other cases, the Commission will have to base its evaluation on sufficient evidence and sound knowledge. In that respect, for example, the above-mentioned assessment of an added value should concern not only energy efficiency but also other aspects contributing to the increase of the level of protection of the environment (Article 1.2 of the Ecodesign Directive).

Therefore, there are no grounds for assuming that an ex-ante assessment of a self-regulation measure should be less detailed than an assessment of an implementing measure.

It is not correct to assume that once a self-regulation is admitted by the Commission the whole responsibility for ensuring its proper implementation lies entirely on industry. By approving a self-regulation measure, the Commission does not abandon its responsibility to ensure a proper implementation of the Ecodesign Directive, as is further described in other parts of this document.

3. Life-time of the self-regulation measures: reporting, monitoring and quantified and staged objectives

Self-regulation measures are not only assessed at the beginning but also during their life-time as results from point 6 of Annex VIII of the Ecodesign Directive as well as from the 2002 Commission Communication.

Monitoring is crucial for ensuring effective implementation of self-regulations. As the examples of the car industry agreements on the reduction of CO₂ emissions from passenger cars show (see further in chapter 4), industry self-regulations do not necessarily achieve the results which industry has promised. In order to be able to assess whether the parties to the agreement make sufficient progress to achieve the promised results by the deadline indicated in the self-regulation, effective monitoring mechanisms are necessary.

It results from the above mentioned point 6 of Annex VIII of the Ecodesign Directive that the monitoring system must be designed clearly within a self-regulatory measure. Although monitoring is to a large extent to be ensured by industry and independent inspectors, it also requires involvement of the Commission services. They must be involved in the monitoring process in a way that allows them to assess whether the objectives of self-regulation measure are being met. According to point 6 of Annex VIII *"it must remain for the Commission services, assisted by the Committee referred to in Article 19(1), to consider whether the objectives of the voluntary agreement or other self-regulatory measures have been met"*.

It is also worth in this context to mention again Commission Recommendations 1999/125/EC, 2002/303/EC and 2000/304/EC. In particular, it is interesting that they were supplemented by a decision of the European Parliament and of the Council establishing a scheme to monitor the average specific emissions of CO₂ from new passenger cars³⁶. The possibility of combining a Commission Recommendation with a Parliament and Council Decision on monitoring is explicitly mentioned in point 4.1.2 of the 2002 Commission Communication for cases when the Commission and the legislator wish to monitor a self-regulation closely.

There is no reason for not applying a similar solution in case of the self-regulation measures under the Ecodesign Directive. On the contrary, taking into account the requirement of Annex VIII of the Directive to establish a well designed monitoring and reporting system and detailed, transparent and objective plan which allows the Commission to consider whether the objectives of the self-regulation measure have been met, such a solution could be seriously envisaged by the Commission and the legislator.

One should also remember the involvement in the monitoring process of the European Parliament and of the Council in the case of agreements on the reduction of CO₂ emissions from passenger cars. In that case, a Community Strategy to reduce CO₂ emissions from passenger cars and improve fuel economy indicated in relation to the intermediate targets and a system of monitoring of those targets that *the Commission will periodically inform the Council and the European Parliament of progress made*.³⁷ The possible involvement of these two institutions in the monitoring process is furthermore confirmed by the Interinstitutional Agreement on better law-making.³⁸

Monitoring is related to the reporting. Regular intermediate reports should be provided by parties to the self-regulation as can be deduced from Annex VIII to the Ecodesign Directive requiring reporting and monitoring be both parts of the *detailed, transparent and objective* plan.

As mentioned above, involvement of civil society is also crucial in the process of reporting and monitoring of a self-regulation measure. Stakeholders, including NGOs, must be invited to

³⁶ Decision N° 1753/2000/EC of 22 June 2000, OJ L 202, 10.8.2000, p. 1.

³⁷ Point 34, 2nd paragraph, page 16.

³⁸ See footnotes 19 and 20.

comment on a self-regulatory initiative. This also concerns commenting on interim and final monitoring reports (point 5 of Annex VIII of the Ecodesign Directive).

The 2002 Commission Communication mentions the application of the United Nations Convention on access to information, public participation in decision-making and access to justice in environmental matters³⁹ in relation to environmental agreements. In particular, it states that *"transparency in both the 'design' and 'deliver' phases could be an important element for the success of environmental agreements"*.

Therefore, civil society, as well as other stakeholders, must be provided with reports and all other documents which will allow them to assess the effectiveness of a self-regulation measure.

Reporting and monitoring system are obviously directly linked with the achievement of pre-defined objectives.

Point 4 of Annex VIII provides some details concerning the objectives of a self-regulation measure. The objectives must be clear, unambiguous, starting from a well defined baseline. Monitoring compliance with objectives and targets (final and possibly interim targets) must be possible in an affordable and credible way using clear and reliable indicators.

Point 4 of Annex VIII also mentions a time-span. It does not require that a time-span is established in a self-regulation but at the same time allows assuming that it will be the case. It is provided that *"if the self-regulatory initiative covers a long time-span, interim targets must be included"* – therefore, it must be at least clear from the measure whether it covers a long or a short time-span in order to be able to determine whether interim targets are needed or not. It is not clear when a time-span could be considered to be long and when not.

The above-mentioned Commission Recommendations 1999/125/EC, 2000/303/EC and 2000/304/EC contained deadlines for achieving a final objective and an intermediate target. The intermediate target served as the basis for an assessment by the Commission of the expected achievement of the final CO₂ emission objective and progress made towards this objective. The annual reports which the car manufacturers associations had to submit, served the same objective.

Therefore, it can be expected that self-regulation under the Ecodesign Directive will also contain clear deadlines for achieving its interim and final objectives so that it is clear when the Commission should decide as to whether a self-regulation is successful or whether should be replaced by a legally binding measure.

It would be also useful to include in the recommendations under the Ecodesign Directive a mid-term evaluation of the potential for additional improvements. Such mid-term evaluations were included in the Commission Recommendations 1999/125/EC, 2002/303/EC and 2000/304/EC.

4. Replacement of industry self-regulations by legally binding implementing measures

According to recital 18 of the Ecodesign Directive, where market forces fail to evolve in the right direction or at an acceptable pace, legislative measures may be needed to replace a self-

³⁹ "Aarhus Convention", signed on behalf of the EU on 25.06.1998; approved by the EU on 17.02.2005.

regulation measure. In order to be able to take a formal decision in that respect the Commission will have to monitor a self-regulation measure and assesses it against pre-defined objectives, targets and indicators, as described above.

The Commission's power to propose replacing a self-regulation by a legislative measure is confirmed by the 2002 Commission Communication which underlines that the Commission can never, by acknowledging self-regulatory measure, forgo its right of legislative initiative. The Communication also provides, similarly to the Ecodesign Directive but in the stronger form, that *"if an agreement considered in a Commission Recommendation or exchange of letters fail to deliver the expected results, the Commission can make use of its right of initiative and propose appropriate binding legislation"*.

Therefore, the Commission may decide to propose a legally binding implementing measure instead of self-regulation when it considers that the self-regulation is not working and is not providing the expected results within a specific period of time.

It can also be considered that the Ecodesign Consultation Forum could be involved in such a decision (see also title II of this paper).

According to Articles 225 and 241 TFEU respectively, the European Parliament and/or the Council may request the Commission to exercise its right of legislative initiative. This applies also to ecodesign implementing measures. In case the Commission does not submit the proposal, it shall inform the institution that made a request of the reasons. Although it is not stated in the Treaty what happens if the Commission does not submit a proposal or if the reasons it provides are not convincing, it could be envisaged in such a case by the institution which made a request, to take a legal action for a failure to act under Article 265 TFEU against the Commission before the Court of Justice of the European Union.

This approach also results from the Interinstitutional Agreement on better law-making⁴⁰ which states that in certain cases, in particular at the request of the competent legislative authority or in the event of a failure to observe relevant requirements, the Commission should consider the possibility of putting forward a proposal for a legislative act.

To make clear for all the stakeholders the rules applicable to a particular self-regulation measure, the Commission could take an example of the above-mentioned Commission recommendations on the reduction of CO₂ emissions from passenger cars. Each of them contains a clause clearly stating that should the car association fail to achieve the target CO₂ emission objective within 9 years (for 2008 and 2009 respectively) in its commitment or should not make sufficient progress towards this objective and should the Commission not be satisfied that such failure is due to factors for which the car association cannot be held accountable, the Commission would present⁴¹ a legislative proposal on CO₂ emissions from passenger cars.

It is suggested that similar provision is included in any Commission recommendation admitting self-regulations under the Ecodesign Directive.

These elements are extremely important taking into account some examples of previous unsuccessful voluntary measures. The voluntary agreements on the reduction of CO₂ emissions

⁴⁰ See footnotes 19 and 20.

⁴¹ The exact wording is : '... the Commission intends to present a legislative proposal...'

from passenger cars, mentioned several times in this briefing, were in fact a failure in spite of all measures taken as to their design. In 2006 it appeared that the manufacturers would not be able to achieve the objectives fixed in self-regulations and that a legally binding EU measure was needed. Manufacturers explained this failure by the fact that consumers preferred more powerful cars with higher emissions.⁴² However, as the EU legislation (directives in particular) part from the concept that a specific result must be obtained - see on that article 288 TFEU – it is only reasonable to expect that a self-regulation measure which replaces legislation, is equally assessed according to the results which it achieves.

This is not the only example of unsuccessful initiatives of industry self-regulation measures. Some others that may be quoted here did not even lead or not sufficiently to the conclusion of voluntary measures:

- the Commission initiative from the late 1990s to conclude voluntary commitments by industry to reduce greenhouse gases – in the end it did not lead to any industry proposal of a self-regulation because of the fear by economic operators to be disadvantaged in comparison with non-EU operators,
- considerations by the Commission in the late 1980s of having voluntary agreements by industry for energy labeling measures – as the Commission's efforts did not bring a desired result, an EU framework directive, implemented through EU legally binding implementing measures, was adopted instead⁴³,
- EU ecolabel⁴⁴ system established since 1992⁴⁵ based on voluntary participation by the manufacturers; it brought only limited results and relatively low numbers of products with eco-label, taking into account its potential and long existence.⁴⁶

All these examples show the difficulty of having industry self-commitments in place and even, once in place, to have them achieve desired results. That is why this is so crucial to put an industry agreement in clear frames so that it is possible to measure results and replace it when it does not deliver.

IV. Conclusion

It appears from the above legal analysis that although self-regulation measures under the Ecodesign Directive are industry unilateral voluntary commitments not binding at EU level, in fact they are not at the complete discretion of industry; the Commission holds an important role in relation to them.

They have to comply with certain obligations to be admitted by the Commission as alternatives to implementing measures and to be maintained as such during their planned life-time. In fact, the requirements relating to self-regulations, e.g. concerning an ex-ante assessment, are not lower than for legally binding implementing measures. If objectives of measures are not

⁴² 'Accords volontaires européens : une voie sans issue' by Ludwig Krämer in 'Acteurs et outils du droit de l'environnement. Développements récents, développements (peut-être) à venir', sous la direction de Benoît Jadot, 2010, Anthemis s.a.

⁴³ 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; now replaced by Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products, OJ L 153, 18.6.2010, p. 1.

⁴⁴ Ecolabel has the form of a logo representing a flower with stars.

⁴⁵ Council Regulation No 880/92, OJ L 99, 11.4.1992, p. 1; replaced in 2000 by Regulation No 1980/2000 of the European Parliament and of the Council, OJ L 237, 21.9.2000, p. 1; now replaced by Regulation No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27, 30.1.2010, p. 1.

⁴⁶ See footnote 42.

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attained, the Commission may propose to replace them by implementing measures which then are legally binding at EU level. Therefore, to be able to comply with its obligations, the Commission has to ensure constant assessment of these measures based on data provided by industry and/or independent experts. The European Parliament and the Council must be informed about the conclusion of voluntary agreements as well as their development throughout their life-time, including when they are planned to be replaced by implementing measures. Certain involvement of the Ecodesign Consultation Forum⁴⁷ should be also considered. Civil society consultation must be ensured at different stages of the process.

Self-regulations should be binding for the parties under the national law. They must also comply with certain requirements under the relevant national civil law, which the Commission should verify before officially acknowledging a self-regulation measure as an alternative to legally-binding implementing measure.

Taking into account the numerous examples of unsuccessful EU self-regulation measures, it is crucial that voluntary agreements under the Ecodesign Directive and EU acts acknowledging such agreements are concluded in a way which guarantees that the expected results will be achieved.

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⁴⁷ See Article 18 of the Ecodesign Directive.