

SPSD II

THE ROLE OF PUBLIC AUTHORITIES IN INTEGRATED PRODUCT POLICY: REGULATORS OR COORDINATORS?

M. PALLEMAERTS, M.T. JANS, D. MISONNE



PART I

SUSTAINABLE PRODUCTION AND CONSUMPTION PATTERNS



GENERAL ISSUES



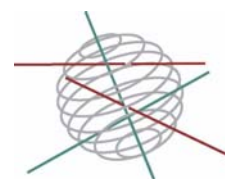
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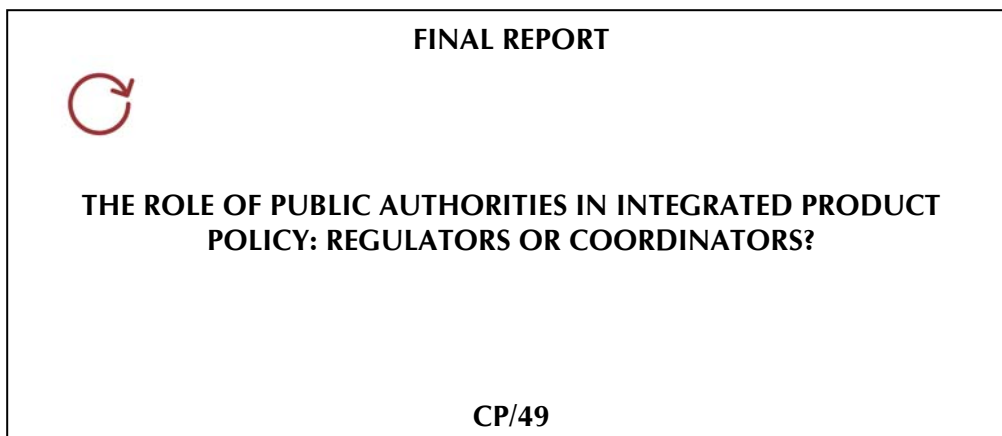
ENERGY



TRANSPORT



Part 1:
Sustainable production and consumption patterns



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Chapter 1. IPP: the concept, its development and diffusion

1.1. The concept of IPP as proposed by the European Commission

This research project is inspired by the European Commission Communication on Integrated Product Policy (IPP) of June 2003. When the research objectives were initially formulated, we focused on the policy approach proposed by the Commission in this Communication and undertook to explore its political and legal implications, in particular in relation to the existing body of European law and policies concerning products and to the role of public authorities at the European and national level in the policy process aimed at promoting more sustainable patterns of production and consumption.

However, it soon became apparent from further analysis of the Commission documents and the policy debate within the EU institutions that the Commission Communication of June 2003 in itself did not provide an adequate and sufficient conceptual framework for our research. To begin with, it does not actually provide a clear definition of the concept of IPP. The vague notion that it articulates seems incomplete, deliberately ambiguous and has been criticized by other EU institutions in their response to the Communication. The Council and the European Parliament have formulated their own views on IPP, which differ from the Commission’s perspective in a number of significant respects.

Since the Commission’s work on IPP developed as a reaction to developments in national product-related environmental policies in a number of Member States, the Commission was never in the forefront of the conceptual debate on IPP, but rather approached the subject in a reactive mode, trying to articulate and legitimize a proper role for the EU vis-à-vis those national policies. In order to properly define IPP and address its implications, we have therefore found it necessary also to study the national policy developments which prompted its emergence.

The Commission Communication of 2003 was the result of a process of policy formulation which had started in the Commission services in the late 1990s. A major exploratory study had been carried out by consultants and informal consultations held with national experts and stakeholders between 1996 and 1998. In 2001, the Commission published a Green Paper on IPP, which was followed by another, formal round of stakeholder consultations and preliminary discussions with other institutions. Based on the results of those consultations, the Commission further elaborated its policy and eventually produced a formal Communication to the Council and the European Parliament which was published in June 2003. To place the Communication in context, it is necessary to analyze it against the background of the earlier Green Paper.

The Green Paper described IPP as “an **approach** which seeks to **reduce the life cycle environmental impacts** of products from the mining of raw materials to production, distribution, use, and waste management. The driving idea is that **integration of environmental impacts** at each stage of the life cycle of the product is essential and should be **reflected in decisions of stakeholders.**”

The Communication did not repeat this rudimentary definition, nor attempt to articulate another one. Instead, it characterizes IPP as an approach based on five “**key principles**”:

- Life-Cycle Thinking
- Working with the market
- Stakeholder involvement
- Continuous improvement
- Variety of instruments

Taken together, these statements amount to less than a proper definition of the concept of IPP. The objective of IPP is formulated in very general terms as the reduction of the environmental impacts of products throughout their life-cycle, but the means to be used to achieve this are not specified beyond a set of general principles which, together, do not constitute an operational formula.

Life-cycle thinking is an analytical tool rather than a specific prescription for action. It helps to identify the various impacts but does not dictate where to act. Whereas the Green Paper seemed to suggest that IPP implies action “at each stage of the life cycle of the product”, the Communication introduces a criterion of cost-effectiveness in calling for “measures to reduce **environmental impacts at the point in the lifecycle where they will best and most cost effectively** for business and society reduce the overall environment impacts and resource use”.

The language used is at its vaguest where it comes to the choice of instruments and the respective role of stakeholders and public authorities. Is IPP a public policy or a mere “approach” to be implemented by producers, consumers and other stakeholders, “working with the market”? To be sure, there are a “variety of instruments” which can be used to reduce the environmental impacts of products, but these are very different in terms of their political, economic and legal implications. How are choices going to be made? “Stakeholder involvement” is certainly a useful principle of policy implementation, but how about the right of initiative: does this still rest with public authorities? Or does IPP rely entirely on the “decisions of stakeholders” to integrate the results of “life-cycle thinking” in their actions?

As these questions indicate, the description of the IPP “approach” in the Commission documents raises more questions than it answers. In order to further define IPP, we must therefore turn to other sources: the academic literature, the positions of other EU institutions and national policy documents.

1.2. Views of other EU institutions on the concept of IPP

The first discussion on IPP within the Council in fact predates the first policy document issued on the subject by the Commission. The subject of product policy was put on the agenda of an informal meeting of the Environment Council held in Weimar in May 1999, at the initiative of the German Presidency. The Presidency was seeking to build support within the Council for an EU initiative on IPP and submitted to this meeting a background paper defining IPP as “**public policy** which aims at or is suitable for **continuous improvement** in the **environmental performance** of products and services within a life-cycle context.”¹

The Presidency conclusions of this informal Council meeting indicate that while “Ministers took the view that a Community environmental product policy was justified at Community level”, they did not subscribe to any precise definition but merely formulated some general views on the future development of such a policy. The concept of IPP had apparently not yet sufficiently matured to be ready for wholesale adoption. The conclusions emphasized the use of non-regulatory instruments by describing the main objective of product policy as to “**improve economic framework conditions for environmentally sound products on the market.**” Product policy was envisaged as a “new innovative policy approach” which “does not necessarily lead to additional regulatory measures, but is meant to be an **intelligent integration of instruments** and measures taking into account existing provisions.”²

¹ Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Background Paper on Product-Related Environmental Policy, 1999.

² Presidency conclusions, Informal Meeting of EU Environment Ministers, Weimar, 9 May 1999.

The Council’s views on the concept of IPP were further crystallized when it discussed the Commission’s Green Paper and adopted its first formal conclusions on the subject in June 2001.³ The Council conclusions describe the general aim of IPP in similar terms as the Commission – “a **continuous improvement** of the environmental and health performance of products throughout the entire lifecycle” – but further specify it in terms which are notoriously absent from the Green Paper. The Council conclusions put special emphasis on the substitution of hazardous substances by stating that IPP should aim at products “that do not contain nor require the use of substances that may give rise to adverse effects during the life cycle of these products on human health and the environment.” Moreover, the Council also addresses the sensitive issue of overall product throughput which the Commission refrained from touching: “As well as improving the performance of each product unit, IPP **should aim for significant reductions in total environmental burden generated by the quantity** of products in circulation.” In the Council’s view, IPP should not be seen as a substitute for existing policies but its life-cycle approach should be intended “to fill the gaps in existing policies”. IPP should contribute to “all three dimensions of sustainable development”.

The European Parliament, for its part, responded to the Commission’s IPP Communication of June 2003 by adopting a detailed resolution on IPP in April 2004. In this resolution it presents a rather ambitious view of IPP as a concept aimed at restructuring production and consumption patterns and business practices “built on **systems thinking, giving priority to resource efficiency** and (...) structured progressively along biological lines.” The resolution tends to stress non-regulatory instruments, as it describes the objective of IPP as “**not to present detailed requirements for product design** but to **establish framework conditions** aimed at facilitating business practices”. At the same time, it calls for a review of existing instruments of substances-oriented environmental policy with a view to ensuring their coherence and consistency within an IPP framework. The Parliament’s resolution does not contain a precise definition of IPP but rather articulates a philosophy for an IPP approach, based on a rather detailed list of “principles” that should “guide the IPP framework”. These principles largely overlap with those put forward by the Commission in its Communication, but many are more specific or have a different emphasis. They address optimisation of both the product design process and production techniques and suggest many different approaches for doing so. Parliament shares the Council’s primary concern about the substitution of hazardous substances, a point not specially emphasized by the Commission. A special principle put forward by the Parliament, but not by the other institutions, is the preferential use of “bio-based materials”. In addition to targeting product design and production processes, Parliament calls for an enhanced understanding of consumption patterns and how to change them to contribute to sustainable development. In this context, dematerialization “by turning products into sustainable services” is presented as a means of enhancing energy and material efficiency and reducing transport demand.⁴

1.3. Academic definitions

The scientific and technical work which underpinned the development of IPP was initiated in the mid-1990s. In fact, one of the most influential research projects in the field, whose results clearly influenced the policy debate at the national and EU level, was funded by the Commission as part of its 5th Framework Programme for Research and Technological Development. These researchers (Oosterhuis, Rubik & Scholl) coined the term “product policy” as a short version of “product-oriented environmental policy”, and first articulated a comprehensive perspective of an environmental policy approach focusing on products.⁵

³ Environment Council conclusions of 7 June 2001.

⁴ EP Resolution of 21 April 2004.

⁵ F. Oosterhuis, F. Rubik & G. Scholl, *Product Policy in Europe: New Environmental Perspectives*, Kluwer, Dordrecht/Boston/London, 1996.

In their study, they identify three basic “strategies” of product policy aimed at reducing life-cycle impacts:

- lowering the product throughput
- changing the product with regard to its environmentally harmful features
- changing the product use and disposal into an environmentally sound direction⁶

They characterize product policy as involving “inter-relationships between four angular poles: **objectives, instruments, actors and products.**”⁷ Though their study simply uses the term “product policy”, the “integrated” nature of such policy is duly stressed:

“Product-oriented environmental policy can be conceived as belonging to an **integrated policy** approach, taking into account the intricate **social, economic and technological systems** in which products are embedded.”⁸

These authors also emphasize the important distinction between **product policy** and **product management**. The latter term refers to “the area of actions and measures taken by the ensemble of actors (especially producers, traders, consumers) who are involved in the life-cycle of a product.”⁹ **Product policy**, however, is used exclusively to denote measures taken by governmental institutions to influence the actions of other actors. It “encompasses the formulation of objectives and the framework setting by selecting and implementing instruments.”

A consultant’s report commissioned by the European Commission in 1998 is the first to coin the term “integrated product policy” and to define it as “**public policy** which explicitly aims to modify and improve the **environmental performance of product systems**”. The same study identifies the following main “building blocks” of IPP:

- managing wastes
- creating markets
- green product innovation
- allocating responsibility
- transmitting environmental information¹⁰

We agree with these authors that it is essential, for conceptual purposes, to clearly distinguish the domain of public policy from that of action taken by other actors than public authorities. The objectives of IPP can be described either in rather abstract terms – as “improving the environmental performance of product systems” – or in more operational terms, as a set of interrelated yet distinct “strategies”. The latter approach adds clarity by indicating that there are several possible approaches to pursuing the general objective. We note that the “building blocks” of IPP proposed by the Commission’s consultants are effectively a list of instruments rather than a set of objectives. These instruments are ways of pursuing objectives relating to product design, use and disposal, but seem to disregard the strategic objective of lowering product throughput.

⁶ Ibid., pp. 4-5.

⁷ Ibid., p. 4.

⁸ Ibid., p. 26.

⁹ Ibid.

¹⁰ Ernst & Young 1998.

1.4. Some national definitions of IPP and other product-related environmental policies

As has already been mentioned above, the policy debate on IPP was initiated not by the European Commission, but by national authorities in a number of member states who were becoming increasingly aware of the importance of products as a focus of environmental policy in the future. As these member states were developing plans for new product-related policies, the constraints of the EU internal market prompted them to explore the potential for cooperation with other member states and EU institutions. As early as 1993, the Dutch Ministry of Housing, Physical Planning and Environment took the initiative of organizing an “International Workshop on Product Oriented Environmental Policy” aimed at exchanging information and “exploring possibilities of coalitions between countries in order to promote an effective European environmental product policy”.¹¹ Though it did not yet coin the term “integrated product policy”, the background paper for this workshop already advocated what it called an “integrated approach” widening the scope of product-oriented environmental policy to all life-cycle stages.¹² From this perspective, the workshop discussed various areas of product policy, such as economic instruments, product information, product composition and product design, and emerging new concepts such as extended producer responsibility and product stewardship.

Building on this exploratory work, the Dutch authorities then launched an official programme aimed at supporting “product-oriented environmental management” (*productgerichte milieuzorg* – PMZ) in industry in 1995. PMZ was defined as “a management tool which seeks to structure all the activities of an enterprise so as to control, restrict and where possible prevent the environmental impact of products in a continuous fashion.” This programme provided subsidies and technical assistance for the implementation of pilot projects in various sectors of industry. It is aimed entirely at promoting voluntary product management initiatives developed in cooperation with the private sector through incentive measures. The Dutch PMZ concept builds on internal corporate environmental management systems and does not involve the use of regulatory instruments.

The Nordic countries also took an early and active interest in the development of IPP. To coordinate national policy initiatives and develop a common perspective a working group on “product-oriented environmental strategy” (*produkt-orienteret miljöstrategi* - POMS) was established under the auspices of the Nordic Council in 1998 and a Nordic seminar on IPP was organized in 2000. The Nordic policy documents subscribe to the general definition of IPP as proposed by the German Presidency in its background document for the Weimar informal Council meeting in 1999, while putting special emphasis on a number of aspects. One of these aspects is dialogue and cooperation with stakeholders. The report of the Nordic seminar describes IPP as “a framework for **cooperation between producers, consumers and authorities** across industries and sectors to create cleaner products.”¹³ IPP involves a **new approach for public authorities**: apart from their traditional standard-setting role, they “have to learn to be catalysts in a process that is driven by the market”. Their role in IPP is “to establish frameworks, motivate the market and offer credible tools to the players.” It is important to note that, in the Nordic view, IPP is not a substitute for regulation, but “**builds onto existing legislation**, with initiatives that raise the environmental properties of products above the level stipulated by legislation.”¹⁴ Legislative instruments are regarded as proper instruments of an IPP strategy, alongside economic instruments and information instruments.¹⁵ From the Nordic perspective, the three “basic

¹¹ Workshop Preparation Document, International Workshop on Product Oriented Environmental Policy, The Hague, 30 September-1 October 1993, p. 5.

¹² *Ibid.*, p. 8.

¹³ Report Nordic IPP Seminar, Saltsjöbaden, February 2000, p. 9.

¹⁴ *Ibid.*, p. 15.

¹⁵ Proposal for a common Nordic IPP, Background document prepared for a Nordic IPP meeting in Saltsjöbaden, December 1999, p. 15.

principles” of IPP are: lifecycle perspective, market orientation and coordination and integration.¹⁶ It is viewed as crucial “to **involve the market forces**” to stimulate market demand for cleaner products. The Nordic IPP strategy places considerable emphasis on instruments like product panels, greening of public procurement and environmental product declarations (as a tool to disseminate life-cycle information, based on a common LCA methodology).

National initiatives in Nordic countries reflect this common approach. The Danish Environmental Protection Agency launched a new product policy under the label “Product-orientated environmental initiative” in 1998. This policy is presented as having a dual, environmental and economic objective: “The overall **environmental objective** is to intensify the development and marketing of cleaner products so as to reduce the total environmental impact from production, use and disposal of products. The corresponding **trade policy objective** is to consolidate the competitiveness of Danish trade and industry on a future market, which increasingly brings the environment into focus and calls for cleaner products.”¹⁷ To this end, the initiative provides for a combination of measures to promote the use of LCA, ecodesign, green public procurement, eco-labelling, environmental product declarations and other forms of product information, and stakeholder dialogue through product panels. The strong emphasis on voluntary instruments, information and incentives confirms the strong market orientation of the Danish policy. However, the use of taxation and regulation as instruments is not excluded from the scope of product policy. The voluntary instruments are designed to encourage product management actions going beyond the minimum legal requirements. As one Danish official put it, IPP is a market-based policy providing a “framework and incentives for **voluntary initiatives building upon a solid foundation of legislation** defining the minimum acceptable market performance.”¹⁸

In Sweden, the development of a national IPP resulted from the strategic objectives of environmental policy in the area of “non-toxic and resource-efficient eco-cycles”. In 2001 the Swedish Environmental Protection Agency was mandated by the government to develop proposals for the elaboration and implementation of IPP. Its recommendations, published in a report entitled “Towards greener products”, articulate a strategy based on three “cornerstones” which are essentially the same as the three “basic principles” of IPP laid down within the framework of Nordic cooperation: a “holistic approach” (lifecycle perspective), “better conditions for market actors” (market orientation) and “cooperation among actors” (coordination and integration). The Swedish view on the relationship between IPP and the market is articulated as follows: “IPP should provide **better conditions for market actors** by laying down **clearer rules, increased supply and demand** of green products and the **internalisation of environmental costs**.”¹⁹ Thus, the achievement of market conditions favourable to green products involves, *inter alia*, the use of regulation and taxation as instruments. In 2002, the Swedish government proposed an “eco-cycle” bill designed to enshrine some of those basic principles of IPP in legislation. Like in Denmark, the other main instruments of IPP are aimed at improving the availability of LCA and environmental product information and promoting “an increased dialogue along the production chain” between all stakeholders (through the creation of a special council for this purpose).

As appears from the above overview of a number of national policies, there seems to be a broad measure of agreement across Europe on the basic overall objective (reducing the environmental impact of products throughout their lifecycle) and principles of IPP (lifecycle approach, stakeholder

¹⁶ Ibid., pp. 10-11.

¹⁷ Danish Environmental Protection Agency, *Statement on A Product-orientated Environmental Initiative*, 1998, p. 13.

¹⁸ P. Kristensen, Danish Toxicology Center; Danish EPA.

¹⁹ Naturvardsverket, *Choosing the right path—sustainable production and consumption*, 2002, p. 8 (available at <http://www.internat.naturvardsverket.se/documents/issues/envprod/newipp/pdf/ipp.pdf>)

involvement, using market forces), but different perspectives as to the translation of this general objective into operational sub-objectives, the most appropriate instruments to be used to achieve them and the extent of the role to be played by public authorities.

1.5. IPP and sustainable development

The EU IPP is presented as an integral part of the EU’s Sustainable Development Strategy.²⁰ Its primary aim is to reduce the environmental impacts from products throughout their life-cycle, harnessing, where possible, a market driven approach, within which competitiveness concerns are integrated. This should enhance competitiveness and help the companies use their environmental performance as a marketing instrument. Moreover, IPP should contribute to addressing the *environmental challenges* identified in both the EU Sustainable Development Strategy and the 6th Environment Action Programme.

The concept of IPP does for sure operate an interesting attempt of integrating the economic and environmental dimensions of a product policy.²¹ It pleads for the integration of an environmental dimension in product development strategies.

But the reference to sustainable development hides a major shortcoming as it does completely ignore the social dimension, or the so-called “third pillar” of sustainable development. The lack of any reference to these social aspects is particularly puzzling since the EU does not ignore them, but, on the contrary, firmly supports them in long-standing debates on fair trade and social labelling.

In its Communication of 1999 on “fair trade”, the Commission states that “in accordance with the overarching objective of achieving a sustainable development, the Community is committed to integrate environmental considerations into other policies *and is also placing more emphasize on the social aspects of trade globalization. Following the line developed at the Copenhagen Summit, the EU has declared its intention to place more emphasis on the social aspects of the globalization of trade*”.²²

These social aspects include the compliance with the core ILO labour standards, especially regarding freedom of association and effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour and elimination of discrimination in respect of employment and occupation.

How can we therefore explain then that in building a strategy on “integrated product policy”, the Commission kept totally quiet about the social dimension, even though the integrated product policy is firmly placed under the auspices of sustainable development? The IPP Communication does not even draw a link to that parallel debate in its section devoted to labelling.²³

The same lack of explicit attention to social issues characterizes the national product-related environmental policies surveyed above. Their objectives are described in environmental terms, and

²⁰ COM(2003) 302, p.5.

²¹ In so doing, it actually proves to be quite faithful to the first evocation of the sustainable development idea in the early seventies, with the concept of eco-development, assumed by the very new United Nations Environment Programme (UNEP), as an attempt to demonstrate that growth would be made compatible with the environment, under some conditions however.

²² COM(1999) 619 final.

²³ On social and environmental aspects in product labelling, see L. Gradoni and A. Olesti Rayo, “The EU context : mapping the contours of EU law and policy on sustainability labelling and certification”, in M.Campins Eritja (Ed), *Sustainability Labelling and Certification*, M.Pons, Barcelona, 2004, p.181.

the economic dimension is generally taken into account by putting the emphasis on the use of market-based instruments for implementation. The Danish policy is even presented as pursuing both environmental and economic objectives. But these national policy documents do not refer to the social dimension of sustainable development any more than the Commission does in its IPP Communication. The only example of an IPP policy that explicitly addresses the three “pillars” of sustainable development is to be found outside the EU, in Switzerland.²⁴

We agree with the Swiss view that an optimal integrated and sustainable product policy can not reasonably ignore the social externalities. This becomes obvious when considering the following examples.

A proper integrated product policy on timber which would only pay attention to environmental considerations (deforestation, transport), at each stage of the life-cycle, and not to the social dimension (such as the protection of the indigenous populations or labour standards), could hardly be qualified as “sustainable.”. Textile products provide another easy example: a policy considering the environmental impact of the product during its whole life-cycle, from manufacturing, to dyeing, transport and end-use, is not properly sustainable if it does not take the condition of workers (including child labour) into consideration.

However, we can only note that the fully integrated approach advocated by Switzerland is not representative of current IPP policy development and practice, and at any rate cannot be taken as a basis for an analysis of IPP in the EU. It also seems that the methodological and policy challenges of integrating the social dimension are even more daunting than those of an IPP focusing on environmental impacts. In accordance with the current mainstream approach within the EU, we will therefore not include the minimization of social externalities among the explicit objectives of IPP in our working definition. While the primary objective of IPP will be described in environmental terms, an indirect reference to the three-dimensional objectives of sustainable development will nevertheless be included through our proposed interpretation of the term “integrated”.

1.6. Working definition of IPP used for the research project

We consider it important to base this study of IPP on a definition which captures the full range of policies that have been or are being developed by public authorities in Europe to address the environmental impact of products. The objective of those policies is formulated not only in general terms, but, as proposed by Oosterhuis et al., as a series of operational sub-objectives, bearing in mind that not every individual measure taken within the framework of IPP will necessarily address all of these sub-objectives simultaneously. Like other authors, we feel it is crucial to distinguish between IPP as a public policy and the product management practices of market participants.

²⁴ The Swiss Strategy for Sustainable Development (2002) describes the objectives of IPP as follows: “Throughout their life cycle (planning, production, use and disposal), products and services are to comply with stringent economic, environmental and social requirements. The aims of the IPP are correspondingly diverse. (...) For all policy areas of relevance to IPP, criteria and instruments are to be developed which highlight the **interplay between the three dimensions of sustainability** and are conducive to the implementation of this policy.”

IPP = Public policy which explicitly aims to modify and continuously improve the environmental performance of product systems through a life-cycle approach, by pursuing three basic objectives in an integrated way:

- *lowering the volume of products used, inter alia by demand-side measures and the promotion of dematerialization and substitution of services for products*
- *changing the design of products with regard to their environmentally harmful features by promoting innovation*
- *changing the patterns of use and disposal of products into an environmentally sound direction*

The term “integrated” refers to:

- *the analytical approach which takes into consideration the entire life cycle of products and their environmental impacts across all environmental media*
- *the implementation strategy which is based on a co-ordinated use of all available policy instruments and on participation of, dialogue and exchange of information between and allocation of responsibility to all stakeholders involved in product systems*
- *the cross-sectoral dimension of strategies to achieve sustainable patterns of production and consumption by taking into account the environmental, social and economic objectives of sustainable development*

IPP as a public policy is to be distinguished from product management actions and measures taken by the stakeholders who are directly involved in the product systems with the objective of enhancing the environmental performance of these systems. IPP aims to achieve its objectives by imposing, guiding or encouraging such product management actions and measures.

Since the focus of this study is on the role of public authorities, we define IPP as a public policy. Finally, we do not wish to exclude any instruments from the scope of IPP: all instruments deployed by public authorities to pursue the objectives of IPP, whether regulatory, fiscal, information-based or voluntary, are intended to be covered by the definition

1.7. Development and implementation of a European IPP

The development, until now, of the European IPP scheme can be divided in two successive periods.

The first period covers the development of the IPP concept and the consultation process leading to the European Commission’s Communication of June 2003. The second period can be qualified as the implementation stage and covers the different initiatives undertaken by the Commission to implement and further develop the IPP policy as described in the 2003 Communication.

In retracing the evolution of IPP at EU level, references can be found to it from the 5th Environmental Action Programme (EAP) of 1992. Although this first reference was rather modest, more explicit references can be found in the EAP progress report published in 1996.

1996 was also the year the European Commission ordered its first study on the topic. Ernst & Young and the University of Sussex carried out the study between 1996 and 1998.²⁵ This first initiative towards the development of a European IPP policy concept provoked a long period of stakeholder consultation that eventually led to the Commission’s Green Paper. In this study, IPP is presented as a public policy with an explicit aim to improve the environmental performance of product systems.²⁶

At an intergovernmental level, the IPP issue was first addressed in 1999 during an Informal Meeting of EU Environmental Ministers in Weimar under the German presidency.²⁷

In February 2001 the next important step was taken with the publication of the Commission’s Green Paper on IPP.²⁸ A wide array of instruments were suggested: differentiated taxation, environmental labeling, green public procurement, Life Cycle Analysis, ecodesign, standardization, product panels, Environmental Management and Audit Systems (EMAS). The paper suggested command-and-control instruments as well as voluntary instruments but emphasis was placed on the latter.²⁹

Finally, in June 2003, the Commission published its latest communication on IPP.³⁰ This Communication opened up the next phase of the IPP development process by announcing the first steps towards its implementation. Priority is given to products rather than services. The importance of market forces is clearly recognized and the need for diverse instruments is addressed. The emphasis here seems to be on voluntary, market related instruments.

The approach at EU level includes the life-cycle dimension - stating life cycle thinking as one of its building blocks. Here, the ultimate aim is to prevent burden shifting from one stage to the other. However, this does not mean that all stages will be actively addressed as the approach foresees concentrating its activities on the stages where means can be most efficiently used.³¹ This life cycle perspective also affects the stakeholder dimension of the policy, as it addresses the need to involve all stakeholders (industry, consumers, NGO’s and government) which are part of the product’s life-cycle. This involvement at all possible levels, as stated in the Green Paper, is also reflected in the policy making stage as all communications are accompanied by consultation rounds and stakeholder meetings. With regard to relationships between public and private actors, the policy puts the emphasis on the facilitating role public actors must play. This can be deduced from the strong emphasis on voluntary instruments like eco-labeling, EMAS, VEA’s and standardization and also from the market driven character of the policy.

The IPP-related initiatives announced in the Commission’s Communication which have been implemented so far can be divided into initiatives related to co-ordination and integration matters on the one hand, and specific product-oriented initiatives on the other.

²⁵ Ernst & Young and SPRU, *A study analyzing national and international developments with regard to Integrated Product Policy in the environment field and providing elements for an EC policy in this area*, March 1998.

²⁶ Ibid.

²⁷ Federal Ministry for the Environment, Nature Conservation and Nuclear Safety of Germany, Informal Meeting of EU Environmental Ministers on Integrated Product Policy (IPP) Weimar 7th –9th May 1999. Background paper on Product Related Environmental Policy, Weimar, 1999, 20p.

²⁸ European Commission, *Green paper integrated product policy*, COM (2001) 68 final.

²⁹ Ibid, p.5

³⁰ European Commission, *Communication from the Commission to the Council and the European Parliament. Integrated Product Policy*, COM (2003) 302 final.

³¹ Ibid, p.5.

Under the first heading, Regular Meetings were set up where Member States of both the EU and the EEA (European Economic Area), and stakeholders could meet. This forum monitors and promotes the implementation of the Commission’s Communication on IPP. The Member State representatives to the forum are typically from a national environmental ministry or agency, while the stakeholder community is represented by public interest groups, such as the EEB and BEUC, at the EU-level, in addition to industrial associations like UNICE, Eurocommerce and UEAPME. The Regular Meetings provide a fixed framework in which stakeholder consultation can be conducted. Before the creation of these Regular Meetings, consultation was generally based on a specific paper or communication. The only IPP meetings organized on a regular basis were organized by the Informal European IPP network. However, the network was limited to Member States, and stakeholders were only invited to these meetings as experts.

The first Regular Meeting was held in February 2004 and was followed by two meetings in September 2004 and March 2005. During the first meetings, the decision was taken to set up two specific working groups in addition to the regular meetings. The first working group was to concentrate on one of the crucial areas of IPP: product information needs. The second working group was given the task of defining the format for national IPP reports.

Two important projects were started in 2004 by the European Commission concerning product-oriented initiatives. The first is a study designed to identify the products with the greatest potential for environmental improvement. This study consists of two stages.

The first stage, started in January 2004, is the development of a methodology to identify the products with the greatest environmental impact.³² During the methodology development the different stakeholders were consulted and two scientific expert workshops on methodology were held in May and September 2004. Besides this, the intermediate results were discussed during the Regular Meetings (September 2004) already mentioned above. The second stage will build on the results of the first and will try to identify the products with the greatest potential for environmental improvement by 2007.

The second project, under the heading of product-oriented initiatives, is the establishment of Voluntary Pilot Projects. This initiative was announced in the Commission’s latest Communication and a similar tool was suggested in the Green paper. Similar initiatives were also used in the Danish variant of IPP under the label of product panels. In the European voluntary pilot projects, the environmental impacts of a specific product and associated possible improvements will be evaluated in consultation with the different stakeholders and an action plan will be designed.³³ These pilot projects are a confirmation of the strong stakeholder dimension of IPP and of the life-cycle thinking principle.

Currently, two pilot projects are up and running: one concerning Nokia mobile phones and a second one concerning Carrefour’s teak garden furniture.³⁴ By chairing the project, the Commission adopts the role of facilitator, even though it does not finance the participation of the stakeholders.³⁵

³² European Commission, *Identifying products with the greatest potential for environmental improvement*, online <http://europa.eu.int/comm/environment/ipp/identifying.htm>, 26/4/2005.

³³ European Commission, *Communication from the Commission to the Council and the European Parliament. Integrated Product Policy*, COM (2003) 302 final.

³⁴ Petitat, V. (2004), ‘Research Project on the Role of Public Authorities in Integrated Product Policy (IPP): Regulators or Coordinators? National Developments. The Integrated Product Policy from Swedish perspective report’, Brussels: CEDRE.

The Voluntary Pilot Projects can bring clarification to the concept of IPP for the general public and the stakeholders concerned. In addition, these projects can help overcome skepticism regarding the viability of the IPP by demonstrating how it can work in practice. In conclusion, with regard to future implementation efforts, the experience with the Voluntary Pilot Project could lead to further use of product panels as an addition to the IPP toolkit. These product panels could then serve as a means to integrate the different instruments the toolkit contains.

In its 2003 Communication, the Commission's strategy for implementing IPP was articulated along three main axes:

- (a) Creating the right economic and legal framework
- (b) Promoting the application of life-cycle thinking
- (c) Giving consumers the information to decide

The foregoing survey of activities carried out pursuant to the Communication indicates that while life-cycle thinking is being promoted through the Voluntary Pilot Projects and the issue of product information is under consideration in a working group, no specific EU policy initiatives to improve the economic or legal framework for IPP have resulted from these activities. The work is still ongoing and no particular measures have yet been recommended. With respect to the economic framework, the Commission already announced in the Communication itself that it intends to refrain from specific initiatives at Community level and instead called on member states to promote the use of fiscal measures favoring environmentally friendly products. Therefore, no specific policy outcomes from IPP are to be expected in this field, with the possible exception of criteria to identify environmentally harmful subsidies with a view to their elimination. As regards the legal framework, no specific IPP-related legislative initiatives have been taken by the Commission. However, IPP is influencing the evolution of other instruments of EU environmental policy in which legislation plays an important role. One recent EU legislative initiative which originated independently from IPP but has clearly been influenced by the IPP approach establishes a framework for ecodesign requirements for a particular product group. These indirect policy outcomes of IPP through a process that can be described as “diffusion” will be addressed in the following section.

1.8. Diffusion of the IPP approach through other instruments

The development of IPP has not occurred in a vacuum, but in close interaction with other instruments of European environmental policy, most of them pre-existing. IPP was designed to fulfill an important integrating function: integrating the existing environmental tools is one of the objectives put forward by the Commission. As a consequence, IPP has influenced and supported the development of various policy tools which have the potential to be used to pursue the objectives of IPP: green public procurement, EMAS, LCA, standardization, ecodesign and environmental labeling. Most of these tools originated as a result of other, earlier policy initiatives than IPP itself, but they have developed a link with IPP as they are now viewed as possible instruments for its implementation.

The greening of public procurement policy was supported by the setup of a study to determine the state of play of public procurement in the Member States.³⁵ Furthermore, action plans for greening public procurement at member state and EU level are to be developed by 2006. To facilitate the

³⁵ European Commission, *Questions and Answers on the stakeholder participation in the IPP Pilot Product Exercise*, online http://europa.eu.int/comm/environment/ipp/pdf/04_11_08_qa.pdf.

³⁶ International Council for Local Environmental Initiatives, *Study contract to survey the state of play of green public procurement in the European Union Final Report* Freiburg, July 2003 available online <http://europa.eu.int/comm/environment/gpp/pdf/iceisstudy.pdf>.

implementation of green public procurement different information tools were already developed: a dedicated website, a practical handbook for public authorities, and a database gathering information about existing product criteria for product groups.³⁷

For EMAS, the IPP strategy focuses on the integration of product considerations in this primarily process oriented instrument. Besides this, EMAS is considered to be used for the verification of Green Claims.

The practice of LCA, which was first introduced in EU environmental policy in support of eco-labeling, has been supported with information based tools: a study to create a platform for life-cycle data exchange, a directory of LCA tools and service providers, and finally a forthcoming handbook on best practices.

For standardization, IPP follows the ongoing efforts made concerning the greening of standardization. The possibility for standardization to contribute to IPP is also acknowledged in the Commission’s Communication on the ‘Integration of Environmental Aspects into European Standardization’.³⁸

Finally environmental labeling under the form of environmental product declarations (EPDs), Green Claims, Community eco-labeling and private eco-labeling schemes are under scrutiny as potential tools of IPP. In its working plan, the EU eco-label describes IPP as a new opportunity to develop. This is especially important since they had to operate with little or no support from other policies in the past.³⁹

At the policy level, IPP has also been linked to both the EU Sustainable Development Strategy and the 6th Environmental Action Programme: it is presented as adding a product dimension to the environmental objectives they address. Through its input to the “ten-year framework of programs on sustainable production and consumption” agreed upon during the World Summit on Sustainable Development in Johannesburg in September 2002, IPP is also said to contribute to the fulfillment of the EU’s international commitments.⁴⁰

In the Presidency conclusions of the Göteborg European Council on the Sustainable Development Strategy, IPP was referred to as a policy focused on the reduction of resource use and environmental impact of waste.⁴¹ Hereby, IPP is linked to the Thematic Strategies on Sustainable Use of Resources and on the Prevention and Recycling of Waste which are being developed in implementation of the 6th Environmental Action Programme.⁴²

³⁷ European Commission, *Buying Green a Handbook on Environmental Public Procurement*, Brussels (CEC), 2004.

Green public procurement database online

http://europa.eu.int/comm/environment/green_purchasing/cfm/fo/greenpurchasing/index.cfm

Green public procurement website: <http://europa.eu.int/comm/environment/gpp/index.htm>

³⁸ European Commission, *Communication from the Commission to the Council, the European parliament and the European Economic and Social Committee. Integration of Environmental aspects into European Standardisation*, COM(2004)130 final, p.4.

³⁹ European Commission, *Community Eco-labeling Working Plan*, OJ L7/29 11.1.2002.

⁴⁰ Paragraph 14 of the WSSD – Johannesburg Plan of Implementation and paragraph 8 of the General Affairs and External Relations Council’s conclusions of 30.10.2002.

⁴¹ European Council, *Presidency Conclusions Göteborg European Council 15 and 16 June 2001*, SN 200/1/01 REV 1 online http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en1.pdf p8.

⁴² European Commission, *Communication from the Commission to the Council and the European parliament. Integrated Product Policy*, COM (2003) 302 final p.6.

The resource strategy is built on the same life-cycle principle as IPP. The strategies on resources and waste and IPP are presented as closely interrelated building blocks to achieve a true life-cycle approach: going from resource extraction through the production, use and disposal phase to finally determine its environmental impact.⁴³ The ultimate aim being to combine the sustainable use of resources with the economic performance objectives laid down in the Lisbon strategy. The waste strategy, for its part, tries to assess the role IPP and its toolkit can play in waste prevention.⁴⁴ However, concrete links between both strategies and IPP still have to be further defined as the strategies develop.

In the context of EU waste management policy, reference to IPP elements can be found in some waste legislation, such as the WEEE Directive. This Directive deals with waste of electrical and electronic equipment and focuses on the prevention and reuse or recycling of this type of waste. In addition, it strives to “improve the environmental performances of all the actors involved in the life-cycle of electrical and electronic equipment: producers, distributors and consumers and in particular those operators directly involved in the treatment of waste electrical and electronic equipment.⁴⁵ The directive has also a product design provision, insisting on the importance of product design to facilitate the reuse, recycling, dismantling and recovery of WEEE.⁴⁶ So, even though the WEEE Directive is focused on the waste phase, it integrates life-cycle thinking and product design features.

Even though it has not been proposed to turn IPP as such into a directive, several of its core elements are incorporated in the recent Directive on Energy Using Products or EuP Directive, considered by many as the first IPP directive. Finally, because IPP was designed to further innovation, it is closely linked to the Environmental Technologies Action Program or ETAP: a recent policy initiative focused on promotion of environmental technologies.

Within the framework of the European environmental policy, ETAP and the EuP Directive are the policies most closely linked to IPP. The EuP Directive, on the one hand, is closely linked to IPP because it incorporates the main building blocks of IPP: life-cycle thinking, stakeholder participation, the governance approach (voluntary instruments), and the purpose to continuously improve the environmental performance of products. In this perspective it truly is the first IPP directive. Furthermore, explicit references to IPP can be found in the final directive and early proposals. In the explanatory memorandum of the draft directive, the EuP directive is even considered as a test case for future IPP activities concerning ecodesign.⁴⁷ This document also cites life-cycle thinking as a basic principle of IPP, which the EuP Directive will help to integrate in the area of product design. In the final directive, ecodesign is considered a crucial factor in the IPP strategy: combining the prevention of environmental impacts with the preservation of functional qualities, thus creating new opportunities for the market players.⁴⁸ Finally, the product design phase is presented as the most cost-efficient phase

⁴³ European Commission, *Communication from the Commission to the Council and the European Parliament. Towards a Thematic Strategy on the Sustainable Use of Natural Resources*, COM (2003) 572 final.

⁴⁴ European Commission, *Communication from the Commission to the Council and the European Parliament. Towards a Thematic Strategy on the Sustainable on the Prevention and Recycling of Waste*, COM (2003) 301 final.

⁴⁵ Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), L37, 13.2.2003.

⁴⁶ *Ibid.*, Art.4.

⁴⁷ European Commission, *Proposal for a Directive of the European Parliament and the Council on Establishing a Framework for the Setting of Eco-design Requirements for Energy-Using products and Amending Council Directive 92/42/EEC*, COM (2003) 453 final, memorandum, point 2.

⁴⁸ Directive 2005/32/EC of the European Parliament and 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 Directive 96/57/EC and 2000/55/EC of the European Parliament and the Council, OJ L 191, 22.7.2005, p.29.

to address environmental impact, because decision made there are influencing the environmental impact of the subsequent phases and committing most of the costs.⁴⁹

ETAP, on the other hand, could be considered as a less comprehensive and more focused alternative for IPP, as it concentrates on the development and diffusion of environmental technology to improve environmental performances. To achieve this, ETAP is designed to bring down market, regulatory and information barriers. Hereby it strives to facilitate the transition from scientific laboratories to the market, creating the right market condition if needed. The plan does not only refer to IPP on several occasions, but also incorporates several of its key elements. Just as in IPP, the development of the plan has been done in close cooperation with stakeholders via consultations, issue groups and expert working groups. Furthermore, some of the voluntary instruments from the IPP toolbox are mentioned as tool for ETAP e.g. EMAS, EU-eco-label.

Even though IPP has no concrete output of its own yet, it has already influenced other policies by supporting various instruments used in environmental policy. Besides this IPP and its concept is referred to and included in two recent policy initiatives: the EuP Directive and ETAP. Each one of them incorporates key IPP building block like life-cycle thinking, stakeholder involvement, the use of voluntary instruments and continuous improvement. This diffusion could be considered as an achievement of IPP.

1.9. Scope and methodology of the study

The aims of this research project were originally formulated as follows:

1. to explore the political and legal implications of the European Commission’s proposals for an Integrated Product Policy (IPP) of June 2003, as formulated in its Communication of June 2003, for the future development and implementation of product policies aimed at promoting more sustainable patterns of production and consumption;
2. to analyse the implications of the Commission’s proposals on IPP on the current body of European law and policies, in the light of the EC Treaty and the *acquis communautaire*;
3. to clarify the relations between IPP, as proposed by the Commission, and the objectives and principles of sustainable development;
4. to analyse the impact of the proposed IPP approach on the role of public authorities in the policy process at the European and national (Belgian) level.

The research first focused on conceptual issues, analysing the various proposed definitions of IPP, the implications of different definitions and criteria for defining IPP, and the relationship of the proposed new policy approach with other, existing approaches in environmental policy. The results of this first stage, which revealed the lack of a clear definition of IPP in EU policy documents, were presented in sections 1.1 to 1.5 above, and prompted the elaboration of a working definition of IPP for the purpose of the project, as stated in section 1.6. Based on these results, the overall research objectives were adjusted to extend the scope of the research beyond the ill-defined IPP concept as proposed by the Commission to encompass the full range of policies and instruments falling within the scope of our working definition.

⁴⁹ Ibid.

For conceptual reasons, as explained above, it would not have been justifiable, from a scientific perspective, to limit the scope of our research to those policies and measures that have been explicitly developed and implemented by the European institutions under the banner of IPP. First of all, because there appears to be disagreement between those institutions as to the exact range and nature of measures that should be covered by this label. Second, because, as appears from section 1.7, very few concrete measures have actually been implemented under this banner so far and IPP is more notable for its influence on current debate and discourse across the full range of EU and national environmental policies than for any particular policy outcomes. As shown in section 1.8, the policy impact of the IPP debate extends well beyond the boundaries of IPP as defined by the European Commission.

Based on the working definition of IPP in section 1.6, which was developed on the basis of both EU and national policy documents, we identified a range of EU policies and instruments which fall within its scope, whether or not they are recognized as such by the Commission. These include all the instruments which address, directly or indirectly, the environmental impacts of products at one or several stages of their life-cycle. These instruments do not necessarily pursue all objectives of IPP simultaneously. They may not be fully “integrated” as they address only a particular life-cycle stage and their design may not reflect a comprehensive life-cycle approach. In our research, we decided to address the full range of those policies and instruments.

The research objectives were pursued through a combination of legal and policy research methods. The research team undertook a comprehensive review of national and EU policy documents, of existing EC legislation and preparatory document, of relevant academic literature and of stakeholder position papers. About 45 structured interviews were conducted with policy-makers and stakeholders.

The legal research addressed the existing legal framework of EC law affecting products, which forms the background for the development of IPP. This involved a comprehensive analysis of existing EC legislation, both environmental and non-environmental (such as health and safety, consumer protection, etc.), relating to products. Based on the concept of “product chain” as articulated in IPP policy documents, the research identified those elements of the product life-cycle addressed by existing legislation. It also examined the relationship between IPP and the three “pillars” of sustainable development, as well as its compatibility with the fundamental principles and objectives of EU environmental policy.

The policy research first reviewed the academic literature on the theory and practice of multi-level governance, and identified the relevant stakeholders and their respective positions on IPP.

To support our research activities with external expertise, a project workshop for discussion and review of preliminary results with members of specialized research community and stakeholder representatives was organized in March 2005.

On the basis of the initial research and the discussions at the workshop, the research team prepared a list of survey questions and a structure for the interviews with policy-makers and stakeholders.

In analyzing the policy implications of IPP, the further research focused primarily on the proposed instruments of IPP, against the background of the broader, ongoing debate about the instruments of EU environmental policy, focusing on the relationship between and the proper role of legislative instruments vis-à-vis economic instruments and voluntary instruments. It also addressed the practical implications of an IPP approach, in particular the need for vertical and horizontal policy co-ordination at both the national and European level and the challenge of ensuring fair and effective stakeholder

participation in the development and implementation of IPP, including questions concerning the format, the conditions and the stakeholders’ capacity to effectively participate in the policy process. These questions were examined in the interviews with actors at several policy levels (national, regional and Commission officials, representatives of industry, NGOs).

Chapter 2 presents our analysis existing EU product-related legislation regulating the design, composition, placing on the market, use and disposal of certain products with a view to limiting their impact on the environment and human health. This legislation already pursues some objectives of IPP and forms part of the context in which IPP is being developed. It is also likely to be influenced by the development and implementation of IPP. The context of IPP also includes non-environmental legislation which, though pursuing different objectives such as consumer health and safety, impinges on the conditions of production, marketing and use of certain products. The experience gained in such other fields of regulation which have products as their primary object may be relevant to the development of IPP. The various forms of existing legislation are analyzed from the perspective of IPP to determine their impact on the product life-cycle and the extent to which they reflect a life-cycle approach.

Chapter 3 discusses, under the heading “instruments of IPP”, those policy tools which are considered to part of the IPP “toolkit” by the Commission and have been explicitly identified as such in its IPP Communication. The chapter assesses the potential of each of these instruments to contribute to the achievement of the objectives of IPP, as defined in section 1.6 above, taking into account existing experience where possible (since many of these instruments actually predate IPP).

Chapter 4 considers governance issues raised by the implementation of IPP, with special attention to the role of stakeholders in policy design and implementation. The results of interviews with stakeholders and the review of stakeholder position papers are interpreted in the light of theoretical perspectives on the legitimacy and effectiveness of public policies.

Finally, chapter 5 draws general conclusions from the research project, based on the material presented in the previous chapters. It focuses in particular on the role of public authorities versus stakeholders in IPP, identifies the main problems of policy design and implementation and formulates some recommendations to address them.

Chapter 2: Existing EC legislation affecting the life-cycle of products

2.1. Introduction

Concern about the environmental impacts of products at various stages of their life-cycle long predates the emergence of the debate on IPP. From the very start of the EC's environmental policy, measures have been taken at Community level to address certain environmental effects of specific products. In fact, the very origin and initial legitimization of EC environmental policy is related to the perceived need to establish harmonized environmental product standards to avoid obstacles to the free movement of goods arising within the common market as a result of disparate national product regulation. The earliest legislative measures of the then EEC in the environmental field in the late 1960s were in fact directives regulating certain aspects of the marketing and use of particular categories of environmentally harmful products such as dangerous preparations and motor vehicles. Since then, a considerable body of product-related EC environmental legislation has developed, though not in a coordinated, integrated manner, but rather incrementally, as a result of shifting policy priorities.

The two main areas of EC environmental law addressing products are waste management legislation on the one hand and chemicals legislation on the other. Originally, waste management legislation essentially consisted of prescriptions concerning the planning and regulation of waste disposal activities with a view to minimizing their impact on human health and the environment. Though waste prevention has always been a stated objective of this legislation, it initially contained few specific norms aimed at achieving this objective. However, as waste volumes continued to grow and environmentally sound disposal posed increasing difficulties for public authorities, policy-makers gradually began to devote more attention to preventive measures to address major waste streams at their source. As a result, the regulation of products as a means of minimizing waste production and its environmental impact naturally came to be viewed as an important policy tool. Thus the scope of waste management legislation expanded to include ‘upstream’ stages of the life-cycle of products and, as a corollary, to impose obligations on producers. This evolution has come to be known as “extended producer responsibility” (EPR).

What is traditionally regarded as “chemicals legislation” is that part of environmental law which deals with the intentional production and use of chemicals. Such product-related regulatory measures were not initially conceived as part of an integrated strategy for the control of chemical pollution, but primarily designed to protect users against harmful health effects associated with the use of particular products. They were rarely intended to affect the production or marketing of the chemical *per se*, but mostly aimed at regulating the *use* that may be made of it following its placing on the market. When such use regulation proved insufficient to eliminate risks deemed unacceptable, legislation would eventually ban particular uses, or even all uses, of specific hazardous substances. There has, however, been a gradual evolution towards a more preventive regulatory approach, based on pre-market control systems, which make market access for new chemicals conditional on preliminary risk assessment and, in some cases, even prior authorization by public authorities. At the same time, the rationale for the regulation of chemicals has been extended beyond the avoidance of direct health risks to users to include the prevention of more remote environmental effects occurring further ‘downstream’ in the chemical’s life-cycle. In the context of IPP, we will not consider the full range of EC chemicals legislation – which primarily addresses the placing on the market and use of chemical substances as

such or in preparations⁵⁰ – but only those provisions which specifically regulate the use of hazardous substances *in products other than chemical preparations*, thus drawing – for the purposes of this study – a dividing line between product regulation and ‘pure’ chemicals regulation.

This chapter analyzes existing EU environmental legislation regulating the design, composition, placing on the market, use and disposal of certain products with a view to limiting their impact on the environment and human health. This legislation, though largely developed independently of any explicit IPP approach, already pursues some objectives of IPP and forms part of the context in which IPP is now emerging. It is also likely to be influenced by the development and implementation of IPP.

This chapter is divided into three parts. First, it provides a survey of EPR provisions in legislation on (i) packaging, (ii) batteries, (iii) vehicles and (iv) electrical and electronic equipment. This section details the objectives behind the measures, their scope, and relevant provisions. Second, it discusses provisions regulating the use of hazardous substances in products and thus affecting their composition and design, provisions which evolved either from waste management legislation or from chemicals legislation. Finally, after providing an overview of these two main strands of existing product-related legislation, we will analyze them from the perspective of IPP to determine their impact on the product life-cycle and the extent to which they are consistent with a life-cycle approach.

The overview of existing product-related environmental legislation in this chapter excludes the legislative framework of the Community’s voluntary eco-labeling scheme (the first example of EC environmental legislation embodying a life-cycle approach) and the recent Directive on ecodesign requirements for energy-using products (EuP). In view of their explicit link with IPP, and their strong reliance on voluntary instruments, they will be discussed in chapter 3 together with the other specific instruments of IPP.

2.2. Extended Producer Responsibility provisions in EC Waste Legislation

2.2.1. Waste prevention, EPR and IPP

Within the framework of its waste policy, the EU has adopted a package of Community legislation implementing the principle of EPR to varying degrees for packaging, batteries, vehicles, and electrical and electronic equipment. This legislation is loaded with different primary and secondary objectives. The primary objective is dual, as the legislation aims to ensure the smooth functioning of the internal market as well as to achieve environmental policy objectives. Even within the environmental field, the legislation pursues different secondary objectives: waste prevention through product design changes, as well as improved waste management through separate collection, recycling and recovery requirements. These different objectives may lead to contradictions, for example, the pursuit of recycling and recovery targets may negatively affect other sustainable development objectives, and the establishment of collective EPR schemes may reduce incentives for individual producers to modify the design of their products.

The phrase ‘Extended Producer Responsibility’ (EPR) has been coined to denote the trend towards broadening the nature and extent of the responsibility of producers for the products they produce. This

⁵⁰ For an overview of chemicals legislation, see M. Pallemaerts, “EC Chemicals Legislation: A Horizontal Perspective”, in: R. Macrory (ed.), *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?*, Groningen, Europa Law Publishing, 2005.

trend is not confined to the EU, but can also be observed in other OECD countries. The OECD, who have been active in developing the EPR idea, define it as:

‘An environmental policy approach in which a producer’s responsibility, physical and/or financial, for a product is extended to the post consumer stage of a product’s life cycle. There are two related features of EPR policy: (1) the shifting of responsibility upstream to the producer from the municipalities, and (2) to provide incentives to incorporate environmental considerations in the design of their products.’⁵¹

The European Commission, for its part, contends that the EPR idea is derived from the EC Treaty and is a relatively effective environmental policy option. It suggests that EPR derives from the polluter pays principle, as laid down in Article 174 EC:

‘The idea behind this principle is to make those persons responsible for environmental pollution who have the possibility to improve the situation.’⁵²
Producers of ... equipment design the product, determine its specification and select its materials. Only producers can develop approaches to the design and manufacture of their products to ensure the longest product life and, in the event that it is scrapped, the best methods of recovery and disposal.’⁵³

EPR provisions in EC environmental law in fact reflect a dual rationale: the search for effective instruments for waste prevention by promoting ecodesign, and a shifting of responsibility and the financial burden for waste management from public authorities to the private sector. This shifting of financial responsibility in accordance with the polluter pays principle is itself also envisaged as an economic incentive for product design changes.

In focusing policy attention on ‘upstream’ stages of the product life-cycle and the role of producers in waste prevention, EPR has a clear affinity with IPP. The relevance of product design for waste prevention was recognized from the outset in the Waste Framework Directive, which contains a provision requiring Member States to

‘take appropriate measures to encourage (...) firstly, the prevention or reduction of waste production and its harmfulness, in particular by (...) the technical development and marketing of *products designed so as to make no contribution or to make the smallest possible contribution, by the nature of their manufacture, use or final disposal, to increasing the amount or harmfulness of waste and pollution hazards.*’⁵⁴

Initially, the implementation of this provision was left entirely at the discretion of individual Member States, which, in general, were reluctant to act as they feared that unilateral national measures in this field may clash with internal market rules. Isolated Member State initiatives to introduce product

⁵¹ OECD, *Extended Producer Responsibility: A Guidance Manual for Governments*, (2001), p.9, cited at p.7, Parliamentary Sustainable Waste Group, ‘Producer Responsibility,’ (July 2004). Note, the reference given in the PSWG is incorrectly given as p.27 to the OECD report.

⁵² Explanatory Memorandum to Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment, Brussels 13.6.2000 (COM (2000) 347 final, 2000/0158 (COD)). P.11, para.3.

⁵³ Ibid.

⁵⁴ Dir. 75/442/EEC on waste, as amended by Dir. 91/156/EEC, Article 3(1).

standards and EPR schemes eventually prompted the Commission to propose EC legislation for specific categories of products. In doing so, it acted pursuant to another provision of the Waste Framework Directive which provides for ‘specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste’ to be laid down by means of individual Directives.⁵⁵

The following sections survey areas where products are subject to provisions of EC waste management legislation implementing the EPR concept. They provide a summary of the measures adopted, against the background of their legislative history.

2.2.2. Packaging

The ‘extended producer responsibility’ concept was first applied in Community environmental legislation for packaging. Directive 94/62/EC on packaging and packaging waste,⁵⁶ has been amended once,⁵⁷ and supplemented with technical measures on marking,⁵⁸ data and reporting.⁵⁹

The legislation has twin primary objectives, one, internal market, and two, environmental.⁶⁰ Its substantive objective is to ‘prevent the production of packaging waste.’⁶¹ Additional, but secondary objectives, are the (i) the ‘reuse of packaging’, (ii) the ‘recycling of packaging waste’, and (iii) the ‘recovery of packaging waste’. The point of these secondary objectives are to reduce the ‘final disposal of packaging waste’.⁶²

The Packaging Directive also lays down the ‘essential requirements’ for packaging (requirements to be considered in its design and manufacture) and concentration limits for heavy metals in packaging (these will be discussed in the following section).

This Directive was updated and amended by Directive 2004/12/EC.⁶³ The revised Directive does not change the objectives, but spells out its adoption of EPR where it states:

‘The operators in the packaging chain as a whole should shoulder their shared responsibility to ensure that the environmental impact of packaging and packaging waste throughout its life cycle is reduced as far as possible.’⁶⁴

The Directive requires Member States to set up return, collection and recovery systems for packaging waste. It does not prescribe how these systems are to be financed, but allows Member States to apply economic instruments based on the polluter pays principle. In applying this principle, Member States may opt to place financial requirements on industry. Directive 2004/12/EC invites the Commission to report on ‘producer responsibility including its financial aspects’ in a forthcoming assessment of the Packaging Directive.⁶⁵

⁵⁵ Ibid., Art. 2(2) .

⁵⁶ OJ L. 365, 31.12.1994, p.10.

⁵⁷ Dir. 2004/12/EC.

⁵⁸ Decision 97/129/EC.

⁵⁹ Dir. 91/692/EC.

⁶⁰ Dir. 94/62, Art.1(1).

⁶¹ Dir. 94/62, Art. 1(2).

⁶² Dir. 94/62, Art. 1(2).

⁶³ OJ L 47, 18.2.2004, p.26.

⁶⁴ Dir. 2004/12, Recital 8.

⁶⁵ Dir. 2004/12, Art. 6(8)(f).

2.2.3. Batteries

Existing Community environmental regulation of batteries is provided for a Directive and implementing measures.⁶⁶ A recent proposal to reform the existing rules is currently subject to legislative negotiations.⁶⁷ This section first considers existing Community law, and second, sets out the main provisions of the proposal for a new Directive.

Council Directive 91/157/EC ‘on batteries and accumulators containing certain dangerous substances’, is about setting up rules for the take back and disposal of some types of batteries, and the substances permitted in those batteries. It is supplemented by two updating Directives, one, Commission Directive 98/101/EC, tightening the hazardous substances controls on some batteries, and adding some batteries to the control regime. The second, Commission Directive 93/86/EC, detailing the crossed out wheeled bin mark to be put on regulated batteries.

Its objectives are (i) to set up common Community wide rules for the take back and disposal of batteries, and (ii) to provide for controls on the use of hazardous substances in some batteries.⁶⁸

The explicit obligations on producers appear limited to (i) restrictions on the hazardous substances that can be used in some batteries,⁶⁹ (ii) the marking of the battery to indicate the need for separate collection,⁷⁰ and (iii) design requirements to allow for the removal of batteries from products.⁷¹

But, Member States retain the discretion to charge producers to deliver the objectives of their national recycling programmes,⁷² and to pay for the separate collection and deposit system.⁷³ These provisions allow Member States to instigate fully fledged EPR systems, more than could be inferred from the seemingly incidental reference to the ‘polluter pays’ principle in the Directive.⁷⁴

On 21 November, 2003, the European Commission published a proposal for a new ‘directive on batteries and accumulators and spent batteries and accumulators’,⁷⁵ that is subject to ongoing legislative negotiations.

The new Directive would establish an EU-wide framework for national battery collection and recycling schemes. This should prevent batteries from ending up in incinerators or landfills and should also recover the precious metal resources used in the batteries. The proposal includes the following measures:

- to ban the landfilling or incineration of all automotive and industrial batteries;

⁶⁶ Directive 91/157/EEC on batteries and accumulators containing dangerous substances; Commission Directive 93/86/EEC; Directive 98/101/EC.

⁶⁷ Brussels, 21.11.2003 COM(2003) 723 final 2003/0282 (COD).

⁶⁸ Dir. 91/157, Art. 1.

⁶⁹ Dir. 91/157, Art. 3(1) .

⁷⁰ Dir. 91/157, Art. 4(2), and Commission Directive 94/86/EC.

⁷¹ Dir. 91/157, Art. 5.

⁷² Dir. 91/157, Art. 6.

⁷³ Dir. 91/157, Art. 7.

⁷⁴ Dir. 91/157, Recital 6.

⁷⁵ SEC (2003) 1343) .

- to set up national collection systems, allowing consumers to return their spent batteries free of charge;
- to set a collection target for consumer batteries of 160g per inhabitant per year (corresponding to 4-5 portable batteries per person per year);
- to set a collection target of 80 per cent for nickel-cadmium consumer batteries;
- to set recycling targets of 65 per cent by weight for lead-acid batteries (all lead to be recovered), 75 per cent for nickel-cadmium batteries (all cadmium to be recovered) and 55 per cent for all other batteries;
- producers to be made responsible for costs related to collection, treatment and recycling;
- producers to be allowed to use a 'visible fee' for a maximum of five years after implementation.

Explicit EPR provisions are provided, requiring producers to pay for the ‘financing for at least the treatment, recycling and sound disposal of all spent portable batteries and accumulators’⁷⁶, financial guarantees by producers to pay for treatment,⁷⁷ financing of historic waste treatment by producers.⁷⁸

2.2.4. Vehicles

Directive 2000/53/EC on end-of-life vehicles (ELV),⁷⁹ as amended, lays down rules for some, although not all, vehicles when they are scrapped. The first part deals with the objectives, scope, and key definitions behind the legislation. The Directive has several objectives, some stated, and some not. The primary objective is to ‘prevent waste from vehicles’. Other objectives the legislation aims to deliver are to ‘promote recovery’ of end of life vehicles and their components, such as reuse, recycling, and other forms of recovery, and to improve ‘the environmental performance of all the economic operators involved in the life cycle of vehicles’ (e.g. producers, retailers, and recyclers).⁸⁰

The Commission’s explanatory memorandum elaborates the objectives to be achieved:

‘changes in the production of vehicles (in order to have vehicles which are easy to dismantle and recycle), in the behavior of vehicle owners (in order to ensure that vehicles are handed over to authorized facilities) and of vehicle dismantlers/recyclers (in order to ensure that treatment operations are done by respecting the environment).’

The Directive suggests that EPR is an incidental, not primary objective of the ELV Directive, with product design, hazardous substance restriction, and core internal market and environmental policy objectives more clearly stated.

But, shifting the responsibility from local authorities back to the producer to deal with vehicles at the end of their life, and getting the vehicle producers to pay for the necessary waste management system is a clear objective.

A closer inspection reveals that EPR is at the heart of the Directive. The Commission’s Explanatory Memorandum clearly and succinctly considers the responsibility for the waste management, and the associated costs, and states:

⁷⁶ Ibid., Art. 20(1).

⁷⁷ Ibid., Art. 22.

⁷⁸ Ibid., Art. 23.

⁷⁹ OJ L 269, 21.10.2000, p.34.

⁸⁰ Dir. 2000/53, Art. 1.

‘In order to prevent the generation of waste, waste management concerns have to be fully taken into account from the vehicle design or conception phase onwards. To be effective, this implies that action is necessary at all stages of the vehicles life-cycle, from production through use to collection, re-use, recycling and final disposal. Economic operators will be responsible for contributions to the protection, preservation and improvement of the quality of the environment. In this respect the vehicle manufacturer plays a predominant role, since he takes key decisions concerning the waste management potential of his product, such as design, conception, use of specific materials, composition of the product and finally its marketing.’⁸¹

2.2.5. Electrical and Electronic Equipment

Directive 2002/96/ EC, on waste electrical and electronic equipment (WEEE),⁸² as amended,⁸³ is about the environmental regulation of electrical and electronic equipment.

The stated objectives are split into three, and are weighted in order of preference. The first objective of the Directive is the prevention of electrical and electronic waste; the second objective is to promote the recovery of such waste. This recovery can be by way of reuse, or recycling, or other recovery options, which includes the option of energy recovery. Third, the legislation looks to ‘improve the environmental performance of all operators involved in the life cycle’, which includes producers, distributors consumers, and waste treatment operators.⁸⁴ The preferences provided mirror the ‘waste hierarchy’ detailed in the Waste Framework Directive (Directive 91/156/EEC).⁸⁵

The important role the ‘producer’ shoulders under this legislation is not clear until the second part of the Directive dealing with the substantive provisions of separate collection, treatment, recovery and financing. Until then, the Directive opts for a broad definition of producer,⁸⁶ targeting the ‘producer’ who benefits from the sale of the product, by making them liable for the yet un-numerated extended responsibilities.

The second part of the Directive spells out clear ‘extended producer responsibility’ provisions, dealing with, first, waste management obligations, and second, financial obligations. The batch of waste management provisions require Member States to pass on to producers the need to ‘provide for the treatment of WEEE’⁸⁷, ‘set up systems either on an individual or on a collective basis for the recovery

⁸¹ Page 14, para 2, Article 1: Objectives.

⁸² OJ L 37, 13.2.2003, at p.24.

⁸³ Directive 2003/108/EC of the European Parliament and of the Council of 8 December 2003 amending Directive 2002/96/EC on waste electrical and electronic equipment (WEEE), OJ L 345, 31.12.2003, at p.106.

⁸⁴ Dir. 2002/96, Art. 1.

⁸⁵ Dir. 2002/96, Art. 3.

⁸⁶ Dir.2002/96, Art. 3(i): ‘producer’ means any person who, irrespective of the selling technique used, including by means of distance communication in accordance with Directive 97/7/EC ... (i) manufacturers and sells electrical and electronic equipment under his own brand;(ii) resells under his own brand equipment produced by other suppliers, a reseller not being regarded as the ‘producer’ if the brand of the producer appears on the equipment, as provided for in subpoint (i), or (iii) imports or exports electrical and electronic equipment on a professional basis into a Member State. Whoever exclusively provides financing under or pursuant to any finance agreement shall not be deemed a ‘producer’ unless he also acts as a producer within the meaning of subpoints (i) to (iii);

⁸⁷ Dir. 2002/96, Art. 6(1).

of WEEE collected separately in accordance with Article 5'. In addition to the handing over these waste management obligations to the producer, the producer is required to finance the schemes.

The producer of 'household' and 'non-household' equipment has to pay for respectively 'new' and 'historic' waste. The financial regime that the producer of 'household' and 'non-household' equipment falls into differs, and the burden, through known and unknown liabilities the producer will carry, also differs.

In an important respect the WEEE Directive takes the 'EPR' concept to a new level. It moves from the 'polluter pays' for their own pollution, to the 'producer pays for other producers' pollution'. From 13 August 2005 producers will have to provide 'at least for the financing of the collection, treatment, recovery and environmentally sound disposal of WEEE from private households deposited at collection facilities set up under Article 5(2).'⁸⁸ Therefore, producers will have to pay for the 'collection, treatment, and recovery' of WEEE left at, for example, municipal sites and shops. But, also, a Member State may go further, and require producers to pay for the running and provision of the 'collection' sites, for the financial requirement is not strictly delimited.

Second, whilst producers of so called new waste, that is from products put on the market from 13 August 2005, finance only the take back for their own products⁸⁹, the burden of the treatment of historic waste, that is waste arising from products put on the market before 13 August 2005, falls on the producer of similar products on the market at the time when the 'old' products become waste.

This is a double whammy for a new market entrant. They will have to deal with legally rare 'retrospective' financial burden, but the market entrant will have to carry the treatment cost for producers who no longer exist on the market. The original notion of producer's responsibility, namely to ensure that (1) the physical and/or (2) the financial responsibility, for a product is extended to the post consumer stage of a product's life cycle seems distorted in an important respect. The producer's responsibility is not maintained, it is shifted to another producer entirely. When a policy has several objectives, it is possible, and if the policy is detailed or apparently complex, likely, that the objectives will clash and contradictions arise. The paradox of shifting financial burdens from a waste producer to a 'new' producer lies in the third objective of EPR, namely that of the 'shifting of responsibility upstream to the producer from the municipalities', or getting producers to pay for the waste clean up that local and central government used to pay under general taxation.

2.3. Provisions of EC Law Regulating Hazardous Substances in Products

The Community regulates the presence of certain hazardous substance in products under Community chemicals legislation as well as through product specific legislation. This section is divided into two parts, with the first section considering the regulation of hazardous substances in products under general EC chemicals legislation and general product safety legislation.

The second part details provisions on hazardous substances in product specific directives on packaging, vehicles, batteries, and electrical and electronic equipment.

⁸⁸ Dir. 2002/96, Art. 5(1).

⁸⁹ Dir. 2002/96, Art. 8(2).

2.3.1. Hazardous Substance Regulation

This section considers the control of hazardous substances under first, legislation on marketing and use of dangerous substances and, second, under product safety legislation.

2.3.1.1. Marketing and Use of Dangerous Substances

The presence of hazardous substances in products can be restricted through Directive 76/769/EEC on ‘the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations.’⁹⁰ This Directive, based on Art. 100 EEC (now Art. 95 EC), is aimed at full harmonization of the relevant provisions. Accordingly, the provisions of Directive 76/769/EEC do not merely establish minimum requirements: where the placing on the market and use of a substance is not altogether prohibited, the obligation of the member states to ensure that the regulated substances “may only be placed on the market or used subject to the conditions specified” in the annex to the Directive⁹¹ implies that member states are not free to prevent any marketing or use of the substances in question which complies with the conditions laid down at Community level. The Directive’s objectives range from (i) protecting the public at large and, in particular, users,⁹² to (ii) environmental protection,⁹³ and (iii) internal market justifications.⁹⁴

The legislation is concerned with substances, which are defined as ‘chemical elements and their compounds as they occur in the natural state or as produced by industry,’⁹⁵ and preparations’, which are ‘mixtures or solutions composed of two or more substances.’⁹⁶

Once a substance or preparation has been listed in the annex to Directive 76/769/EEC, the conditions of its marketing and use are determined by Community law and can be amended by Commission Directives adopted pursuant to a regulatory committee procedure. Adding a new substance to the annex requires a Directive adopted by the European Parliament and Council under the co-decision procedure. To date, there have been 26 amendments of the Annex, some of them adopted by the Commission and others through the normal legislative procedure.

Most of the marketing and use restrictions under Directive 76/769/EEC are primarily aimed at the protection of users and consumers and based on human health grounds, but some of them are taken for environmental reasons, including the control of air and water pollution. According to its preamble, the Directive is designed, *inter alia*, to “contribute to the protection of the environment from all substances and preparations which have characteristics of ecotoxicity or which could pollute the environment.”

Many of the restrictions laid down in the Directive’s annex are not in fact outright prohibitions on the marketing or use of particular chemicals; they rather amount to prohibitions or restrictions on the use of particular chemicals in specific preparations or other products destined for certain uses. On the scale of risk reduction measures, regulators will normally first act to prohibit those applications of a

⁹⁰ OJ L 262/21, 27.9.1976.

⁹¹ *Ibid*, Art. 2.

⁹² Dir.76/769/EEC, Recital 1.

⁹³ Dir.76/769/EEC, Recital 2.

⁹⁴ Dir. 76/769/EEC, Recitals 4 and 5.

⁹⁵ Dir. 76/769/EEC, Art. 3(a) .

⁹⁶ Dir. 76/769/EEC, Art. 3(b) .

chemical which pose the highest risk to human health or the environment, rather than ban its marketing and use altogether. Generally, such applications are those which involve the highest risk of direct human exposure or diffusion in the environment. This explains the high number of product-specific restrictions in the annex to Directive 76/769/EEC.

Thus, for example, certain lead compounds may not be used in paints, cement may not contain more than a trace amount of soluble hexavalent chromium, and the marketing of anti-fouling paints for ships and underwater equipment containing mercury, arsenic and organic tin compounds is prohibited. Several chlorinated organic solvents may not be used in substances and preparations for sale to the general public,⁹⁷ and similar restrictions apply to preparations containing substances which have been identified as carcinogenic, mutagenic or toxic to reproduction above specified concentrations, which may be sold only to professional users.⁹⁸ There are also restrictions affecting substances used in textiles⁹⁹ and jewelry¹⁰⁰.

A recent example of the application of Directive 76/769/EEC concerns restrictions on two brominated flame-retardants, pentaBDE and octaBDE. The restrictions were introduced by Directive 2003/11/EC¹⁰¹ Pentabromodiphenyl ether, better known by its abbreviations, PentaBDE, and octabromodiphenyl ether, better known as octaBDE, are two widely used flame retardants, but also have toxic, persistent and biocumulative qualities. After a Community risk assessment,¹⁰² and the confirmation by the Community's expert Scientific Committee on toxicity, ecotoxicity and the environment (CSTEE) of the risk assessment findings,¹⁰³ that pentaBDE and octaBDE posed unacceptable risks to the environment, and the unexplained presence of pentaBDE in breast milk, posed concerns for the exposure of pentaBDE to breast fed children,¹⁰⁴ it was recommended to prohibit articles being placed on the market with either of these substances.

The prohibition of pentaBDE and octaBDE in 'articles placed on the market'¹⁰⁵ commenced on 15 August 2004.¹⁰⁶ The substance ban is carefully drafted¹⁰⁷ and provides clarification on the chemical

⁹⁷ Commission Directive 96/55/EC of 4 September 1996 adapting to technical progress for the 2nd time Annex I to Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (chlorinated solvents), OJ No L 231 , 12.9.1996, p. 20.

⁹⁸ Commission Directive 97/10/EC of 26 February 1997, OJ No L68, 8.3.1997, p. 24.

⁹⁹ Parliament and Council Directive 2002/61/EC amending for the nineteenth time Council Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations (azocolourants), OJ L 243/15, 11/09/2002. Annex, item 43.

¹⁰⁰ Parliament and Council Directive 94/27/EC amending for the 12th time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations. OL L 188/1, 22/07/1994. Annex, item 28.

¹⁰¹ Parliament and Council Directive 2003/11/EC amending for the 24th time Council Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations (pentabromodiphenyl ether, octabromodiphenyl ether).

¹⁰² Council Regulation 793/93/EEC on the evaluation and control of the risks of existing substances, OJ L 84/1, 5.4.1993.

¹⁰³ Dir. 2003/11/EC, Recital 1.

¹⁰⁴ Ibid.

¹⁰⁵ Dir. 2003/11/EC, Recital 4.

¹⁰⁶ Dir. 2003/11/EC, Art. 2.

¹⁰⁷ Dir.2003/11/EC.

formulation of both substances, but also the trace level and method for assessing the presence of pentaBDE and octaBDE.¹⁰⁸

Another brominated flame retardant, deca BDE, is not subject to restrictions under the same amendment to Directive 76/769/EEC. The co-legislators agreed to wait until on-going risk assessments were finalized before proceeding to consider whether to regulate deca BDE.¹⁰⁹ Whilst this risk assessment is not yet finalized, restrictions on the use of deca BDE in some electrical and electronic equipment were introduced by Directive 2002/95/EC on RoHS.¹¹⁰ But these tough restrictions were subsequently lightened with an exemption provided for the use of ‘DecaBDE in polymeric applications.’¹¹¹

2.3.1.2. Regulation of Hazardous Substances in Products under Product Safety Legislation

Regulators and legislators are sometimes faced with the need to ban or restrict hazardous substances very quickly. With science’s ever developing ability to determine the exact nature of a substance’s properties, science raises the dilemma on what to do about substances that once were thought to be harmless but have been discovered to be hazardous to public health or the environment. Directive 76/769/EEC does not provide an appropriate instrument for swift action in such cases, since imposing regulatory restrictions on substances not yet listed in its Annex requires the adoption of an amendment through the time-consuming formal legislative procedure.

A special instrument to react quickly when knowledge develops has however been provided under EC consumer safety legislation. Directive 2001/95/EC¹¹² lays down the framework requirements on general product safety, building on the provisions of Directive 92/59/EEC¹¹³ which it replaced.

The objective of this general product safety legislation is ‘to ensure that products placed on the market are safe,’¹¹⁴ and to this end to impose basic safety requirements applying to all products for which no specific safety standards imposed by other Community legislation exist.¹¹⁵ The rationale for such catch-all legislative provision is that ‘it is very difficult to adopt Community legislation for every product which exists or which may be developed,’ and ‘there is a need for a broad-based, legislative framework of a horizontal nature to deal with those products, and also to cover lacunae’ and ‘to complement provisions in existing or forthcoming specific legislation, in particular with a view to ensuring a high level of protection of safety and health of consumers’.¹¹⁶ It is striking that, though this argument would be just as valid when it comes to ensuring a high level of environmental protection, no similar general legislation on environmental product requirements exists.

¹⁰⁸ Dir.2003/11/EC. Recital 5.

¹⁰⁹ Dir.2003/11/EC, Recital 6.

¹¹⁰ Dir. 2002/95/EC, Art. 4(1) .

¹¹¹ Commission Decision 2005/717/EC, amending for the purposes of adapting to the technical progress the Annex to Directive 2002/95/EC of the European Parliament and of the Council on the restriction of certain hazardous substances in electrical and electronic equipment. OJ L. 271/48, 15.10.2005.

¹¹² Parliament and Council Directive 2001/95/EC on general product safety, OJ L 11/4, 15.1.2002.

¹¹³ Council Directive 92/59/EEC on general product safety, OJ L 228/24, 11.08.1992.

¹¹⁴ Dir. 2001/95/EC, Art. 1(1).

¹¹⁵ Dir. 2001/95/EC, Art.1(2).

¹¹⁶ Dir. 2001/95/EC, Recital 5.

Apart from its general safety requirements, Directive 2001/95/EC provides for several specific instruments to guarantee product safety. It provides a framework and procedure for the establishment of European standards by standardization bodies.¹¹⁷ It also provides a legal basis for the Commission to adopt ‘emergency measures’ taking products off the market.¹¹⁸ However, as this emergency procedure is intended to be the exception rather than the rule, specific conditions and procedural requirements have to be met before emergency measures can come into force.

The Commission has to go through a two-stage procedure. It must first satisfy the following requirements to introduce an emergency ban:

- a) It has to become aware of a serious risk from certain products to the health and safety of consumers in various Member States;¹¹⁹
- b) It must consult Member States,¹²⁰ and it must emerge from these consultations that they differ significantly on the approach adopted or to be adopted to deal with the risk;¹²¹
- c) If relevant scientific issues arise, it must consult the Community Scientific Committee competent to deal with the risk concerned;¹²²
- d) The risk cannot be dealt with, in view of the nature of the safety issue posed by the product, in a manner compatible with the degree of urgency of the case, under other procedures laid down by the specific Community legislation applicable to the products concerned;¹²³ and
- e) The risk can be eliminated effectively only by adopting appropriate measures applicable at Community level, in order to ensure a consistent and high level of protection of the health and safety of consumers and the proper functioning of the internal market.¹²⁴

After these requirements have been fulfilled, in a second stage, the Commission can bring forward a proposal for measures,¹²⁵ and that proposal can be adopted in accordance with a regulatory comitology procedure.¹²⁶ A decision adopted under the emergency procedure shall, in principle, be valid for a limited period only, though it can be renewed. Under Directive 92/59/EEC the maximum period of validity was three months, but this was extended to one year by Directive 2001/95/EC.¹²⁷

An example of the application of the emergency procedure under general product safety legislation resulting in restrictions on the use of substances in products is shown by Commission Decision 1999/815/EC which banned phthalates in some plastics used in toys for young children.¹²⁸ The

¹¹⁷ Dir. 2001/95/EC, Art. 4.

¹¹⁸ Dir. 2001/95/EC, Art. 13.

¹¹⁹ Dir.2001/95/EC, Art.13 (1).

¹²⁰ Dir.2001/95/EC, Art. 13(1).

¹²¹ Dir.2001/95/EC, Art. 13(1)(a).

¹²² Dir. 2001/95/EC, Art. 13(1).

¹²³ Dir.2001/95/EC, Art. 13(1)(b).

¹²⁴ Dir.2001/95/EC, Art. 13(1)(c).

¹²⁵ Dir. 2001/95/EC, Art. 13.

¹²⁶ Dir. 2001/95/EC, Art.15.

¹²⁷ Dir. 20001/95/EC, Art. 13(2).

¹²⁸ Commission Decision 1999/815/EC, adopting measures prohibiting the placing on the market of toys and childcare articles intended to be placed in the mouth by children under three years of age made of soft PVC containing one of or more of the substances di-iso-noyl phthalate (DNIP, di (2-ethylhexyl) phthalate (DEHP),

Commission acted after several Member States implemented measures against soft toys with PVC,¹²⁹ in the absence of adopted Community legislation, and following confirmation from the Scientific Committee on Toxicity, Ecotoxicity and the Environment (SCTEE) that there ‘were grounds for concern’ as regards exposure of phthalates from certain toys in children.¹³⁰

Decision 1999/815/EC was originally adopted for a three-month period under Directive 92/59/EEC, but its period of validity was repeatedly renewed, first under Directive 92/59/EEC for successive three-month periods, and later under Directive 2001/95/EC for longer periods.¹³¹ The Commission has recently proposed to replace these successive ‘emergency’ measures by a permanent ban under Directive 76/769/EEC, which suggests that the repetitive use of the emergency procedure may in fact have been improper. It should be noted that the emergency procedure under Directive 2001/95/EC can be invoked only in the event of a serious risk ‘to the health and safety of consumers’, and not for environmental protection purposes. Hence, it is of no relevance as a potential instrument of IPP.

2.3.2. Product-related provisions in waste legislation

2.3.2.1. Packaging

Directive 94/62/EC on packaging and packaging waste¹³² restricts the amount of lead, cadmium, mercury and hexavalent chromium allowed in packaging materials. These four heavy metals are controlled because ‘their presence is a cause for concern due to their presence in emissions or ash when packaging is incinerated, or in leachate when packaging is land filled.’¹³³

Directive 94/62/EC provided that producers had to meet restrictions that were phased in over a five-year period. Packaging needed to meet tougher concentration value limits, starting with 600 ppm (by weight) on 30 June 1998,¹³⁴ 250 ppm on 30 June 1999,¹³⁵ and just 100 pm on 30 June 2001.¹³⁶

These restrictions¹³⁷ apply to the packaging and packaging waste covered by Directive 94/62/EC. The packaging covered included most types of packaging,¹³⁸ which includes:

‘all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer. ‘Non-returnable’ items used for the same purposes shall also be considered to constitute packaging.’¹³⁹

dibutyl phthalate (DBP), di-iso-decyl phthalate (DIDP), di-n-octyl phthalate (DNOP), and butylbenzyl phthalate (BBP), OJ L 315/46, 9.12.1999.

¹²⁹ Commission Decision 1999/815/EEC, Recitals 5 and 9.

¹³⁰ Commission Decision 1999/815/EEC, Rectal 17.

¹³¹ See Commission Decision 2004/781/EC amending Decision 1999/815/EC concerning measures prohibiting the placing on the market of toys and childcare articles intended to be placed in the mouth by children under three years of age made of soft PVC containing phthalates, OJ L 344/35. 20.11.2004.

¹³² Directive 94/62/EC on packaging and packaging waste (1994) OJ L 365/10, 31.12.1994.

¹³³ Commission’s Proposal for a Council Directive on packaging and packaging waste. (COM (1999) 278, 15.7.1992), Explanatory Memorandum, Para 2.2, p.4.

¹³⁴ Dir. 94/62, Art. 11(1) (indent 1): 600 ppm by weight two years after the date referred to in Art. 22 (i).

¹³⁵ Dir. 94/62, Art. 11(1)(indent II) 250 ppm by weight three years after the date referred to in Art. 22 (i).

¹³⁶ Dir. 94/62, Art. 11(1)(indent iii): - 100 ppm by weight five years after the date referred to in Art. 22 (i).

¹³⁷ Dir. 94/62, Art. 11 (1).

¹³⁸ Dir. 94/62, Art. 2.

¹³⁹ Dir. 94/62, Art. 3(1).

This broad definition is supplemented with clarification of sales packaging, grouped packaging, and transport packaging,¹⁴⁰ which are all covered by the measures.

Directive 94/62/EC's scope is broad because there are few household or industrial products that do not use paper, glass or plastic based packaging or containers to hold goods. But, there are specific exclusions provided for, with 'road, rail, ship and air containers'¹⁴¹ not being defined as packaging at all, and some packaging falling under limited 'no-conflict provisions' on scope.¹⁴² Also, the hazardous substance restrictions do not apply to 'packaging of lead crystal glass'.¹⁴³

It is worth pointing out that Directive 94/62/EC restricts lead, cadmium, mercury and hexavalent chromium 'packaging or packaging components'. Even after June 30 2001 packaging could still contain the hazardous substances up to the prescribed 'concentration levels.'¹⁴⁴ The concentration values are limits up to which the hazardous heavy metals are allowed in the packaging. Concentration values are needed because there are 'trace elements' of these heavy metals in the natural environment and in the manufacturing environment, and their absolute elimination, whilst maybe not in all cases technically impossible, would be in most cases technically improbable. So, whilst not banning the use of the heavy metals, the ultimate limits to be met of 100 part per million (ppm), with the provision of a step by step reduction over a five year period, amounts to a basic ban if not an absolute ban on the heavy metals.

The co-legislators who worked on Directive 94/62/EC saw the need to keep up with technical progress, and delegated to the Commission the power to bring forward proposals for technical adaptation measures to either subtract from, or add to, the exemptions for some types of packaging.¹⁴⁵

Parliament's reluctance towards 'comitology' provisions is shown by their moving the Commission's original proposal, with heavy metal restriction provisions in an annex, to the body of the text. Provisions as articles in the body of the legislative text are less malleable to change through back door procedures under the comitology process than if they are left in an Annex.

2.3.2.2. Batteries

Directive 91/157/EC is concerned about controlling mercury, cadmium and lead, and it lays down rules for the collection and labeling of batteries containing these heavy metals. The restrictions are limited to mercury.¹⁴⁶ The Directive only provides for limited restrictions on the use of the hazardous heavy metal, mercury, in some batteries,¹⁴⁷ and it provides for controls for the other heavy metals.¹⁴⁸

These substances constitute an environmental hazard when the spent batteries or accumulators are disposed of, and the legislation recognizes prohibition as the most effective way of dealing with this

¹⁴⁰ Dir. 94/62, Art. 3(1).

¹⁴¹ Dir. 94/62, Art. 3(c).

¹⁴² Dir. 94/62, Art. 2(2).

¹⁴³ Dir. 94/62, Art. 11 (2).

¹⁴⁴ Dir. 94/62, Art. 11.

¹⁴⁵ Dir. 94/62, Art. 11(3).

¹⁴⁶ Dir.91.157, Art. 3.

¹⁴⁷ Dir.91.157, Art 3(1).

¹⁴⁸ See Explanatory Memorandum, Proposal for a Council Directive on Batteries and Accumulators containing dangerous substances, (COM (88) 672 final, SYN 170), 1.12.1988, p.3-6.

source of pollution.¹⁴⁹ The restrictions on mercury were tightened in 1998 by updating measures¹⁵⁰ that ratcheted up these restrictions.¹⁵¹

The mercury restrictions apply to a ‘battery or accumulator,’ which the Directive defines as ‘a source of electrical energy generated by direct conversion of chemical energy and consisting of one or more primary (non-rechargeable) batteries or secondary (rechargeable) cells, as listed in Annex I’.¹⁵² Subject to certain exceptions, the annex, as amended in 1998, essentially refers to batteries and accumulators containing more than 0,0005 % of mercury by weight.¹⁵³

There are specific exemptions for the use of mercury in some button cell batteries,¹⁵⁴ and a broad group of batteries are excluded from the scope in Annex II, which lists, among various items, some types of permanently attached batteries in appliances¹⁵⁵, batteries in pacemakers,¹⁵⁶ and some types of portable appliances.¹⁵⁷

Article 10’s wide delegation clause provides the Commission with the option to amend the scope and extent of the Directive. It provides for a regulatory Committee to amend Articles 3, 4, 5, Annexes I and II, and these provisions have been used to tighten the restrictions on mercury.¹⁵⁸ As it is a regulatory Committee, the Commission is provided greater discretion to amend the scope and impact of the Directive than if it had to go through legislative amendments. The new proposal retains these extensive delegation provisions.¹⁵⁹

2.3.2.3. Vehicles

Directive 2000/53/EC on end of life vehicles¹⁶⁰ limits the use of lead, mercury, cadmium and hexavalent chromium in some vehicles.¹⁶¹ This Directive is the first specific Community environmental product regulation based on Article 175, which deals with environmental protection, rather than on Article 100, the legal base for internal market measures, which was the case for the Directives on batteries and packaging.

The Directive states that the reason to limit the ‘the use of hazardous substances in vehicles and to reduce them as far as possible’ is to ‘prevent their release into the environment, make recycling easier, and to avoid the need to dispose of hazardous waste.’¹⁶²

The Commission develops this reasoning in their explanatory memorandum, stating that:

¹⁴⁹ Commission Directive 98/101/EC, recital 4.

¹⁵⁰ Commission Directive 98/101/EC.

¹⁵¹ *Ibid.* Art. 3(1) (as amended).

¹⁵² *Ibid.* Art. 2(a).

¹⁵³ *Ibid.* Annex I: Batteries and Accumulators Covered by the Directive.

¹⁵⁴ *Ibid.* Art. 3(1).

¹⁵⁵ *Ibid.* Annex II (1).

¹⁵⁶ *Ibid.* Annex II (2).

¹⁵⁷ *Ibid.* Annex II (3).

¹⁵⁸ *Ibid.* Art. 1 (1).

¹⁵⁹ *Ibid.* Art. 30.

¹⁶⁰ OJ L 269/34, 21.10.2000.

¹⁶¹ Dir. 2000/53, Ar. 4(2)(a).

¹⁶² Dir.2000/54, Art. 4(1)(a).

‘Some 25% of the vehicles weight (the so called “shredding residues”) is hazardous waste which is today landfilled, often contaminating the soil and groundwater. This fraction, which amounts to 1.9 million tones of waste per year, represents up to 10% of the total amount of hazardous waste generated yearly in the EU.’¹⁶³

The restrictions on the use of these hazardous substances in the materials and components of vehicles are subject to several exemptions listed in Annex II, as amended.¹⁶⁴ The Directive provides for the ‘substitution principle’, which is intended to prefer the use of as effective and less environmentally harmful substitutes in materials and components by leading to the regulated phase out of their more environmentally harmful competing substances. However, it is open to question if this principle is consistently applied, as exemptions for the continued use of harmful hazardous substances, even when a less harmful substitute exists, and despite the substitute being available on the market place, have been introduced by implementing measures, which are discussed in further detail below.

Directive 2000/53/EC, which provides for partial hazardous substances restrictions, along with the extensive set of exemptions, covers most but not all ‘vehicles’.¹⁶⁵ This means that two and three wheel motor vehicles, and special purpose vehicles, are exempted from the hazardous substance restrictions.¹⁶⁶ Indeed vehicles with more than 9 seats, or that weigh more than 3.5 tonnes (mass) are not covered at all by the Directive.¹⁶⁷ Finally, there are provisions to ensure this Directive’s hazardous substance restrictions are narrowly but carefully confined, and do not clash with other Community provisions.

The scope and extent of the hazardous substance restrictions can be changed under the extensive comitology provisions.¹⁶⁸ The co-legislators, Parliament and Council, delegated to the Commission wide powers to alter provisions of the Directive, under a regulatory committee procedure.

Under the wide provision to make ‘the amendments necessary for adapting the Annexes to this Directive to scientific and technical progress,’¹⁶⁹ the Commission has instigated moves to add to, rather than reduce the number of exemptions to the hazardous substance restrictions,¹⁷⁰ and expand the scope of the exemptions to the hazardous substance restrictions to ‘spare parts.’¹⁷¹

As with some other hazardous substance restrictions, the restrictions do not absolutely prohibit the presence of the hazardous substances; they rather limit them to ultra low levels,¹⁷² to what can be best described as trace levels.

¹⁶³ Explanatory Memorandum, page 3, paragraph 9.

¹⁶⁴ E.G. Commission Decision of 24 January 2005 amending Annex II to Directive 2000/53/EC of the European Parliament and of the Council on end of life vehicles.

¹⁶⁵ "Vehicle" means any vehicle designated as category M1 or N1 defined in Annex IIA to Directive 70/156/EEC, and three wheel motor vehicles as defined in Directive 92/61/EEC, but excluding motor tricycles.

¹⁶⁶ Explanatory memorandum, p.14, Article 3.

¹⁶⁷ Explanatory Memorandum, p.14, Article 2.

¹⁶⁸ Dir.2000/53, Art. 11, Committee procedure.

¹⁶⁹ Dir.2000/53, Art. 11(4)(d).

¹⁷⁰ 2002/525/EC: Commission Decision of 27 June 2002 amending Annex II of Directive 2000/53/EC of the European Parliament and of the Council on end-of-life vehicles (Text with EEA relevance)COM (2002) 2238).

¹⁷¹ Ibid. Recital 1.

¹⁷² Directive 2000/53/EC, Annex II, Note I, p.15: ‘a maximum concentration value up to 0,1 % by weight and per homogeneous material, for lead, hexavalent chromium and mercury and up to 0,01 % by weight per

2.3.2.4. *Electrical and Electronic Equipment*

Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment¹⁷³ (RoHS) requires the substitution of certain heavy metals and brominated flame retardants in electrical and electronic equipment¹⁷⁴. Its key provision is that by 1 July 2006 no new equipment may be put on the market containing the concerned substances, except for refurbished equipment and specific applications mentioned in the annex to Directive.

Specifically, the heavy metals mercury, lead, cadmium, and hexavalent chromium are subject to the RoHS Directive. Also, the brominated flame retardants, PBBs (polybrominated biphenyls), and PBDEs (polybrominated diphenylethers).

The RoHS Directive provides for a number of exceptions to the restrictions. These are detailed in the Annex, and include¹⁷⁵:

- Mercury in fluorescent lamps (partial exemption, details according to type of lamps)
- Mercury in other lamps
- Lead in glass of cathode ray tubes, electronic components and fluorescent tubes
- Lead as an alloy in steel (0.35%), aluminum (0.4%) and copper (4%)
- Lead in solders for servers, storage and storage array systems (until 2010)
- The exceptions in the annex to the RoHS Directive (2):
- Lead in high melting temperature type solders and network equipment
- Lead in electronic ceramic parts
- Cadmium plating (with exceptions)
- Hexavalent chromium as an anti-corrosion of the carbon steel cooling system in absorption refrigerators

In addition, the Annex provides for the re-evaluation of the restrictions on Deca-BDE, mercury in straight fluorescent lamps for special purposes, lead in solders, and light bulbs.¹⁷⁶

The list of exemptions provided for is not static, and the Directive makes provision for adding to or removing exemptions from the list in the annex.¹⁷⁷

The RoHS Directive regulates most but not all ‘electrical and electronic equipment’ (EEE). The RoHS Directive sets down an initial three-part test to determine if an appliance¹⁷⁸ is covered. The scope of the RoHS Directive runs for the most part, parallel to Directive 2002/96/EC on waste electrical and electronic equipment.

homogeneous material for cadmium shall be tolerated, provided these substances are not intentionally introduced’.

¹⁷³ OJ L 37, p.19, 13.2.2003.

¹⁷⁴ Dir. 2002/95, Art. 2.

¹⁷⁵ Dir.2002/95, Annex, Item 1-9.

¹⁷⁶ Dir.2002/95, Annex Item 10.

¹⁷⁷ Dir.2002/95, Art. 5(1)(b)& (c).

¹⁷⁸ The WEEE Directive refers to ‘appliance’ (Art. 11(2), ‘equipment’ (Art 12(1), ‘product’ (Art. 5(1)(b) and Annex IB. Only equipment is defined in Article 3(a).

An example of trade offs concerns the issue of spare parts. A specific exemption is provided for spare parts for the repair of EEE put on the market before 1 July 2006.¹⁷⁹ Spare parts that do not comply with the RoHS Directive can be manufactured after 1 July 2006. These spare parts can only be used in old EEE, that is EEE put on the market before that date. This ensures that old EEE can be maintained and prevented from becoming waste.

However, the exemption is framed to prevent retrofitting new EEE with RoHS non-compliant parts. Exemptions under Community law are interpreted narrowly and this is the case here. Manufacturers who re-use parts of old EEE in new equipment will not be able to use non-RoHS compliant parts after 1 July 2006.

It seems from European Parliamentary Questions on the issue, that some photocopier manufacturers re-use parts several times and these parts may be RoHS non-compliant.¹⁸⁰ The Commission clarified that new photocopiers put on the market after 1 July 2006 could not use non-RoHS compliant parts.

However, the RoHS restrictions apply to new equipment. Only equipment that is marketed as re-manufactured is not new EEE and so could continue to re-use the non-RoHS compliant parts. Producers could bypass the RoHS restrictions by selling old products. This is unlikely, as re-manufactured products sell for a substantial discount, and producers are reluctant to retail their products as second hand or re-manufactured.

Also, whilst non-RoHS compliant spare parts can still be produced for old EEE, this will be a niche area. For example, whilst there are exemptions for the use of leaded solder in chips, the chip manufacturing industry will shift away from lead. Leaded solder chips costs will rise significantly, and will force even those who have been provided with an exemption to use leaded solder¹⁸¹ to move away from its use. In an industry that is dependent on large volumes for low prices, specialized spare part manufacturing is a legal but not economic option.

Whilst this may lead to unintended consequences, for example, stopping the re-use of old equipment, an alternative would be for a producer to seek an exemption under Article 5(1)(b) RoHS Directive.

2.4. The significance of existing product-related legislation for IPP

This final section is divided into two parts. The first part provides an overview of the impact of existing product-related measures in EC waste management legislation on product systems. The second part considers to what extent elements of the IPP approach are in fact reflected in the existing environmental product regulation and, conversely, cases in which the lack of a fully integrated life-cycle perspective in such legislation may lead to unintended detrimental environmental effects.

2.4.1. Impact of product-related provisions in EC waste legislation on product systems

Table 2 provides a synthetic overview of how various provisions in EC waste management legislation discussed above have a direct or indirect impact on product systems. This impact can be summarized as follows.

¹⁷⁹ Dir.2002/95, Art. 2(3).

¹⁸⁰ See: Written Question E-0789/03 by Ria Oomen-Ruijten (PPE-DE) and Alexander de Roo (Verts/ALE) to the Commission. (05 March 2003).

¹⁸¹ Dir.2002/95, Annex Items 6 & 7.

2.4.1.1. *Product concept and design*

Existing environmental product regulation looks to promote ‘better products’ through either explicit product design obligations or through restrictions on the material that can be used in the product.

Explicit environmental design criteria can be taken on board directly by producers or be promoted by Member States pursuant to EC legislation. The measures that Member States can take fall into two distinct categories, discretionary or mandatory, depending on the nature and stringency of the obligations imposed by the relevant Directives.

The WEEE Directive provides an example of largely discretionary measures. Whilst Article 4 of the WEEE Directive explicitly refers to product design, the requirement on the producer to act is conditional on the Member States taking implementing measures.¹⁸² In the absence of Member State action, there is no actual requirement on the producer to produce a product that meets these demands. Indeed, the Directive only provides that Member States shall ‘encourage’ better design, that is design that takes into account ‘dismantling, reuse and recovery.’¹⁸³

The Batteries Directive provides an example of mandatory design requirements. Article 5(i) of Directive 91/157/EC on batteries requires Member States to ‘take measures to ensure that batteries and accumulators cannot be incorporated into appliances unless they can be readily removed, when spent, by the consumer’. Whether this design requirement is policed and enforced is another matter, but it does require, except for where the products are specifically exempted,¹⁸⁴ products using batteries to be re-designed to enable the batteries to be removed.

Also, design changes are required by producers with measures to phase out certain hazardous substances and heavy metals in electrical and electronic equipment,¹⁸⁵ vehicles,¹⁸⁶ packaging,¹⁸⁷ and batteries.¹⁸⁸ The phasing out of certain hazardous substances and substituting them with other substances with a lesser impact on the environment and public health have two objectives. One is to reduce the impact of the products, especially at the waste phase of their life. Another is to encourage innovation in product development, which is also a form of industrial policy.¹⁸⁹

2.4.1.2. *Product marking, labeling and user information*

As can be seen from Table 2 (below) batteries, packaging, and electrical and electronic equipment are now required to carry new marks on the product. These marks impact not only on the look of the product but also on its design process. The production chain needs to be re-designed to add the

¹⁸² Dir. 2002/96/EC, Art. 4: ‘Member States shall encourage the design and production of electrical and electronic equipment which take into account and facilitate dismantling and recovery, in particular the reuse and recycling of WEEE, their components and materials. In this context, Member States shall take appropriate measures so that producers do not prevent, through specific design features or manufacturing processes, WEEE from being reused, unless such specific design features or manufacturing processes present overriding advantages, for example, with regard to the protection of the environment and/or safety requirements.’

¹⁸³ Dir. 2000/53/EC, ELV, Art.4(1)(b); Dir. 2002/96/EC, WEEE, Recital 14.

¹⁸⁴ Dir. 91/157/EEC, Annex I.

¹⁸⁵ Dir. 2002/95, RoHS, Art. 4(1).

¹⁸⁶ Dir. 2000/53/EC, ELV, Art. 4(2)(a).

¹⁸⁷ Dir. 94/62/EC, Packaging, Art. 11.

¹⁸⁸ Dir. 91/157/EC, Art. 3(1).

¹⁸⁹ See Art.6(4) Dir. 91/157/EEC; Art. 6(2) Dir. 94/62/EC; Art.1 Dir. 2002/53/EC and 2002/96/EC.

‘crossed out wheeled bin’ (batteries and electrical and electronic equipment) or ‘recyclable logo’ (packaging). Space has to be found along with CE marks, parts numbering, producer identification, and sometimes national eco-marks (Nordic Swan, Green Dot). Of course, this extra information needs to be explained, with additional information provided on the packaging or inside the packaging.

Producers are also required to provide information to the public or to recyclers (except in relation to batteries) which carries additional responsibilities, such as publishing information in several languages, and making it available on line.

2.4.1.3. Costs

Also, there is a financial cost associated with meeting these measures. Costs which producers have to bear and, if they are able to, will pass on directly, for example through the RECUPEL visible fee, or indirectly, through price rises to the end consumer. Whilst these costs are often relatively low, it would be disingenuous not to highlight such an obvious impact on a product.

2.4.1.4. Production Chain

The nature of a producer’s business changes with product-related waste legislation. Firstly, the producer takes on a financial and logistical responsibility for the product. Producers often have to finance the take back, collection and treatment of the products. Secondly, this feeds back into the supply chain, with producers, distributors, local authorities and recyclers all becoming interlinked in the take back, collection, treatment, reporting of information, and financing. This imposes a relationship on the producer of the product where often none existed before.

2.4.1.5. Industrial Policy

Finally, waste legislation has a less publicized, but more ambitious agenda, that could be described as ‘environmental industrial policy’. This objective is stated through obligations such as to:

‘Improve the environmental performance of all operators involved in the life cycle of the product, e.g. producers, distributors and consumers and in particular those operators in the treatment of the waste product.’¹⁹⁰

This is an ambitious agenda, whose achievement is beyond the reach of waste legislation alone, but none the less reflects a basic objective of Community environmental policy which is also pursued by IPP.

¹⁹⁰ For example, see Art. 1, Dir. 2002/96/EC on WEEE.

Table 2: Provisions in Waste Legislation Impacting Product Systems

	75/442 WFD	91/157 Battery	94/62 Packaging	2002/53 ELV	2002/96 WEEE
Product Design		5	4(1)	4(1)0	4
Hazardous Substances		3(1)	11	4(2)(a)	4(1) RoHS
Prevention	1(a)	Recital 3	1(2)	1	1
Industrial Policy	1(a)(i)(ii)	6(4)	6(2)	1	1
Collection	4	4(1) & 7	7	5(1)	5(2)(b)
Treatment	4	7		6	6(1)
Recovery Target	1(b)(i) No target	N/A	50-65% ¹⁹¹	75-95% ¹⁹²	80-70% ¹⁹³
Re-use Target	1(b)(i) No target	N/A	7(b)	85% - 95%	75-50%
Recycle	1(b)(i) No target	N/A	25-45%	80-85%	80-50%
Marking product		4(2)	8(2) ¹⁹⁴	N/A	8(3)(ii) 10(3) 11(2)
Information Public		8	13	9(2)	10(1)
Information Industry		N/A	13	8(3)	11(1)
Costs	15	7	15	5(1) (4)	8 & 9
Register	14	N/A	12(6)	5(3)	12(1)

¹⁹¹ Dir.94/62, Art.6(a)

¹⁹² Dir.2002/53, Art.7(2).

¹⁹³ Dir. 2002/96, Art. 7.

¹⁹⁴ Commission Decision 97/129/EC establishing the identification system for packaging materials pursuant to Directive 94/62/EC, OJ 20.2.1997, L 50/28.

2.4.2. Elements of the IPP approach in existing legislation

While it has been demonstrated above that existing product-related legislation has an impact on various aspects of product systems, it is also relevant to consider to what extent it reflects basic IPP life cycle thinking and integration criteria, or uses certain instruments and procedures which IPP seeks to encourage.

2.4.2.1. Life Cycle Assessment

The lexicon of ‘life cycle’ is not new to environmental product regulation. Its use has been an explicit or implicit rationale for many environmental product Directives. But, and perhaps crucially, life cycle is just one of several considerations taken into account in the design of existing regulatory measures, and usually a secondary consideration. In practice, it is often relegated behind more straightforward objectives like ‘environmental protection’ and ‘internal market’.

Art. 1(1) of the WEEE Directive¹⁹⁵ and Art. 1 of the ELV Directive¹⁹⁶ consider life cycle as a secondary objective of those Directives. Life cycle techniques were used in the development of the WEEE Directive.¹⁹⁷ It is mentioned as an explicit consideration in the updating of Directive 94/62/EC on packaging and packaging waste.¹⁹⁸ An analysis of the legislative history of Directive 94/62/EC itself makes it clear that life cycle thinking was already a factor taken into account in the drafting of the original Directive.¹⁹⁹

It is harder to find an express reference to ‘life cycle’ thinking in earlier measures. Dir. 91/157/EC on batteries does not mention it, but the 2003 revision proposal makes clear that that it has taken into account life cycle analysis. Indeed, it goes on to claim membership of an ‘IPP legislative portfolio’, when it states:

‘This proposal also takes account of the objectives of the recent Commission Communication in Integrated Product Policy.’²⁰⁰

Given that the proposal comes from the same unit that developed the Commission’s IPP Communication, it would seem rational to presume that this statement is intended as an IPP ‘statement of conformity’.

2.4.2.2. Sustainable resource use

Though ‘prudent and rational use of natural resources’ is a cornerstone of Community environmental policy,²⁰¹ it seems to be only an incidental factor in existing environmental product measures.

¹⁹⁵ Dir.2002/96/EC: ‘to improve the environmental performance of all operators involved in the life cycle of the electrical and electronic equipment, e.g. producers, distributors and consumers and in particular those operators directly involved in the treatment of waste electrical and electronic equipment’.

¹⁹⁶ Dir. 2000/53/EC on end-of life vehicles.

¹⁹⁷ Explanatory Memorandum, WEEE, para 11.2.3., p.25.

¹⁹⁸ Dir. 2004/12/EC recital 3. Also see p.10 Proposal for a Directive amending Directive 94/62/EC on packaging and packaging waste (COM (2001) 729).

¹⁹⁹ Para 2.2., Proposal for a Council Directive on packaging and packaging waste, p.4, 15 July 1992.

²⁰⁰ Ibid footnote 4. Proposal, p.7, para. 5.

²⁰¹ Art.174(1)(3rd indent).

Whilst the issue is mentioned briefly in the WEEE²⁰² and the batteries²⁰³ Directives, and the proposal to the Packaging Directive,²⁰⁴ this brevity should not be a matter of surprise. These measures are concerned more with reducing the harmful impact of waste products and internal market considerations. Pressures on resources could of course be expected to be alleviated by waste prevention and recycling targets. Though waste prevention has always been an explicit objective of EC waste legislation, it has proved very hard to deliver. Reducing waste production by reducing the volume of products consumed – one of the objectives of IPP in our working definition – conflicts with basic economic rationales. This is unsurprisingly, since producers of products are in the business of making and selling more products (at a profit).

2.4.2.3. *Environmental Trade Offs in Product Legislation*

There are trade offs in making legislation: action on one issue may well be at the expense of another. Secondly, legislation may lead to unintended consequences, and some of those consequences may be negative, just as some may be positive.

This section is not a comprehensive survey, and draws from the conclusions on the impact of the Packaging, ELV and WEEE Directives in the UK in a report by the Associate Parliamentary Sustainable Waste Group (APSWG).²⁰⁵ This report provides examples of lower than expected environmental benefits, or unintended consequences that are detrimental to the environment.

For example, APSWG note that whilst ‘packaging has seen an increase in recycling and recovery of packaging and diversion from landfill, environmental objectives to manage waste close to its source and to encourage waste reuse and reduction have been compromised.’²⁰⁶

For End of Life Vehicles the report notes ‘the potential conflicts between light-weighting and recyclability. In evidence BMW Group highlight that a move towards carbon fibre panels could save 200kg from the bodyweight of a car, and over its lifetime 2 tonnes of carbon dioxide. The use of this material would significantly decrease the recyclability of the vehicle and therefore be non compliant with the ELV Directive’²⁰⁷ Indeed, ‘whilst the Directive will benefit waste management policy, the Directive does not necessarily benefit sustainable development and take regard of the Best Practicable Environmental Option.’²⁰⁸

On WEEE, the report concludes that ‘the environmental impacts of the WEEE are significant, with concern over the growth of the waste stream’²⁰⁹ ... However, in relation to the Best Practicable Environmental Option, the environmental benefits of the WEEE Directive are modest. The amount of landfill diversion is relatively modest and the Directive provides little incentive for waste reduction and reuse ... Furthermore even though the largest environmental impacts of WEEE are during their manufacture and use, the WEEE Directive will not be implemented in a way to encourage eco-design ...’²¹⁰

²⁰² Dir.2002/96/EC, recital 1.

²⁰³ Dir. 91/157/EEC, recital 3.

²⁰⁴ Proposal for amending Directive 94/62/EC, p. 10, para. 3.

²⁰⁵ See: ‘Producer Responsibility’ Associate Parliamentary Sustainable Waste Group (2004).

²⁰⁶ *Ibid*, Para 3.2.25.

²⁰⁷ *Ibid*, Para. 4.3.20.

²⁰⁸ *Ibid*, Para 4.3.24.

²⁰⁹ *Ibid*, Para. 5.3.23.

²¹⁰ *Ibid*. Para. 5.3.24.

These examples indicate that unintended effects or lack of environmental effectiveness may result from a shifting of impacts from one life-cycle stage to another, or from a failure to target measures at the most appropriate stage in the life-cycle. They show that the design of some measures was not based on a comprehensive life-cycle approach, which could have helped to make such trade-offs visible and prevent unintended consequences. Theoretically, the IPP approach which is now being advocated by the Commission, if correctly implemented based on adequate information, could avoid such pitfalls.

2.4.2.4. Stakeholder dialogue

One of the key tenets of the IPP approach as articulated by the Commission is on-going stakeholder participation. Traditional regulatory responses have not explicitly adopted this technique. However, this does not mean that there has been a total lack of stakeholder involvement. Regulation has taken on board the input of stakeholders through three routes, first of during the development of the proposals, secondly through explicit consultation provisions in the directives for their updating, and finally, during the legislative passage of the directives.

Legislation does not appear out of nowhere. Commission officials do not decide to publish a proposal after pulling it out of a magic hat, without lengthy and detailed discussions with Member States, interested parties, and other Commission Services. The IPP Communication unpersuasively assumes a previous lack of consultation with stakeholders. It should be pointed out that rules on the process of consulting stakeholders have recently been formalized by the Commission²¹¹ for all its policy initiatives.

Indeed, for much of existing environmental product legislation, the views of stakeholders were taken into consideration during consultations on proposals²¹² or the preparation of the impact assessment.²¹³ Explicit provision has been made for their views to be taken into account during the amendment to some Directives.²¹⁴ Of course, stakeholders can also have their views taken into consideration and on board by members of the Council and of the European Parliament during the passage of legislation. However, the informal or formal consultation of stakeholders in the legislative process may not be as systematic as that advocated by IPP.

2.4.2.5. Voluntary Approach

IPP professes a preference for voluntary solutions over legislation. On the other hand, Community environmental product regulation has opted for the adoption of legislation to address public policy concerns. And, whilst directives offer some flexibility as to how they can be implemented, they are, as they provide legal certainty and form, less flexible than many IPP options.

To date, the Community has opted for a legislative approach to deal with environmental product regulation, which provides Member States with flexible options as to their transposal. For example, Art. 17(3) of the WEEE Directive, and Art. 10(3) of the ELV Directive provide Member States with the opportunity to implement some provisions through 'agreements' with industry. Also, Directive 94/62/EC on packaging offers Member States the opportunity to use market-based instruments to fulfill

²¹¹ See : Commission Communication, Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, (COM (2002) 704).

²¹² See: 94/62/EC p.9, and proposal for a review of 94/62/EC p.32.

²¹³ WEEE, Annex II, pp.34-37, Explanatory Memorandum Packaging 94/62/EC pp, 66-69. 2000/153, E-M, Annex 3, pp.22-23, Batteries review p.31-32.

²¹⁴ ELV Art. 13(ii), WEEE Art. 13(ii), RoHS Art.5(2).

the Directive’s requirements, which have been used in many Member States, for instance in the UK.²¹⁵

Whilst voluntary instruments are to be welcomed,²¹⁶ questions remain about verifying if they deliver on their commitments,²¹⁷ or whether they are suitable to achieve the objectives pursued. In fact, both EC and national environmental product regulations have often arisen from the failure of the market to respond, or voluntary initiatives to deliver.

²¹⁵See: www.dti.gov.uk/sustainability/packaging.htm#Objectives_and_Background_of_the_Directive.

²¹⁶ See for example, CECED, Second Voluntary Commitment on Reducing Energy Consumption from Energy Consumption of Domestic Washing Machines, (2002 - 2008) 31 October 2002, www.ceced.org/energy/issue_wash.html.

²¹⁷ See, Euractiv, Car makers unable to reach CO2 targets of voluntary agreement, 18 November 2003.

Chapter 3: Instruments of IPP

3.1 Introduction

The IPP approach rests on a toolkit of instruments, and calls are made not to use them in isolation from one another but to find the right or « balanced » mix of instruments – a recipe that seem to be closely dependent on the products at stake and that is not necessarily supposed to be generalized. The instruments are indeed proposed to be selected on basis of their effectiveness to achieve the desired environmental results, with a clear preference for voluntary instruments²¹⁸, i.e. those which are only put in action if the stakeholder decides to do so.

Eco-labelling, EMAS, standardisation, environmental agreements, and public procurement all pre-existing instruments that are part of the suggested mix of IPP tools functioning on a voluntary basis, even if not necessarily deprived of a legal framework. Their relevance, functioning and implications are analysed below (sections 3.2 to 3.6).

In addition to those pre-existing tools, three other instruments are analysed in this chapter:

- Product panels (3.7), a new instrument developed specifically for the purpose of IPP, which is currently being applied at the EU level on an experimental basis for two product groups;
- ETAP (3.8), a recent policy initiative focused on the promotion of environmental technologies, which also includes a reference to various IPP-linked instruments, thus providing evidence of the diffusion of the IPP approach as referred to in section 1.8, and which is particularly relevant due to its focus on the promotion of innovation in environmental technologies, a true key element of product policy, especially in the view of the European Parliament;²¹⁹
- Ecodesign (3.9), another new tool being promoted in the context of IPP, and first applied at the EU level through the recent Directive establishing a framework for the setting of ecodesign requirements for energy-using products, which is really a test case of post-IPP Communication policy, shedding light on what a proper mix of instruments might mean when applied to (integrated) product policy.

3.2. Eco-labelling

In the Commission’s own words, the EU eco-label is “a voluntary scheme designed to encourage businesses to market products and services that are kinder to the environment and for European consumers - including public and private purchasers - to easily identify them.”²²⁰

The EU Eco-Label is based on Regulation 1980/2000²²¹ and is part of the broader strategy aimed at promoting sustainable production and consumption. It is a market-based instrument, meant to

²¹⁸ COM(2003)302.

²¹⁹ European Parliament resolution on the communication from the Commission to the Council and the European Parliament on Integrated Product Policy – Building on Environmental Life-Cycle Thinking (COM(2003) 302 – C5-0550/2003 – 2003/2221(INI))

²²⁰ http://europa.eu.int/comm/environment/ecolabel/index_en.htm, accessed Oct. 5, 2005.

²²¹ Regulation 1980/2000 of 17 July 2000 on a revised Community eco-label award scheme, OJ L 237/1, 21.9.2000. This replaced Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme. OJ L 099 , 11/04/1992, p.1.

stimulate both the supply and the demand of greener products. In practice, the process and the division of labor between the EU and national entities can be summarized as follows: the European Union Eco-labeling Board (EUEB) develops ecological criteria for product groups in close collaboration with the Commission. The EUEB is composed of the Competent Bodies (national authorities entitled to award the EU eco-label to the products that meet the criteria) and the Consultation Forum (representatives of consumer NGOs, environmental NGOs, trade unions, industry, SMEs and commerce). The criteria developed by the EUEB are submitted to the Regulatory Committee (made up of governmental experts of the Member States) and then endorsed by the Commission. The award of the eco-label is made by the Competent Body in each Member State. With the revision of the scheme in 2000 three management groups were created to assist the Commission and the Member States in the elaboration of different aspects of the scheme. Of the three groups, the Policy Management Group,²²² the Co-operation and Coordination Group and the Marketing Management Group, the former is specifically entrusted with the task of coordinating the scheme with relevant policy developments, including IPP.

Public authorities are present, within this framework, only in the Competent Bodies. Nevertheless, the Competent Bodies carry out the most important activities in the eco-label scheme: leading the ad hoc working group created to evaluate the introduction of new product groups in the eco-label scheme, leading the preparatory work to develop or revise criteria, receiving applications and awarding the EU eco-label. In addition, national experts sit on the Regulatory Committee, but their position as representatives of Member States or independent experts is hard to assess. The Commission has the task to adopt criteria (after they have been endorsed by the Regulatory Committee) and to ensure the transparency of the whole process by inviting international observers together with the EUEB. It can also select specific groups of products for the scheme (the EUEB enjoys the same right) and drafts the mandates for developing or revising criteria. From a purely administrative perspective, the Commission finances the lead Competent Body in charge of the preparatory work or the preparation of criteria. The stakeholders have several roles: on the one hand they are members of the Consultative Forum which, together with the Competent Bodies, make up the EUEB. On the other hand, they can be part of the ad hoc working groups formed either for preparatory work or to devise/revise criteria. In addition, they are consulted at national level by the Competent Bodies.

While the eco-label has considerable potential for life-cycle coverage,²²³ several problems arise when assessing the degree of stakeholder involvement. On the one hand, as a voluntary scheme, the EU eco-label never had strong support from economic operators (producers, distributors, services and importers).²²⁴ On the other hand, environmentalists are skeptical about it since eco-labeling appears to provide a new green legitimacy for consumption, and underplays the responsibility stated in Agenda 21 to reduce consumption levels.²²⁵ In addition, the multiple opportunities for stakeholder involvement in the scheme do not mean that environmental and consumer protection interests are

²²² The membership of the group, currently suspended because of the on-going revision of the scheme, was not fixed but it practically was a cross-section of the EUEB - mainly representatives from national competent bodies (a few of whom also have functions in their national ministries) and some representatives from industry and NGO; Denmark and the UK paid for the group's consultancy support.

²²³ In the development of criteria all the stages of the product life-cycle can potentially be taken into account.

²²⁴ Eiderström, E. – “Ecolabels in EU Environmental Policy” in Golub, J. (ed.), “New Instruments for Environmental Policy in the EU”, Routledge, London, 1998.

²²⁵ Idem.

those which prevail. Environmental NGOs have pointed out to the heavy industry lobby to water down criteria,²²⁶ and to the fact that several industrial sectors systematically boycott the scheme.²²⁷ A study conducted in 1998, by IEFE and ICEM-CEEM,²²⁸ identified a vicious circle that acts as the main barrier hindering the adoption of the EU eco-label by companies: companies either do not know about the EU eco-label or have not heard of success stories; consumers do not know the label and therefore do not ask for it; retailers hardly ever offer eco-labelled products because there are few of them; and because retailers do not promote such products the consumer does not know about them. Indeed, different studies carried out in several Member States also underline the poor level of consumer awareness of the label. Thus, for instance, the EU eco-label is known by 1% of the consumers in Germany, 0,4% in Italy and 1,2% in Spain.²²⁹ The differentiated consumer response to the label leads to different marketing strategies: a Swedish paint producer for instance sells an eco-labeled product in Sweden (where consumers are more aware of the label) and the very same product without the label in Belgium.²³⁰

Two additional barriers can also be identified: the financial and administrative burden on one hand and the limited added value on the other. The costs for the label in Belgium for instance are: 400 Euro (standard fee, a 25% discount is applicable to SMEs) application fee plus an annual fee of 0,15% of the product's annual sales in the EU.²³¹ Costs for tests and verification are not included and those seem to be the biggest problem for SMEs.²³² The relatively high total costs have been clearly identified as a problem by industry during the Expert Workshops preceding the adoption of the Commission Communication on IPP.²³³ The EU eco-label, once obtained, can be used until the end of the validity of the criteria for the product group in question; normally criteria are valid for 3-5 years, which means that a new application is needed when the criteria are changed. Some industrial players complain not only about the application process being expensive, but also about the ethics behind having to pay for being environmentally-friendly while non-applicants do not have to pay anything. Moreover, the fee money paid for the eco-label in Belgium goes directly to the Treasury and is not used for marketing activities for the scheme. This lack of transparency and the apparent loss of the tax is definitely not an incentive for producers to apply.

In addition to the financial costs, the administrative process of applying for the label seems to be cumbersome especially for SMEs. There seem to be five stages²³⁴ a company has to go through to apply: first, they have to be interested. Second, they have to conduct a feasibility study in order to assess their capacity of meeting the criteria. Third, they have to undertake a cost-benefit analysis and

²²⁶ Idem.

²²⁷ European Environmental Bureau – *EEB Evaluation of the European eco-label Criteria and Scheme*. “What we wanted – what we got ...”, July 2004, on http://www.eeb.org/activities/product_policy/EEB-Ecolabel-evaluation-What-we-wanted-what-we-got-July2004.pdf.

²²⁸ IEFE & ICEM-CEEM – *Project for the Promotion and Diffusion of the EU Eco-label in Italy and the Benelux. Final Report Submitted to the European Commission DG XI.E.4*, February 1, 1998, on http://europa.eu.int/comm/environment/ecolabel/pdf/market_study/bocconi.pdf.

²²⁹ Rubik&Frankl quoted in EVER Study, p. 20.

²³⁰ Interview Belgian Competent Body, April 19, 2005.

²³¹ Minimum 500 Euro and maximum 25,000 Euro per product group and per applicant.

²³² Vermeire, I., Le Roy, D., Aenderkerck, V., Vanlangendonck, C. – *Development and Implementation of Marketing Actions for the European Eco-Label in Belgium*, February 2003, p. 15.

²³³ Summary of Discussions at the 7th Integrated Product Policy Workshop. Economic Instruments. Brussels, 19th June 2001, p. 4.

²³⁴ Idem, p. 8 .

make the decision. Fourth, they submit an application and finally have to set up a marketing strategy for the eco-labeled products. A study conducted by BECO²³⁵ identified bottlenecks in each of the five stages, ranging from lack of information in the first phase to the difficulties of collecting data in the second (potential applicants often only execute the last steps of the production cycle and cannot influence the environmental characteristics of their suppliers' products) and to the questionable validity of laboratory tests in the fourth.

This relatively complex and expensive procedure does not seem to have an added value so that companies are eager to engage in it. Most companies already invest considerable means in environmental protection just by having to live up with the environmental legislation in place. Why would they invest in a label for which there is no market pressure at the moment? In fact, a recent study shows that only 2% of Belgian consumers know, interpret correctly and have confidence in the EU Flower.²³⁶ Only very few companies are willing to be pro-active and address that niche market of environmentally aware consumers.

Figures seem to confirm the fact that the EU eco-label does not have many supporters in the market and is not very successful. Thus, criteria have been drafted for some 23 product groups (out of which 5 are under revision) and a further 5 product groups are under development;²³⁷ 224 licenses for the use of the logo have been awarded throughout the EU so far.²³⁸ These figures do not account for the differences among countries and product groups, which are highly imbalanced. Thus, only a few of the product groups account for most of the products labeled. In 2000, when only 15 product groups were developed, four of them (paints and varnishes, textile products, footwear, tissue paper) accounted for 85% of all products labeled.²³⁹ At the same time, 75% of the products labeled were concentrated in five countries.²⁴⁰ In addition, 50% of the product categories currently show applicant levels of between 0 and 3.²⁴¹

Nevertheless, the eco-label does not seem to be an unsuccessful instrument per se. At the national level it seems to be working quite well. In Germany for instance, about 600 companies and 3,800 products use the Blue Angel environmental label. And about half of the consumers in West Germany and almost a third in East Germany take it into account when they go shopping.²⁴² The scheme also seems to be working at smaller regional levels as well. For instance, there are 680 licenses for the Nordic Swan in Sweden alone today, covering 60 product groups.²⁴³

Another important element that needs to be taken into account when assessing the success, or lack thereof, of the EU eco-labelling scheme is the fact that its success cannot be evaluated by numbers

²³⁵ Quoted in Vermeire et. al., *op. cit.*, p. 10.

²³⁶ Rousseau, C. et al. – *Label écologique européen: quels impacts sur les choix de consommation?*, Bruxelles, CRIOC, 2004, p. 15.

²³⁷ http://europa.eu.int/comm/environment/ecolabel/product/index_en.htm.

²³⁸ http://europa.eu.int/comm/environment/ecolabel/whats_eco/greenstore_en.htm.

²³⁹ Taylor Nelson Sofres Consulting – *Investigation of the market impacts and penetration of the European Eco-label over the years 1992-2000 and 2001-2004. Final Report*. December 2001, p. 4, on http://europa.eu.int/comm/environment/ecolabel/pdf/market_study/sofresoutlookphase1_1201.pdf.

²⁴⁰ *idem*.

²⁴¹ EVER Study, Interim Report, p. 19, on http://europa.eu.int/comm/environment/ecolabel/pdf/news/ever_interimreport.pdf.

²⁴² http://www.blauer-engel.de/englisch/navigation/body_blauer_engel.htm.

²⁴³ <http://www.svanen.nu/Eng/products/>.

alone. Many people involved in the scheme both at the national and at EU level point to the indirect but important effects of the Label. Thus, for instance, a study²⁴⁴ carried out by AEAT in 2004 at the request of DG Environment identified the following indirect uses of the eco-label criteria:

- by another eco-label scheme
- in public procurement calls for tender
- in private procurement calls for tender
- by companies as a benchmark for their own products or as a target to improve their environmental performance
- to generate Type III labels (environmental product declarations) or recommendations on how to make green claims (Type II)
- to generate minimum environmental requirements applicable to all products of a product category on the market
- in “New Approach” as a basis for establishing whether companies have complied with “essential requirements”
- to raise stakeholder awareness of the environmental impact of products
- as a basis for establishing fiscal measures to promote green products

In addition to taking the indirect effects into account, a country-by-country analysis of the implementation of the EU eco-labeling scheme would be needed for clearly assessing its success. Given that the national Competent Bodies are in charge of promoting the scheme and dealing with applications at the national level, the resources they have at their disposal, as well as the national legislative framework in which they work, are of extreme importance. Thus, for instance, there are only two people working on the scheme in Belgium who are not only supposed to attend the meetings of the EUEB and of all the technical committees, but also to be pro-active and publicize the scheme nationally. As a consequence, they can only reply to requests and are not able to follow-up actively on producers who showed interest in the scheme. Only 3 Belgian companies have obtained the EU eco-label, one of which applied at the request of its Danish business partner.²⁴⁵

The EU scheme is scheduled for revision in 2006. There is no official position yet concerning the points that will be revised, as an assessment study is currently being developed by Bocconi University. Nevertheless, there are a few concepts that will definitely be discussed within the revision process and that point to current problems in the scheme. They mostly concern: a wider role of Competent Bodies and a possible merger of EMAS and eco-label national Competent Bodies,²⁴⁶ legal personality and enhanced role for the EUEB,²⁴⁷ the creation of a graded eco-label,²⁴⁸ mutual recognition of labels,²⁴⁹

²⁴⁴ AEAT in Confidence – *The Direct and Indirect Benefits of the European Ecolabel – Final Report*, November 2004, on http://europa.eu.int/comm/environment/ecolabel/pdf/market_study/benefitsfinalreport_1104.pdf.

²⁴⁵ Interview Belgian Competent Body, April 19, 2005.

²⁴⁶ This would seem to make administrative charges easier and to encourage companies to apply for both systems. Nevertheless, in practice it would be extremely hard to achieve, given the different legal status of the Bodies in the different Member States and the different nature of the two instruments.

²⁴⁷ Currently, the process of criteria development takes on average two years, out of which at least six months are lost because of the internal decision-making mechanisms of the Commission. Criteria, once agreed on, need to be formalized through a Commission decision – an official document that has to go through all the stages of adoption within the institution (inter-service consultation, translations, etc). If the EUEB would be entrusted, as a body with legal personality, with the formal adoption of criteria, the whole process would be reduced.

²⁴⁸ In order to satisfy producers who argue that eco-label criteria are too strict and those who argue that they are too loose, the idea has been launched to develop several sets of criteria for the same product group. While the

and a thorough revision of the administrative set-up. An interim report on the revision of the Scheme (jointly with EMAS) has been recently published. It summarizes part of the relevant literature and the preliminary conclusions of a series of interviews, but does not offer additional information as to the changes to be made to the scheme.

Despite its questionable success, the EU eco-label scheme is the only concrete life-cycle based EU product policy, given the current status of IPP.²⁵⁰ Moreover, the EU eco-label community seem enthusiastic about IPP, as it offers new opportunities for the Scheme, which has operated with little or no support from other policy measures so far.²⁵¹ Thus, within the instrument-mix approach of IPP, the EU eco-labeling scheme may be reinforced through the interaction with other instruments and policy approaches (using for instance the eco-label for public procurement). In order to better assess the practical working of these synergies, members of the EUEB declared their intention to be closely involved in the IPP pilot projects.²⁵² This seems to be happening in practice as for instance, the UK representative on the EUEB, who chaired the Policy Management Group in 2003 and 2004 is currently involved in the mobile phone pilot project as well as chairing the IPP working group on product information.

The emerging IPP strategy inspired a series of discussions within the EUEB Policy Management Group as to how the eco-label could be developed in the new framework and what the new framework should actually look like. The visions discussed took into account the integrative, life-cycle perspective of IPP, and proposed a product chain information system.²⁵³ This system would integrate environmental management systems (such as EMAS), environmental product declarations and eco-labels, by making information for one usable for the others thus encouraging companies not only to implement environmentally-sound management systems, but also to produce environmentally-friendly goods. At this time, however, it does not seem that these proposals have been taken up by the Commission in its official IPP documents. Nevertheless, they might reappear on the agenda during discussions in the working groups or the pilot projects.

To review, the EU eco-labeling scheme is potentially a good instrument, with good coverage of the product life-cycle stages and multiple opportunities for stakeholder involvement. Nevertheless, a series of structural weaknesses such as the long criteria development process and the lack of response from the market render it highly inefficient. The on-going revision process might find remedies and transform the scheme into a valuable asset for the IPP instrument mix. However, this depends on the

Commission seems to be going towards a three-layer system (three Flowers for the top 5% of the products, two Flowers for those between 5-25% and one Flower for 25%-50%)²⁴⁸, other proposals seem to favor a simpler, two-level system (with a distinction between “gold” and “normal” label).

²⁴⁹ A system should be developed in which a product having a national eco-label could be automatically eligible for the EU Flower. This would enhance the perception of the label and promote it more visibly in the eyes of producers and consumers. Nevertheless, a series of practical problems would have to be solved, such as differences in criteria between national and EU schemes.

²⁵⁰ European Environmental Bureau, p. 29.

²⁵¹ European Union Eco-labeling Board, Policy Management Group – *Possible synergies between the EU Eco-label and other product-related instruments and tools*, September 2004, p. 5, on http://europa.eu.int/comm/environment/ecolabel/pdf/work_plan/mgtgroups/policy/backgdpapersynergiespmg_300904.pdf.

²⁵² *Ibid*, p. 14.

²⁵³ *Possible vision for how the eco-label can develop in a new IPP framework*, on http://europa.eu.int/comm/environment/ecolabel/pdf/work_plan/mgtgroups/policy/ippframework.pdf.

willingness of public authorities, at all levels, to commit to actively promoting the scheme and to rendering it more attractive to industry. This might break the vicious circle in which the EU Scheme is currently stranded. Nevertheless, stakeholders expressed from the very beginning of the IPP development process their reticence concerning the use of the eco-label. Thus, during the discussions in the Working Group 6 at the Stakeholders’ Conference on IPP in March 2001, participants said they found it difficult to understand the emphasis on the eco-label and EMAS given their limited success to date.²⁵⁴ Moreover, this focus could be a barrier for SMEs,²⁵⁵ due to the reasons described above. Given the fact that SMEs represent around 90% of all companies in the EU, then the dimension of the problem is even more obvious. Maybe the reform of the label should have preceded its inclusion on the list of IPP implementation tools, in order to ensure its working capacity before relying on it to achieve results within the IPP framework.

Despite the enthusiasm of the EU eco-label policy-making community around IPP (that has not been turned into concrete measures by the IPP policy-makers yet), it seems that stakeholders do not make the link between the two. As for the other voluntary instruments under scrutiny in this report, EMAS and Voluntary Environmental Agreements, eco-label is considered in isolation, as a tool to be considered mostly in the national context, while IPP is seen more as a philosophy than as an actual policy that needs to be implemented. If policy makers, both at the national and at the EU level, do not make a clear and strong link between the two, industry should not be expected to take the lead (based on their attitude towards the label so far).

3.3. The European Eco-Management and Audit Scheme (EMAS)

The EU Eco-Management and Audit Scheme (EMAS) is a voluntary management tool for all public and private sector organizations to evaluate, report and improve their environmental performance. Originally restricted to companies in industrial sectors, the scheme has been available since 1995.²⁵⁶ Since 2001²⁵⁷, it has been open to all organizations, both in the private and the public sectors. Despite the different ways in which an EMAS can be conducted, according to the profile and needs of each organization, there are several mandatory steps that need to be taken in order for the EMAS registration to be awarded. These steps include an environmental review, the drafting of an effective environmental management system, an environmental audit and a statement of environmental performance. Thus, as opposed to the eco-label scheme described above, which focuses on the environmental performance of particular products, EMAS deals with the overall environmental performance of an *organization*. This performance is to be evaluated on the basis of the direct and indirect environmental impact of the organization’s activities, products or services. Thus, in principle, product-related impacts are covered by EMAS, though the EMAS Regulation recognizes that an organization may not have “full management control” over all product-related issues.²⁵⁸ EMAS is based on the international standard ISO 14001, but goes beyond its requirements by adding four additional

²⁵⁴ The IPP Green Paper: Launching the Stakeholder Debate Conference Report. Borschette Conference Centre, Brussels, 8-9th March 2001, p. 27.

²⁵⁵ Ibid.

²⁵⁶ Council Regulation (EEC) No 1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme. OJ L 168/1. 10 July 1993.

²⁵⁷ Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS). OJ L 114/1. 24 April 2001.

²⁵⁸ Ibid., Annex VI, para. 6.3.

dimensions: legal compliance, employee involvement, binding annual improvement of environmental performance and the need for the registered sites to communicate their impacts on the environment.

Within this framework, the tasks of the Commission are to develop and supervise the scheme at the EU level, to co-ordinate promotion activities (it has already set up an EMAS Helpdesk), to ensure proper implementation, to keep and make public the register of EMAS verifiers and EMAS registered organizations, to provide technical support to Candidate Countries in setting up the structures for the implementation of the scheme, and to chair the Art. 14 Committee (the steering committee of EMAS; it represents member states and interest groups). As for the Member States, they are in charge of creating the registration and verification scheme at the national level. In practice, this means that they designate a Competent Body²⁵⁹ and an Accreditation Body.²⁶⁰ Accreditation Bodies, in their turn, accredit EMAS verifiers whose mission is to check the organizations' compliance with the EMAS registration procedures and the reliability of the information provided. Member States also need to promote the scheme and to establish special assistance measures to help SMEs register and comply.

From a formal point of view, stakeholders only sit on the Article 14 Committee. They can also be represented in the national competent bodies, but this is different in each national context. The organizations that take part in the EMAS scheme need to demonstrate an open dialogue with all stakeholders, but this is difficult to assess in practice and it does not imply any oversight or control capacity. This lack of involvement in the actual implementation of the EMAS scheme has led NGOs to fear that EMAS might turn into an instrument that will be used instead of, and not in addition to, public authority control.

The academic analyses of the scheme have shown that the most powerful participation leverage is the granting of regulatory relief (such as less frequent inspections) for registered companies. Nevertheless, the possibility and scope for a lighter regulatory touch are primarily nationally specific since they are related to the national regulatory traditions.²⁶¹ In Germany for instance, the granting of regulatory relief²⁶² has led to the highest EMAS registration rates in the EU.²⁶³ Other motives detected in the

²⁵⁹ Competent Bodies are independent and neutral and are responsible of issuing registration numbers to the organizations that have successfully completed the EMAS registration steps, collecting registration fees, refusing, suspending or deleting organizations from the EMAS national register, responding enquiries concerning the register. The Competent Bodies from all Member States are engaged in a peer review process (they meet at least once a year) in order to ensure consistency across the EU.

²⁶⁰ “An Accreditation Body is an independent, impartial institution or organization responsible for the accreditation and supervision of environmental verifiers and designated by the Member State. Member States may use existing accreditation institutions, the EMAS Competent Body or designate any other appropriate body. The Accreditation Body establishes, revises and updates a list of environmental verifiers and their scope of accreditation (according to NACE codes) in their Member State. Changes to this list have to be communicated to the Competent Body and the Commission. Consistency of procedures relating to the verification process is ensured by a peer review process of all Accreditation Bodies which meet at least once a year in the "Forum of Accreditation Bodies" (FAB) to exchange information and disseminate best practice. The FAB develops guidance in the field of accreditation, competence and supervision of environmental verifiers”.
(http://europa.eu.int/comm/environment/emas/about/work_en.htm).

²⁶¹ Glachant, M., Schucht, S., Bultmann, A., Watzold, W. – *Companies' Participation in EMAS: The Influence of the Public Regulator*, Business Strategy and the Environment, 11, 254-266, 2002.

²⁶² “In Germany [...] public authorities provide more information and subsidies to EMAS participants and only grant regulatory relief to EMAS registered companies”. Watzold, F., Bultmann, A., Eames, M., Lulofs, K., Schucht, S. – *EMAS and Regulatory Relief in Europe: Lessons from National Experience*, European Environment, 11, 37-48, 2001.

literature for adopting EMAS are: continuing improvements in environmental performance, identifying weaknesses and potential uses of energy sources, motivating employees, improving the image of the company, increasing legal certainty, improving internal organization and documentation, detecting and minimizing environmental and liability risks and reducing specific environmental impacts.²⁶⁴ According to a recent study commissioned by the European Commission within the review of the Scheme, the main drivers pushing companies to register are mainly economic and strategic (competitive improvement, legal compliance, etc.), while environmental reasons such as the reduction of environmental impacts lag behind.²⁶⁵

Nevertheless, except for Germany, which accounts for more than half of the total number of EMAS registered sites and organizations in the EU, the scheme does not seem to be too successful.²⁶⁶ This might be due to the capacity, and traditions, of member states to grant regulatory relief in exchange for EMAS registration, as shown by Glachant et al., but it could also be related to a series of other factors such as the nature of the Competent Bodies and the control capacity they possess (public authorities vs. chambers of commerce). Thus; for instance, the high number of EMAS-registered sites in Germany could be justified by the fact that the Competent Bodies are in fact Chambers of Commerce, that is private bodies, as opposed to the public nature of the Competent Bodies in Belgium for instance. This distinction between private and public bodies could entail different degrees of control and EMAS-registration based on looser or stricter interpretations of the Regulation.

One of the main barriers identified by companies and organizations to EMAS registration is the fact that EMAS prescribes an obligation to improve, which in turns means yearly progress in each of the indicators. This seems to be a rather hard objective to achieve in practice and organizations argue that progress should be assessed over a longer time span, to allow for short-term fluctuations. ISO 14001 does not impose this obligation, but only request proof of the willingness to improve, which to a certain extent makes it more attractive for companies. Another strong barrier, especially for SMEs, is the cost of implementation (mostly related to the cost of external consulting and verification).²⁶⁷ The list of barriers identified in the literature continues with the lack of customer interest and the lack of recognition and positive rewards by public institutions in certain cases.²⁶⁸

Still, as in the case of the EU eco-labeling scheme, success cannot be assessed on figures alone. EMAS also has important indirect effects, among which the most important is its role as an inspiration for other schemes. In the Region of Brussels for instance, EMAS was taken as a model by the regional public authorities when they created a new label for companies, “enterprise éco-dynamique”. This label was created to respond to the needs of the service sector companies of the Region, for which EMAS was not the best suited tool.

Even when companies do register for EMAS, the results of the actual implementation of the scheme are mixed. A recent study shows that differences between companies using an environmental management system and those who do not in what concerns improvement in resource use and

²⁶³ http://europa.eu.int/comm/environment/emas/pdf/5_5articles_en.pdf.

²⁶⁴ Morrow, D., Rondinelli, D.- *Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification*, European Management Journal, vol. 20, no. 2, pp. 159-171, 2002.

²⁶⁵ EVER Study, p. 8.

²⁶⁶ http://europa.eu.int/comm/environment/emas/pdf/5_5articles_en.pdf.

²⁶⁷ EVER Study, p. 9.

²⁶⁸ Ibid.

emission levels is statistically not significant.²⁶⁹ Also, an EMAS certification is by no means a guarantee of absolute regulatory compliance.²⁷⁰ On the other hand, EMAS registration does seem to have positive effects on the introduction rate of environmental innovation in companies²⁷¹ and on the procedural aspects of environmental management (recording of environmental data, etc.).²⁷² Nevertheless, the internal administrative benefits seem to be limited, especially if we consider the significant number of drop-outs from the scheme.²⁷³ The main reason for abandoning the scheme is precisely the lack of benefits, both in terms of internal organization and external recognition, as compared to the costs implied by participation.

Despite the mixed picture of EMAS throughout the EU, one thing seems to be clear: its success, or lack thereof, depends mostly on the attitude of public authorities (national or regional, according to the division of power in each Member State), on their willingness to provide regulatory relief for participating companies and on their pro-activeness. The latter can even lead to extreme applications, such as the compulsory nature of EMAS for certain enterprises and organizations²⁷⁴ in the Walloon Region in Belgium, which completely deny the voluntary nature of the instrument. Nevertheless, it appears that despite the fact that they are obliged to register for EMAS, the enterprises that do so appreciate the advantages of the system (legislative certainty, putting order into one’s business, etc.) once they have implemented it. This only reinforces the extremely important role of public authorities in “pushing” for EMAS; the first step towards doing so is by themselves setting an example registering their own sites. The Belgian government seems to be very much aware of this, as they have decided that all federal services are to implement EMAS by 2007.²⁷⁵ The high influence that the attitude of public authorities has on the number of EMAS registrations is confirmed by the studies on EMAS pilot projects. Thus, EMAS uptake in the Member States has been directly linked to the level of information and funding available at the national level. More precisely, the number of EMAS pilot projects was, at an early stage, directly proportional to the number of EMAS registrations.²⁷⁶

Within the framework of IPP, EMAS is a potentially good instrument, as it focuses on production processes and management, both in companies and organizations, thus virtually covering the entire life-cycle of a product. Nevertheless, given that the success of EMAS depends on the attitudes of the national and regional authorities, a clear link should be made between the EU-level IPP and a nationally/regionally applied voluntary instrument. In the Belgian case for instance, there is a clear separation between IPP and EMAS, given that IPP, as any “product policy”, is a federal competence, while EMAS is a regional one and the coordination between the two bodies is far from ideal. If this lack of coherence can happen in a national context, then the difficulties of integrating such an instrument in an EU-level framework are obvious. Stakeholders themselves, when consulted by the Commission on the IPP Strategy, expressed their reticence towards using EMAS given the low take-up by industry.²⁷⁷

²⁶⁹ Hertin et al. quoted in EVER Study, p. 3.

²⁷⁰ Dahlstrom et al. quoted in EVER Study, p. 4.

²⁷¹ Rennings et al. quoted in EVER Study, p. 4.

²⁷² Dahlstrom et al. quoted in EVER Study, p. 4.

²⁷³ For a more detailed discussion of drop-outs see EVER Study, p. 6.

²⁷⁴ In the Walloon Region EMAS is compulsory for public enterprises (such as water treatment plants, waste collection enterprises, etc) and for organizations that receive public subsidies.

²⁷⁵ <http://www.belgium.be/eportal/application?pageid=contentPage&docId=39489>.

²⁷⁶ EVER Study, p. 7.

²⁷⁷ The IPP Green Paper: Launching the Stakeholder Debate Conference Report. Borschette Conference Centre, Brussels, 8-9th March 2001, p. 27.

The Scheme is currently undergoing a review process, together with the EU eco-label. There are no indications as to the reforms to be made, but they will most probably concern the relationship between EMAS and Corporate Social Responsibility, between EMAS and the EU eco-label, and making EMAS global, among others. The Interim Report of the review process, recently published, limits itself to a review of the relevant literature and to a series of preliminary conclusions from interviews and does not provide additional information on the future reform measures.

3.4. Standardization

3.4.1. New Approach and standardization

The New Approach legislation created in 1983 is a good example of governance whereby the participation of private actors increased substantially due to information dependency: the European Commission is dependent on the producers for information regarding products and markets.

New Approach, officially called “New approach to technical harmonization and standardization”, was primarily developed as an instrument for the creation of the European internal market. The EC Treaty left the possibility for the introduction of trade restrictions through its legislation (Art. 29-30) and in its jurisprudence (cf. *Cassis de Dijon*), if essential requirements (e.g. health, consumer safety and protection of the environment) were threatened. To avoid possible distortions of the internal market without ignoring the public interest, the EU legislated to harmonize the national technical regulations.²⁷⁸ This led to a very slow, rigid and technically complicated legislation.

The introduction of the New Approach directive transformed this slow and technical legislation, which, in addition, was burdened by unanimous decision making, into a lean legislative act that focused on essential requirements.

In New Approach directives the legislative work is restricted to the formulation of ‘essential requirements’ with respect to safety, health, consumer safety and environmental protection. The actual harmonization task is then delegated by a mandate to private European standardization bodies (CEN, CENELEC and ETSI). New Approach legislation thus combines the political nature of a directive formulated by public authorities with the technical and voluntary nature of a standard crafted by private actors.

In the first, legislative, step the directive is set up following the co-decision procedure (Art. 251 EC Treaty) in combination with advice from the Economic and Social Committee. The directive contains the ‘essential requirements’ that refer to the basic safety requirements representing the public interest. The essential requirements serve as a basis for the Commission mandate to the European standardization bodies.²⁷⁹

European standardization bodies are essentially associations of national standardization bodies. These national bodies form a privileged group of “full members” with voting power within CEN and CENELEC. The other members, namely, associations of industry, SMEs, environmental associations (e.g. ECOS) and consumer associations (e.g. ANEC) are only granted the status of “associate

²⁷⁸ European Commission, *Guide to the implementation of directives based on the New approach and the Global approach*, Luxembourg, Office for Official Publications of the European Community, 2000

²⁷⁹ Ibid.

membership” or socio-economic partners without voting power. The non-voting members have access to the different decision-making arenas (commission, national inquiries), but without voting rights their strategies to influence a standard are limited to persuasion and lobbying. Despite the subsidies the Commission grants to public interest groups such as ECOS, they have very limited means to fulfill their tasks in standardization (e.g. in the case of ECOS there is only one full-time employee). For the work in the technical committees ECOS relies on a network of experts. Through its network of experts ECOS managed, in 2003, to participate in 27 meetings of technical standardization committees (some of which occurred in ISO context).²⁸⁰ To put the formidable task of ECOS in perspective it is worth considering that CEN alone has over 400 Technical Committees and working groups.

It is precisely in these Technical Committees and working groups that the development of standards takes place. The draft standards created in these working groups are sent to the different members, namely the national standardization bodies. These national standardization institutions subject the draft standard to a public inquiry.

During the development of the actual standard an effort is made to proceed by consensus. Consensus is understood to be the “lack of sustained opposition”. Some authors consider the use of the consensus rule to be the natural result of the voluntary nature of product standards.²⁸¹ The standards emanating from the new approach legislation are voluntary standards, meaning that producers do not need to comply with them if they find other ways to comply with the essential requirements of the directive. Without consensus, the voluntary standard loses some of its relevance if sizeable segments of producers refuse to adopt the voluntary standard.

Once the procedure within the standardization bodies is finished, the standards are submitted to the Commission for publication of their references in the Official Journal of the European Union. The Commission has the option to refuse the publication if it feels that the scope or terms of the mandate were not respected. The Member States and the Commission can use the “safeguard procedure” to prevent publication or remove references if the essential requirements are not, or are only partially, complied with. However, no systematic control or approval is provided for the final standards.²⁸² Moreover, the standards remain voluntary, which implies that the user can always opt for another means of providing proof of conformity with the essential requirements.

The New Approach method has been criticized, but has already been used for more than 20 directives and produced as many as 2165 standards.²⁸³

Since its beginnings, European standardization has not only expanded in volume but has also undergone a process of evolution. The latter seems to develop somehow in parallel to the

²⁸⁰ ECOS, *Annual Report 2002/2003*, Brussels, ECOS, 2004.

Jeanson, M., *ECOS NGO active at European level, Presentation at the Commission workshop on integration of environmental aspects into standardization*, Brussels, June 11th 2004.

²⁸¹ Vos, E., *Institutional Frameworks of Community Health and Safety Legislation: Committees, Agencies and Private Bodies*, Oxford, Hart Publishing, 1999.

²⁸² Falke, J., *Achievements and Unresolved Problems of European standardization*, pp.187-224 in C. Joerges, K.H. Ladeur & E.Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations*. Baden-Baden, Nomos Verlagsgesellschaft, 1997.

²⁸³ European Commission, *Communication from the Commission to the Council, the European parliament and the European economic and social committee. Integration of Environmental Aspects into European Standardisation*, COM (2004)130 final p.7

development of IPP. Standardization appears to position itself within the sustainable development policy as a blueprint for its implementation.²⁸⁴ In addition, there has been a call to integrate environmental requirements into standardization since the 6th European Environmental Action Plan (2002).

The Commission has organized several activities (consultations and inquiries) during the past years to support the use of New Approach legislation and the work of standardization bodies to further sustainable development. These activities resulted in a Communication of the Commission (COM(2004) 130 final) with respect to integration of environmental aspects in European standardization, which contained explicit references to IPP. Similar activities for the integration of environmental aspects were undertaken by CEN. In addition, a strategic advice body related to environmental issues, was set up to follow environmental issues in CEN and advise CEN with regard to the European environmental policy. An environmental helpdesk was also created to support the technical committees. Finally, representation of environmental interests was increased through the admission of ECOS as an “associated member”.²⁸⁵

When we compare the elements of the IPP policy, its principles and requirements, with the characteristics of New Approach standardization some elements plead in favor of a combined use of both. The important need for information and expertise to implement the lifecycle approach turns standardization bodies into promising partners for the implementation of IPP. Furthermore, New Approach can be used as an instrument to incorporate market-oriented thinking and market actors into IPP: providing economic insight, in addition to the environmental element, of the three pillars of sustainable development.

New Approach legislation may seem to offer advantages for the implementation of IPP, but there are some shortcomings that need to be taken into account. One of the shortcomings is the limited input of the public authorities during the development of the actual standards by the standardization bodies. The input of the public authorities is restricted to fairly short mandates, which most often only contain items regarding the essential requirements, the description of the legal bases, the planning, the obligation to report, and the coordination with other standardization bodies. In some cases, the mandate can require the participation of particular groups (e.g. public interest groups) during the standardization procedure. The Commission can assist as an observer to the development of the standard, but does not use this opportunity in a systematic fashion. The co-operation guidelines between the standardization bodies and the European Commission could be an opportunity for control, but they seem to be more of a compilation of vaguely formulated intentions than a real set of concrete procedures and rules. This situation accentuates the independent nature of the standardization bodies.

The function of the guardian of the public interest and quintessence of legitimacy which public authorities embody could be partially performed in standardization by a significant and balanced representation of the different (public) interest groups. This is an option that has been promoted by the European Commission for a long time. In its Green Paper of 1990, the Commission suggested the

²⁸⁴ Enterprise Europe, Strategies for energy and environment-what can standards do?, *Enterprise News Update*, Brussels, 26/9/2002 online <http://europa.eu.int/comm/enterprise/library/enterprise-europe/news-updates/internal-market/20020926.htm>.

²⁸⁵ CEN, *CEN Standardization and the Environment*, CEN, 2004.

introduction of a European Standardization System in which the role of the different participants in standardization would be clearly defined, and a stronger involvement of public interest groups would be achieved.²⁸⁶ This call was motivated by the criticism the Commission received concerning the delegation of safety requirements to private actors. It was meant to achieve more transparency, legitimacy, and coordination of the procedure. The attempt at reform embedded in the Commission Communication on standardization encountered strong resistance from the standardization bodies, who refused the suggested reform as well as an enhanced involvement of interest groups in the European standardization activities, claiming that those changes would undermine their independence.²⁸⁷ Despite this resistance, the Commission has stressed the importance of active participation of public authorities and interest groups in the standardization process and policy.²⁸⁸

The Commission emphasis on strong direct stakeholder participation in the European standardization process seems to be diametrically opposed to the role national standardization institutions see for themselves in the European standardization process. The view that national standardization institutes are the essential components of the European standardization process and that they infuse the necessary attention and representation of public interests in the process is the predominant view in European standardization. The national standardization institutions are responsible for the collection and representation of the various national positions. They perform this function through the organization of public enquiries and through the activities of national mirror committees. The national institutions are expected to gather not only the positions of the producers, but also to cater for the views of all actors that are members of the national standardization body, or that have communicated their views via the public inquiry organized by the national standardization institute.

National consultation procedures provide an opportunity for the representation of public interests, but the requirement to formulate a unique national position in EU standardization is problematic for the weaker groups in the process. That is why direct participation of interest groups in European standardization activities, within the technical committees of CEN en CENELEC, is a key element. Due to the constant pressure of the Commission and the initiatives of the European standardization bodies, the opportunities for participation by interest groups have grown, nevertheless we still observe a dominance of industry actors in the process. The very gradual and tentative involvement of public interest in standardization does not tally well with the specific call in the Commission’s IPP communication for a strong and balanced participation of stakeholders included.

Finally, although the New Approach procedure was designed for efficiency reasons, the decision making procedure is still long and cumbersome. One of the causes of the slow decision making is the consensus principle which is supposed to guarantee both a maximum acceptance as well as the effective use of the voluntary standards by the producers.

The shortcomings discussed above are some examples of the criticism which New Approach has faced. The most important criticism remains the delegation of competencies from the Commission to private actors (the European standardization bodies) and the legitimacy problems that this entails.²⁸⁹

²⁸⁶ European Commission, *Green Paper on the development of European Standardisation*, COM(90)456 final.

²⁸⁷ Vos, E., *Institutional Frameworks of Community Health and Safety Legislation: Committees, Agencies and Private Bodies*, Oxford, Hart Publishing, 1999.

²⁸⁸ European Commission, *Report from the Commission to the Council and the European Parliament*, SEC(98)291.

²⁸⁹ The legality of the New Approach standardization was also raised on the basis of the non-delegation principle (Art. 5 and 249 of the EC Treaty) and confirmed in the Meroni judgement

Concerns about the lack of control by the European public authorities over the standardization procedure have been expressed, some even considered that the vagueness of the safety requirements allow too much room for interpretation by the standardization bodies (e.g. such bodies may sometimes determine the real level of the safety risk the public would have to bear). Finally these institutions were not perceived to sufficiently guarantee the public interest, as they were mainly composed of economic producers and were shielded from public control.²⁹⁰ The delegation issue is even more critical if we consider the view of Bergkamp, which qualifies harmonized standards as nominally voluntary but effectively mandatory.²⁹¹ This view is based on the presumption of conformity (to the essential requirements of the directive) conferred by the standards and the inversed burden of proof that it causes. Indeed, if a producer complies with the standard it is to the member state to prove that the product is not in conformity with the essential requirements.²⁹² Bergkamp’s point is further strengthened by the fact that products not adhering to the recognized standard are often rejected by distributors because alternative methods of proof are considered too burdensome.²⁹³

Principal-agent theory²⁹⁴ can help shed light on the delegation and control issues. Delegation is induced by the need for expertise and information. However, although this tactic could lower production costs and settle some of the information requirements, it could also possibly generate new control costs, mainly related to the fact that the *principal* would have to control and monitor the selected *agent*. In the context of the New Approach legislation, the European Commission functions as a *principal* and selects the standardization bodies as its *agent* through the mandates it delivers. The principal-agent theory suggests different methods and moments in time to perform the control. In the case of New Approach standards, the ex-post control can be found in the “safeguard clause”, which can be used by European institutions and Member States when the standard does not comply with the essential requirements.²⁹⁵ The fact that there is no systematic control of the standards by the Commission, and that Member States are given the opportunity to start such a procedure, seems to indicate a clear preference for “alarm bell” procedures instead of the more time consuming “police patrol” control tactic. In the literature, other control instruments are described, which the Commission could potentially use. They concern mainly budgetary sanctions when a deadline has been ignored, or regular evaluations, and procedural reforms.²⁹⁶

Case 10-56, *Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*, ECR 1958, p. 157.

²⁹⁰ Falke, J., Micklitz, H.W. and G. Brüggemeier, *European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards? Florence? EUI Working paper Law, nos 91/10-14, Florence, EUI, 1991.*

²⁹¹ L. Bergkamp, *European Community Law for the New Economy*, Intersentia, (2003) p.291.

²⁹² E.Vardakas, ‘Vademecum on European Standardization, Chapter 1, Standardization and the Directive 98/34/EC’, European Commission, Directorate-General Enterprise. P.7.

²⁹³ R. Hunter and C. Garcia Molyneux, "The Draft EC Directive on Electronic Equipment: An Imprudent and Illegal Proposal", 23 (2000) BNA International Environment Reporter 924 at 926. Cited in “The New Approach in Setting Product Standards for Safety, Environmental Protection and Human Health”, p.29.

²⁹⁴ Pollack, M.A., Delegation, agency, and agenda setting in the European Community, *International Organization*, 51, 1, 1997, 99-124.

Gilardi, F., *Principal-Agent Models Go to Europe: Independent Regulatory Agencies as Ultimate Step of Delegation*, Paper presented at the ECPR General Conference, Canterbury (UK), 6-8 September 2001.

²⁹⁵ Falke, J., Achievements and Unresolved Problems of European standardization, pp.187-224 in C. Joerges, K.H. Ladeur & E.Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations*. Baden-Baden, Nomos Verlagsgesellschaft, 1997.

²⁹⁶ Egan, M., Regulatory strategies, delegation and European market integration, *Journal of Public Policy*, 5:3, 1998, 485-506.

Finally, not only is control of the agent important, the selection of the agent also matters. The agent’s qualifications, as well as its interests, should be considered. If the interests, and subsequently the goals of the agent, are not in line with the underlying goals of the principal, high control costs, and even failure of the delegation exercise, can follow. When this consideration is applied to the case of New Approach standardization, the criticisms concerning the delegation of public interest issues, such as safety considerations, to private actors, which are mainly driven by economic interests, come to the fore. These criticisms already existed when the New Approach was mainly used for safety issues, but seem even more pressing now that the procedure is considered for specific environmental policies: IPP or the Packaging and Packaging Waste directive.

3.4.1.1. The packaging and packaging waste directive

To illustrate the difficulties that New Approach instruments encounter when used for public interest issues, such as the environment, we will turn to the Packaging and Packaging Waste Directive.²⁹⁷ This Directive is the first New Approach directive explicitly developed to achieve environmental goals. While the actual directive was developed in 1994, and the first mandates to CEN were delivered in 1996, it took until February 2005 for all the mandates to be turned into publishable harmonized standards.

Although standards usually take several years to develop, extra difficulties seemed to burden the procedure in this particular case. The packaging directive was developed to reduce the quantity of packaging, increase reuse and recycling, and reduce the amount of harmful substances used in packaging. For these reasons a mandate was given to CEN (mandate 200 Rev. 3). The mandate asked for five standards to be prepared. The first standard concerned packaging requirements specific to manufacturing and composition, and dealt with waste prevention. The second standard had to cover the reuse of packaging. The following three standards respectively dealt with packaging and material recycling, energy recovery, and organic recovery. The mandate was accepted by CEN, who developed six standards based on this mandate, despite the fact that only five standards were directly mandated by the Commission.

In addition to the explicitly mandated standards, CEN delivered an “umbrella” standard (EN 13427:2000 Packaging-Requirements for the use of European Standards in the field of packaging) which was designed to serve as a guide to the use of the other standards.

In 2000, these standards were adopted by the CEN members and submitted to the European Commission for publication of their references in the Official Journal. Such a publication would grant a “presumption of conformity” to the products applying the standards. At that time, the so-called “safeguard clause” was put into action. On the basis of article 9(4) of the Packaging Directive Belgium and Denmark filed a formal objection with the Standing Committee on Standards and Technical Regulations (98/34 Committee). The objections contained general remarks which applied to all standards, and more specific remarks related to technical specifications in the individual standards. For example, Belgium raised objections against the formulation and status of the non-mandated umbrella standard, which could affect the essential requirements in the mandated standards by directing their uses. Other objections regarding the lack of participation of environmental and consumer NGOs in standardization activities were also voiced. Participation by public interest groups was especially important, since the need for it was explicitly stated in the mandate. Concerns were raised as to the

²⁹⁷ Directive 94/62/EC of 20 December 1994 on packaging and packaging waste. OJ L 365, 31.12.1994, p. 10.

efficiency of ISO 9000 and EN ISO 14000 series management control systems to guarantee essential requirements and to realize a harmonized internal market. Finally, the lack of technical specifications was addressed, as a requirement appeared to be literally copied from the mandate without further elaboration. In addition, new terms and definitions were used in the standards instead of specific legal terminology.²⁹⁸

These official objections were matched by the criticisms of public interest groups defending consumer and environmental issues. The European Association for the Co-ordination of Consumer Representation in Standardization (ANEC) highlighted the lack of consideration for non-industrial stakeholders in CEN’s Packaging Committee and the predominance of industry on this committee. ANEC also condemned the lack of substantive and verifiable requirements (number of trips for reusable packaging), and the ignorance of the mandates provisions of the CEN standards. In their critique of the individual standards they condemned, for instance, the predominance of marketing and presentation criteria on source reduction for packaging.²⁹⁹ Similar criticisms were found in the position paper of the European Environmental Bureau (EEB), which particularly stressed the fact that the management system that had been opted for in the standards would not be able to guarantee essential requirements. The EEB even felt that the publication of these standards as they were, would “encourage CEN and hence industry, to ignore and bypass environmental legislation and write out its own in the future.”³⁰⁰

According to the instructions of the safeguard clause, the objections of the Member States were considered in the Committee for the Adaptation to Scientific and Technical Progress, created by Directive 94/62/EC, better known as the Article 21 Committee. Compliance with the essential requirements was discussed during their meetings, but diverging opinions remained. Austria, Belgium and Denmark were clearly against the publication, while France and the UK defended the standardization effort.

After consulting the Article 21 Committee, the Commission turned to the Standing Committee on Standards and Technical Regulations (98/34 Committee) with a draft Decision, but no consensus could be reached. After a vote, the Commission deemed it had sufficient support to proceed. It consulted the 98/34 committee again on 27 June 2001 before publishing its decision. In its decision of 28 June 2001, the Commission published the references of standard EN 13432 concerning recovery by composting and bio-degradation, and EN 13428 concerning prevention by source reduction, although the latter was published noting that it did not fully cover the essential requirements.³⁰¹ The remaining standards were not published, and consequently did not receive the “presumption of conformity” but still kept the status of CEN standards. In this way they can be used as an instrument by Member States on a voluntary basis, this was the case in The United Kingdom and France.

²⁹⁸ Ministerie, van Sociale Zaken, Volksgezondheid en Leefmilieu, *Clausule van formele tegenkating ingediend door België bij het Permanente Comité ingesteld overeenkomstig artikel 5 van Richtlijn 98/34/EG betreffende de CEN-normen voor de invulling van de essentiële eisen van de Verpakkingsrichtlijn 94/62/EG in het kader van Mandaat 200 Rev.3 overeenkomstig artikel 9, §4 van deze Richtlijn*, Brussels.

²⁹⁹ ANEC, *CEN standards in the field of packaging and the environment – an inadequate complement to the Packaging Directive*, Brussels, ANEC, 2000.

³⁰⁰ EEB, *CEN at work: How the requirements of the European packaging and packaging waste directive (94/62) are bypassed by CEN standards*. EEB publication 2000/15, Brussels, EEB, 2000.

³⁰¹ Commission Decision 2001/524/EC of 28 June 2001 relating to the publication of references for standards on packaging and packaging waste - OJ L 190 of 2001-07-12.

In coordination with the different committees and the Member States, a new mandate was developed to revise the remaining standards and to incorporate the so-called “umbrella” standards proposed by CEN. Drafts of the revised mandate were distributed among the Member States for comments. In November 2001, the final version of the revised, or second, mandate M317 EN was finalized and reached the relevant CEN technical Committee by March 2002. Although the Commission opted for this second standard, it must be noted that the Commission recognized the need for a fundamental review of the New Approach elements of the Packaging Directive in order to achieve a complete solution.³⁰² Moreover, during the preceding committee meeting some Member States expressed their skepticism towards a revised mandate and asked for a broad review of the New Approach elements of the directive, while others believed the revised mandate could provide a swift solution. Concerns were also expressed regarding the effective separation of political issues and technical issues to ensure that only technical issues were addressed by CEN.³⁰³ By December 2004, CEN entered a request for publication of the revised standards. No official objection was raised against the revised standards, although an informal objection was raised by Austria and discussed during the Article 21 Committee meeting on 2 February 2005. During this meeting, CEN had the opportunity to present the standards and to answer delegates’ questions. Some Member States were concerned about the capacity of the standards to establish clear boundaries between acceptable and non acceptable packaging. The Commission’s opinion was asked concerning the minimum criteria for rotation of reusable packaging and the presence of hazardous substances. In its response, the chair qualified the management approach as the “best feasible” and explained that it was difficult for the Commission to request fixed values. A new attempt to refine the standards was not expected to make any substantial difference.³⁰⁴ Finally, in the absence of any formal objections, the references of the revised standards on reuse (EN 13429: 2004), material recycling (EN 13430:2004), energy recovery (EN 13431:2004) and a new version of the partially accepted standard on prevention by source reduction (EN 13428: 2004) were published on 19 February 2005. This publication was completed by the inclusion of the umbrella standard in the second mandate.³⁰⁵

When we look at the opinions of the public interest groups such as ANEC and ECOS on the matter, we still see a strong rejection of the revised standards. In their joint position paper, they considered that the standards did not satisfy the essential requirements, or the provisions of the second mandate M317, that most of the changes are purely editorial, and that only a few substantial changes were made.³⁰⁶ Regarding the individual standards, the public interest groups criticized the use of management systems instead of clear-cut specifications, the supremacy of marketing criteria above packaging reduction, the inclusion of hybrid systems in the reuse standard and the minimum caloric value that was prescribed.

³⁰² European Commission, *Committee for the adaptation to scientific and technical progress of directive 94/62/EC on packaging and packaging waste. Summary record of the 20th meeting held on 3 October 2001.*, Brussels, European Commission, 2001.

³⁰³ European Commission, *Committee for the adaptation to scientific and technical progress of directive 94/62/EC on packaging and packaging waste. Summary record of the 19th meeting held on 6 June 2001.*, Brussels, European Commission, 2001.

³⁰⁴ European Commission, *Committee for the adaptation to scientific and technical progress of directive 94/62/EC on packaging and packaging waste. Summary record of the 26th meeting held on 2 February 2005.*, Brussels, European Commission, 2005.

³⁰⁵ Commission communication in the framework of implementation of the European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste OJ C 44/23 of 19.2.2005.

³⁰⁶ ANEC and ECOS, *ANEC-ECOS Position paper on the revised Packaging Standards prepared under the second Standardisation Mandate M317 ANEC2005/ENV/001*, Brussels, ANEC, 2005.

The example of the Packaging and Packaging Waste Directive, demonstrates quite well the difficulties of using New Approach legislation for environmental purposes. The whole process took more than a decade while multiple objections and a variety of issues were raised by the Member States, public interest groups and even the Commission. In this case, a revision of the New Approach elements of the directive was proposed by the different actors, but time restrictions influenced the choice of a second mandate. With regard to the standardization process itself, concerns were expressed regarding the division of political and technical decisions. When using New Approach legislation, utmost attention must be devoted to the definition of the essential requirements to prevent the migration of political decision to standardization bodies and industry. The advocacy of the public interest and the control of the public authorities on the matter must be evaluated in the context of “real life”. As we have seen in the packaging case, lack of meaningful involvement has been raised, both by the Member States (cfr. formal objection of Belgium and during Article 21 committee meetings) and the public interest groups (position papers ECOS and EEB). As to the public authorities, we can note that the “safeguard clause” was successfully applied to object to the first standards. However, the European Commission still opted for the formulation of a new mandate instead of a thorough revision of the directive. Furthermore, the revised standards were accepted even though important doubts still arose as to the fulfillment of the essential requirement.

Finally, the role of the European Commission seems to be more important than that of the Member States. The Commission has to acknowledge the formal objections and consult the relevant committees cited above, but the output of these committees is non-binding.³⁰⁷ As a consequence, the final decision is reserved for the European Commission.

Regarding the “safeguard procedure”, we must note that its outcome is influenced by the characteristics of the different committees. The Article 21 Committee of the Packaging Directive, for example, is composed of different types of delegates: members of the Permanent Representations to the EU and members of national agencies, or national administrations. As a consequence, the knowledge of the issues at hand can vary substantially and delegates can be restricted by the mandates they receive.

When we consider the public interest viewpoint, we can conclude that control by public authorities is rather limited. This is the case within the European standardization bodies, as we have stated before, but also within EU institutions in the case of the safeguard procedure. In this procedure, the final decision is in the hands of the European Commission, as the opinions of the committee (composed of national delegations) are non-binding. Moreover, contextual factors can work in favor of the agent, as ex-post control systems can cause serious delays.

Despite the efforts to include public interest groups in the process, their position does not seem strong enough, at the moment, to guarantee the systematic advancement of public interests. They often lack the means to defend these interests sufficiently and as in the packaging case, feel their views are not adequately taken into consideration within the standardization committees.

³⁰⁷ European Commission, *Committee for the adaptation to scientific and technical progress of directive 94/62/EC on packaging and packaging waste. Summary record of the 18th meeting held on 16 January 2001.*, Brussels, European Commission, 2001.

Other examples of the use of the New Approach for environmental matters can be found in the WEEE Directive and the recent EuP directive.

3.4.1.2. WEEE

In the WEEE directive standardization is used to develop marking requirements. Even though standardization activities based on the WEEE directive do not entail the same norm setting tasks as in the Packaging case, these standards still raise issues of legal certainty and validity of the approach.

The WEEE Directive provides for two marking requirements, one a “crossed out wheeled bin,”³⁰⁸ and the other that is being prepared by the European Committee for Electrotechnical Standardization (CENELEC).

Article 11(2) deals with information for treatment facilities. It provides for a similar but separate marking requirement to that provided for in Art. 10(3) that is the marking requirement for a crossed out wheeled bin on most electrical and electronic products. The simple option of just using the same crossed out wheeled bin was rejected as some companies already mark some of their products with the crossed out wheeled bin. .

The Commission provided CENELEC with a mandate to make a recommendation for a standard to fulfill the Art. 11(2) requirements.

The CENELEC first standard provided for a mark to identify the producer and when the product is put on the market as required under Art. 11(2). More sensitive matter, from a legal viewpoint, is that CENELEC standard also contains an exemption from the marking requirement. Clause 4(3) of the Draft Recommendation makes provisions for an exemption from the marking mandate. First it sets out conditions for being exempted, which are size and functionality.

If a producer meets one of these two criteria the marks (date and producer) can be put on:

- i) the flag on the fixed supply cord (if any), and
- ii) operating instructions and warranty certificates; or
- iii) mark on packaging.

Whilst this may be practical it was not legal. There is a confusion with a mistaken view that the limited derogation in Art. 10(3) for marking not to be on the products is imported into Art. 11(2). There is no such provision.

More simply the WEEE Directive does not provide for an exemption from the requirement for “a mark on the appliance”. The Council and European Parliament called for “a mark on the appliance” covered by the Directive. This wording is clear. No provision is made for exceptions to the marking requirement like that provided in Art. 10(3). If the co-legislators had intended that they would have said so.

Second, the Art.11(2) requirement runs in conjunction with Art. 8 on “Financing in respect of WEEE from private households”. Article 8 (2) provides:

³⁰⁸ Dir.2002/96, Art. 10(3).

“For products put on the market later than 13 August 2005, Member States shall ensure that each producer provides a guarantee when placing a product on the market showing that the management of all WEEE will be financed and that producers clearly mark their products in accordance with Article 11(2).”

It would appear that the Art.11(2) marking requirement is key to ensuring that the individual finance approach taken for products put on the market after 13 August 2005 works. An individual finance approach requires products to be marked so the producer can pay for new WEEE.

Third, a key part of the provision is beyond the powers of the WEEE Directive, and should not have been inserted into the standard. Whilst compliance with the standard provides a presumption of conformity with the Directive, there is a presumption of conformity, where, legally, none exists.

On 1 April 2005, CENELEC adopted the standard, EN 50419 :2005. They adopted it despite concerns raised by the Commission. They withdrew it after the Commission refused to accept the standard by not publishing it in the OJ. They adopted a new text in line with the Directive that will enter into force around June 2006.

As the standard has the force of law in most Member States as their implementing measures refer to the standard as providing ‘a presumption of conformity’ with the Directive. Whilst this presumption can be refuted by adding another mark, this is a costly and time consuming path, which in the meantime, would prevent a product being brought onto the market. So, by fact of circumstance, the standard becomes binding.

3.4.1.3. *EuP*

In the EuP Directive standardization is mentioned as a possible instrument for the implementation measures, but the text does not contain essential requirements and no implementing measures have been taken yet. This extension of the New Approach to environmental design in the framework of EuP has been qualified by Bergkamp as a ‘questionable grant of broad discretionary authority’, which would violate the non-delegation principle and would shift political decision to the standardization bodies.³⁰⁹ Nevertheless, standardization was included into the final text and a programming mandate was given to the European standardization bodies before the approval of the directive.³¹⁰ The simple fact of mandating a standardization program before the actual text was approved sets the course for serious political impact, by the standards, on the development of the directive and its implementation measures. The European Commission stated in the mandate that ‘Standardisers will not be invited to settle issues that, in view of their sensitive nature, should be left to the regulators, such as fixing a limit for a given environmental aspect.’³¹¹ However, considering the delegation and control problem cited above, this provision can hardly be seen as a watertight guarantee.

3.4.2. *Evaluation of New Approach standardization for IPP*

Public control issues and balanced participation of all stakeholders are two of the main issues affecting the New Approach system. Both are also reflected in two core elements of the IPP concept: the relation between public authorities and private agents, and the emphasis on stakeholder participation.

³⁰⁹ L. Bergkamp, *supra* note 284, at p. 291.

³¹⁰ Mandate to CEN/CENELEC/ETSI for Programming of Standardization Work in the field of Eco design of Energy Using Products (7 January 2004).

³¹¹ Mandate, p.2, para 2.

The control problem clarified by the principal-agent theory fits the IPP concern about the relationship between public authorities and stakeholders. Within the New Approach system clear communication and good agreements an important element, because they are both key ingredients of any successful relationship and central elements of control. The need of clear communication and good agreement is reflected in the call for clear essential requirements and mandates in position papers of both NGOs and industry, when asked about the use of standardization in IPP.³¹² Good agreements require a clear definition of responsibilities: clearly differentiating political decisions and technical implementation. This distinction is deemed even more significant when dealing with environmental issues in a life-cycle perspective. In these matters political decision and technical decision are closely linked as important trade-off decisions must be taken in a context where information is difficult to obtain and comparative tools are still debated.³¹³ Better communication methods also entail increased feedback opportunities between public authorities and standardization bodies, not only at the end of the drafting exercise (e.g. safeguard clause) but also during the actual drafting process.³¹⁴ Finally, if the relationship between public authorities and private actors is to succeed using voluntary instruments like standardization, the right incentive must be provided to align both public and private preferences.

Stakeholder participation is the second issue that must be dealt with in regard to the IPP concept. The involvement of public interest groups, in particular, can be an asset not only for a more balanced participation of stakeholders, but also as a safeguard or control for public interest. This could partially compensate for the weak control of public authorities during the standardization process. However, in this perspective public interest NGOs put the emphasis on their restricted means to face such a complex and vast standardization activity. In their various position papers both environmental and consumers NGOs emphasize the need for sustained financial support to public interest groups in standardization activities. Public interest groups insist on their role as defender of public goods, which entails that they cannot rely on a possible return on investment to fund their activities. Besides the hardship to participate in standardization, environmental NGOs underline the minority status of environmental interest within the system and the frequent recourse to voting: cutting off any minority positions.³¹⁵ Some stakeholders consider that participation of relevant stakeholders is already achieved while other fear that wider participation will slow down the entire process.³¹⁶

³¹² UNICE, *European industry's views on the instruments proposed in the Green paper on IPP, UNICE's 2nd contribution tot the Commission's stakeholder consultation*, Brussels, 4 July 2001

CEPI et al., *Paper and Board Manufacturing and Converting Industry's Joint Position Paper on The Commission's Green Paper on IPP –Integrated Product Policy*, Brussels, June 2001

European Commission, *Summary of Discussions at the 6th Integrated Product Policy Expert Workshop. Standardization and New Approach. Brussels 18th June 2001*, online <http://europa.eu.int/comm/environment/ipp/pdf/standard.pdf> [consulted on 25/08/2005].

³¹³ Danish Environmental Protection Agency, “The new Approach in Setting Product Standards for Safety, Environmental Protection and Human Health. Directions for the future”, *Environmental News* 66 (2002) p.37.

³¹⁴ Danish Environmental Protection Agency, “The new Approach in Setting Product Standards for Safety, Environmental Protection and Human Health. Directions for the future”, *Environmental News* 66 (2002) p.17.

³¹⁵ European Commission, *Summary of Discussions at the 6th Integrated Product Policy Expert Workshop. Standardization and New Approach. Brussels 18th June 2001*, online <http://europa.eu.int/comm/environment/ipp/pdf/standard.pdf> [consulted on 25/08/2005].

³¹⁶ European Commission, *The Integration of environmental aspects into European standardization: - Public Consultation 25 July 2003 – 15 September 2003*, Brussels, CEC, p. 12-13.

Nevertheless, public interest NGOs do not only claim a significant role within the standardization bodies at European and national level, but also want to be involved in other phases of the New Approach. An early involvement during the drafting of the mandate and representation in the Committee created by the New Approach directive (known as the 98/34 Committee) are two of the adjustments suggested by the ANEC to improve the participation of public interest groups in the New Approach.³¹⁷ This claim is closely linked to the perceived need to integrate the environmental issues (and their advocates) as early as possible in the process in order to achieve significant changes. This is an issue was also raised during the general debate concerning the ‘greening’ of standardization: a policy designed to incorporate environmental concerns in standardization at large.

The issues mentioned above mostly apply to the standardization process in general, but the use of standardization for environmental purposes makes them even more complicated. Public interest NGOs make the comparison between environmental requirements and product safety requirements. They attribute the success of the latter to its strong legal backbone: the Framework Product Safety Directive and the Product Liability Directive³¹⁸. They perceive this kind of legal framework as a necessary incentive for industry to incorporate environmental aspects in standards.³¹⁹ Key industry federations like UNICE take a diametrically opposite stance on the issue: in their opinion the use of standardization should contribute to deregulation.³²⁰ This validates the apprehensions of environmental interest groups that standardization will be used as a lobbying tool to undermine environmental protection or to undermine politically set objectives.³²¹

3.5. Voluntary Environmental Agreements (VEAs)

According to the Commission Communication of 2002 on Environmental Agreements at Community Level,³²² environmental agreements at Community level are those by which stakeholders undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives set out in Article 174 of the Treaty. Voluntary Environmental Agreements are seen by the Commission as being part of a mix of policy instruments, an implementation tool rather than a means of deregulation. They have no specific Treaty basis but rely on a series of Communications from the Commission.³²³

³¹⁷ ANEC, ANEC comments on the “Green Paper on the Contribution of Product –Related Environmental Policy to Sustainable Development. A strategy for an Integrated Policy Approach in the European Union” 2 July 2001 ANEC2001/ENV/035.

³¹⁸ Directive 2001/95/EC on general product safety, OJ L 011 , 15/01/2002 p .4 – 17.

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products *Official Journal L 210 , 07/08/1985 P. 29 – 33.*

³¹⁹ European Commission, *Summary of Discussions at the 6th Integrated Product Policy Expert Workshop. Standardization and New Approach. Brussels 18th June 2001*, online <http://europa.eu.int/comm/environment/ipp/pdf/standard.pdf> [consulted on 25/08/2005].

³²⁰ UNICE, European industry’s views on the instruments proposed in the Green paper on IPP, UNICE’s 2nd contribution tot the Commission’s stakeholder consultation, Brussels, 4 July 2001.

³²¹ EEB, *EEB response to the Commission Green paper on IPP*, Brussels, April 2001; (EEB Doc. 2001/008).

³²² COM(2002)0278 final.

³²³ COM(1996) 561 final “Communication on Environmental Agreements”, COM(2002) 0278 final Communication Action plan “Simplifying and improving the regulatory environment”, COM(2002) 0412 final “Communication Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment”.

There are three types of agreements possible at the EU level. First, co-regulation means that the legislator sets the legal framework, the stakeholders fill in the details and public authorities either monitor the outcome, or sometimes validate those more detailed rules by turning them into binding regulations. In practice, at the EU level this means that the Commission drafts an environmental agreement (either on its own initiative or in response to voluntary action on the part of industry), the Council and the EP set the targets and the monitoring requirements, while industry decides what measures to take and how. In any event, in cases where using the co-regulation mechanism does not produce the expected results, the Commission can exercise its right to make a traditional legislative proposal to the legislator. Second, self-regulation covers a large number of practices, common rules, codes of conduct and voluntary agreements with economic operators, social players, NGOs and organized groups establishing voluntary bases in order to regulate and organize their activities. It does not involve a legislative act. At the EU level, the Commission can acknowledge such an agreement by a Commission Recommendation (after consultation with the Council and the EP). The Commission recommendation of the agreement is then published in the Official Journal. The Commission will monitor whether the objectives of the agreement are being achieved and inform the Council, EP and the public of its findings. If necessary, additional monitoring obligations can be imposed on the Member States through a Council Decision. Third, own-initiative means that industry takes an initiative in an area where the Commission has no intention to propose legislation. The agreement can be endorsed by the Commission through a formal recognition of it.

The 1996 Communication on Environmental Agreements identified a set of criteria considered necessary for the appropriate use (and success) of environmental agreements. Those were: prior consultation with interested parties, a binding form, quantified and staged objectives, the monitoring of results as well as the publication of the agreement and of the results obtained. These criteria should make it possible to avoid the stipulation of vague objectives, lack of transparency and possible distortion of competition caused by free-riders. In its communication of 2002, the Commission recalls that an environmental agreement must deliver added value in terms of a high level of protection of the environment and that Community policy on the environment shall always aim at a high level of protection. Therefore, before acknowledging an environmental agreement, the Commission must make sure that it also fulfils this condition. This should ensure that the agreement delivers more than "business as usual".

In addition, the Commission also proposed procedures to be respected when acknowledging (self-regulation) or specifically providing for the use of environmental agreements (co-regulation). For the environmental agreements used as an instrument of self-regulation, the Commission's evaluation and conclusion as to the appropriateness of an environmental agreement will be made publicly available, for example on the Commission's web site, in order to give the wider public a possibility to be informed of the proposed agreement and to comment on it. After considering any comments received, in particular those from the European Parliament and the Council, the Commission may take the decision to proceed by recognizing an environmental agreement. The Commission will verify, by appropriate monitoring and reporting mechanisms, if the underlying environmental objective is actually reached. The monitoring results and the reports will be communicated to the European Parliament and the Council, and will be made accessible to the public by electronic means. If an agreement considered in a Commission Recommendation or exchange of letters fails to deliver the expected results, the Commission can make use of its right of initiative and propose appropriate binding legislation.

For the environmental agreements used as an instrument of co-regulation, key elements - mainly the environmental objective and monitoring requirements - and potentially also a follow-up mechanism in case of failure of an environmental agreement to deliver, are integrated into the legal act itself. The latter is subject to stakeholder consultation during its preparation, in line with the Commission Communication on minimum standards for consultation, and is adopted under a normal co-decision procedure. Where the Commission decides that co-regulation is the best means of achieving an environmental objective and where key elements of its proposal are based on an existing or proposed voluntary agreement, which is satisfactory from the Commission's point of view, the Commission will include these elements in its proposal and pursue them in discussions with the other institutions. The environmental agreement should be made public on the Commission's website. Monitoring results and associated reports should also be made available by electronic means. Under co-regulation, as for self-regulation, the Commission can always make use of its right of initiative and propose appropriate binding legislation if the agreement fails to deliver the expected results. These procedures should ensure that environmental agreements are appropriately used wherever they are considered a genuine complement to existing policy tools. At the same time, they should guarantee the involvement of European institutions in the process as appropriate.

The recent Directive on Ecodesign³²⁴ offers more insight into the Commission conceptualization of VEAs and of their possible use at the EU level. In its initial proposal,³²⁵ the Commission stated that the adoption of a framework directive on ecodesign requirements would reinforce the potential impact of self-regulation by the industry. More concretely, a satisfactory agreement would be a sufficient justification for deciding not to adopt an implementing measure and, therefore, not to set the regime created by the Directive into motion. Nevertheless, the draft directive is silent on what a “satisfactory” agreement is. It is only in the final text of the Directive that criteria are listed. Thus, Annex VIII contains a non-exhaustive list of indicative criteria that may be used to evaluate the admissibility of self-regulatory initiatives as an alternative to implementing measures. The voluntary agreement must make proof of: openness of participation, added value, representativeness, quantified and staged objectives, involvement of civil society, monitoring and reporting, cost-effectiveness of administration, sustainability and incentive compatibility. In addition, the Commission makes reference to the criteria set out in its Communication on Environmental Agreements (listed above) as useful assessment instruments. Self-regulation, according to the Preamble of the EuP Directive, “can provide for quick progress due to rapid and cost-effective implementation, and allows for flexible and appropriate adaptation to technological options and market sensitivities.”³²⁶

Still, three questions beg to be asked. First, it is not clear why the Commission opted for VEAs to be used as self-regulation and not as co-regulation. In a co-regulation process, voluntary agreements would have been a way to adopt supplementary provisions to the Directive rather than an alternative to it. In fact, VEAs used as self-regulation and as an alternative to implementing measures basically stop the mechanism of the Directive from being put into practice. Without implementing measures, producers no longer enjoy non-restricted access to the EU market, Member States being free to impose their own environmental conditions. If voluntary agreements would have been provided for as co-

³²⁴ Directive 2005/32/EC of the European Parliament and of the Council 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.

³²⁵ Proposal for a Directive of the European Parliament and the Council On establishing a framework for the setting of Ecodesign requirements for Energy-Using Products and amending Council Directive 92/42/EEC (presented by the Commission), COM(2003) 453 final.

³²⁶ Directive 2005/32/EC, p. 6.

regulation, then they would have fallen within the scope of the Directive and producers would have enjoyed the same benefits as with implementing measures.

Second, one can ask where the incentive for the industry shall lay: in concluding successful agreements in order to avoid the whole new regime and remain in a self-regulatory process, thus avoiding the probably heavy participatory requirements for developing implementing measures in cooperation with other stakeholders or, on the contrary, to stimulate the adoption of Commission decisions which would offer them a favored access to all markets and the guarantee of no other national measures being adopted.

Third, the text of the Directive does not clarify whether the Commission has the national or the European level in mind when arguing for voluntary agreements. Given that they would be an alternative to EU-wide implementing measures, the assumption is that the VEAs would also have to be EU-wide, with all the practical problems this would entail.

At the EU level only a few VEAs have been concluded, the most well-known being the 1998 agreement between the European Commission and the European Car Manufacture Association (ACEA) aimed at reducing CO₂ emissions from passenger cars. A new environmental agreement in the form of a unilateral industry self-commitment was proposed in 2004 (and endorsed by DG Enterprise) by a consortium of companies producing biodegradable and compostable polymers designed to ensure the observance of standard EN 13432³²⁷ in the production of biodegradable and compostable polymers. If the application of the former has been heavily criticized by NGOs,³²⁸ the effectiveness of the latter cannot be assessed for the moment due to the short time elapsed since its conclusion. Nevertheless, its story is illustrative for the use of self-regulation at the EU level, especially keeping in mind the boost given to self-regulatory voluntary agreements by the EuP directive. Standard 13432 describes, in fact, when a product is “compostable”, conclusion to be reached via a series of test methods. Based on the results of the tests, a label is awarded to products that qualify – it is, in practice, a quality label that shows compliance with standard EN 13432. A label can be protected (from a juridical point of view), while concepts such as “compostable” and “biodegradable” cannot be protected and have been used abusively by producers. The first purpose of the self-commitment is, therefore, to put the basis of and protect a label indicating compostability. The federations behind the agreement are made up precisely of producers of bio-based and bio-degradable polymers, which in turn make up compostable packaging. Their market penetration at the moment is extremely limited and they are very active in promoting their products at national level. An EU-endorsed agreement ensures both free publicity (given that the Commission needs to publicize the agreement) and additional leverage power in national negotiations. As for DG Enterprise, who not only endorsed the agreement but had actually helped prepare it, it mainly wanted a VEA (the first one after the 2002 Communication) and took advantage of its working group on Renewable Raw Materials being out of work at a certain moment to serve as a negotiating forum for the agreement. This story mainly shows that for self-regulation to occur pro-active industry is needed; industry seems to be pro-active mostly when it is made up of non-dominant market players, as dominant market players generally resist any change in the status quo. The other lesson to be drawn from this story is that DG Enterprise and DG Environment have different

³²⁷ The norm EN13432 defines biodegradability and compostability and is recommended in the Directive on Packaging and Packaging Waste 94/62/EC.

³²⁸ See for instance the WWF Discussion Paper *Will voluntary agreements at EU level deliver on environmental objectives? Lessons from the agreement with the automotive industry*, on <http://www.uneptie.org/outreach/vi/reports/wwf.pdf>.

understandings of what a VEA should be. DG Environment was not involved in the preparation of the self-commitment and now argues it would not have acknowledged it because it brings no added value in environmental terms.³²⁹ On the other hand, DG Enterprise is not at peace with the definition of VEAs as proposed by the Commission in its Communications and is more in favor of voluntary initiatives and self commitments from industry (for which this particular agreement is an example).³³⁰ Given the stress on self-regulation in the EuP Directive, it seems that for the moment it is the vision of DG Enterprise that prevailed.

Despite the limited number of VEAs concluded at the EU level, both NGOs and the European Parliament have been extremely critical of the use of this instrument by the Commission for several reasons. It is argued that there is little evidence that environmental agreements are effective, that the existing control systems are based on self-monitoring and hence subjective and that negotiated agreements (when industry commits itself to a certain environmental performance while the government in return agrees to refrain from direct regulation in this issue area while the agreement is in effect) severely restrict the range of policy options for future governments.³³¹ Besides, these agreements are often concluded in the absence of parliamentary control and without the participation of the public in the negotiations. Industry on the other hand, wants the agreements to retain as much flexibility as possible and is not too happy about publicizing negotiations and results.

The academic analyses of VEAs have linked the emergence of joint approaches to the characteristics of the general policy culture: a consensual rather than an adversarial style and a pragmatic rather than a legalistic approach are more conducive to the development and use of joint approaches and voluntary agreements.³³² This might explain the higher incidence of national VEAs in countries like Germany or The Netherlands.

The advantages for participating firms are regulatory flexibility, preemption of existing regulation, improved anticipation of future regulation, increased opportunities to develop innovative environmental solutions that can improve industrial performance and provide competitive advantages, the exchange of tacit knowledge.³³³ The main disadvantages are, for industry, the fact that both the bargaining process and the administration of the agreement require resources, transaction costs, free-riding partner firms, disclosure of confidential information to regulators, third parties and competitors, while for the regulator the risk of poor compliance and the risk of being captured by one specific industry³³⁴ seem to be the main downsides.

In general, students of VEAs seem to agree on the fact that preference learning and utility derived from a participatory process are central aspects of VAs; the negotiation process itself provides information that would not be available given a traditional type of regulation.³³⁵ Moreover, VEAs can be seen as arenas where parties meet to voluntarily “exchange” bargaining power, in the sense that the regulator

³²⁹ Interview DG Environment, April 7, 2005.

³³⁰ Interview DG Enterprise, March 29, 2005.

³³¹ <http://www.euractiv.com/Article?tcmuri=tcm:29-117478-16&type=LinksDossier>.

³³² Ingram, V. – *From sparring partners to bedfellows: joint approaches to environmental policy-making*, European Environment, 9, pp. 41-48, 1999.

³³³ Delmas, M., Terlaak, A. – *A Framework for Analyzing Environmental Voluntary Agreements*, California Management Review, vol. 43, no. 3, pp. 44- 63, 2001.

³³⁴ Ibid.

³³⁵ Grepperud, S. – *Voluntary environmental agreements: bargaining over more than emissions*, European Journal of Political Economy, 18, pp. 545-559, 2002.

makes concessions with respect to pollution abatement in exchange for industry concessions with respect to layoff decisions.³³⁶

It is interesting to see that, according to the literature, VEAs are a clear favorite both of industry and of public authorities. Thus, industry prefers VAs to taxation owing to lower enforcement costs while the authorities do the same because of lower transaction costs.³³⁷ Also, industry prefers VAs to licenses because negotiated emissions are higher than the emissions expected to be required by the use of licences and because abatement costs are lower. The authorities prefer VAs because they involve both lower transaction and abatement costs.³³⁸ In addition, public voluntary agreements are often proposed in the absence of strong legislative threats; regulatory authorities often use such agreements precisely because they lack statutory authority to undertake more stringent measures. Companies join public VAs in order to obtain the benefits offered to participants by the government. Such agreements can be thus viewed as subsidies from governments to firms, aimed at inducing environmentally friendly actions by the participating firms.³³⁹

Nevertheless, this optimistic account does not seem to match the figures, at least not at the EU level. Therefore, it might be the case that the success of VEAs depends heavily on the national capacity of Member States to offer regulatory relief to participating companies. This would explain the relative success of VEAs at national levels (according to OECD figures there were 317 VAs in the EU countries in 1997)³⁴⁰ as compared to the extremely limited amount of initiatives at the EU level. Still, national design and implementation of VEAs is not devoid of problems. In Belgium for instance, most agreements are concluded within the legal framework of the producer/importer take-back obligation for certain products. The objectives are set by the legislator at the national level, while regional authorities negotiate agreements with industry and lets the latter organize itself and find the ways to reach the objectives. Industry seems to appreciate its margin of discretion and its power to actually set-up the mechanisms of implementation, but, at the same time, is not at all comfortable with the objectives being set by the legislator (in most cases without extended consultation with the industry concerned). Regional authorities promote the use of VEAs in order to avoid the complicated internal legislative procedures and, sometimes, overstep their competencies,³⁴¹ but industry is not always happy to see regions imposing requirements that are not within their powers.

Given the equally mixed balance of VEAs at national levels (we have to admit that VEAs do actually deliver more in national contexts than at the EU level), not to mention the pretty somber picture at EU level, the appropriateness of this instrument for IPP purposes needs to be questioned from at least two perspectives. On the one hand, the life-cycle coverage of the instrument is not obvious. The EU-level agreements mentioned above focus on one stage alone – production – while, for instance, the Belgian national accords only deal with waste. It is hard to imagine how VEAs could integrate, even at a purely theoretical level, the entire life-cycle of a product. On the other hand, a clear and workable set of

³³⁶ Ibid.

³³⁷ Schmelzter quoted in Grepperud, S., Pedersen, P. – *Voluntary Environmental Agreements: Taking Up Positions and Meeting Pressure*, Economics and Politics, vol. 15, no. 3, pp. 303-321, 2003.

³³⁸ Segerson and Miceli quoted in Grepperud&Pedersen, p. 304.

³³⁹ Lyon, T., Maxwell, J. – *Self-regulation, taxation and public voluntary environmental agreements*, Journal of Public Economics, 87, pp. 1453-1486, 2003.

³⁴⁰ OECD, *Voluntary approaches for environmental policy – an assessment*, 1997.

³⁴¹ For instance in Belgium “waste” is a regional competence while everything related to product norms is federal. Thus, if a regional authority wants to regulate on waste and to include a prevention dimension into it, it is easier to negotiate a VEA then to get into the regional-federal legislative game.

criteria should be identified and applied. The literature on environmental agreements is extremely rich in conditions for success that could be taken as an inspiration by policy-makers to turn VEAs into a workable instrument. The guidelines of the Commission are admirable on paper and some authors have even proposed taking them as criteria for both national and EU-level agreements and developing a Europe-wide mechanism to monitor the implementation of the guidelines.³⁴² In the absence of such mechanisms, it is hard to imagine what kind of VEAs the Commission envisages as implementation tools for IPP. If it is EU-level VEAs that the Commission wants to promote, the question remains of whether they would be used as self-regulation or as co-regulation. Following the example of the EuP Directive it might seem that self-regulation is the way forward for EU-level agreements. Nevertheless, for self-regulation to happen industry would need to be pro-active, which does not seem to be the case so far, especially where there is no regulatory relief in exchange. If it is national-level VEAs that the Commission envisages, then a series of co-ordination mechanisms would be needed in order to ensure, for instance, that free market principles are not violated.

3.6. Public procurement

Public authorities are spending some 16% of the European Union’s Gross Domestic Product. By using this purchasing power to opt for goods and services that also respect the environment, they can make an important contribution toward sustainable development, but also provide the market with a real incentive for developing innovative green product and services.³⁴³ In its 2003 Communication, the Commission declared that “positive action is needed to encourage public authorities to use the possibilities in existing public procurement legislation”. What those possibilities are could be worth assessing indeed.

3.6.1. Public Procurement law

3.6.1.1 General objectives of Public Procurement

The current public procurement legislation is built on a combination of directives, applying to public supply contracts;³⁴⁴ public works contracts;³⁴⁵ public service contracts;³⁴⁶ water, transport, energy and telecommunications.³⁴⁷ These directives, based on Articles 7(2), 55 and 95 of the Treaty, were consolidated in 2004.^{348 349}

³⁴² Volpi, S., Singer, S. – *EU-level Agreements: A Successful Tool? Lessons from the agreement with the automotive industry*, in ten Brink, P. (ed.) – *Voluntary Environmental Agreements. Process, practice and future use*, Sheffield, Greenleaf Publishing, 2002.

³⁴³ Commission Staff working document, “*Buying green! A handbook on environmental public procurement*”, SEC(2004) 1050, 18.8. 2004.

³⁴⁴ Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ L 199, 9.8.1993, p.1.

³⁴⁵ Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L 1993, 9.8.1993, p. 54.

³⁴⁶ Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 1992, 24.7.1992, p. 1.

³⁴⁷ Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 1993, 9.8.1993, p. 84.

³⁴⁸ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004.

³⁴⁹ S. Van Garsse, “Nieuwe richtlijn overheidsopdrachten. Codificatie van het Europees aanbestedingsrecht in de klassieke sectoren”, N.j.W. 2004, 948.

Regarding the margin of manoeuvre allocated to the integration of environmental requirements into the current regime, the Commission adopted, first, an Interpretative Communication of 4 July 2001.³⁵⁰ And, second, on 18 August 2004, the Commission presented a “*Handbook on environmental public procurement*” designed to help public authorities in a more practical way to implement environmental considerations in their public procurement policy.³⁵¹

Later on, the Commission’s interpretation, which was mainly based on the case law of the European Court of Justice,³⁵² has been clarified and, to some points, enlarged by the Court itself.³⁵³

3.6.2. Legal constraints on the greening of public procurement

3.6.2.1. Subject matter of the contract

The legally most important occasion for public authorities to take account of environmental considerations, is the stage of the circumscription of the subject matter of the contract. In this case, public authorities define which goods or services they will purchase, or which work they want to construct. At this stage, public authorities have the widest opportunity to choose for environmentally sound products.³⁵⁴ The public procurement directives do not prescribe what contracting authorities should buy; they only prescribe “*how*” they must buy. Whether or not the subject matter of the contract will have a green definition depends entirely on the environmental awareness and knowledge of the public authority, but especially the political will to do so.³⁵⁵

In case of public work contracts, contracting authorities can, for example, order the conception of a low-energy and water consuming building, based on alternative energy sources.³⁵⁶ For public service contracts contracting authorities could prescribe a specific method of cleaning, using only those products that are least harmful for the environment. They also could demand that public transport is carried out by electric buses.³⁵⁷ They could also prescribe a selective collection of waste in order to render recycling more effective.³⁵⁸

³⁵⁰ Commission Communication “*on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*”, 4.7.2001; COM (2001) 274.

³⁵¹ Supra note 343.

³⁵² Case 31/87, *Gebroeders Beentjes BV v State of the Netherlands*, ECR 1998 p.4635, Opinion of Advocate General Darmon, ECR 1998 p.4635; Case C-225/98, *Commissie/France*, ECR 2000 p. I-7445, Opinion of Advocate General Alber.

³⁵³ Case C-19/00, *SIAC Construction Ltd/County Council of the County of Mayo*, ECR 2001 p. I-07725, Opinion of Advocate General Jacobs, ECR 2001 p.I-7725; Case C-513/99, *Concordia Bus Finland Oy Ab/ Helsingin kaupunki, HKL-Bussiliikenne*, ECR 2002 p.I-7213, Opinion of Advocate General Mischo ECR 2002 p.I-07213; Case C-448/01, *EVN AG, Wienstrom GmbH/Oostenrijk, Stadtwerke Klagenfurt AG, Kärtner Elektrizitäts-AG*, ECR 2003 p.I-14527 Opinion of Advocate General Mischo, ECR 2003 p.I-14527 ; Case C-59/00, *Bent Mousten Vestergaard/Spottrup Boligselskab*, ECR 2001 p. I-9505.

³⁵⁴ M.A. Flamme, Ph. Flamme and C. Dardenne, *Les marchés publics européens et belges*, Brussels, Larcier, 2005, 114.

³⁵⁵ COM (2001) 274, p. 7.

³⁵⁶ COM (2001) 274, p. 7.

³⁵⁷ Case C-513/99, supra note 353.

³⁵⁸ The Brussels Institute for Environmental Management IBGE-BIM entitled for example their call for tender for some services: “*environmental cleaning contract*”; “*Organic catering contract*”; “*Energy-efficient building*”; SEC (2004) 1050, p. 15.

3.6.2.2. Technical specifications

After having chosen the subject matter of the contract, the contracting authorities need to stipulate the characteristics or technical specifications of the subject so that the work, product or service, fulfils *the use* for which it is intended by the contracting authority.³⁵⁹

These technical specifications of the public contract are without prejudice to the legally binding national technical rules, which may also have an environmental purpose.³⁶⁰

The technical specifications give objectives and measurable details of the subject matter of the contract and therefore have to be linked to this subject.³⁶¹ In order to enhance transparency, the public procurement directives oblige contracting authorities to indicate the technical specifications in the general or contractual documents relating to each contract.

The current public procurement Directives contain a complicated and detailed system of mandatory references to *standards* and comparable instruments to define the technical specifications in an objective way. The contracting authorities must respect a clear hierarchy:³⁶² preference is given to the European instruments and, in the absence of these, reference can be made to international or national standards or comparable instruments. If no standard can be found, the contracting authorities can define the level of performance or the functional characteristics, provided this does not lead to discrimination.³⁶³

Nowadays, few European and national standards exist that deal with environmental performance of products and services. Moreover, these standards do not stimulate innovative solutions, but are always one step behind on the technical evolution. Nevertheless, the Commission adopted a Communication on 25 February 2004 to stimulate the integration of environmental aspects into European Standardisation.³⁶⁴

This does not preclude contracting authorities from indicating the required level of performance.

The new Directives, 2004/17/EC and 2004/18, plainly allow contracting authorities to choose between specifications based on technical standards or on performance-based requirements.³⁶⁵ These

³⁵⁹ B. Schutyser, “ Sociale en milieuoverwegingen bij overheidsopdrachten : een stand van zaken in het licht van de nieuwe richtlijnen ”, T. Gem. 2005, 144; D. D’Hooghe, *De gunning van overheidscontracten en overheidsopdrachten*, Brugge, Die Keure, 1997, 327; M. Martens, “ Milieuoverwegingen in overheidsopdrachten ”, T.M.R. 2004, 305.

³⁶⁰ B. Schutyser, “ Sociale en milieuoverwegingen bij overheidsopdrachten : een stand van zaken in het licht van de nieuwe richtlijnen ”, T. Gem. 2005, 144; D. Misonne, K. Bodard, S. Horvat, L. Vanwalle, M. Pallemarts, L. Lavrysen, and N. De Sadeleer, *Legal constraints on national measures to promote environment-friendly products. A product regulator's trade law handbook*, Brussels, Science Policy, 2004.

³⁶¹ COM (2001) 274 final, p. 10; SEC (2004) 1050, p. 17; M. Martens, “ Milieuoverwegingen in overheidsopdrachten ”, T.M.R. 2004, 306.

³⁶² See Dir. 92/50, Art. 14; Dir. 93/36, Art.8; Dir. 93/37, Art.10.

³⁶³ COM (2001) 274, p. 11; B. Schutyser, “ Sociale en milieuoverwegingen bij overheidsopdrachten : een stand van zaken in het licht van de nieuwe richtlijnen ”, T. Gem. 2005, 144.

³⁶⁴ COM (2004) 130 final.

³⁶⁵ Dir. 2004/18, Art.23; Dir.2004/17, Art. 34; H. Nijholt, “Milieugericht aanbesteden”, T.B.O. 2004, 73-84; P. Thiel, “Les clauses environnementales dans les marchés publics”, Amén. 2003, 77.

performances or functional requirements must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract.³⁶⁶

The new Directives³⁶⁷ also explicitly allow to use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, when defining performance-based or functional environmental requirements, provided: (i) the specifications are appropriate for defining the characteristics of the supplies or services covered by the contract; (ii) the requirements for the label are based on scientific information ; (iii) the eco-labels are adopted with the participation of all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations; (iv) they are accessible to all interested parties.³⁶⁸ Contracting entities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents.

On the other hand, they must accept any other appropriate means of proof, such as a technical dossier from the manufacturer or a test report from a recognised body.

At least, the Directives explicitly allow for the taking into account of production and process methods, when defining the technical specifications.³⁶⁹

3.6.2.3. Selection of bidders

The European public procurement directives contain three kinds of selection criteria, namely criteria of exclusion, indicating whether or not the candidate is reliable; criteria based on the candidate's financial and economic standing; and criteria based on the candidate's technical capacity, indicating whether the candidate is able to execute the contract.

Compliance with an environmental management scheme can be required by the contracting authority, as mean of proof of technical capacity. This environmental management scheme should have an impact on the quality of the supply or the capacity of the candidate to execute a contract with environmental requirements.³⁷⁰ The existing regulated environmental management scheme EMAS can be used as a means of proof.³⁷¹

The public procurement Directives, 2004/17/EC and 2004/18/EC, allow contracting authorities, in “appropriate cases”, to ask from bidders to demonstrate their technical capacity to meet requirements

³⁶⁶ Dir.2004/18, Art. 23(3); Dir. 2004/17, Art.34(3).

³⁶⁷ Dir. 2004/18, Art. 23(6) and Dir. 2004/17, Art. 34 (6).

³⁶⁸ B. Schutyser, “ Sociale en milieuoverwegingen bij overheidsopdrachten : een stand van zaken in het licht van de nieuwe richtlijnen ”, T. Gem. 2005, 146; M. Martens, “ Milieuoverwegingen in overheidsopdrachten ”, T.M.R. 2004, 308.

³⁶⁹ Dir. 2004/18, Annex VI; Dir. 2004/17, Annex XXI.

³⁷⁰ COM (2001) 274, p. 17; “Green Paper: public procurement in the European Union: exploring the way forward” COM (96) 583; Commission Communication “Public Procurement in the European Communities”, COM (1998) 143.

³⁷¹ Article 11 (2) of the EMAS Regulation states that “In order to encourage the organisation's participation in EMAS the Commission and other institutions of the Community as well as other public authorities at national level should consider, without prejudice to Community law, how registration under EMAS may be taken into account when setting criteria for their procurement policies”.

set by the contract to put into place certain environmental management measures for public works and services contracts.³⁷²

Under “appropriate cases”, one should consider contracts, of which the execution could endanger the environment and, therefore, call for measures to protect the environment during their execution. Naturally, those measures are directly linked to the performance of the contract. The new directives explicitly recognise that EMAS certificates can serve (if relevant) as a possible means of proof for companies to demonstrate their technical capacity to perform these environmental management measures. Other means of proof can be accepted.

3.6.2.4. Award of the contract

The public procurement Directives contain two options for the award of contracts: either the “lowest price” or the ‘most economically advantageous tender’.³⁷³

The aim of this second option is to help the contracting authorities get the best value for money. In order to define which tender should be considered the most economically advantageous, the contracting authority has to indicate beforehand which criteria will be decisive and will be applied. These various criteria should be mentioned either in the contract notice or in the contract documents, in descending order of importance, if possible.

The current European public procurement Directives give examples of the criteria that may be applied in order to define the most economically advantageous tenders, such as price, delivery date, delivery period, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics of the goods or services, after-sales service, technical assistance, profitability, technical merit.

According to the Commission, environmental elements can serve to identify the most economically advantageous tender, in cases where these elements imply an economic advantage for the purchasing entity,³⁷⁴ attributable to the product or service, which is the object of the procurement. The environmental advantage must be economically measurable. The public authority should translate the environmental objective into specific, product-related and economically measurable criteria by requiring for example a rate of energy consumption.³⁷⁵

In the same way the Commission stated that not all costs incurred during the life cycle of a product can be included in the tender price.³⁷⁶ The price paid by a contracting authority to purchase a product, reflects and takes account of those costs incurred in the phases which are already completed (normally: design, materials, production; sometimes also testing and transport) and, therefore, should not be taken into consideration a second time in the award process.

In its handbook, the Commission gives some examples of partial life-cycle costs that can be taken into account to define the price of the tender, in order to find the most cost-effective and at the same time

³⁷² Dir. 2004/18, Art.48(2)(f); Dir. 2004/17, Art. 52 (3).

³⁷³ Articles of directive.

³⁷⁴ P. Thiel, “Les clauses environnementales dans les marchés publics”, Amén. 2003, 68.

³⁷⁵ COM (2001) 274, p. 21-22.

³⁷⁶ COM (2001) 274, p. 23-24; M. Martens, “Milieuoverwegingen in overheidsopdrachten”, T.M.R. 2004, 311; D. D'Hooghe, I. Vos and P. De Keyser, “Recente evoluties in het aanbestedingsrecht”, in Jaarboek Bouwrecht 2004-2005, Brugge, die Keure, 2005, 29.

most environmental-friendly offer. The contracting authorities can, for example, take the operating costs/savings of water, electricity and fossil fuels, but also the end of life costs, such as disposal costs into account.³⁷⁷

In the opinion of the Commission, other production or process related externalities can not be part of an award criterion.³⁷⁸ Externalities are not borne by the public purchaser of a product or service, but by society as a whole. Public authorities should retain the possibility to define the subject matter of a contract or impose conditions relating to the execution of the contract and to integrate, at these stages of the tender procedure, their environmental preferences linked to eventual occurrence of external costs.

The interpretation of the Commission that every award criterion needs to have an economic advantage for the contracting authority, seems to be rejected by the European Court of Justice in the case *Concordia Bus Finland Oy Ab*.³⁷⁹ The Commission still contends that the criteria for the award of public contracts, which may be taken into consideration when assessing the economically most advantageous tender, must satisfy four conditions: they must (i) be objective, (ii) apply to all the tenders, (iii) be strictly linked to the subject-matter of the contract in question, and (iv) be of direct economic advantage to the contracting authority.³⁸⁰

The Court of Justice considers that the list of award criteria provided by Article 36 of Directive 92/50/EEC (award criteria) is not exhaustive³⁸¹ and that this list does not only mention criteria of a purely economic nature (like the aesthetic characteristics of a tender).³⁸² Therefore, article 36 could not be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature.³⁸³

The European Court of Justice ruled³⁸⁴ that the contracting authority, which decides to award a contract to the tenderer who submits the economically most advantageous tender, may take into consideration ecological award criteria (such as the level of nitrogen oxide emissions or the noise level of the buses), provided they:

- are linked to the subject-matter of the contract;
- do not confer an unrestricted freedom of choice on the authority;
- are expressly mentioned in the contract documents or the tender notice; and
- comply with all the fundamental principles of Community law, in particular the principle of non-discrimination and transparency.

³⁷⁷ SEC (2004) 1050, p. 34.

³⁷⁸ COM (2001) 274, p. 21-22.

³⁷⁹ Case C-513/99, supra note 353.; Case C 448/01, supra note 352, opinion of Advocate General Mischo, para. 36 (ECR 2003 p.I-14527).

³⁸⁰ See *Ibid.*, para. 52.

³⁸¹ Case C-19/00, supra note 353, see opinion of Advocate General Jacobs para. 32.

³⁸² See: C-513/99, Opinion of Advocate General Mischo, para. 103-104; C-448/01, Opinion of Advocate General Mischo, para 36.

³⁸³ See Case 448/01, *ibid.*, para. 55.

³⁸⁴ In his opinion A-G Mischo stated that the environmental award criteria may be equally justifiable if it offers a benefit to other parties than the contracting entity or to the environment in general, which in our opinion was confirmed by the Court, stating that award criteria do not need to have an economical nature.

In the Case *EVN AG, Wienstrom GmbH*,³⁸⁵ the European Court of Justice confirmed its earlier ruling,³⁸⁶ and gave some precisions on the need for objective and transparent award criteria and the link with the subject matter of the contract.

The Court ruled that an award criterion, for which the contracting authority itself has admitted that it does not have the technical ability to verify whether electricity supplied to it has actually been generated from renewable energy sources and that it did not require the tenderers to supply proof of their actual supply obligations or existing electricity supply contracts, is contrary to the principles of Community law in the field of public procurement, especially the principles of equal treatment and transparency.³⁸⁷

The Court also analysed whether the criterion used was linked to the subject matter of the contract. In this case, the Court ruled that the award criterion applied did not relate to the service which is the subject-matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the invitation to tender, but to the amount of electricity that the tenderers have supplied, or will supply, to other customers. An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, can not be regarded as linked to the subject-matter of the contract.

In its handbook, the Commission changes its opinion and states that it is not necessary for each individual award criterion to give an economic advantage to the contracting authority, but that taken together (economic and environmental) the award criteria have to allow to determine the best value for money.³⁸⁸

After the case *EVN AG, Wienstrom GmbH* some say that contracting authorities can take non-product related (life-cycle) externalities into account.³⁸⁹ Still, these externalities must be linked to the subject matter of the contract.

The new directives consolidate the case law of the European Court of Justice and explicitly allow environmental characteristics to be included in award criteria,³⁹⁰ on the condition that the award criteria have a link to the subject matter of the contract.³⁹¹

³⁸⁵ Case C-448/01, supra 353, opinion of Advocate General Mischo.

³⁸⁶ Ibid. para 33.

³⁸⁷ Supra note 385, paras 47-52. Because electricity produced from renewable energy sources is physically indistinguishable from electricity produced from conventional sources, the method of proof is crucial in ensuring that the public authority is getting value (including environmental value) for money. Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources requires Member States to ensure that the origin of electricity from renewable energy sources can be guaranteed according to objective, transparent and non-discriminatory criteria by no later than 27 October 2003. Accordingly, Member States have to ensure that a guarantee of origin for green electricity is issued whenever requested.

³⁸⁸ SEC (2004) 1050, p. 31.

³⁸⁹ M. Martens, “Milieuoverwegingen in overheidsopdrachten”, T.M.R. 2004, 308; P. Kunzlik, "Case Law Analysis. Making the Market Work for the Environment : Acceptance of (Some) 'Green' Contract Award Criteria in Public Procurement", *Journal of Environmental Law*, 2003, 199.

³⁹⁰ Article 53 of Directive 2004/18/EEC and article 55 of Directive 2004/17/EEC; H. Nijholt, “Milieugericht aanbesteden”, T.B.O. 2004, 78.

3.6.2.5. Performance clauses

With performance clauses, the contracting authorities precise the mode of execution of a public contract, once awarded.

There has not been a European harmonisation of this stage of the public procurement procedures. The current public procurement directives do not cover contract clauses. The regulation of the contractual part of public procurement contracts relies entirely on the member states.³⁹²

The European Commission gave some examples of specific performance clauses which ultimately meet general environmental objectives, which are sufficiently specific and are in conformity with the primary principles of European Law: delivery or packaging of goods in bulk rather than by single unit; recovery or re-use of packaging material and the used products by the supplier; delivery of goods in re-usable containers ; collection, take-back recycling or re-use of waste produced during or after use or consumption of a product by the supplier; transport and delivery of chemicals (like cleaning products) in concentrate and dilution at the place of use.³⁹³

3.6.3. Contribution of Public Procurement to IPP

Directives on public procurement offer possibilities for public authorities to take environmental concerns into consideration during the different stages of public procurement procedures :

- subject matter of the contract;
- selection and;
- award.

Still, it is the European Court of Justice that paved the way for the greening of public procurement.

Contracting authorities can prescribe strict environmentally friendly characteristics for the products and services (and even constructions) when they award the contract to a candidate with the objectively most environmentally friendly submission. In our opinion, public authorities could award a public contract (partially) based on a comparison of a life-cycle analysis. This life-cycle analyse needs to be objective/standardised.

In this manner, public authorities would contribute to the realisation of IPP by pushing industry to put on the market only products and services which are less/not harmful for the environment, and intervene in a very early stage of the life-cycle.

However, public procurement law indicates some limits on the integration of environmental requirements, and the life-cycle approach. The technical specifications, the performance/functional criteria, and the award criteria always need to be linked to the subject matter of the contract. In order

³⁹¹ Dir. 2004/18, Rec.1 : “*This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2*”.

³⁹² P. Thiel, “Les clauses environnementales dans les marchés publics”, Amén. 2003, 68.

³⁹³ Other examples SEC (2004) 1050, p. 37; M.A. Flamme, Ph. Flamme en C. Dardenne, *Les marchés publics européens et belges*, Brussels, Larcier, 2005, 115.

to judge whether or not these specifications or criteria are linked to the subject matter, the Court of Justice does not provide clear requirements. In the case *Concordia*, the Court stated that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses, must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services, although this service can be executed by conventional busses. In the case *EVN AG, Wienstrom*, the Court defined the subject of the contract in a narrow way. The Court analysed the actual need of the contracting authority, which was, not the supply of green electricity, but the supply of the annual consumption need. One could conclude from this judgement that if the contracting authority does not circumscribe precisely what (and to what environmentally friendly degree) it needs, the risk of the lack of a link between the specifications or criteria and the subject matter will be bigger.

It should also be mentioned that the public procurement law offer possibilities to take the environmental cost of (nearly) every stage of the life-cycle into account. Contrary to the opinion of the Commission, not only savings (economic advantages) for the contracting authorities can be taken into account (like costs of extraction of raw materials etc). Still, these product or process externalities must be objectively measurable, in order to ensure the equal treatment of the candidate (for example the cost of the production of the product in its contribution to the depletion of the ozone layer, global warming or air pollution is not measurable). However, one could say that this requirement is compatible with the cost-effective characteristic of IPP.

Furthermore, this extended price-criterion, which integrates at least partially the life-cycle approach, seems to be excluded in case of contracts which are only awarded on the lowest price. The new directives only allow environmental requirements for contracts where the award is made to the tender most economically advantageous from the point of view of the contracting authority.

Finally, it should be noticed that the greening of public procurement is not mandatory and depends entirely on the willingness of the contracting authorities.

3.7. Product panels

The pilot projects on mobile phones and teak garden furniture, which are currently used as a test case for the IPP policy, are clearly based on the model of product panels. The product panels were also cited as a possible instrument in the Green Paper of 2001 and an Expert Workshop on the topic was hosted by the European Commission in June 2001.

Unlike other instruments discussed in this report, product panels do not have a fixed formula and thus can be found in various forms. Even in the IPP Green Paper only a very vague definition was given: “*stakeholder groups to work on how environmental goals can be achieved or obstacles overcome in relation to their particular product group*”. The Green Paper states that panel can be set up in various formats, adapted to the issue at stake. The panels can concern a specific product or product groups or a particular problem. Finally, the involvement of the European Commission is considered as a variable feature. In general, essential features that may vary are the weight of public authorities in the process, the composition of the panel (front runners or not, mix of different stakeholder groups) and the status of the panel’s outcome (binding or not). Still, the panels are always voluntary and serve as a forum for stakeholders and public authorities. Prominent examples of product panels can be found in the Nordic countries like Finland and Denmark.

The Danish product panels were launched in 1998 within the framework of the Danish Product – Oriented Environmental initiative. These panels were designed to stimulate a binding dialogue and to strengthen cooperation between participating players for the purpose of increasing development and sale of cleaner products.³⁹⁴ The panels are designed to bring together relevant actors from the entire life-cycle of a selected product. This includes producers, professional purchasers, consumers and NGOs. The panels were launched by the Danish EPA, which also financed the secretariat of the panels. Its representatives, however, participated to the panels on an equal footing with the other members. To select the participant for the panels, the Danish EPA focused on front-runners and motivated individual companies, rather than branch organisations.³⁹⁵ The panels could largely determine their own framework and design their own action plan.³⁹⁶ The projects designed by the panels get an extra incentive as they can be financed or co-financed by the Danish EPA’s program for cleaner products.

The first panels were set up in the following areas: electronics, textile and goods transportation. The textile panel is one of the most successful. It focuses on the marketing of eco-labelled textiles and succeeded in achieving a larger share of green products on the market. Both producers and retailers committed themselves on the use of the existing EU eco-label to produce and sell environmental cleaner textile products. Their activities are not restricted to the participants of the panel, but reached out to other producers and retailers through campaigns and a knowledge centre for textile. The success of the textile panel can be attributed for a large part to the participation of front-runners, the existing knowledge base on which they could build (EU Flower) and the consideration of green textile as a promising niche by the Danish industry.³⁹⁷ After this first load of panels new ones were set up in the following areas: building and construction (2000) and agriculture (2003). Finally, two stakeholder specific panels were created, one for retailers and a second one for private and public purchasers.

In the slipstream of Denmark, the Finnish environmental administration and the textile association started their own product panel on textile in 2001. The panel consisted of manufacturers, retailers, industrial associations, recycling companies, research institutes, consumer and environmental administrations and an eco-labelling institution. The panel’s activities lasted 1,5 years but did not reach the level of productivity of its Danish predecessor. Most of its activities were intended to provide a clear picture of environmental aspects of textile: discussing eco-label criteria and environmental indicators, BREF documents and information flow within product chains. Unlike in Denmark, most of its activities were organized within the panel and no attempts were made to involve non-participants or to raise awareness in the wider community.³⁹⁸

³⁹⁴ Product panels, online <http://www.mst.dk/indu/01030000.htm>.

³⁹⁵ Traberg, R., *Sharing responsibilities-the Danish Product Panels*, presentation at the International Summer Academy “From Government to Governance: The Case of Integrated Product Policy”, September 7-11, 2003, Wuerzburg, Germany.

³⁹⁶ Knudsen, P., M. Jensen and Chabert, A., *Evaluating Product Panels An Evaluation Made in 2001* by Oxford Research A/S in *Working Report Arbejdsrapport fra Miljøstryrelsen: 14*, 2003.

³⁹⁷ Traberg, R., *Sharing responsibilities-the Danish Product Panels*, presentation during the International Summer Academy “From Government to Governance: The Case of Integrated Product Policy”, September 7-11, 2003, Wuerzburg, Germany.

³⁹⁸ Nissinen, A. and K. Parikka, *Product Panels for Promoting Environmentally Sound Products-Finding Balance Between Preset Objectives and Autonomous Goals Setting*, paper presented at The 11th Annual International Sustainable Development Research Conference Finlandia Hall, Helsinki, 6-8 July 2005.

The Finnish Ministry for the environment initiated a second panel on furniture in 2001. Participant of the panel covered the entire life-cycle of key players in the furniture industry, designers, retailers and public purchasers, representatives from waste treatment facility, research centres, Consumer agencies and eco-label institutions. Industrial actors active at different levels (global and local) and on different scale (SME and large manufacturers) were represented. The panel activities were supported by the Finnish Environmental Institute and the Finnish Furniture Association. The first goal of the panel is to promote environmentally sound furniture through better information, the second to improve the maintenance and eventually reuse and recycling of furniture. In this case some preset objectives were set, which included the setup of an action plan, an internet website to publicize their activities and organization of a seminar to inform the furniture branch on environmental features of furniture.³⁹⁹

Other product panel-like initiatives have been developed in The Netherlands (on clothing, food and home furnishing) and Norway (pilot projects on paint and coatings, textiles, and building and accommodation). In Sweden, an ‘Environmental Advisory Council’ was created within which dialogue is organised in a product forum-like fashion. Finally, in Germany pilot various projects were started. Two panels were created in Baden-Württemberg: one on paper from 2001-2002 and one on textiles from 2002-2003. In Lower Saxony the cooperative approach was used in a working group of the government dealing with product responsibility concerning tires (1999-2002). Finally, in Bavaria (2002) ‘product bodies’ were created to examine the possibility to cooperate with the different stakeholder along a product’s life-cycle: kitchens and sports footwear were taken as test cases there.⁴⁰⁰

The different practices described above illustrate the importance of some key issues when setting up a product panel. One of them is the selection of the participants: they should be committed and knowledgeable. As we have seen in the Danish case, a choice has to be whether to mainly select association or pioneering businesses. Associations can give a good representation of the industry, but could also lead to the less advanced results.⁴⁰¹ Another choice has to be made between a focus on incorporating important decision-makers in the panels or rather players which are expected to be more motivated to participate and implement the panel’s results.⁴⁰² Finally, the role of public authorities in initiating the panels and their participation is an important issue. The panels are considered to be independent forums, but the question remains how detailed the panel’s assignment must be and whether public authorities should set some specific tasks to kick start the process as was the case in the Finnish panel on furniture.⁴⁰³ Besides this, the position of public authorities representatives within the panels is an important issue. These representatives can play an important role: informing the panel of relevant government initiatives, providing technical assistance and communicating panel results to the relevant public authorities. If representatives from different departments are present it is of great importance that they take a common position.⁴⁰⁴ Finally, several studies emphasize the neutral role these representatives should adopt as well as the fact that they should work on an equal footing with the other participants.⁴⁰⁵

³⁹⁹ Ibid.

⁴⁰⁰ Institute for Ecological Economy Research , *Cooperative Approaches to Integrated Product Policy(IPP). Reflection on how to structure a Product Forum*, Ministry of the Environment and Transport Baden Württemberg, Stuttgart.

⁴⁰¹ Ibid., pp. 22-23.

⁴⁰² Ibid., p. 22.

⁴⁰³ Nissinen, A. and K. Parikka, *supra* note 398.

⁴⁰⁴ Institute for Ecological Economy Research, *supra* note 400, at p.24.

⁴⁰⁵ Ibid., Knudsen, P., M. Jensen and Chabert, A., *Evaluating Product Panels An Evaluation Made in 2001 by Oxford Research A/S in Working Report Arbejdsrapport fra Miljøstryrelsen*: 14, 2003.p.15-49.

The national experiences and the issues cited above provide an extra tool to study the IPP pilot projects that are currently running. In the European case public authorities gave the initial incentive. The European Commission launched a call for pilot projects and selected two of the 22 applications. One on mobile phones and the second on teak garden furniture: respectively proposed by Nokia and Carrefour. The projects are considered as test cases and so the selection was not based on the environmental potential of the product concerned but rather on the familiarity of the wider public with a particular product. Another criterion was based on the life-cycle thinking and focused on the coverage of the supply chain. Both pilot projects are chaired by the European Commission, but the companies which proposed the project are co-authoring the discussion document with the European Commission. The European Commission and the applicants also cooperated to select the other participant to the pilot project. The selection was based on the relevance of the participants for the product in question, their degree of commitment and the ability to function at a European level.⁴⁰⁶ The project on mobile phones includes representatives from the major ICT industrial communities (phone manufacturers, component manufacturers and network operators), Commission officials, consumer and environmental NGO's, and governmental agencies. The project on teak garden chairs has a similar mix of participants which includes producers, retailers, the European Confederation of Woodworking Industries (CEI-Bois), governmental agencies; environmental NGOs and Commission officials. Commission officials are well present during the project meetings: on the participants list of the mobile phone project first meeting as much as 6 officials were listed.

The pilot projects reach out to the wider stakeholder community through consultation opportunities during each phase of the project: serving as an extra input from stakeholders and probably a means to publicize their work.

The projects are divided in five phases: the analysis of the product's environmental impact throughout its life-cycle, the identification of ways to improve these impacts, the analysis of potential effects (environmental, social and economic) of the possible strategies, the setup of an implementation plan, and finally implementation itself. The progress of the implementation will be assessed after one year. At the moment, it is not clear what the outcome of the pilot project will be, since it largely depends on the commitment and choices of the participants. Both projects are currently in the first stages of their development, but have to be completed by December 2005.

Although, it is still early to assess the pilot projects, it seems as if the European Commission is very involved. They chair the projects and attend the meetings with several officials. They can help the project by providing information and feedback but can also influence the project's results. The selection of participants they made in cooperation with the project applicants has resulted in a mix of stakeholders including major players in the industry as well as associations, industry as well as NGOs and public agencies. The selection criteria they used show no real bias towards specific groups of the stakeholder community, even though a lot of large industrial players are involved.

3.8. ETAP

The Environmental Technologies Action Plan (ETAP) was adopted at the European Spring Council in March 2004 and its implementation is already well underway. Before looking more closely at the Plan

⁴⁰⁶ European Commission, *Questions and Answers on Stakeholder Participation in the IPP Pilot Product Exercise*, Brussels, 2004 online http://europa.eu.int/comm/environment/ipp/pdf/04_11_08_qa.pdf.

itself and at its relationship with IPP, it might be useful to reconstruct its main principles and its evolution.

ETAP is seen by the Commission as a bridge between the EU’s Sustainable Development Strategy and the Lisbon agenda. Environmental technologies, being less polluting, using fewer resources and recycling more than their alternatives, can help both secure a top market position for EU industries and preserve the environment. The main reason behind the creation of an EU strategy is that the development of these environmentally-friendly technologies is hampered by market, regulatory and information barriers. The purpose of the Plan is, therefore, to remove these obstacles and, in addition, to make the EU the world leader in developing and applying environmental technologies. There are three main objectives:

- to help make the transition from research to markets
- to improve market conditions
- to act globally

The Commission is to monitor the implementation of ETAP and report to the European Council and the Parliament every two years. A European Panel on Environmental Technologies was set up to promote the exchange of information between stakeholders, while Member States will co-operate via the Open Method of Co-ordination.

In 2002, the Commission released a Report on environmental technologies for sustainable development,⁴⁰⁷ where it makes a first connection with IPP. Thus, not only do both policies fit into the wider sustainable development framework, but IPP is seen as one of the main tools for harnessing business’s expertise.⁴⁰⁸ In addition, some of the instruments listed as possible implementation tools for IPP are also mentioned in the Report. EMAS and the EU eco-label appear as voluntary measures that can encourage business and consumers to identify opportunities.⁴⁰⁹ Stakeholders were involved in the preparation of the Report through bilateral discussions and through existing consultation mechanisms.⁴¹⁰

Also in 2002, the Commission held a conference on environmental technology designed to gather the initial views of stakeholders on the future Action Plan. Their general attitude seemed to be positive, provided that the Commission would be committed to the issue.⁴¹¹

The Report was followed, in 2003, by a Communication from the Commission on developing an action plan for environmental technology.⁴¹² It presents the first findings of the Commission on the

⁴⁰⁷ COM(2002) 122 final.

⁴⁰⁸ “One of the major tools for harnessing business’s expertise will be an Integrated Product Policy, which is concerned with cost-efficiently reducing products’ impacts throughout their life cycle through a range of instruments. This will involve creating the conditions needed for the efficient development and use of environmental technology”, *idem*, p. 17.

⁴⁰⁹ *Idem*, p.18.

⁴¹⁰ Communication from the Commission. Developing an action plan for environmental technology. COM(2003) 131 final, p. 8.

⁴¹¹ *Ibid.*

⁴¹² COM(2003) 131 final.

topic and is meant to serve as the starting point of the consultation with stakeholders.⁴¹³ The latter are not only invited to comment on the Communication, but will also be involved in four Issue Groups (on climate change, sustainable production and consumption, water and soil protection) – working groups whose outcome will form the basis for the Action Plan. In addition, stakeholders are invited to be part of an Advisory Expert Group (30 participants from research, industry, NGOs and public bodies) on sustainable production and consumption and, eventually, of working groups in charge of examining more precise issues. During the consultation period following the publication of the Communication the Commission received 72 responses from a very broad range of parties. Most of the participants argue in favor of a mix of policy instruments, while others advocate the use of voluntary agreements.⁴¹⁴

In 2004, the Commission made public its Communication on ETAP,⁴¹⁵ based on the results of the stakeholder consultation. A first direct reference to IPP is made in the introductory part, when the Commission talks about the policy context around ETAP. A second reference is made in the section dedicated to public procurement: *the Commission (...) by developing, in the context of IPP, several initiatives designed to encourage procurers to make use of the many possibilities in existing public procurement directives.*⁴¹⁶ IPP is also complementing ETAP in developing Environmental Product Declarations,⁴¹⁷ to be used in the business-to-business flow. Then, a series of IPP-like proposals are made, such as the use of different policy instruments. Nevertheless, while in the Communication on IPP legislation is not part of the list of implementation means, in this context the range of instruments is as wide as possible: *from legislation, through market-based and economic instruments to voluntary measures.*⁴¹⁸ EMAS and the EU eco-label are mentioned again in the context of raising business and consumer awareness.⁴¹⁹

Stakeholders are to be involved in the implementation process through technology platforms – bodies set up to bring together all interested stakeholders to develop and promote a specific technology (similar to product panels). In addition, the Commission wants to start a dialogue with stakeholders on specific issues related to the development and deployment of technologies.⁴²⁰ Moreover, a European Panel on Environmental Technologies is to be created, to help the Commission implement and further develop the Plan and to improve the information flow between different actors.

A first Report on the implementation of ETAP⁴²¹ was released in January 2005. It highlights the creation of technology platform in certain areas, recalls the need for Member States to draw up Action

⁴¹³ “Stakeholders include the producers and users of environmental technologies, trade unions, as well as the providers of training and education who ensure that people are suitably qualified to develop, use and maintain new technologies”, *idem*, p. 6.

⁴¹⁴ Outcome of the stakeholders’ consultation resulting from COM(2003)131. Detailed analysis. Commission website.

⁴¹⁵ Communication from the Commission to the Council and the European Parliament. Stimulating Technologies for Sustainable Development: An Environmental Technologies Action Plan for the European Union, COM(2004) 38 final.

⁴¹⁶ *Idem*, p. 19.

⁴¹⁷ *Idem*, p. 20.

⁴¹⁸ *Idem*, p. 8.

⁴¹⁹ *Idem*, p. 20.

⁴²⁰ *Idem*, p. 11.

⁴²¹ Communication from the Commission. Report on the implementation of the Environmental Technologies Action Plan in 2004. COM(2005) 16 final.

Plans for greening their procurement (suggested by the Commission in the IPP Communication), and announces the creation of the Panel in 2005.

3.9 The Directive on Ecodesign.

The European Commission, in its Communication of 18 June 2003, advocates the adoption of IPP, a concept we have explored in chapter 1. As appears from that chapter, what IPP means precisely is not so easy to master. One way to get a better idea of what the concept really covers is to have a closer look at the way EU legislation regarding the environmental impact of products is being developed after this turning point of June 2003.

In that perspective, the recent Directive 2005/32/EC establishing a framework for the setting of ecodesign requirements for energy-using products (EuP)⁴²² is worth scrutinizing.

3.9.1. The genesis of the Directive

In Augustus 2003, the Commission adopted a proposal for a framework directive for the setting of ecodesign requirements for energy-using products.⁴²³ The proposal is the outcome of the merger at the end of 2002 of proposals for a Directive on ecodesign for electrical and electronic equipment (EEE) and for a Directive on energy efficiency requirements (EER). Its objective is to ensure the free movement of energy-using products within the EU and to contribute both to environmental protection policy and to security of energy supply.

The Economic and Social Committee delivered its opinion on 31 March 2004. The European Parliament adopted its opinion at first reading on 20 April 2004, approving 78 amendments. The Commission made an oral presentation of its modified proposal on 27 April 2004. On 29 November 2004, the Council issued its common position,⁴²⁴ which was then approved by the Commission on 10 December 2004. On 13 April 2005, the European Parliament approved a text which had been agreed with the Council. On 19 May 2005, the Commission accepted in full all amendments adopted by the European Parliament which were actually the result of a compromise package agreed between the Parliament and the Council for the second reading. The Directive was finally adopted on 6 July 2005 and entered into force on 11 August 2005. Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 11 August 2007.

3.9.1.1. A clear link to IPP

According to the Commission itself, the Directive contributes to the integration of life-cycle thinking, one of the basic principles of the Integrated Product Policy (IPP), into product design⁴²⁵: “Given the many environmental aspects of products, the risk exists that sectoral policies may focus on particular aspects or phases of the product’s life cycle to the detriment of others, which may lead to contradictory and counterproductive legislation. This situation can be avoided by using an IPP approach. This has been elaborated in the aforementioned Green Paper on IPP and is further expanded in the Communication on the issue. IPP seeks to reduce the environmental impacts of all

⁴²² 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 OJ, L 191/29 , 22.7.2005.

⁴²³ COM(2003)0453 of 1 August 2003.

⁴²⁴ OJ, C38 E/45, 15.2.2005.

⁴²⁵ COM(2001)68final.

products and services across the whole of their life-cycles. It is based on life-cycle thinking, stakeholder involvement, the continuous improvement of products and the use of a variety of different policy instruments, including eco-design measures”. The Commission further states that the IPP principle, according to which environmental impacts must not merely be transferred from one phase of the life cycle to another, shall be followed when drafting implementation requirements.

The Directive is even presented as a test case for IPP: “experiences with its implementation will contribute to judging the appropriateness of establishing similar parallel framework Directives for other products, or general obligations on producers to undertake ecodesign. Activities that will be pursued in the follow-up to the Communication on IPP.”⁴²⁶

The preamble of the Directive states that “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 opportunities for manufacturers, for consumers and for society as a whole”.

Thus, the EuP Directive is indeed good sample for further investigation on how the Commission plans to implement IPP, as described in its communication of June 2003.

3.9.1.2. A sustainable development Directive?

Sustainable development is one of the major policy goals of the European Union. Article 2 of the EC Treaty calls for a sustainable development of the economy of the Community. Article 6 of the EC Treaty requires environmental considerations to be integrated into the other Community policies and activities, with a view to promoting sustainable development. The Cardiff European Council in 1998 reaffirmed the need for integration of environment into other policies. In December 1999, the Helsinki European Council emphasised the three dimensions of sustainability: economic, social, and environmental.

According to the Commission,⁴²⁷ the Directive perfectly fits with the goal of sustainable development: “it aims to create the framework for improving the environmental performance of energy-using products while preserving and enhancing a sound economic environment for this significant sector of activity with regard to the free movement of goods within the EU and the competitiveness of industry. It is therefore fully in line with the requirements for promotion of sustainable development and at the same time constitutes a concrete example of integration of environmental aspects in other Community policies and of implementation of the IPP concepts in a wide product area”.

Was this to forget the social dimension of sustainability? There are indeed no considerations at all in the Directive about the social and working conditions under which products are being manufactured, in Europe or elsewhere and, in this regard, one can question the assimilation of the draft Directive (and of the IPP strategy itself) to a true incarnation of the sustainable development concept, as the Directive should then include, on the same footing with environmental and economic considerations, a stronger social pillar, which should not rest with merely making sure that prices of EuPs do not rise, to the advantage of consumers on the EC market. The Directive can be considered as an important step towards a more sustainable way of production and consumption but does not fully embrace the three pillars of the sustainable development concept.

⁴²⁶ COM(2003) 453 final, memorandum, point 2.

⁴²⁷ Ibid.

More realistically, the preamble of the Directive now declares that “improving the energy efficiency of products contributes to the security of the energy supply, which is a precondition of sound economic activity and therefore of sustainable development”.

3.9.1.3. *The legal basis*

The Directive is based on Article 95 of the Treaty. Such a choice leads to various consequences:

- the adoption procedure of the Directive is co-decision, involving both the Parliament and the Council;
- the Commission, in its proposal, when dealing with health, safety, environmental protection, and consumer protection, must take as a basis a high level of protection;
- the possibilities left to Member States to adopt stricter standards than those set under the Directive are very narrow, once the negotiation process is closed: Article 95(4) and (5) provides the possibility for Member States to maintain or introduce national provisions relating to the protection of the environment on the grounds of a specific problem and based on new scientific evidence, but under very strict and difficult to match conditions.

Member States are submitted to such restrictions because disparities between the laws or administrative measures adopted by the Member States can create barriers to trade and distort competition in the Community. The aim of Article 95 is precisely to favour the harmonisation of legislation at European level in a way that guarantees the proper functioning of the internal market.

With Article 95 as a legal basis, it is crucial to guarantee, during the negotiations, that a high level of environmental protection is not only taken as a basis but also maintained during the whole process, in order to make sure that the final project does really incorporate a valid target regarding environmental protection. If this is not the case, it will be too late or very difficult for the Member States, afterwards, to try to adopt stricter standards.

Discussions have been tense at Parliament level whether Article 175 of the Treaty, which is the dedicated legal basis for legislation on the environment, would not be more appropriate.⁴²⁸ Article 175 does indeed offer more flexibility for Member States to adopt or maintain stricter environmental standards, after the adoption of the European legislation. Its objective is not, before all, to achieve the internal market; its target is to favour a good protection of the environment.

The literature is very rich in comments regarding the choice of proper legal bases and the pro and contra of Article 95 of the Treaty versus Article 175.⁴²⁹ We shall just note here that product policies are most often confronted with the dilemma, as soon as they are concerned with environmental protection. Products have indeed a vocation to be traded and to move across the borders, which is not the case of a habitat or a power plant for instance. Any regulation on the environmental impact of products does consequently raise the issue of the proper legal basis.

The choice of the legal basis is not left to the discretion of the Community institutions, but has to be based on objective criteria, such as the stated objective and the content of the measure. The centre of

⁴²⁸ See Amendment 1 of the European Parliament.

⁴²⁹ See e.g. J.H. Jans, *European Environmental Law*, Groningen, Europa Law Publishing, 2000; L. Krämer, *EC Environmental Law*, Fifth ed., Thomson, Sweet and Maxwell, 2003.

gravity of the measure (the main purpose) is generally the key concept for cutting short the discussions when a measure pursues more than one objective and in this regard we can notice that Article 95 gets the preference of the legislator.⁴³⁰

In theory, when a measure simultaneously pursues several objectives which are not incidental in nature, multiple legal bases may be proposed, provided that the procedures can be conciliated. Both Article 95 and 175 are now based on co-decision by the Parliament and the Council but the residual powers they provide for Member States under Art. 176 and 95(4-9), are so different that a double legal basis can create considerable legal uncertainty. Authors have diverging positions on the admissibility of such a dual legal basis, in cases where both aspects (environment/internal market) would be equally essential.⁴³¹

In the case of the Ecodesign Directive, the addition of Art.175 as a double legal basis would probably not have provided the expected results regarding the broader latitude left to Member States, for a strong lock as been inserted in the text itself, which states that “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 (...) covered by the applicable implementing measure” and this even if the existing implementing measure does not contain any ecodesign requirement.⁴³² With such a drafting, Member States have no latitude at all for reinforcing the objectives pursued by the implementing measures, whatever the legal basis.

With the current wording, it shall be extremely important that the negotiators make sure that implementing measures do incorporate sufficiently strong environmental requirements, as no prospects for any reinforcement of the objectives shall be left to Member States, except for changing the implementing measure itself or from removing the lock from the framework directive.

This shall have to be dealt with via the comitology process,⁴³³ in accordance with Decision 1999/468/EC, as the implementing measures shall be adopted by the Commission via this procedure. Implementing measures shall not take the form of daughter-directives, which would have required an adoption via a co-decision procedure involving the Parliament and the Council.

3.9.2. Main features of the new regime

3.9.2.1. A mere framework

The Directive provides a framework for the setting of ecodesign requirements for a specific category of products, called “energy-using products” (EuP).

It does clearly limit itself to providing a framework, without setting any environmental requirements yet. The box is there, but still empty, the real substance being expected to be produced later on. As a

⁴³⁰ Are based on Article 95: the packaging and the batteries Directives in the waste management area; the RoHS Directive; the Directive on noise from equipment for use outdoors on emissions from engines for mobile equipment (other than road vehicles); the directives on minimum energy efficiency requirements; the framework directive on labelling concerning energy consumption of domestic appliances.

⁴³¹ L.Krämer,p.73; J.Jans, p.54.

⁴³² Dir. 2005/32, Art. 6.

⁴³³ See C.F.Bergström, *Comitology – Delegation of Powers in the European Union and the Committee System*, OUP, Oxford, 2005.

consequence, the proper working of the new regime is for now a question mark, as it is fully dependent of the adoption of implementing measures, which are still to be adopted,⁴³⁴ if ever.

In the meantime, EuPs are not submitted to any generic requirement by the Directive regarding their ecodesign or any other aspects, such as the environmental soundness or energy efficiency.

It is an important feature of the Directive indeed, which marks a difference with the Product Safety Directive⁴³⁵. The Product Safety Directive is built upon such a generic clause which imposes that all products put on the market must be “safe”.

Art.3(1). “Producers shall be obliged to place only safe products on the market”.

Art.2(b). A “safe product” is any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular: i) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;

(ii) the effect on other products, where it is reasonably foreseeable that it will be used with other products;

(iii) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;

(iv) the categories of consumers at risk when using the product, in particular children and the elderly.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be “dangerous”.

3.9.2.2. Energy-using products

The Directive deals with energy-using products.

An EuP is a product which, once placed on the market and/or put into service, is dependent on energy input (electricity, fossil fuels and renewable energy sources) to work as intended, or a product for the generation, transfer and measurement of such energy, including parts dependent on energy input and intended to be incorporated into an EuP covered by this Directive which are placed on the market and/or put into service as individual parts for end-users and of which the environmental performance can be assessed independently.⁴³⁶

Vehicles and all means of transport for persons or goods are excluded from the scope of the Directive.⁴³⁷

⁴³⁴ Except for the content of three existing Directives, Directives 92/42/EEC (boilers), 96/57/EC (freezers) and 2000/55/EC (ballasts), which are turned into implementing measures by Article 17 of the Directive.

⁴³⁵ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L11/4, 15.1.2002.

⁴³⁶ Dir.2005/32, Art.2(1).

⁴³⁷ Dir.2005/32, Art.1.3.

3.9.2.3. Ecodesign

Ecodesign means the integration of environmental aspects into product design with the aim of improving the environmental performance of the EuP throughout its whole life cycle.⁴³⁸

3.9.2.4. The scheme

The regime which is being built by the Directive can be summarised by a set of eight key elements.

1) *The ultimate goal: an optimal access to the market for EuPs.*

The Directive guarantees a non-restricted access to the European market to those EuPs that do comply with the implementing measures.⁴³⁹

The general objective of the Directive is to ensure the free movement of energy-using products within the internal market. It provides for the setting of requirements which these EuPs must fulfil in order for them to be placed on the market or put into service.⁴⁴⁰

"Placing on the market"⁴⁴¹ means making an EuP available for the first time on the Community market with a view to its distribution or use within the Community whether for reward or free of charge and irrespective of the selling technique; "Putting into service"⁴⁴² means the first use of an EuP for its intended purpose by an end-user in the Community.

One can thus consider that the new requirements shall only concern the new products, or the newly used products, those which are placed for the first time on the market after mid-2007,⁴⁴³ or used after that period for the first time. All the products which are already circulating within the internal market do not appear to be concerned.

2) *No further constraints by Member States.*

Member States can, in no way, try to restrict the access of those EuP to the European market, for any reason whatsoever.⁴⁴⁴ This is true even where the implementing measure would not include any requirement regarding ecodesign.⁴⁴⁵

3) *Implementing measures: not the first option.*

Implementing measures, which are a key element for the functioning of the regime, must be adopted by the Commission in accordance with Article 15. But they shall not necessarily be adopted for all products. For three reasons:

- a) Not all products are worth to be submitted to the new regime: only those complying with three criteria are targeted: 1. sale and trade volume of more than 200 000 units/year, 2. significant impact on the environment, 3. significant potential for improvement, on basis of three parameters: absence

⁴³⁸ Dir.2005/32, Art.2(23).

⁴³⁹ Dir. 2005/32, Art. 3 & 6.

⁴⁴⁰ Dir.2005/32, Art.1.

⁴⁴¹ Dir. 2005/32, Art.2(4).

⁴⁴² Dir.2005/32, Art. 2(5).

⁴⁴³ Dir.2005/32, Art.25.

⁴⁴⁴ Dir. 2005/32, Art. 3 & 6.

⁴⁴⁵ Dir.2005/32, Art. 6(2).

of other relevant Community legislation, a failure of market forces to address the issue, a wide disparity in the environmental performance. A working plan shall be elaborated and propose the list of the product groups to be considered as a priority in the coming years,⁴⁴⁶ with a transitional period ensuring that the Commission shall not wait for that plan for introducing measures offering a high potential for cost effective reduction of greenhouse gas emissions (as detailed in Article 16(2)) or for reducing stand-by losses;

b) The need for implementing measures is evaluated on basis of relevant self-regulation, such as voluntary agreements, or other measures adopted by the industry. This can mean that if a voluntary agreement leads to satisfaction regarding a given product group, the choice shall be made not to adopt implementing measures;⁴⁴⁷

c) The need for implementing measures is tested against the priorities of the European Community regarding the environment and climate change in particular⁴⁴⁸

4) Implementing measures: not a priority for environmental criteria

Implementing measures must meet the criteria set in Article 15 of the Directive. The substantial criteria are more economic than environmental (see *infra*).

5) Implementing measures: comitology

The implementing measures are adopted by the Commission, via the Comitology procedure.⁴⁴⁹ However, in order to make sure that all stakeholders (industry, NGOs, trade unions) are involved in or kept informed of the process, a “consultative forum” is created.⁴⁵⁰

6) The manufacturer must assess the impact of his product

The manufacturer must carry out an assessment of the EuP’s conformity with all the requirements of the implementing measure (either via internal design control, set out in Annex IV, or the management system, set out in Annex V). The importer has special duties for ensuring compliance with the Directive and keeping all required documentation available.⁴⁵¹

7) The presumption of conformity and the New Approach

Before placing an EuP on the market or putting it into service, the manufacturer must assess the EuP’s conformity with all the relevant requirements of the applicable implementing measure. A CE conformity marking shall then be affixed on the EuP by the manufacturer. Member States shall regard an EuP bearing the CE marking as conforming to the implementing measures.

An EuP shall also be presumed to be conforming to the implementing measure (where existing):

a) when it is conforming to harmonised standards, “the reference of which have been published in the Official Journal of the European Union”;

⁴⁴⁶ Dir.2005/32, Art.16.

⁴⁴⁷ Dir.2005/32, Art. 15(3)(b).

⁴⁴⁸ Dir.2005/32, Art. 15(3)(a).

⁴⁴⁹ Dir.2005/32, Art. 19.

⁴⁵⁰ Dir.2005/32, Art.14.

⁴⁵¹ Dir.2005/32, Art.4.

b) when it has been awarded the Community eco-label.

8) The powers of Member States in case of non-conformity

Control of the trustworthiness of the presumption of conformity is in the hands of the Member States. They are given the responsibility to control the use of the EC marking and they must bear the burden of proof. They are in charge of organising appropriate checks on compliance and to require all necessary information by the parties concerned.

Under some conditions, they can take the decision to restrict or prohibit the placing on the market, or to withdraw the EuPs which have already be placed on the market. Member States are required to inform immediately the Commission and the other Member States of their decision, and this shall lead the Commission “to enter into consultation with the parties concerned without delay”. If the Commission considers that the decision is unjustified, it shall immediately inform the Member States to that effect.

The sharing of information is to be organised by Member States, possibly with the help of the Commission. The precise nature and structure of this process must be decided via the comitology procedure.

3.9.2.5. Implementing measures

In preparing and adopting implementing measure, the Commission must take a large set of criteria into account. Those are of a procedural and substantive nature and are stated under Article 15 and the Annexes.

3.9.2.5.1. The preparation of the implementing measure

In preparing a draft implementing measure, the Commission shall, according to Article 15 (4):

- consider the life cycle of a EuP;
- carry out an impact assessment, which must not only focus on the environmental impact of the measure but also on the impact on consumers and producers (competitiveness, innovation, market access and costs and benefits); prepare a memorandum thereabout;
- take into account existing national environmental legislation that Member States consider relevant;
- carry out appropriate consultation with stakeholders;
- set implementing dates, staged or transitional measures or periods;
- take into account possible impact on small and medium enterprises.

3.9.2.5.2 The content of the implementing measure

Non-environmental criteria

An implementing measure must meet a large set of criteria, which meet very clearly an objective of cost reduction and protection of competitiveness:⁴⁵²

- the requirements shall not have a significant negative impact on the functionality of the product, from the perspective of the user; health and safety must not be affected neither;
- there shall be no significant negative impact on the affordability of the product for the consumer and on the life cycle cost of the product;

⁴⁵² Dir.2005/32, Art.15 (5).

- the measure must not have a significant negative impact on manufacturers’ competitiveness, including on markets outside the Community;
- the setting of an ecodesign requirement should not, in principle, have the consequence of imposing proprietary technology on manufacturers;
- the measure must not lead to an excessive administrative burden for the manufacturer.

The requirements must also be formulated so as to ensure that surveillance is made possible and the implementing measure shall specify whether verification can be achieved directly on the EuP or on the basis of the technical documentation.

Environmental criteria

Implementing measures shall lay down ecodesign requirements but can also specify that no ecodesign requirements are necessary for some specified parameters.

An ecodesign requirement means any requirement in relation to an EuP, or the design of an EuP, intended to improve its environmental performance, or any requirement for the supply of information with regard to the environmental aspects of an EuP. Quantified and measurable requirements (the so-called specific ecodesign requirements) shall only be introduced for “selected environmental aspects which have a significant impact”. Generic ecodesign requirements aim at improving the environmental performance without setting limit values and are based on the ecological profile as a whole.

The ecodesign requirements must be adopted in accordance with Annex I and/or Annex II. Annex I only deals with the appropriate method for setting generic ecodesign requirements, i.e. requirements containing no limit values. It draws up a list of parameters among which the Commission shall have to pick to choose those relevant for the EuP covered.

The lifecycle of a product is divided in six stages: 1) raw material selection and use; 2) manufacturing; 3) packaging, transport and distribution; 4) installation and maintenance; 5) use; 6) end-of-life.

Annex I lists the aspects (an element or function that can interact with the environment during its life cycle) which are to be assessed, where relevant or appropriate, when drafting the implementing measure. Among those: consumption of energy, water and other resources throughout the life cycle, use of hazardous substances, ease for reuse and recycling, extension of lifetime (i.e. reparability), emissions to air, water and soil.

According to Annex II, the quantified levels set via the specific ecodesign requirements shall be based on a selection of representative models and technical options for improving the environmental performance of the product, keeping sight of the economic viability of the options and avoiding any significant loss of performance or of usefulness for consumers.

Concerning energy consumption in use, the level of energy efficiency or consumption shall be set aiming at the life-cycle cost minimum to end users.

Annex VII sets the minimal content of the implementing measure, in accordance with Article 15(8).

The implementing measure must specify:

- the exact definition of the type of EuP covered;
- the ecodesign requirements (generic and/or specific), with implementing dates and transitional measures;
- the ecodesign parameters relating to which no ecodesign requirement is necessary;
- the requirement on installation of the EuP, where relevant;
- the measurement standards or methods (possibly harmonised standards, where available);
- the details for conformity assessment;
- requirements on information to be provided by manufacturers to the authorities;
- the transitional period during which Member States must accept EuPs which comply with the regulations in force in their territory on the date of adoption of the implementing measure;
- the date for the evaluation and possible revision of the implementing measure.

3.9.3. Testing the Ecodesign Directive against IPP

3.9.3.1. Life-cycle thinking

The Directive takes as a basis a life-cycle approach. This is clear from the definition of the “ecodesign” concept itself (“the integration of environmental aspects into product design with the aim of improving the environmental performance of the EuP throughout its whole life cycle”⁴⁵³ and from the definitions of “environmental aspect”, “environmental impact” and “ecological profile” (“a description, in accordance with the implementing measure applicable to the EuP, of the inputs and outputs (such as materials, emissions and waste) associated with an EuP throughout its life cycle which are significant from the point of view of its environmental impact and are expressed in physical quantities that can be measured”) and from the requirements set under Art.15 and in the annexes. The Commission must indeed consider the life cycle of the product when preparing the implementing measure and the manufacturer must assess the impact of its product throughout its life cycle (Art. 15 (4)(a)), based upon realistic assumptions about normal conditions and purposes of use (Annex 1, Part 3).

According to the Directive, “life-cycle” means “*the consecutive and interlinked stages of an EuP from raw material use to final disposal*” (Art.2 (13)).

The life-cycle concept is used as a frame :

- for evaluating the characteristics (source of potential impact) and impacts of the (still to be designed) product,
- for identifying the stages where significant improvements could be achieved.

The analysis of these impacts and potential for improvements are to be carried out for *each* of the following stages : (a) raw material selection and use; (b) manufacturing; (c) packaging, transport, and distribution; (d) installation and maintenance; (e) use; (f) end-of-life, meaning the state of an EuP having reached the end of its first use until its final disposal.

Raw material extraction does not seem to be included in that enumeration, making the assessment of the real environmental impact of a product incomplete. The cradle is not as upstream as it could be, in such a life-cycle approach.

⁴⁵³ Dir.2005/32, Art.2(23).

The conceptual phase of the product design itself, preceding the physical birth of the product, is not included neither in this enumeration – quite logically as it is more the result of an intellectual process which, as such, does not have a proper external physical impact - but it is referred to in the preamble as the best stage to consider the environmental impact of a product throughout its whole life cycle, as it provides a high potential to facilitate environmental improvement in a cost-effective way. The stage of the creation of a product is a key moment indeed for minimizing its future environmental impact. It's the most upstream level possible for making sure the impact on the environment of a given product shall be kept as low as possible, in a given technical and economic context.⁴⁵⁴

Impact assessment must be carried out for each stage on the list, according to a fixed series of environmental aspects. The environmental aspects are the elements or functions of an EuP that can interact with the environment during its life cycle⁴⁵⁵ such as energy use, raw material at the production stage and, most probably, impact on infrastructure and land planning (where applicable, the case of mobile phones for instance);

For instance, the stage “ manufacturing” of, say, a computer or an air conditioner, must be screened regarding the following aspects, where relevant :

- predicted consumption of resources, energy and water ;
- anticipated emissions to air, water and soil ;
- anticipated noise, vibration, radiation, electromagnetic fields ;
- expected generation of waste material ;
- possibilities for reuse, recycling and recovery of materials and/or energy.

Within each stage, the depth of the analysis is not required to be equal for all aspects and parameters: it shall be proportionate to their significance⁴⁵⁶ ().⁴⁵⁷ Scientific uncertainty on some aspects should not unduly delay the adoption of ecodesign requirements on other aspects, provision which seem to be inspired by the precautionary principle and should be interpreted accordingly.

On how the *synthesis* of the large amount of the collected data should be made, in order to define ecodesign requirements, some indications are given in Annex II, which is dealing with the setting of target-based ecodesign requirements: it appears that comparisons should be made with a number of representative models, in Europe and elsewhere (benchmarks). The manufacturer, when assessing alternative design options, shall base his choice on the possibility to achieve a reasonable balance between the various environmental aspects and between environmental aspects and other relevant considerations, such as safety and health, technical requirements for functionality, quality and performance, and economic aspects, including manufacturing costs and marketability, while complying with all relevant legislation (Annexes I, III).

⁴⁵⁴ It is not clear however if the process leads also to appreciate the zero alternative, or at least the necessity to move from one category of products to another. Ecodesign seems to make sure the impact is the lowest possible in a given category, but does it also mean making sure the lowest possible impact is achieved regarding the use to be satisfied? It is not so far reaching.

⁴⁵⁵ Dir.2005/32, Art.2 (11).

⁴⁵⁶ Dir.2005/32, Art.15(4)(a).

⁴⁵⁷ “ Significant ” is a key word indeed under the Directive: the proposed implementing measures shall only focus on the significant environmental aspects of the product (annexes I and II). The EuP shall only be covered by an implementing measure if, considering the quantities put on the market, it has a significant environmental impact and if it presents significant potential for improvement without entailing excessive costs (Dir.2005/32, Art.15(2)).

The Directive also introduces the concept of “life-cycle cost”:

- by stating that the implementing measure must not have a significant impact on consumers regarding the life-cycle cost of the product,⁴⁵⁸
- by setting criteria for the elaboration of the specific ecodesign requirements: consumption of resources must be set at a life-cycle cost minimum for end users (Annex II), taking into consideration the consequence on other environmental aspects.

A life-cycle cost method is provided for: it uses a real discount rate on the basis of data provided from the European Central Bank and a realistic lifetime for the EuP; it is based on the variation in purchase price (resulting from the variations in industrial costs) and in operating expenses, which result from the different levels of technical improvement options, discounted over the lifetime of the representative EuP models considered. The operating expenses cover primarily energy consumption and additional expenses in other resources (such as water or detergent).

Life-cycle cost is to be used in parallel to the life cycle approach. It is a crucial condition for the acceptability of the implementing measure, based on the consideration that the cost of the product to consumers is directly related to the operating expenses and the price of primary resources, during its lifetime. But, contrary to the life cycle approach concept, it does not include any environmental externalities.

The requirement set by the Commission Communication of 2003 that the environmental impacts of products should be addressed “at the point in the lifecycle where they will best and most cost-effectively for business and society reduce the overall environment impacts and resource use” is not illustrated by the Directive. There is no explicit requirement to base the implementing measure on the sole stage of the life-cycle where the action would be the less expensive possible. Except for the declaration that the product design phase itself is surely the most appropriate to prevent the environmental impact of the product during its whole life, for economic reasons.⁴⁵⁹

3.9.3.2. Working with the market and the voluntary agreements

In assessing the need to prepare a draft implementation measure, the Commission must take “into account relevant Community legislation and self-regulation, such as voluntary agreements, 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.”⁴⁶⁰

The existence of a voluntary agreement dealing with an EuP, if proved to be satisfactory, is consequently a right motivation for deciding not to adopt implementing measures. One can consider that the Directive contains a call for the manufacturers to organize themselves in a way that is so satisfactory and convincing that the Directive itself does not need any more to be started up, via the adoption of implementing measures, for the EuP covered. In its initial proposal, the Commission states indeed that the adoption of a framework directive on ecodesign requirements would reinforce the potential impact of self-regulation by the industry. The industry, aware that the Community possesses an efficient tool to set requirements rapidly through the adoption of implementing measures, could seize the opportunity to conclude satisfactory self-commitments. On the contrary, it would support

⁴⁵⁸ Dir.2005/32, Art. 15(5)(c).

⁴⁵⁹ Dir.2005/32, Preamble, Recital 10.

⁴⁶⁰ Dir.2005/32, Art.15(3)(b).

compulsory requirements where it is clear that too many “free riders” would not share the same environmental improvement targets, especially where the market at stake is very fragmented. Still according to the Commission, an implementing measure shall provide a quick alternative should a self-commitment prove not to work.

At first, the draft Directive did not contain any provisions on how to appreciate the admissibility of a self-regulation instrument, while balancing the need to adopt an implementing measure, opening a huge door to uncertainty regarding the proper functioning of the future Directive (when can you consider a voluntary agreement is sufficiently efficient to justify the non enactment of the Directive?). There were absolutely no indications on what were the *criteria* for considering that a voluntary agreement, pre-existing or newly concluded, could be deemed acceptable and promising to such a degree that it can motivate the decision not to adopt an implementing measure with the very important consequence that the EuPs at stake shall fall outside the scope of the application of the new regime and shall not benefit from a non-restricted access to the EC market. The opportunity was not seized either to define how the monitoring and reporting on the agreement should occur and what should be the criteria for deciding that an agreement did not deliver the promised result.⁴⁶¹ One could wonder then why the Draft Directive was so laconic about the possible acknowledgement of an instrument which is called to play an ever-increasing role in a context of deregulation, as demonstrated in the Commission Communication of 1996 and 2002, and singularly on the way towards an integrated product policy.

This has been partly solved though as a large package of provisions has been in extremis added to the Directive as part of the amendments proposed by the European Parliament at second reading:

- a new Article 17, dedicated to self-regulation, states that “*Voluntary agreements or other self-regulation measures presented as alternatives to implementing measures in the context of this Directive shall be assessed at least on the basis of Annex VIII.*”

- Annex VIII contains 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 in the context of the Directive, related to : 1. openness of participation, 2. added value, 3. representativeness, 4. quantified and staged objectives, 5. involvement of civil society, 6. monitoring and reporting, 7. cost-effectiveness of administering a self-regulatory initiative, 8. sustainability, 9. incentive compatibility.

- the preamble of the Directive declares that: “(16) Priority should be given to alternative courses of action such as self-regulation by the industry where such action is likely to deliver the policy objectives faster or in a less costly manner than mandatory requirements. Legislative measures may be needed where market forces fail to evolve in the right direction or at an acceptable speed. (17) Self-regulation, including voluntary agreements offered as unilateral commitments by industry, can provide for quick progress due to rapid and cost-effective implementation, and allows for flexible and appropriate adaptation to technological options and market sensitivities. (18) For the assessment of voluntary agreements or other self-regulation measures presented as alternatives to implementing measures, information on at least the following issues should be available: 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.(19) [not new] Chapter 6 of the Commission's "Communication on Environmental

⁴⁶¹ Despite an amendment proposed by the European Parliament in order to solve the issue.

Agreements at Community level within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment" could provide useful guidance when assessing self-regulation by industry in the context of this Directive.”

One can wonder though why the Commission did not propose to stimulate the use of voluntary agreements via a coregulation process, where agreements would not be an alternative to implementing measures but would, on the contrary, be part of it. The Directive and its preamble is quite clear indeed as to the fact that voluntary agreements are presented as a process of self-regulation,⁴⁶² and not as a co-regulation process.⁴⁶³

In a co-regulation process, voluntary agreements would have been a way to adopt supplementary provisions to the Directive, rather than being an alternative to it. The implementing measures could have been adopted via the regulatory-linked comitology process or via a voluntary agreement.

It would have given more strength to those voluntary agreements, when confronted to the possible control of Member States. In the current situation indeed, EuPs which shall be dealt with by voluntary agreements only shall not be offered an eased access to the European market, as they are not entering the scope of Article 5 of the Directive. Member States remain perfectly free to impose their own environmental conditions to them, in due respect of the EC Treaty.

3.9.3.3. Stakeholder involvement

The Directive provides for the creation of a Consultation Forum, where all stakeholders should meet in accordance with the rules of procedures which shall be established by the Commission. This should ensure that the Commission, in the conduct of its activities, in respect of each implementing measures, observes a balanced participation of Member States representatives and all interested parties concerned with the product/product group in question. Among those are industry, including SMEs and craft industry, trade unions, traders, retailers, importers, environmental protection groups and consumers organisations.⁴⁶⁴

This requirement was not in the original version of the draft Directive but has been called on board by the European Parliament and by the Economic and Social Committee. It remains to be seen, however, how that participation is going to take place in the daily practice and how the requirement for a balanced participation shall be met and controlled.

The Consultation Forum shall be consulted by the Commission when establishing the working plan for the coming three years, establishing an indicative list of product groups which will be considered as priorities for the adoption of implementing measures.⁴⁶⁵ But no information can be found on how the various stakeholders shall be invited to participate in the elaboration of those implementing measures, to be prepared by the Commission via a Comitology process, except for the provision in Article 12(4) stating that “in preparing a draft implementing measure the Commission shall carry out appropriate consultation with stakeholders”. One could have expected, having regard to the Communication on

⁴⁶² Art.2005/32, Art. 15(3)(b).

⁴⁶³ On the distinction between self-regulation and co-regulation, see 3.4. and the Commission communication on voluntary agreements, COM(2002)278.

⁴⁶⁴ Dir.2005/32, Art.18.

⁴⁶⁵ Dir.2005/32, Art. 13.

IPP, the setting-up of specific product groups or product forums, in charge of providing a structured advice during the preparation of an implementing measure concerning a given EuP.⁴⁶⁶

3.9.3.4. *Continuous improvement*

The requirement for continuous improvement of the environmental performance of the EuP can be found at various places in the Directive, in particular in the definition of “ecodesign”.

One must admit however that this level of improvement is not easy to evaluate in the absence of (newly written) implementing measures, due to the very important weight of economic considerations in the conditions set for adopting the implementation measures (in particular Article 12(5)) and due to the absence of any general requirement regarding the level of protection of the environment.

In this light, it is important to come back to our discussion on the legal basis of the Directive and to specify, after a more thorough analysis of its content, that the environment is surely not the main objective, nor can it put on an equal footing with the objective of harmonisation in the internal market. If this was perhaps the case in its very early stages, the balance has now been struck in favour of the internal market.

Under the Commission Communication of 2003, “continuous improvement” has a peculiar meaning, as it indeed means that “improvements can often be made to decrease a product’s environmental impacts across its life-cycle, whether in design, manufacture, use or disposal, taking into account the parameters set by the market. IPP aims for a continuous improvement in these rather than setting a precise threshold to be attained. As a result, companies can set their own pace and can focus on the most cost efficient improvements.”

This is partly reflected in the Ecodesign Directive as:

- precise thresholds are not required in all ecodesign requirements but only in the “specific” ones. Generic ecodesign requirements, on the contrary, aim at improving the environmental performance without setting limit values and are based on the ecological profile as a whole;
- requirements must take into account possible impact on small and medium enterprises. and contain staged or transitional measures or periods.

Manufacturers are invited to establish the “ecological profile” of their product and to test their performances against benchmarks which shall be established by the Commission in the implementing measure. They must evaluate alternative design solutions, taking into consideration a proper balance between environmental considerations and others, including manufacturing costs and marketability.⁴⁶⁷

3.9.3.5. *Instruments*

We already analysed the room left to voluntary agreements in the mechanism created by the directive: a satisfactory agreement is a sufficient justification for deciding not to adopt an implementing measure and, therefore, not to set the regime created by the Directive into motion. The conditions under which an agreement is considered as satisfactory are not specified by the Directive.

⁴⁶⁶ See *Cooperative Approaches to Integrated Product Policy (IPP) – Reflections on how to structure a product forum*, IOW/ Ministry of the Environment Baden-Württemberg, 2004.

⁴⁶⁷ Dir.2005/32, Annex I (3).

The Directive makes also room for other instruments which are promoted by the IPP strategy: EMAS, the eco-label, the EC-marking and standardization.

3.9.3.5.1. EMAS

When an EuP is designed by an organisation registered under the EMAS regulation and if the design function is included within the scope of that registration, the management system of that organisation shall be presumed to comply with the requirements of Annex V of the Directive.

3.9.3.5.2. The eco-label

An EuP which has been awarded an eco-label is presumed to comply with the ecodesign requirements (in so far, however, as those requirements are met by the eco-label). The Commission can even decide that other eco-labels fulfil equivalent conditions to the Community eco-label pursuant to Regulation 1980/2000 and are also presumed to be in conformity with the implementing measure.⁴⁶⁸

3.9.3.5.3. CE marking

All EuP covered by an implementing measure and placed (for the first time) on the market must be affixed a CE conformity marking. This is an obligation for the manufacturer or, alternatively, the importer.⁴⁶⁹ Member States shall regard an EuP bearing the CE marking as conforming to the implementing measure.⁴⁷⁰

One should notice though that many EuPs do already bear a CE marking in accordance with other Directives, among which Directives 89/336 and 2004/108 on electronic compatibility.⁴⁷¹ Is there a proper added value to the requirement to affix such a logo then, if it already stands on most devices anyway? This raises the issue of the relevance of the CE marking, which is only the sign of a self-declaration of the manufacturer or importer and does not result from a compliance control carried out by a public authority. One must at least make sure that the concerned person is aware that the EC-marking package that must be complied with has grown heavier.

3.9.3.5.4. Standardization

Harmonised standards, which are to be adopted via the so-called “new approach” under a mandate from the Commission⁴⁷² (intervene in the Directive as another possibility of presumption of conformity with an implementing measure,⁴⁷³ where existing.

In this perspective, the regime can be summarized as such:

- an implementation measure is adopted for an EuP;
- the manufacturer must assess the conformity of its EuP to the implementing measure;
- such an assessment is not necessary where the EuP conforms to a harmonised standard, published in the *Official Journal* and conforming to all the relevant requirements of the applicable implementing measure to which the harmonised standard relates.

⁴⁶⁸ Dir.2005/32, Art.8 (3) & (4).

⁴⁶⁹ Dir.2005/32, Art.5.

⁴⁷⁰ Dir.2005/32, Art.9.

⁴⁷¹ See http://europa.eu.int/comm/enterprise/electr_equipment/emc/index.htm

⁴⁷² Dir.2005/32, Art.2(26).

⁴⁷³ Dir.2005/32, Art.8.

The Directive does not go as far as to invite the Commission to give instructions to standardization bodies, in order to adopt appropriate standards, a process inserted though in the 1994 Packaging Directive.⁴⁷⁴

Where a Member State or the Commission considers that harmonised standards do not entirely satisfy the implementing measure, the Standing Committee set up under Art.5 of Directive 98/34/EC must be informed and shall issue an opinion as a matter of urgency.⁴⁷⁵ In the light of this opinion, the Commission shall decide to publish, not to publish, to publish with restrictions, to maintain or to withdraw the references of the harmonised standards concerned in the *Official Journal*. The Commission shall inform the European Standardization body concerned and, if necessary, issue a new mandate for the revision of the standard.

The harmonised standards are also referred to in the chapter dedicated to the conformity assessment by the manufacturer: a presumption of conformity to the requirements of the Annex V is provided for when the EuP is designed by an organisation having a management system which includes the product design function and which is implemented in accordance with harmonised standards, the references of which have been published in the Official Journal.

In this context, one can wonder what shall be the steering force in this process? Are the existing standards going to guide the elaboration of the implementing measures on ecodesign requirements or shall the standards be elaborated in order to conform the implementing measures ?

Actually, most standards still needed to be elaborated, at the time the draft Directive was at the proposal stage, as witnessed by the mandate that was given by the Commission,⁴⁷⁶ on 7 January 2004, to CEN/CENELEC/ETSI for “programming of standardization work in the field of eco-design of energy-using products”, in the prevision of the adoption of the (then still to be adopted) Directive.

CEN/CENELEC/ETSI were asked to draw up “a comprehensive standardization programme with a view to producing standards which will assist the realisation of the objectives of the draft Directive, which are to improve the overall environmental performance of EuP and ensure free movement of compliant equipment in the internal market. Such standards should help the manufacturers to comply with the requirements of the future implementing measures, to be proposed by the Commission after the adoption of the EuP framework Directive by Council and EP. In this context these standards should clearly indicate the relationship between their clauses and the requirements dealt with”. Work would not start from scratch, as it is specified that “other standards (e.g. the measurement standards for

⁴⁷⁴ Dir.94/62, Art. 10: “The Commission shall promote, as appropriate, the preparation of European standards relating to the essential requirements referred to in Annex II, (...)in particular, the preparation of European standards relating to:

- criteria and methodologies for life-cycle analysis of packaging,
- the methods for measuring and verifying the presence of heavy metals and other dangerous substances in the packaging and their release into the environment from packaging and packaging waste,
- criteria for a minimum content of recycled material in packaging for appropriate types of packaging,
- criteria for recycling methods,
- criteria for composting methods and produced compost,
- criteria for the marking of packaging.”

⁴⁷⁵ Dir.98/34, Art. 9(3).

⁴⁷⁶ M 341, DG ENV.

energy labelling or efficiency requirements), specifications, guidance documents and technical reports currently available or in preparation in this area at a national or international level (e.g. ISO TR 14062, IEC Guide 109, ISO Guide 64, ISO 14020 series), and specifications established by interested organisations such as manufacturers’ associations shall be taken into account, along with best practices in industry, in order to avoid duplication of work or overlapping.

A first programme of standardization work items and related target dates was expected within twelve months from acceptance of the mandate, while the Directive was still under negotiation.

3.9.4. Conclusions

The EuP Directive provides us with some indication indeed on what IPP might mean, when implemented in new regulation.

First, some light is shed on how the reliance on a mix of instruments is supposed to be understood in an IPP strategy. In this regard, the most interesting element in the Directive is probably the way voluntary instruments are being used in the proposed regime. A successful voluntary agreement is a motive for not adopting an implementing measure under the Directive,⁴⁷⁷ at the risk of turning the Directive itself into an empty box. The main key elements of the framework Directive are indeed built in such a way that they shall only start functioning when related to an implementing measure. If a decision is taken that no implementing measures is necessary for a given EuP, due to the acknowledgement that market self-regulation successfully addresses the issue, the whole regime shall be rendered void for that EuP (and this means no guarantee for free access to the market, no conformity assessment, no presumption of conformity via standardization for the EuP), because the relevant provisions can only be brought to life through those implementing measures, adopted by the Commission. One can actually ask where the incentive for the industry shall lay : in concluding successful agreements in order to avoid the whole new regime and remain in a self-regulatory process, avoiding so the probably heavy participatory requirements for developing implementing measures in cooperation with other stakeholders or, on the contrary, to stimulate the adoption of Commission decisions which should offer them a favoured access to all markets and a guarantee that probably no other national measures shall be adopted. We wonder, on the other hand, why the Directive did not choose for a true co-regulation process, where voluntary agreements would be proposed as one possible way to implement the framework itself, instead of being an alternative to it. This would have provided the producers with all the guarantees of the new regime.

Another consideration regarding the “mix of instruments” concerns the room made for standardization. The Directive does not expressly invite the Commission to request the standardisation bodies to propose appropriate standards. The standard is instead to be used as a tool allowing to presume that an EuP conforms to all the requirements of the implementing measure. It is a facilitator in proving the conformity of a product to the requirements. The process is kept twofold : implementing measures are to be prepared via the comitology, with the help of the concertation forum ; standards shall be developed afterwards or in parallel in order to match those implementing measures and to allow the manufacturer whose product would respect the standard not to carry out the conformity assessment. Or shall the process be reversed in practice, with preexisting standards guiding the elaboration of the implementing measures themselves ? Beyond theories, standardization bodies are actually already working on the elaboration of appropriate standards, on basis of a 2004 mandate and

⁴⁷⁷ Dir.2005/32, Art.15.

at the request of the Commission, but outside the proper legal framework of the Directive, which, at the time, had not yet been adopted.

Still regarding the instruments, a very positive and important stand is taken in favour of promoting knowledge building on the environmental impact of products, on the side of both the producers and the consumers. A “conformity assessment” is indeed imposed, in principle, to the manufacturer, under various possible forms (including the “ecological profile”), and implementing measures can consist in requiring the supply of information for consumers on how to correctly use the product and to ensure its optimal life-expectancy.

The life-cycle approach permeates the EuP Directive, in the conditions set for the elaboration of implementing measures. The life of a product is divided in six stages, and for each of them a list of environmental aspects must be analysed, together with an evaluation of the potential for improvement. The Directive does not give indications on how a balance should be made between the possible impacts of the various stages themselves. The only clear criteria according to which a proposed technical package shall have to be assessed are the economic considerations set under Article 12(5). In so far as the implementing measure does not have a significant negative impact on consumers (affordability) or on competitiveness, a better performance for each stage of the life-cycle is supposed to be recommended. The Directive does not comfort the opinion stated in the Commission Communication on IPP that the environmental impacts of products should be addressed “at the point in the lifecycle where they will best and most cost effectively for business and society reduce the overall environment impacts and resource use”. There is no explicit requirement to base the implementing measure on the sole stage of the life-cycle where the action would be the less expensive possible, what is surely better in line with the prevention principle. But there is no requirement neither to act on all stages necessarily (see the definition of “improvement of environmental performance”: “the process of enhancing the environmental performance of an EuP over successive generations, although not necessarily in respect of all environmental aspects of the product”). The ecological profile which must be elaborated by the manufacturer is also a life-cycle based concept.

At last, on the question whether the EuP Directive is an instrument for sustainable development, we note that the balance struck under the framework Directive is not in equilibrium. A very clear stand is adopted in favour of privileging economic development and the free movement of goods. Environmental considerations come only alongside, in the process of drafting new implementing measures. Awaiting them, there is absolutely no indication about the *level of protection* of the natural resources at large which is being sought with the new regime. Of course, Article 95 impose to take a high level of environmental protection as a basis for the negotiation process but this does not help us with testing the final result itself. There is no generic provision in the EuP Directive stating that, for instance, “all EuPs must be environmentally sound”. Even in the procedure for adopting the implementing measures, no indication is given about the *objective* which should be reached or at least pursued ; the provisions give only details on *what* criteria must be taken into account, but do not provide indications on the level of performance which should be enhanced. On the other hand, the economic objectives which should be pursued with adopting the implementing measures are clearly stated : the proposed measures must truly enhance competitiveness, keep prices low (this could be seen as some kind of social consideration), including during the use stage (with the concept of life-cycle cost), and even not impose proprietary technology on manufacturers. An environmental measure which does not match those conditions shall not be admitted under the Directive. The whole regime is streamlined towards better economic performances and the harmonisation of access to the market and

environmental requirements are only accepted if they fit with these economic objectives, not if they distort them.

Chapter 4: Governance, consultation and stakeholder participation

4.1 Governance and policy instruments.

Policy processes typically develop within government institutions. The production of public goods and the formulation of public choices are activities primarily attributed to state institutions or public authorities. Several authors identify a marked shift from ‘government’ to ‘governance’ in policy processes. In the ‘governance’ approach policy is the result of negotiation, persuasion and competition between actors that operate in a non-hierarchical context. Policy-making becomes an exercise in combining and mobilizing know how and resources at multiple policy levels to achieve collective goals. The centralized and hierarchic imposition of rules by democratically composed bodies no longer seems to capture the policy-making practice. The shift from government to governance places policy processes increasingly outside the public realm. Private and non-state actors perform public functions and are central parts of the policy process. In a discussion of the ‘governance’ concept Peters and Pierre identify the following common denominator in most academic definitions of the concept:

“...it refers to the process through which public and private actions and resources are coordinated and given a common direction and meaning.”⁴⁷⁸

The emphasis on public-private cooperation is essential to the ‘governance’ approach. Without the public-private dimension the ‘governance’ concept can not be distinguished from ‘government’ or from other complex systems of intergovernmental relations in federal systems. Complexity and the involvement of multiple policy levels is a standard feature of federal countries. It is the systematic involvement of private actors at multiple policy levels that differentiates ‘governance’ from other related concepts.

The format of the public-private cooperation may vary substantially (self-, co-regulation, implementation) but it always involves a significant private actor involvement in the formulation and the execution of public policy.⁴⁷⁹ In practice, governance entails public authorities outsourcing certain public functions to private actors in one form or another.

The ‘governance’ approach can also be associated with specific policy instruments. Public authorities have a broad arsenal of policy instruments at their disposal to alter behaviour and achieve collective goals. Van den Heuvel distinguishes instruments based on coercion (law, regulation, levies), transaction-based instruments (contracts, commitments, subsidies) and persuasion-based instruments (information, propaganda, reviews).⁴⁸⁰

Public authorities will resort to a mix of policy instruments to implement policies. However, the legitimate use of coercive instruments (law and levies) is strongly associated with ‘government’. Classic ‘command-and-control’ regulation imposed in a top down fashion by a central government

⁴⁷⁸ Peters, G. B., Pierre, J., *Multi-level governance: a Faustian bargain?*, Paper presented at the conference on ‘*Multi-level governance: interdisciplinary perspectives*’, June 2001, Political Economy Research Center, University of Sheffield.

⁴⁷⁹ Heritier, A., *New modes of governance in Europe: policy-making without legislating?* Preprint 2001/14, Max-Planck-Projektgruppe: Recht der Gemeinschaftsgüter, Bonn, 2001.

⁴⁸⁰ Van Den Heuvel, J.H.J., *Beleidsinstrumentatie. Sturingsinstrumenten voor het overheidsbeleid*. Uitgeverij Lemma, Utrecht, 1998, 21.

corresponds with the standard operating procedure associated with the ‘government’ concept. This form of classic regulation entails the formulation of a rule, the monitoring of its implementation and a possible sanction in case of non-compliance.

The governance approach refers to policy instruments, which, in one way or another, differ from coercive instruments or prescriptive and enforceable legislation. The ‘soft’ instruments associated with governance can (a) be voluntary or non-binding, (b) have no clear sanctions in case of non-compliance, (c) have no specified procedure, or (d) have no clear goals. The soft policy instrument will lack at least one and often a combination of the features of classic regulation. Instead, soft policy instruments provide room for private actor involvement in different phases of policy formulation and implementation. The prescriptive and coercive nature of the instrument is replaced by increased stakeholder involvement. Compliance is sought through direct private actor involvement in the policy formulation, rather than through imposition and sanctioning. Examples of these ‘soft’ and ‘governance’ instruments can be found at national and supranational policy levels. Moreover, use of the ‘soft’ instruments seems increasingly popular. Policy making through covenants, quality labels, management and audit systems, open method of coordination (EU economic and social policies), partnerships (EU regional policy), tripartite contracts, are examples of policy techniques that deviate from classic regulatory methods and explicitly depend on extensive private actor involvement.⁴⁸¹

The academic analysis of governance instruments does not concentrate exclusively, but is in fact largely based on experiences and instruments in the field of environmental policy. The explanations offered for the rising importance of governance instruments is to some extent biased by the policy domain and level where the policy instruments are applied. Nevertheless, the explanatory insights gathered from the field of European environmental policy do have a broader relevance for other policy areas and levels. Without seeking to be comprehensive the following reasons for the increased use of ‘soft’ policy instruments can be found in the literature:

- The instruments involve little or no administrative costs for public authorities (there is less need for extensive prescription, monitoring and control).⁴⁸²
- The instruments provide opportunities to systematically tap into the information and know how of private actors (producers, consumers, non-governmental organizations) for public purposes.⁴⁸³
- The instruments are used to avoid the disadvantages (time, resources) and the risks (deadlock) of cumbersome and veto-sensitive legislative processes.⁴⁸⁴
- The instruments provide an alternative source of government legitimacy because stakeholders and target groups are directly involved, through formats ranging from consultation to self-regulation, in the formulation and execution of the policy.⁴⁸⁵

⁴⁸¹ Scott, J., Trubek, D.M., Mind the gap: law and new approaches to governance in the European Union, *European Law Journal*, 8, 1, 2002, 1-18.

Eberlein, B., Kerwer, D., New governance in the European Union: a theoretical perspective. *Journal of Common Market Studies*, 42, 1, 2004, 121-142.

Jordan, A., Wurzel, R.K.W., Zito, A. R., eds., ‘New’ instruments of environmental governance? *National experiences and prospects*. Frank Cass, London, 2003.

⁴⁸² Collier, U. The environmental dimension of deregulation, in Collier, U. (ed.), *Deregulation in the European Union. Environmental Perspectives*, London, Routledge, 1998, p. 13

⁴⁸³ Hey, C., Janicke, M., Jorgens, H., *Environmental governance in the European Union*, paper gepresenteerd op de ECPR conferentie, Marburg, 2003.

⁴⁸⁴ Heritier, A., *Policy-making and diversity in Europe. Escaping deadlock*. Cambridge University Press, Cambridge, 1999.

- The flexibility of the instruments allows for context-specific policy measures adapted to the policy situation at hand.⁴⁸⁵
- The voluntary and non-coercive nature of the policy instruments and the involvement of those affected by the policy, reduces the probability of contestation and protest.

Formulating and implementing public policy in a context of increased diversity, scale and interdependence presents public authorities with formidable cognitive and information requirements. Public authorities at national, and especially at supranational levels, often do not have the means to overcome the challenges of uncertainty and incomplete information. Moreover, constraining legislation may prove to be a competitive disadvantage to domestic producers operating in a common European market and a globalized economy. Public authorities will seek to circumvent the transaction costs linked to classic regulatory instruments and resort to ‘governance’ and to ‘soft’ policy instruments that put the governance approach into practice. The soft policy instruments introduce stakeholders and target groups as policymakers. The stakeholders provide information and legitimacy both are much needed assets in multilevel political systems. Soft instruments can constitute a solution to the problem of incomplete information, they also reduce the probability of damaging conflict. Public authorities can avoid protest and discontent through the use of voluntary and less constraining policy tools.

IPP as conceived by the European Commission covers all features associated with the governance approach. The policy requires the mobilization of resources, capabilities and prerogatives at different levels of government. It is heavily dependent on information, expertise and eventually on the cooperation of private actors. Both the scope of the policy as well as the administrative (EC resources made available for the development of IPP) and the legislative constraints (length and veto-sensitivity of legislative process), push the European Commission to apply existing and voluntary instruments to implement IPP. Given the emphasis on private stakeholders in the formulation of the policy program as well as in the actual implementation of the policy (e.g. voluntary instruments), it is important to assess the role of private stakeholders in IPP.

The following sections provide an overview and assessment of the role and involvement of stakeholders in IPP and its policy instruments. The framework for the analysis is provided by the Commission’s own consultation standards and by the criteria set forth in the ‘deliberative democracy’ approach.

4.2. An overview of stakeholder participation in IPP

Different types of consultation techniques were used since the European Union’s first IPP initiatives in 1998. Large scale meetings were held launching stakeholder consultations after the publication, in March 1998, of the initial European IPP study conducted by Ernst &Young and after the Green Paper of 2001. Besides these large-scale stakeholder meetings, instrument specific expert workshop were held dealing with: green public procurement, environmental product declarations, environmental management systems, life-cycle analysis, product panels, standardization and the use of economic instruments. In addition to the initiatives set up by the European Commission, the hearings organized by the European Parliament provided an extra forum for stakeholders.

⁴⁸⁵ Beetham, D., Lord, C., Legitimizing the EU: Is There a ‘post-parliamentary basis’ for its legitimation?, *Journal of Common Market Studies*, 39, 3, 2001, 443-462.

⁴⁸⁶ Knill, C., Lenschow, A. , Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation, *European Integration online Papers*, vol. 7, No. 1, 2003.

In the margin of these initiatives informal IPP meetings have been held. These meetings were organized for Member States and European Commission representatives but occasionally offered a forum for other stakeholders as well.

The types of consultation mentioned above were most prominent until the Communication of 2003, afterwards consultations have been organized in relation to different activities implementing the latest communication, e.g. the pilot projects and the studies to identify the products with the greatest potential for environmental improvement.

The pilot projects on mobile phones and teak garden chairs, which are modeled on the Scandinavian product panels, seek to further implementation through consultation. Dialogue and consultation constitute the very core of the instrument, since the product panels bring together the different stakeholders along a product's life-cycle to improve environmental performance of the product. Within the framework of these pilot projects consultation is organized in two stages. The first consultation round is restricted to a small community of actively involved stakeholders, after which the consultation is broadened to include the wider stakeholder community. In this scheme stakeholders are not only reacting to policy proposals but are also invited to actively shape the policy.

The study to “identify the products with the greatest potential for environmental improvement” incorporates stakeholder's feedback through the consultations calls and the expert workshops organized by the European Commission.

Finally, the communication of 2003 provided the creation of Regular IPP Meetings between the European Commission, the Member states and the other stakeholders. These meetings, which are held twice a year, provide a permanent framework for stakeholder consultations which were held on an ad hoc basis until then.

4.2.1. Who participates?

The first workshop held in 1998 was a large consultation event with over 180 participants. The event combined a plenary presentation of the IPP study, ordered by the European Commission, with 12 individual working groups discussing the IPP policy at large, the instruments that could be considered, and the potential role of stakeholders. Active participants to this events included EU Member States representatives from national environmental departments or EPAs, international institutions (OECD, UNEP, Eurostat), representatives from major industrial players (Sony, Procter&Gamble), European and national industry federations (AIM, Orgalime, BDI), environmental NGO's (EEB), and research centers.

A similar event was organized in March 2001 to kick start the consultation after the publication of the IPP Green Paper. 300 stakeholders attended the two-day conference. More than a third (approx. 44%) of the participants qualified as industrial producers (multinationals, industry federations at the EU and national level, ...) or retailers (multinational, national and European federations), almost at third qualified as governmental organizations (including national environmental departments or agencies, members of permanent representations to the EU, MEPs, EC,...), less than a tenth were environmental organizations (including Environmental NGO's at national, European and international level), finally only 4 consumer organizations were present (EU level and national level organizations). A few research institutions, consultants and lobbyists also participated.

After this large, initiating event, six expert workshops were organized dealing with possible IPP instruments. These workshops gathered an average of 15 participants to discuss green public

procurement, environmental product declarations, environmental management systems, LCA and ecodesign guidelines, product panels, standardization and New Approach, and the role of economic instruments. Stakeholders from industry and retail sector accounted for one third of the participants, just under one third were members of EU institutions and about a quarter were representatives of national authorities (environment administrations, environmental agencies, advisory councils, ...). The remaining participants were members of public interest groups, research institutes, UN affiliated organizations and specialized organizations like standardization bodies. Environmental NGOs participated in only three workshops: workshop on environmental product declarations, life-cycle analysis, ecodesign guidelines and standardization. The consumer groups were even less present and only participated, through ANEC, in the standardization workshop. Besides the stakeholder meetings and workshops a call for written submissions was launched. 133 written comments were received by the European Commission (EC) of which 59 percent were from industry: more than two third of these were from national and European trade associations, and about one third were from individual companies. National and EU-wide consumer and environmental NGOs presented 9 contributions. The remaining comments were sent by research organizations, standardization bodies, and individuals.⁴⁸⁷

Finally, an additional opportunity for consultation was offered during the public hearing organized by the European Parliament on 18 October 2001. This hearing, which was designed to contribute to the Parliament’s opinion on the Green Paper, offered a forum for the representatives from the European Commission, the European standardization body (CEN) and the European Environmental Bureau.

The IPP Communication, published in 2003, sought to integrate the findings of the consultation initiatives and was the source of new, smaller and more focused consultation initiatives. Since 2003, consultations have concentrated mainly on the specific implementation initiatives launched by the Communication: the pilot projects and the study to identify the products with the greatest potential for environmental improvement. During the first stage of the latter study two expert workshops were held.

The pilot projects were selected out of 22 stakeholder’s applications. The selection was based on their coverage of the supply chain and on the familiarity of the products to the wider public.⁴⁸⁸ For the purpose of each pilot project, a small group of stakeholders was selected for direct participation. These groups were selected by the EC and the project initiators: Nokia and Carrefour. Although these groups make up the core of the project a wider stakeholder consultation is foreseen after each important step in the process. The pilot project on mobile phones largely consists of representatives of the major ICT industrial community (phone manufacturers, component manufacturers and network operators). These actors are complemented by a several EC officials, consumer and environmental NGOs (BEUC, WWF), and representatives of government agencies and research centers (DEFRA and SYKE). The participants selected for the teak garden chair project have a similar profile: producers and retailers (Homebase, IKEA), environmental NGOs (WWF), European confederations (CEI-bois), a group of entrepreneurs and scientists from the wood processing industry and governmental agencies (OVAM).

⁴⁸⁷ European Commission, *Communication from the Commission to the Council and the European parliament. Integrated Product Policy*, COM (2003) 302 final.

European Commission, *Table listing all those who submitted written comments to the Consultation on the IPP Green Paper*, online <http://europa.eu.int/comm/environment/ipp/tablelisting.htm> consulted on 5/8/2005.

⁴⁸⁸ European Commission, *Commission and industry initiate projects for greening products*, Brussels, 25 June 2004 online <http://europa.eu.int/comm/environment/ipp/pdf/040625pressrelease.pdf>.

Furthermore, Regular Meetings on IPP replaced the ad hoc stakeholder meetings. These meetings are modest in scale and gather only between 30 and 36 participants: the participants are mainly officials representing EU and EFTA member states (47-58%), and EC officials (31-23%). These groups were supplemented by representatives from European business federations (UNICE, EUAPME, Eurocommerce) and public interest groups (EEB, BEUC)⁴⁸⁹. In addition to this, two expert working groups were created: a working group on reporting and a working group on product information needs. In both cases interested stakeholders were encouraged to apply after which the EC selected the participants in the working groups (10 experts per group).

The working group dealing with reporting was appointed to design a format for the planned report on the implementation of IPP. This report will be based on information submitted by the Member States and the stakeholders. The report is due to be handed to the European Parliament and the Council by 2007. On the basis of this report, the European Commission will decide whether and in what way IPP needs to be altered.⁴⁹⁰ The year 2007 is also the deadline for the study identifying products with the greatest potential for environmental improvement. The IPP implementation report and the study on products with the greatest potential for improvement are to guide the further development of IPP.

4.2.2. Stakeholder views on IPP.

4.2.2.1. Stakeholder views: industry, retailers and employers.

The positions of stakeholder from the retail and industrial sectors differed according to their area of activity but did share some common concerns regarding IPP.

With regard to the overall IPP framework, concerns were raised regarding the link between IPP and other related EU policies (e.g. legislation on chemicals and ecodesign) as well as about the sectoral integration required by IPP (across different DGs).⁴⁹¹ Stakeholders supported the vision of IPP as a framework which should integrate existing policies and existing instruments rather than create an entirely new policy.⁴⁹² As a framework, stakeholders also expected it to give clear direction and definition to the very concept of sustainable development and its incorporation in EU policy.⁴⁹³

⁴⁸⁹ European Commission, *Minutes of the first Regular Meeting on the implementation of the Commission's Communication on Integrated Product Policy*, Brussels, 24.2.2004.

European Commission, *Minutes of the second Regular Meeting on the implementation of the Commission's Communication on Integrated Product Policy*, Brussels, 20.9.2004.

⁴⁹⁰ European Commission, *Mandate of the working group on reporting formats*, Brussels, 20 September 2004.

⁴⁹¹ CIAA, *Ciaa Views on Integrated Product Policy*, online www.ciaa.be/uk/Documents/positions/env/znv220e.html consulted on 11/3/2004.

ORGALIME, *Draft Communication on Integrated Product Policy. Orgalime Reflections*, Brussels, 7 February 2003.

UEAPME, *Press Release: 'Integrated Product Policy: UEAPME welcomes approach of the new Communication but calls for preliminary SME focused measures'*, Brussels, 15 May 2003.

CEPI et al., *Paper and Board Manufacturing and Converting Industry's Joint Position Paper on The Commission's Green Paper on IPP –Integrated Product Policy*, Brussels, November 2003.

⁴⁹² ORGALIME, *Contribution to the Stakeholder Consultation on the Green paper on Integrated Product Policy (IPP) Orgalime position*, Brussels, 9 July 2001

⁴⁹³ EUROPEN, *Packaging and packaged goods. A response to the European Commission Green Paper on Integrated Product Policy [COM (2001) 68 FINAL] from EUROPEN The European Organization for Packaging and the Environment*, Brussels, 21 June 2001.

AIM, *Integrated Product Policy – Response to the Commission Green Paper*, Brussels, June 2001.

IPP should not only integrate the different existing environmental policies, but should also be very careful not to disrupt the internal market. This argument of market distortion was expressed under various forms in the different stakeholders’ comments.⁴⁹⁴ The fear that IPP may lead to competitive disadvantages for compliant EU producers did not only refer to the internal market but also to the position of EU businesses on the global market. In this perspective, retailers raised the problem of suppliers in third world countries which could not possibly meet the same ecodesign standards.⁴⁹⁵ Producers, for their part, feared IPP would toughen the competition with non-EU competitors: as the latter can produce under less restrictive environmental regimes. Various stakeholders stated that the policy was indeed too much focused on the environmental concerns and should therefore pay more attention to the two other pillars of sustainable development, namely, economic and social sustainability.⁴⁹⁶

The stakeholder method, applied during policy development and implementation, was praised by all actors and was even suggested as a means to help formulate the concept of sustainable development. However, different limitations were suggested on how to organize and who to include in the policy consultation. The mix of actors, as well as, the relative importance of the different actors was discussed. For product panels, UNICE stressed the need of inviting all stakeholders and not only environmental front runners.⁴⁹⁷ Public interest NGOs were welcome to join the discussion, but their ability to judge technical issues was questioned by some.⁴⁹⁸ Others claimed a central role for professional stakeholders if product panels were to be used, namely, by having them run the panels.⁴⁹⁹ Environmental NGOs, for their part, acknowledged the possible difficulties of stakeholder dialogue in their call for a set of guiding principles to structure the dialogue.⁵⁰⁰

Comments concerning the particular tools were further clustered around the respect for market forces and actors, and the leeway given to businesses to implement IPP e.g. through the use of voluntary instruments based on business initiatives. Besides this, the viability of specific instruments as implementation tools was challenged.

Many critical notes were expressed against the use of LCA as a policy making tool. LCA was considered to be useful within large, individual firms to identify company-specific problem areas or to make certain business choices, but was generally considered too complex and product specific to be

⁴⁹⁴ UNICE, *Guiding principles for an IPP framework, UNICE’s initial contribution to the ongoing stakeholder consultation on the Green Paper*, Brussels, 18 April 2001.

⁴⁹⁵ EUROCOMMERCE, *Communication from the Commission to the Council and the European Parliament on Integrated Product Policy Position Paper* June 2003, Brussels, June 2003.

⁴⁹⁶ AIM, *Integrated Product Policy – Response to the Commission Green Paper*, Brussels, June 2001.

⁴⁹⁷ UNICE, *European industry’s views on the instruments proposed in the Green paper on IPP, UNICE’s 2nd contribution tot the Commission’s stakeholder consultation*, Brussels, 6 June 2001

⁴⁹⁸ EUROPEN, *Packaging and packaged goods. A response to the European Commission Green Paper on Integrated Product Policy [COM (2001) 68 FINAL] from EUROPEN The European Organization for Packaging and the Environment.*, Brussels, 29 June 2001.

⁴⁹⁹ CECED, *Green Paper on the Contribution of Product-Related Environmental Policy to Sustainable Development (“IPP Green Paper”)* PP 01-11 CECED observations on questions raised in the IPP Green Paper, online 9/8/2005
www.ceced.org/sites/ceced.org/community/files/179/phpOeUp1i/IPPAnswersToQuestions.doc

⁵⁰⁰ EEB, *EEB Response to the Commission Green Paper on Integrated Product Policy*, Brussels, April 2001.

used as a comparative policy making tool.⁵⁰¹ Even when restricted to internal use by businesses, LCA would not be able to fit the needs of the rapidly evolving industrial sectors or SMEs.⁵⁰² The methodology of LCA itself was under fire too, as it was considered to be based on outdated data and to lack reliability.⁵⁰³ In addition to this evaluation, some feared that LCA could be used to categorize products as ‘green’ or ‘non-green’ and to develop possible sanctioning mechanisms for the latter category.⁵⁰⁴

The reservations regarding LCA were related to the fear that preferential VAT rates for environment friendly products could be introduced based on either LCA results or awarded eco-labels. Such a differentiation between ‘green’ and ‘less green’ products was strongly rejected by most business stakeholders.⁵⁰⁵

The general use of eco-labels was also criticized by the business representatives. The instrument was said, by some, to be contrary to the ultimate goals of continuous improvement, as the instrument was deemed to provide little or no incentive for further improvements.⁵⁰⁶ The eco-label could be useful as an information instrument but was still considered to be too costly, complex and inflexible.⁵⁰⁷

Stakeholders tended to favor other types of labels like the ISO Type II Self Declaration instruments, which only deal with one aspect and are not third party verified, or Type III environmental product declarations.⁵⁰⁸ The voluntary nature of these instruments was systematically emphasized by the stakeholders. In their opinion, the purely voluntary nature of these instruments should not be watered down by supportive legislation or differential taxation.⁵⁰⁹

Environmental management systems were considered to be a more fruitful venue to achieve IPP, as they enable continuous improvement. Reference was made not only to the European EMAS system but

⁵⁰¹ UNICE, *European industry’s views on the instruments proposed in the Green paper on IPP, UNICE’s 2nd contribution tot the Commission’s stakeholder consultation*, Brussels, 2 July 2001

AIM, *Integrated Product Policy – Response to the Commission Green Paper*, Brussels, June 2001.

CEPI et al., *Paper and Board Manufacturing and Converting Industry’s Joint Position Paper on The Commission’s Green Paper on IPP –Integrated Product Policy*, Brussels, June 2001.

⁵⁰² ORGALIME, *Integrated Product Policy Orgalime comments on EP ENV Committee Draft Report*, Brussels, 31 March 2004.

⁵⁰³ FEVE, *The Green Paper on Integrated Product Policy. Comments by FEVE*, Brussels, 28 June 2001.

⁵⁰⁴ EUROOPEN, *Packaging and packaged goods. A response to the European Commission Green Paper on Integrated Product Policy [COM (2001) 68 FINAL] from EUROOPEN The European Organization for Packaging and the Environment.*, Brussels, 29 June 2001.

⁵⁰⁵ *European industry’s views on the instruments proposed in the Green paper on IPP, UNICE’s 2nd contribution tot the Commission’s stakeholder consultation*, Brussels, 2 July 2001.

ORGALIME, *Contribution to the Stakeholder Consultation on the Green paper on Integrated Product Policy (IPP) Orgalime position*, Brussels, 9 July 2001.

EUROCOMMERCE, *Communication from the Commission to the Council and the European Parliament on Integrated Product Policy Position Paper* June 2003, Brussels, June 2003.

⁵⁰⁶ ORGALIME, *Draft Communication on Integrated Product Policy. Orgalime Reflections*, Brussels, 7 February 2003.

⁵⁰⁷ IKEA, *Comments on the EU Green Paper for IPP*, Brussels, 12 June 2001.

⁵⁰⁸ IKEA, *Comments on the EU Green Paper for IPP*, Brussels, 12 June 2001.

⁵⁰⁹ UNICE, *European industry’s views on the instruments proposed in the Green paper on IPP, UNICE’s 2nd contribution tot the Commission’s stakeholder consultation*, Brussels, 6 June 2001.

also to the ISO 14001 system. Stakeholders dismissed the Green Paper’s emphasis on the European EMAS system and favored the more flexible ISO 14001 system.⁵¹⁰

4.2.2.2. Stakeholder views: public interest groups.

Consumer and environmental NGOs were actively involved in the different consultation activities that preceded the IPP Communication of 2003. Currently, public interest groups are involved in the implementing initiatives: actively participating in the Regular Meetings and the Pilot Projects. Consumer and environmental NGOs developed similar positions regarding IPP.

One of their main criticisms concerned the qualification of public authority as facilitators. As EEB puts it: “Consultation, negotiation and proposing legislation should be parallel and not sequential actions.”⁵¹¹ Public interest groups called for clear legal foundations like a framework directive on performance for products or a European IPP framework directive setting environmental objectives.⁵¹² The EEB suggested the creation of an Environmental Product Responsibility Directive as one of the possible legislative steps. These comments clearly established that, in the opinion of public interest groups, soft instruments and business solutions could not form the base of the IPP strategy.

Public interest groups called upon Commission leadership to structure the consensual multi-stakeholder process approach: defining clear-cut principles and rules to improve their effectiveness.⁵¹³ To fulfill its duty the Commission would need more research resources to acquire independent knowledge and expertise.⁵¹⁴ The co-operation with stakeholder was praised, but extra funding of public interest groups was demanded to conduct research and enable expert contributions.⁵¹⁵

NGOs stressed the difficulty to assess current environmental policies and voiced concerns regarding difficulty to ensure effective coordination and cooperation across policy domains.⁵¹⁶

4.2.2.3. Stakeholder views: overall appreciation.

Most stakeholders of the IPP community were satisfied with the prominent place of consultation initiatives during the policy development. Many participation opportunities were provided and stakeholders mostly felt their positions were taken into account. Suggestions to introduce differentiated VAT rates, for example, were heavily criticized during the consultations and were eventually not withheld in the EC Communication of 2003. Nevertheless, the European environmental organization (EEB) emphasized that these consultations should not replace concrete policy activities. This remark

⁵¹⁰ EUROOPEN, Packaging and packaged goods. A response to the European Commission Green Paper on Integrated Product Policy [COM (2001) 68 FINAL] from EUROOPEN The European Organization for Packaging and the Environment., Brussels, 29 June 2001.

⁵¹¹ EEB, *EEB Response to the Commission Green Paper on Integrated Product Policy*, Brussels, April 2001.

⁵¹² EEB, *An Environmental NGO vision paper towards a European Integrated Product Policy*, Brussels, March 2003.

ANEC, ANEC comments on the “Green Paper on the Contribution of Product –Related Environmental Policy to Sustainable Development. A strategy for an Integrated Policy Approach in the European Union” ANEC2001/ENV/035, Brussels, 2 July 2001

⁵¹³ EEB, *EEB Response to the Commission Green Paper on Integrated Product Policy*, Brussels, April 2001.

⁵¹⁴ Idem.

⁵¹⁵ ANEC, ANEC comments on the “Green Paper on the Contribution of Product –Related Environmental Policy to Sustainable Development. A strategy for an Integrated Policy Approach in the European Union” ANEC2001/ENV/035, Brussels, 2 July 2001.

⁵¹⁶ BEUC, *BEUC comments on the Green Paper on the Contribution of Product-related environmental Policy to Sustainable Development (BEUC/X/152/2000)*, Brussels, 17 May 2001.

fits the general demand of public interest groups for a strong legal framework as a solid base for further developments.

Despite the extensive consultation, covering more than 7 years, stakeholders are today still uncertain as to the concrete significance of the policy and unclear about what could be their contribution to it. The lack of clarity and momentum resulted in stakeholders adopting a wait-and-see attitude, which defies the purpose of a stakeholder driven policy. It might even confirm the fears of some public interest groups that the multitude of consultation activities in combination with a strong emphasis on voluntary instruments is unlikely to lead to concrete policy results.

In the meantime new policy initiatives, such as, for instance, the EuP Directive, emerged. This Directive integrated the IPP building blocks, namely, life-cycle thinking, stakeholder involvement and voluntary instruments. It is these kinds of concrete and tangible initiatives that grab the attention of the IPP stakeholder community. Stakeholders increasingly consider IPP to be a source of inspiration that could guide other more concrete policy initiatives rather than a policy in its own right.

4.3. Evaluation of stakeholder consultation and participation.

Given the fact that stakeholder involvement is one of the cornerstones of IPP, it is important to assess to what extent producer and civic interests have been associated to the design and implementation of the EU-level IPP. This means both looking at the process preceding the 2003 Communication and at the actual involvement of stakeholders in the running of the different instruments mentioned by the Commission as possible implementation tools for IPP (see Chapter 3). The best way to evaluate both is to see whether the consultation processes match the standards and the guidelines that the Commission fixed for itself. This empirical analysis needs to be supplemented by a normative approach, supplied by the deliberative theories increasingly used over the last years in relation to different aspects of the functioning of the EU.

4.3.1. Commission guidelines and principles.

In the 2002 Communication on “General principles and minimum standards for consultation of interested parties by the Commission”⁵¹⁷, a number of principles that should govern the relationship of the Commission with third parties were laid down. The attempt was to provide a Commission-wide approach to how to undertake consultations, given the previous disparity between the different departments, each having its own consultation methods.

The key principles, also highlighted in the White Paper on European Governance, are: participation, openness, accountability, effectiveness and coherence. Participation means that the Commission is committed to an inclusive approach and to consulting as widely as possible on major policy initiatives and especially in the context of legislative proposals. Openness and accountability translate into the consultation processes being transparent: it should be clear what issues are being developed, what mechanisms are being used to consult, who is being consulted and why, what has influenced decisions in the formulation of policy. On the other hand, participants to the consultation process should also be open and accountable, in the sense that it should be apparent what interests they represent and how inclusive that representation is. Effectiveness entails, among others, that consultations should start as early as possible, so that interested parties could still have a substantial impact on the formulation of a particular policy. Last but not least, coherence means that the

⁵¹⁷ COM(2002)704. General principles and minimum standards apply for 1 January 2003.

Commission must make sure that there is consistency and transparency in the way in which the different departments consult and that mechanisms for feedback, evaluation and review will be included in the consultation processes.

As for the minimum standards, they concern the following:

- Clear content of the consultation process. Basically all communications relating to the consultation process should be clear and concise and include all the necessary information to facilitate responses, such as contact details and deadlines for instance
- Consultation target groups. Whenever the Commission defines the target groups in a consultation process, it should ensure that relevant parties have an opportunity to express their position. Parties representing those affected by the policy, those who will be involved in the implementation of the policy or bodies that have stated objectives giving them a direct interest in the policy should be adequately involved.
- Publication. “Your Voice in Europe” webportal is in principle the single access point for consultation.
- Time limits for participation. The Commission should allow for at least 8 weeks for reception of position papers and give a minimum 20 working days notice for meetings.
- Acknowledgement and feedback. Not only should receipt of contributions be acknowledged, but the results of open public consultations should be made public. In addition, the latter will also be included in Explanatory Memoranda accompanying legislative proposals or Commission communications.

These standards, according to the Commission, “will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality, which is a clear weakness with the current method of ad hoc consultations. These standards should improve the representativity of civil society organizations and structure their debate with the Institutions”⁵¹⁸.

While the Commission promotes an all-inclusive approach and has resisted using accreditation systems or criteria for selecting which organizations to consult, it admits that sometimes a selection has to be made (for instance in the case of specific consultation arrangements in a series of policy areas) and for those situations it recommends using criteria such as:

- the structure and membership of NGOs
- the transparency of their organization and the way they work
- previous participation in committees and working groups
- the track record of NGOs as regards competence to advise in a specific field
- the capacity of NGOs to work as a catalyst for exchange of information and opinions between the Commission and the citizens⁵¹⁹

4.3.2. Deliberative democracy.

According to Benhabib, “it is a necessary condition for attaining legitimacy and rationality with regard to collective decision-making processes in a polity, that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation

⁵¹⁸ European Governance. A White Paper, COM(2001) 428 final, Brussels, 25.7.2001, p. 17.

⁵¹⁹ Commission Discussion Paper “The Commission and Non-Governmental Organisations: Building a Stronger Partnership”, presented by President Prodi and Vice-President Kinnock.

conducted rationally and fairly among free and equal individuals”⁵²⁰. This is a procedural definition, as it is the process of deliberation itself that ensures the legitimacy of the outcome. Nevertheless, in addition to legitimacy, deliberative practices also generate practical rationality. On the one hand, through taking part in deliberation participants become informed of the others’ positions and of the possible consequences a decision might have on their interests. All are, therefore, more aware of possible conflicts and more prone to compromising. On the other hand, given the nature of the process, individuals must bring good reasons to support their positions. This very process of finding the best reasons brings one to the position of thinking of what would count as a good reason for the others, thus being obliged to think from different perspectives. In addition, the need to publicly state and defend one’s arguments is conditioned by the “civilizing force of hypocrisy”⁵²¹, namely the need to provide reasonable and acceptable arguments. To summarize, deliberation is thought to help bring about competent (and, as far as possible, consensual) policy-making through reflection and discussion. In addition, deliberative processes might also produce shared collective meaning and a stronger sense of community⁵²².

For deliberation to begin, several conditions must be met⁵²³:

- a suspension of action to create the necessary political space for the deliberation to occur

There must be guarantees that no political decision or action will be taken until the deliberation is completed.

- inclusiveness

All parties potentially affected by the decision or representing all relevant points of view need to be represented. Given the fact that inclusiveness might in some cases lead to scale problems, Parkinson suggests the legitimacy of representation as a possible solution. Thus, he argues that there are legitimate ways of limiting participation and that the legitimacy of representation depends partly on seeing deliberative forums as being embedded in a wider deliberative system in which legitimacy is created in the openness of the linkages between moments, rather than relying on ideal legitimacy conditions for each moment taken separately⁵²⁴.

- publicity

All those affected but not directly involved need to be informed and have the right to react to the outcomes of the deliberation process. Moreover, publicity is also required in the name of accountability and considered, by some authors, even favorable to deliberative outcomes⁵²⁵.

⁵²⁰ Benhabib, S. (1996). *Toward a Deliberative Model of Democratic Legitimacy* in Benhabib, S. (ed.) *Democracy and Difference. Contesting the Boundaries of the Political*. Princeton University Press. Princeton.

⁵²¹ Elster, J. (1998). *Deliberative Democracy*. Cambridge. Cambridge University Press.

⁵²² Papadopoulos, Y. (2002). *Is “Governance” a Form of “Deliberative Democracy”?*. Paper presented at the ECPR Joint Sessions of Workshops, 22-27 March 2002, Turin.

⁵²³ Rosenberg, S. (2003). *Reason, Communicative Competence and Democratic Deliberation: Do Citizens Have the Capacities to Effectively Participate in Deliberative Decision-Making?* Paper presented at the 2003 Annual Meeting of the American Political Science Association. Philadelphia.

⁵²⁴ Parkinson, J. (2003). *Legitimacy Problems in Deliberative Democracy* in *Political Studies* 51:180-196.

⁵²⁵ Elster, J. (1995). *Strategic Uses of Argument* in Arrow, K. et al. (eds.) *Barriers to the Negotiated Resolution of Conflict*. New York. Norton.

- the requirement that the results of the deliberation be binding on those involved in the process.

This is needed in order to ensure that deliberative institutions are not mere talking forums. Quoting Cohen, “the principal virtues of the deliberative conception are allied closely to its conception of binding collective choice”⁵²⁶. It is precisely this binding character that enhances the value of deliberation. In addition, the measures agreed upon will encounter lesser resistance as compared to decisions taken in non-deliberative instances.

Theorists also seem to agree on a series of standards of conduct that need to be met, such as:

- the autonomy of participants and equality of participation

Participants are and regard each other as free and equal. This means, in Cohen’s perspective, that no religious or moral view provides a defining condition of participation or a test of the acceptability of arguments. In addition, the rules regulating the deliberative procedure do not confer special advantages or disadvantages on individuals. Every participant has and is recognized as having equal status in the deliberation⁵²⁷.

- “the outcomes of deliberation must be consistent with the associated values of justice as fairness and democracy as governance oriented to the common good and guided by the principles of autonomy and equality”⁵²⁸
- a “shared appreciation of the truth and right of the reasons for the collective choices being made”⁵²⁹

The claim is that once these conditions and standards are met the ensuing discussion will be deliberative. “As such, it will consist of a respectful and reciprocal expression, correction, revision and restatement of views. In the process, thinking will become more logical and self-reflection will become deeper and more critical. As a result, personal beliefs, values and preferences will change. At the same time, this will encourage the discovery of a common ground for agreement, one that will yield more just and legitimate recommendations for public policy. This in turn will provide the basis for both a renewal of interest and faith in democratic governance (thus addressing current problems of declining interest and participation in politics) and a means for social reintegration (thus addressing the problem of a socially destructive individualism and a socially disintegrative multiculturalism)”⁵³⁰. Deliberation is distinguished from other kinds of communication, such as consultation or bargaining for instance, in that “deliberators are amenable to changing their judgements, preferences, and views during the course of their interactions, which involve persuasion rather than coercion, manipulation, or deception”⁵³¹.

⁵²⁶ Cohen, J. (1998). Democracy and Liberty in Elster, J. (ed.) *Deliberative Democracy*. Cambridge. Cambridge University Press.

⁵²⁷ Cohen, *op. cit.*

⁵²⁸ Rosenberg, *op. cit.*

⁵²⁹ Rosenberg, *op. cit.*

⁵³⁰ Rosenberg, S. (2004). *Reconstructing the Concept of Democratic Deliberation*. Center for the Study of Democracy (University of California, Irvine). Paper 04’02.

⁵³¹ Dryzek, J. (2000). *Deliberative Democracy and Beyond. Liberals, Critics, Contestations*. Oxford. Oxford University Press.

4.3.3 Evaluation of the consultation process prior to the Communication

The multitude of consultation rounds, meetings and workshops that were organized in the run up to the 2003 IPP Communication, shows the dedication of the European Commission to the stakeholder participation principle and this since the earliest stages of the policy. The stakeholder meetings as well as the consultation rounds generally respected the *participation* principle, incorporated in the White paper on European Governance, by including producers and retailers, governmental organizations of different kinds, environment and consumer related public interest groups. This list was often completed by research groups, consultants and individual participants. However, it must be acknowledged that industry, retailers and governmental organizations made up the biggest part of the participants and that the public interest groups accounted for only a small percentage. Nevertheless, public interest groups were present in almost all activities and were only missing in a few smaller expert workshops dealing with the suggested instruments. The consultation effort respects the principles of *openness* as well: details of the minutes of the meeting and workshops, and details of the consultation round were put online and were reported in the following communication.

The consultation activities were started at a very early stage of the policy development: the first stakeholder meeting took place a few years before the first Green Paper. This characteristic of the IPP consultation is said to contribute to the *effectiveness* of the consultation by enhancing the stakeholder's impact on the policy formulation. Indeed, such an early participation should enable stakeholders to influence the basic design of the policy.

On the whole IPP related consultation efforts covered most of the basic principles stated in the White Paper on European Governance: participation, openness and effectiveness. However, some supplementary requirements to assess the quality of the consultation can be found in the Commission's minimum standards for consultation: clear content of the consultation process, definition of the consultation target groups, publication and time limits, and acknowledgement and feedback.

The main consultation round was organized on the basis of the 2001 Green Paper (published in the OJ), which contained a list of questions and all the details concerning deadlines and contact details. This made the basis and the terms of the consultation very clear although the questions were sometimes very broad. The response period was more than four months long and the different target groups responded to the consultation call. As was mentioned before, details on the consultation round were published on the IPP website and feedback was given in the IPP Communication of 2003.

This preceding review of the IPP consultation effort reflects the Commission's own standards. However, to conform to the archetype of deliberative democracy some extra conditions must be met. The first review confirmed a basic respect of *inclusiveness* and *publicity*.

It is difficult to say if a real suspension of action was created to create the political space for the deliberation to occur, but the entire process did develop in consecutive steps and meetings were rarely spread over a long period. The most important difference with the deliberative theory principles rests in the fact that no real decisions were made during the different consultation efforts and thus no binding results were meant to be achieved. In this sense the consultation effort was indeed a mere talking forum.

Finally, the consultation reports and minutes did not show any problem relating to the autonomy or status of participants. On the whole the consultation activities of the European Commission covered

most of the EU principles but did not fit the concept of deliberative democracy as the end goal was could not be qualified as a specific political decision binding all participants

4.3.4. Evaluation of stakeholder participation in the voluntary instruments.

Despite the fact that the general principles and minimum standards do not apply to the participation of stakeholders in the different committees, they can still be useful in assessing the third party involvement in the Eco-label Consultation Forum and in the Article 14 Committee. In the former, there is one representative of environmental concerns, the EEB, one representative of consumer interests, traditionally BEUC (but it has withdrawn from the scheme), one trade union federation, ETUC, and three industry federations, UNICE, UEAPME and EuroCommerce. This seems to be a balanced picture, with three representatives of civic interests and three producer/retailer interests.

Nevertheless, when product criteria are being discussed within the EUEB, many more industry federations are present, to defend the interests of a particular sector, which breaks the equilibrium in favor of industry representatives. Moreover, while industry gets to be represented by experts in a particular sector, environmental and consumer NGOs do not have the expertise needed or the resources to hire an external consultant for a specific file. This unequal representation when it comes to product criteria development is definitely one of the reasons for the skepticism of NGOs and their lack of support of the EU eco-label. As for the EMAS Article 14 Committee, only one environmental NGO is represented, the EEB, while industry has two seats – one for UNICE and one for UEAPME. In addition, CEN is also there, as is ETUC. This is a slightly unbalanced representation, given the absence of consumer interests. The situation is more dramatic when we look at the involvement of stakeholders in the negotiation of EU-level Voluntary Environmental Agreements. In the case of the agreement on CO₂ emissions from cars for instance no civic NGOs were represented. This does not signal a coherent approach towards systematically involving NGOs in the design and implementation of voluntary tools in EU environmental policy. Moreover, this is not compensated by a strong stakeholder involvement at the national level. Our interviews have shown that national-level NGOs are not systematically involved in the implementation of the different voluntary environmental instruments, which, in turn, enhances the skepticism and the lack of market support.

Looking at the different instruments from a deliberative perspective, the Commission Communication on IPP only listed voluntary instruments as possible implementation means. While they do imply stakeholder involvement and the co-operation of national public authorities, EU public authorities, civil society and industry, their non-binding outcome means that there is more talking for the sake of talking than a serious effort to attain the common good. The completely voluntary nature of IPP might prove to be its condemnation, as the analysis of voluntary instruments showed that there is no market take-up in the absence of regulatory relief or some kind of binding element (such as imposing EMAS to certain enterprises in Wallonia).

The issue of stakeholder participation in standardization was identified as a major obstacle for the instrument to become part of the IPP toolbox. The consultation principles of the European Commission, as well as the principles of deliberative democracy allow us to refine this diagnostic even further. *Participation*, the first principle cited by the White Paper on European Governance, is the central issue. The European standardization bodies (CEN and CENELEC) granted public interest groups an observer status, but this did not change the overrepresentation of industrial interest in the standardization procedure. Moreover, the national standardization bodies were given the responsibility to reflect all national views and were given the task to manage the public enquiry on draft standards. Unfortunately, the participation at the national level as well as the management of the

public enquiries varies between different countries and these activities are not monitored at the European level.

Openness and *accountability* are other essential features of the deliberative democracy theory. The standardization does not follow the same rules of openness with regard to their functioning as we found in the European Commission activities: no public dissemination of Technical Committees and working group activities is done and even the final standard is sold rather than publicly advertised. The accountability of the participants is difficult to establish as participants with various affiliations can, for example, be part of national standardization body's delegations.

If we consider the timing of the public enquiry and the need to intervene at an early stage of the process to achieve an *effective* consultation, it is obvious that this principle can hardly be met. As a result most decision power is restricted to the participants of the specific Technical Committees (TCs) and working groups. This is all the more important considering the restricted means of public interest groups to participate in multiple TCs and working groups.

The standardization instrument does not comply with the European Union's principles for consultation, but the concept of deliberative democracy might fit the standardization better. The principle of *inclusiveness* is provided for in theory, but is not always reflected in the daily functioning of standardization bodies. Moreover, the participants cannot be considered as *autonomous* and *equal* as the European standardization bodies created different membership statuses with distinct privileges e.g. voting rights. The principle of *publicity* might be catered for by the public enquiry, but this procedure cannot fulfill the principle of publicity on its own since it concerns only the final stages of standard formulation. Finally, the outcome of standardization procedure cannot be considered as binding to all participants, because it still is a voluntary agreement and even those who crafted the standard can choose not to abide by it.

The process of product standards formulation through standardization bodies does not comply with the consultation principles set out by the Commission nor does it fulfill the requirements of deliberative democracy. Participation and inclusiveness, transparency, and the status of the different participants in standardization all constitute serious obstacles to achieve the goals of deliberative democracy.

Chapter 5: Conclusions

5.1. The policy context

The emergence and development of IPP as described in this report is not an isolated phenomenon, but reflects a number of broader policy trends in environmental policy and governance in the EU generally.

Since the early 1990s, the traditional Community method of policy-making through legislative instruments has been under challenge. The debate on subsidiarity has tended to weaken political support for centralized legislative action at EU level and encouraged wider recourse to more cooperative modes of multi-level governance. In the specific context of environmental policy, this overall trend has been translated into the notion of “shared responsibility” of EU institutions, member states and stakeholders, first articulated in the 5th Environmental Action Programme in 1992,⁵³² reiterated in its 1998 review⁵³³ and further consolidated in the 6th Environmental Action Programme adopted in 2002.⁵³⁴ At the same time, awareness of the limits of classical environmental policy targeting specific media and production processes has led to a shift to more “integrated” forms of policy-making and calls for broadening the range of instruments of environmental policy. Not only is environmental policy itself to become more integrated, but environmental requirements are also to be integrated into other policy areas, in order to promote sustainable development, in accordance with Article 6 of the EC Treaty as amended by the Treaty of Amsterdam. This move towards the integration of environmental, economic and social policies under the overarching objective of sustainable development has led to a more explicit attention to interest balancing and trade-offs across the three “pillars” of sustainable development, which has not invariably strengthened the position of environmental policy.

The first explicit mandate for an IPP is to be found in the 1998 European Parliament and Council Decision on the review of the 5th Environmental Action Programme, which called for the development of “a framework for an integrated, life-cycle orientated product policy (...) in order to promote the development of cleaner products by incorporating environmental considerations into their design”,⁵³⁵ while reiterating the importance of “shared responsibility and partnership” and specifically pledging to “ensure that an appropriate mix of actors is involved in the preparation and implementation of [Community] policies and actions.”⁵³⁶ The mandate for IPP is confirmed in the 6th Environmental Action Programme’s provisions on “improving collaboration and partnership with enterprises”.⁵³⁷ IPP was firmly placed in the context of sustainable development by the Conclusions of the Göteborg European Council of June 2001 on the EU Sustainable Development Strategy (SDS), stating that “the EU Integrated Product Policy aimed at reducing resource use and the environmental impact of waste should be implemented in cooperation with business.”⁵³⁸ This emphasis on cooperation with business

⁵³² COM(92) 23 final.

⁵³³ Decision No 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development 'Towards sustainability', OJ L 275/1, 10.10.1998.

⁵³⁴ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242/1, 10.9.2002.

⁵³⁵ Decision No 2179/98/EC, Art. 2(4)(b).

⁵³⁶ *Ibid.*, Art. 9.

⁵³⁷ Decision No 1600/2002/EC, Art. 3(5).

⁵³⁸ Presidency Conclusions, Göteborg European Council, 15-16 June 2001, para. 31

is by no means coincidental, given the explicit link between the SDS and the Lisbon Strategy aimed at competitiveness, economic reform and innovation. The recent re-launching of the Lisbon Strategy in 2005 and ongoing review of the SDS tend to further reinforce this link, by stressing the contribution of green technologies and eco-innovation – two key instruments of IPP – to the competitiveness of the European economy.

Another general policy trend which has influenced the development of IPP is the “Better regulation” agenda, which originated in earlier concerns about subsidiarity but has also become closely related to the Lisbon Strategy, that tends to narrow it down to a mandate for deregulation as a means of boosting industrial competitiveness. The “Better regulation” agenda has served as a vehicle for promoting the substitution of alternative instruments of governance such as co-regulation, negotiated agreements and standardization to traditional forms of lawmaking. IPP’s emphasis on cooperation with stakeholders and the use of voluntary instruments dovetails with this agenda. Thus, while the stated rationale for the introduction of IPP is the achievement of sustainable modes of production and consumption and more effective environmental protection, the policy attention that it has received cannot be understood from this perspective only, but also stems from the fact that it is viewed as potentially supportive of other, non-environmental policy objectives. In the present political context, the risk that such other objectives may become predominant and seek to instrumentalize IPP, for example as a vehicle for deregulation, is not illusory.

5.2. Relationship between IPP and the existing instruments and principles of environmental policy

Product policy as a branch of EU environmental policy long predates the debate on IPP. As appears from our analysis in chapter 2, EC environmental legislation already contains a wide range of product-related measures which are aimed at achieving some of the objectives of IPP. Though such legislation often originates from sectoral policy objectives, such as waste prevention or reduction of chemical risks, it has an impact, directly or indirectly, on many stages of the life-cycle of the products concerned. While it does not claim to be “integrated”, this earlier legislation often incorporates elements of a life-cycle perspective and other features of the policy approach which is currently being promoted under the IPP label. Despite the debate on IPP, such product-related legislation constitutes an important part of the environmental *acquis* and is likely to remain the effective mainstay of environmental product policy for some time to come. If the further development of IPP is to be successful, it is important for policy-makers to clarify how the IPP approach builds on this existing legislation, which remains an important incentive for producers to improve the environmental performance of their products and has also significantly contributed to consumer awareness of the environmental impacts of consumption.

Neither does the “integrated” approach to environmental policy originate with IPP. The move towards this approach in the EU was inspired by a 1990 OECD Environment Monograph on “Integrated Pollution Prevention and Control”,⁵³⁹ which pleaded for a shift in focus for decision making, away from water, air and land (a discharge-to-medium approach) towards considering “substance”, “source” and “region”, opening the way for consideration that substances need to be controlled at many points in their environmental and even commercial lifetime, and not only in production processes. According to a subsequent OECD Council Recommendation, the basic principles of Integrated Pollution Prevention and Control (IPPC) were to be “to prevent or minimise the risk of harm to the environment

⁵³⁹ Environment Monograph No. 37, OECD, Paris, 1990.

taken as a whole (...) by taking account of the effects of substances or activities on all the environmental media”, *inter alia* through “consideration of the *whole life cycle of substances and products* (the “cradle to grave” concept)”.⁵⁴⁰ However, a fully integrated approach, though theoretically justified, may well prove too ambitious to implement in actual policy practice. Thus, when the EC adopted a Directive on IPPC in 1996,⁵⁴¹ this was more narrow in scope than the OECD’s basic principles on the same subject, as this concrete legislative application of IPPC focused on an integrated permitting procedure for major point sources of pollution only.

The current IPP approach could be considered as a complementary step in this regard. While the source-linked integrated permitting procedure does not consider the impact of the end result of the process (the product), IPP draws attention to the global impact of the product alongside its whole life-cycle. In that sense, it provides for a more embracing perspective than the IPPC Directive, which remains focussed on processes and permitting, with no consideration of the use phase.

Though some authors have argued that IPP should be viewed as a completely new policy paradigm, under which product-oriented environmental policy will eventually replace traditional process-oriented regulatory schemes,⁵⁴² there is little evidence so far to substantiate such grand designs. As currently developed and implemented, IPP is actually not about revising legislation in order to substitute a product approach to a process approach. Its focus is on developing the most adequate tools to convince business to move towards cleaner products. It is a call to reinforce the move towards cleaner production processes, via a reflection on the total impact of a product during its lifetime, and about enshrining the IPPC approach in a broader scheme, where processes would be viewed as just one stage in the life of a product. The direct control of industrial installations and other potentially damageable facilities remains crucial for the prevention of environmental harm, and IPP does not provide a credible substitute for it. However, the exchange of information, involvement of stakeholders and incentives which are called for in the Commission Communication on IPP should act as a driver for reinforcing the need to develop cleaner products, to make a step further in comparison with what is already imposed by the BAT requirement of the IPPC Directive, and this on a voluntary basis.

How does IPP relate to the overall objectives, principles and current priorities of EU environmental policy, as laid down in Article 174 of the Treaty and the 6th Environment Action Programme (EAP)? IPP looks to address the main environmental challenges identified in the 6th EAP via a “product dimension”, presented as an underdeveloped aspect of environmental law and policy, without which the chances of meeting these challenges could be jeopardized. IPP reflects some of the main “strategic approaches” advocated in the 6th EAP:

- the integration of environmental concerns in other policies ;
- encouraging the market to work for the environment ;
- working in partnership with business ;
- helping consumers to make informed choices.

⁵⁴⁰ Recommendation of the Council on Integrated Pollution Prevention and Control, OECD Doc. C(90)164/Final, 31 January 1991, Appendix, para. 1.

⁵⁴¹ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257/26, 10.10.1996.

⁵⁴² E. Tufet-Opi, “Life After End of Life: The Replacement of End of Life Product Legislation by an European Integrated Product Policy in the EC”, *Journal of Environmental Law* 14 (2002), 33-60; R. Malcolm, “Integrated Product Policy – A New Regulatory Paradigm for a Consumer Society?”, *European Environmental Law Review* (May 2005), 134-144.

All these elements can be found in the IPP communication indeed and appear to be key factors of the proposed strategy, which is mostly about *convincing* business to move towards cleaner products, by providing adequate information on the whole environmental impact of a product, making sure the information reaches its target and transforming business and consumers into *actors*.

However, the consistency of the Commission’s IPP approach with the fundamental principles of EU environmental policy, as laid down in Article 174(2) EC,⁵⁴³ in particular the precautionary principle, the principle of preventive action, the source principle, and the polluter pays principle, deserves scrutiny.

As to the precautionary principle, one should assess the emphasis on life-cycle “thinking” in IPP. The entire life-cycle of a product must be considered when fixing priorities, but the Commission communication does not require a full life-cycle analysis in all cases. One must above all have an overall picture of the general impact of the product in order to identify the most significant impacts. As specified in the EuP Directive of July 2005, which is presented as a test-case for IPP, “*the adoption of ecodesign requirements on the significant environmental aspects of an EuP shall not be unduly delayed by uncertainties regarding the other aspects,*” which means that the requirement for more coherence and more knowledge about the environmental impact of a product should not paralyse action. In that sense, one could say that the IPP approach does not appear to be contrary to the precautionary principle.

One should be cautious however. Current efforts to assess which products have the greatest environmental impact from a life-cycle perspective prove to be lengthy and not directly conclusive (repeated calls are made for further research).⁵⁴⁴ The evaluation process is quite demanding, due to the horizontal perspective and the necessity to evaluate stages of a product life which are not all in the hands of the same actors, but function on a chain basis. Could uncertainty about the effective impact of a product lead to the postponement of a policy measure which was aimed to tackle a single environmental stage of the product, with no consideration of the whole life cycle? In other words, could the demand for a life-cycle approach be transformed into a means for delaying action, where no scientific certainty can be reached? Could it be used as a screen for questioning the relevance of proposed policy measures and delaying those which are not well accepted by some sectors? The benefits of a coherent and integrated approach should not make policy-makers blind to these possible drawbacks. Public authorities have a crucial role to play in orienting further research in this regard.

In the IPP approach, the life-cycle is like a “bubble”, within which trade-offs⁵⁴⁵ shall be promoted, for the sake of (economic) efficiency, as seems to be inferred by the statement of the Commission that IPP “*should encourage measures to reduce environmental impacts at the point in the lifecycle where they will best and most cost effectively for business and society reduce the overall environment impacts and resource use.*”

⁵⁴³ R. Macrory (Ed), *Principles of European Environmental Law*, ELP, Groningen, (2004) ; N.de Sadeleer, *Environmental Principles, From Political Slogans to Legal Rules*, OUP, Oxford, (2002) ; J.Jans, *European Environmental Law*, ELP, (2000) ; P.Sand, *Principles of International Environmental Law*, 2nd ED, CUP, Cambridge, (2003).

⁵⁴⁴ See the European Commission website on IPP.

⁵⁴⁵ Commission Communication, p.7.

Such a trade-off perspective needs to be carefully scrutinized in the light of Article 174, as it could possibly conflict with the source principle and the prevention principle if cost considerations are allowed to take precedence over environmental considerations, when fixing priorities. A decision to reduce the environmental impact of a product at the end-of-life stage only on grounds that this would be the most cost-effective solution, would not be consistent with the source and prevention principles. But cost effectiveness could actually join up with environmental efficiency if the cost calculations do take into account the impact on society at large, including the environmental damage. In that case only, the approach advocated by the Commission is to be considered consistent with these two principles. On the contrary, a choice based on a cost-benefit calculation for the sake of business product strategies only would not conform to the principles. Moreover, such a choice would conflict with established legislation on preventive environmental management, such as the Directives on waste management, which regard waste prevention as a cornerstone. The efforts to achieve cost reduction should be constrained by the established limits laid down by the environmental *acquis*.

In this connection, it should also be recalled, as the IPP communication does, that “getting the prices right” is a long-term goal of EU environmental policy, recently confirmed in the SDS. Getting the prices right means trying to ensure that the price paid by a consumer for a product includes the costs of all the environmental impacts it creates. This supposes an application of the polluter pays principle, which requires that the cost of the environmental externalities should be internalized in the price of an activity or a product. From this perspective, it is to be regretted that current IPP activities do not pay much attention to the use of economic and fiscal instruments that can promote cost internalization.

5.3. Policy formulation: extensive stakeholder participation.

Integrated product policy (IPP) has been long in the making. The earliest references to IPP can be found in EU policy documents in the mid-nineties. The preparatory stages of policy formulation have been long and encompassing. Technical expertise, stakeholder and member state views were included in these preparatory stages. The consultation covered broad public hearings, expert workshops, oral and written submissions and a sustained dialogue between public authorities and interested parties. Overall, the consultation effort complied with the consultation standards set out by the European Commission (EC) as well as with the principles of deliberative democracy. The consultation process can be coined as public, open, inclusive, coherent and balanced with ample possibilities for public interest representation. The stage of policy formulation came to a temporary close with the publication of the Communication on IPP. The Communication describes the nature, goals, content and instruments of a European IPP.

5.4. Policy content: a beneficial ambiguity?

The Communication constitutes the basis for further policy development and implementation and offers information on the essential features of the policy, namely, the policy problem, intended outcome, content, target groups and instruments.

What *policy problem* does IPP address? At a general level the problem seems to be clear: products have an impact on the environment and these impacts occur at every stage of the products life cycle, so it makes sense to address the reduction of impacts throughout the cycle. Beyond this general understanding, the policy documents offer little more precision on the problems that are targeted by IPP. The policy problem is a very broad and comprehensive phenomenon that lacks borders or delimitations. Policy problems with such a massive and broad scope come across as hard to manage

and are unlikely to mobilize the necessary attention, resources, and support of policy entrepreneurs. The problem that IPP appears to tackle will need to be translated in directly identifiable and clear issues of a more manageable scale if the IPP is to draw and maintain the attention of policymakers.

The *intended policy outcome* is no less than a market transformation triggered by a mentality change of producers and consumers. The Communication does not set any quantifiable targets and instead it proposes an effort to continuously improve the environmental performance of products. This approach encourages companies to set their own pace and to focus on their own most cost efficient improvements. To attain such a process of continuous improvement, the need for incentives towards the producers and consumers to produce and buy greener products is acknowledged. In addition to certain public incentives the policy is premised on the assumption that forerunners in the market will lead a transformation that will eventually encompass the entire market.

The analysis of *target groups* probes the question to who the policy is directed. Policy documents point at three target groups: (1) producers (2) public authorities (3) consumers. The policy targets markets, and seeks to influence the key actors in the market, namely, suppliers, buyers and governments regulating markets. Although three groups are mentioned, the emphasis clearly lies on producers.

Producers are coined as the driving forces to achieve the reduced impact of products on the environment.⁵⁴⁶ The market transformation, which IPP seeks to achieve, needs to be carried out by producers. If producers are the policy’s main target, it will be necessary base that policy on a set of incentives that clearly matters and impacts on producers. Policy documents offer little information on what these incentives to alter producer behavior are likely to be. They suggest that market leaders be at the vanguard of the market’s transformation and reap the benefits.⁵⁴⁷ If producers are the main target, two conclusions can be drawn: (1) IPP policy instruments must directly impact on producers to achieve the desired behavioral change and market transformation, (2) there are no reasons or explanations provided in the policy documents why producers are expected to lead the transformation and why they are likely re-evaluate and change their products to reduce environmental impacts.

On the demand side, consumers are mentioned as targets. Consumers should be convinced to buy greener product through the diffusion of better, more reliable and clear product information.⁵⁴⁸ Eco-labels stand out as a possible means to alter consumer behavior. Though targeted at consumers each of the consumer-oriented measures shift the burden of adopting and delivering ‘greened’ products to the voluntary commitment of producers.

Public authorities are mentioned as another group targeted by the policy. Policy documents clearly state that direct market intervention is unlikely to be the main role of public authorities. Governments are to facilitate the process (of continuous improvement).⁵⁴⁹ In practice the facilitation has up until now entailed: (1) the organization of policy debates and stakeholder consultations, e.g. Green Paper, White Paper; (2) the development, the structuring, and promotion of information and techniques to be taken up by producers and other levels of government at their discretion, e.g., handbooks, databases, reports, regular meetings, etc.; (3) reviewing and developing concrete formats for direct policy

⁵⁴⁶ COM (2001) 68 final, p. 3

⁵⁴⁷ COM (2001) 68 final, p.7

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid., p.5.

implementation, e.g., identifying products with the greatest impact and greatest room for improvement, product panels, etc.

Finally, public interest groups are targeted as partners to identify relevant issues and develop practical solution.⁵⁵⁰ Tasks relating to the promotion of IPP instruments, e.g. eco-label or EMAS, the greening of standardization at national level, and educational and awareness-raising activities were suggested by the European Commission.⁵⁵¹

The identified target groups and their respective roles present a division of labor in which producers are to drive and deliver the policy program. Public authorities are to generate a framework and the conditions for producers to come forward and to achieve the policy goals. Organizing persuasion and policy learning seems to be the main function of the European public authority in the IPP, rather than achievement of behavioral changes through constraining legislation or tax incentives. Confining the role of public authorities to that of a facilitator is not without consequence. Member states facing regulatory competition in a common market and producer resistance to measures which could entail costs and competitive disadvantages, point to the EU as the relevant policy level for market correction. At the supranational level direct and coercive intervention is largely discarded as an adequate or viable policy option. Instead IPP posits facilitation as the main governmental responsibility and it singles out producers as the actors that must achieve and deliver the market correction. The shift from state to markets to establish collective decisions combined with the presence of different policy levels can easily give rise to extensive responsibility and burden shifting and eventually to governance failures.

The analysis of the *policy design* draws the attention to the concrete measures and decisions that are being developed under the IPP label. The Communication specifies the actions, the budget⁵⁵² and the instruments of IPP. In addition to the public resources, the European Commission explicitly counts on contributions of stakeholders, expecting them to make considerable investments to realize IPP.⁵⁵³

Two types of actions can be discerned. First, the Commission has set up two pilot projects and has launched studies to determine the products with the greatest potential for environmental improvement. Furthermore a working group was set up to determine the information needs of different stakeholders and to develop means to compensate for possible information gaps. These initiatives can be qualified as information gathering efforts to identify feasible formats and appropriate objects for the implementation of IPP. Second, the Communication proposes a strengthening of the instruments included in the IPP toolbox, namely, green public procurement, EMAS, LCA, standardization, taxes, product design and eco-labeling.

⁵⁵⁰ Ibid., p.7.

⁵⁵¹ COM (2003) 302 final, p.22.

⁵⁵² The IPP budget for the period 2003-2007 is € 4,910 million of which € 3,305 million is earmarked for human resources and administration. The remaining € 1,605 million are reserved for the studies and expert consultation related to the development of the IPP toolbox (€960,000), the IPP pilot projects (€417,000) and progress monitoring (€228,000). See COM(2003) 302 final.

⁵⁵³ European Commission, Questions and Answers on Integrated Product Policy (IPP) MEMO 03/136 Online:<http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/03/136&format=HTML&aged=0&language=EN&guiLanguage=en>

The IPP Communication presents a toolkit of *instruments* to achieve a reduction of product-related impacts on the environment. The suggested instruments are eco-labels, EMAS, voluntary environmental agreements, standardization and public procurement. The Commission considers that the goals of IPP can only be achieved by applying a mix of instruments.

5.5. “Mixing the instruments”. Still a long way to go?

Regarding the policy instruments the following concluding comments can be made:

1. If the toolkit of instruments is to be used for IPP purposes, it is crucial that the policy communities working on or with these instruments are adequately informed and knowledgeable on IPP. The interview results indicate that few policy actors involved in the instruments know or appreciate the relevance of IPP. Those policy makers who are informed on IPP interpret the policy approach in differing ways and there is little shared understanding of the meaning and nature of the policy.
2. The policy instruments in the toolkit are information-based and/or voluntary instruments. Regulatory measures are mentioned in the policy documents and not entirely excluded but the emphasis is voluntary instruments. These instruments are only viable when the interests of the policy makers and those of the producers coincide. There is little or no indication that such parallelism of interests exists, rather the contrary seems to be true.
3. The Commission’s reliance on a voluntary approach puts private actors and producers at the centre stage of the policy (formulation and implementation). The suggested instruments (eco-label, EMAS, VEA, standardisation) all rely heavily on the input and the commitment of private actors to achieve outcomes. The experience with EU-based voluntary instruments, as discussed earlier, does not seem to be very promising when it comes to private actor involvement and participation. The limited number of eco-label applications and voluntary environmental agreements indicates that industry is not very forthcoming and that an IPP policy based on these instruments is likely to suffer the same fate.
4. The analysis of standardization as an instrument to achieve IPP goals pointed at a principal-agent problem. The use of standardization in the framework of the packaging and packaging waste directive showed the importance of interests and incentives to make voluntary instruments work. New Approach standardization worked well when it involved product safety standards, which have direct consumer and producer utility. The system proved much less successful when it came to setting environmental standards which entailed more costs than benefits for the producers. In those cases where the interests of the agent or standardisation body do not match the underlying goals and interests of the public authority or principal, delegations will either fail entirely or trigger high monitoring and control costs. Moreover, principal-agent relations tend to be reversed when the principal has few or no other alternatives than to resort to the services and expertise of the agent. Information dependence or lack of administrative capacity on behalf of public authorities can create a situation where the agent steers and guides the principal rather than the other way around. The reliance on private standardization bodies to achieve collective goals may bring certain advantages (e.g. tapping into private resources at limited administrative expense) but also entails dangers of goal displacement and loss of public control.

5. It should be highlighted that it is possible for public authorities to create effective incentives for producers to adopt voluntary instruments. The literature and our own findings point at the importance of flanking supportive measures to stimulate the adoption of voluntary instruments by producers. Tax measures and public procurement stand out as effective means to provide producers with incentives that would otherwise be lacking if the markets and producers are left to their own devices.
6. IPP documents suggest a toolkit of instruments but offer little guidance as to how these different instruments are to be mixed. Since IPP cannot be achieved through isolated instruments, a mix of instruments will be required. The actual integration of instruments into a coherent and effective instrument mix is not tackled by the relevant policy documents nor is it convincingly broached in the subsequent policy initiatives, even if some attempt of clarification can be induced from the EuP Directive. IPP offers building blocks without a construction plan or “contractors” to build the policy. The failure to be clear on the instrument mix is a crucial omission in the policy design for it allows public authorities and producers to pick up on certain instruments without contributing to IPP goals. Presenting policy instruments without establishing how they are to contribute jointly to IPP invites policy-stretching. The policy concept is stretched to include such a vast scope of activities and instruments that the policy loses meaning, practical relevance, and its capacity to guide policy development.
7. Product panels could constitute a possible alternative to the formulation of pre-defined policy mixes. Based on Scandinavian experiences the European Commission has put in place panels of stakeholders to develop an implementation plan to reduce the life cycle impact of a product on the environment. Stakeholders rather than public authorities determine which instruments from the toolkit can be applied for a given product or product group. Although such product panels could turn out to be a useful format to achieve the much needed integration of policy instruments, it is currently unclear what the precise status and powers of the EU product panels are. The pilot projects can be interpreted as a feasibility study and a means to convince producers that IPP is a viable and worthwhile policy approach. The pilot projects can also be an experiment to test the option of turning stakeholders into effective policymakers that decide on the goals to be achieved and the instruments to be adopted for a given product. Both options have their downside. Product panels as decision-makers shift very significant amounts of power from public officials to private actors. Such delegations of power are typically subject to principal-agent problems. If product panels are merely to be interpreted as a feasibility study, the exercise may convince certain producers but may fail to achieve a coherent approach to reduce product impacts.
8. The extensive and balanced consultation efforts in the initial and preparatory stages of the policy (before the Communication) allowed for ample and decisive input of public interest groups. The conditions for a systematic and meaningful involvement of public interest groups are less if at all present in the discussed policy instruments. Many of the voluntary instruments (e.g. standardization, VEAs, EMAS) do not constitute a level playing field. Whether for lack of resources, expertise or formalized prerogatives, public interest groups struggle to have a significant impact on the development and outcomes of voluntary measures. In view of the increased reliance on and the importance of measures to be crafted through voluntary instruments, it seems essential to not limit equitable participation to the formative stages of policymaking but to ensure it even more forcefully during the implementation process.

5.6. Extreme interdependency and experimental implementation: a promising strategy?

The design of IPP portrays some striking features. First, the policy confronts the European Commission with rather extreme interdependencies. Carrying out the policy requires coordinated and coherent action within EU institutions (e.g. between Directorate Generals), between different levels of government (EU, national, regional), between governments and agencies, between public and private actors. The resulting interdependency renders imposition and hierarchical control difficult if not impossible. Mobilizing resources, awareness, support, capabilities, etc. among so many and diverse actors over which EU institutions have no direct or only partial control seems difficult to achieve with the resources (budget and staff) made available for the policy.

Second, IPP is characterised by a long process of policy formulation in which policy concepts, approaches and instruments were discussed at length by both public authorities and a broad range of stakeholders. The actual decision making occurred with the adoption of the Communication. However, the Communication included few decisions. The document provides orientations and suggestions but offers little in terms of concrete measures or decisions. In effect, actual decision making was shifted to the implementation stage. Essential decisions regarding the scope (which products), the format (how) and the expected outcomes (what) were to be determined during the implementation of the policy. Implementation was to shape the policy rather than the inverse. The implementation strategy embedded in the Communication and in subsequent policy measures clearly displays the characteristics of what Richard Matland⁵⁵⁴ coined as “experimental implementation”. The implementation process is less geared towards successful outcomes but seeks to trigger a learning process whereby policy measures are seen as natural experiments to enhance policymakers’ understanding of policy effects and formats. Policy ambiguity is seen as opportunity rather than as obstacle in this type of implementation. Attempts at policy implementation occur in varying contexts based on differing understandings of the policy and thus give rise to varied experiences from which policy makers can learn and achieve clarity on more viable and desirable policy measures. This approach does require significant monitoring, evaluation and feedback on the different attempts at implementation. Without the sustained scrutiny of policy experiences at different policy levels and in different policy domains, policy learning is unlikely to ensue. Furthermore, as contextual conditions (domestic, policy domain) will largely determine the implementation process, outcomes will differ accordingly and show high levels of variation. Following this reasoning it seems likely that EU member states will forward their existing product-related environmental policies as cases of IPP. This would indeed lead to highly context-dependent outcomes and to a mere re-branding of existing policies on an IPP ‘logo’.

Third, IPP is characterised by ambiguity of both goals and means. Our analysis of IPP was largely inspired by the assumption that policies are sets of clear and formalised measures, programmed to achieve precise and pre-defined goals. When we analyse IPP from that classic perspective, the policy is found wanting. The relevance of IPP should maybe not merely be assessed on the basis of direct and concrete policy outcomes. The policy introduces an important and potentially useful policy concept or idea. Although, it remains unclear whether and how the policy concept can be put into practice, it may be important to allow the concept to mature and ‘travel’ in different domestic contexts and to inspire a range of policies which, while they may fall short of the elusive ideal model of a fully ‘integrated’ and consensual IPP which addresses all life-cycle impacts in the most environmentally

⁵⁵⁴ Matland, R. E. (1995) Synthesizing the implementation literature: the ambiguity-conflict model of policy implementation. *Journal of Public Administration Research and Theory*, 5, 2, 145-174.

effective and economically efficient way, pragmatically combine available instruments to improve the environmental performance of product systems.

5.7. Recommendations

Our research has demonstrated that IPP, as promoted by the European Commission, suffers from important flaws, both in terms of policy design and implementation. From this perspective, it is not surprising that the grand ambitions of this new policy approach have not materialized and that it has failed to deliver any significant results so far. The Commission’s concept of the self-effacing role of public authorities in IPP has appeared to be self-defeating. If carried through to its ultimate consequences, this concept of IPP may well amount to a recipe for regulatory inertia or roll-back. Yet pro-active public policies to address the environmental impacts of products along their life-cycle are more necessary than ever. Our research leads to the following recommendations:

1. A product policy in which the role of public authorities is limited to the facilitation and coordination of voluntary action by stakeholders, purposefully excluding the use of any coercive instruments, cannot be effective, due to information dependence and lack of administrative and technical capacity on the part of public authorities. Market transformation cannot be achieved without providing strong incentives for producers to improve the environmental performance of their products.
2. While IPP is useful as a theoretical policy concept, it lacks a clear focus. Product policy needs to be based on more discrete and manageable targets in order to mobilize the attention of policymakers and target groups.
3. IPP will not replace existing product-related environmental legislation. Public authorities should continue to make use of regulatory tools where appropriate. Other IPP tools of a more voluntary nature tend to be most effective where they build on a strong foundation of existing legislation. IPP needs to clarify how binding and non-binding instruments can complement and reinforce each other.
4. Product policy should devote more attention to the use of economic and fiscal instruments based on the polluter pays principle, which are potentially very powerful incentives for market transformation through cost internalization and modification of producer and consumer behaviour.
5. Information-based instruments have only limited effectiveness in the absence of strong guidance and incentives provided by public authorities. The greening of public procurement, while possible within the framework of existing legislation, relies too heavily on voluntary initiatives of under-resourced public authorities. Stronger guidance and support is needed to increase the take-up of these instruments.
6. Where product policy relies on the use of voluntary instruments such as standardization, the clear formulation by public authorities of essential environmental requirements and mandates for standardization bodies is necessary to avoid goal displacement and loss of public control over the process.

7. Product panels can be useful to promote dialogue between stakeholders along the product chain and explore the feasibility of various product management measures. However, if they are to be more than a noncommittal exercise, their purpose, status and powers need to be more clearly defined by public authorities.
8. Additional resources need to be provided to ensure a more balanced participation of stakeholders and ensure a level playing field during the implementation process of product policy.