



Council of the
European Union

Brussels, 16 March 2023
(OR. en)

7403/23

LIMITE

MI 207
COMPET 223
IND 116
ENER 131
ENV 260
CONSOM 88
CODEC 399

Interinstitutional File:
2022/0095(COD)

NOTE

From:	Presidency
To:	Delegations
Subject:	ESPR: Discussion note

In view of the upcoming Working Party for Competitiveness and Growth (Internal Market – Ecodesign) on 21 March 2023, delegations will find in Annex a Presidency discussion note.

The Presidency has prepared this discussion note to guide a further round of discussion on Green Public Procurement (Article 58 and recital 87) and the Digital Product Passport (Article 8-12 and corresponding recitals and Annexes). During the Working Party on 21 March we will kindly ask you to comment on the below proposals and also let us know of other concerns.

I. GREEN PUBLIC PROCUREMENT**1. Empowerment to adopt implementing acts**

During the meeting of the Working Party on 17 February, several Member States welcomed the Swedish compromise text as regards Article 58 and in particular that it was proposed that the Green Public Procurement requirements (GPP requirements) would be adopted by implementing acts. We propose to maintain Article 58 as an empowerment to adopt implementing acts for establishing irrespective of the final outcome regarding the Article for establishing ecodesign requirements.

2. Increased demand for environmentally sustainable products

In our compromise proposal we clarified that implementing acts should be set “in order to incentivise demand for environmentally sustainable products” [these products being covered by ecodesign requirements]. This wording was chosen taking into account that recital 87 referred to that GPP requirements should “leverage of public spending to boost demand for better performing products is maximized”. It has been suggested the Article could refer to supply as well, which we think could be considered. We would therefore suggest the following change in Article 58 “in order to incentivise demand for **and supply** of environmentally sustainable products”.

3. National Measures

The link between national measures and GPP requirements in the context of the Ecodesign regulation can be considered from two angles: (i) there is the possibility of maintaining or introducing national measures when there are no established GPP requirements and (ii) there is the possibility of maintaining or introducing national measures when GPP requirements are established.

On the first point, it must be underlined that the GPP requirements must only be established pursuant to Article 58 once ecodesign requirements have been established for a product group. For sake of clarity, the Presidency therefore proposes to create a reference to ecodesign requirements in Article 58 1a.

“The requirements referred to in paragraph 1 shall be set **on product groups for which there are ecodesign requirements**, as appropriate in view of...”

If there are no established ecodesign requirements and hence no established GPP requirements, Member State can maintain or introduce national measures establishing mandatory requirements on products which are subject of public contracts awarded by contracting authorities and contracting entities.

To clarify that MS are allowed to set GPP requirements on products for which ecodesign requirements have not been established so far, the Presidency therefore proposes adding the following wording in recital 87:

(Recital 87)

It is possible for Member States to maintain or lay down national measures on green public procurement regarding product groups for which ecodesign requirements have not yet been established. National measures relating to these green public procurements must comply with Union law.

On the second point, several delegations requested that the GPP requirements under Article 58 would only be minimum requirements, allowing Member States to have stricter national requirements exceeding the terms of these GPP requirements established pursuant to Article 58.

The Presidency, having analysed this again do consider this being possible, and therefore proposes to complete Article 58, first subparagraph, as follows: “The Commission shall [...] specify **minimum mandatory requirements**”

4. Justified derogations

Member states have voiced the opinion that the basic act should provide that, when establishing the GPP requirements, the Commission needs to take into account, and provide for exceptions from complying with the GPP requirements pursuant to Article 58, based on specific procurement needs on national markets and national public policy objectives. To some extent this was previously addressed in Recital 87 but the Presidency suggests recital 87 to be removed instead adding the following text in Article 58 para 1a.(c) ensuring the Commission establishes, where for derogations from the mandatory requirements:

(Article 58, para 1a.(c))

Where relevant in view of the needs on national markets and national public policy objectives, contain exceptions from complying with the minimum mandatory requirements in duly justified circumstances on ground of public policy or public security.

(recital 87)

~~Green public procurement requirements should not be developed if they are likely to disproportionately impact other public policy objectives of the Member States. When developing implementing acts related to Green Public Procurement, the Commission should take due account of the Member States different geographical, social and economic circumstances.~~

5. Readability

Several Member States voiced appreciation of improved readability and clarity at the presentation of the latest compromise proposal. To move forward on this, the Presidency finds the logic of the para 1.a would increase if trading places between 1a.(a) and 1a.(b) of Article 58 para 1.

6. Requiring public contracts to procure products complying with ecodesign requirements before such requirements have entered into force

Several Member States have voiced concerns over Article 58.1.a. (v) finding it unclear or too prescriptive. The Presidency had added this since our understanding was that one of the types of requirements the Commission could consider for GPP was that public authorities should procure products complying with ecodesign requirements earlier than the general public. Given the questions and comments the Presidency however suggests to remove it.

7. Competitive pressure

Member States have pointed out that Article 58 para 2.d is unclear and that the section on competitive pressure might risk decreasing the ambition of the Article – arguing that the requirements must not lead to disproportionate restriction of competition. The Presidency proposes to remove that section.

(Article 58, para 2.(d))

The market situation at Union level, ~~including the competitive pressure~~, of the relevant product group.

II. DPP

1. Period for which the DPP shall remain available

Several delegations have raised the question of how long the digital product passport should be available for a product. In accordance with Article 8, para 2, point (h), this period will be decided in the act setting out the ecodesign requirement on the product group concerned. The Presidency proposes to add a new recital (26a) to clarify what the Commission should consider here:

(26a) The period for which the product passport is to remain available should be set with a view to ensure information on the product remain available also for end-of-life operations when appropriate considering the administrative burden. Where the requirement has been put on an item level, the product passport should not be required to remain accessible after a product has become waste.

2. Updating of the product passport

Several delegations have raised the question when different types of actors will be given a right to update a product passport. In accordance with Article 8, para 2, point (g), this will be decided in the act setting out the ecodesign requirement on the product group concerned. The Presidency proposes to add a new recital (26b) to clarify what the Commission should consider here:

(26b) Actors, such as repairers, refurbishers and other economic actors but also competent national authorities and the Commission should under some circumstances be given a right to update the product passport. Economic actors improving a product after it has been placed on the market should for example often be given a right to update the product passport where this specific information requirement has been put on the item level in order that more accurate information are given on the environmental sustainability of the product. Competent national authorities could be given a right to update the product passport for example in situations where a product is no longer in conformity. The Commission should be given a right to update the product passport in situations where for example new legislation requires, or other circumstances makes it necessary, that additional information to be given in the product passport.

Recital (27)

International and European standards are not free of charge and several delegates have expressed concern about the reference to standards in Annex III and the need to avoid disproportionate costs for economic operators, in particular for SMEs. That the product passport should rely on ISO standards was part of the Commission's original proposal. Regarding the solution of copying the standard into the delegated/implementing act laying out the requirements on the digital product passport, as suggested, our understanding is that this could entail a large cost for the Commission. The Presidency proposes to add a sentence to recital 27, that the impact assessment should consider how disproportionate costs for SMEs can be avoided in this regard. Given that the Commission has explained that SMEs most often would rely on third party service providers for their product passports they would not need themselves to purchase access to the standards:

(27)

The impact assessment should also, to the extent that the digital passport relies on ISO standards which are not free of charge, consider whether this is suitable and how disproportionate costs for SMEs can be avoided here.

3. Web portal (Article 12a)

Some delegations have requested a clarification on the suggested article 12a, where the Commission shall set up and maintain a web portal allowing stakeholders to search for information included in digital product passports. The Presidency suggests a new recital (34a) to clarify the purpose and the content of the web portal and who could benefit from it.

(34a) The Commission should set up and maintain a user-friendly web portal where stakeholders, such as consumers, economic operators and other relevant actors can search for the digital product passports. The web portal should link to information already stored by economic operator in its decentralised stored digital product passport and at least include information on each product, the unique product identifiers, the economic operator identifiers and the facility identifiers. The Commission should, when setting up the portal ensure, that this does not create [additional ?] costs for the economic operators.

4. Remanufacturing

Several delegations asked if repairs, refurbishers and remanufacturers would be required to produce a Digital Product Passport for products they work on. The definition of repair and refurbishes in Article 2 ensures that these types of operations do not result in a new product, meaning that a repaired or a refurbished product will never be required to produce a product passport.

Remanufactured products do however result in new products, meaning that the requirement to have a digital product passport will apply for such products, even if only a single item is remanufactured. Given that the requirement to provide a digital product passport will represent a cost, requiring such products to always have a product passport, even if remanufacturing has taken place on an item level, could decrease the amount of remanufactured products. On the other hand the safety and performance of a product can be impacted by remanufacturing. The Presidency therefore proposes to add a possibility, but not an obligation, for the Commission to exempt such products from the obligation to have a product passport, where appropriate, in view of promoting such business models in Article 8 paragraph 4:

4. When establishing the requirements related to the product passport, the Commission may exempt product groups from the requirement **to have a product passport where set out in paragraph 1 of this Article where:**
- (a) technical specifications of the product passport are not available in relation to the essential requirements included in Article 10; or
 - (b) other Union law includes a system for the digital provision of information related to a product group for which the Commission considers that it achieves the objectives referred to in paragraph 3, points (a) and (b).

The Commission may also exempt remanufactured products, that have been altered in such a substantive way that they are considered as new products, having been placed on the market for the first time, from the requirement to have a product passport when this is appropriate in view of promoting such business models.

An alternative to introducing a possibility for the Commission to exempt remanufactured products from specifically the obligation to have a Digital Product Passport could be to indicate that the Commission shall, as appropriate, analyse when developing ecodesign requirements if remanufactured products under some circumstances should be exempted from the definition of the product group (see Article 2(5)) subject to the ecodesign requirements.

5. Article 9 General requirements for the product passport

In Article 9, para 1, point (d), one delegation has pointed out the importance of ensuring interoperability between data and systems across product groups. To achieve this, the Presidency proposes to align the wording of this article with the legal text agreed in the Battery Regulation by adding to Article 9, para 1, point (d):

- (d) all information included in the product passport shall be based on open, standards, developed with an inter-operable format and shall be machine-readable, structured, and searchable, as appropriate, and in accordance with the essential requirements set out in Article 10. **The information shall be transferable through an open interoperable data exchange network without vender lock-in.**
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