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Commission proposal	Drafting Suggestions	MS Comments
<p>Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act) (Text with EEA relevance) 2023/0081 (COD)</p>		<p>These comments are preliminary from Denmark and we reserve the right to come back to these highly important articles. We have limited our comments to article 19, but a similar approach would be applied to article 20.</p> <p>In a nutshell, we agree that we should lift the common ambitions within the EU, to ensure a solid and harmonised increase of resilience and sustainability in public procurement of strategic Net Zero technologies. We are of the view, that the proposed award criteria will not ensure a common approach and, due to the technicality and flexibility, will lead to divergence across procurement entities. This will in turn result in a fragmented implementation and uncertainty for companies wanting to participate in the green transition.</p> <p>To this extend, we propose a model based on so-called minimum requirements/pre-qualification requirements, by introducing a common set of technical requirements or contract clauses. We have done this for three main reasons:</p> <ol style="list-style-type: none"> 1) This will ensure a harmonised and operational approach on the internal market. 2) This will ensure transparency for companies active on the internal market because they know what exactly to expect in each member state. 3) Contrary to its name ("minimum requirements") we believe will strengthen

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		<p>sustainability and resilience in comparison to mandatory award criteria</p> <p>Also, this approach does not exclude the possibility for national procuring authorities to use additional criteria, such as award-criteria, if deemed optimal in the specific situation.</p> <p>To illustrate how minimum requirements/pre-qualification requirements can be used in practice, we distributed an example prior to these comments. In this regard, it is also worth noting that resilience criteria also can be lifted through for instance social clauses or cyber security contribution.</p>
Chapter IV Access to markets		
Article 19 Sustainability and resilience contribution in public procurement procedures		
<p>1. Contracting authorities or and contracting entities shall base the award of contracts for strategic net-zero technology listed in the Annex Article 3b in a public procurement procedure on the most economically advantageous tender, which shall include the best price-quality ratio, comprising at least the sustainability and resilience contribution of the tender, in compliance with Directives 2014/23/EU, 2014/24/EU, or 2014/25/EU and applicable sectoral legislation, as well as with</p>	<p><u>1. When procuring strategic net-zero technology listed in article 3b contracting authorities and contracting entities shall take the tender's contribution to sustainability and resilience into account through the application of minimum requirements, i.e. technical specifications, or contract clauses.</u></p> <p><u>The tender's contribution to sustainability and resilience must be handled in an objective,</u></p>	<p>The suggested article 19 from the Commission and Presidency needs clarification – a concern raised by many Member States. Furthermore, the suggested article interferes with the prerogative of a contracting authority under the Procurement Directives to choose the award criteria, they see fit, given the particular purchase and the particular market situation.</p> <p>The draft version of article 19 suggesting a mandatory use of award criteria risk being a</p>

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<p>the Union's international commitments, including the GPA and other international agreements by which the Union is bound.</p>	<p><u>transparent and non-discriminatory manner and shall be taken into account based on:</u></p> <p><u>(a) the proportion of the strategic net-zero technologies that originates from a source of supply accounting for more than 65% of the supply of that specific strategic net-zero technology within the Union. The source of supply shall be determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council¹;</u></p> <p><u>and at least one of the following where applicable:</u></p> <p><u>(b) the environmental sustainability going beyond the minimum requirements in applicable legislation; or</u></p> <p><u>(c) where an innovative solution needs to be developed, the contribution to innovation by providing entirely new solutions or improving comparable state-of-the-art solutions.</u></p>	<p>limiting factor for contracting authorities who wants to accelerate the green transition.</p> <p>A new phrasing of article 19, subsec. 1. is needed in order to secure transparent, implementable and harmonized requirements in the public procurement of net zero technologies, while also securing the necessary flexibility for the contracting authority.</p> <p>The litras (a), (b) and (c) would need some work still as there are other aspects to consider such as social clauses or cyber security. It also needs to be considered whether the specific criteria should be in the act itself, with the risk of setting them in stone without any chance of reviewing them. In any case, the criteria must be clear and operational for public authorities in their implementation of the requirements and <i>increase</i> the transparency for companies bidding. At the same time, it is important to ensure that they are flexible enough due to changing market situations. Commission guidance mentioned in art. 22 (1) could be important in this regard.</p> <p>Prior and in parallel to the NZIA, it has been discussed in Brussels in recent months how sector regulation can incorporate requirements for contracting authorities in the procurement process. For example, the building products</p>
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¹ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

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		<p>regulation, Ecodesign regulation, regulation on heavy duty vehicles. In these discussions, award criteria as a regulatory mechanism was suggested. However, the discussions have shown that policy makers as well as procurement professionals find it insufficient to rely solely on award criteria when utilizing public spend as a lever to reach specific policy goals. Therefore, award criteria have either been supplemented by other procurement mechanisms or abandoned as regulatory mechanism. We suggest to transfer this argumentation to apply to public procurement of Net Zero-technologies due to the challenges in the form of transaction costs, fragmentation through circumvention risk, and untransparent, when relying solely on the award criteria-approach.</p> <p>DK's suggestion for a redrafted article 19, subsec. 1. is thus also inspired by the latest version of the procurement-article in regulation on amending Regulation (EU) 2019/1242 as regards strengthening the CO₂ emission performance standards for new heavy-duty vehicles and integrating reporting obligations, and repealing Regulation (EU) 2018/956.</p>
<p><u>When a strategic net-zero technology is not the main object of the contract but only part of it, but the estimated value of the respective part of the contract is above the thresholds</u></p>	<p>When a strategic net-zero technology is not the main object-subject of the contract but only part of it, and can be separated from the mail object of the contract and but the estimated value of the</p>	<p>The option to divide contracts into separate lots is regulated in the public procurement directive article 46. It is an important tool to help SME's participation in the competition for public</p>

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<p><u>set out in Directives 2014/23/EU, 2014/24/EU, or 2014/25/EU, contracting authorities or contracting entities shall either:</u></p>	<p>a respective part of the contract regarding the strategic net-zero technologies is above the thresholds set out in Directives 2014/23/EU, 2014/24/EU, or 2014/25/EU, contracting authorities or contracting entities shall <u>divide the strategic net-zero technology part into one or more separate lot</u>either:</p>	<p>procurement contracts. Dividing into separate lots do however often lead to some increased transaction costs for the contracting authority, as they have to manage several contracts instead of one. It may also lead to a worse product, if tenderers are limited to only winning one or some of the lots. If for example a contracting authority has divided a contract into 2 lots, and limits the tenderers access to only 1 lot per tenderer, the tenderer who wins the main contract may have also had the best offer for the secondary lot, but is restricted from winning it. This will leave the contracting authority with a worse product for the secondary lot, but 2 separate tenderers, which is favourable for SME's, as they would otherwise struggle competing against bigger companies.</p> <p>It is not clear from the draft, whether or not a tenderer should be allowed to win more than one lot.</p> <p>Question: Is this equivalent to the assessment of the main subject of a contract as used in Directives 2014/23/EU, 2014/24/EU, or 2014/25/EU?</p>
<p><u>(a) separate the strategic net-zero technology part into dedicated lot or lots,</u></p>	<p>(a) —separate the strategic net-zero technology part into dedicated lot or lots,</p>	<p>The content of the paragraph has been moved to the above paragraph.</p>
<p><u>(b) prepare a separate contract or contracts for the strategic net-zero technology part, or</u></p>	<p>(b) —prepare a separate contract or contracts for the strategic net-zero technology part, or</p>	<p>This option seems unnecessary. Without it, the contracting authority will still have the option to do so, since if they choose to prepare separate contracts, then the contract regarding the net-</p>

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		zero technology would no longer “not be the main part of the contract” and thus would not be covered by this paragraph.
<u>(c) impose on the main contractor an obligation of competitive subcontracting for the supply of the respective strategic net-zero technology products applying respectively the rules of Directives 2014/23/EU, 2014/24/EU, or 2014/25/EU and the provisions of this Article.</u>	(e) —impose on the main contractor an obligation of competitive subcontracting for the supply of the respective strategic net-zero technology products applying respectively the rules of Directives 2014/23/EU, 2014/24/EU, or 2014/25/EU and the provisions of this Article.	<p>This paragraph is very unclear regarding what obligations it imposes on the contracting authority. It potentially involves a lot of obligations if the contracting authority is responsible for the main contractor’s completion of a public procurement, and even more obligations if the contracting authority is required to verify that such a procedure is done within the legal framework of the directives.</p> <p>If the paragraph is kept, it needs to be clarified what exactly the contracting authority is obliged to do, and therein what it takes to fulfil those obligations.</p> <p>It is doubtful if a contracting authority would ever prefer imposing these requirements on the main contractor with whatever obligations entails by doing so over simply dividing the contract into separate lots.</p> <p>For clarity it is suggested, that only the option to divide into separate lots is used, as it is assumed, that this will be the preferred option in practice in most – if not all – cases.</p>
	<u>The contracting authority shall not be obliged to divide the strategic net-zero technology part into one or more separate lots, if a division would lead to disproportionate costs or if it is not</u>	In practice it may prove difficult or disproportionately expensive to separate some parts from the main contract. If the net-zero technology part is not possible to separate from

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	<p><u>technically possible to divide the strategic net-zero technology part from the main object of the contract.</u></p> <p><u>Contracting authorities shall provide an explanation of the main reasons for their decision not to divide into lots, which shall be included in the procurement documents.</u></p>	<p>the main contract e.g. due to technical dependency (compatibility), the contracting authority should have the option to not divide the contract. It also seems in accordance with the considerations put forth in paragraph 4 of the proposal that the contracting authority may be exempt from dividing the contract, if the division of the contract would lead to disproportionate costs. It may also be appropriate to add an example of what disproportionate costs would be, as is done in paragraph 4.</p> <p>As is also the case in the public procurement directive article 46, paragraph 1, contracting authorities should be obliged to provide an explanation for the main reasons for not dividing a contract into lots. Therefore, the suggested addition creates consistency with existing procurement regulation.</p>
2. The tender's sustainability and resilience contribution shall be based on the following cumulative criteria which shall be objective, transparent and non-discriminatory:	2. The tender's sustainability and resilience contribution shall be based on the following cumulative criteria which shall be objective, transparent and non-discriminatory:	Moved to paragraph 1.
<u>(a) contribution to resilience, taking into account the proportion of the strategic net-zero technologies that originates from a source of supply accounting for more than 65% of the supply of that specific strategic net-zero technology within the Union.</u>	(a) contribution to resilience, taking into account the proportion of the strategic net-zero technologies that originates from a source of supply accounting for more than 65% of the supply of that specific strategic net-zero technology within the Union.	Moved to paragraph 1.
<u>For the purpose of point (a), the source of supply shall be determined in accordance</u>	For the purpose of point (a), the source of supply shall be determined in accordance with	Moved to paragraph 1.

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<u>with Regulation (EU) No 952/2013 of the European Parliament and of the Council²;</u>	Regulation (EU) No 952/2013 of the European Parliament and of the Council³;	
<u>and at least one of the following:</u>	and at least one of the following:	
(a)(b) environmental sustainability going beyond the minimum requirements in applicable legislation;	(a)(b) environmental sustainability going beyond the minimum requirements in applicable legislation;	Moved to paragraph 1.
<u>(c) contribution to innovation by providing entirely new solutions or improving comparable state-of-the-art solutions;</u>	(e) — contribution to innovation by providing entirely new solutions or improving comparable state-of-the-art solutions;	Moved to paragraph 1.
(b) — where an innovative solution needs to be developed, the impact and the quality of the implementation plan, including risk management measures;		
(e) — where applicable, the tender's contribution to the energy system integration;		
(d) — the tender's contribution to resilience, taking into account the proportion of the products originating from a single source of supply, as determined in accordance with Regulation (EU) No 952/2013 of the European		

² Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

³ ~~Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).~~

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Parliament and of the Council ⁴ , from which more than 65% of the supply for that specific net-zero technology within the Union originates in the last year for which data is available for when the tender takes place.		
<u>This shall not preclude contracting authorities and contracting entities from using additional non-price criteria.</u>	This shall not preclude contracting authorities and contracting entities from using additional non-price criteria.	This should obviously be the case due to a number of reasons. But just considering the fact that other legislation may also contain obligatory award criteria should be enough. It is however redundant, if the above changes are accepted, as award criteria will not then be obligatory to use.
3. <u>In public procurement procedures,</u> Contracting authorities and contracting entities shall give <u>to each of the criteria applied to assess the</u> tender's sustainability and resilience contribution <u>a minimum weight of 5% and a combined</u> weight between 15% and 30% of the award criteria. <u>This is</u> without prejudice of the application of Article 41 (3) of Directive 2014/23/EU, Article 67 (5) of Directive 2014/24/EU or Article 82 (5) of Directive 2014/25/EU, <u>which allow</u> for giving a higher weighting to the criteria <u>on environmental sustainability referred to</u> in paragraph 2, points (a) and (b).	3. The tender's contribution to the sustainability and resilience as referred to in paragraph 1, shall be given a significant weighting in the public procurement documents 3. — <u>In public procurement procedures,</u> Contracting authorities and contracting entities shall give <u>to each of the criteria applied to assess the</u> tender's sustainability and resilience contribution <u>a minimum weight of 5% and a combined</u> weight between 15% and 30% of the award criteria. <u>This is</u> without prejudice of the application of Article 41 (3) of Directive 2014/23/EU, Article 67 (5) of Directive 2014/24/EU or Article 82 (5) of Directive 2014/25/EU, <u>which allow</u> for giving a higher	The obligatory weighting will be redundant, if the above changes are accepted, as award criteria will not be the only option. The added text is a bit more flexible, as it allows for contracting authorities to give the tender's contribution to the sustainability and resilience as referred to in paragraph 1 a significant weighting in the public procurement documents by for example using mandatory minimum criteria as technical specifications. As a separate comment, we question whether a weight of 5% will be of significance.

⁴ — Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

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	weighting to the criteria on environmental sustainability referred to in paragraph 2, points (a) and (b).	
4. The contracting authority or the contracting entity shall not be obliged to apply the considerations relating to the sustainability and resilience contribution of strategic net-zero technologies where their application would oblige that authority or entity to acquire equipment having disproportionate costs, or technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance. Cost differences above 10% may be presumed by contracting authorities and contracting entities to be disproportionate.	<p>4. The contracting authority or the contracting entity shall not be obliged to apply the considerations relating to the sustainability and resilience contribution of strategic net-zero technologies as referred to in paragraph 1, where their <u>when the contracting authority can demonstrate, that the</u> application would <u>impose a reasonable risk of leading to</u> oblige that authority or entity to acquire equipment having disproportionate costs, or technical characteristics different from those of existing equipment, resulting in incompatibility with existing equipment. , technical difficulties in operation and maintenance. Cost differences above 10% may be presumed by contracting authorities and contracting entities to be disproportionate.</p> <p><u>The contracting authority may demonstrate the risks of disproportionate costs or incompatibility based on information from a market dialogue prior to the publication of the contract notice.</u></p>	<p>The exemption makes sense as a guard against unreasonable costs due to obligatory requirements. It is however very important to note that contracting authorities cannot make substantial changes to the public procurement documents after the publication of the contract notice. The ECJ made this point in the case C-368/10, pr. 55: “...they cannot change, even by means of corrections, the meaning of the essential contractual conditions, to which category the technical specifications and the award criteria belong, as those conditions were formulated in the specifications, upon which the economic operators concerned legitimately relied in taking the decision to prepare to submit a tender or, on the other hand, not to participate in the procurement procedure concerned.”.</p> <p>In order for this exemption to be usable without having to make a new tender, the decision to apply or not to apply the conditions must be made before the public procurement procedure begins, as it would entail a great legal risk to make such changes to the public procurement documents <u>during</u> the public procurement procedure.</p> <p>The reference to paragraph 1 is made to ensure clarity in regards to which conditions the paragraph concerns.</p>

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		<p>It does seem reasonable that the contracting authority must be able to demonstrate, that the application of the conditions imposes a reasonable risk of leading to either disproportionate costs or incompatibility with existing equipment. It seems difficult for a contracting authority to demonstrate that technical difficulties are disproportionate without converting their “difficulties” to a monetary value, and in that case it would be contained under “disproportionate costs”, which is why it may be left out of the paragraph.</p>
<p>This provision shall be without prejudice of the possibility to exclude abnormally low tenders under Article 69 of Directive 2014/24/EU and Article 84 of Directive 2014/25/EU, and without prejudice to other contract award criteria according to the EU legislation, including social aspects according to Articles 30 (3) and 36 (1), second intent of Directive 2014/23/EU, Articles 18 (2) and 67 (2) of Directive 2014/24/EU and Articles 36 (2) and 82 (2) of Directive 2014/24/EU.</p>		
<p>Article 20</p> <p>Auctions to deploy renewable energy sources</p>		
<p>1. Without prejudice to Article 4 of Directive (EU) 2018/2001 and Articles 107 and 108 the Treaty, and to the Union’s international commitments including the GPA and other</p>		

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<p>international agreements by which the Union is bound, Member States, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, shall assess the sustainability and resilience contribution as referred to in Article paragraph 1a of this Article of this Regulation when designing the criteria used for ranking bids in the framework of auctions, the aim of which is to support the production or consumption of energy from renewable sources and where technologies listed as a strategic net-zero technologies under this Regulation are allowed to participate. This is without prejudice to Article 4 of Directive (EU) 2018/2001 and Articles 107 and 108 the Treaty, and to the Union's international commitments as defined in Article 2, point (1) of Directive (EU) 2018/2001.</p>		
<p>1a. The auctions' sustainability and resilience contribution shall be based on the following criteria which shall be objective, transparent and non-discriminatory:</p>		
<p>(a) contribution to resilience, taking into account the proportion of the strategic net-zero technologies that originates from a source of supply accounting for more than 65% of the supply of that specific strategic net-zero technology within the Union.</p>		

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<u>For the purpose of point (a), the source of supply shall be determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council;</u>		
<u>and at least one of the following:</u>		
<u>(b) environmental sustainability going beyond the minimum requirements in applicable legislation;</u>		
<u>(c) contribution to innovation by providing entirely new solutions or improving comparable state-of-the-art solutions;</u>		
<u>(d) contribution to the energy system integration.</u>		
<u>This shall not preclude Member States from using additional non-price criteria beyond those listed in this paragraph 1a.</u>		
2. <u>Member States shall give to each of the criteria applied to assess the auction's sustainability and resilience contribution a minimum weight of 5% and a combined weight between 15% and 30% of the award criteria.</u> <u>This is</u> without prejudice of the possibility to give a higher weighting to the criteria <u>on environmental sustainability referred to</u> in Article 19(2) 20(1a) , points (a) and (b), where applicable under Union		

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legislation, and of any limit for non-price criteria set under State aid rules.		
3. The Member States, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law shall not be obliged to apply the considerations relating to the sustainability and resilience contribution of net-zero technologies where their application would oblige those entities to acquire equipment having result in disproportionate costs, or technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance. Cost differences above 10% may be presumed by contracting authorities and contracting entities Member States to be disproportionate.		
Article 21 Other forms of public intervention		
1. Without prejudice to Articles 107 and 108 of the Treaty and Article 4 of Directive 2018/2001 ⁵ and in line with the Union's international commitments, when deciding to set up schemes benefitting households, companies or consumers which incentivise the purchase of		

⁵ Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources

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<p><u>strategic</u> net-zero technology final products listed in the Annex, Member States, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, shall design them in such a way as to promote the purchase by beneficiaries of <u>strategic</u> net-zero technology final products with a high sustainability and resilience contribution as referred in Article <u>21(3a)</u> 19(2), by providing additional proportionate financial compensation.</p>		
<p>2. The additional financial compensation granted by authorities in accordance with paragraph 1, due to the application of the criteria referred to in Article <u>21(3a) (a)</u>, (b)-(c) and (d) shall not exceed 5% of the cost of the net-zero technology final product for the consumer.</p>		
<p>3. When designing and implementing a scheme falling under paragraph 1, the authority shall base itself on an open, non-discriminatory and transparent process to assess the resilience and sustainability contribution of available <u>strategic net-zero technology final</u> products on the market. Any <u>strategic</u> net-zero technology final product shall be entitled to apply to join the scheme at any time. The authority shall specify a pass mark for <u>strategic net-zero technology final</u> products to be eligible to the</p>		

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additional financial compensation under the support scheme.		
<u>3a. The sustainability and resilience contribution of other forms of public intervention shall be based on the following criteria which shall be objective, transparent and non-discriminatory:</u>		
<u>(a) contribution to resilience, taking into account the proportion of the strategic net-zero technologies that originates from a source of supply accounting for more than 65% of the supply of that specific strategic net-zero technology within the Union.</u>		
<u>For the purpose of point (a), the source of supply shall be determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council;</u>		
<u>and at least one of the following:</u>		
<u>(b) environmental sustainability going beyond the minimum requirements in applicable legislation;</u>		
<u>(c) contribution to innovation by providing entirely new solutions or improving comparable state-of-the-art solutions;</u>		
<u>(d) contribution to the energy system integration.</u>		

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<u>This shall not preclude Member States from using additional non-price criteria beyond those listed in this paragraph 3a.</u>		
4. Member States shall publish on a single free access website all information relating to schemes pursuant to Article 21(1) for each relevant <u>strategic</u> net-zero technology <u>final</u> product.		
Article 22 Coordination of access to markets initiatives		
1. Where relevant, the The Commission shall provide guidance on the <u>application of the</u> criteria to assess the resilience and sustainability contribution of available products covered by the forms of public intervention covered under articles 19, 20 and 21.		
2. <u>For the assessment of the contribution to the resilience criterion,</u> The The Commission shall make available and regularly update a list of each of the net-zero technology final products listed in the Annex, broken down by the share of Union supply originating in different third countries in the last year for which data is available.		
3. The Net-Zero Europe Platform shall discuss measures carried out by Member States to implement Articles 19 and to 21 and		

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exchange best practices, inter alia, as concerns the practical use of criteria defining the sustainability and resilience contribution in public procurement, or schemes incentivising the purchase of net-zero technology final products.		
		<u>Genral comments :</u>
END	END	END



Council of the European Union
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From:	General Secretariat of the Council
To:	Working Party on Competitiveness and Growth (Industry)
Subject:	DK preliminary comments on NZIA Chapter IV on Access to markets
