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#### COVER NOTE

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From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	31 March 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2022) 81 final
Subject:	COMMISSION STAFF WORKING DOCUMENT Subsidiarity Grid Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC

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Delegations will find attached document SWD(2022) 81 final.

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Encl.: SWD(2022) 81 final



Brussels, 30.3.2022  
SWD(2022) 81 final

## COMMISSION STAFF WORKING DOCUMENT

### Subsidiarity Grid

#### *Accompanying the document*

**Proposal for a Regulation of the European Parliament and of the Council  
establishing a framework for setting ecodesign requirements for sustainable products  
and repealing Directive 2009/125/EC**

{COM(2022) 142 final} - {SEC(2022) 165 final} - {SWD(2022) 82 final} -  
{SWD(2022) 83 final}

## Subsidiarity Grid

<p><b>1. Can the Union act? What is the legal basis and competence of the Unions' intended action?</b></p>
<p><b>1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?</b></p> <p>The proposal is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which is to be used for measures aiming at the establishment and functioning of the internal market. The new legislative proposal has at its centre a revision of the Ecodesign Directive<sup>1</sup>, which currently covers energy-related products only. It establishes a framework for setting sustainability requirements that products (with the exception of food, feed and medicines) have to comply with in order to be placed on the market</p>
<p><b>1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?</b></p> <p>In this case of internal market legislation, the Union's competence is shared.</p>
<p><b>2. Subsidiarity Principle: Why should the EU act?</b></p>
<p><b>2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2<sup>2</sup>:</b></p> <ul style="list-style-type: none"> <li>- Has there been a wide consultation before proposing the act? YES</li> <li>- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level? YES, see Impact assessment report.</li> </ul>
<ul style="list-style-type: none"> <li>- In line with Better Regulation guidelines, a number of public and targeted consultation exercises took place: <ul style="list-style-type: none"> <li>o An <b>Inception Impact Assessment</b> on SPI was published on 14 September 2020 and the period to provide feedback closed on 16 November 2020.<sup>3</sup> A total of 193 responses were submitted through the online Better Regulation Portal;</li> <li>o An <b>Open Public Consultation</b> was accessible to the public for 12 weeks from 17 March 2021 to 9 June 2021 and received 626 responses via the online tool;</li> <li>o Between April and July 2021, a series of <b>dedicated workshops</b> was organised on different topics related to SPI and widely attended by participants from various stakeholder groups, including business associations and companies, academics, NGOs, environmental and social organisations, as well as Member State representatives;</li> <li>o A <b>survey of small and medium-sized enterprises</b> (SMEs) was held from 26 April until 15 June, receiving 332 responses;</li> <li>o A second <b>targeted SME survey</b> was held from 20 October to 4 November 2021. This built on the first SME survey outlined above, and drew primarily on the knowledge and expertise of organisations representing SMEs (<a href="#">Enterprise Europe Network</a>)</li> </ul> </li> </ul>

<sup>1</sup> Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related product

<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

<sup>3</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en)

- contact points and other SME representative bodies). This survey received 35 replies;
- **Tailored questionnaires** were submitted to selected stakeholder representatives from 20 May 2021 to 9 June 2021;
- A number of **stakeholder interviews** were conducted with selected stakeholder representatives.

Further details on these activities out are outlined in the impact assessment (Annex 2).

- The explanatory memorandum and the impact assessment (chapter 3) contain a section on the principle of subsidiarity, see replies to question 2.2 below.

**2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission’s proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?**

With regard to the necessity test, or the question of whether the objectives can be sufficiently achieved by action taken by Member States alone, in order to ensure a harmonised and well-functioning internal market for sustainable products across all Member States, and therefore a level playing field for economic operators, it is essential to put in place a common set of rules, which include product requirements and the obligation to provide reliable information to end-users. Member States alone would not have the possibility to enact appropriate measures without creating divergences in the requirements for economic operators, and obstacles to the free movement of products, regulatory burden and excessive costs for economic operators. In addition, Member States alone would inevitably develop tools that diverge from one another, and render consumer choices more complicated. If Member States act individually (as they have already begun to do - see Annex 7 of the impact assessment, Table on ‘National Level Initiatives’) there would be a high risk of ending up with numerous different and competing approaches across Member States, based on different methods and rules, especially for products traded across the internal market. This in turn would create market fragmentation and distortions of competition, and likely lead to uneven awareness and lack of information on the environmental performance of products across the EU, as well as additional costs for companies trading cross-border.

With regard to the effectiveness test, or the reasons why action at Union level is more effective than action at national level, only EU action can set harmonised common product requirements and information requirements on sustainability, ensuring the free movement of goods and allowing consumers access to pertinent and reliable information about sustainability characteristics and circular features of products in whatever Member State they are purchased. There is clear added value in setting common requirements at EU level, as this will ensure a harmonised and well-functioning internal market across all Member States and, therefore, a level playing field for economic operators. With harmonised performance and information requirements set at EU level, sustainable products and circular practices will be promoted in all Member States, creating a larger and more efficient market and hence greater incentives for the industry to develop them. Finally, the size of the internal market provides a critical mass enabling the EU to promote product sustainability and to influence product design and value chain management worldwide.

**2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?**

The need to increase the sustainability of products placed on the internal market has an inherent cross border dimension. National action would inevitably lead to fragmentation of the internal market and to a related distortion of competition creating additional costs and burdens for economic

<p>operators and damaging consumers. Member States cannot enact appropriate measures without creating separate and divergent requirements for products and economic operators. The proposal addresses unsustainable production and consumption of products placed on the EU market – both of which have the same underlying causes. Member States are not overstretched in achieving the objectives of the proposal.</p>
<p>(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?</p>
<p>The main problem that the proposal tackles is that products' consumption and production are not sustainable and not adequately addressed by existing EU product and internal market rules, leading to increasingly divergent national rules on the sustainability of products. This problem is therefore typically of a cross-border nature.</p>
<p>(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty<sup>4</sup> or significantly damage the interests of other Member States?</p>
<p>Member States acting individually could only try to address the issue on their respective territories by setting requirements for products and economic operators, and as such creating obstacles to the free movement of goods, divergences with other Member States, market fragmentation and distortions of competition among economic operators active across borders.</p>
<p>(c) To what extent do Member States have the ability or possibility to enact appropriate measures?</p>
<p>Member States would not be able to enact appropriate and effective measures because of the scale of the problem and of its underlying causes.</p>
<p>(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?</p>
<p>The problem of unsustainable consumption and production and its causes, from the market failures due to product related externalities not being sufficiently internalised to the behavioural biases and regulatory failures that underpin them, do not vary across the EU and are widespread.</p>
<p>(e) Is the problem widespread across the EU or limited to a few Member States?</p>
<p>Yes, see above.</p>
<p>(f) Are Member States overstretched in achieving the objectives of the planned measure?</p>
<p>No. The proposal foresees a framework for setting requirements at Union level via delegated acts of the Commission. Member States' primary responsibility will be market surveillance.</p>
<p>(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?</p>
<p>The stakeholder consultation has not identified significant differences in views across countries or across levels of authorities.</p>
<p><b>2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?</b></p>

<sup>4</sup> [https://europa.eu/european-union/about-eu/eu-in-brief\\_en](https://europa.eu/european-union/about-eu/eu-in-brief_en)

<p>There is clear added value in setting common requirements at EU level, to ensure a well-functioning internal market and a level playing field for businesses. With harmonised performance and information requirements set at EU level, sustainable products and circular practices and business models will be promoted in all Member States, creating a larger and more efficient market. The proposed measures will not go beyond what is necessary to provide regulatory certainty while ensuring a high level of protection of health and of the environment. The actions are best achieved at Union level by reason of effectiveness and economies of scale.</p>
<p>(a) Are there clear benefits from EU level action?</p>
<p>Harmonised minimum and information requirements set at EU level will enable the good functioning internal market. At the same time, sustainable products and circular practices will be promoted in all Member States, creating a larger and more efficient market and hence greater incentives for the industry to develop them.</p>
<p>(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?</p>
<p>There is clear added value in setting common requirements at EU level, as this will ensure a harmonised and a better functioning internal market across all Member States and, therefore, a level playing field for businesses (as discussed in the impact assessment). The internal market size provides a critical mass enabling economies of scale for producers complying with the requirements applicable to the products covered by the delegated acts. Moreover, with the proposed action the EU will promote product sustainability and influence product design and value chain management worldwide.</p>
<p>(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?</p>
<p>The benefits are a functioning internal market and undistorted competition that will benefit both economic operators and consumers.</p>
<p>(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?</p>
<p>Yes, the size of the internal market allows for efficient requirements that enable promoting the EU model worldwide.</p>
<p>(e) Will there be improved legal clarity for those having to implement the legislation?</p>
<p>The proposal takes the opportunity to improve conformity assessment and market surveillance, building on general instruments and on specific upgrades and adjustments of the Ecodesign framework that the proposal is meant to repeal.</p>
<p><b>3. Proportionality: How the EU should act</b></p>
<p><b>3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission’s proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?</b></p>

The assessment of the principle of proportionality is made in the Impact Assessment and included in the explanatory memorandum.

The proposal does not go beyond what is necessary for providing a regulatory framework for the development of sustainability requirements for the broadest possible range of products.

The Ecodesign Directive approach of implementing measures being based on impact assessments carried out in line with the European Commission's Better Regulation guidelines will continue. As such, there will be an analysis of the economic, social and environmental impacts of different options for each set of requirements. This will allow for proportionality to be maintained.

The proposal is designed as a flexible framework, which will be a chief means of ensuring proportionality. This means that no requirements, criteria or targets will be applied unless they are justified on the basis of an assessment of their impacts. To ensure proportionality, each individual requirement will need to be justified for any product group, before being applied. Defining requirements, criteria or targets at the level of well-defined product groups will allow for the careful assessment of impacts. It will also allow to assess the added value and proportionality of setting requirements, targets or criteria depending on the inherent characteristics of the relevant products, of their manufacturing processes and of their market situation.

**3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?**

The impact assessment explicitly considers the effectiveness of the proposal, and whether it is appropriate to meet the objectives. The proposed measures will not go beyond what is necessary to provide regulatory certainty while ensuring a high level of protection of health and of the environment. This will be best achieved by means of a Regulation allowing sustainability requirements to be set based on a common approach for all operators in the EU. Requirements will be set by means of delegated acts only after specific impact assessments, in order to ensure proportionality and effectiveness with respect to the selected groups of products. As the Regulation will replace the Ecodesign Directive, it will strengthen the delivery of internal market objectives.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

The proposal is limited to providing a framework for setting product sustainability requirements at EU level with a view to improving the functioning of the internal market and to improving the sustainability of the production and consumption of products placed on the EU market.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The choice of a Regulation, replacing a Directive, allows for a uniform approach to setting product sustainability requirements for all relevant operators, thus providing the necessary legal certainty and enforcement possibility of a fully integrated market across the Union. A Regulation also ensures that the obligations are implemented at the same time and in the same way in all 27 Member States.

(c) Does the Union action leave as much scope for national decision as possible while achieving

satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
The setting of sustainability requirements will be considered in impact assessment(s) in line with the Commission's Better regulation guidelines, including consideration by the Regulatory Scrutiny Board), before the adoption of the relevant delegated act(s), thus allowing to assess the specific need and extension of EU action in relation to the specific product group(s).
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
<p>Due to the framework architecture foreseen for this initiative, it is difficult to identify overall future costs with precision. Most significant costs are likely to be incurred only in a second stage, after concrete rules for products or groups of products have been laid down. Once this takes place, costs for economic actors involved in manufacturing the products in question are likely to increase, with some costs passed on to consumers. Nevertheless, experience under the current Ecodesign Directive has shown that increased costs are more than offset over the long term by financial savings for consumers. Clear potential for benefits from product life extension and production process improvements are also expected.</p> <p>For businesses operating across EU borders, harmonised requirements at EU level are likely to reduce overall compliance costs, given that they will replace various existing or planned requirements at national level. There will also be direct benefits to the competitiveness of businesses, including from a shift of activity from the processing of primary towards secondary raw materials and from production of products to maintenance, reuse, refurbishment, repair and second-hand sales, which is expected to benefit SMEs significantly because they are more active in these sectors.</p> <p>All product rules to be laid down in a second stage will be underpinned by impact assessments and consultation processes that examine the costs and benefits to ensure proportionality.</p>
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
There are no special circumstances applying in individual Member States.