



VOLUNTARY AGREEMENTS CAN ONLY
DELIVER IF SUBJECT TO MINIMUM
REQUIREMENTS –

THE CASE OF VAs IN THE ECODESIGN
IMPLEMENTATION PROCESS

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Summary

Consumer organisations have traditionally expressed strong reservations *vis-à-vis* voluntary agreements (VAs) and self-regulation in general, in the context of public policy-making, in particular in the environmental area. As the Ecodesign Directive (2009/125/EC) gives priority to voluntary industry agreements if certain preconditions are met, this paper aims to specify in more detail the criteria that must be met in order to make VAs related to ecodesign acceptable.

We call on the European Commission to develop guidelines taking into account agreed universal requirements, e.g. independent governance, clear consumer protection objectives, robust standards, transparency, public consultation, large market coverage, effective monitoring, inspection and reporting as well as clear rules on penalties.

Such guidelines need to ensure a coherent approach for all VAs. As we see a need to base all ecodesign measures on a scientific basis, all measures should be prepared using the same approach as in the preparatory studies.

We also call on the European Commission to carry out a suitability impact assessment for each VA if it is to achieve the aims of the Ecodesign Directive.

We also call for complementing VAs with other instruments such as the Energy Label and Ecolabel.

In this paper, we call on the Commission to replace VAs with mandatory minimum requirements in case the minimum requirements of the Ecodesign Directive are not fulfilled.

Introduction

Consumer organisations have traditionally expressed strong reservations *vis-à-vis* voluntary agreements (VAs) and self-regulation in general, in the context of public policy-making, in particular in the environmental area. Since the early 1990s, these “soft” instruments have often been praised by the EU institutions as alternatives to more traditional regulatory approaches. They are believed to allow environmental protection goals to be met at a lower cost, in a faster and more flexible manner. However, in the absence of solid evidence, such claims are based on little more than “faith” or “ideology”. ANEC and BEUC, like many other public interest advocates, observe a variety of shortcomings in these approaches and stress the role of legislation to ensure the basic needs of citizens, such as safety or economic protection¹.

An example of this current regulatory trend is the Ecodesign Directive², aiming at improving the environmental performance of energy-using and energy-related products. This directive foresees the use of VAs as an alternative to mandatory implementing measures³. VAs are considered as a form of self-regulation in the directive rather than a form of co-regulation. Annex VIII of the directive enumerates criteria to be fulfilled by VAs, including openness of participation, quantified and staged objectives, involvement of civil society, and monitoring and reporting. We believe these criteria are a step forward, but are neither sufficiently clear nor stringent enough. We are convinced that the use of VAs in the ecodesign process will end up undermining the intended positive effects of the directive. So far, no VAs under the Ecodesign Directive have been put in practice but proposals for an increasing number of product groups are currently under development⁴.

In this paper, we aim to specify in more detail the criteria that must be met in order to make VAs related to ecodesign acceptable, e.g. independent governance, clear consumer protection objectives, robust standards, transparency, public consultation, large market coverage, effective monitoring, inspection and reporting as well as clear rules on the consequences of non compliance. We also call on the Commission to prepare clear guidelines for the drafting of VAs that encompass these criteria and will ensure a coherent approach. These guidelines should serve as a toolbox for industry representatives to draft VAs.

If these minimum requirements are eventually not met, mandatory minimum legislation needs to be set up replacing the VA.

¹ See ANEC/BEUC position on voluntary environmental agreements, ANEC-ENV-2006-G-048, BEUC/X/060/2006, <http://www.anec.eu/attachments/ANEC-ENV-2006-G-048.pdf>

² Directive 2005/32/EC on the Ecodesign of Energy-using Products (2005/32/EC) will be replaced by the new Directive establishing a framework for setting ecodesign requirements of energy-related products (2009/125/EC).

³ The implementing measures are drafted by the Commission and are subject to comitology with scrutiny procedure. So far, all binding ecodesign measures are regulations.

⁴ VAs for imaging equipment, complex set top boxes, machine tools and medical imaging devices are currently under discussion.

1. A consistent and coherent approach to all VAs

We see an urgent need for the Commission to ensure a coherent approach to ecodesign, in general, and the development of VAs, in particular. The challenge for better consistency increases with the new Ecodesign Directive as this piece of legislation has been extended to energy-related products and emphasises the need for better resource efficiency.

First, it has to be ensured that there is no contradiction between regulatory requirements for specific product groups and VAs for similar product groups. In the case of set top boxes for instance, the related product specific EU Ecodesign Regulation⁵ requires an automatic power down of simple set top boxes after a maximum of three hours. An automatic power down is also required by the EU Ecodesign Regulation for TVs⁶ after no more than four hours. However, the first draft proposal for a VA on complex set top boxes did not foresee such a technical feature that could prevent unwanted energy losses. Thus, the TV could enter into automatic power down without the consumer noticing that the complex set top box is still consuming a large amount of energy in on-mode. The Commission should therefore ensure that consistency will be ensured between existing product specific ecodesign legislation and related VAs.

Second, it should be ensured that there is a common understanding of the legal requirements of Annex VIII. VAs should be based on a common approach regarding market coverage, rules of good independent governance, monitoring, transparency, sanctions for non-compliance and market coverage. Guidance should also include a requirement that VAs begin with a section justifying their use over implementing measures in accordance with Article 15 of the Directive (demonstrating that a VA is faster, more suitable and more effective in terms of costs and environmental improvements compared with implementing measures). Therefore the Commission should develop more detailed guidelines as to the interpretation of Annex VIII as this would give a clearer framework to all stakeholders once VAs are eventually being developed.

Finally, we believe the guidelines mentioned above should also outline procedures for the evaluation of whether a VA is working or not, as well as a follow up procedure should a VA be considered unsuccessful. Such guidelines should outline which criteria the Commission will use to assess if a VA was successful. In addition, the guidelines should define the deadline by when the Commission would consider replacing a VA with mandatory legal requirements if the VA appears to be unsuccessful. When making the assessment, the overall environmental impact of products should be taken into account.

The guidelines should ensure a consistent approach and effective design of the various VAs that will be developed under the Ecodesign Directive.

⁵ Commission Regulation (EC) No 107/2009 of 4 February 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for simple set-top boxes.

⁶ Commission Regulation (EC) No 642/2009 of 22 July 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for televisions.

In a nutshell, we call on the European Commission to:

- ensure consistency between existing ecodesign legislation and related VAs before they are put into practice;
- develop clear guidelines based on a consultation of the members of the Ecodesign Consultation Forum, outline minimum requirements for the design of VAs whilst ensuring freeriders are excluded, and cover issues including market coverage, rules of good independent governance, monitoring, transparency penalties and market share.
- develop clear guidelines for assessing whether a VA has been successful or not and setting out subsequent steps to replace an unsuccessful VA with mandatory requirements. The guidelines should include a timeline detailing the process for replacement of the VA with an implementing measure.

2. Methodological coherence

Based on the working plan for Ecodesign⁷, the Commission contracted over thirty product-specific preparatory studies that follow a common methodological approach⁸. The preparatory studies cover, for instance, an analysis of market data, best available technology, and consumer relevant behaviour, and give improvement options. In the process of compiling the studies, all relevant stakeholders are consulted and the possibility to submit data and information and to review all chapters of the preparatory study is given.

However, when developing VAs for ecodesign, manufacturers are not obliged to follow the same approach. This raises serious concerns regarding a scientifically sound basis to build the VAs upon. This also raises concerns in terms of transparency and the possibilities for stakeholders to assess the adequateness of the ambition level.

What ANEC and BEUC call for:

As all ecodesign measures need to have a scientific basis, we call for all VAs to be well prepared by collecting independent product specific information and data from stakeholders following the approach used for the ecodesign preparatory studies.

3. Added value and high market coverage

We welcome that the Ecodesign Directive requires that VAs deliver value that goes beyond a business as usual scenario in terms of the overall environmental performance of products. However, we believe that the VA objectives and targets should be based on a realistic and externally verified “business as usual” scenario to determine a baseline. They should result in significant improvements compared to this basic scenario and lead to the elimination of a significant proportion of products with poor performance (e.g. 20%)⁹.

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0660:FIN:EN:HTML>

⁸ For more information on the methodology see: http://ec.europa.eu/enterprise/policies/sustainable-business/sustainable-product-policy/ecodesign/methodology/index_en.htm

⁹ Supra, footnote 1.

Unfortunately, the draft proposals presented so far on imaging equipment and complex set top boxes fall short of meeting this requirement for added value¹⁰.

The requirement of added value should also imply that tackling the energy efficiency of products only is not sufficient. We see an urgent need to address other environmentally relevant aspects such as resource efficiency, use of hazardous substances, life time extension and recycling and recovery in each product group.

Furthermore, VAs are currently falling short of phasing out the most energy wasting appliances as, in contrast to legal measures, there is no obligation for a specific manufacturer to join a VA. VAs tend to involve the better-intentioned and those (e.g. brand owners) who have a long term stake in the market and in building consumer confidence. This leaves out many companies with very different business models and priorities. Amongst these are often the ones causing most problems to consumers and the environment and being the least likely to respect self-regulatory schemes (free-riders). Participation in VAs is often (far) below 100% of market coverage. This free-riding problem stands mainly because of the lack of formal sanctions in the case of non-compliance. Furthermore, the structure of the industry very much impacts the recourse to VAs, as they are often easier to develop in a highly concentrated industry¹¹.

Although the Ecodesign Directive requires openness of participation to all manufacturers, it may be difficult to include those companies that are not established in the EU. Manufacturers from non-EU countries may not be aware of the VA. This inherent shortcoming of VAs is unlikely to be solved. However, the Ecodesign Directive requires VAs to be representative of an industry sector with as few exceptions as possible. It should therefore be clearly stated in the guidelines that this representativeness requirement refers to all the manufacturers offering products to consumers at the EU market *and* represents a significant market share. In addition, it is important that the signatories to the VAs bring all devices they are placing on the market into the scope of the VA. Including a limited number of models only into the scope of the VA could lead to a widely ineffective measure as inefficient devices could have the highest sales figures.

What ANEC and BEUC call for:

In order for VAs to be representative, at least 90% of manufacturers selling products in the EU market should fall under the scope of the VA.

It should not be possible for signatories to exempt the least efficient models from the scope of the VAs. In other words, all models of a signatory should be included in the scope of the VAs. In addition, the market share as represented by units sold should reach 80% at least.

¹⁰ In the case of complex set top boxes for instance, the Tier 2 requirements, which are envisaged to come into effect on 1st July 2013, are – especially for the base functionality allowances – only slightly stricter than those of Tier 1. In order to stimulate ongoing improvements, Tier 2 requirements should be on average 30-40% below those of Tier 1. This would be more or less in line with the findings of the Preparatory Study. Even more regrettably, the requirements of Tier 2 have been proposed to be non-binding.

¹¹ Supra, footnote 1.

4. Democratic and transparent process to ensure integration of consumer concerns

We appreciate that the Ecodesign Directive requires legal and voluntary measures to involve civil society and invite them to comment on the proposals. However, we consider that the requirements of Annex VIII are not sufficient to ensure that the interests of consumers will be taken into account.

The Commission has organised Ecodesign Consultation Forum meetings to discuss VAs for imaging equipment¹² and complex set top boxes¹³, medical imaging devices and machine tools¹⁴. However, the draft proposals from industry on imaging equipment and complex set top boxes were very vague on the practicalities of involving civil society. In particular the composition and decision-making rules of the envisaged Steering Committees did not grant explicitly a seat and voting rights to consumer organisations. In addition, the rules would not ensure equal access to relevant data and information that is needed to assess the progress in the implementation of the agreement.

As the European Parliament has a right of scrutiny when mandatory ecodesign measures are under development, we see a need to develop adequate procedures to ensure that the views of the European Parliament are taken into account by the Commission when deciding on the acceptance of a VA. As several of the concerned products groups such as lighting, boilers and water heaters have an impact on the society as a whole, it is crucial that the European Parliament is also given the opportunity to participate in the development of VAs.

What ANEC and BEUC call for:

To ensure that the principles of good governance are applied. The composition and decision-making rules of VA Steering Committees need to be balanced. Seats and majority voting rights should be granted to independent stakeholders. As the Steering Committee assesses the performance of the VA it is essential that the views of independent stakeholders, as well as the Commission, the European Parliament and Member States will be taken into account.

We call for stakeholders to be involved in the negotiation and approval of targets, and the monitoring and verification of the measures. Stakeholders should also be involved in agreeing on the reporting mechanisms.

We also call for agreements, as well as their outcome, to be made publicly available to ensure transparency and raise consumer awareness. The information made public should allow citizens and stakeholders to assess the performance of each signatory to the VA.

¹² See ANEC/ BEUC joint position on consumer interests in ecodesign of imaging equipment, <http://www.anec.eu/attachments/ANEC-PT-2009-EuP-056final.pdf>

¹³ See ANEC/ BEUC joint position on consumer interests in ecodesign of complex set top boxes, <http://www.anec.eu/attachments/ANEC-PT-2009-EuP-054final.pdf>

¹⁴ ANEC and BEUC are not involved in the work on medical imaging devices and machine tools because other consumer relevant products groups have a higher priority.

5. Long term perspective needed through a staged approach

The Ecodesign Directive requires for legal and voluntary measures to set quantified and staged objectives. According to Annex VIII, the objectives as defined by stakeholders need to be set in clear and unambiguous terms, starting from a well-defined baseline.

What ANEC and BEUC call for:

As required for all Ecodesign Regulations, we urge for all VAs to be required to include two successive steps. The binding requirements for all signatories on a second step have to be incorporated into the VA when it is originally set up.

Should it not be possible in certain cases to establish two successive steps because of technological restrictions or uncertainties, the Commission should hold a second stakeholder Consultation Forum meeting on the further development of the VA requirements.

6. Transparent monitoring, reporting and enforcement

We call on the European Commission to establish guidelines on the independent monitoring, reporting and enforcement that should be applied to all VAs consistently. Although we recognise that competing companies that will be co-signatories of VAs might have an interest in not releasing sensitive information, we emphasise the need for transparent and independent reporting which allows for assessing the performance of individual companies and different models that are subject to the VA. The above-mentioned VAs are very vague and do not specify which information is considered to be sensitive. Thus, the VAs do not provide a sound framework for monitoring the progress and achievements of individual companies.

We call for requirements to be added to all VAs that ensure an open and transparent access to all relevant information thereby leaving the door open to a full and meaningful monitoring by all stakeholders, including consumer organisations. Progress reports should be required to name the achievements of individual companies. To allow for reliable monitoring of (non-)compliance, progress reports should give details on unit sales per model.

The reporting and monitoring should be accompanied by independent verification of all data.

What ANEC and BEUC call for:

We urge the Commission to specify in the proposed guidelines that as a basic requirement for all VAs, stakeholders, including Member States, consumer associations and environmental NGOs, will be granted access to all relevant information for full and meaningful monitoring.

The annual progress report should contain independent verified data on individual company performance and compliance rate to ensure transparency in the process, allow implementing effective sanction mechanisms for non-compliant companies and encourage a race to the top among manufacturers. The monitoring information and data in the annual progress report should be provided next to the names of individual companies meaning it should not be anonymous.

7. Consistency of the single market has to be ensured

The Ecodesign Directive requires a large representation of the relevant economic sector for any VA. However, we consider that this requirement is not sufficiently specific to ensure that similar conditions and results will be achieved for all consumers in all EU Member States¹⁵. It could lead to severe market distortions in case consumers in some countries only have access to inefficient products.

We call on the Commission:

to accept VAs as an alternative to Regulation only if consistency of the single market can be ensured.

8. Severe sanctions should be an integral part of all VAs

VAs, by essence, cannot be legally enforced by national market surveillance authorities as the legal power to ask the importer or manufacturer to take corrective action or to withdraw the product from the market is missing.

Therefore the design of all VAs should ensure that measures are put in place which can effectively act as a deterrent to free riders. The most important of such safeguard mechanisms should be substantial financial penalties and regular and independent inspections of the products on the market. The second mechanism should be the compulsory exclusion of non-compliant signatories from the VA.

In addition, retailers should be encouraged, e.g. through the cooperation in the European Retail Forum, to take products that do not meet the requirements of the VA off the shelves.

Some voluntary schemes between manufacturers that foresee independent regular inspections, financial penalties and mechanisms for withdrawing the membership of non-compliant companies already exist¹⁶. They could serve as a basis for minimum requirements for VAs at EU level.

What ANEC and BEUC call for:

Significant financial penalties, naming and shaming, regular independent inspections of products and mechanisms to withdraw the membership of non-compliant companies should be part of all VAs.

¹⁵ For instance in the case of complex set top boxes concerns have been raised that a large part of the French market would not be covered as the manufacturers and service providers of triple-play-boxes (for internet, telephone and TV) had not signed up to the draft VA.

¹⁶ In Germany for instance RAL (Reichsausschuss für Lieferbedingungen) organises a coordinated approach between industry, public authorities and stakeholders developing basic requirements for the quality assurance of products. This scheme does not focus on environmental aspects in the first place but gives an example of a well designed voluntary scheme as it implies independent controls, penalties and expulsion in case of persistent non-compliance. For more information see:

http://www.ral-guete.de/fileadmin/lib/pdf/guete/RG_Imagebroschuere_2008.pdf

9. Safeguard measures ought to be set up

We are not supportive of the possibility for manufacturers to unilaterally terminate all obligations under a VA as resignation of one or more signatories would severely undermine the potential positive impact of the VA. We therefore call on the Commission to closely monitor any withdrawal and disclose such information. Legal minimum ecodesign requirements have to be implemented as soon as the number and the market share of the remaining companies are both lower than required based on the Ecodesign Framework Directive.

Likewise, the Commission should develop binding legal requirements as soon as it becomes obvious that the VA:

- is not successful in phasing out the least efficient appliances from the market;
- does not improve the products significantly beyond a business as usual scenario;
- does not ensure market coverage with as little exceptions as possible;
- is not working because several signatories do not put the commitments in practice;
- falls short of applying the rules of good governance for administrating the VA, or
- is not transparent because the data is not collected independently and is not provided to all stakeholders.

In order not to lose time if the scope and requirements of the VA are not considered to be sufficiently ambitious, the Commission should decide as a first step to make the requirements of a VA legally binding. In addition, the Commission should consider a long term approach as to the improvement of the product group in question by developing a staged approach with 2-3 new steps of legal requirements which would be subject to a regular revision based on the speed of technological progress and the overall EU energy efficiency targets.

What ANEC and BEUC call for:

Alternative, legally binding requirements should be outlined by the Commission as soon as the initial VA is being discussed with stakeholders in order to ensure full transparency and clarity for manufacturers as to the possible consequences of not living up to their commitments.

10. VAs should be subject to a Commission Impact Assessment

When developing Ecodesign Regulations, the Commission always carries out an Impact Assessment. Assessing the impact of VAs is also needed to ensure that the aims of the Ecodesign Directive will be met.

We call on the Commission:

to always perform an impact assessment before accepting a VA as an alternative option to regulation.

11. No preference in Green Public Procurement

In order to create an incentive for manufacturers to sign up to a VA, some of the existing draft VAs suggest that signatories should have advantages in Green Public Procurement (GPP) tenders. However, we are critical of this approach as based on the low ambition level of the current draft VAs, the products in the scope of the scheme will not be “green” or environmentally friendly products as such.

We call on the Commission:

to specify in the guidelines for setting up VAs that preference in Green Public Procurement tenders will only be given to the signatories in case the VA defines equal or stricter requirements than the existing product specific Green Public Procurement criteria.

When developing new product specific GPP criteria, third-party certified Ecolabels should be taken into account.

12. VAs need to be complemented by other instruments

Consumers should be provided with transparent information about the environmental aspects of products. In this context, it is important that the Commission complements VAs with other legislative and voluntary instruments such as Energy Label and Ecolabel criteria for these product groups. As these labelling schemes increase the demand for the most efficient and most environmentally friendly products, this complementary approach is needed to foster consumer demand for the most environmentally friendly products on the market.

We call on the Commission:

To complement products that fall into the scope of VAs with additional measures such as Ecolabel and Energy Label criteria as this potentially increases the demand for more sustainable products.

Ends