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Explanatory Memorandum to

COMMISSION REGULATION (EU) No .../..

of **XXX**

Amending, regarding the use of tolerances in the verification procedures, Regulations (EC) No 1275/2008, (EC) No 107/2009, (EC) No 278/2009, (EC) No 640/2009, (EC) No 641/2009, (EC) No 643/2009, (EU) No 1015/2010, (EU) No 1016/2010, (EU) No 327/2011, (EU) No 206/2012, (EU) No 547/2011, (EU) No 932/2012, (EU) No 617/2013, (EU) No 666/2013, (EU) No 813/2013, (EU) No 814/2013, (EU) No 66/2014, (EU) No 548/2014, (EU) No 1253/2014, (EU) 2015/1095, (EU) 2015/1185, (EU) 2015/1188, (EU) 2015/1189 and (EU) 2016/XXX [Air heating/cooling and chillers Number of the Regulation to be inserted before publication in the OJ]

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Background

EU legislation on the energy efficiency of products provides for the following energy requirements to be set: 1. minimum energy efficiency requirements for placing products on the market under the Ecodesign Directive (Directive 2009/125/EC of the European Parliament and of the Council), and 2. defined performance levels that have to be achieved for products to be classified in a particular energy class on an A to G (or A+++ to D) scale under the Energy Labelling Directive (2010/30/EU of the European Parliament and of the Council). The two Directives are implemented based on the ‘new approach’ principle, meaning that manufacturers and importers have to test their own products to make sure they comply with the requirements set out in implementing measures (in the case of Ecodesign) or in delegated acts (in the case of Energy Labelling). Manufacturers and importers include these test results in a ‘self-declaration’ of compliance, which is a requisite to be allowed to display the CE marking (indicating conformity). As a rule, they do not need to have their products tested by third parties before placing them on the market, but they must, on request, provide the technical documentation for those products.

It is the Member States’ duty to check whether manufacturers and importers comply with the requirements set out in the Ecodesign and Energy Labelling regulations. Member States therefore carry out market surveillance in the form of spot-checks on the products placed on the market, and test products’ performance against the values declared by manufacturers and importers. There are, however, inevitable differences in the measurement equipment used by manufacturers and importers and by surveillance authorities across the EU. A good measurement is meaningless without knowing the quantification of the doubt about the measurement result (uncertainty). Tolerance is the acceptable uncertainty. A certain degree of variation in the measured values therefore has to be tolerated, in order to account for the differences in measurement equipment. The level of variation allowed (i.e. the tolerance) differs according to the product and parameter being measured, and is set on the basis of careful consideration by technical experts. In view of this, the product-specific Ecodesign and Energy Labelling regulations always contain an annex indicating the tolerated level of variation for each measured parameter, and the procedure that Member State market surveillance authorities must follow to decide whether or not a product complies with the implementing or delegated act.

The measured value recorded is sometimes the average of several measured results, or is calculated from measurement results in another way.

Closing an unintended loophole

Member State authorities have identified cases where manufacturers have systematically used the tolerances – intended to apply only to the verification procedure – to make it appear that their products perform better than is actually indicated by their measured performance.

The following forms of misuse have been observed in the application of both Ecodesign and Energy Labelling regulations:

1. The manufacturer declares more favourable values in the technical documentation file than were actually measured to comply with ecodesign requirements, reach a higher energy label class, or suggest better performance.

Example If measuring the product's performance as being value X would lead to the product being classified in class B, but a value of X-7 % would lead to a classification in class A, the manufacturer declares the value X-7 % in the technical documentation file and the product is labelled as being class A. If the verification tolerance is 15 %, there is little chance of market surveillance finding this product non-compliant in a single surveillance action (although repeated surveillance actions may eventually uncover a deliberate understatement).

2. The values declared by the manufacturer in the technical documentation file should have led to non-compliance or to a lower label class. Nevertheless, the manufacturer placed the product on the market with a declaration of conformity or with a higher label class, as the declared values were within the verification tolerance from the limit value.

Example The limit imposed by an ecodesign requirement is X. The corresponding value declared by the manufacturer in the technical documentation file is X-7 %, meaning the product is non-compliant. The product is still placed on the market with a CE marking, as the manufacturer believes this is authorised since X-7 % is still within the tolerance allowed for verification (X-15 %).

3. In the label and product fiche as required by an Energy Labelling regulation, or in other product information required by an Ecodesign regulation, the manufacturer declared values that were more favourable than those given in the technical documentation file. The difference remained within the verification tolerance.

Example The yearly energy consumption stated by the manufacturer in the technical documentation file is X, while the value declared on the energy label is X-5 %. The manufacturer believes this is authorised as X-5 % is within the 10 % verification tolerance for yearly energy consumption.

In all of these cases, it should have been clear that the tolerances provided for in the verification procedures are intended for use only by the market surveillance authorities. Their sole purpose is to allow for unavoidable differences in calibration between the measuring equipment used by the authorities and that used by manufacturers. Having no margin of tolerance could unduly penalise some manufacturers. The tolerances are not, however, intended to give manufacturers any margin for manipulating or misrepresenting the results of the measurements they carried out on their own products.

These forms of misuse lead to the placing on the market of products that: 1. do not fulfil the applicable ecodesign requirements; 2. are claimed by manufacturers to belong to higher label classes than they should; or 3. are claimed by manufacturers to perform better than they do in reality for certain criteria regulated under ecodesign or energy labelling legislation. This abusive practice (whether intentional or otherwise) threatens to undermine the objectives of the two Directives. These practices also harm honest companies that suffer as a result of unfair competition from manufacturers and importers who 'over-declare' the performance of their products instead of improving them so as to reach the required standards.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation of interested parties

Consultation methods, main sectors targeted and general profile of respondents

International and EU stakeholders and Member State experts were consulted in the Ecodesign Consultation Forum, which was established by the Ecodesign Directive. The Forum is composed of experts from the Member States and a balanced representation of stakeholders, namely environmental and consumer NGOs, retailers and manufacturers. At the Consultation Forum meeting of 20 November 2012, the Commission services presented working documents proposing a revision of the existing Ecodesign and Energy Labelling measures, with the aim to clarify the intended purpose of the verification tolerances. The Commission incorporated the comments from Member States and stakeholders and amended the draft documents before conducting a written consultation within the Forum, which lasted from July to September 2013.

All relevant working documents and studies were circulated to the experts and stakeholders, and published in the Commission's Communication and Information Resource Centre for Administrations, Businesses and Citizens (CIRCABC) system, alongside the comments received from stakeholders in writing.

Summary of responses and how they have been taken into account

All Member States, many European industry representatives, and consumer and environmental NGOs strongly supported the Commission's intention to prevent such abuse. They also pointed out that this would be essential to maintain the credibility of Energy Labelling and Ecodesign in the eyes of consumers.

The consultation also revealed that the practice of misusing the verification tolerances has been the 'general rule' in the European lighting industry, and is even described in harmonised standards. When a clarification of the use of tolerances was introduced (albeit a less comprehensive measure than the amendment being proposed here) during the general revision of the Lamp Labelling Directive (Commission Directive 98/11/EC, now Commission Delegated Regulation (EU) No 874/2012), lamp manufacturers and importers were forced to downgrade most of their halogen lamps from class C to class D. While re-labelling in this way should be encouraged, as it provides consumers with more accurate information, if the Ecodesign regulations on lighting products (Commission Regulations (EC) No 244/2009, (EC) No 245/2009 and (EU) No 1194/2012) were clarified in a similar way, a strict application of the tolerances would lead to certain technologies, most notably some types of mains-voltage halogen bulbs, being banned. By contrast, the intention of the legislators, at the time of drafting the related implementing measure in 2009, was to keep those lamps on the market. This intention was re-confirmed in 2015, when Regulation (EU) No 244/2009 was amended to allow the continued placing on the market of mains-voltage halogen bulbs until 2018 (instead of 2016). The related annexes to the lighting Ecodesign Regulations should, therefore, instead be clarified in the ongoing review of the Regulations. , If the placing on the market of the concerned lamps is still deemed necessary in the review, the requirement levels can be adjusted, so that the revised regulations imposing a strict application of the verification tolerances do not ban the lamps in practice.

The Commission's investigation has not identified systematic problems in other industry sectors (only anecdotal and inconclusive evidence was found). However, it is appropriate to clarify the purpose of verification tolerances for all regulations so as to provide legal certainty to market surveillance authorities when they act against such misuse. Only in this way can

future abuse be prevented and a level playing field guaranteed for all economic actors, while ensuring that the improvement potential of the measures is achieved.

In an effort to fully clarify the purpose of verification tolerances, Member State and industry experts suggested replacing the entire verification annex rather than inserting a clarifying paragraph into the verification annex to each Regulation, as was originally planned.

International stakeholders

The World Trade Organisation technical barriers to trade (TBT) committee was notified of the proposed measure on 4 February 2016.

Impact assessment

The proposed amendments are intended to clarify the market surveillance procedure — which is already set out in each Regulation to be amended — with regard to the use of verification tolerances. The proposals will therefore not have any new effect that has not already been approved by the legislators. Instead, by amending the wording of the Regulations, the proposals aim to ensure that they achieve the desired positive effect.

The total amount of energy savings that has been lost as a result of the misuse of verification tolerances is difficult to estimate, as there are no systematic statistics on this form of misuse. Tolerances for certain regulated parameters can, however, be as high as 19 %. The average saving from product efficiency measures is about 35 TWh, meaning that even 5 % of savings lost due to systematic misuse of the tolerances by industry in a particular product group would amount to an average of 1.5 TWh of lost savings in one product group alone. The Ecodesign and Energy Labelling Regulations cover more than 20 product groups.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

The Commission's proposal is to replace the existing verification annexes to the ecodesign and labelling regulations with new ones. The draft new annexes describe in more detail the verification procedure that Member State authorities should follow. The intended use of the verification tolerances is clarified by requesting that the authorities, when checking that the product complies with the requirements set out in the Regulation, look for manufacturers and importers employing the different forms of misuse of the verification tolerances. If they detect misuse of this type, the authorities must declare the product non-compliant on these grounds. The new annexes integrate the tolerances from the original annexes without modifying the values, as the objective of the clarification exercise is not to revise the individual verification tolerances.

The amendments will take immediate effect when the proposed Regulation enters into force.

The amendments do not cover the Ecodesign of lighting Regulations ((EC) No 244/2009, (EC) No 245/2009 and (EU) No 1194/2012) for the reasons explained under point 2.

Legal basis

The Regulation implements the Ecodesign Directive (Directive 2009/125/EC), in particular Article 15(1) of this Directive. The Directive is based on Article 114 of the Treaty.

Subsidiarity principle

The adoption of ecodesign measures by individual Member States' legislation would lead to obstacles to the free movement of goods within the EU. Such measures must therefore have the same content throughout the EU. In line with the principle of subsidiarity, it is thus appropriate for the measure in question to be adopted at EU level.

Proportionality principle

In accordance with the principle of proportionality, this measure does not go beyond what is necessary to achieve the objective. It clarifies existing requirements which act as an incentive for technology leaders to invest in high-efficiency products while reducing the economic costs for European consumers. Such measures lead to higher savings than any other conceivable option with minimum administrative costs.

Choice of instrument

Proposed instrument: Regulation.

Other means would not be appropriate for the following reason(s):

The proposed form of action is an amending Commission Regulation, because only by amending the Commission Regulations adopted under Directive 2009/125/EC can requirements be fully harmonised throughout the EU (including the date of entry into force). This ensures the free movement of complying products. National administrations will thus not incur any costs for transposing these requirements into national legislation.

4. BUDGETARY IMPLICATION

The proposal has no implications for the EU budget.

5. ADDITIONAL INFORMATION

Review/revision/sunset clause

The proposal includes no review clause, because the Commission Regulations to be amended already have review clauses, which remain unchanged.

European Economic Area

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.