

## **Annex 5. Transposition of the EU Ecodesign Directive into Ukrainian Legislation**

### **A5.1. Scope**

The transposition of the EU Ecodesign Directive 2009/125/EC into Ukrainian legislation by November 2017 is a requirement under the EU-Ukraine Association Agreement and is expected to become also a requirement under the Energy Community Treaty. SAEI is therefore actively pursuing the transposition of the Directive.

In principle, two different ways exist to transpose the Directive into Ukrainian legislation: either as a Law or as a Technical Regulation by Resolution of the Cabinet of Ministers. An important precedent is the EU Energy Labelling Directive 2010/30/EU which was transposed in August 2013 by Resolution no. 702 of the Cabinet of Ministers, as a Technical Regulation. Since then, four product-specific Energy Labelling regulations were enacted and seven more are under preparation, five of them with the assistance of the current assignment (see Section 3 of this report).

While the transposition of the Ecodesign Directive as a Technical Regulation by Resolution of the Cabinet of Ministers would allow a rather swift legal procedure, which would not involve Parliament, there are also arguments in favour of the transposition of the Directive as a Law of Ukraine. The main argument is the major weight of the Law, which may also be more immune against attempts to amend the legislation, and may provide more leverage to the Government to enforce its implementation. Implementing the Ecodesign Directive as a Law and specific product-specific regulations with legal force may also give investors more certainty when considering long-payback investments in upgrades to production facilities. The expectation is that the Ecodesign Directive may become part of the required structural reform measures for macro-financial assistance in 2017, which will provide a strong incentive to Parliament for a timely transposition of the Directive.

On the other hand, according to various pieces of Ukrainian legislation<sup>1</sup>, both the Directive 2009/125/EU and product-specific Ecodesign regulations have to be enacted by Regulatory Acts of the Cabinet of Ministers of Ukraine.

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<sup>1</sup> Action Plan on implementation of the Association Agreement between Ukraine and the European Union, European Atomic Community and their member states for 2014-2017, approved by Resolution of the Cabinet of Ministers of Ukraine № 847-p of 17 September 2014; Plan for implementation of Directive 2009/125/EC, Commission Regulation (EC) № 278/2009, Commission Regulation (EC) № 245/2009, Commission Regulation (EC) № 244/2009, Commission Regulation (EC) № 107/2009 Commission Regulation (EC) № 1275/2008, establishing the framework and requirements for the eco-design of energy products, approved by Resolution of the Cabinet of Ministers of Ukraine № 475/2015; Strategy of development of the system of technical regulation until 2020, approved by Resolution of the Cabinet of Ministers of Ukraine № 844-p of August 19, 2015.

## A5.2. Methodology

In order to assess the most appropriate legal option to transpose the EU Ecodesign Directive into Ukrainian legislation, discussions were held with SAEE, consultations with stakeholders were conducted and relevant legal documents have been reviewed. Presentations and discussions during the workshop "Ecodesign: the experience of the EU and first steps of Ukraine" in Kyiv, on November 13, 2015, provided additional input for this assessment. Based on a brief account of the meetings with SAEE and stakeholders, and the reviews of legal documents, three options are presented, which are analysed in accordance to relevant criteria.

### A5.2.1. Meetings with SAEE and stakeholders

During two missions of the team of experts to Ukraine (week of 19–23 October and week of 9–13 November 2015), meetings and consultations were held with:<sup>2</sup>

- Senior staff of SAEE, including the Head of Department for Technical Regulation in Energy Efficiency, the Head of the Standards, Regulations and Labelling Divisions, the Head of the Legislative Support Division, and technical specialists.
- The Support Group for Ukraine (SGUA) of DG NEAR, the Deputy Head of the European Integration Department of the Ministry of Energy and Coal Industry, the Head of the Technical Regulation Division of the Ministry of Economy of Ukraine, a Senior Specialist of the Division for European Integration, Adaptation of Legislation and Supporting of International Agreements of the Ministry of Ecology and Natural Resources, the Coordinator of Communications of Household Electrical Appliances of EBA, as well as representatives of product suppliers.

In these meetings, the basic options for transposition of the Directive (as Law of Ukraine or as Technical Regulation enacted by Resolution of the Cabinet of Ministers) were presented and discussed.

The views expressed by the interlocutors varied from strong advocacy to transpose the Directive within the system of TRs, by Resolution of the Cabinet of Ministers (Ministry of Economy) to a clear preference to implement it as a Law of Ukraine (SGUA). While the preference to transpose the Directive as a law was shared by the representative of the Ministry of Ecology and Natural Resources, the representative of EBA advocated its transposition as Technical Regulation by Resolution of CMU.

A concern articulated by various interlocutors were the very long periods needed by the Ukrainian Parliament to pass laws<sup>3</sup>, and the associated uncertainty regarding the date of implementation of a Law transposing the Directive.

Arguments in favour of a Law were related to its superior legal status, compared to regulatory acts, which would be more adequate, given the market restrictions imposed by Ecodesign. A law may also provide a more stable legal framework, facilitating compliance by market actors, although this

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<sup>2</sup> See Annex 4 for a list of interlocutors.

<sup>3</sup> E.g. the new Energy Efficiency Law is debated already since seven years in Parliament.

argument was not shared by all interlocutors.<sup>4</sup> Transposition as a Law will also reflect the legal character of the Ecodesign Directive, which provides "the framework for the setting of Ecodesign requirements for energy-related products" and for the implementing measures for each ErP.

An third option brought forward by SAEE was to include in the forthcoming new Energy Efficiency Law – which is currently drafted by the Agency – an article which confirms Ukraine's obligation to transpose Directive 2009/125/EC and to implement it as Technical Regulation by Resolution of the Cabinet of Ministers.

## **A5.2.2 Review of legal documents**

### ***Association Agreement European Union – Ukraine<sup>5</sup> and Action Plan***

The Association Agreement between the European Union and Ukraine requires Ukraine to transpose Directive 2005/32/EC and various implementing directives and regulations<sup>6</sup>, within three years after entry into force of the agreement.<sup>7</sup> It also stipulates that "New daughter directives/regulations shall be implemented in accordance with the timetables established in these directives/regulations after changes to this Annex in line with the institutional provisions as set out in Title VII<sup>8</sup> of this Agreement and as notified to the Ukrainian side."

The Action Plan on implementation of the Association Agreement between Ukraine and the European Union of September 2014<sup>9</sup> confirms these commitments, specifying that the Directive 2005/32/EC (substituting Directive 2009/125/EU)<sup>10</sup> has to be transposed by August 2017, together with the Commission Regulations mentioned in the Association Agreement. It specifies the following Ukrainian entities as responsible for the implementation: the Ministry of Nature, SAEE, the Ministry of Energy, and the Ministry of Economic Development.<sup>11</sup> Both the Directive and the Commission

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<sup>4</sup> In the opinion of the advocates of transposition as Technical Regulation, the implementation of a technical regulation would be easier to control and monitor.

<sup>5</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, 29.5.2014. The Agreement was ratified by the Ukrainian Parliament in September 2014.

<sup>6</sup> Commission Regulations (EC) No 278/2009 (No-load condition electric power consumption and average active efficiency of external power supplies), 245/2009 (Fluorescent lamps without integrated ballast, high intensity discharge lamps, and ballast and luminaires able to operate such lamps), 244/2009 (Non-directional household lamps), 107/2009 (Simple set-top boxes) and 1275/2008 (Standby and off mode power consumption of electrical and electronic household and office equipment), as well as Directives 92/42/EEC (New hot water boilers fired with liquid and gaseous fuels), 96/57/EC (Household electric refrigerators, freezers and combinations) and Directive 2000/55/EC (Ballasts for fluorescent lighting).

<sup>7</sup> Annex XXVII to Chapter 1 of the Association Agreement.

<sup>8</sup> "Institutional, General and Final Provisions".

<sup>9</sup> Action Plan on implementation of the Association Agreement between Ukraine and the European Union, European Atomic Community and their member states for 2014-2017, approved by Resolution of the Cabinet of Ministers of Ukraine № 847-p of 17 September 2014

<sup>10</sup> This is apparently the result of a misinterpretation by the authors of the Action Plan.

<sup>11</sup> Government entities as quoted in accordance to their denomination in the legal documents reviewed.

Regulations are supposed to be transposed *by regulatory acts to be submitted to the Cabinet of Ministers of Ukraine (CMU)*.<sup>12</sup>

### ***Plan for the implementation of Directive 2009/125/EC and Commission Regulations***

Based on the provisions of the Association Agreement and of the Action Plan for its implementation, the Cabinet of Ministers, by Resolution N° 475 of 14 May 2015, approved the "Plan for implementation of Directive 2009/125/EC, Commission Regulation (EC) N° 278/2009, Commission Regulation (EC) N° 245/2009, Commission Regulation (EC) N° 244/2009, Commission Regulation (EC) N° 107/2009 Commission Regulation (EC) N° 1275/2008, establishing the framework and requirements for the eco-design of energy products".

The plan assigns SAE as the main implementing agency for the following activities:<sup>13</sup>

- Assessment of Ukrainian legislation regulating energy saving and energy efficiency to detect the need for amendments in connection with the Ecodesign Framework Directive;
- Definition and legislative consolidation of the basic energy efficiency requirements of products subject to Ecodesign;
- Development of national standards harmonised with European standards.

Co-executors are the Ministry of Natural Resources, the Ministry of Regional Development, the Ministry of Economic Development and the Ministry of Health.

The implementation plan foresees several activities, among these "Standard setting activities" and the "Development of regulation activities". Among the "standard setting activities", the plan foresees "*The development of a legal act (technical regulation) to consolidate the basic requirements to energy efficiency products that will apply under the Ecodesign Framework Directive*", by August 2017. Under the headline "development of regulation activities", the Plan stipulates the development of Technical Regulations in accordance with the Commission Regulations for the products included in the Action Plan on implementation of the Association Agreement.

### ***Law on Technical Regulations and Compliance Assessment***

The Law of Ukraine on Technical Regulations and Compliance Assessment (Law N° 124 of 15 January 2015), which will enter into force on 10 February 2016, "defines the legal and organisational framework for development, adoption and application of the technical regulations and foreseen procedures for compliance assessment".

The Law defines a TR as a regulatory act relating to the identification and fulfilment of mandatory requirements to the parameters of products or production processes and associated methods,

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<sup>12</sup> The text of the Action Plan regarding the transposition of the Directive: "Development and submission of draft regulatory acts to the Cabinet of Ministers with a view of implementation of Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 determining the structure of setting the Ecodesign requirements for energy-related appliances (substitution of Directive 2009/125/EU of 21 October 2009 establishing a framework for the setting of Ecodesign requirements for energy-related products)"

<sup>13</sup> SAE has recently been assigned Central Executive Body for Ecodesign by Resolution of CMU #1057 of 16/12/2015

including the relevant procedure provisions, like compliance assessment. The "provision of energy efficiency" is explicitly mentioned as a possible objective of a TR.<sup>14</sup> According to Article 9 of the Law, TRs are approved by laws, acts of the Cabinet of Ministers and central executive bodies, and "a regulatory act having signs of a technical regulation specified by this Law, are regarded as a technical regulation regardless of use of such words as "a technical regulation" in the title".

#### ***Strategy of development of the system of technical regulation until 2020<sup>15</sup>***

The EU - Ukraine Association Agreement envisages the creation of a deep and comprehensive free trade area (DCFTA), which requires reforming the system of TRs in Ukraine, in order to remove technical barriers to trade.

The "Strategy of development of the system of technical regulation until 2012", which was approved by Resolution of the Cabinet of Ministers of Ukraine № 844-p of August 19, 2015, includes an Action Plan, which specifies the activities to be implemented, including a list of "New technical regulations that meet EU legislative acts". Among these activities are:

A system to determine the Ecodesign requirements for energy-related products (Directive 2009/125/EC of the EP and Council of October 21, 2009 on setting the system of determining the Ecodesign requirements to the energy consuming products), as well as the list of 22 EC Ecodesign regulations referred to in Section 6 of this report. The responsible entities for the implementation of these activities are the Ministry of Regions, SAEE and the Ministry of Nature. The deadline of these activities is 2015 – 2017, and the progress indicator is an "Act by the Cabinet of Ministers".

#### ***Conclusions from the review of legal documents***

The Action Plan on implementation of the Association Agreement, the Plan for the Implementation of the Ecodesign Directive and various product-specific regulations, and the Strategy of the system of TRs stipulate that Directive 2009/125/EC should be implemented in Ukraine by "regulatory acts to be submitted to the Cabinet of Ministers of Ukraine", "a legal act (technical regulation)" or by an "Act by the Cabinet of Ministers", respectively. "Acts by the CMU" are usually Resolutions of the CMU, which typically enact Technical Regulations. The fact that the same legal instruments are stipulated for the transposition of Commission Regulations for specific products (implementing measures), suggest that the Government intends to transpose the Ecodesign Directive as a Technical Regulation, by Resolution of the Cabinet of Ministers.

Furthermore, the Law on Technical Regulations and Compliance Assessment includes stipulations which *could* be interpreted in favour of transposing the Ecodesign Directive as a Technical Regulation, e.g. the definition of a Technical Regulation in Article 1 and the stipulations in Article 9 of the Law, mentioned above.<sup>16</sup> Therefore, in the case of transposition of the Ecodesign Directive by

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<sup>14</sup> Article 9 of the Law on Technical Regulations and Compliance Assessment.

<sup>15</sup> Strategy of development of the system of technical regulation until 2020, approved by Resolution of the Cabinet of Ministers of Ukraine № 844-p of August 19, 2015

<sup>16</sup> According to the interpretation by the Ministry of Economy (communication by the Head of the Technical Regulation Division), due to these stipulations the Ecodesign Directive would qualify as a technical regulation, taking into consideration e.g. article 3(1.) and article 5(1.) of Directive 2009/125/EC.

law, an important question is whether the draft law (bill) would be presented in Parliament or submitted by the Cabinet of Ministers to Parliament. In the latter case, the Cabinet of Ministers could conclude that certain stipulations in the draft legal act would characterise it as a Technical Regulation and thus prevent it to qualify to be presented as draft law.

### **A5.3. Evaluation of options**

As follows from the above, in principle three options for the transposition of the Ecodesign Directive into Ukrainian legislation exist:

1. As a Law of Ukraine;
2. As a Technical Regulation based on a Resolution of the Cabinet of Ministers of Ukraine;
3. As an Article of the new Energy Efficiency Law, which requires the transposition of the Directive as Technical Regulation by Resolution of the Cabinet of Ministers.

Both the meetings with SAEE and stakeholders, and the review of the legal documents, revealed arguments in favour and against each of these options, in particular Options 1 and 2, which are in the centre of (controversial) debate among stakeholders. In this context, Option 3, which was brought forward by SAEE could be a "third way" in order to overcome this dichotomy, as will be argued below.

Arguments for and against each of these options are presented in Table A5.1, referring to relevant criteria, mentioning the related evidence. The table also includes comments by the independent ITS experts on the evidence gathered for and against the arguments.

**Table A5.1: Options for the transposition of the Ecodesign Directive into Ukrainian legislation**

Criteria	Arguments			Evidence	Comments by ITS
	<b>Option 1:</b> As Law of Ukraine	<b>Option 2:</b> As Technical Regulation by Resolution of the Cabinet of Ministers	<b>Option 3:</b> As Article of the new Energy Efficiency Law which requires the transposition of the Directive as Technical Regulation by Resolution of the Cabinet of Ministers	<u>Option 1</u> is supported by: SGUA The Ministry of Ecology and Natural Resources <u>Option 2</u> is supported by: Ministry of Economy European Business Association <u>Option 3</u> was mentioned by SAEE as a viable alternative	The preferences articulated by these organisations were based on several of the arguments mentioned in this table
Adequate level of legislation	Major weight of a Law (primary legislation), as compared to a Technical Regulation (secondary legislation)	Minor weight of a Technical Regulation (secondary legislation)	Provides foundation in primary legislation	General assumption based on international best practice	Transposition as, or foundation in, primary legislation should be considered as the preferred option
Stable legal framework	More stable legal framework, which makes it more difficult to amend the legislation	Might be more susceptible to attempts to amend the regulation	Stable legal framework, due to foundation in primary legislation	General assumption based on international best practice Ministry of Economy and SAEE consider TR as less susceptible to attempts to amendments	Notwithstanding the arguments by the Ministry of Economy and SAEE, foundation of the transposed Ecodesign Directive in primary legislation should provide a more stable legal framework

Criteria	Arguments			Evidence	Comments by ITS
Leverage to Government to enforce implementation	Provides more leverage to the Government to enforce its implementation	Provides less leverage to the Government to enforce its implementation	Provides leverage to Government to enforce the implementation of the Directive transposed as Technical Regulation	General assumption, although the Ministry of Economy and SAEE argued that the transposition as TR would be easier to control and monitor	Notwithstanding the arguments by the Ministry of Economy and SAEE, foundation of the transposed Ecodesign Directive in primary legislation should provide more leverage to the Government for enforcement
Certainty for investors	More certainty for investors when considering long-payback investments in upgrades of production facilities	May provide less certainty for investors, increasing risk-weighted cost of capital	Provides certainty for investors	Investors may consider a legal framework based on a Law as more stable	Foundation of the Ecodesign Directive in primary legislation will increase investor confidence
Compliance with EU legal framework	Transposition as a Law reflects the legal character of the Ecodesign Directive, which provides "the framework for the setting of Ecodesign requirements for energy-related products" and for the implementing measures for each ErP	Placing the framework Directive on the same level as product-specific regulations contradicts EU practice	Not fully in line with EU practice	EU legislation on Ecodesign: Directive and product-specific implementing measures (regulations)	Although transposition as a Law will be most compliant with the EU legal framework for Ecodesign, other options do not contradict the obligations of Ukraine under the Association Agreement

Criteria	Arguments		Evidence	Comments by ITS	
Swiftness of implementation	Very long periods are needed by the Ukrainian Parliament to pass laws, leading to uncertainty regarding the date of implementation of a Law transposing the Directive.	Allows a rather swift legal procedure, which would not involve Parliament	Allows a rather swift implementation of the Ecodesign Directive as Technical Regulation, probably even ahead of the promulgation of the new Energy Efficiency Law	The draft new Energy Efficiency Law has already been debated in Parliament for the last seven years. Precedent is the EU Energy Labelling Directive 2010/30/EU which was transposed in August 2013 by Resolution no. 702 of the Cabinet of Ministers, as a Technical Regulation, within a period of less than 15 months.	The usually long periods required by the Ukrainian Parliament for passing laws are a major concern and a strong argument for pursuing Option 2 or 3. This argument is strengthened by the positive experience in transposing the Energy Labelling Directive in 2013
Potential impact on macro-financial assistance	Ecodesign Directive may become part of the required structural reform measures for macro-financial assistance in 2017, which will provide a strong incentive to Parliament for a timely transposition	Transposition as Technical Regulation will meet the deadline 2017	Transposition as Technical Regulation will meet the deadline 2017	Communication by SGUA	An important argument in favour of Option 1, as far as this possibility is confirmed.

Criteria	Arguments			Evidence	Comments by ITS
Existing legislation	Does not comply with relevant legal documents	Relevant legal documents stipulate the transposition of the Directive as: By regulatory acts of the Cabinet of Ministers (technical regulation)	Complies with relevant documents, as the Directive would be implemented as Technical Regulation, under the umbrella of the New Energy Efficiency Law	Action Plan on implementation of the Association Agreement between Ukraine and the European Union Plan for the implementation of Directive 2009/125/EC and Commission Regulations Strategy of development of the system of TR until 2020	Option 1 obviously contradicts the stipulation of various relevant legal documents, whereas Option 2 is in full compliance and Option 3 does not contradict it.
Compliance with Ukrainian legal framework	In the case that the Law would be initiated by a Government entity to be submitted by the Cabinet of Ministers to Parliament, the Cabinet of Ministers could conclude that certain stipulations in the draft legal act would characterise it as a Technical Regulation and thus prevent it to qualify to be presented as draft law.	Law on Technical Regulations and Compliance Assessment includes stipulations which <i>could</i> be interpreted in favour of transposing the Ecodesign Directive as a Technical Regulation	Would not be in contradiction to the Law on Technical Regulations and Compliance Assessment	The definition of a Technical Regulation in Article 1 and the stipulations in Article 9 of the Law, the Ecodesign Directive would qualify as a technical regulation, taking into consideration e.g. article 3(1.) and article 5(1.) of Directive 2009/125/EC. Communicated by Ministry of Economy.	Although the interpretation of the stipulations of the Law of Technical Regulations and Compliance Assessment by the Ministry of Economy are debatable, it may not be taken for granted that CMU would pronounce again submission to the Parliament of a law transposing the Ecodesign Directive. This would not be the case if the respective bill would be presented in Parliament.