

22nd April 2009

Lighting industry (ELC-CELMA) Position Paper on the Term „placing on the market” of the Directive 2005/35/EC on Ecodesign Requirements for Energy-using Products (the „EUP Directive”)

The draft implementing measure for domestic lamps (Commission Regulation implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for non-directional household lamps) provides that Stage 1 of the ecodesign requirement shall apply from 1st September 2009, therefore the clarification of the term "placing on the market" is of essential importance for the entire lighting industry and consumers as it relates to goods designed for mass market. Legal certainty is crucial both in order to be able to predict requirements within the supply chain of each manufacturer and for Member State authorities to be able to have a consistent basis for market surveillance.

The EUP Directive defines the term „placing on the market” as *“making an EuP available for the first time on the Community market with a view to its distribution or use within the Community whether for reward or free of charge and irrespective of the selling technique”*.

The European Commission gives more explanation in the Guide to the implementation of directives based on the New Approach and the Global Approach (Blue Book), according to which "a product is placed on the Community market when it is made available for the first time. This is considered to take place when a product is transferred from the stage of manufacture with the intention of distribution or use on the Community market ... The transfer of the product takes place ... from the manufacturer ... to the person responsible for distributing the product on the Community market. (Footnote (31): the distribution chain can also be the commercial chain of the manufacturer...). ... the product is considered to be transferred either when the physical hand-over or the transfer of ownership has taken place. This transfer can be for payment or free of charge, and it can be based on any type of legal instrument. Thus, a transfer of a product is considered to have taken place, for instance, in the circumstances of sale, loan, hire, leasing and gift.”

The Blue Book also provides a list of cases, when “placing on the market” is not considered to taken place, if a product is:

- transferred from the manufacturer in a third country to an authorized representative in the Community whom the manufacturer has engaged to ensure that the product complies with the directive;
- transferred to a manufacturer for further measures (for example assembling, packaging, processing or labeling);
- not (yet) granted release for free circulation by customs, or has been placed under another customs procedure (for example transit, warehousing or temporary importation), or is in a free zone;
- manufactured in a Member State with a view to exporting it to a third country;
- displayed at trade fairs, exhibitions or demonstrations; or
- in the stocks of the manufacturer, or the authorized representative established in the Community, where the product is not yet made available, unless otherwise provided for in the applicable directives

In order to provide further guidance in the practical interpretation of the term “placing on the market”, the lighting industry sets out below the industry understanding thereof, considering four scenarios and using information available from the EUP Directive and available Commission guidance document.

1.) Private label products

The EUP Directive sets out that a brand owner is regarded as “manufacturer” when the EUP is placed on the market under the manufacturer’s own name or trademark. This, together with the requirement as per article 3 of the EUP Directive that “...EUP’s covered by implementing measures may be placed on the market ... only if they comply with those measures ...” means that a product being transferred from the stage of manufacture, *if there are no further measures* (e.g. assembling, packaging, processing or labelling) carried out at or by the brand owner, is regarded to be placed on the market. Hence, once a private label product is transferred¹ to a brand owner and enters the private label owner’s distribution chain before the 1. September deadline, in its entirely final form and final packaging, without any further measures, *including without limitation conducting a conformity assessment*, other than preparing the products for shipment, to be carried out at or by the brand owner, then that product is considered to be placed on the market and can be further marketed by the brand owner.

¹ The product is considered to be transferred either when the physical hand-over or the transfer of ownership has taken place.

2.) Manufacture and Storage in the EU

Taking into account the definition of placing on the market in the EUP Directive and the clarification notes from the Blue Book it is our understanding that a final product manufactured in the EU is considered to be placed on the market when the manufacturing process is fully completed (no more packaging, labelling, assembling needed), the product is transferred from the stage of manufacture (both physically and administratively, documented in the books and database of the manufacturer) to the distribution chain (whether it is a third party distributor or the commercial chain of the manufacturer responsible for distributing the product, e.g., a distribution warehouse of the manufacturer), hence the final product is made available and ready for shipment. Preparing the products for their shipment within the distribution chain (e.g. wrapping final and packaged products for shipment, putting products on euro-pallets, wrapping pallets with plastic film for shipment) is not considered as “packing” within the manufacturing process.

3.) Importing

It is clear from the EUP Directive and the Blue Book that in case of importing to EU from outside of EU, the finished product is put on the market when it is released by EU customs authorities.

4.) Assembled lighting products

In this scenario the lamps are built into and sold together with other products e.g. fixtures. In this case the person who mounts and sells the lamps and fixtures together is not considered to be manufacturer, since he is not distributing the lamps under his name or trade mark, and he is not changing the intended use and purpose of the lamp. Therefore the general rules apply to these lamps, i.e. they are placed on the market as individual EuPs as and when they are made available for the first time on the Community Market with a view to their distribution or use within the Community - see point 2. above and thus, there is no limitation to build in such lamps into any devices.