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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
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Subject:	Commission Delegated Regulation (EU) No .../.. of 18.2.2014 amending Annex V to Regulation (EU) No 305/2011 as regards the assessment and verification of constancy of performance of construction products

Delegations will find attached document C(2014) 866 final.

Encl: C(2014) 866 final



Brussels, 18.2.2014
C(2014) 866 final

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

of 18.2.2014

amending Annex V to Regulation (EU) No 305/2011 as regards the assessment and verification of constancy of performance of construction products

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Pursuant to Article 60(e) of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonized conditions for the marketing of construction products and repealing Council Directive 89/106/EEC¹, the Commission has been delegated the task of adapting Annex V to Regulation (EU) No 305/2011.

By means of using this power, the Commission therein proposes to adapt Annex V to Regulation (EU) No 305/2011 in order to fulfil three main objectives: first, to prescribe the particular treatment of products for which European Technical Assessments (ETA) are issued; second, to simplify and bring clarity to the distribution and description of tasks contained in Annex V, notably by means of increased consistency with the concepts used and approaches defined in Regulation (EU) No 305/2011; and third, to better reflect the current application practices of the systems of assessment and verification of constancy of performance (AVCP), taking into account the first practical experiences gathered and reported by notified bodies designated for Regulation (EU) No 305/2011, Member States and industry.

The draft Regulation does not intend to alter the distribution of tasks established by Regulation (EU) No 305/2011 for the AVCP of construction products.

The adoption of the draft Regulation would facilitate the actions of manufacturers and the functioning of notified bodies authorized to carry out third-party tasks in the process of AVCP of construction products. This will be the outcome of clarifying their respective roles and of explicitly introducing the simplified process applicable to products for which ETAs are issued. All this should both reduce administrative burden and increase clarity on the interpretation of Regulation (EU) No 305/2011.

For these reasons, this revision should also enhance the consolidation of the internal market for construction products and thus have a favourable impact on the competitiveness of the European construction sector as a whole.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The aspects covered by the draft Regulation were submitted for public consultation by means of three meetings held for this purpose on 15 July and 9 September 2013 and on 28 January 2014, as well as by a written consultation between 24 October and 4 November 2013. These consultations were preceded by informal contacts with representatives of different stakeholders, notably Member States, the European Parliament, notified bodies, the organisation of Technical Assessment Bodies (TABs) EOTA and industry. For the meetings and the written consultation, all Member States were invited to nominate experts. In addition to these experts, also representatives of the European Parliament participated in the consultations, alongside widespread representation of diverse other concerned stakeholders. The documents relevant to the meetings and the written consultation were transmitted simultaneously to the European Parliament and the Council, as foreseen in the Common Understanding on delegated acts. The observations presented during the meetings and the

¹ OJ L 88, 4.4.2011, p. 5.

written consultation have been taken into account when preparing the final draft version of this act.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Pursuant to Article 28 of Regulation (EU) No 305/2011, the rules on AVCP of construction products in relation to their essential characteristics have been contained in Annex V to Regulation (EU) No 305/2011. Following these rules, the AVCP tasks shall be carried out in accordance with the systems set out in this Annex.

As mentioned in Article 39 of Regulation (EU) No 305/2011, Member States shall notify the Commission and the other Member States of bodies authorised to carry out third-party tasks in the process of AVCP under Regulation (EU) No 305/2011 (hereinafter referred to as 'notified bodies'). Articles 40 to 43 prescribe the requirements and procedures for such notifications.

In the initial Annex V, however, the role and the activities of TABs and their organisation (EOTA) had been disregarded. Although TABs have not been given the status of notified bodies in Regulation (EU) No 305/2011, they have been acknowledged as bodies carrying out assessments of performance of construction products in case of issuing European Technical Assessments (ETAs). Since no justifications can be brought forward for subjecting the manufacturers to additional unnecessary costs and burdens in this context, such assessments presented in ETAs should be used as the base for the subsequent tasks of verifications of constancy of this performance by notified bodies and manufacturers. Indeed, the publication by the Commission of the final European Assessment Document mentioned in point 8 of Annex II to Regulation (EU) No 305/2011 would allow Member States to designate appropriate notified bodies and would permit the manufacturer to ensure fulfilment of the subsequent tasks of AVCP required under Annex V before the product is placed on the market. The respective adaptation of Annex V is due to avoid the doubling of work already carried out. A clear statement of using the ETAs as the base for the verifications of constancy of performance for these products is therefore to be added to Annex V.

For the sake of simplification and clarity, the rules in place for AVCP systems should be reconciled with the general principles of Regulation (EU) No 305/2011. Notably, pursuant to this Regulation, it always remains an obligation for the manufacturer to determine the product-type, as defined in Article 2(9). The role of the manufacturer has been confirmed also in Article 36 of Regulation (EU) No 305/2011. This general principle of Regulation (EU) No 305/2011 should therefore be clearly acknowledged also in Annex V.

An introductory sentence is also proposed under Section 1 of Annex V, with a view to replacing the current introductions included for every one of the five AVCP systems. In the same vein, the actors for every task are described in a clearer manner, in order to increase legal certainty. These clarifications don't intend to shift the current repartition of responsibilities as set out in Regulation (EU) No 305/2011.

Another general approach of Regulation (EU) No 305/2011 is to focus on the performance of construction products, which is first to be assessed and the constancy of which then subsequently verified in accordance with the AVCP systems. In the current Annex V, this is already reflected in the name of the certificates to be issued under systems 1+ and 1, which are called certificates of constancy of performance of the products.

In order to understand the process at hand, one needs to distinguish between its phases: the starting point is constituted by the assessment of the performance in relation to its essential characteristics, resulting in a set of performance levels or classes. After that, notified bodies are to verify in the following phase that this performance remains constant, as indicated by Articles 52(3) to 52(5). While the name of the notified body involved in this certification of constancy of performance has to be kept intact, owing to references to it notably in Article 36(2) of Regulation (EU) No 305/2011, the wording of Annex V is slightly clarified in this respect, also to alleviate the problems caused by the rules in place and to assist in the appropriate application of Articles 52 and 53 of Regulation (EU) No 305/2011.

Furthermore, in case of ETAs, notified bodies are in charge of other tasks than the assessment of performance, already carried out by TABs while issuing ETAs, for the construction products involved. This additional statement, emphasising the differences between these two types of bodies and the requirements set out for them, has thus been deemed necessary to be included into the draft Regulation (new point 6 of Section 1 of Annex V).

The demands for simplification and clarity have resulted also in less significant changes within Section 2 of Annex V, aimed at bringing the descriptions of the activities of different types of notified bodies and their names into coherence with factual practices currently followed. In particular, this concerns the work of laboratories, some of which could also be notified for performing calculations (instead of calibrations) to assess the performance of construction products, when such a method has been prescribed in harmonised technical specifications. On the other hand, the alternative of directly utilising laboratories in the context of systems 1+ and 1 has met with considerable opposition during the public consultations and has therefore been discarded. The notified bodies currently involved in these systems could always turn to subcontracting some of their activities, as foreseen in Article 45 of Regulation (EU) No 305/2011.

During the public consultations, stakeholders, especially notified bodies, have expressed their concern about the lack of clarity remaining on the treatment of so-called cumulative AVCP systems, i.e. situations where more than one system is to be applied to a given construction product, owing to distinctions made for its different essential characteristics. In these circumstances, the requirements for the use of notified bodies should also be differentiated between the essential characteristics in accordance with the various systems applicable to them. Since this principle, already in common use, relates to the uniform application of Article 28 of Regulation (EU) No 305/2011, when choosing the AVCP system or systems to be applied, as well as applying them, rather than the contents of these systems, as determined in Annex V, it was not considered appropriate to make any amendment to Annex V.

Annex V is also to undergo certain more minor adjustment, so as to adapt it to technical and practical needs and conditions. The term “factory” has been replaced by “manufacturing plant” on certain occasions, so as to come to better coherence with the general wording of Regulation (EU) No 305/2011. Since continuous (with the connotation of constant) surveillance in fact is not possible and in practice is not carried out even today, reference is to be made to the continuing nature of this activity of notified bodies. The processes of sampling and audit-testing are described in accord with current reality. Finally, for acoustics, the essential characteristics in question are redefined by replacing noise absorption in Section 3 of Annex V by acoustic performance.

Finally, a transitional provision is proposed to allow manufacturers to continue using certificates and other documents which were issued by notified bodies applying the initial Annex V to Regulation (EU) No 305/2011.

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

of 18.2.2014

amending Annex V to Regulation (EU) No 305/2011 as regards the assessment and verification of constancy of performance of construction products

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC², and in particular Article 60(e) thereof,

Whereas:

- (1) Pursuant to Article 28 of Regulation (EU) No 305/2011, assessment and verification of constancy of performance of construction products in relation to their essential characteristics is to be carried out in accordance with the systems set out in Annex V to Regulation (EU) No 305/2011.
- (2) Annex V should be adapted in order to respond to technological progress, to make provision for the specific case of products for which European Technical Assessments have been issued, as well as to enhance the clarity, accuracy and consistency to the descriptions and terms used therein, in line with practical experience gained in the course of the application of Annex V.
- (3) This adaptation would facilitate the work of manufacturers and notified bodies authorised to carry out third-party tasks in the process of assessment and verification of constancy of performance of construction products, reduce administrative burden and increase clarity on the interpretation of Regulation (EU) No 305/2011, thus having a favourable impact on the competitiveness of the construction sector as a whole.
- (4) Regulation (EU) No 305/2011 implies that the manufacturer is responsible for determining the product-type for any product the manufacturer wishes to place on the market. In the same context, the underlying logic of Regulation (EU) No 305/2011 does not imply the existence of product certification, but notified bodies are only responsible for assessing the performance of construction products, the constancy of which is then to be certified. This repartition of competences between manufacturer

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OJ L 88, 4.4.2011, p. 5.

and notified bodies should be better reflected in Annex V, without entailing a shift in the responsibilities of these actors.

- (5) Since constant surveillance of factory production control by notified bodies in fact is not possible and is not carried out in practice, reference should rather be made to the continuing nature of the surveillance.
- (6) For construction products not covered or not fully covered by harmonised standards, European Technical Assessments (ETA) can be issued by a Technical Assessment Body. Pursuant to Article 2(13) of Regulation (EU) No 305/2011, such an ETA already contains an assessment of the performance of the product in question in relation to its essential characteristics. Additional subsequent controls of the correctness of this assessment process would not bring about any added value, but only generate unnecessary costs for manufacturers. Enterprises have already made requests for ETAs and need legal certainty with respect to the third-party tasks to be carried out in the process of assessment and verification of constancy of performance of these construction products.
- (7) In order to better reflect the current practice the names of the types of notified bodies and the description of their respective tasks should be adjusted.
- (8) A technical adaptation is necessary concerning the term ‘noise absorption’ referred to in Section 3 of Annex V to Regulation (EU) No 305/2011 to achieve a more accurate description of the essential characteristics to be assessed and more consistency with terminology used in relevant harmonised technical specifications.
- (9) In order to ensure a smooth transition for manufacturers they should have the right to continue using certificates and other documents which were issued by notified bodies in accordance with Annex V to Regulation (EU) No 305/2011 before the entry into force of this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Annex V to Regulation (EU) No 305/2011 is replaced by the text in the Annex to this Regulation.

Article 2

Certificates and other documents issued by notified bodies in accordance with Annex V to Regulation (EU) No 305/2011 before the entry into force of this Regulation shall be deemed to comply with this Regulation.

Article 3

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18.2.2014

For the Commission
The President
José Manuel BARROSO