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Brussels, 13.10.2011

Guidance document¹

The application of the Mutual Recognition Regulation to non-CE –marked construction products

1. INTRODUCTION

This document seeks to provide ‘user-friendly’ guidance on the application of Regulation (EC) No 764/2008² (the ‘Mutual Recognition Regulation’ or ‘the Regulation’) to construction products, which do not have the CE marking affixed to them. It will be updated to reflect experience and information from the Member States, authorities and businesses.

The definition of “construction product” has been taken from the Regulation on Construction Products (hereinafter “the CPR”)³: According to Article 2(1), “construction product” means ‘any product or kit which is produced and placed on the market for incorporation in a permanent manner in construction works or parts thereof and the performance of which has an effect on the performance of the construction works with respect to the basic requirements for construction works’.

¹ This document is not legally binding. Neither the European Commission nor any person acting on its behalf may be held responsible for the use to which information contained in this publication may be put, nor for any errors which may appear despite careful preparation and checking. This guidance document should not prejudice further harmonisation of technical rules, where appropriate, with a view to improving the functioning of the internal market. This guidance document does not necessarily reflect the view or the position of the European Commission.

² Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, OJ L 218, 13.8.2008, p. 21.

³ 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/EEC, OJ L 88, p. 5-43.

2. THE REGULATORY FRAMEWORK APPLICABLE TO CONSTRUCTION PRODUCTS

The Construction Products Directive (89/106/EEC, as amended by Directive 1993/68/EEC and by Regulation (EC) No 1882/2003 – “the CPD”)⁴ is being replaced by a new Regulation, the CPR⁵. This Regulation has already entered into force. However, Articles 3 to 28, Articles 36 to 38, Articles 56 to 63, Articles 65 and 66 as well as Annexes I, II, III and V will only apply from 1 July 2013. In any case, construction products which have been placed on the market in accordance with the CPD and before 1 July 2013 are deemed to comply with the CPR.

2.1. The transition period (until 1 July 2013)

All “operative articles” of the new CPR (i.e. everything except definitions and articles required for the implementation of the new framework, e. g. for notifications, standing committee, etc.) will apply only from 1st July 2013.

2.2. After 1 July 2013

The CPR aims to prohibit the use of conflicting national marks of declaration of performance and ensure that any product that is CE marked is freely allowed onto the market in the EEA without further testing.

After 1 July 2013 the existing framework will be both reinforced and simplified by the entry into force of provisions on:

- Basic requirements for construction works (Article 3);
- Declaration of performance and CE marking (Articles 4 – 10);
- Obligations of economic operators (Articles 11 – 16);
- Harmonised technical specifications (Articles 17 – 28);
- Simplified procedures (Articles 36 – 38);
- Market surveillance and safeguard procedures (Articles 56 – 59);
- Delegated acts (Articles 60 – 63); and
- Annexes I, II, III and V.

⁴ Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, OJ L 40, 11.2.1989, p.12. Amended by Council Directive 93/68/EEC of 22 July 1993, OJ L 220, 30.08.1993, pp. 01 – 22 and by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, OJ L 284, 31.10.2003, p.1.

⁵ See note 3 above.

Concerning the implementation of the principle of mutual recognition and the Mutual Recognition Regulation, neither this transition period nor the new legislative framework after 1 July 2013 produce any change in the general situation described in this guidance document.

This new legislative tool provides more clarification of the concepts and the use of CE marking and introduces simplified procedures, which will reduce the costs incurred by enterprises, in particular SMEs. By imposing new and stricter designation criteria to bodies involved in the assessment and the verification of construction products, the CPR also increases the credibility and reliability of the whole system.

3. WHICH CONSTRUCTION PRODUCTS REMAIN UNDER THE MUTUAL RECOGNITION PRINCIPLE?

Since all construction products can be CE –marked both under the CPD and the CPR regime, the important factor in establishing whether a construction product falls within the scope of the principle of mutual recognition, is the presence or absence of the CE marking. Only those products to which the CE marking has not been affixed, fall within the scope of this principle and its procedural consequences. CE –marked construction products are to be dealt with in accordance with the provisions of the CPD or, from 1 July 2013, the CPR.

4. THE FREE CIRCULATION OF CE-MARKED PRODUCTS

4.1. The situation under the CPD

Pursuant to Article 6(1) of the CPD, it must be possible to use a product to which the CE marking is affixed (indicating that it is in conformity with the requirements of a harmonised standard), throughout the EU without any additional testing or requirements.

The objective of standards under the CPD is to provide harmonised methods and criteria for assessing the performance of construction products, as opposed to harmonising the products themselves or setting requirements for their performance. Unlike other harmonisation directives, the issue of the compliance of a construction product with a harmonised standard under the CPD has to be understood in the sense that the performance of such a product has to be assessed in accordance with (by applying) the methods and criteria provided by that harmonised standard. The compliance of a construction product with a harmonised standard cannot thus be interpreted as providing a presumption of conformity with any legal requirements applicable to the use of the product. Nor can a construction product be considered fit for use solely owing to its compliance with a harmonised standard, since fitness for use is to be determined by examining the performance of the product with respect to precisely those same legal requirements, which could differ depending on each specific use (as implied in the ninth and the tenth recitals of the Directive).

Nevertheless, some Member States continue to require national marks in addition to the CE marking, going against the basic free market aim of the CPD. The numerous complaints received by the Commission services indicate that instead of taking the necessary steps to have their existing requirements taken into account in the context of European standardisation processes, they have relied upon national sets of technical specifications which can be considered mandatory. These instruments

introduce sometimes very burdensome ex ante approvals and/or specific national approvals for efficient market access for construction products already bearing the CE marking. Additional requirements for such products have thus been brought forward not by means envisaged in the European harmonised standards, but instead through these national systems, which raise significant obstacles to free circulation of CE –marked products.

Member States may ensure the safety of construction works within and by means of the harmonised system established by the CPD and by harmonised standards under it, instead of resorting to additional national mechanisms for the definitions of the requirements regarding the performance of construction products.

4.2. The situation under the CPR

From 1 July 2013, pursuant to Article 8(2) of the CPR, by affixing or having affixed the CE marking, manufacturers indicate that they take responsibility for the conformity of the construction product with the declared performance as well as compliance with all applicable requirements laid down in the CPR and other relevant Union harmonisation legislation providing for its affixing. Under the CPR, the CE marking should thus consolidate its role as the only marking signifying the conformity of the construction product with the declared performance and compliance with applicable requirements of Union harmonisation legislation.

Articles 56 to 59 of the CPR establish market surveillance and safeguard procedures where a construction product does not comply with the requirements laid down in the Regulation, presents a risk to health and safety, or is formally non-compliant.

In cases where the Member State of destination might have legitimate reasons to prohibit or restrict within its territory the marketing of construction products even if lawfully marketed in another Member State, the national authorities can rely upon Article 36 TFEU. This Article lists the grounds on which Member States may justify national measures that impede cross-border trade, among others the protection of health and life of humans, animals or plants. The Court of Justice interprets narrowly the list of derogations in Article 36 TFEU, which all relate to non-economic interests. Moreover, any measure must respect the principle of proportionality and not ‘constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States’⁶.

In any case, the burden of proof in justifying the measures adopted under Article 36 TFEU lies with the Member State and not with the economic operator.

5. THE MUTUAL RECOGNITION REGULATION (EC) No 764/2008

The Regulation applies to administrative decisions addressed to economic operators, on the basis of a technical rule, in respect of any non-harmonised product lawfully marketed in another Member State, where the direct or indirect effect of that decision is the prohibition,

⁶ Case 34/79 *Henn and Darby*, [1979] ECR 3795, paragraph 21, as well as Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia*, [1991] ECR I-4151, paragraph 20.

modification, additional testing or withdrawal of the product (Article 2(1)). Any authority intending to take such a decision must follow the procedural requirements in the Regulation.

The Regulation will apply when all the following conditions are met:

5.1. The (intended) administrative decision must concern a product lawfully marketed in another Member State

The principle of mutual recognition applies where a product, irrelevant of its actual origin (EU or third country import), lawfully marketed in one Member State is placed on the market in another Member State. Following this principle, a Member State cannot in principle forbid the sale on its territory of products which are lawfully marketed in another Member State, even if they were manufactured according to different technical rules. Both actual and possible denials of mutual recognition are governed by the Regulation. Hence, any Member State intending to ban access to its market should follow the procedure in Article 6.

Those products which have not previously been marketed on the territory of the EU fall outside the scope of the Regulation. They will have to comply with the technical rules applicable in the Member State where they are put on the market for the first time in the EU.

5.2. The (intended) administrative decision must concern a product which is not subject to harmonised EU law

The Regulation operates in the non-harmonised area, in relation to products for which there is either no harmonisation of laws at EU level, or for aspects not covered by partial harmonisation (in the field of construction products see point 3 above).

5.3. The (intended) administrative decision must be addressed to an economic operator

Under Article 2(1), the Regulation applies to administrative decisions addressed to economic operators, whether taken or intended, on the basis of a ‘technical rule’, in respect of construction products lawfully marketed in another Member State, where the direct or indirect effect of that decision is the prohibition, modification, additional testing or withdrawal as set out under point 5.5.

Any restrictive decisions taken by a national authority and addressed to any natural or legal person who is not an economic operator do not fall within the scope of the Regulation. An economic operator, as established by Article 2(18) of the CPR is, in essence, any person in the supply chain for the product concerned: its manufacturer, his authorised representative, its importer or distributor.

Thus - and without prejudice to Art. 36 TFEU – any restrictive decisions taken by competent authorities and addressed to any natural or legal person who is not an economic operator are not covered by the Mutual Recognition Regulation.

5.4. The (intended) administrative decision must be based on a technical rule

The Mutual Recognition Regulation applies to (intended) administrative decisions taken on the basis of a ‘technical rule’ (Article 2(2)).

A technical rule is here defined as any provision of a law, regulation or other administrative provision of a Member State:

- (a) which prohibits the marketing of any products lawfully marketed in another Member State in the territory of the Member State where the administrative decision is or will be taken or compliance with which is compulsory when that product is marketed in the territory of that Member State, and
- (b) which lays down either:
 - the characteristics required of that (type of) product, such as levels of quality, performance or safety, or dimensions, including requirements as regards the name under which it is sold, terminology, symbols, testing and test methods, packaging, marking or labelling; or
 - any other requirement which is imposed on that (type of) product for the purposes of protecting consumers or the environment, and which affects its life-cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition, nature or marketing of construction product.

5.5. The direct or indirect effects of the (intended) administrative decision must be any of the following:

- (a) prohibition of the placing on the market of that (type of) product;
- (b) modification or additional testing of that (type of) product before it can be placed or kept on the market;
- (c) withdrawal of that (type of) product from the market.

Any such (intended) decision must be taken in accordance with Article 2(1) of the Regulation.

Additionally, and in light of the Commission interpretative communication on the practical application of mutual recognition⁷, Member States are invited to insert into their draft national technical regulations mutual recognition clauses for products which have been lawfully manufactured and/or marketed in another Member State of the European Union or in Turkey, or lawfully manufactured in an EFTA State that is a contracting party to the EEA agreement.

6. PRIOR AUTHORISATION PROCEDURES

Economic operators that have previously marketed legally their products in a Member State where different technical requirements are imposed, or where there are no requirements at all,

⁷ “Commission interpretative communication “facilitating the access of products to the markets of other Member States: the practical application of mutual recognition (2003/C 265/02) (Text with EEA relevance)”, OJ C 265/2 of 4.11.2003, pp. 2 - 16. This communication proposes four standard model mutual recognition clauses that the Member States are invited to choose from.

may face difficulties when trying to introduce their products in Member States which apply more stringent controls.

The Court of Justice has established⁸ that in the absence of fully harmonising provisions at EU level, it is for the Member States to decide upon the level at which they wish to ensure safety in their territory, whilst taking account of the requirements of the free movement of goods within the EU⁹.

The Court of Justice has also stated that, since that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate¹⁰.

Therefore, EU law does not in principle preclude Member States from establishing appropriate measures, if they deem this necessary to control and/or restrict the placing on the market of construction products. Member States usually establish those measures through prior authorisation procedures in accordance with which, before a product may be placed on a given Member State's market, the competent authority of that Member State should give its formal approval following an application.

Nevertheless, the Court of Justice has repeatedly held¹¹ that any national legislation which makes the marketing of products subject to a prior authorisation procedure restricts the free movement of goods and constitutes in fact a measure equivalent to a quantitative restriction on imports within the meaning of Article 34 TFEU. In order to be justified, such national legislation must be covered by one of the exceptions provided for in Article 36 TFEU or one of the overriding requirements recognised by the case-law of the Court and, in either case, must be appropriate for securing the attainment of that objective and not go beyond what is necessary in order to attain it (Recital (11) of the Regulation).

The Court of Justice has also summarised a number of conditions under which the prior authorisation procedure might be justified:

- it must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;

⁸ Judgment of the Court (Grand Chamber) of 10 February 2009, *Commission v Italian Republic*, Case 110/05, [2009] ECR I-519.

⁹ Case 50/83 *Commission v Italy* [1984] ECR 1633, paragraph 12 and, by analogy, Case C-131/93 *Commission v Germany* [1994] ECR I-3303, paragraph 16.

¹⁰ In particular, see the Judgment of the Court of 5 February 2004, *Commission v French Republic*, Case 24/00, [2004] ECR I-00000, paragraph 65 and, by analogy, Case C-262/02 *Commission v France*, [2004] ECR I-6569, paragraph 37, and Case C-141/07 *Commission v Germany*, [2008] ECR I-0000, paragraph 51.

¹¹ Judgment of the Court of Justice of 22 January 2002, *Canal Satélite Digital SL*, Case C-390/99, [2002] ECR I-607, paragraph 43; Judgment of the Court of 10 November 2005, *Commission v Portuguese Republic*, Case C-432/03, [2005] ECR I-9665, paragraph 52 ; Judgment of the Court of 15 July 2004, *Nicolas Schreiber*, C-443/02, [2004] All ER (D) 276 (Jul), paragraphs 49-50.

- it should not essentially duplicate controls which have already been carried out under other procedures, either in the same State or in another Member State;
- prior authorisation will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve its aim;
- the procedure should not, on account of the cost and time element, be such as to deter operators from pursuing their business plan.

6.1.1. *Is a prior authorisation a technical rule?*

The obligation to submit construction products for prior authorisation before they can be marketed in a Member State falls outside the scope of the Regulation (Recital (12) of the Regulation). Such an obligation does not in itself constitute a technical rule within the meaning of the Regulation since it does not lay down the characteristics required of that (type of) construction product. Thus, any decision to exclude or remove construction products from the market solely on the grounds that they do not have prior authorisation does not constitute a decision to which the Regulation applies.

When, however, an application for such mandatory prior authorisation of a product is made, any intended decision to reject the application on the basis of a technical rule should be taken in accordance with the Regulation, so that the applicant can enjoy the procedural protection the Regulation provides.

6.1.2. *Prior authorisation procedures and products already tested in other Member States*

Requirements to carry out assessments of compliance in a concrete way as stated under national legislation should not be considered as a technical rule, but as a prior authorisation procedure in terms of Recitals (11) and (12) of the Mutual Recognition Regulation.

It is clear that, by means of such prior authorisation procedure, technical rules within the meaning of the Regulation are to be applied. These rules may provide for tests, verifications or other technical assessments by testing laboratories which, in turn, should provide the relevant national administrative body with the necessary elements to take a decision on the issue.

Within a given prior authorisation scheme no specific EU rules exist for the evaluation of those cases where tests were done in countries where the same or similar tests were carried out. The existing case-law of the Court of Justice¹² requires that in these cases national legislation must make provision for simplified authorisation procedures which:

- are readily accessible
- can be completed within a reasonable time, and

¹² In particular, Judgment of the Court of 5 February 2004, *Commission v French Republic*, Case 24/00, [2004] ECR I-00000.

- where any rejection must be open to challenge before the courts.

National authorities are specifically not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal. Strict compliance with that obligation requires an active approach on the part of the national body to which an application is made for approval of a product or recognition, in that context, of the equivalence of a certificate issued by an approval body of another Member State. Further, such an active approach is also required, where appropriate, of the latter body, and in this respect it is for the Member States to ensure that the competent approval bodies cooperate with each other with a view to facilitating the procedures to be followed to obtain access to the national market of the importing Member State¹³.

6.1.3. *Products placed for the first time on the market and products lawfully marketed in another Member State*

The CPR, in its Article 2(16) and 2(17) makes a clear distinction between "making available on the market" and "placing on the market" construction products. "Making available on the market" means any supply of a construction product for distribution or use on the Union market in the course of a commercial activity, while "placing on the market" means the first making available of a construction product on the Union market.

As regards making available on the market in a Member State of products lawfully marketed in another Member State, and in the absence of harmonising EU measures, a national provision which requires that imported products undergo the same tests as products placed for the first time on the market and be approved beforehand constitutes a measure equivalent to a quantitative restriction on imports within the meaning of Article 34 TFEU¹⁴.

As regards the first placing on the EU market, see point 5.1 above.

7. EVALUATION PROCEDURES AND REQUESTS FOR INFORMATION

When a competent authority submits a product to an evaluation to determine whether or not to adopt an administrative decision, Member State may request economic operators some relevant information concerning the characteristics of the product (Art. 4 of the Regulation). However, the request should remain proportionate: it should not essentially duplicate controls which have already been carried out under other procedures, either in the same State or in another Member State.

¹³ See Judgment of the Court of 10 November 2005, *Commission v Portuguese Republic*, Case C-432/03, [2005] ECR I-9665, paragraphs 46 & 47; Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277, paragraph 14, *Brandtsma*, paragraph 12, and Case C-400/96 *Harpegnies*, [1998] ECR I-5121, paragraph 35.

¹⁴ See Case C-14/02 *Atrál v Belgium*, [2003] ECR I-04431, paragraph 62, as well as Case C-390/99 *Canal Satélite Digital*, [2002] ECR I-607, paragraphs 12, 25 and 29.

Member States can not refuse certificates or test reports issued by a conformity assessment body accredited for the appropriate field of conformity-assessment activity in accordance with Regulation (EC) No 765/2008 on grounds related to the competence of that body (Art. 5 of the Regulation).