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EUROPEAN COMMISSION

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

concerning the

**position of the Council on the adoption of a Regulation of the European Parliament and
of the Council
laying down harmonisation conditions for the marketing of construction products**

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1. BACKGROUND

Date of transmission of the proposal to the European Parliament and 23 May 2008.
to the Council (document COM(2008)311 final – A6-0068/2009-
2008/0098 (COD):

Date of the opinion of the European Economic and Social 25 February 2009.
Committee:

Date of the opinion of the European Parliament, first reading: 24 April 2009.

Date of transmission of the amended proposal: 20 October 2009.

Date of adoption of the position of the Council: [13 September 2010].

2. OBJECTIVE OF THE COMMISSION PROPOSAL

Simplification of the Council Directive 89/106/EEC, the Construction Products Directive, referred to hereafter as the CPD, is one of the initiatives under the Commission's simplification rolling programme as part of its *Better Regulation: Simplification Strategy*. The CPD is aimed at ensuring the free circulation and use of construction products in the Internal Market. Since construction products are intermediate products intended to be incorporated in the construction works, the concept of safety applies to those products to the extent that they contribute to the safety of the works. In this way the CPD achieves its objective by defining harmonized means to express the performance of the product in an accurate and reliable way, rather than by harmonizing the safety requirements of the product, as it is the case in the New Approach directives.

The objective of the Commission proposal is to replace the CPD by a Regulation, with the aim of better defining the objectives of this Community legislation, as well as making its implementation easier and more efficient. As part of the Better Regulation initiative, the proposal **clarifies** of the basic concepts and the use of CE marking; introduces simplified procedures, so as to reduce the costs incurred by enterprises, in particular SMEs; and **increases the credibility** of the whole system by imposing new and stricter designation

criteria to bodies involved in the assessment and the verification of constancy of performance of construction products.

3. COMMENTS ON THE POSITION OF THE COUNCIL

3.1. General comments

The Commission welcomes the completion of the 1st reading in the Council, with the position now adopted. It is important for the construction sector that the main objectives of the Commission proposal, i.e. simplification, clarification and increased credibility, have been in general upheld by the Council, whilst still respecting the principles of Better Regulation (see Commission declaration in point 5).

In particular, the Commission appreciates the support given by the Council to its proposal concerning the measures aimed at simplification, which remains a key issue for the European SMEs active in this sector. Simplified procedures as outlined in Articles 36 – 38, especially Article 37 applicable for micro-enterprises manufacturing construction products, will turn out highly pertinent for the competitiveness of the European industry. Moreover, also the wholesale reforms introduced to the EOTA structure and to the issuing of ETAs will contribute effectively to increased simplification, transparency and confidence to the system.

Clarification of general principles and contexts has also been supported by the Council: this is notably reflected in the clear and central role played by the Declaration of Performance (DoP) and the associated CE marking, whose meaning is now unambiguous in this context. The same goes also for the role of harmonised standards, which now clearly has been strengthened by making them the only means available to assess the performance of the essential characteristics of the construction products covered by them. Both the manufacturers and the Member States authorities are thus obliged to use this common technical language when assessing and declaring the performance of the products, or respectively when setting any regulatory requirements for them. Thirdly, the credibility of the system has been strongly boosted by the links to the contents of the Internal Market Package for Goods, both for notified bodies and for market surveillance.

3.2. Comments on the amendments adopted by the European Parliament

The Council was only partially in accordance with the Commission's opinion on the amendments adopted by the European Parliament at first reading. The same goes also for those amendments which have only partially been incorporated in the position of the Council.

The Council approved in principle the main lines of the amendments by the European Parliament on the declaration of performance, thus rendering it obligatory when the construction product in question is covered by a harmonised standard or a ETA has been issued for it. In the same context, the new Article 3(3) of the Council position develops somewhat further the corresponding amendments by the European Parliament, delegating the Commission decision-making powers on determining those essential characteristics of construction products covered by harmonised standard, for which the manufacturers shall always declare the performance.

The Council rejected the Parliament's proposal to include dangerous substances into the mandatory contents of the declaration of performance, covering this topic only in the new

recital 24. This position is in line with the Commission's views, as expressed also in the amended proposal.

The Council also rejected the Parliament's proposal, supported and re-worded by the Commission, to include in Article 10(4) a clause ensuring the independence of Product Contact Points for Construction from bodies involved in the procedure for obtaining the CE marking. The argument of Regulation 764/2008/EC not containing such a provision cannot be seen as tenable, since that Regulation only deals with products outside the harmonised area and thus not bearing the CE marking.

3.3. New provisions introduced by the Council and the Commission's position

The Council introduced a new set of formulations for Articles 3 – 6, more specifically by including a provision in Article 3(3) delegating the Commission decision-making powers on determining the essential characteristics always to be declared, by providing in Article 5 with a set of derogations from the general principle of mandatory declaration of performance, and by elaborating further in Article 6 on the minimum contents of this declaration, notably ensuring that the performance of at least one essential characteristic would always be declared, by levels or classes.

The Commission regrets that Articles 3 – 6, as adopted by the Council, could impose unnecessary administrative and testing burdens on enterprises, and thus not remain in line with the principles of Better Regulation.

Moreover, the Commission notes that, in spite of the efforts to streamline the final Council position, certain incoherencies have remained, some of them with a potential for also political repercussions. In order to avoid future difficulties in the application of the Regulation, all these provisions should necessarily be adjusted in the final stages of the legislative procedure. As a striking example, reference can be made to simplified procedures, where neither recital 34, nor the definition of STD in Article 2(15), are corresponding to the contents of Articles 36 - 38.

The Council has further developed also the demands on information to accompany the CE marking, by adding several items to Article 9(2). This amendment goes to the other direction than the corresponding one by the European Parliament. It would also appear worth checking how these demands match together with the possibilities (now delegated to the Commission) in Article 7(3) for digital supply of the contents of the declaration of performance, which according to the new Article 9(2) now would in any case partially also have to be provided alongside the product.

In addition, the Council has completed in its position the alignment to the Internal Market Package for Goods for notified bodies (Chapter VII) and introduced the necessary amendments to replace the initial provisions on Comitology with the new set of rules (new Articles 60 – 64, implementing Articles 290 and 291 of the Treaty on the Functioning of the European Union to this context. The position adopted by the Council also contains a new structure for the provisions concerning the development and adoption of European Assessment Documents (EADs) (Articles 19 – 24 and Annex II) and the functioning of the organisation of TABs, as well as new provisions on the financing by the European Union of the said organisation (Articles 31 – 35).

The Commission endorses the principles expressed by these changes.

4. CONCLUSION

Although it considers that the position of the Council does not meet some of the essential aims of its initial/amended proposal, the Commission perceives that the only way of allowing the procedure to continue is to refrain from opposing it.

The Council acted by a qualified majority.

In conclusion, the Commission supports, in a spirit of compromise, the position adopted by the Council, subject to the statements mentioned in the following point.

5. STATEMENTS BY THE COMMISSION

The Commission made two statements (annexed) which apply to the respect of the principles of Better Regulation and to market surveillance.

Commission Declaration in Council on better regulation

The Commission supports, in a spirit of compromise, the Political agreement of the Council on the Commission proposal for a Regulation of the European Parliament and the Council laying down harmonised conditions for the marketing of construction products.

Nevertheless, the Commission recalls that this proposal is part of its simplification strategy¹ and therefore regrets that the text finally agreed by the Council, in particular Articles 3 to 7, could impose unnecessary administrative and testing burdens on enterprises as assessed in the impact assessment accompanying the original proposal². Therefore it would not be in line with the principles of Better Regulation and the broad objective to reduce administrative burden arising from EU legislation, endorsed by the Spring European Council of March 2007.

The Commission intends to monitor in particular this aspect of the Regulation and will include its conclusions in the report it will present to European Parliament and the Council five years after the entry into force of this Regulation.

Commission Declaration in Council on market surveillance

The Commission considers that in the light of recital 37 and in line with the spirit of Article .6(3) and of Article 8(3), the authorities of a Member State may, if necessary, take appropriate measures for a product which is placed, or made available, in their market, if the declaration of performance does not contain the performance related to the essential characteristics for which there are requirements for that product and its declared intended use or uses, or if the declared performances do not correspond with those requirements, in the same Member State, or parts of its territory.

The measures need to be proportionate to the risks involved and should not lead to the fragmentation of the internal market.

¹ European Commission (2005):COM (2005) 535 final: Communication of the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions – Implementing the Community Lisbon Programme: A Strategy for Simplification of the Regulatory Environment, Brussels.

² COM (2008) 311, SEC (2008) 1900 and SEC (2009) 1901 of 23 May 2008.