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GUIDANCE PAPER I

(concerning the Construction Products Directive - 89/106/EEC)

THE APPLICATION OF ARTICLE 4(4) OF THE CONSTRUCTION PRODUCTS DIRECTIVE

(Revision Sep 2002)

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Preface

Article 20 of the Construction Products Directive (89/106/EEC) states that the Standing Committee may, "at the request of its Chairman or a Member State, examine any question posed by the implementation and the practical application of this Directive".

In order to ensure as far as possible a common understanding between the Commission and the Member States as well as among the Member States themselves as to how the Directive will operate, the competent services of the Commission, assuming the chair and secretariat of the Standing Committee, may issue a series of ***Guidance Papers*** *dealing with specific matters related to the implementation, practical implementation and application of the Directive.*

These papers are not legal interpretations of the Directive.

They are not judicially binding and they do not modify or amend the Directive in any way. Where procedures are dealt with, this does not in principle exclude other procedures that may equally satisfy the Directive.

They will be primarily of interest and use to those involved in giving effect to the Directive, from a legal, technical and administrative standpoint.

They may be further elaborated, amended or withdrawn by the same procedure leading to their issue.

THE APPLICATION OF ARTICLE 4(4) OF CONSTRUCTION PRODUCTS DIRECTIVE

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1. Scope

1.1 This Guidance Paper clarifies issues relating to the application of Article 4(4) of Council Directive 89/106/EEC[1] (hereafter referred to as the Construction Products Directive or CPD), as amended by Council Directive 93/68/EC[2].

1.2 The Guidance Paper is primarily intended for regulators and enforcement authorities within the European Economic Area (EEA), industry and notified bodies.

1.3 The guidance provided in this document can only be provisional, until experience is gained with the application of Article 4(4) in practice. The Commission, with the assistance of the Advisory Group of Notified Bodies, will monitor the use of Article 4(4) by industry, keep the Member States informed and ensure that this guidance is reviewed as necessary.

2. Introduction

2.1 Article 4(4) of the CPD states :

> "*Where a manufacturer, or his agent, established in the Community, has not applied, or has applied only in part, the existing technical specifications referred to in paragraph 2, which require, according to the criteria set out in Article 13(4), the product to be submitted for a declaration of conformity as defined in Annex III(2)(ii), second and third possibilities, the corresponding decisions under Article 13(4) and Annex III shall apply and such a product's fitness for use within the meaning of Article 2(1) shall be established in accordance with the procedure set out in Annex III(2)(ii), second possibility.*"

2.2 In other words, two conditions have to be fulfilled before this article can be called upon – a technical specification whose scope covers the product and intended use in question must be in application and the system of attestation of conformity applicable to the product for the given intended use must be either system 3 or system 4 [3].

2.3 If, under these conditions, a producer chooses not to apply the technical specification, or to apply it only in part, then the fitness for use of the product shall be established under system 3 (i.e. declaration of conformity of the product by the manufacturer on the basis of initial type testing of the product by an approved laboratory and factory production control).

2.4 Note, however, that it is not intended that the approved laboratory deliver a favourable technical assessment of the fitness for use of a product for an intended use (that would be an ETA). Neither is the article generally intended to apply to products that differ significantly from harmonised standards, as, according to article 8(2)(b) of the CPD, ETAs may be granted for such products.

3. Applicability of Article 4(4)

3.1 Article 4(4) can be regarded as an instrument of flexibility within the CPD, ensuring that innovation is not stifled by the need to wait for revised technical specifications.

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1 OJ L 40, 11.2.1989

2 OJ L 220, 30.8.1993

3 Note that manufacturers of products that effectively fall under system 4 through the application of Art. 13(5) of the CPD cannot also make use of the provisions of Art. 4(4). The latter specifically limits its applicability to the systems 3 and 4 determined according to the criteria set out in Art. 13(4).

However, whilst it represents a derogation from the requirement to comply fully with a technical specification, it does not lessen the producer's responsibilities with respect to any of the other obligations imposed by the CPD.

3.2 Experience of the use of Article 4(4) is lacking, but there may a number of reasons why a producer might choose not to apply parts (or any) of a technical specification, for example :

- a defined test method(s) cannot properly accommodate a sample of a particular product for reasons of size, shape etc;
- the product is slightly, but not significantly, different from the usual type of product targeted by the specification;
- the provisions on factory production control contained within the specification are not suited to the particular production facility.

3.3 The CPD does not impose any restrictions on the use of Article 4(4), other than those mentioned in Section 1. However, the non-use or partial use of a technical specification will remove the automatic presumption of conformity which that specification confers on the product. The burden of proof regarding those parts of the technical specification not followed will thus be reversed and the producer, in collaboration with the approved laboratory, will have to demonstrate equivalence with its provisions (i.e. the technical specification remains the European reference as regards the required characteristics and performance of the product in question).

4. Notified Bodies

4.1 The CPD does not provide any indication that the approved laboratories involved in the application of Article 4(4) are any different from those involved in a "normal" system 3 evaluation. Member States should therefore ensure that the approved laboratories that they notify to the Commission are also capable of carrying out tasks related to the application of Article 4(4). Member States may limit the scope of notification of an approved laboratory if it is not considered to be capable of carrying out such tasks. [4]

5. Evaluation of fitness for use under Article 4(4)

5.1 Under Article 4(4), the fitness for use of the product shall be established under system 3 (i.e. declaration of conformity of the product by the manufacturer on the basis of initial type testing of the product by an approved laboratory and factory production control).

a) The Initial Type Test

5.2 Under Article 4(4), as for a "normal" system 3 attestation, the responsibilities of the approved laboratory relate only to the Initial Type Test (ITT) of the product [5]. The approved laboratory must, however, first verify that the product under consideration is allowed to be CE marked under the Article 4(4) procedure (see Section 1).

5.3 Provisions relating to the conduct of an ITT should be laid down in each technical specification [6]. Where the producer does not intend to follow these provisions, either at

[4] Further guidance on notification will be provided in a revised version of EC Guidance Paper A. As all Article 4(4) ITTs require a notified body, the possibility of there being no approved laboratories notified for some product families normally under system 4 may also need to be addressed.

[5] References to "approved laboratory" in this paper do not exclude the possibility that more than one laboratory can be involved in carrying out the ITT (as previously agreed by the SCC).

[6] If such rules are not yet provided in the technical specification, the Group of Notified Bodies should provide appropriate common instructions.

all or in part, the approved laboratory has to take on additional responsibility[7]. Essentially, the task of the approved laboratory in cases of deviation is to establish equivalence with respect to the performance of the product in the ITT that would have been obtained by full application of the reference technical specification. The link between the results obtained by the variant assessment methods used and those contained in the technical specification for the same characteristics must therefore be demonstrated.

5.4 The ITT report should therefore include, *inter alia* :

- a description of the product and its intended use and confirmation that the approved laboratory has checked that they both fall within the scope of a technical specification already in application;
- a record of the tests/ procedures/ provisions applied according to the reference technical specification and the results obtained;
- identification of the tests/ procedures/ provisions in the technical specification that have NOT been followed;
- description of the tests/ procedures/ provisions applied to replace those laid down in the technical specification and the results obtained;
- evaluation of the equivalence of the results of the variant tests/ procedures/ provisions applied with respect to those laid down in the technical specification;
- the correspondence between any classes and levels contained in the technical specification and the results obtained from any alternative tests/ procedures/ provisions.

5.5 As the ITT results provide the reference for the performance of the product declared with the CE marking, it is essential that their meaning be readily apparent to all parties. This is particularly the case where test results/ product characteristics are subsequently required as inputs to design calculations.

5.6 ***Note :*** the technical specification will often stipulate that the producer himself may conduct a specific test within the context of the ITT (under system 3). Where this test relates to that part of the technical specification not applied by the producer, the approved laboratory shall take over responsibility for the conduct of the test in question.

b) Other aspects of conformity

5.7 Under Article 4(4), the producer remains fully responsible for the attestation that products are in conformity with the requirements of the CPD. For aspects not related to the performance of the product in the ITT, and for which the technical specification has not been followed, it is therefore the responsibility of the producer to establish equivalence with respect to the reference condition of full application of the technical specification.

5.8 The producer must therefore demonstrate how the variant procedures/ provisions applied can be considered to be equivalent to those laid down in the technical specification.

6. Information to accompany the CE marking

6.1 In cases where the technical specification has been followed only in part, the reference to the technical specification in the information accompanying the CE marking shall be

[7] Note that if the deviation from the technical specification does not have any impact upon the ITT, then the tasks of the approved laboratory under Article 4(4) will not be any different from a normal system 3 ITT.

followed by a clear indication of the clauses not applied. Where the technical specification has not been followed at all, the reference to it in the information accompanying the CE marking shall be followed by the words "not applied" [8].

6.2 Accompanying information relating to the performance of the product (e.g. declared values) must be expressed in terms comparable to those of the reference technical specification, such that enforcement authorities (and users) can relate the performance characteristics of the product to those of similar products complying fully with the technical specification. The equivalence of the product to a fully compliant one must therefore be readily apparent. As the declared values derive directly from the ITT, the approved laboratory should assist the producer in determining what additional information needs to accompany the CE marking.

7. Article 4(4) and European technical approvals (ETAs)

7.1 An ETA is a favourable technical assessment of the fitness for use of a product for an intended use. Thus, it is already a tailor-made technical specification for a particular product and producer [9]. Article 4(4) permits deviations from ETAs (but not ETA Guidelines) under the same conditions as for harmonised European standards, although in this case the producer also has the alternative of approaching the original approval body to issue an amendment to the ETA already granted.

7.2 In respecting the general obligation to apply "good engineering practice", the approved laboratory involved under Article 4(4) must consider the need to consult the approval body that granted the ETA about the deviations proposed by the producer.

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[8] Even though the technical specification has not been applied at all, it still provides the basis upon which the product is to be judged and thus a reference to it should be made with the CE marking.

[9] Note that it is not possible for a producer to use or deviate from an ETA granted to another producer. Each producer has to apply separately for an ETA in his own name.