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ZDB position on the

EU Commission proposal for a new Construction Products Regulation

On 30 March 2022, the EU Commission published the draft of a new Construction Products Regulation (hereinafter: drCPR). The revision is intended to further deepen the fundamental internal market approach, to overcome identified weaknesses of the current regulation, to build a bridge to construction safety and at the same time to contribute to the goals of the ecological and digital transformation.

Significant extension of the scope: construction companies become manufacturers

The current Construction Products Regulation is primarily a trade instrument and is aimed at manufacturers who place their construction product on the European Single Market. Now, the scope of the regulation is also to be considerably extended by sustainable product requirements aiming for the protection of the environment. Compliance with the product requirements must be imposed solely on the manufacturer.

If the contractor, in the course of his construction activity (when using a product), modifies the construction product for installation (shortening, cutting, filing, drilling, bending, painting, etc.), the declared performance of the construction product may change. Consequently, the manufacturer's declaration of performance may no longer be meaningful. Although the building contractor does not become the manufacturer due to the lack of marketing, he must guarantee that this processed product complies with the substantive requirements of the drCPR. His liability follows from the respective rules of the applicable civil law.

Here, the draft assumes, without explicitly regulating this, that all actors in the building chain are responsible for the requirements of a construction product.

The changeover of the CPR from a regulation for facilitating the internal market for construction products to a set of rules comprising the professional use of construction products is associated with an extension of the scope of application and, as a consequence, also the inclusion of building activities.

Construction companies as economic actors

This in turn means that construction companies which manufacture, use or process construction products individually and/or on the construction site within the framework of a works and services contract also become economic operators within the meaning of the drCPR, even though they only become active at a time when the product selection has already been made. Construction companies are certainly actors in the building chain when they process and install construction products. It is to be feared that these "users" (i.e. the construction companies) will therefore be faced with considerable administrative and consequently also financial burdens.

Due to the complex draft regulation, it remains unclear whether this is actually intended by the EU Commission. In any case, it should be clarified that the modification of a construction product when „using“ it is not the same as the manufacturing of construction products for the placing on the market.

However, the drCPR does not contain a distinction between the "manufacture“ and the "user" of a construction product. Therefore, it should be clearly ruled out that the "processing" of a construction product, at least in the case of direct installation, is considered to be the „manufacturing“ of a new construction product.

Product requirements are confusing

The product requirements are regulated in a confusing manner in various places of the drCPR. Their validity depends on different facts. The implementation of all requirements from other EU legal acts has been only imperfectly successful, so that important requirements for construction products can still be found outside the drCPR. The requirements for construction products and the preconditions for their application should therefore be clearly and uniformly regulated. Otherwise, the requirements cannot be met in practice.

Complex and unclear requirements increase the liability risk of construction companies vis-à-vis building owners. A European state of the art is to be taken as a basis, which does not exist. Furthermore, the question arises whether national courts may interpret this term at all. Other principles must also be adequately taken into account. All in all, the drCPR leads to ambiguities with regard to contractual performance. This is all the more true as this provision is also supposed to refer to construction works. Therefore, a deletion of the reference to the state of the art is recommended.

More powers for the EU Commission

The Commission's proposal includes a large number of enabling clauses, whereby the EU Commission is granted the right to adopt delegated acts to supplement/amend the drCPR. Although, it is true that delegated acts are adopted in the so-called comitology procedure, so far always with the involvement of the Member States.

According to EU law, these additions/amendments must not change the essence of the provision. Due to the large number of authorisations, it is doubtful that this principle will be always respected.

Pursuant to Art. 4 (3) and (4) drCPR, the EU Commission may, for certain product families and categories, lay down voluntary or mandatory essential characteristics and assessment methods, including threshold values and performance classes, in certain cases binding for the Member States and manufacturers.

According to Art. 5 (2) and (3) of the drCPR, the EU Commission can set product requirements of any kind, as framework conditions of "environment, safety and technical progress" are hardly limitable.

Furthermore, the EU Commission can change test procedures and assessment systems (Art. 6 para. 1-3 drCPR).

This would make the EU Commission a "supreme standard-setting authority". The proposed powers of the Commission to adopt delegated acts go far beyond the legal framework; the Commission can decide in a legally binding way whether the regulatory content of standards is sufficient without any decision power of the Parliament or the member states.

Therefore, the powers of the EU Commission must be significantly reduced.

Danger of "shadow standardisation“

From the point of view of the EU Commission, CEN (European Standards Organisation) has not delivered sufficient quality in standards in the past. As a result of the rejection of standards by the Commission, an unfavourable backlog of standards has arisen, which is now to be resolved.

If the EU Commission is of the opinion that a standard is deficient, it could correct this via delegated acts. However, this would make the Commission a bottleneck due to the lack of its own standardisation capacities. Therefore effective structures are to be developed. This would mean a danger, that parallel standardisation structures will be created and thus of "shadow standardisation".

In addition, the alternative route used so far via EOTA, the European Organisation for Technical Assessments, in which primarily the Member States are organised and in which Deutsches Institut für Bautechnik in Berlin is also active, is to be restricted in future. European Assessment Documents (EADs) are no longer to be technical specifications (in contrary to standards or delegated acts). They are only to be used for a limited time for the preparation of European Technical Assessments (ETAs).

This means that manufacturers lose the possibility of avoiding a "standardisation freeze". Innovations such as decarbonised building products are thus prevented.

A long way to legal certainty

The European legislators (EU Commission, EU Parliament and Council of the Member States) hope for speedy negotiations in the legislative procedure, so that the new CPR could enter into force as early as 2025.

However, according to Art. 92 drCPR, the current CPR (EU) No. 305/2011 is not to be withdrawn until 2045 (no, it is not a printing error!). This time frame is to be used to successively, product family by product family, sift through and update the collected inventory of technical specifications for construction products (the so called CPR Acquis), e.g. the standards. Only when this process has been completed would there be legal certainty for construction companies with regard to the recognised rules of technology for construction products.

It is to be feared that this will delay the industry's efforts towards a circular economy and innovative building products. Nor is the quality and completeness of the standards likely to improve.

In the meantime, the current practice will continue that the properties missing in the standards, but required for the structural engineering verification, are specified by voluntary manufacturer's declarations.

Sustainability gaps

One of the objectives of the drCPR is the resource-saving manufacturing of construction products and the promotion of the circular economy and sustainability in the construction sector. This objective is to be taken into account by imposing environmental obligations on the manufacturer (Art. 22 drCPR). Preference is to be given to materials that can be recycled and those obtained through recycling. Minimum requirements for the proportion of recycled materials are to be met.

However, the drCPR only applies to used products (Art. 3 No. 24, 29), which are defined as products that are not waste and have already been used at least once.

By-products that are important for the promotion of the circular economy and that arise during the manufacture of construction products (e.g. fly ash) and excavated soil that has not yet been built into a structure, both are not covered by the drCPR.

The use of substances as construction products must be defined more broadly in order to facilitate their classification as products.

Construction product law reaches out for public procurement

So far, the CPR has been aimed at reducing barriers to trade. Now the drCPR is also to intervene in the fiscal activities of the public sector. Article 84 of the drCPR would empower the EU Commission to adopt delegated acts laying down sustainability requirements for public procurement. The legal acts could take the form of binding technical specifications, selection criteria, award criteria, contract performance clauses or targets. These criteria would not only apply to direct procurement of these products, but also to public works or service contracts.

This is questionable from a regulatory point of view, because the EU is thus acting both on the level of (procurement) directives that have been transposed into national procurement law and on the level of a regulation that is directly applicable in the member states.

In addition, Art. 7 (2) of the drCPR also interferes with a principle of the previous public procurement law, which is secured by the constant case law of the ECJ: the right of the contracting authority to

determine the performance. In deviation from this, public contracting authorities may only demand what is laid down in standards, even if this does not cover their needs. Exceptions would only be permitted with the explicit (but completely impracticable) consent of the EU Commission.

We reject the EU Commission's efforts to prescribe the technical content of works and construction contracts. The public procurement rules of the drCPR must therefore be deleted.

Our demands in a nutshell:

In the legislative process that will now follow for the new CPR, ZDB will advocate at Member State and EU Parliament level that

- the exemption for the preparation of the declaration of performance in Art. 10 (1) b of the drCPR for the installation of the construction product on the construction site is maintained,
- it remains clear that construction companies are not manufacturers within the meaning of the new CPR and remain exempted from the manufacturer's obligations under the CPR when "processing" a construction product in case of direct installation or individual modification,
- the new CPR does not impose any obligations on construction companies as economic operators which are impossible in practice,
- the proposed powers of the Commission to adopt delegated acts do not go beyond the legal framework and thus undermine the competences of the Member States,
- no parallel standardisation structure ("shadow standardisation") is created,
- the EOTA route is retained as a genuine alternative to standardisation,
- the obligations of manufacturers in Art. 22 of the drCPR also extend to by-products, insofar as they relate to recyclable materials or raw materials obtained from recycling,
- the provisions on public procurement in the drCPR are deleted.

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