

REFIT Platform Opinion

Date of Adoption: 07/06/2017

REFIT Platform Opinion on the submission by Detailhandel Nederland (LtL 494) on the Construction Product Regulation

The REFIT Platform has considered the issues raised by Detailhandel Nederland on the need to clarify who is bound by the obligation to keep the Declaration of Performance (DOP) for 10 years.

The Stakeholder group invites the Commission to review the issue as part of the review of the Construction Product Regulation (CPR) and recommends that particular attention is being paid to the distinction between retailers selling to businesses and/or consumers as there seems to be an implementation problem at national level.

Member States consider the requirements laid out in the Construction Product Regulation to be sufficiently clear and have not observed problems with regards to the storage period of DOP.

Some Member States support the recommendation that the Commission assess the possibility of providing the DOP to consumers either in paper or electronic form during the revision of the CPR.

Detailed Opinion

Contents

1. Submission XII.8.b by Detailhandel Nederland (LtL 494).....	2
2. Policy context.....	4
3. Opinion of the REFIT Platform	6
3.1 Considerations of the REFIT Platform Stakeholder group.....	6
3.2 Considerations of the REFIT Platform Government group.....	6

1. Submission XII.8.b by Detailhandel Nederland (LtL 494)

The Construction Products Regulation requires retailers to keep a declaration of performance for construction products (planks, screws, nails, tubes of glue, etc.), available for a period of 10 years from the date of purchase. The performance, for example, of a plastic plate refers to its tensile and compressive strength. The EU Member States have different interpretations of what exactly needs to figure in the declaration, and how it should be drafted. The performance data for these products, which are generally stored on the importer or manufacturer's computer, must be kept by the retailer for a period of 10 years, in case any questions are put by consumers. There are also many shops which only sell these products, such as tubes of glue, as service products.

Detailhandel Nederland would like the requirement to store declarations of performance for 10 years to no longer apply to retailers, but to apply only to producers, to whom retailers may at any point refer for this information.

Additional information

The Construction Products Regulation (CPR), adopted in 2011, obliges retailers to make available to clients (and supervisory authorities) a Declaration of Performance (DOP) for each product that carries the CE-marking, such as timber planks, but also screws, nails, tubes of glue, etc. For example, the performance of a sheet of plastic should indicate its push and pull strength.

Issue

Retailers (distributors) must provide the DOP to clients and ensure that the DOP remains available for a period of 10 years after the sale of the product, in case the clients ask for it. Not only have clients never asked for it, the information would be incomprehensible for private consumers. The obligation to provide and most of all stores the DOP creates a large financial and administrative burden, without contributing to the goals of the Regulation, namely safer construction through better information.

Solution

The information on the DOP is meant for professional users and not for private users. There are many DIY stores that only cater to the market for private consumers, and many more types of retail stores also have to comply with the CPR if they sell products covered under the Regulation (such as glue in supermarkets). A solution would therefore to exempt retail stores that sell primarily to private consumers from the obligation to provide and store the DOP for 10 years (article 14).

Background

While it is up to the manufacturer to draw up and provide the DOP, distributors can be considered manufacturers as producers for own brand and importers (placing on the market of products) [see art. 11.2 jo. art. 15]. The fact that a DOP needs to be kept for a period of 10 years means that retailers need to keep and maintain a separate administration, much like a GSI administration. This is a very time-consuming and expensive administrative

burden for retailers, costing several tons every year in subscription fees. The problem is relatively even more burdensome for SMEs, which often do not focus on selling construction products, but sells the occasional tube of glue or set of screws. They still need to make sure their administration is fit to keep the DOP for 10 years.

The DOP was initially meant to provide professional users with information about the performance of construction products (if so requested). There are many DIY stores that cater only to private consumers, and not to professional users. Business to business sales happen in other stores. The CPR does not differentiate between the sales to private or professional users. Providing the DOP to private consumers the CPR is administratively burdensome, without making the European internal market any safer or better for consumers. In fact, in the period since the CPR is into force, there has not been a single consumer asking for a DOP. If a consumer were to ask for the DOP, he would not understand it due to the nature and complexity of the information provided (the DOP refers to standards and norms).

While the manufacturer should provide the DOP, there are also cases in which the retailer (distributor) should produce separate DOPs. For example, a retailer can decide to halve a standard sheet of wood of 2.40m by 1.20m. The original DOP is now no longer valid, so that two separate DOPs must be produced. This is very hard for a retailer to estimate and would require new testing costs. Again, the separate DOPs must be archived and remain available for 10 years.

2. Policy context

The Construction Products Regulation (EU) No 305/2011 (CPR) creates a harmonised framework for declaring the performance of construction products in accordance with harmonised technical specifications (either mandatory standards or ad-request European Assessment Documents) and for CE marking these products. It aims to remove technical barriers in the field of construction products and simplify their performance assessment procedures.

The CPR takes over a number of features from the horizontal framework for the marketing of products known as the "New Legislative Framework" and embodied, inter alia, in Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC. The Annex to this Decision lists reference provisions for Union harmonisation legislation for products, including on obligations of manufacturers (Article R2), obligations of importers (Article R4) and obligations of distributors (Article R5), corresponding in a proportionate way to their respective roles in the supply and distribution process (cf recital (19) of the Decision).

- The reference obligations for manufacturers include an obligation to draw up a declaration of conformity and to keep it for a certain period (to be specified in proportion to the lifecycle of the product and the level of risk) after the product has been placed on the market. In line with this, under the CPR the manufacturer must draw up a declaration of performance and to keep it for a period of 10 years after the construction product has been placed on the market (Article 11(1) and (2) CPR).
- The reference obligations for authorised representatives of manufacturers include an obligation to keep the declaration of conformity at the disposal of national surveillance authorities for a certain period (to be specified in proportion to the lifecycle of the product and the level of risk). In line with this, under the CPR the manufacturer's authorised representative must keep for a period of 10 years after the construction product has been placed on the market the declaration of performance at the disposal of national surveillance authorities (Article 12(2)(a) CPR).
- The reference obligations for importers include an obligation to ensure that the product is accompanied by the required documents. Moreover, the reference obligations include an obligation for the importer to keep for a certain period (to be specified in proportion to the lifecycle of the product and the level of risk) a copy of the declaration of conformity at the disposal of the market surveillance authorities. In line with this, under the CPR the importer must ensure that the product is accompanied by the required documents, which includes a copy of the declaration of performance (Article 13(2) CPR). Moreover, the importer must keep for a period of 10 years after the construction product has been placed on the market a copy of the declaration of performance at the disposal of the market surveillance authorities (Article 13(8) CPR).
- The reference obligations for distributors include an obligation to ensure that the product is accompanied by the required documents. In line with this, under the CPR

the distributor must ensure that that the product is accompanied by the required documents, which include a copy of the declaration of performance (Article 14(2) CPR). There is no obligation for the distributor to keep (a copy of) the declaration of conformity/performance for a certain time period, either under the reference obligations, or under the CPR.

- Finally, the reference provisions of the New Legislative Framework provide for cases where obligations of manufacturers apply to importers and distributors. In line with those reference cases, under the CPR the importer or the distributor must comply with the manufacturer's obligations, including those referred to under the first bullet point above, if he places a construction product on the market under his own name or trademark or if he modifies a construction product already placed on the market in such a way that conformity with the declaration of performance may be affected.

Following the abovementioned legal provisions, retailers who sell construction products under their own name or trademark or who have modified those construction products in such a way that conformity with the declaration of performance may be affected, have to draw up a declaration of performance and keep it for 10 years. This is because they are, in such a case, considered manufacturers. See also FAQ No 24 on the following website: https://ec.europa.eu/growth/sectors/construction/product-regulation/faq_en. Also following the abovementioned legal provisions, retailers who have themselves imported construction products from countries outside the Internal Market sphere or who are appointed as a manufacturer's authorised representative, have to keep (a copy of) the declaration of performance at the disposal of the market surveillance authorities for a period of 10 years. The CPR foresees no other scenarios however in which a retailer is obliged to keep a copy of the declaration of performance for a period of 10 years (or, in fact, any longer than they are in possession of the products themselves).

In addition to the above obligations inspired by reference provisions in Decision No 768/2008/EC, the CPR requires a copy of the declaration of performance to be provided at each stage of the supply chain, whenever a construction product is being supplied (Article 7 CPR); accordingly retailers are indeed required to provide such copies when selling a construction product. The CPR allows that copy of the declaration of performance to be supplied in paper form or by electronic means. However, if the recipient so requests, a paper copy must be supplied to him. Nothing prevents, in such a case, the ad hoc printing of the copy of the declaration of performance from an electronic file or from a website. If the copy is made available on a website, it must remain available on that website in an unaltered state for at least 10 years. Apart from the scenario where the copy is being made available on a website, there is no obligation for retailers to keep the copy available for at least 10 years – except if the retailer is being considered as the manufacturer or has himself imported the products, cf previous paragraph.

State of play

Information provision will be looked at in the upcoming evaluation of the CPR possibly leading to a revision of the CPR as announced in the Communication Clean Energy for all

Europeans in November 2016.

3. Opinion of the REFIT Platform

3.1 Considerations of the REFIT Platform Stakeholder group

The Stakeholder group has considered the submission from Detailhandel Nederland. There is a need to clarify who is bound by the obligation to keep the Declaration of Performance (DOP) for 10 years. It should be clear that this obligation lies on the manufacturers and the importers placing products on the market, not distributors and retailers, unless they place own brand products on the market.

The Stakeholder group invites the Commission to review the issue as part of the review of the DOP and consider in particular the distinction between retailers selling to businesses and/or consumers as there seems to be an implementation problem at national level.

3.2 Considerations of the REFIT Platform Government group

9 Member States contributed

The Detailhandel Nederland proposes that the requirement to store declarations of performance for 10 years would not apply to retailers, but only to producers, to whom retailers may at any point refer for this information.

Member States (9 out of 9) consider the requirements laid out in the Construction Product Regulation to be sufficiently clear and have not observed problems with regards to the storage period of DOP. However, some Member States are supportive of considering providing the DOP to consumers either in paper or electronic form during the revision of the CPR.

One MS agrees with the appropriateness to clarify distributor's obligation to keep DOP.

Individual contributions from Member States

Member State 1 has not seen this matter as an important issue and indicates that its industry has not indicated that requirement to keep DoPs for 10 years would be any kind of a problem for distributors.

In fact the article 11 (2) ("Manufacturers shall keep the technical documentation and the declaration of performance for a period of 10 years after the construction product has been

placed on the market.") applies to manufacturers, not distributors. Article 14 refers to article 11 (4) and (5), not 11 (2). The obligation to keep DoPs for 10 years applies only to distributors who shall be considered a manufacturer according to article 15.

In all cases the information of the DoP has to be available for consumers at the moment the product is purchased. When the DoP has been made available on the website of the manufacturer it could be possible to consider whether the DoP has to be kept for 10 years in paper form or not. This may be an issue to be considered if there will be a revision of CPR.

Member State 2 does not support the proposal. In its view, the proposed clarification is not necessary because the Regulation obliges the manufacturer and the product importer to keep a Declaration of Performance for the product. The distributor is not obliged to keep the Declaration for the stated period.

Member State 3 considers that the issue described in the submission is not occurring to a significant extent in the MS. The interpretation that distributors shall keep declaration of performance for ten years does not match the MS's interpretation of the Construction Products Regulation. Getting the system of traceability in place was associated with some initial challenges from both businesses and market surveillance authorities but it is now functioning satisfactory. Even though clarifications are in most time positive, the MS3's position is that the provisions stating the responsibilities for different economic actors are sufficiently clear and are in no immediate need of revision.

Member State 4 agrees that it is appropriate to specify distributors' obligations in order to clarify whether the obligation to keep the Declaration of Performance (DoP) for each product for 10 years applies to them or not. Such obligation does not directly stem from the current wording of the Construction Product Regulation (CPR). Distributors must be able to submit DoP to market surveillance authorities even after x year(s) after the completion of sale of the product concerned (this period is not specified) and it is only up to distributors whether they keep DoP or they solely envisage that it will be possible to obtain DoP from original manufacturer who may not already exist. At this moment, there is no uniform understanding in MS4 whether distributors should or should not be subject to this obligation. MS4 believes that the possibility to archive DoP not only in paper form but also in electronic form shall significantly reduce burden for distributors.

Member State 5 clarifies that the Construction Products Regulation requires the importer of a product to keep the Declaration of conformity, for a period of 10 years. The proposal is to remove this obligation for distributors, leaving this obligation for manufacturers and importers. In MS5's opinion, and unless the distributor assumes the status of manufacturer or importer, it does not exist in the European regulation any obligation.

The text of the regulation is considered to be correct and it does not seem appropriate to distinguish between the types of customer from a dealer to fix differentiated information conditions.

Member State 6 does not support the proposals made in the submission of Detailhandel Nederland. The tasks manufacturers and distributors have in making available the DOP has

always been the subject of discussion at the SCC. MS6 has no evidence that this obligation of the distributors to provide the DOP is a market obstacle. It is important, especially in the legal dispute, to obtain an appropriate declaration of performance. A differentiation of professional building company and homeowners who carry out construction work does not seem justified. All customers must be informed about the DOP.

Member State 7: At the Explanatory Memorandum for the Context of the Proposal for the CPR (Grounds for and objectives of the proposal), it was stated that “the meaning of the CE marking defined in this proposal is specific for construction products: it attests that the information accompanying the product has been obtained in accordance with the proposed Regulation and, therefore, must be considered accurate and reliable”.

So it was clarified that the objective of the CPR is not to define the safety of the products, but to ensure that reliable information is presented in relation to their performances, achieved by providing a common technical language to be used by manufacturers when placing products on the market and by public authorities when defining the technical requirements of works which influence, the products to be used in those works.

MS7's view is that it is necessary to provide simplified procedures and solutions for the DOP in order to alleviate the financial burden of SMEs and in particular of micro-enterprises. But MOI has strong reservations that the information on the DOP is meant only for professional users and not for private users. Indeed, taking into account complaints filed to the Market Surveillance Authority, as part of the passive system, it can be understood that private users are using the relative legislative framework in order to protect their interests when in disagreement with the economic operators on matters related with the technical requirements. Therefore, it is also for the interests of the retailers to provide the manufacturer's DOP to the users in order to avoid disputes on liability issues.

Having in mind that the CPR requires a copy of the DOP to be provided at each stage of the supply chain, whenever a construction product is being supplied, the retailers are required to provide such copies when selling a construction product (supplied in paper form or by electronic means).

MS7's view is that the presentation of the information to the users is the cornerstone for aiming at fulfilling the basic requirements for construction works.

Member State 8 does not support the stakeholders' recommendation. As a general rule, the Construction Products Regulation (CPR) does not require distributors to keep a copy of DoP for a period of 10 years. This Regulation only states in Article 14 (2) that “before making a construction product available on the market, distributors shall ensure that the product bears the CE marking and is accompanied by the documents required under this Regulation and by instructions and safety information in a language determined by the Member State concerned which can be easily understood by users. Distributors shall also ensure that the manufacturer and the importer have complied with the requirements set out in Article 11(4) and (5) and Article 13(3) respectively.”

A different situation is that of the distributors who places a construction product on the market

under his own name or with his own trade mark or changes a construction product already on the market in such a way as to change its conformity with the Declaration of Performance (Article 15). In this case it is understandable that they are subject to the obligations applicable to manufacturers, as referred to in article 15, including the obligation to keep the DoP for a period of 10 years. If there is any request from market surveillance authority, this entity will address to the person who places the product on the market, in this case the distributor.

Member State 9 considers that requirements laid out in the Construction Product Regulation are sufficiently clear. EU primary legislation lays down horizontally (and cannot be waived by Member States) that DOP must be made at the time of introducing the product into the market and must be stored by producers, distributors and importers and not by retailers. MS9 also stresses that the discussion on providing the DOP to consumers either in paper or electronic form is still ongoing. MS9 agrees to provide to customer the DOP in electronic form, but its acquisition should be prevented.