

**Brussels, 13 September 2010**

**ORGALIME OPINION ON THE POSITION OF THE COUNCIL AT FIRST READING WITH A VIEW TO THE ADOPTION OF A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN HARMONISED CONDITIONS FOR THE MARKETING OF CONSTRUCTION PRODUCTS AND REPEALING COUNCIL DIRECTIVE 89/106/EEC (Reference: 10753/10 2008/0098 (COD))**

## **SPECIAL FOCUS ON ARTICLE 60 – DELEGATED ACTS**

Orgalime is the European Engineering Industries Association, representing the interests of the Mechanical, Electrical, Electronic, Metalworking and Metal Articles Industries. On behalf of the 33 national association members, Orgalime speaks for an industry, which includes over 130.000 companies, the vast majority of which are small and medium enterprises.

In 2009, these companies employed some 10.6 million people in the European Union and accounted for some € 1 427 billion of annual output over a quarter of the EU's manufacturing output and a third of its manufactured exports.

Construction products are within the remit of Orgalime's constituency. Our industry covers a heterogeneous sector, which includes a wide variety of products, including structural metal products, metal structures and parts of structures, metal building and construction products in general.

Orgalime believes that the European industry needs a clear and harmonised framework, avoiding different national implementation and interpretations, which have for a long time given rise to significant problems and barriers to trade for European manufacturers. We welcome the revision of the existing directive; however, we feel that the current draft Regulation's text still presents a number of points of concern that should be reconsidered.

Therefore we submit to your attention hereafter the following comments and additional proposal for amendments.

### **1. Background**

In the framework of the revision of the Construction Product Directive, the Council has published its Common Position on 3 September 2010.

Article 60 lists all the matters that shall be delegated to the Commission following the application of the delegated acts (Article 290 of the Lisbon Treaty). Orgalime is of the opinion that some of the issues laid down in Article 60 seem to be out of the scope of the delegated acts.

*Orgalime, the European Engineering Industries Association, speaks for 33 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 22 European countries. The industry employs some 10.6 million people in the EU and in 2009 accounted for some €1,427 billion of annual output. The industry not only represents more than one quarter of the output of manufactured products but also a third of the manufactured exports of the European Union.*

## 2. Delegated acts vs. Implementing acts

The Lisbon Treaty introduces a new legal framework to delegate to the Commission certain power to adopt non-legislative acts:

### Article 290

*(1) A legislative act may delegate to the Commission the power to adopt **non-legislative acts** of general application to supplement or amend certain **non-essential elements** of the legislative act.*

This provision does not require the adoption of any binding instrument of secondary legislation to ensure its implementation. To this end, the Commission has published a Communication related to the application of Article 290 of the Treaty on the Functioning of the European Union (COM(2009) 673 final).

In addition, the Lisbon Treaty reaffirms the possibility to confer implementing powers on the Commission:

### Article 291

*(2) Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.*

The Lisbon Treaty substantially modifies the framework for implementing powers that are conferred upon the Commission by the legislator. Contrary to article 202 of the EC Treaty, the new Treaty makes a clear distinction between the powers delegated to the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act (delegated acts) and the powers conferred on the Commission to adopt implementing acts.

Currently the Comitology procedure is implemented by Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC). This Decision has been amended by Decision 2006/512/EC. In the case of the Construction Product Directive (89/106/EEC), the Standing Committee on Construction currently acts on the grounds of article 5 (Regulatory procedure) of Decision 1999/468/EC. Within this framework, the Standing Committee on Construction delivers its opinion on draft measures to be taken and the Commission takes its decision based on what has been discussed by the national experts (The Standing Committee has a regulatory role).

## 3. Delegated acts within CPR

Article 60 of the Position of the Council at first reading lists the different issues that shall be delegated to the Commission, on the grounds of Article 290 of the Treaty.

In addition, Article 64 point 2 allocates to the Standing Committee on Construction an Advisory role (on the grounds of Article 3 of the Decision on Comitology – 1999/468/EC).

The following issues will be dealt with in the Standing Committee on Construction referred to in Article 64:

- Mandates and harmonised standards;
- European Assessment Documents;
- Guidelines for TABs;
- Union safeguard procedure.

#### 4. Orgalime Position

It appears that some of the issues listed in Article 60 are, by nature, implementing measures and do not supplement nor amend the legislative act. The criteria used in the Communication COM (2009) 673 final (see 2.3 Criteria for implementing Article 290) were used to establish the following position:

Article 60 of the Council Common Position	Comment	Orgalime position
(a) the determination, where appropriate, of the essential characteristics or threshold levels within specific families of construction products, in relation to which, in accordance with Articles 3 to 6, the manufacturer shall declare, in relation to their intended use, by levels or classes, or in a description, the performance of the manufacturer's product when it is placed on the market;	This does not amend nor supplement the non-essential elements of the legislative act.	This issues should not in our view be the object of a delegated act and should be dealt with under implementing powers (Art. 291)
(b) the conditions on which a declaration of performance may be electronically processed, in order to make it available on a web site in accordance with Article 7;	This does not amend nor supplement the non-essential elements of the legislative act.	This issue should not in our view be the object of a delegated act and should be dealt with under implementing powers (Art. 291)
(c) the amendment of the period for which the manufacturer shall keep the technical documentation and the declaration of performance after the construction product has been placed on the market, in accordance with Article 11, based on the expected life or the part played by the construction product in the construction works;	This does not amend nor supplement the non-essential elements of the legislative act.	This issue should not in our view be the object of a delegated act and should be dealt with under implementing powers (Art. 291)
(d) the amendment of Annex II and where necessary the adoption of supplementary procedural rules in accordance with Article 19(3) in order to ensure compliance with the principles in Article 20, or the application in practice of the procedures set out in Article 21;	This is of general application and also amends (with a possibility to supplement) non-essential elements of the legislative act.	This is clearly an issue for delegation of power to the Commission as a consequence of Article 290 of the Treaty

(e) the adaptation of Annex III, table 1 of Annex IV and Annex V in response to technical progress;	The adaptation of Annexes III, IV table 1 is of general application and also amends non-essential elements of the legislative act.	This is clearly an issue for the delegation of power to the Commission as a consequence of Article 290 of the Treaty
	The modification of modules within New Approach is by nature a regulatory issue and, as such, an essential element of the legislative act. The content of Annex V deals with AoCs, which are equivalent to modules	<b>This fundamental issue would in our view require the revision of the legislative act</b>
(f) the establishment and adaptation of classes of performance in response to technical progress in accordance with Article 27(1);	This is of general application and also amends non-essential elements of the legislative act	This is clearly an issue for the delegation of power to the Commission as a consequence of Article 290 of the Treaty
(g) the conditions on which a construction product shall be deemed to satisfy a certain level or class of performance without testing or without further testing in accordance with Article 27(5), provided that the fulfilment of the basic requirements for construction works is not thereby jeopardised;	This does not amend nor supplement the non-essential elements of the legislative act	This issue should not in our view be the object of a delegated act and should be dealt with under implementing powers (Art. 291)
(h) the adaptation, establishment and revision of the systems of assessment and verification of constancy of performance in accordance with Article 28, relating to a given product, a given product family or a given essential characteristic, and in accordance with:	This does not amend nor supplement the non-essential elements of the legislative act	This issue should not in our view be the object of a delegated act and should be dealt with under implementing powers (Art. 291)
(i) the importance of the part played by the product or those essential characteristics with respect to the basic requirements for construction works; (ii) the nature of the product; (iii) the effect of the variability of the essential characteristics of the construction product during the expected life of the product, and (iv) the susceptibility to defects in the product's manufacture.		

In summary, Orgalime is in favour of:

- Restricting the list of Article 60 to d), partially e), and f) for which the proposed delegated acts can be considered as supplementing or amending the legislative act.
- Considering a), b), c), g) and h) as implementing measures as stated in Article 291 of the Treaty.
- Withdrawing the adaption of Annex V from Article 60, because the modification of modules within New Approach is by nature a regulatory issue and, as such, an essential element of the legislative act. Therefore this requires the revision of the legislative act through the ordinary procedure.
- We moreover believe that in order to ensure the proper consultation of stakeholders, whether in the framework of a delegated act or implementing measures, it would be important to set up a consultation forum (or to adapt the Standing Committee to be so) as has happened in the framework of the Eco design directive and is now being considered in the recast of the directives on the Reduction of Hazardous Substances (RoHS) and for the recast of the IPPC – now Industrial emissions Directive.



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