

Construction briefing

New law relating to construction products - Who does it apply to?

The Construction Products Regulations 2013 come into force on 1 July 2013, following the EU Construction Products Regulation 2011. The ultimate aim is for there to be harmonised European standards (called "hENs") for all construction products for safety and environmental reasons and thereby to remove barriers to trade.

Who has duties under the new law?

The EU Regulation is clearly aimed at the point at which construction products first come onto the market in Europe and imposes specific duties on manufacturers, importers and distributors. The UK Regulations are intended to implement the EU Regulation.

However, the wording of the new UK Regulations is *potentially* wide enough to capture anyone who supplies a relevant construction product, wherever they are in the supply chain, and therefore contractors supplying products up the chain to the client (and subcontractors supplying products to contractors) could potentially be caught.

The new law will not directly impact private sector clients (although design specifications produced on their behalf are likely to refer to the EU standards increasingly) but Member States are obliged to ensure that public sector clients do not impede the use of construction products bearing the required EU marking (called "CE marking"), i.e. by specifying the performance of products other than in accordance with the requirements covered by the harmonised technical specifications.

What is a product?

The definition of product is intentionally wide:

"any product or kit which is produced and placed on the market for incorporation in a permanent manner in construction works or parts thereof and the performance of which has an effect on the

performance of the construction works with respect to the basic requirements for construction works".

"Kit" means a product put on the market by a single manufacturer as a set of at least two separate components which need to be put together to be incorporated into the works.

New offence

Regulation 4 of the UK Regulations states that a person who supplies a construction product that is covered by a harmonised standard or conforms to a European Technical Assessment (where one has been issued for it) shall be guilty of an offence unless a **declaration of performance** for the product (drawn up in accordance with the EU Regulation) is supplied with it and the product has affixed to it the relevant **CE marking**.

Exceptions to this are bespoke products, products manufactured on site and traditional and heritage products.

A person guilty of an offence under this section will be liable to imprisonment or to a fine or both.

Who will be caught by the new offence?

This will very much depend upon how the Regulations (particularly, the word "supplies") are interpreted and enforced in practice. Unfortunately there is currently no definite answer to the question.

It will clearly apply to manufacturers, distributors and importers.

As for contractors, it is worth noting that in other contexts, notably in relation to contractual implied terms as to the quality of goods and materials, a building contract is a work and materials contract and governed by the Supply of Goods and Services Act 1982 and for those purposes, at least, the contractor is treated as supplying goods and materials to the client. This may not be the intention under the

Construction Products Regulations (which may be intended to be strictly limited to the first 'supply' to the market by the manufacturer/distributor/importer) but until the question is answered one way or the other, there are certain things that contractors can do to make sure they do not commit an offence.

If the Regulations do apply to contractors, they are likely to be most relevant to the situation where the contractor 'supplies' products or kit which have just come onto the European market.

What should contractors do now?

Some recommended steps are as follows:

- check that all construction products (or batches thereof) that are new to the market/state of the art products which are supplied to them, come with the required declaration of performance plus an electronic or paper copy to pass on to the client and keep records;
- check that all such products have the appropriate CE marking (and familiarise teams now as to what to look for);
- carry out due diligence on the supply chain and make sure that the chain is aware of the contractor's expectations and requirements when it comes to products. If prosecuted, it will be a defence to show that the person prosecuted took all reasonable steps and exercised all due diligence to avoid committing the offence.

We realise that this will inevitably add to both on-site and off-site paperwork and record-keeping but if this can be kept at a sensible level it is a worthwhile exercise to avoid liability.

Further information

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Declarations of performance

As stated above, manufacturers of a product have to give a declaration of performance for all products covered by the new law, except in relation to bespoke products, products manufactured on site and traditional and heritage products. The declaration must be in the specified form, identify the product and its reference number, state its intended use and contain contact details of the manufacturer, the testing that it has undergone and what its declared performance is.

The declaration should help designers and contractors choose products when deciding what is most suitable for a particular use.

Compulsory CE marking

All new products must now be marked with compulsory CE marking (previously this was voluntary). Technical [Guidance](#) has been produced by the Construction Products Association. It includes an example declaration of performance at Appendix B.

Relationship to Building Regulations

The provisions of the new law do not detract from a contractor's obligations to comply with the Building Regulations and will be reflected in Approved Document 7 which relates to materials and workmanship. This currently states that "*If used appropriately and under satisfactory conditions, a product bearing a CE marking shall be presumed by the building control body to satisfy the relevant requirements unless there are reasonable grounds for suspecting otherwise.*"

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