
Levelling Up, Housing and Communities Select Committee

Response to question posed by Bob Blackman MP at the meeting held on 27 November 2023

1. Introduction and summary

At the Select Committee meeting held on 27 November to hear evidence about the construction product testing review commissioned by DLUHC, and in response to a statement by the reviewers to the effect that there is some flexibility for national requirements to be layered onto international standards, committee member Bob Blackman MP asked for examples of this.

A quick answer is that there are many examples of what is happening in practice, varying from the routine to the esoteric, and some of these are set out in section 2 below.

The longer answer, which goes beyond example to the important context of legal principle, is also set out below, in section 3.

A summary of this latter section is that, although there are many examples across the EU of additional requirements being applied above EU standards, this may well be the consequence of a gap developing between practical experience – what is actually happening on the ground – and a strict application of EU law. There is also a fine line between requirements that are imposed by product regulations and those that are called for as a condition of obtaining building regulations approval.

The particular significance of these distinctions is in their relevance to any possible compromise between a UK system that aligns itself exclusively with the Construction Products Regulation (“CPR”) as it relates to all EU member states, and one that goes its own way and diverges from EU practice, with all the consequences that follow.

They are, however, distinctions upon which it has proved difficult to obtain an authoritative consensus of legal opinion. The propositions of this paper should therefore be tested by reference to such authoritative legal opinion (which may already have been secured within the Department in developing policy) in considering whether the principles of bringing in national requirements might be reconciled with staying generally aligned with the EU regime for the regulation of construction products – if indeed that might be a policy objective.

2. Practical examples

As noted above, there appears to be a gap between the general (anecdotal) understanding of practice across the EU, and a stricter legal understanding of what that practice should be. For example, it is commonly suggested that national (or regional) standards that are higher than, or different from, standards agreed across the EU might still be insisted upon. This was certainly the case in the past, and may still be observed as a matter of habit, but this has now been challenged in law¹.

Subsequent to legal challenge, a note has been published by the relevant national/federal authority in Germany (the *Deutsches Institut für Bautechnik*, or “DIBt”) stating that, where an agreed EU “harmonised standard” exists, the national requirements for verification of fitness for use do not apply and the German standards are to be regarded as voluntary. It adds that construction products bearing the CE marking may be used **if the declared performance complies with the requirements for the specific use set out in the Building Codes**.

¹ See, for example, *James Elliott Construction Ltd v Irish Asphalt*, and *European Commission v Federal Republic of Germany* Case (C-100/13).

The DBIt has also published a document that tabulates harmonised standards that it considers to be “incomplete”, setting out gaps in the standard and how they might be made good, particularly where products are to be used in a particular situation. Satisfying these additional requirements can then become a *de facto* precondition to obtain building regulations approval from the federal states (Länder).

Examples are:-

- An additional requirement for the structural stability of the assembly where structural timbers, panels and fixings are brought together in a partition.
- Additional requirements for the durability/strength of plasterboard used in walls which may (for example) be required to support shelving.
- The chemical composition of certain products (such as fly ash used in concrete) where it may be in contact with groundwater.
- Particular requirements for products used in zones susceptible to flooding, earthquakes, abnormal snow or wind loads etc.

There are many other examples: the document (which is available only in German) actually covers 81 different standards – approaching 20% of the total number of harmonised standards, in respect of which DBIt is urging reform.

Examples from other EU member states, which frequently apply where products are brought together in assemblies – but where compliance of each individual product with a harmonised standard may still not deliver the performance required of the system, include:-

- Demonstrating the resistance to smoke passage between spaces in buildings, which can lead to additional testing - of fire dampers, for example (Netherlands).
- Where individual components of a fire safety management system are brought together (fire control panel, smoke and heat detection, smoke exhaust activation etc), demonstrating that the products are compatible with each other (France).
- Delamination of laminated timber members – where the structural performance of the timber may be covered by the standard, but where requirements relating to delamination are not (EU-wide).

A body of practice therefore seems to have developed on the principle that national requirements can be layered onto the Construction Products Regulation, even when there is a harmonised standard, where a member state believes that the standard is incomplete, and does not cover all aspects of the performance of a product that might be relevant in a particular situation. In that situation, additional requirements are frequently imposed not through differences in the way that products are regulated, but rather in the requirements that need to be met to obtain building regulations approval.

There is, however, a question as to whether this practice would withstand legal challenge in the European Court of Justice. This is addressed below.

3. Legal framework

3.1 Generally

Policy clearly has to be founded on a complete understanding of the law, and the subject involves EU law, both generally and in the specifics of the regulation of products, and also the law relating to international barriers to trade. Both are specialist areas of the law, and are beyond the competence of the (non-lawyer) author of this paper, and it has proved difficult to obtain consistent, definitive legal advice - partly because of the diversity of practice across the EU, but also because this is a specialist area which has not been much tested in law, so advice based on precedent is also limited.

A brief summary of the law as it is understood is therefore set out below, both as a basis for challenge and as it leads to the conclusions that follow; and it starts with a differentiation between rules operating internationally generally and those operating within the EU.

3.2 International trade generally

Outside of the EU, and in the absence of more specific trade agreements, trade in goods (including construction products) is principally conducted by reference to the World Trade Organisation (“WTO”) Agreement, which includes a specific agreement on technical barriers to trade.²

This agreement specially acknowledges and seeks to preserve WTO members’ right “*to regulate to protect legitimate interests*” and those interests specifically include “*protection of human health or safety*”. There is, however, a parallel objective of “*avoiding unnecessary or discriminatory obstacles to international trade*” and members must be able to justify regulations (including the setting of standards and conformity assessment processes required to confirm compliance).

3.3 Trade between member states within the EU

Trade in construction products within the EU is principally conducted by reference to the Construction Products Regulation – so long as there is a harmonised standard for them.

Where there is no harmonised standard, then there is no prescriptive regulation of products, and trade is presumably conducted in accordance with the WTO Agreement, as both the EU and its individual member states are members of the WTO; and each nation is free to act to protect the health or safety of its citizens, as long as it avoids unnecessary or discriminatory obstacles to international trade.

Where there is a harmonised standard for a group of products, however, then the freedom to impose specific national requirements is more constrained.

As far as the standards themselves are concerned, these frequently cover a range of performances (for example performance of a product in reaction or resistance to fire) and member states can choose the required level of performance in specific applications for the product – but must choose from the options covered by the standard, and conform to definitions, testing methods etc.

The question as to whether a member state might have greater latitude to impose additional national requirements arises in respect of the circumstances illustrated in practical experience, as section 2 above. These include:

- (1) where a standard does not cover a specific performance characteristic at all, and a member state considers that characteristic necessary for public safety across all uses of the product;
- (2) and/or, as a subset of this, where a standard does not cover a specific performance characteristic, and a member state considers that characteristic necessary for public safety in certain defined situations;
- (3) and/or where a standard *does* cover a specific performance characteristic, but a member state considers that some aspect of the standard does not adequately serve public safety in certain defined situations;
- (4) and/or where a member state considers that additional requirements may be necessary to protect public safety when products are assembled in certain combinations, and impose those requirements (possibly including additional testing requirements), even if any or all of the products in the assembly are covered by a harmonised standard.

The other angle that is potentially relevant to all of these situations is whether what might be permissible is influenced by whether additional requirements are implemented not as additional product regulations, but rather as a condition to obtaining building regulations approval.

² See The WTO Agreements Series, Technical Barriers to Trade, Third Edition

As noted above, bringing in additional requirements as part of the process of obtaining building regulations is most routinely practised in Germany. However, one source of informal legal advice taken for the purposes of this paper (also in Germany) is of the opinion that this practice would not survive legal scrutiny if formally challenged in the European Court of Justice.

This is in spite of recital 47 of the CPR, which would appear to make it clear that safety is a Member State responsibility.³ This is, however, interpreted as meaning that a member state can choose the level of performance required in certain situations from the range set down in the harmonised standard – but may not impose a requirement that is outside that range.

In addition to this issue being the subject of ongoing legal proceedings in the EU, it is reportedly a matter of debate in the development of revised EU product regulations, and some member states (including Germany) are arguing for greater freedom to introduce national requirements in the interests of safety. It is not clear what the conclusion of those negotiations might be, nor when they might be concluded, but the advised expectation is that any national freedom to add requirements to harmonised standards will still be conditional upon obtaining specific EU approval.

3.4 Summary of legal position as understood

A summary of the legal position as understood and outlined above is therefore:

- (1) Under WTO rules there are specific provisions allowing a nation state to add requirements justifiably deemed necessary for health and safety purposes.
- (2) The same flexibility applies within the EU where there is no agreed (harmonised) standard, but respecting the principles of the free movement of goods.
- (3) But where there is a harmonised standard, then it seems that that the flexibility for a member state to impose additional requirements is limited – and, subject to legal advice, potentially very limited, notwithstanding the examples differing national practice referred to above.

4. Conclusion

If the balance of legal advice is correct, then the flexibility to add national requirements to the EU regulatory regime is probably too limited (and, in fact, more limited than implied in the Select Committee hearing) to offer a compromise between alignment and divergence with that regime.

It would mean (or could mean, after further litigation or amendment of the regime) that a member state cannot add national requirements for the protection of the public, even where a particular characteristic is not addressed in the harmonised standard or the standard is not considered appropriate in certain built situations..

A case in point (of particular relevance to the fire at Grenfell Tower) could relate to the issue of toxicity. As noted in the product testing review, there is currently no requirement in harmonised/designated standards for products to be tested for toxicity (in the event of a fire, for example), and consideration could be given to introducing such a requirement for certain products in certain situations. The indication of ECJ case C-100/13 is that this would not be permissible.

Even if it were, contemplating such a change would also have to include considering the implications of imposing a new requirement (for example potentially proscribing existing products); the means by which a standard might be developed (given the limitations on BSI's freedom to work on matters that are already the subject of an existing or developing harmonised standard); and the agreement of an appropriate test or other means of satisfying the requirement (without which the requirement itself is impotent).

³ *"The responsibility of Member States for safety, health and other matters covered by the basic requirements for construction works on their territory should be recognised in a safeguard clause providing for appropriate protective measures".* EU Construction Products Regulation 305/2011, recital 47.

Other caveats to the principle of following this route are:-

- (1) It should not be underestimated what resources would be required to create an organisational infrastructure equivalent to that in Germany (where the DIBt is understood to have more than 50 technical committees and more than 500 “honorary” technical experts), including capacity for setting and agreeing standards, testing/assessing performance of individual products and surveilling the market and enforcing regulations
- (2) The other limitations on freedom to impose national requirements would also need to be accepted.
- (3) For example (and again subject to expert legal opinion), the operation of a general safety requirement could be open to challenge if it imposes a higher burden than a harmonised standard, unless and until the EU also extends the general product safety regulations to cover construction products (that possibility currently being under review).
- (4) Similarly, should a product for which there is a harmonised standard be considered safety critical, and not adequately protected by the standard, then raising requirements above the harmonised standard would be open to challenge.

Finally, at some point, the distinction between regulating a product and its application may become a fine line (for example, one EU-based testing house advises that it regularly challenges the adequacy of information results of other Approved Bodies on the grounds that the results do not accurately reflect the fixing method of certain products), and it is difficult to identify exactly where this line is drawn.

This reinforces the importance of establishing the most authoritative legal opinion possible as to precisely whether and how a member state might be free to impose additional national requirements, including addressing the circumstances set out at items (1) to (4) in section 3.3 above – again if that should be the policy objective.

Paul Morrell
Chair, Independent Review of Construction Products Testing Regime
14 January 2024

January 2024