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TG1 – Barriers to Trade Update on Barriers to Use CEN/TR 16410

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CEN/TC 351 workshop, Brussels
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1

Why a CEN Technical Report on Barriers to Use?

- The Mandate M/366 to CEN/TC 351 was issued to remove or prevent barriers to trade in construction products resulting from technical requirements for dangerous substances
- If no barriers to trade existed or were foreseen then there was no work for CEN/TC 351 to carry out
- TG1 took the task to evaluate the situation regarding technical barriers to trade – Published as CEN/TR 15855

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2

Conclusion – from CEN/TR 15855

- Barriers do exist, but there are more “barriers to use” than legally defined [*technical*] barriers to trade
- National legislation can [*of course*] create barriers
- Voluntary schemes and industry initiatives also responsible [*for barriers*]
- Environmental and health protection measures create barriers
- CEN/TC 351 work will go some way towards removing or preventing barriers

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3

Background to TC 351 Mandate

- Although the number of identified technical barriers is small, the number of requirements in the “indicative list” [*relating to dangerous substances*] must give rise to technical barriers, today or in the future
- Harmonisation of test methods *should* remove any existing barriers and help prevent creation of future barriers
- But – legislators must be prepared to adopt the harmonised methods into legislation and accept mutual recognition

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4

Further background ...

- Although not *directly* related to the existing harmonisation work, voluntary schemes and initiatives can become de-facto requirements – maybe even with their own test methods
- Task Group 1 believes that this [*Barrier to Use*] is a significant area which warrants further investigation
- The European Commission agreed

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5

Extension to CEN/TR 15855

- Further examination of the Barriers To Use concept
- To identify the reasons behind them
- To present specific examples
- To examine whether the standardisation work in CEN/TC 351 can influence or eliminate barriers to use related to dangerous substances and construction products

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6

But ...

- Standardisation can only provide the framework for prevention of barriers to use of construction products
- The harmonised test methods of CEN/TC 351 will provide some of that framework insofar as the barriers are of a technical nature and regulatory
- Standardisation can only provide tools but cannot prevent or eliminate voluntary measures or controls that create barriers to use.
- So, what are the barriers to use?

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7

Barrier to Use – a definition

National, local, or industry initiatives, schemes or recommendations, which are not mandatory, but which become accepted or demanded as a minimum requirement for products being placed on the local market. Barriers to Use are often based upon voluntary certification or approval schemes, labelling or information requirements.

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8

Examples

- Collateral warranties (restrictions on use of “deleterious” materials) in the UK
- “Green” product labelling schemes (including Eco-labels)
- Dutch Environmental Certification Label
- European schemes for labelling emissions to indoor air (AgBB, AFSSET, M1 etc)
- Swedish BASTA scheme
- National policy instruments or schemes
- “Industry” as a promoter?

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9

The Collateral Warranty

- A scheme by lawyers to protect the developer's interests
- Prohibition on use of “deleterious materials”
- Originally to prevent use of asbestos or high alumina cement following high cost future compensation claims
- But the list has grown as they are copied by one law firm after another – usually without any justification
- No science, no assessment of potential for exposure or risk

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10

Includes:

- *Calcium silicate bricks or tiles*
- *Lightweight or air entrained concrete bricks or blocks*
- *Polysiocyanurate [sic] foam*
- *Vermiculite plaster*
- *Lightweight or air entrained concrete bricks or blocks*
- *Mineral fibres, man-made or natural ...*
- *Many others including copying of errors!*

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11

But ...

- Many materials are only deleterious if used improperly which would be a breach of the warrantor's explicit duty to employ reasonable care and skill
- The impact is that some materials face barriers to their use since the contractor does not have the knowledge, or the time, to argue the case for using materials in the list

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12

Material labelling schemes

- M1, Finland
- Indoor Climate Label (ICL), Denmark
- AgBB (Committee for Health-related Evaluation of Building Products), Germany
- GuT, Germany (textile floor coverings)
- EMICODE, Germany (products for installation of flooring)
- Blue Angel, Germany
- AFSSET (Agency for Environmental and Occupational Health and Safety), France (now a notified national "Decree" in France)

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Labelling Schemes

- Can they ever be harmonised?

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Regulatory Barriers

- AFSSET was a voluntary proposal but now a French Decree for assessment and labelling of emissions for construction products
- Notified under the 98/34 procedure (TRIS)
- Complaints made that it was a barrier to trade
- "Jumping the gun" on harmonisation?
- Is 98/34 notification and consultation an effective tool for today?

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15

TRIS

- Official position: *"[TRIS] has prevented thousands of new obstacles and new administrative burdens since now 25 years. ... It allows for early identification of potential obstacles, brings Member States together and prevents also "gold-plating". In fact, it looks very technical – but this directive has created a truly European success story."*
- The notification procedure only works when there is a willingness of the Member States to use the comment period to really assess the impact of their proposals – what happens in those cases where there is a perceived or possibly clear intent of unilaterally raising requirements in that country to the detriment of supplies originating elsewhere?

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Green public procurement

- At the EU level, current Green Public Procurement (GPP) policies are all of a voluntary nature
- A very laudable objective but a problem: the lack of harmonised GPP criteria creates the potential for barriers to trade or barriers to use of products. It paves the way for either national programmes or environmental lobby groups to push for criteria that may also include specific reference or controls on release of dangerous substances – long before we even have the harmonised tools at our disposal for assessing emissions.

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17

To be contentious ...

- Barriers to use are probably as extensive (or more so) than technical barriers to trade
- Although originating in voluntary or "non-regulatory" requirements, they often become de-facto market requirements
- Sometime "driven" by industry itself?
- Market protection?

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18

And ... a couple of thoughts

- Does TRIS (98/34 procedure) really work when a Member State simply “follows the rules”?
- Can the “Green movement” of GPP and environmental labelling ever be free of potential barriers?
- How do we deal with private contractor’s or developer’s or even national regulatory “protection” from liability?

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19

Thank you

Discussion

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20