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Statement of the German Institute for Quality Assurance and Certification (RAL Deutsches Institut für Gütesicherung und Kennzeichnung e. V. – RAL) on the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011, 2022/0094 (COD)

The German Institute for Quality Assurance and Certification (RAL Deutsches Institut für Gütesicherung und Kennzeichnung e. V. – RAL) acknowledges, with great interest, the Proposal put forward by the European Commission for a Regulation of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011 (hereinafter referred to as the "Proposed Regulation"). RAL hereby issues a statement in response thereto, both in its own name but also in its capacity as the umbrella association for the 115 RAL Quality Assurance Associations (*Gütegemeinschaften*) comprising more than 9.000 member companies.

As we will demonstrate in detail in the following, RAL has substantial concerns with regard to the proposal as it currently stands and therefore sees an urgent need for a number of amendments to the text.

- The **prohibition of the use of private markings** enshrined in Article 18(1) of the Proposed Regulation goes significantly beyond the rules governing the relationship between CE markings and other markings generally applied to date. Pursuant to the existing rules, CE markings are the only markings which attest to the conformity of a product with the requirements of the provisions of the harmonisation legislation. In addition, these provisions stipulate that any possibility of confusion must be excluded and the perception ensured effectively. However, the Proposed Regulation will also prohibit other markings "covering" the same area of activity.

- Article 18(1) of the Proposed Regulation essentially means the **end of many private marking systems,** in that it would ultimately preclude the use of private markings for construction products to a considerable degree, even where these have a different regulatory purpose and apply different standards and thus serve to attest to the existence of different product characteristics. This is due to the fact that the Proposed

Regulation will preclude, in particular, the use of markings which relate to the same characteristics and the same assessment methods, irrespective of the aspects of said characteristics which are being assessed or the end to which the assessment methods in question are being applied.

- There is, however, **no need and no justification** for the prohibition of the use of private markings, given that these – in contrast to mandatory rules of a Member State – do not impact the marketing of construction products. It is rather the case that private markings provide added value for customers in having a very different focus than CE markings (e.g. in that they attest to the existence of a particularly high degree of excellence).

- The first paragraph of Article 18 and the second clause of Article 7(2) of the Proposed Regulation also **run counter to the provisions of Union law on public procurement** which expressly provide for reference to private markings (labels).

- The **prohibition of claims about a product that are based on other assessment methods** pursuant to the first clause of Article 21(2) of the Proposed Regulation should also be substantially revised. The scope of the prohibition must be clearly delineated, given that it currently relates to all claims and documents and not merely to declarations of performance. Moreover, the satisfaction of the requirements with regard to product claims must be achievable at a realistic and economically acceptable level of expense and risk.

We are happy to share our expertise and kindly ask that we once again be permitted to participate in the further course of the legislative process.

Specifically:

1. RAL Quality Assurance

The RAL quality assurance system has traditionally been an **important element of self-regulation.** Almost one hundred years ago, there was already awareness of the need, driven by rationalisation considerations, to lay down uniform technical and quality requirements for certain products and services. To this end, the relevant economic players – under the auspices of RAL – channel their technical expertise into the RAL rules and standards (RAL Quality Assurance), which they then voluntarily undertake to apply and observe. Non-compliance may be met by the imposition of sanctions.

RAL Quality Marks relate to objectively measurable characteristics of products and services. Quality and Testing Specifications are laid down in consultation with the affected professional and trade groups and are published in the German Federal Gazette (*Bundesanzeiger*). RAL Quality Marks **always confirm the existence of a certain degree of excellence and/or superiority** of products and services. They therefore do not simply attest to conformity with minimum requirements arising pursuant to normative or legislative standards.

There are currently 115 different RAL Quality Assurance Associations with 149 different RAL Quality Marks and approximately 9,000 members. RAL Quality Marks serve as a guide through a veritable jungle of markings for consumers, companies and public authorities alike. RAL organises and safeguards this process and monitors **compliance with the rules on a purely private law basis.** Continuous updating of the rules and standards ensures constant innovation.

2. Prohibition of the use of private markings – Article 18 of the Proposed Regulation

a. Extensive scope of the proposed prohibition of the use of markings

Article 18 of the Proposed Regulation provides for a far-reaching prohibition of the use of other markings. In particular, the wording of this provision is considerably **broader**

in its scope than that of Article 30(4) and (5) of Regulation (EC) No 765/2008[1] to which Article 8 of Regulation (EC) No 305/2011 refers. These two paragraphs merely preclude the use of markings which also attest to the conformity of a product with the relevant harmonisation legislation, or could either be mistaken for or compromise the perception of a CE marking:

> *(4) The CE marking shall be the only marking which attests the conformity of the product with the applicable requirements of the relevant Community harmonisation legislation providing for its affixing.*
>
> *(5) The affixing to a product of markings, signs or inscriptions which are likely to mislead third parties regarding the meaning or form of the CE marking shall be prohibited. Any other marking may be affixed to the product provided that the visibility, legibility and meaning of the CE marking is not thereby impaired.*

The prohibition of the use of markings goes beyond these provisions in a number of ways. First of all, the second paragraph of Article 18 of the Proposed Regulation contains a very specific provision which ensures the **visibility of the CE** marking. This degree of specification – as compared to the rather more abstract wording in Article 30(5) of Regulation (EC) No 765/2008 – is fundamentally a welcome development. However, it is debatable whether compliance with the provision regarding to the spacing of the different markings will be feasible in practice (particularly in the case of smaller packaging).

Secondly, the first paragraph of Article 18 of the Proposed Regulation prohibits the use of any marking which covers or refers to "*harmonised technical specifications or to product requirements or essential characteristics or assessment methods included in the harmonised zone*". The prohibition goes beyond that provided for in Article 30(4) of Regulation (EC) No 765/2008, which merely precludes the use of other attestations as to the conformity of the product with the harmonisation legislation. However, the Proposed Regulation will also prohibit **other markings which "cover" the same area**

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1 Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ 2008 L 218/30.

of activity. It is unclear whether this is meant to encompass all substantive overlaps, i.e. also partial overlaps (with regard to product requirements, essential characteristics and assessment methods).

Should such a broad interpretation be adopted, the use of optional **private markings that also relate to an essential characteristic** of a product could be deemed to constitute an infringement of the prohibition of the use of markings. Given that the term "essential characteristic" comprises (pursuant to Article 3(7) of the Proposed Regulation) all characteristics of a product which relate to the basic requirements for construction works, this would preclude the use of **practically all relevant markings for construction products.** This is due to the fact that virtually all relevant characteristics of construction products relate to the basic requirements for construction works.

Moreover, the use of all markings which use assessment methods included in the harmonised zone (i.e. based on harmonised technical specifications) would be precluded. It is unclear why the **use of certain assessment methods for markings** should be precluded simply because a harmonised technical specification already applies the same method, particularly where this is done with regard to a different essential characteristic or for a different product.

b. Uncertainty as to the subject matter of the prohibition

As has been demonstrated in the foregoing, not only is the prohibition of the use of markings very broad in its scope; it is also unclear under what specific circumstances the use of a marking will be deemed to be impermissible. This relates, for example, to the question of whether the use of a marking will be prohibited where it only marginally touches on, or encompasses only some, product requirements, essential characteristics or assessment methods.

In particular, the subject matter of the clause "*included in the harmonised zone*" (first paragraph of Article 18) is unclear. This limitation could relate to either merely the words "assessment methods" or also to the words "essential characteristics" and

"product requirements", and possibly also to the aforementioned "harmonised technical specifications".

Should the prohibition of the use of markings in the first paragraph of Article 18 of the Proposed Regulation generally be retained, the subject matter of that prohibition will certainly require clarification. Otherwise, it could give rise to considerable uncertainty as to which markings other than CE markings it will still be possible to use in the future.

c. Prohibition of the use of private markings neither justified nor necessary

Numerous private product markings (in particular, labels) have become established and are valued in the market as a reliable source of orientation and quality endorsement. A far-reaching prohibition of the use of markings (such as that provided for in the first paragraph of Article 18 of the Proposed Regulation) would entail a preclusion of the **use of private assessment and marking systems,** which would ultimately sound the death knell for such systems. As we will demonstrate in greater detail in the following, this prohibition, which significantly restricts both manufacturers and scheme owners and encroaches upon the self-regulation of the economy, is neither justified nor necessary:

It is unclear why private markings should be prohibited. In particular, there are **no grounds for taking the view that private markings run counter to the objectives of the Proposed Regulation**. According to Recital 106 of the Proposed Regulation, its objectives comprise ensuring the free circulation of construction products, the protection of human health and safety, and the protection of the environment. Neither the Impact Assessment nor the Recitals can be interpreted as implying that the use of private markings would jeopardise the attainment of these objectives.

There can be no question of the use of private markings having the effect of restricting access to the market given that such use is optional. The use of **private markings** is generally **not a prerequisite for market access,** except where an official regulation contains a reference to private markings. The prohibition of the use of private markings

is therefore not necessary to ensure the free circulation of construction products. It is also not justified on these grounds.

The use of private markings may actually improve the **protection of both human health and safety and the environment,** given that they help to provide customers with better information. It being the case that the subject matter of private markings differs from that of CE markings (e.g. attestation of the existence of a particularly high degree of excellence), they provide **added value for customers,** even if there may on occasion be some overlap. The prohibition of the use of private markings also cannot be justified on these grounds.

The **existence of private markings does not undermine the relevance of CE markings.** This is already ensured by the provisions of Article 30(4) and (5) of Regulation (EC) No. 765/2008. Pursuant thereto, CE markings are first of all the only markings which attest to the conformity of a product with the requirements of the provisions of the harmonisation legislation. Secondly, these provisions stipulate that any possibility of confusion must be excluded and a positive perception ensured.

The prohibition **also runs counter to the provisions of Union law on public procurement.** Pursuant to Article 43 of Directive 2014/24/EU[2] and Article 61 of Directive 2014/25/EU[3], contracting authorities procuring construction services may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as proof of the satisfaction of certain requirements. This possibility would no longer be available to such contracting authorities were the use of markings for construction products to be largely precluded. Although the second clause of Article 7(2) of the Proposed Regulation will in any case generally prohibit the stipulation by contracting authorities of product requirements which exceed those in the harmonised zone, it is unrealistic to expect contracting authorities to set product requirements solely in accordance with harmonised technical specifications. They

2 Directive 2014/24/EU of the European Parliament and of the Council of 26/02/2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

3 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ 2014 L 94/243.

must also be able to stipulate requirements as to the specific form or workmanship of construction products (e.g. windows or exterior facings) that go beyond those in the harmonised zone. Furthermore, contracting authorities should be able to demand a particular level of quality of construction products and labelling as proof thereof.

Moreover, the first paragraph of Article 18 of the Proposed Regulation would result in **European Union certification marks,** which were only introduced a few years ago, **no longer being eligible for use for construction products.** The Union legislator has, in Regulation (EU) 2017/1001[4], provided a means of registering a certification mark for goods or services which are **certified** by the proprietor of the mark as possessing **special characteristics** – in particular, as regards their material composition, mode of manufacture (goods) or performance (services), quality or accuracy. The regulations governing its use must specify the persons authorised to use the mark, the characteristics to be certified by the mark, how the certifying body is to test those characteristics and to supervise the use of the mark.[5] The far-reaching nature of the prohibition of the use of markings in the first paragraph of Article 18 of the Proposed Regulation – as addressed in the foregoing – would preclude any use in the market of such marks for construction products.

There is therefore no objective justification for the severe encroachment represented by the first paragraph of Article 18 of the Proposed Regulation. The Proposal also fails to take account of the fact that the implementation of this provision would mean that the Union legislation governing labels and certification marks would no longer be applicable to construction products.

d. No legal basis for prohibition of the use of private markings

The prohibition of the use of private markings for construction products pursuant to the first paragraph of Article 18 of the Proposed Regulation is also not supported by Article 114 TFEU, given that it is not necessary for the implementation of the internal market. As has been demonstrated in the foregoing, there is nothing to indicate that

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4 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ 2017 L 154/1.

5 First sentence of Article 84(2) of Regulation (EU) 2017/1001.

the use of optional private markings hinders or constrains the marketing of construction products, particularly as they are not a prerequisite for market access.

It is also not apparent that the Union legislator intends the Proposed Regulation to serve as a means of harmonising the legislation of the Member States with regard to private markings, or indeed – assuming such legislation actually exists – why this should be necessary. Rather, the Proposed Regulation is essentially intended to improve the functioning of the internal market for construction products by eliminating or precluding governmental requirements as regards construction products. However, it being the case that optional private markings for construction products play a role which is different to that of governmental requirements as regards construction products, and do not have the effect of restricting access to the market, the Union legislator likewise cannot refer to Article 114 TFEU for support for the provisions with regard to private markings. In the interests of completeness, we would like to clarify that the prohibition of the use of private markings would also not be justified on any other legal grounds.

e. Proposal for amendment

We therefore suggest that Article 18(1) of the Proposed Regulation be amended as follows:

"Markings other than the CE marking, which have been established by public bodies ~~including private ones~~, may be affixed on a product only if they do not cover or refer to harmonised technical specifications or to product requirements or essential characteristics or assessment methods included in the harmonised zone."

3. Prohibition of declarations made on a different basis – the first subparagraph of Article 21(2) of the Proposed Regulation

Pursuant to the first subparagraph of Article 21(2) of the Proposed Regulation, manufacturers are prohibited from making any claims about the characteristics of a product that are not based on an assessment method which is contained in a harmonised technical specification or *"represents the most effective and advanced method to achieve an accurate assessment"*. This prohibition is not limited to specific

declarations or documents, with the result – on a non-restrictive interpretation – that it generally encompasses claims about product characteristics even though the Regulation does not contain any provisions in this respect, and such provisions may be adopted on the basis of the Regulation. The precise scope of application here should therefore be clarified, for example by means of its limitation to claims made in the declaration of performance.

It is furthermore conceivable that, due to the broad wording of the provision, the first subparagraph of Article 21(2) of the Proposed Regulation could also apply to private markings (e.g. labels), given that, in affixing labels to their products, manufacturers are also making claims about the characteristics of those products. The relationship of the first subparagraph of Article 21(2) to the first paragraph of Article 18 of the Proposed Regulation is thus in need of clarification.

It would also not be reasonable to demand that every claim about product characteristics (even those made outside of the context of declarations of performance) be based on the "*most effective and advanced method*". This wording implies that claims made in accordance with "generally accepted technical standards" or the "state of the art" are inadequate. Pursuant to Article 21(2)(b) of the Proposed Regulation, claims would have to be made on the basis of the most advanced scientific methods, even where these have not yet been tested in practice. This would result in a significant rise in costs for companies and also – due to the untested status of the methods in question – considerable liability risks.

The first subparagraph of Article 21(2) should therefore be revised to clearly define the scope of application of the prohibition and to ensure that the satisfaction of the requirements with regard to product claims must be achievable at a realistic and economically acceptable level of expense and risk. The provision could **sensibly be refined and clarified by means of the following minor amendments:**

"*The manufacturer shall refrain from any claim about the characteristics of a product in the declaration of performance that is not based on: [...]*

a) the assessment method contained in a harmonised technical specification where the relevant characteristic is covered by such; or

b) where no such assessment method exists, an assessment method which reflects the state of the art and represents the most effective and ~~most advanced~~ method to achieve an accurate assessment."

In addition, the **term "state of the art" in Article 3(32)** of the Proposed Regulation would have to be defined differently, for example as follows:

"'state of the art' means a way to achieve a certain goal which ~~is~~either ~~the most effective and advanced~~reflects an advanced stage of development which is predominantly recognised as secure and has been tested in practice, or comes close to this~~it~~ and is thus above the average of ways which can be chosen;"