CIB W 92 - Procurement Systems

THE IMPLEMENTATION OF THE EC CONSTRUCTION PRODUCTS DIRECTIVE IN THE UK

by

ANTHONY LAVERS

CIB Working Commission W-87
On Post-Construction Liability & Insurance

Plenary Session 28th ~ 29th November 1991
Las Palmas, Gran Canaria.

The Implementation of the EC Construction Products Directive in the UK

by Anthony Lavers LL.B M.Phil Ph.D

Fishburn Boxer Reader in Law
Department of Estate Management
Oxford Polytechnic

"Recently I signed the regulations which implement the EC Construction Products Directive in the UK .... For the construction industry the directive is probably the single most important measure so far to emerge from the EC's single market programme"
~ Michael Heseltine
(Euronews Construction Issue No. 15 ~ September 1991)

"It is time we all understood what these directives are. When they are issued by the Council of Ministers in Brussels they become part of our law. Not only that, but, if we do anything or pass anything that is inconsistent or in conflict with it, the directive governs .... These directives are very important, affecting all our law"
~ Lord Denning
(House of Lords debate on Consumer Protection Bill 1986)

THE CONSTRUCTION PRODUCTS DIRECTIVE AND CONSUMER PROTECTION OBJECTIVES

The Construction Products Directive is an example of European legislation based upon a consumerist policy; namely to afford a minimum level of protection to consumers using or potentially at risk from defective products. The preamble to the Directive refers to the opinion of the EC's Economic and Social Committee that

> "Member States are responsible for ensuring that building and civil engineering works on their territory are designed and executed in a way that does not endanger the safety of persons, domestic animals and property, while respecting other essential requirements in the interests of general well-being."

The preamble to the Directive contains another significant passage noting that

> "Member States have provisions including requirements, relating not only to building safety, but also to health, durability, energy economy, protection of the environment, aspects of economy, and other aspects important in the public interest ... often the subject of national provisions laid down by law, regulation or administrative action ... reflected in national product standards, technical approvals and other technical specifications and provisions which, by their disparity, hinder trade within the Community."

The combination of these ideas gives the key to the purpose of the Directive. There is a perceived common need to ensure that building and engineering works do not endanger safety of persons or property. The Member States have legislation and other mechanisms in place to secure this, but they are disparate. Their disparity is potentially inconsistent with the two principal aims of the EC as set out in the Treaty of Rome viz:

to promote competition and the conditions for a fair internal market.

- to give to consumers (ie clients, purchasers, tenants, users) a high level of protection.

The Construction Products Directive seeks to achieve uniform minima of consumer protection in respect of the essential requirements and to eliminate disparity which is inconsistent with fair internal competition.

The concept of EC legislation impinging upon UK law, so as not merely to cover new areas, but to extend and change the existing substance, is not so long established as to be familiar. Nevertheless, there is a precedent for EC intervention by directive in UK consumer legislation. This is the Product Liability Directive (85/374/EEC) of the 25th July, 1985. Its conception and translation into UK legislation have certain analogous features which make it useful as a model both for comparison and contrast.

THE PRODUCT LIABILITY DIRECTIVE

The Consumer Protection Act 1987 was the result of the conjunction of two influences. First, there was a clear desire in the UK to reform the law relating to consumer protection. During the previous 15 years, this desire had prompted the enactment of such legislation as the Trade Descriptions Act 1972, the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979, and the Supply of Goods and Services Act 1982, and both lacunae in the coverage and the need for revision were evident. The second influence, an influence without which the Act would not have been passed either at that time or in that form, was European.

The history of consumer protection in the EC commences with a resolution of the European Council on 14th April, 1975, concerning a preliminary programme for a protection and information policy for the consumer. In 1976 the Commission of the EEC pointed out that differing national laws on product liability could lead to a distortion of competition and also expressed concern that there should be equal protection for consumers within the Community.

The draft of the Directive provoked much debate across the community, especially from organisations, such as the Confederation of British Industry, which was concerned that too much liability was placed upon producers. The English and Scottish Law Commissions and the House of Lords Select Committee on the European Communities were of the opinion that the proposal was too wide and concern was expressed about the sovereignty of national legislatures, in that the Directive was required to be incorporated into the national law of Member States, albeit with discretion as to how. Article 189(3) of the EEC Treaty states that

> "A directive shall be binding as to the result to be achieved upon each member state to which it is addressed, but shall leave to national authorities the choice of form and methods."

When the Product Liability Directive was issued on 25th July, 1985 as Directive 85/374/EEC, it had been amended to take account of the criticism by permitting derogation ie. allowing discretion as to the inclusion or exclusion of certain parts of the directive according to the wishes of individual Member States. For example, the defence of development risk could be incorporated by those member states wishing to do so. Member States, including Britain, were required to act within 3 years from the date of the Directive to introduce legislation to comply with it.

Summary of Contents of the Product Liability Directive

Parties concerned (Articles 1 and 3)

Producer	A manufacturer of a finished product/component, a producer of raw material, a person fixing a trade mark, etc.
Importer	One who imports into the EC a product for sale, hire, leasing or distribution in the course of a business.

Supplier — Where the producer or importer cannot be identified by the injured party.

All these are treated as producers for the purposes of the Directive and are liable for damage caused by defective products.

Product (Article 2)

All moveables which have been industrially produced. This applies to movables used in the construction of or installed in immoveables.

Defective (Article 6)

A product which does not provide the safety which a person is entitled to expect taking into account circumstances of presentation, use to which it can reasonably be expected to be put, and the time that the product was put into circulation.

Damage (Article 9)

Death, personal injury, damage to property other than the defective product, provided that the item damaged is of a type ordinarily intended and mainly used for the injured party's private use.

Burden of proof (Article 4)

The injured party is required to prove damage, defect, and causal relationship.

Defences (Article 7)

a) That the defendant did not circulate the product.
b) That it is probable that the defect did not exist at the time of circulation.

c) That the product was not manufactured for sale/economic distribution.

d) That the defect was due to compliance with mandatory regulations of public authorities.

e) That the product was built at the state of the art.

f) That the defect was in the design of a product rather than the component fitted into it.

Limitation (Article 10 and 11)

An action must be brought within 3 years of the date on which the plaintiff became aware or should reasonably have become aware of the damage, defect and identity of producer.

Exclusion of liability (Article 12)

Producers may not rely on provisions limiting or excluding liability.

In Parliament, there was disquiet about the effects of the Directive upon English law, notably relating to the repeal of the Trade Descriptions Act 1972, and concern was expressed at the Government's apparent alacrity in acquiescence with the EC position that it contravened EC policy. This was seen as an acquiescence made without any significant attempt to protect British rights, or allowing British consumers the added protective measure of being able to make an informed choice in respect of goods purchased. The insidious effect of an EC directive on UK consumer law was highlighted in the House of Lords debate by Lord Denning. He felt that it was

"time we all understood what these directives are. When they are issued by the Council of Ministers in Brussels they become part of our law. Not only that, but if we do anything or pass anything that is inconsistent or in conflict with it the directive governs ... but where is it to be found? ... These directives are very important, affecting all our law. Yet we have to search around and have copies made in the basement ... Those who have to consider the Bill, and the courts which have to consider the Act, when it is passed, ought to have before them the directive on which it is based."

The bill was enacted as the Consumer Protection Act 1987. Its key provision, from the point of view of technical harmonization measures, is the granting of power under section 11 to the Secretary of State to make **safety regulations**. These may contain provisions with respect to the content, design, construction, finish, or packing of goods, approvals, testing, and inspection of goods, any marks or instructions to be put on or accompany them, and any controls over the supply of goods. Thus, safety regulations can encompass any regulations made to enact essential requirements, attestation of conformity provisions, or provisions concerning the use of the CE mark that are required by directives produced under the new approach to technical harmonization.

The Act creates a number of offences. Section 10 makes it an offence to supply consumer goods which fail to comply with the general safety requirements, offering or agreeing to supply such goods, or exposing or possessing such goods for supply. Section 12 creates the offences of supplying goods where prohibited by safety regulations,contravening safety regulations that require a mark or particular kinds of information, failing to carry out tests or procedures required by safety regulations, and failing to give the information required by a safety regulation. Section 3 defines a defect in such a way as to take into account the use of any mark in relation to the product and any instructions and warning given with it. Thus, the Act would appear to provide a basis for implementing new approach directives by creating offences that could be applied to their essential requirements and atteatation of conformity provisions.

The Act creates various powers of enforcement including:-

- prohibition notices, which prevent the supply of unsafe goods.

- notices to warn, which require a person to publish at his own expense a warning about unsafe goods.

- suspension notices, which prevent a person from supplying specified goods for up to 6 months.

- the forfeiture of goods on the grounds that there has been a contravention of a safety provision.

- the obligation to provide information or to produce records on being served a notice by the Secretary of State.

The contravention of notices can result in a fine of up to level 5 on the standard scale and/or up to 6 months imprisonment, with there being similar penalties for offences against safety regulations and similar fines for supplying false or recklessly furnishing false information. Appeals can be made against suspension notices and against the detention of goods. Enforcing authorities are liable to pay compensation for the seizure and detention of goods where there has been no contravention of any safety provision. If a person is convicted of a contravention of any safety provision or a forfeiture order is made, the court may order the offender to reimburse the enforcing authority for any expenditure incurred in connection with the detention or forfeiture of the goods.

Enforcement is by the weights and measures authorities in Great Britain (district councils in Northern Ireland). They can make purchases and undertake tests of goods, enter premises, require the production of records, and seize goods or records. Custom officers can seize imported goods and detain them for two working days. The Act creates penalties of impersonating an officer of an enforcement authority and obstructing an authorised officer.

The Consumer Protection Act has supplied the model for enforcing regulations to implement new approach directives in the UK.

THE CONSTRUCTION PRODUCTS DIRECTIVE AND THE CONSTRUCTION PRODUCTS REGULATIONS

The Product Liability Directive required legislation to implement it. It is a characteristic of directives that they do not take effect in the national law of Member States, but require the enactment within a specified period of measures which produce consistency between Directive and national law. This was achieved by the Consumer Protection Act 1987. The Construction Products Directive also requires UK legislation to implement it and this has been done by statutory instrument under s.2(2) of the European Communities Act 1972: the Construction Products Regulations 1991. The Construction Products Directive gave Member States thirty months from its notification to "bring into force the laws, regulations and administrative provisions necessary to comply with the provisions of the Directive." Notification was on the 27th December, 1988 and the Construction Products Regulations would have had to have been produced by 27th June, 1991 to have complied within the dead-line. This was not achieved in the UK. Nothing is likely to turn upon the minor transgression of the time limit. The Regulations appeared on 15th July 1991 and come into force, by Regulation 1, on 27th December, 1991, three years after the Directive. Theoretically, action could be taken against a transgressing government, but the time taken to mount such an action often means that implementation would have taken place well before the action comes to trial before the European Court.

LEGAL LIABILITY AND THE CONSTRUCTION PRODUCTS REGULATIONS

John Barber (1991) concludes that contracts and other forms of legal obligation are inadequate to assure quality. He gives a reminder of the truism that

> "the courts will not ensure that a contract to construct a sewage treatment works actually results in the sewage treatment works being completed on time and in accordance with the specified requirements".

The Construction Products Directive and the Construction Products Regulations would similarly be incapable of implementing the EC's policy if they were only enforcement mechanisms, or their chief purpose was to add to existing systems of enforcement. Key areas of the Directive and the Regulations are concerned with the concepts of product standards and the setting up of procedural systems to validate and approve those standards. This is all predicated upon the assumption that in developed, industrialised nations like the EC Member States, with construction industries which are in the main highly sophisticated, there will be both the capacity and the will to achieve a high degree of compliance with the standards produced by these procedures. So it is not the case that the EC, or the British Parliament, believes that legal weaponry could achieve its quality objectives or that legal remedies are capable of producing better buildings.

The fact that legal mechanisms are incapable of ensuring the achievement of quality does not mean that quality management and its failures are legally neutral. The Construction Products Regulations themselves, in implementing the Directive, create legal consequences. Beyond the legislation itself, but resulting from it, are other potential legal consequences. These variants of legal liability are dealt with in two the next two sections.

The Construction Products Regulations create a number of offences, principally that of supplying a construction that when incorporated into a building or construction works results in them failing to meet the **essential requirements.**
The penalty is a fine of up to scale 5 on the standard scale and/or up to three months imprisonment. It should be noted that Regulation 27 states that where a corporate body is guilty of an offence under the Regulations, which is shown to have been committed with the consent of or is attributable to one of its officers, proceedings can be taken against that officer. Until other Member States take action to bring the Construction Products Directive into force, it will not be apparent whether the penalties in the UK legislation are comparable with those in other Member States. Differences in penalties could distort trade in construction products but the Directive contains no provisions for their harmonization.

The presence of the CE mark (described as an EC mark in the Regulations) creates the presumption that the product has complied with the relevant directives. Member States are obliged to ensure that the CE mark is correctly used. Regulation 4 creates the offences of:-

- making an EC declaration of conformity for a product that has not met the requisite technical specifications or attestation of conformity provisions.

- affixing the CE mark to a construction product that has not met the requisite technical specifications or attestation of conformity provisions.

- affixing a mark to a construction product that is likely to be confused with the CE mark.

- importing a construction product for supply within the EC to which has been affixed outside of the EC a mark that is likely to be confused with the CE mark or a CE mark when it has not met the requisite technical specifications or attestation of conformity provisions.

The penalties for these offences are a fine of up to level 5 on the standard scale and/or up to three months imprisonment.

Under Regulation 26 a defence exists to the offences created by the Regulations that the person took all reasonable steps and exercised all due diligence to avoid committing the offence. The offering of this defence by alleging that the commission of an offence was due to an act or default by another or by reliance on information from another is permitted only if a notice is served on the person bringing the proceedings at least 7 days before the hearing identifying the other person.

Regulation 8 lists as acceptable defences:-

- reasonable belief that the product would not be used in the EC.
- the product was supplied in the course of carrying on a general retail business and there were no reasonable grounds for believing that the product failed to satisfy the Regulations.
- the product was not supplied as a new product and provided for the acquisition of an interest in the product by the person supplied.

ENFORCEMENT OF THE CONSTRUCTION PRODUCTS REGULATIONS

The most significant parts of the Construction Product Regulations are concerned with the concept of fitness for use, according to the criteria set out by the essential requirements, and with the affixation and meaning of the CE mark. The enforcement provisions of the Regulations are basically aimed at suppliers.

The whole coverage of the Regulations is based upon "supply" of goods and the necessity to ensure that they are fit for their purpose within the meaning of the essential requirements. Supply is defined in Regulation 2 as consisting of

> "offering to supply, agreeing to supply, exposing for supply and possessing for supply, and cognate expressions".

The Directive uses the more restrictive term, "placed on the market", rather than supply, which would allow certain non-commercial ways of supplying construction products to escape regulation. There is some overlap with the Consumer Protection Act 1987 extension of its definition of producers who may be liable for products to

> "any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product" [and] "any person who has imported the product into a member State from a place outside the member States in order, in the course of any business of his, to supply it to another."

POWERS OF ENFORCEMENT

The liabilities that can occur under the Regulations correspond to some extent to the enforcement powers given to the enforcement authorities and also with equivalent provisions in the Consumer Protection Act 1987. These enforcement powers fall into four categories.

Prohibition notices/notices to warn

Prohibition notices are a device found in similar form in the Consumer Protection Act (s.13), where they are defined as notices prohibiting persons (except with the consent of the Secretary of State) "from supply, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply" goods which contravene the legislation. Regulation 9 of the Construction Products Regulations defines them as prohibiting the person, except with the consent of the Secretary of State, " from supplying any construction products which the Secretary of State considers do not satisfy the relevant requirement" ie. the essential requirements.

Notices to warn (also found in s.13 of the Consumer Protection Act) are described as " a notice ... requiring [a] person at his own expense to publish, in a form and manner and on occasions specified in the notice, a warning". In the case of the Construction Products Regulations they warn as to the inadequacy of the product with respect to one or more of the essential requirements.

Suspension notices

An enforcement authority may, where a contravention of the Regulations has taken place, or where it has reasonable grounds for suspecting it, serve a suspension notice upon a supplier under Regulation 10. The effect of the notice is to ban a supplier from supplying the goods which breach the Regulations. The maximum duration of the effectiveness of the notice is six months. The notice should contain a description of the goods sufficient to identify them, the grounds on which the contravention is alleged, and details of the right of appeal. Note that no further suspension notice can be served at the end of the period it is in force unless proceedings are pending at that time in respect of contravention. As with the contravention of the prohibition notice or notice to warn, the penalty for the offence of breaching a suspension notice is imprisonment not exceeding three months or a fine not exceeding level 5 on the standard scale, or both. The Directive requires Member States to inform the commission of any action taken to prevent the placing on the market of products that are declared to be in conformity with it. The Secretary of State must be notified of suspension notices so that he can inform the Commission (see section 10.3.6).

There is an aspect of suspension notices which may well inhibit their use.
If there has been no contravention and there has been no default or neglect by the recipient of the notice, the enforcement authority shall be liable to pay compensation to any person having an interest in the goods. Any question of right or amount is to be referred to arbitration (in Scotland by an arbiter appointed by the Sheriff), but it is simply defined as "any loss or damage caused by reason of the service of the notice". This is very wide ranging and appears potentially to include consequential ie. economic loss. Nor is it mere supposition to expect that this may act as an inhibition to action by enforcement authorities. An analogous power exists in planning law for the purposes of enforcement of development control. It is called a stop notice and can be served in conjunction with an enforcement notice to put an immediate stop to a breach of development control, whereas the activity could continue if no stop notice was served pending an appeal against the enforcement notice. If the enforcement notice appeal subsequently succeeds, so that the stop notice is shown, retrospectively, to have been unjustified, the planning authority (the exact equivalent of the enforcement authority) is liable to pay compensation for loss or damage caused by compliance with the stop motice. In the case of *Barnes* v *Malvern Hills District Council* (1984), the local authority was held to be obliged to pay compensation including liability in liquidated damages under a building contract. A period of up to six months prohibition from supplying a product could result in the supplier suffering very considerable economic loss, not least through contractual liability to customers for breach of a pre-existing supply agreement.

Forfeiture

As with the Consumer Protection Act, the Construction Products Regulations contain provision in Regulations 12 and 13 for the forfeiture of construction products which contravene the Regulations. This is to be done by application for an order to the Magistrates Court in England, Wales, or Northern Ireland by the enforcement authority (Regulation 12) or in Scotland by application by the Procurator-Fiscal to the Sheriff (Regulation 13). The order may specify the destruction of the contravening products or their release to a specified person upon conditions. Conditions can include their release for scrap or for repairing or reconditioning. The enforcing authority can seek to recover the costs it has incurred in forfeiture from persons having an interest in the goods.

Other enforcement powers

The enforcement authorities (local weights and meazsures authorities or district councils in Northern Ireland) enjhoy a number of other powers under the Regulations. These are in many respects ancillary to the principal enforcement powers considered above, but are significant enough to warrant separate mention:-

a) **Obtaining information.** By Regulation 14, the Secretary of State can serve a notice upon any person requiring them to furnish necessary information within a reasonable time, including the production of records. Failure to do so within the specified time or misleading information would constitute an offence. One purpose of this weapon is to enable the government to respond directly to requests for action form the Commission or from other Member States. It should also be noted that there are no central registers of records generated by the attestation of conformity provisions of the Directive so that enforcement would be problematic without the right to gain access to appropriate records held in private hands. Regulation 6 requires those affixing the CE mark or importing CE marked products into the EC to keep declarations and certificates of conformity for 10 years after affixing or supply respectively. The procedure is similar to that given to planning authorities by the planning contravention notice procedure instituted by the Planning and Compensation Act 1991, which empowers them to seek information from an owner suspected of a breach of planning control, where they are acting upon a report and need further evidence. There are also equivalent provisions in the Consumer Protection Act. Those supplying information are protected from its wrongful disclosure by making such disclosure an offence punishable by a fine of up to level 5 on the standard scale and/or two years imprisonment.

b) **Test Purchases.** As under s.28 of the Consumer Protection Act, the Construction Products Regulations provide for enforcement authorities to purchase samples of products for testing to see whether they comply with the regulations. Test purchases are governed by Regulation 16. Again, the identity of " any person" may be crucial because they may also be entitled to have the products tested where the enforcement authority make such a purchase.

b) **Search.** Duly authorised officers of the enforcement authority may enter any premises, except a residence, at any reasonable hour to inspect goods, examine production or testing procedures, or check records. This is governed by Regulation 17 and is based upon the Consumer Protection Act equivalent. This is an important power as without it enforcement authorities would lack the means to check that attestation of conformity procedures are being properly followed.

c) **Detention by Customs.** Because of the need to control entry of suspect construction products into the UK, either from other Member States or from outside the EC, customs officers are empowered to seize imported construction products and detain them for two working days pending investigation. This is under Regulation 18 and, as the title of the Regulation indicates, these powers are supplemental to the provisions of Regulation 17 above.

Notifications to the Commission

Member States are required by the Directive to take all necessary measures to ensure that construction products are only placed upon the market if they are fit for their intended purpose in the sense that they enable the works in which they are incorporated to satisfy the essential requirements. Article 21 permits Member States to take action against a product declared to be in conformity with the Directive where there is reason to believe it does not comply. However, Member States must notify the Commission of any measures taken against such products and, in particular, whether non-conformity is due to a failure to meet technical specifications, the incorrect application of technical specifications, or shortcomings in the technical specifications.

LEGAL LIABILITY RELATED TO OBLIGATIONS RESULTING FROM THE CONSTRUCTION PRODUCTS REGULATIONS

This rather cumbersome sub-heading refers to the 'knock-on' effects in terms of potential legal liability of the Construction Products Regulations. It does not refer to the creation of statutory offences dealt with above, but to changes in the obligations of participants in the construction process other than suppliers. In particular, it focuses upon the duty of construction professionals in design. This is part of an area of law commonly known as post-construction liability, since, while the obligations are assumed with the design task, liability for non-performance or mis-performance only arises after construction as a result of a defect or failure ofsome element of the building.

It must be made clear at the outset that this section is not about changes to construction contracts or associated documentation. There will undoubtedly be changes in formulae of wording as a consequence of the introduction of the Construction Products Regulations and the advent of the CE mark. But it is not the function of this Report to anticipate the responses of contract draughtsmen to this issue.

Nevertheless, there are important points which need to be made. Chief amongst these is the fact that the CE mark is not mandatory for construction products though it is for gas appliances. This is significant in a number of ways which have implications for legal liability. If the CE mark was mandatory upon all construction products as the only way of satisfying the requirement of fitness for purpose, the construction of a house, for example, using un-marked products would have potential consequences for the producers. The builder could be said not to have complied with his duty under the Defective Premises Act 1972 to construct a dwelling fit for human habitation if it was not fit for its purpose as regards all the essential requirements. An architect could likewise be liable for such a failure. Failure to comply with a statute would be breach of an implied term of a contract. In the case of *London Borough of Newham v Taylor Woodrow-Anglian Ltd.* (1981) 19 BLR 99 a contractual provision to the effect that the parties agreed that (building) regulations had been complied with, irrespective of whether they had or not was declared to be meaningless and unlawful. Failure to comply with a statutory requirement can also be a tort: the tort of breach of statutory duty.

These are potential consequences in terms of liability, where the use of a particular practice or procedure is mandatory. Failure to use a CE mark product could not automatically give rise to breach of an implied contractual duty (as opposed to an express one, which could well come to be imposed) nor to breach of a tortious duty. This is because it is non-mandatory.

However, it would be wrong to conclude that the Construction Products Regulations are neutral in terms of post-construction liability because use of CE mark products is not mandatory. Designers in particular need to have regard to their obligations to their clients, and in the event of physical injury or damage occurring, to their liability in tort to third parties.

When a designer is specifying components of the structure which he is building, he has to have regard to their performance. Thus in *Richard Roberts Holdings v Douglas Smith Stimson Partnership* (1989) 47 BLR.113, architects designing an effluent cooling tank were in breach of their duty of care to their clients in failing to research and explore the performance of the specified tank linings, which subsequently failed. Designers have to have regard to the fitness for purpose of the products which they are specifying as part of their design. This does not mean that they are themselves under a strict duty to achieve a guaranteed result. As was said in *George Hawkins v Chrysler and Burne Associates* (1986) 38 BLR.36 a professional providing advice does not normally give an implied warranty beyond one of reasonable care and skill. The position is different where a party contracts for the design and supply of a product, where there is an implied duty to ensure fitnes for purpose of the design, and this could lead to a designer acquiring a similar obligation as in *Greaves and Co.* v *Baynham Meikle* (1975) 1 WLR 1095, where the designer knew of the precise design and build obligations of his client, the contractor, and was held to owe a similarly strict duty. The position is also different if the designer expressly warrants the achievement of a result, although his professional indemnity insurance may well be negated by the assumption of such a responsibility, certainly if he neglects to inform his insurers.

Chiefly, however, the designer is under a duty of reasonable care and skill to his client (and to third parties in tort). He must consider the fitness of the products specified to achieve their purpose as components of the design, but he does not guarantee the overall success of the design as in a warranty of fitness for purpose.

What of the designer's duty to consider the suitability of a product? the Construction Products Regulations introduce criteria for fitness, the essential requirements. this creation of a set of criteria for fitness will make it harder than it now is to contend that a product deficient in terms of energy efficiency, for example, can be validly specified within the meaning of the designer's duty of reasonable care and skill. Put simply, while at present it could in theory be argued that any particular criterion was not crucial to fitness for purpose, the presence of a definitive set of criteria in statutory form will make harder to defend the specification of a deficient product. This is not a change in the law. The standard by which a designer will be judged remains that set out in *Nye Saunders v Alan E. Bristow* (1987) 37 BLR. 93:-

"The courts approach the matter upon the basis of considering whether there was evidence that at the time a responsible body of architects would have taken the view that the way in which the subject of inquiry had carried out his duties was an appropriate way of carrying out the duty, and would not hold him guilty of negligence merely because there was a competent body of competent professional opinion which held that the was at fault."

In *Kelly* v *City of Edinburgh District Council* (1983) SLT 593 it was held that departure from a code is not proof of negligence by a designer.

Thus, failure to specify a CE marked product, even though that mark creates a presumption of fitness in the product's favour, is not necessarily evidence of negligence by the specifier. The specification of a non-CE marked product would be tenable if its technical performance satisfied the essential requirements and was no less rigorous than equivalent CE marked products. What would be harder to argue is that the inferority or inadequacy of the specified products regarding one or more of the esential requirements is irrelevant to an assessment of the specifier's professional standards and this can be regarded as a consequence of the Regulations, although not a departure in the law.

Another point which must be understood by designers is that the specification of CE marked products is not definitive of their professional obligations. Just as specification of a non-CE marked product is not necessarily negligence, so specification of a CE marked product does not mean that professional obligationshave been satisfied. Regulations, standards and codes are not co-extensive with the standards required of a designer by the law. It is axiomatic that any given design task might require standards well in excess of the general fitness for purpose as regards the essential requirements which is the meaning of the CE mark. The courts have often held that adherence to minimum standards required under statute does not automatically mean that a professional designer has not been negligent. In *McLaren Maycroft and Co.* v *Fletcher Development Co. Ltd.* (1973) NZLR 100 in the New Zealand Court of Appeal, it was held that general compliance with current practice might fall short of what the situation demanded. In *Eames London Estates Ltd.* v *North*

Hertfordshire District Council (1981) 259 EG 491 the Official Referee had to assess the professional standards of an architect whose work had been accepted by the local authority as complying with the building regulations. When the building failed, the architect was adjudged negligent:

> "An architect cannot shed his responsibility for foundations by ascertaining what will get by the local authority as this architect seems to have done."

CONCLUSION

Just as a supplier cannot be guilty of an offence simply because he supplies a non CE marked product, so a designer cannot be liable in negligence simply because he specifies a non CE marked product. Nevertheless, a designer needs to consider the suitability of his product and is likely to find it hard to defend the specification of a product which has failed if it is deficient or significantly inferior to a CE marked equivalent as regards the essential requirements.

However, the specification of CE marked products does not release the designer from the primary professional obligation to the client of using reasonable care and skill and exercising judgment with those attributes. The presence of a CE mark does not say that the product meets the individual needs of the project or will perform as the client requires. It speaks only to general fitness for purpose within the meaning of the essential requirements, and should not be treated as some form of alibi.

This paper derives from part of a research project carried out by the author (with Richard Grover) for the Construction Industry Research and Information Association. The author expresses his gratitude to the officers and Steering committee of CIRIA for their assistance. The views expressed are not necessarily those of CIRIA. The Report on Quality Management in Construction: The Impact of European Communities Policy, can be obtained from CIRIA, 6 Storey's Gate, Westminster, LONDON.