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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	25 January 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION DELEGATED DECISION (EU) .../... of 25.1.2018 on the applicable system to assess and verify constancy of performance of anchor devices used for construction works and intended to prevent persons from falling from a height or to arrest falls from a height pursuant to Regulation (EU) No 305/2011 of the European Parliament and of the Council

Delegations will find attached document C(2018) 287 final.

Encl.: C(2018) 287 final

Brussels, 25.1.2018
C(2018) 287 final

COMMISSION DELEGATED DECISION (EU) .../...

of 25.1.2018

**on the applicable system to assess and verify constancy of performance of anchor devices
used for construction works and intended to prevent persons from falling from a height
or to arrest falls from a height pursuant to Regulation (EU) No 305/2011 of the
European Parliament and of the Council**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

According to Article 28 of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC¹, assessment and verification of constancy of performance (AVCP) of construction products in relation to their essential characteristics is to be carried out in accordance with the systems set out in Annex V to Regulation (EU) No 305/2011.

Pursuant to Articles 28(2) and 60(h) of Regulation (EU) No 305/2011, the Commission is delegated the task of establishing the AVCP systems of construction products, relating to a given product, a given product family or a given essential characteristic, taking into account the considerations laid down in those provisions.

For anchor devices used for construction works and intended to prevent persons from falling from a height or to arrest falls from a height, an appropriate decision for establishing the AVCP system does not yet exist.

Pursuant to Article 28(2), the choice of the AVCP system should aim at the least onerous system for the manufacturers, when account is taken of all the relevant considerations.

In 2010, the Court of Justice of the European Union ruled² on the question whether particular anchor devices were covered by Council Directive 89/686/EEC on personal protective equipment³ or Council Directive 89/106/EEC on construction products⁴. The Court found that classification as personal protective equipment presupposes that such a product is, or at least can be, worn or held by its user for the entire period of his exposure to risk and that, therefore, it must be a movable product. Anchor devices secured, when in use, to a construction work are therefore not intended to be worn or held by their user within the meaning of Council Directive 89/686/EEC⁵. On the other hand, the Court found that the applicability of Council Directive 89/106/EEC to a specific product requires two conditions to be met, one relating to the nature of the product and the other to its function⁶. Anchor devices secured in such a way that they are part of the construction work (nature of the product) and intended to ensure the safety in use or in the functioning of a construction work by preventing individuals to fall from a height (function of the product) are therefore covered by Council Directive 89/106/EEC⁷. This finding is also valid under Regulation (EU) No 305/2011 which did not significantly change the definition of construction products⁸.

Anchor devices covered by types A, C or D of standard EN 795:2012 are meant to remain permanently fixed to the structure and are therefore, following this jurisprudence, not personal protective equipment, as confirmed by Commission Implementing Decision (EU) 2015/2181⁹.

¹ OJ L 88, 4.4.2011, p. 5.

² Case C-185/08, judgment of the Court of 21 October 2010, *Latchways*, ECR 2010 I-09983.

³ Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment (OJ L 399, 30.12.1989, p. 18).

⁴ Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ L 40, 11.2.1989, p. 12).

⁵ Case C-185/08, paragraph 42.

⁶ Ibidem, paragraph 50.

⁷ Ibidem, paragraphs 53, 55 and 56.

⁸ Cf Article 1(2) of Council Directive 89/106/EEC and Article 2(1) of Regulation (EU) No 305/2011.

⁹ Commission Implementing Decision (EU) 2015/2181 of 24 November 2015 on the publication with restriction in the Official Journal of the European Union of the reference to standard EN 795:2012 on

However, if they are meant to be secured in such a way that they are part of the construction work and intended to ensure the safety in use or in the functioning of a construction work by preventing persons from falling from a height or by arresting falls from a height, they are to be considered construction products and thus covered by Regulation (EU) No 305/2011.

As from 21 April 2018, anchor devices intended to prevent persons from falling and within the scope of Regulation (EU) 2016/425¹⁰ will belong to risk category III as set out in Annex I to that Regulation, as they are products intended to protect users from risks that may cause very serious consequences such as death or irreversible damage to health relating to falling from a height. Accordingly, such anchor devices will be subject to EU type-examination (module B of Decision 768/2008/EC¹¹) as set out in Annex V to Regulation (EU) 2016/425, and either conformity to type based on internal production control plus supervised product checks at random intervals (module C2 of Decision 768/2008/EC) as set out in Annex VII to that Regulation or conformity to type based on quality assurance of the production process (module D of Decision 768/2008/EC) as set out in Annex VIII to that Regulation.

Until 20 April 2018, anchor devices intended to prevent persons from falling and within the scope of Council Directive 89/686/EEC are subject to EC type-examination as set out in Article 10 of that Directive, and their production is subject to either the 'EC' quality control system for the final product (Article 11(A) of that Directive), or the system for ensuring EC quality of production by means of monitoring (Article 11(B) of that Directive).

Taking into account the use of anchor devices and the risks of possible death or irreversible damage to health which they are intended to protect users from, it is desirable that an AVCP system comparable to the conformity assessment procedures for anchor devices which are personal protective equipment is applied for those anchor devices which are construction products. This implies an AVCP system comprising continuing surveillance, assessment and evaluation of the manufacturer's factory production control and audit testing of samples taken by the notified product certification body at the manufacturing plant or at the manufacturer's storage facilities.

Those considerations have led the Commission to choose system 1+ as set out in Annex V to Regulation (EU) No 305/2011 for the construction products covered by the present draft Delegated Decision.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The draft Decision was discussed in the meeting of the Advisory Group on Construction Products¹² (the AG) on 9 December 2016 and also submitted for written consultation of the experts between 25 November 2016 and 16 January 2017. Before those steps, all Member States were presented an opportunity to nominate experts to participate. In addition to these experts, also other external stakeholders were consulted. The documents discussed in the AG and relevant to the written consultation were transmitted simultaneously to the European Parliament and to the Council, as foreseen in the Common Understanding on delegated acts.

'Personal fall protection equipment – Anchor devices' under Regulation (EU) No 1025/2012 of the European Parliament and of the Council (OJ L 309, 26.11.2015, p. 10).

¹⁰ Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC (OJ L 81, 31.3.2016, p. 51).

¹¹ Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC (OJ L 208, 13.8.2008, p. 82).

¹² Code E01329 in the Register of Commission Expert Groups and other Similar Entities.

The observations presented in these contexts were taken into account when preparing the final draft version of this act for the inter-service consultation.

It was published for public feedback on the Better Regulation Portal from 12 July to 9 August 2017; two stakeholders provided feedback. One stakeholder's comments both supported the proposed AVCP system, while at the same time recommending to change it to system 2+. As these suggestions contradicted each other, they could not both be taken up. Another stakeholder referred mainly to the state of play of discussions in the CEN Technical Committee which is developing the relevant standard, to AVCP systems 3 and 2+ previously chosen for other comparable products, to a lack of documented experience regarding accidents, to costs for SMEs, to the absence of technical evolution necessitating a change of AVCP system and to the fact that the elements of the justification of the choice of AVCP system (cf recital (2)) are considered in system 2+. As these comments expressed contradictory preferences for an AVCP system not higher than system 3 as well as for system 2+, did not take into account that system 2+ does not include audit testing of samples and did not consider the conformity assessment procedures for anchor devices which are personal protective equipment, they were not taken up. Accordingly, the Regulation was not modified following the feedback.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Pursuant to Articles 28(2) and 60(h) of Regulation (EU) No 305/2011, AVCP systems of construction products, as set out in Annex V to that Regulation, are to be established by delegated acts of the Commission, to be applicable to a given product, a given product family or a given essential characteristic, taking into account the considerations laid down in those provisions.

When establishing the AVCP systems, pursuant to Article 28(2) of Regulation (EU) No 305/2011, the Commission shall take into account the effect on the health and safety of people and choose the least onerous systems consistent with the fulfilment of all basic requirements for construction works. Pursuant to Article 60(h) of Regulation (EU) No 305/2011, this shall be done in accordance with the impact of the product to this fulfilment during its expected working life.

The draft Decision conforms to the principle of proportionality, as applying an AVCP system comparable to the conformity assessment procedures for anchor devices which are personal protective equipment contributes to the coherence between the different legal frameworks applicable to comparable products as well as to the robustness of, and the confidence in, the harmonised system put in place by means of Regulation (EU) No 305/2011.

For those reasons, the draft Decision is expected to serve the interests of the construction sector as a whole.

COMMISSION DELEGATED DECISION (EU) .../...

of 25.1.2018

on the applicable system to assess and verify constancy of performance of anchor devices used for construction works and intended to prevent persons from falling from a height or to arrest falls from a height pursuant to Regulation (EU) No 305/2011 of the European Parliament and of the Council

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC¹³, and in particular Article 28 and Article 60(h) thereof,

Whereas:

- (1) An appropriate decision for assessment and verification of constancy of performance does not exist for anchor devices used for construction works and intended to prevent persons from falling from a height or to arrest falls from a height ('anchor devices'). It is therefore necessary to establish which system of assessment and verification of constancy of performance is applicable to the anchor devices.
- (1) Taking into account that the anchor devices are intended to prevent persons from falling from a height or to arrest falls from a height, it is appropriate to choose a system of assessment and verification of constancy of performance that comprises continuing surveillance, assessment and evaluation of the manufacturer's factory production control and audit testing of samples taken by the notified product certification body at the manufacturing plant or at the manufacturer's storage facilities,

HAS ADOPTED THIS DECISION:

Article 1

This Decision applies to anchor devices used for construction works and intended to prevent persons from falling from a height or to arrest falls from a height.

Article 2

The anchor devices referred to in Article 1 shall be assessed and verified for constancy of performance in relation to their essential characteristics in accordance with the system specified in the Annex.

¹³ OJ L 88, 4.4.2011, p. 5.

Article 3

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 25.1.2018

For the Commission
The President
Jean-Claude JUNCKER