To Johan RENDERS
DG Entreprise
Johan.Renders@cec.eu.int

Paris 2005-09-12

Dear Johan

I am updating the FIN document "Présentation de la directive 94/25" modified by 2003-44, and I am (maybe suddenly) questioning the point of who is signing the declaration of conformity.
I will try to sum up what I had previously understood, and I would be glad if you could help in clarifying the situation.

Original directive
In the original directive (unchanged in that point) it is said that the DOC shall be written by the manufacturer of its authorised representative.
But it does not say that if the manufacturer is outside of EU or EFTA, it shall be signed by him or his authorised representative.(Article 4 and Annex XV)

The directive also seem to imply that there shall be only **one** "authorised representative" in EU.

Combined comments
The combined comments seem to have changed their view in that field.
I do not have the 1998 English comments, but the 1998 French (green cover) comments say:"
*"Le fabricant/constructeur peut être établi dans l'EEE ou ailleurs. Dans les deux cas**, il doit** désigner un mandataire chargé d'agir en son nom qui, lui, doit être établi dans l'EEE."*

Whereas in the second F (blue)version it says:
*Le fabricant/constructeur peut être établi dans l'EEE ou ailleurs. Dans les deux cas**, il peut** désigner un mandataire chargé d'agir en son nom qui, lui, doit être établi dans l'EEE.*

Similarly the latest English version of the comments say

iv) Manufacturers
…..
*The manufacturer may be based in the EEA or elsewhere. In either case, the manufacturer **may** appoint an authorised representative who must be established in the EEA, to act on his behalf.*

It seems therefore that "shall" was replaced by "may".

This is what I had understood from discussions I had with US manufacturers:
- Some great companies (Marine Power, Yamaha, etc) can afford to have a EU subsidiary that is responsible for placing in the EU market their product.
- Other companies do not have this unique structure, and usually have national importers, maybe not one in each of the 25 EU states, but several in the main EU countries.

If one of these importers is named authorised representative, he is the only responsible for placing the craft in the EU market and I can understand that a French importer does not want to be responsible of a boat sold in the Estonian market by the Estonian importer if he has not been commercially involved.

So, I understand that, for simplicity, the DOC can now be signed by the third country manufacturer.

For a customer having a problem with his product and having a commercial litigation, who is the responsible? From the comments it does not seem it is the importer, but this may have changed with 99/44 Directive on product liability.
If the responsible is the importer, (located in EU) no problem, but if the responsible is the company and person or that signed the DOC, it may cause problems.
This may not be a great problem if this manufacturer is Australian or from USA, as there is a "strong" state in these countries, but what happens if an EU customer has a problem with a company from Zimbabwe or Costa Rica. ? The possibilities for a EU citizen of solving favourably a litigation are questionable.

The answer to these questions may have an impact on how the DOCs are checked by each country administration.
If there is an authorised representative, and only one in EU, there might be a list of them.

I also believe that, in many EU countries, anybody can import a boat from any country, fill a declaration of conformity in the name of the manufacturer, put a "fake" name and signature and nobody will check is this is the right person and the right signature (the company stamp is not mandatory).
How can this problem solved by Ad-Co?

I hope you will be able to clarify my understanding in this field.

I thanks in advance for your reply and send my best regards

Grégoire Dolto

From: Renders
Sent: 13 September 2005 15:57
To: Dolto
Cc: Tony Rice; paulhandley@onetel.com; Gwenole.Cozigou@cec.eu.int; Birgit.WEIDEL@cec.eu.int
Subject: RE: Declaration of conformity, authorised representative

Dear Grégoire,

Thank you for consulting me on the above mentioned issues.

You are correct in stating that the original Directive 94/25/EC requires that the Declaration of Conformity (DoC) has to be drawn up by the manufacturer or his authorised representative established within the Community. (See Annex V.1, Annex VIII.1, Annex IX.1, Annex X.2, Annex XI.1 and Annex XII.1).

However, this requirement has not remained unchanged in the amended directive, since Directive 2003/44/EC has introduced in article 8.1 the post-construction assessment (PCA) procedure. This PCA procedure provides that the natural or legal person established in the Community who, under his own responsibility, places on the market and/or puts into service a recreational craft for which neither the manufacturer or his authorised representative established within the Community fulfils the responsibilities for the product's conformity to the Directive, has also to draw up a declaration of conformity.

As to the question whether in the case of product manufactured by a manufacturer established outside the EU/EEA, the DoC has to be signed by him or by his authorised representative established within the EU/EEA, the Directive does indeed do not provide a concrete answer. Annex XV of the Directive only specifies that the DoC shall include the identification of the person empowered to sign on behalf of the manufacturer or his authorised representative established within the Community.

The Guide to the implementation of directives based upon the new approach and the global approach (Blue Guide) does however provide the following clarification:

(see: http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/document/guidepublicfr.pdf) In §3.2 it is stated that "*a manufacturer established outside the Community is not obliged to have an authorised representative (although this may present some advantages)*". It is also specified that "*the delegation of tasks from the manufacturer to the authorised representatives must be explicit and should take place in writing, in particular to define the contents of the tasks and the limits of the representative's powers. Depending on the conformity assessment procedure and the directive in question, the authorised representative can, for instance, be appointed to ensure and declare that the product complies with the requirements, to affix the CE-marking and the notified body's number to the product,* ***to draw up and sign the EC declaration of conformity,*** *or to keep the declaration and the technical documentation at the disposal of national surveillance authorities*".

From the above clarifications, it can be concluded that it is indeed implied that a manufacturer established outside the EU/EEA can only have one authorised representative in the EU/EEA and that whether the DoC will be signed by the manufacturer or by his authorised representative will depend on the content of the delegation of tasks as they have been laid down in written agreement between the manufacturer and his authorised representative.

I want to draw your attention to the fact that the 1998 edition of the application guide to the recreational craft directive (CC Guide) has become obsolete and has been replaced twice by the revised 2001 and 2003 editions respectively. These revised editions have been brought in line with the general guidance provided in the Blue Guide, which explains why the clarifications in the CC Guide concerning the appointment of an authorised representative by a manufacturer established outside the EU/EEA have been changed.

You raise also the possible difficulties arising from the different systems applied by manufacturers outside the EU/EEA, based either on the appointment of an authorised representative in the EU/EEA or involving a number of importers established in different EU/EEA Member States. In the former case, the authorised representative will be responsible, within the scope of the tasks delegated to him by the manufacturer, for the administrative tasks related to the demonstration of conformity of the manufacturer's products which are placed on the market in the EU/EEA. In the latter case, where no authorised representative is appointed by the manufacturer, the importers established in the EU/EEA are not entitled to assume any of the tasks that would normally be delegated to an authorised representative. This is confirmed by the Blue Guide which specifies in § 3.3 that "***according to new approach directives, the importer (person responsible for placing on the market) must be able to provide the surveillance authority with a copy of the EC declaration of conformity, and make the technical documentation available. This responsibility is placed on the importer only where the manufacturer is not established in the Community and has no authorised representative in the Community".*** From this follows that the importer cannot issue any documents on behalf of the manufacturer. If he would wish to do so, "***he has to be explicitly designated by the manufacturer to become the authorised representative***" (Blue Guide, §3.3, second last alinea).

From the above follows that your understanding that the "DoC can now be signed by a third country manufacturer" is correct, be it that this possibility has always existed (i.e. in the case where no authorised representative in the EU/EEA has been designated).

You also raise the question of responsibility in case of commercial litigation for products manufactured outside the Community and placed on the market/put into service in the EU/EEA . As you point out correctly, this is an issue covered by Directive 85/374/EEC on product liability. (Please note that Directive 99/44 you refer to deals with other issues than product liability, such as guarantees, conformity of the product with the contract etc). The Blue Guide provides also some guidance on the relationship between the directive on product liability and new approach directives (see §2.2.3 , §3.1.2 and § 3.7), explaining that the concept of manufacturer covers more and different persons compared to those considered under the new approach directives. Liability is placed on a "producer", who can be either the manufacturer of a finished product or a component part of a finished product , producer of any raw material, or any person who declares himself as a manufacturer. "***Importers placing products on the Community market from third countries are all considered to be producers according to the Directive on product liability.***." Article 3.2 of the Directive on product liability specifies that "***Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer"***

From this follows that even if the DoC is signed by a third country manufacturer, the importer established in the EU can be held liable. Therefore it is not correct to state that the possibilities for a EU citizen (consumer) of solving a litigation favourably are questionable.

You finally raise the risk of falsified DoCs, whereby anyone importing a boat from a country outside the EU/EEA can fill out the DoC in the name of manufacturer, put a "fake" name and signature, making it impossible to trace back who has issued the DoC. This is indeed a problem that has to be tackled by market surveillance authorities and therefore I intend, subject to your agreement, to submit your questions on this issue to the RCD AD-CO group for consideration at its next meeting.

I trust that the above information and clarifications will be helpful. In case you would have further questions on this issue, please do not hesitate to contact me again.

Kind regards,

Johan Renders
European Commission
DG Enterprise & Industry
Maritime Industries
Recreational Craft Legislation