Analysis of the implementation of the Construction Products Regulation

Annex 5: topical reports

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Topical Report #1:

CE Marking

1 Background

1.1 CE marking under the CPR

The general principles set out in Article 30 of Regulation (EC) No 765/2008 apply to the CE marking. Among them, it is prescribed that that Member States shall ensure the correct implementation of the regime governing the CE marking and take appropriate action in the event of improper use of the marking, including by imposing penalties for infringements.

Article 8 of the CPR concerns the general principles and use of CE marking. Article 8(2) prescribes that the **CE marking shall be affixed to** any construction product covered by a harmonised standard, or for which a European Technical Assessment has been issued, for which the manufacturer has drawn up a declaration of performance. In such a case, Articles 8(2) clarifies that the **CE marking shall be the only marking** which attests conformity of the construction product with the declared performance in relation to the essential characteristics covered by that harmonised standard or by the European Technical Assessment.

Articles 8(4) and 8(5) of the CPR re-emphasise that Member States have an obligation to ensure that construction **products bearing the CE marking are not prohibited** or impeded from being made available on the market or used, when the declared performances correspond to the requirements for such use in that Member State.

Article 9 of the CPR specifies that the CE marking shall:

- be affixed visibly, legibly and indelibly to the construction product or to a label attached to it or, where this is not possible, to the packaging or to the accompanying documents;
- be followed by the two last digits of the year in which it was first affixed, the name and the registered address of the manufacturer (or an identification mark to that effect), the unique identification code of the product-type, the reference number of the DoP, the level or class of the performance declared, a reference to the harmonised technical specification applied, the identification number of the notified body, if applicable, and the intended use as laid down in the harmonised technical specification applied; and
- be affixed before the construction product is placed on the market. It may be followed by a pictogram or any other mark notably indicating a special risk or use.

Compared to the legislative situation which existed under the CPD, the CPR aims to simplify and clarify the regulatory framework for construction products in four main ways:

- The first aspect relates to the clarification that **CE marking is now mandatory in all EU Member States** for all products for which the manufacturer has drawn up a declaration of performance (DoP).
- The second aspect relates to the clarification of the **specific products which are exempt from CE marking**. According to Article 8(2), the CE marking is to be affixed to construction products for which the manufacturer has drawn up a DoP; however, if a DoP has not been drawn up, the CE marking does not have to be affixed. This derogation would apply to the situations described under Article 5 of the CPR.

- The third aspect relates to CE marking within the context of ensuring the **free movement of construction products**. CE marking of construction products was originally introduced in the CPD in order to enhance the free movement of construction products within the EU. In this context, it is important to note that performance requirements applicable to construction products are not harmonised across the EU and vary between Member States. Therefore, although a product may bear the CE marking, it may not be suitable for particular applications or for use within some Member States. Articles 8(4) and 8(5) of the CPR re-emphasise that Member States have an obligation to ensure that construction products bearing the CE marking are not prohibited or impeded from being made available on the market or used, when the declared performances correspond to the requirements for such use in that Member State.

- The fourth aspect relates to the CPR clarifying the difference in the **meaning of the CE marking with respect to construction products**, when compared to CE marking for other products. In this context, it is worth noting that the CE marking under the CPR only indicates the conformity of the construction product with the declared performance, which must relate to at least one of the essential characteristics of the construction product, relevant for the intended use(s).

1.2 Implementation experience

Companies responding to the questionnaire were highly knowledgeable about CE marking. Around 80% considered themselves to be highly knowledgeable/experts or to have good technical knowledge about CE marking.

Most stakeholders responding to the consultation and interviews did not identify any changes as a result of the implementation of the **mandatory CE marking** aspect of the CPR. This is mainly because mandatory CE marking was already in place in the vast majority of countries before the CPR and, as a result, the requirement was new in only four Member States: UK, Ireland, Sweden and Finland. While, in theory, it might be expected that the implementation of this aspect of the CPR would have a greater impact in these four countries; in practice, CE marking was already being carried out in some of these countries (e.g. the UK) for some construction products, particularly those intended for export into international markets.

Information obtained for this study indicates that some stakeholders encountered some implementation issues during the transition from the CPD to the CPR; however, these issues appear to be linked to specific companies or sectors or related to individual hENs. For instance, in the pavement sector, one company noted that it had spent significant time and more than €270,000 in the process of CE marking its products (including comprehensive testing, the introduction of factory production controls and the production of a detailed DoP for each product, as well as redesigning and reprinting all packaging to reflect the test results). There were also some issues relating to hEN 1090 and the steel sector; however, these appear to have been addressed based on the clarification provided by the Commission (see FAQ 31[1]).

[1] http://ec.europa.eu/growth/sectors/construction/product-regulation/faq/index_en.htm

1.3 Comparison of CPR against intended results

Recital 30 of the CPR states that:

> "*due to the difference in the meaning of the CE marking for construction products, when compared to the general principles set out in Regulation (EC) No 765/2008, specific provisions should be put in place to ensure the clarity of the obligation to affix the CE marking to construction products and the consequences thereof*".

With the above in mind, the intended results of clarifying the CE marking aspect of the CPR can be summarised as follows:

- Increased legal certainty and transparency regarding the rules
- Increased ease of compliance and enforcement
- Enhanced free movement of construction products across the EU
- Increased credibility of the CPR

As can be seen from the Table below, a number of conclusions can be deduced.

Table 1-1: Response to the question - Overall, please indicate whether, in your view, there have been positive or negative impacts from the clarification of the concept and use of CE marking

Response	Large positive impact	Low positive impact	Neutral/no change	Low negative impact	Large negative impact
Increased legal certainty and transparency regarding the rules					
Companies	23%	29%	35%	6%	7%
NBs, TABs, SBs	33%	36%	26%	3%	2%
Public Authorities	53%	27%	13%	4%	4%
Increased ease of compliance and enforcement					
Companies	11%	29%	45%	8%	6%
NBs, TABs, SBs	19%	32%	39%	8%	2%
Public Authorities	39%	35%	19%	6%	2%
Enhanced free movement of construction products across the EU					
Companies	13%	24%	54%	4%	5%
NBs, TABs, SBs	18%	26%	48%	6%	2%
Public Authorities	23%	35%	40%	2%	0%
Increased credibility of the CPR					
Companies	12%	37%	38%	6%	7%
NBs, TABs, SBs	18%	39%	34%	8%	1%
Public Authorities	26%	36%	28%	6%	4%

Over half of companies, public authorities and organisations involved in conformity assessment were of the view that the CE marking provisions have had **a positive effect in terms of increasing legal certainty and transparency regarding the rules.**

Over half of public authorities and organisations involved in conformity assessment were of the view that the CE marking provisions have **had a positive effect in terms of making compliance with the CPR easier for companies and making enforcement of the legislation easier for authorities**. Around 40% of companies agreed with this assessment, almost one third of which were from the Member States where CE marking was deemed not mandatory under the CPD. Of those companies indicating a positive effect in this regard, more than half were micro-enterprises or SMEs. Although a slightly higher percentage of companies indicated that the CE marking provisions have not made compliance easier for them.

Around half of companies and organisations involved in conformity assessment were of the view that the CE marking provisions **have not had any effect (i.e. neither positive nor negative) in terms of enhancing the free movement of construction products across the EU**. Around 40% of public authorities agreed with this assessment. That said, over a third of all respondents indicated that the CE marking provisions have had a positive impact in terms of enhancing the free movement of construction products. This may be explained by (a) the short period that has elapsed since the full applicability of the CPR; (b) the issue of national marks discussed further in Topical Report No 3; and (c) by the more detailed views provided below on the impacts of the CPR on the free movement of construction products. On the whole, there seems to be a general view that, while there may have been a slight improvement, the actual benefits of the CPR in this area have been "*much less than expected*". One possible reason relates to the lack of information regarding developments at the local level, particularly for public authorities. As one public authority noted "*No big changes noticed. Barriers to trade may [arise at a] more local level*". Associations and construction industry stakeholders also reflected on the fact that the outcomes have been less than expected:

> *"CPR has slightly enhanced the free movement of construction products as unlike with the CPD, CE marking is applicable to all European countries. But the principles that allow for the free movement of construction products were already laid down in the CPD. Besides that, it should be emphasised that the main obstacles to the free movement of construction products are the national marks and national requirements. In that respect, actions should be undertaken by the European Commission, like what was recently done against Germany."*

Over half of companies, public authorities and organisations involved in conformity assessment were of the view that the CE marking provisions have increased the credibility of the CPR. Around a third of respondents did not agree with this view, indicating 'no change' in their perception of the credibility of the CPR. Overall, most stakeholders within the construction industry agreed that there is the potential for benefits to accrue in the short and long term from the clarification of CE marking in the CPR.

Table 1-2: Response to the question - The CPR has clarified the concept and use of CE marking and its legal meaning. Are you aware of any benefits (whether current or future) relating to this clarification?

Response	Companies	NBs, TABs, SBs	Public authorities
Yes	60%	62%	73%
No	37%	25%	25%
Not applicable	3%	13%	2%

Why has CE marking not had a greater impact in terms of enhancing the free movement of construction products across the EU?

1.4 Benefits of CE marking under CPR

In general, stakeholders who were interviewed indicated that the CPR has helped to clarify the **meaning of the CE marking within the context of construction products**, when compared with the situation which existed under the CPD.

In terms of benefits associated with the updated rules for CE marking, some companies noted that:

> "*All Producers are working with same rules, that is good*"
>
> "*All manufacturers then operate on a level playing field. This results in a faster clarification of product to prospective customers."*
>
> "*It is much clearer what standard a product conforms to and what performance is being declared as a common method is applied as set out by the Annex ZAs*."
>
> "*It clarifies to users what a product can (not) be used for and what characteristics it has*."

An industry association has similarly noted that it strongly supports the CPR and that it is a major improvement compared with the CPD, in particular, because it clarifies the rules relating to CE marking.

Organisations involved in conformity assessment expressed somewhat similar opinions noting that:

> *"It is an essential tool for free movement of goods among the EU member states. CPR clarifies the necessity of quality infrastructure behind the CE Marking which is previously not very much clear in each directive. This is critically important for all parties to understand the overall workings of the system (standardization, accreditation, conformity assessment, market surveillance and metrology)"*
>
> *"The CE Marking makes it easier for specifiers and designers to identify proper material within the meaning of [national] Building Regulations*."

More specifically, organisations involved in conformity assessment (NBs, TBs, etc.) noted that the CE marking has a beneficial impact on the free movement of construction products within Europe:

> *"Under CPR, CE marking enables a product to be placed legally on the market in any Member State."*
>
> *"Once CE marked the construction products may be sold anywhere in the EU."*

Somewhat reflecting the views of other enforcement authorities, one public authority noted that:

> "*From a market surveillance perspective, the requirements under the CPR in respect of CE marking increase the ease of compliance and enforcement*".

1.5 Scope for improvement

Information obtained in the course of this study indicates that the CE marking information requirements have posed various problems for stakeholders. A major issue identified by various key stakeholders relates to the **duplication of information in the DoP with the CE marking information**. Another issue encountered by many stakeholders is the **lack of understanding by users of the (updated) concept and meaning of CE marking within the context of the CPR**. The following sections set out the key problems encountered in this regard, based on the indicative and representative comments from the various stakeholder groups, as well as a literature review.

2 Duplication of Information

2.1 Legal requirements

A key problem identified by many stakeholders is the **duplication of information, which is already provided in the DoP, in the CE marking information**. As can be seen in the Table below (adapted from a CPE submission), there are substantial overlaps between the information required in the DoP and CE marking under the CPR. These overlaps have resulted in various impacts including:

- the legal value of the CE marking being unclear for stakeholders;
- problems in affixing the CE marking, whether that be to the construction product itself or to the accompanying packaging; and
- costs to industry.

Table 2-1: Overlaps of the DoP and CE marking

CE marking, Article 9 (2)	DoP, Article 6 and Annex III
Article 9(2) […] the name and the registered address of the manufacturer, or the identifying mark allowing identification of the name and address of the manufacturer easily	Article 6(4) The declaration of performance shall be drawn up using the model set out in Annex III. [name and registered address of the manufacturer is required in Annex III]
Article 9(2) […] without any ambiguity, the unique identification code of the product-type,	Article 6(2) The declaration of performance shall contain, in particular, the following information: (a) the reference of the product-type for which the declaration of performance has been drawn up;
Article 9(2) […] the reference number of the declaration of performance	Article 6(4) The declaration of performance shall be drawn up using the model set out in Annex III. [reference number of the declaration of performance is required in Annex III]
Article 9(2) […] the level or class of the performance declared	Article 6(3) The declaration of performance shall in addition contain: (d) where applicable, the performance of the construction product, by levels or classes, or in a description, if necessary based on a calculation in relation to its essential characteristics determined in accordance with Article 3(3); Article 6(3) The declaration of performance shall in addition contain: (g) when a European Technical Assessment has been issued for that product, the performance, by levels or classes, or in a description, of the construction product in relation to all essential characteristics contained in the corresponding European Technical Assessment.

Table 2-1: Overlaps of the DoP and CE marking	
CE marking, Article 9 (2)	**DoP, Article 6 and Annex III**
Article 9(2) […] the reference to the harmonised technical specification applied	Article 6(2) The declaration of performance shall contain, in particular, the following information: (c) the reference number and date of issue of the harmonised standard or the European Technical Assessment which has been used for the assessment of each essential characteristic; [the date of issue of the harmonised standard or the ETA is only required in the DoP]
Article 9(2) […] the identification number of the notified body, if applicable	Article 6(4) The declaration of performance shall be drawn up using the model set out in Annex III.
Article 9(2) […] the intended use as laid down in the harmonised technical specification applied	Article 6(3) The declaration of performance shall in addition contain: (a) the intended use or uses for the construction product, in accordance with the applicable harmonised technical specification;
Source: Construction Products Europe (2014) Implementation of the Construction Products Regulation, Manufacturers' Report. See http://www.construction-products.eu/cust/documentrequest.aspx?DocID=277	

2.2 Views of stakeholders

Some manufacturers and industry associations indicated that it is not always possible for manufacturers to supply all of the required information on the CE mark label in an understandable way **for some construction products**.

Firstly, for **small construction products**, there are difficulties associated with physically including a large amount of information in the CE marking. The smaller the CE label, the more difficult it becomes to read and the less valuable/useful the information provided is. Furthermore, the cost of printing such labels is an important consideration for **low-cost construction products**. For some products, manufacturers need to develop and print one page for each delivery of construction products. Effectively, manufacturers are spending money for each delivery to provide information that is already displayed in the DoP in a more legible, understandable and accessible way. It was noted that, taking into account the number of deliveries of construction products in the European market, even a very small cost saving on CE marking would accrue to a large amount of money across the construction industry and, importantly, a reduction in the financial burden for SMEs.

For **larger construction products**, the cheapest way of providing the CE marking is printing the information on the bag/packaging. Where the packaging volume is very large, this means that making changes to the CE label becomes a complicated and expensive undertaking (if not impossible, for products where bagging/packaging is reused). For even **larger construction products (e.g. those sold and transported in bulk form,** e.g. asphalts, cement and aggregates), it is more likely that the CE marking label cannot be affixed to the construction product. The CE marking would typically be provided with the accompanying packaging or documents; however, providing a paper copy of the CE marking with the product is not only burdensome (in terms of human resources and financial costs) but also results in additional environmental impacts. An industry association has estimated that, in the UK alone, around 7 million additional sheets of A4 paper (~35 tonnes of paper)

are used annually for the provision of CE marking for all loose bulk supplied aggregates, asphalt and mortar.

Furthermore, some stakeholders also questioned what is meant by the 'accompanying documents' that the CE marking may be affixed to. In this regard, some were of the view that the invoice document or delivery ticket would suffice; however, one problem with this approach is that if the product is resold, another invoice (and not the one bearing the CE marking) will accompany the product and it is not clear who would be responsible for affixing the CE mark and the procedure that should be followed. As noted by two manufacturers:

> *"The requirement to provide a separate CE information sheet with every delivery of loose bulk construction materials is a ridiculous increased burden on any SME and a shocking waste of natural resources (paper) when there is an electronic solution available."*

> *"[There should be] the ability to use abbreviated CE marks which contain less information and has a link to the respective Declaration of Performance. Online CE marking should be available for bulk products e.g. aggregate as this industry works in a paperless world – everything is electronic."*

An indication as to the types of problems faced by **specific or complex construction products** can also be seen in the case of bitumen waterproofing products. Bitumen waterproofing products are sold per pallet, but also per individual roll via distributors. Labelling the individual rolls is impossible because the label would influence the installation negatively. In practice, the roll tapes are too small to include all required information, largely because the products have several intended uses and fall under different intended uses. To provide an enlarged roll packaging would contravene the environmental policy to decrease the amount of packaging. It is therefore difficult to find a solution which is satisfactory for all types of waterproofing products. In situations like this (and others mentioned earlier), manufacturers must provide the CE label in the product, packaging or accompanying documents. This results in **unnecessary costs, paper wastage and conflicts with the principle of sustainability**.

It has also been noted by CPE that CE marking of **kits**[2] (e.g. external thermal insulation cladding systems, curtain walls, etc.), that are put together on the construction site is not practically possible (as the specific kit is created on site). It has been suggested that, in such cases, it should be allowed to omit CE marking of the system because the DoP already includes all information required by the CPR and the CE marking label could be indicated on the DoP. Also, the components of the kit already carry their own CE marking[3].

The current CE marking information approach has also been indicated to result in significant **costs** for certain products and inefficiencies in others. One SME has estimated initial costs of developing CE marking labels (at a single site) to be up to €8,000 (with this including costs associated with purchasing a new printer/hardware and A4 paper). Assuming that this SME was preparing a smaller CE marking label, they would be more likely to use A5 paper (as opposed to A4) which could reduce annual costs by around €3,000 (where the reduction reflects the reduced costs of printing paper,

[2] 'Kit' refers to a construction product placed on the market by a single manufacturer as a set of at least two separate components that need to be put together to be incorporated in the construction works (Article 2(2) CPR).

[3] CPE (2014), Implementation of the CPR – manufacturers' report, accessed http://www.construction-products.eu/cust/documentrequest.aspx?DocID=277

printing ink, etc.). The exact cost reduction would vary depending on the product range being manufactured, the packaging approach, the number of deliveries, etc. As noted earlier, a very small cost saving on CE marking would accrue to a large amount of money across the construction industry and, importantly, a reduction in the financial burden for SMEs.

This is perceived as particularly burdensome and unnecessary given that the information is already available in the DoP and the vast majority of users would never consult the CE marking for such information (although this view may not be shared by all). For some of these products, particularly **construction products with aesthetic purposes, the CE marking labels are removed, which means that the information is lost** (with no value gained in terms of the resources and effort put in).

One industry association also noted that several **Member States have prohibited or made difficult the import of construction products that do not have a visible CE marking**.

Is the flexibility allowed by Article 9(1) of the CPR (in particular, allowing to affix the CE mark to the packaging or the accompanying documents) sufficient to address the difficulties mentioned above for affixing the CE marking on some types of products?

2.3 Possible solutions

One suggested solution is for a reduced CE marking label to be allowed for certain construction products. In order to achieve this reduced CE marking label (and prevent the duplication of information in the CE marking that is already listed in the DoP), it has been suggested that the CE marking label could contain only the product identification code and a reference to the DoP[4]. This would reduce the costs associated with drawing up the CE mark label, reduce the environmental impact (i.e. smaller paper/label) and would also increase the number of construction products to which a simplified CE marking label could be affixed. Moreover, such an approach would accord with market expectations, as most end users are unlikely to acknowledge or consult the CE marking for information on its performance. The primary stakeholders who seek such information are specifiers/purchasers/architects who will consult the DoP before the product is ordered.

In practice, some manufacturers are already affixing a simplified CE marking to some extent. For example, some ceramic tiles manufacturers apply a very reduced/simplified CE marking on the packaging and the full CE marking is supplied in the accompanying documentation. Some industry associations have also advised their members to use simplified CE marking labels (for an example, see Figure 2-1), as some Member States make the movement of products more difficult if the CE marking is not visible. However, it must be acknowledged that manufacturers are effectively producing two CE marking labels, one that meets the requirements of the CPR and one that satisfies the expectations of Member States/the markets. Overall, a key aspect to explore is how the CE

[4] Note that FIEC (in their 2013 Annual Report) considered it a success that the content of the CE marking label was retained, despite pressure during the debate in the European Parliament to replace technical information with a simple barcode and website link. It was considered important for the CE label to give information on the intended use and key technical characteristics of the product, and that the contractor should be able to identify the exact product on site without needing to refer to internet-based information. However, one industry association has noted that, during the last year, they have noticed that the information in the CE mark label is not being requested by the market. They believe that this is because the full performance is already available in the DoP.

marking label can be reduced so as to ensure that it can be affixed to the maximum number of products (rather than being included in the accompanying documentation).

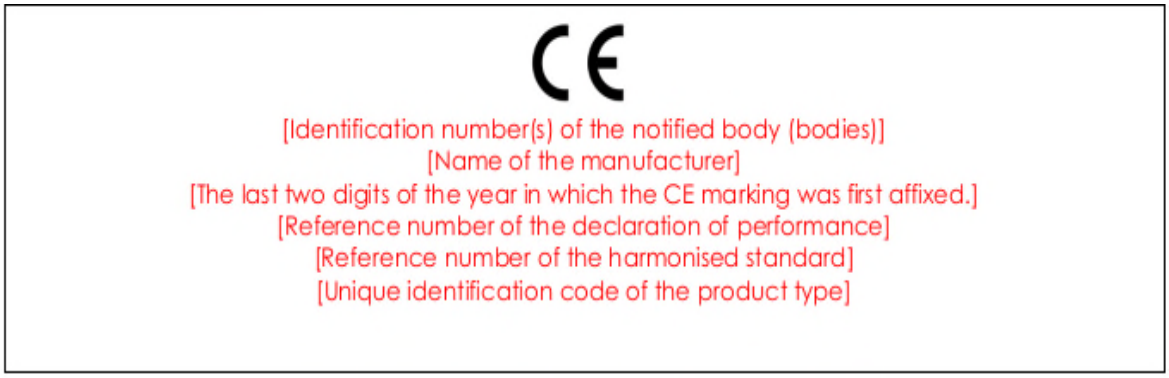

Figure 2-1: Summary CE marking recommended by FEICA
Source: FEICA (2013) FEICA Fact Sheet, CE marking for products supplied in small packaging accessed at http://www.feica.com/images/stories/library/fas-ex-c11-028_ce_marking_for_small_packaging.pdf

Do you agree with a suggestion for a 'reduced CE marking label' for certain construction products? If YES, which construction products would need it? What information SHOULD be included in the CE marking label and what information can be left out?

In fulfilling the solution for a reduced CE marking label, it is fundamental that critical information and the link to the DoP are retained. Indeed, with a reduced CE marking label, it is important that the information which is in the DoP can be accessed or made available in real time to end-users and other stakeholders. The CE marking must therefore contain a reference that allows the user to find the DoP, if desired and necessary, and to examine the various performance values of a particular product. One means to achieve this could be to exploit available IT tools. For example, the CE marking label could be provided with a link to the full information in the DoP that is available on a website. Alternatively, the CE marking label could have a link (website and QR code) to the full information in the DoP available on a website. This could reduce the size of the CE marking label while also providing those who require further information with the means of accessing it (i.e. going on-line or scanning the QR code with a smart phone). These suggestions have been proposed by key industry stakeholders, including CPE. However, it is necessary that in these cases, access to the paper copies of these documents are also ensured, for those users that do not have access to electronic means or internet. This is required by Article 7(2) of the CPR for the DoP. Equally, the conditions for the availability of the DoP on a website laid down by Commission Delegated Regulation (EU) No 157/2014[5] would apply in such a case.

Do you agree with a suggestion for the use of more electronic tools to link the CE marking with the DoP?

[5] Commission Delegated Regulation (EU) No 157/2014 of 30 October 2013 on the conditions for making a declaration of performance on construction products available on a website (OJ L 52, 21.2.2014, p. 1).

3 Concept of CE Marking

3.1 Problem Definition

Under the CPR, when a construction product is not covered by a harmonised European standard (hEN), CE marking does not have to be affixed – although this can be undertaken voluntarily by a manufacturer. One problem expressed by some stakeholders relates to a **misunderstanding on the market as regards what CE marking means within the context of the CPR**.

In this context, some large enterprises have been accused of marketing the CE marking as a 'quality' label, with the market then perceiving the CE marking as the gold standard that must always be followed. Other stakeholders perceive the CE marking as a 'safety' label and incorrectly believe that it indicates the product is 'safe' for installation.

According to some manufacturers, some purchasers/end users believe that all construction products should carry the CE marking. Consequently, they demand that manufacturers apply the CE marking even when it may not be within the scope of a hEN. Thus the voluntary option of applying for an EAD/ETA has, for some operators, become de facto mandatory as a result of the market operating under the mistaken belief that all construction products must carry the CE marking.

3.2 View of industry stakeholders

- It would seem that there are stakeholders across the construction industry who do not understand the concept of CE marking under the CPR. As noted previously, even **where there is no hEN, some purchasers and end-users are demanding that products carry the CE marking** (e.g. for fear of not complying with the CPR). As a result of customers wanting products to bear the CE marking, one Spanish SME reported that they will often apply for a ETA where a hEN is not applicable. This is a very costly exercise (circa €50,000). Similarly, a manufacturer reported that a standard exists for fire sprinkler heads, but the coupling which they import and market does not fall within the scope of this standard. However, customers still expect a DoP and CE marking for this coupling, despite the fact there is no relevant hEN. Thus far, the manufacturer has been unable to attain an ETA (although they have an ETA drawn up, they are have found it difficult to find a notified body to certify their product).

- In other instances, **manufacturers will apply hENs to products that are not strictly covered by a particular hEN**. For instance, one manufacturer notes that all of their products have the CE marking under the CPR, with the exception of a roof window for a flat roof. The manufacturer explains that nearest applicable standard for a 'roof window for a flat roof' is EN 14351 for windows and doors which covers 'roof windows for inclined roofs'. Although there is no clear definition of a roof window, the manufacturer believes it is evident that products intended for flat roofs are not within the scope of this standard. However, he is aware of other manufacturers that have been incorrectly applying this standard to such products and that, in his view, are exploiting the ambiguity of the term 'roof window' in the standard. Ideally, the manufacturer would prefer that there is an effective mechanism to clarify or amend the scope of the hEN, such that he could then apply the CE marking to his product and meet the market expectation of a construction product with CE marking.

- Other stakeholders reported that parts of industry need to understand that the CE marking indicates that the product conforms to declared performance for a specific intended use. In other words, parts of **industry should be made aware that the CE marking does not provide an indication as to the performance of the product for all potential uses**. Similarly, the CE marking gives an indication as to the performance of a product and does not indicate whether the product is 'safe'. In this respect, the CPR and the CE marking on construction products is not the same as for other products subject to harmonisation laws (see below).

  Both the Commission and some product contact points for construction have tried to clarify this misunderstanding on the meaning of CE marking under the CPR (see FAQ 33[6]). For example, an end-user in Sweden commented that the National Contact Point launched a series of information campaigns in March 2012 and organised several information meetings.

  A Public authority reiterated that the concept of the CE marking for some consumers and professional users remains unclear and that they perceive it as indicating that a product is 'safe', noting:

  > *If the CE marking tell that a product was tested for some the essential performances it does say that the product reach a acceptable level of performances for a safe, fit, appropriate or... use. This distinction is not clear for consumer and the majority of professional users.*

  Interestingly, an end-user commented that they will look to purchase products with a CE marking because they consider such products to be safe.

- Somewhat linked to the concept of CE marking, some stakeholders indicated a lack of clarity as to **the language that the CE marking label itself should be in**. One public authority noted that there is uncertainty with respect to whether CE marking information should be in the official language(s) of the Member State in which a construction product is marketed. The stakeholder was also unsure whether they can require distributors under Article 14(2) to supply construction products to be placed on their national markets with CE marking in the language of the Member State. With a view to clarifying this matter, the Member State consulted with the market surveillance authorities in a number of other countries, the responses of which indicated that a Member State is not permitted to request the CE marking for construction products placed on their market to be provided in their own language. While the stakeholder acknowledges that different Member States have different views, some suggesting that the CE marking language is not important because the DoP provides this information, they see little merit in requiring a manufacturer/distributor to provide a CE marking with information that is not understood by the public authorities or end users. The stakeholder also accepts that if Member States were to be able request the CE marking in the language of the Member State, it is likely that some enterprises would consider this as an additional burden. In any event, a clarification would be welcomed.

[6] http://ec.europa.eu/growth/sectors/construction/product-regulation/faq/index_en.htm

3.3 Possible solutions

The message that CE marking is mandatory for all construction products has been understood too literally by parts of industry, with some failing to appreciate that there are instances when the CE marking is not required. Additional efforts to disseminate information regarding the application of the CPR from all stakeholders will help to ensure that the relationship between the DoP/CE marking and hENs is better understood. In this regard, information dissemination could take the form of:

- **A Guidance document** focussing on CE marking within the context of the CPR;
- **Leaflets, brochures and factsheets** targeted at particular groups, for example purchasers and end-users of construction products. These could be one or two page documents provided in all EU/EFTA languages to ensure they reach a wide audience and particularly SMEs. Such documents could be uploaded to the European Commission's dedicated webpage on CE marking[7], disseminated through industry associations and/or handed out at trade fairs.
- **Seminars and conferences**. These could be held in Brussels (or selected Member States) and could take a form similar to the promotional conference held by the Commission on the 25th June 2012 which provided a great forum to exchange opinions and information in preparation for the full implementation of the CPR.[8]
- **Webcasts, virtual seminars and informative videos**, such as DG GROW's 2014 video on "*Building trust in the construction sector*"[9] which could be distributed through channels such as Youtube.

Between 2010 (first quarter) and March 2012, the European Commission carried out an information campaign on CE marking, which included outputs similar to those listed above.[10] The success of this campaign, as illustrated by feedback from the seminars and fairs, the high demand for informational material and the strong interest of print and online media, suggests that there may be benefits from using a similar approach in the future.

Do you agree with a suggestion for more information campaigns to further clarify the concept of CE marking for construction products? Which would be the most appropriate target group for such information campaigns and what would be the most effective communication approach to adopt?

[7] Available at: http://ec.europa.eu/enterprise/policies/single-market-goods/cemarking/

[8] BBS (2012): Construction Products Regulation Conference, Brussels, available at: http://www.bbsbarriers.com/announcements/ce-marking-mandatory-from-1st-july-2013-for-construction-products

[9] Available at: https://www.youtube.com/watch?v=_zMs_K23ZaI&list=UUvhco_i3akl_yhKLgsjEcNA

[10] European Commission (2013): COM(2013) 77 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0077:FIN:ES:PDF

Topical Report #2:

Market Surveillance & Enforcement

1 Background

1.1 Relevant CPR provisions

A properly functioning system of market surveillance is important for ensuring an equivalent level of enforcement of the CPR in EU countries, the credibility of the legal framework and that the CPR delivers the intended results. Articles 56-59 of the CPR set out the procedures relating to market surveillance of construction products:

- Article 56 sets out the **procedures to deal at the national level** with construction products presenting a risk;
- Article 57 sets out the **Union safeguard procedure**, for ensuring the compatibility of national measures with EU legislation;
- Article 58 sets out provisions relating to compliant construction **products which nevertheless present a risk to health and safety**; and
- Article 59 sets out provisions dealing with **formal non-compliance** with the CPR.

These provisions draw on and complement Regulation (EC) No 765/2008[1], which provides a horizontal legal framework for the marketing of products. Concerning market surveillance, Regulation (EC) No 765/2008:

- sets out clear obligations for EU countries to set up, national market surveillance infrastructures and programmes, to carry out market surveillance programmes and to prohibit or restrict the marketing of dangerous or non-compliant products;
- provides market surveillance authorities the powers to obtain all necessary documentation from manufacturers to evaluate product conformity, to enter manufacturers' premises and take samples for testing, and in extreme cases to destroy products; and
- includes clear obligations for EU countries to ensure cooperation at national and international level.

The General Product Safety Directive 2001/95/EC[2] contains additional market surveillance provisions applicable to non-harmonized consumer products.

1.2 Implementation context

As required under Regulation (EC) No 765/2008, national market surveillance programmes are established, implemented, and periodically updated[3]. The functioning of surveillance activities is also reviewed and assessed on a regular basis by Member States.

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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 (OJ L 218, 13.8.2008, p. 30)

[2] OJ L 11, 15.1.2002, p. 4.

[3] These programmes can be found on the EC website. See http://ec.europa.eu/growth/single-market/goods/building-blocks/market-surveillance/organisation/index_en.htm

Information exchange and cooperation between market surveillance authorities in different EU countries is also taking place based on the following:

1. Rapid Information System (RAPEX) - an alert system that facilitates the rapid exchange of information among EU countries and the European Commission.

2. General information support system – the ICSMS system[4] for information exchange will include best practices, results of joint actions, details of non-compliant products, and information on national market surveillance programmes.

3. Administrative Co-operation Groups (AdCos), including one for the CPR - the Commission facilitates (including by financial means) discussions within AdCos composed of market surveillance experts. The purpose is to share information and cooperate on practical matters related to the implementation of EU laws;

4. Financing of joint actions – the Commission finances market surveillance activities jointly carried out by national authorities.

In 2013, the European Commission adopted a proposal for new rules improving the safety of consumer products and market surveillance for all non-food products[5]. The proposal should enhance consumer product safety and strengthen market surveillance over products in the EU. This proposal, which includes the amendment of the CPR market surveillance provisions, is still under discussion by the European Parliament and the Council.

[4] Information from Bulgaria indicates that market surveillance has withdrawn from the national market about 10 construction products and information for these cases has been presented by ICSMS system.

[5] Safer products and a level playing field in the internal market. See http://europa.eu/rapid/press-release_IP-13-111_en.htm

2 Implementation experience

2.1 Overview

In discussing the implementation experience to date:

- Section 2.1 looks at the **actions and reporting by Member State authorities on market surveillance actions** undertaken for construction products.
- Section 2.2 considers the **perceptions of stakeholders on the extent of market surveillance actions** currently being undertaken.
- Section 2.3 delves deeper into the **views/concerns of stakeholders on the nature and scale of specific problems** which market surveillance should be addressing, particularly relating to Articles 58 and 59 of the CPR.
- Section 2.4 looks at the **expectations of stakeholders from market surveillance**, particularly relating to proactive market surveillance and sample testing.
- Section 2.5 looks at issues relating to **resource limitations** which are a problem relevant for some national authorities.

The qualitative information in this report is based on information provided by stakeholders to the online survey, during telephone interviews, from published reports and reporting obligations to the Commission. In general, information has been obtained from all Member States in developing the views below. Where quantitative information has been provided, this is based on a total of **65 responses from Public Authorities**, including national/regional public authorities, market surveillance authorities, inspectors/enforcement officers and product contact points. There were responses to the online survey from **27 national/regional public authorities covering 17 Member States** and **28 Market surveillance authorities (MSAs)** although 40% of responses were from authorities in Poland (see Table 2-1). There were also responses from **3 inspectors/enforcement officers** and **7 PCPCs.** In practice, it is the case that for many countries, one organisation sometimes had more than one 'role' with at least 10 authorities being responsible for three or four 'roles' under the CPR as 'public authority', 'market surveillance authority', notifying authority', 'national standardisation body', PCPC, etc. It is therefore not possible to analyse too deeply or discount views on the online survey on the basis of the categorisation provided, although these statistics must be borne in mind in interpreting the findings. Also, for some of the authorities that did not respond to the online survey, telephone interviews were held with representatives covering the same key areas. Overall, considering the diverse sources of views presented here (and the range of experience which these organisations possess), for simplicity, the views of respondents to this questionnaire will be presented in aggregate as from "public authorities" – except where otherwise specified.

2.2 Actions and reporting by Member State authorities on market surveillance actions

The CPR does not aim to certify construction products which are put on the market as "safe and without adverse health impacts". However, the CPR provides the necessary tools for achieving this, mainly via:

a) the basic work requirements for works included in it Annex I, which covers health and safety under different angles and constitutes the basis for the preparation of standardisation mandates and harmonised technical specifications;
b) the information contained in and accompanying the DoP;
c) the obligations put on economic operators and on Member State Authorities.

It is also important to understand that health and safety of construction products can not only be related to the product itself in isolation (for example, as regards its toxic components) but is frequently related to its incorporation in a construction work (for example, as regards the mechanical resistance and stability).

As far as the **use of the CPR market surveillance provisions** is concerned, the Commission has not being informed of any formal procedures initiated by Member States under Articles 56, 57 or 58. There could be various reasons for this. One possible reason is that Article 59 of the CPR is the primary tool used to police the market, as indicated by the Finnish authorities. For some authorities, no cases have emerged under Article 56. It is also possible that economic operators have voluntarily complied with requests for corrective action (see Table 3-1) and actions taken at national level did not require the escalation of the issue to the Commission or to other Member States.

Which measures are taken by Market Surveillance Authorities in order to detect and address compliant products which present a risk to health and safety of workers, consumers and citizens? Are these measures effective?

Are Member States using the formal procedures laid down under Articles 56, 57 or 58 CPR without constraints?

In general, some MS authorities indicated they have undertaken market surveillance activities and corrective action has been taken as shown by some of the selected examples in the Table overleaf.

Table 2-1: Inspection of construction products					
Country	**Type of inspection**	**2010**	**2011**	**2012**	**2013**
Austria	**Total**	**7**	**21**	**91**	**109**
	Reactive	7	21	18	17
	Proactive	0	0	73	92
	Prompted by customs	0	0	1	0
	No. inspections resulting in:				
	A finding of non-compliance	*4*	*16*	*48*	*54*
	Corrective action by economic operators	*3*	*7*	*39*	*45*
	Restrictive measures by the MSA	*0*	*0*	*9*	*8*
	Application of sanctions/penalties	*0*	*2*	*1*	*0*
Denmark	**Total**	**-**	**54**	**49**	**52**
	Reactive	-	24	19	22
	Proactive	-	30	30	30
	Prompted by customs	0	0	0	0
	No. inspections resulting in:				
	A finding of non-compliance	-	-	*23*	*11*
	Corrective action by economic operators	-	-	-	-
	Restrictive measures by the MSA	-	-	*23*	*11*
	Application of sanctions/penalties	-	-	-	-
Estonia	**Total**	**28**	**17**	**13**	**40**
	Reactive	-	-	-	-
	Proactive	-	-	-	-
	Prompted by customs	-	-	-	-
France	**Total**	**860**	**948**	**1077**	**810**
	Reactive	140	98	139	98
	Proactive	720	850	938	712
	Prompted by customs	-	-	-	-
	No. inspections resulting in:				
	A finding of non-compliance	*209*	*272*	*258*	*206*
	Corrective action by economic operators	-	-	-	-
	Restrictive measures by the MSA	*29*	*22*	*25*	*34*
	Application of sanctions/penalties	*65*	*57*	*80*	*53*
Greece	**Total**	**77**	**125**	**76**	**45**
	Reactive	6	8	13	21
	Proactive	27	33	46	22
	Prompted by customs	44	84	17	2
	No. inspections resulting in:				
	A finding of non-compliance	*43*	*54*	*61*	*43*
	Corrective action by economic operators	-	-	-	-
	Restrictive measures by the MSA	-	-	*1*	-

Table 2-1: Inspection of construction products					
Country	**Type of inspection**	**2010**	**2011**	**2012**	**2013**
	Application of sanctions/penalties	-	-	*7*	*1*
Poland	**Total**	**1623**	**1612**	**1606**	**1452**
	Reactive	124	108	103	46
	Proactive	1499	1504	1503	1406
	Prompted by customs	65	79	90	97
	No. inspections resulting in:				
	A finding of non-compliance	*615*	*631*	*662*	*562*
	Corrective action by economic operators	*128*	*154*	*137*	*88*
	Restrictive measures by the MSA	*18*	*23*	*29*	*18*
	Application of sanctions/penalties	*0*	*0*	*0*	*0*
Portugal	**Total**	**159**	**1**	**34**	**1**
	Reactive	5	1	3	1
	Proactive	154	0	31	0
	Prompted by customs	-	-	-	-
	No. inspections resulting in:				
	A finding of non-compliance	*25*	*0*	*0*	*0*
	Corrective action by economic operators	-	-	-	-
	Restrictive measures by the MSA	*0*	*0*	*0*	*0*
	Application of sanctions/penalties	*17*	*0*	*0*	*0*
Sweden	**Total**	**118**	**20**	**26**	**75**
	Reactive	7	10	12	17
	Proactive	111	10	14	58
	Prompted by customs	-	-	-	-
	No. inspections resulting in:				
	A finding of non-compliance	*0*	*0*	*0*	*0*
	Corrective action by economic operators	*0*	*1*	*0*	*2*
	Restrictive measures by the MSA	*0*	*0*	*0*	*0*
	Application of sanctions/penalties	*0*	*0*	*1*	*5*

2.3 Perceptions of stakeholders on the extent of market surveillance actions

Based on the feedback from consultation (i.e. the online survey, interviews and discussions with industry associations), there is a view from some industry stakeholders that there is currently very limited market surveillance of construction products being carried out on national markets. As can be seen from the Table below, around **a third of companies would describe market surveillance as 'non-existent' in their country**. Also, as shown in the Figure below, most companies are of the view **that appropriate enforcement actions are currently not being taken with regard to restricting or prohibiting the movement of non-compliant construction products from entering the EU market.**

Table 2-2: Response to the question - How would you rate the market surveillance activities carried out by the authorities responsible for construction products in your country?

Response	Companies
Not sure	13%
Non-existent	30%
Poor/Fair	42%
Good	16%
Very Good	0%

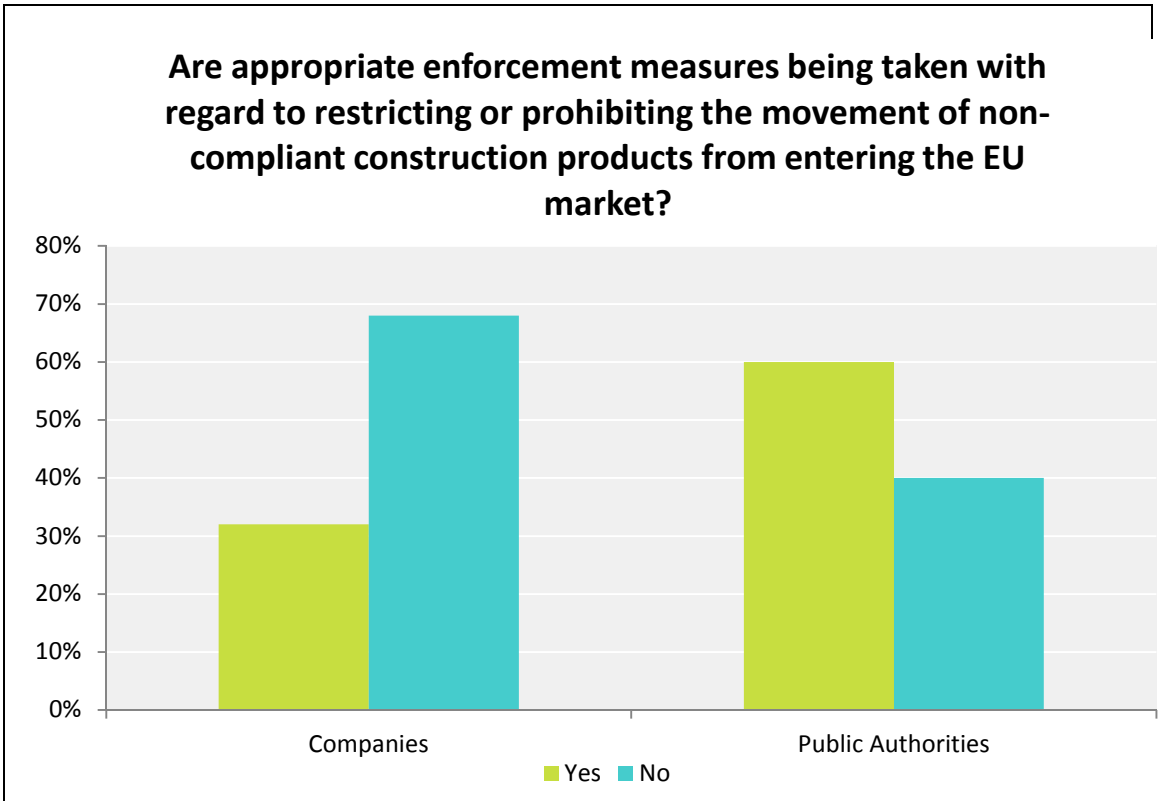

Figure 2-1: Response to the question - In your opinion, are appropriate enforcement measures being taken with regard to restricting or prohibiting the movement of non-compliant construction products from entering the EU market?

As shown in the Figure below, the vast majority (~80%) of companies and organisations involved in conformity assessment are not aware of instances where an economic operator has been required to take corrective action, or withdraw or recall construction products from the market due to non-compliance with the CPR.

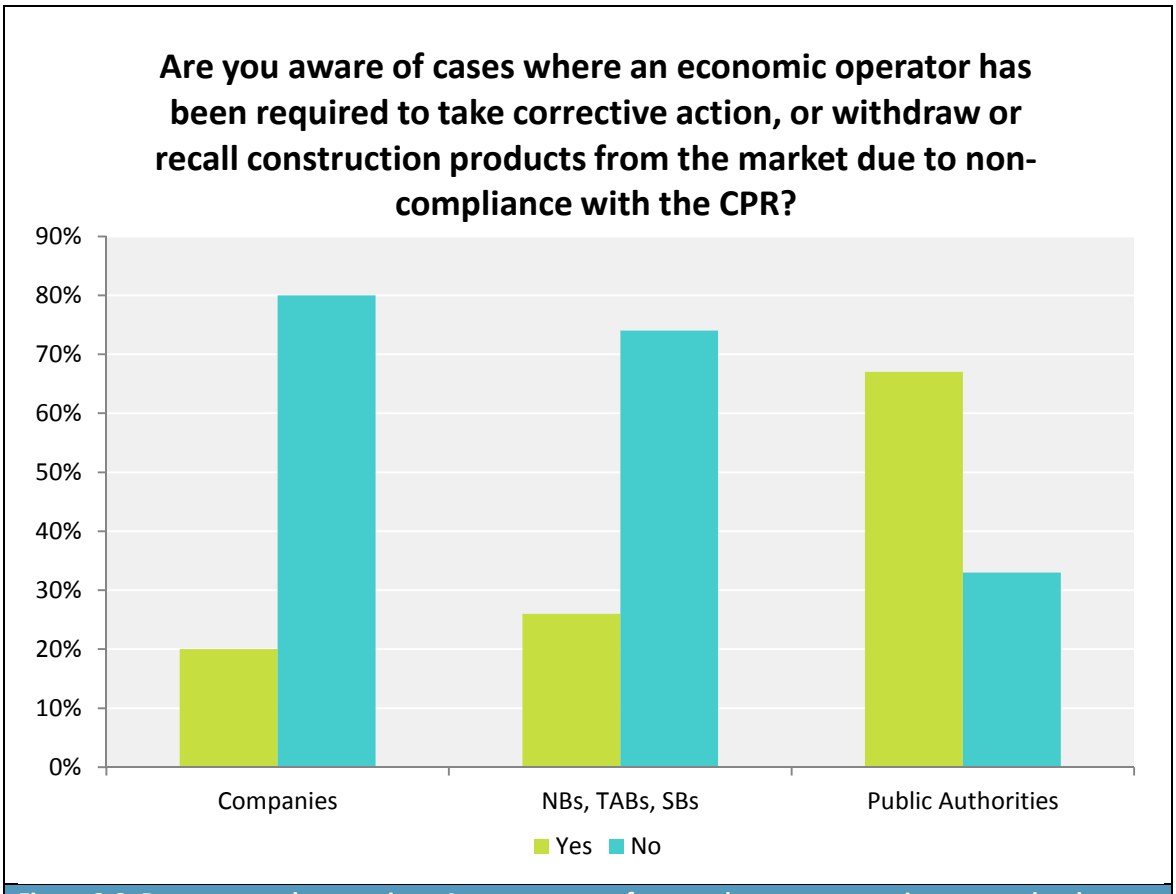

Figure 2-2: Response to the question - Are you aware of cases where an economic operator has been required to take corrective action, or withdraw or recall construction products from the market due to non-compliance with the CPR?

At best, **this indicates a lack of visible enforcement action (which has a deterrent benefit)** and, at worst, suggests that insufficient action is currently being taken in terms of market surveillance in some at the national level. While the exact **situation will vary from Member State to Member State**, it is clear there are examples of Market Surveillance Authorities (MSAs) performing their duties rigorously, as reported by companies responding to the consultation (and as described in Section 2.1). For instance, one stakeholder from industry noted that a MSA discovered a 'typo' in their DoP while a distributor of steel tubes was required to take corrective action because they failed to supply the DoP in the applicable national language. **There is therefore an issue of the perception of companies versus the actual extent to which enforcement action is being taken.**

What are the reasons for the high percentage of responses stating that appropriate enforcement actions are currently not being taken? Is it possible that this reflects the situation in certain MSs?

Is there a need to improve visibility of market surveillance actions? If yes, how?

2.4 Views of stakeholders on the nature and scale of specific problems to be addressed

Discussions with key industry players appeared to suggest that there are concerns about some construction products which are being placed on the EU market as a result of a lack of market surveillance (and reporting). In order to gather more information on this aspect and verify this view point (and by extension, implementation of Articles 56 – 59), stakeholders were asked a series of questions in order to clarify the nature of the construction products causing problems, divided broadly into three categories:

- Formal non-compliance with the CPR (e.g. no CE marking, no DoP; etc.)
- Construction products posing a risk to health and safety (even if, in some cases, they are compliant with the CPR e.g. possessing CE marking, DoP, etc.); and
- Counterfeit construction products (which may or may not pose a risk).

In general, the feedback from consultation suggests that the main concern relates to **formal non-compliance with the CPR**. Stakeholders were asked to indicate, in their view, how serious the issue of formal non-compliance with the CPR is. As can be seen from the Figures 2-3 and 2-4 overleaf, **the majority of respondents across all stakeholder groups indicated that formal non-compliance with the CPR is a 'serious' or 'highly serious' problem.** Indeed, public authorities believe that over a quarter of economic operators placing construction products on the market are currently not complying with the CPR. The anecdotal evidence from consultation also supports the notion that formal non-compliance is a problem. As to the nature of the non-compliance, one stakeholder noted that most cases of non-compliance will be linked to an **incorrect DoP and lack of CE marking**. One notified body suggested that within the windows and doors sector, 80% of manufacturers are not in compliance with the CPR, with around 50% not even attempting to draw up a DoP.

For **compliant products which present a risk to health and safety**, stakeholders were asked to indicate, in their view, how serious the issue is. As can be seen from Figure 2-5, around 50% of organisations involved in conformity assessment were of the view that this was a 'serious' or 'highly serious' problem. The majority of companies and public authorities acknowledge that it is a problem (which is being addressed, see Section 2.1), although there was an almost even split between those that think it is a 'minimal problem' as opposed to a 'serious/highly serious' problem. In trying to estimate the scale of the problem, most respondents estimated that between 1% and 5% of construction products currently on the market present a risk to health and safety. In a certain sense, this number appears low when compared with the general perception regarding the absence of market surveillance.

Similarly, for **counterfeit products**, around 50% of organisations involved in conformity assessment were of the view that this was a 'serious' or 'highly serious' problem. The majority of companies acknowledge that it is a problem, although there was an almost even split between those that think it is a 'minimal problem' as opposed to a 'serious/highly serious' problem. Of those that estimated the percentage of counterfeit products that are currently on the construction market, most companies estimated that 5-10% of products on the market are counterfeit. Hence, while Tables 2-5 and 2-6 do indicate some concerns, a more in-depth statistical analysis of the figures shows that there is not a clearly discernible conclusion that can be drawn from these. The more critical issue is the impact of these views (i.e. those that believe there is a highly serious or serious issue) on the **perception of the credibility of the CPR and market surveillance.**

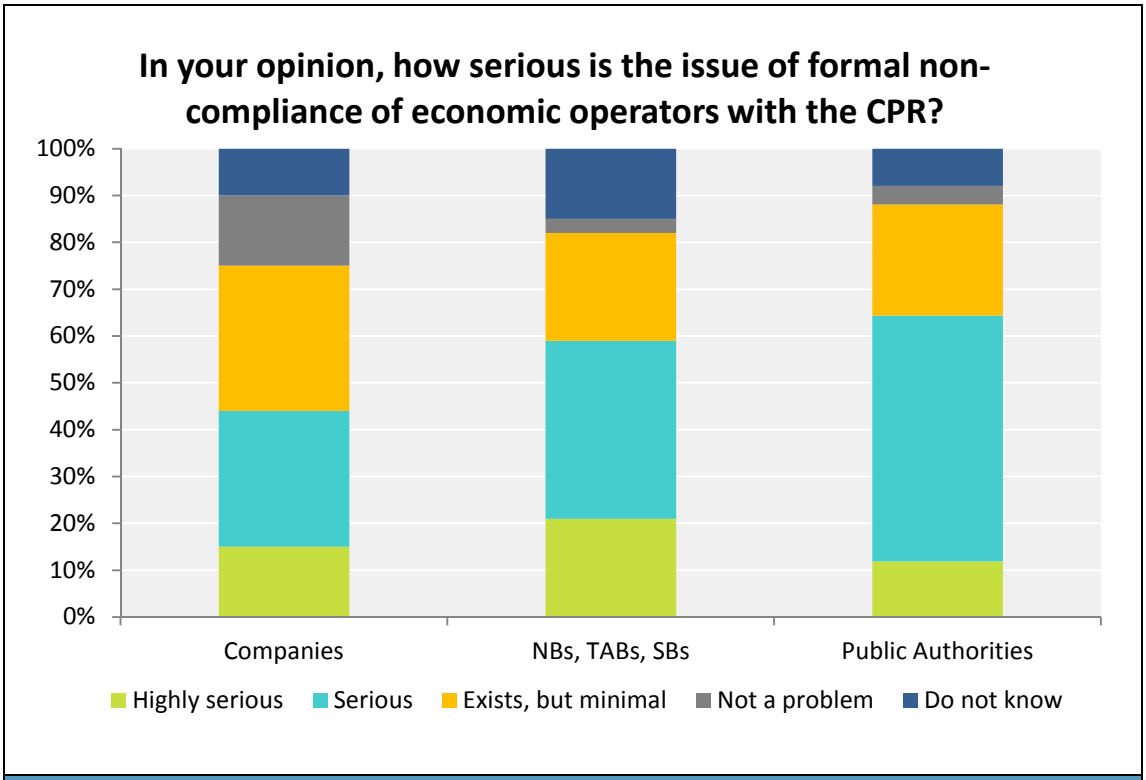

Figure 2-3: Response to the question - In your opinion, how serious is the issue of formal non-compliance of economic operators with the CPR ?

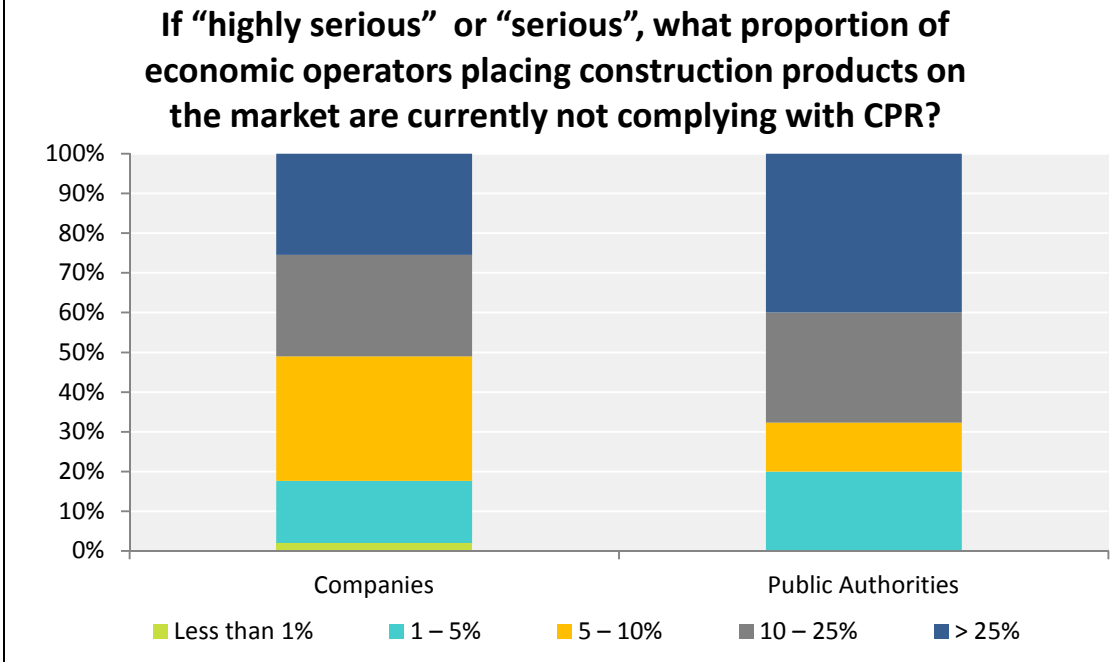

Figure 2-4: Response to the question - If “highly serious” or “serious”, what proportion of economic operators placing construction products on the market are currently not complying with the CPR?
Note: Around 40% of respondents indicated “they do not know”

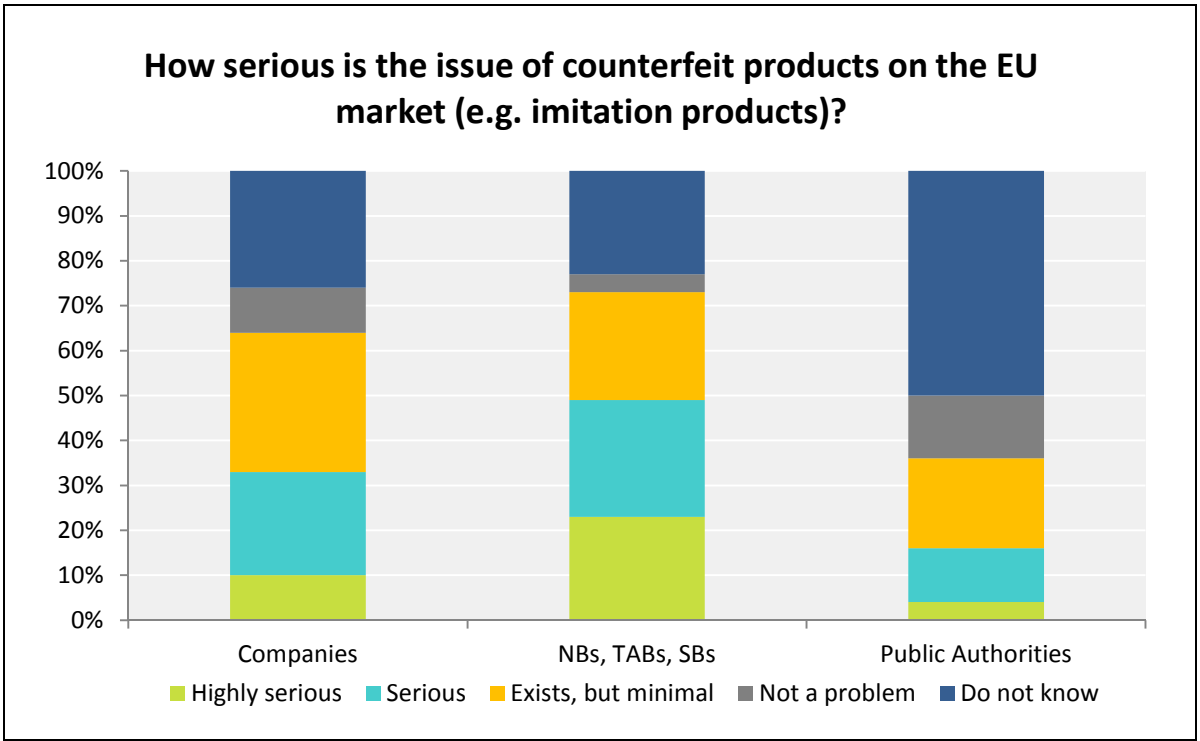

Figure 2-5: Response to the question - In your opinion, how serious is the issue of counterfeit products on the EU market (e.g. imitation products)?

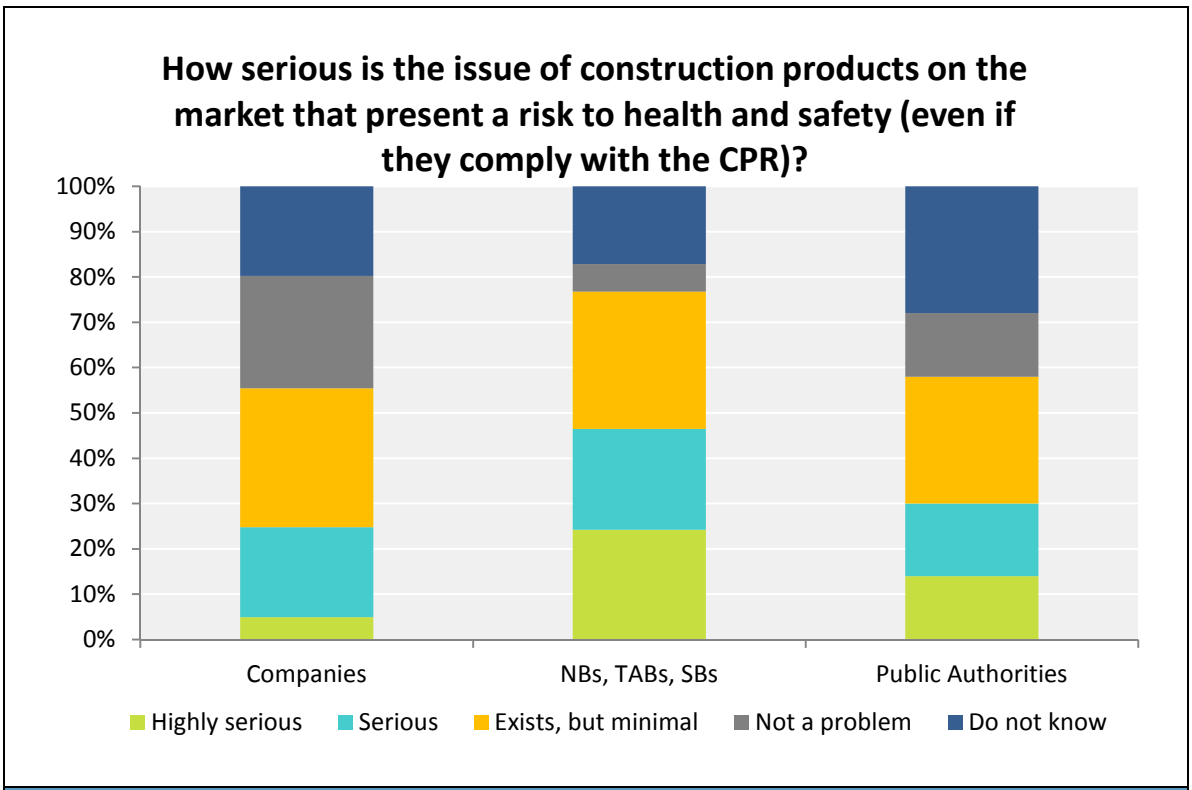

Figure 2-6: Response to the question - In your opinion, how serious is the issue of construction products on the market that present a risk to health and safety (even if they comply with the CPR)?

2.5 Expectations of stakeholders from market surveillance

2.5.1 Overview

Taking into account the perceptions of stakeholders regarding market surveillance, their views were sought on potential areas for improvement relating to the market surveillance of construction products. Three main areas were suggested: more proactive market surveillance, less selective investigations and increased sample testing. These are discussed below.

2.5.2 Proactive Market Surveillance

Some stakeholders were of the view that MSAs typically react to stakeholders' reports rather than proactively inspecting products. In other words, market surveillance activity is triggered following a complaint (e.g. from the public, public bodies, contractors, designers, customs, police or other market surveillance authorities). It has been advocated by a number of stakeholders that MSAs should be making more spot checks, visiting sites and making an effort to target products imported from third countries. For example, statistics from the Latvian MSA for 2013 and 2014 give an indication as to the potential scale of non-compliance when on-site checks are carried out.

In Finland, there have been around 190 reactive inspections, but also around 200 self-initiated inspections have been undertaken, with corrections made voluntarily[6]. In Austria, it was intended that proactive market surveillance measures would be implemented in 2014 for safety glass (ESG and VSG glazing), wood-based panels for use in construction, resilient, textile and laminate floor coverings and dowel-type fasteners for timber structures. These examples illustrate that **proactive surveillance does take place in some Member States (as shown in Table 2-1), but the wider point is that by taking a proactive approach, MSAs can better engage with and educate industry about the CPR which is vital for ensuring compliance in the future**. That said, it is worth recognising that there are physical and resource limitations (discussed later) which make it impossible to proactively check the full range of construction products on any given market.

Table 2-3: On-site market surveillance, Latvia

	2013	2014 (9 months)
Construction sites	7	53
Models	49	420
No DoP	17 (35%)	186 (33%)
Not intended use	n/a	7

2.5.3 Non-selective investigation

Another key issue raised in this regard is the selective approach authorities take to case investigations. Some stakeholders indicated that they had negative experiences having submitted complaints to MSAs. For instance, it has been suggested that complaints relating to products tested wholly by AVCP system 3 and 4 are unlikely to be followed up and tested by MSAs. A notified body

[6] National Market Surveillance Programme 2015, Finland, accessed at http://ec.europa.eu/DocsRoom/documents/8302/attachments/3/translations/en/renditions/native

also suggested that many MSAs will only pursue a case if they are confident they can get a conviction and this obviously impacts on the products they investigate (and how complaints are perceived).

A number of companies noted that compliance checking is more typically undertaken when a competitor tests other products on the market. For instance, one industry association stated that MSAs are not actively pursuing importers of windows and doors who are not compliant with the CPR. This undermines the efforts (i.e. human and financial resources) of manufacturers who comply with harmonised standards and gives those who do not comply with such standards a competitive advantage.

In stating this, it is important to note that it may not necessarily be the case that these complaints have not been followed up. In practice, authorities do not have an obligation to report back to a company that, for instance, has complained about competitors' products. Hence, there might be an issue of perception of action taken versus actual action taken in this instance.

Some differences can also be observed due to national strategic/policy differences. For instance, a certification authority noted that, in their experience, the UK authorities are more involved in proactively informing the economic operators, while the Dutch authorities are stricter with enforcement. One industry association noted that market surveillance should cover all economic operators, yet the main action taken is manufacturer audits.

It has also been noted generally that e-commerce of products can present additional challenges for the market surveillance of products that are imported from third countries into the EU. While MSAs possess the legal authority to seize such products, they encounter particular difficulties with identifying and intercepting such goods[7]. It is likely these same problems exist within the construction sector for construction products, although it is the case that some MSA do test such products (e.g.in 2013, the Czech MSA tested 16 construction products mainly from third countries for conformance to their declared performance[8]).

2.5.4 Sample Testing

Although it is acknowledged that MSAs are addressing a serious issue in the form of formal non-compliance, stakeholders believe that tackling this problem alone is not enough to fulfil the objectives of market surveillance. For example, one industry stakeholder noted that '***formal compliance audits are necessary but by far not sufficient to foster or establish trust in the system or to ensure a level playing field'***. Formal non-compliance must be supplemented by product testing undertaken by MSAs. Indeed, one stakeholder from industry noted that the market surveillance and control of foreign products in retail construction product chains (BAU centres) is weak because only the packaging is checked and no sample tests are undertaken.

The extent to which product testing may be beneficial, at least within some sectors, is evident from some of the responses to consultation. For example, it was noted that France has published a notice stating that 7 out of 10 smoke detectors on the French market failed to meet the declared performance. Equally, the General Office of Building Control has noted that from the 2011 – 2013, Polish authorities tested 80 expanded polystyrene slabs and in 54 instances, the test results

[7] CSES & Panteia (2014): Evaluation of the Internal Market for Legislation for Industrial Products accessed at http://ec.europa.eu/DocsRoom/documents/4225/attachments/1/translations/en/renditions/native

[8] Czech Trade Inspection Authority Annual Report, 2013, http://ec.europa.eu/DocsRoom/documents/6652/attachments/3/translations/en/renditions/native

indicated non-compliance. In Belgium, ad hoc monitoring based on complaints and the development of surveillance activities targeted at CE markings was undertaken primarily for the following products: masonry units (EN 771), wood panelling and cladding (EN 14915) and double glazing (EN 1279-5).

In Ireland, authorised officers have been appointed within each of the 37 local building control authorities to enforce statutory requirements set out under the CPR. These authorities do not have the capacity to test products in-house and when required, this is outsourced to independent accredited bodies providing such services. Enforcement activity will need to be performed within the constraints of budgets which are subject to national restrictions on Government spending. Where tests are undertaken and the product is found to be non-compliant, the building control authority will seek to recover the costs from the offending economic operator[9].

However, **product testing may be complex and expensive and would again, require additional resources or a new approach.** Indeed, the cost of such testing may prevent the market from regulating itself. For example, one industry stakeholder noted that they suspected that a competitor was not in compliance with the CPR, but were discouraged from proving that this was the case because of the complicated laboratory reports that would need to be drawn up.

A public authority noted that the CPR only provides a certain number of formalities and does not really ensure that tests are carried out. It was stated that the most common type of fraud is document fraud, but it is not easy to monitor the performances that are declared, as it is expensive to carry out the tests. One authority also noted that the construction sector is perhaps too large to be sufficiently covered by market surveillance, as there are such a range of economic operators. A public authority noted that companies have recently become very adept at appealing against penalty notices and they are often unsuccessful when it comes to enforcing their decisions.

2.6 Resource Limitations

While stakeholders are calling for additional action to be taken by MSAs, the current economic climate is making it difficult for MSAs across Europe to continue undertaking the core activities that were previously possible.

A stakeholder noted that market surveillance in France is as vigilant as it can be in the current circumstances. As a result of cuts in public spending, it will be difficult for them to improve the level of market surveillance to the level required. Although the French Government had in the past tried to introduce further requirements for market surveillance, it is understood that this was not possible because insufficient funds were available. Similarly, it was noted by an industry stakeholder that the UK Government's cost-cutting programmes have seen a 70% cut in funding for local authority trading standards offices and, hence, a proportionate reduction in the number of enforcement officers. These were small operations previously and now their reduced scope of cover means they tend to place CPR non-compliance issues as a lower priority relative to their overall responsibilities to ensure trading standards compliance. Another stakeholder suggested that they had spoken to the Government department which controls the MSAs which police the implementation of the CPR, but the response received stated that they are too busy to be able to police this legislation.

[9] National Sector Specific Market Surveillance Programme, 2014 – 2015. Available at http://ec.europa.eu/DocsRoom/documents/4431/attachments/3/translations/en/renditions/pdf

Many stakeholders have noted that the number of personnel responsible for market surveillance is low in some countries (e.g. at the federal level in Austria, Malta[10]., etc.). In Belgium, it was indicated that there were three people working within market surveillance, but that the size of the workforce has subsequently increased and that consequently market surveillance is able to carry out many more checks. On the other hand, there are authorities with significant resources to devote to construction. For instance, the Finnish Chemicals Agency (Tukes) has over €800,000 and 12 full time staff and inspectors (FTE) dedicated to the field of construction. The unit intends to grow and expand and will divide the construction sector into seven zones by the end of 2016.

[10] In Malta, the market surveillance officer for the CPR covers other products falling under harmonised legislation and under the GPSD (a full time staff equivalent of 0.2 is budgeted for the construction sector). Although the small size of the construction market in Malta must be borne in mind, as well as the fact that they have meetings with major manufacturers and SMEs (usually importers) to disseminate information. National Market Surveillance Programme (2015) Malta.

3 Possible Solutions

The discussions above show that there are issues relating to perceptions of market surveillance in various Member States. Stakeholders have noted that, when there is a disparity in the capacity and level of enforcement of MSAs between Member States, the level playing field that should exist in Europe is undermined which may give some enterprises a competitive advantage. As noted by one industry association, their members often report that industry has no means to fight against unfair competition and non-compliant products. It is therefore up to market surveillance authorities to intensify their activities.

It is possible to draw the following general solutions which could help addressing issues identified in the previous sections:

- **Increase awareness about the market surveillance structures, programmes and actions** undertaken at national and Commission level seems necessary, given the big differences in perception identified in Section 2.3.

- **Increasing awareness of the CPR** could contribute to increase the level of compliance. In responding to the survey, MS authorities indicated that companies are typically cooperative and helpful when asked to provide documentation, information and support on investigations and when required to take corrective actions. This would suggest that there is indeed a high awareness on the part of economic operators to comply with the law. **There is, therefore, a need to ensure that there awareness of the CPR is increased significantly**. As shown in the Figure below, there is a very low knowledge of certain key CPR concepts amongst companies.

Table 3-1: Response to the question - How would you rank the extent/degree of cooperation of economic operators when required by Public Authorities to provide documentation, information and support on investigations and when required to take corrective actions?

Response	Public Authorities
Highly cooperative/very helpful	32%
Somewhat cooperative/helpful	66%
Not cooperative/unhelpful	2%
Extremely uncooperative/very difficult	0%

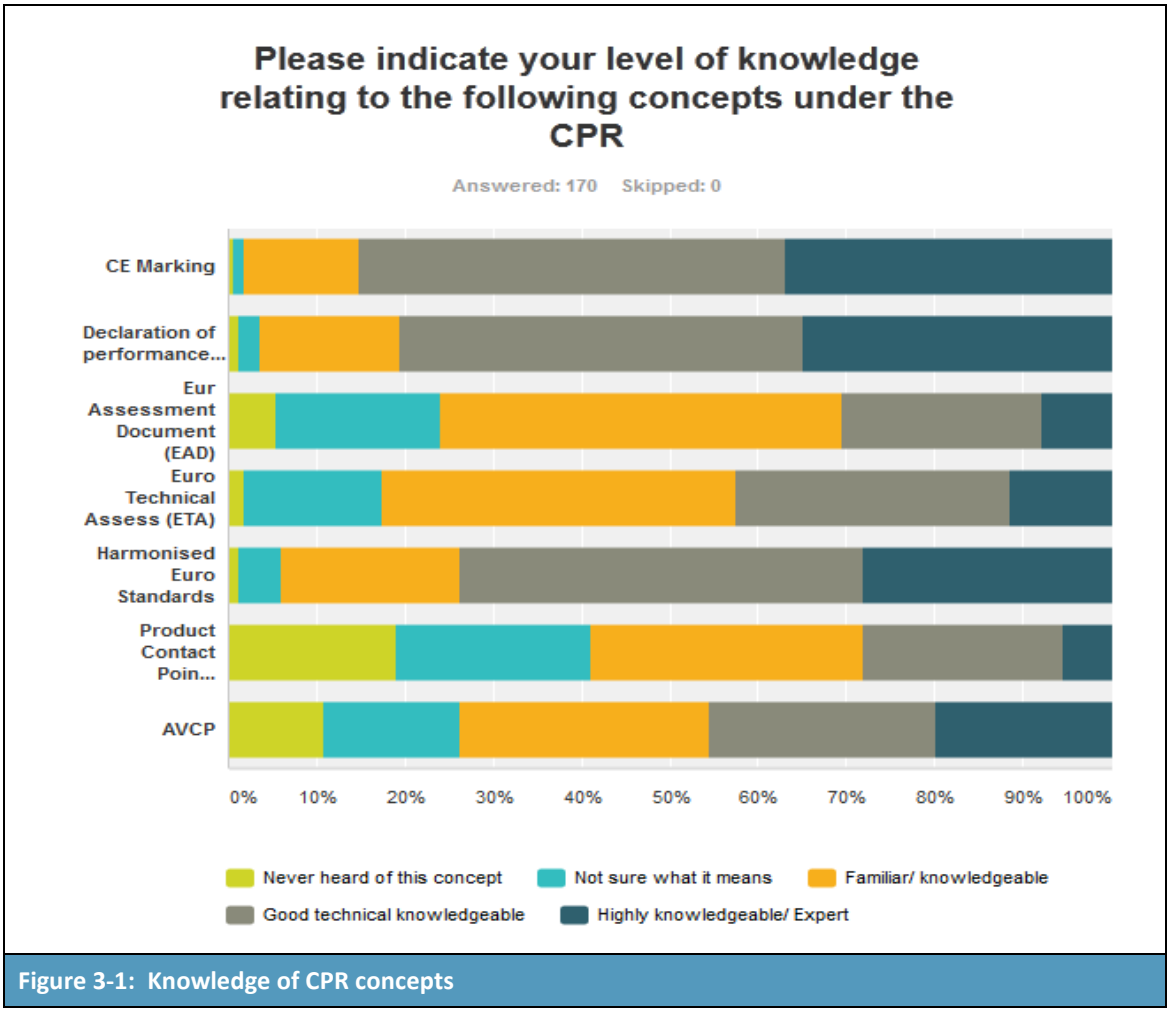

Figure 3-1: Knowledge of CPR concepts

- Take full benefit of the on-going administrative **cooperation** under the AdCo CPR Group in order to exchange information and expertise, identify priorities for market surveillance actions and conduct more joint market surveillance actions. **Joint market surveillance actions serve** particularly to support Member States with more limited resources. These actions could be focussed on sub-sectors or products identified as being particularly problematic in terms of non-compliance. There have been previous positive experiences from these types of action in the past. For instance, in 2013, a Joint Market Action on Smoke Detectors was undertaken[11] to detect whether there are smoke detection products on the European market that may create safety problems and risks due to an incorrect operation of the device (e.g. inability to detect a dangerous amount of smoke) and, if such devices exist, to remove them from the market[12]. In addition, the Joint Market Action aimed

[11] The Product Safety Forum of Europe (PROSAFE) is a non-profit non-governmental organisation for market surveillance comprising market surveillance authorities and officers from throughout Europe. Its primary objective is to improve the safety of users of products and services in Europe. The Action, which is primarily funded by the European Commission, started in January 2014 and will end in February 2016. See: http://www.prosafe.org/index.php?option=com_content&view=article&id=130&Itemid=600.

[12] PROSAFE (2014): Joint Action 2013, GA N° 2013 82 01, Call for Tender for Test Laboratories Product Activity Smoke Detectors, available at: http://www.prosafe.org/images/Documents/Tenders/JA2013/PROSAFE_Call_for_Tender_JA2013_SDs.pdf

to developed best practices and to exchange experience by carrying out market surveillance on such products. Further information can be found on the PROSAFE website. Such joint action may provide a possible template for wider future action on the market surveillance of construction products.

- Finally, considering that many industry stakeholders have expressed their desire to inform authorities of where non-compliant or suspicious products are being used (and also, because manufacturers do appear to undertake testing of competitor products), perhaps, there might be advantages to **increase the communication between MSAs and industry stakeholders,** in order to exchange information. This could facilitate the work of MSAs at the same time as increasing trust in the activities of national market surveillance authorities.

- It has already been recognised by the Commission in its vision for the internal market for industrial products that expanding the capacity of MSA and ensuring that MS invest the **necessary human and financial resources** into market surveillance is fundamental to strengthening enforcement actions.

- **Moving forward, it is possible that the constraints linked to limited resources, which affect all EU administrations, may be overcome by a more efficient prioritization and organisation of market surveillance activities.** While the main responsibility of this organisation remains at national level, the Commission is providing active support for this purpose, mainly for the CPR AdCo Group and for joint actions.

Is the on-going prioritization and administrative cooperation of MSAs serving to overcome the constraints linked to limited resources?

Can the issues identified above be addressed by a better identification of priorities for market surveillance actions?

Are the issues identified above being addressed by the administrative cooperation and joint actions undertaken under the AdCo CPR Group?

Can a closer cooperation between MSAs and industry, including exchange of information, improve the efficiency of market surveillance? Are there examples of such cooperation?

Topical Report #3:

National Certifications/ Quality Marks

1 Background

Free movement of goods is a cornerstone of the Single Market and the mechanisms in place to achieve this aim are based on **prevention of new barriers to trade**, **mutual recognition** and **technical harmonisation**. Prior to the CPR, it was evident that trade in construction products between Member States (MS) had been impeded in various countries[1]. Building on the CPD, one of the aims of the CPR is to remove technical barriers to trade in the field of construction products in order to enhance their free movement in the Internal Market, via harmonised standards for construction products and European Technical Assessments (ETAs).

Article 8(3) of the CPR specifies that, for any construction product covered by a harmonised standard, or for which a ETA has been issued, the **CE marking shall be the only marking** which attests conformity of the construction product with the declared performance in relation to the essential characteristics, covered by that harmonised standard or by the ETA.

Under the CPR, quality marks (whether public or private and including those with national connotations) are not allowed to cover characteristics already included in harmonised European standards (hENs). This includes situations where a manufacturer has not declared the performance of his product in relation to some characteristics (i.e. has used the "No Performance Declared" option referred to in Article 6(3)(f). Since Article 4(2) of the CPR renders the use of the DoP as the only manner to declare performance and Article 8(3) specifies the CE marking as the only mark which attests conformity of construction products with the declared performance, the manufacturer cannot turn to other options here. Put simply, **for products covered by hENs**, performance in relation to essential characteristics included in hENs can only be attested using the CE marking[2].

Within the territory of an EU Member State, **a national technical specification** (e.g. a technical standard) for a construction product can be issued for **products not covered by a hEN** or if the **national technical specification transposes hENs** (see Article 17(5)). However, the national technical specification is to respect the limits imposed by the CPR (Article 8(4)-(6)) and comply with other applicable EU legislation (for example, the notification in conformity with Directive 98/34/EC) as well as with the provisions governing free movement of goods in non-harmonised sectors.

In this context, it is important to note that Member States retain the competence to set technical requirements for the performance of construction products, in particular for specific uses of the products in a building or civil engineering work (e.g. fire safety requirements for escape routes). In case these national technical requirements imply limits to the use of CE-marked construction products, these limits need to be duly justified and proportionate and not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. In any case, the

[1] For instance, in 2008, the European Court of Justice (ECJ) found that the practice of Belgian authorities encouraging economic operators to obtain Belgian marks of conformity prior to the marketing of construction products that had been manufactured/marketed in accordance with the CPD in another Member State infringed the free movement of goods principle. See Judgment of 13 March 2008, C-227/06, Commission v Belgium. More recently, the ECJ considered contrary to the CPD the additional national requirements (including the national Ü Mark) imposed in Germany to CE marked products (see judgement of 16 October 2014 on case C-100/13).

[2] Frequently Asked Questions on the Construction Products Regulation (CPR) See http://ec.europa.eu/growth/sectors/construction/product-regulation/faq/index_en.htm

burden of proof in justifying the measures lies with the Member State and not with the economic operator. Put simply, for **products not covered by hENs**, national provisions referring to national marks are not to discriminate against products which do not bear such marks[2].

This paper **examines the problems encountered by manufacturers (and other stakeholders) in placing their products on the market in countries where national certifications/quality marks exist**. Put succinctly, many manufacturers of construction products have indicated that they feel obliged to obtain these marks as they would effectively not have access to national markets without them – the question to be considered is, therefore, **to what extent do national certifications /quality marks constitute a barrier to trade?** In attempting to answer this question, this paper draws on the perception of/and feedback provided by stakeholders, rather than a thorough legal or technical analysis of the exact nature/status of the various marks identified.

In this context, it is relevant to mention one of the most cited quality marks by stakeholders: the **'Ü mark' in Germany**. In Germany, as well as the CE marking required at EU level, the Ü mark imposes additional and compulsory requirements on certain construction products to be used indoors. For example, floor coverings that had the CE marking in accordance with EN 14041 also had to carry the Ü mark if they were to be installed in German buildings in rooms where humans were to stay longer than transiently. The Ü mark is placed on the product following confirmation of conformity by the German Institute for Construction Technology (DIBt) who administers it. To obtain the Ü mark, a manufacturer must provide test results accepted from laboratories recognised by the DIBt.[3] **Effectively, the Ü mark is a mandatory mark with legal standing (not a voluntary mark**). Consequently, manufacturers have been prevented from accessing the German market or have incurred additional administrative and compliance costs to market products in Germany.

On 21 June 2012, the European Commission referred Germany to the European Court of Justice (ECJ) for failing to respect EU rules governing the harmonisation of the marketing of construction products. The Commission considers the Ü mark a barrier to trade as it imposes additional requirements for products which are already covered by European harmonised standards and bear the CE mark.

In the above court case, the ECJ ruled in favour of the Commission against the requirement of the German Ü mark for CE marked products under the CPD. The Germans made the case that the additional specifications related to health and the environment and were necessary for the German authorities but were not covered by a harmonised standard. The ECJ answered to this by explaining that Germany should follow the procedures foreseen in the CPD for reacting to harmonised standards or to products considered to present a risk. Although this case was in the context of the CPD and only three construction products[4], it is expected that **the ECJ decision will be applicable under the CPR and with regard to all construction products with a CE marking.**

[3] Eurofins (2012): AgBB/DIBt – German restrictions for VOC emissions, available from http://www.eurofins.com/media/17642/AgBB-DIBt%20approvals%20-%20en.pdf. See also: AgBB, DIBt and German Ü mark for construction products, accessed at http://www.eurofins.com/u-mark.aspx

[4] Elastomeric seals for pipes, insulating materials made of mineral wool and gates, windows and exterior doors

2 How Companies Perceive Quality Marks

2.1 Overview

Information obtained from stakeholders indicates that quality marks available on the market pose different problems and, most likely, would require different solutions. For the purposes of this paper, the national/quality marks have been grouped into three categories **to reflect how these marks are typically perceived by companies**. These are not legal categories, but simply reflect the fact that quality marks possess certain common properties which pose common challenges to manufacturers.

These categories are:

- **Standards-related quality marks**, which are typically linked to standards, the CPR or specific CPR requirements (e.g. AVCP);
- **De facto mandatory quality marks**, typically required by important third parties in the construction supply chain (e.g. in public procurement notices and by insurers); and
- **Market-driven quality marks**, which are recognised/highly rated by customers.

In this context, it should be noted that national/quality marks do not necessarily/always fit perfectly into the categories identified (e.g. a mark could be de facto mandatory and also market driven); however, this grouping allows for some consideration of the problems posed and possible solutions.

2.2 Standards-related marks

2.2.1 Problem definition

Standards-related marks are used, in this context, to refer to national/quality marks which are directly or indirectly supported by, related to, linked to, or measured against standards which are of relevance to the CPR.

The main problem with these marks is that it is not always clear to manufacturers whether or not they fulfil a different/complementary function to the CPR, safety assessments, CE marking (e.g. in terms of covering essential characteristics) and/or whether, overall, they potentially confuse third parties as to the meaning of the CE marking. As noted by one manufacturer, these national marks very often follow the EN standards but sometimes with a minor deviation and/or, in some cases, upgrade the level of AVCP from 3 to 1[5].

In discussing these standards-related marks, it is difficult to determine easily whether each is:

- a national technical specification (e.g. a technical standard) for a construction product for a products not covered by a hEN ;
- a national technical specification transposing a hEN;

[5] It should be noted that it is not allowed under the CPR for a MS to upgrade the level of AVCP from 3 to 1.

- a national technical specification transposing a hEN, but not respecting the limits imposed by the CPR or the provisions governing free movement of goods in non-harmonised sectors);
- a national technical requirement setting specific uses of the products in a building or civil engineering work, which may (or may not be) justified or proportionate. As noted earlier, the choice of required performance values for specific intended uses to which construction products are put rests with each Member State and this sometimes reflects in national certifications/marks.

Put simply, it is difficult to ascertain clearly (without in-depth technical product knowledge) when these quality marks have gone beyond the remit allowed by the CPR for Member States' discretion. In any case, if the CE marking is publicised as being deficient or as representing a minimum conformity standard (rightly or wrongly), then these national/quality marks become even more important for manufacturers and consumers as an indication/sign of higher quality, safety or reliability. This also means that **companies are required to spend additional resources (and time)** before they can place their products on national markets where these marks exist. As there is no/limited mutual recognition across national markets for these marks, manufacturers could spend a lot of resources in order to take advantage of the Single Market.

2.2.2 Views of stakeholders

Stakeholders have identified various national certifications/quality marks which may qualify under this category. For example, in the **UK**, it has been indicated that the **BBA certificate** maintains a dominant position, even over CE marked products where hENs are in force. According to one manufacturer, the BBA process is costly, unnecessary, and can add one year to the introduction of new products. The BBA is accredited by the United Kingdom Accreditation Service (UKAS) and carries out testing in accordance with ISO/IEC 17025. As noted on the BBA website, "*Products that receive Agrément Certificates are recognised by building control, government departments, architects, specifiers and industry insurers.* ***It's a mark of quality, safety and reliability*** *that provides reassurance of the product's fitness-for-purpose. For new construction products it is vital to achieve this certification if they are to gain a quick route to the marketplace*."[6]

In **France**, the **NF228 standard** has been highlighted as hindering the easy sale of products in France for non-tested products. According to one manufacturer, the EN 12326 standard for roof slates is viewed as inferior and, indeed, publicity of the NF228 highlights the drawbacks of CE marking. As noted on one website: "*NF 228 is a French testing standard – you can think of it as the Michelin Star of the slate world. Slate with an NF mark has passed all the CE tests, and more, to a very high standard."* This manufacturer notes that the NF228 is used as a barrier to prevent EN-marked natural slate successfully selling in France and it costs time and money to obtain the certification. The manufacturer also indicated that they face drawbacks in other national markets where there is only limited awareness of EN 12326 and, as such, the CPR "*while very worthwhile, has not given compliant products any significant advantage…*". This view is somewhat reflected in further publicity material which notes that: "*The slate industry in the UK looks to a French standard because the current CE certification does not have a pass/fail criteria and the NF standard is a like-for-like replacement of the arduous old British standard BS680".*[7]

[6] BBA website: Agrément Certificates, accessed at http://www.bbacerts.co.uk/product-approval/agrement-certificates/

[7] Why The NF Mark is The ONLY Way To Know You're Getting Quality Slate, accessed at http://www.ssqgroup.com/resource-centre/why-the-nf-mark/

Another example can be seen in the **UK Kitemark**. As noted on the BSI website, "*As a Kitemark licensee you are already ahead of your competitors. With the introduction of EN 14351, BSI is modifying the Kitemark for Doors and Windows to include three new characteristics [that are either covered by building regulation or have threshold values in EN 14351]. CE marking may cover only these three areas whereas the Kitemark will include these as well as air permeability, water tightness and resistance to wind loading plus durability and security. …CE marking may not have the benefit of Kitemark but the introduction of EN 14351 cannot be ignored.*"[8]

Other examples mentioned by stakeholders include the **PAS24 in the UK** (and SKG quality mark 'star concept' in the Netherlands) for burglary products. One stakeholder noted that these introduce additional requirements outside of the main characteristics in Annex ZA of EN 14351-1 (windows and doors). In both cases, the European Burglar Resistance Standard EN 1627-1630 is "undermined" by additional tests required to qualify for the national marks. Similarly, it has been suggested that the **German RAL quality mark** (RAL GZ after 695) has a meaning in Germany that goes far beyond the requirements of the BauPVO. Here, there is a test sequence for the properties of air permeability (EN 1026), wind load (EN 12211), water tightness (EN 1027) and other properties, which leads to an increase in the requirements. Stakeholders also noted that the **"Bauregelliste" in Germany** defines additional requirements for harmonised products that have to be met by producers placing their products on the German market. One manufacturer indicated that for EN 1317 (Compliant Road Restraint Systems), there was no consensus about part 4 regarding transition; as a result, **France prepared a national regulation (NF 058)** which results in extremely high costs for manufacturers and effectively closes the market to the few operators that can afford these costs.

2.2.3 Possible solutions

According to the CPR, Member States are not to introduce any references, or should withdraw any references, in national measures to a marking attesting conformity with the declared performance in relation to the essential characteristics covered by a harmonised standard other than the CE marking. Put simply, national marks are permitted under the CPR, so long as they do not cover essential characteristics and fulfil a different function to the CE marking. Only the CE mark can be used to demonstrate compliance with the CPR. For the quality marks which would fall under this category, a case-by-case assessment would be required in order to identify the specific problems they pose – however, it is worth considering **whether there is a need for a systematic investigation of national/quality marks which go beyond the EU harmonised standards.**

That said, it is expected that the ECJ ruling on case C-100/13 will have a direct impact on various quality marks which are currently overstepping the mark in several Member States. However, the full impacts of the ECJ judgement in Germany will not be fully known until internal discussions between the DIBt, the Länder and the Federal Government are finalised[9].

[8] BSI website: Windows and doors certification schemes, accessed at http://www.bsigroup.com/en-IN/Our-services/Product-certification/Industry-sector-schemes/Construction/Windows-and-doors/windows-and-doors-certification-schemes/

[9] DIBt Press Release, Germany condemned by ECJ for impeding the free movement of construction products, See: https://www.dibt.de/en/Departments/data/ZD5_Press_release_Decision_ECJ_16_October_2014.pdf

2.3 De facto mandatory marks

2.3.1 Problem definition

De facto mandatory marks, are used in this context to refer to national marks which claim to be "voluntary"; however, they are effectively (de facto) mandatory for manufacturers as they will be unable to sell their products on certain markets, or in certain sectors, without them. These include cases where national/quality marks are (compulsory) requirements imposed under public procurement rules or by insurers (without which insurance cannot be obtained). Indeed, Construction Products Europe (CPE)[10] recognises that voluntary marks remain de facto necessary to sell in countries where the AVCP system is perceived as inadequate; when imposed by controls on building site/insurances; and when linked to incentives (e.g. renovation).

2.3.2 Views of stakeholders

In the UK, one stakeholder highlighted the **HAPAS (Highways Authorities Product Approval Scheme)** for the approval of a range of Highways Products. Within this range are Asphalt Thin Surfacing Systems which includes certification of the performance of the asphalt in the road for 2 years prior to certification and 'maintenance' of the certification/approval at annual intervals thereafter. This certification covers the supply of CE marked asphalts and an assessment and audit of material installation by approved contractors by the certification body BBA (British Board of Agrément). BBA are currently the sole UK certification body and owner of the HAPAS scheme and supposedly "*insist that they carry out audits of the suppliers' Factory Production Control for the asphalt manufacture which has already been assessed, audited and certified under AVCP System 2+ as they do not have confidence in the notified bodies' audits*". If the supplier does not permit this sequence of secondary or duplicate audits by BBA, BBA will withdraw their Thin Surfacing Certificate of Approval, the holding of which is currently a specified condition of supply of this product type within the UK market, primarily Public Sector Procurers responsible for the Motorways, Trunk and Local Authority roads in the UK.

Another manufacturer mentioned the **CEKAL certification (France)** as a de facto mandatory scheme which hinders the placing of glass products on the French market. The following bullet points lifted and reproduced from some publicity material highlights some of the key issues:[11]

- For more than 20 years CEKAL certification has been applied to glass products in France as a guarantee of quality, transparency and sustainability, and therefore plays an important role in the market.
- The CEKAL certification system is structured and organised according to the European standard EN 45011, thus ensuring that CEKAL displays the objectivity, impartiality and accuracy that is to be expected of a certification body.
- CEKAL certification of insulating glass units is a voluntary certification process in which the individual components are required to meet quality criteria, thus guaranteeing the quality not just of the end product as a whole, but also of each of its components.

[10] CPE (2014): The manufacturer's point of view by Construction Products Europe (CPE), available at http://www.buildingtestexpo.com/assets/files/Proceedings2014/anne_minne.pdf

[11] Glass Global community website: CEKAL and ift Rosenheim sign cooperation agreement, available at http://www.glassglobal.com/news/cekal_and_ift_rosenheim_sign_cooperation_agreement-21062.html

- The CEKAL mark is a visible indication of high product quality, not least because products achieving CEKAL certification must satisfy higher requirements than those set out in the product standards for glass, for example regarding the ageing (UV resistance) of the individual components.
- To ensure consistently high quality the certificate remains valid for just six months and products must undergo surveillance twice a year by independent third parties such as CSTB (Centre Scientifique et Technique du Bâtiment), Ginger CEBTP (Centre Expérimental de Recherches et d´Études du Bâtiment et des Travaux Publics) and now also the ift Rosenheim.
- Voluntary CEKAL certification is very important for insulating glass units in France, particularly because construction insurance companies tend to rely on well-known certification systems before issuing 10 year guarantees at affordable prices
- As a result, window manufacturers can more easily place their windows on the French market if they are made with CEKAL-certified insulating glass units. This makes CEKAL certification essential for insulating glass unit manufacturers who wish to sell their products on the French market.

Other examples mentioned by stakeholders include the **CSTB certificate (Document Technique d'Application (DTA) approval)** which is required in France by insurance companies, design engineers or clients in strong/monopoly positions. In France, the **UPEC classification (NF UPEC mark)** has been highlighted as a de facto obstacle (for insurance reasons) to the free circulation of tiles intended to be used in floors of public areas. The **Avis Technique in France** was also highlighted as a quality mark which is related to insurance requirements, but not required directly by Member States. In **Hungary** and **Poland**, it was noted that additional requirements of approvals and audits are "voluntary" but de facto necessary. In Spain and France, it was noted that there is interference with the free movement of CE marked construction products, because products coming from other countries must comply with **AENOR and AFNOR** marks and regulations. All these marks require additional testing of the products which creates administrative and financial burdens for manufacturers.

2.3.3 Possible solutions

From the consultation, there was a very strong view that more needs to be done in this area by the Commission to address public bodies, or private bodies acting as a public undertaking, that seem to be imposing additional national requirements/standards that impede the free movement of CE marked construction products. In this context, some manufacturers have argued that Article 8(5) is vague and MS have used Recital 33 (which notes that other markings may be used, provided that they help to improve the protection of users of construction products) as justification for these marks.

2.4 Market-driven marks

2.4.1 Problem Definition

Market-driven quality marks, in this context, refer to those quality marks which are recognised and highly rated by customers and consumers. In many cases, they do not clash with the CE marking

and, technically, do not impede the free movement of construction products.[12] However, they occupy a very strong position in the market and, as such, effectively become barriers to trade – as manufacturers are unable to trade their products without these. Or put another way, customers (consumers) will not buy products which do not have these quality marks. For these marks, **the main problem is that that there is no mutual recognition between these marks (or cross-border benefit) which reinforces their importance at the national level**. Where this practice exists, it is **SMEs who are hit hardest,** as larger companies can rely on their good reputation and resources to gain more accreditation and sell more products.

2.4.2 Views of stakeholders

Public authorities, companies, industry associations and construction industry stakeholders all noted the impact of market forces at the local level as being key in terms of determining whether or not the CPR is effective in ensuring the free movement of products. Some views are summarised below:

> "*The real barriers to trade are the local labels. If your product does not have the local label, no one will buy and install it. Nothing has been done to solve this*".
>
> "*For sanitary installations, national labels are predominant and misused by the national certification institutes to protect national markets. If you don't have the label, you can enter the market but won't sell a single item*".
>
> *"Customers, especially consumers, are not aware or not interested in CE marking. They care about local / national labels and awards for construction products (e.g. Blaue Engel in Germany, SNJF in France, KOMO in the Netherlands)".*
>
> "*… CE-mark makes a product dealable [legal], but not necessarily applicable…. It does not matter whether the [product] is legal, when you are not allowed to use the product in the country. Nobody will buy it, when he is not allowed to use it on the building site."*

One manufacturer of insulating glass units provided a list of various quality marks required in order to trade their products across the EU:

> ***Belgium**: Benor, ATG; **Finland**: SFS; **France**: Cekal; **Germany**: GMI (RAL), U-mark; **Italy**: CSI (UNI); **Norway**: Sinteff; **Poland**: B-Safety; **Portugal**: CERTIF; **Spain**: N-mark, AP+; **Sweden**: P-mark; **UK**: Kite-Mark, BM-Trada*

A cement manufacturer also indicated that they needed to obtain the BENOR, KOMO and NF Quality marks in order to gain access to the Belgian, Dutch and French markets respectively.

These examples illustrate the need for some mutual recognition or system of marks which goes beyond the national marks.

In discussing these, it is important to note that, many stakeholders/organisations want voluntary marks to remain, as they perform different functions to CE marking. Some were of the view that some well-established voluntary schemes currently provide more credibility compared to the CE marking for construction products and would need to continue in the short term at least. However,

[12] For example, KOMO in the Netherlands has set out the differences between KOMO and CE marking to justify that they are incomparable. See http://en.komo.nl/files/84_engelstalige-leaflet.pdf

as shown in the Table overleaf, for manufacturers and SMEs wishing to trade across the EU, these requirements impact on their resources.

2.4.3 Possible solutions

There is no obvious solution for dealing with market-driven marks, as these marks are effectively recognised and highly rated by customers and consumers. Perhaps, it needs to be considered whether these is scope for some mutual recognition or EU-level quality marks which cover the points addressed by these marks.

3 Questions for discussion

What are your views on the likely impacts of the ECJ rulings on cases C-227/06 and C-100/13 on quality marks?

Which types of quality marks should be investigated as a priority for their compatibility with the CPR? Why?

Are there any suggestions for how to improve mutual recognition of quality marks, so as to reduce costs for manufacturers and SMEs?

Are there any suggested approaches for dealing with De facto mandatory marks?

Are there aware of any national marks or technical specifications which may be impacting on the free movement of CE marked construction products which have not been mentioned in this paper (including the table in the next section)?

4 Key National Marks

The Table below provides a list of key national marks identified to date.

Table 4-1: Examples of National Certifications/Quality Marks identified in various MS from consultation and literature review		
Country	**Mark**	**Details**
Austria	Baustoffliste OE	Building Materials List issued by the Austrian Institute for Building Technology
Belgium	BENOR	BENOR mark certifies that a product or service conforms to a technical quality framework adopted by all parties involved in the placing on the market. *The BENOR mark for aggregates and concrete is mandatory in public works in Flanders even with AVCP 2+*
	EHPA	European Heat Pump Association issues a quality label to heat pumps that undergo tests according to EN 14511 and EN 16147
Denmark	DANAK	National Accreditation Body involved in the accreditation of laboratories, certification bodies and inspection bodies. Also involved in testing or inspecting products for certification.
France	ACERMI	The Association for Certification Materials Isolants scheme is operated by CSTB and LNE. The scheme validates the factory and laboratory characteristics of thermal insulation.
	AFNOR	The national organisation for standardisation whose certification branch is responsible for two quality marks; AFAQ and NF.
	CEKAL Certification	Applied to glass construction products e.g. windows as a guarantee of quality, transparency and sustainability. The certification scheme is structured and organised according to EN 45011. In July 2012, ift Rosenheim was nominated as its first testing partner in Germany.
	CSTB	CSTB (Centre Scientifique et Technique du Bâtiment) is an independent third party involved in the AVCP system (notified body). CSTB also provides voluntary, certification to 'add value' and reward performance of building products. There are three types of evaluation given by a group of experts supported by CSTB: • Document Technique d' Application (DTA) - issued for construction products subject to CE marking; • Avis Technique (Atec); and • Appreciation Technique d' Expérimentation (ATex) is applied to innovative construction systems. In some cases DTA are demanded by the designing engineers and insurances.
	NF Environment Mark	Voluntary certification mark issued by AFNOR Certification (notified body) e.g. NF228
	SNJF	SNJF (Syndicat National des Joints et Facades) is a certification body delivering around 600 certificates a year
	UPEC Classification	UPEC, NF-UPEC and NF-UPEC.A++ are systems of certifications established by CSTB for the classification of floor coverings. Being

Table 4-1: Examples of National Certifications/Quality Marks identified in various MS from consultation and literature review		
Country	**Mark**	**Details**
		based on classification procedures defined under the NF EN 1307 standard, to which they add supplementary requirements.
	VOC labelling	Since 1st Jan 2012, construction products traded in France must be labelled with an emissions classification on the basis of a VOC emissions test (as stated in the Décret n° 2011-321).
Germany	AgBB/ DiBT	Task force of public health authorities (AgBB) and the Deutshes Institut fur Bautechnik (DIBt) developed restriction for VOCs published for a number of construction products including floor coverings, parquet flooring and adhesives.
	Blaue Engel	Voluntary certification system as a way of demonstrating that a construction product is environmentally friendly
	DIBt	Granted approval body as German Technical Approvals (TAB)
	EMICODE	Voluntary certification system aimed at assessing the implications on environmental and indoor air quality
	IFT/Rosenheim	Testing institute (notified body) which specialises in the assessment of the fitness for use of construction products, including: • Window examination by EN 14351-1; • Facade examination by EN 13830; • Examination of doors , gates, statements , among others; • Testing of building materials, such as glass, sealants or wood; and Fire resistance test according to EN 16034.
	RAL	RAL quality Mark is intended to identify products that are manufacturers to high, precisely specified quality criteria. Products certified include road equipment and photovoltaic components
	Natureplus	A European Association which awards a quality mark to building products which fulfil high standards relating to climate protection, healthy accommodation and sustainability.
	TŰV Rheinland	Among other services, TŰV Rheinland provides material testing and inspection services, including products, systems, functional safety and personnel.
	Ü-Zeichen	Mark of conformity indicating a construction product meets the relevant national building regulations. German national system of "Bauregellisten" (Building Regulations), requires the Ü mark for certain construction products.
Netherlands	KOMO	Voluntary certification system for construction products guaranteeing compliance with the national building regulations. Includes the following: • Attest-with-product certificate for components of solar systems • Attest-with-product certificate for thermal insulation of cavity walls (new buildings)
	SKG	SKG quality mark for glass, hinges, locks and related products. Also certifies products for burglary resistance, security and other specific characteristics. Also licensee to attest and certify construction

Table 4-1: Examples of National Certifications/Quality Marks identified in various MS from consultation and literature review		
Country	**Mark**	**Details**
		products with SKG KOMO quality marks.
Poland	B Mark	Mandatory certification mark for electrical and electronic products exported from Poland. Applies to some construction products e.g. fire protection equipment. B marking for intumescent products obtained based on EN13381
Spain	AFEOR	The Spanish Association for Standardisation and Certification provides certification for products with regards to quality. Products can also be certified to show the consideration of environmentally sustainability during sourcing and manufacturing.
	Document of Assessment for fitness of Use (DAU)	ITEC issues several quality marks for innovative products or systems which are not covered by a harmonised standard.
Sweden	BASTA	Voluntary certification scheme for construction products focusing on the content of hazardous substances
United Kingdom	BBA Certificate	Approvals issued by the British Board of Agrément showing the fitness for purpose of constructions products. Certificates are recognised by building control, government departments, architects, local authorities, specifiers and industry insurers.
	Highway Authorities Product Approval Scheme (HAPAS)	Issued by the British Board of Agrément the HAPAS is a nationally recognised approval scheme for innovative products and systems used in highway works.
	LPC	LPC (loss prevention certification board) standards applicable to some construction products e.g. doors, windows, curtain walling etc. e.g. LPC1175 (Loss Prevention standards/secured by design)
	Kitemark	Product quality certification mark owned and operated by the British Standards Institute. Commonly used on products where safety is particularly important e.g. smoke detectors and windows
	PAS 24	A British standard relating to enhanced security performance requirements for doorsets and windows. Testing and certification are carried out by UKAS accredited certification bodies.
More information on quality marks can be found on the ELIOS database http://signsdirectory.elios-ec.eu/		

Topical Report #4:

Experiences with CPR Derogations (Article 5) and Simplified Procedures (Chapter VI)

1 Background

Article 5 of the CPR sets out a number of exceptions (or 'derogations') to the requirement that a declaration of performance (DoP) is made for each construction product that conforms to a hEN or ETA. These derogations cover construction products which are (a) '*individually manufactured or custom-made in a non-series process…*'; (b) '*manufactured on the construction site for incorporation in the respective construction works…*'; or (c) '*manufactured in a traditional manner or in a manner appropriate to heritage conservation…*'. According to Article 8(2), if a DoP has not been drawn up by the manufacturer, then the CE marking shall not be affixed.

Manufacturers may refrain from drawing up a DoP in these cases under one condition contained in the first sentence of Article 5: "*in the absence of Union or national provisions requiring the declaration of essential characteristics where the construction products are intended to be used*".

Chapter VI of the CPR lays out simplified procedures for construction products covered by a hEN. Specifically, Article 36 enables any manufacturer to replace the type-testing or type-calculation stage of the assessment process with Appropriate Technical Documentation, under certain conditions. Article 37 of the CPR provides micro-enterprises with the option to use simplified procedures when carrying out the AVCP. Article 38 provides that Specific Technical Documentation may be used in place of the performance assessment part of the applicable system (as set out in Annex V of the CPR) for all construction products which are '*individually manufactured or custom-made in a non-series process…*'. The latter provision aims at facilitating the performance assessment within the context of the derogation allowed under Article 5(a) of the CPR.

When the CPR was introduced, it was anticipated that the derogations and simplified procedures would have a number of positive effects, including:

- **Enhancing the competitiveness of EU manufacturers and increasing ease of compliance** (by avoiding unnecessary testing): According to Recital 35, "*To **avoid duplicating tests already carried out**, a manufacturer of a construction product should be allowed to use the test results obtained by a third party*". Recital 34 also notes the need to "*To **avoid the unnecessary testing of construction products** for which performance has already been sufficiently demonstrated*…"; and

- **Reduce costs for small and medium-sized enterprises (SMEs) and micro-enterprises and enhance potential for innovation**: According to Recital 38, "*To further **decrease the cost to micro-enterprises of placing construction products, which they have manufactured, on the market**, it is necessary to provide for simplified procedures for the assessment of performance when the products in question do not imply significant safety concerns while complying with the applicable requirements, whatever the origin of those requirements*". Recital 39 also recognises the need for simplified procedures to be allowed for the drawing up of DoP's "*for an individually designed and manufactured construction product"* in order to alleviate the financial burden on enterprises, in particular SMEs.

Information obtained in the course of this study indicates that these benefits have not accrued to the extent anticipated. More specifically, while some companies have used the derogations, other **companies have lacked the awareness, legal and technical capacity to take advantage of these derogations** and some authorities have also encountered difficulties in supporting them in this regard. The **extent to which there are economic benefits associated with applying the simplified**

procedures has also been questioned. The aim of this Topical Report is to summarise the key issues which have led to the limited uptake of the flexibility provided for under the CPR. The information provided in this paper is based on information provided by stakeholders during the course of the study. For each problem identified, ***indicative*** and ***representative*** comments from each of the stakeholder groups have been provided, as well as relevant information from a literature review.

2 Article 5 Derogations

2.1 Article 5

2.1.1 Problem definition

Article 5 clearly states that the derogations may only be used in the "***absence of Union or national provisions***" requiring the declaration of essential characteristics where the construction products are intended to be used. Stakeholders have noted **this caveat has created a lack of legal certainty** and further clarity needs to be provided as to what constitutes a 'Union' and 'national provision'. **Consultation undertaken for this study has also not identified actual use of Article 5; although, there has been some interest in the uptake of this Article as can be seen from the views of stakeholders (below). It is, therefore, not conclusive that this provision has not been used at all, but no positive experiences or benefits to organisations have been identified to date.**

2.1.2 Views of stakeholders

Stakeholders identified various legal issues resulting from the caveat "*in the absence of Union or national provisions".* One public authority noted that the term 'Union' should be removed from the introductory text and that it should only refer to national provisions, as this would rightly focus attention on those unique situations (e.g. climatic conditions) that arise within each Member State (e.g. provisions for snow in Scandinavian countries). It was also indicated that by including the term 'Union', the provision is made more difficult to apply, presumably as it becomes so all-encompassing and deters companies away from taking advantage of the provision (as there is a higher risk of non-compliance with some unknown 'Union' rule).

As regards the limited uptake of the derogations under Article 5, three additional reasons have been put forward by stakeholders, all linked to the **lack of clarity regarding the spirit, intent and implementation of the law (or more specifically, the Article provision).**

Firstly, there is a view that the scope of Article 5 was intentionally defined so strictly that it is relevant to only a handful of situations/companies. It is the view of some stakeholders that once the caveat under Article 5 (i.e. "*in the absence of Union or national provisions"*) is combined with other requirements set out under Articles 5(a), (b) and (c), only very few situations would qualify for a derogation. For example, using the case of Article 5a, a company that produces say 40 windows which are "*individually manufactured or custom-made in a non-series process in response to a specific order*", will still not qualify for derogation if these are installed on two sites (as Article 5a further specifies that it needs to be "*installed in a single identified construction work*"). This is a high threshold to achieve for many companies realistically and, in practice, leads to a situation whereby manufacturers are/can be accused of incorrectly interpreting the CPR (because they have not properly understood the legal caveats). On the other hand, it has also been suggested that some authorities intentionally rely on the caveats to deter manufacturers from taking advantage of the derogations in cases where the authorities wish to regulate closely (e.g. heritage buildings).

Secondly, **there are concerns relating to the issue of liability and the extent to which a manufacturer will (or will not) be covered as a result of taking advantage of the provisions under Article 5**. Some of these concerns are driven by the testing bodies that have an incentive (or conflict of interests) to encourage manufacturers to test their products (rather than take up the derogation).

As noted by one notified body, using the example of windows, performance requirements such as those related to safety devices associated with windows are critical to the health and safety of a user. Indeed, if a safety device were to fail, an individual could fall out of the window with potentially fatal results. Under such circumstances, a court may determine that the manufacturer should have drawn up a DoP and provided CE marking on the product, rather than relying on Article 5. As noted on one notified body's website, "*how would a court view a company looking for positive ways to become exempt rather than compliant to the law, especially when costs involved in CE Marking are minimal?*".[1] Given the potential penalties of fines or imprisonment, they advocate that manufactures should incur the minimal costs associated with CE marking, which translates to fewer companies taking advantage of Article 5.

Thirdly, it has been indicated that there may be harmonisation issues implicit in the provision and relating to the "national provisions" aspect. As one notified body indicated, what is "traditional" in one Member State may not be traditional in another and this needs to be made clearer or more specific, if harmonisation of the internal market is to be ensured. Another public authority noted that there is a need to provide a better definition of what constitutes a relevant national provision (e.g. national standards, national marks, building regulations, etc.) as manufacturers will be better able to understand the derogation with such clarification. It has also been suggested that the caveat "*in the absence of Union or national provisions"* tends to be used in tandem or to justify the non-application of Article 5(c) and this has led to some stakeholders questioning how Article 5(c) should be interpreted and applied. For example, it has been suggested that some authorities do not have any desire/intention to see construction products which are used in 'heritage conservation' or in buildings of 'architectural or historic merit' subject to derogations. In such cases, these authorities tend to invoke the initial clause in Article 5 "*where there is an absence of Union or national provisions*" in justifying the case that the derogations are not applicable.

In your view, is the reference to the "*absence of Union or national provisions*" a major problem impacting on the uptake of Article 5. If YES, should this reference be (a) removed/amended; (b) clarified in Commission FAQs; or (c) should more detailed guidance be provided on how this is to be interpreted and implemented. Who would be best placed to provide this additional guidance taking into account national regulations and the wide range of construction products: industry associations, Member States or the EC?

Are you aware of cases of use of the Article 5 derogation and, if yes, which of the derogations (5a, 5b, 5c) and for which products?

2.2 Article 5(a): Individually manufactured, custom made and non-series construction products

2.2.1 Problem Definition

A key problem with Article 5(a) relates to the **legal uncertainty as to how industry should interpret and apply the terms 'individually manufactured' and 'custom made in a non-series process in response to a specific order…'**

[1] Buildcheck website, Is the heritage sector exempt from CE Marking? Accessed at http://buildcheck.co.uk/triple-glazing-affect-ce-marking/

In 2014, the Commission published a paper aimed at clarifying the situation regarding Article 5(a), in particular providing some definitions for key concepts as follows[2]:

- **Individually manufactured** products are those manufactured according to customer designs or designed by the manufacturer taking into account the requirements and needs of the client.
- **Custom made** is a product made to fit the needs or requirements of a particular person or made according to the specifications of an individual purchaser.
- **Series production** is the manufacture of goods in large quantities using standardised designs and assembly line techniques. A **non-series** process is thus the manufacture of goods in small quantities without using standardised designs and assembly lines.

Despite this, many stakeholders have indicated that there was a problem with interpreting Article 5. It is possible that some of the issues facing stakeholders regarding Article 5a relate to a **lack of awareness of these latest guidelines**, although some stakeholders have questioned the **method employed to clarify matters** (i.e. the legal status of the explanatory document published on the Commission's website) as well as **the validity of the interpretation provided** by the Commission.

2.2.2 Views of stakeholders

Various stakeholders identified the **need for a clearer definition of key terms** set out under Article 5(a) and the **provision of examples**. It was highlighted that the lack of legal certainty means that some manufacturers are choosing not to take advantage of the derogation, for fear of penalties if they are later found to be non-compliant as a result of unintentionally misinterpreting the provisions. In this context, it is interesting to note that an industry association, in trying to advise its members on what may be within the scope of Article 5, uses the term "*loophole*" to describe the possibility of a product being within the scope of Article 5. Furthermore, they note the need for this to be addressed by a lawyer and "*the potential downside of a prolonged engagement with a trading standards department*" as not being attractive - effectively, highlighting the potential costs and risks of taking up the Article 5 derogation[3]. In a similar vein, the British Woodworking Federation state that "as the derogations or exemptions from the requirements are very limited, we recommend that companies aim to achieve the CE mark, rather than try to avoid it and risk prosecution"[4].

On the other hand, some manufacturers are taking advantage of the lack of legal certainty and interpreting the provisions in a manner that benefits their organisation (and perhaps, reflects their perception of the chances of detection during market surveillance and/or action being taken by an authority). An industry stakeholder suggested that some manufacturers of doors and windows may be interpreting the term '*individually manufactured*' widely and exploiting the ambiguity of the term so as to avoid the obligation of drawing up a DoP and affixing the CE marking. In such cases, it appears that some manufacturers have failed to take into account all of the requirements of Article 5(a), in particular, that it requires 'a manufacturer' to install the construction product. On a similar note, a public authority explained that some construction products covered by the CPR are produced

[2] European Commission, Explanations on Art 5(a) of the CPR, CPR 07/07/1. See: http://www.kwaliteitbouwprodukten.nl/wp-content/uploads/2014/04/CPR-07-07-1-Individual-and-non-series.pdf

[3] http://www.mortar.org.uk/documents/MIA-CE-Marking-Briefing.pdf

[4] Website, British Woodworking Federation (2013) First joinery CE Marking prosecution – don't let it be you! See http://www.bwf.org.uk/news/latest-news/first-joinery-ce-marking-prosecution-dont-let-it-be-you

for installation in a single identified construction work, for example windows which are made to different widths and heights. For such products, there is a need to provide criteria that should be taken into the account for identification of the series or non-series manufacturing processes.

A few stakeholders recognised that some explanatory guidance has been prepared by the Commission; however, they questioned the extent to which this should be treated as legally binding guidance (i.e. to introduce a legal interpretation of the CPR which may have significant impacts on some sectors of the construction industry via Commission FAQs is questionable. On the other hand, interpretation of European legislation via guidance documents is now common practice). This becomes even more critical if the validity of the interpretation provided by the Commission is in question.

Overall, a number of public authorities (and stakeholders) shared the view that there is a **need to further define (with examples) what is meant by "*individually manufactured or custom-made in a non-series process*"** and what it means for a manufacturer to install an '*individually or custom-made*' construction product. A notified body also requested further clarification with regards to what constitutes a '*series*' and '*non-series*' product.

2.3 Article 5(b): Manufactured on the construction site

2.3.1 Problem Definition

Information from consultation shows that there is some ambiguity as to when a construction product can be considered to be "*manufactured on the construction site for its incorporation in the respective construction works*".

2.3.2 Views of stakeholders

One public authority noted that there is some confusion as to when Article 5(b) is applicable. For instance, within road construction, slurry surfacing (which consists of putting gravel and bitumen spray on the road) would appear to be a clear case of being manufactured on a construction site. However, industry still has doubts and (as a precautionary measure) chooses to apply the CE marking just to ensure there are no problems with the authorities. In this instance, it would appear that **the lack of legal certainty relating to Article 5(b) means that organisations are not taking advantage of the derogations (and associated benefits)**, even where they are entitled to.

Some of this uncertainty may relate to contradictory views from other authorities regarding what should be taken into consideration under Article 5(b). Indeed, one public authority questioned whether the volume or type of construction products being manufactured on site should be taken into consideration when deciding whether/how to apply Article 5(b). In this case, it can be seen that there is a view that a blanket derogation for all products meeting the criteria under Article 5(b) is not appropriate and the public authority expressed the view that this provision would benefit from specifying what kind of construction product may be manufactured on site (and for which Article 5(b) is applicable).

2.4 Possible solutions

A review of the literature shows that various sectoral industry associations have issued guidelines to assist their members in determining the extent to which Article 5 could be applied to products within their sector (See Table 2-1 below). It can be observed that these attempts focus on what

Article 5 should not be applied to (as opposed to what it covers) and uses examples of products which are borderline cases. **A possible option to consider is the provision of supplementary and comprehensive guidance (including examples) which can address these issues in a manner that can be easily understood by companies (particularly micro-enterprises and SMEs who may have minimal experience with interpreting European legislation) and which can improve the uptake of these derogations by those it is intended for**. Overall, there is a need for a clearer communication of what manufacturers should look out for and public authorities should permit in relation to the derogations under Article 5.

Table 2-1: Interpretation of Article 5 by industry associations

Association	Comments in relation to Article 5(a)
Rural and Industrial Design and Building Association (RIDBA)	Referencing the CPD Guidance Paper M, it is advised that Article 5 should not be applied to Agricultural buildings that need to be CE marked
Euralarm	Reiterating Article 5, it is noted that individually manufactured or custom-made in a non-series process is not applicable if components are used out of serial production and therefore unusual for fire detection alarm system products
Mortar Industry association (MPA)	The paper notes that lime sand mortar may fall within the scope of Article 5. However, legal advice would need to be sought to clarify this and the prolonged costs of entering into dialogue with trading standards may best be avoided.
The Concrete Centre (MPA)	The paper notes that questions remain as to whether ready-mixed cementious screeds that are 1:4 are bespoke or subject to harmonised standard EN 13813 which specifies/defines strength.
Glass for Europe	Although bullet-resistant glass products may be produced in small quantities by a specific producer to meet a bespoke order, it does not satisfy all the requirements of Article 5(a). Therefore, the derogation would not apply to such products. Some guidance is also provided to window manufacturers, by listing examples of glass products that may fall within the scope of Article 5(c) with these likely to include 'traditional lead light, copper light or some types of curved glass or brown glass
Fire Industry Association (FIA)	Article 5 does not apply to products that have site specific software configurations

Sources:
RIDBA, CE Marking Enforcement, accessed at http://www.ridba.org.uk/CEmarking/CE-Marking-update.pdf.
Euralarm, Guidance Document, Construction Products Regulation (EU) 305/2011, accessed at https://www.euralarm.org/media/news_files/2013/05/Euralarm_Guidance_document_CPR_GL-0202-1304-0101_14052013_3.pdf.
*MPA – The Concrete Centre (2013) Standards Update: CE Marking accessed at industry*https://www.concretecentre.com/pdf/TCC043_The%20CPR%20for%20Designers%2023%20Apr%202013%20%20v7.pdf
MIA - CE marking and the UK mortar and screed
http://www.mortar.org.uk/documents/MIA-CE-Marking-Briefing.pdf
Glass for Europe (2014) CPR Guide: EU Rules Practical Impact accessed at http://www.glassforeurope.com/images/cont/192_21487_file.pdf
Fire Industry Association, FIA Guidance for the Fire Protection Industry, accessed at https://www.euralarm.org/media/news_files/2013/06/Guidance_on_EU_Construction_Products_Regulation.pdf.

Are there alternative or additional solutions which can improve the uptake of the derogations under Article 5?

3 Article 36 – 38: Simplified Procedures

3.1 Background

3.1.1 Problem Definition

In general, information from consultation appears to show that there is a **low level of awareness** regarding the simplified provisions, as shown in the Figure below. **As can be seen from the Figure below, there does appear to be some uptake of Articles 36 – 38 by some organisations and some positive experiences or benefits to organisations have been identified to date.**

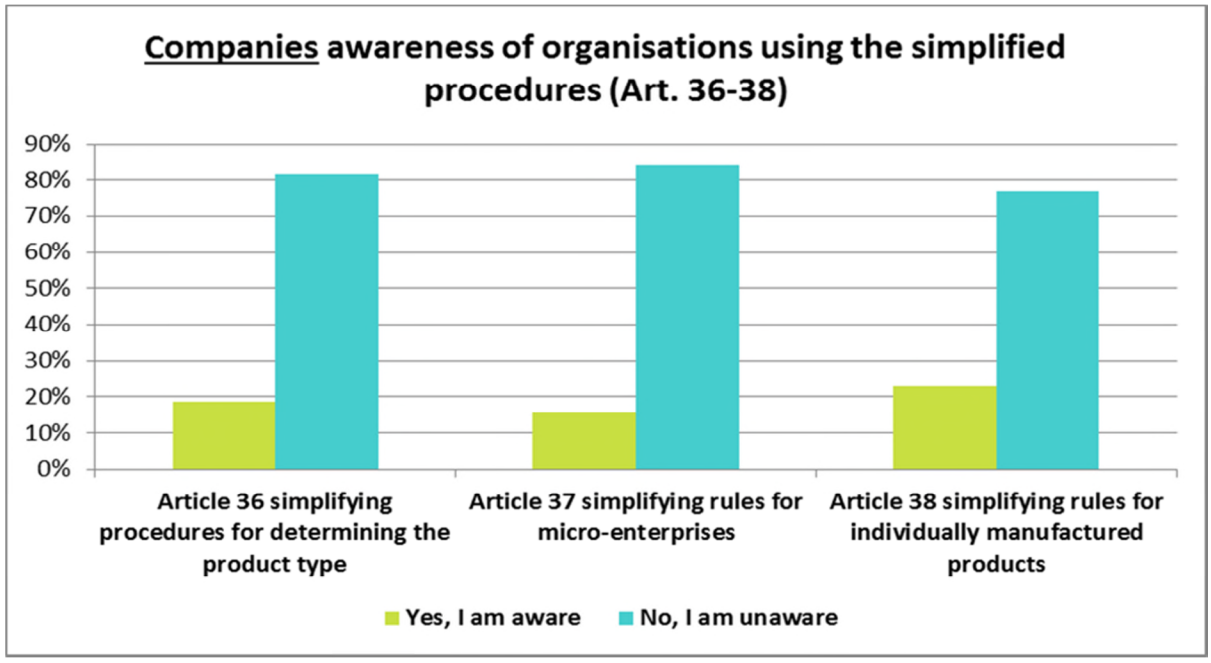

Figure 3-1: Response from companies

3.1.2 Views of stakeholders

Based on the responses to consultation, most companies indicated that there had been no change from the situation which existed previously under the CPD (obviously linked to the fact that many are unaware of the simplified procedures). However, in contrast the majority of public authorities indicated that the simplified procedures had brought about positive impacts. Some companies did, however, indicate that they had used the simplified procedures in Articles 36, 37 and 38 of the CPR, or that they were aware of organisations that had used them.

An engineer in Germany noted that **Article 36(1)(a)** is commonly used for "reaction to fire" for wood-based panels according to EN 13964, plasterboard according to EN 520 and Glued laminated timber according to EN 14080. EN 14081 "structural timber with rectangular cross section" may also use this provision. A company in Poland and another European manufacturer also noted that this provision (and Article 38) has been used for ceramic roof tiles and fittings, lintels and beams for floor

systems, ceramic blocks for walls and ceramic fillers for floor systems and ceramic facing bricks. It was noted that there are a lot of harmonized standards that give reaction to fire classes, in addition to the CWFT-Lists of the European commission.

Other stakeholders also noted that **Articles 36(1)(b) and 36(1)(c) relating to** "shared ITT" and "cascading ITT" (according to guidance Paper M under the CPD) are commonly used in the windows and façades industry (e.g. a big company produces alloy or plastic profiles as a basis for producing windows or façades, and small companies buy the profiles and make windows or façades out of them for different buildings). While a German engineer noted that that this provision is commonly used and works well in practice, an industry associated in Germany remarked that many SME manufacturers may not be aware that they are applying Article 36, only that they are following a route to comply with the CPR. A German engineer noted that thousands of small metalworkers or small cabinetmakers producing alloy windows or wooden windows could save a lot of money (and possibly also time) if they have used cascading ITT. This is because the harmonized standards for windows and façades are very complex and SMEs cannot afford such testing and development.

One stakeholder noted that **Article 37** (micro-enterprises) of the CPR will become more important over time although, clearly, its use is dependent on the specified AVCP procedures. It was noted that the extent of any cost savings as a result of this procedure will be variable and very product and sector specific.

One manufacturer, which had applied **Article 38** of the CPR to custom-made tiles, noted that they had followed the same procedures that they were using before the CPR and that the process had been straightforward. The manufacturer carried out in-house testing of the tiles and advised the customer that the requirements set out in the order/contract had been fulfilled. The stakeholder noted that they will use the simplified procedures again for custom-made tiles as these are non-series products.

Some companies and the majority of public authorities identified a positive impact in terms of **reduced costs for SMEs and micro-enterprises**, with the scale of cost savings estimated at less than 10% by the majority of respondents. Some respondents considered the cost reduction to be between 10 – 25%, although this may reflect the number/value (€) of products which a company manufactures which are able to take advantage of the simplified procedures. One organisation involved in conformity assessment also remarked that "*They [simplified procedures] have made our work easier and help the producers as well".*

3.2 Scope for improvement

3.2.1 Overview

Information from consultation indicates that there has been a relatively low uptake of the simplified procedures (as set out in Articles 36 – 38) to date. Three main problems have been identified in this regard:

- the lack of awareness and understanding of these provisions by industry stakeholders;
- doubts over the actual extent of financial savings applicable (and scope for potential future costs or complications on the market); and
- Difficulties in demonstrating 'equivalence' and/or providing alternative technical documentation.

3.2.2 Article 36

Information from consultation shows a **low level of awareness amongst industry stakeholders** regarding the Article 36 provisions, with many stakeholders indicating that they were not aware of these simplified procedures.

Information from consultation does, however, indicate that there are groups of industry stakeholders that have actually taken advantage of Article 36 (most certainly, a greater proportion have used Article 36, compared to Articles 37 and 38). Some of these organisations were those that were aware of the principles of 'cascading' and 'sharing' set out under Guidance Paper M (CPD). For these companies, the introduction of these principles within the legislative text of the CPR has been beneficial, as it has resulted in increased legal certainty. It has also allowed industry associations to play a more active role in supporting companies to take advantage of these provisions, with testing laboratories now owned/run by SME trade associations in Italy/France. One public authority also noted that Article 36 has been used by timber mills to share costs by coming together to undertake shared testing.

Other stakeholders, however, indicated that they found the terms outlining how the procedures should be applied 'ambiguous and confusing', which may have led to scepticism in some cases. As noted by one company, it is '*unclear how these simplified methods may be used and whether they are in the actual application even a genuine simplification*'. A few industry stakeholders also indicated that when they have applied or inquired as to the application of Article 36, the process has been complex and costly, with one company noting that they were required to present the individual type testing data for every individual product (presumably as '*Appropriate Technical Documentation*').

Stakeholders also highlighted **issues relating to** the application of **Article 36(2),** concerning the verification of the Technical Documentation and **enforcement**. It was noted that, when the simplified procedures are not specified in any of the harmonised standards, notified bodies are unable/unwilling to certify anything other than the required mandatory tests. Also, where the simplified procedures have been applied, national authorities have problems understanding and evaluating them. Interestingly, public authorities (responding to the consultation) expressed concern as to how market surveillance authorities will evaluate technical documentation that has replaced laboratory testing, as a result of an organisation applying the procedures under Article 36.

3.2.3 Article 37

With regard to Article 37 (and 38), many stakeholders indicated that the requirement for "*Specific Technical Documentation*" (STD) and to "*demonstrate the equivalence of the procedures used to the procedures laid down in the harmonised standards*" has made Article 37 almost unfeasible for SMEs.

Firstly, the lack of clarification of **what may be considered STD** means that it is open to interpretation by different authorities in different ways (which may not always result in 'simplification'). As noted by one notified body, it is unclear how this should be implemented and certifying bodies are afraid to be the first one to implement these requirements. "*There is always the threat that, if someone decides to implement the article inappropriately, the market will be clogged up with products carrying CE marks that are misleading and do not conform to the CPR".*

Some notified bodies/technical assessment bodies also made the point that micro-enterprises are structurally unable to apply the simplification procedure as, **by definition, demonstrating equivalence is generally more complicated than applying the rule**. In the view of one notified body,

if a manufacturer does not seek the advice of a notified body, it is likely that they would not undertake the procedure correctly and would not be in compliance with the CPR. Ultimately, a notified body must decide whether to accept test results provided or not and it was suggested that a guide on the criteria that should be applied would be helpful. One public authority also noted that it is not clear how market surveillance authorities will evaluate whether the technical documentation that replaces the laboratory testing is appropriate. One suggestion put forward was that it is necessary for the simplified procedures to be incorporated in standards, as this is where micro-enterprises look. In this regard, it was noted that there is a conflict of interest when it comes to a notified body having to advise a micro-enterprise to take advantage of simplified procedures (or to apply system 4 instead of system 3), as this recommendation will result in lost revenue for the notified body.

Industry stakeholders also indicated that a possible reason for the lack of uptake of Article 37 is that **micro-enterprises typically want to demonstrate that their products are as good as those manufactured by the big manufacturers**. This means that there may be a natural reluctance to use procedures which may be perceived as a less rigorous product testing/certification approach. Indeed, a stakeholder in the glass industry indicated that **it is difficult to find a less onerous method which is 'equivalent' and as reliable as that outlined in the harmonised standard**. Wherever possible, specification writers are already using simplified or low-cost procedures to determine the performance, so there is very little financial benefit in applying the simplified procedure. Moreover, the comparative costs of complying with the CPR by adopting the conventional route are only marginally more expensive (for certain products) than the Article 37 route (according to one manufacturer, per window or door, the harmonised standard route is likely to be in the range of €250 - €700 more expensive).

On the other hand, it must be noted that some stakeholders disagreed with the Article 37 procedures. Public authorities noted that the distinction between a micro-enterprise and small company may be marginal and that the application of **Article 37 could raise competition issues**. Some companies also noted that procedures should be the same for all enterprises; indeed, it has been reported that allowing micro-enterprises to follow system 4, instead of system 3, has raised many objections by the construction product industry. It has been suggested that application of this simplified procedure could lead to a distortion of the market, because different procedures will be used for the same product type, and this could possibly lead to defective products. Some stakeholders have argued that if advantages are to be given to micro-enterprises, there should be measures other than a simplified procedure for assessing and determining the performance (e.g. grants). Technical requirements for a product should be the same, irrespective of the size of the enterprise, and so the assessment and determination must also be the same. Furthermore, it is possible that different requirements may undermine the confidence in the CE marking and hence, these procedures should also be extended to larger companies.

3.2.4 Article 38

The issues identified with regard to Article 38 were broadly similar to those for Article 37. A public authority reiterated that economic operators may be reluctant to apply Article 38 because they are unsure how national authorities and the market surveillance authorities will **interpret the documentation provided** (i.e. the "Specific Technical Documentation"). It is also not clear **how the equivalence** of the results obtained by methods within the applicable AVCP system and the results obtained by other methods used for a certain product **can be proven**.

Industry stakeholders commented that the distinction between 'individually manufactured' and 'not individually manufactured' is completely unclear, which could lead to some manufacturers exploiting this simplification and gaining an unfair competitive advantage (this is particularly relevant for doors, windows and metal ceilings)[5]. A notified body highlighted that the term 'individually manufactured' is interpreted differently in various MS and that the 'alternative procedures' that must be as good as those cited in the harmonised procedures are "scarce and difficult to prove". A public authority stated that the double reference to "individually manufactured products" in Article 5 and Article 38 of the CPR creates confusion, particularly because a clear and precise definition of the term "individually manufactured products" is missing in the CPR.

Are there alternative or additional solutions which can improve the uptake of the derogations under Articles 36 - 38?

What option of the two foreseen under Article 36(1)(a) has been most used: the one foreseen in harmonised technical specifications or in a Commission decision? Within these, which technical specifications or decisions? Is there a need for allowing the use of Article 36(1)(a) for other products?

What experience exists on the implementation of Article 36(2)? Are there best practices to be shared or specific issues to be addressed?

Are you aware of cases of use of the Article 37 derogation and, if yes, for which products?

Which products are more concerned by Article 38?

[5] The case of window makers constructing windows of different dimensions for each client was put forward - could this be interpreted as "individually manufactured" and "custom made"?

4 Possible ways forward

In summary, **companies have encountered the following difficulties** in taking advantage of the derogations and simplified procedures:

- **Legal difficulties**, including uncertainties as to how to interpret and apply Articles 5(a)(b)(c) as well the application and meaning of the caveat in the "***absence of Union or national provisions***".
- **A perceived lack of net financial savings** (for instance, after incurring legal costs) **and the marginal economic benefits for specific construction products** resulting from the application of these provisions. Furthermore, there is scope for potential future costs or complications on the market from not obtaining CE marking.
- **Technical difficulties** in demonstrating 'equivalence' and/or providing alternative technical documentation.
- **Information gaps** where this relates to the lack of awareness and understanding of the provisions (and associated guidelines) by industry stakeholders.

Some of the identified problems **can be addressed through the issuance of additional guidance or clarification**. For example, key terms associated with Article 5 and the simplified procedures require further clarification. It should be acknowledged that the Commission has attempted to address these matters by releasing guidance in the form of CPR FAQs. It may be the case that public authorities and industry were primarily concerned with ensuring that all stakeholders were aware of the most fundamental aspects of the CPR (i.e. CE marking and DoP). Now that this is better understood, additional messages related to the obligations designed to alleviate burdens on industry can begin to be disseminated to all stakeholders.

However, some alternative views have been expressed in relation to why the uptake is/will remain low:

- A public authority expressed the view that the lack of uptake so far simply reflects the fact that the CPR has only recently been introduced, and it will take some time for people to familiarise themselves with the legislation (which is relatively complex), before considering the potential derogations. In this context, it is logical that early information campaigns focus on informing companies on how to comply with the CPR provisions, rather than how to be exempted from its provisions.

- One TAB also noted that there were similar simplified procedures contained under Guidance Paper L of the CPD and, as far as they were aware, this was used only once in 20 years. Hence, any lack of uptake is not unique to the CPR, but perhaps reflects underlying interest.

- Another TAB also noted that they do not expect that Articles 37/38 will be used because they disadvantage the manufacturer, as they need to explain to potential customers/purchasers why they have not used the normal route to CE marking. Consequently, it is likely (or will be perceived) that only those less serious about the CPR will apply these procedures (the same would be true for the application of Article 5).

- As noted earlier, it is difficult for micro-enterprises and indeed manufacturers generally to demonstrate equivalence of the procedures used to the procedures laid down in the harmonised standards as they lack the know-how or the financial means. Small businesses

would thus need to enlist external bodies for advice which would remove any economic advantage.

Overall, some questioned whether the simplified procedures offered a beneficial route of compliance, both in terms of direct financial savings from testing and in the ability to market the product having applied these procedures. In other words, **it may be the case that the burden of explaining to customers why a construction product has undertaken a different route to compliance outweighs the potential financial benefits accrued as a result of adopting the simplified procedures**.

Linked to the concept of CE marking, customers need to understand that it is possible to provide a construction product without a CE marking and DoP (Article 5) or apply the simplified procedures (Articles 36 – 38) and still comply with the CPR. Many economic operators fear that their customers will not accept products without a CE marking and DoP, even though they are in compliance with the CPR. **Until the market is informed and is willing to accept that derogations are permissible, the uptake of Article 5 and the simplified procedures will be unlikely to reach their full potential**.

Overall, additional efforts should be made by public authorities and industry associations to engage with all stakeholders, particularly those that are traditionally more difficult to reach (SMEs and micro-enterprises). In particular, they should seek to ensure that all stakeholders better understand the options the CPR offers to enterprises to alleviate the financial burden of complying with the CPR.

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