POSITION PAPER

The future of the CPR and its implementation

16 March 2018

The EU's Construction Products Regulation (CPR) is one of the major pieces of legislation in the construction field, because it sets the legal conditions according to which products can circulate freely within the Union. It came into force in 2013, making CE marking (and therefore the harmonised European Standards used for this) compulsory. The SBS position is that, for reasons of 'regulatory certainty', **the CPR should not be repealed**. Moreover, SBS does not support converting the CPR into a 'product regulation', because this would not bring any substantial benefits. Nonetheless, a number of challenges with the text of the regulation itself, and with its application, exists and SBS would like to put forward the following points. Further background and explanation of these points is given in the attached Technical Note.

User requirements versus manufacturer obligations

The Declaration of Performance (DoP) is a document that is intended primarily for market surveillance authorities and is intended only indirectly for users. It would be good for SMEs to minimise the efforts of producing documents by having just one document providing all relevant information about the product, combined with clarifications on which information should be provided:

- All information (Essential Characteristics (ECs), non-Essential Characteristics (NECs) and other) should be allowed in one document, with separation between ECs and other information.
- The DoP needs to contain end use/installation information where this is necessary and where it falls within the responsibility of the manufacturer (i.e. it can be assessed before CE marking).
- The possibility of including NECs as ECs should be considered, when industry requires this. Any such request would, however, need to be formalised in a revised mandate from the Commission.
- Products where instructions and safety information have little meaning should be exempt from the need to supply these instructions and/or information.
- Clarification on CPR Article 4.2 should be provided.

The DoP and CE marking

There is currently duplication of information between the DoP and the CE marking, while the meaning of the CE marking is often not understood (people consider that it means 'a good product'). Finally, the "No performance determined" (NPD) option of the CPR, where the intended end use of the product does not require a performance to be declared, disadvantages SMEs:

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- Awareness-raising on the meaning of CE marking and how to use data from the DoP is required.

- The need to give information on ECs with CE marking should be removed, providing specification writers the flexibility of only making reference to the DoP or of maintaining EC performance information with the CE marking, depending on the needs/wishes of a given product sector.

- The declaration "NPD" should be changed to "NPA" (no performance applicable).

- A 'centralised' and public list of which ECs are required for which end use(s) in each Member State would be helpful.

Exemptions and simplified procedures of the CPR

The CPR includes exemptions and simplified procedures (Articles 5, 37 and 38) whose current use is limited and would need more clarification in order to be fully used by small and medium enterprises:

- Article 5 should be reformulated to allow products in appropriate cases to be exempt from the full provisions of the regulation while continuing to benefit from free circulation.

- Definitions of "individually manufactured", "custom-made" and "non-series process" are needed, as is clarification on whether "non-series process" applies to both of the other two.

- The obligation, in Article 5 a), that products are installed by their manufacturer, is too limiting. The wording needs adapting to provide appropriate exemptions for individually manufactured and custom-made products, without extending this to manufacturers which should properly be covered by the CPR.

- Article 37 should be extended beyond micro-enterprises but only to manufacturers of a size where the article may justifiably be used.

- The factory production control (FPC) requirements of hENs should be changed or extended to address one-off and non-series products, or a general exemption for such products from following FPC provisions should be given.

The content and quality of CPR standards, and EC procedures affecting standards

Harmonized European standard (hEN) simplifications need to be kept, and need to be made better known to SMEs. Moreover, they should include less onerous assessment methods that are just as robust a method as testing, but which substantially minimise the burdens on SMEs. Finally, the timely delivery of consolidated mandates and mandate answers needs to be addressed, and frequent changes to standards' drafting templates and guidance, from the Commission or from CEN, should be avoided:

- hENs should, as a strong preference, be allowed to continue to include ECs and NEC.

- The simplifications of 'families' and 'tests previously performed' need to remain in standards.

- hENs should include less onerous assessment methods in hENs, in addition to and as alternatives to testing and, where appropriate, methods other than testing should be the reference method.

- Results from less onerous methods should have the same status as those from the reference method.

- The delays caused by Delegated Acts on threshold levels, classes and classified without testing/ without further testing (CWT/CWFT) are seen as challenging.

Post-CE marking national requirements

Post-CE marking national requirements are a current challenge for the implementation of the CPR. In order to avoid the need for additional national characteristics, harmonised technical standards should be exhaustive and unfair obligations that constitute a barrier to trade should be avoided:

- HTSs should be exhaustive, and Member States should use Regulation 1025 Article 11 to avoid the need for additional national characteristics.

- HTSs should be extended to include the assessment of products in generic end use conditions, where this appropriately belongs within CE marking and where it does not compromise national practices.

- A transitional period is needed while HTSs are made exhaustive.

- More action is needed against unfair additional requirements, installation requirements, quality marks and qualification of installers, without which the free market will not function as intended.

- SBS might support an approach towards quality marks which allows individual product sectors to decide for themselves whether there is a market need for them.

Market surveillance

Despite actions to strengthen national market surveillance over recent years (in particular Regulation 765/2018), SBS remain concerned that unfair competition, in particular, is going uncontrolled, even if reported to market surveillance authorities:

- Market surveillance authorities should be prepared to intervene more frequently and actively to prevent instances of unfair competition.

- Further guidance is needed on the need for documentation by the CPR, including the possible re-introduction of requirements in hENs, to reduce the high level of documentary non-conformity.

- A central or national system of anonymous reporting should be considered, as should more active monitoring of market surveillance activity among Member States with a view of ensuring equivalent levels of activity across the EU.

The roles of EOTA and CEN

More clarification is needed concerning the differences between the CEN and EOTA routes. In any case, the 'technical' route to CE marking needs to be basically the same between hENs and EADs, and 'competition' between the perceived 'quality' of hEN CE marking and ETA CE marking should not be permitted:

- Clarification is needed of when CPR Article 19 can be used.

- Once an hEN exists/is being developed, the EAD route should no longer in general be available.

- 'Competition' between the perceived 'quality' of EADs and hENs should not be permitted.

- The possibility of EOTA developing individual assessment methods only, for inclusion in hENs, should be considered.

For more information on the positions in this paper, please see the Technical Note below. Further information on the subjects in this paper can be obtained from the SBS Secretariat at info@sbs-sme.eu.

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Technical Note

SBS position on the future of the CPR and its implementation

16 March 2018

➢ Introduction

The aim of this Technical Note is to provide the background explanations to the positions proposed in the Position Paper above. A number of challenges with the text of the Construction Products Regulation (CPR), and with its application, exist and have led the Commission to review it, to launch studies into aspects of its implementation and consequences, and to hold a series of Technical Platform discussions with stakeholders.

This Note is divided into topics which align roughly with the topics of the Commission's Technical Platforms. While it provides the explanations for the SBS positions, it does not repeat them.

➢ The CPR topics

Topic 1: User requirements versus manufacturer obligations

The Declaration of Performance (DoP) is a document that is intended primarily for market surveillance authorities and is intended only indirectly for users. It would be good for SMEs to minimise the efforts of producing documents by having just one document which would be a tool for the customer, whether this is an extended DoP or a document which contains the DoP.

Some products need to be tested, prior to CE marking, in representative end-use conditions (e.g. anchors bolts and products subject to reaction to fire). This should be understood as assessing the capability of the product to perform in general uses, which can be covered by CE marking. It does not, however, cover the suitability of the product for use in a particular works ('fitness for use'), which cannot be covered by CE marking but is the responsibility of users/designers.

Some products have to be tested in the Member State of destination before they can be used (but after they have the CE marking), and some users require information about non-essential characteristics which do not appear in the DoP. Whether some of what is tested after CE marking could be included in harmonised technical specifications (HTS) should be examined. If HTSs are 'extended', and in particular if they are extended to include more assessment in generic end use conditions, the conditions should cover all those which exist in different Member States. The intension of extending HTSs would be to make post-CE marking testing largely unnecessary.

There may be a case for adding what are currently non-essential characteristics (NECs) to the list of essential characteristics (ECs), if there is some link between the NEC and one or more of the Basic Works Requirements (BWRs) and where the industry considers them to be necessary for trade (recognising that technical barriers arise as much from NECs as ECs), provided that this does not lead to over-regulation. If a TC wishes to include such NECs, it could do so by a revised mandate answer. Assessment and Verification of Constancy of Performance (AVCP) of NECs would need to be considered, although many NECs might appear under the "Other uses than identified above" section of mandates, and NPD would apply in the same way as it applies to ECs.

If the performance of a product depends on how it is installed, then the need for installation instructions to be included in the DoP should be emphasised. Writers of HTSs should be allowed to consider requiring manufacturers to assess products in, and identify, generic intended end use conditions/applications where, for their products, it is appropriate to do so.

CPR Article 4.2 states "… information in any form about [the product's] performance in relation to the essential characteristics, as defined in the applicable HTS, may be provided only if included and specified in the declaration of performance", which has been interpreted as meaning that ECs may be given outside the DoP. However, CPR FAQ 19 says "… the CPR renders the use of the declaration of performance the only manner to declare this performance". If ECs are to be allowed to be given outside the DoP, or if NECs are to be allowed to be given in a document which includes the DoP, a clear statement from the Commission on this is needed because it would clarify whether current assumptions on what is permitted are correct.

CPR Article 11 6) requires that "When making a construction product available on the market, manufacturers shall ensure that the product is accompanied by instructions and safety information". CPR FAQ 14 mentions the "installation manual or installation instructions", implying that these are separate from the DoP. It should be clarified that installation instructions may be included in or with the DoP. There should also be an exemption from the requirements of Article 11 for products where "installation" and/or "safety" instructions have little sense.

It needs to be more clearly understood that the obligation to declare at least one EC is what defines a product as a 'construction product' within the CPR. If there is an end-use where NPD could be declared for all ECs, the product would not be a CPR product, would not have to comply with the HTS and would not have CE marking.

It should be possible for manufacturers to supply all information required by all stakeholders, including market surveillance authorities and users, and also covering generic installation conditions (where appropriate) and safety information, in one document.

Topic 2: The DoP and CE marking

There is currently duplication of information between the DoP and CE marking, because the ECs have to be given both in the DoP and with the CE marking. For some products, it is not possible to give all information about ECs with the CE marking. HTS writers should not be allowed to decide on giving only the most important ECs with the CE marking, but if a TC judges it appropriate, it should be permitted for the CE marking to refer only to the DoP.

The meaning of the CE marking needs to be better explained, to ensure that it is not understood as 'a good product'. HTS writers for specific products should be given the possibility to consider and decide on whether performance information has to be given both in the DoP and with the CE marking, and the decision would then be binding on all manufacturers applying that HTS. If the decision is that performance information is given only in the DoP and not with the CE marking, the wording with the CE marking should make it clear that this information is given in the DoP.

The declaration "NPD" (no performance determined) often has a negative meaning, obliging SMEs to assess and declare ECs which need not be declared. In addition, the word "determined" is not always correct, because the correct meaning of NPD is that a characteristic is not declared because it is not needed for the intended end use. The term "No performance applicable" is preferable.

CPR FAQ 28 clarifies that "the manufacturer should not mention in the CE marking the essential characteristics for which he declares NPD in the Declaration of Performance". The recommended change from "NPD" to "NPA" therefore applies only to the DoP but, in addition, FAQ 28 needs to be made more widely known.

There are challenges in trying to specify exactly which EC(s) have to always be declared with a performance for a particular product, because this varies from one Member State to another and might also vary within a given Member State depending on the end use. Nonetheless, lists of which characteristics are required in each Member State for different uses would potentially be helpful.

Topic 3: Exemptions and simplified procedures of the CPR

CPR Article 5

CPR Article 5 was intended to exempt some products from the need to draw up a DoP and apply CE marking, although Article 4 means that the manufacturer is not exempt from complying with an hEN if it exists or an ETA if he has one. The wording of Article 5 should be changed in order to clarify that the exemption can be used even when the CPR and an hEN/ETA exist. The criterion of the existence of national provisions makes Article 5 almost inapplicable and should be deleted.

Article 5, because it applies to products already included in the CPR, should be written in a way to allow products in appropriate cases to be exempt from the full provisions of the regulation, while continuing to benefit from free circulation.

While many products are installed by their manufacturer, the obligation that they have to be limits the possible application of Article 5. Therefore, Article 5 a) should be modified to apply to products other than those installed by their manufacturer, while not extending it to manufacturers which should properly be covered by the CPR. Clarification is needed of the definitions of "individually manufactured", "custom-made" and "non-series production" (as required by CPR Recital 40), , as is clarification on whether "non-series process" applies to both of the other two. These definitions need to be acceptable to all parties, so as to allow a sensible and justified application.

Traditional/heritage conservation products should be excluded from all provisions of the CPR, and Article 5 b) should be clarified to mean that it applies to products used in the construction works on that site.

It is understood that a manufacturer applying Article 5 would need to comply with whatever provisions exist for products not covered by the CPR in the Member State of destination.

CPR Articles 37 and 38

CPR Articles 37 and 38 provide exemptions, in respect of product-type determination (initial type) testing, from following the methods in hENs. Article 37 provides an exemption for micro-enterprise manufacturers of all products, while Article 38 provides an exemption for all manufacturers of individually manufactured products or products custom made in a non-series process, but they provide no exemption from following the factory production control (FPC) provisions of hENs. The FPC section of any hEN should be changed or extended to cover individual and non-series products, because manufacturers of such products cannot follow conventional FPC provisions.

Practical examples of where Articles 37 and 38 could be applied and how, if necessary, the requirement to show equivalence between the alternative and the reference method is shown, would probably be helpful in encouraging the wider use of these two articles.

Topic 4: The content and quality of CPR standards, and EC procedures affecting standards

hENs contain two 'simplifications' already: "Families" and "Tests previously performed". Both of these simplifications need to be kept, and possibly they need to be made better known to SMEs.

The idea that only one assessment method is allowed for each characteristic does not appear to derive from the CPR. CPR Article 17.3 encourages the inclusion of less onerous assessment methods than testing, while mandates permit more than one method, when this is properly justified. CEN TCs should be encouraged to include simpler assessment methods (e.g. calculation, tabulated values, deemed to satisfy provisions and classified without testing/further testing (CWT/CWFT)), in addition but as alternatives to the reference method. The reference method should not always be a test method, where it is appropriate for it to be something else, such as calculation.

Until fairly recently, hENs under the CPD/CPR contained both ECs (referred to from Annex ZA) and NECs. The Commission has recently been refusing hENs which contain NECs. As a clear preference, hENs should be allowed to continue to contain both ECs and NECs.

A further possibility could be to better differentiate ECs from NECs, making it clear that the Commission has no responsibility for NECs (recognising, however, that all hENs would need an informative Annex ZA). Extending ECs might work for products where an hEN contains only a few NECs which could be linked to the BWRs of the CPR, but it is less likely to work for hENs where most characteristics are NECs, such as shower trays for which the hEN has only one EC.

Certain aspects which used to be considered as 'technical' (the setting of threshold values (TLs) and classes) have become 'legal', requiring a Delegated Act from the Commission. CWT/CWFT decisions have always been 'legal' although, in principle, they are 'technical'. Experience seems to indicate that at least 18 months is required for any such Delegated Acts, which adds substantially to the time to develop hENs (the same provisions will presumably apply to EADs). The definition of 'threshold levels' in the CPR has changed, and no longer includes the idea of "not fit for any purpose", leading to uncertainty about whether they have to be satisfied (this is implied by CPR Article 27 3) and clarified by CPR FAQ 18). Also, Delegated Acts might actually formalise inappropriate decisions (a threshold level which is too high, for example) which are not then easy to change.

No specific recommendations are made about how decisions about threshold levels, classes and CWFT/CWT are made, but they need to be made rapidly so as not to slow down the harmonisation process, they need to be flexible to allow for technical change, and they need to include a 'safeguard procedure' allowing for rapid correction of incorrect decisions. The decisions need, as well, to be free from undue influence from any specific interested party. It may be appropriate to consider different procedures for the three different aspects of TLs, classes and CWT/CWFT.

Topic 5: The CPR as a 'product regulation'

The CPR is not a conventional legislative act because, unlike all other EU legislation for industrial products, it contains no requirements on products. This leads to a complicated and long process of mandating and mandate answers, and AVCP decisions, which slows the production of hENs (while AVCP decisions are also needed for EOTA products, these products do not require mandates, avoiding the equivalent delays).

The CPR could be converted into a 'product regulation', by introducing for each product/product group the lists of relevant ECs, these being taken from existing mandate answers. Specific AVCP systems could then be assigned to each characteristic within the regulation. Both of these changes would remove the mandating process, but would require provisions to allow the lists of ECs to be updated when necessary. No substantial benefit in this approach is seen, however.

Topic 6: Post-CE marking national requirements

CPR Article 8 4) requires that "A Member State shall not prohibit or impede … the making available on the market or the use of construction products bearing the CE marking, when the declared performances correspond to the requirements for such use in that Member State". Article 8 6) requires that "The methods used by the Member States in their requirements for construction works … shall be in accordance with harmonised standards." Taken together, the interpretation is that Member States are permitted to set requirements on performance levels/classes where these are given in an hEN or EAD, but that they are not permitted to impose additional characteristics or to require compliance with national standards.

Despite this, there are many examples of where Member States do impose either additional characteristics and/or require compliance with national standards. Also rules on installation, even if they do not require additional characteristics, represent technical barriers to trade if they can only be satisfied in the Member State of destination.

If a Member State justifiably requires such additional characteristics, they should be brought within the scope of the CPR, in particular by changing mandates so that hENs can be amended to cover them (although a suitable transitional period is required while such characteristics are harmonised). The CPR does not provide for an appeal against any hEN in general terms, only when the hEN does not comply with the mandate. Article 11 of Regulation 1025/2012 should be more widely used as the correct means of appealing against hENs which do not address all required characteristics. Consequently, additional national requirements for products should not, in fact, occur.

CPR Article 8 4) states "… 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 … ." This is confirmed by CPR FAQ 19; "Quality or private marks, let alone those with national connotations, are not allowed to cover any characteristics already included in the hEN. This also applies to NPD". Despite these provisions, national quality marks continue to exist to demonstrate the performance of essential characteristics.

Consideration should be given to whether "categorisation", where this means combining different ECs and their levels and classes of performance to correspond to specific national situations, should be encouraged under the CPR, when this is market-driven. An example is "A product for external use is in Category 2 where is achieves level x against water resistance, level y against impact resistance and level z against durability".

Further clarification of the meaning of the CE marking (as a regulatory conformity marking, not a mark of quality) is needed, and any quality marks must not be used in a way which creates or maintains barriers to trade. National requirements on the qualification of installers are also seen as an important, and sometimes costly, barrier to trade.

Topic 7: Market surveillance

Despite actions to strengthen national market surveillance over recent years (in particular Regulation 765/2018), SBS remains concerned that unfair competition, in particular, is going uncontrolled, even if reported to market surveillance authorities.

According to the most recent (2013) report on market surveillance activities in the construction sector, there are widely different levels of intervention, ranging from none to more than 1 000 per year, there are different types of control, varying from 100 % documentary and no testing to 90 % testing, and there are different levels of actions/fines resulting from inspections, ranging from none to more than 50 per year.

A common finding, though, is that 50+ % of inspections show non-conformity, although many of these are related to documentation and marking. It does not seem possible to know how many products on the market do not have the performance levels declared of them. The high level of documentary non-conformity perhaps calls into question the decision that the content of the DoP and CE marking can no longer be given in hENs.

A central or national system of anonymous reporting of complaints of unfair competition would be welcomed, as would more active monitoring of market surveillance activity beyond just the collection of data.

Topic 8: The roles of EOTA and CEN

The CPR permits manufacturers to approach EOTA for products where:

(a) the product does not fall within the scope of any existing harmonised standard;
(b) for at least one essential characteristic of that product, the assessment method provided for in the harmonised standard is not appropriate; or

(c) the harmonised standard does not provide for any assessment method in relation to at least one essential characteristic of that product.

Further guidance appears necessary for when and under what conditions these provisions may apply, because cases exist where they have been applied inappropriately. In particular, "not appropriate" should be limited to physical problems with applying an assessment method in an hEN (e.g. products which are too large) or to when the method does not adequately represent the performance of a product; manufacturers should not be able to claim that a method is "not appropriate" simply because they prefer a different method.

The situation implied by (c) should not, in many cases, arise. 'Incomplete' hENs are not permitted (i.e. hENs which do not cover all required essential characteristics), so if a case arises where an EC is genuinely missing from an hEN, this implies that the original mandate was inadequate, that it should be extended and that CEN should be instructed to amend the standard, rather than the product passing from CEN to EOTA. SBS proposes that, once an hEN is being developed or exists already, the EOTA route should become unavailable and should not be used as an alternative to correcting deficiencies in that hEN.

EOTA should not be permitted to assess product characteristics (this relates in particular to assessment of fitness for use and product installation) which CEN is not permitted to include in hENs, and nor should the lack of such characteristics from an hEN be an excuse for a manufacturer to approach EOTA. The 'technical' route to CE marking needs to be basically the same between hENs and EADs.

EOTA is sometimes seen by stakeholders to be a 'higher quality' route to CE marking created, in part, because there is TAB assessment (3rd party control) of products even if these products fall under low AVCP systems. The EOTA route should not be open to manufacturers who wish to use it only because of this 'higher quality', marketing reason, and it should not be permitted for manufacturers to indicate, explicitly with the CE marking, that their products have obtained an "EOTA CE marking".

One possibility which might merit consideration is to permit EOTA, where an assessment method is inadequate or missing, to develop the assessment method only, which is then provided to CEN for inclusion in an amended hEN. Manufacturers would then, in such circumstances, follow the AVCP procedures of the hEN instead of the TAB-assessment procedure of EOTA.

It is recognised that EOTA TABs have a 'regulatory' aspect to their work (it is the TAB which, together with the manufacturer, identifies which essential characteristics are required; there is no mandate for EOTA work), whereas CEN acts largely as a 'technical' body, responding to 'regulatory' decisions which appear in mandates.