Analysis of implementation of the Construction Products Regulation

Topical Report #4:

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

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Topical Report

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

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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.**

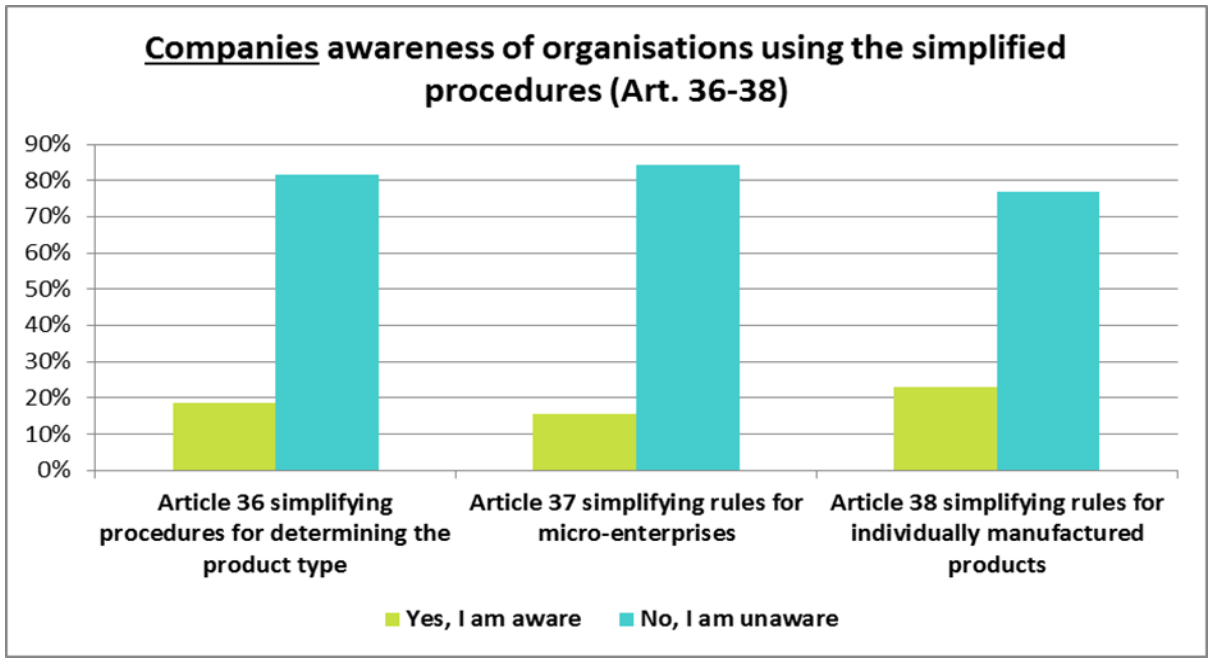

Figure 3-1: Response from companies

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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