

REFINED INDICATIVE OPTIONS FOR THE REVIEW OF THE CONSTRUCTION PRODUCTS REGULATION, VERSION 2 - 08.04.2020

The purpose of this document is to present the options regarding the potential revision of the Construction Product Regulation (CPR). At the same time, this document is deemed to become the basis for discussion with all interested parties in the course of 2020 and to inform the two legislators on the many choices and sub-choices to be made.

To reach these goals, the options need to be concrete, whilst remaining as open as possible as neither the Commission nor the legislators have expressed any views with regard to the elements contained in these options.

Therefore, this document follows two approaches:

- It describes different ways how the various elements of the options could materialise;
- Where the presentation of different ways of materialisation becomes too complex, the most far-reaching materialisation has been presented. This is meant to open the space between the current state and the far-reaching, radical way of materialisation, whilst not favouring any of these ways.

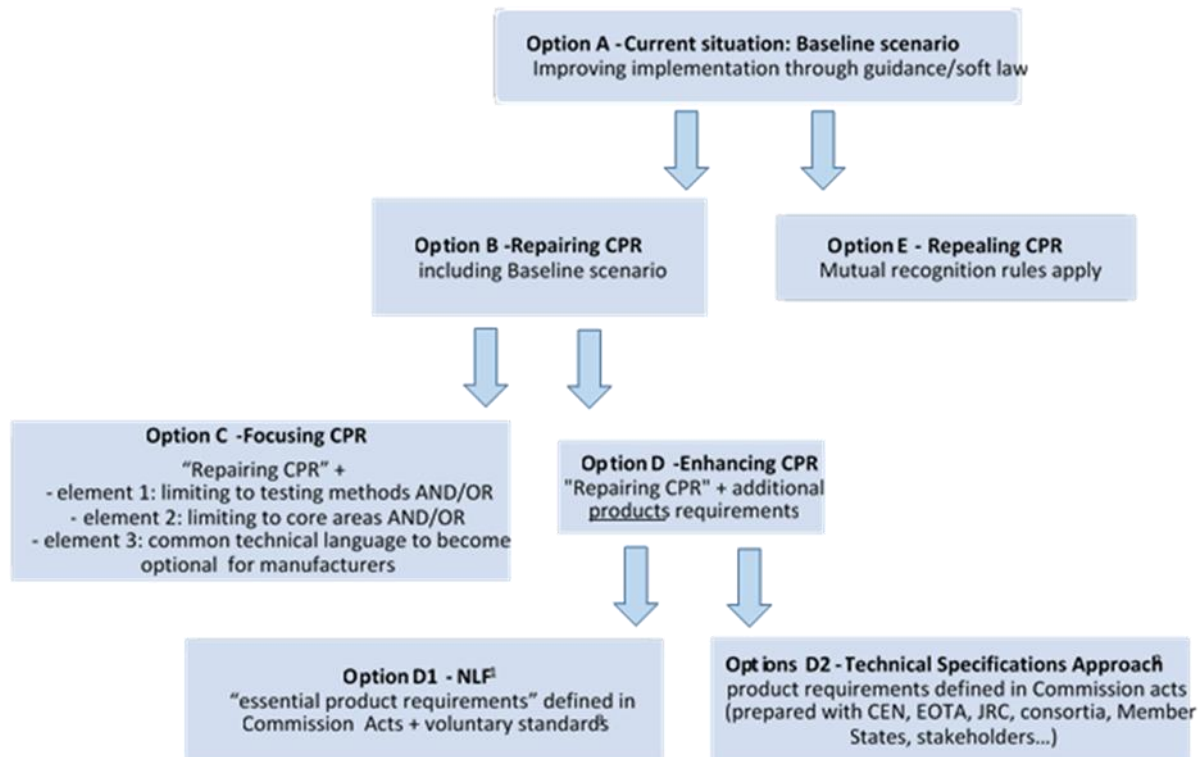
Accordingly, this text is not deemed to express any views in terms of how the future CPR should look like, but rather to trigger an open debate.

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OVERVIEW OF THE INDICATIVE REFINED OPTIONS

The following graph presents the reformulated options and the logical relationship between them. A detailed description of each option is provided in the next section.



¹ “NLF“ stands for „New Legislative Framework“ as laid down in Decision 768/2008/EC. The predecessor to the NLF is the so-called “New Approach”.

² “Technical specifications” or “Common technical specifications” are technical provisions adopted by the European Commission as Delegated or Implementing Acts. This approach is sometimes also called “Old Approach”.

³ These would contain concretions of the Essential Product Requirements, as foreseen in the New Legislative Framework laid down in Decision 768/2008/EC.

There is a range of links between the different options:

- “Repairing the CPR” (Option B) is a stand-alone option especially based on the issues highlighted in the implementation report.
- However, it would be absurd to be in favour of focusing (Option C) or enhancing the CPR (Option D) without at the same time trying to solve the issues identified in the implementation report (i.e. “Repairing the CPR”). This aspect has been reflected in the decision tree graph above.
- A combination of focusing (Option C) and enhancing (Option D) is only possible for Element 2 of Option C (limiting scope to core areas), which could also be combined with both Options D1 (NLF) or D2 (technical specifications approach).

- It would not make sense to combine Element 1 of Option C (limiting scope to assessment methods”) with the enhancement by product requirements of Options D1 or D2, as the enhancement of product requirements is only possible where technical specifications are complete.
- Likewise, there is a logical contradiction between the goal of Options D1 and D2 to establish mandatory product requirements and making the common technical language optional for manufacturers (Element 3 of Option C).

DETAILED PRESENTATION OF THE INDICATIVE REFINED OPTIONS

OPTION A - BASELINE SCENARIO

No legislative change, but improving implementation through guidance / soft law by the European Commission.

The Commission would pursue its efforts at implementation level to:

- **Streamline the standardisation work**, to the (limited) extent that it is in the hands of the European Commission¹, e.g.:
 - following initiatives like the Joint Initiative for Standardisation;
 - inviting CEN to ensure clarity of the scope of harmonised standards;
 - inviting CEN to front-load² acceptability criteria to be applied by the European Commission;
 - inviting CEN to ensure internal quality control;
 - inviting CEN to speed up the revision of CPD-era standards with high market relevance or relevance for the safety of citizens;
 - inviting CEN to ensure fair and equitable representation of various categories of stakeholders;
 - ensuring that the rules in Articles 3(3) and 27 CPR on classes or thresholds are used and respected;
 - issuing, where needed and promising, new standardisation requests which respond to current legal requirements, Member States' regulatory needs and market needs.
- Go against **national marks, ex ante processes and verifications**, by using informal dialogue and the formal tools provided by primary or secondary EU law (pending Court judgement on German case T-229/17), namely by infringement procedures and support for economic operators acting against infringements at national courts;
- **Enhance market surveillance and enforcement** (e.g. by recommending highly effective default/standard market surveillance controls³), and this clearly in the context of [Regulation \(EU\) 2019/1020](#) on market surveillance⁴;
- **Improve the functioning of EOTA and Technical Assessment Bodies, Notified Bodies, national authorities, PCPCs⁵**, to the extent that the functioning can be influenced by the European Commission;

¹ The elements listed below have indeed already been pursued by the European Commission services, though with limited success.

² This would mean that the acceptability criteria become quality goals for the development of the respective standards during the entire process of development.

³ E.g., it is very efficient to control formal compliance because in most of the cases of formal non-compliance, the manufacturers are also non-compliant for requirements of substance, e.g. regarding performance. Hence, a program could be set-up to list elements of formal non-compliance which can be easily verified.

⁴ OJ L 169, 25.6.2019, p. 1–44.

⁵ Product Contact Points for Construction.

- **Increase**, to the limited extent possible under the current CPR, **the legal sustainability of the EAD route to CE marking**, namely by formal Commission Decisions on the citation of EADs in the Official Journal;
- **Promote the uptake of simplification provisions** by clarification / guidance / information, to the extent possible⁶ (incl. Art. 5, 9(2), 37, and 38 CPR);
- **Promote the understanding of the CPR** in general and in particular with regard to the CE marking and the Declaration of Performance, and this with special focus on SME and microenterprises and including the “Your-Europe-Portal” and possibly the “Single Digital Gateway”;
- Apply the existing empowerments for **delegated and implementing acts, as well as the formal objections procedure**, also **to complement, correct, overrule or delist deficient standards**. The empowerments to correct or overrule deficient standards are uncertain and content-wise limited. Thus only a small part of the deficiencies of harmonised standards can, if any at all, be remedied.

⁶ The extent is limited because the European Commission cannot disseminate an authoritative interpretation where different interpretations are equally possible due to an unclear wording of the CPR. Only the European Court of Justice can provide for authoritative interpretations in such situations.

OPTION B – REPAIRING THE CPR

This option would not so much invest into the implementation of the current CPR, but focus on the repair of the CPR by its revision. Option B might include legislative amendments to realise the following aims (the envisaged amendments are outlined below)⁷:

- 1) **Scope and objectives**
 - **Clarifying and streamlining the scope of the CPR**
 - **Ensuring coherence with other EU legislation**
 - **Addressing environmental aspects of construction products (BWR7)**
 - **Promoting circularity of construction products**
- 2) **Harmonisation**
 - **Empowering the Commission to act against partial system failures**
 - **Ensuring the comprehensiveness of the CPR’s Common Technical Language**
 - **Allowing manufacturers to obtain preliminary CE marking**
 - **Reducing the administrative burden for manufacturers**
 - **Improving access to Harmonised Technical Specifications**
- 3) **Improving effectiveness**
 - **Improving the use of the CPR’s non-conformity procedures**
 - **Enhancing market surveillance**
 - **Improving the efficacy of Notified Bodies**
 - **Supplementing Notified Bodies with special bodies in charge of BWR7**
 - **Evaluating the role of PCPCs**
 - **Better covering information needs**
 - **Allowing for true claims or no claims**
 - **Better coverage of Member States’ needs by determining the “harmonised zone”**
 - **Improving legal certainty**
- 4) **Transition**
 - **Ensuring a smooth phasing in of the revised CPR**

1) Scope and objectives

Clarifying and streamlining the scope of the CPR

The future CPR would dispel confusion by specifying application to certain products or product categories, as well as prevent future confusion by anticipating future developments and allowing the Commission to modify the CPR’s scope in light of such developments. This would include the explicit exclusion of certain product categories, in particular to avoid overlap with other EU legislation (e.g. Drinking Water Directive).

In order to dispel confusion about the scope of the regulation as much as possible, a revised CPR would make explicit its application to possibly confusing products or product

⁷ It follows from the preliminary remarks of this document that, while any of the elements might find its way into the final revised CPR, it is extremely unlikely that all the elements will be taken up by the legislator.

categories. It would exclude some products for which there are little regulatory needs from Member States, little intra-EU trade and little safety or environmental aspects to be covered as well as explicitly include others for which currently there is uncertainty (e.g. construction products manufactured for immediate incorporation by their manufacturer in construction works⁸). In addition, a revised CPR would provide clearer definitions of modules, kits and assemblies and specify in what circumstances they can be considered construction products, as well as stipulate under what circumstances used construction products newly made available on the market come under its scope.

To prevent future confusion about the CPR's scope, a revision would also anticipate new business models. In anticipation of the increased use of 3D-printing, a revised CPR would bring the placing on the market materials and datasets used for the decentralised 3D-printing of construction products by other operators than those responsible for the materials and datasets within its scope⁹. It would assign to operators of 3D-printshops the responsibilities of distributors under the current CPR. In addition, it would bring prefabricated one-family-houses of less than 150 m² exterior ground surface with one floor or of less than 80 m² with two floors within its scope (probably without the fundament, the roof coverage and façade coverage to permit adaptation to Member States' construction codes). This could be reached by letting them become a construction product altogether or by qualifying them as a kit.

In terms of clarification, lastly, a revised CPR would allow the Commission to modify the CPR's scope, by Delegated Act, to exclude specific products or to close regulatory loopholes, in particular where this is necessary to clarify the CPR's application to emerging new business models. The control mechanisms foreseen for the adoption of Delegated Acts would guarantee the involvement of Member States and the European Parliament.

Overall, the scope of the future CPR would remain rather broad. However, as today, the harmonised sphere (i.e. the sphere covered by technical specifications) will be not as large as the scope of the CPR. The broad scope of the CPR thus has the function to give room for technical specifications to be developed in accordance with the needs of today and tomorrow.

Ensuring coherence with other EU legislation

In order to ensure coherence with other EU legislation, a revision of the CPR would clarify its relationship with current rules as well as introduce clear collision rules for potential future overlap.

Coherence with existing EU legislation would be ensured by making explicit the CPR's relationship to overlapping rules (e.g. REACH¹⁰ or the Waste Framework Directive¹¹). Additionally, a revised CPR would exclude certain construction products to prevent overlap (e.g. in relation to the Drinking Water Directive¹²). For other legislation (e.g. the Energy

⁸ Regarding this issue: see also the possibility for Member States to exempt certain economic operators on a national basis.

⁹ Regarding the regulatory issues raised by decentralised 3D-printing, see <https://www.howtoregulate.org/decentralized-3d-printing-a-regulatory-challenge/#more-23>.

¹⁰ OJ L 396, 30.12.2006, p. 1–849 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008D0768>).

¹¹ OJ L 312, 22.11.2008, p. 3–30 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576749547065&uri=CELEX:32008L0098>).

¹² OJ L 330, 5.12.1998, p. 32–54 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998L0083>).

Labelling Directive¹³ and the Ecodesign implementing regulations¹⁴), coherence would be ensured at the level of tailor-made Harmonised Technical Specifications that cover all aspects amongst those that are not governed by the other legal instrument (“Harmonised Technical Specifications” in this document shall be understood as harmonised standards cited in the Official Journal, or Implementing or Delegated Acts that contain technical specifications).

In anticipation of the expected increase in energy efficiency, environment, health and consumer protection rules, a revised CPR would also include provisions governing the CPR relationship with such future rules.

Addressing environmental aspects of construction products (BWR7)

A revised CPR would speed up the operationalisation of environmental aspects by introducing a harmonised method for assessing and communicating construction products’ environmental performance.

Amid increasing environmental concern, Member States are likely to increasingly implement national legislation on how to assess the environmental footprint of construction works and thus implicitly also construction products. As a result, diverging approaches could weaken the internal market. A revised CPR would therefore provide a harmonised method for assessing and communicating the environmental performance of construction products. This would take place in full coherence with the horizontal approach regarding the environmental assessment of products, currently under development at EU level. First, Annex I would be amended to include all relevant environmental aspects in Basic Work Requirement 7¹⁵. Second, the CPR would prescribe the general principles of a harmonised method for assessing and communicating construction products’ performance in relation to those aspects; the method itself would be laid down more precisely in a Commission act. The harmonised method would be based on an existing Life Cycle Assessment method, such as the Commission’s Product Environmental Footprint¹⁶ or EN 15804, and provide for the development of harmonised Product Category Rules and the use of common datasets in order to ensure fairness and comparability. Importantly, a revised CPR would ensure that the resulting environmental data can be used in the assessment of the environmental performances of buildings¹⁷.

The supervision of the application of these very specific systems could be based on the current Notified Bodies system which would ensure minimisation of burden. However, in view of harmonising the assessment of environmental footprints across all product sectors and to optimise assessment methods, there could also be a separate designation and supervision process (see below under Supplementing Notified Bodies with special bodies in charge of BWR7).

¹³ OJ L 198, 28.7.2017, p. 1–23 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017R1369>).

¹⁴ OJ L 285, 31.10.2009, p. 10–35 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0125>), a list of implementing regulations can be found here: https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards/ecodesign_en.

¹⁵ One might regard some environmental aspects as nowadays being covered in BWR 3 and 6 instead of 7. This makes the regulatory management difficult.

¹⁶ Accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0179&from=EN> (for proposed updates see https://eplca.jrc.ec.europa.eu/permalink/PEF_method.pdf).

¹⁷ Council of the European Union, *Conclusions on Circular Economy in the Construction Sector*, 28 November 2019, Doc. 14653/19, n9.

Measures directly supporting the reduction of environmental impacts of construction, such as funding the research and development of more sustainable construction products or the creation of incentives to limit the surplus of construction products, as suggested by Member States¹⁸, are beyond the remit of the CPR. As mentioned below, the CPR could contribute indirectly through facilitation of the use of certain recycled or used construction products by allowing them to be CE marked. It will also contribute to the transparency of the market by facilitating the comparability of construction products based on their environmental impacts.

Promoting circularity of construction products

In order to promote the circular economy, the CPR would support the placing on the market of certain used or used and remanufactured construction products. However, several aspects of the CPR would need to be adapted. In addition, the issue of trans-generational availability of product data needs to be tackled. Finally, the CPR might contain a series of provisions reflecting the Circular Economy Action Plan and the European Green Deal.

The revised CPR might cover certain construction products which were used and remanufactured or just used but newly made available on the market, allowing such products to obtain CE marking and gain access to the European market. We speak here of “remanufacturing” to cover processes like cleaning, cutting-off of damaged parts and new coating because the term “recycling” in the meaning of the Waste Framework Directive is limited to items which have become waste in the first place, whilst the regulatory approach of the CPR would be different, aiming at used construction products to undergo a process *before* they become waste¹⁹. The purpose would be to promote re-use, in particular to reduce construction products’ climate and other environmental impacts. These goals cannot be pursued without limiting obligations for the relevant economic operators (when compared to the original manufacturer). This could often lead to a marginal loss in terms of safety when compared to new products. If the legislators oppose this approach, a revised CPR might only define a gold standard for certain used or remanufactured construction products permitting free circulation of these (at the end of the day very few) products and empower Member States to regulate on all other products not fulfilling the gold standard. Member States would then be empowered and invited to decide on the best domestic trade-off between two not fully compatible goals: promoting re-use on one hand and preserving full safety as for new products. They would most likely make different choices, adapted to their domestic balancing of interests.

Used construction products will have to be treated slightly different in terms of CE marking, declaration of performance, performance assessment and certain other obligations of economic operators. Maybe, the original manufacturer should remain responsible to some extent, e.g. with regard to information that only he can provide, whilst overlapping responsibility fields of different economic operators have to be avoided.

Given the likely enhanced longevity of construction products, re-use and remanufacturing will depend to a large extent on the trans-generational availability of product data. The establishment of a public database is the classic response to such a situation. However,

¹⁸ Ibid., n7.

¹⁹ See Article 3(17) of the Waste Framework Directive, OJ L 312, 22.11.2008, p. 3–30 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0098>)

alternatives have to be investigated. High market value IT companies are likely to be subject to mergers and acquisitions, but not disappearance. Hence, a multi-generational public tender might be a suitable alternative to the not always efficient process of setting up a public database. Alternatively, a tender could be launched every 5 years, with the running contract to be automatically renewed in case no competitor makes a potentially better offer.

In addition, the recently published Circular Economy Action Plan²⁰ and European Green Deal²¹ foresee a comprehensive change of our economy. In the next months and years, there will be a discussion on which measures shall be taken across all sectors. It might not be ideal for construction products to be covered by horizontal regulation as horizontal regulation can hardly be fine-tuned to construction products and might trigger overlapping and partly conflicting obligations. Hence, it is to be considered to which extent the CPR can and should foresee measures applying the policies of the Circular Economy Action Plan and the European Green Deal to construction products. Measures to be considered in this context, as applicable to individual construction products and taking into account safety aspects, might notably include:

- The obligation to take back construction products which, after delivery onto the construction site, have not been used²²;
- conformity assessment or other procedural privileges for construction products which are based on recycled materials, typically derived from a previous construction product which has become waste;
- minimum recycled content quota; or
- the obligation to give preference to recycled materials where possible;
- the obligation to give preference to materials with a low overall environmental footprint, unless a higher environmental footprint is later overcompensated at the building level;
- the obligation to refrain from premature obsolescence;
- the obligation to reach state-of-the-art durability; and
- the obligation to facilitate repair, re-use, remanufacturing and recycling by appropriate design, information and, for repair, accessibility of spare parts.

These measures describe only the frame in which the discussion will take place. Not all these measures will be taken, the more so as hardly any of them is applicable to all construction products.

Furthermore, a Sustainable Product Policy Initiative has been announced under the umbrella of the European Green Deal and the Circular Economy Action Plan. The core of this legislative initiative will be to widen the Ecodesign Directive beyond energy related products so as to make the Ecodesign Framework applicable to the broadest possible range of products and make it deliver on circularity. As construction products would potentially fall within the scope of this future initiative, there could be multiple interactions between the horizontal policy, its concretion within the CPR and the many other elements of the CPR directly or indirectly aiming to enhance the sustainability of the construction products. It even cannot be excluded that the listed measures will mostly be laid down in the horizontal framework. In the latter case, defining a clear interface and avoiding duplications will be paramount.

²⁰ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1583933814386&uri=COM:2020:98:FIN>.

²¹ Available at: https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf.

²² This could be economically interesting for both sides if the manufacturer reimburses the transportation costs, capped by his own manufacturing costs, whilst the dumping of the not used construction product would be costly, due to national law.

Finally, measures to promote the use of tools that could facilitate the recycling or reuse of construction products, as suggested by Member States²³, are, in so far as such tools apply to the construction work or demolition level, beyond the remit of the CPR. E.g., both economic operators who remanufacture used construction products and those who manufacture new products on the basis of recycled (CP) materials need information about the previous use of the products, at least so as to appropriately inform their own customers. The CPR revision could, informally or in the form of a European Commission Recommendation, be accompanied by some prototype national legal provisions that would generate the relevant data. This example illustrates a general potential, still to be levied, which consists in developing finely imbricated regulatory approaches both at the EU and the Member States' level, to jointly pursue the common goals.

2) Harmonisation

Empowering the Commission to act against partial system failures

The current situation where the Commission is not empowered to act against system failures should be remedied. Therefore, a revised CPR would introduce a full range of empowerments for Delegated and Implementing Acts.

E.g., the situation today is that the legislator has empowered CEN and EOTA to adopt Harmonised Technical Specifications, thus bodies outside the EU law legitimation chain, without empowering the Commission in the first place. Thereby the CPR deviates crucially from the standard pattern of EU legislation according to which the Commission is empowered in the first place and outside bodies only in the second. In the light of the current breakdown of the standardisation system under the CPR²⁴, this unfortunate inversion merits revision, the more so as the ECJ has in the meantime set up severe conditions for delegation of regulatory powers to bodies not already mentioned in the Treaties.

But this is only an example of the past, whilst more system failures can emerge in the future. To reduce the likelihood of another system breakdown, comprehensive empowerments to act against system failures should be foreseen.

Ensuring the comprehensiveness of the CPR's Common Technical Language

Using its aforementioned empowerments to act against system failures, the Commission would complement the Common Technical Language where needed. Furthermore, it might become possible for other bodies than CEN to develop harmonised standards.

At least in cases where no harmonised standards exist or where these are insufficient²⁵, the Commission would be empowered to adopt Delegated or Implementing Acts in order to ensure the availability of complete assessment methods and criteria for essential characteristics related to the basic requirements for construction works listed in Annex I. Such acts would contain Harmonised Technical Specifications or, where needed, normative

²³ Council of the European Union, *Conclusions on Circular Economy in the Construction Sector*, 28 November 2019, Doc. 14653/19, n15 and n16.

²⁴ For analysis and explanation, see the evaluation of the current CPR accessible at <https://ec.europa.eu/docsroom/documents/37827> (especially pages 28-31).

²⁵ See e.g. the wording of Article 9(1) of Regulation (EU) 2017/745.

references to existing standards or other documents containing technical specifications (e.g. EADs). When formulating technical specifications, the Commission would gather information from different actors, including namely industry, depending on the products and characteristics under consideration (e.g. CEN, private standardisation consortia, the Joint Research Centre, industry groups, Technical Assessment Bodies or Regulatory Advancement Bodies²⁶, Member States or groups of Member States), and all this in addition to the already now mandatory consultation processes. The governance mechanisms foreseen for the adoption of Delegated or Implementing Acts would guarantee the control by Member States.

In addition to the development of technical content for Delegated or Implementing Acts, it is conceivable that other organisations than CEN would be charged with developing harmonised standards. Again we could think of private standardisation consortia, industry groups, Technical Assessment Bodies or their successors, the Regulatory Advancement Bodies, but also Notified Bodies or combinations of these actors. The harmonised standards' path would thus be enlarged. This would lead to a two-tier system of technical specifications, with Delegated or Implementing Acts on top and harmonised standards below, the first overruling the second if needed.

Allowing manufacturers to obtain preliminary CE marking

Where a harmonised technical specification is in the pipeline, a revised CPR would allow manufacturers to have their products assessed by a Regulatory Advancement Body in order to obtain a preliminary right to CE mark their products. This option would replace the current EOTA/TABs route.

Assuming the Commission is empowered to ensure the completeness of the common technical language, the current EOTA/TABs route will become less relevant. Moreover, the EOTA/TABs route raises many systemic issues, the majority of which have been described in the EOTA report²⁷. To close the loophole in case of its deletion and to advance the development of new harmonised technical specifications in particular for innovative products, the following procedure could be foreseen. The TABs would be replaced by Regulatory Advancement Bodies with the primary task to investigate the potential for new Harmonised Technical Specifications²⁸. Where the Commission assesses a draft Harmonised Technical Specification, of which the technical content was elaborated by a Regulatory Advancement Body, as likely to be cited as Harmonised Standard in the Official Journal or to be transformed into a Delegated or Implementing Act within one year, this and other Regulatory Advancement Bodies would be allowed to issue certificates confirming the performance and the conformity of a construction product as requested in that draft Harmonised Technical Specification. The certificate would be valid until the actual citation²⁹ or publication³⁰ takes effect or, if no citation / publication takes place, for a maximum of 18 months. Once the certificate has been issued, a manufacturer could affix the usual marking followed by the letters “(pr)” and the date of expiry to its products.

²⁶ Replacing the TABs, see below under 'Allowing manufacturers to obtain preliminary CE marking.'

²⁷ Accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1571917158693&uri=COM:2019:800:FIN> (COM/2019/800 final, 24.10.2019).

²⁸ To be adopted either as Delegated or Implementing Act or as Harmonised Standard.

²⁹ In case it becomes a harmonised standard.

³⁰ In case of a Commission act.

Member States would be invited to designate Notified Bodies or authorities to fulfil the role of a Regulatory Advancement Body. The current TABs would become obsolete.

Reducing the administrative burden for manufacturers

The CPR would strive to reduce the burden for manufacturers by offering simplification measures, empowering Member States to exempt certain micro-enterprises from the scope of the CPR, reducing overlap between CE marking and the Declaration of Performance, and establishing empowerments for the Commission to define conditions for reducing or lifting AVCP obligations in case of coverage by a liability insurance.

In order to promote the uptake of simplification measures, current provisions could be considered to be redrafted with a view to clarification, though feasibility has not yet been completely ascertained. For example, a revised CPR might strive for a clearer difference between Article 5 and 38, clarify the content of Article 37 and 38, notably by defining more clearly what is understood as a ‘non-series process.’

To further promote simplification, Member States will be offered the possibility to exclude from the CPR’s scope enterprises, or at least SME or micro enterprises, individually producing construction products meant for direct final installation under their own responsibility. Alternatively, Member States could be allowed to exempt such enterprises from certain conformity assessment obligations. There would be a size-limit: to ensure that such a provision does not allow bigger manufacturers to circumvent their obligations, it would exclude cases where individual production is based on materials provided by another economic operator who manages a network of SMEs or craftsmen, e.g. under a franchising structure.

To reduce the administrative burden for all manufacturers, a revised CPR would aim to eliminate the current performance information overlap between the CE marking and the Declaration of Performance. Moreover, all viable possibilities for digitisation will be used.

Finally, a revised CPR might contain an empowerment for the Commission to adopt Delegated Acts determining conditions under which AVCP obligations can be reduced or lifted provided that the manufacturer has concluded a liability insurance which is proportionate to the maximum damages potentially caused by non-compliant or underperforming construction products. In cases where risks are not minimal, the exemption from AVCP obligations can be made subject to the application of a risk reduction scheme³¹ that is established by the insurance or an association of insurances and verified by agents acting on behalf of the insurance.

Improving access to Harmonised Technical Specifications

The revised CPR would improve access to Technical Specifications by ensuring translation into all official languages and free availability.

Under the current CPR, accessing the content of harmonised standards is sometimes made difficult or costly because they are not available in all official languages or because they are subject to copyright protection. If, under the future CPR, the Commission adopts Harmonised

³¹ Covering both aspects of performance and aspects of inherent product safety.

Technical Specifications by Delegated or Implementing Acts, such acts would have to be translated into all official languages, as is the case for all Union acts. Moreover, their content would be included in the Official Journal and would thus be freely available. Where Harmonised Technical Specifications contain normative references to other documents, the revised CPR would ensure that the pertinent content of the referenced documents is available in all languages and free of charge.

3) Improving effectiveness

Improving the use of the CPR's non-conformity procedures

By redrafting Articles 56 to 59, a revised CPR would aim to dispel interpretative confusion and facilitate the use of safeguard mechanisms, possibly even by creating a more streamlined procedural sequence for the different steps to be taken.

In its current form, Article 56(1) requires for the launch of the procedure both the inaccuracy of a product's declared performance and a risk to health and safety. This overly restrictive wording has led to the current situation where Article 56 is hardly used whilst Article 58 is not used at all. Article 58 deals with construction products that achieve their declared performance but nevertheless present a risk to health and safety. By removing the cumulative condition of a product's inherent safety and the accuracy of declared performance from Article 56(1), a revised CPR would therefore aim to unlock the use of the procedures defined in both articles.

Enhancing market surveillance

A revised CPR would enhance market surveillance by strengthening enforcement powers and aligning the performance of different market surveillance authorities. For the full list of envisaged measures regarding market surveillance, see Annex II.

The strengthening of enforcement powers would entail the introduction of appropriate sector-specific provisions to supplement the horizontal provisions contained in Regulation (EU) 2019/1020 on market surveillance and compliance of products, which are already part of the Baseline scenario (Option A). Such provisions would include stronger empowerments for market surveillance authorities related to fact-finding (e.g. the right to confiscate samples or to seize documents related to presumably non-compliant products) and possible punitive measures (e.g. the right to impose financial sanctions or to exclude non-compliant operators from public tenders). Special focus will be put on internet trade. Surveillance would be further enhanced by allowing manufacturers to sue their competitors and by allowing consumer and environment organisations to sue non-compliant operators, as well as by setting up a sector-specific EU-wide whistle blowing portal and a Member State forum to discuss and follow up on external complaints (using one of the fora provided for by Regulation 2019/1020 if possible³²).

³² See Chapter VIII of Regulation 2019/2011, OJ L 169, 25.6.2019, p. 1–44 (accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1020&from=EN>).

Aligning the performance of different market surveillance authorities would entail the introduction of absolute³³ and parameter-based³⁴ minimum benchmarks for Member State authorities, for example in terms of the number of full-time equivalents dedicated to CPR-related surveillance, as well as the introduction of procedures designed to ensure the proper performance of market surveillance staff. To further improve alignment, appropriate and effective mechanisms would be set up to allow for communication, coordination and cooperation between market surveillance authorities and to make them even mandatory, in particular where this is necessary to align decision-making practice, see Annex I.

Improving the efficacy of Notified Bodies

A revised CPR would improve the efficacy of Notified Bodies by strengthening the designation process and introducing control mechanisms for after designation.

In order to moderately strengthen the Notified Bodies' system, a revised CPR would introduce a mandatory qualification matrix (matching staff to product groups and technologies), to be used by Member States when designating Notified Bodies. Member States would also be asked to provide an accreditation or another assessment report for revision by peers and the European Commission. It would further grant the Commission the explicit right to block the registration of a Notified Body in NANDO where there is a lack of evidence of its competence.

Measures to strengthen the work of Notified Bodies towards manufacturers would include:

- Asking Notified Bodies to apply clear pass-fail criteria in their certification practice, thus avoiding that the Notified Body becomes by repetitive feed-back on non-conformities a consultant on the way to certification;
- requiring Notified Bodies to change the staff responsible for deciding on certification as regards products of a given manufacturer every 3 years;
- introducing structured reporting obligations for Notified Bodies to their respective Notifying Authority;
- making control of subcontracting stricter;
- complementing existing provision to make currently implicit obligations of Notified Bodies explicit; and
- introducing provisions covering the change of certification from one Notified Body to another.

Notified Bodies and Notifying Authorities would, together with market surveillance authorities also be affected by a package of measures enhancing harmonised decision-making, outlined in Annex I.

Supplementing Notified Bodies with special bodies in charge of BWR7

The current Notified Bodies are not necessarily competent to assess whether the calculation of environmental impacts by manufacturers is correct or, subject to the AVCP system, to make such calculations from scratch. The customary notification

³³ Even the smallest Member State should have available three full-time equivalences for the enforcement of the CPR.

³⁴ Parameters could be the size of the market in terms of €, tonnes or numbers of products sold, inhabitants etc. Evidently, these parameters can be combined.

procedures are not appropriate to assess these competences either. As these calculations are a science of their own, it might be necessary to complement the current Notified Bodies' system by designating specialised bodies or creating a responsible sub-group.

Today, only very few, namely extremely big, Notified Bodies designated under the CPR would also be able to obtain the competences for assessing these calculations. These extremely big Notified Bodies would have a disproportionate, unjustified competitive advantage if the verification of environmental impact calculations were to be done by the ordinary Notified Body in charge. Also to keep the small and medium Notified Bodies which are geographically close to the SME manufacturers alive, it might be useful to split the verification functions for BWR 1 to 6 and the one for BWR 7. In addition, it is questionable whether the current few big Notified Bodies able to calculate environmental aspects suffice, capacity-wise, to cover all (manufacturers of) construction products. Hence, it might be commendable to integrate other organisations that have specialised in calculating environmental impacts, hereafter called environmental verification organisations (EVOs). Such EVOs could either work separately from the current system or function as a sub-group within the current system, like for example the existing sub-group of Notified Bodies in charge of fire safety aspects.

EVOs would in particular be called upon to scrutinise whether the methodology applied by the manufacturer or his suppliers is aligned to best available techniques, to verify samples of particular calculations, and to assess the plausibility of the overall results or, subject to the AVCP obligations, to undertake themselves such calculations.

The designation and supervision mechanisms of the EVOs in charge of BWR 7 might differ from those of the current Notified Bodies because a much closer alignment of practices across different product sectors must be reached. It cannot be that steel (intended to be) used for cars is to be evaluated differently from steel (intended to be) used for construction products, and the same goes for all other materials or intermediate products. To reach this cross-sector alignment of calculation practices, no designation of an EVO should happen without a methodologically competent entity (be it the Commission Joint Research Centre or an external, entrusted service provider) having reviewed the qualification of the candidate EVO. The form of designation might also vary from that of normal Notified Bodies.

Comparability of environmental impact calculations can only be ensured if there is a more intense control and alignment in day-to-day decision-making, the more so as the same material or intermediate product might find its way both into construction and other products. This will imply the need for some knowledgeable supervisory body, e.g. the Commission Joint Research Centre, or peer review or both. Where these mechanisms become unsustainable due to a high number of manufacturers and assessments, a two-level supervisory hierarchy could be envisaged. The top-level supervisory body would entrust certain experienced and reliable EVOs to become supervisory bodies for less experienced EVOs.

When developing further concepts on the verification of environmental aspects, it has to be borne in mind that there is an inherent tension between the goal of alignment of practices across all product sectors on one side and the goals of minimising the burden specifically for the construction products industry and adapting to construction products specificities on the other side. The two sides cannot be fully served at the same time. But many questions must stay open at this point in time as the development of concepts regarding these questions

happens also in other products sectors or at a cross-sector level. The final proposal for a new CPR cannot create a construction products island, but must be in harmony³⁵ with concepts used across other products sectors. Moreover, it cannot be excluded that harmony must be sought for in the light of the different potential uses of environmental impact calculations. In Member States, these calculations are starting to play a role in very different contexts, namely in fiscal policy and for public tenders. Also for manufacturers of construction products it would not be wishful to have to calculate the environmental impact in several different ways. Hence, a consensus should be found which goes beyond the field of product regulation.

Evaluating the role of PCPCs

The Commission will investigate how Product Contact Points for Construction are currently being used.

In case they are not or hardly used for their main purpose, i.e. providing information about Member States' building regulations relevant to the intended use of construction products, a different purpose could be envisaged. Namely, they could be put in charge of providing information on the harmonised system created by and under the CPR. To some extent, they do this already today, we learnt.

Better covering information needs

In order to better cover Member States' and stakeholders' information needs, a revised CPR would allow, in certain specified cases, additional information to be included in the Declaration of Performance as well as empower the Commission to make mandatory the declaration of certain characteristics. Manufacturers can declare additional performances and characteristics.

To better cover information needs of architects and users, a revised CPR would include a positive list of additional information that manufacturers are allowed to include in their Declaration of Performance (additional to a product's performance in relation to the essential characteristics covered by Harmonised Technical Specifications). Examples might include information on the presence or absence of certain chemical components³⁶, the product's conformity with Member State regulations, its durability in the meaning of usability endurance of the product, or a link to instructions for use and installation. The Commission would be empowered to modify this positive list by means of Delegated Acts in light of information needs or other developments.

Currently, manufacturers only have to declare performance for one essential characteristic of a construction product in order to obtain CE marking. While it is not intended to oblige manufacturers to declare performance related to all product characteristics covered by Harmonised Technical Specifications, a revised CPR would, similar to its current Article

³⁵ „Harmony“ does not necessarily mean full alignment. Full alignment should not be strived for because construction products need specific environmental read-outs for the environmental assessment of construction works. These read-outs are not needed in most other product sectors.

³⁶ In line with, not duplicating REACH (OJ L 396, 30.12.2006, p. 1–849, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008D0768>) and other legislation on chemicals such as Regulation 1272/2008 on classification, labelling and packaging of substances and mixtures (OJ L 353, 31.12.2008, p. 1–1355, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R1272>).

3(3), empower the Commission to lay down mandatory characteristics by Delegated or Implementing Acts where necessary, most frequently in the context of having such a specification cited or adopted. Thus the revised CPR would start with the current situation where only one of the characteristics needs to be declared. However, based on a more precise analysis of the respective product group, regulatory needs, safety and environmental aspects, certain characteristics can be made gradually mandatory.

True claims or no claims

Wherever a performance or product characteristic is declared, whilst there is not yet any Harmonised Technical Specification, the manufacturer would be obliged to ensure the correctness of the declared information by using at least “state of the art” methodology. This brings standards into play in an additional (third) way.

To avoid misleading claims, the manufacturer should be obliged to assess the performance or the characteristic in accordance with a methodology that fulfils the quality notion “state of the art” or “best available technique” (the latter being more severe). The “state of the art” or “best available technique” is to be determined on a case-by-case basis in the light of available methodological documents, namely but not exclusively international and EU standards. Thus, in addition to the incorporation of the content of standards into Commission acts³⁷ (1st path) and harmonised standards becoming harmonised technical specifications (2nd path), there would be a third, more remote and indirect way of using the valuable content of standards (3rd path). This third path would not be subject to the same legal and formal constraints as the other two. It might resuscitate some of the advantages of the “New Approach” in its initial stage, meaning before full legal control of harmonised standards became obviously mandatory through Regulation (EU) 1025/2012 on European Standardisation and rulings of the European Court of Justice.

Better coverage of Member States’ needs by determining the “harmonised zone”

Following a given procedural order, Member States would, after a fair standstill period, become free to establish national requirements where EU provisions do not yet satisfactorily cover the relevant aspects.

In order to better cover Member States’ regulatory needs, a revised CPR would allow the Commission to determine by Delegated or Implementing Acts the exact borderlines of the “harmonised zone”³⁸, the sphere effectively covered by EU law. This clarification would work with product lists and lists of aspects covered. This would bring the legal concept of “exhaustiveness” (hindering Member States to regulate or otherwise interfere) in line with the de facto degree of “completeness” of the CPR Acquis. It would also reduce a good part of the legal uncertainty of the current CPR.

The procedure upstream to the determination of the “harmonised zone” together with the development of technical specifications would give Member States the right and obligation to communicate needs for technical aspects to be covered. If, after determination of the

³⁷ Either by taking over text or by normative reference where, exceptionally, translations into all languages exist.

³⁸ The expression “harmonised zone” has been chosen on purpose because the expression “harmonised sphere”, referred to in the context of rulings of the European Court of Justice, is broader and also encompasses aspects that are not covered by harmonised technical specifications in reality.

“harmonised zone”, Member States discover additional regulatory needs, they have to communicate them first to the Commission so as to give opportunity to cover them at EU level. Only after a standstill period of e.g. 4 years Member States would be authorised to establish additional national requirements, provided there is evidence of the relevant Member State’s regulatory need and if the claimed needs are legitimate. In order to avoid too the establishment of protectionist trade hurdles by the back-door, some acceptability criteria for Member States’ needs should be developed – not every need, even when well documented, might be legitimate.

A variant for the above mentioned standstill period could be that, after obtaining a formal³⁹ or implicit⁴⁰ validation, any Member State could introduce a national assessment method, to be used in relation to essential characteristics still lacking a harmonised EU method, for the duration of that standstill period. Notified Bodies across the EU could also apply that method and issue certificates on the basis of it. Other Member States would be obliged to recognise as well the respective assessment method and certificates.

Improving legal certainty

A revised CPR would improve legal certainty by addressing interpretation issues and clarifying the validity of Commission acts adopted prior to the application date of a revised CPR.

Many of the sections above deal also with legal uncertainty. In addition, the revised CPR could contain the following elements:

Under the current CPR, several ambiguous definitions have led to divergent interpretations. A revised CPR would seek to address such interpretation issues as far as possible. This would include making more specific existing definitions (e.g. for ‘construction product’, ‘construction work’ and ‘placing on the market’) as well as introducing new definitions where necessary (e.g. for ‘assembly’, ‘module’ and ‘building’).

An internal analysis showed that under the current CPR, substantive legal uncertainty exists regarding the validity of acts adopted under the CPD, its predecessor, in particular where their content is not fully in line with the CPR. To prevent this from occurring again, a revised CPR would lay down clear rules on the validity of Commission acts adopted prior to its application date. This is evidently also part of the smooth phasing-in of the revised CPR.

4) Transition

Ensuring a smooth phasing-in of the revised CPR

For a variety of legal reasons, only very few of the current Harmonised Technical Specifications, Commission Delegated and Implementing Acts could be used immediately and as such under the future CPR. Hence, clear transitional provisions would provide for a multiannual phase-in period, during which a large part of the CPR Acquis would be readopted whilst the old CPR remains applicable.

³⁹ By a decision of the European Commission.

⁴⁰ No objection by other Member States or the European Commission.

Almost the entirety of the current CPR Acquis has to be rebuilt and readopted. This will not happen overnight. Given the size of the current Acquis (444 Harmonised Standards and 157 EADs⁴¹), the entire exercise will take at least 5 to 10 years. In the meantime, transitional provisions would provide, where appropriate and for a limited time, for the continued application of the current CPR's Acquis for those product groups not yet covered by Harmonised Technical Specifications fit for the future CPR. Both regimes would thus exist in parallel for many years to come. This would trigger the need for authorities and economic operators to distinguish between products placed on the market under the old CPR and those placed on the market under the new CPR, possibly even with a distinct marking. A distinct marking would also make sense in so far as, contrary to other sectors, the CE marking on construction products refers to performance declaration, not to conformity. To shift to a distinct marking on the occasion of the introduction of the new CPR could thus kill two birds with one stone.

To organise this process, transitional provisions would lay down priorities according to which the development of the future CPR Acquis could be planned. Priority would be given to product groups that are of high importance to Member States (in view of the safety of buildings), that are most relevant for the internal market, or that raise problems regarding inherent product safety, consumer protection, or the environment (see legal basis of Article 114 TFEU).

As it is likely that the harmonised technical specifications adopted under the CPD and the CPR cannot be transferred to the future CPR, there is a need to adopt a high number of technical specifications in very short time, that is to say much less than the previously mentioned 5 to 10 years. As the first wave of technical specifications will mainly consist of technical content of the current Harmonised Technical Specifications, major impacts for economic operators are not to be expected. Therefore we expect the acts to be adoptable without impact assessments.

Lastly, the transitional provisions would stipulate the continuation of the legal validity of certificates and other documentation issued under the current CPR or before, or clarify that certain document types have to be reissued, either by the end of the general transition period or by the respective ends of the "coexistence" periods between the current and the new CPR regimes per product family.

⁴¹ There are 210 in NANDO, but these include superseded ones.

OPTION C – FOCUSING THE CPR

The CPR would be focused, freeing up capacity to improve the quality and comprehensiveness of the remaining harmonised sphere. This option builds on the “Repairing CPR” option, meaning that it would, to the extent that there is compatibility, include all the elements described in Option B. The three elements presented here could be combined:

Element 1: Limiting the CPR’s scope to assessment methods

The Common Technical Language would be limited to assessment methods

Harmonised Technical Specifications would include only assessment methods for performance calculation. No performance threshold levels or classes would be laid down at EU level. No other requirements or “characteristics” would be established at EU level.

Assessment methods would be developed as set out under Option B

As a primary root, the Commission would adopt Delegated or Implementing Acts containing Harmonised Technical Specifications indicating which assessment methods apply to certain identified essential characteristics of a specific product family. In doing so, the Commission would base itself on the assessment methods included in existing standards. The result would be a list of assessment methods specifying the range of product families and the essential characteristics they address, published in the OJEU.

National construction regulation would refer to these harmonised assessment methods

Member States would be obliged to refer to harmonised assessment methods when setting up product-related requirements in their construction regulation and to list the product families to which a particular assessment method should be applied. Indirectly, therefore, manufacturers of products covered by harmonised assessment methods will be obliged to use those methods when selling on the EU market.

Entire product groups for which no harmonised assessment methods have been provided would fall outside the harmonised sphere and would be covered freely by national legislation, including national assessment methods and EU rules on mutual recognition. The Member States would have the same freedom with regard to the essential characteristics of a certain product group that have not been covered by a harmonised assessment method.

Element 2: Limiting the CPR’s scope to core areas

Core areas would be identified during the legislative process

The CPR’s scope would be redefined to focus on core areas, and this would be done at the level of the CPR itself so that the CPR would need to be revised to go beyond the boundaries of that scope. The core areas would be identified according to three criteria: the coherence of Member States’ regulatory needs⁴², the relevance for the environment or for citizens in terms

⁴² Thus excluding areas where Member States’ regulatory expectations and needs differ so much that a harmonised approach barely makes sense.

of safety⁴³ and market relevance. These criteria are thus not only applied by the Commission when setting priorities for formulating Harmonised Technical Specifications as described under Option B, but already by the legislator when determining the overall scope of the CPR.

This approach would permit a better focusing on the regulatory needs of the Member States. It would give Member States the certainty that the EU cannot quickly extend the harmonised zone beyond what is laid down as the scope of the CPR. It would also to some extent "legalise" the de facto market fragmentation that already exists in some areas. On the other hand, it would deprive the Commission and the Member States to react quickly to new harmonisation, safety or environmental needs

Outside core areas mutual recognition would apply

For essential characteristics and products outside the resulting core areas, Member States could lawfully regulate performance assessment and communication (subject to Articles 34-36 TFEU). National requirements subject to notification under Directive 2015/1535 would be notified through TRIS (Technical Regulation Information System⁴⁴), allowing the Commission to follow up by initiating amendments to harmonised technical specifications if appropriate. If the Commission does not, mutual recognition rules would apply (to the limited extent they are effective in the construction sector⁴⁵). For all other aspects, Option B would apply, however limited to the reduced scope.

Element 3: Making the Common Technical Language optional for manufacturers

Manufacturers could choose whether they use the Common Technical Language

In case manufacturers choose not to use the common technical language to assess and communicate performance, they would not be allowed to affix CE marking or deliver any document that could be mistaken for a Declaration of Performance.

Member States would remain obliged to offer market access to manufacturers that choose to use the Common Technical Language

Member States would continue to be required to offer a path to market access based on national requirements referring to the Common Technical Language. Manufacturers would thereby have the certainty of access to the European market if they use the Common Technical Language. Thus, the free circulation of products, which is the CPR's main goal, would be ensured for CE marked products.

Member States would be allowed to regulate for an alternative path to market access not based on the Common Technical Language

⁴³ "Safety" in a broad sense, including e.g. harmful emissions.

⁴⁴ The (EU) 2015/1535 procedure aims to stop barriers before they materialize in the internal market. Through TRIS, Member States notify their legislative projects regarding products and Information Society services to the Commission which analyses these projects in the light of EU legislation. Member States participate in this procedure on an equal footing with the Commission and they can also provide their opinions on the notified drafts.

⁴⁵ See the analysis of the effectiveness below at the end of Option E (the repeal option).

Member States may wish to take into account in their national requirements the possibility of manufacturers not using the Common Technical Language. Such deviating requirements would constitute an alternative path to market access, so that manufacturers have a choice. More leeway would thus be given to the use of national marks, to the extent that these do not hinder market access based on the Common Technical Language⁴⁶.

Evidently, such an alternative national path might lead to higher performance requirements and subsequent marketing advantages, although free circulation is ensured. Alternatively, an alternative national path might also lead to lower requirements than in the Common Technical Language path, e.g. by allowing test methods which are less severe than the ones foreseen at EU level or by refraining from minimum threshold levels. Therefore, the EU regulation would no more achieve the goal of establishing minimum environmental or safety requirements. Accordingly, Element 3 might not be in line with the mandate of Article 114 TFEU to pursue a high level of protection of these values.

⁴⁶ However, unless deliberately decided otherwise by the legislator, ECJ ruling C-227/06 would apply, limiting the room for national marks.

OPTION D – ENHANCING THE CPR

Under this option, a revised CPR would introduce product requirements dealing with product inherent aspects⁴⁷ in order to protect health, safety and the environment. It builds on Option B “Repairing CPR”, which in turn includes the Baseline scenario outlined under Option A. Such product requirements could follow two different approaches, which are outlined under D1 and D2. The elements common to both approaches are outlined here:

Product requirements would be gradually introduced into the CPR system

A revised CPR would gradually introduce product requirements for certain specific product inherent aspects of selected products or products families. Going beyond the provision of a common technical language for the assessment of performance, such requirements would prescribe a products’ mandatory minimum requirements.⁴⁸ The current common technical language approach would thus be complemented by proper product requirements aimed at ensuring the health and safety of citizens and protection of the environment. The degree to which health and safety of citizens and protection of the environment can be improved would determine priorities.

Tailor-made product requirements would in particular ensure inherent product safety

This option would allow for the introduction of effective product safety requirements and obligations meant to guarantee inherent product safety into the standards (see D1) or in the technical specifications (see D2). Inherent product safety should be distinguished from construction work safety, which is framed by national legislation. Manufacturers of the products concerned would have to comply with such requirements and obligations even if their products are not covered by national regulation on construction works, for example in the case of products sold directly to consumers in DIY (do-it-yourself) shops.⁴⁹ They would not have the possibility to refrain from CE marking and thereby avoid EU regulation. A similar logic could apply to environmental product requirements.

The CPR itself would include a first thin layer of horizontal product requirements

A first thin layer of “horizontal” environmental and product safety requirements and obligations would be laid down in an Annex to the CPR itself. Currently, the European Commission and the Member States are assessing which types of requirements and obligations are necessary or at least useful for the vast majority of construction products. In order to avoid repetition in each individual Harmonised Technical Specification, these requirements and obligations would already be laid down horizontally. A certain number of these horizontal requirements and obligations are likely to be identified in particular with

⁴⁷ Thus not with aspects that become relevant for health, safety and the environment via the construction works.

⁴⁸ These requirements can go beyond threshold levels as they might also touch upon non-scalable characteristics, labelling, instructions for use etc. They might relate to physical characteristics like (absence) of sharps, mechanisms or other characteristics protecting users, IT safety, electrical and mechanical safety etc., but also to environmental characteristics like easy disposability or recyclability.

⁴⁹ European Commission services took note of the fact that some national regulation on construction works also covers DIY products. However, they are also aware that this is anything but systematic. Furthermore, the application and in particular the market surveillance varies strongly. In view of all this there is a regulatory loophole.

regard to instructions for (safe and environmentally friendly) use and environmental information⁵⁰. Some of them might also be of such fundamental character (e.g. the obligation to disclose chemical components) that it is legally preferable, if not necessary, to establish them at the level of the CPR itself.

The establishment of such a thin layer of horizontal requirements and obligations would establish a kind of minimum protection of the three goals prescribed by the CPR's legal basis (Article 114 of the Treaty on the Functioning of the European Union) besides ensuring the functioning of the internal market: environmental protection, safety and (in our case: indirectly) consumer protection. It would have this role wherever Harmonised Technical Specifications are incomplete. In particular in the first phase of the applicability of the new CPR, it is likely that some Harmonised Technical Specifications will be incomplete.

Background: One has to distinguish between the safety of construction works and the inherent safety of construction products as such. Article 114 TFEU, the CPR's legal basis, requires a "high level of protection". The Commission's proposal therefore must be oriented towards this goal. The Commission has an obligation to investigate possibilities to enhance citizens' health and safety by establishing requirements for the inherent safety of construction products. It should also be remembered, however, that Option D is only an enhancement option, an add-on. It builds on the CPR as "repaired" under Option B and still has the Common Technical Language approach at its core. It is thus an enhancement option and does not propose a radical system change.

OPTION D1 – NEW LEGISLATIVE FRAMEWORK APPROACH FOR PRODUCT REQUIREMENTS

Beyond the initial thin layer of horizontal environmental and product safety requirements and obligations laid down in an Annex of the CPR, Option D1 would formulate product requirements based on the New Legislative Framework approach. In case the resulting requirements address certain aspects covered by the CPR's horizontal requirements in a more specific manner, these more specific requirements would supersede the relevant horizontal requirements.

- **Essential requirements would be laid down in standardisation requests**

For the products or product families concerned, essential requirements would be laid down in standardisation requests addressed to CEN.

- **CEN would be requested to develop voluntary standards**

CEN would be mandated to develop standards providing technical detail. These voluntary standards would be harmonised by referencing in the OJEU.

- **Compliance with standards would provide presumption of conformity**

⁵⁰ Which could well go beyond the information needed under BWR 3, 6 and 7, namely in view of chemicals legislation.

Following the voluntary standards would lead to the presumption of a product's conformity with the relevant essential requirements, but other means to prove conformity would remain possible.

- **The Declaration of Performance⁵¹ would, depending on the case, be complemented by a Declaration of Conformity and both would be combined in one document.**

OPTION D2 – TECHNICAL SPECIFICATIONS APPROACH FOR PRODUCT REQUIREMENTS

Beyond the initial thin layer of horizontal environmental and product safety requirements and obligations laid down in an Annex of the CPR, Option D2 would formulate product requirements based on the Technical Specifications Approach. In case the resulting requirements address certain aspects covered by the CPR's horizontal requirements in a more specific manner, these more specific requirements would supersede the relevant horizontal requirements.

- **Detailed requirements would be included in Harmonised Technical Specifications**
Considering the problems experienced with the quality of the harmonised European standards at the core of the current CPR system⁵², it appears appropriate to envisage the possibility for reconsidering the Technical Specifications Approach for product requirements (the “Old Approach”). For the products concerned, the relevant Commission acts would lay down technically detailed product requirements.
- **Requirements would be developed in line with Option B**
Like under Option B, the Commission would be empowered to adopt Delegated or Implementing Acts containing, alongside the technical specifications pertaining to the Common Technical Language approach, detailed product requirements. When formulating technical specifications, the Commission would gather information from different actors depending on the products and characteristics under consideration (e.g. CEN, private standardisation consortia, the Joint Research Centre, industry groups, Regulatory Advancement Bodies, Member States or groups of Member States). Such Commission Acts would be developed step by step and in accordance with clear priority setting, in particular by Member States.

⁵¹ One and the same product may fall under the classic Common Technical Language Approach (triggering the need for a Declaration of Performance) and the newly introduced product requirements, triggering the need for a Declaration of Conformity e.g. for inherent aspects of product safety.

⁵² In most cases, harmonised standards do not cover all the essential characteristics impacting the Basic Work Requirements listed in Annex I to the CPR; certain draft standards remain blocked by industry representatives to protect national markets; most harmonised standards offered by CEN for citation in the OJ contain legal and other formal deficiencies (this is the reason for a high rejection rate by the COM services and cumbersome repair exercises, all delaying the timely adoption and subsequent OJ listing of harmonised standards); harmonised standards quite often contain content which aims at the protection of certain major companies and thus turn out to be SME-unfriendly; finally, EADs are often cast in such a way that they cannot be used for a broad range of products (hence they cannot always serve as substitutions for missing harmonised standards).

- **Harmonised standards would continue to play a role**

Harmonised European standards would have a new role because the technical specifications adopted by the Commission would partly refer to such standards, e.g. to the test methods contained in the standards. Other content of the harmonised European standards could simply be integrated into Harmonised Technical Specifications.

- **The Declaration of Performance⁵³ would, depending on the case, be complemented by a Declaration of Conformity and both would be combined in one document.**

⁵³ See footnote 51.

OPTION E – REPEALING THE CPR

The CPR would be repealed without any substitute

There would be no harmonisation, i.e. no common technical language, no mandatory harmonised standards, no voluntary harmonised standards either, no basic work requirements for construction works, no obligation to draw up a Declaration of Performance or communicate it, no CE marking, no classes or thresholds, no AVCP systems, and no conditions for classification determined at EU level.

Relying on mutual recognition would likely fragment the construction products market

Based on experience outside the sphere for which requirements are set under the CPR doubts must be raised as to the effectiveness of the principle of mutual recognition. The main reason for the supposedly weak effectiveness of the principle is that Member States regulations on construction works (and thus implicitly the product requirements derived therefrom) differ very much, as can be proven by the fact that national regulation requires very different performance levels. Hence, little conclusions⁵⁴ can be drawn from the acceptance of a certain product with regard to Criteria list A in Member State X for the Criteria list B in Member State Y, the Criteria list B reflecting other construction work needs that are easily explained by natural factors. A manufacturer strategy based on mutual recognition thus becomes particularly risky in the field of construction products. These elements may explain why, in reality, manufacturers mostly seem to adapt to the different national requirements in all the different Member States where they wish to market their products, without relying on mutual recognition. Repealing the CPR is likely to compel manufacturers of ever more construction products to go down this road.

Equally, the current CPR-imposed criteria on the design of public tenders would cease to apply. The diversity of requirements established in public tenders would widen even more.

The repeal would not contribute to the European Green Deal

It must be noted that a repeal without replacement would not, contrary to a CPR as revised as outlined in Options B and D, provide a substantial contribution to the European Green Deal (e.g. by providing harmonised information on construction products' environmental performance or introducing environmental product requirements).

⁵⁴ Regarding the likelihood of acceptance or matching.

ANNEX I –PACKAGE OF MEASURES AIMED AT HARMONISING DECISION-MAKING (OPTION B)

In order to harmonise the decision-making of market surveillance authorities (MSAs), Notified Bodies (NBs), Environmental Verification Organisations (EVOs) and Notifying Authorities (NAs), a revised CPR would include a package of measures providing for their structured communication, coordination and cooperation, as well as lay down requirements for their qualification and performance. The measures described here would be part of Option B.

Note: The measures described here are unlikely to be selected all or even by majority. The purpose of this listing is just to describe what might be needed to be considered as possible means for harmonising decision-making.

Setting up a structured information mechanisms

As a necessary fundament for harmonised decision-making, a revised CPR would set up a structured mechanism for the exchange of information between the relevant actors. Such a mechanism would allow for the identification and communication of interpretative questions, as well as the collection and evaluation of different possible interpretations.

To achieve this aim, a revised CPR might possibly:

- Set up a single information infrastructure;
- Provide clear rules on when and how relevant actors must report on new interpretative questions;
- Provide for the possible use of artificial intelligence to detect recurring patterns (e.g. similar decision types) and deviating decisions (to prevent unjust decisions, any final decision would be left to a human agent);
- Permit 3rd parties (citizens and economic operators) to raise interpretative questions (after the single information infrastructure is up and running).

Ensuring common approach to interpretative questions

A revised CPR would provide for the centralised processing of identified interpretative questions, with validity for all relevant actors.

In addition to possible informal interpretations or interpretation rules, the Commission would be empowered to adopt Implementing Acts containing binding interpretations or implementation rules. This empowerment would be used to address pertinent interpretative questions raised through the structured information mechanism. The resulting binding interpretations would be based on careful analysis of the practical, legal and economic impacts of various possible interpretations (maybe even following a testing period of the chosen interpretation). Moreover, before adopting a binding interpretation, the Commission would discuss the options and their effects with the relevant actors and with Member States in virtual fora. Lastly, from the moment an interpretative question is taken under consideration by the Commission a standstill period might apply under certain circumstances to avoid a drifting apart of views.

Introducing rules for the qualification of agents

Knowledge gaps may lead to wrong decisions. As most actors decide correctly and wrong decisions are unlikely to be consistent, knowledge gaps also lead to non-harmonised decision-making. Qualification measures addressed at the relevant agents could close such gaps.

To close existing knowledge gaps and to prevent the emergence of new knowledge gaps, a revised CPR would provide for the following measures aimed at ensuring the qualification of the agents of MSAs, NBs, EVOs and NAs:

- Inserting minimum qualification criteria;
- Introducing mandatory periodic training after qualification;
- Ensuring availability of online training modules or at least visual recordings of training courses to complement live training courses.

Introducing quantitative minimum requirements

Non-harmonised decision-making often also results from uneven or insufficient human resources. In technical fields, the lack of laboratory capacities plays a role. To address these issues, a revised CPR would set up minimum requirements, in terms of output and input, for relevant actors (in addition to those already mentioned in Option B).

A revised CPR might possibly include two kinds of minimum requirements:

- Input requirements: proportionate, parameter-based minimum resources (for example in terms of full-time equivalents) to be made available by relevant actors;
- Output requirements: different minimum control measures depending on the relevant actor, e.g. a minimum number of unannounced verifications to be performed by MSAs.

Promoting a common decision-making culture

Promoting a collaborative attitude among the relevant actors can further favour harmonised decision-making. When relevant agents do not hesitate to inform and ask their peers about interpretative issues, when such issues are viewed as occasions for common learning, they are more likely to be settled in a harmonised way.

In order to promote a common decision-making culture, a revised CPR might possibly:

- Establish requirements for periodic trainings that might bring together actors from different Member States;
- Ensure that such trainings are based on common simulated cases;
- Ensure that such trainings also address cultural aspects (e.g. pace of decisions);
- Create a legal basis for sharing national responsibilities and attribution of shared roles (depending on the context, roles could be shared according to knowledge and capacities).

Ensuring the involvement of peers

At the level of decision-making itself, a revised CPR could provide for the involvement of peers where appropriate. The structure of involvement would depend on the context and relevant actors.

Examples of possible measures might possibly include:

- Reporting obligations on past decision-making practice and discussion thereof;
- Mandatory participation to meetings dealing with decision-making practice;
- Reporting obligations on inspection planning (indirectly disclosing intended decision-making);
- Peers observe each other's enforcement activities like audits and inspections of economic operators and publish a report on their performance;
- Allow for joint decision-making of different relevant actors;
- Setting up a formal or informal entity to coordinate decision-making across different relevant actors, which would also disseminate information and promote alignment of views among relevant actors.

ANNEX II – PACKAGE OF MEASURES ON ENHANCED ENFORCEMENT (OPTION B)

A revised CPR would improve enforcement by introducing a series of measures already to be foreseen in the legal text (which are not or not fully covered by Regulation (EU) 2019/1020 on market surveillance and compliance of products). The measures listed below are part of Option B.

Note: The measures described here are unlikely to be selected all or even by majority. The purpose of this listing is just to describe what might be needed to be considered as possible means for enhancing enforcement.

Rights to sue:

- Give competitors the right to sue non-compliant manufacturers and their distributors (such a right has been foreseen in EU and Member States' competition law and some Member States have extended the right to sue competitors to cases where EU product law is infringed);
- Give consumer organisations the right to sue non-compliant manufacturers and their distributors (such a right has been foreseen in some pieces of EU environmental law).

Minimum requirements:

- Establish minimum benchmarks for market surveillance, e.g. in terms of qualified full-time equivalences to be made available or of enforcement measures or actions to be taken;
- Establish procedures and other arrangements for the proper performance of the duties of market surveillance staff, e.g. a qualification matrix to be used when hiring staff.

Investigative powers:

- Give market surveillance authorities the power to require any public authority, body or agency within the market surveillance authority's Member State, any natural or legal person or any economic operator to provide any information, data or document (in any form or format and irrespective of its storage medium or the place where it is stored) on compliance, physical aspects, supply chain, distribution network or quantities? (this empowerment goes, except for economic operators, beyond the empowerments foreseen in Article 14(3) of Regulation (EU) 2019/20 - letters (a) and (b) thereof only relate to economic operators);
- Give market surveillance authorities the right to request information directly from economic operators in another Member State;
- Give market surveillance authorities the right to obtain information from internet service providers on communication and data-exchange of presumably non-compliant operators and supervising the internet communication or telecommunication (meta-data or even content) in a personalised or generic way;
- Give market surveillance authorities the right to acquire product samples, including under a cover identity, to inspect them and to reverse-engineer them in order to detect non-compliance and obtain evidence;
- Give market surveillance authorities the right to visit and inspect, without prior announcement, offices, factories, warehouses, wholesaling establishments, retailing establishments, laboratories, research institutions and other premises or vehicles in which products are produced or kept (this empowerment is broader than the empowerment

foreseen in Article 14(3)(e) of Regulation (EU) 2019/1020 in so far as it is not limited to premises ‘that the economic operator uses’);

- Give market surveillance authorities the right to seize and take possession of all documents, data and products which might serve as means of proof for stating the non-conformity;
- Give market surveillance authorities the right to confiscate samples of possibly non-compliant products;
- Give market surveillance authorities the right to seize and take possession of all non-compliant products, be they in a possession of the person responsible for the infringement or another person;
- Give market surveillance authorities the right to confiscate non-compliant products or property used in or in connection with the illegal activity or obtained in return or in connection with the illegal activity;
- Give market surveillance authorities the right to compel the attendance of witnesses and the production of evidence by third parties, when there are reasons to believe or first evidence exist that an infringement is ongoing;
- Give market surveillance authorities the right to acquire data and documents from third parties, including against payment or providing advantages.

Information exchange:

- Give market surveillance authorities appropriate and effective communication and cooperation mechanisms with other market surveillance authorities and other relevant authorities, including customs authorities for the identification and examination of potential risks related to counterfeit products and withdrawal of such products from the market;
- Give market surveillance authorities the right to communicate or exchange data with third parties, other authorities, courts, natural or legal persons or other jurisdictions and adopting agreements in this regard to obtain further evidence on possible non-compliance;
- Give market surveillance authorities the right to use, without any further formal requirements, evidence produced by a market surveillance authority in one Member State as part of investigations to verify product compliance.

Sanctioning powers:

- Give market surveillance authorities the possibility to block or to remove content from internet websites offering products which are not in compliance with requirements applicable to them (hereafter: “non-compliant products”) or to order the explicit display of a related warning to end-users when they access the website (this empowerment goes beyond the empowerment of Article 14(3)(k) of Regulation (EU) 2019/1020 which requires that there is no other effective means to eliminate a serious risk);
- Give market surveillance authorities the right to recover from non-compliant economic operators costs for state action triggered by infringements (Article 15 of Regulation (EU) 2019/1020 gives Member States the right to do convey such empowerments to authorities, but does not itself convey the empowerment);
- Give market surveillance authorities the right to impose other enforcement costs
- Give market surveillance authorities the right to decide on penalties, including fines, for non-compliant natural persons (Article 41 of Regulation (EU) 2019/1020 covers only penalties against economic operators);

- Give market surveillance authorities the right to impose financial sanctions for non-compliant legal persons (Article 41 of Regulation (EU) 2019/1020 covers only penalties against economic operators);
- Give market surveillance authorities the right to enforce financial obligations and financial sanctions or penalties via confiscation of products, rights or money;
- Give market surveillance authorities the right to ban non-compliant economic operators from receiving subsidies;
- Give market surveillance authorities the right to exclude non-compliant economic operators from public tenders;
- Give market surveillance authorities the right to practice public naming and shaming of non-compliant economic operators and, in particular, to publish any final decisions, final measures, commitments given by the economic operator or decisions, including the publication of the identity of the economic operator who was responsible for the non-compliance and of the identity of the natural persons acting on behalf of these operators;
- Give market surveillance authorities the right to extend sanctions to mother or sister companies and their agents, at least in cases where a company has been set-up as a shield for illegal activities;
- Give market surveillance authorities the right to extend sanctions to partner companies and their agents where they contributed to illegal activities.

ANNEX III – HARMONISED TECHNICAL SPECIFICATIONS UNDER OPTION A (TODAY) AND UNDER OPTION B (POSSIBLY TOMORROW)

1. Issues of the current HTS system

As the system of the current HTSs is well-known and described in detail in the Commission evaluation⁵⁵ and the EOTA report⁵⁶, we focus on highlighting the issues which might be regarded as necessary to be solved:

a) Both Harmonised Standards and EADs (European Assessment Documents)

- Translations not available in all EU languages, thus potential formal invalidity;
- Infringement of requirements for legal preciseness by imprecise normative references (e.g. undated or to standards which have been withdrawn or contradicting normative reference chains);
- De facto little involvement of authorities and stakeholders other than industry;
- Weak or absent democratic legitimization;
- High risk of deviation from legal requirements (e.g. giving leeway to economic operators not foreseen in law);
- Mixture of requirements that are necessary for the respective regulation and others that are not (“superfluous” ones);
- Requirements which give privileges to certain manufacturers and keep out of the market others;
- SME underrepresentation;
- No possibility for authorities to step in when CEN / EOTA do not deliver.

b) Only Harmonised Standards

- Extremely high rejection rate;
- Refusal of CEN to establish internal legal control, which can be explained by:
- CEN’s strategic preference for ISO alignment versus EU regulatory alignment.

c) Only EADs

- No formal validation of EADs by Commission decision⁵⁷ and no empowerment for such validation and hence potential formal invalidity in application of ECJ rulings since 1958 (see the *Meroni* case⁵⁸ - for more recent rulings applying *Meroni*, see for example *Parliament v Council*⁵⁹ and the *ESMA* case⁶⁰);
- EAD proliferation – too many variants;
- EAD proliferation – EADs going beyond the purpose of EADs (“innovation”), becoming de facto another type of Harmonised Standard;

⁵⁵ COM/2019/800 final, 24.10.2019, accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1571917158693&uri=COM:2019:800:FIN> ().

⁵⁶ COM/2019/800 final, 24.10.2019, accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1571917158693&uri=COM:2019:800:FIN>

⁵⁷ The right of Commission staff to object to the EADs does not constitute a formal decision of the Commission.

⁵⁸ Judgement of 13 June 1958, *Meroni v High Authority*, C-10/56, ECLI:EU:C:1958:8, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61956CJ0010&from=EN>

⁵⁹ Judgement of 5 September 2012, *Parliament v Council*, C- 355/10, ECLI:EU:C:2012:516, paras. 64-82, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126363&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=935739>

⁶⁰ Judgement of 22 January 2014, *UK v Council and Parliament*, C-270/12, ECLI:EU:C:2014:18, paras. 41-55, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=146621&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5618770>

- Too many stages for EADs, legal uncertainty, which can lead to ETAs being issued without formally valid EADs.

2. Outline of the HTS / standardisation system under Option B

- a) The **current system of Harmonised Standards would continue to exist**, but for the time being only as a second best (or “back-up”) solution⁶¹. The range of standardisation organisations would be enlarged, including a follow-up organisation to EOTA. Some of the issues listed above can be remedied within the context of the revision of the CPR, but not all. Others can only be addressed, if at all, by a future revision of the Regulation (EU) 1025/2012 on European Standardisation. Therefore, the current system of Harmonised Standards under the CPR needs to be complemented. It could become complemented “above” by a thick new level of Harmonised Technical Specifications adopted by the European Commission (letter b)) and “below” by a thin layer of indirect references to standards (letter c)).
- b) The main pillar of Option B is the **re-introduction of the centuries old principle that regulation is, as default path, formally adopted by public authorities**⁶², in this case by the European Commission. This does not imply that the technical content of the HTS is elaborated by the European Commission or other authorities. Private bodies (CEN, EOTA or its follow-up organisation, industry associations, private standardisation bodies or consortia, Notified Bodies, or combinations/consortia of these) and Member States’ authorities/institutes would all be welcome to provide technical content which can be cast into a harmonised standard format for Harmonised Technical Specifications adopted by the European Commission. Subject to readiness, available resources and specialisation, one or the other or a combination of these actors would become entrusted with elaborating the technical content, whilst the European Commission, together with authorities, would ensure by supervision that regulatory needs are covered and that legal requirements are fulfilled. Entrusted actors would be asked to provide for transparency towards other stakeholders and to invite them to contribute to the development of the technical content. At the level of the formal adoption by the European Commission, the usual public consultation mechanisms would kick-in. Hence, there would be a double-layer of stakeholder information and participation.

On an organisational level, neither CEN nor (the follow-up organisation of) EOTA would be obliged to substantially change its internal organisation. They can provide technical content on the basis of their current internal organisation or another. But both would be discharged of formal adoption mechanisms, which will facilitate their task and permits them to focus on what they are particularly good at: developing technical content.

The integration into Commission acts of technical content can happen in two ways:

- by inserting the content;
- by referencing the content laid down in a document which is publicly available and translated into all EU languages.

The latter path could in particular be practiced if CEN wished to continue to formally adopt standards. In this variant, little would change for CEN, except, for the variant of the

⁶¹ In the medium or long term, however, it might become very relevant again, see Section 4. Outlook.

⁶² This is anything but new, history of regulation has not started with the New Approach. The New Approach is rather a historic exception to the rule. It is also an exception when we compare the overall number of sectors covered by the New Approach versus others. Finally, the New Approach is also, in a worldwide perspective, the exception from the rule.

second indent, the need to ensure translations into all languages via the national standardisation bodies⁶³. In return, the complex administrative process in relation to the European Commission, namely the standardisation requests and the responses thereto, could be dropped.

- c) On a level “below” the current Harmonised Standards, a **thin layer of indirect references to standards** (not necessarily “Harmonised Standards”, i.e. standards covered by a standardisation request of the European Commission) would be added. To avoid misleading claims, the manufacturer should be obliged to assess the performance or the characteristics they claim in accordance with a methodology that fulfils the quality notion “state of the art” or “best available technique”⁶⁴. Although “state of the art” can be interpreted to mean the best available method⁶⁵, this outcome is by no means certain. The severity of this quality notion will thus depend on the formula chosen (“best available technique” being more severe). What then constitutes the “state of the art” or “best available technique” is to be determined on a case-by-case basis in the light of available methodological documents, namely but not exclusively international and EU standards. De facto, standards would become the main source for the concretion of these abstract terms, as they are already today in those Member States that use this regulatory technique. The indirect referencing avoids so far the need for severe legal scrutiny of the standards. It thereby pursues the intention of the now already old “New Approach” of using the flexibility of standards without buying-in the formal burdens of regulation.

3. Risks and downsides of the HTS / standardisation system under Option B

- a) The subsidiary new element of Option B is the introduction of a thin layer of indirect references to standards. This regulatory technique has been used with success and for many decades by some Member States and in particular Germany. It has some downsides at the level of legal preciseness. However, if courts play the game as they did in Germany, the legal preciseness increases over time⁶⁶. As mentioned above, the interpretative outcome also depends on how the reference is formulated.
- b) The main element of Option B is the re-opening of the classic, centuries old path for adoption or regulation by authorities. This path has proven to be viable across sectors, across jurisdictions and across centuries. There is no reason why it should not be viable in the case of the CPR either.
- c) However, we cannot, at this point in time, estimate the speed of delivery of the system. The speed of delivery depends on a long range of factors such as cooperation and

⁶³ In case of insertion of CEN technical content into the legal acts adopted by the European Commission, the translation would be ensured by the European Commission itself.

⁶⁴ See for example Article 5 of Delegated Regulation (EU) 665/2013 supplementing Directive 2010/13 on the energy labelling of vacuum cleaners (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02013R0665-20170307&from=NL>), which states that ‘the information to be provided [...] shall be obtained by reliable, accurate and reproducible measurement and calculations methods, which take into account the recognised **state-of-the-art** measurement and calculation methods’.

⁶⁵ See for example Opinion of the Advocate General of 26 January 1999, *Commission v Germany*, C-198/97, ECLI:EU:C:1999:23, para. 21, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=44378&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5784189> in which the ‘État optimal de la technologie’ was taken to be equivalent to ‘state of the art technology’.

⁶⁶ See for example the Judgement of 30 September 1996 of the German Federal Administrative Court (<http://www.eb.archive.org/web/19991009005152/http://www.vrp.de/archiv/rupdig/mrz97/aktuell/ar387.htm>), in which the “generally recognised state of the art” was defined as those methods that “are tested and proven in practice.”

engagement of industry, of CEN, of (the follow-up organisation of) EOTA, of Member States authorities and specialised institutes, but also Commission human resources and intra-administrative obligations / hurdles for the formal adoption of HTSs as Commission acts.

- d) Assuming an equivalent engagement of industry, there is no reason to assume that the output in normal times, once basic mechanisms have been established, would be lower than under the current standardisation system – even when we disregard that currently virtually no harmonised standards are newly cited in the Official Journal. As can be seen in many different sectors, the European Commission is able to produce a high number of regulatory acts in a given sector⁶⁷.
- e) However, a precondition is that Member States engage slightly more than currently. They should engage at the same level as they used to engage – speaking now across all sectors, not just for the CPR – in standardisation one or two decades ago. One or two decades ago, Member States were still very active also at the level of Technical Committees of standardisation bodies, avoiding that standards deviate too much from legal requirements⁶⁸. This level of engagement would need to be re-established to reach a full output of HTSs. Not more.
- f) Without any engagement of Member States and of industry, the European Commission would, with the help of its consultants, its Joint Research Centre and contractors, still be in a position to prepare HTSs. However, the overall speed and thus output would be dramatically reduced, whilst being still higher than the output of the current system in terms of HTSs really becoming law. Hence, as much as it would be disappointing if there was no contribution from Member States and from industry, the situation would be much better than today⁶⁹. Accordingly, there does not seem to be an alternative for opening the path of adoption of technical regulation by the European Commission⁷⁰.

4. Outlook

From the current perspective, where the standardisation path is at least as procedurally cumbersome as the adoption of technical regulation by the European Commission, it might be questionable why the standardisation path should be kept as an alternative for the CPR. However, things can change, as they changed in the past. Adopting technical regulation by the European Commission was easy three or four decades ago, but became increasingly cumbersome in the last two decades⁷¹. This gave standardisation a tremendous comparative advantage, in addition to the much less severe legal and formal control. With the Regulation (EU) 1025/2012 on European Standardisation⁷² and the fall-out of the *James Elliott* ruling⁷³

⁶⁷ Such regulatory „machines“ exist for instance in the field of pharmaceuticals, automotive industry, transport, agriculture, food and feed safety, to name but a few.

⁶⁸ With successive budget cuts, the engagement of Member States in standardisation bodies has dwindled and, in parallel thereto, the mismatch with regulation has increased.

⁶⁹ Admittedly, the situation could be hardly worse than today.

⁷⁰ The detailed reasons for the failure of the current standardisation system in the field of the CPR have been described in detail in the recently published evaluation, accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1571917158693&uri=COM:2019:800:FIN> (COM/2019/800 final, 24.10.2019). Many efforts have been spent in vain to get the system afloat again.

⁷¹ There were many very valid reasons for the establishment of the different procedural steps, from the better integration of EU policies to a better control by the legislators to more transparency towards trade partners and stakeholders.

⁷² OJ L 316, 14.11.2012, p. 12–33, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1025>

in the years after 2016, however, the standardisation path is now equally if not more cumbersome than the adoption of technical regulation by the European Commission⁷⁴. Hence, the adoption of technical regulation by the European Commission is a – comparatively – more promising path. Subject to a revision of the Regulation on European Standardisation and of the regulatory policies for regulation of the European Commission this might change again. Hence, it is commendable to keep both paths open and to complement both with the thin layer of indirect references to standards.

In an even broader perspective, having three different regulatory techniques at hand provides a large range of choices and possibilities for intelligent combinations that can be arranged in a flexible way in accordance with the concrete situation at a given time. The actual handling of the three regulatory techniques should be made in view of the concrete situation, namely the respective product family, the knowledge, performance and willingness of potential cooperation partners, the specific regulatory needs of authorities and industry, the speed of update to technical progress needed etc. Our services are confident that, if all parties involved realise the full potential given by pragmatic tailor-made combinations of these three techniques, the current debate on whether this or that path “is the right one” will be quickly forgotten.

⁷³ Judgement of 27 October 2016, *James Elliot Construction*, C-613/14, ECLI:EU:C:2016:821, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=184891&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5620375>

⁷⁴ We exempt cases where an impact assessment is needed.