James Elliott Construction: A "New(ish) Approach" to Judicial Review of Standardisation

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James Elliot Construction: A "New(ish) Approach" to Judicial Review of Standardisation

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Abstract

This article analyses the decision of the Court of Justice of the European Union in the James Elliot Construction *case delivered on 27 October 2016. In its decision, the Court has for the first time affirmed its jurisdiction to interpret harmonised technical standards on a preliminary reference. In this contribution, we argue that the decision marks an important breakthrough in the evolution of EU law by recognising harmonised technical standards as part of Union law. This opening offers new possibilities for litigating technical standards and assuring the centrality of the rule of law in the achievement of the internal market. The article concludes by analysing the implications of the decision in relation to the* Meroni *doctrine, the potential conflicts between the principle of free access to the acts of the Union and the protection of intellectual property, and the impact that greater litigation over harmonised technical standards may have on the caseload of the Court.*

Introduction

Over the past several years, an expansion of technical standards has encroached upon the legal domain.[1] Standardisation has gained considerable importance not only in terms of the number of standards produced, but also in terms of the scope of application, which by now covers goods and services, the environment, and even corporate social responsibility (ISO 26000).[2] The powerful upswing of standardisation techniques is particularly remarkable at EU level.[3] The New Approach standardisation strategy[4] initiated in the 1980s placed standardisation techniques at the heart of the free movement of goods with rapid success. According

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[1] T. Buthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton: Princeton University Press, 2011); D. Snyder, "Private Law Making" (2003) 64 *Ohio State Law Journal* 371.

[2] For an analysis of this phenomenon, see B. Frydman and A. van Waeyenberge (eds), *Gouverner par les standards et les indicateurs: De Hume aux rankings* (Brussels: Bruylant, 2014).

[3] "The importance of standardisation in stimulating and enabling innovation and competitiveness in Europe is at the heart of European Policy": F. Scapolo, P. Churchill, V. Viaud, M. Antal, H. Cordova Gonzalez Castillo and P. de Smedt, *How will Standards Facilitate New Production Systems in the Context of EU Innovation and Competitiveness in 2025?* (Luxembourg: Publications Office of the European Union, 2014) p.13.

[4] Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standards (85/C136/01).

to the Commission, this approach is successful not only because it is an effective model of legislation[5] but also because it fosters economic growth.[6]

Nevertheless, the New Approach has not escaped criticism. In particular, questions have arisen on the level of effective judicial safeguards insofar as,

> "the only way to ensure the legality of the New Approach was to keep the standardisation system at arm's length from the legal system, and preferably a bit further still."[7]

Schepel argues that this would be achieved, in particular, "by the claim that harmonised standards remained of 'voluntary' application".[8] As Van Gestel and Micklitz explain, "up until today, standardisation bodies are united by the idea that what they produce is self-regulation and not law".[9] This explains why the Court had for long time overlooked these standards because, "being private, they were widely held to be beyond the scope of what is now Article 34 TFEU and Article 263 TFEU".[10]

This contribution discusses the nature and function of harmonised technical standards—developed by private European standardisation bodies under mandate from the Commission—in the EU legal order.[11] More specifically, it analyses the decision of the Court of Justice of the European Union (the Court) in the *James Elliot Construction* case and its implications for the justiciability of these standards.[12] This decision provides a prime opportunity to consider the question because it marked the first time a national judge requested the Court to interpret a harmonised technical standard.[13] The Court followed the reasoning of AG Campos Sánchez-Bordona and claimed jurisdiction to interpret harmonised technical standards in the context of the preliminary reference procedure.

In this contribution, we argue that the decision of the Court is an important breakthrough in the evolution of EU law and offers new possibilities for litigating technical standards. As a consequence, it reinforces the principle of the rule of law in the achievement of the Internal Market. In this view, the decision carries

[5] "The 'New Approach' has proven to be a specific model of legislation by which both public interests (i.e. protecting public health and safety, consumer, and environmental protection) and private interests in producing 'state of the art' standards could be adequately merged. It allows for more flexible and less stringent forms of legislation in areas where details would otherwise have to be determined by the legislative act itself." "The role of European standardisation in the framework of European policies and legislation" COM(2004) 674 final, p.6 (last consulted 10 March 2017).

[6] The Commission, relying on a study made by the German National Standards Body (DIN), reports that "in Europe, standardisation adds approximately 1% to the value of the gross domestic product … and that the added value generated by standardisation is at least as important as the value generated by patents": "The role of European standardisation in the framework of European policies and legislation" COM(2004) 674 final, p.6.

[7] H. Schepel, "The New Approach to the New Approach: The Juridification of Harmonised Standards in EU Law" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 524—for a similar conclusion a couple of years earlier, see P. Pecho and A. van Waeyenberge, "La normalisation technique vue de Luxembourg" (2010) *Revue du Marché commun et de l'Union européenne* 387, 394.

[8] Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 524.

[9] R. van Gestel and H.-W. Micklitz, "European Integration through Standardization: how Judicial Review is Breaking Down the Clubhouse of Private Standardization Bodies" (2013) 50 C.M.L. Rev. 145, 146.

[10] Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 522.

[11] For a broader analysis see H. Aubry, A. Brunet and F. Peraldi-Leneuf, *La normalisation en France et dans l'Union européenne: Une activité privée au service de l'intérêt général?* (Aix: Presses universitaires d'Aix-Marseille, 2012); H. Schepel, *The Constitution of Private Governance: Products Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

[12] For an introduction to the possibilities of challenging technical standardisation in the European legal order see J.-L. Laffineur, M. Grunchard and C. Leroy, "Les possibilités de recours contre une norme technique dans l'Union européenne" (2009) 4 *Revue Européenne de Droit de la Consommation* 813; and Pecho and Van Waeyenberge, "La normalisation technique vue de Luxembourg" (2010) *Revue du Marché commun et de l'Union européenne* 387, 387.

[13] *James Elliott Construction* (C-613/14) EU:C:2016:821.

at least three key implications. First, the justiciability of technical standards means that the Court will be able to verify the compatibility of standards with legislation, which raises the issue of the extent of its power within the meaning of the *Meroni* doctrine. Secondly, if the Court considers technical standards to be part of Union law and thus susceptible to preliminary ruling, it should follow that these "acts" are freely accessible to the public (art.15(3) TFEU). Such accessibility would carry broad implications regarding the intellectual property associated with these standards. Finally, the decision may have considerable impact on other remedies such as actions for annulment and the preliminary rulings on validity, as well as on the workload of the Court.

This article is divided into four sections. The first section provides an analysis of the legal status of harmonised technical standards as part of the New Approach. The second section addresses the *James Elliot Construction* case on the basis of the facts and the law. The third section discusses the consequences of this decision for the legal status of harmonised technical standards in EU law by exploring the three above-mentioned issues. The last section provides a conclusion to the analysis.

The blurred status of harmonised standards

Traditionally, all European regulations relating to the Internal Market passed through the classic "top-down" approach, which meant the adoption of general regulations and their uniform application by all Member States. The procedure was particularly burdensome because unanimity was often required in the Council, and the Commission was burdened with detailed regulation proposals across many different sectors.[14] The administrative weight naturally resulted in relatively little harmonisation outside a small number of areas such as the automobile or agriculture sectors, and harmonisation of the Internal Market appeared a long way off. In the absence of harmonisation on the European level, Member States retained the competence for regulating the production and marketing of goods with respect to the provisions of the Treaty. A producer wishing to market his goods in different Member States was often confronted with a plethora of different national regulations and standards.

In order to simplify the process and realise the single market, the European Union launched in 1985 a new harmonising strategy known as the New Approach.[15] The new strategy was intended to promote the free movement of goods, while guaranteeing new minimum security requirements in all Member States. Relying on the principle of mutual recognition,[16] the New Approach harmonisation focused on the essential requirements rendered mandatory by directives concerning health, security and the environment. The essential requirements were supplemented by technical specifications in the form of harmonised European standards.[17] These harmonised standards are not compulsory, but manufacturers have an incentive to comply because of the subsequent presumption of equal compliance with the mandatory essential requirements set out in directives.

Although deviation from the standards is authorised, a manufacturer then bears the burden of proving that his goods are compliant with the essential requirements. Because these essential requirements are framed in very broad terms (e.g. toys should not be dangerous for children), this can be a heavy burden

[14] COM(85)310 final, p.68.

[15] Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standards (85/C136/01). For an explanation of this approach see C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 5th edn (Oxford: Oxford University Press, 2016), pp.590–595; P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2015), pp.166–167 and 620–662; S. Weatherill, "Union Legislation relating to the Free Movement of Goods" in P. Oliver (ed.), *Free Movement of Goods in the European Union*, 5th edn (Oxford: Hart Publishing, 2010), pp.468–470.

[16] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (120/78) EU:C:1979:42; [1979] 3 C.M.L.R. 494 at [8] and [14] (*Cassis de Dijon*).

[17] For an overview of the use of harmonised standards see *https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards/* [Accessed 11 October 2017].

of proof and manufacturers find it easier to comply with the more precise technical standards. In practice, this means that harmonised technical standards become the de facto standards of the market.

The European Committee for Standardisation (CEN) develops harmonised standards for most major sectors under the Commission's mandate[18]; the European Committee for Electrotechnical Standardisation (Cenelec) develops harmonised standards in the electrotechnical sector; and the European Telecommunications Standards Institute (ETSI) develops harmonised standards in the telecommunications sector.[19] Mandates are described as "part contract—fixing target dates, arranging financial modalities, and so forth—and part technical elaboration of an essential requirement".[20]

This system has proved rather productive; 32 directives/regulations rely on the approach[21] and an estimated "4,000 harmonised European standards [have been] developed by CEN-Cenelec, and almost 500 by ETSI …".[22] Moreover, the trading volume of products covered by the key sectors where the New Approach applies is estimated at €1.5 billion per annum.[23]

In relation to case law, relatively few Court decisions have addressed European technical standards.[24] Moreover, according to AG Manuel Campos Sánchez-Bordona, the issue of the Court's jurisdiction to make a preliminary ruling on harmonised standards adopted by European standards bodies has yet to be addressed.[25] The *Latchways* case[26] constitutes a valuable precedent in this regard because the Court decided the matter of its jurisdiction to interpret non-harmonised technical standards produced by a European standard body (CEN).

In *Latchways*, the national court asked the Court whether the provisions and requirements of EN 795 standard, prepared under a mandate given to CEN by the Commission, are covered by EU law and, accordingly, are capable of being interpreted by the Court. The Court abstained from addressing non-harmonised standard techniques produced by the CEN insofar as "the Court's jurisdiction to give

[18] The relationship is therefore of a contractual nature such that the standardisation body is not bound to accept instructions from the Commission; indeed, the body can decline the Commission's request. See General Guidelines for the Cooperation between CEN, Cenelec and ETSI and the European Commission and the European Free Trade Association (28 March 2003) [2003] OJ C91/7–11. For a description of the content of the mandates, see C. Mattiuzzo, "Mandated standards: how exactly does that work?", *KANBrief 2/14*, *https://www.kan.de/en/publications/kanbrief/wie-viel-politik-braucht-die-normung/mandatierte-normen-wie-laeuft-das-eigentlich/* [Accessed 15 December 2016]. For an analysis of the legal nature of the mandate, see Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 524.

[19] These are all non-profit associations incorporated under Belgian law (CEN and Cenelec) or French law (ETSI).

[20] Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 524. See also L. Waddington, "A Disabled Market: Free Movement of Goods and Services in the EU and Disability Accessibility" (2009) 15 E.L.J. 575, 587.

[21] See the list on this website: *http://www.newapproach.org/Directives/DirectiveList.asp* [Accessed 11 October 2017].

[22] MEMO/16/1963 (1 June 2016), *http://europa.eu/rapid/press-release_MEMO-16-1963_fr.htm* [Accessed 11 October 2017].

[23] Craig and De Búrca, *EU Law: Text, Cases and Materials* (2015), p.624. The EU GDP in 2015 is estimated to €152,000 billion. See *http://data.worldbank.org/region/european-union* [Accessed 11 October 2017].

[24] Four cases are related at a general level to technical standardisation in the European context: *Commission of the European Communities v Ireland* (45/87) EU:C:1988:435; [1989] 1 C.M.L.R. 225; *Commission v Belgium* (C-227/06) EU:C:2008:160; *Fra.bo* (C-171/11) EU:C:2012:453; [2012] 3 C.M.L.R. 38; and *Commission v Germany* (C-100/13) EU:C:2014:2293. We can conclude from these different decisions that the Court does not hesitate to consider incentives or presumptions of compliance implemented by Member States through national technical standards as constituting possible barriers to the free movement of goods. Similarly, where harmonised technical standards exist, they cannot be supplemented with national technical standards of a mandatory nature because this would also constitute an obstacle to the free movement of goods.

[25] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) EU:C:2016:63 at [3].

[26] *Latchways and Eurosafe Solutions v Kedge Safety Systems BV* (C-185/08) EU:C:2010:619.

preliminary rulings is limited to provisions of Union law".[27] What was highly relevant in this case was that in order to arrive at this conclusion, the Court followed a line of reasoning focused on the nature of the technical standard. The technical standard at issue had been developed within the framework of a mandate given by the Commission to the CEN but with "no direct link to Directive 89/686".[28] The standard could not therefore be considered a *harmonised* technical standard. The Court did not assert its jurisdiction to interpret non-harmonised technical standards produced by the CEN because such standards are not connected to any particular directive. The Court's reasoning seemed to suggest that it would have jurisdiction to rule on a technical standard established by a private standards body pursuant to a directive.

James Elliott Construction—taking harmonised standards seriously

Factual and legal background

In 2005, James Elliott Construction constructed a building in Ireland. Upon completion of the construction, cracks began to appear in the building's floors and walls to such extent that the building could not be occupied. James Elliott Construction accepted responsibility and carried out remedial work at a cost exceeding €1,550,000.

On 13 June 2008, James Elliott Construction sued Irish Asphalt, the company that had quarried and supplied the under-floor product, for breach of contract regarding the supply of aggregates. The builders claimed that the product did not conform to the specifications of the Irish standard for aggregates (I.S. EN 13242:2002), which transposed the European Harmonised Standard EN 13242:2002[29] following a Commission mandate to the CEN as per art.7 of Directive 89/106. The Irish High Court found that the concrete defects derived from the presence of pyrite in the aggregate supplied by Irish Asphalt to James Elliott Construction. The High Court confirmed that tests on the aggregate removed from the building showed that it did not meet Irish standard I.S. EN 13242.

Irish Asphalt appealed to the Irish Supreme Court on the issue of its liability to James Elliott Construction. On 2 December 2014, the Supreme Court rendered judgment on the issues of domestic law. However, the Supreme Court did not rule on the aspects relating to the application of EU law given the uncertainty about the legal nature of European technical standards and whether they could be relied upon in contractual relationships between private parties, i.e. the interpretation of EN 13242:2002.[30] The Irish Supreme Court made a reference, asking inter alia whether the Court of Justice had jurisdiction to deliver a preliminary ruling interpreting such a harmonised standard.

Opinion of AG Campos Sánchez-Bordona

The main question in this case was whether the Court had jurisdiction to interpret a harmonised standard in a preliminary ruling. In response, the Advocate General analysed the nature of these standards so as to determine if they might be classified as "acts of the institutions, bodies, offices, or agencies of the Union". Campos Sánchez-Bordona's discussion followed a three-pronged approach.

First, Campos Sánchez-Bordona noted that "the use of the New Approach directives may not compromise the Court's jurisdiction to give preliminary rulings".[31] Directive 89/106 covered only essential elements

[27] *Latchways* (C-185/08) EU:C:2010:619 at [34].

[28] *Latchways* (C-185/08) at [33].

[29] This standard is in accordance with art.7 of Directive 89/106, 6 July 1998, under Commission Mandate M/125, given to the CEN for the purpose of preparing a technical standard concerning a type of construction material, namely aggregates. In compliance with that Mandate, the CEN adopted EN 13242:2002.

[30] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) EU:C:2016:63 at [25]–[30].

[31] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) at [42]–[45].

of the harmonised regulation applicable to construction products. As such, the standards of the CEN were intended to supplement the directive in order to ensure the free movement of construction materials in the Internal Market. Given the Court's jurisdiction to interpret the directive in a preliminary ruling, the Advocate General reasoned that the Court should also have the option to weigh in on the interpretation of harmonised technical standards that supplement the directive insofar as the contrary would risk giving rise to varying interpretations in different Member States and to the detriment of construction material.

Next, the Advocate General noted that "the Commission exercises significant control over the CEN procedure for drafting harmonised technical standards".[32] In the first place, the Commission verifies the existence of a mandate conferred to the CEN that covers the essential elements governing the technical standard.[33] Secondly, there are two measures of control that may prevent the technical standard from carrying the presumption of compliance with a directive: the Commission must check the substance of a standard to verify that it conforms to the mandate and the directive,[34] and Member States (and the Commission) may raise objections that prevent its publication and eventually block it entirely.[35] If the Commission endorses the conformity of the mandate given to the CEN with the directive, the references of harmonised standards are published in the Official Journal. According to the Advocate General, the Commission's decision on publication produces legal effects and is therefore an act against which an action for annulment may be brought.[36] That would allow to the Court to exercise its control.

The third part of the Advocate General's reasoning defended the idea of "the operation of the CEN as a standardisation body subject to action by the European Union".[37] Here, the discussion analysed the system implemented by the New Approach and identified the relevant jurisprudence. The resulting analysis demonstrated that the activities of the CEN during preparation of harmonised standards rely on co-operation with the Commission, which is governed by an agreement in the form of general guidelines that are periodically renewable.[38] Then, too, the Commission provides financial support for the CEN to prepare harmonised standards. Starting from the *Fra.bo* jurisprudence,[39] where the Court stated that art.34 TFEU applied to the standardisation and certification activities of a private body where national legislation considered its certification as proof of compliance with national law, Campos Sánchez-Bordona reasoned a fortiori that the Court must have jurisdiction to interpret the standard as connected to EU law, namely,

[32] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) EU:C:2016:63 at [46]–[55]. In the same way, see Communication from the Commission, "The role of European standardisation in the framework of European Policies and legislation" COM(2004) 674 final, p.2: "standardisation is an integral part of the Council's and Commission's policies … to remove barriers to trade … ."

[33] Therefore, we do not find in this decision circumstances discussed by *Latchways* (C-185/08) EU:C:2010:619, which addressed a technical standard by the CEN's own initiative where the Court declared itself lacking jurisdiction to interpret this type of standard. By contrast, the case here involved a harmonised standard.

[34] Article 5 of Directive 89/106 laid out the obligation in rather confusing terms, but art.10(6) of Regulation 1025/2012, and art.17(5) of Regulation 305/2011, now applicable to construction products, left no room for doubt (Opinion of the Advocate General in *James Elliott Construction* (C-613/14) EU:C:2016:63 at [52]).

[35] Directive 89/106 art.5; M. Medzmariashvil, "Opening the ECJ's door to harmonised European standards (Opinion of the AG in C-613/14 James Elliott Construction)" (2016), *http://europeanlawblog.eu/?p=3107#sthash.o45ruyWA.dpuf* [Accessed 12 October 2017]. For an explanation of the procedure see Aubry, Brunet and Peraldi-Leneuf, *La normalisation en France et dans l'Union européenne* (2012), pp.93 and 94. Since 1 January 2013, at least five procedures against publication of the references of harmonised standards in the Official Journal raised by a Member State or the Commission have been triggered: for the list, see *https://ec.europa.eu/growth/node/2783_de* [Accessed 12 October 2017].

[36] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) EU:C:2016:63 at [52].

[37] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) at [56]–[63].

[38] General Guidelines for the Cooperation between CEN, Cenelec and ETSI and the European Commission and the EFTA (28 March 2003) [2003] OJ C91/7–11.

[39] See *Fra.bo* (C-171/11) EU:C:2012:453; [2012] 3 C.M.L.R. 38.

Directive 89/106.[40] This position was strengthened by a series of decisions where the Court "displayed flexibility" in answering preliminary questions relating to different acts with legal effects other than regulations, directives, and decisions.[41]

Surprisingly, the "voluntary" nature of technical standards commonly evoked to avoid Court jurisdiction[42] was not quite addressed by the Advocate General. He only mentions briefly that,

> "the private nature of standardisation bodies (in this case, the CEN) does not mean that their activities fall outside the scope of EU law."

In order to support this, the Advocate General uses only the *Fra.bo*[43] decision. He recalls that the Court reasoned in this case that,

> "Article 34 TFEU applies to standardisation and certification activities of a private-law body, when the national legislation considers the products certified by that body to be consistent with national law restricting the marketing of products not certified by that body."

In other words, according to the Advocate General, the effects (i.e. presumption of conformity) that the legislation confers on certain technical standards of private origin would make them lose their voluntary character. Applied to the *James Elliott Construction* case, the harmonised technical standards produced by the CEN are no longer voluntary where they produce a presumption of legality. This reasoning therefore acknowledges that harmonised technical standards are de facto mandatory and that the option for producers to use other technical standards for meeting the essential requirements is merely theoretical.

The ruling of the Court

Following the Advocate General and endorsing his line of reasoning, the Court presented a two-part analysis to justify its jurisdiction to interpret a harmonised technical standard in a preliminary ruling.

The first part consisted in responding to the argument that the Court lacks jurisdiction given the private nature of the European standards bodies and given the non-binding nature of standards. Concerning the private nature of standards bodies, the Court first recalled its prior judgments affirming its jurisdiction to interpret acts which, while indeed adopted by bodies that cannot be described as "institutions, bodies, offices or agencies of the Union", are by their nature measures implementing or applying EU law.[44] Regarding the non-binding nature of standards, the Court recalled that it had already ruled[45] that the non-binding nature of an act of Union law did not preclude the Court's ability to provide a preliminary ruling in accordance with TFEU art.267.[46]

The second line of reasoning concerned the acknowledgement of harmonised standards as part of EU law. To this end, the Court advanced a series of arguments. First, standards constitute measures implemented

[40] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) EU:C:2016:63 at [60].

[41] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) at [60]–[61]; *Grimaldi v Fonds des Maladies Professionnelles* (C-322/88) EU:C:1989:646; [1991] 2 C.M.L.R. 265 at [8]; *Deutsche Shell* (C-188/91) EU:C:1993:24 at [18]; and *Gauweiler v Deutscher Bundestag* (C-62/14) EU:C:2015:400; [2016] 1 C.M.L.R. 1.

[42] *Latchways* (C-185/08) EU:C:2010:619; Medzmariashvil, "Opening the ECJ's door to harmonised European standards" (2016), *http://europeanlawblog.eu/?p=3107#sthash.o45ruyWA.dpuf* [Accessed 12 October 2017].

[43] *Fra.bo* (C-171/11) EU:C:2012:453 at [31] and [32]. For an analysis of this case, see P. Oliver, "L'article 34 TFUE peut-il avoir un effet direct horizontal? Réflexions sur l'arrêt Fra.bo" (2014) *Cahiers de droit européen* 77.

[44] *James Elliott Construction* (C-613/14) EU:C:2016:63 at [34] quoting *Sevince v Staatssecretaris van Justitie* (C-192/89) EU:C:1990:322; [1992] 2 C.M.L.R. 57 at [10]; and *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg* (C-188/91) EU:C:1993:24 at [18].

[45] *Deutsche Shell* (C-188/91) EU:C:1993:24 at [18].

[46] *James Elliott Construction* (C-613/14) EU:C:2016:63 at [35].

as necessary and strictly regulated[47] as essential requirements of secondary law. Moreover, they are realised through the initiative and control of the Commission and are published in the Official Journal of the European Union. Finally, they have the effect of conferring a presumption of conformity with the requirements of the directive at issue, securing the "CE" mark and the ability to ensure free movement through all Member States of the Union such that, as per *Commission v Germany*,[48] Member States cannot impose supplementary regulations. Bolstered by this argument, the Court reasoned that a harmonised standard carried "legal effect" in the European Union so as to render the standard "part of Union law", and thus subject to preliminary ruling.[49]

Finally, and more generally speaking, the Court emphasised the function of preliminary rulings—to ensure uniform application in the Union of all provisions of the Union legal order in order to avoid varying interpretations in different Member States.[50]

Beyond the consequences of this judgment, analysed in the next section, the decision appears a *necessary* step forward to ensure the continuous development of the New Approach. After over 30 years of existence, market actors needed more clarity on the legal nature of the harmonised technical standards and their relationship with the legislation concerning the essential requirements. The Court was also pragmatic by offering an analysis of the system as it functions while refusing to invoke the private or voluntary nature of standardisation.

Legal consequences of the decision

Scope of control and the Meroni *jurisprudence*

The first consequence of the judgment relates to the scope of control over harmonised standards. Confrontation with the *Meroni* doctrine/jurisprudence,[51] intended to ensure the division of powers established by the Treaties and to preclude delegation by the Union except in the most administrative aspects of Union law implementation,[52] has heretofore been avoided given that technical standards were not considered acts susceptible to recourse before the Court. At the same time, legal scholars are consistently at odds with the system implemented by the New Approach.[53] With this judgment, the Court may now verify the compatibility of a technical standard with EU law. This check primarily affects the conformity of harmonised technical standards with regard to essential requirements of supplementing directives. It will probably not be long before the question of constitutional order relative to the permissible scope of the

[47] The Court analysed the terms of the mandate conferred by the Commission onto the CEN on the basis of art.7 of Directive 89/106, which ascribes the control and approval of technical standards to the Commission (*James Elliott Construction* (C-613/14) EU:C:2016:63 at [44]–[45]).

[48] See *Commission v Germany* (C-100/13) EU:C:2014:2293.

[49] *James Elliott Construction* (C-613/14) EU:C:2016:63 at [36]–[43].

[50] *James Elliott Construction* (C-613/14) at [34].

[51] *Meroni v High Authority* (C-9/58) EU:C:1958:7 and many subsequent cases. For a more recent analysis of the *Meroni/Haute Autorité* doctrine with regard to European agencies, see S. Griller and A. Orator, "Everything under Control? The 'Way Forward' for European Agencies in the Footsteps of the Meroni Doctrine" (2010) 35 E.L.J. 3; M. Chamon, "EU Agencies: Does the Meroni Doctrine make Sense?" (2010) 17 *Maastricht Journal of European and Comparative Law* 281.

[52] J. Jorda, *Le pouvoir exécutif de l'Union européenne* (Aix-Marseille: PUAM, 2001), p.475.

[53] H. Hofmann, G. Rowe and A. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011), pp.598–600; Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 523; Van Gestel and Micklitz, "European Integration through Standardization" (2013) 50 C.M.L. Rev. 145, 178; A. van Waeyenberge, *Nouveaux instruments juridiques de l'Union européenne—évolution de la méthode communautaire* (Brussels: Larcier 2015), p.237.

delegation comes before the Court. Indeed, although the *James Elliott Construction* decision does not specifically reference *Meroni*, the Advocate General made the allusion in his analysis.[54]

The terms of the future debate are the following. On the one hand, regulatory tasks for harmonised standards bodies or private/public networks such as the CEN clearly exceed the simple framework for the delegation of powers in the sense of *Meroni*. On the other hand, the technical standards are of a "non-binding nature" and establish conformity of goods according to the mandatory essential requirements provided in a given directive. The Court has recently softened its position in the *ESMA* decision by admitting that these delegations,

> "are precisely delineated and amenable to judicial review in light of the objectives established by the delegating authority."[55]

The existence of a shared mandate between the Commission and the CEN, the possibility of denying its publication or revocation by the Commission and Member States, and the new factor of Court control since *James Elliott Construction* all seem to indicate further judicial development.[56] Although the final word has not been uttered, there is a high probability that the Court will follow the trend established in this latest jurisprudence and find no violation of the *Meroni* jurisprudence.

Free public access v intellectual property issue

Currently, only references to harmonised standards are published and the European standards bodies retain the intellectual property rights to the standards they produce. Licensing these rights creates a significant source of revenue.[57] Given that the Court considers standards to be part of Union law and thus susceptible to preliminary ruling, it should follow that these "acts" are freely accessible to the public insofar as art.15(3) TFEU provides that,

> "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium …".

Hence, there is clear tension between the retention of intellectual property by the standards bodies[58] and the free access to standards that are considered public.[59] The Court's recognition of the status of harmonised standards should logically give rise to their free accessibility. Correlatively, the Union should endeavour to increase the funding to standards bodies in order to cover the lost revenue.[60] If the Court follows this

[54] Opinion of the Advocate General in *James Elliott Construction* (C-613/14) EU:C:2016:63 at [55] via a footnote.

[55] *United Kingdom v European Parliament* (C-270/12) EU:C:2014:18; [2014] 2 C.M.L.R. 44 at [53].

[56] For a concurring opinion, see Medzmariashvil, "Opening the ECJ's door to harmonised European standards" (2016), *http://europeanlawblog.eu/?p=3107#sthash.o45ruyWA.dpuf* [Accessed 12 October 2017].

[57] "A study on behalf of DG Enterprise and Industry reveals that the price for European Standards is one of the major barriers to effective use of the standards": Van Gestel and Micklitz, "European Integration through Standardization" (2013) 50 C.M.L. Rev. 145, 181.

[58] For a recent example of this tension under the lens of art.102 TFEU, see *Huawei Technologies Co v ZTE Corp* (C-170/13) ECLI:EU:C:2015:477; [2015] 5 C.M.L.R. 14, and the comment of P. Oliver and C. Stothers, "Intellectual Property under the Charter: are the Court's Scales Properly Calibrated?" (2017) 54 C.M.L. Rev. 517.

[59] For an in-depth study of this tension within Dutch, German, and American jurisprudence, see Van Gestel and Micklitz, "European Integration through Standardization" (2013) 50 C.M.L. Rev. 145.

[60] "Free access to technical standards is inherently linked to the question of who pays the bill of standardisation": see Van Gestel and Micklitz, "European Integration through Standardization" (2013) 50 C.M.L. Rev. 145, 175.

pattern in the future, it will be necessary to review and reassess the general funding policy of standards production within the European Union.[61]

The proposal to increase the public funding of technical standardisation is only meaningful if it remains limited to harmonised technical standards. Indeed, a generalisation of this system would lead to the standardisation bodies of public agencies. However, in view of the nature and legal effects of European legislation on harmonised technical standards, the need for publication of such standards is essential and deserves special public funding in order to avoid undermining the financial stability of standardisation bodies.

The shift towards a publicly funded production of standards may also lead the Commission to consider whether the creation of a European public agency of standardisation would be a better solution than subsidising standardisation bodies across economic sectors. The advantage would be the creation of a truly public service of standardisation, but it would undermine the original conception of standardisation as belonging to the private sphere.

Increase in litigation and effective judicial protection

James Elliott Construction is likely to result in a substantial increase in Court litigation. Given that harmonised standards may now be referred to the Court for interpretation, national courts may increasingly resort to this mechanism for clarification purposes. Commentators have expressed concerns about a possible increase in litigation on grounds that the Court will not be adequately equipped to handle these types of technical questions.[62] The argument is reinforced by the fact that European policy-makers generally outsource these highly technical issues to experts. However, the concerns may lack foundation. Technical complexity has been at the heart of the Court's caseload since its creation, and there is no apparent reason to find harmonised standards of a more complex technical nature. Furthermore, while rarely used, art.70 of the Rules of Procedure of the Court of Justice allows the Court to call in experts if necessary.[63]

Finally, arguments relating to the workload of a judicial body or to the complexity of the problems brought before it cannot be decisive as to the capacity to judge a case. So doing would result in numerous denials of justice and would be contrary to the principle of the Rule of Law upon which the entire European construction is based. The Court could nevertheless, as it does in other matters, exercise looser control over very technical matters and verify the absence of any obvious errors (*erreur manifeste*).

Another question relates to the possibility that national judges make preliminary rulings on the *validity* of harmonised standards. Even if the *James Elliot Construction* jurisprudence recognises that harmonised standards carrying "legal effects" become "part of Union law", thus subject to preliminary ruling on interpretation, it does not necessarily follow that the Court will agree to rule on their *validity*. Of course, there are very close connections between the two,[64] but interpreting a text in light of a directive is different from ruling on its *validity*. Ultimately, harmonised standards are not the product of a European institution, office or organism, but are rather the product of private organisations. It is unlikely that the Court will agree to rule on the validity of these kinds of standards.[65] Indeed, whereas it is inconceivable that the Court

[61] Currently, European public funding represents around 35 per cent of the CEN and 15 per cent of ETSI: see *http://www.etsi.org/about/what-we-are/funding* [Accessed 12 October 2017].

[62] Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 533.

[63] Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L265, as amended in [2013] OJ L173/65 and [2016] OJ L217/69.

[64] See V. Constantinesco, J.P. Jacque and R. Kovar, *Traité instituant la CEE* (Paris: Economica, 1992), pp.1085 and 1086.

[65] Similarly, as regards the conclusions of the Customs Code Committee, see *Friesland Coberco Dairy Foods BV v Inspecteur van de Belastingdienst/Douane Noord/kantoor Groningen* (C-11/05) EU:C:2006:312 at [36]–[41].

should declare invalid a text that is not the product of the European institutions, organisms or bodies, nothing prevents the Court from interpreting a text produced by an external organisation in light of a European legislative text. While the latter concerns application in conformity with Union law, the former entails a kind of annihilation of a text over which the Court lacks ultimate authority.

The Court adopted a similar approach to the one used for preliminary rulings on international treaties. In these cases, the Court does not rule on the validity of the provisions of the treaty under scrutiny, but rather on the formal act through which the treaty becomes part of the EU legal order. From this perspective, a challenge to the validity of a harmonised standard through preliminary ruling would not be conducted against the harmonised standard itself, but against the Commission's Implementing Decision,[66] which authorises its publication in the Official Journal of the European Union and confers the presumption of conformity.

In our view, this ruling creates a favourable context regarding the possibility for individuals to bring an action for annulment (art.263 TFEU) against the Commission's Implementing Decision. First, it is an act of the Commission that produces legal consequences. The condition linked to the nature of the act is therefore fulfilled. Secondly, national standardisation bodies, or the various producers or importers whose goods are negatively affected by a harmonised standard, will have an interest to act.[67] As usual with an action for annulment, the key to success lies in the locus standi.[68] The Lisbon Treaty has to some extent softened the requirements as to the admissibility of actions for annulment brought by individuals (TFEU art.263, fourth paragraph), by eliminating the requirement of being individually affected by regulatory acts of direct concern. The Commission's Implementing Decision may be defined as a regulatory act[69] for, as held in *James Elliot Construction*, it is a non-legislative act of general application, which produces legal effects without any further intervention required. Therefore, it seems possible for stakeholders negatively and sufficiently affected by the choice of a harmonised standard to bring an action for annulment before the Court and have considerable chance of success.[70] Nonetheless, it is uncertain what position the Court will take given its tendency to adopt a strict interpretation of locus standi for annulment actions and to promote the preliminary ruling system.

Finally, one might argue that an increase in litigation will lead to the paralysis of the system of technical standardisation in the sense of the New Approach and bring back a system similar to the Old Approach.[71] In our view, this opening would constitute real progress. Indeed, *James Elliot Construction* should be used to enhance the effective judicial protection of individuals (such as companies affected by the application of one standard over another) by offering the possibility of enforcing rights granted to them

[66] For an example of this kind of implementation decision, see Commission Implementing Decision (EU) 2015/2181 of 24 November 2015 on the publication with restriction in the Official Journal of the European Union of the reference to standard EN 795:2012 on Personal fall protection equipment-Anchor devices under Regulation 1025/2012 of the European Parliament and of the Council [2015] OJ L309/10–12.

[67] *AKZO Chemie UK Ltd v Commission* (C-53/85) EU:C:1986:256 at [21]; *Commission v Provincia di Imperia* (C-183/08 P) EU:C:2009:136 at [19]; *Provincia di Imperia* (T-351/05) EU:T:2008:40 at [33]; *Centre de Coordination Carrefour* (T-94/08) EU:T:2010:98 at [48]; *Forum 187 ASBL v European Commission* (T-189/08) EU:T:2010:99 at [62]; *French Republic v Commission* (T-425/04) EU:T:2010:216 at [116].

[68] J. van Meerbeeck and A. van Waeyenberge, "Les conditions de recevabilité des recours introduits par les particuliers: au cœur du Dédale européen" in N. de Sadeleer, H. Dumont and P. Jadoul (eds), *Les innovations du Traité de Lisbonne: Incidences pour le praticien* (Brussels: Bruylant, 2011), pp.165–204.

[69] *Inuit Tapiriit Kanatami v Commission* (C-583/11 P) EU:C:2013:625 at [58]–[60].

[70] This opinion is shared by Schepel: "it is therewith beyond doubt that the Commission's decision to confer the presumption of conformity on certain harmonised standards can in principle be challenged by private parties, provided they can show that the act is of 'direct' concern to them." See Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 531.

[71] Schepel, "The New Approach to the New Approach" (2013) 20 *Maastricht Journal of European and Comparative Law* 521, 532–533.

under Union law.[72] Yet, in order to ensure that this protection is not all principle without substance, it is necessary to bring it to life through a wide range of concrete procedures. This is exactly what is contemplated by the case at hand. Given that the legitimacy[73]—indeed, the force[74]—of the European Union lies partially on the concept of *Union de droit*, an opening for due process can only be praised. In brief, we believe that from the moment that a technical standard purports to represent the general interest, it should be subject to the Court's jurisdiction. Future Court cases on this issue should not be seen as an obstruction to the New Approach system, but rather as an opportunity to improve it.

Conclusion

James Elliot Construction must be understood in light of the broader European standardisation policy and EU Regulation 1025/2012.[75] This regulation created an appropriate framework[76] at the European level to evaluate standards more efficiently, ensure greater representation by stakeholders—especially small and medium-sized businesses (SME)—and account for public interest by reinforcing certain *public* aspects of the procedure such as mandates for the adoption and publication of standards, as well as oversight from technical commissions. The reform also allowed for the development of harmonised European standards in the area of services. Finally, the regulation contained a section devoted to the financing of standardisation, primarily through subsidies "accrediting the idea of a European public service in standardisation".[77] Henceforth, given the non-binding nature of representation and participation by stakeholders, the transparency and surveillance of work by standards bodies, and the logic of granting funding via EU Regulation 1025/2012, it is natural that the Court has entered the jurisprudential policy in a manner that undermines the private nature of EU standardisation and prevents standardisation from remaining a "legal No Man's Land" in which rule-making takes place behind closed doors.[78]

Given the importance placed on technical standards since the establishment of the Internal Market and ensuing legal effects, it is appropriate that the Court, the guarantor of the Union's rule of law, does not let these standards remain in the blind spot for judicial review. At the same time, the opening gesture in *James Elliot Construction* is rather limited insofar as it only extends to harmonised standards. There is no indication that the Court will return to its earlier jurisprudence—*Latchways*[79]—and adopt a similar position for other standards produced by European standards bodies. These standards are intrinsically different because they do not carry a presumption of conformity. Additionally, the role of the Commission in their creation and monitoring is quasi non-existent. Thus, we may reasonable conclude that we are observing the emergence of a New(ish) Approach to judicial review of standardisation.

[72] See the Opinion of AG Mengozzi in *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (C-279/09) EU:C:2010:489 at [42]–[43], as well as cited jurisprudence). It must be effective and cannot be summarised by a simple theory: see *Bellet v France* (23805/94) 4 December 1995 ECtHR at [38].

[73] A. Vauchez, *L'Union par le droit: L'invention d'un programme institutionnel pour l'Europe* (Paris: Presses de Sciences Po, 2013).

[74] Z. Laidi, *La norme sans la force* (Paris: Presses de Sciences Po, 2008), pp.79–80.

[75] Regulation 1025/2012 on European standardisation [2012] OJ L316/12.

[76] This regulation is not intended for "spontaneous" or private standardisation established by industrial demands or the private sector. For an assessment five years later, see Commission, "The Annual Union work programme for European standardisation for 2016" SWD(2015) 301 final.

[77] F. Peraldi-Leneuf, "La réforme de la normalisation européenne et son extension au domaine des services: l'un des douze chantiers du single market act" in *La normalisation en France et dans l'Union européenne* (2012), p.31.

[78] Van Gestel and Micklitz, "European Integration through Standardization" (2013) 50 C.M.L. Rev. 145, 148 and 150.

[79] *Latchways* (C-185/08) EU:C:2010:619.