The harmonized standards before the ECJ: James Elliott Construction

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CASE LAW

A. Court of Justice

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Case C-613/14, *James Elliott Construction Limited* v. *Irish Asphalt Limited*, Judgment of the Court of Justice (Third Chamber) of 27 October 2016, EU:C:2016:821

1. Introduction

Since its introduction in 1985, the New Approach represents an effective method for harmonizing the technical barriers which hinder the free movement of goods between Member States, thus contributing significantly to the development of the internal market. This method consists in regulating through directives only the essential requirements of general interest of a product, while referring the detailed definition of technical aspects to private organizations composed of experts and representatives of the business sector, i.e. the European standard-setting bodies.[1] Under this method, after the adoption of a New Approach directive, the European Commission gives a mandate to one of the European standard-setting bodies to issue a document defining the technical rules applicable to the product. Although these documents, called harmonized standards, are non-binding, compliance with them confers a presumption of conformity with the essential requirements of the New Approach directive. Due to the success of the New Approach, the standard-setting organizations and the harmonized standards have acquired a significant role in the governance of the internal market. However, the legal position of the harmonized standards in EU law and, in particular, the jurisdiction of the ECJ on the interpretation of these measures of private-law bodies, remained uncertain.

1. See White Paper from the Commission to the European Council, *Completing the Internal Market*, 14 June 1985, COM(85)310 final; Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, O.J. 1985, C 136/1; Council Resolution of 21 Dec. 1989 on a global approach to conformity assessment, O.J. 1990, C 10/1.

In the judgment annotated here the Court gave a preliminary ruling addressing important issues in relation to the role of the European standard-setting bodies and the harmonized standards adopted in compliance with New Approach directives. In particular, for the first time the Court established its jurisdiction to give preliminary rulings on the interpretation of harmonized standards, clarifying their position in relation to EU law. For the ground-breaking outcome of the case and for the institutional implications it entails, the judgment in *James Elliott Construction* represents a fundamental step in the evolution of the case law concerning standardization in its relation to the EU legal system and to the law in general.

2. Factual background

The case originates from a request for a preliminary ruling under Article 267 TFEU from the Irish Supreme Court in the course of proceedings between James Elliott Construction Limited and Irish Asphalt Limited, two Irish undertakings active in the building sector. In 2004, Irish Asphalt supplied James Elliott Construction with a construction product, an aggregate known as "Clause 804", to be used as a high-quality infill for the construction of a youth facility at Ballymun in Dublin. After the work had been completed, cracks began to appear in the floors and ceilings, rendering the building unusable. James Elliott accepted liability and remedied the flaws at its own expense. However, it later sued Irish Asphalt for breach of contract, claiming that the damages at issue derived from the presence of pyrite in the Clause 804 supplied by the latter. Indeed, the following judgment of the Irish High Court ascertained that the damage had been caused by the presence of pyrite in the aggregate supplied by Irish Asphalt, which did not comply with the specifications of the Irish standard for aggregates (IS EN 13242:2002). The Irish standard transposed the European technical standard EN 13242:2002 issued by the CEN, a European standard-setting body (in full: European Committee for Standardization). Therefore, the High Court found Irish Asphalt in breach of contract since, under Irish law, it was bound to supply aggregate of "merchantable quality" that was "fit for the purpose".[2]

Irish Asphalt appealed to the Supreme Court against the High Court judgment; but, in order to settle the case definitively, the Supreme Court decided to seek guidance on the nature of European harmonized standards and their relevance in contractual relationships between private parties. In particular, the Supreme Court referred five questions to the ECJ. First, it asked whether the ECJ has jurisdiction on the interpretation of a European standard

2. Sale of Goods and Supply of Services Act 1980, 16/1980, Art. 14 (2) and (3).

issued according to the provisions of a New Approach directive[3] such as the Construction Products Directive.[4] Second, referring to the consequences of the lack of notification of technical provisions pursuant to Directive 98/34,[5] it asked about the need to disapply the relevant provisions of national law. Third, it asked whether the presumption of fitness for use of a construction product derived from the Construction Product Directive also applies for the purpose of determining the "merchantable quality" of the product according to national law. In its fourth and fifth questions, depending on whether the previous questions were answered positively, the Supreme Court sought guidance on the interpretation of the European standard EN 13242:2002 itself.[6]

3. Opinion of the Advocate General

In his Opinion delivered on 28 January 2016, Advocate General Campos Sánchez-Bordona analysed the issues raised in the preliminary ruling, paying particular attention to the possibility of giving a preliminary ruling on the interpretation of a harmonized technical standard. In answering the first question, the Advocate General remarked that the Court had had no opportunity, until that point, to address this relevant issue and acknowledged that the literal interpretation of Article 267 TFEU does not expressly consider the possibility of reviewing acts of private law bodies such as the standard-setting organizations. However, in spite of the private law nature of the standard-setting bodies and of the non-binding nature of the harmonized standards, he argued that the Court does have jurisdiction to give a preliminary ruling on the interpretation of harmonized technical standards since the

3. For the sake of completeness, the first question included a sub-question on the possibility of establishing compliance with the standard only by evidence of testing in accordance with the standard, and the point in time for such test. The discussion on this point is omitted in this note.

4. Council Directive 89/106/EEC of 21 Dec. 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, O.J. 1989, L 40/12.

5. Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. 1998, L 204/37.

6. Question No. 4 read as follows: "If the answers to questions 1(a) and 3 are both yes, is a limit for total sulphur content of aggregates prescribed by, or under, EN 13242:2002 so that compliance with such a limit was required, inter alia, to give rise to any presumption of merchantability or fitness for use?"; question No. 5 read as follows: "If the answers to [questions] 1(a) and 3 are both yes, is proof that the product bore the 'CE' marking necessary in order to rely on the presumption created by Annex ZA to EN 13242:2002 and/or Art. 4 of Directive 89/106?".

standards "should be regarded as 'acts of the institutions, bodies, offices or agencies of the Union'".[7]

The reasons underpinning his position were threefold. Firstly, the Advocate General reasoned on the method of the New Approach directives, which only set forth the essential elements of the harmonized legislation leaving to the standard-setting bodies the adoption of detailed norms applicable to the products. In his view, the use of this method cannot compromise the jurisdiction to give preliminary rulings which the Court would have had if the European legislature had adopted exhaustive harmonization.[8] Secondly, the Advocate General highlighted the significant control that the Commission exercises over the procedure for the drafting of harmonized technical standards, both *ex ante* (in the mandate issued pursuant to the relevant New Approach directive) and *ex post* (through the review prior to the publication in the Official Journal and through the procedure for lodging objections set out in Art. 11 of Regulation 1025/2012).[9] In this context, the legislative framework which embeds the issuing of a harmonized standard connects the procedure to EU law to such an extent that it cannot be considered "purely private technical standardization",[10] but a "case of 'controlled' legislative delegation in favour of a private standardization body".[11] Thirdly, in the same vein, the Advocate General pointed to the legal and financial ties which link the activities of the CEN to the EU, excluding the possibility that its activities could fall outside the scope of EU law when they are carried out in compliance to a New Approach directive.

Leaving the second question to the end of the Opinion, the Advocate General consequently answered the following questions. With regard to the third question, he argued that the validity of presumption of fitness for use of the products complying with Directive 89/106 is limited to the context of EU law and cannot be used to assess the fitness for use of construction products according to national law. Furthermore, in addressing the issues raised in the fourth and fifth questions, he interpreted harmonized standard EN 13242:2002, clarifying its supremacy over the conflicting national standards

7. Opinion of A.G. Campos Sánchez-Bordona in Case C-613/14, *James Elliott Construction Limited* v. *Irish Asphalt Limited*, EU:C:2016:63, para 40.

8. Ibid., paras. 42–45.

9. Regulation (EU) 1025/2012 of the European Parliament and of the Council of 25 Oct. 2012 on European standardization, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No. 1673/2006/EC of the European Parliament and of the Council, O.J. 2012, L 316/12.

10. Opinion, para 46.

11. Ibid., para 55.

and the meaning of the EC mark as evidence of compliance with the requirements of Directive 89/10 and the relevant harmonized standard.

Finally, addressing the second question, the Advocate General recalled the case law of the ECJ on the consequences of violating the obligation to notify the European Commission of a national provision setting a technical specification under Article 8 of Directive 98/34.[12] As held in *CIA Security International*[13] and in *Unilever,*[14] a non-notified national provision should be disapplied by the national Courts, even in proceedings between private parties. However, in his view the requirement to supply products of "merchantable quality" set out in Irish law does not constitute a technical specification within the meaning of Directive 98/34.

4. Judgment of the Court

The judgment of the Court, delivered on 27 October 2016, follows the same structure and arrives at the same conclusions as those of the Advocate General. Interestingly, however, the reasoning of the Court differs from that of the Opinion, especially with regard to the possibility of giving a preliminary ruling on the interpretation of a European standard.

In this regard, the Court started by recalling its case law according to which it has jurisdiction to interpret not only "acts of the institutions, bodies, offices or agencies of the Union", but also other acts which are "by their nature measures implementing or applying an act of EU law".[15] Thus, in a teleological reading of Article 267 TFEU, the Court can establish its jurisdiction also over such acts of other bodies in order to ensure the uniform application of EU law.[16] Acknowledging that the standard-setting bodies cannot be described as "institutions, bodies, offices or agencies of the Union", the Court considered whether the standard at issue represents a measure implementing or applying an act of EU law.

For this purpose, it analysed the provisions of the Construction Products Directive and stressed the relevance of the essential requirements set out by

12. Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. 1998, L 204/37.

13. Case C-194/94, *CIA Security International SA* v. *Signalson SA and Securitel SPRL*, EU:C:1996:172.

14. Case C-443/98, *Unilever Italia SpA* v. *Central Food SpA*, EU:C:2000:496.

15. Judgment, para 34. The ECJ refers to Case C-192/89, *S.Z. Sevince* v. *Staatssecretaris van Justitie*, EU:C:1990:322; Case C-188/91, *Deutsche Shell AG* v. *Hauptzollamt Hamburg-Harburg*, EU:C:1993:24.

16. Judgment, para 34.

European legislation,[17] as well as the control exercised by the European Commission in initiating, managing and monitoring the procedure for the adoption of a harmonized standard.[18] In light of this, the Court concluded that the standard at issue is "a necessary implementing measure" of the Construction Products Directive,[19] and therefore it can be considered as "part of EU law".[20] As such, the harmonized standard can be subject to interpretation by the Court, which thus establishes its jurisdiction to give a preliminary ruling. Moreover, the lack of binding effects of harmonized standards does not preclude the Court from ruling on its interpretation, having regard to the legal effects of the presumption of conformity to the New Approach directives that the compliance with the standard entails.

With reference to the third question, the Court clarified that the presumption of fitness for use of a construction product manufactured in compliance with a harmonized standard must be read in connection with its purpose of guaranteeing the free circulation of the product within the internal market and is meaningful only in this context. Therefore, national courts cannot apply it to give meaning to general clauses of national law, such as the obligation to supply products "of merchantable quality" or "fit for purpose".[21] Having replied to the referring court's question in the negative, the fourth and fifth questions could be omitted.

Finally, as regards the second question, concerning the application of the *CIA Security International* and *Unilever* case law to the Irish provision on the need to provide products "of merchantable quality", the Court considered whether this provision falls within the scope of the notification duty imposed by Article 8 of Directive 98/34. Since the Irish provision did not fall within the concepts of "technical specification", "technical regulation" or "other requirements" within the meaning of Article 1 of Directive 98/34, the Court concluded that there was no need to notify such a provision to the European Commission and, therefore, the Irish judge may apply it in the proceedings before it.

5. Comment

The case addresses several interesting issues regarding the role of standardization in the EU legal system and sheds light on the relationship

17. Ibid., para 43.
18. Ibid., para 45.
19. Ibid., para 43.
20. Ibid., para 40.
21. Ibid., para 59.

between EU law and general contractual clauses of national law. In this respect, the Court appears to limit the legal effects of measures designed to promote the functioning of the internal market in relation to other legal contexts which do not concern the free movement of goods.[22] However, the most significant aspect which constitutes an important step in the evolution of the case law is certainly the established jurisdiction of the Court on the interpretation of harmonized standards.

5.1. *A step in the evolution of standardization*

In this regard, it should be noted that the judicial scrutiny of harmonized standards has long been controversial. Notwithstanding the relevant role they have acquired since the European institutions adopted the New Approach in 1985, the Treaties have never mentioned harmonized standards among the reviewable acts. Neither did the Lisbon Treaty mention them, even though it introduced relevant innovations by expressly admitting the judicial review of acts of agencies. In academic debate, the peculiar mosaic of private and public elements in the New Approach was generally considered problematic in relation to the possibility of bringing a harmonized standard before the Court, thus resulting in a sort of immunity of standards from judicial scrutiny.[23] Given the voluntary application and the lack of binding legal effects, a harmonized standard was deemed unsuitable for judicial review, especially under Article 263 TFEU.[24] Against this background, although this case concerns only the jurisdiction of the Court under Article 267 TFEU, the outcome of this case stands out.

However, in a more detailed analysis of the role of standardization in the EU legal system, this judgment comes as a further step in the progressive phenomenon which legal literature describes as the "juridification"[25] of standardization. Indeed, recent developments in national and European case law, together with the introduction of a clear legal framework for the New Approach directives at the European level, appear to have brought significant

22. In this sense, although delivered in a different context, the case can be compared to the judgment in *Lemmens* where the effects of the *CIA Security International* case law were not extended to render unlawful any use of a product that is in conformity with regulations which have not been notified. See Case C-226/97, *Johannes Martinus Lemmens,* EU:C:1998:296.

23. Pecho and Waeyenberge, "La normalisation technique européenne vue de Luxembourg", 539 RMC (2010), 387–394, at 393.

24. Laffineur, Grunchard and Leroy, "Les possibilités de recours contre une norme technique dans l'Union européenne", (2009) *Revue européenne de droit de la consommation*, 813–846, at 827.

25. Schepel, "The new approach to the new approach: The juridification of harmonised standards in EU law", 12 MJ (2013), 521–533.

innovation in the interplay between standardization and European law, affecting the possibility to scrutinize the standards in court.

Firstly, in 2012 the European Parliament and Council enacted Regulation 1025/2012 which sets out a general legal framework for cooperation between European standardization organizations and institutions, and for establishing European standards. Whereas the applicable rules and regulations were previously found in the original non-binding acts which introduced the New Approach[26] and in the relevant directive setting the essential requirements of the products in each case, Regulation 1025/2012 now defines in general and binding terms the procedure to be followed for the adoption of harmonized standards and establishes a financing scheme for the European standard-setting bodies. In particular, it codifies a control mechanism which allows the European Parliament and the Member States to raise formal objections to harmonized standards,[27] thereby enhancing the institutional oversight over the activities of these private-law bodies. Although in *James Elliott Construction* the Court does not refer to Regulation 1025/2012, these elements of connection between the standardization activities and the European Union played a significant role in the reasoning of the Court to consider the harmonized standards as part of EU law.[28] This confirms that the enactment of Regulation 1025/2012 significantly contributes in delineating the clear implementation relationship the Court has drawn between EU legislation and harmonized standardization.

Secondly, the national case law has contributed to progressively changing the view of standardization as a purely private phenomenon. In particular, some courts have approached the issue of the legal status of technical standards, thereby contributing to the tendency of "breaking down the club house of private standardization bodies".[29] The relevant cases arose in a number of different Member States and concerned the accessibility of private standards, which are generally sold in the market in exchange for copyright fees.[30] In this regard, it was argued that when reference to standards is made in national law, they cannot be considered a purely private phenomenon and, consequently, the principle of legal certainty requires that the text of the

26. E.g. Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, O.J. 1985, C 136/1. See also *supra* note 1.

27. Regulation (EU) 1025/2012, Art. 11.

28. Judgment paras. 43,45.

29. See Van Gestel and Micklitz, "European integration through standardization: How judicial review is breaking down the club house of private standardization bodies", 50 CML Rev. (2013), 145–181.

30. See *Knooble,* The Hague District Court Decision of 31 Dec. 2008, LJN:BG8465; and *DIN,* BVerfGE, 29 July 1998, ZUM 1998 cited in Van Gestel and Micklitz, op. cit. *supra* note 29.

standard shall be made publicly available free of charge.[31] Despite the fact that the issue remains controversial and that the national cases have had different outcomes, these cases raise an interesting problem, and have stimulated reflection on the legal nature of standards and of standard-setting organizations.

Thirdly, at the European level, some seminal judgments already paved the way for the recognition of the legal effects of harmonized standards and, consequently, for the possibility of judicial review, anticipating the further evolution of case law. In this regard, two cases deserve particular attention. On the one hand, in *Commission* v. *Belgium,*[32] the Court, considering the control that the Belgian authorities had on the national standard-setting body, ruled that its standardization activities could actually be attributed to the State.[33] Therefore, in light of the established case law on the notion of measure having equivalent effect to a quantitative restriction, the Court found that Article 34 TFEU had been violated since the measures were capable of hindering intra-EU trade. It is notable that the voluntary application of the standards was considered not relevant, as the presumption of conformity set out by Belgian legislation "incited or was capable of inciting" purchasers to prefer the products complying with the standard.[34] On the other hand, in *Fra.bo.,*[35] the dispute concerned a request for preliminary ruling from a German court where an Italian producer of copper fittings had brought proceedings on the ground that the German standardization and certification body unduly refused to issue a certificate of compliance with its standards. Focusing on the legislative and regulatory context in which the standard-setting bodies operate[36] and on the actual practice of the market,[37] the Court found that standardization activities, even if carried out by private entities, can still violate Article 34 TFEU where the national legislation considers the products certified by that body to be compliant with national law. This presumption of conformity has the effect in practice of restricting the marketing of products which are not certified by that body. Arguably, this judgment was interpreted in the sense that, as a result of the reference in national law, national standards can ultimately be attributed to the State which enacted the law and fall within the scope of EU law.[38] Arguing *a fortiori* from this interpretation, as the Advocate General did in his Opinion, it can be inferred that, when they are

31. Van Gestel and Micklitz, op. cit. *supra* note 29, at 162.
32. Case C-227/06, *Commission* v. *Belgium,* EU:C:2008:160.
33. Ibid., paras. 37–39.
34. Ibid., para 55.
35. Case C-171/11, *Fra.bo.* v. *DVGW*, EU:C:2012:453.
36. Ibid., para 26.
37. Ibid., para 30.
38. Schepel, op. cit. *supra* note 25, at 528.

acting in connection with European legislation, the activities of European standardization bodies can also be ultimately attributed to the European Commission since it exercises significant control over the procedure of drafting harmonized standards.[39]

Finally, concluding this overview of the previous case law on standardization, it is interesting to note that this remarkable judgment was delivered in relation to the Construction Products Directive, which was considered rather exceptional among the New Approach directives for the peculiar legal effects of the related standards. As remarked by Advocate General Trstenjak in *Carp*, "Directive 89/106 differs from the other New Approach directives in that it provides that – after publication and on expiry of the transitional period – the harmonized standards established on the basis of that directive are to become binding on the Member States."[40] However, as that element appears to have been overlooked by the Court, there is probably no reason to believe that the considerations expressed in the judgment will be limited to this particular area.

5.2. *The institutional implications of the judgment*

In light of the above, it appears that the Court's acceptance of jurisdiction on harmonized standards is an expected development.[41] However, it should be noted that the Court's reasoning does not leave the door open to rash conclusions for the "juridification" of this private phenomenon. In this regard, it is interesting to compare the arguments of the Advocate General and those contained in the judgment of the Court. While Advocate General Campos Sánchez-Bordona argues in favour of equating harmonized standards to "acts of the institutions, bodies, offices or agencies" under Article 267 TFEU on the basis of their connection to EU law, the Court focuses on the same elements but does not draw such a conclusion. On the contrary, it bases the possibility to give a preliminary ruling on the interpretation of harmonized standards on the established case law relating to Article 267 TFEU, which allows for the

39. Ibid., at 527; Van Gestel and Micklitz, op. cit. *supra* note 29, at 158.

40. Opinion of A.G. Trstenjak in Case C-80/06, *Carp* v. *Ecorad*, EU:C:2007:200, para 34. See also Opinion of A.G. Mazák in Case C-254/05, *Commission* v. *Belgium*, EU:C:2007:85, para 37: "It should also be noted that Directive 89/106 differs from most other 'New Approach' Directives in that harmonized standards established under that directive are intended to become binding on Member States after the publication of their reference in the Official Journal and the expiry of a transition period. Once the transition period has expired, Member States are not anymore allowed to apply diverging national standards." See Daelmans, "The legitimacy and quality of European standards: The legitimation of delegation of powers and standard-setting procedures" in Joerges, Ladeur and Vos (Eds.), *Integrating Scientific Expertise into Regulatory Decision-Making. National Experiences and European Innovations* (Nomos, 1997), p. 259.

41. Schepel, op. cit. *supra* note 25, at 532.

interpretation of measures other than those listed in the Treaty. This different approach has major implications.

The Court clarifies that the harmonized standards cannot be attributed to any EU institution, so they remain acts of the European standard-setting organizations established under private law. The control exercised by the European Commission through the mandates and through the publication in the Official Journal is insufficient to transfer responsibility from the private entities to the Commission. The case law mentioned,[42] which was developed in the context of the external relations of the EU, is applicable exclusively to Article 267 TFEU.[43] Therefore, the decision not to attribute the harmonized standards to any institution arguably precludes the judicial review of standards via a direct action under Article 263 TFEU. Even without considering the assessment of the legal effects of the standards[44] and the restrictive limits on the *locus standi* of individuals in direct actions, this element suggests that the complete reviewability of harmonized standards is far from being established, thus disappointing the expectations of the most enthusiastic scholars.[45]

Furthermore, in the Court's approach one issue that is not addressed is the legal qualification of the relation between the European standard-setting organizations and the European Commission. Conversely, the Advocate General, reflecting upon the control exercised by the institutions over the issuing of harmonized standards, claims that the New Approach method results in a "case of controlled delegation of powers in favour of a private standardization body".[46] However, instead of contributing to settling the position of standard-setting organizations in EU law, this assertion has the potential of opening a Pandora's box in relation to the legitimacy of the whole New Approach method. First and foremost, the qualification as a delegation of powers raises the problem of assessing whether such a delegation complies with the strict requirements of the *Meroni* doctrine,[47] established by the Court in the 1950s in relation to the delegation of powers to private entities and, with some adjustments, still considered good law.[48] As the Opinion also briefly mentions, strong doubts about the compatibility of the reference to

42. Case C-192/89, *Sevince*; Case C-188/91, *Deutsche Shell AG*.

43. Lenaerts, Maselis and Gutman, *EU Procedural Law* (OUP, 2014), p. 228.

44. In this case, the assessment of the legal effects of harmonized standard was not necessary since under Art. 267 TFEU the Court has jurisdiction on the interpretation also of non-binding acts (see C-188/91, *Deutsche Shell AG*). However, it remains controversial for the judicial review under Art. 263 TFEU.

45. *In primis*, Schepel, op. cit. *supra* note 25, *passim*.

46. Opinion, para 55.

47. Case C-10/56, *Meroni & Co., Industrie Metallurgiche, società in accomandita semplice* v. *High Authority of the European Coal and Steel Community*, EU:C:1958:8.

48. See Case C-270/12, *UK* v. *Council of the European Union and European Parliament (Short selling*), EU:C:2014:18.

harmonized technical standards in the New Approach directives with this doctrine have been expressed in literature.[49] In particular, the broad discretion often conferred on the standardization bodies and the lack of judicial review of harmonized standards are considered to be at odds with the principles established in the case law. In this regard, it has been remarked that the standard-setting bodies enjoy a wide margin of discretion in elaborating European legislation with detailed provisions since the principles and criteria of the directives are often excessively vague and no adequate control over their activities is provided, resulting in an unlawful delegation of powers.[50] Therefore, the exercise of these discretionary powers has the potential of undermining the institutional balance set in the Treaties.[51]

In this regard, the judgment in *James Elliott Construction* does not unequivocally solve the conundrum of the legitimacy of the standard-setting organizations' role within the institutional balance of the EU. However, it is not completely silent on some interesting aspects which are relevant to the delegation discourse. In the case law of the Court concerning the delegation of powers, especially in the recent *Short Selling* case, particular attention has been paid, firstly, to the fact that the margin of discretion of the body is circumscribed by delineated "conditions and criteria"[52] established in a complete legal framework. In this respect, the relevance attributed by the Court to the control of the institutions and to the guidance given by the New Approach directives, which results in the standard-setting organizations being "strictly governed by the essential requirements",[53] suggests that in Luxembourg the current legal framework may appear adequate to limit the discretion enjoyed by these bodies. Secondly, equally important seems to be the possibility that the measures are "amenable to judicial review in the light of the objectives established by the delegating authority".[54] Indeed, establishing the jurisdiction of the Court on the interpretation of harmonized standards, even with the aforementioned limitations, contributes to erode the immunity from judicial scrutiny which has long characterized this

49. Hofmann, Rowe and Turk, *Administrative Law and Policy of the European Union* (OUP, 2011), p. 248; Schepel, *The Constitution of Private Governance* (Hart Publishing, 2006); Steindorff, "Quo vadis Europa? Freiheiten, regulierung und soziale grundrechte nach den erweiterten zielen der EG – verfassung", in Forschungsinstitut für Wirtschaft (Ed.), *Weiterentwicklung der Europäischen Gemeinschaften und der Marktwirtschaft* (Heymanns, 1992), p. 11.

50. Previdi, "The organization of public and private responsibilities in European risk regulation: An institutional gap between them?" in Joerges, Ladeur and Vos, op. cit. *supra* note 40, p. 236.

51. Case C-10/56, *Meroni*, at 173.

52. Case C-270/12, *UK* v. *Council and Parliament (Short Selling)*, paras. 50–53.

53. Judgment, para 43.

54. Case C-270/12, *UK* v. *Council and Parliament (Short Selling),* para 53.

phenomenon. Therefore, the judgment in *James Elliot Construction* arguably represents a step towards reconciling the system of the New Approach with the institutional principles enshrined in the Court's case law, thus strengthening the shaky grounds of its legitimation.

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