It is not all about judicial review: Internal appeal proceedings in the European standardisation process

LE FUTUR DU DROIT ADMINISTRATIF / *THE FUTURE OF ADMINISTRATIVE LAW*

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It is not all about judicial review: Internal appeal proceedings in the European standardisation process

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Judicial oversight over European standardisation activities is an old – yet topical – issue, which has recently returned to the forefront of the debate with the Court of Justice's *James Elliott* ruling. Albeit revolutionary in admitting the jurisdiction of the Court over European harmonised standards, it is doubtful whether this judgment will pave the way to a significant involvement of courts in technical standardisation matters. The uncertainty about the chance – and extent – of judicial review over standard-setting clashes with the pervasive (para-)regulatory function that European technical standards are increasingly entrusted with. Ultimately, that questions the compliance of the European standardisation system with the basic tenets of democracy and respect for the rule of law which the EU is bound to.

This paper aims at investigating whether, under the premise of a troublesome review of technical standards by courts, the internal appeal mechanism established by the bylaws of the European Standardisation Organisations (ESOs) could play a role in – at least partially – filling the gap of oversight of standard-setters. Although arguably not designed to replace judicial scrutiny, the appeal mechanism is indeed conceived as a tool for (internally) accommodating stakeholders' complaints about the procedural soundness and the legality of the European standardisation process. The conditions for lodging and appeal will be considered, analysing whether they allow for an effective review of standardisation outputs and procedures. Building on this, the extent to which the features of the appeal mechanism are responsive to – or rather disregards – the basic principles of transparency and participation established by the 2012 Standardisation Regulation will be assessed.

A mixed methodological approach will be adopted, which complements traditional black-letter investigation with empirical findings.

I. – Technical Harmonisation and Standardisation in Europe: Setting the Scene

A. – The origins of standardisation in the EU: hybrid governance at work

The 1985 "New Approach to technical harmonisation and standards" is a cornerstone of the Internal Market and one of the most successful pieces of EU industrial policy.(1) With a view to tackling non-tariff barriers to trade among Members States, the "New Approach" uncoupled technical standardisation from legislative harmonisation: while the setting of common product requirements remains in the hands of the EU legislature, the detailing of those requirements through technical standards is outsourced to private associations – the European Standardisation Organisations (ESOs), namely the "Comité européen de normalisation" (CEN), the "Comité européen de normalisation électrotechnique" (CENELEC), and the "European Telecommunications Standards Institute" (ETSI).

Almost 30 years apart, Regulation (EU) 1025/2012 – the Standardisation Regulation – has nestled the core features of the New Approach in a comprehensive legal framework.(2) Article 10 therein establishes that, at Commission's request and in accordance with the essential requirements set out by the legislature, the ESOs develop non-binding technical specifications for easing the marketing of products – and services(3) – in harmonised sectors. These European-wide standards are submitted to the Commission for final approval and referenced in the C series of the *Official Journal of the EU* as "harmonised standards" (HSs). Despite publication, HSs remain private documents of voluntary application: standardisation bodies hold copyright on them(4) and manufacturers are free to show compliance with applicable legislation by any alternative means.(5) Still, the referencing of standards in the *Official Journal* carries along substantive legal effects under EU law: national authorities are obliged to presume that goods complying with HSs abide by the applicable law, and shall therefore refrain from hampering their circulation.(6) Because of this, HSs exert a considerable regulatory effect on public and private markets. On the one hand, they necessarily influence public procurement policies.(7) On the other hand, as the presumption of conformity represents a considerable incentive for manufacturers, HSs penetrate industries' customs, shape manufacturing processes, enter supply contracts.

(1) Council Resolution of 7 May 1985 on a New Approach to Technical Harmonisation and Standards [1985] OJ C136/1. The essential features of the New Approach are further defined by the Commission, "Completing the Internal Market. White Paper from the Commission to the European Council": COM (85) 310 final.

(2) Reg. (EU) 1025/2012 on European standardisation [2012] OJ L316/12.

(3) Service standardisation was firstly endorsed by Art. 26(5), Dir. 2006/123/EC of the European parliament and of the Council [2006] OJ L376/36, and is now taking shape with the inclusion of the service sector within the scope of application of the Standardisation Regulation. *See* Recitals 10 to 12, as well as Art. 1, Reg. (EU) 1025/2012.

(4) *See* clause 9.3, CEN-CENELEC Internal Regulation, Part 2 (2018).

(5) The very definition of standard under EU law is a "technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory". *See* Art. 2(1) Reg. (EU) 1025/2012.

(6) Member States can however rebut the presumption of conformity through a "formal objection procedure" established by Art. 11, Reg. (EU) 1025/2012.

(7) Telling in this sense is Case C-489/06 *Commission* v. *Greece*, ECLI:EU:C:2009:165, § [illegible]ase C-6/05, *Medipac*, ECLI:EU:C:2007:337, § 42.

The public-private nature of European standardisation[8] – by which technical bodies implement legislative decisions – lies behind the composite character of the governing and decision-making mechanisms of the ESOs, *i.e.* those associations called upon to issue uniform standards for the European market. On the one hand, the Standardisation Regulation subjects standard-setting to a set of general principles loosely inspired by administrative law, such as transparency[9] and stakeholder participation.[10] On the other hand, the ESOs are left with a wide margin of discretion in defining their internal rules and, accordingly, the procedural features governing European standardisation, including the extent to which the principles envisaged by the Regulation are enforced. The mechanisms for the representation of "societal" interests (consumers, workers, environment) and SMEs in standard setting are telling in this respect. The balanced representation of these interests is encouraged by the Standardisation Regulation, which to this end recognises participatory prerogatives to selected Brussels-based associations funded by the Commission in accordance with Annex III of the Regulation – the so-called Annex III organisations (A3Os).[11] The A3Os are currently four: the ANEC – European Association for the Co-ordination of Consumer Representation in Standardisation – protects the interest of consumers; the ECOS – European Environmental Citizens' Organisation for Standardisation – pursues environmental protection; the ETUC – European Trade Union Confederation – puts forward the instances of workers; the SBS – Small Business Standards – represents SMEs. While enjoying a privileged status under the Standardisation Regulation, the actual involvement of the A3Os in standard-making highly depends on how the mechanisms of interest representation are (internally) designed by each of the ESOs. ETSI, for instance, is open to direct participation of institutional actors, companies, interest groups and individuals; CEN and CENELEC, on the contrary, rely on the principle of national delegation and accordingly reserve full membership to representatives of national organisations – the National Standardisation Bodies (NSBs) of EU and EFTA country. For their part, business and non-business interest groups – including the A3Os – can contribute to CEN and CENELEC as observer by entering into partnership agreements with these organisations.[12] Currently, all four A3Os have negotiated and signed a partnership agreement with CEN and CENELEC.

B. – Hibridity under control: Judicial review and internal appeal procedure

The hybrid character of European standardisation – public and private, political and technical – determines the way competing interests are represented in the planning and making of standards. Importantly, it also affects the extent to which

(8) *See* M. Eliantonio, *Private actors, public authorities and the relevance of public law in the process of European standardization: European Public Law* 2018, 24(3), 473-490.
(9) *See* Arts 3-4, Reg. (EU) 1025/2012.
(10) Arts 5-6, Reg. (EU) 1025/2012.
(11) *See* Art. 5 and Annex III, Reg. (EU) 1025/2012. These organisations were already actively involved in standardisation, but lacked formal recognition in legislation.
(12) CEN-CENELEC Guide 25 – The Concept of Partnership with European Organizations and other Stakeholders (2017).

judicial oversight is – and could be – exerted over the processes and outcomes of standardisation. While the recent *James Elliott* case has shed some light on the CJEU's jurisdiction over HSs in preliminary rulings under Article 267 TFEU, doubts still remain as to the adequacy of this system of judicial protection for ensuring the acceptability of standardisation activities by institutions and stakeholders. In this current legal uncertainty, it becomes all the more important to consider and explore the alternative review possibilities which affected stakeholders have at their disposal. In this light, this paper considers the dispute-settlement mechanism internal to the ESOs, touching upon its characteristics and design with a view to assess its aptness to enhance the monitoring system over European standardisation: Could this mechanism counterweight the limited operativity of judicial remedies? Is it able – and if so, to which extent – to accommodate general interest concerns?

These aspects will be treated with reference to CEN and CENELEC, and with a specific focus on the case of A3Os.(13) After providing an overview of the reasons underpinning the limited access to judicial review for A3Os, the occurrence and modalities of the internal appeal mechanism will be outlined, thereby assessing its relevance and potentialities. Later, the extent to which the design of this mechanism meets the demands of the Standardisation Regulation will be evaluated, with specific regard to the "effective participation" requirement established by Article 5 of the Regulation.

II. – Standards and judges: the context in the aftermath of *James Elliott*

A. – HSs and the problem of a "reviewable act"

In the *James Elliott* case,(14) the CJEU was asked to determine its jurisdiction over HSs in preliminary questions under Article 267 TFEU. While the Court did not qualify harmonised standards as acts of the EU institutions – unlike the Advocate General(15) – it did state that they form "part of EU law" because they constitute necessary implementation measures of EU law provisions.(16) As a consequence, the CJEU concluded that the Court had jurisdiction to interpret HSs. While the *James Elliott* case concerned a preliminary question of interpretation, it seems a settled matter – at least for the Commission – that the CJEU has *also* jurisdiction to rule on matters of validity of HSs under Article 267 TFEU.(17)

(13) The inquiry jointly considers CEN and CENELEC settings because of their inherent similarities. These two standard-setting bodies share, to a large extent, the same organisational structure, internal rules and guidelines, as well as the same management facilities. As such, they are parts of a homogeneous and unitary model of standardisation. The analysis skates over the case of ETSI, that nonetheless does grant all members a right of appeal against the decisions of its organs, which must be exhausted prior to any attempt of litigation in court. *See* Clause 18, ETSI Rules of Procedure (2017).

(14) Case C-613/14, *James Elliott Construction Limited* v. *Irish Asphalt Ltd*, EU:C:2016:821.

(15) Opinion of Advocate General Campos Sanchez-Bordona in Case C-613/14 *James Elliott Construction Limited* v. *Irish Asphalt Ltd*, EU:C:2016:63, § 40.

(16) Case *James Elliott* ■■(*see supra* note 14)■■, § 40.

(17) In Toolbox 18 of the Better Regulation Package, the Commission states that "Where indirectly referenced technical standards, even when voluntary, confer a legal effect, such technical standards fall under Article 267 of TFEU meaning that the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning *the validity and interpretation* of such standards", SWD (2017) 350, 114 (emphasis added).

Given the shortcomings of the preliminary ruling procedure over direct actions of annulment, it is, however, still important to investigate whether *James Elliott* opens any avenue, especially for private litigants, to challenge HSs in annulment proceedings under Article 263 TFEU. As it is well known, access to the Court of Justice *via* the preliminary reference procedure is not available to applicants as a matter of right, since national courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EU measure to the Court, or might err in their assessment of the validity of the measure and decline to refer a question to the Court on that basis. Furthermore, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants' claims might be redefined or that the questions referred might limit the range of measures whose validity is being challenged before the national court. Finally, proceedings brought before a national court are more disadvantageous for individuals compared to an action for annulment under Article 263 TFEU, since they involve delays and extra costs.(18)

James Elliott as such did not shed any light on the admissibility of a direct action against HSs. While it admits that HSs form part of EU law, indeed, it did not consider HSs as acts of the EU institutions, bodies or offices of the EU which are reviewable under Article 263 TFEU. It seems therefore unlikely that a direct action against a HS would be considered admissible.

A direct action could at most be brought against the Commission Communication which publishes a reference to a HS in the *Official Journal – i.e.* the act which grants to HSs a legal effect under EU law, namely the presumption of conformity with legislation. However, it is not clear whether this challenge would lead to the substantive review of the standard by the Court, as it remains a private measure which is only available against payment and the copyright of which remains with the standardisation bodies.

One possible avenue to open the doors to this "indirect review" of standardisation would be to rely on the "control function" exercised by the Commission in the process of setting standards, as apparent by the Standardisation Regulation.(19) Indeed, Article 11(1) of Regulation states that the Commission has to "decide" whether a certain HS fulfils the essential requirements it must comply with. One could therefore imagine a claim against a Commission Communication publishing a reference to a HS, alleging that the latter is invalid as the HS does not comply with the essential requirements, therefore paving the way to the "indirect" review of the HS. It remains to be seen whether this claim will be successful in court.

The feasibility of this means of review should be nevertheless considered in light of the long-standing case law of the Court on the reviewability of non-binding measures. According to the Court of Justice, actions for annulment under Article 263 TFEU are open against "all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".(20) In *James Elliott*,

(18) These considerations all appear in the Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* v. *Council of the European Union*, ECLI:EU:C:2002:197.

(19) On this point, H. Schepel, *The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law: Maastricht Journal of European and Comparative Law* 2013, 12(4), 528 ff.

(20) Case 22/70 *Commission* v. *Council (ERTA)*, ECLI:EU:C:1971:32, § 39.

the Court of Justice clarified that the non-binding nature of HSs "cannot call into question the existence of the *legal effects* of a harmonised standard",(21) namely the presumption of conformity arising from publication of the reference to a HS in the *Official Journal*. In light of this conclusion, it might be argued that the Commission Communication publishing a reference to a HS might be considered as an act intended to have legal effects for the purposes of judicial review.

B. – The standing rules and the barriers to judicial review

Given the status of "reviewable act" of the Commission Communication publishing a reference to a HS, a subsequent hurdle for A3Os – and any other interested (private) – would be represented by the standing rules applicable in direct actions which are to be found in Article 263(4) TFEU.

The starting point for a determination of standing is the legal qualification of the Communication which contains a reference to a HS. This typology of measure could be qualified as a regulatory act within the meaning of Article 263(4) TFEU,(22) because it is adopted following a different decision-making process than the legislative procedure(s) contained in Article 289 TFEU. While regulatory acts profit from more favourable standing conditions after the Lisbon Treaty (applicants are now exempted to prove individual concern), these conditions only apply if these acts do not entail "implementing measures". As the Commission Communication does not entail any implementing measures (it has *per se* legal effects, the national standards being a purely private phenomenon without public law relevance), the A3Os would be able to gain standing if they were able to prove "direct concern".

According to the case law of the Court of Justice, in order for a non-privileged applicant to be regarded as directly concerned the challenged measure must, firstly, directly affect the legal position of the person concerned and, secondly, there must be no discretion left to the persons to whom the measure is addressed and who are responsible for its implementation, such implementation being purely automatic.(23) These criteria are cumulative.

With regard to the first criterion, the requirement of showing direct concern will only be met if the measure is capable of directly producing effects on the applicant's legal situation.(24) While the A3Os might, on the basis of this case law, be able to challenge a Commission Communication if the process of adopting a HS has infringed any of the specific prerogatives which they enjoy by virtue of secondary law (for instance, the right to be consulted during the drafting of a request to an ESO(25) and to be

(21) Case C-613/14, *James Elliott Construction Limited* v. *Irish Asphalt Ltd*, EU:C:2016:821, § 42 (emphasis added).

(22) *See* Case C-583/11 P, *Inuit Tapiriit Kanatami and Others* v. *European Parliament and Council of the European Union* [2013], ECLI:EU:C:2013:625. The European courts have defined it to be a non-legislative measure of general application, *i.e.* a measure which is not adopted following the ordinary or special legislative procedures within the meaning of paragraphs 1 to 3 of Article 289 TFEU, whether adopted by the Commission or not. *See also* Case T-93/10 *Bilbaína de Alquitranes, SA, and others* v. *Commission*, ECLI:EU:T:2013:106, §§ 55-59.

(23) Case C-386/96 P, *Dreyfus* v. *Commission*, ECLI:EU:C:1998:193, § 43. – Case C-486/01 P, *Front national* v. *Parliament*, ECLI:EU:C:2004:394, § 34; and Joined Cases C-445/07 P and C-455/07 P, *Commission* v. *Ente per le Ville vesuviane* and *Ente per le Ville vesuviane* v. *Commission*, ECLI:EU:C:2009:529, § 45.

(24) Case C-486/01 P, *Front national* v. *Parliament*, ECLI:EU:C:2004:394.

(25) Reg. (EU) 1025/2012, Art. 10(2).

notified of the most important steps in the standardisation process[26]), it seems less probable that they would be able to prove direct concern also with regard to a substantive ground concerning the adopted HS. This conclusion is supported by the recent *PAN Europe* case before the General Court, in which a claim was brought by a number of environmental organisations against an Implementing Regulation of the Commission. Here, the Court concluded that "no provision of the contested act is directly applicable to the applicants, in the sense that it would confer rights or impose obligations on them. Consequently, the contested act does not affect their legal position, and therefore the condition of direct concern, as referred to in the second and third situation referred to in the fourth paragraph of Article 263 TFEU, is not met".[27]

The intersections between the Court's jurisdiction and European standardisation should, moreover, be considered in light of the scarce predisposition to formal litigation among the actors involved in the standard-setting process. Structural and extra-legal factors intertwine in this regard. Firstly, the consensus-based decision-making procedures adopted by the ESOs – and by standard-setting bodies all over the globe[28] – in principle make final decisions conditional to "the absence of sustained opposition to substantial issues by any important part of the concerned interests."[29]

Secondly, the public enquiry phase – which any European standard should go through[30] – makes it difficult for controversial issues to stand unchallenged during the pre-approval phase. The consensus mechanism and the fact that institutions, stakeholders and society at large are able to examine the preliminary outcomes of standardisation allow the thorniest issues to get smoothed out through ex-ante negotiation, rather than ex-post litigation.

Thirdly, the very peculiar position of the A3Os within the balance of powers of European standardisation should be considered. As the A3Os almost entirely rely on the Commission for legitimising and financing their activities,[31] it seems indeed unlikely that they would even consider taking an action for the annulment of the Commission's Communication publishing a reference to HSs. For the same reason, a hypothetical direct action against HSs could be as well inopportune: it would be, in fact, a challenge against a measure of which the Commission, through the standardisation request and the referencing in the *Official Journal*, has in some way accepted the political responsibility.[32] As frankly admitted by an officer of the ANEC – the A3O championing consumer interest – judicial actions are "out of our scope (...)

(26) Reg. (EU) 1025/2012, Art. 12(2).

(27) Case T-600/15, *Pesticide Action Network Europe (PAN Europe)* v. *Commission*, ECLI:EU:T:2016:601, § 62; similarly also Case T-673/13, *European Coalition to End Animal Experiments* v. *ECHA*, ECLI:EU:T:2015:167.

(28) Standard-setting procedures are usually modelled on the "Code of Good Practice" established by the 1995 WTO Agreement on Technical Barriers to Trade (TBT Agreement), Annex III.

(29) This is the notion of "consensus" notion is directly derived by the ISO/IEC systems (ISO/IEC Guide 2:2004). *See* clause 3.2 CEN-CENELEC Internal Regulation, part 1, referring to European standard EN 45020:2006 "Standardization and related activities – General vocabulary".

(30) Clause 11.2.2, CEN-CENELEC Internal Regulations – Part 2 (2018).

(31) *See* Commission's "Staff Working Document accompanying the Report on the implementation of EU Standardisation Policy": COM(2018) 26 final, 56.

(32) *See* Commission's "Vademecum on European Standardisation in support of Union Legislation and policies, Part 1 – Role of the Commission's Standardisation requests to the European standardisation organisations" of 27 October 2015: SWD(2015) 205 final, 9.

and the Commission might even argue that it is not our role: our role is to influence the standard-development process."(33)

C. – Interim conclusion

The sporadic and troubled interplay between technical standardisation and judiciaries in the EU depends on institutional and policy factors. Firstly, judicial engagement is constrained by the jurisdictional architecture of the EU: private standards might not fall within the range of acts amenable to judicial review; interested parties might sometimes struggle to fulfil the standing requirements before the European judiciary. Secondly, the role of the Court is constrained by the scarce predisposition of the standardisation community to judicial litigation. That is also due to the allocation of powers envisaged by the New Approach, which aims at preserving the autonomy and discretion of standard-setters, although within the boundary of a basic framework of substantive requirements(34) and procedural principles.(35) This "regulated autonomy" approach, which reminds of reflexive law theories,(36) raises fundamental questions about the role that judges can – and ought to – play in the context of European standardisation. How – and to which extent – should courts interfere with private ordering arrangements? How do private autonomy and judicial review intertwine whenever private bodies are entrusted with tasks of general interest? Can the appeal procedure internal to the ESOs compensate for this weak judicial oversight? It is to this last question which the paper now turns.

III. – Managing conflicts in CEN and CENELEC ecosystems: the case of the appeal procedure

A. – Grounds for action and procedural features: the potentialities of the appeal procedure

CEN and CENELEC establish an internal appeal mechanism for settling disputes on standardisation-related matters, in accordance with the procedure established by clause 7 of their Internal Regulations, part 2. This provision allows any member and partner of the CEN and the CENELEC – A3Os included – to lodge an appeal "against any action, or inaction, of a technical body or any other body under the responsibility of the Technical Board or technical body officer of CEN/CENELEC. The appeal may also be lodged against a Technical Board decision, a technical body decisions, a technical body document or a new work item". The provision

(33) Interview with ANEC officer, Brussels, March 2017.

(34) Such as, for instance, the public interest clause embedded in the Commission's "General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the EC and EFTA" (2003/C 91/04), [2003] OJ C91/7', § 5; the essential requirements established by any piece of New Approach legislation, which the ESOs should respect; the terms of the standardisation request issued by the Commission.

(35) Such as the principle of transparency and mechanisms for interest representation. *See*, respectively, Reg. (EU) 1025/2012, Arts. 3 and 5.

(36) The goal of reflexive law models in the face of private organisations "is the design of organizational structures which makes the institutions – corporations, semi-public associations, mass media, educational institutions – sensitive to the outside effects of their attempts to maximize internal rationality. Its main function is to substitute for outside interventionist control an effective internal control structure", G. Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *Law & Society Review* 1983, 239, 278.

also indicates on which grounds the appeal may be lodged, namely if the applicant believes that the action or inaction is not in accordance (1) with the Statutes/Articles of Association or CEN/CENELEC Internal Regulations, or where it has a negative impact on (2) the implementation of the European Single market or (3) the reputation of CEN/CENELEC , or where it otherwise (4) raises public concerns with regard to safety, health, environmental or accessibility.

Therefore, under the current formulation of clause 7, the A3Os – in their quality of partner organisations of CEN and CENELEC – would in principle be entitled to lodge an appeal against alleged procedural flaws in the standard-making process. Crucially, they would also be granted the possibility to bring forward "substantive" challenges against standardisation activities based on the "best interests of the European market" or public interest concerns. These all-encompassing grounds might however be a double-edged sword. On the one hand, they would embrace any claim on the substance of standard, thus ensuring a general monitoring on the merit of standard-setting activities; on the other hand, it can be suspected that these two seemingly very far-reaching grounds of review are more of a "paper tiger" than actual tools to control the process of European standardisation, especially considering the vagueness of benchmarks such as the "negative impact on the implementation of the European Single market", previously referred to in CEN and CENELEC Internal Regulations as the "best interests of the European market". It is indeed not clear neither how an A3O would achieve the proof that a certain draft standard would not foster the smooth functioning of the European market, nor who will eventually decide what has a "negative impact" on the market, and upon which basis.

A look into the practice suggests that the "substantive" grounds of appeal could be used by A3Os for complaining about the non-conformity of standards with the essential legislative requirements and the terms of the standardisation request they must fulfil: in these instances, the "best interest of the European market" formula would cover "non-conformity actions", playing a role similar to the formal objection procedure to which Members states and the European Parliament can resort for questioning the technical fitness of requested standards.(37) An appeal filed in 2011 by the ECOS – the A3O pursuing environmental protection goals – is telling in this respect. On this occasion the challenge concerned a HS on solid recovered fuels which, according to ECOS, fell short of reaching the "high level of environmental protection and human health protection" requested by the correspondent mandate issued by the Commission.(38) Filtered by clause 7, the defects identified by ECOS resulted in the fact that the standard "would (…) be contrary to the best interest of the European market [and] to the best interest of European citizens in terms of public health and environmental concerns".

If the grounds for appeal are vague, even more so are the conditions for ensuring the independence and impartiality of the panel asked to decide on the appeal.

(37) *See* Reg. (EU) 1025/2012, Art. 11.

(38) EN 15359 "Solid recovered fuels – specifications and classes". Full text of the appeal available at http://cniid.fr/IMG/pdf/ECOS_appeal_prEN15359_final.pdf.

According to the same clause 7, appeals are ruled upon either by the Technical Board,(39) or, if the appeal is lodged against the Technical Board or the Administrative Board,(40) by the General Assembly. If instead further consideration is needed or the complainant requests it, a Conciliation Panel is convened in consultation with the parties involved. Clause 7 requires this latter body to ensure a "balanced representation of all interests involved". As numbers are not available, it is not possible to say how relevant this Conciliation Panel is in practice. There is, however, anecdotal evidence that the doubts about the impartiality of the conciliation panel, and the overall way in which the appeal is generally handled, have in the past discouraged A3Os from filing a formal appeal though the conditions existed. Informal channels of mediation and policy negotiations are generally preferred.(41)

In spite of the broadness and heterogeneity of the grounds of appeal – which would allow for a wide-ranging review of CEN-CENELEC activities – the appeal procedure has been scarcely used. From 2012 to the beginning of 2018, only 20 appeals have been filed, of which 12 have been settled successfully before the formal decision of the appellate board. Incredibly low is also the use of the procedure by the A3Os: within the time-frame considered, only one appeal has been lodged by an A3O – namely the ANEC for an issue on the accessibility of lift to people with visual impairment.(42) The remaining 19 appeals have been put forward by members – *i.e.* the National Standardisation Bodies –, most of them for issues regarding, safety, or for standards not in the best interest of the European market.(43)

B. – Participation as a pre-condition for contention in CEN-CENELEC ecosystems

In clause 7, CEN-CENELEC Internal Regulations establish that "whilst the right to lodge an appeal is unlimited for a CEN/CENELEC member, a Partner organization has the right to lodge an appeal only in relation to the work carried out by CEN/CENELEC Technical Bodies to which this partner organization has contributed". This constraint, unknown in the immediate aftermath of the Standardisation Regulation, has been added to the 2015 version of the CEN-CENELEC internal rules and maintained in the 2018 version of the document, with the intended purpose of avoiding specious and abusive uses of the appeal procedure. As appeals impede the ratification of the standards at issue, the unconditional access to the remedy could have indeed offered a means of obstructionism that potentially hampers the efficiency of European standardisation and the readiness of the system to adapt to technological changes. Moreover, if any partner could delay the dissemination of standards it has not taken part in, that would come to the detriment of the "diligent" stakeholders which have invested

(39) The Technical Board is the body in charge of controlling the full standards programme and its execution.
(40) The Administrative Board directing the work and coordinating the actions of all CEN bodies with the aim of executing the decisions taken by the General Assembly.
(41) Interview with ANEC officer, Brussels, March 2017.
(42) All data courtesy of CEN-CENELEC, June 2018.
(43) Specifically, 6 appeals openly mentioned safety issues, 2 implicitly refer to safety, while 4 were filed against standards not in the best interest of the European market.

time and resources into the standard-setting process: ultimately, the credibility of CEN and CENELEC system *vis-à-vis* its members and affiliates would be undermined.(44)

While these might be reasonable concerns,(45) the restriction to the right of appeal carries along an important drawback. The limited standing indeed deprives partner organisations of a last resort means for challenging the decisions of CEN and CENELEC organs, regardless of the reasons that have determined nonparticipation in the first place. Anecdotal evidence shows that weaker stakeholders, and particularly the A3Os, may indeed experience some difficulties in gathering the resources needed for actively monitoring and contributing to standardisation works.(46) There is a substantial hiatus between the abstract chances for being involved in CEN and CENELEC systems on the one hand, and the actual possibility of exploitation of these chances, which depends on the capacity of stakeholders to find the financial and technical assets necessary for obtaining an "appropriate representation" and "effective participation" in standardisation *fora*, as required by the Standardisation Regulation.(47)

On the one hand, the partnership status within CEN-CENELEC(48) systems allows stakeholders to participate as observers in both the administrative and the technical decision-making bodies of the organisations. While partners in no case have voting rights, they are nevertheless granted access to all relevant documents, can formulate advices, as well as submit comments and provide technical inputs. Although these rights are not always unconditional,(49) A3Os are entitled, because of their special status under the Standardisation Regulation, to unrestricted participation in any technical committee and working group.(50)

On the other hand, various dysfunctions hinder the optimal use of the participatory channels offered by CEN and CENELEC systems. Standard-setting is a costly and time-consuming exercise: technical committees are dispersed in all corners of the continent, participation is subjected to a fee, standards may take years to be completed. Considerable financial resources are therefore needed, which the A3Os might struggle to attract, and which eventually determine the number of work items that they are able to get involved with.(51) Similarly, the availability of relevant expertise is an essential element for delivering effective inputs to the

(44) Interview with CEN-CENELEC officer, Brussels, Apr. 2017.

(45) The SBS – the association representing SMEs – is of a different opinion, *see* SBS press release, "SBS opposes CEN-CENELEC decision to limit the right of appeal", 2014, available at www.sbs-sme.eu/sites/default/files/publications/141030-%20SBS%20Press%20Release%20-%20Position%20on%20the%20right%20of%20appeal.pdf.

(46) *See*, for instance, the European Parliament "Report on European standards" (2017), § 73; "Access to Standardisation – Study for the European Commission, Enterprise and Industry Directorate-General" (2009), 45; this conclusion is also corroborated by interviews with ETUC, ANEC and ECOS officers, Brussels, March 2017.

(47) "Virtually all standards organisations (national and European) have declared their openness to the involvement of new stakeholders in the standardisation process. In practice, however, effective participation in the standards development process largely depends on the capacity of any interested party to provide technical input and to earmark resources for such work", Commission Communication "Integration of environmental aspects into European Standardisation" (2004), 13.

(48) The partner status is specifically addressed to "those organizations having an interest for cooperation at overall corporate and technical level with Cen and/or CENELEC" and which are, alternatively, "an independent European or international European based sectoral organization representing, within its defined area of competence, a sector or subsector", or "a recognized European pan-sectoral organization promoting, within its defined area of competence, the interest of a defined category of stakeholders, such as SMEs, or societal interests, such as consumers, social or environmental stakeholders" *See* clause 1, CEN-CENELEC Guide 25.

(49) Participation in the CEN-CENELEC Presidential Committee, for instance, requires the approval of the chairman Clause 1.2.1, CEN-CENELEC Guide 25.

(50) *See* footnote 1 CEN-CENELEC Guide 25, 5.

(51) Indeed, the A3Os rely almost exclusively on the limited public funding of the Commission ■■(*see supra*, note 32■■).

standard-setting committees.(52) However, for A3Os it is sometimes troublesome to find experts bringing together the required scientific background, commitment to the interests pursued by the organisation, willingness to work pro bono for the general good, and experience about how standardisation works.(53)

As contingent factors hinder the chances of A3Os to engage with standard-setting mechanisms, the opportunity of anchoring the right of appeal to the claimant's contribution to the to-be challenged decision is debatable. Even more so, in light of the peculiar role that the A3Os are asked to play under the Standardisation Regulation. The quintessential *raison d'être* of A3Os is complementing the deficiencies of non-business and SMEs interest representation in national settings. In this sense, they act as the European-level "guardians" of sensitive and diffuse interests which could be otherwise overpowered in the meandering decision-making processes of European standardisation. In order to fulfil their mandate, the A3Os are encouraged to participate in all phases of standard-setting,(54) and are a necessary counterparty for the lawful delivery of standardisation requests to the ESOs.(55) Nonetheless, according to CEN-CENELEC rules these prerogatives do not justify the unlimited access to the internal appeal procedure: A3Os, as other partners, shall be prevented from challenging prospective standards if they have failed – whatever the reasons – to contribute to the works of the correspondent technical committee.

IV. – Conclusions

The process of European standardisation has been undoubtedly "juridified" in the last years.(56) However, the paper has shown that, because of the hybrid public-private nature of the process of European standardisation, quite some uncertainties remain as to the possibility to ask the European judiciary to review harmonised standards. This situation is exacerbated by the standing requirements applicable to the A3Os – *i.e.* the associations entrusted with the representation of weak and diffuse interests in European standard-setting. The "non-conflictual" culture of the standardisation environment makes the likelihood of a challenge to a HS by a A3O even less likely. The ensuing question which this paper examined is whether the internal appeal procedure could serve to compensate the currently marginal role played by the European judiciary.

(52) *See* W. Mattli and T. Büthe, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press, 2011, 56 ff.

(53) The shortage of available experts in some sectors relevant for A3Os activities is acknowledged by the 2010 Report of the Expert panel for the review of European Standardisation System (EXPRESS), § 3.6.3. *See* also ANEC/ECOS/ETUI views on: The Standardisation Regulation: "Consumer expertise is scarce, especially given the complexities of more recent legislation (…) and the convergence of technologies. Environmental expertise, the kind needed to contribute meaningfully to the standardisation process, would normally be the product of an extended education in chemistry, biology, oceanography, geology or one of several professional career paths that do not necessarily facilitate the ability to engage with industry and policy-makers. Finally, workers' expertise in doing their jobs is often difficult to translate into the technical knowledge needed to draft standards for workplace equipment and services." available at www.etui.org/content/download/10297/90766/file/Standardisation+Regulation+-+ANEC-ECOS-ETUI+article.

(54) Reg. (EU) 1025/2012, Art. 5(1).

(55) Re[illegible]1025/2012, Art. 10(2).

(56) H.[illegible], *The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law: Maastricht [illegible]f European and Comparative Law* 2013, 12(4), 521-533.

The result of the investigation is somewhat a paradox. On the one hand, the generous formulation of clause 7 would seem to allow stakeholders to exert a broad check on the merit of CEN-CENELEC decisions, that extends to the "best interests of the European market or such public concerns as safety, health or the environment". In this sense, the appeal procedure might surely be a great added value for the "acceptability" of European standard-making by stakeholders and society at large. On the other hand, the organisations which are specifically entrusted with the protection of these general and diffuse interests are denied standing for appealing a standard when the partner organization has not contributed to the standard it wishes to challenge, with the consequence of excluding from the remedy the most radical among the foreseeable dysfunctions: the case where lack of resources, information and/or expertise has *de facto* hindered consumers, environmentalists, trade unions and SMEs the chance to participate to the making of standards.

Inevitably, some questions arise: Is the design of the right of appeal under CEN and CENELEC rules compatible with the role that A3Os ought to play in standard-setting dynamics? Is that in line with the principles of "appropriate representation" and "effective participation" that CEN and CENELEC structures should uphold? Or rather the access to the internal appeal procedure is a matter for the ESOs alone to rule upon? In this respect, the A3Os stress the existence of a relationship of "instrumentality" between the right of appeal and the fulfilment of the principles of appropriate participation and effective participation enshrined in the Standardisation Regulation.(57) This opinion finds some support in the attention paid to the ESOs internal rules as a means for enhancing the monitoring of standards. The co-operation guidelines between the ESOs and the Commission establish that the former shall "ensure that structures and procedures allow for the highest possible degree of openness, transparency and representativeness".(58) More specifically, the 2010 EXPRESS report requested by the Commission highlights that "consideration should be given to ensuring that both CEN and CENELEC have appeal mechanisms that can be used by these organizations that are truly impartial in dealing with fundamental disagreements should they arise."(59) Similarly, the independent review requested by the Commission in 2015 concludes that "it is of importance for Annex III organisations to be able to contribute to the standards development process until the end of the process, even if they have not been involved along the process."(60) The European Parliament has addressed these concerns in various occasions, inviting the ESOs "to reinforce their existing appeal mechanisms which are meant to be used should a disagreement over a standard arise."(61) More recently, it has stressed the need for "transparent and accessible appeal mechanisms" and recommended that "the membership status, rights and obligations of Annex III

(57) *See* SBS press release, "SBS opposes CEN-CENELEC decision to limit the right of appeal", 2014, available at www.sbs-sme.eu/sites/default/files/publications/141030-%20SBS%20Press%20Release%20-%20Position%20on%20the%20right%20of%20appeal.pdf

(58) *See* Commission's "General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the EC and EFTA" (2003/C 91/04), [2003] OJ C91/7', § 5.

(59) EXPRESS report "Standardization for a Competitive and Innovative Europe: A Vision for 2020" (2010), 29.

(60) Independent Review of the European Standardisation System (2015), 111.

(61) European Parliament "Resolution on the future of European Standardisation" (2010), § 27.

organisations, such as the *right of appeal*, consultative powers, the right to an opinion before a standard is adopted, and access to technical committees and working groups be reviewed within the ESOs to assess whether they meet the requirements of Regulation 1025/2012".(62) In light of these insights, the compatibility of the appeal mechanism – as it stands now under CEN-CENELEC Internal Regulations – with the inspiring principles of the Standardisation Regulation seems debatable.

(62) European Parliament "Report on European standards" (2017), §§ 69 and 74 (emphasis added).