

CEN and CENELEC's response to the Communication of the European Commission, COM(2018) 764 'Harmonised standards: Enhancing transparency and legal certainty for a fully functioning Single Market'

18 December 2018

Executive Summary

On 22 November 2018 the European Commission issued a Communication on harmonised standards¹. This Communication states that it is part of a response to the request of the European Council in March 2018 to assess the state of play on the implementation of single market legislation and the remaining barriers and opportunities to a fully functioning Single Market.

CEN and CENELEC welcome the European Commission's clear support for the role of European standards in underpinning the European economy as well as the initiative taken to facilitate European stakeholders to benefit from the use of standards to comply with legislation under the New Legislative Framework (NLF).

With this reply, we:

- Offer **support for the specific actions** outlined in the Communication;
- Request the EC to involve all standardization stakeholders to **streamline the relationship between standards and regulation** while preserving the NLF;
- **Draw attention** to the assumptions resulting from the interpretation of the James Elliot case, which may be incompatible with the voluntary nature of standards and require further discussion, since CEN and CENELEC cannot support these.

We also stress the need for a continued and regular dialogue between the EC and CEN and CENELEC about the **nature of the public-private partnership within the NLF**. In 2019 we will continue this dialogue on the functioning of the European standardization system in the context of the NLF with economic actors, societal stakeholders, the Member States and the European Parliament, focusing on the value of standards for a well functioning European Single Market, which ensures our European competitiveness and future prosperity.

¹ A harmonized standard is a European standard developed on the basis of a request from the European Commission to a recognized European Standards Organisation (CEN, CENELEC or ETSI) under European harmonization legislation. Such a request provides guidelines for the requested standards to meet relevant EU legal requirements. Compliance with harmonized standards provides a presumption of conformity with the corresponding legal requirements. Manufacturers, other economic operators or conformity assessment bodies can use harmonized standards to demonstrate that products, services or processes comply with relevant EU legislation."

Support for specific actions outlined in the Communication

The Communication commits to four actions aimed at improving further the Single Market. The EC will:

1. Endeavour to eliminate as rapidly as possible the remaining backlog of Harmonized Standards not cited in the Official Journal of the European Union;
2. Review its internal decision making processes with a view to streamlining the procedures for publishing the references to harmonized standards in the OJEU;
3. Develop, with stakeholders, a guidance document on practical aspects of implementing the Standardization Regulation, 1025/2012;
4. Reinforce, on an on-going basis, the system of consultants to support swift and robust assessments of harmonized standards and their timely citation in the OJEU.

We welcome the statements in the Communication about the role of European standards in driving down barriers to trade and delivering increased business competitiveness; this has been demonstrated through repeated national studies. We concur that European standards enable innovation and promote consumer protection and safety.

We endorse the EC's recognition of the NLF and its essence as a public-private partnership. This partnership is between the European Union institutions, stakeholders that contribute to the development, and are the final users, of standards, and the European Standards Organizations (ESOs). For CEN and CENELEC, this includes their national member bodies and committees.

Intrinsic to this public-private partnership is the flexibility and agility of the standards development process, by which ESOs produce technical standards corresponding to the essential requirements in harmonized Union legislation. This reduces unnecessary legislative burden on stakeholders and allows them to deliver state of the art technical solutions, which facilitate cross-border trade.

We are pleased to rely on this recognition to continue the dialogue with the EC, and will acknowledge this backing in our discussions with the Member States and with the European Parliament, as well as with the other key stakeholders within the European standardization system.

CEN and CENELEC welcome the first, second and fourth actions in the Communication. Eliminating the backlog of standards awaiting citation is crucial for businesses and consumers to gain the maximum benefit from the use of standards as tools that enable regulatory compliance, as is having streamlined procedures for citation in the OJEU and an efficient group of HAS consultants working with and within the standards system, not against it.

CEN and CENELEC note that from October 2017 to October 2018 only 24% of the offered electrotechnical standards and 59% of all the offered standards were referenced in the OJEU.

Delivered effectively and together, these actions can send a powerful and much needed message that the EC is committed to delivering on the Single Market ambitions. We want to offer our full support for their accomplishment.

Streamline the relationship between standards and regulation

CEN and CENELEC wish to move forward with the implementation of all four actions in this Communication and would therefore also like to offer our particular support for the third action in the Communication.

We look forward to the invitation from the EC to work together to deliver the guidance document on practical aspects implementing Regulation 1025 in line with its proposal to “elaborate [the guidance] in consultation with stakeholders”.

We consider that the best approach to the development of guidance for a public-private partnership is to bring in all the parties to work together. Special attention in this respect should be paid to the division of roles and responsibilities, including those of the Member States and the European Parliament in preparing standardization requests and making formal objections.

Specific statements and assumptions in the Communication

Whilst we welcome the overall approach and clarity from the EC in the Communication, it contains a number of statements based on assumptions that require further discussions between all standardization stakeholders, as CEN and CENELEC do not agree with their content.

The essence of the Communication, and the responsibilities, obligations and actions assumed by the EC, are based on its interpretation of the judgement of the European Court of Justice Case C-613/4 ‘James Elliott Construction Limited vs. Irish Asphalt Limited’. CEN and CENELEC note that the James Elliott case concerns the interpretation of provisions of EN 13232:2002, a harmonized standard under the Construction Products Directive.

The CEN and CENELEC approach to this case is detailed in our [Position Paper](#) of May 2017.

The Court has stated that the specific harmonized European standard (hEN), “*the references to which have been published in the Official Journal of the European Union, forms part of EU law*” (§40) [...] because it was “*initiated, managed and monitored by the Commission...*” (§43). The EC has subsequently derived from this statement a heightened attention to the content of all harmonized standards in general and has further asserted in its Communication a responsibility for the EC “*to assess whether they comply with the requirements set out in harmonized Union legislation and/or standardization requests in order to ensure that harmonized standards fully comply with the applicable legislation.*” This expressively “*includes the technical aspects of standards*” according to the Communication (page 3).

This interpretation has led the EC to seek greater influence over the interaction between standards and regulations, and to define the way in which hENs and their technical content are presented.

This has the potential to alter the longstanding cooperative approach to standards development that is a critical element of the NLF and the balance of our public-private partnership. This is why we welcome the EC intention to reinforce links between the relevant EC services in charge of harmonized legislation and the technical committees in charge of developing harmonized standards.

It is important to note that the European Court of Justice confirmed with its judgement in the James Elliott case, and the subsequent Case T-474/15 ‘Global Garden Products Italy SpA (GGP

Italy)', that hENs are of voluntary nature and only offer a presumption of conformity with the essential requirements of legislation. Therefore, any further effort to formalize the development process and the determination by the EC of the technical content of hENs, may be inconsistent with the voluntary nature of hENs and the separation of roles within our partnership, and may therefore be detrimental to the functioning of the NLF.

It is essential in that regard to distinguish between the EU law per se, for which the EC has a recognised role in its formation under the EU Treaties, and hENs which are tools which assist in the implementation of EU legislation.

The issues raised here link to broader ongoing dialogues between the EC and the ESOs about the nature of the public-private partnership within the NLF. We look forward to continuing those dialogues and to addressing these issues specifically.

Recognizing the role of the Member States and the European Parliament within the NLF, we note in particular the content of the report of the European Parliament that appears to take an opposite view to the EC on the nature of hENs². CEN and CENELEC will therefore also engage with the European Parliament, and with Member States, with regard to the functioning of the European standardization system in the context of the NLF and to the relevant issues in this paper.

² Report on European Standards – implementation of Regulation (EU) No 1025/2012 (2016/2274(INI)), 9.6.2017, A8-0213/2017: “4. Notes that standards are a voluntary, market-driven tool providing technical requirements and guidance the use of which facilitates compliance of goods and services with European legislation and supports European policies when they are developed in an accountable, transparent and inclusive way; stresses, however, that **standards cannot be seen as EU law**, since legislation and policies regarding the level of consumer, health, safety, environment and data protection and the level of social inclusion are determined by the legislator”