CEN – European Committee for Standardization
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# CEN and CENELEC position on the consequences of the judgment of the European Court of Justice on James Elliott Construction Limited v Irish Asphalt Limited[1]

## Executive Summary

On 2016-10-27 the European Court of Justice delivered its judgment following the request for a preliminary ruling from the Supreme Court of Ireland on the case James Elliott Construction Limited v Irish Asphalt Limited ("Elliott case"). The case concerns the interpretation of some provisions of the CEN harmonized standard ("hEN") EN 13242:2002 in the construction sector. It was initiated on 13 June 2008 by James Elliot Constructions, who brought an action for damages against Irish Asphalt for breach of a contract for the supply of aggregates for the construction of a building. According to James Elliott the aggregate provided by Irish Asphalt was not compliant with the specifications of the relevant harmonized EN for aggregates adopted in Ireland as I.S. EN 13242:2002.

CEN and CENELEC acknowledge that, while the Elliott case was delivered within the specific context of a preliminary ruling given by the Court of Justice of the European Union, as foreseen by article 267 TFEU, this Court's ruling raises the need to address some specific aspects of the functioning of the European standardization system.

CEN and CENELEC have already exchanged views with the relevant services of the European Commission regarding the practical implications of this ruling for the European standardization making process, including whether there is a need to further adjust the Commission's process of engagement in the development of hENs based on the interpretation of the Court's ruling while maintaining the efficiency of the European standardization system.

[1] http://curia.europa.eu/juris/document/document.jsf?text=&docid=184891&doclang=en

With this Position paper CEN and CENELEC would like to publicly share their position on this matter within an open and collaborative approach with DG GROW and other Commission services in order to identify suitable solutions, if necessary. This to ensure a smooth implementation of the outcome of this dialogue that will safeguard the common objective to keep and improve the efficiency and sustainability of the European standardization system in support of European Competitiveness and Growth.

In summary, in this paper CEN and CENELEC:

- welcome the conclusion of the Court, which recognises the private nature of CEN, hence of the three ESOs;
- welcome the European Court's recognition of the voluntary nature of hENs;
- call for greater coherence of the legislator with the principle of the voluntary use of harmonised standards in new legislative proposals in order to preserve the "New Approach" and the benefits it can bring to the European actors;
- believe that Regulation (EC) N°1025/2012 already provides the necessary mechanism of control on the standardization process by the European institutions and a rigorous implementation of the Commission's *Vademecum on European Standardization* already entitles the Commission to formally comply with its role of "supervisor" of the standardization making-process of hENs, as outlined by the Court;
- believe that there is no sufficient legal ground to justify the Commission's need for "an implementing act" for its decision for the citation of the references of the relevant hEN in the OJEU and, consequently, that hENs cannot be considered themselves as "implementing acts" within the meaning of Article 291 TFEU;
- propose the Commission to set-up a structured process of "technical interpretation of ENs" to ensure that the European Court is provided whenever needed with the correct interpretation of such hENs;
- believe that there is no ground to challenge their copyright and distribution policies of hENs;
- are ready to discuss with the Commission the terms of a possible arrangement regarding the translations of hENs in EU national languages;
- recall the importance of the international dimension of copyright and distribution aspects of hENs and the possible negative repercussion for the European companies;

## 1. The ESOs are private independent bodies

CEN and CENELEC welcome the conclusion of the Court, which recognises the private nature of CEN, hence of the three ESOs.

The judgement indeed made clear that *the development of harmonized standards is "entrusted to an organisation governed by private law*" (§43). Consequently, CEN and CENELEC are not to be considered as institutions, bodies, offices or agencies of the Union.

This also implies, among other considerations, that any right of the EU citizens to access hEN and any other of the ESO's (draft) documents according to Article 15 §3, TFEU or Regulation (EC) N°1049/2001 regarding public access to European Parliament, Council and Commission documents, cannot be invoked towards CEN and CENELEC.

## 2. The voluntary nature of hENs is confirmed

CEN and CENELEC welcome the Court's recognition, that hENs are not binding documents as the evidence of compliance with the essential requirements "*may be provided by means other than proof of compliance with harmonized standards"* (§ 42). Hence, hENs are voluntary technical publications.

CEN and CENELEC underline that this aspect is one of the founding principles of the success of the so called "New Approach", the New Legislative Framework and the European standardization system. This is also in line with the definition of "Standards" in Regulation (EC) N°1025/2012 art 2(1). The Court indeed recognises the principle that the concerned undertakings, when making a product or providing a service, can, when provided for in these European legislative acts, claim presumption of conformity to the relevant essential requirements by manufacturing or providing them in compliance with the relevant CEN or CENELEC hENs, or through other means.

## 3. The judgment calls the Commission for greater coherence in the European legislative initiatives to preserve the success of the "New Approach"

CEN and CENELEC believe that the fact that the European Court has now jurisdiction to rule on the legality of and to interpret hENs must not undermine the effectiveness of the concept of the "New Approach", which has been so successfully applied to those Directives and Regulations that refer to hENs during the last 30 years. It is important to recall that the success of the "New Approach" is based on the fact that, while compliance with an hEN gives presumption of conformity with the "essential requirements" laid down in the concerned Directive or Regulation, hENs are not binding documents, being of voluntary nature, and with which compliance is not compulsory, as confirmed by the EU legislator itself [2].

However, considering that some European legislative acts fail to ensure coherence with the principle of the voluntary use of hENs, this ruling brings CEN and CENELEC to strongly insist on the need for an increased awareness by the European and national institutions regarding the proper use of voluntary standardization within the legislative texts. CEN and CENELEC are leading some important initiatives on this matter, and they are also willing to further discuss with the Commission's Secretariat General and DG GROW the possibility to develop an EC-ESOs consultation mechanism, which will aim to support the Commission on relevant legislative initiatives involving standardization, and which will promote the voluntary use of standards.

[2] See Article 2(1) of Regulation (EC) N°1025/2012 of 25 October 2012 on European standardisation, OJ L 316/12.

## 4. hENs as measures, acts or forming part of EU law

CEN and CENELEC acknowledge the Court's reasoning that while the development of hENs is entrusted to the ESOs that are organizations governed by private law, *"it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements (…), initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the 'C' series of the Official Journal of the European Union*." (§ 43), and the statement that the evidence of compliance with the essential requirements, while may be provided by means other than proof of compliance with harmonized standards, *"cannot call into question the existence of the legal effects of a harmonized standard" (§ 42).*

CEN and CENELEC also understand that the above-cited § 43 of the Judgment stems from the involvement of the Commission in the standardization making-process, which was a key factor in triggering the qualification of hENs as forming part of EU law (§ 40). This statement of the Court might lead the Commission to examine further its involvement in the development process of hENs, including its approval of the publication of their reference in the Official Journal series C.

With this in mind, it must be recalled the existence of the *"Vademecum on European standardization in support of Union legislation and policies*" which, under article 7.2 Part 1, identifies three different ways to proceed with the compliance assessment, each of these ways involving various stakeholders of the standardization making-process.

CEN and CENELEC are of the firm opinion that a rigorous implementation of article 7.2 Part 1 already entitles the Commission to formally comply with its role of "supervisor" of the standardization making-process of hENs. Therefore, no additional process needs to be put in place to uphold this role of the Commission, but the entire system needs to remain lean and efficient in accordance with the policy initiatives already undertaken by the Commission, the ESOs and the relevant stakeholder towards this direction through the "Joint Initiative on Standardization".

## 5. hENs cannot be considered as an implementing act within the meaning of Article 291 TFEU

CEN and CENELEC are also aware that this judgment has raised some debates on other issues, both of institutional and practical nature, such as the appropriate legal basis for the decision by the European Commission of the publication of the reference of the hEN in the EU Official Journal.

Article 290 and Article 291 TFEU provide for the procedure for adopting respectively delegated and implementing acts. Indeed, the Commission itself acknowledged, in its *"Vademecum on*

*European standardization in support of Union legislation and policies"*[3], that a Standardization Request, which "initiates" the standardization process, is an implementing act, within the meaning of Article 291 TFEU.

However, the Court remains silent on the legal qualification of hENs, using only the general words of "*measures implementing or applying an act of EU law*" (§34) without referring explicitly to Article 291 TFEU or to another Treaty provision. For this reason CEN and CENELEC believe that there is no sufficient ground to consider that the Commission needs an "implementing act" for its decision of citation of the references of the hEN in the OJEU and, consequently, that hENs should *not* be considered themselves as "implementing acts" within the meaning of Article 291 TFEU.

Furthermore, if the main legal effect attached to the publication of the references of the hEN is to bring a means for providing a presumption of conformity to a product or a service with the essential requirements laid down in a harmonizing EU act, then we remind that the use of hENs is fundamentally voluntary and that there is no obligation to use this hEN to provide evidence of such conformity. Since the reference to a hEN is voluntary, it seems difficult to consider that the decision of the publication is the result of some implementing power conferred to the Commission because, within the meaning of Article 291 TFEU, '*uniform conditions for implementing legally binding Union acts are needed'*.

This conclusion is also supported by the argument that the EN is not an act "adopted" by the Commission itself but by "*an organization governed by private law*", as recognized by the Court (§43 of the Elliot judgment).

## 6. The strict implementation of the Commission's Vademecum on European standardization is sufficient

Despite the reluctance of the Court to clarify the debate on the qualification of and on the legal basis of the hENs, CEN and CENELEC are of the opinion that the Commission's *Vademecum on European standardization* already offers a set of specific provisions that, if fully applied by the Commission's officials, are largely sufficient to offer efficiency and consistency to the entire process, hence limiting the practical consequences of possible unclear situations.

CEN and CENELEC are, in any event, willing to provide their input in identifying the most suitable solutions that will allow the further improvement of the procedures which are already foreseen in the *Vademecum*. However, CEN and CENELEC draw the attention to the following aspects, which shall be taken into account in any future discussion:

(a) the need to ensure the European standardisation system is kept as lean and as efficient as possible. This especially considering the request to the ESOs for continuous efforts to find

[3] See Section 3.2 of document SWD(2015) 205 final of 27 October 2015.

new ways to reduce the timely delivery of hENs while keeping the system as inclusive as possible;

(b) the need to ensure continuous adaptation to the "state of the art" in the relevant technologies;

(c) developing further the role of the Commission in the standardization making-process itself would necessarily entail substantive resource increases in order to ensure that the responsible Commission services have the necessary technical expertise to follow properly the process and take informed decisions during the different steps of the development of the hENs;

## 7. The European Court has jurisdiction to interpret the hENs and to assess their validity

CEN and CENELEC note the Court's conclusion that *"a harmonized standard (…) the references to which have been published in the Official Journal of the European Union, forms part of EU law" (§40)*. Consequently, despite the fact that hENs are adopted by private bodies, CEN and CENELEC recognise that the European Court has jurisdiction for a preliminary ruling on hENs under Article 267 TFEU, with the objective *to "ensure the uniform application, throughout the European Union",* and to ensure that the interpretation of hENs *"does not vary according to the interpretation accorded to them by the various Member States*" (§34).

As for the implementation aspects of this part of the judgment, CEN and CENELEC would like to stress that European judicial control over the interpretation and assessment of the validity of hENs may raise concerns regarding the availability, selection and use of proper technical expertise by the European Court on each case at hand regarding the interpretation of hENs.

Admittedly, article 70, §1 of the Rules of procedure of the Court of Justice provides that: "*The Court may order that an expert's report be obtained*." However, some of the ~4.500 hENs may involve highly technical and technologically complex specifications, where only the availability of a pool of recognised knowledgeable experts can guarantee that the European Court is able to take fully informed positions and judgments for every case at hand.

Within this context, CEN and CENELEC propose to the Commission to set-up a structured process of "technical interpretation on ENs" that will be made available to the Commission, whereby the ESOs provide technical interpretation of hENs -through the expertise of their Technical Committees- in support to the EC where it is itself involved in a court case brought to the European Court of Justice involving hENs. This in view to ensure that the European Court is provided with the correct interpretation on the hENs, while allowing CEN and CENELEC to have visibility on the European Court cases involving their standards. Within this context the experience under and REACH Regulation regarding the mechanism of helpdesks and exchange of information on the interpretation of the REACH provisions may be explored.

## 8. The copyright and distribution policies of hENs shall not be challenged

All CEN and CENELEC adopted contents, including hENs, are implemented as national standards by each and every national member of CEN and CENELEC respectively; conflicting national standards are withdrawn. CEN and CENELEC have in place a system allowing national members to hold the copyright in all European standards they adopt nationally. Each member of CEN and CENELEC is responsible for making all nationally adopted ENs publicly available and, for this purpose, CEN and CENELEC licence them to distribute the national adoptions of ENs in their own countries.

By this system, the revenues from sales of standards and from other forms of copyright exploitation of the content of ENs support the ability of the national members to fund the European standardization system, hence to ensure its sustainability.

The exploitation of copyright on all ENs contents, including hENs contents, allows the CEN and CENELEC members to secure an autonomous and sustainable source of income, which ultimately guarantees the independency of the European standardization system from unilateral influences from any particular category of stakeholder, thereby guaranteeing transparent and inclusive standard development and decision making processes.

This aspect is also recognized in Recital (9) of Regulation (EC) N°1025/2012 which says that "*[i]n order to ensure the effectiveness of standards and standardisation as policy tools for the Union, it is necessary to have an effective and efficient standardisation system which provides a flexible and transparent platform for consensus building between all participants and which is financially viable*".

The copyright ownership of ENs -including hENs- contents has also been recognised by the Commission services at different occasions.

Considering the above, and the fact that the European Court is silent on the CEN (and CENELEC) copyright on hENs, CEN and CENELEC would like to stress that the recognition of the voluntary nature of hENs by the Court implicitly confirms CEN and CENELEC's intellectual property rights on the hENs.

In all events, and irrespective of any other consideration, it must be reminded that Article 17, §2 of the EU Charter of Fundamental Rights provides that: *"Intellectual property shall be protected."* The Charter is binding for all the institutions, including the European Commission.

Furthermore, CEN and CENELEC understand that the Commission is currently discussing the option of widening the availability of hENs to all EU-Member States' languages. If such an approach is ultimately confirmed CEN and CENELEC are ready to discuss with the Commission the terms of a possible arrangement that will take into account the following aspects:

- the publication of the reference in the OJEU shall not depend on the translation process;

- appropriate expertise for reliable translations need to be ensured and the translation cannot be left to the EC translation services;
- clarification/assurance on the copyright aspects of the translated texts will be needed and,
- the financial implication and the sustainability of the related investments from the EU budget; i.e. availability of the necessary budget for all the national members and straight implementing procedures.

CEN and CENELEC also stress that not all hENs are of the same interest for the national industry in each EU Member State. Indeed, there might be cases where in a given EU country there is no market need for the translation of a specific hEN. For the same reason, to find the appropriate expertise to translate the hEN in that country may be a challenge, as well as the liability derived from the validation of the translation. An alternative pragmatic approach that may be considered could be a mechanism through which national stakeholders "express their interest" in receiving the translation in their national language of a hEN. Hence, the translation will take place only when such interest is formally declared.

## 9. The successful relationship with international standardization must not be jeopardised

Finally, it is of paramount importance to understand that the European standardisation system works in a very close relationship with international standardization. Thanks to the successful cooperation between CEN and ISO and CENELEC and IEC, as of March 2017:

- out of 5266 CEN ENs that are identical to ISO standard, 650 are "harmonised" ENs;
- out of 5116 CENELEC ENs that are identical to IEC standards, 985 are "harmonised" ENs.

Once the content of the international standard at stake has been adopted as a hEN, the legal "regime" applicable to this hEN should be applied to its entirety, regardless of the origin of the content of that standard. Consequently, any future Court decision or Commission initiative on hENs may also affect ISO or IEC exploitation rights (Copyrights) over their above mentioned standards adopted as CEN or CENELEC hENs.

Considering that ISO and IEC are not bound by specific obligations with the EU Institutions, the challenge of their intellectual property in the EU may have a serious impact on the way the four organizations (ISO and IEC on one hand, CEN and CENELEC on the other hand) cooperate together and, therefore, on the ability to continue the successful cooperation under the respective Vienna and Frankfurt Agreements.

Ultimately, any decision or initiative that may affect ISO or IEC exploitation rights over their above mentioned standards that are identical to CEN or CENELEC hENs could have very serious negative impact on the ability for European companies (both multinational and SMEs) to compete and access the global market beyond Europe.

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## About CEN and CENELEC

**CEN (European Committee for Standardization)** and **CENELEC (European Committee for Electrotechnical Standardization)** are recognized by the European Union (EU) and by the European Free Trade Association (EFTA) as European Standardization Organizations responsible for developing and defining standards at European level. These standards set out specifications and procedures in relation to a wide range of products and services.

The members of CEN and CENELEC are the National Standards Bodies and National Electrotechnical Committees of 34 European countries including all of the EU Member States plus Iceland, Norway, Switzerland, Turkey, Serbia and the former Yugoslav Republic of Macedonia.

European Standards (ENs) are developed through a process of collaboration among technical experts nominated by business and industry, research institutes, consumer and environmental organizations and other societal stakeholders. Once adopted, these standards are implemented and published in all of the 34 countries covered by CEN and CENELEC.

CEN and CENELEC also work to promote the international harmonization of standards in the framework of technical cooperation agreements with ISO (International Organization for Standardization) and IEC (International Electrotechnical Commission).

For more information, please see: www.cencenelec.eu.

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