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The EP's 'European Standards' Resolution in the wake of James Elliott Construction: carving ever more holes in Pandora's Box?

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A mere three years ago, the voluntary and non-binding nature of technical standards was still deemed self-evident. Standards, it was believed, would never be seen as parts of EU law. In the meantime, however, the *James Elliott Construction* case (C-613/14) caused a serious crisis of faith in this regard. Holding that it has jurisdiction to interpret a European harmonised technical standard adopted by the European Committee for Standardisation ('CEN'), the EU Court of Justice ('CJEU') forewarned that it would play a more active role in the interpretation and legality assessment of harmonised technical standards. In the wake of that judgment, the European Parliament in July 2017 additionally also called for more control and accountability mechanisms to be put in place, albeit in ways diametrically opposed to what the CJEU had proposed just eight months earlier. This post will compare and contrast the Parliament's proposals with the CJEU's approach in *James Elliott Construction*, inviting the European Commission to reconcile both institutions' positions as part of its on-going modernisation initiatives in this field**.**

After *James Elliott Construction:* the European Parliament jumps in

It is by now well-known (for an analysis on this blog see here) that, according to the CJEU, harmonised European standards, though adopted by private standardisation bodies, are to be assimilated to acts of the EU institutions (*James Elliott Construction*, para 34), all the more since references to such standards have been published by the Commission in the 'C' series of the *Official Journal of the European Union* (*James Elliott Construction*, para 40). As a result, the Court confirmed that it has jurisdiction to give a preliminary ruling concerning the interpretation of such a harmonised standard (*James Elliott Construction*, para 47). The Court, however, left unsettled what implications this would have for the standardisation governance framework and when it would intervene precisely in the interpretation of such standards. It thus remains to be seen how far the Court will go in interfering with a standardisation governance framework in place for decades. In any case, it would seem that standardisation bodies are no longer unconditionally shielded from any judicial control at the EU level (as argued previously on this blog).

It is worthwhile highlighting that the *James Elliott Construction* judgment was been rendered in the midst of an ongoing review process of the current standardisation framework, spearheaded by the European Commission. That review process aims to modernise and improve the EU technical standards adoption processes.

Within the framework of that process, the European Parliament decided to jump in by preparing a critical Report on 'European Standards', which has subsequently been adopted as a Resolution (2016/2274(INI)) in its plenary sitting of 4 July 2017. Highlighting the accountability and legitimacy gaps underlying the EU's new approach towards standardisation, the Resolution offers no less than 85 recommendations to the Council and the Commission to improve the current standardisation framework.

The European Parliament, for instance, recognises that the standardization system has certain flaws from the points of view of

transparency (recommendation 45) and democratic oversight over the adoption of standards (recommendation 46). To tackle the issue of transparency of the standardisation mechanism, the European Parliament considers that a 'transparent and accessible appeal mechanisms' might 'build trust in the ESOs and in the standard-setting processes' (recommendation 69). Furthermore, the European Parliament invites the Commission to prepare a register including all existing European standards in all official EU languages, 'which would also include information on the ongoing standardisation work being done by ESOs, existing standardisation mandates, progress made, and decisions containing formal objections' (recommendation 80). To increase democratic oversight over the adoption of technical standards, the Parliament proposes to be informed more directly and pro-actively of steps the Commission takes in this regard and to be involved more directly in policymaking initiatives (recommendation 51). In doing so, the Parliament considers itself to be a well-suited actor to oversee the processes of standardisation within the European Union.

Blatantly ignoring *James Elliott Construction*?

Yet most remarkably, the European Parliament's Resolution establishes that, although not perfect, the very fundamentals of the current standardisation framework are not to be called into question. In doing so, it confirms **that '**the national delegation principle is fundamental for the European system' (recommendation 67) and that 'standards are valuable voluntary, market-driven tools (…) that (…) cannot be seen as EU law' (recommendation 4). No reference whatsoever to *James Elliott Construction* can be found throughout the Resolution.

In the absence of such reference, the Parliament's statement that technical standards are not to be seen as EU law, could be interpreted easily as an implicit rejection of (more) judicial control over standardisation processes. That is all the more the case since the Resolution has been drafted in the wake of the *James Elliott Construction* judgment. The fact that the Parliament has chosen not to refer to the case altogether, despite the uproar it has caused among policymakers and scholars, can be interpreted as a clear sign that it does not want to follow the path charted by the Court in this field.

Not surprisingly, CEN/CENELEC quickly welcomed the Parliament's Resolution as a confirmation of its own position that standards are not to be considered a part of EU law.

CJEU v. European Parliament: diametrically opposed approaches working towards the same goal

At first sight, the European Parliament's position could not be more conflicting with the Court's *James Elliott Construction* judgment. The Parliament seems to prefer a governance framework in which the Court has no role to play at all, as standards – including harmonised technical standards – are not to be seen as parts of EU law. The Court in *James Elliott Construction*, on the other hand, ruled that harmonised standards are to be seen as part of EU law and can therefore be interpreted in the context of a preliminary ruling.

On second thought, however, both the Court and the Parliament seem to concur in finding that the current standardisation governance framework can be improved. In fact, both institutions agree on the lack of openness, accessibility and transparency of the current standardization system. They also both essentially call for an improvement of the existing standardisation governance scheme. The solution proposed to tackle those difficulties is nevertheless fundamentally different: the Court would intervene *ex post* to clarify the meaning and assess the legality of a standard as part of EU law, whereas the Parliament calls for more *ex ante* control mechanisms being put in place and seems to ignore the possibility of *ex post* judicial control in this particular context. Despite those rather fundamental differences, both institutions seem willing and even eager to increase means to hold standardisation bodies to account.

Looking forward

The *ex ante* and *ex post* approaches towards increasing the accountability of standardisation bodies are not necessarily incompatible. The extent to which both parliamentary and judicial control mechanisms will be combined nevertheless remains to be seen and will depend both on how the Court continues its line of *James Elliott Construction* cases and how many parliamentary recommendations are inserted in the Commission's upgraded standardisation package.

For obvious reasons related to the predictability of adopted standards, the EU standardisation do not seem entirely happy about the prospects of more judicial control. In a position paper adopted in the wake of the judgment, CEN/CENELEC presented three principal concerns. Firstly, CEN/CENELEC fears that the jurisdiction of the Court of Justice to rule on the legality and the interpretation of harmonised European standards might lead to an overload of preliminary rulings before the Court (page 3). Secondly, it questions 'the availability, selection and use of proper technical expertise by' the Court to properly assess the interpretation and validity of harmonised European standards (page 6). According to CEN and CENELEC, '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' (page 6). Thirdly, CEN/CENELEC considers that the existing system has already at its disposal all the necessary instruments to allow the Commission to fulfil its role of custodian of the standardization making-process of the harmonised European standards. As a result, 'no additional process needs to be put in place to uphold this role of the Commission' (page 4).

Although not explicitly saying so, one could infer from this paper that CEN/CENELEC, although preferring to stick to the system currently in place, would be more inclined to accept some kind of obligation to report regularly to the European Parliament than the

continuous threat of technical standards being interpreted by a court of law. In the absence of more clarity surrounding the Court's judicial take on standards, however, it remains to be seen whether the threats voiced by CEN/CENELEC will materialise effectively. In the same way, it remains to be seen how many of the Parliament's recommendations will be taken into consideration by the Commission throughout its review. To the extent that those recommendations are not translated into a modified standardisation framework, the Court's interventions may very well be the only or best alternative to guarantee increased accountability of that framework. It will thus be crucial to reflect more fundamentally about the shape in which either *ex ante* or *ex post* accountability improvements to the standardisation framework will have to take shape.

What is clear at least from the foregoing analysis, is that some changes to the ways in which standardisation bodies have functioned for decades can no longer be avoided, whether it be at *ex post* or at *ex ante* stages of the standards' adoption process. In doing so, the Court and Parliament have proposed to carve different holes in the closed toolbox the EU standardisation governance framework used to be. It will fall upon EU policymakers, in consultation with all relevant stakeholders, to find a way to ensure that those holes carved are not big enough to open Pandora's Box.

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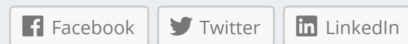

Written by Pieter Van Cleynenbreugel Posted in EU constitutional law, Free movement of goods, Institutional law, Internal Market
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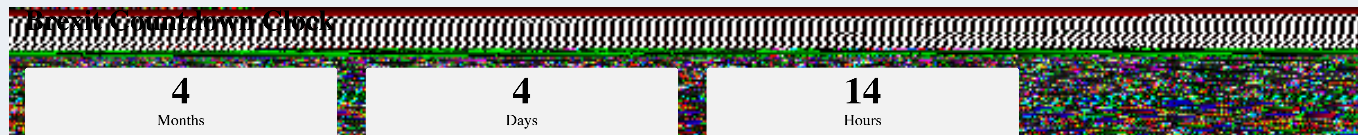

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