Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SANCHEZ-BORDONA
delivered on 28 January 2016[1]

Case C‑613/14

James Elliott Construction Limited
v
Irish Asphalt Limited

(Request for a preliminary ruling from the Supreme Court of Ireland)

(Article 267 TFEU — Jurisdiction of the Court — Definition of acts of the institutions — European Standard EN 13242:2002 published by the European Committee for Standardisation (CEN) pursuant to a mandate given by the Commission — Directive 89/106/EEC on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products — Transposition of European standard EN 13242:2002 into national law — Aggregate used in construction — Method and time of establishing whether a product meets that standard — CE marking — Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations — Scope — Whether a European standard may be relied upon in proceedings between private parties)

1 — Original language: Spanish.

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1. The Supreme Court of Ireland has made a reference for a preliminary ruling under Article 267 TFEU, asking the Court of Justice to interpret: (a) certain articles of Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products;[2] (b) the harmonised European standard EN 13242:2002 ('EN 13242:2002'), adopted by the European Committee for Standardisation ('CEN'); and (c) Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.[3]

2. The reference for a preliminary ruling was made in the course of proceedings for breach of contract between the building company James Elliott Construction Limited ('James Elliott') and the undertaking Irish Asphalt Limited ('Irish Asphalt'). The latter supplied the former with Clause 804 aggregate which allegedly did not satisfy the quality requirements laid down by EN 13242:2002, implemented in Ireland by the National Standards Authority of Ireland ('NSAI') in I.S. EN 13242:2002.

3. This case brings directly before the Court of Justice, for the first time, the issue of whether the Court has jurisdiction to give a preliminary ruling on the interpretation of a harmonised technical standard adopted by the CEN and subsequently converted into a national technical standard, in addition to various questions of interpretation concerning the subject-matter of the harmonised standard and the issue of whether that standard may be relied upon in proceedings between private parties.

I – Legal framework

A – *EU law*

4. Technical barriers impeding the free movement of construction products in the internal market were removed by means of the adoption of a directive applying the so-called 'new approach' to harmonisation, specifically, Directive 89/106, which stipulates the basic criteria required for such products. The Commission entrusted the CEN, as the European standardisation body, with drawing up the technical specifications for every one of those products. In the case of aggregates, the Commission sent the CEN mandate M/125, and in order to give effect to that mandate the CEN adopted EN 13242:2002 on aggregates for unbound and hydraulically bound materials for use in civil engineering work and road construction.[4]

5. Directive 89/106 was repealed and subsequently replaced by Regulation (EU) No 305/2011.[5] EN 13242:2002 was also subsequently amended in 2007[6] but those changes are not applicable to this case.

6. To enable the Commission to identify future technical barriers, Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations[7] established a procedure for the provision of information in the field of technical regulations making it possible to identify the areas requiring harmonisation by means of the

2 — OJ 1989 L 40, p. 12.

3 — OJ 1998 L 204, p. 37.

4 — The title of the Spanish version of EN 13242:2002, published by the Asociación Española de Normalización, is 'áridos para capas granulares y capas tratadas con conglomerados hidráulicos para uso en capas estructurales de firmes'. It should be noted that there are considerable differences between the Spanish translation and the English text.

5 — Regulation of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ 2011 L 88, p. 5).

6 — EN 13242:2002 + A1:2007.

7 — OJ 1983 L 109, p. 8.

so-called 'new approach' directives. Directive 83/189 was replaced, following various amendments, by Directive 98/34 which, as amended by Directive 98/48/EC, is applicable to the present case.[8] Recently, that procedure for the removal of technical barriers was amended and codified by Directive (EU) 2015/1535.[9]

1. Directive 89/106

7. With the aim of abolishing technical barriers in the construction products sector and promoting the free movement of such products in the internal market, Directive 89/106 effected a non-exhaustive harmonisation which followed the new approach set out in the Council Resolution of 7 May 1985.[10] In line with that approach, Article 3 of Directive 89/106 refers to the essential requirements applicable to works influencing the technical characteristics of products, which are set out in Annex I to the directive (mechanical resistance and stability; safety in the case of fire; hygiene, health and the environment; safety in use; protection against noise; energy economy and heat retention).

8. Article 4(2)(a) of Directive 89/106 provides that the principal method of proof that construction products satisfy the safety requirements is their compliance 'with the relevant national standards transposing the harmonised standards, references to which have been published in the Official Journal of the European Countries. Member States shall publish the references of these national standards'. That conformity is indicated by the CE mark.

9. According to Article 4(1) of Directive 89/106,

'…

For the purposes of this Directive, harmonised standards shall be the technical specifications adopted by CEN, Cenelec or both, on mandates given by the Commission in conformity with Directive 83/189/EEC, on the basis of an opinion given by the Committee referred to in Article 19 and in accordance with the general provisions concerning cooperation between the Commission and these two bodies signed on 13 November 1984.'

10. As can be seen, Directive 89/106 effects a minimum harmonisation of the essential requirements applicable to construction products and, as regards the technical specifications, it refers to the standards to be established subsequently by the European standards organisations. In order to ensure the quality of harmonised technical standards, Article 7 of that directive provides that those organisations must establish standards on the basis of mandates issued by the Commission in accordance with Directive 83/189. Harmonised technical standards are published by the Commission in the 'C' series of the Official Journal.[11]

8 — Directive of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 217, p. 18).

9 — Directive of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).

10 — OJ 1985 C 136, p. 1.

11 — Pursuant to Article 7 of Directive 89/106,
'1. In order to ensure the quality of harmonised standards for products, the standards shall be established by the European standards organizations on the basis of mandates given by the Commission in accordance with the procedure laid down in Directive 83/189/EEC and, after consulting the committee referred to in Article 19, in accordance with the general provisions concerning cooperation between the Commission and these bodies signed on 13 November 1984.
2. The resulting standards shall be expressed as far as practicable in product performance terms, having regard to the interpretative documents.
3. Once the standards have been established by the European standards organisations, the Commission shall publish the references of the standards in the "C" series of the Official Journal of the European Countries.'

Construction products meeting the harmonised technical standards enjoy a presumption of conformity with Directive 89/106, Article 6(1) of which guarantees their freedom of movement in the territory of all the Member States, unless the safeguard clause in Article 21 is applicable.[12]

2. EN 13242:2002

11. In accordance with Article 7 of Directive 89/106, on 6 July 1998 the Commission adopted Mandate M/125, given to the CEN for the purpose of preparing a technical standard concerning a type of construction material, namely aggregates. In compliance with that Mandate, the CEN adopted EN 13242:2002.

12. Mandate M/125[13] includes a requirement that the CEN should adopt technical standards on aggregates used in construction, to ensure that such products are fit for their intended use, as that term is defined in Directive 89/106.[14]

13. Chapter II, clauses 8 and 9,[15] and Chapter III, clause 2,[16] of the Mandate contain guidelines on test methods for establishing compliance with the technical specifications of the harmonised standard. In accordance with Chapter III, clause 1, 'harmonised standards shall be prepared to allow those products listed in Annexes 1 and 2 to be able to demonstrate the satisfaction of the essential requirements. One of the purposes of the Directive being to remove barriers to trade, the standards deriving from it will therefore be expressed, as far as practicable in product performance terms (art. 7.2 of Directive 89/106), having regard to the Interpretative Documents.'

12 — The safeguard clause in Article 21(1) of Directive 89/106 expressly provides that '[w]here a Member State ascertains that a product declared to be in conformity with the terms of this Directive does not comply with Articles 2 and 3, it shall take all appropriate measures to withdraw those products from the market, prohibit the placing thereof on the market or restrict free movement thereof.'

13 — M/125: Mandate to CEN/CENELEC concerning the execution of standardisation work for harmonized standards on aggregates. The full text of the Mandate is not available in Spanish and there are only versions in English, French and German on the Commission's website relating to standardisation mandates, at the following address:
http://ec.europa.eu/growth/tools-databases/mandates/index.cfm?fuseaction=search.detail&id= 249. Mandate M/125 was amended on 29 June 2010, M/125 rev.1 EN.

14 — According to the preamble to Mandate M/l25, '[t]his mandate is intended to lay down provisions for the development and the quality of harmonised European standards in order, on the one hand, to make "approximation" of national laws, regulations and administrative provisions (hereafter referred to as "regulations") possible and, on the other hand, to allow products conforming to them to be presumed to be fit for their intended use, as defined in the Directive.'

15 — Chapter II, clauses 8 and 9, of the Mandate states:
'8. CEN/TCs must give a technical answer for the determination of the characteristics of the mandate taking into account the conditions stated below; test methods suggested must be directly related to the relevant required characteristic and must not make reference to determination methods for characteristics not required by the mandate. Durability requirements should be dealt with in the framework provided by the state of the art at present.
9. Reference to test/calculation methods must be in accordance with the harmonisation aimed at. In general, only one method should be referred to for the determination of each characteristic, for a given product or family of products.
If, however, for a product or family of products because of justifiable reasons, more than one method is to be referred to for the determination of the same characteristic, the situation must be justified. In this case all referenced methods should be linked by the conjunction "or" and an indication of application should be given.
In any other case, two or more test/calculation methods for the determination of one characteristic can be accepted only if a correlation between them exists or can be developed. The relevant harmonised product standard must then select one of them as the method of reference.
Testing and/or calculation methods shall have, whenever possible, a horizontal character covering the widest possible range of products.'

16 — Chapter III, clause 2, provides, *inter alia*, as follows:
'The harmonised standard will contain:
…
The methods (calculation, test methods or others) or a reference to a standard containing the methods for the determination of such characteristics.'

14. In order to implement Mandate M/125, the CEN adopted the standard EN 13242:2002, clause 2 of which, concerning 'Normative requirements', provides for reference to other CEN technical standards[17] and clause 6 of which, entitled 'Chemical requirements' provides as follows:

'6.1 General

The necessity for testing and declaring all properties in this clause shall be limited according to the particular application or end use or origin of the aggregate. When required, the tests specified in clause 6 shall be carried out to determine appropriate chemical properties.

…

NOTE 2 – When a property is not required, a "No requirement" category can be used.

NOTE 3 – Guidance on selection of appropriate categories for specific applications can be found in national provisions of the place of use of the aggregate.

…

6.3 Total sulfur

When required, the total sulfur content of the aggregate, determined in accordance with EN 1744-1:1998, clause 11, shall be declared in accordance with the relevant category specified in Table 13.Table 13Categories for maximum values of total sulfur content

Aggregate	**Total sulfur content** %	**Category** S
Aggregates other than air-cooled blastfurnace slag	< 1 > 1	S1 $S_{Declared}$
	No requirement	S_{NR}
Air-cooled blastfurnace slag	< 2 > 2	S2 $S_{Declared}$
	No requirement	S_{NR}

…'

15. Clause ZA.1 of Annex ZA to EN 13242:2002 states that the standard was prepared under a mandate given to the CEN by the Commission under Directive 89/106 and that aggregates complying with it enjoy a presumption of fitness for use.[18]

17 — Specifically: 'This European standard incorporates by dated or undated reference, provisions from other publications. These normative references are cited at the appropriate places in the text and the publications are listed hereafter.' The standards concerned are, in particular, EN 1097-2:1998 — Tests for mechanical and physical properties of aggregates. Part 2: Methods for the determination of the resistance to fragmentation, EN 1367-2 — Tests for thermal and weathering properties of aggregates. Part 2: Magnesium sulphate test, and EN 1744-1:1998 — Tests for chemical properties of aggregates. Part 1: Chemical analysis.

18 — Clause ZA.1 of Annex ZA to EN 13242:2002 states:
'This European Standard and this annex have been prepared under a Mandate … given to CEN by the European Commission and the European Free Trade Association.
The clauses of this European Standard shown in this annex meet the requirements of the mandate given under the EU Construction Products Directive (89/106/EEC).
Compliance with these clauses confers a presumption of fitness of the aggregates covered by this European Standard for their intended use indicated herein; reference shall be made to the information accompanying the CE marking.'

16. The references to the standard adopted by CEN were published in the C series of the Official Journal on 27 March 2003.[19]

3. Directive 98/34

17. Directive 98/34 consolidated and replaced the contents of Directive 83/189 and the amendments thereto. Essentially, Directive 98/34 creates a procedure for preventing the emergence of technical barriers in the internal market, supplementing the harmonisation of laws. It establishes one information system for technical standards drawn up by the national standardisation bodies and another for the technical regulations adopted by the national authorities of the Member States.

18. Using somewhat unclear language, Article 1 of Directive 98/34 distinguishes between ‘standard’ and ‘technical regulation’,[20] on the basis of the voluntary nature of technical standards as opposed to the mandatory nature of technical regulations. The source of this difference in nature is that technical standards are adopted by private bodies, namely, national and European standardisation bodies, whereas technical regulations are legislative acts of national public authorities. However, there is extensive interaction between technical regulations and technical standards in the context of EU law, particularly since the use from 1985 of the new approach in the field of harmonisation of laws to enable the internal market to move ahead.

19. Some light was shed by the separation of the legislation governing the procedures for the provision of information on technical standards and technical regulations. Regulation (EU) No 1025/2012[21] now lays down the provisions on European standardisation, while Directive 2015/1535 governs the procedure for the provision of information on technical regulations.

19 — OJ 2003 C 75, p. 8.

20 — Directive 98/34, as amended by Directive 94/48, provides the following definitions in Article 1:

‘…

(3) “technical specification”, a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

…

(4) “other requirements”, a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

…

(6) “standard”, a technical specification approved by a recognised standardisation body for repeated or continuous application, with which compliance is not compulsory and which is one of the following:

international standard: a standard adopted by an international standardisation organisation and made available to the public,

European standard: a standard adopted by a European standardisation body and made available to the public,

national standard: a standard adopted by a national standardisation body and made available to the public;

…

(11) “technical regulation”, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

…’

21 — Regulation of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12).

20. The procedure for the provision of information on technical regulations is basically governed by Articles 8 and 9 of Directive 98/34. Article 8 requires the Member States to notify their draft technical regulations to the Commission.[22] Article 9 fixes a period of three months during which the State notifying the draft regulation may not definitively adopt that regulation. That period is increased when one or more States issues a detailed opinion indicating that the draft technical regulation notified may create obstacles to the free movement of goods, or when the Commission decides to initiate the preparation of a harmonising provision.

B – *Irish law*

21. As a member of the CEN, the NSAI included verbatim the wording of EN 13242:2002 in the Irish technical standard I.S. EN 13242:2002.

22. Section 10 of the Sale of Goods and Supply of Services Act 1980 ('the 1980 Act') amended Section 14 of the Sale of Goods Act 1893, giving it the following new wording:

'(1) Subject to the provisions of this Act and of any statute in that behalf, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

2. Where the seller sells goods in the course of a business there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition:

(a) as regards defects specifically drawn to the buyer's attention before the contract is made, or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to have revealed.

3. Goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances, and any reference in this Act to unmerchantable goods shall be construed accordingly.

22 — Article 8 of Directive 98/34 reads as follows:
'1. Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

…

The Commission shall immediately notify the other Member States of the draft and all documents which have been forwarded to it; it may also refer this draft, for an opinion, to the Committee referred to in Article 5 and, where appropriate, to the committee responsible for the field in question.

…

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation.
3. Member States shall communicate the definitive text of a technical regulation to the Commission without delay.

…'

4. Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgement.'

23. Under Section 55 of the 1980 Act, if a purchaser contracts as a consumer the terms implied by Section 14 may not be excluded. If, however, as here, the purchaser is not a consumer, then the provisions of Section 14 may be amended, modified or wholly excluded by agreement of the parties.

24. In the present case, the contracting parties did not amend, modify or exclude the terms implied by Section 14(2) and (4) of the 1980 Act, and therefore the High Court held that those terms formed part of the contract.

II – Facts and proceedings before the national court

25. James Elliott sued Irish Asphalt for breach of a contract for the supply of aggregates, known in Ireland as Clause 804, a product originally used in road building and, as high-quality infill, in the construction of buildings. James Elliott had used that aggregate for the construction of the Youth Facility at Ballymun in the city of Dublín. Irish Asphalt supplied aggregate to James Elliott between 27 August and 17 December 2004, at a total price of EUR 25 000 plus VAT.

26. As soon as the building was finished, cracks began to appear in its floors and walls, to such an extent that it could not be used. James Elliott accepted responsibility and carried out remedial work at a total cost of at least EUR 1 550 000. Taking the view that the damage had been caused by a phenomenon known as 'pyrite heave', caused, in its opinion, by the presence of pyrite in the Clause 804 aggregate supplied by Irish Asphalt, James Elliot unsuccessfully sought compensation from that company for breach of contract.

27. On 13 June 2008, James Elliot brought an action for damages against Irish Asphalt. In its judgment of 25 May 2011, the High Court found that the damage was caused by the pyrite heave due to the presence of framboidal pyrite in the aggregate supplied by Irish Asphalt.

28. The High Court held that the contract between the two companies required the supply of Clause 804 aggregate in accordance with the specifications of the Irish standard for aggregates (I.S. EN 13242:2002), which applied EN 13242:2002. After examining the evidence relating to a number of tests on aggregate removed from the building in 2009, five years after it had been supplied and used in the construction of the building, the High Court concluded that the material did not meet the standard in a number of respects, particularly with regard to its sulphur content. The High Court held that Irish Asphalt was in breach of its contract with James Elliott, which, under Section 14(2) of the 1980 Act, required it to supply aggregate of merchantable quality and fit for the purpose made known to the supplier.

29. Irish Asphalt appealed to the Supreme Court against the judgment of the High Court, but during the appeal proceedings it admitted that the damage to the building had been caused by pyrite heave. On 2 December 2014, the Supreme Court gave judgment on the issues of domestic law, dismissing the appeal and holding that the findings of the High Court relating to the sulfur content were supported by evidence and that the High Court's findings of fact were sustainable and should not be overturned.

30. However, the Supreme Court did not rule on the aspects of the case relating to the application of EU law, for it was uncertain about the legal nature of European technical standards and whether they could be relied on in contractual relationships between private parties, about the interpretation of EN 13242:2002, and about the obligation of prior notification laid down in the Irish provisions on the sale of goods. The Supreme Court therefore decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘1. (a) Where the terms of a private contract oblige a party to supply a product produced in accordance with a national standard, itself adopted in implementation of a European standard made pursuant to a mandate issued by the European Commission under the provisions of the Construction Products Directive (89/106/EEC) of 21 December 1988, is the interpretation of the said Standard a matter upon which a preliminary ruling may be sought from the Court of Justice of the European Union pursuant to Article 267 TFEU?

(b) If the answer to question 1(a) is yes, does EN 13242:2002 require that compliance, or breach of the said standard, be established only by evidence of testing in accordance with the unmandated standards adopted by CEN and referred to in EN 13242:2002, and where such tests are carried out at the time of production and/or supply; or may breach of the Standard (and accordingly breach of contract) be established by evidence of other tests conducted later, if the results of such tests are logically probative of breach of the Standard?

2. When hearing a private-law claim for breach of contract in respect of a product manufactured pursuant to a European standard issued pursuant to a mandate from the European Commission under the Construction Products Directive, is a national court obliged to disapply the provisions of national law implying terms as to merchantability and fitness for purpose or quality, on the grounds that either the statutory terms, or their application, create standards or impose technical specifications or requirements which have not been notified in accordance with the provisions of the Technical Standards Directive (98/34/EC) of 22 June 1998?

3. Is a national court hearing a claim for breach of a private contract alleged to arise from a breach of a term as to merchantability or fitness for use (implied by statute in a contract between the parties and not modified or disapplied by them) in respect of a product produced in accordance with EN 13242:2002, obliged to presume that the product is of merchantable quality and fit for its purpose, and if so, may such a presumption only be rebutted by proof of non-compliance with EN 13242:2002 by tests carried out in accordance with the tests and protocols referred to in EN 13242:2002 and carried out at the time of supply of the product?

4. If the answers to questions 1(a) and 3 are both yes, was a limit for total sulphur content of aggregates prescribed by, or under, EN 13242:2002 so that compliance with such a limit was required, inter alia, to give rise to any presumption of merchantability or fitness for use?

5. If the answers to [questions] 1(a) and 3 are both yes, is proof that the product bore the “CE” marking necessary in order to rely on the presumption created by Annex ZA to EN 13242:2002 and/or Article 4 of the Construction Products Directive (89/106/EEC)?’

31. The request for a preliminary ruling was received at the Court Registry on 30 December 2014, and during the written procedure observations were submitted by James Elliott, Irish Asphalt, the Irish Government and the Commission.

32. At the hearing, held on 19 November 2015, oral argument was presented by the representatives of James Elliott, Irish Asphalt, Ireland and the Commission.

III – Analysis of the questions referred for a preliminary ruling

33. To my mind, the questions referred for a preliminary ruling by the Supreme Court in this case are clearly admissible. In fact, only Ireland has argued that the dispute between James Elliot and Irish Asphalt concerns a purely internal commercial situation or relationship (breach of a contract between two Irish undertakings), restricted to Ireland, the consequences of which must be decided under Irish law, from which it follows that there are no applicable EU legal provisions whose validity or interpretation is open to doubt.

34. The Irish Government's argument cannot be accepted for I believe, like the Supreme Court, that the outcome of the case depends on interpretation of EN 13242:2002, adopted pursuant to Directives 89/106 and 98/34 and implemented by the Irish technical standard I.S. EN 13242:2002. The Supreme Court has jurisdiction to adjudicate on whether there has been a breach of contract, but its finding may be conditional upon the interpretation of EU law, a situation in which the Court of Justice considers that it has jurisdiction to give a preliminary ruling on questions submitted to it by national courts.[23]

A – *Question 1(a): whether the Court of Justice has jurisdiction to give a preliminary ruling on the interpretation of harmonised technical standards*

35. The Supreme Court asks whether the Court of Justice has jurisdiction under Article 267 TFEU to give a preliminary ruling on the interpretation of a harmonised technical standard. The admissibility of the reference for a preliminary ruling is beyond doubt, as are its relevance and importance, particularly because, to date, the Court has not had occasion to rule directly on this issue.

36. The reply to the question calls for consideration of whether harmonised technical standards, adopted by the CEN under a mandate given by the Commission and published in the 'C' series of the Official Journal, may be classified as 'acts of the institutions, bodies, offices or agencies of the Union' for the purposes of referring questions of validity and interpretation for a preliminary ruling.

37. In their observations, both the Commission and Irish Asphalt assert that the Court has already answered that question in *Latchways and Euro safe Solutions*. I believe, however, that in that judgment the Court merely held that the provisions of EN 795 relating to Class A 1 anchor devices were not covered by Directive 89/686, because they were not harmonised technical specifications on account of the fact that they were not accepted by the Commission and in the publication in the *Official Journal of the European Union* they were expressly excluded. From that premiss, I conclude that those provisions did not form part of EU law and that it was not, therefore, within the jurisdiction of the Court of Justice to interpret them.[24]

38. In my opinion, it cannot be inferred, *a contrario*, from the judgment in *Latchways and Eurosafe Solutions* that the Court would have declared that it had jurisdiction if EN 795 had been a harmonised technical standard, in accordance with Directive 89/686.[25] Furthermore, on that occasion, the Court concluded that it could not rule on the legal nature of harmonised standards,[26] an analysis I believe essential for the purpose of assessing whether such standards may be the subject of a request for a preliminary ruling.

23 — See, for example, the judgment in *Leur-Bloem*, C-28/95, EU:C:1997:369, paragraph 27.

24 — Judgment in *Latchways and Eurosafe Solutions*, C-185/08, EU:C:2010:619, paragraph 36.

25 — **Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment (OJ 1989 L 399, p. 18).**

26 — Judgment in *Latchways and Eurosafe Solutions*, C-185/08, EU:C:2010:619, paragraph 35.

39. The Supreme Court takes the view that its first question should be answered in the negative, because a national standard implementing a European standard drawn up by the CEN under a mandate granted by the Commission in accordance with Directive 89/106 is not an act of an institution, body, office or agency of the Union. James Elliott and Ireland are of the same opinion, and they essentially put forward two reasons: the private-law nature of the CEN, on the one hand, and the non-binding nature of harmonised technical standards, on the other. The CEN is a private, not-for-profit association governed by Belgian law, consisting of the standardisation bodies of 33 European countries, all of which are private entities too, which means that it cannot be classified as an institution, body, office or agency of the Union.[27] Its autonomy, in Ireland's view, is not affected by the fact that the CEN draws up technical standards on behalf of the Commission, for it is free to accept or refuse a mandate.[28] Moreover, compliance with the harmonised technical standards drawn up by the CEN is always voluntary and, according to James Elliott, the logic of the harmonisation of laws by means of new approach directives would be frustrated if their application were to be made the object of judicial proceedings.

40. I do not find these arguments persuasive. I propose to answer this question in the affirmative, to the effect that the Court must declare that it has jurisdiction to give a preliminary ruling on questions of interpretation concerning harmonised technical standards, like those in the present case. Those standards should be regarded as 'acts of the institutions, bodies, offices or agencies of the Union' for the purposes of Article 267 TFEU.

41. My opinion is based on the three arguments which I shall develop below: (a) the use of the new approach directives may not compromise the Court's jurisdiction to give preliminary rulings; (b) the Commission exercises significant control over the procedure for the drafting of harmonised technical standards by the CEN and (c) the operation of the CEN as the standardisation body of the European Union is subject to the actions of the latter.

1. The use of the new approach directives may not compromise the Court's jurisdiction to give preliminary rulings

42. Directive 89/106, which does not effect a detailed, exhaustive harmonisation of the technical specifications for construction products, including aggregates, is directly connected to EN 13242:2002. The directive lays down the minimum requirements applicable to building materials in order to ensure that works are safe and it entrusts to the European standards organisations the subsequent fixing of standards that include the technical specifications needed to ensure that those materials comply with the basic requirements of the directive. The application of the harmonised standards is voluntary and producers are always free to apply other technical specifications in order to meet those requirements. Products manufactured in compliance with the harmonised standards are, however, presumed to satisfy the essential requirements of Directive 89/106.[29]

27 — Pursuant to Article 1 of CEN's statutes, 'Il est constitué une association internationale sans but lucratif (AISBL), avec le numéro d'entreprise 0415.455.651, régie par les lois coordonnées relatives aux associations sans but lucratif, aux associations internationales sans but lucratif et aux fondations.' The text of CEN's statutes, approved by the extraordinary general assembly of 22 July 2013, is available in French, English and German at the following address: ftp://ftp.cencenelec.eu/CEN/AboutUs/Statutes/Statuts_CEN_FR_20140213.pdf.

28 — As provided for in Article 10(3) of Regulation No 1025/2012.

29 — For more details, see, European Commission, *Guide to the implementation of directives based on the new approach and the global approach*, 2000.

43. The Union legislature uses the method of making a reference to the technical standards instrument, common in various national laws and in international law, which the European Union has promoted in order to facilitate the completion of the internal market since 1985.[30] In accordance with that method, Directive 89/106 includes only the essential elements of the harmonised legislation applicable to construction products, the standards adopted by the CEN being a necessary supplement in order to enable the free movement of those products in the internal market.

44. If the Court of Justice has, as is obvious, jurisdiction to give a preliminary ruling on the interpretation of Directive 89/106,[31] it must also have an identical right to answer questions referred for a preliminary ruling in relation to the harmonised technical standards supplementing that directive. Otherwise, the harmonisation of construction products would be rendered ineffective, for the harmonised technical standards (in this case, EN 13242:2002) could be given diverging interpretations in the various Member States.

45. Use of the 'new approach' in harmonisation directives may not give rise to restriction of the Court's jurisdiction to interpret, in preliminary-ruling proceedings, all the harmonised provisions (that is to say, the directive and the harmonised technical standards supplementing it) applicable to the production and marketing of a particular product. If, in the case of a directive providing for complete harmonisation, the jurisdiction to give preliminary rulings extends to all harmonised provisions relating to the product at issue, the same solution must be applied to the new approach directives, the use of which may not prejudice the jurisdiction of the Court.

2. The Commission exercises significant control over the procedure for the drafting of harmonised technical standards by the CEN

46. The legislative technique of making a reference to European standards is regulated by the EU legislature both generally, and specifically too in every directive using that technique. The general rules were originally laid down in Directive 83/189 and subsequently in Directive 98/34, recently replaced by Directive 2015/1535. As regards construction products, the specific rules were included in Directive 89/106, subsequently replaced by Regulation No 305/2011. Consequently, it is not a case of purely private technical standardisation, carried out on the initiative of the CEN and unconnected to EU law. On the contrary, control is exercised by the Commission over the procedure for drawing up the harmonised standards for which the CEN is responsible, which is given concrete expression in several ways, as I shall explain below.

47. In the first place, a harmonised technical standard is always drawn up pursuant to a mandate given by the Commission to the CEN. EN 13242:2002 originated from Mandate M/125.

48. Article 4(2) and Article 7(1) of Directive 89/106 provide that harmonised standards are the technical specifications adopted by the CEN, the European Committee for Electrotechnical Standardisation ('Cenelec') or both, 'on mandates given by the Commission in conformity with Directive 83/189 on the basis of an opinion given by the Committee referred to in Article 19 and in accordance with the general provisions concerning cooperation between the Commission and these two bodies signed on 13 November 1984.' Accordingly, without a mandate there is no CEN harmonised standard and such a mandate includes the basic criteria that have to govern the drawing up of a harmonised technical standard by the CEN.

30 — See, in that respect, Álvarez García, V., *Industria*, Iustel, Madrid, 2010; Aubry, H., Brunet, A., and Peraldi Leneuf, F., *La normalisation en France et dans l'Union européenne*, Presses universitaires d'Aix-Marseille, 2012; Scheppel, H., *The Constitution of Private Governance: Products Standards in the Regulation of Integrating Markets*, Hart Publishing, Oxford, 2005.

31 — See, *inter alia*, judgments in *Commission* v *Portugal*, C-432/03, EU:C:2005:669; *Commission* v *Belgium*, C-227/06, EU:C:2008:160; *Ascafor and Asidac*, C-484/10, EU:C:2012:113; and *Elenca*, C-385/10, EU:C:2012:634.

49. Without Mandate M/125, the CEN would not have adopted EN 13242:2002. Although the CEN also prepares European technical standards on its own initiative, these will not be harmonised standards connected to a directive and the products meeting such standards will enjoy neither the presumption of compliance with the directive nor freedom of movement. [32] That was the case, for example, of EN 795, at issue in *Latchways and Eurosafe Solutions*, [33] whose lack of connection to EU law led the Court to hold that it had no jurisdiction to interpret it in preliminary-ruling proceedings.

50. In the second place, the reference to harmonised technical standards must be published in the *Official Journal of the European Union*. That is provided for in Article 7(3) of Directive 89/106 as a requirement for ensuring that such standards have the main effect attributed to them by the directive, namely the presumption that conformity with a standard implies compliance with the directive itself and guarantees freedom of movement for the product within the European Union.

51. Admittedly, what appears in the *Official Journal of the European Union* is only the reference to the harmonised standard, and not its full contents. Harmonised technical standards adopted by the CEN are drafted in English, French and German, it being the national standardisation bodies belonging to the CEN that draw up the national versions and sell them to interested parties. Those national bodies hold the intellectual property rights in the respective national versions of harmonised technical standards and charge for their distribution, a fact which has led to varying case-law in certain Member States on the necessity of official publication of technical national standards when legislatures make a reference to those standards. [34] For the purposes of this reference for a preliminary ruling, I do not consider it essential to examine in more detail the important question of whether the complete official publication of harmonised technical standards is necessary in order for those standards to have legal effect [35] and for the principle of the publication of legislation to be observed. That requirement would have a very significant impact on the European standardisation system, and in particular on the sale of harmonised technical standards by national standardisation bodies.

32 — According to data supplied by the Commission, the percentage of harmonised standards among the European technical standards adopted by CEN, Cenelec and the European Telecommunications Standards Institute ('ETSI') increased from 3.55% in 1989 to 20% in 2009 (SEC(2011) 671 final, p. 6).

33 — Judgment in C-185/08, EU:C:2010:619.

34 — The German Bundesgerichtshof (BGH, 30 June 1983, GRUG 1984, pp. 117 to 119) and the Bundesverfassungsgericht (BVerfGE, 29 July 1998, ZUM 1998, p. 926) held that technical standards adopted by the German standards institute (Deutsches Institut für Normung, 'DIN') were not protected by intellectual property rights and should be published. The Netherlands Hoge Raad (Hoge Raad, 22 June 2012, LNJ:BW0393) held in *Knooble* that technical standards adopted by the Netherlands standards institute (Nederlands Normalisatie Instituut, 'NEN') were protected by intellectual property rights and it was not compulsory to publish them officially. See the analysis of Van Gestel, R., and Micklitz, H.-W., 'European integration through standardization: How judicial review is breaking down the club house of private standardization bodies', *Common Market Law Review*, 2013, No 1, pp. 145 to 182.

35 — In the recent judgment in *Balázs*, C-251/14, EU:C:2015:687, at paragraph 54, the Court of Justice interpreted Article 1(6) of Directive 98/34 as meaning that it does not require a national standard within the meaning of that provision to be made available in the official language of the Member State concerned. In that case, the national standard was the Hungarian standard MSZ EN 590:2009 on the specification of the flash point of diesel fuel, which transposed European standard EN 590:2009 and was made compulsory in Hungarian law under Paragraph 110(13) of the Law on excise duties. The national standard MSZ EN 590:2009 was not available in Hungarian but only in English.

52. The obligation to publish references to harmonised standards in the Official Journal means that the Commission must review their contents in order to ascertain whether they accord with the mandate given to the CEN and with the directive. Article 5 of Directive 89/106 laid down that obligation in rather more confused terms, but Article 10(6) of Regulation No 1025/2012, and Article 17(5) of Regulation No 305/2011, now applicable to construction products, left no room for doubt. The Commission's decision on publication produces legal effects and is, therefore, an act against which an action for annulment may be brought.[36]

53. In the third place, the Commission and the Member States have the option, under Article 5 of Directive 89/106, of putting forward objections to the standard drawn up by CEN if they believe that it does not satisfy the requirements of the directive or the mandate given by the Commission. An objection can prevent the publication of the harmonised standard in the *Official Journal of the European Union* or lead to the subsequent withdrawal of that publication where it is made *a posteriori*. In those cases, the CEN technical standard does not give rise to the presumption of a product's conformity with the directive.

54. In view of the differences between the new approach directives on the procedure for lodging objections to harmonised technical standards, Article 11 of Regulation No 1025/2012 laid down uniform rules in that regard.[37] The Commission is now required to carry out a check *ex ante* a standard is published. Formal objections may be lodged by the Member States and the European Parliament but not by the Commission, which reviews a harmonised technical standard as an essential step to publication of the reference to that standard. Like those relating to the publication of harmonised technical standards, decisions adopted by the Commission concerning formal objections to harmonised technical standards raised by the Member States or the European Parliament are legal acts against which an action for annulment may be brought.[38]

36 — Article 10(6) of Regulation No 1025/2012 provides that '[w]here a harmonised standard satisfies the requirements which it aims to cover and which are set out in the corresponding Union harmonisation legislation, the Commission shall publish a reference of such harmonised standard without delay in the Official Journal of the European Union or by other means in accordance with the conditions laid down in the corresponding act of Union harmonisation legislation'. To the same effect, Article 17(5) of Regulation No 305/2011 clearly states that '[t]he Commission shall assess the conformity of harmonised standards established by the European standardisation bodies with the relevant mandates. The Commission shall publish in the Official Journal of the European Union the list of references of harmonised standards which are in conformity with the relevant mandates'. See Schepel, H., 'The new approach to the New Approach: The juridification of harmonized standards in EU law', *Maastricht Journal of European and Comparative Law*, 2013, No 4, p. 531.

37 — Article 11 of Regulation No 1025/2012 provides, in relation to formal objections to harmonised standards:
'1.
When a Member State or the European Parliament considers that a harmonised standard does not entirely satisfy the requirements which it aims to cover and which are set out in the relevant Union harmonisation legislation, it shall inform the Commission thereof with a detailed explanation and the Commission shall, after consulting the committee set up by the corresponding Union harmonisation legislation, if it exists, or after other forms of consultation of sectoral experts, decide:
(a) to publish, not to publish or to publish with restriction the references to the harmonised standard concerned in the Official Journal of the European Union;
(b) to maintain, to maintain with restriction or to withdraw the references to the harmonised standard concerned in or from the Official Journal of the European Union.
2. The Commission shall publish information on its website on the harmonised standards that have been subject to the decision referred to in paragraph 1.
3. The Commission shall inform the European standardisation organisation concerned of the decision referred to in paragraph 1 and, if necessary, request the revision of the harmonised standards concerned.

…'

38 — See the order in *Schmoldt and Others* v *Commission*, C-342/04 P, EU:C:2005:562, which held that the applicants in that case did not have legal standing to seek the annulment of Commission Decision 2003/312/EC of 9 April 2003 on the publication of the reference of standards relating to thermal insulation products, geotextiles, fixed fire-fighting equipment and gypsum blocks in accordance with Council Directive 89/106/EEC (OJ 2003 L 114, p. 50), and dismissed the objection of the Federal Republic of Germany lodged under Article 5(1) of that directive in relation to the 10 standards adopted by CEN relating to thermal insulation products, numbered from EN 13162:2001 to EN 13171:2001.

55. The right of Member States and of the European Parliament to lodge formal objections and the action taken by the Commission prior to the publication of harmonised technical standards make it clear that this is a case of ‘controlled’ legislative delegation in favour of a private standardisation body. [39]

3. The operation of the CEN as a standardisation body is subject to action by the European Union

56. As I stated above, the CEN is a private standardisation body subject to Belgian law and comprising the national bodies of the Member States of the European Union and EFTA. Its structure and operation are similar to those of the majority of standards organisations, including the special features of their transnational character. [40] That the CEN is a private body is made quite clear when it draws up non-harmonised standards, but the CEN adopts a different approach when the object of its activities is to perform the mandates given it by the Commission for the purpose of drafting harmonised standards.

57. The CEN’s activities in relation to harmonised technical standards are based on cooperation with the Commission, governed by an agreement in the form of certain general guidelines, periodically renewed. [41] Those guidelines emphasise the importance of standardisation for European policy and the free movement of goods and services, and for increasing the competitiveness of European producers as well. [42] To those ends, certain common principles are laid down, governing the relationship and cooperation between standardisation bodies and the Commission, in accordance with which standardisation bodies undertake to draw up standards in the manner most appropriate to the interests of the Union. In return, the Commission undertakes to support and involve itself in the work of those bodies.

58. In addition, the Commission gives financial support to the CEN for the drafting of harmonised technical standards. Decision No 1673/2006/EC [43] provides for the European Union to contribute to the financing of European standardisation in order to ensure that harmonised European standards are drawn up and revised in the light of the objectives, legislation and policies of the Union. The number of harmonised standards which the Commission requests from the CEN and the other bodies is limited and represents a small proportion of the total number of standards drafted. Industry assumes the greater share of the costs of standardisation, meaning that recourse to the CEN by the European Union is an ‘economically viable’ option, the idea of creating an executive agency for the adoption of the technical standards required by the new approach directives having been rejected. [44]

39 — I shall confine myself here to noting the doubts of some authors concerning the compatibility with the *Meroni* case-law of the use, by the Union legislature in the new approach directives, of the method of referring to harmonised technical standards. See Hofmann, H., Rowe, G., and Türk, A., *Administrative Law and Policy of the European Union*, Oxford University Press, 2011, pp. 598 to 600.

40 — Most standardisation bodies observe the principles of standardisation laid down in Annex 3 to the WTO Agreement on Technical Barriers to Trade, which contains the Code of Good Practice for the Preparation, Adoption and Application of Standards. Text available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#ann3. Articles 2 and 5 of, and Annex 3 to, the TBT Agreement were implemented by the Decision of the Committee on Technical Barriers to Trade on principles for the development of international standards, guides and recommendations with relation to articles 2, 5 and annex 3 of the agreement, *G/TBT/9*, 13 November 2000. Those basic principles are: transparency, openness, impartiality and consensus, effectiveness and relevance, and coherence.

41 — General Guidelines for the Cooperation between CEN, Cenelec and ETSI and the European Commission and the European Free Trade Association — 28 March 2003 (OJ 2003 C 91, p. 7). The first guidelines were approved on 13 November 1985.

42 — See the document COM(2011) 311 final, which contains the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, entitled ‘A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020’.

43 — Decision No 1673/2006/EC of the European Parliament and of the Council of 24 October 2006 on the financing of European standardisation (OJ 2006 L 315, p. 9). That decision was repealed and its provisions incorporated into Articles 15 to 19 of Regulation No 1025/2012.

44 — That option was expressly rejected during the *travaux préparatoires* for Regulation No 1025/2012. See the document SEC(2011) 671 final, p. 24

59. The private nature of standardisation bodies (in this case, the CEN) does not mean that their activities fall outside the scope of EU law. The Court observed in the judgment in *Fra.bo*[45] that Article 34 TFEU applies to standardisation and certification activities of a private-law body, when the national legislation considers the products certified by that body to be consistent with national law restricting the marketing of products not certified by that body.

60. If the Court did not hesitate to analyse the compatibility with EU law (specifically, with the prohibition of measures having an effect equivalent to quantitative restrictions) of the activities of a national standardisation body connected to national legislation it must, *a fortiori*, have jurisdiction to give a preliminary ruling on whether the harmonised technical standards drawn up by CEN are compatible with that prohibition and to interpret those standards and the directive making the reference to them.

61. As a closing argument, the Court must, in my view, have jurisdiction to interpret that type of technical standard, in the light of the flexibility it has displayed in answering questions referred for a preliminary ruling on various acts having legal effects, other than regulations, directives and decisions. In its judgment in *Grimaldi*,[46] for example, when considering a recommendation adopted on the basis of the EEC Treaty, the Court held that 'Article 177 confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community, without exception'.[47] The Court recently applied the same flexible approach in *Gauweiler and Others* when giving a preliminary ruling on questions from the German Constitutional Court concerning the OMT (Outright Monetary Transactions) programme, which was an act with atypical features.[48]

62. In short, I believe that EN 13242:2002, arising out of Mandate M/125 adopted by the Commission under Directive 89/106 and Directive 98/34, produces legal effects in the internal market and that its interpretation falls to the Court of Justice. In particular, compliance with the harmonised standard by a product (construction aggregate) leads to the presumption that that product satisfies the requirements of Directive 89/106, which facilitates the unimpeded marketing of the product in the internal market.

63. In the light of those arguments, I propose that the Court should answer question 1(a) as follows: when the terms of a private contract oblige one of the parties to supply a product manufactured in accordance with a national technical standard, itself adopted in implementation of a harmonised technical standard adopted by the CEN pursuant to a mandate from the Commission, the Court of Justice has jurisdiction to give a preliminary ruling on the interpretation of that harmonised technical standard.

45 — Judgment in *Fra.bo*, C-171/11 (EU:C:2012:453), paragraph 32. That case concerned a German standardisation body governed by private law which prepared technical standards in the gas and water sectors under a system similar to that of the new approach directives: the German body drafted technical standard W534 and German legislation provided that products for the installation, enlargement, alteration and maintenance of customer equipment connected to the public water supply were presumed to conform to the recognised rules of technology if they complied with technical standard W534. That being the case, the rules laid down in Section 12(4) AVBWasserV resulted, according to the referring court, in its being virtually impossible to market pipes and accessories for the supply of drinking water in Germany without the relevant certificate from the standardisation body, DVGW, attesting to compliance with the technical standard.

46 — Judgment in *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 8. On the same lines, see the judgment in *Deutsche Shell*, C-188/91, EU:C:1993:24, paragraph 18.

47 — According to Advocate General Ruiz-Jarabo Colomer, the Court thus confirmed its jurisdiction, in preliminary rulings, to interpret soft law provisions adopted on the basis of the Treaty, stating that such measures are not lacking in legal effects. Accordingly, national courts must 'take into consideration' soft law provisions when deciding cases before them, in particular where such provisions clarify the national rules enacted in order to implement them, or where they supplement legally binding Community rules. See the Opinion of Advocate General Ruiz-Jarabo Colomer in *Lodato & C.*, C-415/07, EU:C:2008:658, point 34.

48 — Judgment in *Gauweiler*, C-62/14, EU:C:2015:400, and the Opinion of Advocate General Cruz Villalón in that case (C-62/14, EU:C:2015:7), points 73 to 80.

B – *Question 1(b): methods of establishing compliance with harmonised standard EN 13242:2002*

64. The Supreme Court asks whether EN 13242:2002 requires compliance with that standard to be established: (a) only by the testing methods indicated therein and used at the time of production and/or supply of the product, or (b) by other testing methods used later, if the results of those methods logically establish the breach of that standard.

65. The Supreme Court takes the view that compliance with or breach of EN 13242:2002 may be determined at the time of production or supply of the product, and also during the reasonable working life of the product, by means of any logically probative evidence. James Elliott, Ireland and the Commission take the same view, while Irish Asphalt submits that EN 13242:2002 permits only the testing referred to therein to be used and only at the time of production or supply of the product.

66. Mandate M/125 (Chapter II, clause 9) required the CEN to include in the harmonised standard a reference to the test method or methods used to determine the characteristics of a product and its compliance with the technical specifications of the standard. On the same lines, Chapter III, clause 2 stated that '[t]he harmonised standard will contain … The methods (calculation, test methods or others) or a reference to a standard containing the methods for the determination of such characteristics'.

67. Clause 6 of EN 13242:2002 included the test methods required for its implementation, referring to those provided for in a number of non-harmonised European standards drawn up by CEN (specifically, EN 1097-2:1998, EN 1367-2 and EN 1744-1:1998).[49] It is therefore a case of inclusion in a harmonised technical standard, by means of a reference, of the content of non-harmonised European technical standards. That is the usual practice in technical standardisation in the construction sector because what matters in that sector, more than the actual characteristics of a material, is the determination of the methods of analysing their performance in order to ensure the safety of buildings.[50]

68. Without any need to analyse such references in more detail, it is clear to me that the use of test methods, recourse to which is voluntary, makes it easier to establish compliance with the technical specifications of the harmonised standard at the time of the marketing or supply of a product, which makes it possible to enjoy the presumption of conformity with Directive 89/106 and freedom of movement. That proof may be provided by recourse to other types of technically valid testing, a matter not limited by EN 13242:2002.

69. Moreover, I believe that a construction product (aggregates in the present case) may be subjected to testing in order to establish compliance with the technical specifications of EN 13242:2002, not only at the time when the producer markets the product but also during the product's economically reasonable working life. That may be inferred from Article 3(1) of Directive 89/106, according to which the essential requirements stipulated therein apply to products and must be satisfied during 'an economically reasonable working life'.

70. The safeguard clause in Article 21 of Directive 89/106 leads to an identical result, for a State may withdraw from the market a product previously declared compliant with the directive only if it carries out subsequent tests and discovers that the product does not actually comply with the essential safety requirements of the directive. If the conformity tests might be carried out only at the time when the

49 — EN 1097-2:1998, Tests for mechanical and physical properties of aggregates. Part 2: Methods for the determination of resistance to fragmentation; EN 1367-2, Tests for thermal and weathering properties of aggregates. Part 2: Magnesium sulfate test, and EN 1744-1:1998, Tests for chemical properties of aggregates. Part 1: Chemical analysis.

50 — Article 17(3) of Regulation No 305/2011.

product is first placed on the market, the producer would have almost full control of those tests, given the financial cost to the buyer of subjecting purchased goods to the tests. The presumption of conformity with Directive 89/106 would go from being a rebuttable presumption to being virtually irrebuttable, as James Elliott asserts in its observations.

71. I suggest, therefore, that question 1(b) must be answered as follows: the harmonised standard EN 13242:2002 must be interpreted as meaning that it allows a breach of its technical specifications to be established by test methods other than those expressly provided for therein, and that both methods may be used at any time during the economically reasonable working life of the product.

C – *Third question: the presumption of fitness for use of products that comply with Directive 89/106*

72. By its third question, the Supreme Court asks whether the presumption of fitness for use of a building material, derived from Article 4(2) of Directive 89/106, applies also for the purpose of determining whether the product is of merchantable quality, when the latter is a condition laid down in general national legislation applicable to the sale of goods.

73. All those participating in the proceedings, with the exception of Irish Asphalt, propose a negative answer to this question, with which I agree. The presumption of fitness for use laid down in Article 4(2) of Directive 89/106 is valid in the context of that European Union provision and for the purposes of marketing a product in the internal market without any technical barriers. Logically, the Court has jurisdiction to interpret the presumption and all the provisions of Directive 89/106 relating to it. However, the presumption is not transposable, nor may it be used to determine whether a construction product is of merchantable quality when national legislation, such as that governing the sale of goods in Ireland, is applied to private commercial relationships.

74. It is not for the Court to rule on the interpretation of national laws or, therefore, on the factors used in assessing the merchantable quality of goods under the national legislation in accordance with which the courts must adjudicate on breaches of private contracts.

75. In consequence, I suggest that the Court of Justice should answer the third question as follows: the presumption of fitness for use of construction products, which is provided for in Directive 89/106 in order to facilitate their free movement in the internal market, is of no effect when the merchantable quality of construction products is assessed, for the purposes of the application of a national law governing the sale of goods.

D – *Fourth question: the maximum sulfur content laid down in harmonised standard EN 13242:2002*

76. By its fourth question, the Supreme Court asks whether a maximum limit for the total sulfur content of aggregates is prescribed by (or may be prescribed in accordance with) EN 13242:2002, with the result that that limit has to be observed as a condition for enjoying the presumption of fitness for purpose.

77. The answer to that question is, in principle, negative. Clause 6.3 of EN 13242:2002 requires the total sulfur content of aggregates to be declared, but does not fix a maximum limit of 1% sulfur content. Table 13, to which clause 6.3 refers, includes ‘Aggregates other than air-cooled blast furnace slag’ (the aggregates at issue in this case), envisaging the possibility that they may contain either less than 1% sulfur or more than 1% sulfur. In my opinion, that clause leaves no room for doubt.

78. In 2004, the NSAI published guidance on the use of I.S. EN 13242:2002, based on note 3 to clause 6.1 of EN 13242:2002 which, for specific uses of aggregates, refers to the national provisions of the place of use of aggregates. The guidance restricts the total sulfur content of the aggregates in question to 1%. However, I believe that note 3 does not authorise the fixing of that absolute limit.

79. In my opinion, a national technical standard transcribing a harmonised technical standard drawn up by the CEN may include no content incompatible with the latter. If EN 13242:2002 fixes no maximum limit for the sulfur content of aggregates, the standardisation body of a Member State may not impose an absolute limit of 1%. To impose such a limit would run counter to the effectiveness of the harmonised standard, which could be applied differently in the various Member States, thereby compromising the aim of Directive 89/106, which is to promote the free movement of construction products in the internal market. This is now clearly stated in Article 17(5) of Regulation No 305/2011: 'conflicting national standards shall be withdrawn and Member States shall terminate the validity of all conflicting national provisions'.

80. Accordingly, I propose the following reply to the fourth question: harmonised standard EN 13242:2002 does not establish a limit of 1% for the total sulfur content of aggregates and any conflicting national technical standard must not be applied.

E – *Fifth question: the use of CE marking*

81. Likewise, the Supreme Court asks whether it must be established that the product bears the CE marking in order for the presumption created by Annex ZA to EN 13242:2002 or Article 4 of Directive 89/106 to be relied upon. It is necessary, therefore, to determine whether CE marking is a prerequisite for the application to aggregates of the presumption of conformity with Directive 89/106 or whether, on the other hand, such marking is merely evidence of compliance with the requirements of that directive.

82. Contrary to the observations of Ireland and James Elliott, I believe that CE marking is simply evidence of compliance with the essential requirements of Directive 89/106 and not a prerequisite for establishing compliance. In accordance with Article 4(2) of Directive 89/106, the CE mark indicates that products comply with the national standards adopted to transpose the harmonised standards and that they are fit for their intended use. [51] According to Article 4(6), the CE mark signifies that products satisfy the requirements of Article 4(2) and (4), the manufacturer or his agent being responsible for affixing the mark, while Article 15 requires Member States to ensure that the CE mark is correctly used and provides that Member States may prohibit use of the mark where it is established that the CE mark has been incorrectly affixed to a product which does not satisfy, or no longer satisfies, the requirements of Directive 89/106. The Court has declared that a Member State cannot require construction products which use and correctly bear CE marking to be affixed with an additional national mark on the pretext that the harmonised standards are incomplete. [52]

51 — According to Article 4(2) of Directive 89/106, the CE mark also indicates that a product complies with a European technical approval, delivered in accordance with Chapter III of Directive 89/106, and that a product complies with the national technical specifications initially notified to the Commission in the absence of harmonised standards.

52 — Judgment in *Commission* v *Germany*, C-100/13, EU:C:2014:2293, paragraph 63.

83. CE marking therefore constitutes a declaration, made by the natural or legal person responsible for affixing it, that the product complies with the applicable provisions of Directive 89/106 and EN 13242:2002, and that it has undergone the relevant examination procedures. The manufacturer is ultimately responsible for ensuring that the product complies with the directive and for affixing the CE marking once the conformity assessment procedure is complete. Accordingly, CE marking is merely one way of making it known that aggregates satisfy the requirements of Directive 89/106 and EN 13242:2002, in order to facilitate the marketing of such products. [53]

84. Under the later general legislation (not applicable to the present case), CE marking was strengthened and became the sole means of attesting the conformity of the product with the applicable requirements laid down by the relevant Community harmonisation legislation. That is provided for in Article 30(4) of Regulation (EC) No 765/2008, which includes the definition, format and general principles governing CE marking, and Decision 768/2008 applicable to procedures for examining conformity which lead to the affixing of the CE marking. [54] Article 8(3) of Regulation No 305/2011 also provides that CE marking is the only marking to be used for construction products.

85. The Court's existing case-law on Directive 89/106 points to the interpretation put forward herein, for, according to the judgment in *Elenca*, [55] national legislation prohibiting, absolutely and automatically, the distribution on national territory of products lawfully marketed in other Member States because those products do not have CE marking is not compatible with the requirement of proportionality imposed by EU law. That judgment therefore denies CE marking substantive effect and confers probative value on it.

86. Consequently, I suggest the following reply to the fifth question referred by the national court: CE marking is not a prerequisite but only evidence of compliance on the part of an aggregate with the requirements of Directive 89/10 and harmonised standard EN 13242:2002.

F – *Second question: the application of Directive 98/34 and the* CIA Security International *and* Unilever *case-law*

87. The Supreme Court asks whether provisions of national law implying terms as to merchantability and fitness for purpose or quality must be disapplied, on the grounds that they are technical regulations not notified in accordance with Directive 98/34.

88. Like all the parties who have submitted observations, with the exception of Irish Asphalt, I believe that the answer to that question is perfectly clear. A provision of national law, like Section 14(2) of the 1893 Act, as amended in 1980, pursuant to which contracts remain subject — with the possibility of exclusion by agreement of the parties — to an implied term relating to the merchantable quality of the products concerned, does not satisfy the definition of technical regulation in Directive 98/34. Accordingly, the *CIA Security International* and *Unilever* case-law [56] is not applicable to such a provision and, for the same reason, prior notification of that provision to the Commission at the draft stage is unnecessary.

53 — See the European Commission document, *Blue Guide on the implementation of EU product rules*, 17 July 2015, p. 55 et seq.

54 — Regulation of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ 2008 L 218, p. 30); Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC (OJ 2008 L 218, p. 82).

55 — Judgment in *Elenca*, C-385/10, EU:C:2012:634, paragraphs 28 and 29.

56 — Judgments in *CIA Security International*, C-194/94, EU:C:1996:172, and *Unilever*, C-443/98, EU:C:2000:496.

89. The argument put forward by Irish Asphalt, to the effect that the judgment of the High Court ought, as a de facto technical regulation, to have been notified to the Commission is unfounded. The judgment merely applies Irish law to a particular case, for the sole purpose of settling a dispute between companies in the light of the contract concluded between those companies, including the implied terms of that contract.

90. According to the Court's settled case-law, it follows from Article 1(11) of Directive 98/34 that the definition of 'technical regulation' includes three categories; these are, first, the 'technical specification' within the meaning of Article 1(3) of that directive, second, the 'other requirement' as defined in Article 1(4) of that directive and, third, the prohibition of the manufacture, importation, marketing or use of a product referred to in Article 1(11) of that directive.[57] The Irish provision — and, *a fortiori*, the judgment of the High Court — is not a legislative measure prohibiting the manufacture, importation, marketing or use of a product.

91. Nor does Section 14(2) of the 1893 Act (nor, I repeat, the judgment which applies it to a specific contract) satisfy the definition of 'technical specification' in Article 1(3) of Directive 98/34. 'Technical specification' means 'a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures'.

92. The Court has explained that the concept of technical specification presupposes that the national measure refers to the product or its packaging as such and thus lays down one of the characteristics required of a product.[58] The Irish provision examined does not refer to the characteristics of a product or affect its packaging or presentation, for it merely states, in abstract terms, that in contractual relationships there is a presumption that the product sold is of merchantable quality. Therefore, it does not refer to particular products and is a provision generally applicable to the sale of any product, from which it follows that it does not fall within the definition of a technical specification in Directive 98/34.

93. For similar reasons, Section 14(2) of the 1893 Act does not come within the definition of 'other requirements' for the purposes of Directive 98/34, not being 'a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing'.

94. I therefore suggest the following reply to the second question referred: a national provision like Section 14(2) of the Irish Sale of Goods Act 1893, as amended in 1980, cannot be considered to be a 'technical regulation' within the meaning of Directive 98/34, and the *CIA Security International* and *Unilever* case-law is not applicable to it.

57 — See, *inter alia*, the judgment in *Lindberg*, C-267/03, EU:C:2005:246, paragraph 54, and the judgment in *Schwibbert*, C-20/05, EU:C:2007:652, paragraph 34.

58 — See, in that connection, the judgments in *Sapod Audic*, C-159/00, EU:C:2002:343, paragraph 30; *Lindberg*, C-267/03, EU:C:2005:246, paragraph 57; and *Schwibbert*, C-20/05 EU:C:2007:652, paragraph 35.

IV – Conclusion

95. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Supreme Court of Ireland as follows:

(1) When the terms of a private contract oblige one of the parties to supply a product manufactured in accordance with a national technical standard, itself adopted in implementation of a harmonised technical standard adopted by the CEN pursuant to a mandate from the Commission, the Court of Justice has jurisdiction to give a preliminary ruling on the interpretation of that harmonised technical standard.

(2) The harmonised standard EN 13242:2002 must be interpreted as meaning that it allows a breach of its technical specifications to be established by test methods other than those expressly provided for therein, and that both methods may be used at any time during the economically reasonable working life of the product.

(3) The presumption of fitness for use of construction products, which is provided for in Directive 89/106 in order to facilitate their free movement in the internal market, is of no effect when the merchantable quality of construction products is assessed, for the purposes of the application of a national law governing the sale of goods.

(4) Harmonised standard EN 13242:2002 does not establish a limit of 1% for the total sulfur content of aggregates and any conflicting national technical standard must not be applied.

(5) CE marking is not a prerequisite but only a means of proving that an aggregate satisfies the requirements of Directive 89/106 and harmonised standard EN 13242:2002.

(6) A national provision like Section 14(2) of the Irish Sale of Goods Act 1893, as amended in 1980, cannot be considered to be a ‘technical regulation’ within the meaning of Directive 98/34, and the *CIA Security International* and *Unilever* case-law is not applicable to it.