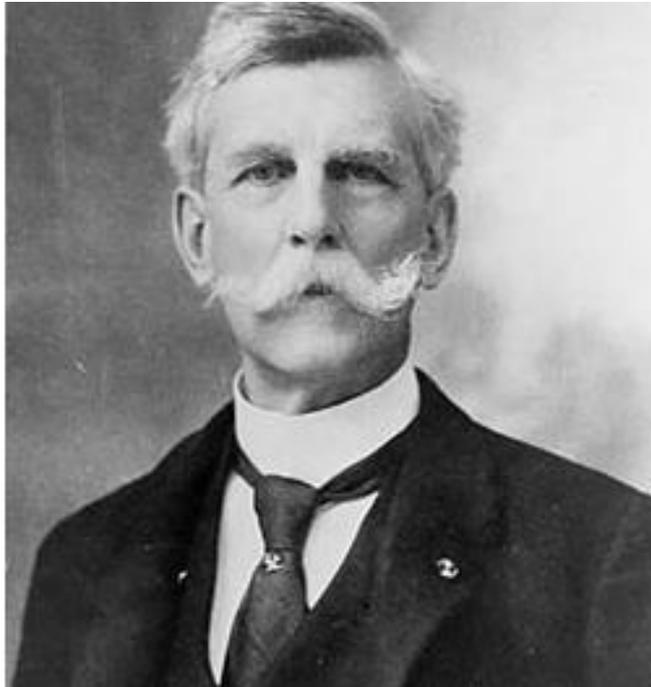


# **Harmonised product standards in public procurement**

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# What do we mean with the question: "What is the law?"



- When we ask what the law is in a given area, usually what we mean is this:
  - What would a court rule if this case was presented before the court?
- This is called "prognosis theory" - introduced by the American Supreme Court judge Oliver Wendell Holmes.
- In order to determine the prognosis of what the law is, you must find all relevant sources of law, i.e. statutes, treaties, precedences of court rulings etc and weigh them according to legal principles
- Usually courts just "find" the existing law. The ECJ, however, is law-making

# Important principles for the interpretation of EU law and national law implementing EU law



- The European Court of Justice uses these principles when interpretation of EU law:
  - EU conform interpretation of national law
  - Direct effect – distinguished between vertical and horizontal direct effect
  - Supremacy of EU law – stated in the Costa/ENEL case from 1964 – directly applicable EU law takes precedence over contrary national law – also national constitutional law

# Harmonisation of goods

- The Treaty on the Functioning of the European Union (TFEU) contains the rules on free movement
- Rules in the TFEU are applicable when an area is not harmonised. And are also used in national law implementing EU law
- All areas of politics are in principle either covered by harmonised rules or the TFEU rules on free movement, for instance art. 34 on goods, art. 56 on services and art. 49 on establishment



# Free movement of goods

- Free movement of goods has a requirement that restrictions are justified and proportionate in relation to achieving their goal
- Justifications are found only in art. 36 TFEU and precedents of the ECJ
- Proportionate means suitable and necessary
- The same rules apply for services and establishment



# The development of the EU's internal market for goods

- Before 1985 – one type of good – one directive – no connection to standards
- After 1985 – harmonisation of goods through “the new approach” which is now called “the new legislative framework”
- Under the new legislative framework overall directives and regulations are issued for different types of goods with overall requirements
- On the basis of these overall directives and regulations the Commission harmonises European standards



# The effect of harmonised standards

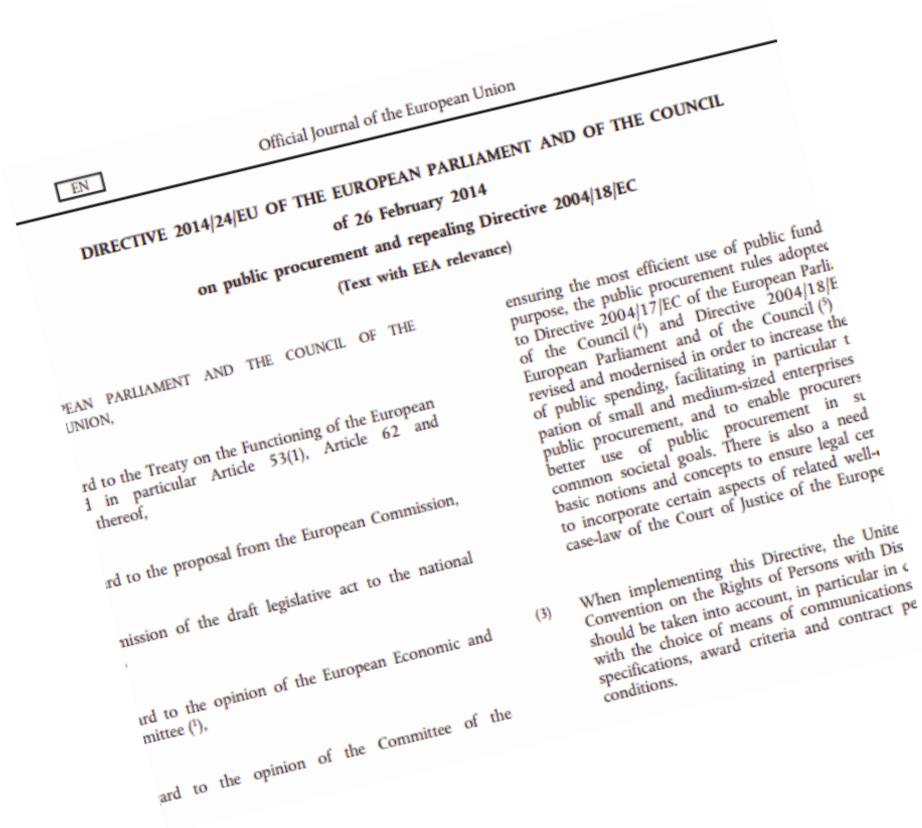
- Usually broad requirements on goods are found in the NLF directive or regulation.
- The broad requirements are then specified in harmonised product standards
- Following af harmonised product standard means that the producer or distributor may have a presumption of conformity in relation to the broad requirements in the directive or regulation in order to attach a CE label to the product
- The producer or distributor may also choose to prove conformity with the directive or regulation in another way – however very difficult
- In practise CE labelled products are produced according to a harmonised standard – this should be taken into consideration when setting tender requirements
- The construction product regulation works differently – hEN's mandatory

# The Construction Product Regulation, CPR

- TFEU art. 288 defines what a regulation and a directive is
- The CPR is a new legislative framework regulation
- A construction product covered by a harmonised standard must have a DOP and CE label to market to the product
- But the CPR also have rules in article 8, section 4, on Member State's use of harmonised construction products



# Public procurement directive



- Preamble consideration 1:
  - The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.
- This is just a reflection of the definition of a measure having the equivalent effect of a QR from the Dassonville ruling

# Commission vs Germany, C-100/13

- Germany made selling and application of construction products conditioned on acceptance on so-called "bauregel-listen".
- ECJ: A member state may not take any other one-sided national measures, that limit the free movement on construction products, than those set out in the CPD that corresponds to the harmonised standard

Deutsches Institut für Bautechnik **DIBt**

**Bauregelliste B Teil 2 – Ausgabe 2015/2**

**4 Bauprodukte für den Metallbau**

Lfd. Nr.	Bauprodukt	Vorschriften zur Umsetzung der genannten EG-Richtlinien	In den Vorschriften nach Spalte 3 nicht berücksichtigte Grundanforderungen nach Artikel 3 Absatz 1 der Bauproduktenverordnung und die hierfür noch nachzuweisenden Produktmerkmale	Zusätzlich zur CE-Kennzeichnung erforderlicher Verwendbarkeits- und Übereinstimmungsnachweis für die Anforderungen nach Spalte 4	
1	2	3	4	5	6
4.1	Nahtlose kreisförmige Rohre aus unlegiertem Stahl nach EN 10216-1 für die Verwendung bei Stahlschornsteinen	97/23/EG	<i>Festigkeit und Standsicherheit:</i> Kerbschlagarbeit von KV=27J bei Raumtemperatur	Bauregelliste A Teil 2, lfd. Nr. 2.46	ÜHP
4.2	Geschweißte kreisförmige Rohre aus unlegiertem Stahl nach DIN EN 10217-1 für die Verwendung bei Stahlschornsteinen	97/23/EG	<i>Festigkeit und Standsicherheit:</i> Kerbschlagarbeit von KV=27J bei Raumtemperatur	Bauregelliste A Teil 2, lfd. Nr. 2.47	ÜHP
4.3	Bauliche Verankerungen (Anker) von Anschlagpunkten für Anschlageinrichtungen	89/686/EWG	<i>Nutzungssicherheit:</i> Eignung der baulichen Verankerungen (Anker) am Bauwerk (gilt nicht für ...)	Z	?

## Elliott case – C-613/14

- A harmonised standard is a part of EU law
- The ECJ has the competence to interpret a harmonised standard even though it has been issued by CEN
- Refers to C-100/13 and states that member states may not set supplementary conditions on their territory
- Two private parties are not bound by a harmonised standard
- Advocate general: harmonised standards must comply with the free movement on goods, ie art. 34 TFEU



# Germany vs Commission, T-229/17

## Ruling from the General Court



- Germany sought the annulment of a decision from the Commission on wooden floors
- Refers to Elliott case and C-100/13
- Member states may not set up one-sided measures based on other criteria than the harmonised standard's annex ZA
- It is not enough that the member state finds that the product is not safe – then they must complain to the Commission
- Old precedence cases from the CPD are still valid

# Germany vs Commission, C-475/19 og C-688/19, ECJ ruling



1. Member states may not set their own methods for the evaluation of harmonised standards but must use those methods that are derived from the harmonised standard.
2. Member states are free to set requirements regarding health, environment and worker's conditions when construction products are installed or applied. But they must for this purpose only evaluate construction products on the basis of the harmonised standard
3. The scope of a harmonised standard is limited to the use of the construction product that is stated in the standard. Other uses are not harmonised

# Overview of different applications of standards

	National legislation	Public tender	Private contract
Does art. 34 TFEU apply to non-harmonised standards referred?	Yes for national and non-harmonised EN standards, DVGW	Yes, procurement directive consideration 1	No, Sapod Audic Modif – if regarding certification in national legislation
Who is responsible for art. 34 violations stemming from a standard?	NSB's for national standards, DVGW. EN standards?	EC for hENs  Member state for other standards	No responsibility Modif as above
May CPR hENs be referred?	Yes, but only annex ZA, G vs. Comm	Yes, but only annex ZA, G vs. Comm	Yes, entire standard, Elliott case
May other non-CPR hEN's be referred?	Yes but only for presumption of conf.	Yes but only for presumption of conf.	Yes
May non-harm. EN's be referred?	Yes	Yes, but similar must be accepted	Yes
May requirements be made to hEN's about ie environment?	Yes, but only in relation to annex ZA	Yes, but only in relation to annex ZA	Yes

