Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

27 October 2016*

(Reference for a preliminary ruling — Article 267 TFEU Jurisdiction of the Court — Concept of 'provision of EU law' — Directive 89/106/EEC — Approximation of laws, regulations and administrative provisions of the Member States relating to construction products — Standard approved by the European Committee for Standardisation (CEN) pursuant to a mandate given by the European Commission — Publication of the standard in the Official Journal of the European Union — Harmonised standard EN 13242:2002 — National standard incorporating harmonised standard EN 13242:2002 — Contractual dispute between individuals — Method used to establish (non-) compliance of a product with a national standard transposing a harmonised standard ? Date of establishing (non-) compliance of a product with that standard — Directive 98/34/EC — Procedure for the provision of information in the field of technical standards and regulations — Scope)

In Case C-613/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 19 December 2014, received at the Court on 30 December 2014, in the proceedings.

James Elliott Construction Limited

v

Irish Asphalt Limited,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 November 2015,

after considering the observations submitted on behalf of:

— James Elliott Construction Limited, by E. Barrington, SC, C. Donnelly, BL, and B. Shipsey, SC, instructed by D. O'Donovan, Solicitor,

— Irish Asphalt Limited, by T. Hogan, SC, D. Conlan Smyth, Barrister, N. Buckley, BL, instructed by N. Mulherin, Solicitor,

* Language of the case: English.

— Ireland, by A. Joyce and L. Williams and J. Quaney, acting as Agents, and B. Kennedy, SC, and G. Gilmore, Barrister,

— the European Commission, by A.C. Becker and G. Braga da Cruz and G. Zavvos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 267 TFEU, Article 4 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 (OJ 1989 L 40, p. 12), as amended by Council Directive 93/68/EEC of 22 July 1993 (OJ 1993 L 220, p. 1) ('Directive 89/106'), Articles 1 and 8 of 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 and of rules on Information Society services (OJ 1998 L 204, p. 37) as last amended by Council Directive 2006/96/EC of 20 November 2006 (OJ 2006 L 363, p. 81) ('Directive 98/34'), and harmonised standard EN 13242:2002, entitled 'Aggregates for unbound and hydraulically bound materials for use in civil engineering work and road construction' ('harmonised standard EN 13242:2002').

2 The request has been made in proceedings concerning the supply of rock aggregate by Irish Asphalt Limited to James Elliott Construction Limited.

Legal context

EU law

Directive 89/106

3 The first, fourth, sixth, seventh, eleventh and twelfth recitals of Directive 89/106 are worded as follows:

'Whereas Member States are responsible for ensuring that building and civil engineering works on their territory are designed and executed in a way that does not endanger the safety of persons, domestic animals and property, while respecting other essential requirements in the interests of general well-being;

...

Whereas paragraph 71 of the White Paper on completing the internal market, approved by the European Council in June 1985, states that, within the general policy, particular emphasis will be placed on certain sectors, including construction; whereas the removal of technical barriers in the construction field, to the extent that they cannot be removed by mutual recognition of equivalence among all the Member States, should follow the new approach set out in the Council resolution of 7 May 1985 [OJ 1985 C 136, p. 1.] which calls for the definition of essential requirements on safety and other aspects which are important for the general well-being, without reducing the existing and justified levels of protection in the Member States;

...

Whereas, as a basis for the harmonised standards or other technical specifications at European level and for the drawing up or granting of European technical approval, interpretative documents will be established in order to give concrete form to the essential requirements at a technical level;

Whereas these essential requirements provide the basis for the preparation of harmonised standards at European level for construction products; whereas, in order to achieve the greatest possible advantage for a single internal market, to afford access to that market for as many manufacturers as possible, to ensure the greatest possible degree of market transparency and to create the conditions for a harmonised system of general rules in the construction industry, harmonised standards should be established as far as, and as quickly as, possible; whereas these standards are drawn up by private bodies and must remain non-mandatory texts; whereas, for that purpose, the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (Cenelec) are recognised as the competent bodies for the adoption of harmonised standards in accordance with the general guidelines for cooperation between the Commission and those two bodies signed on 13 November 1984; whereas, for the purposes of this Directive, a harmonised standard is a technical specification (European standard or harmonised document) adopted by one or both of those bodies upon a mandate given by the Commission in accordance with the provisions of 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 [OJ 1983 L 109, p. 8];

...

Whereas a product is presumed fit for use if it conforms to a harmonised standard, a European technical approval or a non-harmonised technical specification recognised at Community level; whereas, in cases where products are of little importance with respect to the essential requirements and where they deviate from existing technical specifications, their fitness for use can be certified by recourse to an approved body;

Whereas products thus considered fit for use are easily recognisable by the EC mark; whereas they must be allowed free movement and free use for their intended purpose throughout the Community'.

4 Article 2(1) of that directive provides as follows:

'Member States shall take all necessary measures to ensure that the products referred to in Article 1, which are intended for use in works, may be placed on the market only if they are fit for this intended use, that is to say they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if properly designed and built, satisfy the essential requirements referred to in Article 3 when and where such works are subject to regulations containing such requirements.'

5 Article 3(1) of Directive 98/8 is worded as follows:

'The essential requirements applicable to works which may influence the technical characteristics of a product are set out in terms of objectives in Annex I. One, some or all of these requirements may apply; they shall be satisfied during an economically reasonable working life.'

6 Article 4(1) and (2) of that directive states as follows:

'1. Standards and technical approvals shall, for the purposes of this Directive, be referred to as "technical specifications".

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.

2. Member States shall presume that [construction] products are fit for use if they enable [construction] works in which they are employed, provided the latter are properly designed and built, to satisfy the essential requirements referred to in Article 3 where such products bear the CE marking indicating that they satisfy all the provisions of this Directive, including the conformity assessment procedures laid down in Chapter V and the procedure laid down in Chapter III. The CE marking shall indicate:

(a) that they comply with the relevant national standards transposing the harmonised standards, references to which have been published in the *Official Journal of the European Communities*. Member States shall publish the references of these national standards.

(b) that they comply with a European technical approval, delivered according to the procedure of Chapter III, or

or

(c) that they comply with the national technical specifications referred to in paragraph 3 in as much as harmonised specifications do not exist; a list of these national specifications shall be drawn up according to the procedure in Article 5(2).'

7 Article 6(1) of Directive 89/106 provides:

'Member States shall not impede the free movement, placing on the market or use in their territory of products which satisfy the provisions of this directive.'

Member States shall ensure that the use of such products, for the purpose for which they were intended, shall not be impeded by rules or conditions imposed by public bodies or private bodies acting as a public undertaking or acting as a public body on the basis of a monopoly position.'

8 Article 7 of that directive provides:

'1. In order to ensure the quality of harmonised standards for [construction] products, the standards shall be established by the European standards organisations on the basis of mandates given by the Commission ….

2. The resulting standards shall be expressed as far as practicable in [construction] 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 Communities*.'

9 Pursuant to Article 65 of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Directive 89/106 (OJ 2011 L 88, p. 5), Directive 89/106 was repealed. However, that regulation is not applicable *ratione temporis* to the dispute in the main proceedings.

Directive 98/34

10 Article 1(3), (4) and (11) of Directive 98/34, which replaced Directive 83/189, provides as follows:

‘For the purposes of this Directive, the following meanings shall apply:

...

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;

...

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.

De facto technical regulations include:

— laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,

— voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications,

— technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.’

11 Article 8(1) and (3) of that directive provides:

‘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.

...

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

...

3. Member States shall communicate the definitive text of a technical regulation to the Commission without delay.’

Standard EN 13242:2002

12 Standard EN 13242:2002 was drawn up by the Technical Committee CEN/TC 154 ‘Aggregates’ and approved by CEN on 23 September 2002, in accordance with a Commission mandate of 6 July 1998 (M 125 — Mandate to CEN/CENELEC concerning the execution of standardisation work for harmonised standards on aggregates related to [specific] end uses, ‘Mandate M 125’), adopted on the basis of Directive 89/106.

– Mandate M 125

13 The foreword of Mandate M 125 is worded as follows:

‘... One of the aims of the directive being the removal of technical barriers to trade in the construction field, in so far as they cannot be removed by means of mutual recognition among Member States, it seems appropriate that standardisation mandates cover, at least during a first phase of the mandating programme, construction products likely to be subject to technical barriers to trade.

This 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.’

14 Chapter II of that text, entitled ‘Execution of the mandate’ states as follows:

‘1. CEN/CENELEC will present the Commission with a detailed work programme, at the latest, three months after approval of [the committee established by Directive 83/189].

...

5. Any proposals for the addition of products, intended uses and materials and forms not included in the mandate but considered relevant by the [technical committee] should be presented separately from the work programme for further analysis by the Commission services. Standards prepared

for products outside this mandate will not achieve the status of harmonised standards. In addition to the provisions of article 4.1 of [Directive 98/34], it must be taken into account that all the products included in the mandate have a system of attestation of conformity in accordance with the relevant decision of the Commission; those products not included have not.

6. Any proposal for the addition of characteristics and durability aspects not included in the mandate but considered relevant by the [technical committee] should be proposed in a special chapter of the work programme for further analysis by the Commission services.

...

8. [CEN technical committees] 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.

...

12. The terms of reference of this mandate may be subject to modification or addition, if necessary. Acceptance of the work programme by the Commission services does not imply acceptance of all the [elements] listed as supporting standards. [The technical committees] will need to demonstrate the direct link between [those elements] and the needs for harmonisation of the products, intended uses and characteristics given in the mandate. Nor does acceptance exclude the possibility for further [elements] to be added by CEN, in order to fully respond to the terms of the mandate.

...

15. CEN/CENELEC will immediately inform the Commission of any problem relating to the carrying out of the mandate and will present an annual progress report on work within the framework of the mandate.

16. The progress report will include a description of work carried out and information on any difficulties being met, whether political or technical, with particular reference to those that might lead the authorities of a Member State to raise objections or to resort to article 5.1 of ... Directive [98/34].

17. The progress report will be accompanied by the latest drafts of each standard under the mandate and by updated reports on any subcontracted work.

...

19. Acceptance of this mandate by CEN/CENELEC can take place only after the work programme has been endorsed by the Commission services.

...

21. CEN/CENELEC will present the final drafts of the harmonised European standards and of the relevant supporting standards to the Commission services for confirmation of compliance with this mandate at the latest in accordance with the timetable agreed between CEN/CENELEC and the Commission and referred to in point II.2.d).'

15 Chapter III of that text, entitled 'Harmonised standards' is worded as follows:

'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 the directive), having regard to the interpretative documents.

2. 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;

...'

16 Annexes 1 to 3 to Mandate M 125 set out, respectively, the field of application of the mandate, its technical terms of reference and its requirements in terms of attestation of conformity.

– Harmonised standard EN 13242:2002

17 The second paragraph of point 1 of harmonised standard EN 13242:2002 states that it 'provides for the evaluation of conformity of the products to this [harmonised standard]'.

18 Point 6 of that harmonised standard, entitled 'Chemical requirements' is worded 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.

...

6.3 Total sulphur

When required, the total sulphur content of the aggregate, determined in accordance with [article 11 of] EN 1744-1:1998 [adopted by CEN without any Commission mandate and without using the procedure provided for in Article 7 of the directive], shall be declared in accordance with the relevant category specified in Table 13 [entitled 'Categories for maximum values of total sulphur content':]

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

...'

19 'Annex ZA (informative) ? Clauses of this European Standard addressing essential requirements or other provisions of EU Directives' of that harmonised standard states, inter alia, that 'the clauses of [the] European standard [EN 13242:2002] shown in this annex meet the requirements of the Mandate given under the [Directive 89/106]' and that 'compliance with these clauses confers a presumption of fitness of the aggregates covered by this European Standard for their intended uses indicated herein'.

20 The references to the harmonised standard EN 13242:2002 were published in the *Official Journal of the European Union* of 27 March 2003 (OJ 2003, C 75, p. 8).

Irish Law

The Sale of Goods and Supply of Services Act

21 Section 10 of the Sale of Goods and Supply of Services Act 1980 inserts a new section 14 in the Sale of Goods Act 1893, as follows:

(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.

(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.

...'

Standard I.S. EN 13242:2002

22 Standard EN 13242:2002 was transposed in Ireland by the National Standard Authority of Ireland by means of standard I.S. EN 13242:2002.

The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

23 In the context of the construction of the youth facility at Ballymun in Dublin (Ireland) by James Elliott Construction, the specifications given required, inter alia, that the internal floors of the building were to be laid upon 225 mm of 'well compacted hardcore Clause 804 to DOE [Department of Enterprise] specification'. For that purpose, Irish Asphalt supplied Elliott Construction with a product designated as 'Clause 804 hardcore'.

24 After completion of the works, cracks appeared in the floors and ceilings, which rendered the building unusable. James Elliott Construction accepted responsibility and carried out remedial work at a total cost of EUR 1.5 million.

25 On 13 June 2008, James Elliott Construction sought compensation from Irish Asphalt on the ground that the damage in question was caused by the presence of pyrite in the Clause 804 aggregate supplied by Irish Asphalt.

26 In its judgment of 25 May 2011, the High Court (Ireland) found that the concrete defects derived from the presence of pyrite in the aggregate supplied by Irish Asphalt to James Elliott Construction. In that regard, it held that the tests on the aggregate removed from the building showed that it did not meet Irish standard I.S. EN 13242:2002 transposing European standard EN 13242:2002, in particular as regards its sulphur content.

27 Consequently, that court held that Irish Asphalt had infringed its contractual obligations under Article 14(2) of the Sale of Goods Act to supply aggregate of 'merchantable quality' and 'fit for purpose'.

28 Irish Asphalt appealed against that judgment before the Supreme Court (Ireland).

29 On 2 December 2014, the Supreme Court delivered judgment on the domestic law issues, rejecting the appeal, subject to any issue of EU law.

30 In that regard, that court asks, first, about the legal nature of European harmonised standards for construction products and their relevance in contractual relationships between two private parties where reference is made to a national standard adopted pursuant to a harmonised standard in a contract for the supply of goods; secondly, about the interpretation of the scope and content of European standard EN 13242:2002, in particular as regards presumptions created by compliance with

that standard and rules governing their rebuttal; and, thirdly, about the link between provisions of national law implying certain contractual clauses and the obligation to notify imposed on the Member States pursuant to Directive 98/34.

31 In those circumstances the Supreme Court decided to stay the proceedings and to 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 Directive 89/106/EEC, 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 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 Commission under Directive [89/106], 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 which have not been notified in accordance with the provisions of Directive 98/34?

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, is 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 Directive 89/106?'

Consideration of the questions referred

Question 1(a) concerning the jurisdiction of the Court

32 By question 1(a), the referring court asks, in essence, whether Article 267 TFEU must be interpreted as meaning that, when a national court is seised of a dispute concerning a contract governed by private law requiring a party to supply a product compliant with a national standard transposing a

harmonised standard within the meaning of Article 4(1) of Directive 89/106, references to that standard having been published by the Commission in the 'C' series of the *Official Journal of the European Union*, the Court has jurisdiction to give a preliminary interpretation of that standard.

33 As a preliminary point, it must, first, be noted that, according to the order for reference, technical standard I.S. EN 13242:2002 at issue in the main proceedings constitutes the transposition into Irish law by the National Standards Authority of Ireland of harmonised standard EN 13242:2002. Accordingly, the meaning to be attributed to the first standard depends directly on the interpretation given to the second.

34 Second, it must be recalled that, according to case-law, the Court has jurisdiction to interpret acts which, while indeed adopted by bodies which cannot be described as 'institutions, bodies, offices or agencies of the Union', are by their nature measures implementing or applying an act of EU law (see, to that effect, judgments of 20 September 1990, *Sevince*, C-192/89, EU:C:1990:322, paragraph 10, and 21 January 1993, *Deutsche Shell*, C-188/91, EU:C:1993:24, paragraph 17), such a solution being justified by the very objective of Article 267 TFEU, which is to ensure the uniform application, throughout the European Union, of all provisions forming part of the European Union legal system and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by the various Member States (judgment of 20 September 1990, *Sevince*, C-192/89, EU:C:1990:322, paragraph 11).

35 Moreover, the Court has also held that the fact that a measure of EU law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling under Article 267 TFEU (judgment of 21 January 1993, *Deutsche Shell*, C-188/91, EU:C:1993:24, paragraph 18).

36 As regards, more particularly, a harmonised standard such as that at issue in the main proceedings, it must be noted that Article 4(1) of Directive 89/106 defines harmonised standards as technical specifications adopted by CEN, Cenelec, or both, on mandates given by the Commission in conformity with Directive 83/189, which give, as is apparent from the sixth and seventh recitals of Directive 89/106, concrete form on a technical level to the essential requirements defined in Annex I thereto.

37 In accordance with Article 7(3) of Directive 89/106, the references of harmonised standards drawn up by the European standardisation organisations are subsequently published by the Commission in the 'C' series of the *Official Journal of the European Union*.

38 Pursuant to Article 4(2) of Directive 89/106, read in conjunction with the eleventh recital of that directive, such publication has the effect of conferring on products which are covered by that directive, and which satisfy the technical requirements defined in the harmonised standards relating to those products, the benefit of a presumption of conformity with the basic requirements of that directive (see, to that effect, judgment of 21 October 2010, *Latchways and Eurosafe Solutions*, C-185/08, EU:C:2010:619, paragraph 31), allowing the CE marking to be affixed to them.

39 That presumption of conformity with the essential requirements of Directive 89/106 and the 'CE' marking confer on the product in question, in accordance with Article 6(1) of that directive, read in the light of twelfth recital of that directive, the ability to circulate, to be placed on the market and to be used freely within the territory of all Member States of the European Union.

40 It follows from the above that a harmonised standard such as that at issue in the main proceedings, adopted on the basis of Directive 89/106 and the references to which have been published in the *Official Journal of the European Union*, forms part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product.

41 A product's compliance with the technical requirements defined by such a standard allows the presumption that that product satisfies the essential requirements contained in Directive 89/106. It follows that that product is authorised to circulate, to be placed on the market and to be used freely within the territory of all Member States of the European Union, with the result that, pursuant to Article 6(1) of that directive, Member States may not impose additional requirements on such products for their effective use on the market and use within the territory (see, to that effect, judgment of 16 October 2014, *Commission* v *Germany*, C-100/13, EU:C:2014:2293, paragraphs 55, 56 and 63).

42 Although evidence of compliance of a construction product with the essential requirements contained in Directive 89/106 may be provided by means other than proof of compliance with harmonised standards, that cannot call into question the existence of the legal effects of a harmonised standard.

43 It must, moreover, be noted that while the development of such a harmonised standard is indeed entrusted to an organisation governed by private law, it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements defined by that directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the 'C' series of the *Official Journal of the European Union*.

44 In the present case, standard EN 13242:2002 was prepared under Mandate M 125, given by the Commission to CEN on the basis of Article 7 of Directive 89/106 and point 8 of Chapter II of which provides that European standardisation committees must give a technical answer for the determination of the characteristics of that mandate, taking into account the conditions set out therein. To that end, the Commission set out precisely, in Annexes 1 and 2 to that mandate, its scope and a technical reference framework by family and sub-family of products in respect of which it requires that performance and durability characteristics be established. Pursuant to Annex 3 of that mandate, the Commission also required that CEN specify, in the harmonised standard to be drawn up, a certain number of systems of attestation of conformity.

45 It is also apparent from points 1 and 19 of Chapter II of Mandate M 125 that, first, acceptance of that mandate by the standardisation organisation must be preceded by a work programme drawn up by that organisation within a time limit specified by the Commission, which must be accepted by the Commission. Secondly, in accordance with points 5 and 6 of that chapter, any proposal for the addition of aspects not contained in that mandate must be submitted to the Commission for analysis. Thirdly, under points 15 to 17 and 21 of that Chapter, the work of the standardisation organisations must be subject to detailed monitoring by the Commission alongside an obligation duly to report to the Commission along with confirmation by that institution of the compliance of the final drafts of the harmonised standards, prior to their publication in the 'C' series of the *Official Journal of the European Union*.

46 Moreover and as illustrated by the judgment of 16 October 2014, *Commission* v *Germany* (C-100/13, EU:C:2014:2293), the Commission ensures, by means of actions for failure to fulfil obligations provided for in Article 258 TFEU, that harmonised standards are fully effective. In that judgment, the Court therefore considered that by imposing additional requirements on construction products covered by several harmonised standards for effective market access of those products and their use in German territory, the Member State in question had failed to meet its obligations under Article 4(2) and (6) and Article 6(1) of Directive 89/106.

47 The answer to question 1(a) is therefore that the first paragraph of Article 267 TFEU must be interpreted as meaning that the Court has jurisdiction to give a preliminary ruling concerning the interpretation of a harmonised standard within the meaning of Article 4(1) of Directive 89/106, references to that standard having been published by the Commission in the 'C' series of the *Official Journal of the European Union*.

Question 1(b)

48 In view of the answer to question 1(a), question 1(b), in which the referring court asks, in essence, whether harmonised standard EN 13242:2002 must be interpreted as allowing — in the context of a dispute concerning a contract governed by private law requiring a party to supply a product compliant with a national standard transposing a harmonised standard within the meaning of Article 4(1) of Directive 89/106, references to that standard having been published by the Commission in the 'C' series of the *Official Journal of the European Union* — non-compliance with the technical specifications of that harmonised standard to be established by test methods other than those expressly provided for therein, and whether those methods may be used at any time during the product's period of economic viability.

49 As a preliminary point, it must be noted that, in accordance with the second paragraph of section 1 of harmonised standard EN 13242:2002, which states that it 'provides for the evaluation of conformity of the products to [that] European standard', clause 6 of that harmonised standard, entitled 'Chemical requirements' provides, in paragraph 3 thereof, that the total sulphur content of the aggregate, which must be declared in accordance with the relevant category specified in Table 13 of that harmonised standard, entitled 'Categories for maximum values of total sulphur content', must be determined in accordance with European standard EN 1744-1:1998.

50 However, it must be recalled, as stated in the fourth recital of Directive 89/106, that that directive aims to remove obstacles to trade by creating conditions which enable construction products to be marketed freely within the European Union (see, to that effect, judgment of 18 October 2012, *Elenca*, C-385/10, EU:C:2012:634, paragraph 15).

51 It follows that Directive 89/106, which has an objective limited to the removal of obstacles to trade, seeks to harmonise not the specific conditions and rules for use of construction products at the time of their incorporation in construction and civil engineering works but the rules governing market access in respect of those products.

52 Therefore, neither Directive 89/106 nor harmonised standard EN 13242:2002, in particular clause 6.3. thereof, laying down the rules for establishing the sulphur content of aggregates covered by that standard, harmonises the national rules applicable to proof in the context of a contractual dispute such as that in the main proceedings, whether it concerns the method of establishing the conformity of a construction product with the contractual specifications or the time at which the conformity of such a construction product must be established.

53 In the light of the above considerations, the reply to question 1(b), is that harmonised standard EN 13242:2002 must be interpreted as not binding a national court seised of a dispute concerning a contract governed by private law requiring a party to supply a product compliant with a national standard transposing that harmonised standard, either as regards the method of establishing the conformity of such a construction product with the contractual specifications or the time at which its conformity must be established.

The third question

54 By its third question, which should be examined next, the referring court asks, in essence, whether Article 4(2) of Directive 89/106, read in the light of the twelfth recital of that directive, must be interpreted as meaning that the national court must apply the presumption of fitness for use of a construction product manufactured in accordance with a harmonised standard for the purposes of establishing that such a product is of merchantable quality or fit for its purpose where a national law of a general nature governing the sale of goods, such as that at issue in the case in the main

proceedings, requires that a construction product have such characteristics. In the event of an affirmative answer, the referring court seeks the guidance of the Court of Justice regarding the rules governing rebuttal of that presumption.

55 As is apparent from Article 2(1) of Directive 89/106, the objective of that directive is to ensure that construction products which are intended for use in works may be placed on the market only if they are fit for the intended use, that is to say they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if properly designed and built, satisfy the essential requirements referred to in Article 3 of that directive when and where such works are subject to regulations containing such requirements.

56 For that purpose, and as noted in paragraph 39 of the present judgment, the EU legislature has established a mechanism for the presumption of fitness for use, in accordance with which a product which meets the essential requirements specified in Article 3 of Directive 89/106 and given concrete form in a harmonised standard, has, pursuant to Article 6(1) of that directive, read in the light of the twelfth recital of that directive, the ability to circulate, to be placed on the market and to be used freely within the territory of all Member States of the European Union.

57 It follows that such a presumption of conformity seeks only to allow a construction product which meets the requirements laid down by a harmonised standard to circulate freely within the European Union.

58 Accordingly, for the same reasons as set out in paragraph 51 of the present judgment, Directive 89/106 cannot be interpreted as harmonising national rules, including those which may be implied, applicable to sales contracts for construction products.

59 Consequently, the presumption of fitness for use provided for in Article 4(2) of Directive 89/106, read in the light of the twelfth recital of that directive, does not apply, in the context of a contractual dispute, for the purposes of assessing whether one of the parties to the contract has complied with a national contractual requirement.

60 In the view of the answer to the first part of the third question, there is no need to answer the second part.

61 In the light of the above, the answer to the third question is that Article 4(2) of Directive 89/106, read in the light of the twelfth recital of that directive, must be interpreted as meaning that the national court is not obliged to apply the presumption of fitness for use of a construction product manufactured in accordance with a harmonised standard for the purposes of establishing that such a product is of merchantable quality or fit for its purpose where a national law of a general nature governing the sale of goods, such as that at issue in the case in the main proceedings, requires that a construction product have such characteristics.

The fourth and fifth questions

62 Since the fourth and fifth questions were raised by the referring court only in the event of an affirmative answer to question 1(a) and the third question, there is no need to answer them.

The second question

63 By its second question, the referring court asks, in essence, whether Article 1(11) of Directive 98/34 must be interpreted as meaning that, in the context of a dispute between two individuals concerning contractual rights and obligations, a national court is required to disapply national legislation, such as that at issue in the case in the main proceedings, which specifies, unless the parties agree otherwise,

implied contractual terms concerning merchantable quality and fitness for purpose of the products sold, on the ground that that legislation is a 'technical regulation' within the meaning of Article 1(11) of that directive which has not been notified by the Member State to the Commission, in accordance with Article 8(1) of that directive.

64 As a preliminary point, it must be recalled, as the referring court correctly states, that, in accordance with settled case-law, the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 98/34 can be invoked in proceedings between individuals (see judgments of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 54, and 26 September 2000, *Unilever*, C-443/98, EU:C:2000:496, paragraphs 40 to 43, 48 and 49).

65 As a prior step, it is however necessary to establish that the legislation at issue in the main proceedings is in fact a 'technical regulation' within the meaning of Article 1(11) of that directive.

66 It follows from that provision that the concept of 'technical regulation' covers three categories, namely (i) a 'technical specification' within the meaning of Article 1(3) of Directive 98/34, (ii) 'other requirements' as defined in Article 1(4) of that directive, and (iii) the prohibition of the manufacture, importation, marketing or use of a product referred to in Article 1(11) of the directive (judgment of 10 July 2014, *Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 16 and the case-law cited).

67 In the present case, it is apparent, first, that provisions such as those at issue in the main proceedings, either in themselves, or as interpreted by the Irish courts, do not fall within the concept of 'technical specification' within the meaning of Article 1(3) of Directive 98/34. That concept covers only national measures which refer to a product or its packaging as such and thus lay down one of the characteristics required of a product (judgment of 10 July 2014, *Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 19 and the case-law cited). That is clearly not the case for a requirement which applies, unless the parties have agreed otherwise, generally to the sale of all products.

68 Secondly and for the same reason, those provisions cannot be classified as 'other requirements' within the meaning of Article 1(4) of Directive 98/34.

69 In that regard, the Court has explained that, in order to be classified as 'other requirements' within the meaning of that provision, the national measures at issue must constitute conditions which can significantly influence the composition or nature of the product concerned or its marketing, since requirements of a general nature cannot amount to such conditions or, consequently, be classified as 'other requirements' (see judgment of 10 July 2014, *Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 26 and 27 and the case-law cited).

70 Thirdly, the legislation at issue in the main proceedings does not fall within the scope of the technical regulations referred to in Article 1(11) of Directive 98/34, in so far as, by merely stating implied contractual requirements, it does not contain any prohibition, within the meaning of that directive, of the manufacture, importation, marketing or use of a product, the provision or use of a service, or establishment as a service provider.

71 Consequently, Directive 98/34 does not apply to implied contractual requirements such as those imposed by the legislation at issue in the main proceedings.

72 In the light of the above, the answer to the second question is that Article 1(11) of Directive 98/34 must be interpreted as meaning that national provisions such as those at issue in the case in the main proceedings, specifying, unless the parties agree otherwise, implied contractual terms concerning merchantable quality and fitness for purpose of the products sold, are not 'technical regulations', within the meaning of that provision, drafts of which must be communicated in advance, as provided for in the first subparagraph of Article 8(1) of that directive.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **The first paragraph of Article 267 TFEU must be interpreted as meaning that the Court of Justice of the European Union has jurisdiction to give a preliminary ruling concerning the interpretation of a harmonised standard within the meaning of Article 4(1) 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, as amended by Council Directive 93/68/EEC of 22 July 1993, references to that standard having been published by the Commission in the 'C' series of the *Official Journal of the European Union.***

2. **Harmonised standard EN 13242:2002, entitled 'Aggregates for unbound and hydraulically bound materials for use in civil engineering work and road construction', must be interpreted as not binding a national court seised of a dispute concerning a contract governed by private law requiring a party to supply a product compliant with a national standard transposing that harmonised standard, either as regards the method of establishing the conformity of such a construction product with the contractual specifications or the time at which its conformity must be established.**

3. **Article 4(2) of Directive 89/106, as amended by Directive 93/68, read in the light of the twelfth recital of that directive, must be interpreted as meaning that the national court is not obliged to apply the presumption of fitness for use of a construction product manufactured pursuant to a harmonised standard for the purposes of establishing that such a product is of merchantable quality or fit for its purpose where a national law of a general nature governing the sale of goods, such as that at issue in the case in the main proceedings, requires that a construction product have such characteristics.**

4. **Article 1(11) of 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 and of rules on Information Society services, as last amended, by Council Directive 2006/96/EC of 20 November 2006, must be interpreted as meaning that national provisions such as those at issue in the case in the main proceedings, specifying, unless the parties agree otherwise, implied contractual terms concerning merchantable quality and fitness for purpose of the products sold are not 'technical regulations', within the meaning of that provision, drafts of which must be communicated in advance, as provided for in the first subparagraph of Article 8(1) of Directive 98/34, as amended by Directive 2006/96.**

[Signatures]