Lawtify Premium

Lawtify Premium: Public.Resource.Org (T-185/19), a Judicial Take on Standardisation and Public Access to Law

1. Introduction

For those familiar with European Union ('EU') public regulation, the division of tasks between the public legislator and private organisations will not be an unknown phenomenon. During the first decades that followed the establishment of the European Communities, the process of harmonisation of the internal market was slow and cumbersome. Constrained by unanimity and the time-consuming legislative procedure, the adagio of 'each national act should be replaced by a European act' seemed hardly feasible. Nonetheless, with the Treaty introduction of Article 100A EEC and the judicial development of the mutual recognition principle, the 1980s marked a new dawn in the integration process. In 1985, the EU institutions adopted a new strategy, the so-called New Approach, that allowed to progressively, but speedily, remove technical barriers to trade and harmonise the internal market.[1]

With it, the legislative burden of the European legislator has been reduced to setting the essential health, environmental, and safety requirements in harmonising secondary legislation. For those essential requirements to be concretised, each piece of secondary legislation would refer to a set of technical standards. The development of these standards was entrusted to private actors, i.e., the European Standardisation Organisations ('ESOs').[2] Once such standards would be developed and their reference published in the Official Journal of the EU ('OJEU'), they would become harmonised standards ('HESs'). Though HESs have been *de jure* conceptualised as a voluntary mechanism of conformity with the essential requirements laid down in secondary legislation, *de facto* they have been recognised by the CJEU as having binding legal

[1] Council of the European Union, 'Council Resolution of 7 May 1985 on a New Approach to Technical Harmonization and Standards' (1985) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985Y0604%2801%29> accessed on 28-06-2022; and Harm Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 20 Maastricht Journal of European and Comparative Law 521, 523.

[2] The three ESOs are the European Committee for Standardisation ('CEN'), European Committee for Electrotechnical Standardisation ('CENELEC'), and the European Telecommunications Standards Institute ('ETSI'). For more information on their functioning, see Bjorn Lundqvist, 'European Harmonised Standards, EU Law and Copyright' (Social Science Research Network) SSRN Scholarly Paper 2981338 3–5.

effects and being part of EU law.[3] Nevertheless, the legal consequences and broader implications of such recognition did not receive much clarification. Therefore, the nature and legal status of this reference-to-standards regulatory technique and the resulting HESs have become as hard to grasp as it has been questioned by both scholars and courts.

The gist of the ongoing scholarly and judicial debate around this 'gradual replacement of public law-making by private standardisation' lies in the clash between, on the one hand, the efficiency inherent to standardisation as a regulatory technique rooted in the expertise of ESOs; and, on the other, the legitimacy and accountability of the latter in light of the fundamental values and general principles of EU Law.[4] It must be noted that both the EU legislature and the Court of Justice of the EU ('CJEU') have been balancing these two poles. The legislator – through the adoption of the Standardisation Regulation – and the CJEU – especially in the famous *James Elliott* case where it recognised harmonised standards ('HESs') as part of EU law – have increasingly contributed to the juridification and judicialization of HESs, leaning the aforementioned balance closer to the pole of legitimacy and accountability of standardisation.[5]

These developments seemed to have decisively 'broken down the club house' of private standardisation bodies, by highlighting the need to view HESs in light of their

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[3] Regulation (EU) No 1025/2012 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 No 1673/2006/EC of the European Parliament and of the Council (Consolidated text) [2012] OJ L/316 ('Standardisation Regulation'), art 2(1); *C-171/11 Fra.bo* [2012] Court of Justice of the European Union ECLI:EU:C:2012:453, para 27–32; For understanding the implications of this case, see Schepel (n 1) 527–528; more explicitly in *C-613/14 James Elliott Construction* [2016] Court of Justice of the European Union ECLI:EU:C:2016:821, paras 40, 42, and 43 and; *C-185/17 SAKSA (Mitnitsa Varna)* [2018] Court of Justice of the European Union ECLI:EU:C:2018:108 para 39; see, also, Annalisa Volpato, 'The Harmonized Standards before the ECJ: James Elliott Construction' (2017) 54 Common Market Law Review. In this sense, also, Rob van Gestel and Peter van Lochem, 'Private Standards as a Replacement for Public Lawmaking?' in Marta Cantero Gamito and Hans-W Micklitz (eds), *The Role of the EU in Transnational Legal Ordering* (Edward Elgar Publishing 2020) 31.

[4] van Gestel and van Lochem (n 3) 30, 51; Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005) 31. For an alternative, but similar, formulation of this tension, see Carlo Colombo and Mariolina Eliantonio, 'Harmonized Technical Standards as Part of EU Law: Juridification with a Number of Unresolved Legitimacy Concerns?: Case C-613/14 James Elliot Construction Limited v. Irish Asphalt Limited, EU:C:2016:821' (2017) 24 Maastricht Journal of European and Comparative Law 323, 333–334.

[5] Standardisation Regulation (n 3); C-613/14 James Elliott Construction (n 3); and Harm Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 20 Maastricht Journal of European and Comparative Law 521; and Linda Senden, 'The Constitutional Fit of European Standardization Put to the Test' (2017) 44 Legal Issues of Economic Integration.

public law dimension and function.[6] In that sense, the General Court's ('GC' or 'the Court') ruling in the *Public.Resource.Org* case was awaited with curiosity, as it would provide another stepping stone to the debate on the nature of standardisation.[7] Namely, the Court was asked to rule on the possibility of public access to the content of HESs.[8] It was thus called to navigate the clash between the principle of access to the content of the law (a sub-dimension of the EU foundational value of the rule of law) and the commercial interests of the ESOs, who have consistently subjected the access to the content of HESs to the payment of a fee.

In the following lines, the facts of this case and the judgement of the GC will be presented. Thereafter, an analysis of the ruling will focus on how the Court dealt with the tension between the need to protect the efficiency of the standardisation system and the emerging calls for an enhanced public law legitimation of HESs. It will be posited that the GC has privileged the former. Indeed, it is easy to lose sight of the legal status and consequences of standards as long as they prove to be efficient.[9] The GC, as it will be argued, seems to have followed this trend in *Public.Resource.Org*.

However, the rather intricate question of free access to HESs merited reflection on the relationship of those standards with public law. In trying to do so, the present analysis will juxtapose the phenomenon of European harmonised standardisation against classical constitutional and administrative law theory.[10] Far from being innovative, this approach seeks to nevertheless refocus the analysis of the central question of *Public.Resource.Org*: it is only by bringing to the fore the public law dimension of HESs

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[6] Borrowing the expression of Rob van Gestel and Hans-W Micklitz, 'European Integration through Standardization: How Judicial Review Is Breaking down the Club House of Private Standardization Bodies' (2013) 50 Common Market Law Review, 150; and Annalisa Volpato, 'Controlling the Invisible: Accountability Issues in the Exercise of Implementing Powers by EU Agencies and in Harmonised Standardisation' (2019) 12 Review of European Administrative Law 75, 96.

[7] T-185/19 PublicResourceOrg and Right to Know v Commission [2021] General Court ECLI:EU:T:2021:445.

[8] As is well-known, Article 10(6) of the Standardisation Regulation only mandates the publication of the references to harmonised standards in the Official Journal of the EU ('OJEU').

[9] Carlo Colombo and Mariolina Eliantonio, 'Harmonized Technical Standards as Part of EU Law: Juridification with a Number of Unresolved Legitimacy Concerns?: Case C-613/14 James Elliot Construction Limited v. Irish Asphalt Limited, EU:C:2016:821' (2017) 24 Maastricht Journal of European and Comparative Law 323, 333–334; and van Gestel and van Lochem (n 3) 27.

[10] Looking to gauge the legal status of HESs, other scholars have also framed European standardisation from the standpoint of other fields of EU law, such as, for example, competition law or internal market law. See, to that effect, Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, vol 4 (Hart Publishing 2005); and Lundqvist (n 2). Such perspectives are however outside the scope of the present case note.

and gauging their multi-faceted nature, that one can do justice to the past years of scholarly and judicial discourse on standardisation.[11]

An acknowledgement – even if implicit – of the latter should be present in any standardisation-related judicial decision, whatever its outcome may be. This case note's main claim is that the GC has fallen short of doing so.

2. Facts

Our story is set to begin with a letter almost two years after the judgement in the *James Elliott* case was delivered. On the 25th September 2018, Public.Resource.Org Inc. and Right to Know CLG – two NGOs whose purpose is to defend transparency and citizens' right of access to information – submitted a request letter to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs ('DG GROW'). In their request, the two NGOs asked for access, based on Regulations 1049/2001 and 1367/2006, to four HESs concerning toy safety adopted by CEN ('the requested standards').[12] However, as the reader may anticipate, the request was formally declined, twice.

On 15th November 2018, DG GROW rejected the initial request. Subsequently, the two NGOs submitted a confirmatory letter and sought a review of the initial refusal decision.[13] By a decision on 22nd January 2019, the Commission confirmed the initial refusal to grant access to the four requested standards ('the confirmatory decision'). With this, the amicable stage was definitely put to an end, and the judicial battle was set to begin.[14]

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[11] To give but a few examples, Gestel and Micklitz (n 6) 148–150; Schepel (n 5) 528–531; Kathrin Dingemann and Matthias Kottmann, 'Legal Opinion On the European System of Harmonised Standards Commissioned by the German Federal Ministry for Economic Affairs and Energy' (Redeker, Sellner & Dahs 2020) 14 ff.; Mariolina Eliantonio and Annalisa Volpato, 'Legal Opinion On the European System of Harmonised Standards Commissioned by ECOS (on File with the Authors)' (2021) 15 ff. In her case note on James Elliott, Volpato covers not only the CJEU's contribution to this discussion but also relevant national case law: see Annalisa Volpato, 'The Harmonized Standards before the ECJ: James Elliott Construction' (2017) 54 Common Market Law Review 599.

[12] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents 2001 (OJ L 145); Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies 2006 (OJ L 264); The requested harmonised standards were EN 71-5:2015, EN 71-4:2013, EN 71-12:2013, EN 12472:2005+A1:2009.For more information on CEN, see footnote 3; and T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) paras 1–2.

[13] T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) 3–4.

[14] European Commission, 'Decision of the European Commission Pursuant to Article 4 of the Implementing Rules to Regulation (EC) 1049/2001, C(2019) 639 Final' (2019) 2.

On the 28th March 2019, Public.Resource.Org Inc. and Right to Know CLG ('the applicants') lodged an application before the GC seeking the annulment of the Commission's confirmatory decision.[15] The applicants put forward two pleas in law, arguing that:

1. the Commission was wrong in applying the exception of Article 4(2) of Regulation 1049/2001 when finding that, by granting free access to the requested standards, the commercial interests of CEN would be harmed.[16] Specifically, the applicants considered that no copyright protection could be afforded to the requested standards, as such private rights could not be granted with respect to a 'text of law'.[17] Even if the requested harmonised standards could theoretically enjoy copyright protection, the applicants contended that the Commission still erred in considering that an actual infringement of that protection had taken place;[18] and that
2. the Commission erred in not recognising that an overriding public interest in the disclosure free of charge of the requested standards would, in any case, exist.[19]

The Commission, supported by CEN and 14 national standardisation organisations ('the interveners'), disputed these arguments. Preliminarily, the interveners asked the GC to declare the action inadmissible, citing the inexistence of any legal interest of the applicants in bringing proceedings before the Court.[20]

3. The Judgment

The Court summarily rejected the interveners' inadmissibility plea, declaring that there was a legal interest of the applicants in annulling the confirmatory decision and obtaining the requested standards free of charge.[21] Subsequently, and in short, the GC rejected all of the applicants' pleas, ultimately refusing to annul the Commission's confirmatory decision.[22]

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[15] T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) para 5.
[16] ibid 24–25.
[17] ibid 27.
[18] ibid 56-61.
[19] ibid 24, 93.
[20] ibid 15.
[21] ibid 18–22.
[22] ibid 130.

3.1 The applicants' first plea: the Commission's errors in applying the exception to access of documents aimed at protecting commercial interests

The GC started by recalling that the right of access to documents held by EU institutions is limited by a system of exceptions, aimed at protecting certain public and private interests.[23] The relevant exception in the present case is that concerning the protection of commercial interests of third parties against the disclosure of certain requested documents (*in casu*, the interests connected to copyright protection of CEN's standards).[24]

The GC firstly examined whether the Commission complied with the required scope of the review when considering the application of the said exception.[25] Namely, it assessed whether the Commission had based itself on 'objective and consistent evidence' to assert the existence of the copyright of the third party concerned.[26] In that vein, the Court noted the Commission's qualification of CEN as a body governed by private law which holds copyright over all its publications (including the requested standards).[27] Moreover, the Court considered that the Commission had fulfilled its obligation to consult the author of the requested documents by relying on a publicly diffused position paper issued after *James Elliott*, whereby CEN stated that such judgment did not change 'their copyright and distribution policies of harmonised standards'.[28] According to the Court, all the foregoing consubstantiated sufficient 'objective and consistent evidence' for the Commission to support its finding of the existence of the copyright claimed by CEN.[29] The GC subsequently considered that the Commission complied with the requirements of the review of the degree of originality necessary for the harmonised standards in question to be deserving of copyright protection.[30] In conclusion, the Court found that no error could be attributed to the Commission regarding the required scope of review for the application of the exception of Article 4(2) of Regulation 1049/2001.[31]

The Court then proceeded to assess the applicants' argument that, in abstract, harmonised standards cannot be the object of copyright protection, in light of the CJEU's

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[23] ibid 29-31.
[24] ibid 31, 35–36.
[25] ibid 44.
[26] ibid 43.
[27] ibid 45.
[28] ibid 46.
[29] ibid 47.
[30] ibid 48.
[31] ibid 49.

assertion in *James Elliott* that they form 'part of EU law'.[32] In this respect, the Court firstly stated that the CJEU's ruling in *James Elliott* had not in any way invalidated the system set out by the Standardisation Regulation.[33] In particular, the Court noted that compliance with HESs remained voluntary.[34] Moreover, the Court noted that only the references to those standards had to be published by the Commission in the OJEU.[35] As such, the GC rejected the inference of the applicants that, in light of *James Elliott*, harmonised standards should be, as texts of law, accessible free of charge.[36]

The Court continued by dismissing the applicants' argument that the requested standards were a 'list of technical characteristics and/or test methods' developed with no creative choices able to make them a 'personal intellectual creation' deserving of copyright protection.[37] The Court first recalled that such matters should be assessed solely by national courts, as they are governed by national law.[38] In any case, it still considered that the applicants had not sufficiently proved the lack of creative choices present in the requested standards.[39]

In addition, the GC refused the applicants' argument that the Commission was wrong in affirming the existence of a detrimental effect posed to CEN's commercial interests by the disclosure of the requested standards.[40] Namely, the Court sided with the Commission in considering that the disclosure free of charge of HESs would affect CEN's commercial interests as it would represent a significant fall in revenue able to excessively disrupt its business model and its activities as an ESO.[41] The Court further added that it was irrelevant for such a conclusion that, when developing harmonised standards, CEN acted as a public authority performing public functions.[42] It considered that that fact did

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[32] ibid 50, 52.
[33] ibid 51–53.
[34] ibid 51. The Court was alluding to the fact that producers can theoretically resort to other means of proving compliance with the relevant essential health and safety requirements set out in EU secondary legislation. See, inter alia, Schepel (n 5) 524; and Björn Lundqvist, 'European Harmonized Standards as "Part of EU Law": The Implications of the James Elliott Case for Copyright Protection and, Possibly, for EU Competition Law' (2017) 44 Legal Issues of Economic Integration 421, 426.
[35] T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) para 53.
[36] ibid 54.
[37] ibid 56, 59–60.
[38] ibid 40, 57.
[39] ibid 58–59.
[40] ibid 73–74.
[41] ibid 64-67.
[42] ibid 68.

not alter the private nature of ESOs, which were still engaged in economic activity, from which they derived commercial interests worthy of protection.[43]

3.2 The applicants' second plea: the Commission's errors in denying the existence of an overriding public interest on the disclosure of the requested standards

The GC moreover ruled that the Commission had not failed to fulfil its obligation to state reasons concerning the confirmatory decision.[44] At issue was the applicants' claim that the Commission did not address the most important arguments of the confirmatory letter. Most notably, the applicants argued that the Commission had failed to consider the implications of the *James Elliott* judgment on the need, in light of the general principle of the rule of law, to have free access to harmonised standards.[45] The Court disagreed. It found it satisfactory that the Commission had 'succinctly but clearly' laid out, amongst other considerations, that (i) the effects of *James Elliott* had to be considered 'in the context in which the judgement was delivered'; and that (ii) that judgement did not establish an automatic obligation of publication of harmonised standards nor an overriding public interest in their disclosure.[46]

The Court further noted that the applicants had merely put forth the generic claim that harmonised standards are part of EU law, inferring therefrom that such standards should be freely available to the public.[47] In doing so, the applicants, according to the Court, failed to put forth specific grounds that would have justified the disclosure, *in casu*, of the requested standards.[48] It also ruled that the applicants had failed to substantiate why the disclosure of the requested standards would serve the public interest, especially in light of the Commission's assessment that the interest in ensuring the functioning of the European standardisation system would trump that of guaranteeing free access to harmonised standards.[49] Furthermore, the Court explicitly criticised the applicants' approach to 'seek court-mandated freely available access' to the requested standards, instead of 'challenging the European standardisation system'.[50] All in all, the GC found

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[43] ibid 69–72.
[44] ibid 89, 92.
[45] ibid 79.
[46] ibid 84–89.
[47] ibid 98-99.
[48] ibid 100-107.
[49] ibid 102.
[50] ibid 103–104.

that the applicants failed to explain the reasons why harmonised standards should be made accessible in the same terms as a 'law', despite their non-mandatory nature, the limits of their legal effects, and the fact that they may be consulted for free in certain libraries in the Member States.[51]

Finally, the Court rejected the applicants' argument that there was a specific overriding public interest in the disclosure of the requested standards pursuant to Regulation 1367/2006, as they contained environmental information.[52] In that respect, the Court recalled that the obligation to actively disseminate environmental information present in Regulation 1367/2006 only applied to 'texts of EU legislation (…)', a category under which harmonised standards do not fall.[53] The Court also noted that the sole provision of Regulation 1367/2006 that refers to an *overriding* public interest in the disclosure of environmental information – Article 6(1) – relates to information concerning 'emissions into the environment'.[54] However, the requested standards did not contain 'information on actual or foreseeable emissions into the environment', in the meaning of the CJEU's case law.[55]

4. Analysis: how to set a debate back in one ruling

One first point that should be made when analysing this ruling is to acknowledge the presence of some *leitmotive* in the GC's reasoning. Indeed, the Court based its reasoning on some core assumptions that re-surface (either explicitly or implicitly) at various points of the judgement, viz. (i) the private nature of ESOs; (ii) the voluntary nature of harmonised standards; and (iii) the system of limited publication of standards in the OJEU set up by Standardisation Regulation.[56] In our view, this has led the Court to adopt a rather monolithic stance on HESs' copyright protection, which is hardly reconcilable with the public law imperatives stemming from the regulatory role of HESs'.

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[51] ibid 107.
[52] This Regulation implements Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Treaty Series, vol 2161) ('Aarhus Convention'). The latter is an international treaty regulating, *inter alia*, access to information in environmental matters; and T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) paras 109, 130.
[53] ibid 118.
[54] ibid 112, 120–121.
[55] ibid 122–129. On the contrary, the requested standards merely contained some information on maximum amounts of chemical mixtures able to be used in the manufacturing of certain products.
[56] ibid 45, 51, and 53.

4.1. The principle of 'when something is law, but not quite'

There are times when judicial decisions defy the rules of logic. The GC seems to have provided us with one such moment. The Court agreed with the applicants that, following the *James Elliott* case, HES are to be considered part of EU law.[57] However, in the same breath, the GC considered that, despite their place as part of the EU legal order, it is not clear 'why those standards should be subject to the requirement of publication and accessibility attached to a "law"' insofar as (i) their compliance is not mandatory, (ii) they only produce effects as to the persons concerned, they may be consulted for free in some libraries of the MS,[58] and (iii) they are products of private entities, whose commercial interests may be overriding reasons not to make them accessible.[59]

The GC too quickly dismissed the applicants' submission that ESOs, when drafting HESs, perform public functions which should justify facilitated access to the content of those standards. It must be noticed that, though the CJEU has indeed held before that the ESOs are entities governed by private law, it had also understood that such standardisation organisations may exercise public powers.[60] Furthermore, if we are to regard these standards through a constitutional legal lens, it is unavoidable to at least ponder whether they are not the outcome of a process kickstarted by the *delegation* on private bodies of the task to develop technical rules.[61] It is true that EU institutions have carefully avoided formally branding this entrusting of rule-making powers to ESOs as a 'delegation of regulatory powers' in the constitutional sense of the term.[62] But that does

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[57] ibid 52, 118.

[58] ibid 107. To offer more perspective, other linguistic versions of the judgement also refer to the concept of 'law'. In particular, the GC refers to concepts such as 'loi' (French), 'ley' (Spanish), lei (Portuguese), 'lege' (Romanian), or 'legge' (Italian).

[59] ibid 69–72.

[60] C-613/14 James Elliott Construction (n 3) para 43 ; and see *C-171/11 Fra.bo* (n 3). Also, in this sense, Annalisa Volpato, '"Part of EU Law", But Only Partially: The Issue of the Accessibility of Harmonised Standards' (*REALaw*, 6 October 2021) <https://realaw.blog/2021/10/06/part-of-eu-law-but-only-partially-the-issue-of-the-accessibility-of-harmonised-standards-by-annalisa-volpato/> or Rodrigo Vallejo, 'The Private Administrative Law of Technical Standardization' (2022) 40 Yearbook of European Law 172, 175.

[61] Megi Medzmariashvili, 'Delegation of Rulemaking Power to European Standards Organizations: Reconsidered' (2017) 44 Legal Issues of Economic Integration 360. For a critical approach on whether such delegation of powers might not be legitimate under EU law, falling then into a legal vacuum of uncontrolled delegation see Colombo and Eliantonio (n 4) 333–336. See also, in this sense, van Gestel and van Lochem (n 3) 29-30.

[62] Medzmariashvili (n 61) 354, 360. See also van Gestel and van Lochem (n 3) 29-32.

not alter the fact that ESOs are empowered through a Commission mandate to exercise public regulatory functions. Namely, they develop technical rules that supplement EU legislation thereby governing important aspects of public life, such as health, safety, and environmental protection.[63]

Moreover, looking at harmonised standards from an administrative law perspective, one can attest to their *functional* role akin to that of EU implementing acts: to 'support the implementation of Union legislation' and 'give concrete form on a technical level' to a certain piece of EU legislation.[64] Thus, it is hard to come to terms with the GC's argument that 'it is in no way apparent from the provisions governing the European standardisation system that, in the standards development process, CEN acts as a public authority by performing public functions which are not subject to any commercial interests'.[65] Though it may be true that the ESOs are still private entities with commercial interests, it must at the same time be noticed that they are not performing just any other public function. It is unavoidable that HESs developed by ESOs and whose references are published in the OJEU are part of the content of EU law. That begs the question: can commercial interests in the elaboration of such segments of the law be invoked in the same way as they would be for any other document developed by a private body?

In this regard, the GC seems to be hiddenly sceptical about the extent to which HES may be considered part of EU law. It is true, as the Court explains, that these standards cannot be formally considered as 'legislation' in the sense of Article 289(3) TFEU.[66] It is also true that Article 2(1) of the Standardisation regulation defines HES as 'technical specifications […] with which compliance is not mandatory' and which only produce effects with regard to a certain restricted number of economic operators. Nevertheless, EU law also encompasses non-legislative acts, including even non-binding measures – if we are to consider HESs as such.[67] Yet, it is difficult to imagine the extent to which compliance with these standards is not mandatory. As highlighted in the *Fra.bo* case, other means of compliance with EU secondary law would be more costly to producers, considering that they would need to invest in finding methods that can guarantee at least an equivalent level of protection as that of the HESs and taking account

[63] Medzmariashvili (n 61) 455–457.
[64] Volpato (n 6) 82. In the same sense, Senden (n 10) 340.
[65] T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) para 70.
[66] ibid 118.
[67] Eliantonio and Volpato (n 11) 13.

of the fact that any other method of compliance with the essential requirements set in secondary legislation does not generate a presumption of conformity with those requirements.[68] Furthermore, as said above, since HES are a *necessary* implementation of those essential requirements, functionally they may be considered as part of the content of the law that they are implementing, without which the relevant piece of legislation would be incomplete.[69] Ultimately and in any case, not even all hard law is of mandatory compliance and accepts derogations. Likewise, despite being characterised as abstract and general, hard law will, in practice, 'produce the legal effects attached to them solely with regard to the persons concerned',[70] either if that means the public as a whole or more restricted groups that fulfil the conditions for the application of the law.

Therefore, one should wonder whether HESs have not been branded as soft law by the discourse of the Court just so as to avoid having to hold them to the same tenets of the rule of law and democratic values as the rest of the so-called hard law.[71] Should we not, then, look at HESs beyond their face value and to the function they *indeed* perform as the (technical) expression of public rule-making powers?[72] And, as a consequence, should not the principle of the rule of law, as a foundational EU constitutional principle, have significant implications on any judicial assessment of whether they should be publicly disclosed?[73] And should not this be all the more true given the shortcomings shown by the standardisation in terms of input legitimacy and *ex-post* control (both administrative and judicial) already largely debated by the literature?[74]

In this sense, and as argued in the next section, a more permissive approach to public access to harmonised standards could have been endorsed by the Court, as that would be more akin to the constitutional and functional role of HESs in the EU system of public regulation.

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[68] *C-171/11 Fra.bo* (n 3) paras 28–30; and Schepel (n 1) 528.
[69] C-613/14 James Elliott Construction (n 3) para 43.
[70] T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) para 107.
[71] Lundqvist (n 2) 13.
[72] Volpato (n 6) 75–76; and Eliantonio and Volpato (n 11) 15–16.
[73] The Court hinted at an answer to this question in *C-160/20 Stichting Rookpreventie Jeugd and Others* [2022] Court of Justice of the European Union ECLI:EU:C:2022:101. Nevertheless, the Court has answered in a roundabout manner, not definitively settling the issue at hand.
[74] Colombo and Eliantonio (n 4); and Eliantonio and Volpato (n 11) 24–34.

4.2. A monolithic and almighty stance on copyright protection of Harmonised Standards

4.2.1. Are all harmonised standards the fruit of creativity?

For those who expected the GC to further the debate on the fundamental question of whether and when can harmonised standards, as Commission-mandated forms of private rulemaking, be copyright protected, *Public.Resource.Org* is surely a disappointment.

The Court rather simplistically relied on the principled position that, given their private nature as the outcome of the work of private bodies, harmonised standards are worthy of copyright protection.[75] Despite stating that this was a matter for national courts to assess, the GC did not refrain from considering that the applicants had not sufficiently proven that the requested standards lacked the degree of originality necessary to make them copyright-protected.[76] Most notably, the GC sided with the Commission's conclusion that 'the length of the texts implies that the authors had to make a number of choices (including in the structuring of the document), which results in the document being protected by copyright'.[77] It seems as though the GC considers that (i) harmonised standards are to be, as a rule, copyright-protected provided that they have a sufficient length; and that (ii) such length seems to in itself imply that 'free and creative choices' were made by the ESOs when drafting a certain standard. Apart from endorsing such simplistic criteria used by the Commission, the GC's reasoning is oblivious to several factors that pertain to the special nature of HESs.

First, the Court disregarded the significant control that the Commission exerts over the *content* of any harmonised standard through the respective standardisation request (or mandate).[78] Indeed, ESOs are heavily constrained by standardisation requests, namely by the requirements the latter set as to the content of the respective harmonised standard.[79] A Commission's mandate does not merely replicate the legislative essential requirements of any given piece of secondary legislation. Rather, it sets out a number of

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[75] See section 4.1; and T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) paras 51–55.
[76] ibid 57–59.
[77] ibid 48–49, 59. The Court reproduced the quotation at hand from the Commission's confirmatory decision.
[78] *C-613/14 James Elliott Construction* [2016] AG Campos Sánchez-Bordona ECLI:EU:C:2016:63, para 41, 46–55.
[79] Eliantonio and Volpato (n 11) 21.

specificities that 'bridge' those requirements and the technical specifications to be contained in the harmonised standard.[80] What is more, the CJEU has already recognised the request's importance in the interpretation of harmonised standards, to the detriment of the proposed authentic interpretation of ESOs (through the issuance of 'interpretative documents').[81]

Second, even if one concedes that ESOs still possess significant discretion to set out the content of a standard, there is still some merit to the argument that not every standard will represent truly creative work (i.e., worthy of copyright protection). In this vein, careful comparative analysis of other jurisdictions' case law shows that, for example, US courts do not allow private standardisation organisations to claim copyright over standards that express certain technical methods which constitute the only viable way to do a certain measurement necessary for the development of a certain product.[82]

In light of the foregoing, one should wonder whether the creative margin of ESOs when drafting harmonised standards is not, to say the least, diminished: if, as demonstrated above, the content of a harmonised standard is heavily constrained by the Commission's mandate or the nature of certain technical methods, where does the ESOs' creative margin lie? Does it reside on mere formal choices, as the standard's documental structure, as the GC seems to imply?

Now, one should look closely at the Court's reasoning on this matter. Despite stating that copyright protection was a matter governed by the laws of Member States, it nevertheless noted that the settled case-law of the CJEU offers an interpretation of the autonomous EU concept of 'work', i.e., a subject matter that should receive copyright protection. It namely alluded to the fact that, for a subject matter to be considered as a 'work', it should be regarded as original; and that, in order to be original, 'it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his or her free and creative choices'. It then proceeded to state that, based

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[80] ibid 21–22.

[81] *C-630/16 Anstar* [2017] Court of Justice of the European Union ECLI:EU:C:2017:971, para 35, 42, 44; Arnaud Van Waeyenberge, 'La normalisation technique en Europe. L'Empire (du droit) contre-attaque' (2018) 32 Revue internationale de droit économique 305, 314–316; and Eliantonio and Volpato (n 11) 22.

[82] Gestel and Micklitz (n 6) 176. In the same vein, although not related to the present case, one can point to the fact that an incredibly significant portion of CEN and CENELEC's portfolio is composed of standards identical or based on standards developed by international standardisation organisations such as ISO or IEC. See, to this effect, Eliantonio and Volpato (n 11) 35–36.

on the criteria discussed at the beginning of this sub-section, harmonised standards fulfilled the required threshold of originality so as to be considered as a 'work' deserving of copyright protection.[83]

However, the preceding reasoning of the GC is built upon a rather incomplete and selective utilisation of the CJEU's case law on the concept of 'work'. It is true that, as the GC stated, originality is a condition for a subject matter to be considered as a 'work' deserving of copyright protection.[84] It is also true that, as the GC pointed out, originality exists in principle in a subject matter where the author's free and creative choices are expressed.[85] At the same time, the CJEU also affirmed in that same strain of case law that 'where the realisation of a subject matter has been dictated by *technical considerations, rules or other constraints* [emphasis of the authors] which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required for it to constitute a work and, consequently, to be eligible for the protection conferred by copyright.'[86]

One is thus taken aback by the lack of mention of the GC in this segment of the CJEU's jurisprudence, especially since the subject matter at stake – HESs – is to a significant degree influenced by the technical constraints of the respective Commission's mandate. Even if it were to ultimately conclude that HESs constituted 'work' deserving of copyright protection; the GC should have recognised all the nuance intrinsic to this matter, namely whether the constraints imposed by the Commission's mandate still leave room for ESOs to make true and free creative choices when producing HESs. A 'one-size-fits-all approach' could hardly suffice in answering this query, but a *complete* interpretation of the concept of 'work' could have provided for way more solid and refined ground for such an analysis. The latter (whatever its final outcome may be) is not as straightforward as the GC made it look in *Public.Resource.Org*. This is not only displayed by all the above; but also by the lack of consensus between Member States' courts, those ultimately responsible for deciding copyright protection claims.[87] However,

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[83] T-185/19 PublicResourceOrg and Right to Know v Commission (n 7).
[84] *C-683/17 Cofemel* [2019] Court of Justice of the European Union ECLI:EU:C:2019:721, para 29; *C-833/18 Brompton Bicycle Ltd* [2020] Court of Justice of the European Union ECLI:EU:C:2020:461, para 22.
[85] C-683/17 Cofemel (n 84) para 30; and C-833/18 Brompton Bicycle Ltd (n 84) para 23.
[86] C-683/17 Cofemel (n 84) para 31; and C-833/18 Brompton Bicycle Ltd (n 84) para 24.
[87] Gestel and Micklitz (n 6) 160–172; Lundqvist (n 34) 431; and Lundqvist (n 2) 12–13.

by accepting the argument that the length of a standard's text implies some choices (such as the structuring of a document) that are worthy of copyright protection, the GC relied on a too simplistic assessment of the Commission, while some other more refined solutions had been already put forth by other courts and scholars.[88]

4.2.2. Copyright vs the rule of law: *James Elliott* did not move the needle

As mentioned above, the GC was not fazed by the applicants' argument that, since the CJEU had said in *James Elliott* that harmonised standards are 'part of EU Law', such standards, as part of the content of the law needed to be made publicly accessible, in light of the principle of the rule of law.[89] Instead, it dismissed it as a mere generic claim, unable to lead to the conclusion that, in the case of the requested standards, the latter ought to be made publicly accessible to the detriment of the ESOs' invoked copyright.[90] Moreover, it stated that such normative claim built upon the rule of law could not run rampant over the need to preserve ESOs' business model.[91] Specifically, the fact that ESOs derive a significant part of their revenue from the licensing and selling of harmonised standards would preclude the possibility of making those standards available.[92]

It is not the purpose of this analysis to discuss the strategic flaws of the applicants' argumentation. Indeed, if the GC is portraying the application fairly, it might be insufficient to generically argue (and we are paraphrasing here) that harmonised standards need to be made freely accessible and published as legislation simply because the CJEU in *James Elliott* branded them as part of EU law. Nevertheless, *James Elliott* represents a crucial step for the CJEU in its attempt to conceptualise HESs. The latter was said to be part of EU law as necessary implementation measures of EU secondary law whose content is strictly governed and monitored by the Commission and whose effects are

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[88] As an example, one can recall Lundqvist's proposal to not afford copyright protection to HESs *per se*; but to versions thereof enriched with comments and guidelines developed by the ESOs in a true exercise of creative freedom. See Lundqvist (n 34) 435. Another proposal from the same author consists in, again, stripping HESs of copyright protection, and compensate ESOs through the payment by the Commission of the relevant licensing fees based on *sui generis* database protection. See Lundqvist (n 2) 14.

[89] *T-185/19 Public.Resource.Org and Right to Know v Commission* (n 7) paras 27, 50. This (not innovative) line of reasoning is also present (alongside its negation) in, for example, Gestel and Micklitz (n 6) 146; Lundqvist (n 2) 1–2. The connection of the principle of the rule of law, in its sub-dimension of the principle of free access to the content of the law, to the current problematic was eloquently formulated in a posterior AG opinion, namely, *C-160/20 Stichting Rookpreventie Jeugd and Others* [2021] AG Saugmandsdaard OE ECLI:EU:C:2021:618, para 69, 71–72.

[90] T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) para 99.

[91] ibid 64–68.

[92] ibid 67.

linked to publication in the OJEU.[93] Therefore, it is somewhat disappointing to see a GC's judgement on this matter that manages to altogether set aside the public dimension of the phenomenon of HESs. The Court opted (perhaps deliberately) to avoid a more in-depth discussion on this, specifically by relying on the apparent ineptitude of the applicants' claim. Moreover, it treated this case as any other regular case of a request for access to documents. Namely, it found it correct for the Commission to rely on a presumption enabling it to refuse access to the requested standards in the name of the protection of the commercial interests of its author. In addition, it did not accept the applicants' invocation of the principle of the rule of law as an exception to the rule that access to these standards ought to be refused.[94]

In the face of such reasoning, one may wonder whether it is desirable (or even technically correct) to balance the economic rights of ESOs on the same footing as the normative requirements of the rule of law, make the former supersede the latter, and call it a day. Granted, it might even be that this is the most balanced outcome to the tension between, on the one hand, the incentives of ESOs to conduct their rule-making endeavours, and, on the other hand, the public law dimension of the standardisation system. But, in reaching that conclusion, the Court has regrettably taken a rather straightforward approach, in that it does not pay enough attention to the multi-faceted nature of standardisation as a private rule-making phenomenon. As mentioned before in this piece, HESs represent, constitutionally speaking, the outcome of a delegation of regulatory powers on ESOs. Functionally, they form part of the (technical) content of the piece of secondary law whose essential requirements they seek to concretise.

Bearing this in mind, let us think of any given manufacturer wanting to enter any given market where the manufacturing of that product is governed by already existing EU legislation and respective harmonised standard(s): such producer (i) has not had the opportunity to take part in the relevant public participation procedures mandated by the Standardisation Regulation; (ii) is faced by the uncertainty of whether the relevant harmonised standards' content was duly controlled by the Commission or can be controlled in court; and (iii) cannot, without paying the rule-maker (i.e. ESOs), have access to the technical rules which *de facto* allow them to introduce their product into the market. Constitutional principles such as the rule of law can, in those instances, play an

[93] C-613/14 James Elliott Construction (n 3) para 37–43; and Lundqvist (n 2) 11.
[94] ibid 97–100.

important role in creating a more nuanced set of occasions where it would be illegitimate to refuse access to harmonised standards (e.g. where a new entrant to a market has not taken part in a previous procedure of development of harmonised standards; or where the Commission's *ex-post* control of a certain harmonised standard is proven to have been insufficient, to brainstorm a few examples). Instead, the GC has made its monolithic conception of harmonised standards as mere private documents protected by copyright supersede the aforementioned public law considerations, which stem from years of scholarly and judicial debate on standardisation's *ethos*.

In this respect, the argument of the GC that the refusal of access to harmonised standards is justified, *inter alia*, by the need to preserve their business model is particularly striking. The Court namely recalls that 'the sale of standards is a vital part of the standardisation bodies' business model' and that to have those standards accessible 'without charge would call that model into question'.[95] In affirming this, the Court did not, however, feel the need to examine the specific impact of the licensing of HESs on the total revenue of ESOs. Nor did it examine the percentage of harmonised standards in the totality of a given ESO's portfolio (since there is more to the work of an ESO than to produce harmonised standards). Nor did it factor in the significant contributions from the EU budget received by ESOs via the Commission. Instead, it branded the sale of standards as a 'vital part' of the ESOs business model, without examining (i) how much of those sales are of harmonised standards; and (ii) how much of ESOs revenue comes from selling activities. This type of examination on the specific impact of the sale of standards in standardisation bodies' viability would have been hardly pioneering, as it was already conducted in judicial procedures of other jurisdictions, namely in the US.[96]

If the data is to be observed, out of the total deliverables produced in 2020 by CEN only 12.1 per cent were in support of EU legislation, while the EU/EFTA contributions to their budget amount to 20 per cent.[97] This becomes more balanced for CENELEC, as their contribution of HES was 16.61 per cent of their total deliverables, while they received 16 per cent of their budget from the EU/EFTA.[98] Furthermore, the

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[95] T-185/19 Public.Resource.Org and Right to Know v Commission (n 7) para 65.
[96] Gestel and Micklitz (n 6) 173,175.
[97] European Committee for Standardisation (CEN) and European Committee for Electrotechnical Standardisation (CENELEC), 'Annual Report 2020' 135–136 <https://atelier-digital.be/CENCENELEC/Report2020/>; and See also Volpato (n 60).
[98] European Committee for Standardisation (CEN) and European Committee for Electrotechnical Standardisation (CENELEC), 'Annual Report 2020' 173 and 178.

ESOs do not even directly sell nor distribute the HESs themselves but do so through national standardisation organisations that, in turn, pay them annual budgetary distributions.[99] However, in both cases, these data seem to cast some aspersions on the Court's statement that HESs are a *vital part* of the economic activity of the ESOs, especially since they do not appear to imply that a complete rethinking of the business model of European standardisation would be in order in case HESs would – at least in some cases – be freely accessible.[100] They also beg the question of whether the work of ESOs in developing HESs is not already, for the most part, compensated through EU/EFTA contributions, in addition to the annual budgetary contributions from national standardisation organisations.

Ultimately, business models change, and there are certainly ways for ESOs to remain efficient despite a fraction of the standards they produce (i.e., harmonised standards) being made publicly available. In fact, it is easier to change a business model than to dilute the requirements of the rule of law in the name of the efficiency of a system which might still be viable otherwise. Notwithstanding all of this, the GC has with its ruling set aside the ongoing debate on the public law dimension of harmonised standards and on the concomitant need to consider the principle of the rule of law as a tool to enhance the accountability of ESOs when participating in EU public regulation.

5. Conclusion

In *Public.Resource.Org*, the Court was called to rule on the possibility of having free access to the content of HESs. This dispute is illustrative of yet another dimension of the fundamental tension underlying the use of standardisation as a regulatory technique: that between the efficiency of the process and its legitimacy and accountability. Applied to *Public.Recourse.Org*, this tension materialised in a clash between, (i) on the one hand, the need to protect the commercial interests of ESOs and thus ensure the incentives of these private bodies to take part in EU public regulation through the development of HESs; and, (ii) on the other hand, the rule of law imperative of free access to the content of the law.

One must be mindful of the context of this ruling. It came after the landmark judgement in *James Elliott*, where the CJEU considered HESs as 'part of EU Law',

[99] Volpato (n 60).
[100] ibid.

considering their eminent public regulatory functions and legal effects.[101] The GC, however, took a different approach. It built its reasoning upon the formal private nature of ESOs and on the formal voluntary status of HESs. With that in mind, it treated the present case as any other run-of-the-mill-access-to-documents affair, where someone seeks to access a document of a third party who claims copyright over the said document. In that sense, one cannot reproach the internal coherence of the Court's ruling: the rule in this type of case is that only concrete and exceptional public interest can override the commercial interests of third parties linked to the documents whose access is being sought.

However, the requested standards are not just any other document. Constitutionally and functionally speaking, HESs represent the necessary implementation of EU secondary law, which will be incomplete without them. Their content is, furthermore, heavily constrained by the Commission's mandate whereby the respective regulatory powers are entrusted to ESOs. Not only did the GC seem to disregard these implications of the public regulatory functions performed by HESs, but it also considered that it is vital for ESOs' activity to sell access to HESs. However, in proclaiming that, the Court sided with the Commission without questioning the specific impact of the sale of HESs in the funding of ESOs activities. And, as demonstrated in section 4.2., there is good reason to question whether the sale of HESs is indispensable for the efficient functioning of ESOs.

As with any other story, this was too one of contradictions, nuance, and legal intricacies in-between. The Court seemed, however, to ignore most of it, by not considering the inherently contradictory nature of HESs, as the outcome of privatised forms of public regulation. It is now up to the reader (and soon enough to the CJEU), to determine whether the GC is warranted in its unwavering focus on the private and voluntary nature of ESOs and its consequent monolithic stance on HESs' copyright protection in its tension with the rule of law.[102] The recent *Stichting* case, regarding international standards, shows that the CJEU may be inclined to accept that standards when of a mandatory nature, need to be freely accessible and published in order to

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[101] As mentioned above in section 4.1., previous judgements, such as *Fra.bo* had also put the spotlight on the *de facto* mandatory effects of standards (even if, in that case, of national standards) rather than on their origins as the work of a private body.

[102] An appeal of the decision of the General Court was made and is currently under analysis by the CJEU in *C-588/21 P PublicResourceOrg and Right to Know v Commission and Others* (Court of Justice of the European Union).

produce binding legal effects on the public as a whole.[103] Yet, as in the same case, with the same satisfaction of someone who has just been *saved by the bell* and with a certain resignation, the CJEU may still opt for efficiency over accountability. Is this an acceptable outcome in a legal order founded on the rule of law? Can we accept a sort of 'legal Spotify', a Lawtify premium service which allows one to discover the content of the law only after its purchase, while the free version only grants you access to a mere reference?

[103] C-160/20 Stichting Rookpreventie Jeugd and Others (n 88).