

# Private actors, public authorities and the relevance of public law in the process European standardization

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# Private Actors, Public Authorities and the Relevance of Public Law in the Process of European Standardization

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*The reliance on private parties is a global tendency in modern regulation. One peculiar regulatory technique which foresees a core role for private parties is that of European standardization. The employment of standards for regulatory purposes delivers enormous benefits for the harmonization process and is today a key factor in the EU's trade policy; however, the process of European standardization raises a number of concerns from a rule of law perspective, which are linked to 'hybrid nature' of the process, which foresees an intertwined public and private decision-making process. The aim of this contribution is to discuss the role of public law in the process of European standardization. After discussing the legal nature of European harmonized standards, the current application and potential applicability of general principles of administrative law is discussed and the necessity and availability of judicial control is examined.*

**Keywords:** European Standardization; Harmonized Standards; Co-regulation; Public-Private Partnership; Hybridity; Transparency; Participation; Judicial Review.

## 1 INTRODUCTION

The reliance on private parties is a global tendency in modern regulation. The participation of private parties, such as the social partners or the standardization bodies, as (co) decision-makers, is a widespread regulatory technique also at EU level. Private parties participate in the making of EU administrative governance in sectors such as financial markets, food regulation, consumer protection, product safety, data protection and environmental policy.<sup>1</sup>

One peculiar regulatory technique which foresees a core role for private parties is that of European standardization. The essence of this regulatory technique consists in its combination of public and private elements, whereby private

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<sup>1</sup> See on this, e.g. J. Scott, T. Smith, N. Rehmatulla & B. Milligan, *The Promise and Limits of Private Standards in Reducing Greenhouse Gas Emissions from Shipping*, 29(2) J. Envtl. L. 231–262 (2017); P. Verbruggen & T. Havinga, *Hybridization of Food Governance: Trends, Types and Results* (Edward Elgar 2017).

regulators – the European Standards Organizations (ESOs) – are called upon by the Commission to write Harmonized European Standards (HESs) that embody technical specifications of essential health and safety requirements for products contained in EU secondary legislation (most often Directives). The latter strategy is known as New Approach to Technical Standardization and Harmonization and was launched in 1985.<sup>2</sup> Based on this strategy, after the Commission publishes the reference to a HES in the Official Journal, the latter acquires presumption of conformity, meaning that an economic operator using a HES is presumed to be in compliance with the mandatory essential requirements.<sup>3</sup>

The employment of standards for regulatory purposes delivers enormous benefits for the harmonization process and is today a key factor in the EU's trade policy, since it contributes to the removal of the technical barriers to trade, supports innovation by stimulating dissemination of new technologies, and enhances competition.<sup>4</sup> The technical requirements set via the standards also aim to deliver safe products on the market and, by doing so, to protect health and the environment.<sup>5</sup> Market players also gain several benefits from standardization, since standards enable the transfer of technologies and by doing so facilitate innovation. The involvement of private parties in EU administrative governance has overall the clear advantage of delivering policies which are based on the expertise of the regulatees.

Despite the undeniable benefits brought to the economy as whole, the process of European standardization raises a number of concerns from a rule of law perspective, which are linked to the 'hybrid nature' of the process, which foresees an intertwined public and private decision-making process.<sup>6</sup> The aim of this contribution is to discuss the role of public law in the process of European standardization. In this context, public law should be understood as the set of

<sup>2</sup> Council Resolution (85/C 136/01) of 7 May 1985 on a New Approach to Technical Harmonization and Standards [1985] C 136/1. This resolution includes Annex I-Conclusions on Standardization approved by the Council on 16 July 1984 and Annex II-The Guidelines on the New Approach to Technical Harmonization and Standardization (So called Model Directive).

<sup>3</sup> On the concept of 'essential requirement' see further the Commission's, *Blue Guide on the Implementation of EU Product Rules*, [2016] OJ C272/1, para. 4.

<sup>4</sup> Report of the expert panel for the review of the European Standardization System, *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, Feb. 2010, EXP 383 final. See also recital 3 of Regulation No 1025/2012 of the European Parliament and of the Council of 25 Oct. 2012 on European standardization [2012] OJ L-316/12 'Standards [...] increase competition and lower output and sales costs, benefiting economies as a whole and consumers in particular. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility, thereby increasing safety and value for consumers'.

<sup>5</sup> J. Pelkmans, *The New Approach to Technical Harmonization and Standardization*, 25(3) J. Common Mkt. Stud. 249 (1987).

<sup>6</sup> See for an overview of these concerns the Special Issue, *Hybridity Under Scrutiny: How European Standardization Shakes the Foundations of EU Constitutional and Internal Market Law*, 44(4) Legal Issues Econ. Integration (2017), and especially the introduction by M. Eliantonio & M. Medzmarishvili.

rules which not only ‘institutes, enables, guides and constrains the exercise of public authority’,<sup>7</sup> but is also designed to pursue of what is generally referred to as the public interest. In contrast, private law is generally construed as a set of rules which allows action in pursuit of self-interest.<sup>8</sup> Hence, the identification of the role of public law in the process of European standardization enables a discussion (both on a positive *and* on a normative basis) of how the public interest is and ought to be protected in the designing and adoption of HESs. Despite the Commission’s and ESOs’ continued assertions on the fully voluntary and private nature of the process of European standardization,<sup>9</sup> this contribution will shed light to manifold public law implications of the process. As a consequence of the public law relevance of the phenomenon, the current application and potential applicability of general principles of administrative law will be discussed and the necessity and availability of judicial control will be examined.

## 2 THE LEGAL NATURE OF HARMONIZED STANDARDS

### 2.1 A UNIQUE MIX OF PUBLIC AND PRIVATE FEATURES

The origins of the New Approach can be traced back to the difficulties encountered in the process of achieving the internal market and removing the technical barriers to trade in the EU.<sup>10</sup> Because of the unanimity rule applicable to the Council decisions regarding the internal market policy in the 1980s, the adoption of directives intended to harmonize technical requirements was slow. Such deadlock caused the Commission, in its effort to establish the internal market, to opt for a system whereby technical requirements would be no longer set in legislation, but would be created by ESOs acting on the basis of a request received by the European Commission. The ESOs, which today participate in the European standardization process, are the CEN, the CENELEC and the ETSI.<sup>11</sup> The

<sup>7</sup> A. von Bogdandy, *The Idea of European Public Law Today*, in *The Max Planck Handbooks in European Public Law: The Administrative State* vol. 1, 12 (Armin von Bogdandy et al. eds, OUP 2017).

<sup>8</sup> *Ibid.*

<sup>9</sup> See e.g. Recital 1 of Regulation 1025/2012 ‘The primary objective of standardization is the definition of voluntary technical or quality specifications’; European Commission, *The ‘Blue Guide’ on the Implementation of EU Product Rules* 33 (2014).

<sup>10</sup> M. Egan, *Regulatory Strategies, Delegation and European Market Integration*, 5(3) *J. Eur. Pub. Pol’y* 490 (1998). See for a clear account of the developments, H. Schepel, *The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law*, 20(4) *Maastricht J. Eur. & Comp. L.* 521–533 (2013) and Ch. Joerges, H. Schepel & E. Vos, *The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardization under the ‘New Approach’*, EUI Working Paper LAW, No. 99/9 (1999).

<sup>11</sup> For a list of the European standardization organizations (ESOs), see [https://ec.europa.eu/growth/single-market/european-standards/key-players\\_en](https://ec.europa.eu/growth/single-market/european-standards/key-players_en). See for the functioning of the ESOs M. Egan, *Constructing a European Market. Standards, Regulation and Governance* 133 ff (OUP 2001).

CEN and the CENELEC are private organizations which are subject to Belgian law and are composed of national standardization bodies together with experts and representatives from the relevant business sectors.<sup>12</sup> Once the standard is drafted, and the Commission publishes the reference to a HES in the Official Journal, the HES acquires presumption of conformity with the health and safety requirements contained in the underlying legislation.

*Table 1 Overview of the Steps and Actors in the European Standardization Process, with a Determination of the Legal Nature of the Step*

| <i>Step</i>                              | <i>Actor</i>                           | <i>Nature</i> |
|--|--|---------------|
| Identification of essential requirements | Co-legislators                         | Public        |
| Standardization request                  | European Commission (with comitology)  | Public        |
| Drafting of technical standard           | European Standardization Organizations | Private       |
| Publication of reference in the OJ       | European Commission                    | Public        |

It can be seen from the steps identified above how this process creates a unique combination of public and private actions in the delivery of the harmonized standard. What also needs to be added to make the picture complete is the system of controls which Regulation 1025/2012 sets in place.

In particular, according to Article 10 of this Regulation, the European standardization organizations have to inform the Commission ‘about the activities undertaken for the development’ of the HESs. Furthermore the Commission, together with the European standardization organizations, is in charge of assessing the compliance of the drafted standard with its initial request. Finally, according to the Regulation, the Commission will publish a reference to a harmonized standard only ‘where a harmonised standard satisfies the requirements which it aims to cover and which are set out in the corresponding Union harmonisation legislation’. As it has been stated, the process is ‘highly conditioned [and] supervised’.<sup>13</sup>

<sup>12</sup> Please note that ETSI is instead subject to French law and provided for a different membership than the other two organizations. For the purposes of this paper, the focus will be on CEN and CENELEC.

<sup>13</sup> L. Senden, *The Constitutional Fit of European Standardization Put to the Test*, 44(4) *Legal Issues Econ. Integration* 341 (2017).

## 2.2 THE (UNCERTAIN?) QUALIFICATION OF THE EUROPEAN STANDARDIZATION PROCESS

In order to examine and assess the nature of harmonized standards, it should be noted that the ESOs may also develop other standards in light of the need of a specific industry; however, only standards which originate out of a request of the European Commission and a reference to which is published in the Official Journal qualify as ‘harmonised European standards’. This qualification is important because, while non-harmonized standards do remain a purely private phenomenon without any binding force, harmonized standards carry important consequences.

First of all, as soon as a standardization request is made, ‘national standardisation bodies shall not take any action which could prejudice the harmonisation intended and, in particular, shall not publish in the field in question a new or revised national standard which is not completely in line with an existing harmonised standard’.<sup>14</sup> After publication, the national standardization organizations (NSOs) are obliged to withdraw all conflicting national standards.<sup>15</sup>

Furthermore, and importantly for public law purposes, after publication of a reference in the Official Journal, Member States must respect the presumption of conformity which arises in respect of the products which comply with the standards and cannot in any way limit entry to those products in their markets.<sup>16</sup>

Thirdly, the nature of a standard as a HES has specific consequences for product safety: according to Article 3(2) second limb of Directive 2001/95/EC, goods manufactured in accordance with harmonized standards are presumed to be ‘safe’ for the purposes of the Directive.<sup>17</sup>

Finally, harmonized standards can be used in technical specifications to establish the technical characteristics of products for the purposes public procurement procedures, in accordance with Article 42(3) of Directive 2014/24/EU on public procurement.<sup>18</sup>

On this basis, it can therefore be argued that harmonized standards, although produced by private organizations, have been endowed by EU legislation with undeniable public law consequences. In this sense, the process of European standardization can be depicted as a true process of ‘co-regulation’. Co-regulation has been defined in the 2003 Inter-Institutional Agreement on Better Law-Making

<sup>14</sup> Art. 3(6) of Regulation 1025/2012.

<sup>15</sup> *Ibid.*

<sup>16</sup> See also on this point Case C-100/13, *Commission v. Germany*, ECLI:EU:C:2014:2293.

<sup>17</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 Dec. 2001 on general product safety [2002] L 11/4.

<sup>18</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 Feb. 2014 on public procurement [2014] OJ L 94/65.

(IIA),<sup>19</sup> which concluded the Better Regulation Program of 2002,<sup>20</sup> as ‘the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field’.<sup>21</sup> This definition is replicated also in the more recent Toolbox #18 ‘The Choice of Policy Instrument’,<sup>22</sup> attached to the latest Better Regulation package.<sup>23</sup> In other words, co-regulation is a mechanism that brings together private and public parties at the different stages of decision-making as to regulate different interests.<sup>24</sup>

Another ‘label’ which reflect the hybrid nature of the European standardization process relates to the nature of the very bodies which produce the harmonized standards, the ESOs. Departing from a ‘functionalist’ view of public administration, it has been argued that the ESOs which receive a request from the Commission to draft harmonized standards ought to be considered as ‘private bodies entrusted with public tasks’.<sup>25</sup> This is first of all due to the special contractual relationship in place between the ESOs and the Commission as the request to draft a harmonized standard may only be issued towards only to one or more of the (only) three European standardization organizations. Furthermore, the Commission funds the activities of the ESOs and the assessment of the standards is carried out together by the controller (Commission) and the controlled (ESO). Secondly, the qualification of the ESOs as private bodies entrusted with public tasks arises from the fact that, while *de jure* compliance with HESs is voluntary for producers, HESs usually constitute *de facto* the only possibility for producers and service providers to market their products, because of the high threshold in terms of time and costs associated with the need to prove that their products conform to the essential requirements of the underlying legislation.<sup>26</sup> Finally, HESs do not only fulfil the aim to promote better, faster and cheaper industrial developments, but they also realize public interest objectives related to product safety and environmental protection.<sup>27</sup>

<sup>19</sup> European Parliament, Council and the Commission, InterInstitutional Agreement on Better Law-making [2003] OJ C 321/01; this document addressed the aspects of co-regulation and self-regulation as alternative mechanisms to law-making.

<sup>20</sup> Commission Action Plan, *Simplifying and Improving the Regulatory Environment*, COM (2002) 278 Final.  
<sup>21</sup> *Ibid.*, para 18.

<sup>22</sup> [https://ec.europa.eu/info/sites/info/files/file\\_import/better-regulation-toolbox-18\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-18_en_0.pdf).

<sup>23</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better Regulation for Better Results – An EU Agenda*, COM/2015/0215 final.

<sup>24</sup> P. Verbruggen, *Does Co-regulation Strengthen EU’s Legitimacy?*, 15(4) Eur. L. Rev. 425 (2009).

<sup>25</sup> M. Gnes, *Do Administrative Law Principles Apply to European Standardization: Agencification or Privatization?*, (44)4 Legal Issues Econ. Integration 375 ff (2017).

<sup>26</sup> This specific point is also made elsewhere in doctrine. See e.g. Schepel, *supra* n. 10, at 528.

<sup>27</sup> Gnes, *supra* n. 25, at 375 ff.

Finally, a suitable qualification could be that of ‘public-private partnership’,<sup>28</sup> to highlight the element of collaboration between public parties and administrative actors. This concept has been mostly used at the international level, to designate bodies such as the World Anti-Doping Organization, in which private actors co-exercise regulatory functions together with public actors.<sup>29</sup> While this stream of research qualifies public-private partnerships on the basis of their ‘hybrid membership’, it is submitted that such a ‘public-private partnership’ does not require to build one specific institution to carry out a specific regulatory task, but can also be built through the creation of a common *process* to which private parties and public authorities participate. If taken in this broad sense, the concept of ‘public-private partnership’ could certainly be extended to the regulatory structure arising from the European standardization process, because of the mix of private and public steps in the process.

The legal nature of harmonized standards has, until recently, remained in a grey area. On the one hand, the Commission repeatedly stated that harmonized standards are ‘tools of voluntary application’ made by and for market players, hence a totally private phenomenon outside the reach of public law. On the other hand, the Court of Justice progressively eroded this idea by stating, first, in *Fra.bo*, that even formally private standards can fall under the scope of free movement rules,<sup>30</sup> and secondly, in the *EMC* case, that the process of setting the HESs could be subject to EU competition rules.<sup>31</sup>

The Court’s view on the legal nature of harmonized standards has been clarified even further in the recent *James Elliott* case, in which the Court of Justice clearly stated that the voluntary nature of HESs ‘cannot call into question the existence of the legal effects of a harmonised standard’<sup>32</sup> (in the form of the presumption of conformity) and the HESs are not the product of a purely private activity, but a part of EU *law*.

While the Court did not qualify harmonized standards as acts of the EU institutions, unlike the Advocate General,<sup>33</sup> it did state that they form part of

<sup>28</sup> See for an overview T. Börzel & T. Risse, *Public-Private Partnerships: Effective and Legitimate Tools of International Governance?*, in *Complex Sovereignty: On the Reconstruction of Political Authority in the 21st Century* 195–216 (E. Grande & L. Pauly eds, University of Toronto Press 2007).

<sup>29</sup> See on the WADA, L. Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6(2) *Int’l Orgs. L. Rev.* 421–446 (2009). See also C. Jenart, ‘The Binding Nature and Enforceability of Hybrid Global Administrative Bodies’ Norms Within the National Legal Order: The Case Study of WADA’ 24(3) *European Public Law*, 411–432 (2018).

<sup>30</sup> Case C-171/11, *Fra.bo*, ECLI:EU:C:2012:453.

<sup>31</sup> Case C-367/10 P, *EMC*, ECLI:EU:C:2011:203.

<sup>32</sup> Case C-613/14, *James Elliott Construction Limited v. Irish Asphalt Limited*, ECLI:EU:C:2016:821, para. 42.

<sup>33</sup> Opinion of Advocate General Campos Sanchez-Bordona in Case C-613/14 *James Elliott Construction Limited v. Irish Asphalt Limited*, ECLI:EU:C:2016:63.

EU law because they constitute necessary implementation measures of EU law provisions. The fact that the HESs are produced by private bodies, did not, in the court's view, alter this conclusion as the drafting process of HESs is, first, governed by the essential requirements contained in the underlying legislation, and secondly, 'initiated, managed and monitored by the Commission'. Finally, it is only upon official publication of the reference to a HES in a Commission measure that the HESs acquire their peculiar (and one might want to add 'public-law related') effects.<sup>34</sup>

Little doubts are left, after *James Elliott*, on the fact that the process of European standardization can no longer be depicted as a purely private phenomenon, and harmonized standards as voluntary market tools. If harmonized standards leave the private sphere and ought to be read through the lenses of public law, the ensuing question is what consequences descend from this shift in perspective. It is to this question which the article now turns.

### 3 THE APPLICABILITY OF THE PRINCIPLES OF ADMINISTRATIVE LAW

The first question which arises in respect of this shift of perspective is the possible applicability of general principles of administrative law. In particular, two principles seem to be challenged by the process of European standardization, transparency and participation, which have been referred to as 'twin pillars of what is termed specifically 'administrative democracy''.<sup>35</sup> As Curtin and Mendes have argued, respect for these 'twin pillars' is all the more important for actors and processes which do not enjoy democratic legitimacy, such as is, doubtlessly, the case for European standardization.<sup>36</sup>

#### 3.1 THE TRANSPARENCY OF THE EUROPEAN STANDARDIZATION PROCESS

The European Union claims to be founded on the democratic value of openness: accordingly, Article 1 TEU commits the EU to take 'decisions [...] as openly as possible'. Furthermore, in Article 15(1) TFEU it is specified that 'institutions, bodies, offices and agencies shall conduct their work as openly as possible' to foster good governance and facilitate participation. Openness is also required from the European administration under Article 298 TFEU.

<sup>34</sup> *Ibid.*, para. 43.

<sup>35</sup> D. Curtin & J. Mendes, *Transparence et Participation: des Principes Démocratiques pour L'administration de l'Union Européenne*, 2011(1) *Revue française d'administration publique* 137–138, 104 (2011).

<sup>36</sup> *Ibid.*, at 105.

Transparency can be achieved through several mechanisms, ranging from clear information on the agenda of a meeting and topics for debate, to information on who is participating in the decision-making process.<sup>37</sup> One specific prong of transparency is the possibility to have access to documents. In this context, Article 15(3) TFEU, which provides that '[A]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies'. The rules on access to document are further specified in Regulation 1049/2001 which determines the 'principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission'.<sup>38</sup>

While the process of European standardization claims to be founded on the principles of transparency and openness, it is debatable whether these principles are in practice respected.

European standardization organizations are required to publish detailed work programmes at least once per year, providing information on the European standards which the ESO intends to prepare or amend, which it is preparing or amending and which it has adopted in the period of the preceding work programme.<sup>39</sup> Furthermore, European standardization organizations are obliged to send at least in electronic form any draft European standard to other European standardization organizations, national standardization bodies or the Commission, upon their request.<sup>40</sup>

However, it is at least debatable whether these requirements ensure transparency of the process. While indeed it is possible to access information on, for example, which Technical Committees exist within CEL, and which standards are being prepared,<sup>41</sup> it is impossible for the ordinary citizen to obtain information on when these Technical Committees meet and who participates in them, let alone what the outcome of the discussions and the position of each participant are.

The degree of transparency of the process does not increase once the HES is approved and the reference to it is published in the Official Journal, that is, one could argue, once the 'public law effect' of the process has kicked in. Indeed, if

<sup>37</sup> On the principle of transparency see P. Craig, *EU Administrative Law* 356 ff. (OUP 2012). *Europeanization of Public Law* 251 ff. (J. H. Jans, S. Prechal & R. J. G. M. Widdershoven eds, 2d ed., Europa Law Publishing 2015).

<sup>38</sup> Art. 1(a) of 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-145/43.

<sup>39</sup> Art. 3(1) Regulation 1025/2012.

<sup>40</sup> Art. 4(1) Regulation 1025/2012.

<sup>41</sup> See for CEN, <https://standards.cen.eu/dyn/www/?p=CENWEB:6:::NO>.

approved, national standardization organizations are obliged to translate the new European harmonized standard, of which they hold the copyright, and to sell it at the domestic level.<sup>42</sup> This is because the NSOs generally claim that the national representatives that prepared the standard are the ‘authors of a collective copyright protected work and the NSO has obtained through contract the exclusive and permanent right to utilize the so-called financial rights connected to the copyright protected work’.<sup>43</sup> Furthermore, according to the CEN-CENELEC official position, the need to protect the HESs through copyright is a way to ensure the sustainability of the system, which is funded by the revenues from sales of standards.<sup>44</sup> Interestingly, however, as noted by Micklitz and van Gestel, the impact assessment conducted on the revision of the European Standardization Package revealed that national standardization bodies were not able to provide figures for the sale of European harmonized standards. ‘In other words, although standardization bodies are sure that they cannot do without the income of copyrights, they are unable to substantiate that claim’.<sup>45</sup>

However, it is hard to reconcile the idea of standards being part of EU law, as declared by the Court of Justice in *James Elliott* with the idea of their accessibility only against payment. The Court of Justice has not taken a clear stance on this issue in the *James Elliott* ruling, likely because the issue did not directly relate to the question posed by the national court under Article 267 TFEU. Instead, the AG did mention the copyright topic and explicitly stated not to want to meddle with such a complicated issue.<sup>46</sup> In his Opinion, however, he refers to some important national case law which might have implications for the copyright protection of HESs. In particular, while the Dutch Supreme Court considered that technical standards adopted by the Netherlands standards institute were protected by intellectual property rights and it was not compulsory to publish them officially, the German Supreme Court and Constitutional Court held that technical standards adopted by the German standards institute (DIN) were not protected by

<sup>42</sup> See CEN-CENELEC Guide 10 on ‘Policy on dissemination, sales and copyright of CEN-CENELEC Publications’ which sets out the CEN and CENELEC joint policy on copyright and distribution.

<sup>43</sup> B. 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*, 44(4) *Legal Issues Econ. Integration* 424 (2017).

<sup>44</sup> [https://www.cencenelec.eu/news/policy\\_opinions/PolicyOpinions/PositionPaper\\_Consequences\\_Judgment\\_Elliott%20case.pdf](https://www.cencenelec.eu/news/policy_opinions/PolicyOpinions/PositionPaper_Consequences_Judgment_Elliott%20case.pdf), at 7.

<sup>45</sup> R. van Gestel & H.-W. Micklitz, *European Integration Through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies*, 50(1) *Common Mkt. L. Rev.* 147 (2013).

<sup>46</sup> Opinion of Advocate General Campos Sanchez-Bordona, *supra* n. 33. ‘For the purposes of this reference for a preliminary ruling, I do not consider it essential to examine in more detail the important question of whether the complete official publication of harmonized technical standards is necessary in order for those standards to have legal effect and for the principle of the publication of legislation to be observed’. para. 51.

intellectual property rights. Not surprisingly, because of the Europe-wide implications which this ruling could have for the European standardization process (as once those ‘German’ standards, which are a copy-paste version of HESs are made available, the entire copyright system would crumble Europe-wide), the German legislator in essence overturned the ruling and kept the copyright protection of German standards and, indirectly, HESs, intact.<sup>47</sup> That the matter is however not completely uncontroversial is shown by a very recent case of the Higher Administrative Court of Hamburg, which was confronted with a claim brought by the German standards institute against an American NGO which had published on their website some standards owned by DIN.<sup>48</sup> In this case, the Court confirmed that the copyright over these standards belongs to DIN and that there is no requirement of publication of the standards according to German law.

In conclusion, it seems that, despite the principled statements contained in Regulation 1025/2012 concerning the openness and transparency of the European standardization process, the system fails to live up to these values. However, despite the academic support for more accessibility of HESs,<sup>49</sup> it is at the moment not possible to conclusively state that, due to the ruling in *James Elliott*, the system of copyright of HESs ought to be removed. This is mostly due to the fact that the Court of Justice, unlike the Advocate General, did not qualify the HESs as acts of ‘institutions, bodies, offices and agencies’ which would have automatically brought the HESs under the scope of Article 15(3) TFEU and Regulation 1049/2001. Instead, by qualifying the HESs as implementation measures of EU law provisions (despite concluding that they form part of EU law), the Court dodged the dangerous bullet of copyright protection. Until the next national court sends the next preliminary question, that is.

### 3.2 THE PARTICIPATION IN THE EUROPEAN STANDARDIZATION PROCESS

The second ‘twin pillar’ of administrative democracy after transparency is participation. In fact, transparency has been regarded as a starting point for the participation of civil society and democratic control.<sup>50</sup> The European Union itself is

<sup>47</sup> For an account of these cases, see the detailed analysis of van Gestel & Micklitz, *supra* n. 45, at 161–172.

<sup>48</sup> OLG Hamburg, Urteil vom 27 July 2017 – 3 U 220/15 Kart.

<sup>49</sup> Senden argues, e.g. that, after *James Elliott*, ‘it highly questionable whether accessibility only upon payment is lawful’. Senden, *supra* n. 13, at 352. For a different opinion, supporting the copyright of ESOs, see U. Karpenstein, *Gefährdet der EuGH den New Approach?*, 321 and ff. (EuZW 2017).

<sup>50</sup> See on this point D. Curtin & A.J. Meijer, *Does Transparency Strengthen Legitimacy? A Critical Analysis of European Union Policy Documents*, 11(2) Info. Polity 120 (2006).

committed to the participation of civil society as a means to boost its democratic legitimacy.<sup>51</sup>

Just as with transparency, Regulation 1025/2012 seems to commit the process of European standardization to strive for ‘appropriate representation and effective participation of all relevant stakeholders’,<sup>52</sup> the reality shows again a different picture.

Regulation 1025/2012 has ‘institutionalised’ somewhat the participation of societal stakeholders in the European standardization process. In particular, the Regulation has entrusted the representation of these interests to organizations selected on the basis of Annex III of the Regulation. The so-called ‘Annex III stakeholders’ enjoy codified participatory prerogatives in ESO’s activities and receive funding from the Commission.<sup>53</sup> However, as mentioned by the same Regulation ‘[T]he obligation of the European standardisation organisations to encourage and facilitate representation and effective participation of all relevant stakeholders does not entail any voting rights for these stakeholders unless such voting rights are prescribed by the internal rules of procedure of the European standardisation organisations’.<sup>54</sup> Currently none of the Annex III organizations enjoy voting rights in the process.

Furthermore, the vague terminology adopted by the above mentioned provision of Regulation 2015/2012 is operationalized only very scantily in the legislative framework. In particular, the only codified prerogatives of Annex III organizations concern consultation during the preparation of the annual Union work programme for European standardization<sup>55</sup> and during the drafting of a request to an ESO,<sup>56</sup> and notification of the most important steps in the process.<sup>57</sup> Furthermore, these organizations have the possibility to join any ESOs meeting and take part in them as Observers or Experts, and express a positive or negative opinion on a draft standard.<sup>58</sup> Correctly it has been argued that these participation

<sup>51</sup> Participation is featured, e.g. as a key concept and one of five principles of ‘good governance’ in the White Paper on European Governance [COM(2001) 428], and more recently in the Better Regulation Package of the European Commission. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better Regulation for Better Results – An EU Agenda*, COM(2015) 215 final.

<sup>52</sup> Art. 5(1).

<sup>53</sup> There are currently four Annex III organizations: ANEC – the European Consumer Voice in Standardization; ECOS – European Environmental Citizens Organization for Standardization; ETUC – European Trade Union Confederation and SBS – Small Business Standards.

<sup>54</sup> Recital 23 of Regulation 1025/2012.

<sup>55</sup> Art. 8(4) of Regulation 1025/2012.

<sup>56</sup> Art. 10(2) of Regulation 1025/2012.

<sup>57</sup> Art. 12(2) of Regulation 1025/2012.

<sup>58</sup> See clause 1.2.1 and 1.2.2. of the CEN-CENELEC Guide 25, *The Concept of Partnership with European Organizations and other Stakeholders* (2d ed., 2017).

prerogatives cannot be qualified as rights, given their vague legislative embedding, and their violation can likely not be actionable in court.<sup>59</sup>

The lack of effective stakeholder participation in the European standardization process is indeed a concern which has been expressed on various occasions especially in light of the economic, informational and expertise asymmetries of societal stakeholders vis-à-vis the industry. Recently, the European Parliament itself has stated the view that the process ought to be made more inclusive<sup>60</sup> and recommended ‘that the membership status, rights and obligations of Annex III organisations, such as the right of appeal, consultative powers, the right to an opinion before a standard is adopted, and access to technical committees and working groups be reviewed within the ESOs to assess whether they meet the requirements of Regulation (EU) No 1025/2012’.<sup>61</sup> One can read in these lines the scepticism of the European Parliament as to whether the current setup indeed provides for sufficient participation. Similar scepticism is expressed also in literature.<sup>62</sup> However, empirical research would be necessary in order to assess the real participatory reality in the European standardization process.<sup>63</sup>

#### 4 THE POSSIBILITIES OF JUDICIAL REVIEW

Having established the public law relevance of the European standardization process, the last part of this contribution discusses the availability of judicial review in the process itself. After years of judicial neglect, this is a topic which has come to the attention of the Court of Justice and doctrine in the aftermath of the *James Elliott* case, in which the Court established that, as part of EU law, HESs are subject to the jurisdiction of Court in preliminary questions of interpretation.

While the fact that HESs can be interpreted by the Court of Justice in proceedings under Article 267 TFEU is by now a settled question, doubts might still remain on the possibility to challenge the lawfulness of HESs through a preliminary question of validity under Article 267 or directly in annulment actions.<sup>64</sup>

While the issue is not completely clear, it appears that, at least in the view of the European Commission, preliminary questions of validity are available with regards to HESs. Indeed, in Toolbox 18 of the Better Regulation Package, the

<sup>59</sup> P. Cuccuru, *European Judiciary and Harmonised Standards: Which Intersection?*, Eur. L. J. (forthcoming).

<sup>60</sup> European Parliament resolution of 4 July 2017 on European standards for the twenty-first century (2016/2274(INI)), para. 45.

<sup>61</sup> *Ibid.*, para. 74.

<sup>62</sup> M. Kallestrup, *Stakeholder Participation in European Standardization: A Mapping and an Assessment of Three Categories of Regulation*, 44(4) *Legal Issues Econ. Integration* 392 (2017).

<sup>63</sup> See for a first step in this direction, P. Cuccuru, *Interest Representation in European Standardisation* (on file with author).

<sup>64</sup> See further M. Eliantonio, *Judicial Control of the EU Harmonized Standards: Entering a Black Hole?*, 44(4) *Legal Issues Econ. Integration* 395–408 (2017).

Commission states that ‘Where indirectly referenced technical standards, even when voluntary, confer a legal effect, such technical standards fall under Article 267 of TFEU meaning that the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the validity and interpretation of such standards’.<sup>65</sup> The Commission in this statement makes reference to the *James Elliott* case, which suggests a wide reading of the case on its part. While Article 267 provides for one procedure for questions of interpretation and questions of validity, it is readily apparent that the consequences of a ruling of interpretation and one of validity are very different: allowing the Court of Justice interpret the provisions of a HES is a much less intrusive power than giving the court the power to invalidate a standard, thereby depriving it of its legal effects.

It is here submitted that, while this position increases judicial control over harmonized standards, and it is for this reason a welcome development in light of the public law relevance of the European standardization process, it is not the most straightforward reading of the *James Elliott* case, in which the Court never mentioned the word validity and only declared itself competent to provide an interpretation of the HESs. Corroborating this (more limited) reading of *James Elliott* is also the fact that the case law which the Court used in support of establishing its jurisdiction refers exclusively to questions of interpretation.<sup>66</sup> Interestingly, this very forthcoming position of the European Commission clashes with the view recently taken by the European Parliament which, in open contradiction with the *James Elliott* ruling, has stated that standards ‘cannot be seen as EU law’.<sup>67</sup>

Finally, and given the shortcomings of the preliminary ruling procedure over direct actions of annulment, it is still important to investigate whether *James Elliott* opened any avenue, especially for private litigants, to challenge HESs in annulment proceedings under Article 263 TFEU. Indeed, as is well known, access to the Court of Justice via the preliminary reference procedure is not available to applicants as a matter of right, since national courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EU measure to the Court or might err in their assessment of the validity of the measure and decline to refer a question to the Court on that basis. Furthermore, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants’ claims might be redefined or that the questions

<sup>65</sup> [https://ec.europa.eu/info/sites/info/files/file\\_import/better-regulation-toolbox-18\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-18_en_0.pdf), at 114 (accessed 6 July 2018).

<sup>66</sup> Case C-192/89, *Sevince*, ECLI:EU:C:1990:322; Case C-188/91, *Deutsche Shell*, ECLI:EU:C:1993:24. See further C. Colombo & M. Eliantonio, *Harmonized Technical Standards as Part of EU Law: Juridification with a Number of Unresolved Legitimacy Concerns?*, 24(2) *Maastricht J. Eur. & Comp. L.* 323–340 (2017).

<sup>67</sup> European Parliament resolution of 4 July 2017 on European standards for the twenty-first century, para. 4.

referred might limit the range of measures whose validity is being challenged before the national court. Finally, proceedings brought before a national court are more disadvantageous for individuals compared to an action for annulment under Article 263 TFEU, since they involve delays and extra costs.<sup>68</sup>

*James Elliott*, as such, did not shed any light to the admissibility of a direct action against HESs. While it admitted that HESs form part of EU law, it did not consider HESs as acts of the EU institutions, bodies or offices of the EU which are reviewable under Article 263 TFEU. A direct action could therefore only be brought against the Commission Communication which publishes a reference to a harmonized standard in the Official Journal: however, it is not clear whether this challenge would lead to the substantive review of the standard by the Court, as the standard remains as such a private measure, which is only available against payment and the copyright of which remains with the standardization bodies.

One possible avenue to admit an indirect challenge of a HES through a claim against a Commission Communication which publishes a reference to it is to rely on the 'control function' exercised by the Commission in the process.<sup>69</sup> Indeed, Article 11(1) of Regulation 1025/2012 states that the Commission has to 'decide' whether a certain HES fulfils the essential requirements it must comply with. One could therefore imagine a claim against a Commission Communication publishing a reference to a HES, alleging that the latter is invalid as the HES does not comply with the essential requirements, which leads indirect to the review of the HES. It remains to be seen whether this claim will be successful in court. If the Court would accept this argument, it would doubtlessly imply recognition of the public law relevance of the European standardization process and of HESs.

Even if this first hurdle were overcome, a second one posed by the long-standing case law of the Court on review of non-binding measures would present itself. According to the Court of Justice, actions for annulment under Article 263 TFEU are open against 'all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.<sup>70</sup> In this light, the Court of Justice, has partially opened the legality review of measures which are not formally binding, such as guidelines and communications, especially when a measure of soft law is construed as introducing a new obligation.<sup>71</sup>

The question which arises with regard to HESs is that they are formally not binding and, at least according to the official view of both the Commission and the ESOs, voluntary market tools. This would in principle screen them from judicial

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<sup>68</sup> These considerations all appear in the Opinion of Advocate General Jacobs in Case C-50/00 P, *Unión de Pequeños Agricultores v. Council of the European Union*, ECLI:EU:C:2002:197.

<sup>69</sup> On this point, Schepel, *supra* n. 10, at 528 ff.

<sup>70</sup> Case 22/70, *Commission v. Council (ERTA)* ECLI:EU:C:1971:32, para. 39.

<sup>71</sup> Case C-366/88, *France v. Commission (Internal Instructions)* ECLI:EU:C:1990:348.

control. However, in *James Elliott*, the Court of Justice clarified that the non-binding nature of HESs and the fact that conformity with the essential health and safety requirements can in principle be proven in other ways than respecting a HES, ‘cannot call into question the existence of the *legal effects* of a harmonised standard’,<sup>72</sup> namely the presumption of conformity arising from publication of the reference to a HES in the Official Journal. In light of this conclusion, it might be argued that the Commission Communication publishing a reference to a HES might be considered as an act intended to have legal effects for the purposes of judicial review.

From the same perspective, the Commission Communication publishing a reference to a HES can be regarded as an act which introduces a new obligation, as Member States and national standardization organizations are obliged to respect the presumption of conformity with the essential requirements which this publication generates. In conclusion, one could be tempted to argue that, despite its being limited to preliminary questions of interpretation, *James Elliott* might have opened the road to a broader recognition of the public law relevance of the process of European standardization, which might have implications for the overall system of judicial review.<sup>73</sup>

## 5 CONCLUSIONS

This article has examined a very peculiar form of cooperation between public authorities and private parties, the European standardization process. This regulatory technique is a true hybrid form of regulation, which contains public and private steps in the request, drafting, and approval of so-called ‘harmonized European standards’. While this process has remained ‘in the shadow of hierarchy’ for a long period of time, it is now clear that it is slowly being ‘juridified’.<sup>74</sup> The aim of this article was to show the relevance of public law, as a set of rules meant to uphold and protect the public interest, in the process of European standardization, especially in the aftermath of the *James Elliott* case, which declared HESs as part of EU law, thereby bringing them more clearly into the domain of public law.

Two decades ago, in one of the first in-depth studies on the process of European standardization, Joerges, Schepel and Vos concluded that ‘Standardisation [...] is too important to leave it to the standardisation community; it is too complex a mixture of

<sup>72</sup> Case C-613/14, *James Elliott Construction Limited v. Irish Asphalt Limited*, *supra* n. 32, Para. 42.

<sup>73</sup> Whether this development will *actually* lead to a broader judicial control of HES remains however to be seen. Two very significant hurdles in this sense are the general standing requirements applicable in annulment actions, and the ‘non-conflictual’ culture surrounding the process of European standardization, which seems to prefer to have actors resolve their disputes ‘outside the court room’. These difficulties are examined in Eliantonio, *supra* n. 64, at 395–408; Cuccuru, *supra* n. 59.

<sup>74</sup> Schepel, *supra* n. 10, at 521–533.

cognitive, normative and political aspects, one must add, to be taken over by administrators. This conclusion is in principle uncontested. What remains controversial is how to design adequate institutional responses to these insights'.<sup>75</sup> They proposed institutional responses concerning, amongst others, “‘reflexive’ mechanisms within standardization procedures ensuring that consumer concerns and environmental implications be taken into account’ and ‘independence of the judiciary in its assessment of safety requirements’. Fast forward in 2013. Then, Van Gestel and Micklitz saw:

the walls of the ‘club house’ ... com[ing] down because the march into the public domain opened up ‘quasi- technical’ standardization or ‘public law in private disguise’ to market forces and to competition between different standards bodies, and also to public scrutiny, and participation of non-governmental bodies standing for the public interest, such as environmental groups, citizen groups, human rights groups and consumer organizations in the standardization process.<sup>76</sup>

If looked from both of these perspectives, advocating in essence a stronger role for public law in the process of European standardization, this article has presented a rather mixed picture. While the fact that the process has been squarely brought into the public law arena is in principle incontestable after *James Elliott*, the ensuing consequences are less straightforward. In particular, the process still remains very obscure in terms of transparency and the final product, the HESs, still remain subject to the copyright of the national standardization organizations. It is hard to reconcile the nature of something being ‘law’ and its accessibility only against payment. Furthermore, despite positive steps being made in the right direction, the process of European standardization still remains a prerogative of market players, with the Annex III organizations being able to play only a limited ‘reflexive’<sup>77</sup> role.

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<sup>75</sup> Joerges, Schepel & Vos, *supra* n. 10, at 43–44.

<sup>76</sup> van Gestel & Micklitz, *supra* n. 45, at 150.

<sup>77</sup> Here reference is made to Teubner’s concept of ‘reflexive law’ as in the law relating to the ‘installation, correction, and redefinition of democratic self-regulatory mechanisms’. G. Teubner, *Substantive and Reflexive Elements in Modern Law*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896509](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=896509).

