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CASE NOTE

The Use of Copyrighted Technical Standards in the Operationalisation of European Union Law: The Status Quo Position of the General Court in Public.Resources.Org (T-185/19)

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Headnote: Although European Harmonised Standards are considered to form part of "European Union law" and to "contribute to a task in the public interest", they remain private voluntary instruments protected by copyrights granted under national law. Requiring free access to all European Harmonised Standards would undermine the Comité Européen de Normalisation's economic interest and, in turn, the European Standardisation system and the internal market as a whole.

Legislation: *Article 4(2) 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, OJ L 145, 31/05/2001 P. 0043–0048.*

I. Facts

On 14 July 2021, the General Court upheld the validity of the copyright protection over European Harmonised Standards (hereafter EHSs) and found that the European Commission was right to deny free access to four of these standards.

Public.Resources.Org, Inc. and Right to Know CLG, the applicants, are two non-profit organisations whose primary goal is to ensure that the law is freely accessible to citizens. In September 2018, the applicants requested access to four EHSs dealing with toy safety to the Commission. These standards were developed by the Comité Européen de Normalisation (hereafter CEN) at the Commission's request under the so-called New Approach regulatory framework.[1] A reference to these technical standards is published in the *Official Journal*.[2] Although they remain voluntary, EHSs grant a presumption of conformity with specific European Union (EU) laws on toy safety and render certification processes less burdensome. The CEN and, in turn, its members – National Standardisation Organisations (hereafter NSOs) – own copyrights over these technical standards. A few

[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>.

[2] <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32021D0867>.

libraries throughout the Union offer access to these standards on site. However, getting access via these libraries turns out to be excessively burdensome in practice. In 2016, in the *James Elliot* decision, the Court of Justice of the European Union (hereafter CJEU) held that, although they cannot be likened to "acts of the institutions, bodies, offices or agencies of the Union",[3] EHSs in fact "implement or apply an act of EU law",[4] and thus form a "part of EU law".[5] The Court did not question the validity of the European standardisation system as it stands in this judgment. However, the Court opened the door to further legal conundrums by further "juridifying"[6] the process and making the dividing line between what is public and what is private even more blurry. One of these challenges concerns the tension between free access and copyright protection over these standards. There is a constitutional imperative to know and thus to have access to what constitutes the law.[7] Regulation (EC) No 1049/2001 specifies the limits and conditions of access to documents of EU institutions. The Commission, however, refused to grant free access to the requested EHSs on the basis of the exception enshrined in Article 4(2) of that same Regulation. This exception provides that an institution should deny access to a given document if it would undermine the intellectual property rights and hence the commercial interests of a third party.

As a result, the applicants brought an action for annulment against the Commission's decision refusing access to the EHSs. Essentially, the applicants dispute the legitimacy of the copyrightability of EHSs in light of their close link with EU law.

II. Judgment

Under their first plea, the applicants disagreed with the application of the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001 aimed at protecting the commercial interests of third parties for the following reasons. According to them, EHSs are simply not copyrightable and the CEN's commercial interests cannot be undermined as a result of free access since they are performing a public function. First, they argued that intellectual property rights cannot exist for text of the law. Second, the applicants brought forward the argument that EHSs do not constitute "personal intellectual creation", which is a necessary criterion to benefit from intellectual property right protection, since they merely are lists of technical characteristics. Finally, the applicants argued that the Commission did not sufficiently substantiate the alleged harm to the commercial interest of the CEN should free access to the requested technical standards be granted.

When it comes to the application of the exception contained in Article 4(2) and, in particular, the (un)copyrightability of EHSs in light of their quasi-legal nature, the Court sided with the Commission. It held that, in the absence of harmonising EU laws, the protection of intellectual property rights and its exceptions are governed by national law, and an EU institution cannot question it.

Secondly, in response to the applicants' argument that EHSs do not meet the threshold of originality necessary to be considered as "personal intellectual creation" because of their merely technical nature, the General Court drew on the Commission's argument that the length and structure of technical standards automatically imply that the authors had to make several choices. Finally, after insisting that the conditions of originality are also governed by national law, the Court reiterated its settled case law on the meaning of the

[3] Case C-613/14, *James Elliot Construction limited v Irish Asphalt Limited,* ECLI:EU:C:2016:63, para 34.

[4] ibid, para 34.

[5] ibid, para 40.

[6] The term is borrowed from H Schepel, "The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law" (2013) 4 Maastricht Journal of European and Comparative Law 12.

[7] Enshrined in, *inter alia*, Art 17 TFEU.

autonomous notion of "work" and held that if a subject matter can be viewed as "original", notably because choices had to be made, it is both necessary and sufficient that it mirrors the creativity of its author.

Concerning the disruption of the CEN's commercial interests, the Court refused to endorse the argument of the applicants depicting the CEN as exercising public functions, which are not subject to private economic interest. The General Court, in line with the CJEU in *James Elliot*, explicitly stated that it is in no way apparent from the New Approach regulatory framework that the CEN is *acting* as a public authority when developing EHSs. However, the Court acknowledged that the CEN *contributes* to the performance of a task in the public interest. However, this does not in any way alter their status as private undertakings involved in economic activity. The Court upheld the Commission's position that the sale of standards is a vital part of the standardisation bodies' business model and that free access would undeniably and foreseeably undermine the CEN's interests.

Under their second plea, the applicants argued that, even if the exception under Article 4(2) was applicable, free access to the requested standards, in light of their legal nature, constitutes an overriding public interest that prevails over private economic interests. According to the applicants, since the requested harmonised standards "form part of EU law" and since EU law should be accessible based on, *inter alia*, the principles of legal certainty, accessibility and good administration, there is an "automatic overriding public interest" to grant free access to them. First, the applicants deemed that the Commission was wrong not to find the existence of a constitutional imperative to grant free access and that it did not give sufficient reasons as to why that was not the case. Moreover, the applicants argued that, since the technical standards at stake contain environmental information, their full disclosure also stems from the obligation of transparency in environmental matters contained in Article 5(3)b of the Aarhus Convention as implemented by Article 4(2)(a) of Regulation No 1367/2006.

First and foremost, the Court regretted that the applicants did not adequately define the source of what they identified as a "constitutional imperative" to access the standards at stake freely. Furthermore, as a reply to the complaint that the Commission failed to give sufficient reason, the Court insisted that it is on the party arguing for the existence of such an overriding interest to substantiate the specific circumstances underpinning such an interest rather than relying on general factors. By primarily leaning on the *James Elliot* decision to build their argumentation, the applicants *de facto* wish to exclude the entire category of EHSs from copyright protection on the generic consideration that they are "part of EU law". The Court found that granting free access to all EHSs would jeopardise the functioning of European standardisation as a whole in its current form and, in turn, the free movement of goods and the guarantee of an equivalent minimum level of safety in all European countries. Finally, the Court believed that the applicants had not sufficiently explained how the accessibility attached to what constitutes the "law" also applies to the requested EHSs, since they remain voluntary and are available for free in a few libraries in the Union.

When it comes to the obligation of transparency in environmental matters, Article 5(3)(b) of the Aarhus Convention, as implemented by Article 4(2)(a) of Regulation No 1367/2006, provides for the obligation to disseminate environmental information contained in EU legislation. According to the applicant, the requested EHSs fall within this category and should thus be freely accessible. The Court, however, did not agree, since EHSs do not constitute EU legislation that is strictly delimited by the Treaties and reserved for EU institutions. Moreover, while they contain specific information concerning maximum amounts of chemical substances that might be found in toys, the requested technical standards merely describe methods for complying with specific

safety requirements in order to make toys safer. Thus, the General Court found that the technical standards do not contain information affecting the environment per se.

All in all, the General Court decided that the EHSs are worthy of copyright protections and granting free access to all EHSs would undermine the CEN's interest and, in turn, the functioning of the internal market as a whole. Importantly, however, the case is pending appeal in front of the Court of Justice.[8]

III. Comment

The New Approach regulatory framework and the use of private voluntary standards in the operationalisation of EU law have played a crucial role in achieving the internal market.[9] However, they have also brought their share of constitutional issues.[10] To many, including the applicants in the case at hand, the fact that EHSs are "part of EU law" and produce legal effects and yet are protected by copyrights is a legal anomaly.[11] According to that view, the public interest of having access to what forms part of the legislative corpus trumps a private organisation's right to intellectual property. While the General Court refused to endorse such a view and opted for the status quo, this short case note shows that this does not necessarily have to be an either/or question.

On the one hand, requiring interested persons to pay in order to access standards incorporated by indirect reference into legislation does present a significant problem from the perspective of administrative law and its long-standing commitment to transparency. On the other hand, copyright protection guarantees revenues for standard-setting organisations. Furthermore, the protection of property rights is also a fundamental limb of the rule of law.[12] These rights cannot be arbitrarily revoked from private parties.

The balancing exercise between free access and copyrights depends on the answer to two fundamental questions that the applicants did not sufficiently outline in their plea. First, why and how does the peculiar quasi-legal yet voluntary nature of the EHSs qualify them for free access, as would other legal instruments? Second, constitutionally speaking, who is responsible for the legal effects produced by these standards and in turn responsible for the financial burden attached to free access?

1. De jure *versus* de facto *bindingness: does it matter?*

Under the New Approach regulatory framework, the EU legislator establishes the essential health and safety requirements that products must meet to be marketable. Compliance with such requirements can, in theory, be demonstrated using several regulatory routes, one of which being the use of the EHSs developed by one of the European Standardisation

[8] Case C-588/21, *Public.Resources.Org and Right to Know v Commission and Others*.

[9] See, for instance, M Egan, *Constructing a European Market: Standards, Regulation and Governance* (Oxford, Oxford University Press 2001); H Schepel, *The Constitution of Private Governance: The Product Standards in the Regulation of Integrating Markets* (London, Hart 2005).

[10] See, *inter alia*, R Van Gestel and P Van Lochem, "Private Standards as a Replacement for Public Lawmaking?" in M Cantero Gamito and H-W Micklitz (eds), *The Role of the EU in Transnational Legal Ordering* (Cheltenham, Edward Elgar Publishing 2020); C Colombo and M 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, 333–34; L Senden, "The Constitutional Fit of European Standardization Put to the Test" (2017) 44 Legal Issues of Economic Integration 337.

[11] See, for instance, M Medzmariashvili, *Regulating European Standardisation through Law: The Interplay between Harmonised European Standards and EU Law* (1st edn, Lund, Lund University Press 2019) pp 140–47.

[12] And is enshrined in Art 17 EU Charter of Fundamental Rights.

Organisations (hereafter ESOs) in support of the legislation. Sometimes, however, these standards represent the only route *de facto* but also *de jure* to demonstrate compliance with the law. The former situation was described by the Court in its *Fra.Bo*[13] decision and arises when regulatory, market or social forces render the use of a standard as the only viable way for companies to enter a market. The latter situation arises when using a technical standard is exclusively referred to in the law and becomes the only regulatory route to demonstrate compliance with the law. This is notably the case of the EHSs referred to in the Construction Products Regulation.[14] Article 17(5) of this regulation states that:

> . . . the harmonised standard shall be the only means used for drawing up a declaration of performance.

Legally speaking, there is a difference between using a standard as one amongst other accepted means of voluntary non-exclusive compliance with the law as opposed to a regulatory obligation per se.[15] Admittedly, while the *James Elliot* decision opened the door to discussion, EU courts have systematically endorsed the formal distinction between *de jure* and *de facto* bindingness in the case law. The *James Elliot* decision held that the EHSs produce legal effects after references have been made to them in the *Official Journal* and thus form "part of the law". In the decision at hand, however, the General Court argued that, as long as a technical standard is not *de jure* binding, forming "part of the law" or "contributing to a task in the public interest" is not sufficient to alter private economic rights and to trigger free accessibility. A piece was recently added to the puzzle with the recent twin decision in the *Stichting Rook Preventie Jeugd* case.[16] In that case, which deals with access to exclusive reference to International Organization for Standardization (hereafter ISO) standards in the Tobacco Products Directive,[17] the Grand Chamber of the CJEU made enforceability of *de jure* binding technical standards conditional upon free access. Thus, technical standards that remain *de jure* voluntary, as is the case for most of the EHSs, do not fall under these accessibility requirements. In reality, however, *de facto* and *de jure* bindingness are often difficult to distinguish in practice, other than on the basis of purely formalistic criteria. Unfortunately, the applicants did not convincingly substantiate why the fundamental principle of free accessibility to the law could or should functionally also be applicable to the EHSs in light of their tremendous market effects. In that regard, the applicants should have better exploited the *Fra.Bo* decision, which paves the way for the discussion of whether the distinction between a *de jure* and a *de facto* binding nature is tenable. At present, as long as the Court can rely on the fact that EHSs are *de jure* voluntary and accessible in a few libraries, the "constitutional imperative" that the applicants referred to is not rooted in sufficiently deep ground.

IV. Free access or copyrightability: who bears the burden?

The applicants' first plea was overwhelmingly concerned with the – unconvincing – lack of copyrightability of the EHSs, and the second one was concerned with the alleged clash between the private economic interest of the CEN and the overriding public interest of having access to the EHSs. There is little doubt that the EHSs can benefit from copyright

[13] Case C-171/11, *Fra.Bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)* ECLI:EU:C:2012:453.

[14] Regulation (EU)305/2011.

[15] For more on this distinction, see C Jenart, *Outsourcing Rulemaking Power: Constitutional Limits National Safeguards* (Oxford, Oxford University Press 2022).

[16] C-160/20, *Stichting Rookpreventie Jeugd v Staatssecretaris van Volksgezondheid, Welzijn en Sport*, ECLI:EU:C:2022:101.

[17] Directive (EU) 2014/40.

protection since they inherently involve many creative choices and go beyond merely describing the essential health and safety requirements. Not only are the texts of EHSs significantly longer than the Commission's standardisation requests, but they only come about as a result of a long and laborious research and development process. However, the free access to and validity of copyrights over technical standards are not necessarily two mutually exclusive concepts. There is another variable to the equation: the role of the public actor. Importantly, in this judgment, the General Court reaffirmed that it was the choice of the EU legislator to attach legal effects to a technical standard in the operationalisation of EU law after publication in the *Official Journal*.[18] If and when a technical standard worthy of copyright protection becomes *de jure* binding as a result of being used as a support for a piece of EU legislation, would it not be justified that the actor responsible should bear the financial burden of free access? It already does partially, but not necessarily appropriately.

The CEN is an official European Standardisation Organisation under Regulation 1025/2012 and thus receives subsidies from the European Commission. Furthermore, the EHSs only represent a small fraction (approximately 12%[19]) of CEN deliverables. Two interesting phenomena are also worth mentioning. First, free access to the EHSs was negotiated and accepted free of charge by ESOs during the pandemic for specific medical equipment. Second, on some relatively recent – post-*James Elliot* – occasions, the Commission sponsored ESOs and, in turn, NSOs in exchange for free access to certain EHSs, such as e-invoicing standard EN 16931-1:2017[20] and ISO standards notably dealing with the environment. Strikingly, however, there is no centralised list of which EHSs precisely are available for free, and the motivating factors underlying such decisions sorely lack transparency. Ironically, while the cost of buying off copyright over every technical standard in support of EU legislation might be prohibitive (although financial considerations should not as such constitute a valid argument from a constitutional law point of view), so far these sponsorships seem to concern a few *de jure* voluntary standards.

All in all, it can be concluded from these judgments that currently only *de jure* binding standards such as the construction product regulation EHSs or specific exclusively referred to ISO standards should be freely accessible. These technical standards, however, are worthy of copyright protection. Since it is the public actor that created this legal anomaly, the public actor should also play a role in the solution to the problem. It could, for instance, sponsor standard-setting organisations for free access to certain of their deliverables, at least when it comes to binding references to technical standards.

[18] ibid; *PublicOrganisations.Org*, para 53.

[19] CEN Annual Report 2020, available at <https://www.cencenelec.eu/news-and-events/news/2021/publications/2021-06-21-cen-clc-annual-reports-2020/>.

[20] See, for instance, the Belgian National Standard Setting Organisation website, available at <https://www.nbn.be/en/about-nbn/ensure-your-e-invoices-comply-new-european-e-invoicing-standards-download-standards-free>.

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