European Journal of Risk Regulation (2024), 1–8
doi:10.1017/err.2024.64

CAMBRIDGE UNIVERSITY PRESS

CASE NOTES

Is it really all about the money? The future of European standardization after *PublicResourceOrg*

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Case C-588/21P Public.Resource.Org and Right to Know v Commission and Others [2024] ECLI:EU:C:2024:201

Harmonized standards form part of EU law and should be freely accessible

Article 4(2) 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 2001 L 145, p. 43)

Abstract

On 5 March 2024 the European Court of Justice (CJEU) issued a landmark decision on access to harmonised standards that grant presumption of conformity with legal requirements. The CJEU ruled that such standards should be made available free of charge because, once incorporated in EU legislation, they form part of EU law. While the decision was positively received in the scholarly community, it is expected to carry profound consequences for European standards organisations, who hold copyrights over harmonised standards and rely on their sales to finance their standardisation activities. The judgment may also affect the European Commission, whom the Advocate General and the CJEU placed at the centre of European standardisation due to its role in transforming harmonised standards into EU law. This case note engages with the ruling and aims to shed light onto its possible implications for the European standardisation system.

1. Law behind a paywall

"What is law" is by far one of the most intriguing questions for lawyers. For over decades, legal philosophers, regulation and international law scholars have been challenging the idea that what is or ought to be perceived as "law" is made exclusively in law-making institutions. To that end, they also have analysed various mechanisms through which private rules metamorphosise into (semi-) binding obligations.[1]

One of such mechanisms is the European "New Approach:" a regulatory technique through which "harmonized standards" – technical requirements developed by the three

[1] See, among many examples, Hans, Lindahl, "ISO standards and authoritative collective action: conceptual and normative issues" in *The Law, Economics and Politics of International Standardisation* (CUP 2015) pp 42–57; Joost Pauwelyn, Ramses Wessel and Jan Wouters, "When structures become shackles: stagnation and dynamics in international lawmaking" (2014) *25(3) European Journal of International Law*, pp 733–63.

private European Standards Organizations (ESOs) – become conditions to meet European legal requirements. Application of these standards is but one possible way to demonstrate compliance with EU Directives or Regulations, yet by far the most preferable method among product manufacturers seeking access to the Single Market.[2] Such a division of labour between the legislators on the one hand, and industry bodies on the other, has proved beneficial for the European integration.[3] But there is a catch: since ESOs hold copyright over documents their produce, including harmonised standards, they control who, when and under which conditions can access and distribute these documents. Hence, when approving a harmonised standard, the European Commission only publishes the reference to this standard – and not its full text – in the EU Official Journal (OJEU).

The "New Approach" formula stands to this day: for instance, Standardisation Regulation 1025/2012 consistently refers to harmonised standards as "voluntary."[4] However, the non-binding force of these standards has been challenged by the European Court of Justice (CJEU) for over a decade. Already in 2012, the Court ruled in *Fra.bo*, that harmonised standards have de facto mandatory effects since the presumption of conformity with the law is too strong to use other means of demonstrating compliance.[5] In the following landmark judgment *James Elliott*, the CJEU held that harmonised standards form part of EU law owing to their legal effects.[6] It continued in *Stichting Rookpreventie* that mandatory reference to standards of the International Organization for Standardization (ISO) in EU legislation makes these standards binding on public only if they been published in the OJEU.[7]

As harmonised standards are pulled into public domain, fundamental questions linger about their public availability. These questions have been somewhat conveniently sidestepped by the Court – until *PublicResourceOrg.*

The facts of the case are as follows. In 2018, PublicResourceOrg and Right to Know, two Non-Governmental Organizations (NGOs) advocating for transparency and access to public documents, requested the European Commission to provide access to four harmonised standards of European Committee for Standardization (CEN) that were referenced under the Toy Safety Directive[8] and REACH Regulation.[9] The request was filed under Article 1 of Regulation 1049/2001 for public access to EU documents. The Commission refused, reasoning that CEN's copyright over the four standards falls under the exception in Article 4(2) of the Regulation 1049/2001 that allowed denial of access for the reason of CEN's commercial interests – in this case, its intellectual property. The applicants contested this decision before the EU General Court where they claimed, citing *James Elliott,* that since harmonised standards form part of EU law they cannot be

[2] Harm Schepel Gareth Jones, *The Constitution of Private Governance: Product Standards in the Regulation of Internal Markets* (Hart Publishing, 2005).

[3] Michelle Egan, Constructing a European Market: Standards, Regulation and Governance (Oxford University Press 2001); Jacque Pelkmans, "The New Approach to Technical Harmonization and Standardization" (1987), 25 J. Comm. Mkt." *Stud* 249.

[4] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation [2012] OJ L 316, rec. 1 and 2.

[5] Case C-171/11 Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein [2012] ECLI:EU:C:2012:453.

[6] Case C-613/14, James Elliott Construction Limited v Irish Asphalt Limited [2016] ECLI:EU:C:2016:821.

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

[8] Directive 2009/48/EC of the European Parliament and of te Council of 18 June 2009 on the safety of toys [2009] OJ L 170/1

[9] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency [2006] OJ L 396.

protected by copyright and should be freely accessible.[10] In a quite surprising and much criticised decision, the General Court sided with the Commission, finding that there is no overriding principle of access to law which may trump the applicability of the exception of Article 4(2) that would justify harming CEN's commercial interests.[11]

PublicResourceOrg appealed. In the opinion that preceded the appeal ruling, Advocate-General Medina was fiercely critical of the General Court's decision, suggesting that copyright protection of harmonised standards should be abolished and stressing that the rule of law requires that harmonised standards are available free of charge.[12] She also highlighted the central role that the Commission plays in standardisation process through issuing requests for harmonised standards, approving standards once they are drafted, and publishing their reference.[13]

2. The rule of law prevails

The long-awaited decision came on 5 March 2024. The CJEU started its reasoning with acknowledging that "the right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium, is guaranteed to any citizen of the Union," and that the principle of rule of law, entrenched in Article 2 of the EU Treaty (TEU), as well as Articles 15(3) of the Treaty of Fundamental Rights (TEU) and 42 of the EU Charter of Fundamental Rights, requires EU law to be freely accessible.[14] At the same time, the CJEU confirmed that access to the documents of EU institutions may be refused where the disclosure of such documents would undermine the protection of commercial interests, including intellectual property, *unless* there is an overriding public interest in the disclosure.[15] The Court thus did not engage in a balancing exercise between preserving CEN's commercial interests and public interests of access to standards; to the contrary, the wording of the CJEU confirms that the existence of an overriding public interest makes the exception of Article 4(2) inapplicable. In other words, had this balance been sought, it would have been tilted towards overriding public interest of access to law.

The CJEU recalled that while standards are voluntary, economic operators would often struggle to use any other methods of proving compliance with EU legislation due to administrative difficulties and arising costs.[16] In line with the Advocate General's arguments, the CJEU noted that it is up to the person or entity challenging the presumption of conformity with the essential requirements to prove that the product or service does not comply with the standard or that the standard is not fit for purpose.[17] The CJEU then applied this reasoning to the requested standards and held that since those standards are "manifestly mandatory," they form a part of EU law.[18] Reiterating that the rule of law principle requires free access to EU law for all natural or legal persons, and that harmonised standards may specify the rights and obligations conferred on the individuals, the CJEU concluded that there is an overriding public interest to justify the disclosure of the requested harmonised standards.[19] The CJEU thus overruled the General Court's

[10] For the full list of the applicants' claims, see the ruling of the General Court in Case T-185/19, Public.Resource.Org, Inc. and Right to Know CLG v European Commission [2021] ECLI:EU:T:2021:445.

[11] Case T-185/19, paras 101–107.

[12] Case C-588/21P Public.Resource.Org and Right to Know v Commission and Others [2024] ECLI:EU:C:2024:201, Opinion of AG Medina, para 52.

[13] Ibid, para 28.

[14] Ibid, para 66.

[15] Ibid, para 68.

[16] Case C-588/21P, para 75.

[17] Ibid, para 76.

[18] Ibid, paras 79–80.

[19] Ibid, paras 83–87.

decision confirming that free access to harmonised standards is required under the principles of the rule of law, transparency, openness and good governance.[20]

The *PublicResourceOrg* ruling adds to the line of cases on the so-called "juridification" of standards. From this perspective, the CJEU's findings that harmonised standards constitute a part of EU law, and should therefore be accessible to the general public, is not revolutionary. More intriguing however are the questions that the CJEU did not answer. In particular, and to the relief of CEN,[21] the Court did not address the issue of standards' copyrightability, ignoring the biggest elephant in the room. In this regard, the CJEU also did not specify how exactly, and by whom, should harmonised standards be made available, presumably leaving this to the discretion of the ESOs and/or the Commission. And while the decision was primarily filed under the access to documents regulation, the issue of standards' public availability is inseparable from CEN's business model that is believed to rely on the selling of harmonised standards.

Furthermore, even though the CJEU did not go as far as crushing the New Approach for good, the ruling puts into question the well-entrenched practices of this regulatory technique. Firstly, the decision challenges the ESOs' financial mechanisms and secondly, it shatters yet again the voluntary force of harmonised standards that has been the cornerstone of the European standardisation system.

3. Approaching the "New Approach" differently

Although the CJEU's decision concerned only four specific documents, it is expected to affect all harmonised standards. In this regard, the judgment triggers several constitutional and institutional questions and is likely to carry profound effects on different actors involved in the EU process of technical standardisation. This commentary attempts to shed light onto a few considerations that policymakers may have to take into account when implementing the judgment.

3.1. Whose standards?

PublicResourceOrg is yet another Court's decision that brings standards closer to the public realm without invalidating the New Approach. This presents a conundrum: if harmonized standards are part of EU law, they should be public; but because they are made by industry actors, they should be private. At the same time, the Court seems to endow harmonized standards with a mandatory power even if they are established by private parties. So where do standards belong?

An argument can be made that since the text of harmonized standards is not published as law in the OJEU, these standards cannot be binding: a similar reasoning was made by the Dutch Supreme Court in the *Knooble*[22] case and later, in *Stichting Rookpreventie,*[23] where the Court held that an ISO standards that was cited in the EU legislation but (the reference to it) was not published in the OJEU cannot bind the general public from the perspective of legal certainty. But the requirement to publish a standard in the OJEU is different from the requirement to make this standard publicly accessible. Curiously, the Court does not demand the Commission to publish the *text* of *harmonized* standards in the OJEU: in pulling harmonized standards into public domain, the Court looks at their legal effects, rather

[20] Ibid, para 89.

[21] CEN/CENELEC, 'Copyright protection of Harmonized Standards not in question – however, there is an overriding public interest in their disclosure' (5 March 2024) <https://www.cencenelec.eu/news-and-events/news/2024/brief-news/2024-03-05-ECJ-Case> accessed 24 June 2024.

[22] *Knooble,* 22 June 2012, ECLI:NL:HR:2012:BW039.

[23] Case C-160/20, para 39.

than the source or the manner of publication. The Court may thus be soon invited to explain whether references to international *and* European standards should be treated equally with regard to their binding force and free access.[24]

While the question whether standards are public or private seems irrelevant for the Court's assessment of their legal effects, it matters for the institutions that are involved in standardisation processes. If harmonized standards are public, the burden of accountability should lay with the European Commission. This is also in line with the CJEU's and Advocate-General's reasoning that the Commission has a central role to play in standardisation processes through requesting, approving and publishing the reference to the harmonised standard. It also has not been contested that the Commission is the appropriate institution to request standards' disclosure: after all, the appellants could have also petitioned CEN to provide the four standards.

The fact that standards are not drafted by the European Commission, but by industry experts from governments and commercial entities, does not in principle preclude the Commission's ownership of harmonised standard, provided that the *Meroni* requirements[25] are fulfilled. In fact, the Commission often relies on private expertise in drafting its regulatory policies – including the HAS consultants whose expertise is sought to verify compliance of draft harmonised standards with the Commission's standardisation requests.[26] In this regard, some commentators have linked the judgment to a democratic legitimisation mechanism through accountability in the light of the increasing democratic deficit that arises when European regulation is supplied by private bodies.[27]

At the same time, admitting that harmonised standards belong to the public realm may have consequences to their assessment under the European competition law, since standards' voluntary nature is one of the conditions of EU Horizontal Guidelines that keeps standards outside the purview of Article 101 TFEU.[28] It has even been suggested that placing standards into the public domain renders the process of their creation a legislative procedure rather than a private self-regulatory procedure, requiring the necessary constitutional checks and balances.[29]

If, however, standards are private, their disclosure arguably risks disrupting CEN's business model. This view is supported by CEN/CENELEC and the industry, which warn that bringing standards into the public domain is detrimental for the European standardisation system.[30] The General Court seemed particularly keen on such an assessment, while the CJEU kept silent regarding the validity of ESO's commercial interests, merely stating that the overriding public interest prevails. In this regard, it should be noted that while ESOs are indeed private bodies, they are not precluded from

[24] Hans-W. Micklitz "The Role of Standards in Future EU Digital Policy Legislation. A Consumer Perspective" (July 2023), a report commissioned by ANEC and BEUC, < https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-096_The_Role_of_Standards_in_Future_EU_Digital_Policy_Legislation.pdf > accessed 24 June 2024, 13.

[25] Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (1958) ECLI:EU:C:1958:7.

[26] See CEN, "HAS Assessment Process (Innovative Process) < https://boss.cen.eu/developingdeliverables/pages/en/pages/has_assessment_process/ > accessed 24 June 2024.

[27] Alexandru Soroiu, 'The CJEU Dismantles EU Standardisation in C-588/21 P (Public.Resource.Org)" (*Verfassungsblog,* 19 March 2024*)* < verfassungsblog.de/eu-harmonised-standards/> accessed 24 June 2024.

[28] Björn Lundqvist, "EU Constitutionalism and Standards" (11 May 2024). Faculty of Law, Stockholm University Research Paper No. 106, < https://ssrn.com/abstract=4235389> accessed 24 June 2024, 16.

[29] Ibid, 17.

[30] See above n 26, and statement by Business Europe and Orgalim, "Europe Must Maintain Industry Know-How For Its Standardisation System to Succeed" (8 September 2023) <https://www.businesseurope.eu/sites/buseur/files/media/position_papers/internal_market/2023-09-08_right_to_know_-_joint_statement.pdf> accessed 24 June 2024.

exercising a public function when developing harmonised standards upon the request of the Commission.[31]

3.2. Whose (copy) rights?

The CJEU did not follow the Advocate General's view that the copyright protection of harmonised standards should be abolished due to the legal effects of standards as well as the EU and its Member States' obligations under international treaties.[32] Indeed, whereas the requirement to provide free access to harmonised standards will have financial consequences for ESOs, it does not strip them from their intellectual property:[33] even if copyright is used as a commercial tool that allows to finance, at least in part, ESOs' activities, it is primarily a right. To illustrate, the European Telecommunications Standards Institute (ETSI), one of the three ESOs, places their standards into public domain while still holding copyright over them.

It is worth recalling that while economic theories about copyright typically invoke incentives, legislators should in principle require no financial incentives to legislate: the reverse would even undermine independence of the legislature. But in the peculiar settings of the ESOs, where technical contributions are made by private parties and often rely on their innovative ideas, abandoning copyright may indeed discourage contributions from the industry.

In this regard, the question arises whether it is the standards' drafters, rather than the ESOs, that should hold copyright over harmonised standards. This argument is supported by the condition for copyright protection that requires an author to produce an original work.[34] The General Courts did not engage sufficiently with the claim of originality, stating that copyrightability of standards should be assessed by the national courts; hence, the question whether standards' copyrights should be held by ESOs themselves remains open. To the contrary, the US Courts are more outspoken on the matter of copyright. For instance, In the parallel case *Georgia vs. Public.Resource.org,* the Court held that non-commercial dissemination of incorporated technical standards does not result in liability for copyright infringement.[35]

3.3. Who pays?

It is commonly assumed that standards' free availability harms ESOs' business model. Indeed, the financial aspects seem to be the central point of this discussion, since the preservation of the European standardisation system appears to rely on ESOs' revenues from standards' selling. However, previous studies indicated that the importance of this income source may be largely overstated, especially for CEN, who only earns about 4.6% of its financing through the selling of harmonised standards.[36] Furthermore, it should not be overlooked that the ESOs' standardisation activities are also funded by the European

[31] The author has claimed this elsewhere, see Olia Kanevskaia, "The Saga of Copyrighted Standards: a Perspective on Access to Regulation" in Bartosz Brożek et al (eds). *The Research Handbook on Law & Technology* (Edward Elgar Publishing 2023) 330-348.

[32] According to the Advocate-General, Article 297 TFEU which prescribes the publication of texts in the Official Journal of the EU should be seen as an indication that these documents do not benefit from any copyright protection. This is the discretion that the EU has follow Article 2(4) of the Berne Convention, to which it is bound by virtue of Article 1(4) of the WIPO Copyright Treaty. See also Rossana Ducato, "Why Harmonized Standards Should Be Open?" *54 IIC – International Review of Intellectual Property and Competition Law* (2023) 1173-1178.

[33] The opposite was argued by Soroiu, above n 27.

[34] See also the General Court's account of the Commission's decision, Case T-185/19 para 48.

[35] Note that the case was decided upob the fair use doctrine, which does not apply in the EU copyright law.

[36] Ducato, above n 32. See also Alexandru and Mateus Frazao Correia Magalhaes De Carvalho, "Lawtify Premium: Public.Resource.Org (T-185/19), a Judicial Take on Standardisation and Public Access to Law" 15 *Review of European Administrative Law* (2022) 57–76, similarly arguing for the trivial amount of revenues from the selling of harmonized standards.

Commission. Likewise, ESOs' deliverables are much broader than harmonised standards and are equally copyrightable and sellable. ESOs thus appear to have a rather diverse stream of revenues that is not limited to the selling of harmonised standards.

Let assume, for the sake of the argument, that ESOs indeed suffer a loss of revenues by opening up their standards to public. The logic behind the Advocate-General's and the Court's reasoning seems to imply that the accountability burden of the New Approach is held by the Commission. It would hence be reasonable to suggest that it is the Commission that should ensure standards' accessibility, either through increasing its funding for ESOs' activities around the development of harmonised standards, or through "buying off" harmonised standards from ESOs and placing them into the public domain – an option that is used by some Member States, including France and the Netherlands, in relation to standards that are developed by National Standards Organizations (NSOs) and referenced in the national law. Whether the European Commission would be willing to do so in yet another question; at the moment of writing, the Commission has not yet issued a position statement on the *PublicResourceOrg* judgment.

Another option available to compensate ESOs for their (alleged) revenue loss is to increase their membership dues: after all, one of the reasons why ETSI can afford to make their standards freely available is their membership model that relies on private participation and high membership fees. But while seemingly fixing one transparency-related problem, this solution will exacerbate other problems that European standardisation faces in providing for open and inclusive standardisation processes, since the elevated fees may discourage non-commercial actors who already are underrepresented in the ESOs to take part into ESOs processes.[37]

In determining who should be responsible for placing harmonised standards into the public domain, actors that typically get marginal attention are NSOs. However, it is NSOs, and not ESOs, who sell harmonised standards and decide upon their price. This also results in a situation that the same harmonised standard can be priced differently across the EU Member States, although the national industry tends to acquire them domestically rather than shop for a cheaper option.[38] Following this logic, it is the NSOs – and not ESOs,' – business model that may be harmed by the loss of revenues.

The solution should thus be sought at the national, and not European, level. Again, national governments could "buy off" the harmonised standards from the NSOs or propose licensing schemes for allowing access to and distribution of harmonised standards. In this regard, national courts may seem more appropriate to force the disclosure of harmonised standards than the CJEU, since copyright is largely a national system. At the same time, having national laws to decide on the *access* to European standards may create more fragmentation rather than ensure legal certainty. It also places the burden of "fixing" the European standardisation system on the Member States.

The message of the Court is clear and consistent: harmonised standards are part of EU law, and the public should know the laws by which they abide. Yet, since the Court in *PublicResourceOrg* was silent on how access to such standards should be secured, these findings may still be open for interpretation. For instance, it could be argued that making harmonised standards publicly accessible is different from disclosing them upon a specific request; and providing access to standards is different from allowing their reproduction. This is for instance the case when a "read-only" version of a standard is available: such practice is common for some US standards bodies as well as for ISO standards on Artificial Intelligence.[39] However, given that the parallel US cases filed by the same plaintiff were

[37] See also Annalisa Volpato and Mariolina Eliantonio, "The participation of civil society in ETSI from the perspective of throughput legitimacy" Innovation: The European Journal of Social Science Research (2024) 1-17.

[38] Thanks to Peter Maas for pointing this out to me.

[39] Micklitz, above n 24, 113.

about standards' reproduction, it remains to be seen whether *PublicResourceOrg* will be satisfied with the solution that allows standards viewing but not their dissemination, and whether this solution will comply with the requirement of the Regulation 1049/2001 to "ensure the widest possible access" to documents held by European institutions. As a mitigating option, a separate licence may be needed for the lawful dissemination of standards: to compare, documents held by the Commission and the EU Publications Office are subject to the open reuse policy and are often accompanied by a copyright notice on reuse for commercial and non-commercial purposes.[40]

4. Conclusion

ESOs' business model as an obstacle to access to harmonised standards is a direct consequence of the choice of the "New Approach" as a technique for regulatory outsourcing. Whether the architects of the New Approach were aware of the possible hurdles that this choice has brought is unclear. Anecdotal evidence suggests that in the US, private standards that are incorporated in law through reference in legislative acts were initially expected to be made available free of charge. In hindsight, this is where the legislator should have drawn the line between legal certainty and the limits of private ordering.

While the ruling contributes to answering the pertinent question "what is law" (harmonised standards are) and confirms that law should be freely available (harmonised standards are not), it also leaves many issues open to interpretation. The many questions that the Court left unanswered are likely to return in a new wave of litigation. In the years to come, cases at the European and national levels will determine the future of the New Approach. But regardless the aftermath of *PublicResourceOrg,* its consequences should not be borne by a single actor: after all, European standardisation is a cumulative process. But even more important is to remember that amidst the practical issues of financing of standardisation activities, the bigger questions of legal certainty and the rule of law should not be overlooked.

[40] See Ducato, above n 32.

Cite this article: O Kanevskaia, "Is it really all about the money? The future of European standardization after *PublicResourceOrg*". *European Journal of Risk Regulation*. https://doi.org/10.1017/err.2024.64