



General Court EU: Commercial interests block the right to access European harmonised standards

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**Abstract:** In a case brought before the General Court of the European Union, the General Court had the opportunity to decide whether free access to harmonised standards adopted by the European Standardisation Committee CEN is justified on the grounds of public access to documents of the European Commission and Regulation 1045/2001. The Court dismissed the action and confirmed the Commission's decision to deny granting access to the requested harmonised standards.

**Keywords:** *access, harmonised standards, copyright, Regulation 1049/2001*

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## 1. Introduction

Accessibility to harmonised standards is a recurring debate in scholarship and practice.<sup>1</sup> In a case brought before the General Court of the European Union (the General Court or Court),<sup>2</sup> the General Court had the opportunity to decide whether free access to harmonised standards adopted by the European Standardisation Committee CEN is justified on the grounds of public access to documents of the European Commission.<sup>3</sup> The Court dismissed the action and confirmed the Commission's decision to deny granting access to the requested harmonised standards.

## 2. Background

The case concerns a dispute between the European Commission and two non-for-profit organisations, namely Public.Resource.Org Inc. and Right to Know GLC, established in the US and Ireland respectively, the aim of which is to make government information more accessible.<sup>4</sup> In 2018, the two organisations (applicants) requested the European Commission to grant them access to four harmonised European standards (harmonised standards). The harmonised

<sup>1</sup>Read among many: Joerges, C., Schepel, H., & Vos, E. (1999). The law's problems with the involvement of non-governmental actors in Europe's legislative processes: the case of standardisation under the 'new approach'; Lundqvist, B. (2017). European Harmonized Standards as Part of EU Law: The Implications of the James Elliott Case for Copyright Protection and, Possible, for EU Competition Law. *Legal Issues of Econ. Integration*, 44, 421; Cuccuru, P. (2018). The Public and Private Sides of Harmonized Standards: James Elliott Construction v. Irish Asphalt. *German Law Journal*, 19(6), 1399-1416; Eliantonio, M. (2018). Private Actors, Public Authorities and the Relevance of Public Law in the Process of European Standardization. *European Public Law*, 24(3).

<sup>2</sup> Judgment of the General Court of 14 July 2021, *Public.Resource.Org et al v European Commission*, Case T-185/19, ECLI:EU:T:2021:445.

<sup>3</sup> 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, 31.5.2001.

<sup>4</sup> It is worthwhile mentioning that there have been court cases in the US initiated by the Public.resource.org. Read further: Taylor, A. (2020). Copyright Law Cannot Copyright Law Georgia v. Public Resource Org, Inc., 140 S. CT. 1498 (2020). Mitchell Hamline L. Rev., 47, 977.



standards were adopted by CEN on the basis of the horizontal EU Standardisation Regulation 1025/2012, which provides *inter alia* rules on the adoption of harmonised standards on the basis of EU law,<sup>5</sup> and sectoral legislation, such as the Toy Safety Directive.<sup>6</sup> The European Commission refused to grant the request for access and confirmed its decision in January 2019 after a relevant request of the applicants. The Commission relied on an exception to the obligation to grant access to EU institution's documents, established in the Regulation 1049/2001.<sup>7</sup> The Regulation 1049/2001 provides principles, conditions, and limits on the right of access to documents held by EU institutions. One of the exceptions provided in that Regulation, on which the Commission relied to deny access to the harmonised standards, concerns the cases where the disclosure would undermine the protection of "commercial interests of a natural or legal person, including intellectual property."<sup>8</sup> The applicants brought action before the General Court seeking the annulment of the January 2019 Commission Decision, which confirmed the refusal of access to the requested harmonised standards. In the case proceedings, CEN and fourteen national standardisation bodies of EU Member States intervened in support of the European Commission.

### 3. Arguments and findings

#### a. Admissibility and applicants' legal interest in bringing proceedings

Following the relevant argument made by the interveners, the Court first examined the admissibility of the action. In specific, the intervening standardisation organisations argued that the applicants had no legal interest in bringing proceedings for three reasons: first, the requested harmonised standards were accessible free-of charge for non-commercial purposes at different libraries of EU Member States; second, the applicants could access the requested harmonised standards for a fee for any purpose (commercial or non-commercial); and third, because the applicants had already purchased some of the requested standards. The General Court ruled however that the applicants had a genuine, vested, and present legal interest in bringing proceedings, by virtue of the dispute at hand, which concerned a refusal of access to a document.<sup>9</sup> The General Court argued that while there is possibility to consult copies of the requested standards in libraries, that consultation does not fully satisfy the request for access. Besides, in practice their accessibility via libraries is "excessively difficult."<sup>10</sup> On the argument of accessibility to the requested standards through payment of fee, the General Court argued that it does not correspond to the objective of the applicants to "obtain freely available access to those standards" without charge.<sup>11</sup>

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<sup>5</sup> Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ L 316, 14.11.2012.

<sup>6</sup> Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170 30.6.2009, as amended.

<sup>7</sup> Art. 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 L 145, 31.5.2001.

<sup>8</sup> Art. 4(2) first intent Regulation 1049/2001.

<sup>9</sup> Paragraph 18 T-185/19.

<sup>10</sup> Paragraph 21 T-185/19.

<sup>11</sup> Paragraph 22 T-185/19.



b. The “commercial interests” exception to the right to access

The applicants disputed that 1. the Commission had properly assessed the application of the exception of commercial interests (copyright protection) in the case of the requested harmonised standards, 2. that copyright protection applies to harmonised European standards and 3. that by disclosing the harmonised standards, the European Commission would harm the commercial interests of CEN and its national members. As regards the Commission’s assessment, the applicants implied a power of the Commission to carry out a review of the copyright protection.<sup>12</sup> The Commission and the interveners on the other hand argued that the EU Institution cannot call into question the existence of copyright protection, which is subject to national law. The Court found that in examining the applicability of one of the exceptions to the right to access to documents drafted by third parties, the EU Institutions – the European Commission in this case – after consulting those third parties, namely the standardisation bodies as copyrightholders, enjoy a discretion in their assessment, and that the scope of the review should correspond to the division of competences between the European Union and Member States law.<sup>13</sup> Copyright, as an intellectual property right, is not subject to EU law, but to national laws of Member States.<sup>14</sup> As a consequence, the Court found that the Commission, by taking into account the copyright of CEN over its publications, and that the disclosure could undermine the protection of this copyright, as publicly argued by CEN and CENELEC in a previously published position paper, relied on objective and consistent evidence.<sup>15</sup> In addition, the Commission rightly found, according to the General Court, the harmonised standards – despite being based on harmonised EU law – are protected by copyright, as an original work of authorship, since they meet the necessary threshold of originality. That is, they are “sufficiently creative” since their text implies that the authors had to make a number of free and creative choices.<sup>16</sup> The Court concluded that the Commission did not make any error as regards the scope of the review, when it assessed the exception of “commercial interest” stemming from harmonised standards.

On the point of copyright protection, the applicants further claimed that the specific harmonised standards in question, do not constitute a ‘personal intellectual creation,’ but merely lists of technical characteristics and methods.<sup>17</sup> The General Court however repeated that the Commission had no authorisation to examine the national copyright law requirements in its review.<sup>18</sup>

The second point of dispute, namely whether harmonised standards are subject to copyright, was based on the very well-known finding of the Court of Justice EU in *James Elliot*, according to which harmonised standards are part of EU law.<sup>19</sup> In the current case, the applicants argued

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<sup>12</sup> Paragraph 36 T-185/19.

<sup>13</sup> Paragraph 43 T-185/19.

<sup>14</sup> Paragraph 40 T-185/19.

<sup>15</sup> Paragraph 48 T-185/19.

<sup>16</sup> Paragraph 48 T-185/19.

<sup>17</sup> Paragraphs 56 and 59 T-185/19.

<sup>18</sup> Paragraph 57 T-185/19.

<sup>19</sup> Judgment of the Court of Justice of 26 October 2016, *James Elliot*, Case C-613/14, ECLI:EU:C:2016:821, paragraph 40: “ It follows from the above that a harmonised standard such as that at issue in the main proceedings, adopted on the basis of Directive 89/106 and the references to which have been published in the Official Journal of the European Union, forms part of EU law, since it is by reference to the



that if standards are part of EU law, they are 'texts of law' and should thus be freely accessible. However, the General Court sided with the Commission's claim that in *James Elliot* the CJEU provided that "only the references" of harmonised standards in the Official Journal of the Union (OJ) form part of EU law, and that the EU legislature chooses to publish references, instead of the full text in the OJ. The legal effects attached to harmonised standards are subject to the prior publication of the references in the C-series of the OJ. The General Court then – quite abruptly in the author's view – concluded that the applicants were mistaken to argue that the requested standards form part of EU law, and that those are not subject to copyright, and should thus be accessible without the exception of commercial interests applying to them. The General Court also did not accept the applicants' claim that CEN and CENELEC act as public bodies when they develop harmonised standards at the request of the European Commission. The General Court reinstated that the European Standardisation Organisations are non-for-profit organisations contributing to the performance of tasks in the public interest, by providing services "relating to compliance of applicable legislation."<sup>20</sup>

c. The "overriding public interest" ground in Regulation 1049/2001

The Regulation 1049/2001 provides an exception to the exception of commercial interests. That is the institutions may refuse access to documents, "unless there is an overriding public interest in disclosure."<sup>21</sup> The applicant organisations argued that even if harmonized standards are subject to the commercial interests' exception, those commercial interests are overridden by public interest. The applicants claimed that there is the overriding public interest of ensuring free access to the law, in line with the principle of legal certainty, principle of good administration, and the proper functioning of the internal market.<sup>22</sup> They also argued that due to the nature of the harmonized standards in question, there was also an overriding public interest of transparency in environmental matters.<sup>23</sup> In relation to the first claim, the General Court, siding with the Commission's decision, found – quite remarkably - that the functioning of the standardization system prevails over the guarantee of freely available access to harmonized standards.<sup>24</sup> Further, it found that *James Elliot* did not establish an automatic overriding public interest in the disclosure of harmonized standards.<sup>25</sup> As regards the environmental matters claim, while the General Court recognized that the requested harmonized standards contained environmental information, it did not classify them in the categories of EU legislation, subject to obligations of dissemination of environmental information.<sup>26</sup>

#### 4. Comments

One of the findings concerns the applicability of Regulation 1049/2001 to harmonised technical standards held by the EU Institutions. The Regulation, which establishes the right to access to

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*provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product."*

<sup>20</sup> Paragraph 69 T-185/19.

<sup>21</sup> Art. 4(2) last sentence Regulation 1049/2001.

<sup>22</sup> Paragraphs 93 and 94 T-185/19.

<sup>23</sup> Paragraph 109 T-185/19.

<sup>24</sup> Paragraph 102 T-185/19.

<sup>25</sup> Paragraph 104 T-185/19.

<sup>26</sup> Paragraph 118 T-185/19. The General Court referred to Regulation 1367/2006, which implements the Aarhus Convention.



documents drafted and held by EU Institutions, aims at enhancing the transparency of EU public administration. The Regulation has broad subject matter, since it applies to “all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.”<sup>27</sup> As a result, harmonised standards in the possession of the European Commission are subject to access requests provided in the Regulation 1049/2001. However, the exceptions to the right to access established in the same Regulation (Art. 4) are equally broad. Next to public security, defence, and fundamental rights (privacy and data protection), the exceptions concern commercial interests of a natural or legal person, court proceedings and legal advice, and inspections, investigations and audits. In practice, it is difficult to imagine, a document drafted by a private organisation or individual, not undermining the protection of “commercial interests,” which explicitly includes copyright. One wonders therefore about the usability of the right to access for documents not drafted by the EU institutions themselves, given the overly broad and blurry exceptions of Art.4(2). In other words, the very broad exceptions such as copyright and other commercial interests render the right to access to documents not drafted by the EU institutions themselves very narrow in scope. This is especially the case with harmonised standards, as seen in the case under discussion. While the General Court accepts that harmonised standards are subject to the right of access of Regulation 1049/2001, the applicability of the overly broad exception of commercial interests, renders the right without meaning, and with serious doubts it can be applied to harmonised standards, following the General Court’s reasoning.

The General Court’s ruling over the copyrightability of harmonised standards does not bring something new to the table.<sup>28</sup> The issue of copyright as an obstacle to any free access to standards has been also brought before national courts, such as with the prominent Knooble case in the Netherlands, where the Dutch court decided that Dutch standards are based on private agreements, they are not subject to the exemption of applicability of copyrights law, and that the reference to standards in the law does not turn them to law themselves.<sup>29</sup> More recently in *Stichting Rookpreventie Jeugd*,<sup>30</sup> the Court of Justice, had the opportunity to rule on this issue and the compatibility of the conditional access (fee) to harmonised standards referenced in an EU Directive with the EU principle of transparency (Article 297(1) TFEU) and legal certainty. While the AG’s Opinion did refer explicitly to the copyright claims of ISO, the CJEU did not.

What is interesting in this case is the missed opportunity to engage in -depth with the finding of the Court of Justice that harmonised standards are part of EU law. The General Court did repeat the finding that harmonized standards form part of EU law.<sup>31</sup> The applicants based their argument about the non-applicability of the copyright exemption under the Regulation

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<sup>27</sup> Art. 2(3) Regulation 1049/2001.

<sup>28</sup> See analysis on the copyright aspects of the case: Frederic Blockx “The General Court of the EU wanders into copyright law, and gets disoriented” ipkitten.blogspot (15 July 2021), <https://ipkitten.blogspot.com/2021/07/guest-post-general-court-of-eu-wanders.html> (accessed 15 April 2022).

<sup>29</sup> Hoge Raad 22 June 2012, *Knooble*, ECLI:NL:HR:2012:BW039; Senden, L. (2020). Towards a more holistic legitimacy approach to technical standardisation in the EU. In *The Legitimacy of Standardisation as a Regulatory Technique*. Edward Elgar Publishing. p.42

<sup>30</sup> CJEU Judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, ECLI:EU:C:2022:101; Advocate General’s Opinion Saugmandsgaard Øe, 15 July 2021, C-160/20, ECLI:EU:C:2021:618.

<sup>31</sup> Paragraph 118 T-185/19.



1049/2001 on the James Elliot finding that standards are part of EU law, as mentioned earlier. However, the General Court did not elaborate on this finding, but rather in rush, rejected the claim, merely stating that “While they form part of EU law, the requested harmonised standards do not, however, fall within the category of EU legislation, which is strictly circumscribed by the Treaties and comes within the exclusive competence of the EU’s own institutions entrusted with powers in that regard. It follows that the applicants’ argument that the Commission was required actively to disseminate the requested harmonised standards is based on the erroneous premiss that those harmonised standards fall within the category of ‘EU legislation on the environment or relating to it.’”<sup>32</sup> In the second claim of the applicants based on James Elliot concerning the overriding public interest to freely access harmonized standards as EU law, the General Court again dismissed the claim as not being substantiated by the applicants, especially since those standards are “not mandatory,” produce legal effects only with regard to the persons concerned, and may be consulted for free in some libraries in Member States.<sup>33</sup>

Further, the General Court provides elusive, or even contradicting, justifications as regards the role of standardisation organisations. On the one hand the ESO’s private non-for-profit character is used as a justification of why they may have commercial interests and thus the harmonised standards are subject to the commercial interest exception to the right of access. The General Court explained that CEN (merely) offers services relating to compliance with the legislation, and those contribute to the performance of tasks in the public interest, but this does not alter their status as private entities.<sup>34</sup> On the other hand, when assessing the risk to the commercial interests if free access were to be granted to the harmonised standards, the General Court did not justify properly its assessment. It first argues that the disclosure of the requested standards would create a very large fall in the fees collected by the standardisation bodies, and that in general sales is vital part of the business model of standardisation organisations. It is indeed true that the business model of standardisation organisations relies on several sources, including funding from the European Commission, membership fees, and when it comes to national standardisation bodies, to fees from selling standards. However, the General Court further found that if the business model would be called into question - as regards the income of the standardisation bodies from the standards sales, then “significant risks” would be created for the production of standards, but also the “possibility of having a method which shows that a product is deemed to comply with the requirements established by EU legislation by using a uniform method.”<sup>35</sup> In making this statement, one could argue that the General Court acknowledges the de facto binding nature of harmonised standards. As Schepel has argued, harmonised standards are de facto binding due to the complexity and cost to find an alternative way to prove conformity with the essential requirements of the law.<sup>36</sup> The General Court found essentially the same; without harmonised standards, it might not be possible for organisations to show in a uniform manner their compliance with the legal requirements. This finding however is somewhat contradictory with the prior statement of the General Court about the ESO’s activity, merely offering private services for compliance. In other words, what does it

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<sup>32</sup> Paragraph 118 T-185/19.

<sup>33</sup> Paragraph 107 T-185/19.

<sup>34</sup> Paragraph 71 T-185/19.

<sup>35</sup> Paragraph 65 T-185/19.

<sup>36</sup> Schepel, H. (2013). The new approach to the new approach: The juridification of harmonized standards in EU law. *Maastricht Journal of European and Comparative Law*, 20(4), 521-533, p. 528.



convey for the nature of standards, the fact that in the hypothetical scenario where harmonised standards would not exist, uniform compliance with the essential legal requirements would not be possible?

## 5. Future outlook

The General Court's ruling was appealed on the grounds of error of the General Court's assessment of the application of the copyright exception in the Regulation 1049/2001 and in its assessment not recognizing an overriding public interest. The case is currently pending before the Court of Justice of the EU<sup>37</sup> and is expected to become the next landmark ruling, after James Elliot. This is especially the case, considering the growing use of harmonised technical standards in newly drafted legislation and legislative proposals in various areas such as artificial intelligence,<sup>38</sup> cybersecurity,<sup>39</sup> and e-privacy.<sup>40</sup>

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<sup>37</sup> Appeal brought on 23 September 2021, *Public.Resource.Org, Inc. Et al.* against the judgment of the General Court delivered on 14 July 2021 in Case T-185/19, (Case C-588/21 P).

<sup>38</sup> Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending Certain Union Legislative Acts, COM/2021/206 final.

<sup>39</sup> Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union OJ L 194, 19.7.2016; Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148; Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) OJ L 151, 7.6.2019.

<sup>40</sup> Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) COM/2017/010 final.



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