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

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1. Introduction

Do harmonized technical standards (HTSs) qualify as ‘acts of the EU institutions’ for the purposes of a preliminary question of interpretation under Article 267 TFEU? This was the core question posed to the European Court of Justice (CJEU) by the Irish High Court in James Elliot.¹

As such, the case aimed to give a much-needed clarification on the legal nature of these peculiar acts issued by the European Standardization Bodies (ESOs) in the context of the so-called ‘New Approach Directives’.² Their peculiarity stems, in particular, from a number of features these measures possess. First, as indicated, they are adopted pursuant to the New Approach Directives. These are acts based on a

¹ Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, EU: C:2016:821.
² The so-called ‘New Approach directives’ are legal acts approved pursuant to the Council resolution of 7 May 1985 ([1985] OJ C 136/1), which calls for legislative harmonization of essential requirements on safety and other aspects which are important for the general well-being by way of directives, without reducing the existing and justified levels of protection in the Member States. The judgment under assessment deals specifically with the Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products ([1989] OJ L 40/12), as amended by Council Directive 93/68/EEC of 22 July 1993 ([1993] OJ L 220/1). Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Directive 89/106 ([2011] OJ L 88/5), repealed the mentioned Directive 89/106, but it is not applicable ratione temporis to the case discussed.

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peculiar regulatory logic, namely that the technical specifications for products to be able to safely circulate in the internal market are to be defined partly in EU legislation – regulating the essential health and safety requirements – and partly in detailed standards set by ESOs – regulating the technical aspects thereof.3 The origins of this 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.4 Because of the requirement of unanimity in the Council in relation to the internal market policy in the 1980s, the adoption of directives which 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 no longer would be contained in legislation, but rather would be created by ESOs, acting on the basis of a mandate received by the European Commission.

Another feature that makes HTSs instruments rather unique regulatory instruments is that they are created and approved by private entities. In fact, they represent a form of co-regulation falling within the broad category of new governance instruments,5 because the technical rules detailed in the standards are drawn up by private standardization bodies (the CEN, the CENELEC and the ETSI),6 subject to Belgian law, and composed of national standardization bodies together with experts and representatives from the relevant business sectors. Due to their private nature, they question the classic categories of ‘law’ and ‘legal acts’ adopted by EU institutions, as well as the concomitant legal consequences.

Finally, while they create a presumption of conformity with the essential requirements set in the EU legislation, once a reference to them is published by the Commission in the Official Journal, HTSs remain, strictly speaking, voluntary. To wit, compliance with their dicta remain but one of the ways of showing conformity with the ‘essential requirements’7 for undertakings, the latter being free to demonstrate conformity by other means.

3. White Paper from the Commission to the European Council, Completing the Internal Market, 28-29 June 1985, COM(85) 310 final, p. 19 et seq. For further analysis on this, see J. Pelkmans, ‘The New Approach to Technical Harmonisation and Standardisation’, 25 Journal of Common Market Studies (1987), p. 249-269; M. Egan, ‘Regulatory Strategies, delegation and European market integration’, 5 Journal of European Public Policy (1998), p. 490 et seq.; N. Burrows, ‘Harmonisation of Technical Standards: Reculer Pour Mieux Sauter?’, 53 Modern Law Review (1990), p. 597–603.

4. M. Egan, 5 JEPP (1998), p. 490. For a clear account of the developments, see H. Schepel, ‘The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law’, 20 Maastricht Journal of European and Comparative Law (2013), p. 523.

5. See further on this, G. de Búrca and J. Scott, Law and New Governance in the EU and the US (Hart Publishing, 2006); C.F. Sabel and J. Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the European Union’, in C.F. Sabel and J. Zeitlin (eds.), Experimentalist Governance in the European Union: Towards a New Architecture (Oxford University Press, 2010), p. 1-28; D.M. Trubek and L.G. Trubek, ‘New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation’, University of Wisconsin Law School, Legal Studies Research Paper Series No.1047 (2007), http://ssrn.com/abstract=988065; J. Scott and D.M. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, 8 European Law Journal (2002), p. 1–18.

6. The European Committee for Standardisation (CEN) the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI) are the three European standardisation organisations responsible for producing standards in different sectors, officially recognized by the Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation ((2012)OJ L 316/12). For a complete list of the European standardisation organizations (ESOs), their composition, functioning and tasks, see the links contained at European Commission, ‘Key Players in European Standardisation’, https://ec.europa.eu/growth/single-market/european-standards/key-players_en.

7. H. Schepel, 20 MJECL (2013), p. 524.
Given the importance of the New Approach Directives in establishing the internal market, the legal nature of the HTSs – and the legal consequences thereof – has triggered a lively debate in legal scholarship.\(^8\) Nevertheless, and quite surprisingly,\(^9\) this issue has never been explicitly discussed by the CJEU. With the question raised in James Elliot, the CJEU was given an invaluable opportunity to bring clarity to this fundamental issue. Overall, the ruling represents a further step towards the juridification of HTSs,\(^10\) since it appears to follow the same logic introduced with Fra.bo and Regulation No. 1025/2012\(^11\) to consider HTSs, once clear example of ‘integration through delegalization’,\(^12\) as any other legal act forming part of EU law. However, a number of issues raised by the CJEU’s ambiguous reasoning suggests a rather unsatisfactory decision in terms of the legal protection afforded to affected private actors against HTSs. This, coupled with the limited participation and accountability of standardization bodies, seems to raise multiple questions regarding the legitimacy of HTSs.\(^13\)

In the following sections, the case facts will be presented, followed by a discussion of the Advocate General’s Opinion and the ruling of the CJEU. A clear examination of the two is important because the CJEU came to the same conclusion as the Advocate General, but through a different and, as will be argued, less legally sound route. Finally, the implications of this ruling, both for the judicial review of standards and for the constitutional framework of the standardization process, will be examined. The underpinning argument of this article is that, while the ruling certainly constitutes another step towards ‘breaking down the club house’\(^14\) mentality of the ESOs, its positive outcomes ought not to be overestimated, and a long road is still ahead for the standardization process to be considered a fully legitimate regulatory structure in the EU legal system.

2. The facts in the James Elliott litigation

The ruling given in James Elliott deals with two main legal issues related to the use of HTSs in Europe. At stake was, on the one hand, their legal nature as acts of EU law and the consequences of such qualification, and, on the other hand, their significance in a national dispute involving the contractual liability of a party required by a private law contract to supply a product compliant with one of those standards. This contribution will focus only on the first of these two issues.

Both issues stemmed from an Irish case concerning the application of a standard (the Irish standard I.S. EN 13242:2002, transposing the European Standard EN13242:2002) that sets the

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\(^8\) R. van Gestel and H.-W. Micklitz, ‘European integration through standardization: How judicial review is breaking down the club house of private standardization bodies’, 50 Common Market Law Review (2013), p. 145; H. Schepel, The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets (Hart Publishing, 2005), p. 406.

\(^9\) R. van Gestel and H.-W. Micklitz, 50 CMLRev. (2013), p. 150.

\(^10\) H. Schepel, 20 MJECL (2013), p. 528-533. Along the same lines, A. Volpato, ‘The harmonized standards before the ECF: James Elliott Construction’, 54 CMLRev. (2017), forthcoming.

\(^11\) Regulation No. 1025/2012/EU of the European Parliament and of the Council of 25 October 2012 on European standardisation, [2012] OJ L 316/12.

\(^12\) C. Joerges, ‘Integration Through De-legalisation?’, 33 European Law Review (2008), p. 291.

\(^13\) For the purposes of this article, we intend legitimacy as a reference standard comprising two different elements, namely ‘input legitimacy’, by way of citizens’ participation to rule-making processes, and ‘output legitimacy’, through the possibility to ensure ex post accountability of the regulators. On this point, see F. Scharpf, Governing in Europe: effective and democratic? (Oxford University Press, 1999), p. 6-13.

\(^14\) R. van Gestel and H.-W. Micklitz, 50 CMLRev. (2013), p. 145–181.
composition of aggregate for construction products. *James Elliott Construction*, a contractor in charge of building a youth facility in Dublin, sued *Irish Asphalt*, its supplier, for breach of contract involving the supply of aggregate that had to satisfy the technical specifications laid down in the aforementioned standard. Because structural defects emerged after the works were concluded, *James Elliott* carried out a number of additional remedial works, for which it sought compensation in domestic proceedings against *Irish Asphalt*.

In its judgment of May 2011,15 the Irish High Court held that the contract between the two parties involved the provision of aggregate in accordance with the technical specifications of the Irish standard for aggregates – which transposed the European standard into domestic law. Further, since the test carried out during the judicial procedure showed that the actual supply did not meet the standard in relation to its sulphur content, it declared that the contract was breached. *Irish Asphalt* then appealed the decision to the Irish Supreme Court. On 2 December 2014,16 the Supreme Court dismissed the appeal on the issues of domestic law – related to the findings of the lower court about the sulphur content of the aggregate and their judicial sustainability. However, it decided to stay the proceedings and referred a number of preliminary questions on aspects related to the application of both the HTS and Directive 89/106/EC17 to the case at issue.

With the first question, which is the focus of this article, the CJEU was requested to clarify the legal nature of HTSs in EU law and, specifically, whether their interpretation must be considered a matter for a preliminary ruling, pursuant to Article 267 TFEU.

3. The Opinion of the Advocate General and the ruling of the CJEU

Both the Advocate General and the CJEU answered the question posed by the Irish Court in the affirmative, paving the way to the jurisdiction of the CJEU to give preliminary rulings on the interpretation of HTSs adopted in compliance with the New Approach Directives. However, the reasoning followed by the Advocate General and the CJEU differs substantially and, it will be argued, each argumentation has different implications for the jurisdiction of the CJEU and the judicial review of HTSs.

The reference of the Irish Supreme Court gave Advocate General Campos Sanchez-Bordona18 the opportunity to embark on an elaborate legal discussion on why HTSs adopted by the CEN pursuant to a mandate from the Commission should be labelled as ‘acts of the institutions, bodies, offices or agencies of the Union’, pursuant to Article 267 TFEU, which in turn demarcates the CJEU’s jurisdiction. Three specific arguments uphold the Advocate General’s conclusion.

First, the use of the New Directive Approach and of the HTSs adopted thereafter should not compromise the jurisdiction of the CJEU to give preliminary rulings on EU law.19 To sustain this argument, the Advocate General stressed that both the New Approach Directives and the HTSs are essential and supplement each other in defining harmonized conditions for products to be considered safe in the internal market. While the former lay down the minimum requirements for this

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15. *James Elliot Construction Limited v. Irish Asphalt Limited* (High Court Record No. 2008/4767P) on 25 May 2011.
16. *James Elliott Construction Ltd v. Irish Asphalt* 1 ESC 74 (Supreme Court of Ireland) on 2 December 2014.
17. Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, [1989] OJ L 40/12.
18. Opinion of Advocate General Campos Sanchez-Bordona in Case C-613/14 *James Elliott Construction Limited v. Irish Asphalt Limited*, EU: C:2016:63.
19. Ibid., para. 42-45.
purpose, the latter define the technical specifications that are needed to ensure that materials comply with the basic requirements of the directive itself. Therefore, the Advocate General concluded that, were the CJEU not given the jurisdiction to interpret the HTSs adopted pursuant to the new approach directives, then the harmonization objective pursued by this peculiar legislative technique would be rendered ineffective.\(^{20}\)

Second, such an interpretation arose from the fact that HTSs cannot be considered as purely private technical standards unconnected with EU law and institutions, but they represent a case of ‘controlled’ legislative delegation in favour of a private standardization body.\(^{21}\) According to the Opinion of the Advocate General, not only does the CEN operate under a clear mandate from the Commission in setting the basic criteria for drawing the standards, but also the Commission’s decision to publish the reference to the HTSs in the Official Journal of the European Union gives the HTSs the legal effect laid down in the directive and can therefore subsequently be annulled by the Court.\(^{22}\) In addition, the Commission itself retains the power to carry out an ex ante check of the standard and a formal objection to the HTSs may be lodged by the Member States and the European Parliament (according to Regulation No. 1025/2012), thereby excluding the presumption of a product’s conformity with the Directive.

Third, the mentioned conclusion is supported by the fact that the operation of the CEN, as a standardization body, produces legal effects in the internal market, so its actions must be subject to the European Union institutions.\(^{23}\) According to the Opinion, while the private nature of the CEN and of its operations is undisputed, the CJEU case law (in particular the Fra.Bo. case)\(^ {24}\) is also clear in stating that such status does not preclude the jurisdiction of the CJEU over acts issued by this body that, in light of the legal framework that regulates its activity, impacts on the application of EU law. In the Advocate General’s words, if

the Court did not hesitate to analyse the compatibility with EU law of the activities of a national standardisation body connected to national legislation it must, a fortiori, have jurisdiction to give a preliminary ruling on whether the harmonised technical standards drawn up by CEN are compatible with that prohibition and to interpret those standards and the directive making the reference to them.\(^ {25}\)

As indicated above, the CJEU came to a similar conclusion that HTSs are part of EU law, but its positive answer relied, instead, on a different argumentation. As a preliminary point, the CJEU referred to its settled case law\(^ {26}\) to recall that its jurisdiction also encompasses acts that, while formally not made by ‘institutions, bodies, offices or agencies of the Union’, ‘are by their nature measures implementing or applying an act of EU law’.\(^ {27}\) According to the CJEU, this broad interpretation ensures the uniform application of EU law throughout the Union, an objective that Article 267 TFEU aims to safeguard.

\(^{20}\) Ibid., para. 44.

\(^{21}\) Ibid., para. 46-55.

\(^{22}\) Ibid., para. 52.

\(^{23}\) Ibid., para. 56-61.

\(^{24}\) Case C-171/11 Fra.Bo., EU: C:2012:453.

\(^{25}\) Opinion of Advocate General Campos Sanchez-Bordona in Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, para. 60.

\(^{26}\) Case C-192/89 Sevince, EU: C:1990:322, para. 10; Case C-188/91 Deutsche Shell, EU: C:1993:24, para. 17.

\(^{27}\) Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, para. 34.
In light of this definition, the CJEU provided a number of elements to justify why HTSs referred to in Directive 89/106 fit this category. First, the HTSs are technical specifications adopted by private bodies (the CEN and the CENELEC, either jointly or separately) on a mandate by the Commission and reference to the standards is published in the ‘C’ series of the Official Journal of the European Union. According to the CJEU, such publication retains the legal effects of giving the product the presumption of conformity with the basic requirements of the Directive and, as a consequence of this, the ability to be placed on and circulate in the internal market. Therefore, since Directive 89/106/EC allows the harmonized standards to produce de facto effects, the Court concluded that they form part of EU law and that their interpretation must be considered as a matter for a preliminary ruling.

To support this conclusion, the CJEU also rejected a number of contrasting arguments. First, the non-binding effects of the HTSs do not preclude that their interpretation is a matter for preliminary ruling, since – drawing implicitly from Deutsche Shell – these acts are, in any case, of relevance in interpreting the provisions of the directive. Second, the reached conclusion is not undermined by the fact that technical standards, such as those under discussion, are elaborated by two private law bodies, the CEN and the CENELEC. According to the CJEU, their nature as necessary implementing measures stems from a number of elements which clarify the control exercised by the European Commission: the standards are elaborated pursuant to a well-circumscribed mandate of the European Commission, which sets the specific scope for their tasks and technical framework of the products; the acceptance of the mandate is preceded by a work program of the private law bodies which must be approved by the European Commission; the work of the standardization organizations are subject to detailed monitoring and reporting obligations to the European Commission before a reference to the standards is officially published in the Official Journal of the European Union. Third and finally, the CJEU contended that the fact that non-compliance with the standards is a ground for an action for failure to fulfil EU law obligations against a Member State, as provided for in Article 258 TFEU, supports their qualification as part of EU law.

4. The immediate implications of the ruling: limited room for manoeuvre for those seeking judicial protection

Prima facie, the differences between the argumentation followed in the Advocate General’s Opinion and that in the final judgment appear minimal. After all, it is now settled that HTSs can be subject to preliminary ruling proceedings in accordance with Article 267 TFEU. However, divergent legal consequences hide behind the two sets of reasoning.

In its ruling, the CJEU rejected the possibility of attributing the standards to any European institution, but admitted they were reviewable only because they ‘are by their nature measures implementing or applying an act of EU law’. Hence, in the CJEU’s view, HTSs cannot be

28. Pursuant to Article 4(2) of Council Directive 89/106/EEC.
29. Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, para. 42.
30. Case C-188/91 Deutsche Shell, para. 18.
31. Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, para. 35.
32. Ibid., para. 43-45.
33. Ibid., para. 46.
34. Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, para 34.
regarded strictly speaking as measures of any Union body, since they are technically still acts of private organizations. Neither does the endorsement by the European Commission lead to a different conclusion, the latter being merely needed to trigger the legal effects laid down in Directive 89/106. Therefore, the qualification of the HTSs followed in James Elliott, in combination with the fact that the supporting case law cited is only applicable to preliminary rulings of interpretation under Article 267 TFEU, seems to close the door to the direct reviewability of harmonized standards before the CJEU.

This line of argumentation is not unique for private standards, but also emerges in the context of post-legislative guidance. In Scott’s study of the CJEU’s case law on these types of acts, she argues that guidance documents, which have been adopted jointly by the Commission and the Member States, are unlikely to be considered acts of the EU institutions for the purposes of an annulment action and, as such, are not challengeable in Luxembourg. This is so because they are interpreted as the result of a ‘partnership working method’ of the two levels of government and, for this reason, do not form part of the Union legal order in the strict sense. This line of reasoning can, in principle, be extended to other types of acts such as harmonized standards, since in this case the Commission merely publishes the references to the standards in a Communication, but is not the author of the measure’s content.

On this same question, the analysis of the Advocate General was much less cautious and it seems, by contrast, to open up the possibility for judicial review within the context of Article 263 TFEU. The Advocate General opined in favour of the CJEU’s jurisdiction to rule on the interpretation of a standard because they represent ‘act[s] of the EU institutions’ on the basis of the double connection found, on the one hand, between the New Approach Directives and the ensuing standards, and, on the other hand, between the ESOs and the Commission. If this Opinion had been followed by the CJEU, a much more certain case could be made for the reviewability of standards under Article 263 TFEU, as an equal line of reasoning could have been applied to the challenge of standards in direct actions. In our view, this opinion gives a much more accurate image of the reality of HTSs in EU law. Not only does it clarify that HTSs deal with a true case of co-regulation and provide a much clearer framework to the New Approach pursued in EU law, whose underpinning logic is ultimately to mutually sustain the ‘old’ hard law system and ‘new governance’ mechanisms; it also provides a system of remedies to all actors in the internal market against measures that retain a de facto legally binding character.

Still, even if the HTSs were considered reviewable acts in annulment actions, the road would be only half-way open to a complete system of judicial review of HTSs. Connected to such question are indeed other two issues concerning, on the one hand, the standing in judicial

35. Case C-192/89 Sevince; Case C-188/91 Deutsche Shell.
36. J. Scott, ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’, 48 CMLRev. (2011), p. 337; see also E. Korkea-aho, Adjudicating New Governance (Routledge, 2015), p. 173-174.
37. See also on this, Opinion of Advocate General Jacobs in Cases C-181/91 and 248/91 European Parliament v. Council, EU: C:1993:271, para. 18.
38. For a different opinion, refer to Harm Schepel, who instead maintains that ‘it seems beyond doubt that the act of publication of the references is an act that can be challenged in a direct action before the European Courts under Article 263 TFEU’. H. Schepel, 20 MJECL (2013), p. 531.
39. Opinion of Advocate General Campos Sanchez-Bordona in Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, para. 42-61.
challenges on private harmonized standards, and, on the other hand, the extent of the CJEU’s substantive review.

As for the first point, one must remember that standing in actions for annulment will only ever be automatically granted to Member States, because they are, according to Article 263 TFEU, privileged applicants and therefore capable of challenging all EU measures without the need to prove any specific link with the measure itself. However, as has been correctly argued elsewhere, this possibility is not likely to happen in practice.  

With regard to a private party, the starting point for determining standing is the qualification of the Communication, which contains a reference to a HTS. The Communication itself could be qualified, in light of the case law of the CJEU, as a regulatory act within the meaning of Article 263(4) TFEU, because it is adopted following a different decision-making process than that which is contained in Article 289 TFEU. While regulatory acts profit from more favourable standing conditions after the Lisbon Treaty (dispensing applicants from the need to prove individual concern), these conditions only apply if these acts do not entail ‘implementing measures’. However, it is doubtful whether the direct challenge of a standard by a private party would be admissible on such grounds.

In light of the CJEU’s settled case law, an ‘implementing measure’ is any measure taken by the Member States that is linked to a European provision. As the European HTSs always need to be ‘translated’ into national standards for their application, it seems unlikely that the CJEU would admit a claim against a HTS as a ‘regulatory act not entailing implementing measures’. Nor would it be possible to argue, a contrario, that the national standards constitute a mere ‘copy and paste’ of the European standards, as the CJEU has remarked on several occasions that ‘the question whether the contested [measure] leaves any discretion to the national authorities entrusted with the task of implementing it is not relevant for the purposes of determining whether the contested [measure] entails implementing measures’.  

As a consequence, private parties wishing to challenge HTSs in an action for annulment would need to show that they are individually and directly concerned. Again, this looks problematic, at best, in light of the strict Plaumann requirements. Because HTSs are indistinctly applicable to any undertaking in a certain field, an individual company operating in the internal market would  

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40. H.C.H. Hofmann, G.C. Rowe and A.H. Türk, Administrative Law and Policy of the European Union (Oxford University Press, 2011), p. 603. The authors argue that judicial review is likely to be triggered by Member States only as a result of a Commission decision to publish or maintain European standards following the safeguard procedure (on this procedure, see further below in Section 5).

41. See Case C-583/11 Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, EU: C:2013:625. The European courts have defined it to be a non-legislative measure of general application, i.e. a measure which is not adopted following the ordinary or special legislative procedures within the meaning of paragraphs 1 to 3 of Article 289 TFEU, whether adopted by the Commission or not. See also Case T-93/10 Bilbaína de Alquitranes, S.A., and others v. Commission, EU: T:2013:106, para. 55-59.

42. Harm Schepel is, in our view, neglecting this point when concluding that European standards will be able to profit from the ‘regulatory act’ exception in a direct action. See H. Schepel, 20 MJECL (2013), p. 531-532.

43. Case C-274/12 P Telefónica v. Commission, EU: C:2013:852.

44. Case T-134/10 Fédération européenne de l’industrie du sport (FESI) v. Council of the European Union EU: T:2014:143; Case T-381/11 Eurofer v. Commission, EU: T:2012:273, para. 59; Case T-551/11 BSI v. Council, EU: T:2012:273, para. 56.

45. Case 25/62 Plaumann & Co. v. Commission of the European Economic Community, EU: C:1963:17.

46. E.g. Joined Cases 106/63 and 107/63 Alfred Toepfer and Getreide-Import Gesellschaft v. Commission of the European Economic Community, EU: C:1965:65.
face tough times arguing that it belongs to a ‘closed class’ of economic operators that is particularly affected by a HTS.

The same adverse conclusion goes for claims for annulment of HTSs brought by associations, such as those purporting, for instance, to protect consumers or environmental interests. It is settled case law that these actions are only admissible in three situations:47 (a) when a legal provision grants procedural rights to these associations,48 (b) where every single member of the association would be directly and individually concerned,49 and (c) where the association’s interests, and especially its position as a negotiator, is affected by the measure.50

As for the first and third conditions, it may be noted that associations are not granted any special position as negotiators, nor any specific procedural right in light of the relevant provisions leading to the adoption of a standard, because Article 5 of Regulation No. 1025/2012 only requires that European standardization organisations ‘encourage and facilitate an appropriate representation and effective participation of all relevant stakeholders’. Equally so, the second condition appears implausible in practice, since an individual member of these associations – for the arguments discussed earlier – cannot claim to be individually concerned by a HTS, as a result of the application of the Plaumann doctrine.

These conclusions are also supported by the Schmoldt case,51 in which a private individual, a company active in the sector of the challenged standard, and an association protecting the interests of the operators in that same sector were all denied individual concern in a claim against a safeguard decision of the Commission. Indeed, although concerning a different type of decision adopted in the context of the standardisation process,52 the CJEU’s considerations on the concept of individual concern seem equally applicable to the case of a direct challenge against a HTS.

By the same token, one should wonder whether judicial supervision of HTSs could be ensured by the other instruments available in EU law. As is well known, in the system of remedies created by the EU Treaties, measures can be challenged not only directly – through an action for annulment provided under Article 263 TFEU –, but also indirectly – that is, through a question of validity of an EU act issued by a domestic court requested to decide on the legality of a national measure implementing the EU act itself. Hence, in the case of the standardization

47. Case C-321/95 P Stichting Greenpeace Council (Greenpeace International) and Others v. Commission of the European Communities, EU: C:1998:153; Case T-122/96 Federazione nazionale del commercio oleario (Federolio) v. Commission of the European Communities, EU: T:1997:142.

48. Case 191/82 EEC Seed Crushers’ and Oil Processors’ Federation (FEDIOL) v. Commission of the European Communities, EU: C:1983:259; Case T-12/93 Comité Central d’Entreprise de la Société Anonyme Vittel and Comité d’Etablissement de Pierval and Fédération Générale Agroalimentaire v. Commission of the European Communities, EU: T:1995:78.

49. Joined Cases T-447/93, T-448/93 and T-449/93 Associazione Italiana Tecnico Economica del Cemento and British Cement Association and Blue Circle Industries plc and Castle Cement Ltd and The Rugby Goup plc and Titan Cement Company SA v. Commission of the European Communities, EU: T:1996:174; Case T-380/94 Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT) v. Commission of the European Communities, EU: T:1996:195; Case T-229/02 Osman Ocalan acting on behalf of Kurdistan Workers’ Party (PKK) v. Council of the European Union, EU: T:2008:87.

50. Joined Cases 67/85 R, 68/85 R and 70/85 R Kwekerij Gebroeders van der Kooy BV and others v. Commission of the European Communities, EU: C:1985:173; Case T-84/01 Association contre l’horaire d’été (ACHE) v. Council of the European Union and European Parliament, EU: T:2002:5.

51. Case T-264/03 Schmoldt and Others v. Commission, EU: T:2004:157.

52. In this case, the Commission adopted a decision not to withdraw a set of standards on the basis that they failed to meet essential substantive requirements laid down in a New Approach Directive.
process, EU standards could in principle be challenged indirectly in domestic litigation, by installing the procedure under Article 267 TFEU. Again, we are very cautious on the viability of this procedure in the case of HTSs.

As a matter of fact, in the Schmoldt ruling considered above, after having dismissed the admissibility of a direct action, the CJEU went one step further and considered whether the lack of standing would create a gap in the system of judicial protection of the EU legal system. In this context, the EU judges reiterated the usual ‘mantra’ of the existence of a ‘complete system of remedies’: where natural or legal persons cannot directly challenge EU measures of general application, they must be able to plea the invalidity of such acts by asking a national court to make a reference for a preliminary ruling to the CJEU – since the validity of these measures falls notoriously beyond the jurisdiction of domestic judges. In cases such as the one in question, this means that an operator or association would, in principle, be able to challenge a national standard in domestic litigation and, consequently, ask the national court to refer a question concerning the validity of the underlying European standard to the CJEU.

However, whether this system is actually workable in practice seems to be excluded by the mentioned reading of James Elliot. As said above, the CJEU’s wording is clear to qualify HTSs as mere ‘measures implementing (…) EU law’, thus excluding them from the categories of acts whose validity may be contested via a reference for a preliminary ruling. As such, the decision in James Elliot seems to pave the way only to preliminary questions of interpretation under Article 267 TFEU, but not to questions of validity.

Moreover, even if the CJEU had followed the reasoning of the Advocate General in that standards ought to be considered as ‘acts of the EU institutions’ and may therefore be subject to a preliminary question of validity under Article 267 TFEU, the system of indirect challenges can hardly be considered an adequate substitute for a direct action under Article 263(4) TFEU. This can be best explained by reference to Advocate General Jacobs’ Opinion in the UPA case. In his analysis over the locus standi of individual applicants in the preliminary ruling procedure, he recalled that access to the CJEU via the preliminary reference procedure is not available to applicants as a matter of right, since national courts (with the exception of courts of last instance) may refuse to refer a question of validity of an EU measure to the CJEU, or might err in their assessment of the validity and decline to refer a question to the CJEU on that basis. In addition, even when a reference is made, the preliminary questions would be formulated by the national court, with the consequence that applicants’ claims might be redefined both content-wise or in terms of types of measures whose validity is being challenged before the national court. Finally, the Advocate General considered that proceedings brought before a national court are more disadvantageous for individuals compared to the action for annulment under Article 263 TFEU, since they involve delays and extra costs.

Finally, as indicated earlier, the concrete extent of the substantive review exercised by the CJEU seems to equally reduce the likelihood that affected parties could challenge HTSs through judicial

53. Case T-264/03 Schmoldt and Others v. Commission, para. 40.
54. Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost, EU: C:1987:452.
55. Case C-613/14 James Elliott Construction Limited v. Irish Asphalt Limited, para. 34.
56. Opinion of Advocate General Jacobs in Case C-50/00 P Unión de Pequeños Agricultores v. Council of the European Union, EU: C:2002:197.
57. Ibid., para. 42.
58. Ibid.
59. Ibid., para. 44.
review. The elaboration of HTSs requires the evaluation of complex scientific and technical facts, so the settled case law establishing deference on substance and strict assessment of procedural irregularities, acts as judicial benchmark in this instance. This means, in practice, that the CJEU would not engage with the technical merits of the standard in issue, but would restrict itself to parameters such as the adequacy of the information base, the assistance of experts promoting a ‘deliberative’ style of decision-making, and the composition and knowledge of the panel of experts. However, as argued elsewhere, it seems uncertain whether the CJEU can extend its supervision to the standardization process, since CEN consultants have hardly any status in EU law. Therefore, while one could argue that allowing courts to review standards would lead to an undesirable scenario, it is also relevant to point out that the interpretation of the scope of the CJEU’s judicial oversight in similar cases appears to inevitably weaken the interests of affected undertakings to claim the annulment of HTSs before the CJEU.

In conclusion, the gap in the legal protection against allegedly unlawful HTSs does not seem to have been filled after James Elliott. As argued by Schepel, ‘the final result, then, is a paradox‘, but for the opposite reason: rather than opening up the possibility of a hoard of litigation, the CJEU’s reasoning in James Elliott seems to have put a number of insurmountable constraints on the judicial review of HTSs, so much that we can now argue that standards appear to be safe from judicial review. On a more general level, however, one should wonder whether the CJEU is a suitable forum for contesting the validity of private standards in EU law. Given their unique nature and peculiar features, we allow ourselves to cast doubt on this point, especially if the lack of output legitimacy of the standardization process could be compensated with a sufficient degree of input legitimacy. Whether this is currently the case will be discussed in the next section.

5. The broader constitutional implications of the case: delegation, participation and accessibility

When approaching a topic such as private standards in European studies, one must take into account – as indicated in the introduction – the fact that these tools are a key illustration of a peculiar regulatory technique. Being an instance of co-regulation, HTSs represent a case where market actors are entrusted with the implementation of EU law – in the form of codified technical knowledge for the development of products and processes. Scholarship praises private rule-making for its effectiveness, in the sense that it enables regulators to find the more appropriate solutions based on technical knowledge and understanding of the problems affecting a sector, thereby furthering technological and social innovation in the internal market. At the same time,
given the de facto allocation of executive tasks outside classic democratic institutions, these tools raise broader legitimacy questions over the scope of the delegation of regulatory powers to private parties, the participation of affected interests to the rule-making activities and the free access of all actors to their provisions. In essence, as is argued elsewhere, HTSs challenge our understanding of law due to the fact that they combine a complementary role of legal provisions with an imminent market character, so they need to be kept within the legitimate limits by designing good governance principles to which they should adhere. The analysis of James Elliott would thus not be complete without paying attention to the implications of the ruling within the broader problématique of private standards in EU law.

As stated above, one of the issues to be solved is the constitutional question of how legitimate the outsourcing of rule-making competences by EU institutions to market actors is. It has been claimed that the use of private standardization as an EU law tool is questionable, at the very least, from the perspective of the Meroni doctrine. According to this well-known judgment, the Commission can delegate its powers granted by the Treaties to bodies not contemplated therein, provided that very strict conditions, aimed at circumscribing and controlling the exercise of delegated powers, are respected. Different views may be identified on this issue.

On the one hand, under a very legalistic understanding of HTSs, held explicitly by the EU institutions and by the standardization bodies themselves, no delegation of powers takes place in the standardization process, hence HTSs cannot be said to raise constitutional issues. This is so because standards – it is claimed – are of voluntary application and, therefore, economic operators can choose whether to apply them or to comply with the essential requirements mandated by the New Approach Directives in other ways.

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70. H. Schepel, The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets, p. 257.
71. See R. van Gestel and H.-W. Micklitz, 50 CMLRev. (2013), p. 151.
72. H.C.H. Hofmann, G.C. Rowe and A.H. Türk, Administrative Law and Policy of the European Union, p. 247; H. Schepel, The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets, p. 226-227. For an early account of these concerns, see J. Falke, ‘Achievements and Unresolved Problems of European Standardization: The Ingenuity of Practice and the Queries of Lawyers’, in C. Joerges, K.-H. Ladeur and E. Vos (eds.), Integrating Scientific Expertise into Regulatory Decision making – National Traditions and European Innovations (Nomos, 1997), p. 187.
73. Case 9-56 Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community, EU: C:1958:7. The Meroni ruling, in particular, requires that delegation of executive powers is possible only if the powers are the result of an express delegation, are of a clearly defined executive nature and that their exercise is subject to strict review and to the same obligations that would be applicable to the delegating authority.
74. See European Commission, ‘The “Blue Guide” on the implementation of EU product rules’, http://ec.europa.eu/DocsRoom/documents/18027/, p. 33. See also Recital 1 of the Preamble to Regulation No. 1025/2012, which states: ‘The primary objective of standardisation is the definition of voluntary technical or quality specifications’. The perspective of the European courts on the legal effects of standards is not entirely clear. In a 2010 case, an operator challenged a standard on the grounds of a breach of EU competition law, alleging, inter alia, that the standard was de facto binding, because it was largely dominating the market, while the procedure for entering the market without following the standard was ‘time-consuming, slow, costly and its outcome uncertain’. The General Court, however, took a rather legalistic perspective and did not uphold the applicant’s claim. Case T-432/05 EMC Development AB v. Commission, EU: T:2010:189.
75. B. Schettini Gherardini, ‘Harmonised European standards and the EU Court of Justice: beware not to open Pandora’s box’, European Law Blog (2016), http://europeanlawblog.eu/?p=3212.
On the other hand, assuming the de facto binding force of the European standards, it may be concluded, in light of the delegation of clearly defined non-discretionary powers to the ESOs made through the mandate given by the Commission, that HTSs satisfy the strict conditions laid down in *Meroni*. This position, it seems, is implicitly taken up by the Advocate General in *James Elliot*. In his Opinion, Advocate General Campos Sanchez-Bordona defined the standards as ‘a case of “controlled” legislative delegation in favour of a private standardisation body’, given the aforementioned significant control of the Commission over the procedure for drafting the HTSs and given the fact that the latter is subject to actions of the EU. In this way, he appears to plea for an application of the *Meroni* doctrine, even although, we have to admit, he avoids saying so explicitly.

Neither of the two perspectives mentioned, however, seems entirely persuasive. As for the ‘no delegation’ thesis, it may be noted that, in reality, economic operators find it difficult to comply with the essential requirements of the New Approach Directives without the use of harmonized standards. On the contrary, given the far higher time, costs and technical expertise involved in adopting alternative solutions, the large majority of undertakings end up deploying HTSs to show compliance. Moreover, Member States are bound under EU law to observe the presumption of conformity in respect of products produced in accordance with harmonized standards. Private standardization, therefore, can hardly be seen as providing mere voluntary measures, but rather as setting de facto binding rules to regulate the internal market. A reading, by analogy, of a more recent ruling in *Fra.bo*, where the CJEU subjected a national private standardization body to the free movement of goods rule, confirms that, in fact, even the judicial instances at the EU level no longer believe in the ‘tale’ of voluntariness.

As for the argument of the ‘legitimate delegation’, additional doubts emerge. Extensive research on the standardization process reveals that European standards are not mere technical translations of political decisions made by the Commission, but entail significant room for political – and therefore discretionary – evaluation. As Schepel noted, essential requirements laid down in the directives, as well as in the Commission mandates, are sometimes full of very detailed technical conditions, so much so that it seems hard to argue that a real separation of the ‘political’ and the ‘technical’ is feasible in practice. While the latter distinction is certainly valuable to streamlining the functioning of the New Approach, it serves more as a practical expedient, to clarify the social structure of communications in different institutions, than to provide a correct representation of how the reality of standardization operates.

One could contend against these assertions that the European judges have recently watered down the strict conditions for the legitimate delegation of powers to bodies other than those

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76. Opinion of Advocate General Campos Sanchez-Bordona in Case C-613/14 *James Elliott Construction Limited v. Irish Asphalt Limited*, para. 55. An analysis of the Advocate General’s opinion is offered by M. Medzmariashvili, ‘Opening The ECJ’s Door To Harmonised European Standards?’, *European Law Blog* (2016), http://europeanlawblog.eu/2016/03/01/opening-the-ecjs-door-to-harmonised-european-standards-opinion-of-the-ag-in-c-61314-james-elliott-construction-2/

77. H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union*, p. 593.

78. Case C-171/11 *Fra.bo*. See commentary by H. Schepel, 20 *MJECL* (2013), p. 521, and especially, p. 525 et seq.; and by A. van de Kooij, ‘The Private Effect of the Free Movement of Goods: Examining Private-Law Bodies’ Activities under the Scope of Article 34 of the Treaty of the Functioning of the European Union’, 40 *Legal Issues of Economic Integration* (2013), p. 363–374.

79. H. Schepel, *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets*, p. 256.

80. Ibid., p. 254-257.

81. Ibid., p. 256.
regulated in the Treaties. In the more recent ESMA ruling, the CJEU somewhat loosened the Meroni requirements by concluding that the delegation of discretionary powers is allowed, provided that it is subject to adequate judicial supervision. However, we wonder whether this interpretation finds a foothold in James Elliott. As argued earlier, the CJEU seems to have blocked the road to any judicial control over the powers delegated to the ESOs in the case of HTSs, apart from the hardly satisfactory request for a preliminary question of interpretation under Article 267 TFEU.

Neither does the counterargument hold that the CJEU, by not expressing doubts over the legality of the use of technical standards for legislative purposes when asked different questions about the standardization process in EU law, implicitly supported their legitimacy. First, the CJEU has never been directly requested to rule on this specific aspect, so the legal vacuum appears the only reasonable interpretation in this regard. Second, even if the judges decided in the sense of the legality of the delegation of powers to the HTSs on a hypothetical question, the CJEU – we believe – would find it difficult to argue in favour of that conclusion without going against the clear implications of its ruling in James Elliott. The fact that both no real control over the powers delegated to the ESOs is exercised and that, as we said, hardly any adequate judicial review against the HTSs is ensured, seems indeed to question the conclusion that private standardization does not raise any legitimacy question under EU law. Rather, with its judgment in James Elliott, the CJEU appears to position HTSs in a situation of uncontrolled delegation. Yet, this interpretation is, at best, problematic, since it conflicts with the foundational principles upon which the EU legal system, as a legal order on in own right, is based: namely the rule of law and the delicate institutional balance between all authorities empowered to act by the EU Treaties.

It could be also contended that the lack of legitimate delegation and judicial control may be offset by adequate input legitimacy, in the form of ex ante stakeholder participation to influence the content of the standardization process. In this regard, the ‘autonomy perspective’ drawn by Schiek suggests that standardization, as form of self-governance, should be supported for its potential to enhance self-determination, provided, however, that there are sufficient mechanisms to safeguard the participation of all stakeholders.84 Again, however, when looking at the reality of HTSs, as regulated in EU law, a word of caution is needed.

To be sure, the participation of affected actors appears to be the hallmark of the overall standardization construct, at least on paper. Eager to ensure sufficient openness and stakeholder involvement, the EU has long since required that the European standardization process be organized in an open and transparent way.85 This point was reinstated and emphasized in Regulation No. 1025/2012, which sets out the legal framework for the cooperation between the Commission and the ESOs. In Article 5 thereof, it requires ESOs to ‘encourage and facilitate an appropriate representation and effective participation of all relevant stakeholders, including SMEs, consumer organisations and environmental and social stakeholders in their standardisation activities’, also in

82. Case C-270/12 United Kingdom v. European Parliament and Council, EU: C:2014:18.
83. See on the ‘Low Voltage Directive’ (Council Directive 73/23/EEC of 19 February 1973 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits, [1973] OJ L 77/29), Case 815/79 Cremonini and Vrankovich, EU: C:1980:273.
84. D. Schiek, ‘Private Rule-Making and European Governance – Issues of Legitimacy’, 32 European Law Review (2007), p. 456.
85. Recital 24 of the Preamble to Directive 98/34. On this point, see H. Schepel, The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets, p. 244-246.
the phase of the technical discussion of standardization proposals, the submission of comments on drafts and the revision of existing European standards.

The same ambition is echoed – again in the intentions – by the Commission. If one looks at the Commission website, one will find a number of quotes that exemplify the way in which the EU institutions wish to portray the standardization process: entirely voluntary and fairly participative.86

Still, beyond these principled statements, the question is whether enough room is left to ensure effective participation and adequate representation of all actors involved in the elaboration of HTSs. On this issue, it may be noted that the organizations’ view of protecting environmental interests differ from the Commission’s understanding of the concepts of inclusiveness and participation. For instance, commenting on the adoption of Regulation No. 1025/2012, the European Environmental Citizens’ Organisation for Standardisation (ECOS) affirmed that it ‘regrets that the system does not currently guarantee such effective participation of societal stakeholders, neither at European nor national level’, and ‘advocates for a truly inclusive and transparent standards setting process which delivers standards reflecting societal and environmental interests most appropriately’.87 These statements are clearly at odds with the aspiration of the EU institutions outlined earlier. More generally – even although involvement is and should be, in principle, open to all affected interests – it is doubtful whether groups of consumers and environmental associations could keep pace with the expertise and resources deployed by the industry to affect the standardization process.88

These findings are certainly an argument supporting the need for judicial review of the HTSs: as participation is not sufficient for ‘weaker’ interests holders to have a say in the decision-making process leading to the adoption of the standards, they should at least have recourse to courts in order to challenge allegedly illegal standards. Unfortunately, the CJEU’s ruling in James Elliott seems to point in the other direction.

The vacuum left open as regards the input legitimacy of the standardization model in the EU is all the more worrying in light of the uncertain protection afforded by the two other instruments aimed at checking whether the standards developed by ESOs fulfil the obligations laid down in EU legislation – that is, the Commission’s control over the compliance of the standards with the essential requirements, and the ‘safeguard clauses’ triggered by the Member States or the European Parliament.89

86. ‘European standardisation is a consensus-building process that involves many players’. ‘Industry plays an important role’. ‘Consumer, trade union, and environmental interests are represented by ANEC, ETUC, and ECOS, who are important for accountability’. The quotes in this paragraph are retrieved from https://ec.europa.eu/growth/single-market/european-standards/key-players_en. See also Article 5 of the General Guidelines for the cooperation between the ESOs and the Commission of 28 March 2003, which portrays the standardization systems as a ‘a transparent legal and political framework for European standardisation as an independent, consensus-oriented and voluntary activity’. Available at CENELEC, ‘General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association’, ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/4_CENCLCGuide4.pdf

87. The quotes in this paragraph are retrieved from European Environmental Citizens Organisation for Standardisation, ‘Standardisation and Policy’, http://ecostandard.org/?cat=123.

88. M. Egan, Constructing a European Market, p. 211. It is interesting to note that in Case T-432/05 EMC Development AB v. Commission mentioned above, the applicant tried to plea for the recognition of a lack of sufficient participation and transparency in the standardization process. Unsurprisingly, these pleas were not upheld by the General Court which did not find sufficient evidence for these statements in the applicant’s submissions. This outcome makes one wonder whether a court is a suitable forum to judge and assess what sufficient participation and transparency are supposed to mean.

89. H.C.H. Hofmann, G.C. Rowe and A.H. Türk, Administrative Law and Policy of the European Union, p. 600.
On the one hand, checking compliance of the standards with the essential requirements of the directive constitutes a basic activity to ensure that the content of the latter is adequate before a reference to the standards is published in the Official Journal.\textsuperscript{90} In particular, between the receipt of the standards and their publication, the Commission is entitled, as the mandate-giver, to check whether ‘a harmonized standard satisfies the requirements which it aims to cover and which are set out in the corresponding Union harmonisation legislation’,\textsuperscript{91} and can do so with the help of consultants.\textsuperscript{92} In practice, however, hardly any control takes place to check whether standards comply with the essential requirements of the Directive; rather, as a rule, the Commission does not review the adequacy of the HTSs.\textsuperscript{93} As such, this gap would advocate for making judicial review available and open to all affected parties.

On the other hand, the European Parliament and the Member States may also control the substance of technical standards through the use of so-called ‘safeguard clauses’.\textsuperscript{94} This procedure has recently undergone an important adjustment. Under the old regime, both the Commission and the Member States could initiate the review process regarding the substance of HTSs by asking the so-called ‘98/34 committee’ to intervene,\textsuperscript{95} which in turn was empowered to deliver an opinion on the matter after having consulted the relevant European Standardization Body (Article R9(1)(2) of Decision 768/2008).\textsuperscript{96} The Commission itself could then decide ‘to publish, not to publish, to publish with restriction, to maintain, to maintain with restriction or to withdraw the references to the harmonised standard concerned in or from the Official Journal of the European Union’ (Article R9(2) of Decision 768/2008). With the new regime introduced by Article 11 of Regulation No. 1025/2012, both the European Parliament and the Member States are now granted the possibility of activating the procedure, while the Commission has been stripped of this power. In addition, not only does the committee assist the Commission in setting up the corresponding EU harmonization legislation, but also ex ante and an ex post procedures – that is before or after the publication of a standard – are duly distinguished according to different modalities provided for in the Comitology Regulation.\textsuperscript{97}

\textsuperscript{90} Indeed, as mentioned above, the ESOs act on a mandate by the Commission to draft the standards. As the relationship is of a contractual nature, the Commission is empowered to check whether the final outcome of the standardization is in line with its mandate. See Article 10(1) of Regulation No. 1025/2012; Article 7(1) of Directive 89/106; Article 3(2) of Decision 768/2008; and H. Schepel, \textit{The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets}, p. 240.

\textsuperscript{91} Article 10(6) of Regulation No. 1025/2012.

\textsuperscript{92} H.C.H. Hofmann, G.C. Rowe and A.H. Türk, \textit{Administrative Law and Policy of the European Union}, p. 601.

\textsuperscript{93} H. Schepel, \textit{The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets}, p. 235. In fact, according to the Commission guidelines for the publication of references of standards in the Official Journal of the European Union ‘the Commission should not review the technical adequacy of the content of a standard’ (emphasis added), D(2005) C2/MJE/IG –D (2005) 7049, 3.

\textsuperscript{94} Article R9 of Annex I of Decision 768/2008 – recently amended by Regulation No. 1025/2012 – provided that New Approach Directives have all to provide a safeguard clause which can be invoked on the ground that a standard does not comply with the essential requirements before or after the publication.

\textsuperscript{95} This used to be a Committee consisting of representatives appointed by the Member States who could call on the assistance of experts or advisers; its chairman was a representative of the Commission.

\textsuperscript{96} Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, [2008] OJ L 218/82.

\textsuperscript{97} In the ex ante procedure, before the standards are published, the Committee gives an opinion under the advisory procedure, with the Committee taking a decision by simple majority, and the Commission being required to take ‘utmost account’ of the opinion. In the ex post procedure, once the standards are published in the Official Journal, the
The procedure triggered by the ‘safeguard clauses’ undoubtedly provides a form of control over the HTSs, since the Commission – upon an application from the European Parliament or the Member States – can now either block their publication or their continued application (in case they have been already published). However, operators, consumers, and consumers or environmental associations are absent from this process, their only option being to convince their Member States to initiate the procedure, which, again, is a difficult course of action for them. In addition, the final decision on the outcome of the procedure lies on the same institution that mandated the HTSs (that is, the Commission), which – what is even more telling – has expressed concerns about the efficacy of its role in light of the limited resources and expertise it can make available to exercise this task.98

Finally, a few remarks should be made on the difficult coexistence of the twofold nature of the HTSs, which are both market measures and – after the ruling in James Elliott – form part of EU law. Being created by private organizations that are normally entitled to copyright protection, standards are indeed made available to undertakings upon payment.99 At the same time, however, given their de facto normative character, demonstrated by the fact that they represent the only means to comply with internal market rules in practice, HTSs would need to be made available to everyone. While on paper already complex, this unsolved contrast seems to raise even more problems after James Elliott. With this judgment, the CJEU has indeed clarified that standardization measures fulfill the role of implementing an act of EU law and, in particular, are to produce the legal effect to allow products that comply with their dicta to profit from the free movement in the internal market. As such, this character seems to add new elements against the aura of self-regulation that ESOs normally use to justify their copyright protection. Therefore, while it is true that the issue of copyright protection and accessibility has not yet formed object of case law at EU level and that on this same problem a lively academic and jurisprudential debate is still ongoing,100 it seems nevertheless that the judgment in James Elliott, in our opinion, has introduced a further complication to the system that, if confirmed, would raise another point against its overall legitimacy, as currently intended in EU law.

In conclusion therefore, with James Elliott, the CJEU has resolved a relevant question – the qualification of HTSs under EU law – but has missed an important opportunity to bring clarity to an undoubtedly difficult matter. Indeed, besides not providing a fully agreeable interpretation of the nature of HTSs, the unclear reasoning followed in the judgment seems to raise even more problems on a number of other important points that it leaves open, related mostly to the legitimacy of private standardization in EU law. In our opinion, a more thoughtful understanding of the implications of the ruling could have led the CJEU to formulate a clearer and more correct interpretation of the nature of HTSs.

procedure requires the Committee to take a decision by qualified majority, and the Commission to follow that opinion. See Article 11 in combination with Article 22 of Regulation No. 1025/2012, referring to Articles 4 and 5 of Regulation No. 182/2011/EU of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, [2011] OJ L 55/13.

98. Commission communication enhancing the implementation of the new approach directives, COM(2003) 240 final, p. 21.
99. See especially, R. van Gestel and H.-W. Micklitz, 50 CML Rev. (2013), p. 145 et seq.
100. Ibid.
6. Conclusion

The premise underpinning this contribution is that new governance forms, of which standardization constitutes a pre-eminent example, have much to offer and are indeed essential in an era of framework norms. Standardization has proved an effective market integration tool, which has served to overcome technical barriers to trade when political agreement on these issues seems unattainable and it is a system which is able to keep pace with the fast and complex technological and scientific changes of our current society.

However, we cannot overlook that this peculiar regulatory structure, operating ‘in the shadow of hierarchy’,\(^{101}\) gives rise to a form of complex normativity that combines hard and soft law instruments, together with European and national regulatory levels, in a way that challenges the essence of EU law. It is indeed frequently the case that these governance forms cut across established categories of public law, making their essential nature difficult to capture or distil.

Looking back at our point of departure, and attempting an evaluation of the overall legitimacy of the standardization process, we can safely conclude that there is still a long way to go before we can speak of a fully legitimate system. This is because, in the current system, ex post legitimacy is not ensured: standards seem not to be judicially reviewable at EU level, neither directly nor indirectly, by affected persons, thus somewhat weakening the catalyst function that has allowed courts to address the challenges of other instances of new governance mechanisms.\(^{102}\) James Elliot has, from this perspective, closed a door to this possibility. In addition, the lack of judicial control is not compensated by a sufficient degree of ex ante legitimacy: participation by societal stakeholders only seems to work on paper, while the reality depicts a much more ‘elitist’ system, in which consumer or environmental interests hardly have a voice. Similarly, while the Commission’s control over the process seems to resemble a ‘paper tiger’, safeguards measures are not at the disposal of affected persons.

Finally, it is hard to deny that the standardization process represents a case of uncontrolled delegation and, thereby, a challenge to the institutional balance in the EU legal system. James Elliot appears, in this light, a missed opportunity for the CJEU to clarify the constitutional implications of the standardization process and bring it ‘in the light of hierarchy’.

\(^{101}\) A. Héritier, A. Eckert and S. Eckert, ‘New Modes of Governance in the Shadow of Hierarchy: Self-regulation by Industry in Europe’, 28 Journal of Public Policy (2008), p. 113–138.

\(^{102}\) See on this point, J. Scott and S. Sturm, 13 Columbia Journal of European Law (2007), p. 565.