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VINDICATING THE RULE OF LAW'S HORIZONTAL DIMENSION: THE CASE OF HARMONISED TECHNICAL STANDARDS IN EU LAW

Bernard Long*

Harmonised technical standards (HTS) have assumed a vital role in European Union (EU) internal market harmonisation since the advent of the New Approach. Though they now enjoy widespread proliferation and affirmative recognition as part of EU law, HTS remain the copyright-protected intellectual property of the private organisations that produce them and are therefore available only for a fee. In this article, I argue that this curious blurring of private and public interests and functions jars with a fundamental principle of the rule of law, namely the necessity of laws' free availability. In particular, I develop an account of the rule of law's horizontal dimension, ie, its application to side-to-side relationships between private actors. I argue that this account justifies the profound normative interest of private parties in freely accessing HTS, which impose obligations on other private parties with whom they interact. I then contend that this recognition strongly supports HTS' free public availability as a core rule-of-law desideratum. Finally, I demonstrate the urgency of this concern with reference to rights-oriented HTS under the AI Act.

Keywords: rule of law; harmonised technical standards; public availability; internal market; Fuller

TABLE OF CONTENTS

INTRODUCTION 21

I. HARMONISED TECHNICAL STANDARDS IN EU LAW 26

1. An overview of HTS 26

2. The juridification of HTS in CJEU jurisprudence 33

3. The CJEU on HTS' public availability 36

II. THE RULE OF LAW AND THE PUBLIC AVAILABILITY OF HTS 43

1. The rule of law's vertical and horizontal dimensions *43*
2. Laws' publication as a rule of law criterion *48*
III. HTS IN THE AI ACT 52
CONCLUSION 56

INTRODUCTION

Caligula, the notorious Roman emperor, once acquiesced to public demands for the publication of his laws by having them inscribed in an indecipherably small font at the top of high columns.[1] Though this farce complied in a strained technical sense with the Roman tradition of making laws publicly available to the general populace, it plainly outrages basic modern conceptions of legality and the rule of law. Law is, of course, a normative enterprise; it guides and provides reasons for the behaviour of those subject thereto. In Kelsen's words, 'The legal order […] is a normative order of human behaviour – a system of norms regulating human behaviour.'[2] This

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[1] Suetonius, *The Lives of the Twelve Caesars* (Alexander Thomson tr, George Bell & Sons 1909) 280.

[2] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 4. By normativity, I refer here to law's function of prescribing certain accepted standards of behaviour. In this vein, Kelsen continues, at page 5, "'Norm' is the meaning of an act by which a certain behaviour is commanded, permitted, or authorized." Elsewhere, Raz writes, "A norm is prescribed if it is set by an individual or a group as a norm to guide the behaviour of some other person or persons." Joseph

normativity, in turn, generates a range of derivative requirements, one of the more obvious being that a person must know the rules to which their conduct is subject. Accordingly, the free and public availability of laws is a well-established desideratum of the rule of law.[3]

The proposition that the demands of the rule of law necessitate laws' publication is a largely incontestable one. Nonetheless, while this principle enjoys a deep pedigree within the Western tradition and is widely accepted, its realisation within modern legal systems – characterised by a far more diverse and multi-level network of sources than those of antiquity – generates points of contention. One such point of contention, which has recently featured prominently in European Union (EU) law, relates to the public availability of harmonised technical standards (HTS). HTS - technical specifications produced by the European Standardisation Organisations (ESOs) pursuant to a request of the European Commission - have played an increasingly central role in EU internal market harmonisation since the advent of the New Approach in the 1980s. These ESOs – CEN, CENELEC

Raz, *Practical Reason and Norms* (Hutchinson 1975) 82, 149-177. For an in-depth theoretical examination of law's normativity, see Stefano Bertea, *The Normative Claim of Law* (Hart 2009). In his opinion on Case C-160/20 *Stichting Rookpreventie Jeugd and Others v Staatssecretaris van Volksgezondheid, Welzijn en Sport* ECLI:EU:C:2022:101 [hereinafter *Stichting Rookpreventie Jeugd*], Advocate General Saugmandsgaard Øe acknowledged this normativity as 'one of the bases of the rule of law.' See Case C-160/20 *Stichting Rookpreventie Jeugd and Others v Staatssecretaris van Volksgezondheid, Welzijn en Sport* ECLI:EU:C:2021:618, Opinion of Advocate General Saugmandsgaard Øe, point 25. See also Case C-169/80 *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini* ECLI:EU:C:1981:171, para 17; Case C-423/18 *Südzucker AG v Hauptzollamt Karlsruhe* ECLI:EU:C:2019:872, para 55.

[3] Laws' public availability is a seemingly ever-present feature of lists of rule of law criteria. See, for example, Lon L Fuller, *The Morality of Law: Revised Edition* (Yale UP 1969) 39, 49-51; John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 270-271; Tom Bingham, *The Rule of Law* (Penguin 2011) 37-38; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 214.

and ETSI - are, however, private, non-profit bodies governed by Belgian or French law and the HTS they produce have therefore traditionally been subject to copyright protection and available only subject to the payment of a fee.[4] Following the European Court of Justice's (ECJ) judgment in *James Elliot Construction*,[5] HTS – formerly kept at arm's length from the EU's legal acquis – are now recognised as a fully-fledged form of EU law.[6] This recognition, however, has generated a seeming inconsistency between HTS' status as a bona fide form of EU law and their continued obscurity behind the ESOs' paywall. Indeed, while the recognition that HTS unambiguously constitute laws ought to seemingly place them on an equal footing with more traditional forms of EU law, such as regulations and directives, there is, in fact, a jarring contrast in the standards of availability of these respective types of EU law. Whereas regulations and directives are freely available in the public domain, HTS remain the intellectual property of private entities and therefore languish behind these entities' paywall.[7] More recently, the ECJ's *Malamud* judgment has partially disrupted this curious state of affairs by annulling a Commission decision refusing free access to four HTS, *inter*

[4] Arnaud van Waeyenberghe and David Restrepo Amariles, 'James Elliott Construction: A "New(ish) Approach" to Judicial Review of Standardisation' (2017) 42(6) European Law Review 882, 885.

[5] Case C-613/14 *James Elliott Construction v. Irish Asphalt Limited* ECLI:EU:C:2016:821 [*James Elliott Construction*]. The case was referred to the ECJ by the Irish Supreme Court and concerned a contract law dispute relating to the supply of rock aggregate which was non-compliant with I.S. EN 13242:2002, a national standard transposing EN 13242:2002. The Court addressed the question of HTS' legal status in relation to its own jurisdiction to issue a preliminary ruling on their interpretation.

[6] *James Elliott Construction* (n 5) para 40.

[7] In practice, HTS are sold by ESOs' national members and affiliates on the ESOs' behalf. See, for example, CEN/CENELEC, 'Obtaining European Standards' <https://www.cencenelec.eu/european-standardization/european-standards/obtaining-european-standards/> accessed 8 January 2026.

alia in the interests of the rule of law.[8] Nonetheless, while it is tempting to characterise the *Malamud* judgment as a watershed moment in HTS' public availability, it remains unclear whether the judgment will give way to the free availability of HTS as standard, and it must therefore be assumed that the present status quo – HTS' availability subject to a fee – will abide in one form or another.

In this article, I challenge this status quo, arguing that the exigencies of the rule of law require HTS' free, public availability by default. More precisely, I will move beyond the predominant, vertical conception of the rule of law as concerning relations between the state and private entities and emphasise its oft-overlooked horizontal dimension, ie, its application to 'side-to-side' relations between private parties.[9] Drawing primarily on Lon Fuller's influential account of the rule of law, I will argue that a core function of law is to engender normative 'interactional expectancies' between private parties or, in other words, that law facilitates normativity in private relationships by making clear the respective obligations which bear on each party. In the case of HTS, for example, a consumer can only make a well-reasoned and informed decision to purchase a product if they can verify the technical requirements with which it purports to conform.[10] As such, I will argue that

[8] Case C-588/21 P *Public.Resource.Org and Right to Know v Commission and Others* ECLI:EU:C:2024:201 [*Malamud*, in reference to the founder of Public.Resource.Org].

[9] Brian Z Tamanaha, 'Vertical and Horizontal Dimensions of the Rule of Law' (2024) 73(5) Emory Law Journal 1215, 1217.

[10] Consumers are not the only private parties that maintain an interest in freely accessing the content of such obligations. NGOs and activists, for example, seem to have a non-trivial interest in scrutinising the content of relevant HTS. Indeed, it is worth bearing in mind that the appellants in *Malamud* were both non-profit organisations dedicated to promoting transparency and citizens' right to access information. It is equally feasible that environmental activists possess an interest in accessing the content of HTS issued pursuant to legislation such as Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on

the non-free availability of HTS ruptures the rule of law in this horizontal dimension by undermining normativity and precluding consumers from forming reasonable interactional expectations.

To demonstrate the urgency of this concern, I will illustrate my argument in the novel context of rights-oriented HTS under the AI Act. Whereas consumers certainly have an obvious interest in verifying that products comply with requirements in respect of HTS' traditional remit of health and safety, their ability to form normative expectancies in respect of requirements relating to the protection of their fundamental rights plainly means that HTS' free availability assumes an even greater degree of importance. Ultimately, I will argue that this account of the horizontal rule of law justifies HTS' free, public availability on par with the present standards of availability afforded to regulations and directives. While the free availability of directives and regulations is well-established and straightforward, the free availability of HTS is seemingly hampered by the ESOs' proprietary interests therein. Against this, however, the account of the rule of law developed here elevates HTS' free availability above countervailing concerns, including ESOs' intellectual property rights. While I do not suggest that the ESOs' intellectual property rights be ignored, my conclusion here instead justifies urgent policy measures to overcome this impediment. In particular, the importance of HTS' free availability justifies measures such as the Commission fully funding ESOs' HTS production.

The article is structured as follows. In Section I, I provide an overview of the place of HTS in the EU's regulatory regime and in CJEU jurisprudence. This overview will encompass the historical development of HTS within the New Approach, their increasing juridification in the CJEU (culminating in the *James Elliot Construction* case) and, finally, the ECJ's treatment of the question of their free availability. Next, in Section II, I will develop an

packaging and packaging waste. It is therefore necessary to clarify that references throughout this article to consumers' interest in accessing HTS are exemplary, rather than prejudicial to the interests of other relevant private parties.

account of the rule of law's horizontal dimension, drawing on Fuller's seminal work to outline a conceptualisation of law as promoting normative and interactional expectations in private relationships. Based on this account, I will argue that laws' public availability is as vital a desideratum of this horizontal dimension as it is of the rule of law's better-understood vertical guise. Ultimately, I will argue that this conceptualisation justifies certain aspects of the *Malamud* judgments' reasoning, but that it, in fact, indicates even more strongly in favour of free availability as the standard for HTS. Finally, in Section III, I will extend this rationale to HTS under the AI Act, which, by virtue of their protection of fundamental rights, seems to provide a particularly powerful impetus for HTS' future public availability.

I. HARMONISED TECHNICAL STANDARDS IN EU LAW

1. An overview of HTS

Before proceeding to the more substantive aspects of this article, it is first necessary to briefly outline HTS' place within the EU legal framework.[11]

[11] This is not, of course, the place to give a full overview of the minutiae of HTS' place within the EU legal acquis and, indeed, others have done so adeptly. See, for example, van Waeyenberghe and Restrepo Amariles (n 4); Carlo Colombo and Mariolina Eliantonio, 'Harmonized Technical Standards as Part of EU law: Juridification With a Number of Unresolved Legitimacy Concerns? Case C-613/14 James Elliot Construction Limited v. Irish Asphalt Limited, EU:C:2016:821' (2017) 24(2) Maastricht Journal of European & Comparative Law 323; Zachariah Davies and Arnaud van Waeyenbenberghe, 'Better Regulation by Standards? Harmonized Technical Standards, Transparency and the Rule of Law' (2025) 62 Common Market Law Review 147; Harm Schepel, 'The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law' (2013) 20(4) Maastricht Journal of European & Comparative Law 521; Rob van Gestel and Peter van Lochem, 'Private Standards as a Replacement for Public Lawmaking?' in Marta Cantero Gamito and Hans-Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Edward Elgar 2020) 27; Irene Kamara, *Standardizing Personal Data Protection* (Oxford University Press, 2025) 44-76.

HTS originated in the 1980s, with the adoption of the so-called 'New Approach', which sought to remove trade barriers and eliminate uncertainty for economic operators within the Union.[12] In particular, the New Approach championed technical standardisation as an effective and efficient means of promoting market integration and ensuring the completion of the internal market.[13] The current framework for technical standardisation, and in particular HTS, under the New Approach (and its successor, the New Legislative Framework), is set out in Regulation 1025/2012.[14] In accordance with the regulation, a HTS is a technical standard adopted by one or more ESOs on the Commission's request.[15] Such a request shall specify the essential requirements to be met by the HTS.[16] The Commission is responsible for assessing whether the HTS produced pursuant to its request is compliant therewith.[17] If the HTS fulfils the requirements, the Commission shall publish a reference thereto (though not, crucially, its contents) in the Official Journal of the European Union without delay.[18] In accordance with the

[12] Council Resolution (EC) No 136/01 of 7 May 1985 on a new approach to technical harmonization and standards [1985] OJ C136.

[13] Commission, 'Technical harmonization and standards: a new approach' (Communication) COM (85) 19 final. On the issues with the preceding 'Old Approach' – i.e. fragmented, divergent national standards and inert, overly-long legislation – see Schepel (n 11) 522-523.

[14] 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 Text with EEA relevance [2012] OJ L316/12. See also European Commission notice, 'The 'Blue Guide' on the Implementation of EU Product Rules' (Notice) [2022] OJ C247/1 ['Blue Guide'].

[15] Regulation (EU) No 1025/2012, art 2(1)(c) and Annex I.

[16] Regulation (EU) No 1025/2012, art 10(1).

[17] Regulation (EU) No 1025/2012, art 10(5).

[18] Regulation (EU) No 1025/2012, art 10(6).

fundamental principles of the New Approach, HTS remain wholly voluntary,[19] though compliance therewith generally confers a presumption of conformity with the essential requirements they cover.[20] Nonetheless, alternative methods of demonstrating compliance with essential requirements remain available.[21]

HTS represent a crucial form of co-regulation and provide undoubted benefits.[22] Apart from its vital role in market integration, standardisation, as an instance of private regulation, has the obvious advantage of drawing on industry actors' unique technical expertise.[23] This point is recognised by the Commission, with its 2001 white paper on governance noting that co-regulatory measures '[combine] binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise.'.[24] Elsewhere, technical standardisation is sometimes identified as a more efficient and cost-effective alternative to traditional regulation.[25]

[19] Regulation (EU) No 1025/2012, Recital 1; Blue Guide (n 14) paras 4.1.2 & 4.1.2.3.

[20] Regulation (EU) No 1025/2012, Recital 5; Blue Guide (n 14) para 4.1.2.3.

[21] Blue Guide (n 14) para 4.1.2.3.

[22] See Schepel (n 11) 523, who refers to the New Approach as a 'masterstroke' in pursuing the completion of the internal market.

[23] Mariolina Eliantonio and Caroline Cauffman, 'The Legitimacy of Standardisation as a Regulatory Technique in the EU - A Cross-disciplinary and Multi-level Analysis: An Introduction' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 1, 5; Mislav Mataija, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law* (OUP 2016) 12.

[24] European Commission, 'European governance – A white paper' (Communication) COM (2001) 428 final.

[25] Eliantonio and Cauffmann (n 23) 5-6; European Commission, 'Implementing the Community Lisbon. programme: A strategy for the simplification of the regulatory environment' (Communication) COM (2005) 535 final, 7-8.

Finally, the Commission has identified standardisation and related measures as a key expression of the principle of subsidiarity.[26]

Notwithstanding these apparent benefits, the present system of standardisation also contains a swathe of non-trivial drawbacks. Most obviously, while the standardisation process facilitates the input of industry expertise, it has also been criticised as being unduly influenced by industry interests. Indeed, the Commission itself has noted that,

> today's decision-making processes within the European standardization organizations […] allow an uneven voting power to certain corporate interests: some multinationals have acquired more votes than the bodies that represent the entire stakeholder community.[27]

These concerns regarding the non-democratic nature of the ESOs' procedures have been highly criticised.[28] In addition to this question of 'input legitimacy', scholars have also highlighted potential questions surrounding the current standardisation processes' output and throughput

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[26] See, for example, European Commission, 'The principle of subsidiarity' (Communication) SEC(92) 1990 final, 13-14.

[27] See European Commission, 'An EU Strategy on Standardisation: Setting global standards in support of a resilient, green and digital EU single market' (Communication) COM(2022) 31 final, 6. This is especially a problem with ETSI, whose governance model assigns more votes to parties paying higher subscription fees which generates 'a risk that interested private parties might shape norms and values that ought to be democratically debated, particularly when these concern fundamental rights'. See Gregory Lewkowicz and Ritha Sarf, 'Taking Technical Standardization of Fundamental Rights Seriously for Trustworthy Artificial Intelligence' (2024) 25 *La Revue des Juristes de Sciences Po* 42, 44. ETSI was resultingly omitted from the Commission's draft standardisation request under the AI Act. See Luca Bertuzzi, 'Commission Leaves the European Standardization Body Out of AI Standard-setting' *Euractiv* (7 December 2022).

[28] Marion Ho-Dac, 'Considering Fundamental Rights in the European Standardisation of Artificial Intelligence: Nonsense or Strategic Alliance?' in Kai Jakobs (ed), *Joint Proceedings EURAS & SIIT 2023: (Responsible) Standardisation for Smart Systems* (Verlag Günter 2023) 131, 139-142; Davies and van Waeyenberghe (n 11) 155-156.

legitimacy.[29] Apart from these legitimacy challenges, another salient drawback of the current standardisation framework – and the one that provides the impetus for the remainder of this article – is that standards, including HTS, remain the copyright-protected intellectual property of the private bodies that produce them and, as such, typically remain accessible only upon payment of a fee.[30] This scenario generates a seeming incongruity

[29] Output legitimacy refers, as the name implies, to a consequentialist view of the quality of measures' outcomes and, in Scharpf's words, those measures' 'capacity to solve problems'. Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 11. On issues of output legitimacy in the context of food safety standardisation, see Dario Bevilacqua, 'Global Food Safety Regulation and the Interplay between Global Standards and WTO Law: How to Close the Legitimacy Gap?' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 243. cf Maurizia De Bellis, 'The Legitimacy of Banking and Financial Standards: Representation, Due Process and Regulatory Capture' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 180; Marta Cantero Gamito, 'The Legitimacy of Standardisation as a Regulatory Technique in Telecommunications' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 222. Throughput legitimacy 'is judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation with the people.' Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 Political Studies 2, 2. See, for example, Sabrina Röttger-Wirtz, 'Standardisation of Health Products in Search of Legitimacy: Rethinking Judicial Review' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Edward Elgar 2020) 266.

[30] On the copyright protection of standards in both the EU and United States, see Olia Kanevskaia, 'The Saga of Copyrighted Standards: A Perspective on Access to Regulation' in Bartosz Brożek, Olia Kanevskaia & Przemysław Pałka (eds), *Research*

in the standardisation process. Though ESOs are exclusively deputised under EU legislation to perform the quasi-public function of adopting standards in accordance with Commission law and policy objectives, they nonetheless retain their rights as private entities to charge for access to their intellectual property. This curious synthesis of the public and private domains engenders an obvious tension between the commercial interests of the ESOs and the transparency exigencies which usually attach to public functions.[31] As I will demonstrate later, this tension was brought most conspicuously to the fore in both the General Court's and ECJ's *Malamud* judgments.

Whatever the pros and cons of the current EU standardisation framework, HTS occupy a central role in the internal market. Davies and Van Waeyenberghe point to the 'impressive proliferation' of HTS since the genesis of the New Approach in the 1980s, as well as their extensive reach within the EU economy.[32] Estimates by the Commission indicate that over 3,600 HTS have been developed by the ESOs,[33] while HTS are currently

Handbook on Law and Technology (Edward Elgar 2024) 330. Apart from the theoretical focus of this article, this fee-based access model likely establishes a significant financial impediment to access to various stakeholders, such as SMEs and consumers. Regarding difficulties faced by SMEs under the current model, see Small Business Standards, *Involvement of SME associations in standardisation and their relationship with the National Standards Bodies* (2022). Empirical research on the effect of fee-based access on stakeholders is, however, scant and further research in this area is certainly necessary.

[31] As Kanevskaia writes, the obstacle this model creates to accessing harmonised standards is 'a direct consequence of the choice of the "New Approach" as a technique for regulatory outsourcing.' See Olia Kanevskaia, 'Is it really all about the money? The future of European standardization after PublicResourceOrg' (2025) 16 European Journal of Risk Regulation 344, 351.

[32] Davies and van Waeyenberghe (n 11) 153.

[33] COM(2022) 31 final (n 27) 1.

applicable in accordance with 38 harmonisation instruments.[34] EU institutions also seem open to a future widening of HTS' scope. Whereas HTS have traditionally related to technical requirements for health and product safety, a relatively recent communication by the Commission suggested that HTS ought also 'incorporate core EU democratic values and interests, as well as green and social principles.'.[35] One particularly prominent example of this emergent, broader conception of HTS' scope is found in the AI Act, which takes the 'unprecedented' step of using HTS to safeguard fundamental rights.[36] Nonetheless, the seemingly unimpugnable and growing role of HTS within the EU's harmonisation framework exacerbates concerns about both their legitimacy and, more importantly for present purposes, public availability.

[34] European Commission, 'Harmonised Standards' <https://single-market-economy.ec.europa.eu/single-market/european-standards/harmonised-standards_en> accessed 8 July 2025.

[35] COM(2022) 31 final (n 27) 4. Less charitably, this widening in scope might be seen as an instance of mission creep, at least until issues with the legitimacy and availability of HTS are resolved.

[36] Ho-Dac (n 28) 133-134. See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 12.7.2024, art 40(2), according to which the Commission shall issue standardisation requests relating to the requirements contained *inter alia* in art 9, which requires relevant parties to maintain a risk management system for high-risk AI systems. According to art 9(2)(a), the risks covered by this risk management system include risks to fundamental rights. For a detailed consideration of rights-oriented HTS under the AI Act, see Marion Ho-Dac, 'The EU AI Act and the Challenge of Protecting Fundamental Rights' (2025) 62 Common Market Law Review 1299, 1321-1324.

2. The juridification of HTS in CJEU jurisprudence

HTS, as I have said, occupy an uncomfortable middle position between private and public domains. In particular, as Schepel observes, the delegation of a quasi-law-making function jars with the *Meroni* doctrine, which circumscribes the Commission's ability to delegate powers to private parties.[37] Accordingly, he further notes, the traditional approach was 'that the only way to ensure the legality of the New Approach was to keep the standardisation system at arm's length from the legal system, and preferably a bit further still.'.[38] This logic was largely preserved through the standards' voluntary nature and the availability of alternative means of compliance with essential requirements. Nonetheless, in the intervening years, the limited jurisprudence on HTS in the European courts has extinguished the apparent distance between HTS and the EU legal system. Most perspicuously, the ECJ's finding in *James Elliot Construction* largely (though not entirely[39]) extinguished the apparent notion that HTS existed to some degree outside of the EU legal acquis, unambiguously holding instead that a HTS, by virtue of its legal effects, 'forms part of EU law.'.[40]

Much of the case law on standardisation has concerned either national standards or non-harmonised standards.[41] Amongst these, the most relevant for present purposes is *Latchways*, which concerns a technical standard produced by CEN within the framework of a mandate issued by the

[37] Schepel (n 11) 523-524. See Case C-9/56 *Meroni v Haute autorité* ECLI:EU:C:1958:7. On the apparent discord between the *Meroni* doctrine and the new delegatory approach to EU lawmaking, see, for example, Renaud Dehousse, 'Misfits: EU Law and the Transformation of European Governance' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 207.

[38] Schepel (n 11) 524.

[39] The Court remained silent, as I will discuss later, on the public availability of HTS.

[40] *James Elliot Construction* (n 5) para 40.

[41] Case 45/87 *Dundalk* EU:C:1988:435; Case C-227/06 *Commission v Belgium* EU:C:2008:160; Case C-171/11 *Fra.bo* EU:C:2012:453; Case C-100/13 *Commission v Germany* EU:C:2014:2293.

Commission in accordance with Directive 89/686 and relating to a particular product at issue in the case.[42] The standard was referred to in the Official Journal of the European Union, though this communication specifically excluded the relevant product from its scope and from a presumption of conformity with the essential requirements of Directive 89/686. The Court acknowledged that its jurisdiction to issue preliminary rulings was limited to provisions of EU law and that the standard at issue did not constitute EU law, *inter alia* because it was not a harmonised standard.[43] Accordingly, the Court held that it lacked jurisdiction in the matter.[44] By implication, however, the fact that the standard's non-harmonised nature was crucial in determining that it lay outside of EU law seemed to indicate that a harmonised standard may, conversely, constitute part of Union law and therefore come within the Court's jurisdiction.

Four years after this initial and important foray into HTS' juridification, the Court issued its seminal judgment in *James Elliott Construction,* which marked the first time a national court had requested the Court to interpret a HTS.[45] While the minutiae of the case are unimportant for present purposes, the most pivotal aspect of the Court's judgment was its finding that HTS unambiguously constitute part of EU law. In this regard, it outlined various features of the procedure for the adoption of a HTS, namely that its production is 'initiated, managed and monitored by the Commission',[46] that

[42] Case C-185/08 *Latchways and Eurosafe Solutions* ECLI:EU:C:2010:619 [*Latchways*].

[43] *Latchways* (n 42) para 33.

[44] *Latchways* (n 42) paras 35-36.

[45] van Waeyenberghe and Restrepo Amariles (n 4) 883. For commentary, see Colombo and Eliantonio (n 11); Pierluigi Cuccuru, 'The Public and Private Sides of Harmonized Standards: James Elliott Construction v. Irish Asphalt' (2019) 19 German Law Journal 1399; Kai P Purnhagen, 'Voluntary "New Approach" Technical Standards are Subject to Judicial Scrutiny by the CJEU! – The Remarkable CJEU judgment "Elliott" On Private Standards' (2017) 8 European Journal of Risk Regulation 586.

[46] *James Elliott Construction* (n 5) para 43.

it gives 'concrete form on a technical level' to essential requirements contained in harmonising legislation,[47] that compliance with the HTS confers a presumption of conformity and that its legal effects are subject to a publication of its reference in the Official Journal of the European Union.[48] In view of these legal effects, the Court held that a HTS comprises a part of Union law.[49] It further opined that the availability of alternative means of compliance with essential requirements was not sufficient to extinguish these legal effects.[50]

The Court's finding in this regard is monumental, not least in that it rescues HTS from their former place in a 'legal no man's land' by conclusively affirming them as part of the EU legal acquis and refuting any previous notion that they constituted a merely extra-legal form of co- or self-regulation[51]. In spite of the acknowledgement that HTS form part of EU law and are therefore within the European courts' review remit, the *James Elliot Construction* judgment remained conspicuously silent on whether HTS, in view of their newly-recognised status, would enjoy the full trappings of EU law, including the same standards of free publicity as, say, regulations and directives. van Waeyenberghe and Restrepo Amariles argue, for instance, that the recognition of HTS as part of EU law ought logically give way to their free accessibility.[52] As logical as this contention may seem, however, the *James Elliot Construction* judgment unsatisfactorily left this question entirely open. As such, in the following subsection, I will outline two subsequent cases - *Stichting Rookpreventie Jeugd* and *Malamud* – which more

[47] *James Elliott Construction* (n 5) para 36.

[48] *James Elliott Construction* (n 5) paras 38-39, 43.

[49] *James Elliott Construction* (n 5) para 40.

[50] *James Elliott Construction* (n 5) para 42.

[51] Rob van Gestel and Hans-W Micklitz, 'European Integration Trough Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies' (2013) 50 Common Market Law Review 145, 146-150.

[52] van Waeyenberghe and Restrepo Amariles (n 4) 890. In this regard, they cite art 15(3) TFEU.

directly addressed the question of HTS' public availability, in order to preface the theoretical framework I defend in Section 4.

3. The CJEU on HTS' public availability

While the Court remained crucially silent on free accessibility in *James Elliott Construction*, this principle was later given more detailed consideration in *Stichting Rookpreventie Jeugd*, which concerned a preliminary ruling on Article 4(1) of Directive 2014/40/EU, which expressly refers to various ISO standards.[53]

Some salient points from the Court's judgment must be noted. Insofar as the Court was called to consider the free availability of HTS, it acknowledged that the requirement for laws' publication is grounded in the principle of legal certainty. More clearly, it explicitly located the logic of this requirement in law's normativity, affirming that publication is necessary because '[i]ndividuals must be able to ascertain unequivocally what their rights and obligations are' and 'ascertain their position in situations and legal relationships governed by EU law'.[54]

The relationship between normativity, the rule of law and public availability was made even more evident in the opinion of Advocate General Saugmandsgaard Øe, who wrote that one of the rule of law's more vital bases is the principle 'that, in a democratic society, every citizen must have free access to the content of the law.'.[55] He continued that 'the principle of free access to the content of the law must in my view be guaranteed for at least

[53] For commentary, see Annalisa Volpato, 'Transparency and Legal Certainty of the References to International Standards in EU Law: Smoke Signals from Luxembourg?: Stichting Rookpreventie Jeugd and Others (C-160/20)' *EU Law Live* (1 March 2022). The International Organization for Standardization (ISO) is an international, non-governmental standardisation organisation comprised of representatives of the national standardisation organisations of its member countries.

[54] *Stichting Rookpreventie Jeugd* (n 2) paras 41, 45.

[55] Opinion of Advocate General Saugmandsgaard Øe (n 2) point 25.

two reasons. The first derives from the adage that 'ignorance of the law is no excuse', which necessarily means that the law cannot be imposed on citizens before they have the opportunity to become aware of it. The second comes from the need, for citizens in the broad sense, to be in a position to consult all of the texts adopted by the public authorities that govern life in society in order to be able to ensure that they are observed and to exercise effectively the rights conferred on them in a democratic society.'[56]

One vital point must be outlined before proceeding. Insofar as the Court referred to the importance of individuals ascertaining their rights, as well as their obligations, it seemed to hint at the rule of law's horizontal dimension. The horizontal rule of law is even more conspicuous in the second rationale for public availability outlined by Advocate General Saugmandsgaard Øe, which plainly moves beyond a narrow focus on normativity in the sense of obligation and instead acknowledges the right of individuals to ensure that laws are complied with in a general sense (ie, by other parties) rather than merely in their own conduct.

Though the Court hinted at a more encompassing understanding of both the rule of law's vertical and horizontal dimensions, its judgment nonetheless marginalised the latter in favour of a narrow focus on obligation. This marginalisation is particularly evident in the critical distinction drawn by the Court between HTS which impose obligations on undertakings and those which impose obligations on the general public. With regards to HTS which impose obligations on the public, these, the Court seemed to imply, must be published in full in the *Official Journal of the European Union*.[57] In contrast, and citing *James Elliott Construction*, it was considered that, in the case of HTS, which impose obligations only on undertakings, accessibility through national standardisation bodies was sufficient.[58] This distinction, however, has been criticised. Davies and van Waeyenberghe note, for instance, that

[56] Opinion of Advocate General Saugmandsgaard Øe (n 2) point 26.

[57] *Stichting Rookpreventie Jeugd* (n 2) para 48.

[58] *Stichting Rookpreventie Jeugd* (n 2) paras 52–53.

the requirement to publish the contents of HTS which impose obligations on the general public seems to represent a 'prospective rule', as no such HTS is presently used.[59]

While *Stichting Rookpreventie Jeugd* represented the ECJ's first substantial foray into the question of HTS' potential free availability, the Court's treatment of the topic is scant and underwhelming. Though the Court's judgment echoed the Advocate General's implicit recognition of the rule of law's horizontal dimension, it disappointingly marginalised this in favour of a narrow focus on obligation and, with it, the rule of law's more typical vertical dimension. This overemphasis on vertical obligation is typified by the judgment's identification of a speculative and presently inoperable rule that HTS ought only be publicly available if they impose obligations on the general public. Insofar as the Court affirmed that the present system of publishing a mere reference to a HTS in the *Official Journal of the European Union* continues to suffice in the case of HTS imposing obligations exclusively on undertakings – in other words, all existing HTS – it seemed to establish obligation as the gatekeeper of availability.

Two years after the *Stichting Rookpreventie Jeugd* judgment, the ECJ issued its *Malamud* judgment. The somewhat convoluted history and facts of the case are as follows. In September 2018, the appellants - Public.Resource.Org Inc. and Right to Know CLG - lodged a request for access to four HTS, related to essential safety requirements for toys under Directive 2009/48/EC and to Regulation (EC) No 1907/2006.[60] This request was based on

[59] Davies and van Waeyenbenberghe (n 11) 166. See also Volpato (n 53).

[60] Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys [2009] OJ L170/1; Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC,93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.

Regulation No 1049/2001 and Regulation No 1367/2006.[61] The Commission denied the request based on the first indent of A. 4(2) of Regulation No 1049/2001, which permits institutions to deny access to a document where disclosure would undermine the protection of 'commercial interests of a natural or legal person, including intellectual property'.[62] Accordingly, the Commission emphasised the copyright protection of HTS and further affirmed that there was no overriding public interest in disclosure of the relevant HTS.[63] The General Court upheld the refusal of the appellants' request.[64]

Following the General Court's decision, the case was appealed to the ECJ, where the appellants submitted *inter alia* that the Commission had erred in law by failing to find an overriding public interest within the meaning of

[61] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43; Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

[62] Regulation (EC) No 1049/2001, art 4(2).

[63] Regulation (EC) No 1049/2001, art 4(2). Exceptions under art 4(2) are subject to the absence of 'an overriding public interest in disclosure.'.

[64] Case T-185/19 *Public.Resource.Org and Right to Know v Commission* ECLI:EU:T:2021:445. For a critical commentary on the General Court's *Malamud* decision, see Alexandra Soroiu and Mateus Correia de Carvalho, 'Lawtify Premium: Public.Resource.Org (T-185/19), a Judicial Take on Standardisation and Public Access to Law' (2022) 16 Review of European Administrative Law 57. Noteworthily, Soroiu and Correia de Carvalho argue, as I do here, that the pay-for-access model undermines the rule of law, albeit without a detailed theoretical consideration of the rule of law's horizontal dimension (and before the Grand Chamber's judgment).

Article 4(2) of Regulation No 1049/2001.[65] Furthermore, they argued that the Commission had failed to state reasons for its refusal to find an overriding public interest justifying the availability of the HTS. The Court began by noting that Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union guarantee a right of access to documents of the institutions, bodies, offices and agencies of the Union.[66] It further noted that Article 4(2) of Regulation No 1049/2001, which governs the exercise of that right, permits institutions to refuse access to a document in the interest of protecting commercial interests, including intellectual property rights, only when there is no overriding public interest in disclosure.[67]

In engaging with the question of whether an overriding public interest existed, the Court first turned to the rule of law. Here, the Court acknowledged the well-established principle that the rule of law – a foundational value of the European Union – demands free access to EU law, so that 'individuals must be able to ascertain unequivocally what their rights and obligations are'.[68] Though this language evoked that of the *Stichting Rookpreventie Jeugd* judgment,[69] the *Malamud* Court went further, continuing, that 'free access must in particular enable any person whom legislation seeks to protect to verify, within the limits permitted by law, that the persons to whom the rules laid down by that law are addressed actually comply

[65] For reasons of brevity and precision, I will not engage with the appellants' other argument, namely that the Commission had erred in its application of the exception laid down in the first indent of Article 4(2) of Regulation No. 1049/2001, as the Court dispensed with this argument in its finding. For a more detailed account of the arguments advanced in the case, see Davies and van Waeyenberghe (n 11) 164–165.

[66] *Malamud* (n 8) para 66.

[67] *Malamud* (n 8) para 68.

[68] *Malamud* (n 8) para 81.

[69] It is worth noting, however, that the *Stichting Rookpreventie Jeugd* Court did not couch this principle in terms of the rule of law but, rather, legal certainty, which is, of course, a constitutive element of the rule of law.

with those rules.' .[70] It concluded that, by virtue of their legal effects, HTS may specify the rights and obligations of individuals and that access to these specifications 'may be necessary for them to verify whether a given product or service complies with the requirements of such legislation.'.[71]

The Court then turned to the dual principles of transparency and openness, linking these concepts to the legitimacy and accountability of democratic systems.[72] In this regard, it cited the right of access to documents provided for by Article 15(3) TFEU and Article 42 of the Charter, and its implementation by Regulation No 1049/2001.[73] The Court ultimately held that, in view of the principles of the rule of law, transparency, openness and good governance, an overriding public interest was present within the meaning of Article 4(2) of Regulation No 1049/2001. Accordingly, it overruled the General Court and annulled the Commission's decision to refuse the appellants access to the HTS at issue.

Though the *Malamud* judgment took the unprecedented step of making several HTS available to the appellants at no cost, it is vital not to overstate its presently unclear implications. Though the Court annulled the decision to refuse the appellants access to the four requested HTS, it is entirely uncertain – given the narrow scope of the case - whether this will give way to the universal free publication of *all* HTS in the same manner as more traditional forms of EU law.[74] For example, Davies and van Waeyenberghe posit that, in the aftermath of the *Malamud* judgment, HTS which impose obligations on undertakings may still be subject to the conventional pay-for-access model and be freely available only upon the lodging of a request

[70] *Malamud* (n 8) para 81.

[71] *Malamud* (n 8) para 82.

[72] *Malamud* (n 8) para 83.

[73] *Malamud* (n 8) para 84.

[74] This uncertainty is exacerbated by the Court's hesitancy in engaging with the question of HTS' copyright protection.

under Regulation 1049/2001.[75] This would be an outcome of dubious desirability. If free access to HTS is justified by an overriding public interest grounded in the rule of law, it appears incongruous to remove one barrier to access (payment) only to replace it with another (a perfunctory bureaucratic procedure).

Despite these unclear implications, however, it is inarguable that the reasoning in *Malamud* represents a significant departure from that in *Stichting Rookpreventie Jeugd*. The latter Court, despite its cursory reference to the unequivocal ascertainment of rights, ultimately settled on a narrow emphasis on obligation as the gatekeeper of HTS' availability.[76] This narrow focus evinces a commitment to the rule of law – though the *Stichting Rookpreventie Jeugd* did not use that terminology – in its vertical dimension, understood as 'the top-down relationship between government officials and private actors in relation to how the ruling regime treats citizens and entities on matters of interest to the government itself.'.[77] By conspicuous contrast, the *Malamud* judgment emphasised a dynamic altogether different to this traditional, vertical relationship. Rather, its consideration of publication and the rule of law related, as I have said, to the ability of individuals to 'verify […] that the persons to whom the rules laid down by [a] law are addressed actually comply with those rules.'.[78] This emphasis is confirmed by the opinion of the Advocate General, Laila Medina, which queried,

> [H]ow could a citizen know conclusively whether an undertaking has manufactured its product or provided a service in accordance with HTS, if that citizen is not in a position to know the content of those HTS?[79]

[75] Davies & van Waeyenberghe (n 11) 167.

[76] This approach is not without precedent in the CJEU, of course. See, for example, C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc*, ECLI:EU:C:2007:773, para 38.

[77] Tamanaha (n 9) 1217.

[78] *Malamud* (n 8) para 81.

[79] Case C-588/21 P *Public.Resource.Org and Right to Know v Commission and Others* ECLI:EU:C:2023:509, Opinion of Advocate General Medina, point 63.

She continued, '[C]ustomers […] are, in reality, the real addresses.'[80] The acknowledgement that private parties upon whom a HTS imposes no obligations nonetheless maintain an interest in verifying compliance by those subject to its obligations hints at a fuller conception of the rule of law. More perspicuously, the approach adopted by the *Malamud* Court indicates a novel acknowledgement of the rule of law's horizontal dimension, ie, insofar as it applies to side-to-side relationships between private parties. In the next section, I will provide a thorough account of this horizontal dimension of the rule of law – hinted at in the *Malamud* judgment as an overriding interest justifying HTS' free availability – and argue that this account supports HTS' free availability by default.

II. The Rule Of Law And The Public Availability Of HTS

1. The rule of law's vertical and horizontal dimensions

The rule of law is a concept with a deep pedigree in Western politico-legal thought and a firm place in the EU constitutional framework.[81] Nonetheless, the meaning of the rule of law is deeply contested. Shklar, for instance, famously wrote that the concept 'has become meaningless thanks to

[80] Opinion of Advocate General Medina (n 79) point 63.

[81] E. P. Thompson, for example, identified the rule of law as 'an unqualified social good.' See Edward P Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1976) 267. cf Gerald Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (OUP 2022) 79, who doubts the notion that the rule of law is an *unqualified* social good, i.e. one that can be achieved 'without some loss or cost, or without struggle.' On the historical development of the rule of law, see Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004). Article 2 TEU identifies the rule of law as a foundational value of the Union. See also Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999; Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97; Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

ideological abuse and general over-use.'.[82] Given the overabundance of divergent and sometimes conflicting accounts of the rule of law, it is necessary here to narrow my scope and seek a generally palatable starting point. To this end, I will begin with perhaps its most intuitive and uncontentious function, that of restraining the arbitrary exercise of power, particularly by governmental authorities.[83] This conception has an enviably longstanding pedigree and is succinctly outlined by Plato, who wrote that the rule of law exists 'where [law] is sovereign over the authorities and they its humble servants'.[84] In more modern scholarship, this notion is echoed in one way or another by a variety of scholars.[85] Insofar as the rule of law is conceived of as a bulwark against arbitrary state power, its operation is distinctly vertical, a conceptualisation which has tended to predominate *inter alia* in both historical and contemporary academic discourse and, in light of the Court's narrow emphasis on obligation as the gatekeeper of public

[82] Judith N Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1, 1.

[83] Arbitrary power is not, of course, only wielded by governments. On the 'private government' operated by employers over their employees, see Elizabeth Anderson, *Private Government*: *How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton UP 2017). Similarly, the unprecedented power wielded by so-called 'tech leviathans' also poses challenges to traditional conceptions of the rule of law. See Postema (n 81) 263–292; Christian D'Cunha, '"A State in the Disguise of a Merchant": Tech Leviathans and the Rule of Law' (2021) 27(1-3) European Law Journal 109. It might be the case that the chasmic power imbalance in some otherwise horizontal relationships might indicate a third, diagonal dimension of the rule of law. Fully developing this concept is, however, beyond the scope of this article and I will therefore proceed based on the vertical/horizontal dichotomy.

[84] Plato, *The Laws* (Alfred E Taylor tr, Dent & Sons Ltd. 1934) 101.

[85] Postema (n 81) 18; Martin Krygier, 'What's the Point of the Rule of Law?' (2019) 67(3) Buffalo Law Review 743. See also Brandeis J's concurring opinion in *Whitney v. California* 274 U.S. 357, 375, in which he wrote that the founders of the United States 'believed that the final end of the State was to make men free to develop their faculties, and that, in its government, *the deliberative forces should prevail over the arbitrary*.' (emphasis added).

availability in *Stichting Rookpreventie Jeugd*, ECJ jurisprudence. The predominance of the rule of law's vertical dimension is, of course, intuitively intelligible given that transgressions in this domain often evoke visceral distaste and excoriation. To provide a stark historical example, the Nazi *Führerprinzip*, which made Hitler the 'final arbiter of law',[86] has abided in public consciousness as a powerful reminder of the importance of the rule of law in safeguarding against despotism.

In its vertical dimension, law's normativity is an intelligising principle for many core rule-of-law desiderata. The well-accepted objectionability of retroactive laws, for instance, is plainly grounded in the obvious impossibility of complying with laws which come into effect only after one has acted.[87] Prohibiting retroactive laws is therefore vital in shielding citizens from the arbitrary imposition of unforeseeable criminal penalties. In the context of laws' publication, the relevance of this principle is similarly plain. As Raz succinctly noted, if the law is to guide citizens' behaviour, 'they must be able to find out what it is.'.[88] Put simply, the publication of laws is a check on arbitrary rule because it affords citizens foreknowledge of the rules to which their conduct is subject and allows them to order their behaviour to avoid incurring punishment for transgressing them. In contrast, secret or otherwise unavailable laws leave citizens vulnerable to an 'autocratic whim' that they could do nothing to avoid.[89] Indeed, if we are to take seriously the notion that normativity is an inherent feature of law, it seems irrefutable that

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[86] Jens Meierhenrich, *The Remnants of the Rechtstaat: An Ethnography of Nazi Law* (OUP 2018) 103.

[87] Though retrospective laws have largely become artefacts of historical tyrannies, the ECJ somewhat recently dealt with the issue, in relation to retrospective amendments to a pension scheme, in Case C-171/18 *Safeway Ltd. v. Newton* ECLI:EU:C:2019:272.

[88] Raz (n 3) 214. Milton calls this public promulgation's 'success criterion'. See James Milton, 'The Rule of Law and Full-Bodied Promulgation' (2025) 88(3) Modern Law Review 502, 507.

[89] Elizabeth Goitein, *The New Era of Secret Law* (Brennan Center 2016) 16.

non-public laws do not, in truth, constitute laws in any meaningful sense. This position has, of course, been defended by a variety of scholars. For Fuller, a failure to fulfil a basic threshold of any of the eight principles of legality he outlines – including public promulgation – results in something worse than merely bad law. Rather, 'it results in something that is not properly called a legal system at all'.[90] Insofar as they sever the vital link between the existence of laws governing human behaviour and the possibility of arranging one's behaviour to comply therewith, unpublished laws are, as Kutz affirms, 'nugatory'.[91]

In contrast to the clearly vital vertical dimension outlined above, the *Malamud* judgment seemed to evince, as I have outlined, an acknowledgement of the rule of law's horizontal dimension, namely its application to the 'side-to-side' relationship between parties subject to HTS and the general public, including prospective consumers. Though this dimension has received significantly less attention than its vertical counterpart, it too has a longstanding pedigree. One ancient scholar, known as *Anonymous Iamblichi*, wrote,

> The first result of conformity to the law is trust, which brings enormous benefits for everyone and is one of the great blessings of the world […] thanks to their conformity to the law, there is interdependence and trust between [people].[92]

More recently, Bingham implicitly notes this horizontal dimension in identifying the rule of law's function of providing a stable foundation for business relationships:

> [T]he successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights

[90] Fuller (n 3) 39.

[91] Christopher Kutz, 'Secret Law and the Value of Publicity' (2009) 22(2) Ratio Juris 197, 203.

[92] Robin Waterfield (tr), *The First Philosophers: The Presocratics and Sophists* (OUP 2000) 309-310.

> and obligations. No one would choose to do business [...] in a country where the parties' rights and obligations were vague or undecided.[93]

These perspectives highlight a function of the rule of law distinct from the restraint of arbitrary, vertical power: facilitating order, security, and trust in horizontal relationships.[94] Because of the normative character of law, an important feature of the bond of trust generated by this horizontal dimension is that, like in its vertical counterpart, the rule of law provides, in Fuller's words, 'dependable guideposts for self-directed action.'.[95] As such, it facilitates trust in private relationships by enabling reasonable reliance on the predictable actions of other parties, both by establishing reasons for these actions and by making these reasons known to all. For Fuller, the 'function of law is to create an orderly interaction among citizens', in part by establishing the aforementioned 'guideposts for self-directed action.'.[96] Inasmuch, then, as there is a normative dimension to the vertical relationship between state and citizen, there is equally a normative set of expectations which operate horizontally between private actors.

This principle finds its fullest expression in Fuller's related notions of reciprocity and interactionism. According to him, the vertical relationship between state and citizen depends upon reciprocal expectations; the state, he opines, says to the citizen, '[t]hese are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.'.[97] Nonetheless, the interactional aspect of horizontal relationships also has indisputably normative implications. Law, Fuller says, can be best described as a 'language of interaction'.[98] He

[93] Bingham (n 3) 38.

[94] Tamanaha (n 9) 1223–1225.

[95] Fuller (n 3) 229.

[96] Fuller (n 3) 229.

[97] Fuller (n 3) 39–40.

[98] Lon L Fuller, 'Human Interaction and the Law' (1969) 14(1) The American Journal of Jurisprudence 1, 2. Fuller speaks here about customary law, though it seems

continues, 'To interact meaningfully men require a social setting in which the moves of participating players will fall generally within some predictable pattern.'.[99] From this need for predictability arise 'interactional expectancies' which allow individuals to 'guide their conduct toward one another by these expectancies.'[100]

Fuller's contention is simple; whilst the vertical relationship between state and citizen relies on reciprocal, normative expectations, so too do horizontal relationships between private parties. Inasmuch as I must have 'dependable guideposts' in respect of my relationship with public authorities, the rule of law equally requires that I have similarly reliable expectations in my relationships with other private citizens.

2. Laws' publication as a rule of law criterion

While it is largely incontestable that the publication of laws is vital to the rule of law in its vertical dimension, this article's focus necessitates a consideration of whether it is an equally essential component of its horizontal dimension. Given that horizontal relationships are characterised by an interaction between private parties (and, in particular, those which lack the plainly coercive power of public authorities), some have argued that the rule of law's horizontal dimension may involve requirements which differ from those of its vertical operation.[101] It is, of course, far beyond the scope of this article to provide a comprehensive list of criteria which are

unnecessary to demarcate this as a separate area in analysing Fuller's thought. Elsewhere, in *The Morality of Law* (n 3) 234, Fuller writes, 'But customary law...plays an important, though usually silent role, not only in the interpretation of written law, but in helping to supply the gaps that will always be perceived in any body of enacted law.' The common law context in which Fuller writes is unmistakable, though his general theoretical treatment of the rule of law ought not be discarded due to this context.

[99] Fuller, 'Human Interaction and the Law' (n 98) 2.

[100] Fuller (n 98) 7-9.

[101] See, for example, Tamanaha (n 9) 1228-1229.

necessary for the horizontal rule of law to flourish.[102] Instead, as per this article's focus on the free availability of HTS, I will settle for arguing that the public availability of laws is a vital criterion of the rule of law's horizontal dimension.

For this purpose, let us return to Fuller's account, of which the public availability of laws is an indispensable criterion. From one perspective, Fuller's account is concerned in large part with law-making and therefore seems oriented toward the vertical relationship between state and citizen.[103] This tendency is supported by Fuller's choice of example in arguing in favour of laws' public promulgation, namely the famous incident involving Caligula, which I cited at the beginning of this article.[104] Balganesh, however, critiques the scholarly overemphasis on this aspect of Fuller's thought.[105] He argues, in contrast, that Fuller's 'seemingly vertical account of the interaction between state and individual […] is in reality parasitic on the existence of a robust body of horizontal expectancies and obligations among individuals, generated entirely through their interactions.'.[106]

For Fuller, as I have described above, the related notions of reciprocity and interactionism strongly indicate the relevance of his eight famous rule of law criteria, including public promulgation, to horizontal relationships. The law, insofar as it establishes dependable guideposts for action, establishes interactional expectancies in horizontal relationships between private parties. In this context, public promulgation, the second of Fuller's list of eight rules

[102] Though I am concerned here with the somewhat discrete topic of HTS' public availability, it is worth emphasising that the comprehensive operationalisation of the horizontal rule of law – such as through legislative reform – first depends upon a greater theoretical consideration of its essential criteria.

[103] See, in particular, Fuller (n 3) 39-40.

[104] Fuller (n 3) 93.

[105] Shyamkrishna Balganesh, 'Interactional Ordering: Reconstructing Lon Fuller's Theory of Private Law' (2024) 69 The American Journal of Jurisprudence 217.

[106] Balganesh (n 105) 235-236.

of law criteria, assumes a vital significance.[107], Laws' public availability, as I have outlined, is an essential derivative requirement of law's normativity. If a citizen is to avoid the retribution of the criminal law, for example, they must know in advance what constitutes a criminal offence. Equally, however, if the law is taken to comprise normative 'interactional expectancies' from a horizontal perspective, a citizen must have reasonable foreknowledge of these expectancies (including those bearing on them and those bearing on their fellow citizens). Milton provides the simple, though pertinent, example of a labourer who, having recently moved to a new country, seeks tax advice from a lawyer.[108] On their way to the lawyer's office, the labourer may have to cross the road, which, of course, can only be safely done if they know on which side of the road people in that country drive. The interactional expectancy upon which the labourer relies can only be effective if they have free access to this information.[109] Accordingly, the recognition that law generates normative interactional expectancies between private parties affirms that the public availability of laws is, in fact, a vital criterion of the rule of law's horizontal dimension.

The recognition that the rule of law demands the public availability of laws even in its horizontal dimension allows the previously disparate concepts I have outlined to converge. Inasmuch as laws may impose normative obligations on private parties by the state, they may also generate normative interactional expectations between those private parties and others with whom they interact. Accordingly, while it is well-established that checking governmental power requires that laws be publicised in order to allow private parties to verify and comply with their obligations,[110] it is apparent that laws' publication also fulfils an important function in facilitating

[107] Fuller (n 3) 39.

[108] Milton (n 88) 507.

[109] Milton (n 88) 508. Milton's example is plainly somewhat facetious, given that the labourer can reasonably derive this information through observation. In contrast, a consumer cannot discern the content of a HTS by mere observation.

[110] Raz (n 3) 214

horizontal interactional expectancies by allowing private parties to verify that those with whom they interact are compliant with their obligations.

In the context of HTS, this recognition seems to justify two important conclusions. Firstly, it opposes the narrow focus on obligation as the gatekeeper of public availability in *Stichting Rookpreventie Jeugd*. In particular, respect for the rule of law's horizontal dimension seems to cause that judgment's distinction between HTS imposing obligations on undertaking and those imposing obligations on the general public to evaporate; since a vertical conception of the rule of law justifies parties' obvious interest in accessing HTS imposing obligations upon them, a recognition of its horizontal dimension acknowledges parties' legitimate interest in accessing HTS which impose obligations on other private parties with whom they interact. Rather, this fuller conception of the rule of law seems to provide justification for aspects of the *Malamud* judgment, insofar as it acknowledged the appellants' legitimate interest in accessing HTS, which impose obligations on other parties.

Secondly, the recognition that the horizontal rule of law necessitates the publication of laws seems to provide vital guidance for resolving the question of HTS' public availability, especially given the presently ambiguous post-*Malamud* landscape. The *Malamud* judgment may, as Davies and van Waeyenberghe speculate, give rise to curious parallel procedures, whereby HTS remain accessible subject to a fee but become freely available upon lodging a request with the Commission. In contrast, however, the CJEU's repeated acknowledgement that HTS constitute laws and the recognition that the horizontal rule of law requires laws' publication (in parallel to its vertical dimension) provides a strong reason for requiring HTS' publication as standard, ie, on the same terms as more traditional forms of EU law, such as directives and regulations.

III. HTS In The AI Act

In the foregoing, I have provided what I consider a cogent argument in favour of HTS' public availability as a requirement of respect for the rule of law's horizontal dimension. This conclusion is, of course, significant in light of the HTS' widespread adoption in EU legislation. Nonetheless, HTS' public availability as a rule-of-law requirement assumes greater urgency given its widening purview, which I will now demonstrate with reference to Regulation 2024/1689, known as the Artificial Intelligence (AI) Act[111].

The AI Act is a first-of-its-kind piece of legislation, aimed at establishing rules to facilitate innovation in the European AI landscape and the free movement of AI products within the internal market, while protecting health, safety and fundamental rights. The most intriguing aspect of the AI Act, from the perspective of this article, is that it operationalises HTS to address the risks posed by artificial intelligence to fundamental rights.[112] Much has, of course, been written on the feasibility of using HTS to accomplish this novel task. Ho-Dac, for instance, questions the political and legal competence of private standardisation bodies to regulate fundamental rights, as well as their expertise in this realm.[113] She further links this point to the challenges to the democratic legitimacy of standardisation bodies discussed earlier. Elsewhere, scholars have noted that methodologies for assessing risks to fundamental rights differ from those for assessing safety risks and accordingly questioned whether standards can encompass both.[114] Leaving aside these issues, let us instead focus on the implications of including fundamental rights protection in HTS for their future public availability.

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[111] Artificial Intelligence Act (n 36).

[112] See Ho-Dac (n 36).

[113] Ho-Dac (n 28) 141.

[114] See, for example, Marco Almada and Nicolas Pettit, 'The EU AI Act: Between the Rock of Product Safety and the Hard Place of Fundamental Rights' (2025) 62 Common Market Law Review 85, 106.

In the previous section, I argued that respect for the horizontal rule of law justifies the availability of HTS to private individuals. However, since a consumer has a vital interest – based on interactional expectancies and the horizontal rule of law – in knowing that manufacturers are compliant with essential safety requirements, they clearly have an even more pressing interest in ensuring the protection of their fundamental rights. Rights occupy a special place within politico-legal systems, elevating the interests they protect above others and identifying these interests as particularly vital and meritorious. As Mahlmann writes, '[t]he things protected by rights are taken (rightly or wrongly) to be important, precious, even of existential concern to human beings.'.[115] He continues, '[t]he goods that human rights protect are a mirror image of what makes human beings human.'.[116] This unique status is confirmed in the EU context by Article 2 of the Treaty on European Union (TEU), which identifies respect for human rights, like the rule of law and human dignity, as a foundational Union value. In the context of the AI Act, the High-level Expert Group on Artificial Intelligence's report, Ethics Guidelines for Trustworthy AI, refers to fundamental rights as 'reflecting special moral entitlements'.[117] In light of HTS' scope having been expanded to address risks to the exalted notion of rights, it is intuitive that their public availability assumes an even greater urgency. I do not, of course, wish to diminish the importance of the interactional expectancies which relate to HTS' traditional purview of health and safety. Neither do I intend to suggest that only HTS which relate to fundamental rights ought to be freely available, any more than only directives and regulations relating thereto ought to be freely available. Nonetheless, the interactional expectancies citizens bear in relation to the protection of their fundamental rights plainly surpass in importance those relating to HTS' previously limited

[115] Matthias Mahlmann, *Mind and Rights: The History, Ethics, Law and Psychology of Human Rights* (CUP 2023) 204.

[116] Mahlmann (n 115) 279.

[117] High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (8 April 2019) 37.

scope of health and safety. As such, the increased scope of HTS under the AI Act further supports their free availability as a rule-of-law desideratum.

A brief, final word is necessary. If I am correct in my conclusion that HTS ought to be freely available in all cases, the Commission will need to address ESOs' copyright interests in the HTS they produce. On the one hand, my examination here has justified HTS' free availability in line with the demands of the rule of law, a foundational and indispensable EU value. As such, this conclusion implies that the apparent 'tension' between HTS's availability and their copyright protection is not one between competing interests of commensurate value.[118] Rather, given that free availability is firmly justified by the rule of law, HTS' copyright protection ought to be viewed as a challenge to be surmounted in ensuring free availability, rather than a value to be balanced therewith.

This contention leaves open a variety of avenues, which I will now consider. Firstly and most straightforwardly, it is unfeasible for reasons of law, policy and practicality to merely extinguish ESOs' intellectual property interests.[119] From a legal perspective, it must be acknowledged that, however detrimental to HTS' accessibility, ESOs' intellectual property interests therein are nonetheless a legal right.[120] To revoke or abolish this right would therefore represent a radical and probably undesirable measure. From the perspective of policy and practicality, the inability of ESOs to recoup the

[118] Davies and van Waeyenberghe (n 11) 171-172.

[119] This position is somewhat similar to one endorsed by Advocate General Medina in her *Malamud* opinion, in which she argued that HTS, as a part of EU law, are incapable of being subject to copyright protection. See Opinion of Advocate General Medina (n 79) points 72-78.

[120] Kanevskaia (n 31) 349.

cost of producing HTS would plainly remove any incentive to do so, thereby causing the present standardisation system to collapse.[121]

A second avenue would be for the Commission to cease delegating HTS' production to the ESOs and instead establish dedicated in-house bodies for this purpose. This possibility is beset by a variety of challenges. First, the establishment of such a body would represent an enormous undertaking from a financial and administrative perspective, and would also likely cause a substantial delay in HTS production during the transitional period. Second, bringing HTS production within the remit of an EU public body would presumably extinguish one of the present system's primary benefits, ie, the input of industry expertise in the production of standards.

Leaving aside these two possible avenues, then, the most feasible resolution seems to be that suggested by Davies and van Waeyenberghe.[122] Specifically, they argue that, in contrast to its current partial funding, the Commission ought to fully compensate ESOs for the loss of revenue which would result from HTS' free availability. This solution seems intuitively feasible, as the financial impact of this compensation appears at least tolerable given what is at stake. While a full analysis has yet to be conducted, figures noted in Advocate General Medina' *Malamud* opinion indicate that CEN generates €2 million annually from the sale of HTS.[123] Given that the current

[121] Davies and van Waeyenberghe (n 11) 169, drawing on CEN's financial reports, argue that the loss of HTS licence revenue would lead to an 'unsustainable annual deficit'. Conversely, others have argued that the loss of revenue from the sale of HTS would be relatively trivial. See Soroiu and Correia de Carvalho (n 64) 74; Rossana Ducato, 'Why Harmonized Standards Should Be Open?' (2023) 54 IIC – International Review of Intellectual Property and Competition Law 1173, 1177. Ultimately, even if the revenue generated from the sale of HTS is a small part of ESOs' overall revenue, it seems obvious that the loss of this revenue will remove any incentive for these organisations to continue producing HTS.

[122] Davies and van Waeyenberghe (n 11) 172.

[123] Opinion of Advocate General Medina (n 79) point 99.

subsidisation of ESOs amounts to €17 million annually[124], and assuming that the €2 million figure for CEN is approximately replicable for CENELEC and ETSI, Davies and van Waeyenberghe note that the cost of fully funding standardisation activities would amount to a 35% increase in relative terms, which they describe as 'significant'.[125] Nonetheless, they opine, an overall annual cost of €23 million would constitute a 'good deal' given the importance of HTS as a regulatory instrument.[126] While HTS' growing importance as a regulatory technique likely justifies this expense, I go further still and argue that an annual cost of approximately €23 million is trifling if it secures vital rule of law interests, particularly the free availability of HTS. Regardless of how it is achieved, it is imperative that all HTS be freely and publicly available by default to ensure respect for the rule of law.

Conclusion

HTS have become an important tool for ensuring internal market harmonisation within the EU. Given this widespread proliferation, their widening scope and, not least, their unequivocal recognition by the CJEU as part of EU law, HTS' present obscurity behind the paywalls of ESOs engenders a problematic blurring of private and public functions. In particular, the present system seems to intuitively jar with the well-established principle that laws' public availability is an indispensable criterion of the rule of law. Though recent CJEU jurisprudence, especially the *Malamud* judgment, has made some inroads into resolving this dilemma, the future of HTS' public availability remains ambiguous. In this article, however, I have demonstrated that a fuller theoretical conception of the rule

[124] Davies and van Waeyenberghe (n 11) 172.

[125] Davies and van Waeyenberghe (n 11) 172.

[126] Alternatively, Kanevskaia suggests that the cost of licencing HTS could be delegated to national authorities, given that it is national standardisation authorities which conduct the sale of HTS in practice. See Kanevskaia (n 31) 350. I remain largely agnostic, in the absence of further economic research, regarding whether free access ought to be funded at the national or supranational level.

of law can provide a robust normative justification for HTS' free availability. More specifically, acknowledgement of the rule of law's horizontal dimension highlights how parties who are not directly subject to obligations deriving from HTS nonetheless maintain a vital interest in their public availability. More than merely justifying the CJEU's decision in *Malamud*, this account of the rule of law supports HTS' free availability by default. Opposing the curious two-tier system of accessibility which might arise post-*Malamud*, the recognition that HTS generate normative interactional expectancies in horizontal relationships suggests that they ought to enjoy the same standards of free publicity as more traditional forms of EU law. This is especially true given the broadening scope of HTS. Inasmuch as it is vital that citizens have access to HTS to verify that manufacturers comply with the essential health and safety requirements they contain, it is intuitively even more significant that they be able to verify compliance with requirements to protect fundamental rights. While this contention raises issues regarding ESOs' copyright interests in the HTS they produce, it is imperative that the Commission find a suitable workaround to facilitate the free availability of HTS, such as by providing additional compensatory funding to ESOs.