CJEU, 5 March 2024, Public.Resource.Org - Right to Know v Commissie

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Harmonised toy safety standards are part of Union law by virtue of their legal effect - overriding public interest requires their disclosure

- **The Commission should have acknowledged, in the decision at issue, the existence of an overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, arising from the principles of the rule of law, transparency, openness and good governance, and justifying the disclosure of the requested harmonised standards, since those standards form part of EU law owing to their legal effects.**

Source: **ECLI:EU:C:2024:201**

CJEU. 5 March 2024

(K. Lenaerts, L. Bay Larsen, A. Arabadjiev, A. Prechal, E. Regan en N. Piçarra, M. Ilešič, P. G. Xuereb, L. S. Rossi, I. Jarukaitis, A. Kumin, N. Jääskinen, N. Wahl, I. Ziemele and J. Passer)

JUDGMENT OF THE COURT (Grand Chamber)

5 March 2024 (*1)

(Appeal – Access to documents of the institutions of the European Union – Regulation (EC) No 1049/2001 – Article 4(2) – Exceptions – Refusal to grant access to a document whose disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property – Overriding public interest in disclosure – Harmonised standards adopted by the European Committee for Standardisation (CEN) – Protection deriving from copyright – Principle of the rule of law – Principle of transparency – Principle of openness – Principle of good governance)

In Case C-588/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 September 2021,

Public.Resource.Org Inc., established in Sebastopol, California (United States),

Right to Know CLG, established in Dublin (Ireland),

represented by J. Hackl, C. Nüßing, Rechtsanwälte, and F. Logue, Solicitor,

appellants,

the other parties to the proceedings being:

European Commission, represented by S. Delaude, G. Gattinara and F. Thiran, acting as Agents,

defendant at first instance,

European Committee for Standardisation (CEN), established in Brussels (Belgium),

Asociación Española de Normalización (UNE), established in Madrid (Spain),

Asociația de Standardizare din România (ASRO), established in Bucharest (Romania),

Association française de normalisation (AFNOR), established in La Plaine Saint-Denis (France),

Austrian Standards International (ASI), established in Vienna (Austria),

British Standards Institution (BSI), established in London (United Kingdom),

Bureau de normalisation/Bureau voor Normalisatie (NBN), established in Brussels,

Dansk Standard (DS), established in Copenhagen (Denmark),

Deutsches Institut für Normung eV (DIN), established in Berlin (Germany),

Koninklijk Nederlands Normalisatie Instituut (NEN), established in Delft (Netherlands),

Schweizerische Normen-Vereinigung (SNV), established in Winterthour (Switzerland),

Standard Norge (SN), established in Oslo (Norway),

Suomen Standardisoimisliitto ry (SFS), established in Helsinki (Finland),

Svenska institutet för standarder (SIS), established in Stockholm (Sweden),

Institut za standardizaciju Srbije (ISS), established in Belgrade (Serbia),

represented by K. Dingemann, M. Kottmann and K. Reiter, Rechtsanwälte,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, E. Regan and N. Piçarra, Presidents of Chambers, M. Ilešič (Rapporteur), P.G. Xuereb, L.S. Rossi, I. Jarukaitis, A. Kumin, N. Jääskinen, N. Wahl, I. Ziemele and J. Passer, Judges,

Advocate General: L. Medina,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 15 March 2023,

after hearing the **Opinion of the Advocate General at the sitting on 22 June 2023**,

gives the following

Judgment

1 By their appeal, Public.Resource.Org Inc. and Right to Know CLG seek to have set aside the judgment of the General Court of the European Union of 14 July 2021, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2021:445, 'the judgment under appeal'), dismissing their action for annulment of Commission Decision C(2019) 639 final of 22 January 2019 ('the decision at issue'), by which the European Commission refused to grant their request for access to four harmonised standards adopted by the European Committee for Standardisation (CEN).

Legal context

Regulation (EC) No 1049/2001

2 Article 1 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), entitled 'Purpose', provides, in paragraphs (a) and (b) thereof:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council [of the European Union] and Commission (hereinafter referred to as "the institutions") documents provided for in Article [15 TFEU] in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, …

…'

3 Article 2 of that regulation, entitled 'Beneficiaries and scope', lays down, in paragraphs 1 to 3 thereof:

'1. Any citizen of the [European] Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

4 Article 4 of that regulation, entitled 'Exceptions', provides, in paragraphs 1, 2 and 4 thereof:

'1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

– public security,

– defence and military matters,

– international relations,

– the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

– commercial interests of a natural or legal person, including intellectual property,

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

…

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.'

5 Article 7 of that regulation, entitled 'Processing of initial applications', provides, in paragraph 2 thereof:

'In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.'

6 Article 12 of Regulation No 1049/2001, entitled 'Direct access in electronic form or through a register', lays down, in paragraph 2 thereof:

'In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.'

Regulation (EC) No 1367/2006

7 Article 2 of 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 (OJ 2006 L 264, p. 13), entitled 'Definitions', provides, in paragraph 1(d)(i) thereof:

'For the purpose of this Regulation:

…

(d) "environmental information" means any information in written, visual, aural, electronic or any other material form on:

(i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

…'

8 Article 6 of that regulation, entitled 'Application of exceptions concerning requests for access to environmental information', lays down, in the first sentence of paragraph 1 thereof:

'As regards Article 4(2), first and third indents, of Regulation [No 1049/2001], with the exception of investigations, in particular those concerning possible infringements of Union law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.'

Regulation (EC) No 1907/2006

9 Entry 27 of the table set out in Annex XVII to 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 (OJ 2006 L 396, p. 1, and corrigendum OJ 2007 L 136, p. 3), as amended by Commission Regulation (EC) No 552/2009 of 22 June

2009 (‘Regulation No 1907/2006’), provides in respect of the conditions of restrictions of nickel:
‘1. Shall not be used:
(a) in any post assemblies which are inserted into pierced ears and other pierced parts of the human body unless the rate of nickel release from such post assemblies is less than 0.2 [microgram(µg)]/cm2/week (migration limit);
(b) in articles intended to come into direct and prolonged contact with the skin such as:
– earrings,
– necklaces, bracelets and chains, anklets, finger rings,
– wrist-watch cases, watch straps and tighteners,
– rivet buttons, tighteners, rivets, zippers and metal marks, when these are used in garments,
if the rate of nickel release from the parts of these articles coming into direct and prolonged contact with the skin is greater than 0.5 µg/cm2/week.
(c) in articles referred to in point (b) where these have a non-nickel coating unless such coating is sufficient to ensure that the rate of nickel release from those parts of such articles coming into direct and prolonged contact with the skin will not exceed 0.5 µg/cm2/week for a period of at least two years of normal use of the article.
2. Articles which are the subject of paragraph 1 shall not be placed on the market unless they conform to the requirements set out in that paragraph.
3. The standards adopted by [CEN] shall be used as the test methods for demonstrating the conformity of articles to paragraphs 1 and 2.’

Regulation (EU) No 1025/2012

10 Pursuant to recital 5 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12):
‘European standards play a very important role within the internal market, for instance through the use of harmonised standards in the presumption of conformity of products to be made available on the market with the essential requirements relating to those products laid down in the relevant Union harmonisation legislation. Those requirements should be precisely defined in order to avoid misinterpretation on the part of the European standardisation organisations.’
11 Article 2 of that regulation, entitled ‘Definitions’, lays down, in paragraph (1)(c) thereof:
‘For the purposes of this Regulation, the following definitions shall apply:
(1) “standard” means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is one of the following:
…
(c) “harmonised standard” means a European standard adopted on the basis of a request made by the Commission for the application of Union harmonisation legislation’.
12 Article 10 of that regulation, entitled ‘Standardisation requests to European standardisation organisations’, provides, in paragraph 1 thereof:
‘The Commission may within the limitations of the competences laid down in the Treaties, request one or several European standardisation organisations to draft a European standard or European standardisation deliverable within a set deadline. European standards and European standardisation deliverables shall be market-driven, take into account the public interest as well as the policy objectives clearly stated in the Commission’s request and based on consensus. The Commission shall determine the requirements as to the content to be met by the requested document and a deadline for its adoption.’
13 Article 11 of that regulation, entitled ‘Formal objections to harmonised standards’, provides, in paragraph 1 thereof:
‘When a Member State or the European Parliament considers that a harmonised standard does not entirely satisfy the requirements which it aims to cover and which are set out in the relevant Union harmonisation legislation, it shall inform the Commission thereof with a detailed explanation and the Commission shall, after consulting the committee set up by the corresponding Union harmonisation legislation, if it exists, or after other forms of consultation of sectoral experts, decide:
(a) to publish, not to publish or to publish with restriction the references to the harmonised standard concerned in the Official Journal of the European Union;
(b) 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.’
14 The possible grant of EU financing to the European standardisation organisations for standardisation activities is governed by Article 15 of Regulation No 1025/2012.

Directive 2009/48/EC

15 Article 13 of Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ 2009 L 170, p. 1), entitled ‘Presumption of conformity’, is worded as follows:
‘Toys which are in conformity with harmonised standards or parts thereof, the references of which have been published in the Official Journal of the European Union, shall be presumed to be in conformity with the requirements covered by those standards or parts thereof set out in Article 10 and Annex II.’

Background to the dispute

16 The background to the dispute, as set out in paragraphs 1 to 4 of the judgment under appeal, is as follows.
17 The appellants are non-profit organisations whose main focus is to make the law freely accessible to all citizens. On 25 September 2018, they made a request to the European Commission Directorate-General for

Internal Market, Industry, Entrepreneurship and SMEs, on the basis of Regulation No 1049/2001 and Regulation No 1367/2006, for access to documents held by the Commission ('the request for access').

18 The request for access concerned four harmonised standards adopted by CEN, in accordance with Regulation No 1025/2012, namely, standard EN 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; standard EN 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related activities'; standard EN 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and standard EN 12472:2005+A 1:2009, entitled 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items' ('the requested harmonised standards').

19 By letter of 15 November 2018, the Commission, on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, refused to grant the request for access.

20 On 30 November 2018, the appellants, pursuant to Article 7(2) of Regulation No 1049/2001, submitted a confirmatory application to the Commission. By the decision at issue, the Commission confirmed the refusal to grant access to the requested harmonised standards.

The action before the General Court and the judgment under appeal

21 By application lodged at the Registry of the General Court on 28 March 2019, the appellants brought an action for annulment of the decision at issue.

22 By order of 20 November 2019, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2019:828), CEN and 14 national standardisation bodies, namely, the Asociación Española de Normalización (UNE), the Asociaţia de Standardizare din România (ASRO), the Association française de normalisation (AFNOR), the Austrian Standards International (ASI), the British Standards Institution (BSI), the Bureau de normalisation/Bureau voor Normalisatie (NBN), Dansk Standard (DS), the Deutsches Institut für Normung eV (DIN), the Koninklijk Nederlands Normalisatie Instituut (NEN), the Schweizerische Normen-Vereinigung (SNV), Standard Norge (SN), the Suomen Standardisoimisliitto ry (SFS), the Svenska institutet för standarder (SIS) and the Institut za standardizaciju Srbije (ISS) (together, 'the interveners at first instance'), were granted leave to intervene in Case T-185/19 in support of the form of order sought by the Commission.

23 In support of their action, the appellants put forward two pleas in law. By their first plea, they submitted, in substance, that the Commission had made errors of law and of assessment in the application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, on the grounds that, first, copyright protection could not be applicable to the requested harmonised standards and, second, no harm to the commercial interests of CEN and its national members had been established.

24 By their second plea, the appellants claimed that the Commission had erred in law as regards the absence of an overriding public interest, within the meaning of the last clause of Article 4(2) of that regulation, and infringed the obligation to state reasons, since it had considered that no overriding public interest, within the meaning of that provision, justified the disclosure of the requested harmonised standards and it had failed to give sufficient reasons for its refusal to recognise the existence of such an overriding public interest.

25 In response to the first plea, the General Court, after noting, in paragraph 29 of the judgment under appeal, that the purpose of Regulation No 1049/2001 is to give the public the widest possible right of access to EU institutions' documents and that, in accordance with Article 2(3) of that regulation, that right covers both documents drawn up by those institutions and documents received from third parties, which include any legal person, held, in paragraphs 30 and 31 of that judgment, that that right is subject to certain limits based on public or private interest grounds.

26 In the first place, as regards the possible harm to the protection of commercial interests deriving from copyright in the requested harmonised standards, and the eligibility of those harmonised standards for copyright protection even though they form part of EU law, the General Court, in paragraphs 40 to 43 of the judgment under appeal, held, in substance, that it was for the authority in receipt of a request for access to third-party documents to identify objective and consistent evidence capable of confirming the existence of the copyright claimed by the third party concerned.

27 In that regard, the General Court held, in paragraphs 47 and 48 of the judgment under appeal, that the Commission was entitled, without committing any error, to find that the threshold of originality to constitute a 'work', for the purposes of the case-law, and accordingly to be eligible for that protection, had been met in the case at hand so far as concerns the harmonised standards in question.

28 In addition, the General Court found, in paragraph 54 of the judgment under appeal, that the appellants were wrong to claim that, since the Court of Justice had held, in the judgment of 27 October 2016, James Elliott Construction (C-613/14, EU:C:2016:821), that those standards formed part of 'EU law', they should be freely accessible without charge with the result that no exception to the right of access can be applied to them.

29 In the second place, so far as concerns the argument alleging the lack of copyright protection for the requested harmonised standards, in the absence of 'personal intellectual creation', for the purposes of the case-law of the Court of Justice, which is necessary in order to benefit from such protection, the General Court held, in essence, in paragraph 59 of the judgment under appeal, that that argument was not sufficiently substantiated.

30 In the third place, as regards the existence of an error of assessment as to whether protected commercial interests had been undermined, the General Court pointed out, in paragraphs 65 and 66 of the judgment under appeal, that the sale of standards is a vital part of the standardisation bodies' business model. To the

extent that the Commission was justified in finding that the requested harmonised standards were covered by copyright protection, under which they were accessible to interested parties solely after the payment of certain fees, their disclosure for free on the basis of Regulation No 1049/2001 was such as to specifically and actually affect the commercial interests of CEN and its national members. The General Court added, in paragraph 71 of that judgment, that the fact that the European standardisation organisations contributed to the performance of tasks in the public interest by providing certification services relating to compliance with the applicable legislation did not alter in any way their status as private entities engaged in an economic activity.

31 Accordingly, the General Court rejected, in paragraph 74 of the judgment under appeal, the first plea in its entirety.

32 The appellants' second plea was divided into three parts.

33 Concerning the third part of that plea, alleging an inadequate statement of reasons for the Commission's refusal to recognise the existence of an overriding public interest, the General Court noted, first of all, in paragraph 86 of the judgment under appeal, that, in the decision at issue, the Commission had stated that the judgment of 27 October 2016, James Elliott Construction (C-613/14, EU:C:2016:821), did not create an obligation of proactive publication of the harmonised standards in the Official Journal of the European Union, nor did it establish an automatic overriding public interest in their disclosure. Next, in paragraphs 87 and 88 of the judgment under appeal, the General Court also noted that the Commission had rebutted the appellants' claims related to the obligations of transparency in environmental matters, deemed to be in the overriding public interest, compared with the interest in protecting the commercial interests of a natural or legal person, and that the Commission had added that it had not been able to identify any overriding public interest justifying such disclosure. Lastly, in paragraph 91 of the judgment under appeal, the General Court added that, even though the Commission was required to set out the reasons justifying the application to the particular case of one of the exceptions to the right of access provided for by Regulation No 1049/2001, it was not however required to provide more information than was necessary in order for the person requesting access to understand the reasons for its decision and for the Court to review the legality of that decision.

34 As for the existence of an overriding public interest requiring free access to the law, the General Court found, first, in paragraphs 99 to 101 of the judgment under appeal, that, in the case at hand, the appellants were seeking to remove entirely the category of harmonised standards from the scope of application of the system of substantive exceptions established by Regulation No 1049/2001, without however substantiating the specific grounds which would have justified the disclosure of the requested harmonised standards or explaining to what extent the disclosure of those standards ought to have prevailed over the protection of the commercial interests of CEN or its national members.

35 Second, the public interest in ensuring the proper functioning of the European standardisation system, the aim of which is to promote the free movement of goods while guaranteeing an equivalent minimum level of safety in all European countries, prevails over the guarantee of freely available access to the harmonised standards without charge.

36 Third, Regulation No 1025/2012 expressly provides for a system of publication which is limited to the references of harmonised standards and allows for paid access to those standards for those wishing to benefit from the presumption of conformity attached to them.

37 Fourth, the General Court held, in paragraphs 104 and 105 of the judgment under appeal, that the Commission had not erred in finding, in the decision at issue, that there was no overriding public interest justifying the disclosure of the requested harmonised standards under the last clause of Article 4(2) of Regulation No 1049/2001. The General Court added, in paragraph 107 of that judgment that, apart from the fact that the appellants did not state the exact source of a 'constitutional principle' which would require access that is freely available and free of charge to harmonised standards, they did not in any way explain the reason why those standards should be subject to the requirement of publication and accessibility attached to a 'law', inasmuch as those standards are not mandatory, they produce the legal effects attached to them solely with regard to the persons concerned, and they may be consulted for free in certain libraries in the Member States.

38 So far as concerns the existence of an overriding public interest arising from the obligation of transparency in environmental matters, the General Court found, in paragraph 119 of the judgment under appeal, that both the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) and Regulation No 1367/2006 provide for public access to environmental information either on request or as part of active dissemination by the authorities and institutions concerned. However, since those authorities and institutions may refuse a request for access to information where that information falls within the scope of a number of exceptions, they are under no obligation actively to disseminate that information.

39 The General Court inferred therefrom, in paragraph 129 of that judgment, that the requested harmonised standards did not come within the sphere of information which relates to emissions into the environment and could not therefore benefit from the application of the presumption laid down in the first sentence of Article 6(1) of that regulation, according to which the disclosure of standards of that nature is deemed to be in the overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001.

40 Consequently, in paragraph 130 of the judgment under appeal, the General Court rejected the second plea in its entirety, and dismissed the action.

Forms of order sought by the parties to the appeal

41 By their appeal, the appellants claim that the Court of Justice should:

– set aside the judgment under appeal and grant access to the requested harmonised standards;

– in the alternative, refer the matter back to the General Court; and

– order the Commission to pay the costs.

42 The Commission and the interveners at first instance contend that the Court should:

– dismiss the appeal and

– order the appellants to pay the costs.

The application for the oral part of the procedure to be reopened

43 By a document lodged at the Registry of the Court of Justice on 17 August 2023, the interveners at first instance requested that the oral part of the procedure be reopened, in accordance with Article 83 of the Rules of Procedure of the Court of Justice.

44 In support of their application, they submit that the Advocate General's Opinion, delivered on 22 June 2023, is based on numerous assumptions which are factually unsubstantiated, or even erroneous, which would require, at the very least, a more thorough discussion. In addition, they consider that an in-depth debate is all the more necessary since the Advocate General relied on incorrect assumptions and the approach which she adopted in her Opinion, in particular that according to which 'the EU standardisation system does not actually require paid access to [harmonised technical standards]', creates a risk for the functioning of that system.

45 Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to have a decisive bearing on the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

46 That is not the situation here. The interveners at first instance and the Commission set out, at the hearing, their assessment of the factual context of the dispute. In particular, they had the opportunity to express their views on the presentation of the facts as set out in the judgment under appeal and the appeal, and to specify the reasons why, in their view, the European standardisation system requires paid access to the requested harmonised standards. Accordingly, the Court considers, after hearing the Advocate General, that it has before it all the information necessary to give judgment.

47 Furthermore, as regards the claim that the Advocate General's Opinion contains guidelines posing a risk to the functioning of the European standardisation system, it must be borne in mind that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for interested parties to submit observations in response to the Advocate General's Opinion (judgment of 25 October 2017, Polbud – Wykonawstwo, C-106/16, EU:C:2017:804, paragraph 23 and the case-law cited).

48 Under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. In this regard, the Court is not bound either by the conclusion reached by the Advocate General or by the reasoning which led to that conclusion. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in his or her Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 4 September 2014, Vnuk, C-162/13, EU:C:2014:2146, paragraph 31 and the case-law cited).

49 In the light of the foregoing, the Court considers that there is no need to reopen the oral part of the procedure.

The appeal

50 The appellants put forward two grounds in support of their appeal. The first ground of appeal alleges that the General Court erred in law in holding that the requested harmonised standards fall within the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, which seeks to protect the commercial interests of a natural or legal person, including intellectual property. The second ground alleges an error of law as regards the existence of an overriding public interest, within the meaning of the last clause of Article 4(2) of that regulation, justifying the disclosure of those standards.

51 It is appropriate to begin by examining the second ground of appeal.

Arguments of the parties

52 By their second ground of appeal, the appellants claim that the General Court erred in law in holding that there was no overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, justifying the disclosure of the requested harmonised standards.

53 In the first place, the appellants criticise, in substance, the General Court for holding, in paragraphs 98 to 101 of the judgment under appeal, that they had not demonstrated the specific reasons justifying their request for access, based on the existence of an overriding public interest in disclosure of the requested harmonised standards.

54 In that regard, they claim, first of all, that the requested harmonised standards form part of EU law, which must be freely available. Next, they maintain that those standards concern fundamental issues for consumers, namely, the safety of toys. Lastly, they argue that such standards are also very important for manufacturers and all other participants in the supply chain, since there is a presumption of conformity with

EU legislation, applicable to the products concerned when the requirements laid down in those standards are met.

55 In the second place, the appellants complain that the General Court erred in law, in paragraphs 102 and 103 of the judgment under appeal, in finding that the public interest in ensuring the functioning of the European standardisation system prevails over the guarantee of freely available access to the harmonised standards without charge.

56 Furthermore, according to the appellants, the functioning of the European standardisation system is not covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, which concerns only the protection of the commercial interests of a natural or legal person, including intellectual property. By considering that the public interest in ensuring the functioning of the European standardisation system falls within the scope of that provision, the General Court wrongly created an exception, which is not provided for in that regulation.

57 In the third place, the appellants complain that the General Court erred in law, in paragraphs 104 and 105 of the judgment under appeal, by endorsing the Commission's assessment according to which the **judgment of 27 October 2016, James Elliott Construction (C-613/14, EU:C:2016:821)**, does not create an obligation of proactive publication of the harmonised standards in the Official Journal of the European Union or establish an automatic overriding public interest in their disclosure.

58 In that regard, the requested harmonised standards should be considered to be legislative documents since the procedure for their adoption constitutes a form of 'controlled' legislative delegation. In particular, references to such standards are published in the Official Journal of the European Union and the Commission requires Member States to adopt each harmonised standard as a national standard without amendment, within six months. Furthermore, publication in the Official Journal of the European Union has the effect of conferring on products which are covered by EU legislation and satisfy the technical requirements defined in the harmonised standards the benefit of a presumption of conformity with EU legislation.

59 In the fourth place, the appellants claim that the General Court erred in law, in paragraph 107 of the judgment under appeal, when it stated that harmonised standards produce the legal effects attached to them solely with regard to the persons concerned. That conclusion runs counter to the case-law of the Court of Justice according to which harmonised standards form part of EU law.

60 The Commission, supported by the interveners at first instance, contends, as a preliminary point, that the appellants' line of argument is so general that it could apply to any request for disclosure relating to a harmonised standard.

61 As regards the reasons specifically relied on by the appellants, the Commission observes, first, that, although it considers that the requested harmonised standards do indeed form part of EU law, that does not mean that they must be freely available. Second, as for the fact that those standards relate to issues that are fundamental to consumers, it observes that that argument is too general to take precedence over the reasons justifying the refusal to disclose the documents at issue. Third, the interest in harmonised standards that manufacturers and other participants in the supply chain have in order to gain access to the internal market cannot be regarded as an overriding public interest justifying the disclosure of those standards.

62 In addition, it submits that freely available access to the harmonised standards without charge would have systemic effects on the interveners at first instance, their intellectual property rights and their commercial income. In this respect, the European standardisation system cannot operate without paid access to those standards, with the result that the exception provided for in Article 4(2) of Regulation No 1049/2001 is applicable. In any event, there is no overriding public interest justifying the disclosure of those standards.

63 Finally, the Commission states that harmonised standards are not drafted in the course of legislative procedures, but on the basis of a mandate given by the Commission to a standardisation body following the adoption of a legislative act. Moreover, once adopted by a standardisation body, harmonised standards must be transposed into the national legal systems by the national members of that body, and in accordance with the internal procedural rules of that body. In any event, the direct access provided for in Article 12(2) of Regulation No 1049/2001 is also subject to the exception laid down in the first indent of Article 4(2) of that regulation.

64 Consequently, the Commission considers that the second ground of appeal should be rejected.

Findings of the Court

65 By their second ground of appeal, the appellants submit, in substance, that the General Court erred in law in holding that no overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, justified disclosure of the requested harmonised standards. In their view, there is, by virtue of the principle of the rule of law, which requires free access to EU law, an overriding public interest justifying access to those standards for all natural or legal persons residing or having their registered office in a Member State, on the ground that those rules form part of EU law.

66 As a preliminary point, it should be recalled that the right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium, is guaranteed to any citizen of the Union, and to any natural or legal person residing or having its registered office in a Member State, by Article 15(3) TFEU and by Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter'). The exercise of that right is, as regards access to Parliament, Council and Commission documents, governed by Regulation No 1049/2001, the purpose of which, according to Article 1 thereof, is, inter alia, to 'define the principles, conditions and limits' of that right, 'in such a way as to ensure the widest possible access to

documents' and to 'establish rules ensuring the easiest possible exercise of [that] right'.
67 Article 2(1) of that regulation specifically provides for a right of access to documents of the Parliament, Council and Commission. Under Article 2(2) of that regulation, the institutions may, subject to those principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.
68 According to the first indent and the final clause of Article 4(2) of Regulation No 1049/2001, those institutions are to refuse access to a document where its disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.
69 It is thus apparent from the wording of that provision that the exception provided for therein is not applicable where there is an overriding public interest in disclosure of the document concerned.
70 In that regard, it should, in the first place, be recalled that the Court has already held that a harmonised standard, adopted on the basis of a directive and the references to which have been published in the Official Journal of the European Union, forms part of EU law owing to its legal effects (see, to that effect, judgment of 27 October 2016, James Elliott Construction, C-613/14, EU:C:2016:821, paragraph 40).
71 In particular, first, the Court has already held that harmonised standards may be binding on the public generally as long as they themselves have been published in the Official Journal of the European Union (see, to that effect, judgment of 22 February 2022, Stichting Rookpreventie Jeugd and Others, C-160/20, EU:C:2022:101, paragraph 48).
72 Second, as regards the procedure for drawing up harmonised standards, it should be noted that that procedure was laid down by the EU legislature in Regulation No 1025/2012 and that, in accordance with the provisions set out in Chapter III of that regulation, the Commission plays a central role in the European standardisation system.
73 Thus, it should be noted, as the Advocate General did in points 23 to 31 of her Opinion, that even if the development of those standards is entrusted to a body governed by private law, only the Commission is empowered to request that a harmonised standard be developed in order to implement a directive or a regulation. Under the last sentence of Article 10(1) of Regulation No 1025/2012, the Commission determines the requirements as to the content to be met by the requested harmonised standard and a deadline for its adoption. That development process is supervised by the Commission, which also provides financing in accordance with Article 15 of that regulation. In accordance with Article 11(1)(a) of that regulation, it is to decide to publish, not to publish or to publish with restriction the references to the harmonised standard concerned in the Official Journal of the European Union.
74 Third, although Regulation No 1025/2012 provides, in Article 2(1) thereof, that compliance with harmonised standards is not compulsory, products which comply with those standards benefit, as is apparent from recital 5 of that regulation, from a presumption of conformity with the essential requirements relating to them laid down in the relevant EU harmonisation legislation. That legal effect, conferred by that legislation, is one of the essential characteristics of those standards and makes them an essential tool for economic operators, for the purposes of exercising the right to free movement of goods or services on the EU market.
75 More specifically, it may prove difficult, or even impossible, for economic operators to have recourse to a procedure other than that of compliance with such standards, such as an individual expert report, in the light of the administrative difficulties and additional costs arising therefrom (see, to that effect, judgment of 12 July 2012, Fra.bo, C-171/11, EU:C:2012:453, paragraphs 29 and 30)
76 Consequently, as the Advocate General observed in point 43 of her Opinion, where EU legislation provides that compliance with a harmonised standard gives rise to a presumption of conformity with the essential requirements of that legislation, that means that any natural or legal person who wishes effectively to challenge that presumption in respect of a given product or service must demonstrate that that product or service does not meet that standard or, alternatively, that that standard is not fit for purpose.
77 In the present case, three of the four requested harmonised standards, namely, standard EN 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets', standard EN 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related activities' and standard EN 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances' refer to Directive 2009/48. Their references were published in the Official Journal of the European Union of 13 November 2015 (OJ 2015 C 378, p. 1). In accordance with Article 13 of that directive, toys which have been manufactured in compliance with those standards enjoy a presumption of conformity with the requirements covered by those standards.
78 As for standard EN 12472:2005+A 1:2009, entitled 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items', it refers to Regulation No 1907/2006.
79 Although, as is apparent from paragraph 74 of the present judgment, compliance with harmonised standards is not generally mandatory, that standard is, in the present case, manifestly mandatory, since Regulation No 1907/2006 provides, in paragraph 3 of entry 27 of the table set out in Annex XVII thereto, that, as regards nickel, the standards adopted by CEN are to be used as test methods for demonstrating the conformity of the products concerned with paragraphs 1 and 2 of entry 27.
80 In the light of the foregoing considerations, it must be held, in accordance with the case-law referred to in paragraph 70 of the present judgment, that the requested harmonised standards form part of EU law.

81 In the second place, as the Advocate General noted in point 52 of her Opinion, Article 2 TEU provides that the European Union is based on the principle of the rule of law, which requires free access to EU law for all natural or legal persons of the European Union, and that individuals must be able to ascertain unequivocally what their rights and obligations are (judgment of 22 February 2022, Stichting Rookpreventie Jeugd and Others, C-160/20, EU:C:2022:101, paragraph 41 and the case-law cited). 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 with those rules.

82 Accordingly, by the effects conferred on it by EU legislation, a harmonised standard may specify the rights conferred on individuals as well as their obligations and those specifications may be necessary for them to verify whether a given product or service actually complies with the requirements of such legislation.

83 In the third place, it must be recalled that the principle of transparency is inextricably linked to the principle of openness, which is enshrined in the second paragraph of Article 1 and Article 10(3) TEU, in Article 15(1) and Article 298(1) TFEU and in Article 42 of the Charter. It makes it possible, inter alia, to ensure that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see, to that effect, judgment of 22 February 2022, Stichting Rookpreventie Jeugd and Others, C-160/20, EU:C:2022:101, paragraph 35 and the case-law cited).

84 To that end, a right of access to documents is ensured under the first subparagraph of Article 15(3) TFEU and enshrined in Article 42 of the Charter, a right which has been implemented, inter alia, by Regulation No 1049/2001, Article 2(3) of which provides that it applies to all documents held by the Parliament, the Council or the Commission (see, to that effect, judgment of 22 February 2022, Stichting Rookpreventie Jeugd and Others, C-160/20, EU:C:2022:101, paragraph 36).

85 In those circumstances, it must be held that there is an overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, justifying the disclosure of the requested harmonised standards.

86 Therefore, the General Court erred in law in holding, in paragraphs 104 and 105 of the judgment under appeal, that there was no overriding public interest in the disclosure, pursuant to that provision, of the requested harmonised standards.

87 Consequently, the second ground of appeal must be upheld and, without it being necessary to examine the first ground of appeal, the judgment under appeal must be set aside.

The action before the General Court

88 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice is to quash the decision of the General Court if the appeal is well founded. It may itself give final judgment in the matter, where the state of the proceedings so permits. That is the situation in the present case.

89 As is apparent from paragraphs 65 to 87 of the present judgment, the Commission should have acknowledged, in the decision at issue, the existence of an overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, arising from the principles of the rule of law, transparency, openness and good governance, and justifying the disclosure of the requested harmonised standards, since those standards form part of EU law owing to their legal effects.

90 In those circumstances, the decision at issue must be annulled.

Costs

91 Under Article 184(2) of the Rules of Procedure, where an appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

92 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

93 In the present case, since the appellants have applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs relating to both the proceedings before the General Court and the proceedings on appeal.

94 According to Article 184(4) of the Rules of Procedure, where the appeal has not been brought by an intervener at first instance, he or she may not be ordered to pay costs in the appeal proceedings unless he or she participated in the written or oral part of the proceedings before the Court. Where an intervener at first instance takes part in the proceedings, the Court may decide that he or she is to bear his or her own costs. Since the interveners at first instance participated in the written and oral parts of the appeal proceedings before the Court, they must be ordered to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Sets aside the judgment of the General Court of the European Union of 14 July 2021, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2021:445);

2. Annuls Commission Decision C(2019) 639 final of 22 January 2019;

3. Orders the European Commission to pay the costs relating to both the proceedings before the General Court of the European Union and the appeal proceedings;

4. Orders the European Committee for Standardisation (CEN), the Asociación Española de Normalización (UNE), the Asociația de Standardizare din România (ASRO), the Association française de normalisation (AFNOR), Austrian Standards International (ASI), the British Standards Institution (BSI), the Bureau de normalisation/Bureau voor Normalisatie (NBN), Dansk Standard (DS), the Deutsches Institut für Normung eV (DIN), the Koninklijk Nederlands Normalisatie Instituut (NEN), the Schweizerische Normen-Vereinigung (SNV), Standard Norge (SN), the Suomen

Standardisoimisliitto ry (SFS), the Svenska institutet för standarder (SIS) and the Institut za standardizaciju Srbije (ISS) to bear their own costs both in connection with the proceedings at first instance and the appeal proceedings.

OPINION OF ADVOCATE GENERAL

MEDINA

delivered on 22 June 2023 (1)
Case C-588/21 P
Public.Resource.Org, Inc.,
Right to Know CLG
v
European Commission
(Appeal – Access to documents of institutions – Regulation (EC) No 1049/2001 – Harmonised standards – Four harmonised standards adopted by the European Committee for Standardisation – Refusal to grant access – Exception relating to the protection of the commercial interests of a third party – Protection deriving from copyright – Rule of law)

1.
By their appeal, Public.Resource.Org, Inc. and Right to Know CLG (jointly 'the appellants'), non-profit organisations whose main focus is to make the law freely accessible to all citizens, seek for the judgment of the General Court of 14 July 2021, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2021:445) ('the judgment under appeal') to be set aside. That judgment rejected as unfounded their action seeking the annulment of Commission Decision C(2019) 639 final of 22 January 2019 refusing to grant them access to four harmonised technical standards ('HTS') adopted by the European Committee for Standardisation (CEN) ('the contested decision'). The present case gives the Grand Chamber of the Court an opportunity to rule for the first time on the issue as to whether HTS – which the Court has already recognised as forming part of EU law and having legal effects – are capable of being protected by copyright; and, further, whether the rule of law as well as the principle of transparency and the right of access to documents, as enshrined in Article 15 TFEU, require that access to HTS be freely available without charge.

I. Background to the dispute

2.
The appellants made a request to the European Commission, on the basis of Regulation (EC) No 1049/2001 (2) and Regulation (EC) No 1367/2006, (3) for access to documents held by the Commission ('the request for access'). The request for access concerned four HTS adopted by CEN, in accordance with Regulation (EU) No 1025/2012, (4) namely standards: (i) 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; (ii) 'Safety of toys – Part 4: Experimental sets for chemistry and related activities'; (iii) 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and (iv) 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items' ('the requested HTS'). HTS (i) to (iii) refer to Directive 2009/48/EC (5) ('the Toy Safety Directive') and HTS (iv) refers to Regulation (EC) No 1907/2006. (6)

3.
By letter of 15 November 2018, the Commission, on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, refused to grant the request for access. The Commission confirmed that refusal by the contested decision.

4.
Regulation No 1025/2012 continues the 'New Approach regulation' approach to technical harmonisation and standards developed in 1985, which restricts the content of legislation to 'essential requirements', leaving the technical details to HTS. It formally designates only three European Standards Organisations (ESOs) for the purposes of establishing HTS: CEN (responsible for standardisation in most sectors); Comité européen de normalisation électrotechnique (CENELEC, European Committee for Electrotechnical Standardisation), which is responsible for standardisation in electrical engineering); and European Telecommunications Standards Institute (ETSI), which is responsible for standardisation in information and communications.

II. Proceedings before the General Court and the judgment under appeal

5.
By application lodged at the Registry of the General Court on 28 March 2019, the appellants brought an action seeking the annulment of the contested decision. In essence, the appellants' first plea in law alleged that the Commission misinterpreted and/or misapplied the first indent of Article 4(2) of Regulation No 1049/2001; and their second plea in law alleged that the Commission infringed the last clause of Article 4(2) of Regulation No 1049/2001. The General Court rejected both pleas and dismissed the action.

III. Assessment

A. First ground of appeal – Error in the assessment of the application of the exception in the first indent of Article 4(2) of Regulation No 1049/2001

1. First limb of the first ground of appeal – the General Court committed an error of law in incorrectly assessing the copyright protection for the requested HTS

(a) First claim: HTS cannot be protected by copyright since they are part of EU law

6.
The appellants submit, in essence, that the General Court's error of law consists in failing to recognise that the requested HTS cannot be protected by copyright since they are part of EU law and the rule of law requires free access to the law. The Commission and the interveners (CEN and the other 14 interveners at first instance) submit that the appeal should be dismissed as unfounded, arguing essentially that the EU standardisation system is based on a recognition of ESOs' copyright over HTS.

(1) Introduction

7.
It is necessary to start the present Opinion with an overview of the Court's judgments in Fra.bo, in James Elliott and in Stichting, (7) as they form the backdrop for the present case.
8.
First, in the judgment in Fra.bo (paragraphs 27 to 32), the Court recognised essentially that, despite being entities governed by private law, national standardisation and certification bodies may exercise public powers and that even though national technical standards are de jure voluntary, de facto they may have mandatory effects. This is due to the fact that other means of compliance with EU secondary legislation would be more costly to producers who would need to invest in finding methods that could guarantee at least an equivalent level of protection as that of the standards and taking account of the fact that any alternative method of compliance would not benefit from the presumption of conformity with the requirements of EU secondary legislation. The Court acknowledged the potential de facto mandatory character of a technical standard (paragraph 30) and ruled that '[Article 34 TFEU] must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body' (paragraph 32).
9.
Secondly, the Court held in the key judgment in James Elliott (paragraph 40) that, due to their legal effects, HTS form part of EU law. It ruled that '[a HTS] such as that at issue in the main proceedings, adopted on the basis of [a directive] and the references to which have been published in the Official Journal of the European Union forms part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption [of conformity] laid down in [that directive] applies to a given product'. Furthermore, according to paragraph 42 of the same judgment, 'although evidence of compliance of a construction product with the essential requirements contained in [that directive] may be provided by means other than proof of compliance with [HTS], that cannot call into question the existence of the legal effects of [a HTS]' (emphasis added). Finally, according to paragraph 43 of the judgment in James Elliott, 'it must, moreover, be noted that while the development of such [a HTS] is indeed entrusted to an organisation governed by private law, it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements defined by that directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the 'C' series of the [Official Journal]' (emphasis added). It should be noted, however, that since 2018, it is the 'L' series (for legislation) instead of the 'C' series (information and notices), which confirms the recognition that HTS form part of EU law.
10.
Thirdly, in the judgment in Stichting (paragraphs 33 to 49), the Grand Chamber of the Court held that standards (in that case, the International Organisation for Standardisation (ISO) standards) may be rendered mandatory. The Court ruled, essentially, that it was not necessary that details of a technical nature are set out in the legislative act and, accordingly, the fact that the directive contained only a reference to an ISO standard (but not its full text) did not affect the validity of that directive. However, in paragraph 48, the Court held that 'in accordance with the principle of legal certainty …, technical standards determined by a standards body, such as ISO, and made mandatory by [an EU] legislative act are binding on the public generally only if they themselves have been published in the [Official Journal]'.
11.
As I will explain in the present Opinion, the above judgments, when read together, in view of the fact that HTS impose certain obligations and their legal effects may be relied on by the general public, provide a solid basis for the Court to rule on the appropriate conditions for access to HTS. At the same time, it should be pointed out that this analysis does not necessarily apply to other types of standards drawn up by ESOs.
12.
Furthermore, it is necessary to highlight the fact that one of the four requested HTS – that is standard (iv) in point 2 of the present Opinion – is, in fact, clearly mandatory, as was recognised by the Commission at the hearing. This is because entry 27 in Annex XVII to Regulation No 1907/2006 provides, in relation to nickel, that 'the standards adopted by … CEN … shall be used as the test methods for demonstrating the conformity of articles to paragraphs 1 and 2' (emphasis added). Therefore, that requested standard is comparable to the standard at issue in the judgment in Stichting (paragraph 30), which was also mandatory because the EU legislation used the same term ('shall').
13.
As regards the other three requested HTS at issue in the present case, the Toy Safety Directive provides in recital 2 that 'Directive 88/378/EEC [(8)] … sets out only the essential safety requirements with regard to toys …. Technical details are adopted by … CEN … and … Cenelec … in accordance with Directive 98/34/EC [(9)] … Conformity with [HTS] so set, the reference number of which is published in the [Official Journal], provides a presumption of conformity with the requirements of Directive 88/378/EEC. Experience has shown that these basic principles have worked well in the toys sector and should be maintained'.
14.
It is difficult to categorise HTS in any pre-existing category of EU law and, therefore, more in-depth analysis is necessary in order to establish whether access to HTS should be freely available without charge and/or whether they are capable of being protected by

copyright. While the Court has already recognised that HTS have legal effects, form part of EU law and may be binding, it has not yet addressed their exact nature. The appellants' primary plea is that HTS cannot be protected by copyright since they are part of EU law and the rule of law requires free access to the law. Therefore, in order to assess whether that plea can be upheld, it is necessary to analyse the constituent elements of HTS, such as which institution or entity adopts HTS as acts that form part of EU law, under what legal basis and what procedure are HTS adopted, what exactly are the legal effects of HTS and what is the nature of those acts.

15.

Indeed, it is necessary to examine whether HTS have evolved over time in such a manner that they constitute sui generis EU legal acts (EU standardisation acts) in so far as they are strictly regulated implementing measures of EU secondary legislation. The Court has recognised in the 'Short Selling judgment', (10) for instance, that Articles 290 and 291 TFEU do not establish a closed system of implementation, and that it is possible to adopt other regulatory instruments in order to flesh out details of a legislative act. Therefore, I invite the Court to seize this opportunity and provide much-needed clarity on HTS' proper legal nature and place in the EU legal order.

(2) Nature of HTS as an EU legal act

(i) Institution or entity adopting HTS

16.

My primary contention in the present Opinion is that HTS should be considered as constituting acts of the institutions, bodies, offices or agencies of the European Union. Indeed, the Commission plays a central role in the EU standardisation system, as established by the EU legislature. I consider (as Advocate General Campos Sánchez-Bordona considered previously in James Elliott (11)) that '[HTS] should be regarded as "acts of the institutions, bodies, offices or agencies of the Union" for the purposes of Article 267 TFEU' and, as I shall explain below, also for the purposes of EU law in general and for access to EU law in particular.

17.

Indeed, as the Opinion in James Elliott explains, there are several arguments to support that conclusion: (a) the use of the New Approach directives or regulations may not compromise the Court's jurisdiction; (b) the Commission exercises significant control over the procedure for the drafting of HTS by ESOs; and (c) the operation of the three ESOs (as the only standardisation bodies of the EU) is subject to action by the EU. Accordingly, I will show that the Commission should be seen as the institution adopting HTS (since ESOs, in fact, constitute only preparatory bodies with a limited margin of discretion) or, in any event, as the institution responsible for the adoption of HTS in conjunction with ESOs.

18.

It is true that, following the Opinion of Advocate General Campos Sánchez-Bordona, the Third Chamber of the Court recalled in James Elliott that 'according to case-law, the Court has jurisdiction to interpret acts which, while indeed adopted by bodies which cannot be described as "institutions, bodies, offices or agencies of the Union", are by their nature measures implementing or applying an act of EU law' (paragraph 34).

19.

However, as rightly pointed out in legal literature, the Court's judgment in that case does not preclude the interpretation in that Opinion in so far as the Court 'left unanswered the … question whether [HTS] should be considered as originating from the Commission, [while] the ESO only [acts] as a preparatory organ'. Importantly, in that case, the Court was not required to rule on the question whether the control exercised by the Commission is sufficient in order to transfer the ultimate responsibility for HTS from ESOs to the Commission and whether, in the context of HTS, there has been, in effect, a delegation of certain powers by the Commission to the ESOs. (12)

20.

My preliminary considerations lead me to consider that HTS are not simple implementing measures originating from a private-law body (ESO), but are – under the EU standardisation system set out by the EU legislature – to be considered as having been adopted by the Commission or, in any event, that that institution is responsible for the adoption of HTS in conjunction with ESOs.

21.

A recent Commission Communication shows that that institution recognises the public nature of the work carried out by ESOs as the EU standardisation strategy must 'also incorporate core EU democratic values and interests, as well as green and social principles', technical standards being of marked strategic interest for the EU. It also admits that there is a need to shift even more control over HTS from ESOs to the Commission, when it states that in order to ensure that the public interest is taken into account the Commission should be empowered to draw up directly – by way of implementing acts – common specifications (technical documents alternative to HTS drawn up by ESOs). (13)

22.

Moreover, the above considerations are further confirmed by analysis of the procedure for the adoption of HTS.

(ii) Procedure for the adoption of HTS

23.

First, a HTS originates in a standardisation request (the Commission's 'mandate' to the ESO). Only the Commission – and not an ESO or any other entity – is empowered to request that HTS be developed in order to implement a given directive or regulation. Therefore, the Commission reaches out to the relevant ESO, which then acts as a preparatory body tasked with that mandate. The Commission selects which ESO to task with the preparation of the draft HTS according to strict criteria as to its content chosen by the Commission and within the deadline set by the latter. The mandate is detailed and includes a specific timeline for the drafting of the HTS to support the implementation of particular EU secondary legislation. I note that the mandate includes

the criteria, which govern the drawing up of a HTS and that these criteria are, as a rule, very detailed. (14) The ESO is required to keep the Commission informed about the evolution of the drafting process.

24.

I would point out in that respect that that mandate has far-reaching effects, as it not only provides the necessary guidance for ESOs in the development process of HTS, but, in accordance with the Court's judgment in Anstar, HTS must also be interpreted in the light of the mandate from which they originate. (15) Regarding the content of a mandate, the Commission may delegate only technical tasks, and must refrain from any delegation of political discretion to the ESOs. (16)

25.

Secondly, once the draft HTS is complete, the ESO must submit it to the Commission and, once again, only that institution is empowered to carry out a compliance assessment in order to verify whether the draft HTS is consistent with the initial mandate. That assessment can take three forms, in accordance with the Vademecum. Importantly, it is the Commission's sole prerogative whether or not the assessment of the draft HTS is satisfactory. The Vademecum (p. 9) provides that 'specifications delivered by the ESOs in support of Union legislation can never be automatically regarded as complying with the initial mandate, as this is a political responsibility. As the requesting authority, the Commission will always have to assess compliance with its initial request, in cooperation with the ESOs … before deciding to publish the references of a delivered standard in the Official Journal'.

26.

Thirdly, the standard drafted by the ESO under the Commission's close supervision becomes a HTS only if and when the Commission publishes a reference to that standard in the Official Journal. If the Commission considers that the draft HTS is not sufficiently consistent with the mandate, it asks the relevant ESO to modify it or it withdraws the publication of the reference to the draft HTS or of a part thereof from the Official Journal. In addition, ESOs' discretion is limited even further by the power of the European Parliament and of the Member States to raise an objection to the draft HTS.

27.

Finally, the Commission not only supervises closely the drafting of HTS, it also provides significant funding (up to 35% of the CEN's budget). The cooperation with the Commission is governed by an agreement in the form of certain general guidelines which are periodically renewed and which emphasise the importance of standardisation for European policy and the free movement of goods and services. (17)

28.

The life cycle of the creation and adoption of a HTS starts and ends with the Commission. While the draft standard is prepared by the ESO, the fact remains that it is not a part of EU law until such time as the Commission publishes a reference to it in the Official Journal. Accordingly, it is the Commission that transforms that preparatory document into an act that forms part of EU law.

29.

Indeed, as has been widely recognised in the legal literature, (18)'the "New approach" under EU law entails a more complex technique. According to many commentators, in its current version, enshrined in Regulation No 1025/2012, it sets forth a stronger "juridification", so that the EU institutions cannot disavow their control over the content of [HTS]'. (19)

30.

As has already been pointed out by Advocate General Campos Sánchez-Bordona, 'the right of Member States and of the European Parliament to lodge formal objections and the action taken by the Commission prior to the publication of [references to HTS] make it clear that this is a case of "controlled" legislative delegation in favour of a private standardisation body' (point 55). Moreover, that 'CEN is a private body is made quite clear when it draws up non-harmonised standards, but … CEN adopts a different approach when the object of its activities is to perform the mandates given [to] it by the Commission for the purpose of drafting [HTS]' (point 56 of the Opinion). (20)

31.

Furthermore, much like delegated and implementing acts, the Commission's standardisation mandates are also governed by the Comitology Regulation, (21) in order to provide a similar level of scrutiny by the Member States and the European Parliament.

32.

Next, it is necessary to examine the legal effects of HTS.

(iii) The HTS's effects

33.

At the outset, it is important to differentiate between ordinary or non-harmonised standards, which are voluntary and do not have legal effects per se, and HTS. The latter are a specific form of technical standards in that they: (a) form part of EU law; (b) are referred to in mandatory EU legislation or, in any case, they constitute necessary implementing measures of such legislation, as discussed above, and (c) have important legal effects attached to them by EU law as will be shown below. According to the Vademecum (p. 8), HTS 'support the implementation of [EU] legislation', but in reality they are much more than a simple 'aid'. They are actually indispensable for the correct implementation of the relevant EU secondary legislation.

34.

Those effects are as follows. HTS are adopted based on the procedure set out by the EU legislature in Regulation No 1025/2012 and the all-important presumption of conformity attaches to HTS, that is to say, the conformity with a given HTS implies compliance with the essential requirements of the corresponding EU secondary legislation and so guarantees freedom of movement for the goods or services in question within the EU.

35.

In view of the foregoing and given the reference contained in each HTS to the corresponding secondary

legislation, which has been pointed out in legal literature, (22) it can be concluded that while HTS were originally conceptualised as a voluntary mechanism of conformity with the essential requirements laid down in EU secondary legislation, they have in fact been recognised by the Court as having potentially mandatory legal effects. (23)

36.

Stricto sensu, Regulation No 1025/2012 provides that HTS are voluntary, in so far as economic operators have (at least in theory) alternative means to demonstrate conformity with the essential requirements of the relevant secondary legislation. However, as explained above, one of the most important characteristics of HTS is the legal effect of the presumption of conformity. This turns HTS into an essential tool, in particular, for economic operators in order to benefit from the right to free movement because once they meet the requirements of a HTS they benefit from that legal effect and the relevant goods and services may circulate freely within the EU market.

37.

In other words, compliance with HTS affords the manufacturer or service provider the benefit of the presumption of conformity and in terms of liability – in case of related problems, accidents or litigation – the manufacturer or service provider can rely on that presumption: indeed, in that scenario, the burden of proof for the manufacturer or service provider is to demonstrate mere compliance with the relevant HTS and it is for the opposing party (a consumer or a competitor) to rebut that presumption.

38.

Such important legal effects lead to practical difficulties and an imbalance between the parties. While compliance with HTS gives the crucial presumption of conformity there is no free access to them. This fact makes it challenging for the general public to consult HTS and for both economic operators and the general public to assess and make real use of potential alternatives to HTS in order to meet essential requirements of secondary legislation.

39.

The present case is similar to the case that gave rise to the judgment in Stichting. In that case, the national court asked the Court to rule on the validity of a directive in the light of the principle of transparency, when that directive incorporated – by way of a reference – an ISO standard which was not freely available. In that case, the Court ruled that the principle of legal certainty requires the publication of EU law before that law can be effective against natural and legal persons. However, that ruling is based on the premiss that that directive provided for no restriction in relation to the access to documents under Regulation No 1049/2001. The Court observed that that incorporation of ISO standards in the directive imposed obligations on legal persons, because they could access those standards via national standards organisations. However, as regards natural persons, it ruled in paragraph 48 of that judgment that the principle of legal certainty requires that technical standards determined by a standards body, such as ISO, and made mandatory by a legislative act of the EU are binding on the public generally only if the standards themselves have been published in the Official Journal (as opposed to a mere reference). Indeed, in such a case, the general public cannot know the necessary methods for measurement of emissions of tobacco products, unless it has access to those standards.

40.

For instance, in the present case, the essential requirements for toy safety in Annex II to the Toy Safety Directive (‘Particular safety requirements’), Part II (‘Flammability’), point 3, merely state that ‘toys other than toy percussion caps must not be explosive or contain elements or substances likely to explode when used as specified in the first subparagraph of Article 10(2)’. However, as pointed out by the appellants, the list of substances and the maximum quantity permitted in chemical sets, which give rise to the presumption of conformity with the essential requirements, can be discovered only through consultation of the relevant HTS.

41.

In other words, the directive and the essential requirements merely set out the result to be attained, but not the means to achieve it. This shows that, in practice, it is impossible for a natural or legal person to investigate the conformity of a product with the essential requirements without having access to the relevant HTS.

42.

When a manufacturer (or a service provider) takes the risk and puts on the market a product (or a service) that does not comply with HTS, the consequence is that the product and the manufacturer (or the service and the provider) do not benefit from the presumption of conformity with the essential requirements of the EU secondary legislation. It follows that in case of litigation, it is the manufacturer or service provider who bears the burden of proving that the product did, in fact, comply with the applicable EU secondary legislation. To my mind, that clearly amounts to a situation where de facto all manufacturers or service providers will seek always to be in compliance with HTS because no rational manufacturer or service provider would be willing to expose themselves to huge commercial risk and to bear such a burden.

43.

In other words, respecting HTS gives rise to the presumption of conformity with the essential requirements of EU secondary legislation, which means, in turn, that HTS provides the same effect as a mandatory rule for any natural or legal person which seeks to contest that presumption in relation to a given product or service. That means that reliance on HTS directly affects the burden of proof .

44.

Therefore, there are legal effects, for manufacturers and service providers and for a person challenging the presumption, which are linked to compliance with HTS – even where the HTS (for the three Toy Safety

Directive HTS in question here) are formally and in theory not mandatory.

45.

The fact that HTS are de facto mandatory as they are generally the only accepted method in the market for ensuring compliance with the respective EU secondary legislation is confirmed by a study commissioned by the Commission: 'in practical terms [HTS] are almost obligatory for most economic players'. Moreover, the same study points out that the price for HTS is one of the major barriers to their effective use. (24)

46.

Indeed, the essential requirements of EU secondary legislation confer rights on individuals, which can be applied and enforced under EU law. (25) However, the essential requirements in EU secondary legislation cannot be apprehended in isolation, given that, in practice, it is impossible to confirm the conformity of a product or service without reference to the corresponding HTS. In this way, the public cannot exercise their rights against the manufacturer or service provider under that secondary legislation if they cannot rely on the relevant HTS.

47.

It follows that HTS are indispensable for the purposes of enforcing corresponding EU secondary legislation. The fact that HTS are de facto mandatory was also acknowledged by the General Court in the 'Global Garden' case (judgment of 26 January 2017, GGP Italy v Commission, T-474/15, EU:T:2017:36, paragraph 67) and by the Court of Justice in the judgment in Fra.bo. The latter judgment found that 'in practice, almost all German consumers purchase copper fittings certified by [a German certification body]' (paragraph 30). As the Court also explained in that judgment, it is generally difficult if not outright impossible for economic operators to choose a different avenue to the technical standard, in view of the time and cost that are necessary in that respect. The fact that companies pay for HTS supports this too. I do not see why companies acting in a competitive landscape would pay for HTS if they were not de facto mandatory. Indeed, the whole architecture of the EU standardisation system presupposes that, in principle, all actors use HTS.

48.

To my mind, the de facto mandatory character of HTS does not arise solely from the existence of HTS themselves, but also due to the lack of realistic alternatives. There is strong support and incentive for continuous development of HTS. As a result of this process, national standardisation bodies are limited in their ability to provide alternatives to HTS (given that they are, first and foremost, obliged to transpose HTS without any changes), and there seems to be no financial incentive for other private actors to compete on that market. National case-law and legal literature also consider that it is unrealistic to argue that the use of HTS is voluntary. (26)

49.

It follows from the foregoing considerations that HTS are de facto mandatory in so far as they are, at the very least, unavoidable due to the probative value which is attached to them.

50.

Having said that, even if the Court were to come to the conclusion that HTS are not de facto mandatory (quod non), I consider that that would not alter my analysis – in so far as it would arguably be sufficient to hold that – stricto sensu mandatory or not – HTS have clear legal effects as attributed to them by EU legislation.

51.

Finally, once HTS are finalised and their reference is published in the Official Journal, every Member State must adopt each HTS – unchanged – as a national standard and withdraw conflicting standards within six months. In accordance with Article 17 TEU, the Commission, as the guardian of the EU Treaties, 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them [and] oversee the application of [EU] law'. Hence, the Commission ensures that HTS are fully effective and if necessary brings an action for failure to fulfil obligations under Article 258 TFEU. Indeed, the Court made clear that imposing additional requirements on products covered by HTS violates the respective Member State's obligation to correctly implement EU law. (27) The Court made that ruling in relation to HTS themselves and not in relation to the essential requirements contained in secondary legislation. It follows that the Commission is required to ensure that HTS are fully effective, which implies that HTS should be enforceable. (28)

(3) Impact of the rule of law requirements on HTS

(i) General observations

52.

First, it follows from Article 2 TEU that the rule of law requires free access to EU law for all natural and legal persons of the EU. It is based on the fundamental principle that everyone should have the possibility to know the law and everyone is required to respect it. (29) Indeed, that is why Article 297 TFEU provides that EU law must be published in the Official Journal.

53.

Secondly, the Court refers in this regard to the principle of legality (30) and the principle of legal certainty, (31) the latter of which also requires that natural and legal persons have knowledge of the law. In that regard, the Court has already held that rules do not produce legal effects on those persons where those rules were not communicated to third parties by way of publication. (32)

54.

Thirdly, the notion of free access to the law is also recognised by way of the principle of transparency. (33) It is axiomatic that EU law can only be effective if it can be enforced. As noted above it is the publication of the law that ensures its enforceability. It follows that if HTS are not published they cannot be fully enforced. As posited above in points 33 to 51 of the present Opinion, HTS are part of EU law and have clearly defined legal effects. Therefore, the current arrangement to publish only a reference to HTS, but not their text, denies the

general public an essential element of effective and enforceable EU law.

55.

Therefore, the statement in paragraph 107 of the judgment under appeal, according to which the appellants did not substantiate the 'exact source of a "constitutional principle" which would require access that is freely available and free of charge to [HTS]' cannot be upheld.

56.

Moreover, the Court held in Skoma-Lux that EU law must be accessible for EU citizens: 'in accordance with the principle of legal certainty, [EU] rules must enable the persons concerned to identify precisely the scope of the obligations which they are subject to, which can only be guaranteed by the proper publication of those rules in the official language of the addressee'. On this basis, the Court concluded that EU regulations or directives do not have legal effects vis-à-vis individuals if they are not properly published in the Official Journal in the language of a Member State, 'even though those persons could have learned of that legislation by other means'. (34) Hence, as I will explain below, paid access to HTS or access via certain selected libraries or a few 'info-points' (35) are – contrary to the General Court's view (paragraphs 103 and 107 of the judgment under appeal) – obviously not suited and are insufficient in order to ensure respect for rule of law.

57.

Indeed, as was pointed out, for instance, by the Council of Europe, 'the principle of legal certainty is essential to the confidence in the judicial system and the rule of law … It is also essential to productive business arrangements so as to generate development and economic progress … To achieve this confidence, the state must make the text of the law easily accessible'. (36)

58.

Therefore, it needs to be assessed whether the principle of legal certainty requires HTS to be freely available without charge or whether certain conditions on that access may be imposed.

(ii) Scope of access to HTS appropriate in the present case

59.

At the outset, I would point out that, while in the present case the Commission is striving to preserve the status quo, at the same time, that institution recently clearly advocated in its 2022 EU Standardisation Strategy that '[ESOs] should consider free access to standards and other documents. The Commission is ready to engage in constructive dialogue with [ESOs] through existing fora to help them achieve this objective' (see point 21 of the present Opinion).

60.

It follows from the legal traditions of Member States that 'the principle of the rule of law generally requires the promulgation of formally enacted legal norms. The aim is to make them available to the public in such a way that those concerned can obtain reliable knowledge of their content. This possibility must also not be made unreasonably difficult'. (37)

61.

I agree with the appellants' argument that citizens should be able to benefit from an act, which has legal effects, forms part of EU law – such as HTS – and therefore should be capable of being enforced. Indeed, it suffices to refer to the facts underlying the judgment in James Elliott, where the question of the interpretation of HTS arose in the context of a private action concerning defective construction products. Given that HTS have real legal effects on natural and legal persons, the rule of law requires that those persons have access to HTS. Indeed, given that HTS represent the public interest and play a role which is functionally equivalent to that of rules of law, their justiciability (and, therefore, their accessibility) must be adapted accordingly. (38)

62.

It appears that most Member States (save for Ireland and the former Member State, the United Kingdom) tend to exclude official texts from copyright protection. The situation is different as regards the copyright protection of national standards. However, as I explained in point 33 of the present Opinion, given their special role under EU law, HTS are completely different to national standards.

63.

The judgments in James Elliott and in Stichting strongly indicate that there is a need for the official publication of HTS (this has also been pointed out in legal literature); otherwise, there would be a serious limitation of the effectiveness of legislative references to such rules, since they are unenforceable against individuals in general as well as against undertakings that have not had effective access to HTS. Indeed, making HTS available behind a paywall can never replace the obligation to publish them officially in the Official Journal. This is true even for large undertakings, because those rules still ultimately concern their customers, who are, in reality, the real addressees: how 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? A citizen may not be deprived of the possibility of 'officially' having knowledge of the substance of the HTS which, directly or indirectly, is capable of affecting him or her. (39)

64.

The link between HTS and secondary legislation necessarily brings HTS into the domain of public duties, in so far as they are an indispensable (or 'necessary') complement to the effective implementation of EU secondary legislation (and thus to promote the effective creation of the EU internal market). Given that ESOs carry out public duties (that is, the development of HTS supplementing EU legislation), those standardisation organisations could, where appropriate, be remunerated by public funds for performing those public tasks (as is, already, partially the case in view of the Commission's funding of all three ESOs). (40)

65.

It follows from the foregoing that the rule of law requires access to HTS that is freely available without charge. HTS, as standardisation acts that are part of EU law, implement EU secondary legislation and produce legal effects, should be published in the Official Journal in order to ensure their enforceability and accessibility.

(4) HTS, as part of EU law, are not capable of being protected by copyright

66.

In view of the above point, the question remains how to reconcile that conclusion with the fact that, under the Commission's and ESOs' contractual arrangements, HTS are protected by copyright.

67.

Indeed, CEN's and the Commission's argument that access to the requested HTS is impossible because of that protection, depends on whether one accepts that HTS are capable of being protected by copyright under EU law.

68.

My considerations with respect to the principal argument, as set out in point 20 (that HTS are in reality to be considered as adopted by the Commission), are applicable mutatis mutandis even if the Court were to come to the conclusion that HTS should not be regarded as 'acts of the institutions, bodies, offices or agencies of the Union'. This is because, for the purposes of EU law in general and of the access to EU law in particular, the fact remains that HTS form part of EU law and, given their indispensable role in the implementation of mandatory EU secondary legislation and their legal effects, they should, in principle, not benefit from copyright protection.

69.

Therefore, the General Court made an error of law when it failed to deal with that issue and did not assess whether the law (and HTS as an act that forms part of EU law) can at all benefit from copyright protection. It simply referred to the judgment in James Elliott and alleged that the Court had not declared invalid the current system of publication of HTS (although this was not at issue in that case). This did not answer the decisive question whether an act that forms part of EU law can be protected by copyright.

70.

It should be pointed out that contrary to what the Commission and the interveners contend, Regulation No 1025/2012 cannot be regarded as the basis for copyright protection of HTS. That regulation contains no provision establishing that HTS are capable of being protected by copyright. If the EU legislature regarded HTS as capable of benefitting from such protection, it would have included a provision to that effect in the regulation or at least mentioned it in a recital.

71.

It follows that the exception in Article 4(2), first indent, of Regulation No 1049/2001 – on which the General Court based the judgment under appeal and accordingly refused to grant access to the requested HTS – is inapplicable in the context of this case. As a result, the judgment is vitiated by an error of law and must be set aside.

(b) Second claim of the first limb of the first ground of appeal: even if HTS could be protected by copyright , free access to the law has priority over copyright protection

72.

In the alternative, the appellants argue, in essence, that even if the requested HTS can be protected by copyright, free access to the law must take priority over copyright protection.

73.

At the outset, I note that Regulation No 1049/2001 itself recognises the concept of free access to the law and in its recital 6 provides that 'documents should be made directly accessible to the greatest possible extent … in cases where the institutions are acting in their legislative capacity, including under delegated powers' (emphasis added).

74.

Furthermore, the judgment under appeal runs counter to the principle of transparency and the settled case-law of the Court. The Court, sitting as a Full Court, confirmed the importance of that principle, for instance, in the legislative process according to which documents that form part of such a process should, in principle, be made public. The Court recalled that the disclosure of documents used in that process increases the transparency and openness of the legislative process and strengthens the right of EU citizens to scrutinise the information which has formed the basis of a legislative measure. Indeed, even the opinions of the legal services of the EU institutions relating to a legislative process do not come within the ambit of the general need for confidentiality and the Court noted that Regulation No 1049/2001 imposes, in principle, an obligation to disclose them. (41) The importance of the principle of transparency should guide the Court also in relation to HTS.

75.

Moreover, in the judgment in Stichting (paragraphs 40 to 42 and 73), the Court acknowledged that the law needs to be publicised and noted that standards are not binding on the public if they have not been published in the Official Journal.

(1) No copyright protection of the four requested HTS (due to a lack of 'originality')

76.

Even though the EU is not a signatory to the Berne Convention, (42) it has agreed to be bound by Articles 1 to 21 thereof. (43) It follows from Article 2(4) of the Convention, that 'official texts of a legislative, administrative or judicial nature' do not automatically benefit from copyright protection. Rather, 'it shall be a matter for legislation in the countries of the [Berne] Union to determine the protection to be granted to [such] official texts, and to official translations of such texts'.

77.

EU law does not provide explicitly whether legal or quasi-legal texts emanating from EU institutions are capable of being protected by copyright. However, it can

be argued that it follows from Article 297 TFEU that EU law is, in principle, not capable of benefitting from such protection as a work that gives an exclusive legal right to the proprietor to reproduce, publish, sell or distribute that work.

78.

As I explained above, I consider that HTS should not be capable of benefitting from copyright protection, but even if the Court were to conclude otherwise (quod non), I shall explain that the judgment under appeal fails to show that the four requested HTS should, in any case, benefit from copyright protection.

(i) Jurisdiction for the assessment of copyright

79.

The appellants claim that the General Court erred as it found that the Commission was not authorised to examine whether the four requested HTS were capable of being protected by copyright. It should be pointed out that, in fact, it held that such examination would go beyond the scope of the review which the Commission is empowered to carry out in the procedure for access to documents (paragraph 57 of the judgment under appeal).

80.

This reasoning is flawed. First, as the appellants rightly submit, this finding directly contradicts paragraphs 48 and 49 of the judgment under appeal, which held that the Commission was entitled to find that the threshold for originality had been met and that it had correctly decided that the requested HTS were capable of being protected by copyright. It is unclear how the existence of a copyright can be determined if the Commission does not have a right to assess this. Thus, the General Court erred in law when it found that the Commission was not authorised to examine whether the requested HTS were capable of being protected by copyright.

81.

Secondly, as the appellants rightly point out, the case at hand concerns a request for access to documents that form part of EU law (that is, the four requested HTS), and that request is based on an EU regulation (that is, Regulation No 1049/2001). The Court held in this regard that Article 4 of that regulation does not contain any reference to the national law of a Member State. (44) Access to documents under Regulation No 1049/2001 and particularly access to acts that form part of EU law must therefore be assessed by EU institutions and be subject to a legal review under EU law before the EU Courts. The General Court clearly failed to recognise this. Additionally, if the General Court's view were correct, this would undermine the appellants' fundamental right to effective legal remedies including their right to be heard. This contradiction has also been pointed out by numerous authors in legal literature. (45) Therefore, it is a matter for the EU institutions to decide through the EU's own legislation on the level of copyright protection to be afforded to acts which are implementing measures of EU secondary legislation and so to decide whether HTS are capable of being protected by copyright.

82.

Thirdly, the General Court based its finding about the Commission's lack of competence to assess the copyright on the case-law relating to patents. This, however, does not apply here. The Full Court observed in its Opinion 1/09 (46) that 'the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States'.

83.

To the extent the General Court seeks to rely on the Opinion of Advocate General Jääskinen in Donner (C-5/11, EU:C:2012:195) (paragraph 40 of the judgment under appeal) that copyright remains, despite progressively closer harmonisation, largely governed by national law, the judgment under appeal is overly theoretical in this respect. This point has already been made in legal literature. Indeed, since 2012, the Court has shown how far the harmonisation in the area of copyright has been brought. In any case, the reference seems drawn out of context, as the focus in Donner was on remedies for copyright infringement. It was not about the basis for the existence of copyright protection such as here. (47)

84.

However, I note that the present appeal neither concerns a direct action between individuals in relation to a patent (or copyright) infringement nor does it fall outside the jurisdiction conferred on the EU courts under the EU Treaties. Rather, at first instance, the application made sought the annulment of a Commission decision addressed to the appellants, refusing to grant their request for access to EU documents. This is a type of action in respect of which jurisdiction is conferred on the EU Courts. In particular, Article 263 TFEU does not restrict the pleas that may be raised in an application for annulment, as determined by the General Court in paragraph 57 of the judgment under appeal. Therefore, the General Court erred in seeking to draw an analogy between private disputes concerning patent infringement, on the one hand, and a refusal to grant access to EU documents involving the contested application of the first indent of Article 4(2) of Regulation No 1049/2001, on the other.

85.

It follows that the General Court erred in finding that the Commission was not authorised to examine the requirement for originality by considering that such an examination would go beyond the scope of the review which it is empowered to carry out in the procedure for access to documents. Indeed, it is for the Commission and the EU Courts to determine whether the requested HTS are capable of being protected by copyright and whether they meet the requirement of originality.

86.

Therefore, the judgment under appeal is vitiated by an error of law.

(ii) No existence of copyright shown in the requested HTS

87.

The General Court held essentially that the Commission did not commit an error when it stated that the HTS were

drafted by their authors in a way that is sufficiently creative to deserve copyright protection and that the length of the text implies that the authors had to make a number of choices (including the structuring of the document) which results in the document being protected by copyright (paragraphs 47 to 49 of the judgment under appeal).

88.

The General Court's approach is erroneous in law.

89.

It is well-settled case-law that while copyright is not fully harmonised in the EU, 'the concept of "work" … constitutes … an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, that concept entails that there exist an original subject matter, in the sense of being the author's own intellectual creation. Secondly, classification as a work is reserved to the elements that are the expression of such creation'. (48) In order for the copyright protection to exist, the author must be able to express his or her creative abilities in the production of the work by making free and creative choices. (49)

90.

The Court's case-law confirms this result. For example, the Court held that the fact that setting up a database required significant labour and skill on the part of its author could not, as such, justify copyright protection if that labour and skill do not express any originality. (50) That criterion is of fundamental importance in this context.

91.

To my mind, this criterion must apply in the context of HTS. Given that, notably in the judgment in James Elliott, the Court accepted its competence to interpret HTS, it clearly follows that it is for the EU Courts to assess whether HTS are capable of being protected by copyright and whether ESOs should benefit from that copyright protection. Indeed, it is not possible to allow a situation to arise whereby Member States would decide whether copyright is applicable to a legal text that forms part of EU law and has crucial legal effects under EU law. Such a conclusion in no way contradicts the Berne Convention for the Protection of Literary and Artistic Works, as it is for the parties to that convention to decide whether or not legal texts are capable of being protected by copyright in their legal system.

92.

I agree with the appellants that neither the Commission in the contested decision nor the General Court in the judgment under appeal properly examine the originality of the requested HTS and whether they can, in fact, 'reflect the personality of the author'. That applies also to the presence of free and creative choices. In view of the concept and purpose of HTS, which are typically the result of scientific testing followed by an agreement by a committee, I conclude that the originality standard cannot be accepted at face value (51) – as was accepted here by the General Court. That conclusion is only reinforced when we take into account the specific nature of HTS (points 16 et seq. of the present Opinion) and the procedure for their adoption (points 23 et seq. of the present Opinion).

93.

Although it is for the Commission and the General Court to establish that the exemption in Article 4 of Regulation No 1049/2001 is applicable, they relied only on very general allegations and assumptions: considering that the requested HTS were protected by copyright because it could be implied from the length of the texts that the authors had to make a number of choices. However, these factors do not determine whether or not a particular document is original and thus protected by copyright. The judgment under appeal is therefore flawed.

94.

Contrary to what the General Court stated in paragraph 59 of the judgment under appeal, the appellants substantiated – to the extent that it was possible without actually having access to the requested HTS – that the choices available to CEN were constrained in several ways. Therefore, as regards the content of HTS and the layout, these are constrained by the relevant provision in the secondary legislation from which the HTS are derived and by the Commission's mandate. In principle, the above heavily restricts room for creativity and originality. Hence, vague reliance on the length of a document is not sufficient in order to prove that HTS are the result of genuine creative choices on the part of CEN. (52)

95.

Therefore, the General Court erred in finding that the Commission was entitled to conclude that the requested HTS were protected by copyright and, as a result, the judgment under appeal should be set aside.

2. Second limb of the first ground of appeal – the General Court committed an error of law in its assessment of the effect on the commercial interests of CEN

96.

The appellants submit, in essence, that the General Court committed an error of law in its assessment of the effect on the commercial interests of CEN from the incorrect application of a presumption that the disclosure of the requested HTS would undermine the interest protected by the first indent of Article 4(2) of Regulation No 1049/2001 and by failing to assess the specific effects on those commercial interests.

(a) Reliance on a general presumption was illegal

97.

Contrary to what the General Court stated in paragraph 97 of the judgment under appeal, the Commission does not seem to have relied on a general presumption of confidentiality under which granting access to HTS would automatically undermine the interest protected by the first indent of Article 4(2) of Regulation No 1049/2001.

98.

Such a general presumption is neither provided by Regulation No 1049/2001 nor by Regulation No 1025/2012, or indeed by the Court's case-law. Indeed, it would have to be clearly demonstrated that the disclosure of documents at issue would specifically,

effectively and in a non-hypothetical manner (53) seriously undermine the EU standardisation system for such a presumption to be recognised.

99.

First, HTS constitute only a minority of the standards established by ESOs and significant funding of ESOs is provided by the Commission. According to CEN's submission at the hearing, 4.6% of the standardisation budget comes from the sale of HTS, which equates to approximately EUR 2 million per year, whereas, in CEN's own words, the Commission's funding equals 'some 20% of CEN's total budget' (emphasis added). (54) Secondly, it became apparent at the hearing that the EU standardisation system does not actually require paid access to HTS to function (contrary to the findings in paragraphs 102 and 103 of the judgment under appeal); in fact, the payment requirement derives from the contractual relationship and funding arrangements between ESOs and the Commission. For instance, ETSI (which also receives Commission funding for HTS) already allows its HTS to be consulted, printed out and downloaded for free from its website. (55) Furthermore, it appears from legal literature that there are major price differentials between basically the same HTS in different Member States, which is symptomatic of the problems arising from the current access arrangements for HTS. (56)

100.

Moreover, as a general presumption of confidentiality constitutes an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document, it must be interpreted and applied strictly. The Court has recognised five categories of documents which enjoy general presumptions of confidentiality: ((i) State aid administrative file documents; (ii) submissions before the EU Courts; (iii) documents exchanged in merger control; (iv) documents in infringement proceedings; and (v) documents relating to a proceeding under Article 101 TFEU). (57)

101.

It is clear that HTS do not come within any of those categories. In fact, all of the above categories are related to the specific procedural nature of those documents. This does not apply to the requested HTS, which moreover are already available for inspection in libraries, info-points or for purchase. Thus, the requested HTS are not confidential and, unlike the above categories, they do not relate to any ongoing administrative or judicial proceedings.

102.

As a result, the General Court erred when it accepted that the Commission was entitled to rely on such a general presumption to refuse access to the requested HTS.

(b) Failure to assess specific effects on commercial interests

103.

The judgment under appeal (paragraph 64) simply adopted the Commission's allegations about copyright protection as apodictic and concluded that there was a resulting effect on commercial interests due to a 'very large fall in the fees collected by CEN'. This is wrong.

104.

First, the General Court's considerations mean that the alleged copyright protection for HTS will always take precedence over the presumption of a right of access under Regulation No 1049/2001. This is contrary to the spirit and the letter of that regulation under which any exemptions must be interpreted narrowly to afford the widest possible access rights. (58)

105.

Secondly, the General Court did not consider the specific facts of the present case. The alleged effect on the commercial interest appears unfounded (see point 99 of the present Opinion).

106.

As a result, the General Court made an error of law because it could not justify the refusal of access to the requested HTS simply by reliance on an alleged negative effect on such commercial interests under Article 4(2), first indent, of Regulation No 1049/2001.

B. Second ground of appeal – Error of law in failing to recognise an overriding public interest

107.

First, the appellants submit, in essence, that the General Court committed an error of law, in paragraphs 98 to 101 of the judgment under appeal. As follows from my analysis of the first ground of appeal, I agree with the appellants that their request to access the requested HTS was justified on the basis of the rule of law. The General Court, in ruling that the appellants did not demonstrate specific reasons to justify their request, failed to recognise the value of the appellants' argument and based the judgment under appeal on erroneous considerations.

108.

At first instance, the appellants identified that an overriding public interest arose from the fact that the requested HTS form part of EU law, which should be freely available. They further submitted that the requested HTS deal with areas of law where a high level of consumer protection is essential, as protected under Article 169 TFEU, namely toy safety and the maximum rate of nickel as the top contact allergen and suspected carcinogen. It is reasonable to argue that consumers should know the content of those HTS in order to guarantee maximum toy safety and to further prevent cancer. To that end, compliance with HTS plays an important role in protecting members of the public in the European Union (particularly children with respect to the requested HTS) from potentially unsafe and harmful products. To my mind, the appellants also demonstrated to a sufficient degree that the requested HTS are also of significant importance for manufacturers, service providers and other participants in the supply chain.

109.

Therefore, the above considerations were sufficient in order to qualify for an overriding public interest in the case at hand. The General Court made an error of law in this respect.

110.

Secondly, the appellants criticise, in essence, the finding in paragraphs 102 to 104 of the judgment under appeal that the overriding public interest in ensuring the functioning of the EU standardisation system prevails over free access to HTS.

111.

The functioning of the EU standardisation system is a factor that is unrelated to the exception under the first indent of Article 4(2) of Regulation No 1049/2001, which concerns the protection of commercial interests of natural or legal persons, including intellectual property. Therefore, the General Court de facto created a new exception under Article 4 of that regulation, which is not permissible. (59) Indeed, it follows from the foregoing considerations that the functioning of the EU standardisation system is not threatened by granting free and unconditional access to HTS.

112.

Next, Article 12 of Regulation No 1049/2001 requires that EU institutions shall – as far as possible – make documents directly available to the public. In particular, legislative documents – documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States – should, subject to Articles 4 and 9 of that regulation, be made directly accessible. As explained under the first ground of appeal, in this context, HTS are documents that form part of EU law that should be enforceable by any person concerned and therefore the requirement of accessibility must also apply to HTS.

113.

It follows from all the foregoing considerations that the judgment under appeal must be set aside, the contested decision must be annulled and the Commission must be ordered to grant the appellants access to the four requested HTS.

IV. Conclusion

In the light of the foregoing, I propose that the Court of Justice should (i) set aside the judgment of the General Court of the European Union of 14 July 2021, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2021:445); (ii) annul decision C(2019) 639 final of the European Commission of 22 January 2019, refusing access to the requested harmonised technical standards; (iii) order the Commission to give the appellants access to those standards; (iv) order the Commission to pay the costs of the proceedings at first instance and on appeal; and (v) order the interveners to bear their own costs.

(1) Original language: English.

(2) Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

(3) Regulation 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 (OJ 2006 L 264, p. 13).

(4) Regulation of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12).

(5) Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ 2009 L 170, p. 1).

(6) Regulation 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 (OJ 2006 L 396, p. 1).

(7) Respectively, judgments of 12 July 2012, Fra.bo (C-171/11, EU:C:2012:453; ‘the judgment in Fra.bo’); of 27 October 2016, James Elliott (C-613/14, EU:C:2016:821; ‘the judgment in James Elliott’); and of 22 February 2022, Stichting Rookpreventie Jeugd and Others (C-160/20, EU:C:2022:101; ‘the judgment in Stichting’).

(8) Council Directive of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ 1988 L 187, p. 1).

(9) Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37).

(10) Judgment of 22 January 2014, United Kingdom v Parliament and Council (C-270/12, EU:C:2014:18, paragraphs 83 and 84).

(11) Opinion in James Elliott Construction (C-613/14, EU:C:2016:63, point 40).

(12) Lundqvist, B., ‘European Harmonised Standards as ‘Part of EU Law’: The Implications of the James Elliott Case for Copyright Protection and, Possibly, for EU Competition Law’, Legal Issues of Economic Integration, Vol. 44, No. 4, 2017, pp. 429 and 431.

(13) Commission Communication of 2 February 2022 (COM(2022) 31 final) ‘EU Standardisation Strategy’, pp. 4 and 5 et seq, respectively. See also the ‘Blue Guide’ on the implementation of EU product rules 2022 (OJ 2022 C247, p. 1, footnote 192).

(14) For a good example, see mandate M.445/EN of 9 July 2009 on the requested Toy Safety Directive HTS.

(15) Judgment of 14 December 2017, Anstar (C-630/16, EU:C:2017:971, paragraphs 35 to 36).

(16) Commission, Vademecum on European Standardisation – Part I, SWD(2015) 205, pp. 8 and 9 (‘the Vademecum’).

(17) See General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association – 28 March 2003 (OJ 2003 C 91, p. 7).
(18) See Schepel, H., 'The new approach to the new approach: The juridification of harmonised standards in EU law', Maastricht Journal of European and Comparative Law, Vol. 20(4), 2013, p. 521.
(19) De Bellis, M., 'Op-Ed: "Private standards, EU law and access – The General Court's ruling in Public.Resource.Org"', EU Law Live, 10 September 2021.
(20) Importantly, see, in this connection, also the judgment in James Elliott, paragraph 43 (as cited in point 9 of the present Opinion).
(21) Regulation (EU) No 182/2011 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 (OJ 2011 L 55, p. 13.
(22) Soroiu, A. and Correia Magalhaes De Carvalho, M.F. 'Lawtify Premium: Public.Resource.Org (T-185/19), a Judicial Take on Standardisation and Public Access to Law', Review of European Administrative Law, Vol. 15(2), 2022, p. 57. See also Schepel, H., op. cit., pp. 521 and 523; Volpato, A., 'The Harmonized Standards before the ECJ: James Elliott Construction', Common Market Law Review, Vol. 54(2), 2017, p. 591; van Gestel, R., and van Lochem, P., Private Standards as a Replacement for Public Lawmaking? in Marta Cantero Gamito, M., and Micklitz, H.-W., (eds), The Role of the EU in Transnational Legal Ordering, Edward Elgar Publishing, 2020, p. 31.
(23) See the judgments in Fra.bo (paragraphs 27 to 32), James Elliott (paragraphs 40, 42 and 43) and the judgment of 22 February 2018, SAKSA (C-185/17, EU:C:2018:108, paragraph 39).
(24) See EIM Business & Policy Research, Access to Standardisation – Study for the European Commission, [DG] Enterprise and Industry, 2010, pp. 17 and 9, respectively.
(25) See the case-law recalled in the judgment of 22 December 2022, Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution) (C-61/21, EU:C:2022:1015, paragraphs 43 to 47).
(26) See the judgment of the Rechtbank's-Gravenhage (District Court, The Hague, Netherlands) of 31 Dec. 2008, LJN: BG8465. See Van Gestel, B., and Micklitz, H.-W., 'European Integration Through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies', CMLR, Vol. 50, 2013, p. 176.
(27) Judgment of 16 October 2014, Commission v Germany (C-100/13, not published, EU:C:2014:2293, paragraph 63).
(28) See also point 61 of the present Opinion.
(29) Judgment of 18 January 2007, PKK and KNK v Council (C-229/05 P, EU:C:2007:32, paragraph 109).
(30) Judgment of 29 April 2004, Commission v CAS Succhi di Frutta (C-496/99 P, EU:C:2004:236, paragraph 63).
(31) Judgment of 12 November 1981, Meridionale Industria Salumi and Others (212/80 to 217/80, EU:C:1981:270, paragraph 10).
(32) Judgment of 20 May 2003, Consorzio del Prosciutto di Parma and Salumificio S. Rita (C-108/01, EU:C:2003:296, paragraphs 95 and 96).
(33) It is also recognised by the constitutional principles set out in various provisions of the EU Treaty – such as Article 1(2), Article 10(3), Article 11(2) and (3) – as well as in the Charter of Fundamental Rights of the European Union (Article 42).
(34) Judgment of 11 December 2007, Skoma-Lux (C-161/06, EU:C:2007:773, paragraphs 38 and 51, respectively).
(35) Places managed by national standardisation bodies where HTS can apparently be accessed subject to certain conditions.
(36) Report on the rule of law – Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), CDL-AD(2011)003rev, paragraph 44.
(37) See, for instance, the Bundesverfassungsgericht (German Federal Constitutional Court): judgment of 29 July 1998 – Case 1 BvR 1143/90, DE:BVerfG:1998:rk19980729.1bvr114390, paragraph 26.
(38) See Van Waeyenberge, A., 'La normalisation technique en Europe – L'empire (du droit) contre-attaque', Revue internationale de droit économique: RIDE, No. 3, 2018, p. 314. See also Aubry, H., Brunet, A., and Peraldi-Leneuf, F., 'Le contrôle des normes: un garde-fou démocratique à perfectionner', in Aubry, H., et al. (eds.), 'La normalisation en France et dans l'Union européenne. Une activité privée au service de l'intérêt général?', PUAM, Aix-en-Provence, 2012, p. 104.
(39) Alvarez Garcia, V., La problemática de la publicidad oficial de las normas técnicas de origen privado que despliegan efectos jurídico-públicos, Revista de Derecho Comunitario Europeo, No. 72, 2022, p. 467.
(40) See also Alvarez Garcia, V., op. cit., p. 478.
(41) Judgment of 16 February 2022, Hungary v Parliament and Council (C-156/21, EU:C:2022:97, paragraph 58).
(42) Berne Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), in the amended version of 28 September 1979.
(43) Through Article 1(4) of the World Intellectual Property Organisation (WIPO) Copyright Treaty, adopted in Geneva on 20 December 1996.
(44) Judgment of 18 December 2007, Sweden v Commission (C-64/05 P, EU:C:2007:802, paragraph 69).
(45) For a critique of the judgment under appeal, see Kamara, I., General Court EU: Commercial interests block the right to access European harmonised standards, Journal of Standardisation, vol. 1, 2022, Paper 4, and Krämer, L., 'L'environnement devant la Cour de

justice de l'Union européenne', Revue du droit de l'Union européenne, 1/2022, p. 15.
(46) Opinion of 8 March 2011, (Agreement creating a Unified Patent Litigation System) (EU:C:2011:123, paragraph 80).
(47) See Blockx, F., 'The General Court of the EU wanders into copyright law, and gets disoriented', IPKat guest post, 15 July 2021, which contains further references.
(48) Judgment of 12 September 2019, Cofemel (C-683/17, EU:C:2019:721, paragraph 29).
(49) Judgment of 1 December 2011, Painer (C-145/10, EU:C:2011:798, paragraph 89).
(50) Judgment of 1 March 2012, Football Dataco and Others (C-604/10, EU:C:2012:115, paragraph 42).
(51) Blockx, F., op. cit.
(52) Indeed, phone books too are very lengthy and well-structured, but that does not mean that they are the result of creative choices. See, for instance, Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991). See Blockx, F., op. cit. in this regard.
(53) See, for instance, judgment of 1 July 2008, Sweden and Turco v Council (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 43 to 66). See also judgment of 25 January 2023, De Capitani v Council (T-163/21, EU:T:2023:15, paragraphs 87 to 96 and case-law cited) (not appealed to the Court).
(54) However, CEN Annual Report of 2017, p. 22, states it can be up to 35% of CEN's budget.
(55) See https://www.etsi.org/intellectual-property-rights (though their reproduction has to be authorised by that body).
(56) Van Gestel, R., and Micklitz, H.-W., op. cit., p. 181.
(57) Judgment of 4 September 2018, ClientEarth v Commission (C-57/16 P, EU:C:2018:660, paragraphs 80 and 81).
(58) Judgment of 18 December 2007, Sweden v Commission (C-64/05 P, EU:C:2007:802, paragraph 66).
(59) See, to that effect, judgment of 18 December 2007, Sweden v Commission (C-64/05 P, EU:C:2007:802, paragraph 65 et seq.).
