Registry of the European Court of Justice of the European Union
Rue du Fort Niedergrünewald
L-2925 Luxembourg
LUXEMBOURG

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Appeal pursuant to Article 56 of the Statute of the Court of Justice of the European Union

23 September 2020

Applicants:	1. Public.Resource.Org, Inc., 1005 Gravenstein Hwy. North Sebastopol, CA 95472, U.S. 2. Right to Know CLG, Herbert Place, Dublin 2 Ireland Attorneys of record for Applicant 1 and Applicant 2, together referred to as the "Applicants": FP Logue Solicitors, particularly Dr Fred Logue, 8/10 Coke Lane, Smithfield, Dublin 7, Ireland, and Morrison & Foerster LLP, particularly Dr Jens Hackl and Christoph Nüßing, Potsdamer Platz 1, 13th Floor, 10785 Berlin, Germany
Defendant:	European Commission
Interveners:	European Committee for Standardisation (CEN), and others, in support of the European Commission

In the name and on behalf the Applicants, we file an appeal and request the Court to:

1. Set aside the judgment of the General Court of 14 July 2021 in Case T-185/19 and grant access to the requested documents (EN 71-4:2013, EN 71-5:2015, EN 71-12:2013, and EN 12472:2005+A1:2009),

2. In the alternative, refer the matter back to the General Court, and

3. Order the European Commission to pay the costs of the proceedings.

Preliminary Remarks

1 The appeal against the judgment of the General Court ("**GC**") of 14 July 2021 in Case T-185/19 (the "**Judgment**", attached as **Annex A1**) concerns a fundamental issue of the EU, namely the free access to the law for all EU citizens. Free access to the law for all EU citizens is a (fundamental) right following from the rule of law. The GC failed to recognize this.

2 The EU is – as Art. 2 of the Treaty on European the Union ("**TEU**") explicitly provides – "founded" on the rule of law, which is also a "common value" to all EU Member States. Since the rule of law requires that everyone is bound by EU law, everyone must know the law. To know the law, EU citizens must have free access to the law. That is why EU law has to be published in the Official Journal ("**OJ**") under Art. 297 TFEU.

3 As obvious as this seems to be, as of today, however, the whole of EU law is not freely accessible for all EU citizens. Free access is not available for so-called harmonized (technical) standards ("**HS**"), like the four HS requested by the Applicants from the European Commission ("**EC**") in the case at hand. HS consist of a set of rules and regulations, which specify the basic requirements laid down in certain EU regulations or directives. HS concern the most important areas in our modern technical world, like the safety of toys, the safety of agricultural machines and pesticides, how to build safe bridges, the safety of bicycles and automobiles, how to package goods in an environmentally responsible manner, the safety and operation of railroads, the safety of medical equipment in hospitals and of medical implants such as hearing aids and prosthetics, the standards for fire safety in hospitals and schools, etc.

4 HS are mandated, controlled, supervised and financed by the EC. Products manufactured in compliance with HS are presumed to satisfy the essential requirements under the respective EU regulations or directives. This results in the free marketability of products meeting the requirements of HS within the internal market. HS are thus the only accepted method in the market for proving compliance with the respective EU regulations or directives and hence *de facto* compulsory.

5 Due to these legal effects of HS, the European Court of Justice ("**ECJ**") ruled in *James Elliot Construction* that HS "*form part of EU law*" (C-613/14, ECLI:EU:C:2016:821 para. 40). Despite being part of EU law, HS are not freely accessible for all EU citizens. Rather, the publicized EU law only provides an "economy-class version" for the ordinary EU citizens by only publishing the reference to the HS in the OJ, but not the full text. If EU citizens want to get the "first-class version", i.e. if they want to get access to the full text of the HS, they have to pay high prices for such access (e.g., of up to EUR 900 for the four HS requested by the Applicants). This corresponds with a price of up to EUR 8.13 per single page. To put that in perspective, if publishers charged such prices per page, books would cost several thousands of euros.

6 This "pay-per-law" or "paywall" system for HS contradicts the rule of law, which requires free access to the law for all EU citizens. In the Judgment, which the Applicants appeal only on the merits and not on the admissibility, the GC did not properly deal with this main issue of the case at hand. The GC rather upheld the EC's decision, which refused to grant

access to the four requested HS under Regulation (EC) No 1049/2001 (the "**Transparency Regulation**") and Regulation (EC) No 1367/2006 (the "**Environmental Transparency Regulation**"). The GC's generic reasoning seems to be inspired by the protection of the established (or better: outdated) standardization system (under Regulation (EU) No 1025/2012, the "**Standardization Regulation**"). The Judgment is mainly based on the alleged copyright protection of HS, which allegedly follows from the fact that HS are drafted by so-called (private) standardization bodies.

7 This is fundamentally wrong and the GC committed several errors in law in the Judgment, which we will lay out in further detail in this appeal. The GC failed to recognize that it follows from the rule of law – as a founding principle of the EU provided in Art. 2 TEU – that EU citizens must have free access to the EU law. Hence, as the U.S. Supreme Court ruled, "*no one can own the law*" and no one can thus assert copyright protection to restrict free access to the law (cf. Supreme Court of the United States, Georgia et. al vs. Public.Resource.Org, Inc., decision of 27 April 2020, 590 U.S. (2020), attached as **Annex A2**). The GC further misjudged that the rule of law directly follows from the EU Treaties as EU primary law and thus takes precedence over any EU secondary law, like the Standardization Regulation establishing the standardization system. The alleged protection of the standardization system is thus without any merit for the case at hand since there can be no valid interest in protecting the standardization system if its current form leads to a foreclosure of free access to the law as mandated by the rule of law.

8 After analyzing the GC's Judgment, the Applicants had the impression that the GC simply dismissed the rule of law, which is provided in Art. 2 TEU and constitutes a founding principle of the EU, as meaningless verbiage. This is particularly clear where the GC alleges that the Applicants did not substantiate the "*exact source of a 'constitutional principle' which would require access that is freely available and free of charge to harmonised standards*" (para. 107 of the Judgment). This is quite surprising considering that the Applicants dealt with that in all of their submissions and alone in the initial action for annulment in several paragraphs (67-71, and 83-104) on more than seven pages with several citations of EU and national case law. None of this seems to have even been considered by the GC as none of the cited cases are mentioned in the GC's Judgment. This also indicates a violation of the right to be heard by the GC.

9 In further detail:

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A. FACTS

10 The Applicants appeal the Judgment, which was served on 14 July 2021, only on the merits (not on the admissibility of the initial action for annulment, in the following referred to as the "**Initial Action**") and seek (i) annulment of the Judgment (attached as Annex A1), and (ii) corresponding access to certain HS.

I. THE APPLICANTS

11 The Applicants are both non-profit organizations, which are being represented by FP Logue Solicitors and Morrison & Foerster LLP. Their focus is on making the law freely available to all citizens (for further information see Initial Action, paras. 9-11).

II. THE FOUR REQUESTED HS

12 The case at hand is about four HS which the Applicants requested from the EC.

13 The first three HS (i.e. EN 71-4:2013, EN 71-5:2015 and EN 71-12:2013) refer to Directive 2009/48/EC on the safety of toys (the "**Toy Safety Directive**"; the three standards collectively referred to as the "**Toy Safety Standards**"):

- EN 71-4:2013 specifies requirements for the maximum amount and, in some cases, the maximum concentration of certain substances and mixtures used in experimental sets for chemistry and related activities. The substances and mixtures include those that are dangerous or which, in excessive amounts, could harm the health of children using them.

- EN 71-5:2015 specifies similar requirements and test methods for the substances and materials used in chemical toys (sets) other than experimental sets.

- EN 71-12:2013 specifies the requirements and test methods for carcinogenic substances, N-nitrosamines and N-nitrosatable, for (i) toys and parts of toys made from elastomers and intended for use by children under 36 months, (ii) toys and parts of toys made from elastomers and intended to be placed in the mouth; and (iii) finger paints for children under 36 months. These include balloons and teethers.

14 Toys which meet these standards are presumed to be in conformity with the requirements as set out in the Toy Safety Directive (cf. Art. 13 Toy Safety Directive according to which *"toys which are in conformity with harmonised standards or parts thereof […] 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.*").

15 The fourth (i.e. EN 12472:2005+A1:2009) of the requested HS refers to Regulation (EC) No 1907/2006 concerning Registration, Evaluation, Authorization and Restriction of Chemicals (the "**REACH Regulation**", the last standard referred to as the "**REACH Standard**"). The Reach Standard specifies one of the test methods which shall be used for demonstrating conformity with restriction entry number 27 in Annex XVII of REACH. This entry deals with the maximum rate of nickel release from certain products. Nickel is

classified as the top contact allergen in the world and is suspected to be a carcinogen (cf. https://en.wikipedia.org/wiki/Nickel#Toxicity (last accessed November 25, 2018)).

16 The REACH Standard stipulates a *mandatory* test method per paragraph 3 of entry 27 of Annex XVII to REACH Regulation which states that "*[t]he standards adopted by the European Committee for Standardisation (CEN)* ***shall be used*** *as the test methods for demonstrating the conformity of articles to paragraphs 1 and 2. [emphasis added]*".

B. Legal Assessment

I. First plea in law – Error of assessment of the application of the exception in Art. 4(2) first indent of the Transparency Regulation

17 The GC's Judgment must be set aside since it incorrectly applied the exception provided in Art. 4(2) first indent Transparency Regulation. The Applicants divide this first plea in law in two sub-parts. First, they describe the wrongful assessment of the copyright protection (see paras. 18 et. seq.). Second, the Applicants explain why the GC made an error in law when assessing the effects on the commercial interests (see paras. 67 et. seq.).

1. First part of the first plea in law – Wrongful assessment of copyright protection

18 The GC's Judgment is based on the finding that the four requested HS are copyrightable. This is wrong. First, HS cannot be protected by copyright since they are part of EU law and must be freely accessible (see paras. 19 et. seq.). Second, even if such copyright protection were possible (which is wrong), the four requested HS do not meet the criteria for such protection (see paras. 52 et. seq.).

a) HS cannot be protected by copyright since they are part of EU law

19 The four requested HS cannot be protected by copyright since they are part of EU law and because every EU citizens is presumed to know the law, all must have free access to it. The text of the law can thus not be protected by copyright which hinders such free access. Hence, the exception in Art. 4(2) first indent Transparency Regulation on which the GC based its Judgment is not applicable here. The Applicants will lay out in the following in further detail that HS are part of the EU law, that the EU is founded on the rule of law, that the rule of law requires free access to the law and that copyright protection can thus not exist or at least not hinder free access to the four requested HS.

aa) HS are part of the EU law

20 The four requested HS are part of EU law. They were adopted based on the (legislative) procedure and associated with the presumption of conformity (see for further details paras. 42-44, and 88-94 of the Initial Action). The ECJ determined this in *James Elliott Construction* (C-613/14, ECLI:EU:C:2016:821 para. 40):

> "It follows from the above that a harmonised standard such as that at issue in the main proceedings, adopted on the basis of Directive 89/106 and the references to which have been published in the Official Journal of the European Union, **forms part of EU law**, since it is by reference to the provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product." [emphasis added]

21 The GC seems to have accepted this starting point in the Judgment (see para. 52), which should be undisputed given the clear statement of the ECJ in *James Elliott Construction*. But the GC then went on and alleged that the ECJ did not declare "*invalid the system of publication of harmonised standards laid down in Article 10(6) of Regulation No 1025/2012, by which only the references of those standards are to be published*" (para. 53 of the Judgment). This is wrong. The ECJ did not rule about the standardization system including the publication of the HS in *James Elliott Construction*. Rather, this was and is – as the Advocate General in *James Elliott Construction* highlighted (C-613/14, ECLI:EU:C:2016:63 para. 51) – an open and important question on which the ECJ did not have to rule in *James Elliott Construction* as it was not at issue in that case. The GC's conclusion is thus not correct.

22 Further, the GC – by referring to Art. 2(c) of the Standardization Regulation – alleged that "*compliance [with HS] is not compulsory*" (see para. 51). This is flawed. First, the referenced Art. 2(c) of the Standardization Regulation does not say anything about the compulsory nature of HS. With respect to the four requested HS, this is also not correct. The requested REACH Standard (i.e. EN 12472:2005+A1:2009) provides a *mandatory* test method where manufacturers cannot deviate from (cf. para. 3 of entry 27 of Annex XVII to the REACH Regulation, see also para. 16 of the Initial Action). While the requested Toy Safety Standards may – in theory – be "voluntary" (see next para. on the *de facto* compulsory nature of the HS), the ECJ clearly stated in *James Elliot Construction* that this is irrelevant (C-613/14, ECLI:EU:C:2016:821 para. 42):

> "Although evidence of compliance of a construction product with the essential requirements contained in Directive 89/106 may be provided by means other than proof of compliance with harmonised standards, that cannot call into question the existence of the legal effects of a harmonised standard."

23 In addition, the "voluntary" nature only exists in theory. In practice, HS are *de facto* compulsory as they are generally the only accepted method in the market for proving compliance with the respective EU regulations and directives. A study commissioned by the Commission confirms this result by finding that "*in practical terms these harmonised standards are almost obligatory for most economic players*" (cf. EIM Business & Policy Research, Access to Standardisation – Study for the European Commission, Enterprise and Industry Directorate-General, 2010, page 17, (https://www.anec.eu/images/Publications/Access-Study---final-report.pdf, last accessed March 7, 2019, attached as **Annex A3**)). The ECJ also acknowledged this in its *Fra.bo* judgment by holding that "*in practice, almost all German consumers purchase copper fittings certified by the DVGW [i.e. a German standardization organization]*" (C-171/11, ECLI:EU:C:2012:453 para. 30). The fact that companies pay for HS supports this, too. Why would companies acting in a competitive landscape pay for HS if they were not *de facto* binding?

24 Finally, the drafting of the HS (like the four requested HS) shows that they are part of the law. The EC significantly controls the procedure for the drafting of the HS (cf. Opinion of Advocate General Campos Sanchez-Bordona in *James Elliot Construction*, ECLI:EU:C:2016:63 paras. 46 et. seq.; see also paras. 24-34 of the Initial Action). The EC itself highlights that it is "*entrusted with the responsibility for the assessment of European*

harmonised standards" (cf. EC, Harmonised standards: Enhancing transparency and legal certainty for a fully functioning Single Market, COM(2018) 764 final, p. 2, attached as **Annex A4**):

- The EC gives a detailed mandate including a detailed timeline for the drafting of the HS "*to support the implementation of Union legislation*" (cf. EC, Harmonised standards: Enhancing transparency and legal certainty for a fully functioning Single Market, COM(2018) 764 final, p. 2, already attached as Annex A4). The mandate includes the criteria that have to govern the drawing up of a HS. These criteria are very detailed as the mandate (M.445/EN of July 9, 2009) on the requested Toy Safety Standards demonstrates:

> "Make the necessary adjustments to standards to take account of the fact that Directive 2009/48/EC revised Directive 88/378/EEC with the effect that new definitions and warnings have been introduced, in particular the definition of activity toys and design speed and warnings for toys in food, imitations of protective masks and helmets, packaging for fragrances, toys intended to be strung across a cradle, toy scooters, toy bicycles and skateboards;
>
> Ensure that the standards take account of the new physical and mechanical, chemical, electrical, hygiene and flammability requirements;
>
> In particular, make the necessary adjustments to standards to take account of the fact that the Directive 2009/48/EC contains new requirements, to limit the maximum values both for impulse noise and continuous noise emitted by toys in order to adequately protect children from the risk of impairment of hearing;
>
> The revised directive foresees that more stringent and comprehensive standards should be established to limit the maximum values for noise levels for all toys that emit sound, both due to high continuous noise and to impulse noise. The measurement result is as a rule be given as the highest value recorded. The emission of sound pressure levels should not impair children's hearing and should be revised taking into account that children are the most vulnerable age group and that their auditory channel is smaller than in adults.
>
> Address the hazard presented by books made of cardboard and paper in order to cover adequate testing. The requirements must in particular ensure that there is no choking risk as regards books intended for children less than 36 months;
>
> Ensure that the harmonised standards intended to support Directive 88/378/EEC fully satisfy the relevant essential safety requirements of the revised Directive or, failing that, include an indication as to which of the requirements are not satisfied;
>
> Ensure that the standards intended to support the Directive 2009/48/EC include an annex providing information with regard to the relationship between its clauses and the essential safety requirements of the Directive in order to allow the users of the standard to establish to what extend the standard provides for a presumption of conformity with the essential safety requirements in accordance with the agreement on this subject between the Commission and the European Standardisation Organisations;

> Ensure that the harmonised standards intended to support the Directive include an informative annex with the background and justification for the requirements. […]
>
> CEN and CENELEC are requested to communicate to the Commission, within three months of the acceptance of the mandate, a work plan for the execution of the abovementioned standardisation tasks, indicating the new standards that need to be developed, the standards requiring revision or amendment.
>
> CEN and CENELEC are requested to communicate to the Commission within twelve months of the acceptance of the mandate, an interim report on the progress of the tasks set out in this mandate, indicating any possible difficulties encountered.
>
> CEN and CENELEC will revise standards which need adaptation to Directive 2009/48/EC within two years from accepting the mandate for all requirements excluding the chemical requirements and within four years from accepting the mandate for the chemical requirements. CEN and CENELEC are also requested to communicate to the Commission, within one year from accepting the mandate a list of harmonised standards supporting the implementation of Directive 2009/48/EC. The list shall include the titles of the standards in all of the official languages of the EU.
>
> CEN and CENELEC will develop the new standards within 2 years for all requirements excluding the chemical and noise requirements and within four years from accepting the mandate for the chemical and noise requirements.
>
> CEN and CENELEC are requested to draw up the work plan and execute the above mentioned tasks in close cooperation in order to ensure consistency and avoid overlapping standards.
>
> When executing the standardisation tasks covered by this mandate, CEN and CENELEC are requested to take due account of feedback from the stakeholders. Wherever possible, when the abovementioned tasks involve the development of new standards or the revision of existing standards, the tasks should be executed within the framework of the Vienna and Dresden Agreements with a view to preparing international standards that satisfy the relevant essential safety requirements of Directives 2009/48/EC."

- The EC supervises the drafting and it provides significant funding (up to 35% of CEN's budget, cf. para. 33 of the Initial Action and the referenced CEN Annual Report 2017, p. 22, attached as **Annex A5**). The cooperation with the EC is governed by an agreement in the form of certain general guidelines which are periodically renewed and which emphasize the importance of standardization for the European policy and the free movement of goods (cf. 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, attached as **Annex A6**).

- There are also detailed reviews of the HS by the EC and other EU institutions (like the EU Parliament) or EU Member States before the drafting process has finalized.

The EC particularly assesses "*whether it [the HS] complies with the requirements of corresponding Union legislation and the original standardisation request*" (cf. EC, Harmonised standards: Enhancing transparency and legal certainty for a fully functioning Single Market, COM(2018) 764 final, p. 2, already attached as Annex A4).

- The reference to the HS is published in the OJ. The EC recently changed the publication process and publishes the reference now in the L-series (for Legislation) of the OJ (c.f. Commission Implementing Decision (EU) 2018/2048 of December 20, 2018), instead of the C-series of the OJ (Information and Notices). This shows that the EC views HS as being part of the EU law.

- Once HS are finalized and published in the OJ, the EC requires that every EU Member State adopts each HS – unchanged – as a national standard within six months. The implementation of each of the HS as a national standard, without any changes, is not discretionary, but rather a governmental requirement established by the EC. The EC also ensures (cf. Art. 258 TFEU) that HS are fully effective. Imposing additional requirements on products covered by HS violates the respective EU Member State's obligation to correctly implement EU law (cf. C-100/13, Commission v Germany, ECLI:EU:C:2014:2293 para. 63). Consequently, HS cannot be considered as being "voluntary" and are obviously part of the EU law.

bb) The EU is founded on the rule of law

25 The EU is "founded" on the rule of law, which is also a "common value" to all EU Member States (cf. Art. 2 TEU). The ECJ acknowledged and referred to the rule of law in various decisions. For instance, in the decision concerning the European arrest warrant, the ECJ highlighted that "*the Union is founded on the principle of the rule of law and it respects fundamental rights […] as they result from the constitutional provisions common to the Member States, as general principles of Community law*" (C-303/05, Advocaten voor de Wereld, ECLI:EU:C:2007:261 para. 45; see also para. C-354/04 P, Gestoras Pro Amnistía and Others v Council, ECLI:EU:C:2007:115 para. 51; C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117 para. 30).

26 In a "Communication from the Commission to the European Parliament and the Council", the EC stated that the "*rule of law is the backbone of any modern constitutional democracy*" and "*is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based*" (COM(2014) 158 final/2, p. 2).

27 The rule of law as a founding principle of the EU is directly established in the Treaties (Art. 2 TEU). As such, the rule of law constitutes EU primary law and thus takes precedence over any EU secondary law (like, for instance, directives or regulations). Or to put it differently: all EU secondary law must be interpreted and comply with EU primary law. The ECJ confirmed this and explained that "*where it is necessary to interpret a provision of*

secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law […] and, more specifically, with the principle of legal certainty" (C-1/02, Borgmann, ECLI:EU:C:2004:202 para. 30; see also C-314/89, Rauh v Hauptzollamt Nürnberg-Fürth, ECLI:EU:C:1991:143 para. 17).

28 The ECJ also acknowledged this precedence of EU primary law, for instance, by assessing whether the European arrest warrant including the accompanied decision complied with the rule of law (C-303/05, Advocaten voor de Wereld, ECLI:EU:C:2007:261 para. 46 et seq.). There, the ECJ ruled that the rule of law "*include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination*" and that it is thus "*a matter for the Court to examine the validity of the [Council] Framework Decision [concerning the European arrest warrant] in the light of those principles.*"

29 It follows from these considerations that the Standardization Regulation (as EU secondary law) must comply with the rule of law as a founding principle of the EU and as established in the EU Treaties as primary law. Hence, it is completely irrelevant – contrary to what the GC seems to suggest (para. 103 of the Judgment) – what the Standardization Regulation provides regarding the publication of HS. If these publication rules under the Standardization Regulation violate the rule of law (which they do since they (allegedly) do not allow for a free publication of the full text of the HS, see immediately below), they will be irrelevant. It is thus – similarly to what the ECJ ruled concerning the European arrest warrant – a matter for the ECJ to examine the Applicants' request to access the four requested HS under the Transparency Regulation in light of the rule of law and to decide whether the rule of law requires the free access to the HS (which it does, see immediately below).

cc) The rule of law requires free access to the (EU) law for all EU citizens

30 The rule of law as a founding principle of the EU (Art. 2 TEU) requires free access to the EU law for all EU citizens.

31 While the rule of law in itself is an abstract principle, case law and legal authors have further specified certain elements of the rule of law. The core principle of the rule of law is that everyone is bound by the law (cf. Lord Bingham, The Rule of Law, The Cambridge Law Journal, Mar., 2007, Vol. 66, No. 1 (Mar., 2007), pp. 67-85 (p. 69), attached as **Annex A7**). The ECJ acknowledges this core principle by highlighting that the "*European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law which include fundamental rights*" (cf. C-229/05 P, PKK and KNK v Council, ECLI:EU:C:2007:32 para. 109).

32 Since the rule of law requires that everyone is bound by the law (as described above), everyone must have the possibility to know the law. And to know the law, the law must be published and citizens must have free access to the law (cf. Lord Bingham, The Rule of Law, The Cambridge Law Journal, Mar., 2007, Vol. 66, No. 1 (Mar., 2007), pp. 67-85 (p. 69 et. seq.), attached as Annex A7). Or to put it differently: The rule of law requires the publicity of the law which means that the law has to be made public and people concerned

by it must know it (cf. A. Nowak-Far, The Rule of Law Framework in the European Union: Its Rationale, Origins, Role and International Ramifications, Section 4.1, attached as **Annex A8**). The TFEU therefore provides in Art. 297 that all EU law must be published in the OJ.

33 The ECJ acknowledged these principles of publication and access to the law in various decisions. The GC's conclusion according to which the Applicants did not substantiate the "*exact source of a 'constitutional principle' which would require access that is freely available and free of charge to harmonised standards*" (para. 107 of the Judgment) is thus wrong. In conjunction with the principle of legal certainty, which also follows from the rule of law, the ECJ held that EU law must be accessible for EU citizens (C-161/06, Skoma-Lux, ECLI:EU:C:2007:773 para. 38):

> "[I]n accordance with the principle of legal certainty, community 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**." [emphasis added] (see also C-370/96, Covita v Elliniko Dimosio, ECLI:EU:C:1998:567 para. 27; C-228/99, Silos, ECLI:EU:C:2001:599 para. 15).

34 Based on this, the ECJ concluded in that case that EU regulations or directives do not have legal effects vis-à-vis individuals if they are not properly published in the OJ in the language of an EU Member State, "*even though those person could have learned of that legislation by other means*" (C-161/06, ECLI:EU:C:2007:773 para. 51). Hence, paid access to HS or access via certain selected libraries are – contrary to the GC's view (para. 103 and 107 of the Judgment) – obviously not suited to ensure free access as required by the rule of law.

35 The ECJ emphasized the requirement of proper accessibility to EU law also in other judgments. Almost identical in wording, the ECJ decided that "*the principle of legal certainty required that the condition in question be brought to the knowledge of third parties by adequate publicity in Community legislation*". Otherwise, a certain rule does not have any legal effects vis-à-vis EU citizens (C-108/01, Consorzio del Prosciutto di Parma and Salumificio S. Rita, ECLI:EU:C:2003:296 para. 95-96).

36 The concept of free access to the law is also recognized by the Transparency Regulation itself. In recital 6, the Transparency Regulation 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*". This is particularly relevant here as the four requested HS are part of EU law (see above). Additionally, transparency in general is one of the constitutional principles laid down in various provisions of the EU Treaties (like Art. 1(2) TEU, 10(3) TEU, Art. 11(2 and 3) TEU) and in the Charter of Fundamental Rights of the European Union (Art. 42).

37 The European Court of Human Rights ("**ECtHR**") also acknowledged the free accessibility of the law. It ruled that the expression "*prescribed by law*" (which is found in several articles of the European Convention on Human Rights) particularly requires free access to the

law (cf. *The Sunday Times v The United Kingdom* [1979] ECHRR 1, ECLI:CE:ECHR:1979:0426JUD000653874 at para. 49, attached as **Annex A9**).

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. **First, the law must be adequately accessible:** the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case." [emphasis added]

38 In Silver and Others v the United Kingdom ([1979] ECHR 5, ECLI:CE:ECHR:1983:0325JUD000594772, para. 85 attached as **Annex A10**), the ECtHR clarified that the principles identified in Sunday Times in relation to "*prescribed by law*" were also applicable to the concept of "*in accordance with the law*". The court ruled in this judgment that for the law to be accessible the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case and that certain orders and instructions did not meet this criterion since they were not published (para. 87).

39 In a more recent case, the ECtHR was asked to rule on whether a ministerial order was accessible where it was distributed through subscription to an official magazine and therefore made available only to communications specialists rather than to the public at large (*Roman Zakharov v. Russia* [2015] ECHR 1065, ECLI:CE:ECHR:2015:1204JUD004714306, para. 242 attached as **Annex A11**). The court found the lack of a generally accessible official publication of the ministerial order "*regrettable*", but it declined to rule on the point because the order in question had been made accessible to the general public free of charge on the internet by a third party and because the applicant had in fact obtained a copy (para. 181). This is entirely different as regards the four requested HS, which are not available for free over the internet so that a copy of them cannot be obtained without paying for them.

40 In Ireland, it has long been established that the law should be certain and accessibly even for non-statutory administrative measures. Thus. in McCann v Minister for Education ([1997] 1 ILRM 1, at page 15 attached as **Annex A12**) the High Court held:

> "The law should be certain and it should be readily accessible. The same applies to non-statutory administrative measures. In the case of primary and secondary education hundreds of millions of pounds are administered annually by means of a large number of administrative measures whose existence is known only to a handful of officials and specialists, which are not readily available to the public and whose effect is uncertain and often ambiguous. If administrative ministerial rules and regulations were … made available … to members of the public, those would be one way of obviating the danger of injustice which is inherent in the present highly informal procedures."

41 The same principles have been identified in the United Kingdom, for example in the United Kingdom Supreme Court case of R (Lumba) v. Secretary of State for the Home Department ([2011] UKSC 12 at paras. 34-35 attached at **Annex A13**) Lord Dyson explained the position as follows:

> 'The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and

> surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.'
>
> 'The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute … There is a correlative right to know what that currently existing policy is …'

42 Further, the German Constitutional Court ("**BVerfG**") held that the rule of law requires that all legal rules and all other specifications which create a binding effect for the citizen in a binding form (such as the four requested HS), must be made accessible to the public. The publication has to happen in such a way that everyone who is concerned with the corresponding regulation can reliably obtain knowledge of its content. Obtaining such knowledge must not be unreasonably obstructed (BVerfG, judgment of July 29, 1998 – Case 1 BvR 1143/90, ECLI:DE:BVerfG:1998:rk19980729.1bvr114390 para. 26 attached as **Annex A14**):

> "Das Rechtsstaatsprinzip gebietet allgemein, daß förmlich gesetzte Rechtsnormen verkündet werden. Damit sollen sie der Öffentlichkeit in einer Weise zugänglich gemacht werden, daß die Betroffenen sich verläßlich Kenntnis von ihrem Inhalt verschaffen können. Diese Möglichkeit darf auch nicht in unzumutbarer Weise erschwert sein."
>
> Translation into English by the authors of the appeal:
>
> "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."

43 Legal authors support these findings of the courts and further explain why the law must be freely accessible (cf., for instance, Lord Bingham, The Rule of Law, Penguin Books, 2011, Chapter 3). Lord Bingham gives three reasons for this, namely: (a) if a person is to be punished for doing or failing to do something they ought to be able to know what it is they ought or ought not do on pain of criminal penalty; (b) if we are to claim our civil rights or to perform our obligations which the law imposes on us we should know what those rights and obligations are; and (c) trade and business generally are promoted by a body of accessible legal rules.

44 The second and third aspects of Lord Bingham's analysis are particularly relevant here. The four requested HS are intended to give effect to legislation which imposes obligations requiring suppliers of products to conform to safety standards which protect the health and safety of consumers in the EU. The four requested HS are also designed to strengthen the internal market by imposing harmonized safety standards on all suppliers who place goods on the market in the EU. It is thus obvious that the four requested HS must be made freely available.

45 Finally, two further elements laid down in the EU Treaties require free access to the law:

- First, free access to the four requested HS follows also from the fundamental freedoms, like the free movement of goods (Art. 34 TEFU) or the freedom to provide services (Art. 56 TFEU). The fundamental freedoms demand transparent and reliable access to all regulations that must be observed when goods or services are offered across borders (cf. Directive 2014/24/EU, rec. 1, 45, 52). Since the fundamental freedoms may be impaired by HS (C-171/11, Fra.bo, ECLI:EU:C:2012:453, guiding principle), these must be properly published and accessible. The ECJ confirmed this in past rulings. For instance, as regards certain EU Member State rules establishing certain benefits only for their own nationals and hence impairing fundamental freedoms, the EU Member States defended themselves with the argument that they had orally instructed the respective authorities to treat nationals and citizens of other EU Member States equally. The ECJ did not accept that defence and ruled that the oral instructions were not sufficient because they were not publicly available. According to the ECJ, this "*gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law*" (167/73, Commission v France, ECLI:EU:C:1974:35 para. 41; see also 159/78, Commission v Italy, ECLI:EU:C:1979:243 para. 22).

- Second, the principle of good administration under European law (Art. 298 TFEU, cf. also Art. 41 of the Charter of Fundamental Rights) requires the publicity of all legal acts and hence the HS (*Callies*, in: Calliess/Ruffert, EU Treaty / TFEU, Art. 296 TFEU para. 10; *Krajeswki/Rösslein*, in: Grabitz/Hilf/Nettesheim, Recht der Europäischen Union, Art. 298 TFEU para. 18). This publicity of state action therefore includes public access to state documents and in particular to the applicable law (*Callies*, in: Calliess/Ruffert, EUV/TFEU, Art. 1 EUV para. 86).

dd) Result: Copyright protection of the law is excluded

46 Since the rule of law requires free access to the law (as explained above), copyright protection of the law hindering such free access is excluded. Consequently, the GC's Judgment, which based its dismissal of the Initial Action on the alleged copyright protection of the HS, is flawed.

47 This result follows from the rule of law and the required free access to the law. The vesting of copyright in HS to a private person which is free to charge fees or to impose other barriers for access hinders free access to the law. This is supported by a study commissioned on behalf of the EC which revealed that the "*price for standards is an (very) important barrier*" which hinders accessibility of the HS (cf. EIM, "Access to Standardisation, Study for the European Commission, Enterprise and Industry Directorate General", Zoetermeer 2009, p. 46 (https://www.anec.eu/images/Publications/Access-Study---final-report.pdf (last accessed 7 September 2021), already attached as Annex A3).

48 The EC itself confirmed that "*legal and quasi-legal texts emanating from the Community institutions are not subject to copyright, regardless of their format and the medium in which they are available*" (see response to written question E-18441/00 by Klaus-Heiner Lehne

(PPE-DE) to the Commission (28 July 2000) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:92000E001841&from=SV, attached as **Annex A15**). On its website, the EC highlights that "*EU legislation is considered as public domain*" and "*is free from copyright and can be reused without restriction, subject only to the obligation to acknowledge the source*" (cf. https://op.europa.eu/en/web/about-us/reuse-and-copyright, attached as **Annex A16**; for further details see also EC decision of 12 December 2011 on the reuse of Commission documents (2011/833/EU), OJ 2011, L330/39).

49 A ruling of the U.S. Supreme Court also confirms this result. The court dealt with the question whether certain (non-binding) annotations to the law drafted by a private organization under the supervision and with financial support of the legislator could be protected by copyright. The court found that the annotations – although drafted by a private organization and non-binding – qualified as legislative work because they were drafted under the supervision and with financial support of the legislator, and because they provided commentary and resources relevant to understanding the laws. The court concluded that since "*every citizens is presumed to know the law, […] all should have free access […] and [the law] must be free for publication to all.*" Or to put it differently: "*no one can own the law*" so that the annotations "*are ineligible for copyright protection*" (cf. Supreme Court of the United States, Georgia et. al vs. Public.Resource.Org, Inc., decision of 27 April 2020, 590 U.S. (2020), already attached as Annex A2).

50 The U.S. Supreme Court's considerations apply *mutatis mutandis* to the four requested HS that are at issue here. The four requested HS are – as demonstrated above – part of EU law. Like the annotations in the U.S. case, they are also drafted under the supervision and with financial support of the legislator (*i.e.*, the EC). As EU law must be freely accessible, the four requested HS – as part of EU law – are not copyrightable. Hence, the exception in Art. 4(2) first indent Transparency Regulation on which the GC based its Judgment and refused to grant access to the HS is not applicable here. The GC's judgment is thus flawed and must be set aside.

ee) In the alternative: Free access to the EU law must have priority over copyright protection

51 Even if copyright protection existed for the four requested HS and thus EU law (which is not correct, see above), the rule of law requiring free access to the EU law (see above, paras. 30 et. seq.) must have priority over any such copyright protection. If the Court were not to follow the Applicants' arguments about the lack of copyright protection of EU law and the four requested HS, it must interpret the Transparency Regulation in a way that ensures or enables the required free access to EU law and the four requested HS under the rule of law. This can be done, *e.g.*, by denying the effect on commercial interests (see below para. 79) or by affirming an overriding public interest in access to the four requested HS (see below paras. 82 et. seq.).

b) No copyright protection of the four requested HS (due to a lack of "originality")

52 Even if copyright protection of EU law (i.e. the four requested HS) was theoretically possible (which is not the case, see above), the GC erred in its Judgment in finding (i) that the

EU institutions lacked jurisdiction to examine whether the four requested HS were protected by copyright since this was a matter for Member State courts (para. 57 of the Judgment), and (ii) that the four requested HS were protected by copyright (paras. 47-54 of the Judgment).

aa) Jurisdiction for assessment of copyright

53 The GC erred as it found that the EC was not authorized to examine whether the four requested HS were copyrightable. Rather, the GC held that such examination would go beyond the scope of the review which the EC is empowered to carry out in the procedure for access to documents (para. 57 of the Judgment).

54 This is flawed. In the first instance, this finding directly contradicts para. 48 of the Judgment which found that the EC was entitled to find that the threshold for originality had been met and that it had correctly decided that the requested HS were copyrightable. It is completely unclear how the existence of a copyright can be determined if the EC does not have a right to assess this. Additionally, if the GC's view were correct, this would undermine the Applicants' fundamental right for effective legal remedies including its right to be heard.

55 In the second instance, it should be observed that the case at hand concerns access to EU law (i.e. the four requested HS) based on an EU regulation (*i.e.*, the Transparency Regulation). The ECJ held in this regard that Art. 4 Transparency Regulation does not contain any reference to the national law of a Member State (C-64/05 P, Sweden v Commission, ECLI:EU:C:2007:802 para. 69). Access to documents under the Transparency Regulation and particularly access to the EU law can and must therefore be assessed by EU authorities under EU law standards. The GC failed to recognize this.

56 The Berne Convention, which the GC also relied on (paras. 41-42 of the Judgment) confirms this result. While the EU is not a party to the Berne Convention, it nevertheless has agreed to be bound by Art. 1-21 Berne Convention through Article 1(4) of the WIPO Copyright Treaty. Art. 2(4) Berne Convention provides that copyright protection of "*official texts of a legislative, administrative or judicial nature*" do not automatically benefit from copyright protection. Rather, the parties have the right to decide on the protection to be given to such texts through their own legislation. The EC confirmed this and highlighted that "*legal and quasi-legal texts emanating from the Community institutions are not subject to copyright, regardless of their format and the medium in which they are available*" (see response to written question E-18441/00 by Klaus-Heiner Lehne (PPE-DE) to the Commission (28 July 2000) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:92000E001841&from=SV, already attached as Annex A15). Therefore, it is a matter for the EU to decide through its own legislation on the level of copyright protection for official texts and to decide whether HS (as part of the EU law) are copyrightable.

57 In the third instance, the GC based its finding about the lack of competence to assess the copyright on case law relating to patents. This does, however, not apply here.

58 The ECJ observed in Opinion 1/09 (Agreement creating a Unified Patent Litigation System) 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*" (ECLI:EU:C:2011:123 para. 80). In *Document Security Systems v ECB*, the GC held that "*no provision of Community law confers on the Court of First Instance jurisdiction to give judgment on patent infringements*", and that "*patent infringement proceedings do not appear amongst the type of actions in respect of which jurisdiction is conferred upon the Community courts by Articles 220 to 241 EC*" (T-295/05, ECLI:EU:T:2007:243 para. 56).

59 However, the present appeal neither concerns a direct action between individuals in relation to a patent (or copyright) infringement nor is it outside of the jurisdiction conferred on the EU courts under the EU Treaties. Rather, the application is for the annulment of an EC decision addressed to the Applicants refusing to grant their request for access to documents. This is a type of action in respect of which jurisdiction is conferred on the EU courts under Art. 251-281 TFEU. In particular, Art. 263 TFEU does not restrict the pleas which may be raised in an application for annulment as determined by the GC in para. 57 of the Judgment. The GC therefore erred in seeking to draw an analogy between private disputes concerning patent infringement on the one hand and a disputed request for access to documents involving the contested application of the first indent of Article 4(2) Transparency Regulation on the other.

60 For all of the above reasons, the GC erred in finding that the EC was not authorized to examine the national law requirements for originality as 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. Therefore, the GC's Judgment must be set aside.

bb) No existence of copyright in the four requested HS

61 The GC held that the existence of copyright protection for the four requested HS was based on objective and consistent evidence such as to support the existence of copyright claimed by CEN for these HS. The GC then concluded that the EC did not commit an error when it stated that the HS 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 (paras. 47-49 of the Judgment).

62 The GC's considerations are flawed. It is well settled that notwithstanding that copyright is not fully harmonized in the EU, the concept of a "work" protected by copyright is 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. Second, classification as a work is reserved to the elements that are the expression of such creation (C-683/17, *Cofemel*, ECLI:EU:C:2019:721, para. 29 and case law cited). Based on this, the decisive element for the assessment of copyright protection is the originality of the "work".

63 The ECJ's case law confirms this result. For example in *Football Dataco*, the ECJ held that the fact that the setting up of a database required significant labour and skill of its author

could not, as such, justify the protection of it by copyright if that labour and skill do not express any originality (C-604/10, ECLI:EU:C:2012:115 para. 42). On the other hand, even very short texts may benefit from copyright. In *Infopaq*, the ECJ found that even an extract of eleven words was capable of being protected by copyright if the extract is the expression of the intellectual creation of the author (C-5/08, ECLI:EU:C:2009:465 para. 51).

64 It is clear from the Judgment that neither the GC nor the EC examined the originality of the four requested HS. Although they bear the burden of proof for relying on the exemption in Art. 4 Transparency Regulation, the GC and EC only relied on general allegations and assumptions. According to them, the requested HS 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. It is also clear that these considerations are only general allegations that the GC or EC reached without any specific assessment of the requested four HS. The Judgment is thus flawed.

65 Furthermore and contrary to the GC's allegations in para. 59 of the Judgment, the Applicants substantiated – to the extent possible without having access to the four requested HS – that the choices available to the standardization body were constrained in several ways (see para. 76 in the Initial Action). This particularly concerns the relevant provision from which the HS is derived, by the EC's mandate/instructions and that HS merely consist of lists of technical characteristics and/or test methods. In terms of the layout, the Applicants pointed out that there was no room for any free or creative choices since the layout, structure and language and other key features are governed by the standardization bodies' own standards. These drafting standards heavily restrict any room for creativity. Hence, there is no genuine creative choice available for the authors of the HS so that copyright protection is excluded.

66 Therefore, the GC erred in finding that the EC was correct to conclude that the requested HS were protected by copyright. Consequently, the GC's Judgment must be set aside.

2. Second part of the first plea in law – Error of assessment of the effect on the commercial interests

67 Even if copyright protection of the four requested HS were possible (which is not correct, see above) and such copyright existed (which is also not true, see above), the GC's Judgment would still have to be set aside. This is because the GC did not correctly assess the effect on the commercial interest for the standardization bodies. First, the GC was not entitled to rely on a general presumption that the requested HS would undermine the interest protected by the first indent of Art. 4(2) Transparency Regulation. Second, the GC did not correctly assess the specific effects resulting from the access to the four requested HS.

a) Reliance on general presumption was illegal

68 The GC erred when it found at para. 97 of the Judgment that the EC was entitled to rely on a general presumption that the interest protected by the first indent of Art. 4(2) Transparency Regulation would be undermined.

69 It is well settled that openness enables EU institutions to have greater legitimacy and to be more effective and accountable to EU citizens in a democratic system. To that end, Art. 1 Transparency Regulation provides that the purpose of that regulation is to confer on the public a right of access as wide as possible to documents of the EU institutions (C-57/16, ClientEarth v Commission , ECLI:EU:C:2018:660 paras. 73-76).

70 Art. 4 Transparency Regulation introduces a system of exceptions so that the right of access is nevertheless subject to certain limits based on reasons of public or private interest. As such exceptions depart from the principle of the widest possible public access to documents, they must be interpreted and applied strictly. If the EU institution concerned decides based on one of those exceptions to refuse to grant access to a document, it may rely on general presumptions which apply to certain categories of documents (C-57/16, ClientEarth v Commission, ECLI:EU:C:2018:660 paras. 77-79).

71 As general presumptions constitute an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document, they must be interpreted and applied strictly (C-57/16, ClientEarth v Commission, ECLI:EU:C:2018:660 para. 80).

72 As the law stands, the ECJ has recognized five categories of documents which enjoy general presumptions of confidentiality: (i) documents in an administrative file relating to a procedure for reviewing state aid; (ii) submissions lodged in proceedings before the courts of the EU, for as long as those proceedings remain pending; (iii) documents exchanged between the EC and notifying parties or third parties in the course of merger control proceedings; (iv) documents relating to an infringement procedure during its pre-litigation stage, including documents exchanged between the EC and the Member State concerned during an EU Pilot procedure; and (v) documents relating to a proceeding under Article 101 TFEU (C-57/16, ClientEarth v Commission, ECLI:EU:C:2018:660 paras. 81).

73 It can be seen that HS are not within any of the categories of documents in respect of which there is a general presumption of confidentiality. In fact, in all of the cases in which a general presumption has been identified, the refusal of access in question related to a set of confidential documents which were clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings (C-612/13 P, ClientEarth v Commission, ECLI:EU:C:2015:486 para. 78). This does not apply to the requested HS, which are already available either for inspection in libraries or for purchase. The four requested HS are thus not confidential at all, and they obviously also do not relate to any ongoing administrative or judicial proceedings.

74 For the reasons set out above, the GC therefore erred inasmuch as it decided that the EC was entitled to rely on a general presumption to refuse access to the four requested HS. The GC's Judgment must thus be set aside.

b) No assessment of specific effects on commercial interests

75 In its Judgment, the GC simply adopted the EC's apodictic allegations about copyright protection and concluded that this results in an effect on the commercial interests due to a "*very large fall in the fees collected by CEN*" (para. 64 of the Judgment). This is fundamentally wrong.

76 First, the GC's considerations practically mean that the alleged copyright protection for HS (see above, paras. 68 et seq.) systematically takes precedence over the presumption of a right of access under the Transparency Regulation. This is contrary to the Transparency Regulation under which any exemptions need to be interpreted narrowly to give the widest possible effect to the granted access rights (C-64/05 P, Sweden v Commission, ECLI:EU:C:2007:802 para. 66). The GC itself ruled in another judgment that such interpretation is contradictory to the Transparency Regulation (cf. T-189/14, Deza v ECHA, ECLI:EU:T:2017:4 paras. 119-120).

77 Second, the GC did not consider the specific facts of the case at hand. Here, relevant is only the effect on the commercial interest resulting from the Applicants' access to *four* requested HS. The GC's allegation about the "*very large fall in the fees collected by CEN*" (para. 64 of the Judgment) is obviously without any substance if the Applicants get access to *only four* HS. The GC's Judgment does not in any way demonstrate – as required by the ECJ's established case law (C-506/08 P, Sweden v MyTravel and Commission, ECLI:EU:C:2011:496 para. 76) – *how* and *to what extent* the release of the *requested* documents under the Transparency Regulation, i.e. *only four* HS, would actually and foreseeably undermine the commercial interest of the standardization bodies (see also paras. 77-82 of the Initial Action). Rather, the GC wrongly considered the effects of free access to HS in general (see paras. 65-67 of the Judgment). The alleged effect on the commercial interest is further called into question as the HS (including the four HS requested by the Applicants) are – according to the GC (see para. 102 of the Judgment) – available for free in certain libraries. It is unclear how and to what extent the access to only four HS could undermine the commercial interest, if these HS are already accessible for free in certain libraries.

78 Third, the GC completely ignored the fact that access to the four requested HS was without prejudice to copyright (Art. 16 Transparency Regulation) and did not interfere – contrary to the GC's view (see para. 67 of the Judgment) – with existing licensing contracts. The GC itself referred to Art. 16 Transparency Regulation in another judgment and highlighted that this provision "*protect[s] the holder of a document from copyright infringement and the commercial value of the document in the event that the information contained therein is disclosed as a result of a request for access to that document*" (T-189/14, Deza v ECHA, ECLI:EU:T:2017:4 para. 120). The GC then concluded that Art. 16 Transparency Regulation "*prevent[s] the information in question from being used for commercial purposes.*" Hence, access to the four HS requested by the Applicants could by no means have the effect as alleged by the GC or the EC.

79 Finally, as explained by the Applicants (see paras. 81-82 of the Initial Action), the standardization bodies' commercial interest cannot be undermined. This is because the four requested HS are – as the ECJ ruled – part of EU law (see above paras. 20 et seq.). Lawmaking by its nature is, however, a public function carried out by public authorities that cannot have any commercial interest in the product of their work. Such interpretation of the Transparency Regulation is necessary in order to enable or ensure the free access to the EU law and thus the four requested HS under the rule of law (see above paras. 30 et. seq.). Further, standardization bodies are acting – contrary to the GC's view (paras. 69-72 of the Judgment) – as public authorities by performing public functions that are not subject to any commercial interests. The EC itself acknowledged this in its decision in which it refused access to the four requested HS (of 22 January 2019, in case C(2019) 639 final) by highlighting that the standardization bodies are "*publicly recognised bodies tasked with functions in the public interest*". The procedure for drafting (like detailed mandate, supervision and funding by the EC) and adopting HS further support this (see above paras. 24). This is – as the Advocate General in *James Elliot Construction* highlighted – a "*case of 'controlled' legislative delegation in favour of a private standardization body*" (C-613/14, ECLI:EU:C:2016:63 para. 55).

80 This result is not affected by the GC's reference to its ruling in T-875/16 (Falcon Technologies International v Commission, ECLI:EU:T:2018:877 para. 47). This ruling does not deal with standardization bodies and HS, but with a notified body within the meaning of the legislation on EC declarations of conformity. Such "notified bodies" are – contrary to the case at hand – not responsible for drafting the EU law under the supervision of the legislator (*i.e.*, the EC). Hence, contrary to the GC's suggestion (para. 71-72 of the Judgment), this cannot be applied "by analogy" to standardization bodies.

81 In sum, it is to be held that the alleged commercial interest of the standardization bodies does not exist. Consequently, it was also not possible for the GC to justify its refusal of access to the four requested HS with an alleged negative effect on commercial interests under the first indent of Art. 4(2) Transparency Regulation. The GC's Judgment must thus be set aside.

II. SECOND PLEA IN LAW – ERROR IN OVERRIDING PUBLIC INTEREST

82 The GC incorrectly applied the exception provided in Art. 4(2) first indent Transparency Regulation according to which access to the four requested HS must be granted if there is an overriding public interest. An overriding interest for access to the four requested HS follows from the rule of law, which requires free access to the EU law. Such interpretation of the Transparency Regulation is necessary in order to enable or ensure the free access to the EU law and thus the four requested HS under the rule of law (see above paras. 30 et. seq.). The GC failed to recognize this and based its Judgment on erroneous considerations.

83 In essence, the GC criticized that the Applicants did not demonstrate specific reasons to justify their access request (paras. 98-101), and that the interest in ensuring the functioning of the European standardization system prevails over the guarantee of a freely available access to HS (paras. 102 to 103 of the Judgment). This is manifestly wrong.

84 First, the application relied on specific circumstances to justify the disclosure of the four requested HS rather than setting out purely general considerations as indicated by the GC (at para. 100 of the Judgment). The case law established that the overriding public interest justifying the disclosure of a document must not necessarily be distinct from the principles which underlie the Transparency Regulation (C-39/05 P and C-52/05 P, Sweden and Turco v Council, ECLI:EU:C:2008:374 paras. 74-75).

85 Based on this case law, the Applicants relied on specific reasons to justify an overriding public interest in disclosure:

- The Applicants identified that an overriding public interest arose from the fact the four requested HS form part of EU law and that the EU law should be freely available (see para. 88-103 of the Initial Action and also above paras. 19 et. seq.). The Applicants refer to these considerations in full (without just repeating them) for establishing an overriding public interest in disclosure under Art. 4(2) Transparency Regulation.

- The Applicants further submitted that the four requested HS deal with very important topics for consumers, namely toy safety and the maximum rate of Nickel as the top contact allergen and suspected carcinogen. Everybody should know their content in order to guarantee maximum toy safety and to further prevent cancer (cf. para. 41 of the Initial Action). To that end, compliance with HS plays an important role in protecting members of the public in the EU (particularly kids with respect to the requested HS) from potentially unsafe and harmful products.

- Finally, the Applicants further demonstrated that the four requested HS are very important for manufacturers and all other participants in the supply chain. The manufacturer has to know how to manufacture its products in order to comply with the relevant EU product regulation. Just looking at the relevant EU regulations or directives does not help as their scope is most often restricted to high-level regulatory requirements and as they thus do not contain any guidance on how to fulfil these requirements in practice. Therefore, the easiest and most common way for manufacturers is to comply with applicable HS (like the four requested HS) since there is a presumption of conformity with the respective EU product regulation when meeting the requirements of these standards (cf. para. 42-43 of the Initial Action).

86 All of these considerations are specific reasons qualifying for an overriding public interest in the case at hand. The GC's Judgment is thus flawed in that regard.

87 The GC also erred in holding that the interest in ensuring the functioning of the European standardization system prevails over the guarantee of access to HS (paras. 102-103 of the Judgment). It is already incorrect that the GC considered the functioning of the European standardization systems as whole. The case at hand is only about access to *four* requested HS. Hence, the whole standardization system is not at issue.

88 Further, the functioning of the European standardization system is a factor that is not related to the exception under the first indent of Article 4(2) Transparency Regulation. The exception only concerns the protection of commercial interests of a natural or legal person, including intellectual property. The functioning of the European standardization system does not fall under this exception. By considering this, the GC took into account factors that are extrinsic to Art. 4 Transparency. Thereby, the GC *de facto* created a new exception, which is fundamentally wrong (cf. C-64/05 P, Sweden v Commission, EU:C:2007:802 para. 66 et. seq.).

89 To that end, it should be noted that the Standardization Regulation was adopted by the European legislature approximately eleven years after and in full knowledge of the scope and effect of the Transparency Regulation. The legislature did not chose to introduce a special provision for restricted access to HS under the Transparency Regulation. In a similar vein, as pointed out by the Applicants, while the Standardization Regulation allows for paid access to HS, it does not require it, and the European standardization system could just as easily function without paid access. In fact, the Applicants have an interest in strengthening the rule of law, including the European standardization system, through wide access to HS which form part of EU law.

90 Equally, the GC erred at para. 104 of the Judgment in holding that the decision in *James Elliott Construction* does not create an obligation of proactive dissemination of the HS or an automatic overriding public interest in favour of disclosure.

91 Art. 12 Transparency Regulation requires that the 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 Art. 4 and 9 Transparency Regulation, be made directly accessible.

92 In that respect, the four requested HS must be characterized as legislative documents (within the meaning of Art. 12(2) Transparency Regulation) given that the procedure for their adoption is described – by the Advocate General in *James Elliot Construction* – as a form of "controlled" legislative delegation (C-613/14, ECLI:EU:C:2016:63 para. 55). Further, the ECJ has identified HS in that case as forming part of EU law and therefore within the jurisdiction of Art. 267 TFEU, whose purpose is to ensure the uniform application, throughout the EU, of all provisions forming part of the EU legal system and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by the various Member States (C-613/14, ECLI:EU:C:2016:821 para. 34).

93 In particular, once the reference to a HS is published in the OJ, the EC requires Member States to adopt each HS as a national standard without modification within six months. Publication in the OJ has the effect of conferring on products which are covered by the respective EU legislation, and which satisfy the technical requirements defined in the HS, the benefit of a presumption of conformity with the basic requirements of that directive allowing the CE mark to be affixed to them (C-185/08, Latchways and Eurosafe Solutions, ECLI:EU:C:2010:619 para. 31). Moreover, HS are fully effective in the sense that the imposition of additional requirements on products covered by HS is a breach of EU law which

may be enforced by the EC under Art. 258 TFEU (C-100/13, Commission v Germany, ECLI:EU:C:2014:2293, guiding principle).

94 The GC also erred at para. 107 of the Judgment in indicating that HS produce legal effects solely with regard to the persons concerned. This finding is contradictory to the ECJ's case law which found that HS form part of EU Law. In fact, the Irish Supreme Court which made the request for a preliminary reference in *James Elliott Construction* was seized with a private contractual dispute between a construction company (James Elliott Construction Limited) and the supplier of defective concrete blocks (Irish Asphalt Limited). James Elliott Construction Limited in turn had a contract with Ballymun Regeneration Limited to construct buildings as part of an urban generation scheme and had to incur significant costs to remediate damage due to the allegedly defective concrete blocks which it sought to recover from its supplier (cf. Judgment of 2 December 2014, *James Elliott Construction Limited v Irish Asphalt Limited* [2014] IESC 74 https://courts.ie/view/judgments/d132dd95-bcb5-4c91-994c-467676d1bc5a/46f4d4e2-d204-4610-924f-15542e459601/2014_IESC_74_1.pdf/pdf paras. 1-3, attached as **Annex A17**). This example illustrates that in addition to giving rise to obligations under public law, HS also have general applicability to purchasers, suppliers and users of products and services and may be relied on in private law disputes.

95 For the reasons set out above the GC erred in finding that there was no overriding public interest in access to the requested standards.

Based on the above-mentioned reasoning, the Judgment is flawed and must thus be set aside. Therefore, the Applicants request to

1. Set aside the judgment of the General Court of 14 July 2021 in Case T-185/19 and grant access to the requested documents (EN 71-4:2013, EN 71-5:2015, EN 71-12:2013, and EN 12472:2005+A1:2009),

2. In the alternative, refer the matter back to the General Court, and

3. Order the European Commission to pay the costs of the proceedings.

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