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EUROPEAN COMMISSION

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TO THE PRESIDENT AND THE MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

RESPONSE

submitted pursuant to Article 172 of the Rules of Procedure of the Court of Justice by the **European Commission** represented by Sandrine Delaude, Legal Advisor, and by Giacomo Gattinara and François Thiran, members of the Legal Service, acting as agents, with a postal address for service in Brussels at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, who consent to service by e-Curia,

in

Case C-588/21 P

Public.Resource.Org., Inc. and Right to Know CLG

– Appellants –

other Parties to the proceedings being

European Commission

– Defendant at first instance –

Comité européen de normalisation (CEN) and Others

– Interveners at first instance –

in which the Appellants request the Court to set aside the judgment of 14 July 2021 of the General Court (Fifth Chamber, Extended Composition) in case T-185/19, *Public.Resource.Org., Inc. and Right to Know CLG* v *European Commission*, EU:T:2021:445.

Contents

I. INTRODUCTION

1. In the judgment under appeal, which was notified to the Commission on 14 July 2021, the General Court rejected the Appellants' action for annulment against Commission's decision C(2019)639 final of 22.1.2019 refusing to grant access to four harmonised standards adopted by CEN. The General Court found in particular that the Appellants were wrong to claim that, 'since the Court of Justice held in the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821) that the requested harmonised standards formed part of 'EU law', those harmonised standards should be freely accessible without charge with the result that no exception to the right of access can be applied to them' (paragraph 54 of the judgment under appeal). The Commission was therefore entitled to refer to the first indent of Article 4(2) of Regulation 1049/2001[1] and to demonstrate that the disclosure of the requested documents would undermine the protection of the commercial interests of a third party (the interveners), including intellectual property (copyright in this case).

2. The Commission agrees with the General Court's findings in the judgment under appeal. The Commission agrees in particular that the four requested harmonised standards being part of EU law does not mean that they have to be disclosed automatically (or published in full).

3. The Appellants raise two grounds of appeal against the General Court's judgment. They allege that the General Court made: a) an error of assessment of the application of the exception in the first indent of Article 4(2) of Regulation 1049/2001 in relation to the requested documents and, b) an error in not recognising the existence of an overriding public interest in disclosure of those documents. The first ground of appeal is divided in two limbs: the error of assessment being in the first limb that the General Court erred in law in holding that the requested documents are protected by a copyright, and in the second limb that the General Court did not correctly assess the effect of disclosure on the commercial interests of the standardisation bodies.

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[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

4. The Appellants do not contest the parts of the judgment where the General Court rejects the second part of their second plea in first instance regarding the error of law relating to the existence of an overriding public interest owing to the obligation of transparency in environmental matters (paragraphs 109-130 of the judgment under appeal). The Appellants therefore do not anymore contend that the requested harmonised standards contain environmental information, which would result in an overriding public interest justifying their disclosure in accordance with Article 5(3)(b) of the Aarhus Convention[2], as implemented by Article 4(2)(a) of Regulation No 1367/2006[3].

5. The Appellants do not anymore either contend that Commission's decision C(2019)639 final of 22.1.2019 contained an inadequate statement of reasons for the Commission's refusal to recognise the existence of an overriding public interest (third part of the second plea in law in first instance of the Applicants – paragraphs 77-92 of the judgment under appeal).

6. The Commission's position is that the appeal is partially inadmissible and partially unfounded. In the present Response, the Commission will first briefly recall the relevant factual background and will then reply to the Appellants' arguments in the order they are presented in the Appeal.

II. FACTUAL BACKGROUND

7. The factual background directly pertaining to the present proceedings was set out by the General Court at paragraphs 1 to 4 of the judgment under appeal. Nonetheless, for the benefit of the Court, the Commission wishes to briefly recall the broader context in which these proceedings take place.

8. By their request of 25.9.2018, the Appellants sought public access to the following harmonised standards:

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[2] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ L 124, 17.5.2005, p. 1).

[3] 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 L 264, 25.9.2006, p. 13).

- CEN EN 71-5:2015 Safety of toys – Part 5: Chemical toys (sets) other than experimental sets,

- CEN EN 71-4:2013 Safety of toys – Part 4: Experimental sets for chemistry and related activities,

- CEN EN 71-12:2013 Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances,

- CEN EN 12472:2005+A1:2009 Method for the simulation of wear and corrosion for the detection of nickel release from coated items.

9. By letter of 15.11.2018, the responsible directorate-general of the Commission refused to give public access to the four harmonised standards, insofar as their disclosure could undermine the protection of commercial interests of a legal person, including intellectual property, in accordance with Article 4(2), first indent, of Regulation 1049/2001. The letter explained in particular, in relation with standardisation organisations, that 'Given their status as private organisations, they are the owners of their products. In other words, they possess the copyright on all documents, technical deliverables and publications, including European standards that are developed by them. As owners of the copyright, they are also free to decide whether they offer the use of their publications for a fee or free of charge (…). Consequently, the copyright and exploitation rights (distribution and sales) on any CEN publication (including draft European standards) belong exclusively to CEN and its national members from whom the (draft) standards can be obtained. (…) However, to the best of our knowledge, it is also possible to gain access to European standards for free. We were informed that there are public libraries that have the texts of the standards at their disposal and make them available free of charge. The national standardisation bodies might be in a position to provide you with further information on this'. It also noted that there was no overriding public interest justifying disclosure of the documents requested and that no meaningful partial access was possible without undermining the protected interests.

10. On 30.11.2018, the Appellants submitted a confirmatory application to the Commission seeking a review of the initial reply of 15.11.2018, pursuant to Article 7(2) of Regulation 1049/2001.

11. In its decision C(2019)639 final of 22.1.2019[4], the Commission confirmed the position taken by the responsible directorate-general in its initial reply. Commenting the *James Elliott Construction* judgement[5] referred to by the Appellants, the Commission explained that it has 'clarified the legal value of the harmonised standards. However, it does not have the effect of rendering Regulation 1049/2001 (…) ineffective'[6]. The Commission also replied to the allegation made in the confirmatory application that the four harmonised standards cannot be protected by copyright as they 'merely contain lists of factual information or procedures', by explaining that 'the texts of the standards, while taking into account the specific requirements provided for in the legislation they support, were drafted by its authors in a way that is sufficiently creative to deserve copyright protection. The length of the texts implies that the authors had to make a number of choices (including in the structuring of the document) (…)'[7]. The Commission further recalled that access to those documents requires payment of a fee and that their public disclosure would damage the commercial interests of their authors. The Commission explained on that regard that 'Economic operators and the public at large would not be willing to pay a fee in order to obtain a copy of the standard, if they could obtain it free of charge from the European Commission. That, in turn, would have implications on the income gained from the fees, which would significantly decrease. Consequently, the commercial interests of the [CEN] and its members would be undermined. (…)'[8]. Finally, in response to the confirmatory application saying that 'there is a constitutional imperative to publish the requested documents' as they form part of the law, the Commission explained that the *James Elliott Construction* judgment 'does not create the obligation of proactive publication of the harmonised standards in the Official Journal, nor does it establish an automatic overriding public interest in their disclosure'[9].

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4 Annex A.1 to the application in first instance.

5 Judgment of 27 October 2016, Case C-613/14, EU:C:2016:821.

6 Page 7 of Annex A.1 to the application in first instance.

7 Page 8 of Annex A.1 to the application in first instance.

8 Page 9 of Annex A.1 to the application in first instance.

9 Page 10 of Annex A.1 to the application in first instance.

III. RESPONSE TO THE FIRST GROUND OF APPEAL (ERROR OF ASSESSMENT OF THE APPLICATION OF THE EXCEPTION IN THE FIRST INDENT OF ARTICLE 4(2) OF REGULATION 1049/2001)

III.1. Response to the first limb (the General Court erred in law in holding that the requested documents are protected by a copyright)

12. By the first limb of their first ground of appeal, the Appellants contend that the General Court erred in law in holding that the requested documents are protected by a copyright, by relying on **two lines of argumentation**: (i) since the harmonised standards are part of EU law, they must be freely accessible (paragraphs 18 and 19-51 of the appeal), and (ii) even if the copyright protection were possible, the four harmonised standards requested do not meet the criteria for such protection (paragraphs 18 and 52-66 of the appeal).

III.1.1 As to the first line of argumentation (paragraphs 18 and 19-51 of the appeal): since the harmonised standards are part of EU law, they must be freely accessible

13. As to this first line of argumentation, the Commission considers the present appeal to be **inadmissible** *obscuri libelli*.

14. It follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and also from Articles 168(1)(d) and 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or the relevant ground of appeal will be declared inadmissible[10].

15. In their first line of argumentation, the Appellants fail to provide those contested elements (and in particular fail to provide the paragraphs of the judgment of the General Court that are being contested) and those legal arguments.

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[10] See, for example, judgment of 4 July 2000, C-352/98 P, Bergaderm and Goupil v Commission, EU:C:2000:361, paragraph 34; judgment of 8 January 2002, C-248/99 P, France v Monsanto and Commission EU:C:2002:1, paragraphs 68-70; judgment of 20 September 2016, C-105/15 P and C-109/15 P, Mallis and Mallis v Commission and ECB, EU:C:2016:702, paragraphs 33-34, and judgment of 20 September 2018, C-373/17 P, Agria Polska and others v Commission, EU:C:2018:756, paragraph 33.

16. Even when the Appellants mention in their appeal paragraphs 51 and 53 of the contested judgment, they then mainly repeat the same arguments that have been raised by them before the General Court, and therefore also fail to comply with the requirements of Article 169(2) of the Rules of Procedure of the Court of Justice, according to which *"[t]he pleas in law and legal arguments relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested*"[11]. Indeed, in their appeal, the Appellants put forward the same arguments regarding the "compulsory nature" of the harmonised standards (paragraph 93 of the action for annulment and paragraph 23 of the appeal). Furthermore, they repeat their claims regarding the free accessibility of EU law (paragraph 97 of the annulment action and paragraph 33 of the appeal; paragraph 98 of the annulment action and paragraph 37 of the appeal; and paragraphs 99-103 of the annulment action and paragraphs 42-45 of the appeal).

17. Moreover, the Appellants identify neither in the introductory part of the first line of argumentation (paragraphs 18-19) nor in the conclusion (paragraphs 46-50) any contested grounds of the judgment under appeal. Such a lack of precision should then entail the manifest inadmissibility of this part of the Appeal[12].

18. The first line of argumentation is inadmissible for a further reason: in paragraph 29 of the appeal, the Appellants state that Regulation No 1025/2012 on European standardisation[13] 'must comply with the rule of law'. However, the application lodged before the General Court was for the annulment of Commission Decision C(2019) 639 final of 22 January 2019 refusing to grant a request for access to four harmonised standards adopted by CEN, and the validity of Regulation No 1025/2012 on European standardisation has not be questioned in the framework of that action of annulment, since the Appellants did not raise a plea of illegality of that Regulation under Article 277 TFEU (as the General Court noticed in a paragraph of

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11 Emphasis added; in that sense, see, for instance, order of 15 May 2007, C 420/05 P, Ricosmos v Commission, ECLI:EU:C:2007:284, paragraphs 62 and following; judgment of 15 April 2021, FV v Council, C-877/19 P, EU:C:2021:284, paragraph 24.

12 Judgment of 4 October 2018, Staelen v European Ombudsman, C-45/18 P, EU:C:2018:814, paragraph 15.

13 Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ L 316 of 14.11.2012, p. 12).

the judgment under appeal[14]). The appeal therefore does not comply either with paragraph 1 of Article 169 of the Rules of procedure of the Court of Justice, which requires that '*An appeal shall seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision'*.

19. What is more, this paragraph of the judgment is not contested in the appeal (and more generally no plea of illegality of Regulation No 1025/2012 is clearly raised), the Appellants simply mentioning that that ground would be "irrelevant" (paragraph 29 of the appeal) or that the General Court would have erred in giving prevalence to the "interest in ensuring the functioning of the system" provided for in Regulation No 1025/2012 (paragraph 87 of the appeal; in the same vein, see paragraph 83), without however questioning explicitly the legality of the provisions contained therein.

20. Accordingly, the Commission regards that the first line of argumentation of the first limb of the first plea is inadmissible, in view of the Appellants' failure to set out clearly the points contested and the legal arguments specifically advanced, and as the appeal mainly repeats the same arguments already put forward by the Appellants before the General Court.

21. The Commission will therefore only respond **on a subsidiary basis** to the substance of the first line of argumentation, in the following paragraphs.

22. After referring to the *James Elliott Construction* judgment stating that the harmonised standards at stake in that case are part of EU law, the Appellants contend that because 'the EU is founded on the rule of law', all persons must have free access to the law and therefore to the harmonised standards like the ones requested (paragraphs 19, 25-46 and 82 of the appeal).

23. **At the outset**, the Commission considers it important to clarify that the rule of law, as the freedom, the democracy etc, is one of the values on which the Union is founded (Article 2 TEU). It results from the case-law of the Court of Justice that the

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[14] The judgment under appeal recalls this in its paragraph 103: 'In the second place, the approach chosen by the applicants, which seek court-mandated freely available access to the harmonised standards that is without charge by means of the mechanism established by Regulation No 1049/2001, <u>without however challenging the European standardisation system</u>, cannot be regarded as appropriate. (…)' (emphasis added).

values are not invoked alone, but in connection with specific obligations found in the Treaties[15]. The Commission therefore considers paragraphs 25-31, 43-44 and 49-50 of the appeal (and the annexes A.2 and A.7-A.14 referred to in those paragraphs), as irrelevant as they are only based on the rule of law (and sometimes even based on the rule of law in other legal systems as the UK or US system for instance – see for instance paragraph 32 and Annex A.7 of the appeal and paragraphs 49-50 and Annex A.2).

24. However, the Appellants also briefly refer to Article 297 TFEU: 'The TFEU therefore provides in Article 297 that all EU law must be published in the OJ' (paragraph 32 of the appeal), and to the *Skoma-Lux* judgment[16] and *Consorzio del Prosciutto di Parma* judgment[17] (paragraphs 33 and 35 of the appeal).

25. The Commission would like to make the following points on these regards.

26. First, Article 297 TFEU does not provide that all EU law must be published in the Official Journal as it only provides for the publication of the legislative acts (as defined in Article 289 TFEU) and of '*Regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed*'. Article 297 TFEU expressly provides that '*other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed …*'. Obviously, the four harmonised standards do not fall in the legal acts of the Union (as defined in Article 288 TFEU: regulations, directives, decisions, recommendations and opinions) which are subject to Article 297 TFEU[18]. Indeed, as the General Court further observed in paragraph 118 of the judgment under appeal (that the Appellants did not challenge), "the requested

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15 See for instance judgement of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, EU:C:2018:117, paragraph 32: '*Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (...)'.*

16 Judgment of 11 December 2007, C-161/06, Skoma-Lux, EU:C:2007:773, paragraph 38.

17 Judgment of 20 May 2003, C-108/01, Consorzio del Prosciutto di Parma et Salumificio S. Rita, EU:C:2003:296, paragraphs 95-96.

18 See also the judgment of 15 October 2015, C-251/14, György Balázs, EU:C:2015:687, paragraphs 50-54 in particular, where the Court held that Article 1(6) of Directive 98/34 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), as amended by Council Directive 2006/96/EC, 'must be interpreted as meaning that it does not require a national standard within the meaning of that provision to be made available in the official language of the Member State concerned'.

harmonised standards do not, however, fall within the category of EU legislation, which is strictly circumscribed by the Treaties and comes within the exclusive competence of the EU's own institutions entrusted with powers in that regard" (emphasis added). Thus, the Appellants could not even plead for a wide interpretation of the word "*legislation*", without breaching the principle of conferred powers enshrined in Article 5(2) TEU, according to which EU institutions, including those with legislative competencies, have only the powers conferred upon them by the Treaties; hence there cannot be a legislator beyond that indicated in primary law. In this regard, the Commission also recalls that pursuant to Article 289 TFEU, an act can be classified as a legislative "only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure" (emphasis added).[19] The legislative acts here at stake have all been published in the Official Journal, and they contain the essential elements on which only the legislative authority can decide[20]. On the contrary, the four harmonised standards, which are only technical and accessory, do not have to be published in the Official Journal, even if they are part of EU law.

27. Second, the references made in paragraphs 37-39 of the appeal to the European Court of Human Rights judgments enclosed in Annexes A.9-A.11 to the appeal and which interpret the words '*prescribed by the law*' used in several articles of the Convention, or the references made in paragraphs 40-42 of the appeal to national case-law enclosed in Annexes A.12-A.14 to the appeal and relating for instance to the publicity of Irish 'non-statutory administrative measures', or to the UK 'formulated policy statements' in the field of 'immigration detention powers' do not change this conclusion that not all EU law must be published in the Official Journal.

28. Third and in a similar vein, the 'two further elements laid down in the EU Treaties' referred to in paragraph 45 of the appeal that would 'require free access to the law' (namely, on the one hand, the free movement of goods – Article 34 TFEU - and the freedom to provide services – Article 56 TFEU, and, on the other hand, the principle of good administration – Article 298 TFEU and Article 41 of the Charter) have not

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19 Judgment of 6 September 2017, *Slovak Republic and Hungary* v *Council*, Joined Cases C-643/15 and C-647/15, EU:C:2017:631, paragraph 62.

20 See Article 290 TFEU on the requirement to have the essential elements of a legislative act adopted by the legislative authority.

such bearing that all EU law should be published in the Official Journal, and in any event they do not discard Article 297 TFEU or Regulation 1049/2001.

29. Fourth, when the Appellants recall in paragraph 36 of their appeal that Recital 6 of Regulation 1049/2001 states that 'Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, …. Such documents should be made directly accessible to the greatest possible extent', this corresponds to Article 12(2) of Regulation 1049/2001 which provides that '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', but is not corresponding to the present case where access is requested to four harmonised standards, and in any event, disregards the fact that such direct access is also subject to the exception of the first indent of article 4(2) of Regulation 1049/2001.

30. Fifth, the Appellants refer in paragraph 48 of the appeal and Annex A.15 to the answer given by the Commission to a parliamentary question[21], but do not quote the whole statement made by the Commission, which explains clearly that '*The question whether official texts of a legislative, administrative and legal nature* [in the sense of Article 2(4) of the Berne Convention for the protection of literary and artistic works] *are subject to copyright protection has been dealt with differently by legislators in the Member States. In Germany for example, the legislator has clearly opted not protect official texts. At Community level, while there is no specific legal provision which applies, the Commission is of the view 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'* (emphasis added). The four harmonised standards are not emanating from the EU institutions. In a similar vein, when referring to the reuse of Commission documents in paragraph 48 of the appeal and Annex A.16, the Appellants overlook that, according to the applicable Commission Decision[22], the reuse is not applicable to '*documents*

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21 Answer given to the written question E-1841/00 on 'Copyright protection of Community legal texts in the CELEX data bank' (OJ 089 E, 20.3.2001, p. 95).

22 Commission Decision of 12 December 2011 on the reuse of Commission documents (OJ L 330, 14.12.2011, p. 39).

for which the Commission is not in a position to allow their reuse in view of intellectual property rights of third parties' and to '*documents which pursuant to the rules established in Regulation 1049/2001 are excluded from access (...)*'.

31. Sixth, the reference of the Appellants to the judgments in *Skoma Lux* and *Prosciutto di Parma*, recalled above, is also irrelevant, in so far as in those cases the non-opposability of a legal provision did not stem from the lack of publication as such, but from the lack of publication in the language of the concerned person or of the Member State at issue. Conversely, in the case at hand, it is undisputed that the references of the four harmonised standards having been published in the Official Journal (see also *ex plurimis* paragraph 53 of the judgment under appeal), that publication took place in all official languages.

32. These clarifications having been made, the Commission will however try to address the two criticisms which are made to elements of the judgment under appeal (namely **paragraphs 51 and 53 of the judgment under appeal)** in the first line of argumentation of the first limb of the first ground of appeal (and more precisely in paragraphs 20-24 of the appeal).

33. In paragraphs 20-24 of the appeal, the Appellants state that the four requested harmonised standards are part of EU law.

34. However, it is not disputed by the General Court that, for the same reasons than the ones given in paragraph 40 of the *James Elliott Construction* judgment ('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'), the four harmonised standards requested are part of EU law. The Appellants acknowledge that in paragraph 21 of the appeal ('The General Court seems to have accepted this starting point in the judgement (see para. 52) … ').

35. Therefore, as it is not disputed by the General Court that the four requested harmonised standards are part of EU law, paragraphs 20-24 of the appeal are irrelevant. In particular, even if the Commission considers that the description given

under paragraph 24 of the appeal is not fully accurate (as the role played by the Commission in the drafting of the harmonised standards, the funding provided by the Commission to CEN, the role played by the general guidelines and the role played by the European Parliament are overstated), the Commission will not expand more as it considers the entire paragraph 24 of the appeal (and the annexes A.4-A.6 referred to in this paragraph) as irrelevant, in that it alleges that the Commission 'significantly controls the procedure for the drafting of the harmonised standards', with the aim to demonstrate that 'the drafting of the harmonised standards shows that they are part of the law'.

36. According to the Appellants, the General Court was 'wrong' in alleging in **paragraph 53 of its judgment** that the Court of Justice 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' as, according to the Appellants, the Court of Justice 'did not rule about the standardisation system including the publication of the harmonised standards in James Elliott Construction' (paragraph 21 of the appeal).

37. The *James Elliott construction* case was a request for a preliminary ruling in interpretation, not in validity. In the judgment delivered in that case, the Court of Justice therefore did not examine whether Regulation No 1025/2012 on European standardisation was valid, or was invalid in the light of Treaty provisions.

38. Hence the Appellants do not establish in which manner the General Court erred in law in paragraph 53 of its judgment under appeal, when stating that 'It should be noted, as has the Commission, that it is in no way apparent from the judgment of 27 October 2016, James Elliott Construction (C-613/14, EU:C:2016:821), that the Court of Justice declared 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. (…)'.

39. In addition, according to the Appellants, the General Court 'allegation' in **paragraph 51 of the judgment** under appeal that 'compliance with the harmonised standards is not compulsory' is 'flawed' as, first, Article 2, point c, of Regulation No 1025/2012 on European standardisation 'does not say anything about the compulsory nature of harmonised standards' and as, second, 'with respect to the

four requested harmonised standards, this is also not correct' (paragraph 22 of the appeal).

40. In paragraph 51 of the judgment under appeal, the General Court stated only, in connection to the discussion over the *James Elliott Construction* judgment (see paragraphs 50 and 52 of the judgement under appeal), that 'In that regard, it must be borne in mind that a harmonised standard is defined in Article 2(c) of Regulation No 1025/2012 as a technical specification adopted by a European standardisation organisation on the basis of a request made by the Commission for the application of EU harmonisation legislation, with which compliance is not compulsory'.

41. By so stating, the General Court did not err in law, as in the *James Elliott Construction* case, non-compulsory harmonised standards were at stake, and as, in any event, first, the compulsory or non-compulsory nature of harmonised standards was not relevant to 'call into question the existence of the legal effects of a harmonised standard' (paragraph 42 of the *James Elliott Construction* judgment), and, second, the judgment under appeal does not challenge that the four requested harmonised standards are part of EU law.

42. Thus, in their first line of argumentation (paragraphs 19-51 of the appeal), the Appellants claim that because the four requested harmonised standards are part of EU law, they must be freely accessible under the rule of law. The judgment under appeal does not challenge that the four requested harmonised standards are part of EU law, and it does not contest that a system of publication of harmonised standards is necessary. It only recalls that, from the *James Elliott Construction* judgment, 'it is in no way apparent (…) that the Court of Justice declared 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. On the contrary, the Court pointed to the choice of the EU legislature to make the legal effects attached to a harmonised standard subject solely to the prior publication of its references in the C Series of the Official Journal (judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraphs 37, 40 and 43)'. The Appellants simply repeat the position they expressed in their initial action for annulment but do not challenge the reasoning of the General Court: they do not demonstrate why the General Court would err in law in referring, in connection to

the four requested harmonised standards, to a system of prior publication in the Official Journal of their references.

43. It follows that the first line of argumentation should be dismissed at least as unfounded, if not inadmissible.

III.1.2 As to the second line of argumentation (paragraphs 52-66 of the appeal): the four harmonised standards requested do not meet the criteria for the copyright protection

44. The Appellants allege in paragraphs 52-53 of the appeal that the judgment under appeal erred in law, first, in finding that 'the EU institutions lacked jurisdiction to examine whether the four requested harmonised standards were protected by copyright since this was a matter for Member States' (paragraph 57 of the judgment under appeal – **first allegation**) and, second, in finding that 'the four requested harmonised standards were protected by copyright' (paragraphs 47-54 of the judgment under appeal – **second allegation**).

45. As a preliminary remark, the Commission notes that the Appellants do not contest paragraphs 35-46 of the judgment under appeal.

46. In paragraph 37, the judgment under appeal states that the Appellants 'criticise the Commission for not verifying that the conditions for the existence of copyright over the requested harmonised standards in favour of CEN were satisfied. In so doing, they implicitly but necessarily recognise the Commission's power to carry out an exhaustive review of the existence and consequences of alleged copyright protection for requested third party documents' (emphasis added).

47. In paragraph 43 of the judgment under appeal, the General Court held that 'it is for the authority which has received a request for access to third-party documents, where there is a claim for copyright protection for those documents, inter alia, to identify objective and consistent evidence such as to confirm the existence of the copyright claimed by the third party concerned. Such a review corresponds in fact to the requirements inherent in the division of competences between the European Union and the Member States in the field of copyright' (emphasis added).

48. In paragraphs 45-46 of the judgment under appeal, the General Court examined whether the Commission complied with the scope of the review which it was required to carry out, by analysing the initial refusal decision and the confirmatory decision.

49. In paragraph 47 of the judgment under appeal, the General Court concluded positively as follows: 'It follows that the Commission based its finding on the existence of copyright protection for the requested harmonised standards on objective and consistent evidence such as to support the existence of the copyright claimed by CEN for those standards' (emphasis added).

50. The appeal therefore cannot validly challenge this conclusion, contrary to what the Appellants contend in their **second allegation of their second line of argumentation (paragraphs 61-66 of the appeal)**, which is **inadmissible** when the Appellants contend in paragraph 64 of the appeal that 'it is clear from the judgment [under appeal] that neither the General Court nor the [Commission] examined the originality of the four requested harmonised standards', or that the General Court and the Commission 'only relied on general allegations and assumptions' as to the copyright protection.

51. Moreover, and in any event, the second allegation of the second line of argumentation (paragraphs 61-66 of the appeal) according to which the four requested harmonised standards were not protected by copyright is **ineffective** as legislative acts themselves implicitly recognise that harmonised standards are protected by copyrights, and as their legality was not challenged by the Appellants. Regulation No 1025/2012 on European standardisation (and the applicable sectoral legislation[23]) indeed provides that special rates for the provision of harmonised standards will apply to SMEs (article 6(1), point f of Regulation No 1025/2012), that free access will be provided only to draft standards or abstracts of standards (article 6(1), point d and e, of Regulation No 1025/2012) and that only a reference of the harmonised standards will be published in the Official Journal (article 10(6) of Regulation No 1025/2012).

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[23] See for instance Article 27 of Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170, 30.6.2009, p. 1).

52. The second allegation of the second line of argumentation (paragraphs 61-66 of the appeal) according to which the four requested harmonised standards were not protected by copyright is also **ineffective** as it does challenge what the judgement under appeal explains in its paragraph 43 as to what is requested from the Commission in terms of review, and the positive assessment made by the General Court of the Commission review in paragraph 47 of the judgment under appeal. Indeed, what is requested from the Commission is not to establish definitely that a copyright exists on a document, but to carry out a review that there are 'objective and consistent evidence such as to support the existence of the copyright claimed' on the document.

53. As to the Appellants' **first allegation of their second line of argumentation (paragraphs 53-60 of the appeal)**, that paragraph 57 of the judgment under appeal erred in law in finding that 'the EU institutions lacked jurisdiction to examine whether the four requested harmonised standards were protected by copyright since this was a matter for Member States', it is **unfounded**.

54. As previously explained, the General Court, in paragraph 47 of the judgment under appeal, detailed the Commission role when assessing the request for access to documents, which consists in checking 'the existence of copyright protection for the requested harmonised standards on objective and consistent evidence such as to support the existence of the copyright claimed by CEN for those standards'. But as only the national courts are competent to establish definitely whether there is copyright protection under national law, the General Court has rightly added that 'the Commission was not authorised, contrary to the applicants' arguments, to examine the conditions required by the applicable national law for the purpose of checking the veracity of copyright protection for the requested harmonised standards as such an examination goes beyond the scope of the review which it was empowered to carry out in the procedure for access to document' (emphasis added).

55. It is legally funded that the Commission can and must review whether there are objective and consistent evidence of copyright protection, in order to apply correctly the first indent of Article 4(2) of Regulation 1049/2011, but cannot adjudicate definitely as a national court would do on this matter.

56. It follows that the second line of argumentation should be dismissed as partially inadmissible or partially ineffective and partially unfounded.

57. In light of the foregoing considerations, the first limb of the first ground of appeal should be dismissed as partially inadmissible or partially ineffective and partially unfounded.

III.2. Response to the second limb (the General Court did not correctly assess the effect of disclosure on the commercial interests of the standardisation bodies)

58. By the second limb of its first ground of appeal, the Appellants argue, in essence, that the General Court erred in law in holding that disclosing the requested documents would undermine the protection of the commercial interests of the standardisation organisations like CEN, by relying on **two lines of argumentation**: (i) in paragraph 97 of the judgement under appeal, the General Court erred in law when holding that the Commission was entitled to rely on a general presumption that the interests protected by the first indent of Article 4(2) of Regulation 1049/2001 would be undermined, and (ii) the General Court did not correctly assess the specific effects resulting from access to the four harmonised standards requested (paragraphs 67-68 of the appeal).

59. **As a preliminary remark**, the Commission will note that should the first limb of the first ground of appeal (concerning the copyright) be dismissed, the second limb (concerning the commercial interests) will be **ineffective**. Indeed, as paragraph 64 of the judgment under appeal rightly explains, 'In the present case, it is clear from the confirmatory decision that the Commission based its refusal to disclose the requested harmonised standards on two connected but different infringements of the commercial interests of CEN and its national members, namely, first, the protection of those harmonised standards by copyright and, secondly, the risk of a very large fall in the fees collected by CEN and its national members in return for access to those harmonised standards, if access to them could be obtained free of charge from the Commission'.

III.2.1 As to the first line of argumentation (paragraphs 68-74 of the appeal): the requested documents are not covered by a general presumption of confidentiality

60. The Appellants explain that the four harmonised standards requested are ‘not within any of the categories of documents in respect of which there is a general presumption of confidentiality’ (paragraph 73 of the appeal).

61. The Commission does not contest that legal stance, and has never alleged in the course of the procedure that a general presumption of confidentiality would apply to the harmonised standards. What the Commission explained in its initial reply of 15.11.2018 is that it had ‘considered whether partial access could be granted to the document/documents requested. However, the disclosure of only some parts of the documents requested cannot be granted as the documents requested are covered by the exception mentioned above in their entirety’. This shows that the Commission has performed a specific assessment of the documents.

62. The judgment under appeal does not decide that a general presumption of confidentiality applies in the present case: paragraph 97 of the judgement under appeal is part of the assessment made in paragraphs 93-108 of the judgment under appeal of the question whether there was an overriding public interest in disclosure of the requested documents. It is not part of the assessment made in paragraphs 25-74 of the judgment under appeal of the question whether the exception of the first indent of Article 4(2) of Regulation 1049/2001 applies.

63. This means that the statement made under paragraph 97 of the judgment under appeal has not the effect, nor the purpose, of creating a new general presumption of confidentiality in favour of harmonised standards, and has no bearing on the assessment of whether the exception of the first indent of Article 4(2) of Regulation 1049/2001 applies.

64. Indeed, a general presumption of confidentiality is only relevant in connection with the assessment of whether an exception provided in Regulation 1049/2001 applies, by releasing the institution from its obligation to perform this assessment document by document.

65. Hence, paragraph 97 of the judgment under appeal is not pertinent to the line of argumentation advanced by the Appellants within the context of the second limb of the first ground of appeal.

66. It follows that the first line of argumentation is ineffective[24] and should be rejected.

III.2.2 As to the second line of argumentation: the General Court did not correctly assess the specific effects on commercial interests resulting from access to the four harmonised standards requested (paragraphs 75-81 of the appeal)

67. The Appellants contend that the judgment is 'fundamentally wrong' (paragraph 75 of the appeal) by endorsing the Commission position that there is 'the risk of a very large fall in the fees collected by CEN and its national members in return for access to those harmonised standards, if access to them could be obtained free of charge from the Commission' (paragraph 64 of the judgment under appeal). This, first, because 'here, relevant is only the effect on the commercial interest resulting from the [Appellants]' access to four requested harmonised standards'; second, because 'these harmonised standards are already accessible for free in certain libraries' (paragraph 77 of the appeal); third, because 'access to the four requested harmonised standards was without prejudice to copyright (Article 16 of [Regulation 1049/2001])' (paragraph 78 of the appeal) and fourth, because standardisation bodies are producing EU law and acting 'as public authorities by performing public functions that are not subject to any commercial interest' (paragraph 79 of the appeal).

68. The Commission will rebut hereafter each of these allegations, in turn.

69. First, while it is true that the present case concerns only four specific harmonised standards, giving access to them would obviously have systemic effects, as disclosing those standards to the Appellants would mean, on the one hand, making them available to the public at large (and therefore depriving CEN and its members from any intellectual property right on them), and, on the other hand, being obliged to give access to all the other harmonised standards (and therefore deprive CEN and its members from any intellectual property right on all the harmonised standards), as the Commission should act consistently as an administration. The General Court therefore rightly held that '… the sale of standards is a vital part of the standardisation bodies' business model. Freely available access to those standards without charge would call that model into question and would oblige those bodies to

[24] See, in this regard, judgments of 2 October 2003, C-182/99 P, Salzgitter v Commission, EU:C:2003:526, paragraph 54 and C-194/99 P, Thyssen Stahl v Commission, EU:C:2003:527, paragraph 46.

reconsider entirely the way in which they are organised, thus creating significant risks for the production of further standards and the possibility of having a method which shows that a product is deemed to comply with the requirements established by EU legislation by using a uniform method' (paragraph 65 of the judgement under appeal).

70. It also follows that the Appellants cannot validly put into question the control on the alleged error of assessment on the effects of disclosure on commercial interests as allegedly carried out by the General Court only "*in general*" (paragraph 77 of the appeal). Clearly enough, should the harmonised standards be subject to full disclosure as a result of the request of the applicants in first instance, the effects of this precedent would have affected the whole system of production of harmonised standards. The General Court was then fully entitled to consider that public access would have jeopardized the "*model*" of harmonised standards' production (paragraph 65 of the judgment under appeal).

71. In turn, the Appellants cannot validly put forward the argument that the General Court's considerations would "*practically mean*" that copyright protection "*systematically*" takes precedence over right of public access (paragraph 76 of appeal). As the paragraphs 61-74 of the judgment under appeal confirm, the General Court did not confine its review to the issue of copyright. It also assessed whether disclosure would have been detrimental to commercial interests, as also explained at paragraph 64 of the judgment under appeal, which the Appellants did not challenge.

72. Second, the free access to some harmonised standards in some libraries of some Member States cannot be put on the same footing than a free access to all the harmonised standards on a simple request sent to the Commission. This is in particular surprising in the light of what the Appellants alleged in front of the General Court as to the possibility to consult harmonised standards in Member States libraries[25].

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[25] See paragraph 21 of the judgment under appeal: 'That is all the more the case since, as the applicants maintain without being contradicted on that point by the Commission or the interveners, the requested harmonised standards are available only in a very limited number of libraries, sometimes only in one library in a Member State or in libraries which are not open to the public, and their accessibility is excessively difficult in practice'.

73. Third, and once again, once access is given to a document to someone, it is given to the public at large. Indeed, documents released under Regulation 1049/2001 are available to everyone (erga omnes). This is why applications based on Regulation 1049/2001 do not have to state the reasons for which the access is sought, or the quality of the person requiring access. This free and automatic general access is hardly compatible with copyrights.

74. Fourth, the standardisation organisations are not public authorities performing public functions[26], as the EU institutions are.

75. It follows that the second line of argumentation should be dismissed as unfounded.

76. In light of the foregoing considerations, the second limb of the first ground of appeal should be dismissed as unfounded. Consequently, the first ground of appeal should be dismissed in its entirety.

IV. RESPONSE TO THE SECOND GROUND OF APPEAL (OVERRIDING PUBLIC INTEREST IN DISCLOSURE)

77. By its second ground of appeal, the Appellants essentially argue that the General Court erred in law in holding that there was no overriding public interest in the disclosure of the requested documents within the meaning of the last sentence of Article 4(2) of Regulation 1049/2001.

78. The Appellants contend in particular that the judgment under appeal was 'manifestly wrong' for two reasons: first, in holding that they 'did not demonstrate specific reasons to justify their access request (paragraphs 98-101 [of the judgment under appeal])', and, second, in holding that the interest in ensuring the functioning of the European standardization system prevails over the guarantee of a freely available

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[26] See in particular on this regard paragraphs 70-71 of the judgment under appeal:

' 70 Contrary to the applicants' submission, it is in no way apparent from the provisions governing the European standardisation system that, in the standards development process, CEN acts as a public authority by performing public functions which are not subject to any commercial interests.

71 The fact that the European standardisation organisations, including CEN, contribute to the performance of tasks in the public interest by providing certification services relating to compliance with the applicable legislation does not in any way alter their status as private entities engaged in an economic activity (see, to that effect and by analogy, judgment of 5 December 2018, *Falcon Technologies International* v *Commission*, T-875/16, not published, EU:T:2018:877, paragraph 47)'.

access to harmonized standards (paragraphs 102-103 of the judgment)' (paragraph 83 of the appeal).

79. In connection with their **first line of argumentation**, the Appellants list the following specific reasons for an overriding public interest in disclosure (paragraph 85 of the appeal): (i) the requested documents form part of EU law and the EU law should be freely available; (ii) the four requested harmonised standards 'deal with very important topics for consumers', like toy safety; and (iii) they 'are very important for manufacturers and all other participants in the supply chain': 'just looking at the relevant EU regulations or directives does not help'.

80. Those three reasons can actually apply to any disclosure request relating to any harmonised standard. They are general reasons, as highlighted by paragraph 89 of the appeal: « the Applicants have an interest in strengthening the rule of law, including the European standardization system, through wide access to harmonised standards which form part of EU law ».

81. The Commission will consider hereafter each of these 3 reasons, in turn.

82. As to the first reason, the Commission has already explained supra why it is not contested, neither by the Commission nor by the judgment under appeal, that, based on the *James Elliott Construction* judgment, the four requested harmonised standards are part of EU law, but why this does not imply that they should be freely available.

83. As to the second reason, as the General Court rightly held at paragraphs 98, 100 and 101of the judgment under appeal, these arguments are too general in nature to be capable of prevailing over the reasons justifying the refusal to disclose the documents in question. Whilst the Appellants are correct in stressing the importance of the toy safety and public health, the very general statements made at point 85 of the appeal are too vague to provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing[27].

84. As to the third reason, it suffices to note that the interest in the harmonised standards that manufacturers and other participants in the supply chain have in order to gain

[27] Judgment of 21 September 2010, C-514/07 P, C-528/07 P and C-532/07 P, Sweden and others v API and Commission, EU:C:2010:541, paragraphs 157-158.

access to the internal market cannot be qualified as an overriding public interest in disclosure.

85. It follows that the first line of argumentation should be dismissed as unfounded.

86. In connection with their **second line of argumentation**, the Appellants first insist on the fact that 'the case at hand is only about access to four requested harmonised standards. Hence, the whole standardization system is not at issue' (paragraph 87 of the appeal). They then add that 'the functioning of the European standardization system is a factor that is not related to the exception' of the protection of commercial interests of a natural or legal person, including intellectual property provided for in Article 4(2), first indent, of Regulation 1049/2001 (paragraph 88 of the appeal). Further, they explain that the four requested harmonised standards 'must be characterized as legislative documents' (within the meaning of Article 12(2) of [Regulation 1049/2001]' and therefore made directly available to the public (paragraphs 91-92 of the appeal). Finally, referring to annex A.17 and the Irish Supreme Court ruling of 2 December 2014 delivered prior to the *James Elliott Construction* judgment of the Court of Justice, the Appellants claim that the judgment under appeal erred in law in paragraph 107 when stating that the harmonised standards 'produce the legal effects attached to them solely with regard to the persons concerned', as 'harmonised standards also have general applicability to purchasers, suppliers and users of products and services and may be relied on in private law disputes' (paragraph 94 of the appeal).

87. As to the first and second arguments, the Commission has already rebutted them supra, when explaining that while it is true that the present case concerns only four specific harmonised standards, giving access to them would obviously have systemic effects on CEN and its members, and those effects are on both their intellectual property rights and commercial income. The allegation in paragraph 89 of the appeal that 'while the standardization Regulation allows for paid access to harmonised standards, it does not require it, and the European standardization system could just as easily function without paid access' is totally unsubstantiated. In any event, all these arguments and allegations are related to the exception of Article 4(2) of Regulation 1049/2001 itself, not to the overriding public interest in disclosure.

88. As to the third argument, it is recalled that, in accordance with Article 12(2) of Regulation 1049/2001, legislative documents are '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', and that this definition cannot encompass harmonised standards. Indeed, harmonised standards are not drafted in the course of legislative procedures, but on the basis of a mandate given by the Commission to a standardization body subsequently to the enactment of a legislative act. In addition, harmonised standards, once adopted by a standardisation body, have to be transposed into national standards by the national members of the standardisation body, and following the internal procedural rules of the body. Neither the legislator, nor the Commission, nor the Member States play a role on this regard. In any event, the direct access provided for in Article 12(2) of Regulation 1049/2001 is also subject to the exception of the first indent of article 4(2) of Regulation 1049/2001.

89. As to the last argument, it suffices to note that the General Court is right when saying that harmonised standards are mainly relevant for specific persons, namely manufacturers/economic operators and public authorities.

90. It follows that the second line of argumentation should also be dismissed as unfounded, and that therefore the second ground of appeal should be dismissed as unfounded.

V. CONCLUSION

91. In the light of all the foregoing, the Commission respectfully requests the Court to:

– reject the Appeal as partially inadmissible and partially unfounded,

– order the Appellant to bear the costs.

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Agents for the Commission