Date of acceptance : 26/01/2022

Published ID	:	C-588/21 P
Document number	:	9
Register number	:	1211063
Date of lodgment	:	20/01/2022
Date of entry in the register	:	21/01/2022
Type of document	:	Response
	:	Document
e-Curia lodgment reference	:	DC160321
File number	:	1
Person lodging document	:	Kathrin Dingemann (R288088) AFNOR, CEN e.a.

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Berlin, 20 January 2022 **Reg.-No.:** 14/002357-19

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RESPONSE

submitted in accordance with Article 172
of the Rules of Procedure of the Court of Justice

on behalf of

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    Stevana Brakusa 2, 11030 Beograd, Serbia,

– **interveners at first instance** –

by Kathrin Dingemann, Dr Matthias Kottmann and Dr Korbinian Reiter, lawyers,

to the appeal in Case **C-588/21 P**

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

v

European Commission,

served on the interveners at first instance on 12 November 2021,

seeking the dismissal of the appeal in whole.

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(1) With their appeal, the appellants seek to gain access to four harmonised standards under Regulation No 1049/2001, which they intend to publish on the internet. Access was refused by the Commission and the General Court since the requested standards are copyright protected and their disclosure would undermine not only the commercial interests of the interveners at first instance (hereinafter: interveners), whose business model relies vitally on the sale of standards, but ultimately also the functioning of the European standardisation system. To challenge the refusal of access, the appellants attempt to make use of the *James Elliott* ruling.[1] In that case, the Court considered that harmonised standards 'form part of EU law' to justify its competence under Article 267 TFEU for their interpretation. In the appellants' view, it follows from that judgment, in conjunction with the principles of the rule of law and legal certainty, that the requested standards must be excluded from copyright protection and, in any event, be accessible free of charge.

(2) The interveners respectfully ask the Court to dismiss the appeal. As will be shown in the following, the General Court ought to have declared the application inadmissible at the outset since the appellants do not have an interest in bringing proceedings. In any case, the General Court rightfully held the application to be unfounded.

(3) To the extent that the appellants challenge the General Court's finding that the requested harmonised standards meet the threshold of originality required to enjoy copyright protection, they essentially ask the Court to re-examine a factual assessment, which is evidently inadmissible in the context of an appeal. Otherwise, the appellants' claim is – manifestly and undisputedly – incompatible with the system established by the Standardisation Regulation No 1025/2012, which was not challenged by the appellants before the General Court. In any event, the claim remains based on a profound misreading of the *James Elliott* ruling and the principles of the rule of law and legal certainty.

A.
Partial inadmissibility of the appeal

(4) The appeal is inadmissible inasmuch as the appellants ask the Court to 'grant access to the requested documents'.[2] The Court has neither the power to grant access to the requested harmonised standards itself, nor to issue directions to the Commission.[3]

(5) The appeal is also inadmissible inasmuch as the appellants rely on new factual evidence submitted to the Court in the annexes to the appeal. That concerns, in particular, the

1 Judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821.

2 Appeal, first head of claim and paragraph 10.

3 Order of 1 October 2019, *Clarke v Commission*, C-284/19 P, EU:C:2019:799, paragraph 41; judgment of 25 July 2018, *Orange Polska v Commission*, C-123/16 P, EU:C:2018:590, paragraph 118, and the case-law cited.

judgments of national courts submitted by the appellants,[4] which qualify as facts for the purpose of the present appeal.[5] Pursuant to the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, appeals lie on points of law only, to the exclusion of any assessment of the facts, therefore rendering new evidence inadmissible at the appeal stage.[6]

B.
Inadmissibility of the application

(6) The General Court erroneously accepted, in paragraphs 15 to 23 of the judgment under appeal, that the appellants had an interest in bringing proceedings. The Court should therefore proceed to a substitution of grounds and dismiss the appeal in whole due to the inadmissibility of the application.

(7) Any action for annulment brought by a natural or legal person must be based on an interest on the part of the applicant in bringing proceedings.[7] It is for the natural or legal person to prove the existence of such an interest. Non-compliance with that essential prerequisite constitutes an absolute bar to proceeding with a case. The EU Courts must raise a lack of interest to bring proceedings of their own motion at any time,[8] including at the stage of an appeal.[9]

(8) In the view of the interveners, the General Court erred in law by concluding that the appellants had proven their interest in bringing proceedings.[10] *First*, contrary to what the General Court seems to have considered, the appellants' interest in bringing proceedings does not follow automatically from the mere fact that access to documents requested on the basis of Regulation No 1049/2001 was refused to them.[11] According to the case-law of the Court, the interest in bringing proceedings must always be assessed in the light of

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4 Annexes A.2, A.12, A.13, A.14 and A.17.

5 See, to that effect, orders of 6 October 2011, *ThyssenKrupp Acciai Speciali Terni and Others v Commission*, C-448/10 P, EU:C:2011:642, paragraphs 31 to 33, and of 22 October 2015, *Commission v Greece*, C-530/14 P, EU:C:2015:727, paragraph 23 and the case-law cited.

6 Judgment of 19 June 2019, *RF v Commission*, C-660/17 P, EU:C:2019:509, paragraph 30 and the case-law cited.

7 See judgment of 22 March 2011, *Access Info Europe v Council*, T-233/09, EU:T:2011:105, paragraph 33.

8 See, to that effect, orders of 7 October 1987, *G. d. M.* v *Council and ESC*, 108/86, EU:C:1987:426, paragraph 10, and of 21 July 2020, *Abaco Energy and Others* v *Commission*, C-436/19 P, EU:C:2020:606, paragraph 80; judgment under appeal, paragraph 16.

9 Judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others v Commission*, C-176/06 P, EU:C:2007:730, paragraph 18, and of 29 July 2019, *Bayerische Motoren Werke v Commission and Freistaat Sachsen*, C-654/17 P, EU:C:2019:634, paragraph 44; order of 15 April 2010, *Makhteshim-Agan Holding and Others v Commission*, C-517/08 P, EU:C:2010:190, paragraph 54 and the case-law cited.

10 Judgment under appeal, paragraphs 15 to 23.

11 Judgment under appeal, paragraphs 18 and 20.

the specific circumstances.[12] The Court has already held that an applicant may lack such an interest because the requested documents are already accessible to him, even if a decision to refuse access has not been withdrawn.[13]

(9) *Second*, the General Court unlawfully based the interest in bringing proceedings on the appellants' allegation that consultation of the requested harmonised standards in public places was possible 'only in a very limited number of libraries' and therefore 'excessively difficult in practice'.[14] The interveners have provided comprehensive evidence demonstrating that this allegation is incorrect.[15] In Germany, for instance, the requested harmonised standards are accessible free of charge and without any difficulty via more than 90 so-called 'info points' which are located not only in public libraries, but also at the premises of the German standardisation body DIN.[16] Moreover, university libraries are generally public places which can be accessed without any difficulty. The General Court did not assess the evidence adduced by the interveners on that point. Instead, it limited itself to stating – incorrectly – that the appellants had alleged excessive difficulties to consult the requested harmonised standards in public places 'without being contradicted by […] the interveners' at first instance.[17] It is obvious from the documents in the Court's file that the General Court thereby distorted the interveners' submissions.

(10) The General Court further distorted the evidence adduced by the interveners insofar as it considered that 'paid access to the requested harmonised standards via points of sale managed by the national standardisation bodies' did not correspond to the objective pursued by the appellants to obtain free access.[18] It is obvious from the documents in the Court's file that the places managed by the national standardisation bodies where harmonised standards can be accessed are not 'points of sale' but 'info points' and that access to the harmonised standards at those points is not 'paid' but 'free of charge'.[19] This was also explicitly recognised by the appellants.[20]

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12 Judgment of 28 May 2013, *Abdulbasit Abdulrahim v Council of the European Union and European Commission*, C-239/12 P, EU:C:2013:331, paragraph 65; Order of 17 December 2019, *Rogesa v Commission*, C-568/18, EU:C:2019:1092, paragraph 29.

13 Order of 17 December 2019, *Rogesa v Commission*, C-568/18, EU:C:2019:1092, paragraph 26.

14 Judgment under appeal, paragraphs 20 and 21.

15 Replies to written questions presented by the interveners, paragraphs 2 to 4.

16 See also the Replies to written questions presented by the Commission, paragraph 1, where the Commission explains that the Member States provide access free of charge usually 'in the premises of the National Standardisation Organisations (NSOs) or in public and university libraries.'

17 Judgment under appeal, paragraph 21.

18 Judgment under appeal, paragraph 22.

19 Replies to written questions presented by the interveners, paragraph 2.

20 Application, paragraph 53, referring to '90 free display locations'; see also: https://www.din.de/de/service-fuer-anwender/normen-infopoints.

(11) The General Court hence could not reasonably conclude, on the basis of the aforementioned facts, that the appellants retained an interest in bringing proceedings.[21] To the contrary, the evidence in the Court's file shows that the appellants have no such interest.

(12) *Third*, the appellants have, in any event, undisputedly owned since 2015 at least copies of the three toy-related harmonised standards.[22] They also assert to have previously published technical standards requested from authorities and standardisation organisations.[23] With that in mind, it seems likely that the appellants are also in possession of the fourth harmonised standard. They have made no claim to the contrary during the present procedure. The General Court completely failed to take those circumstances into account.

(13) *Fourth*, the appellants' lack of legal interest is evidenced by their criticism of what they call 'outdated standardization system'.[24] Inappropriate wording left aside, this submission reveals the appellants' true aim, which is not to have access to EU documents but rather to sabotage the system of standardisation set out by the Union legislator.

(14) In the light of the above, the appellants have not proven their interest in bringing the present proceedings. The appeal must hence be rejected for this reason alone.

C.
First ground of appeal: No error in law regarding the application of the exception relating to the protection of commercial interests

(15) By their first ground of appeal, the appellants submit that the General Court erroneously applied the exception provided in the first indent of Article 4(2) of Regulation No 1049/2001. That ground of appeal is divided into two parts.

I. First part of the first ground of appeal: No error in law regarding copyright protection

(16) In the first part of the first ground of appeal, the appellants claim, on the one hand, that the requested harmonised standards must be excluded from copyright protection. On the other hand, the appellants argue that the General Court erroneously accepted that those

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21 See, by analogy, judgment of 6 September 2018, *Klein v Commission*, C-346/17 P, EU:C:2018:679, paragraphs 123 to 133.

22 Judgment under appeal, paragraph 15; Observations on the statement in intervention presented by the Commission, paragraph 5 with reference to https://law.resource.org/pub/eu/toys/en.petition.html; Replies to written questions presented by the interveners, paragraph 12.

23 Application, paragraph 9.

24 Appeal, paragraph 6.

standards meet the threshold of originality required to enjoy copyright protection. Neither of those two complaints can be upheld.

1. No exclusion of copyright protection of harmonised standards

(17) The appellants submit that since the Court held in its *James Elliott* ruling that harmonised standards 'form part of EU law', they must be excluded from copyright protection and, in any event, be freely accessible.[25] In that regard, the appellants criticise the General Court for having relied, in paragraphs 53 and 107 of the judgment under appeal, on the system of publication of harmonised standards established by Regulation No 1025/2012. According to the appellants, that system is irrelevant since it violates EU primary law and, in particular, the rule of law.[26] Moreover, the appellants argue that the General Court erroneously relied, in paragraphs 51 and 107 of the judgment under appeal, on the non-compulsory nature of harmonised standards and their free accessibility in certain libraries as well as the omission of the appellants to state the exact source of a constitutional principle that would require free access to harmonised standards.[27]

(18) Those arguments must at the outset be rejected as being manifestly inadmissible and ineffective. In any event, they are ill-founded.

a) The arguments are manifestly inadmissible and ineffective

(19) The appellants do not contest that Regulation No 1025/2012 expressly provides for a system of publication of harmonised standards which is limited to the references of harmonised standards and allows to make access to the full texts of such standards dependant on the payment of a fee.[28] They however claim that the system foreseen by Regulation No 1025/2012 violates primary law.

(20) Yet, as the General Court underlined in paragraph 103 of the judgment under appeal, at first instance, the appellants never challenged the lawfulness of Regulation No 1025/2012.[29] Should their submissions in appeal be understood to mean that they raise an exception of illegality, this would constitute a new plea in law that changes the subject-matter of the proceedings and is, hence, inadmissible. Pursuant to Article 58 of the Statute and Article 170(1) of the Rules of Procedure of the Court of Justice, the jurisdiction of

25 Appeal, paragraphs 19 to 51.
26 Appeal, paragraphs 7 and 29.
27 Appeal, paragraphs 22, 23, 33 and 34.
28 Judgment under appeal, paragraph 103.
29 See also the statement in intervention, paragraph 13, and the defence, paragraphs 16 and 62.

the Court of Justice in an appeal is confined to a review of the findings of law on the pleas and arguments debated before the General Court.[30]

(21) The system of publication of harmonised standards established by Regulation No 1025/2012 hence cannot be called into question in the framework of the present appeal. Since the appellants' arguments aiming at free access to harmonised standards are – manifestly and undisputedly – incompatible with that system, they cannot affect the validity of the judgment under appeal and are thus ineffective at the outset.[31]

b) The arguments are, in any event, ill-founded

(22) In any event, the arguments put forward by the appellants are ill-founded.

aa) Regulation No 1025/2012

(23) It follows from a literal, systematic, historic and purposive reading of Regulation No 1025/2012 that access to standards must respect copyright protection and is not generally free of charge.[32]

(24) *First*, Regulation No 1025/2012 contains explicit provisions on rates for the provision of standards. Article 6(1)(f) of Regulation No 1025/2012 provides that NSOs shall encourage access of SMEs to standards by 'applying special rates for the provision of standards or providing bundles of standards at a reduced price'. Access free of charge is referred to only in Article 6(1)(d) and (e) of Regulation No 1025/2012, regarding access to 'draft standards' and 'abstracts of standards'. Annex II point 4(b) of Regulation No 1025/2012 provides that ICT technical specifications must be 'publicly available for implementation and use on reasonable terms (including for a reasonable fee or free of charge)'. These specific provisions would be completely deprived of their meaning if the appellants' arguments were to be followed.

(25) *Second*, as regards the systematic context, Article 10(6) of Regulation No 1025/2012 provides that only references to harmonised standards shall be published in the Official Journal of the EU. Similar provisions are contained in all 'corresponding acts of Union harmonisation legislation', referred to in Article 10 (6) of Regulation No 1025/2012.[33] These provisions thus reflect a general principle that access to harmonised standards must

30 Judgment of 14 March 2013, *Viega* v *Commission*, C-276/11 P, EU:C:2013:163, paragraph 58; order of 21 July 2020, *Abaco Energy v Commission*, C-436/19 P, EU:C:2020:606, paragraph 37.

31 See, to that effect, order of 20 January 2021, *ZU v EEAS*, C-266/20 P, EU:C:2021:42, paragraph 10.

32 Defence, paragraphs 26 to 29; statement in intervention, paragraphs 11 to 16.

33 Cf. for example Article 17(5) of the Construction Products Regulation No 305/2011; Article 7(2) of Machinery Directive No 2006/42/EC; Article 5(4) of the Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment; statement in intervention, paragraph 13.

respect copyright protection and is not generally free of charge. Had the Union legislator intended the full text of harmonised standards to be accessible free of charge, they would have provided so. The argument relied on by the appellants, that the reference to harmonised standards is (since recently) published in the L-Series of the Official Journal,[34] does not in any way alter that finding.

(26) *Third*, also the legislative history confirms the above reading. Product harmonisation at EU level follows the so-called New Approach. The main feature of the latter is to limit the scope of EU product safety laws to the essential requirements and entrust the definition of technical specifications by way of harmonised standards to the ESOs. For the drawing up of the standards, the ESOs depend, in turn, substantially on revenues resulting from the sale and licensing of standards.[35] Fully aware of that fact, the legislator opted for involving the ESOs and NSBs and established a system that provides for the publication only of references to harmonised standards and for access free of charge only in exceptional, specifically determined cases.

(27) That reading is further corroborated by the European Parliament's Resolution on the future of European standardisation[36] and the expert report entitled 'Standardization for a competitive and innovative Europe: a vision for 2020',[37] referred to in Recital 8 of Regulation No 1025/20. In the said Resolution, the European Parliament requested that access be granted free of charge only for 'new standards proposals'[38] and 'online abstracts'[39]. The expert report deals in detail with access to standards in section 3.6.2. It explains that 'the well-tried model used for the vast majority of formal European standards through ISO, IEC, CEN, CENELEC and NSBs is for standards to be purchased following publication'.[40] The report refers to 'calls for such standards to be provided free at the point of delivery', but underlines that 'there is contrary evidence from ISO/IEC that the purchase price of standards is not a significant barrier to access.'[41] It refers to different models for funding standardization, but states that 'generally having sales as a significant source of revenue is one effective mechanism'. Ultimately, the report only recommends that ESOs and NSBs should be 'encouraged to create summaries of standards and publish these summaries free of charge'. It does not, however, recommend that standards should generally be accessible free of charge.

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34 Appeal, paragraph 24. Previously, the reference was published in the C-Series of the Official Journal.

35 Statement in intervention, paragraphs 6 to 10.

36 Of 21 October 2010, P7_TA(2010)0384, OJ 2012 C 70 E, 8.3.2012, p. 56.

37 Report of the Expert Panel for the Review of the European Standardization System (EXPRESS) of February 2010, EXP 384 final.

38 P7_TA(2010)0384, OJ 2012 C 70 E, 8.3.2012, p. 56, paragraph 41.

39 Ibid., paragraph 50.

40 Report of the Expert Panel for the Review of the European Standardization System (EXPRESS) of February 2010, EXP 384 final, p. 26.

41 Ibid., p. 27. The same finding is also contained in the AIM study cited by the appellants in paragraph 47 of the Appeal. It is probably no coincidence that the appellants fail to mention this part of the study.

(28) It is therefore clear that the legislator deliberately chose a system in which copyright protection is respected and access to standards is not generally free of charge. That deliberate choice of the EU legislator constitutes the financial basis of the New Approach.

(29) *Fourth*, the same result follows from a purposive interpretation. Recital 9 of Regulation No 1025/2012 provides explicitly that 'in order to ensure the effectiveness of standards and standardisation as policy tools for the Union, it is necessary to have an effective and efficient standardisation system […] which is financially viable'.

(30) As the General Court rightly held in paragraph 65 of the judgment under appeal,

> '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 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.'

(31) The appellants do not call into question those factual findings of the General Court. Even less do they show that the General Court distorted the evidence in the file.

(32) The appellants' claim that standards are excluded from copyright protection and accessible free of charge hence runs counter to the objective of Regulation No 1025/2012 to ensure the effectiveness of standards and standardisation as policy tools for the Union through an effective and efficient standardisation system which is financially viable. If economic operators were generally able to obtain free access to the full text of harmonised standards through the back door of Regulation No 1049/2001, the production of further standards would be put at risk. The appellants' claim thus undermines the very foundations of the system of standardisation and the New Approach as a whole.

(33) Moreover, the appellants' claim runs counter to the objectives set out in Recital 3 of Regulation No 1025/2012 inasmuch as it jeopardises CEN's cooperation with the International Organization for Standardization (ISO) as well as the adoption of international standards as harmonised European standards. ISO's business model relies largely on the revenues from the sale and exploitation of copyright in ISO standards.[42] ISO's members and partners that adopt ISO standards are obliged to protect ISO's copyright and trademarks. They must ensure that said standards are always made

[42] See opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, *Stichting Rookpreventie Jeugd*, C-160/20, EU:C:2021:618, paragraph 74.

available under a fee and tackle infringement in their respective countries.[43] A breach of ISO's copyright policy could not only lead to a possible non-compliance with the conditions of ISO membership, but jeopardise CEN's and the NSBs' further participation in the ISO standards development process and their possibility to use ISO standards for national adoptions, reproduction, or distribution. At the same time, it could adversely affect the Member States' ability to comply with the provisions of the WTO Technical Barriers to Trade (TBT) Agreement and the associated Code of Good Practice. As a consequence, European standards would be decoupled from standards in the rest of the world, with grave consequences for the ability of European industry to adopt state of the art technologies and to compete internationally. Obviously, this result would not be in line with the objective of the Regulation to ensure coherence and to avoid fragmentation or overlap in the implementation of standards and specifications.

bb) EU primary law

(34) It should be noted at the outset that the primary law arguments presented by the appellants are ineffective since they essentially aim at establishing a requirement to publish the full text of harmonised standards in the Official Journal. The present case, however, is about a request for access to documents under Regulation No 1049/2001.

(35) In any event, and contrary to what the appellants claim, the system established by Regulation No 1025/2012 is compatible with higher ranking law. EU primary law neither requires copyright protection of harmonised standards to be excluded, nor the full texts of such standards to be available free of charge.

(36) The appellants' claim to the contrary is foremost based on a misinterpretation of the *James Elliott* judgment.[44] The Court's consideration that harmonised standards 'form part of EU law'[45] concerns only the Court's jurisdiction under Article 267 TFEU. The ruling does not in any way imply that harmonised standards must be deprived of copyright protection or that their full text must be generally available free of charge. By no means did the Court call the system established by Regulation No 1025/2012 into question.[46] The appellants themselves recognise that that question 'was not at issue in that case' and that the Court did not rule on it.[47]

(37) Moreover, it is evident from the very wording of Article 297 TFEU – and not disputed by the appellants – that that provision requires only legislative acts and non-legislative acts

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43 See Section 3 of the Policy for the Distribution, Sales and Reproduction of ISO Publications and the Protection of ISO's Copyright, as approved under Council Regulation 08/2017, ISO POCOSA 2017, Annex 4 to the statement in intervention.

44 Appeal, paragraph 20.

45 Judgment of 27 Octobre 2016, *James Elliott*, C-613/14, EU:C:2016:821, paragraph 40.

46 See judgment under appeal, paragraph 53.

47 Appeal, paragraph 21.

of general application adopted in the form of regulations, directives or decisions to be published in the Official Journal of the European Union. Harmonised standards do not fall into either of those categories. They are therefore not concerned by the publication requirement laid down in Article 297 TFEU.

(38) Whilst harmonised standards 'form part of EU law' for the purposes of Article 267 TFEU, they are not legal acts adopted by the institutions, bodies, offices and agencies of the Union. Even less so are they adopted in a 'legislative procedure'[48] in terms of Article 289 TFEU. As is apparent from the definition set out in Article 2(1)(c) of Regulation No 1025/2012, harmonised standards are 'technical specifications' for the 'application' of Union harmonisation legislation. According to the express definition, compliance with harmonised standards 'is not compulsory'. The requirements that must be complied with to enjoy free movement on the internal market are always set out in detail in the harmonisation legislation itself. Harmonised standards do not impose any additional requirements to that legislation; they remain limited to 'applying' the law. As Recital 25 of Regulation No 1025/2012 confirms, harmonised standards are thus a mere 'tool to support Union legislation', but do not themselves constitute such legislation.[49]

(39) Moreover, harmonised standards are adopted by the 'European standardisation organisations', i.e. CEN, CENELEC and ETSI,[50] which are private entities engaged in an economic activity.[51] Contrary to what the appellants try to suggest,[52] harmonised standards can neither be attributed to the Commission, nor do they constitute a 'form of controlled legislative delegation'. In *James Elliott*, the Court explicitly held that harmonised standards are adopted by *'bodies which cannot be described as institutions, bodies, offices or agencies of the Union*'.[53] In this respect, the Court clearly did not follow the opinion of the Advocate General in that matter – on which the appellants hence wrongly rely.[54] As pointed out in the Statement in intervention,[55] the Court also had good reasons for not doing so: If the development of harmonised standards were considered a form of delegated legislation, it would have to satisfy the requirements of the Meroni doctrine.[56]

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48 *Contra* appeal, paragraph 20.

49 See Statement in intervention, paragraphs 3 and 5; Defence, paragraphs 34 and 66.

50 Article 2(1) and (8) in conjunction with Annex I of Regulation No 1025/2012.

51 Judgment under appeal, paragraph 71.

52 Appeal, paragraphs 24 and 92.

53 Judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraph 34 (emphasis added); see also Statement in intervention, paragraphs 32 and 33.

54 Cf. Opinion of Advocate General Campos Sanchez-Bordona of 28 January 2016, *James Elliott Construction*, C-613/14, EU:C:2016:63, paragraph 40, referred to in paragraph 24 of the appeal.

55 See Statement in intervention, paragraph 34.

56 See judgment of 13 June 1958, *Meroni v High Authority*, 9/56, EU:C:1958:7, p. 152 et seqq.; of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 43.

(40) Consequently, the appellants also cannot rely on the principle of good administration.[57] In this respect, it suffices to note that Article 41 of the Charter of Fundamental Rights and Article 298 TFEU only refer to 'institutions, bodies, offices and agencies of the Union' and do not govern the actions of private bodies such as the ESOs and the NSBs.

(41) According to the Court's jurisprudence, a publication requirement may result from the principle of legal certainty for legal acts that are intended to impose obligations on individuals.[58] However, harmonised standards do not impose any obligations on individuals. As pointed out above, it follows from the very wording of Article 2(1)(c) of Regulation No 1025/2012 that compliance with harmonised standards 'is not compulsory'. Moreover, Recitals 1, 2, 10 and 11 of that Regulation refer to the voluntary nature of standards. In fact, it is one of the basic principles of the New Approach that proof of conformity of a product with the essential requirements can also be demonstrated by other means. In *James Elliott*, the Court once again expressly recognised this fundamental principle.[59]

(42) In any event, the principle of legal certainty does not require general access free of charge to harmonised standards. This applies even where EU legislation exceptionally provides that the use of harmonised standards is compulsory.[60] Also in such instances, the essential requirements, i.e. substantive obligations placed on market actors, are set out in EU legislation, while harmonised standards are limited to technical specifications.[61]

(43) In fact, even where compulsory measures of the Member States that implement EU legislation are concerned, the principle of legal certainty requires only 'appropriate publicity'; it does not prescribe any specific form of publicity.[62] The Court has already held that a publication in the national press may satisfy the condition of 'appropriate publicity'.[63] The Court has also consistently rejected the existence of a general principle of EU law under which anything that might affect the interests of an EU citizen must be drawn up in his language in all circumstances.[64] It thus follows clearly from the Court's

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57 Appeal, paragraph 45, second bullet point. It goes without saying that the scholarly literature quoted by the appellants does not support their claim.

58 Judgment of 10 March 2009, *Heinrich*, C-345/06, EU:C:2009:140, paragraphs 44, 45 and 48, and the case-law cited; see also statement in intervention, paragraphs 63 et seqq.

59 Judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraphs 35 and 42.

60 See entry 27 of Annex XVII to Regulation No 1907/2006 (REACH), relied on by the appellants in paragraphs 16 and 22 of the appeal.

61 See by analogy opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, Stichting Rookpreventie Jeugd, C-160/20, EU:C:2021:618, paragraphs 44 et seq.

62 Judgments of 20 June 2002, *Mulligan and Others*, C-313/99, EU:C:2002:386, paragraphs 47 and 51 to 53; of 25 March 2004, *Azienda Agricola Ettore Ribaldi and Others*, C-480/00, EU:C:2004:179, paragraphs 81 to 83.

63 Judgment of 20 June 2002, *Mulligan and Others*, C-313/99, EU:C:2002:386, paragraphs 12 and 53.

64 Judgment of 12 May 2011, *Polska Telefonia Cyfrowa*, C-410/09, EU:C:2011:294, paragraph 38 and the case-law cited.

case-law that, even where compulsory State measures implementing EU legislation are concerned, the Court applies a proportionality test. Under that test, certain restrictions on access, such as the expenses necessary to purchase a publication in the press or translation costs, are compatible with the principle of legal certainty. Such a proportionality test must, *a fortiori*, apply to measures such as the requested standards that are adopted by private entities engaged in an economic activity and do not constitute EU legislative acts.

(44) In light of the above, the condition of 'appropriate publicity' is clearly met in the present case. The requirements that must be complied with to enjoy free movement on the internal market are always set out in detail in the harmonisation legislation itself. Those requirements are published in full in the Official Journal of the EU in accordance with Article 297 TFEU. Harmonised standards do not impose any additional requirements to that legislation. References to harmonised standards are published in the Official Journal, in accordance with Article 10(6) of Regulation No 1025/2012. The full text of harmonised standards can not only be accessed free of charge and without difficulty in info points and public libraries,[65] but also be purchased by any interested person at a reasonable price.[66]

(45) In that regard, it must also be taken into account that, as acts adopted by private entities engaged in an economic activity, harmonised standards enjoy the protection afforded by Article 17(2) of the Charta, according to which intellectual property shall be protected, inasmuch as they meet the conditions to qualify as 'work' within the meaning of the case-law of the Court. Moreover, as pointed out in paragraphs (30) to (32) above, the sale of standards is a vital part of the standardisation bodies' business model. The system ensures that the economic operators who pay for the standards and thus finance the standardisation system are those who rely on the standards and profit from the expertise that standards provide. Both elements confirm that the publication system established by Regulation No 1025/2012 strikes an adequate balance between the interests at stake.

(46) The jurisprudence of the ECtHR relied on by the appellants[67] does not call these considerations into question. In effect, the ECtHR has never held that harmonised standards must be published. The case law quoted by the appellants relates to a totally different question, i. e. the accessibility of laws used as a basis for the limitation of fundamental rights. Moreover, according to the ECtHR

65 See points (9) and (10) above.

66 According to the figures put forward by the appellants in the application, paragraph 49, the harmonised standards at issue can be purchased at prices between EUR 43.15 and EUR 295.77.

67 Appeal, paragraphs 37 et seqq.

> ‘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.’[68]

(47) Like the ECJ, the ECtHR thus also requires the law merely to be ‘adequately accessible’. Whether that requirement is satisfied must be assessed by taking account of the specific circumstances of the case at hand. In the present case, the said requirement is clearly fulfilled for the reasons set out in paragraphs (42) to (45) above.

(48) Similarly, the appellants cannot rely on the decision of the German Constitutional Court of 29 July 1998.[69] The Constitutional Court has never ruled that standards must be accessible free of charge, and the paragraph quoted by the appellants does not refer to standards but rather to formally enacted legal norms.[70] In effect, the German courts have consistently held that it is not required to make standards generally accessible free of charge, even if the law refers to a standard and thus makes its application mandatory.[71]

(49) Finally, this outcome is further corroborated by the rules on copyright. Article 2(4) of the revised Berne Convention – that also applies to the EU via Article 4 of the WIPO Copyright Treaty[72] –, explicitly reserves to the legislature of the contracting parties the right to determine the scope of protection of official texts in the areas legislation, administration and jurisdiction.[73] However, the Copyright Directive 2001/29/EC neither contains a provision that prevents such texts from being qualified as ‘works’ within the meaning of that Directive and the case-law of the Court. Nor does Article 5 of the Copyright Directive, that lays down an exhaustive list of the exceptions and limitations of copyrights,[74] provide any exemptions for laws or official works. There is hence strong reason to consider that a subject matter which constitutes a ‘work’ within the meaning of the Copyright Directive enjoys the protection afforded by that Directive, regardless of whether it constitutes a law or official work. Inasmuch as the appellants request to exclude all copyright protection for harmonised standards, their arguments are therefore not only

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68 ECtHR, judgments of 26 April 1979, *Sunday Times v UK*, No 6538/74, CE:ECHR:1979:0426JUD000653874, paragraph 49; of 25 March 1983, *Silver v UK*, No 5947/72, CE:ECHR:1983:0325JUD000594772, paragraph 87.

69 *Contra* appeal, paragraph 42.

70 Federal Constitutional Court (Bundesverfassungsgericht), decision of 29 July 1998, 1 BvR 1143/90, DE:BVerfG:1998:rk19980729.1bvr114390, paragraph 26.

71 See judgment of the Higher Regional Court (Oberlandesgericht) Hamburg of 27 July 2017, DE:OLGHH:2017:0727.3U220.15KART.0A, Annex 10 to the application for leave to intervene, paragraph 172; see also judgment of the Federal Administrative Court of 27 June 2013, 3 C 21/12, paragraphs 19 et seqq.

72 WIPO Copyright Treaty of 20 December 1996. Cf. on the binding effect of the Berne Convention on the EU: Judgments of 4 October 2011, *Football Association Premier League*, C-403/08 and C-429/08, EU:C:2011, paragraph 189; of 9 February 2012, *Luksan*, C-277/10, EU:C:2012:65, paragraph 59.

73 Berne Convention on the protection of literary and artistic works, revised on 24 July 1971.

74 Cf. recital (33) of the Copyright Directive 2001/29/EC.

incompatible with the system of Regulation No 1025/2012, but also with the EU rules on copyright.

2. No error in law regarding the originality-criterion

(50) The appellants further submit that the General Court erred in finding, in paragraph 57 of the judgment under appeal, that the EU institutions lacked jurisdiction to examine whether the requested harmonised standards were protected by copyright. They also criticise the General Court for having considered, in paragraphs 47 to 49 and 59 of the judgment under appeal, that those standards were protected by copyright. According to the appellants, the considerations of the General Court are contradictory.[75] These arguments must be rejected at the outset since they are based on a misreading of the judgment under appeal.[76] In any event, they cannot be upheld.

a) Misreading of the judgment under appeal

(51) In paragraphs 40 to 44 of the judgment under appeal, the General Court dealt with the scope of the review which the Commission is required to carry out when applying the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001. It stated that the existence and scope of the protection offered by copyright continue to be largely governed by the laws of the Member States, that the enjoyment and the exercise of copyright are not subject to any formality (principle of 'automatic protection') and that the scope of copyright protection for the same work may differ according to the place where that protection is sought (principle of the 'independence' of protection). For these reasons, the General Court held that it was for the authority concerned to identify objective and consistent evidence in order to confirm the existence of a copyright. According to the General Court, such review in fact corresponds to the requirements inherent in the division of competences between the European Union and the Member States in the field of copyright.

(52) Therefore, the General Court clearly did not rule that the Commission 'was not authorized to examine whether the four requested HS were copyrightable'.[77] The respective complaint brought by the appellants must hence be dismissed as ineffective.

b) Scope of review

(53) In any event, the appellants' arguments are unfounded. It is apparent from paragraphs 48, 49 and 59 of the judgment under appeal that, in order to verify whether the Commission

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75 Appeal, paragraphs 52 et seqq.

76 See, by analogy, judgment of 21 December 2021, *PlasticsEurope v ECHA*, C-876/19 P, EU:C:2021:1047, paragraphs 145 et seqq.

77 *Contra* appeal, paragraph 53.

had identified sufficient objective and consistent evidence of the copyright protection of the requested standards, the General Court examined whether those standards were 'capable of reaching the threshold of originality required at EU level'.[78] For this purpose, the General Court relied on the Court's settled case-law on the interpretation of the autonomous concept of 'work'.[79] Having found, in paragraph 48 (and 59) of the judgment under appeal, that the threshold of originality required at EU level was met, the General Court considered, in paragraph 57 of the judgment under appeal, that it was beyond the scope of the review – which the Commission was required to carry out – to further examine the conditions imposed by the Member States in their respective national laws.

(54) These considerations are not vitiated by an error in law capable of affecting the outcome of the judgment under appeal. *First*, it is at least highly doubtful whether any conditions imposed by national law could deprive a subject matter that meets the threshold of originality required at EU level of its copyright protection. According to the case law of the Court, where a subject matter constitutes a 'work' within the autonomous meaning of that notion under EU law, it must, as such, qualify for copyright protection, in accordance with Directive 2001/29.[80] Moreover, as pointed out above,[81] the exhaustive list of exceptions and limitations laid down in Article 5 of Directive 2001/29 does not provide any exemptions for laws or official works. There is hence strong reason to consider that a subject matter which constitutes a 'work' within the autonomous meaning of that notion under EU law must enjoy the copyright protection afforded by Directive 2001/29 and cannot be exempted from it by any conditions imposed under national law.

(55) Against this backdrop, the consideration of the General Court that 'the Member States are free to determine the protection to be given to official texts of a legislative, administrative or judicial nature'[82] appears flawed. However, any potential error of the General Court on that point could evidently not affect the outcome of the judgment under appeal. Such an error would, indeed, only make the considerations of the General Court regarding the lack of competence of the Commission to examine copyright conditions imposed by national law irrelevant. It would thus render the appellants' criticism of paragraph 57 of the judgment under appeal ineffective at the outset.

(56) *Second*, the Commission cannot be required to examine in detail whether a specific document is indeed copyright protected under one or several laws of the 27 Member

78 Judgment under appeal, paragraph 59.

79 See judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 23 and the case-law cited.

80 Judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 35, referring to judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraphs 97 to 99.

81 Paragraph (49) above.

82 Judgment under appeal, paragraph 57.

States.[83] Any other reading would place an undue burden on the Commission and would undermine the effective application of Regulation No 1049/2001.

(57) *Third*, in any event, the appellants have failed to explain how that point could have affected the outcome of the judgment under appeal. It is also for this reason that their argument is ineffective.[84] The appellants have not mentioned any condition under any national copyright law that could deprive the requested standards of their copyright protection. Even less have they demonstrated that the laws of all 27 Member States exclude copyright protection for such standards. As the interveners have shown in their Statement in intervention, at least the national copyright laws of the Netherlands, Ireland, Germany, and Finland recognise the copyright protection of harmonised standards or do not deprive standards of copyright protection even if acts, decrees or official notices refer to such works without reproducing their wording.[85]

c) No error in law regarding threshold of originality required at EU level

(58) The appellants' claim that the requested standards do not meet the required threshold of originality[86] must also be rejected.

(59) *First*, the appellants' assertion that the General Court did not examine the originality of the requested standards[87] is manifestly incorrect. Having ordered the Commission to produce those standards,[88] the General Court assessed, in paragraphs 48 and 59 of the judgment under appeal, whether they meet the threshold of originality which a product must attain to constitute 'work' in terms of the relevant case-law of the Court. In that regard, the General Court correctly recalled that, according to that case-law, if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his or her free and creative choices.[89]

(60) *Second*, in the said paragraphs of the judgment under appeal, the General Court found that the experts who draft the requested standards had to make a number of choices,

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83 Copyright law is governed by the principles of territoriality and lex fori protectionis, which implies that the protection differs between States (see, to that effect, Opinion of Advocate General Jääskinen in Donner, C-5/11, EU:C:2012:195, points 30 and 33). According to Article 5 (2) of the Berne Convention, the enjoyment and exercise of copyright are independent of the existence of protection in the country of origin of the work.

84 See, by analogy, order of 23 April 2020, *Rubik's Brand v EUIPO*, C-936/19 P, EU:C:2020:286, paragraph 17.

85 Statement in intervention, paragraphs 49 and 50.

86 Appeal, paragraphs 61 to 66.

87 Appeal, paragraph 64.

88 Judgment under appeal, paragraph 9.

89 See judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraph 23; judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 30 and the case-law cited.

including in the structuring of the documents, and that, in view of the length of the texts, those choices implied a sufficient amount of creativity to deserve copyright protection. The General Court also explicitly examined and dismissed the arguments by which the appellants tried to show that the room for creative choices of the authors of the requested standards was limited by the technical character of the subject matter and by existing limitations regarding the standard design. Inasmuch as the appellants criticise those findings, they ask the Court to re-examine a factual assessment of the General Court, which is inadmissible in the context of an appeal.[90]

(61) In any event, it follows clearly from the Court's *Brompton Bicycle* ruling, on which the General Court relied in the judgment under appeal,[91] that a subject matter may be eligible for copyright protection even if its realisation has been dictated by technical considerations, rules or other constraints, provided that its being so dictated has not prevented the author from reflecting his personality in that subject matter, as an expression of free and creative choices.[92] Accordingly, it is clear from the case law that different types of works (standards vs. 'artistic' works) are not to be treated differently as long as the required threshold of originality is met. In the present case, the interveners have shown in detail that this condition is met and that neither the technical character, nor the existing limitations regarding the standard design prevent the experts who draft the standards from expressing free and creative choices.[93]

II. Second part of the first ground of appeal: No error in law regarding the effect on commercial interests

(62) In the second part of the first ground of appeal, the appellants claim that the General Court erroneously relied on a general presumption of non-disclosure and failed to assess the specific effects of the disclosure of the requested standards on the commercial interests of the interveners.[94] These arguments must both be rejected.

1. No reliance on a general presumption

(63) The appellants' argument that the General Court erroneously held that the Commission was entitled to rely on a general presumption of non-disclosure is inadmissible. As was pointed out above,[95] the jurisdiction of the Court in an appeal is confined to a review of the findings of law on the pleas and arguments debated before the General Court.

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90 Judgments of 26 March 2019, *Commission v Italy*, C-621/16 P, EU:C:2019:251, paragraph 97 and the case-law cited; of 6 October 2021, *Veit v ECB*, C-272/20 P, EU:C:2021:814, paragraph 26.

91 Judgment under appeal, paragraph 48.

92 Judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraphs 26 and 30 et seqq.

93 Statement in intervention, paragraphs 38 to 44.

94 Appeal, paragraphs 67 et seqq.

95 See the case-law cited in paragraph (20) above.

However, before the General Court, the appellants neither claimed that the Commission had relied on a general presumption of non-disclosure, nor that the Commission was not entitled to do so. The existence of such a presumption was not at all debated in the procedure before the General Court.

(64) In any event, the argument must be dismissed as ineffective since it is based on a misreading of the judgment under appeal.

(65) It is true that paragraph 97 of the judgment under appeal contains the phrase 'general presumption'. It is, however, obvious from both the contested decision and the judgment under appeal that in fact neither the Commission nor the General Court applied a general presumption and that, therefore, the language used in paragraph 97 had no impact on the General Court's assessment of the substance of the case.[96] Rather, the General Court expressly examined whether the Commission had demonstrated that the disclosure of the requested harmonised standards could specifically and actually undermine the commercial interests of the interveners and whether the risk of those interests being undermined was reasonably foreseeable and not purely hypothetical.[97]

2. Correct assessment of commercial interests

(66) Moreover, the General Court rightfully found that the disclosure of the requested standards would undermine the commercial interests of the interveners.

(67) To start with, the appellants' assertion that the General Court merely relied on 'the effects of free access to [harmonised standards] in general' is incorrect.[98] In particular, as is again apparent from the very wording of the judgment under appeal, the General Court's findings regarding the copyright protection, the licensing conditions, the accessibility against payment of certain fees and the risk of a very large fall in the fees collected in return for access all specifically relate to 'the requested harmonised standards'.[99] The mere fact that similar considerations may as well apply to other harmonised standards does not lead to a different result.

(68) *Second*, contrary to what the appellants claim, the fact that the present case concerns 'only four' harmonised standards does not call into question the General Court's finding that the disclosure of these standards would specifically and actually affect the commercial interests of the interveners. The protection afforded by the exception set out in the first indent of Article 4(2) of Regulation No 1049/2001 cannot depend on the number of

96 See, by analogy, judgments of 28 November 2019, *ABB v Commission*, C-593/18 P, EU:C:2019:1027, paragraph 64, and of 25 March 2021, *Generics (UK) v Commission*, C-588/16 P, EU:C:2021:242, paragraph 129.

97 See, in particular, paragraphs 63, 66 and 73 of the judgment under appeal.

98 Appeal, paragraph 77.

99 Judgment under appeal, paragraphs 64 to 67.

harmonised standards that access is requested to. Otherwise, that exception could easily be circumvented and thus be deprived of its effective application. The said exception must hence cover the copyright protection and the ensuing possibility to impose license conditions and charge fees[100] in regard of each requested standard of its own. That conclusion applies even more in view of the General Court's finding that the sale of standards is a vital business part of the standardisation bodies' business model.[101]

(69) *Third*, the appellants' insistence on the accessibility of the standards free of charge in certain libraries underlines that the appellants do not have an interest in bringing the present proceedings.[102]

(70) In any event, the claim that the accessibility of the standards free of charge in certain libraries calls into question the negative effect of their disclosure on the commercial interests of the interveners cannot be upheld. The appellants have never contested that the interveners generate significant revenues by selling the requested standards to persons who – like the appellants – do not want to access those standards in the places where they are available free of charge. This corresponds to the factual findings of the General Court that the disclosure of the requested standards would entail the risk of a very large fall in the fees collected in return for access to those standards and that the sale of standards is a vital part of the standardisation bodies' business model.[103]

(71) *Fourth*, the claim that Article 16 of Regulation No 1049/2001 prevents the commercial interests of the interveners from being undermined[104] cannot be upheld either. The exemption in Article 4(2) first indent of the Regulation is not limited to copyright but also protects any other commercial interest of a natural or legal person. In fact, the interveners' commercial interests go beyond questions of copyright protection. Moreover, the disclosure of the requested standards would degrade the interveners' copyrights to an empty shell. According to the consistent case-law of the General Court, the disclosure of a document under Regulation No 1049/2001 has *erga omnes* effect in the sense that the document disclosed enters the public domain: it may then be communicated to other applicants and anyone has the right to access it.[105] Since nobody would pay for a standard that can be obtained for free from the Commission, the disclosure of the requested standards would not only deprive the interveners of the revenue generated by a potential

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100 See judgment under appeal, paragraphs 64, 66 and 67.

101 Judgment under appeal, paragraph 65.

102 See paragraph (9) and (10) above.

103 Judgment under appeal, paragraphs 64 and 65.

104 Appeal, paragraph 78.

105 Judgment of 21 October 2010, *Agapiou Joséphidès* v *Commission and EACEA*, T-439/08, EU:T:2010:442, paragraph 116; order of the President of the General Court of 20 July 2016, *MSD Animal Health Innovation and Intervet international v EMA*, T-729/15(R), EU:T:2016:435, paragraph 105 and the case-law cited; see also order of the Vice-President of the Court of 28 November 2013, *EMA v AbbVie*, C-389/13 P(R), EU:C:2013:794, paragraphs 13 and 44.

sale of the requested standards to the appellants, but of all future income from the sale of the requested standards. What is more, the appellants have already made it very clear that they intend to diffuse the requested standards as widely as possible and thus intend to deliberately violate the interveners' copyrights.[106]

(72) *Fifth*, the General Court was right to reject, in paragraphs 69 to 72 of the judgment under appeal, the appellants argument that the interveners act as a public authority by performing public functions which are not subject to any commercial interests.[107] That argument is again in direct conflict with the New Approach and Regulation No 1025/2012, which entrusts the drafting of harmonised standards to private entities engaged in an economic activity and establishes a system in which copyright protection is respected and access to standards is not generally free of charge. Since the appellants have not challenged the validity of that system before the General Court, their argument is inadmissible and ineffective at the outset.[108]

(73) In any event, the General Court rightly held that the contribution of the interveners to the performance of tasks in the public interest does not in any way alter their status as private entities engaged in an economic activity, nor preclude them from being deemed to hold commercial interests within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001. Contrary to what the appellants claim, that result is also clearly supported by the case-law upon which the General Court relied in the judgment under appeal.[109]

(74) *Sixth*, the findings of the General Court do not imply that copyright protection of harmonised standards systematically takes precedence over the right of access under Regulation No 1049/2001.[110] Rather, the General Court based those findings on an assessment of the specific circumstances of the case at hand and, in particular, on the – undisputed – fact that the sale of standards is a vital part of the business model of the interveners.[111]

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106 See Rejoinder, paragraph 19; Statement in intervention, paragraph 56; Replies to written questions presented by the interveners, paragraph 19.

107 *Contra* appeal, paragraphs 79 and 80.

108 See paragraphs (19) to (21) above.

109 See, to that effect and by analogy, judgment of 5 December 2018, *Falcon Technologies International v Commission*, T-875/16, EU:T:2018:877, paragraphs 47 to 49 and the case-law cited.

110 *Contra* appeal, paragraph 76.

111 Judgment under appeal, paragraph 65; see, to that effect, also the Replies to written questions presented by the interveners, paragraph 21.

D.
Second ground of appeal:
No error in law regarding overriding public interest

(75) By the second ground of appeal, the appellants claim that the General Court failed to recognise that an overriding public interest for access free of charge to the four requested standards follows from the rule of law.[112]

(76) That ground of appeal must be rejected. *First*, according to the settled case-law of the Court, the onus is on the party arguing for the existence of an overriding public interest to rely on specific circumstances to justify the disclosure of the documents concerned. Setting out purely general considerations cannot provide an appropriate basis for establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question.[113]

(77) In the present case, the General Court was right to hold, in paragraphs 98 to 101 of the judgment under appeal, that the appellants had only set out general considerations to substantiate the existence of an overriding public interest and therefore not lived up to the burden of proof incumbent on them.

(78) To contest those findings, the appellants merely rely on their submissions before the General Court that 'the four requested [harmonised standards] form part of EU law', 'deal with very important topics for consumers' and 'are very important for manufacturers and all other participants in the supply chain'.[114] It is evident that those submissions are not specific within the meaning of the case-law of the Court.[115] In particular, the appellants have never even asserted that access to the requested standards was of higher importance than access to other standards, such as the standards for the safety of automobiles and for other 'most important areas' referred to in the appeal.[116] The appellants thus have not even set out circumstances to establish the existence of a sufficiently specific public interest in the disclosure of the requested standards. *A fortiori*, they have not set out sufficiently specific reasons why such an interest should prevail over the reasons justifying the refusal to disclose those standards.

(79) *Second*, inasmuch as the appellants criticise the findings of the General Court in paragraphs 102 to 107 of the judgment under appeal,[117] their arguments must be rejected

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112 Appeal, paragraphs 82 to 95.

113 See judgment of 11 May 2017, *Sweden* v *Commission*, C-562/14 P, EU:C:2017:356, paragraph 56 and the case-law cited.

114 Appeal, paragraphs 83 to 86.

115 See, by analogy, judgments of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486, paragraph 93, and of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, EU:C:2016:557, paragraph 95.

116 Appeal, paragraph 3.

117 Appeal, paragraphs 87 to 94.

as ineffective. In those paragraphs, the General Court considered – evidently for the sake of completeness only – that even if the appellants' generic allegations were accepted, there was no overriding public interest justifying the disclosure of the requested standards. However, according to the settled case-law of the Court, complaints brought against grounds given in a judgment of the General Court for the sake of completeness are ineffective, as they cannot lead to the setting aside of that judgment.[118]

(80) *Third*, in any event, the appellants have not demonstrated that the General Court's considerations regarding the absence of an overriding public interest justifying the disclosure of the requested standards are vitiated by an error in law capable of affecting the outcome of the judgment under appeal.

(81) In particular, the General Court was right to hold, in paragraph 103 of the judgment under appeal, that the approach of the appellants to seek access free of charge to the requested standards without however challenging the system established by Regulation No 1025/2012 cannot be regarded as appropriate. In effect, the failure to challenge the validity of that system before the General Court renders the appellants' entire line of argument ineffective. In that regard, the considerations set out in paragraphs (19) to (21) above apply respectively.

(82) Moreover, the General Court correctly found, in paragraphs 104 to 107 of the judgment under appeal, that there was no overriding public interest in disclosure. The appellants' claim to the contrary relies exclusively on inferences drawn from the *James Elliott* ruling that are clearly not supported by that judgment.[119]

(83) In any event, the appellants' claim rests on the flawed premise that the rule of law and the principle of legal certainty require general access free of charge to the requested harmonised standards. That premise must, however, be rejected for the reasons set out above. In particular, since the full text of the requested harmonised standards can be purchased by any interested person at a reasonable price and accessed free of charge and without difficulty at info points and public libraries, the commercial interests of the interveners clearly prevail. This applies all the more since the interveners' intellectual property in the requested harmonized standards is protected by Article 17(2) of the Charta.

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118 Order of 3 December 2020, *Barata v Parliament*, C-259/20 P, EU:C:2020:994, paragraphs 88 and 89 and the case-law cited.

119 See paragraph (36) above.

E.
Forms of order sought

For the reasons set out above, the interveners respectfully request that the Court

- dismiss the appeal in whole;
- order the appellants to pay the costs.

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(Rechtsanwältin)	(Rechtsanwalt)	(Rechtsanwalt)

BONN

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