2 April 2022

To the President and Members of the Court of Justice of the European Union

Case C-588/21 P

Public.Resource.Org Inc. and Right to Know CLG v European Commission and Others

REPLY

Submitted pursuant to Article 175 of Rules of Procedure and with the permission of the President of the Court on behalf of the Appellants, who are represented by Dr Fred Logue, Dr Jens Hackl, and Mr Christoph Nüßing

PRELIMINARY REMARKS

1 The Responses submitted by the European Commission (the "**EC**") and the Interveners try to make the case as complicated as possible and want to avoid a decision on the merits with the help of formalistic arguments. It seems as if the EC and the Interveners would fear a decision on the main issue here, i.e. whether four requested harmonized standards ("**HS**") are copyrightable, or whether copyright protection is excluded for EU law, which these HS are part of, since the rule of law requires free access to the law. The EC and Interveners argue a lot about Regulation (EU) No 1025/2012 (the "**Standardization Regulation**") and the New Approach, without however dealing with the rule of law and its implications for the case at hand. This is quite surprising as the EC claims to be the "guardian of the treaties" and acknowledges that the rule of law is the "backbone" of the EU.

2 It is to be recalled that the present case concerns a simple request by the Appellants for four HS under Regulation (EC) No 1049/2001 (the "**Transparency Regulation**"). The requested HS concern important topics of society (toy safety and maximum rate of Nickel emissions, a serious allergen and suspected carcinogen). The appeal concerns an assessment of whether the Appellants are entitled to such access and whether the EC has any reason to refuse the request. It is undisputed that the Appellants have a right of access.

3 The only issue here is whether the EC can refuse access based on an exemption to protect the "*commercial interests of a natural or legal person, including intellectual property*", which is to be interpreted narrowly and for which the EC bears the burden of proof, and if the exemption is engaged whether there would be an "*overriding public interest in disclosure*" (Art. 4(2) Transparency Regulation). All of this is based on the Transparency Regulation without any reference whatsoever to the Standardization Regulation. It is hence clear that the current dispute is not about the (legality of the) Standardization Regulation or the New Approach.

4 The Appellants have, in particular explained in detail that EU law, which the requested HS are part of, cannot be copyrightable as the rule of law does not accept a "paywall" for the law, but requires free access to it. In any event, due to the required free access to the law and because the requested HS concern important topics of society, there would also be an overriding interest in disclosure. Therefore, the exemption does not apply and the access request by the Appellants cannot be rejected. Both the EC and the Interveners did not put forward anything that could change this.

5 In further detail:

I. ADMISSIBILITY

6 The Application and the Appeal including the reliefs sought as well as the presented arguments are admissible.

1. Admissibility of the Application and Appeal, including reliefs sought

7 The Interveners' request for the Appeal to be dismissed on the basis that the General Court ("**GC**") ought to have declared the Initial Action inadmissible at the outset since the Appellants do not have an interest in bringing proceedings (Interveners' Response, para. 2 and paras. 6 to 14) is itself inadmissible and ineffective.

8 First, as is apparent from para. 6 of the Interveners' Response, this part of the Response is based on an argument that the GC erred at paras. 15 to 23 of its judgment of 14 July 2021 in Case T-185/19 (the "**Judgment**") in accepting that the Appellants had an interest in bringing proceedings. As such, this argument is essentially a cross-appeal against part of the GC's Judgment.

9 It is impermissible to submit a cross-appeal by way of the Response since a cross appeal must be introduced in a document separate from the Response under Article 176(2) of the

ECJ's Rules of Procedure (OJ L 265, 29.9.2012, p. 1–42). Recital 3 to these Rules of Procedure makes it clear that there must be a clear distinction between appeals and cross-appeals in consequence of the service of an appeal on a cross-appellant.

10 In addition, the Interveners are also putting forward an argument of inadmissibility that is not within the scope of the Appeal (see para. 10 of the Appeal where the Appellants declare that they appeal the Judgment on the merits only) and that has not been raised by the EC as defendant. The Interveners are not allowed to change the scope of the Appeal or to introduce arguments contrary to the EC as defendant.

11 Insofar as the Interveners urge the Court of its own motion to dismiss the appeal as inadmissible for lack of interest on the part of the Appellants, this is also incorrect. The Interveners erroneously contend that the Appellants lack an interest in bringing the proceedings because (i) the requested HS are already accessible even if a decision to refuse access has not been withdrawn, (ii) the requested HS are allegedly available in various libraries, "info points" and the premises of the German Standardisation body DIN, (iii) that the Appellants allegedly own copies of at least three of the requested HS and likely own the fourth, (iv) and that the true aim of the proceedings is not to have access to EU documents but rather to "sabotage" the system of standardization set out by the Union legislator.

12 Leaving aside that the objections raised by the Interveners constitute an impermissible cross-appeal submitted as part of their Response and inadmissibly change the scope of the Appeal and introduce arguments contrary to the defendant, the arguments are in any event wrong in substance.

13 As a preliminary matter, the case law cited by the Interveners in support of their suggestion that the Court should examine admissibility of its own motion is confined to the situation where there is an absolute bar to standing and the Court, as a matter of public policy, must examine whether the essential requirements which entitle the Appellant to bring the action for annulment and appeal are present (C-298/00, EU:C:2004:240, para. 35). However, as correctly identified by the GC at para. 18 of the Judgment "*a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing access*." Thus, this is not a case within the examples cited by the Interveners at footnotes 8 and 9 of the Response which concern instances where the decision is not addressed to the Appellants or where they lack direct

and individual concern and therefore fail to meet the essential requirements under Art. 263(4) TFEU.

14 Second, the Appellants maintain an interest in the proceedings even if it were true that they owned copies of the requested HS or if they were theoretically capable of accessing them at libraries or info points. In fact, the case law demonstrates that third party access does not relieve an institution from the obligation to grant access to documents on request as provided for in the Transparency Regulation (C-761/18 P, EU:C:2021:52, para. 33). Thus, the Interveners' argument that the Appellants lack an interest in the Appeal based on alleged ownership or theoretical access via third parties is incorrect.

15 Third and finally, the allegation that the request for access to the HS is in truth aimed at "sabotaging" the system of standards is incorrect. Inappropriate wording left aside, it is a fundamental aspect of the Transparency Regulation that an applicant is not obliged to state reasons for the application (Art. 6(1) and C-531/20 P, EU:C:2022:8, para. 72). As already pointed out at para. 89 of the Appeal , the European legislature had the opportunity to introduce a special provision for public access to HS but chose not to. Thus, there is simply no question that the Appellants' request for access to documents is a form of sabotage of the standardization system. The Interveners' attempts to imply such a motivation is unfounded and in any event it is an irrelevant factor.

16 In relation to the alleged inadmissibility of the Appellants' relief asking the Court to grant access to the requested HS (Interveners' Response, para. 4), this relief is admissible in so far as it asks the Court to make a final decision on the action for annulment - which is within its jurisdiction. In accordance with the first paragraph of Art. 61 of the ECJ's Statute, the Court may, after quashing a decision of the GC, refer the case back to the GC for judgment or, where the state of the proceedings so permits, itself give final judgment in the matter. The Appellants therefore ask the Court to give final judgment, which in substance will require the EC to grant access to the HS without the need for the Court to issue a direction. The Appellant's alternative relief is for the matter to be remitted back to the GC.

2. Admissibility of the first line of arguments of the first ground of the Appeal

17 The EC and the Interveners allege that the first line of argumentation of the first ground of the Appeal, according to which HS cannot be protected by copyright, is inadmissible. The EC puts forward that this argumentation is "*inadmissible obscuri libelli*" since the Appellants mainly repeated the arguments presented before the GC and failed to provide the

paras. of the GC's Judgment that are being contested (EC's response, paras. 13 to 17, and paras. 38 to 40). In addition, the EC and the Interveners claim by referring to Art. 277 TFEU and Art. 169(1), 170(1) of the ECJ's Rules of Procedure that the Appellants raised a new plea of illegality regarding the validity of the Standardization Regulation that was not presented before the GC and that results in the inadmissibility (EC's response, paras. 18 to 20 and Interveners' response, paras. 19-21).

18 The EC's and Intervener's argumentation is wrong. First, there is no inadmissibility "*obscuri libelli*". The Appellants made it clear that they challenge the GC's conclusions on the alleged copyright protection of the HS despite the fact that HS are part of the EU law and thus not copyrightable (Appeal, paras. 18-50). In that respect, by further deepening their arguments presented before the GC, the Appellants explained why HS cannot be protected by copyright since the rule of law requires free access to the law. The Appellants also described that the GC did not (properly) deal with this fundamental (and obviously open) question, but rather only relied on its wrong interpretation of the ECJ's judgment in *James Elliot Construction* including the Standardization Regulation (see paras. 50-54 of the GC's Judgment, whereby the GC's main conclusion is in para. 53 which was explicitly contested by the Appellants in para. 21 of the Appeal). It is obvious that the Appellants challenged these findings and showed how the GC erred in law with the first line of argumentation of the first ground of the Appeal with the aim to have the Court rule that HS are not protected by copyright so that access to the HS needs to be granted.

19 As regards the alleged new plea of illegality regarding the Appellants' argumentation relating to the validity of the Standardization Regulation (Appeal, para. 29), it is to be noted that this argument is not a stand-alone argument, but incorporated in the Appellants' line of arguments why HS cannot be protected by copyright and thus why the alleged exemption under the Transparency Regulation does not apply. In the Appellants' view, the Standardization Regulation neither deals with copyright protection of HS nor provides an exemption for an access request under the Transparency Regulation (which would effectively mean that the Standardization Regulation would always prohibit a full access to HS). The Standardization Regulation is thus – as the Appellants have explained (Appeal, para. 29) – irrelevant for the case at hand.

20 It is also to be recalled that the case at hand concerns a simple request by the Appellants to four HS under the Transparency Regulation. In case C-160/20, the ECJ recently indicated

that access requests under the Transparency Regulation are the correct way to access standards (ECLI:EU:C:2022:101, para. 37).

21 However, even if the Standardization Regulation were relevant, the Appellants have also – from the very beginning of the procedure – made it clear that their access right follows from the rule of law, and thus a principle enshrined in EU primary law, which takes precedence over EU secondary law (cf. Appellants Initial Action, paras. 95-103). Especially after the EC raised the argument relating to the alleged legislator's choice in the Standardization Regulation about paid access and the system of publication in the Defence before the GC for the first time (paras. 60-62), the Appellants not only rebutted this argumentation, but also explained that "*a system requiring payment for access to harmonised standards would not be compatible with these rules due to a violation of the principle of the rule of law*" (Reply of the Appellants before the GC, para. 6). The Appellants' argumentation about the incompatibility of the Standardization Regulation with EU primary law is thus not new, but was simply ignored by the GC and the Appellants made this clear once again in the Appeal.

22 The Court is also entitled to deal with this issue. In the Appellants' view, if certain provisions of the Standardization Regulation were indeed to hinder access to the requested HS, this could be addressed by interpreting the Standardization Regulation in a way that it complies with the rule of law as EU primary law. This would be possible without invoking the inapplicability under Art. 277 TFEU as the Standardization Regulation does not provide any explicit rules regarding copyright protection of or access to HS under the Transparency Regulation so that there would be no conflict with the wording of the Standardization Regulation. In that respect, the ECJ held that "*where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law […] and, more specifically, with the principle of legal certainty*" (C-1/02, ECLI:EU:C:2004:202 para. 30; see also C-314/89, ECLI:EU:C:1991:143 para. 17).

23 In addition, even if the Court had to declare the Standardization Regulation as inapplicable and considered that this was not implicitly raised by the Appellants (which would be wrong, see Reply of the Appellants before the GC, para. 6), the Court could nevertheless assess whether the Standardization Regulation complies with EU primary law. In that respect, the ECJ decided that it has a right to assess the validity of EU acts *ex officio* if this is relevant for the decision in a case (14/59, ECLI:EU:C:1959:31, ECR 215, at 229-230).

This would also be necessary in order to grant an effective legal remedy against the GC's Judgment for the Appellants because the Appellants must have a right to challenge the findings of the GC in relation to the Standardization Regulation and its (alleged) implications for the case at hand. Otherwise, the Appellants' right to be heard would be violated.

3. Admissibility of the Appellants' arguments regarding alleged copyright protection

24 Both the EC and the Interveners allege the inadmissibility of the second allegation in the second line of argumentation where the Appellants challenged paras. 47 to 49 and 59 of the GC's Judgment. The EC contends that the second line of arguments in the first ground of the Appeal where the Appellants argue that the GC and EC only relied on general allegations and assumptions when assessing copyright protection of the HS is inadmissible (EC's response, para. 50). The Interveners put forward that the Appellants' argument in relation to the originality assessment in conjunction with the copyright protection of the HS is an inadmissible request to re-examine a factual finding of the GC (Interveners' response, paras. 3 and 60)

25 These allegations are not correct. In its Judgment, the GC simply held that the EC was entitled to find the necessary threshold of originality without itself carrying out an assessment (para. 48) and that the Appellants had not substantiated their claim that the EC had erred in this respect (para 59). The only substantive finding of the General Court was that originality was "*apparent from the length of the texts at issue, which implies choices by the authors, including in the structuring of the documents.*"

26 Thus, the Appellants' arguments are admissible since they are not aimed, as incorrectly characterized by the EC and the Interveners, at displacing a finding of fact by the GC but rather are points of law arising from the GC's Judgment. It is quite apparent that the Appellants' argument is that the GC and the EC did not examine the originality of the four requested HS and that it is for the EC to demonstrate that the requested HS are protected by copyright. It is to be noted that copyright protection is a qualifying condition for the activation of the exception in the first indent of Article 4(2) Transparency Regulation insofar as the interest as regards the protection of copyright is invoked. The approach suggested by the GC (and EC) ultimately means that a refusal of an access request is legal if it is only *likely* that the requirements of the exemption (here: copyright protection) are met. Such standard of assessment would contradict Art. 4(2) Transparency Regulation which

not only requires that its prerequisites are likely to be met, but which must be met with certainty.

27 Therefore, the Appellants' argument is that the GC made a legal error in not itself assessing whether the requested HS constituted works and further erred in finding that it could be implied from the length of the documents that they were original even though the length of a document is not decisive as to whether it is original (cf. the case-law cited at para. 63 of the Appeal).

4. Admissibility of references to national case law

28 The Interveners contend that the Appellants rely on new factual evidence as regards the judgments submitted as annexes to the Appeal (Interveners' Response, para. 5). This is wrong.

29 The cited case law presented by the Interveners in support of their view relates to assessments of national laws by EU courts. This is different in the case at hand. Here, it is not about an assessment of national laws, but about the interpretation of EU law. With the cited and submitted national cases, the Appellants demonstrated that the rule of law, as enshrined in EU law, requires free access to the law to refute the finding at para. 107 of the GC's Judgment, which held that the Applicants did not substantiate the exact source of a constitutional principle which would require access that is freely available and free of charge to HS. In that respect, as general constitutional traditions common in national law can be considered when establishing general principles in EU law (C-11/70, ECLI:EU:C:1970:114, para. 4), the submitted national case law serves as an interpretation aid for EU law. Given that the concept of the rule of law is identified as a common value of the Member States in Art. 2 TEU, the decisions of national courts illustrating this common value is something which the ECJ can take into account without it being first necessary for the GC to make a "finding of fact" in this regard.

30 Further, most of the cited and submitted case law has already been presented before the GC (paras. 69, 98, 99 of the Initial Action). The only difference is that the Appellants wanted to make it more convenient for the Court and thus directly provided them with the relevant judgments as Annexes to the Appeal. It is also noteworthy that the Interveners do not object to the admissibility of this ground of Appeal since it is apparent that it does not raise a new point of law for the first time at the appeal stage. It is also noted that the Interveners do not object to references to decisions of the ECJ (paras. 31, 33, 34, 35), reference

to academic commentary (paras. 31, 32) or references to the case law of the European Court of Human Rights (paras. 37, 38, and 39). Thus, it is not clear what real objection there is to case law from the Irish, English and U.S. courts (paras. 40 to 42) which is consistent with the material over which there is no objection. Taken as a whole, the Appellants, consider that all of this material clearly contradicts the GC's finding that the claim to a constitutional principle of free access to the law has not been substantiated.

5. Admissibility of Appellants' argumentation regarding the general presumption for HS

31 The Interveners take the view that the Appellants' argumentation regarding the illegality of relying on a general presumption for HS under the Transparency Regulation is inadmissible because this was not argued before the GC (Interveners Response, para. 63). This is wrong.

32 The GC, at para. 97 of the Judgment under appeal, noted that the EC relied on a "*general presumption*" in order to refuse access to the requested HS. This is a completely new finding of the GC, which was presented neither by the EC nor the Interveners. The Appellants must thus have a right to challenge this – incorrect (cf. Appeal, paras. 68-74) – finding of the GC in order to have an effective legal remedy. Otherwise, the Appellants' right to be heard would be violated.

33 Contrary to what the EC indicates in paras. 60-65 of its Response, the GC very much assumed that a "general presumption" applied in the case at hand. This follows from the cited case by the GC in para. 97 of the Judgment where the GC relies on its judgment in *Spirlea v Commission* (T-306/12, EU:T:2014:816) which dealt with a general presumption related to investigations. Such reliance on a general presumption means that the burden for explaining the refusal and relying on an exemption is significantly lowered for the EC. It may well be that the GC assumed this as well as considering its explanations on the low standards for the required copyright assessment. As the Appellants explained in the Appeal (paras. 68-74), the reliance on the general presumption was wrong.

II. GROUNDS OF APPEAL WHICH CHALLENGE THE GC'S JUDGMENT REGARDING OVERRIDING PUBLIC INTEREST

34 The EC's and Interveners' Responses raise two objections against the Appellants' arguments regarding the overriding public interest. First, the EC complains that the arguments are "too vague" in this respect (EC's Response, para. 83) and the Interveners that it is not

"specific" (Interveners' Response, para. 78). In particular, the Interveners deploy selected quotes from para. 85 of the Appeal to give the appearance of vague and generalised considerations without referring to the substance and de facto specific nature of the considerations put forward by the Appellants. Second, the Interveners complain about the ineffectiveness of the argument against a point in the Judgment under appeal that is "*for the sake of completeness*" (Interveners' Response, para. 79).

35 Taking the allegation of vagueness first, it is clear from the matters set out at para. 85 of the Appeal that the reasons justifying an overriding public interest are not vague but are rather quite specific. First, the Appellants pointed to a public interest in the free availability of EU law, which is in fact linked to the concept of the rule of law embodied in Art. 2 TEU as discussed in detail at paras. 19 et. seq. of the Appeal.

36 Second, the Appellants pointed to the fact that the four requested HS relate to toy safety and the maximum rate of Nickel emissions, Nickel being a serious allergen and suspected carcinogen. The Applicants pointed out that compliance with these HS plays an important role in protecting members of the public, particularly children, from potentially harmful and unsafe products.

37 Third and finally, the Appellants noted that the four requested HS are important for manufacturers and all participants in the supply chain and they provide the easiest and most common way for manufacturers to comply with the general requirements provided in EU law against the background of the presumption of conformity. While both the EC and the Interveners allege that there would be other ways to ensure compliance, none of them has ever presented any evidence about how this can happen in practice. Additionally, as far as the EC indicates that access to HS would only be relevant for special groups (para. 89 of the EC's response), this is not a valid argument. Effectively, such argument could be used to deny access to all laws as normal citizens usually do not look into law (but rather ask a lawyer to do this).

38 In the Appellants' view, there is nothing vague about these reasons justifying an overriding public interest. In any event, the justification for the overriding public interest in granting the request has been made out by the Appellants for reasons which are distinct from the principles underlying the Transparency Regulation.

39 The EC's reliance on paras. 157 and 158 of *Sweden v API* is misconceived since this judgment concerned whether and in what circumstances an overriding public interest which is

not distinct from the principles underlying the Transparency Regulation can justify the release of documents and/or requires a concrete examination of the requested documents (C-514/07 P, C-528/07 P, and C-532/07 P, EU:C:2010:541, para. 152). This is clearly not the case here where matters of overriding public interest which are specific to the requested HS and that are distinct from the principles underlying the Transparency Regulation have been relied upon by the Appellants.

40 It should also be recalled that the ECJ in *Sweden v API* noted that the considerations put forward by API could not "*in the present case*" provide an appropriate basis for establishing that the principle of transparency was in some sense especially pressing. Contrary to what the EC asserts, this part of the judgment did not establish a general rule but merely stated that the justification in that case (which was not advanced on distinct grounds) was insufficient (C-514/07 P, C-528/07 P, and C-532/07 P, EU:C:2010:541, para. 158).

41 The assertion that the Appeal against paras. 102 to 107 of the GC's Judgment, which are expressed to be "for completeness" is ineffective, is incorrect. This part of the GC's Judgment followed a finding that the GC did not accept what it described as "*general allegations concerning the existence of a public interest in the guarantee of access to harmonised standards that is freely available and without charge*" but went on to say that even if that proposition were accepted the disclosure of the requested HS was unlikely to serve that interest.

42 This demonstrates that if the Appellants succeed in overturning the GC's finding on the first part of the argument, it will be necessary to consider the second part which is expressed as "*in any event*". Thus, the Appeal against this part of the Judgment may in fact lead to its annulment. The Appellants' argumentation is thus effective as case law provides that such "for completeness" arguments may be dismissed as ineffective only where they cannot lead to the annulment of the Judgment under appeal (C-332/18, EU:C:2019:1065, para. 137).

III. NEW ARGUMENTS AND FACTS BY EC AND INTERVENERS ARE INADMISSIBLE, BUT IN ANY EVENT WITHOUT MERIT

43 The EC and Interveners present new facts and arguments relating to the interpretation of the Standardization Regulation, particularly its relationship to the Transparency Regulation (EC's Response, para. 18, and Interveners' Response, paras. 19 and 23). They further allege that the Standardization Regulation would be the basis for the existence of copyright

and that it mandates charging for HS (EC's response, para. 51; Interveners' response, paras. 23 to 31 and 72). The Interveners also contend that there would be a risk of decoupling the system of European HS from the international system (Interveners' Response, para. 33). Finally, the Interveners present new arguments regarding the principle of legal certainty as this would only require "appropriate publicity" (Interveners response, paras. 43 to 47).

44 As far as the EC and the Interveners present new facts, this is inadmissible during the appeals proceedings. This applies particularly to the expert report named "Standardization for a competitive and innovative Europe: a vision for 2020" mentioned in para. 27 of the Interveners' Response. Any citations and conclusions from this expert report are new facts, which cannot be considered. The same applies to the new facts presented by the Interveners in para. 33 of their Response regarding the cooperation with ISO and the references to the WTO Technical Barriers to Trade and the associated Code of Good Practice including any conclusions drawn thereof.

45 In any event, however, the new submissions are without merit.

1. Standardization Regulation is irrelevant in the case at hand

46 The Standardization Regulation is irrelevant here. The case concerns a request for four HS under the Transparency Regulation. For such request, it needs to be assessed whether the Appellants are entitled to such right and whether the EC has any reasons to refuse the access request. It is undisputed that the Appellants have a right for access.

47 The only issue here is whether the EC can refuse access based on an exemption, which is to be interpreted narrowly, of the protection of "*commercial interests of a natural or legal person, including intellectual property*", and if the refusal were possible whether there would be an "*overriding public interest in disclosure*" (Art. 4(2) Transparency Regulation). All of this is based on the Transparency Regulation without any reference whatsoever to the Standardization Regulation. This speaks already against any relevance of the Standardization Regulation in the case at hand.

48 For the assessment of the protection of "*commercial interests of a natural or legal person, including intellectual property*", the decisive question here is whether EU law, which HS are part of, can be copyrightable. The Appellants have explained in detail that the law cannot be copyrightable as the rule of law requires free access to the law (Appeal, paras. 18-50).

49 In that respect and contrary to what the EC and Interveners contend, the Standardization Regulation cannot be regarded as the basis for copyright protection of HS. The word "copyright" is mentioned nowhere in the Standardization Regulation or its recitals. This is remarkable for a Regulation that is supposed to provide for the copyright protection so clearly. If the legislator regarded HS as obviously copyrightable, it would have been logical to include this somewhere in the Standardization Regulation.

50 The EC's and Interveners' reference to Art. 6(1) Standardization Regulation, which deals with access of SMEs to HS, is also irrelevant. This provision does not say anything about the copyright protection of HS, which is the decisive question here. It does also not provide for any explicit rule whether the standardization organizations have to charge fees for the sale of HS. Rather, Art. 6(1) Standardization Regulation only provides certain specific minimum requirements for access of SME. Overall, under the Standardization Regulation, there is no legal obligation anywhere that HS would have to be made available only against payment. This topic (about charging fees) is not even mentioned in the recitals.

51 Finally, the reference to Art. 10(6) Standardization Regulation, which deals with the publication of HS, is without relevance. Again, this provision does not say anything about whether EU laws (and thus HS) are copyrightable. While Art. 10(6) Standardization Regulation provides for a publication of the reference to a HS in the OJ, this provision cannot be understood as prohibiting a full publication or establishing a legal obligation to only publish the reference. Rather, the provision is open in that respect. This is supported by the recitals, which are silent in that respect.

52 In any event, even if the Standardization Regulation were of relevance, this could be addressed by interpreting the Standardization Regulation in a way that it complies with the rule of law as EU primary law (see above, para. 22).

53 Considering the above, the GC made it too easy for itself when it did not assess whether the law (and thus HS) can be copyrightable, but simply referred to *James Elliot Construction* (see para. 53 of the GC's Judgment) and alleged that the ECJ acknowledged the current system of publication of HS (although this was not at issue in that case, see AG in *James Elliot Construction*, para. 51)). This did not answer the decisive question about whether the EU law, which HS are part of, can be copyrightable.

2. Rule of law requires free access (not only appropriate publicity)

54 The Appellants explained in detail that HS cannot be copyrightable since the rule of law requires free access to the law (Appeal, paras. 18-50). In that respect, the Interveners allege that the principle of legal certainty (following from the rule of law) would only require "appropriate publicity", but not free access to law. This is wrong.

55 The cited cases by the Interveners which suggest "appropriate publicity" do not deal with the principle of legal certainty in conjunction with the publication of EU law, but rather with "*national measures adopted pursuant to a Community regulation*" (C-313/99, ECLI:EU:C:2002:386 para. 51; C-480/00 and others, ECLI:EU:C:2004:179 para. 83). These judgments are thus irrelevant here as the case at hand deals with the principle of legal certainty regarding the publication of EU law. In addition, the cases do not propose at all that a "paywall" for access to the law, which is at issue here, would be admissible.

56 Both the EC and the Interveners also try to make an argument out of the case law where the ECJ held that the principle of legal certainty does not require a publication in all Member State languages (EC's Response, para. 31, and Interveners' Response, para. 43). It is sufficient to say that the EU law was publicly available for free in these cases at least in the most relevant languages. Hence, free access to the EU law was possible in these cases. This is completely different here as the HS are only available against payment. It thus follows from this case law that HS must be accessible for free in the case at hand. In that respect, the ECJ very recently acknowledged again that the law needs to be publicized and even noted that standards are not binding on the public if they are not published in the OJ (C-160/20, ECLI:EU:C:2022:101, paras. 40-42, 73)

57 Even if an "appropriate publicity" were required, this test would not be met here. Prices of up to EUR 900 for a single HS, or corresponding prices of EUR 8.13 per single page are not reasonable for access to the law. Additionally, access via libraries or info points is not sufficient as they are not broadly available across Europe. In that respect, contrary to what the Interveners suggest, it is not only decisive how the situation may be in a single Member State, but the whole EU needs to be considered as access to EU law is at stake. Finally, Art. 17(2) of the Charter of Fundamental Rights protecting intellectual property is not affected since HS are not copyrightable. In that respect, the Appellants also dispute again the allegation by the Interveners that the sale of HS is a vital part of their business model. The Interveners have – up to date – not provided any evidence for this allegation.

IV. APPELLANTS' ARGUMENTATION CONCERNING THE COMMERCIAL INTERESTS IS EFFECTIVE

58 The EC alleges that the Appellants' argumentation concerning the commercial interests would be ineffective if the Court acknowledged copyright protection of the HS because the EC based the access refusal on two different lines of reasons, namely the copyright protection and the risk of a very large fall in the fees collected by CEN (EC's response, para. 59).

59 This is wrong. To refuse an access to the requested HS, the EC must demonstrate under Art. 4(2) Transparency Regulation that the commercial interests are affected. The Appellants have explained in the Appeal (paras. 75-81) why this was not properly done by the GC in the Judgment. It is obvious that the Appellants based their considerations on the overall assessment by the GC on both alleged reasons why commercial interests are supposed to be affected, particularly since both reasons are closely "*connected*" (as the GC determined). In that respect, the Appeal puts forward several reasons why the GC's approach was not correct, inter alia since the GC did not consider the specific facts of the case at hand, i.e. the effect of the access to four requested standards, but rather the effects on the standardization system at all. This was not correct so that the commercial interests are not affected and the Judgment needs to be set aside. This applies regardless of whether copyright protection exists or not.

60 The Appellants therefore respectfully request the Court to allow the appeal and to:

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

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

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

Dr. Fred Logue Dr. Jens Hackl Christoph Nüßing