Date of acceptance : 19/05/2022

Published ID	:	C-588/21 P
Document number	:	25
Register number	:	1223092
Date of lodgment	:	16/05/2022
Date of entry in the register	:	17/05/2022
Type of document	:	Rejoinder
	:	Document
e-Curia lodgment reference	:	DC166836
File number	:	1
Person lodging document	:	Delaude Sandrine (R111952) Commission

EUROPEAN COMMISSION

Brussels, 16 May 2022
sj.f(2022)3927550 – SD/yw

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

REJOINDER

submitted pursuant to Article 175 of the Rules of Procedure of the Court of Justice by the **European Commission** represented by Sandrine Delaude, Legal Advisor, and by Giacomo Gattinara and François Thiran, members of the Legal Service, acting as agents, with a postal address for service in Brussels at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, who consent to service by e-Curia,

in

Case C-588/21 P

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

– Appellants –

other Parties to the proceedings being

European Commission

– Defendant at first instance –

Comité européen de normalisation (CEN) and Others

– Interveners at first instance –

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

I. INTRODUCTION

1. The European Commission ("the Commission") has the honour to submit the present Rejoinder to the Court of Justice. In its Rejoinder, the Commission will respond to the new arguments raised in the Reply, whilst avoiding, as much as possible, to repeat statements already made in its Response and referring respectfully the Court to it. The Commission will not comment the arguments of the Reply made in response to the Interveners' response (paragraphs 7-16, 28-30, 31-32 and 55 of the Reply).

2. For the sake of clarity, the Commission will respond to the arguments following the order used in the Reply, even if it is different from the order used in its Response. The Commission notes that numerous arguments developed in its Response are not rebutted in the Reply.

II. ADMISSIBILITY

3. The Reply addresses first the pleas of inadmissibility raised by the Commission's Response as to the first line of argumentation and as to the second line of argumentation of the first limb of the first ground of appeal.

II.1 As to the first line of argumentation (since the harmonised standards are part of EU law, they must be freely accessible - paragraphs 18 and 19-51 of the appeal) **of the first limb** (the General Court erred in law in holding that the requested documents are protected by a copyright) **of the first ground of appeal** (error in assessment of the application of the exception in the first indent of Article 4(2) of Regulation 1049/2001)

4. As to this first line of argumentation, the Commission considered the appeal to be inadmissible *obscuri libelli*, as it did not indicate precisely the contested elements of the judgment which the Appellants sought to have set aside and also the legal arguments specifically advanced in support of the appeal. In particular, the Commission noted that even when the Appellants mentioned in their appeal paragraphs 51 and 53 of the contested judgment, they then mainly repeated the same arguments that had been raised by them before the General Court, and therefore failed to comply with the requirements of Article 169(2) of the Rules of Procedure of the Court of Justice, according to which *"[t]he pleas in law and legal arguments*

relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested".

5. The Reply confines itself in stating that 'In that respect, by further deepening their arguments presented before the [General Court], the Appellants explained why harmonised standards cannot be protected by copyright since the rule of law requires free access to the law' (paragraph 18 of the Reply).

6. The Commission therefore maintains that the first line of argumentation of the appeal is inadmissible *obscuri libelli*.

7. The Commission also maintains that the first line of argumentation is inadmissible for a further reason: in paragraph 29 of the appeal, the Appellants stated that Regulation No 1025/2012 on European standardisation[1] 'must comply with the rule of law', but did not raise at any stage of the procedure a plea of illegality of that Regulation under Article 277 TFEU.

8. The Reply contains contradictory arguments on that regard. In some parts, it recognises that only Regulation 1049/2001[2] applies, and that 'the current dispute is not about the legality of the Standardisation Regulation (…)' (paragraph 3 of the Reply). It even alleges that the Standardisation Regulation is 'irrelevant for the case at hand' (paragraph 19 of the Reply – see also paragraphs 46-47). In other parts, it argues that 'the Appellants' argumentation relating to the validity of the Standardisation Regulation (…) is not a stand-alone argument but incorporated in the Appellants' line of arguments' (based on the principle of rule of law enshrined in primary law) 'why harmonised standards cannot be protected by copyright' (paragraph 19 of the Reply – emphases added by the Commission). The Reply then concludes that 'the Appellants' argumentation about the incompatibility of the Standardisation Regulation with EU primary law is thus not new, but was simply

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

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

ignored by the [General Court]' (paragraph 21 of the Reply – emphasis added by the Commission; see also paragraph 23 of the Reply: 'In addition, even if the Court had to declare the Standardisation Regulation as inapplicable and considered that this was not implicitly raised by the Appellants (which would be wrong …), the Court could nevertheless assess whether the Standardisation Regulation complies with EU primary law').

9. In addition, contrary to what the Appellants suggest, no exception of invalidity has been properly raised by the Appellants at any stage of the procedure. Furthermore, the view that the inapplicability of the Standardisation Regulation would have been wrongfully considered by the General Court as having not been "*implicitly*" raised by the Applicant (paragraph 23 of the Reply), confirms that the Applicants did not actually raise any plea of illegality of this Regulation, such a plea, being a ground of review on the merits, having to be raised explicitly.

10. It should also be noted that the reasoning according to which the (alleged) illegality of the Standardisation Regulation can be raised because it supports the general idea that the exception under Regulation 1049/2001 is not applicable (paragraph 19 of the Reply) is not acceptable: it would mean accepting any plea of illegality at any stage of the procedure.

11. Therefore, the Commission maintains that the first line of argumentation of the first limb of the first ground of appeal is inadmissible *obscuri libelli* and in any event that no exception of invalidity has been properly raised by the Appellants at any stage of the procedure.

II.2 As to the second line of argumentation (paragraphs 52-66 of the appeal) **of the first limb of the first ground of appeal: the four harmonised standards requested do not meet the criteria for the copyright protection**

12. The Appellants alleged in paragraphs 52-53 of the appeal that the judgment under appeal erred in law, first, in finding that 'the EU institutions lacked jurisdiction to examine whether the four requested harmonised standards were protected by copyright since this was a matter for Member States' (paragraph 57 of the judgment

under appeal – first allegation) and, second, in finding that 'the four requested harmonised standards were protected by copyright' (paragraphs 47-54 of the judgment under appeal – second allegation).

13. As to the second allegation of the second line of argumentation, the Commission considered the appeal to be inadmissible when the Appellants contended in paragraph 64 of the appeal that 'it is clear from the judgment [under appeal] that neither the General Court nor the [Commission] examined the originality of the four requested harmonised standards', or that the General Court and the Commission 'only relied on general allegations and assumptions' as to the copyright protection, while in paragraphs 45-46 of the judgment under appeal in particular, the General Court examined whether the Commission complied with the scope of the review which it was required to carry out in accordance with paragraph 43 of the judgment under appeal, by analysing the initial refusal decision and the confirmatory decision, and concluded positively in paragraph 47 of the judgment under appeal.

14. The Reply alleges that the second allegation is admissible, as the General Court 'made a legal error in not itself assessing whether the requested harmonised standards 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'. According to the Reply, 'the approach suggested by the [General Court and by the Commission] ultimately means that a refusal of an access request is legal if it is only *likely* that the requirement of the exemption (here: copyright protection) are met. Such standard of assessment would contradict Article 4(2) [of Regulation 1049/2001] which not only requires that its prerequisites are likely to be met, but which must be met with certainty' (paragraph 26 of the reply).

15. On this regards, the Commission can only refer once again to paragraphs 45-48 of the judgment under appeal, which clearly indicate that the assessment of the originality of the work was not relying only on the length of the harmonised standards.

16. For the rest, the Commission repeats that this standard of assessment, which indeed does not amount to a definitive judgment giving certainty as to the existence of copyrights as this judgment can only be delivered by the national competent courts

applying the national legislation, does not contradict Article 4(2) of Regulation 1049/2001, which purpose is not to give to the Commission the final word as to what are creative works protected by intellectual property rights. Indeed, in this regard, the General Court has rightly added that 'the Commission was not authorised, contrary to the applicants' arguments, to examine the conditions required by the applicable national law for the purpose of checking the veracity of copyright protection for the requested harmonised standards as such an examination goes beyond the scope of the review which it was empowered to carry out in the procedure for access to document' (paragraph 57 of the judgment under appeal - emphasis added by the Commission).

III. GROUNDS OF APPEAL WHICH CHALLENGE THE GENERAL COURT JUDGMENT REGARDING OVERRIDING PUBLIC INTEREST

17. The Reply contends that the Commission complained in its Response that the arguments of the Appellants 'were too vague' (paragraph 34 of the Reply), while, according to the Appellants, 'it is clear from … para. 85 of the Appeal that the reasons justifying an overriding public interest are … rather quite specific', as the Appellants pointed first 'to a public interest in the free availability of EU law, which is in fact linked to the concept of the rule of law …' (paragraph 35) ; second to the fact that the four requested harmonised standards relate to health issues (paragraph 36) and third to the fact that 'the four requested harmonised standards are important for manufacturers and all participants in the supply chain' (paragraph 37).

18. This argumentation does not adduce any new element compared to the Appeal. It was rebutted extensively by the Commission in paragraphs 79-84 of its Response, to which the Commission respectfully refers the Court.

19. The Reply also contends that the reasons justifying an overriding public interest are distinct from the principles underlying Regulation 1049/2001, and that therefore the Commission's reliance on paragraphs 157-158 of the judgment of 21 September 2010 in the joined cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden v API* is misconceived as 'this judgment concerned whether and in what circumstances an overriding public interest which is not distinct from the principles

underlying [Regulation 1049/2001] can justify the release of documents' (paragraph 39 of the Reply).

20. It remains that what the case-law requires is specific reasons, as explained in the judgment of the Court of Justice of 11 May 2017 in the case C-562/14 P *Sweden and Spirlea*, paragraphs 55-57:

'*The General Court found, in paragraph 97 of the judgment under appeal, that, in support of their request for access to the documents at issue, the applicants at first instance merely relied on general assertions that the disclosure of the documents is necessary for the protection of human health and failed to state specific grounds showing to what extent such disclosure would serve that general interest. As the General Court rightly recalled in the same paragraph of the judgment under appeal, to establish the fact that, in the present case, disclosure of the documents at issue met such a need, the applicants ought to have shown that there was an overriding public interest, within the meaning of the final clause of Article 4(2) of Regulation No 1049/2001, to justify such disclosure.*

The Court has previously held that 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 and that 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 (see, to that effect, judgment of 14 November 2013, LPN and Finland v Commission, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 93 and 94 and the case-law cited).

In that regard, it must be noted that nothing which has been adduced in the present case is such as to establish that the considerations of the General Court, in paragraph 97 of the judgment under appeal, regarding both the burden of proof on the applicants at first instance and the fact that those applicants merely alleged, in general, that the protection of human health required that they have access to the documents at issue, without putting forward specific grounds showing that that protection was an overriding public interest, were incorrect in law' (emphasis added by the Commission).

IV. NEW ARGUMENTS AND FACTS BY THE COMMISSION ARE INADMISSIBLE, BUT IN ANY EVENT WITHOUT MERIT

21. According to the Reply, the Commission presented in its Response 'new facts and arguments relating to the interpretation of the Standardisation Regulation, particularly its relationship to' Regulation 1049/2001 and alleged that 'the Standardisation Regulation would be the basis for the existence of copyright and that it mandates charging for harmonised standards' (paragraph 43 of the Reply). The Reply refers to paragraphs 18 and 51 of the Commission's response and claims that those new facts are 'inadmissible during the appeal proceedings' (paragraph 44 of the Reply).

22. In paragraph 18 of its Response, the Commission explained in a nutshell that the validity of the Standardisation Regulation was not questioned in the framework of the action for annulment lodged against the confirmatory decision of the Commission refusing access to documents, and that the Appellants did not raise a plea of illegality of that Regulation under Article 277 TFEU. In paragraph 51 of its Response, the Commission explained that the Standardisation Regulation (and the applicable sectoral legislation) indeed provide that special rates for the provision of harmonised standards apply to SMEs (article 6(1), point f of Regulation No 1025/2012), that free access be provided only to draft standards or abstracts of standards (article 6(1), point d and e, of Regulation No 1025/2012) and that only a reference of the harmonised standards will be published in the Official Journal (article 10(6) of Regulation No 1025/2012).

23. Those points were already made by the Commission in first instance, and are not inadmissible (see for instance the Commission Rejoinder in case T-185/19, paragraphs 5-8).

24. According to the Reply (paragraph 45), 'in any event, the new submissions are without merit'. This would be because 'the Standardisation Regulation cannot be regarded as the basis for copyright protection of harmonised standards' (paragraph 49 of the Reply), Article 6(1) of the Standardisation Regulation 'only provides certain specific minimum requirements for access of SME' (paragraph 50 of the Reply) and Article 10(6) of the Standardisation Regulation 'cannot be

understood as prohibiting a full publication or establishing a legal obligation to only publish the reference' (paragraph 51 of the Reply).

25. This is not the reading that the Commission makes of the provisions of the Standardisation Regulation referred to supra, 22: Regulation No 1025/2012 implicitly recognises that harmonised standards are protected by copyrights and present a commercial interest. Article 6 and Article 10(6) of Regulation 1025/2012 can be read as the expression of a balance established by the legislator between access to the standards on the one hand and the rights of the authors of the standards on the other hand.

V. RULE OF LAW REQUIRES FREE ACCESS (NOT ONLY APPROPRIATE PUBLICITY)

26. The Reply refers to the following Court of Justice judgments: the *Skoma-Lux* judgment[3] and the *Consorzio del Prosciutto di Parma* judgment[4] on the one hand, and the recent judgment of 22 February 2022 in case C-160/20 *Stichting Rookpreventie Jeugd* on the other hand. The judgment contends that the two first judgments are not relevant because while they accepted that the 'principle of legal certainty does not require a publication in all Member State languages', 'the EU law was publicly available for free in these cases at least in the most relevant languages'. The third judgment would indicate that 'standards are not binding on the public if they are not published in the OJ' (paragraph 56 of the Reply). Finally, the Reply complains that 'even if an appropriate publicity were required, this test would not be met here' and refers to 'prices of up to EUR 900 for a single harmonised standard, or corresponding prices of EUR 8.13 per single page' (paragraph 57 of the Reply).

27. The Commission indeed indicated in its Response that the reference of the Appellants to the judgments in *Skoma Lux* and *Prosciutto di Parma* is irrelevant, in so far as in those cases the non-opposability of a legal provision did not stem from the lack of publication as such, but from the lack of publication in the language of the concerned person or of the Member State at issue. Conversely, in the case at hand, it is undisputed that the references of the four harmonised standards having

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

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

been published in the Official Journal, that publication took place in all official languages.

28. As to the recent judgment of 22 February 2022 in case C-160/20 *Stichting Rookpreventie Jeugd*, the Appellants seem to erroneously consider that the Court of Justice has indicated that the standards are to be made publicly accessible under Regulation No 1049/2001, whilst on the contrary at paragraph 37, the Court of Justice merely clarified that Article 4(1) of Directive 2014/40 did not provide for any restriction to the rules applicable under Regulation No 1049/2001, which would then apply in its entirety, including with the relevant exceptions laid down in Article 4 thereof, to any request for public access to the concerned standards. Moreover, account must be taken of the fact that the Court of Justice considered the specific modalities by which undertakings obtain access to the standards - see paragraph 52 of that judgement, which reads as follows:

"That said, account must be taken of the specific features of the system established by ISO, which consists of a network of national standards bodies, enabling those national bodies to grant, upon request, access to the official and authentic version of the standards determined by ISO. Accordingly, where undertakings have access to the official and authentic version of the standards referred to in Article 4(1) of Directive 2014/40, those standards and, therefore, the reference made thereto by that provision are binding on them".

29. Finally, the Commission believes that the prices referred to by the Appellants could be overestimated. The harmonised standards which access was requested by the Appellants cost between EUR 43.15 and EUR 297.77. The Commission however believes that the interveners are better placed to comment on the prices of the standards.

VI. APPELLANTS' ARGUMENTATION CONCERNING THE COMMERCIAL INTERESTS IS EFFECTIVE

30. In paragraphs 58-59 of the Reply, the Appellants contend in substance that as they challenge both the General Court findings on the protection of the intellectual property rights, and of the commercial interests, and as 'both reasons are closely connected', all those findings have to be correct.

31. The Commission maintains that as paragraph 64 of the judgment under appeal rightly explains, 'In the present case, it is clear from the confirmatory decision that the Commission based its refusal to disclose the requested harmonised standards on two connected but different infringements of the commercial interests of CEN and its national members, namely, first, the protection of those harmonised standards by copyright and, secondly, the risk of a very large fall in the fees collected by CEN and its national members in return for access to those harmonised standards, if access to them could be obtained free of charge from the Commission' (emphasis added by the Commission). Therefore, should the exception of the protection of the harmonised standards by intellectual rights be upheld, the decision refusing access to those documents is properly grounded.

VII. CONCLUSION

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

– reject the Appeal as partially inadmissible and partially unfounded,

– order the Appellant to bear the costs.

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Agents for the Commission