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Berlin, 16 May 2022 **Reg.-No:** 14/002357-19

REJOINDER

submitted in accordance with Article 175
of the Rules of Procedure of the Court of Justice

on behalf of the **interveners at first instance**

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

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(1) The appellants' submissions in the Reply cannot save the appeal. To the extent that the appellants try to portray the arguments raised by the Commission and the interveners as being overly 'complicated' and 'formalistic',[1] they disregard the fact that compliance with the procedural requirements for an action before the EU Courts is an indispensable prerequisite for any examination on the merits. The appellants' case still does not meet the admissibility threshold.

(2) In any event, the appeal remains manifestly unfounded. The appellants' essential claim that the rule of law requires general free access to harmonised standards was recently rejected by the Grand Chamber of the Court of Justice in its judgment *Stichting Rookpreventie Jeugd*. In view of the specific features of the standardisation system, which are explained in detail in the Advocate General's opinion,[2] the Court confirmed that it is not necessary to publish the full text of standards in the *Official Journal*, but that it is sufficient for the standards to be accessible, upon request, through the system established by the standardisation bodies.[3] The considerations set out in that judgment and the underlying opinion of the Advocate General are directly applicable to the present case.

(3) For these reasons, the interveners respectfully request that the appeal be dismissed by way of order as manifestly inadmissible or unfounded pursuant to Article 181 of the Rules of Procedure of the Court of Justice.

A.
Partial inadmissibility of the appeal

(4) The appellants seem to recognise that the Court has no power to grant access to the requested standards, nor to issue instructions to the Commission.[4] However, they fail to adapt their forms of order accordingly.[5] For this reason alone, the appeal must be declared inadmissible and the appellants be ordered to bear the costs to the extent that they continue to request that the Court 'grant access to the requested documents'.

(5) The appellants' reliance on national judgments which have not been submitted to the General Court is also inadmissible.[6] The classification of national judgments as factual evidence is not called into question by the fact that they are relied upon to establish an alleged common constitutional principle of the Member States. Contrary to what is

1 Reply, paragraph 1.
2 Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, *Stichting Rookpreventie Jeugd*, C-160/20, EU:C:2021:618, paragraphs 74 to 92.
3 Judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101, paragraph 52.
4 Reply, paragraph 16; cf. already the interveners' response to the appeal, paragraph 4.
5 Reply, paragraph 60.
6 Reply, paragraphs 28 to 30; cf. already the interveners' response to the appeal, paragraph 5.

claimed by the appellants,[7] the concerned judgments of the Irish, English and U.S. courts have also not been presented before the General Court. In any event, judgments from the U.K. and the U.S. cannot be invoked to establish an alleged common constitutional principle of the Member States.

B.
Inadmissibility of the application

(6) The appellants' attempt to prevent the Court from declaring the application inadmissible is doomed to fail as well.

(7) *First*, the appellants wrongly qualify the interveners' submissions as a 'cross-appeal'.[8] The interveners never filed a cross-appeal. However, the EU courts must at all times, including at the stage of an appeal, raise of their own motion a lack of interest to bring proceedings.[9] For this reason, an independent plea of inadmissibility may be raised not only in a cross-appeal, but also in the response to an appeal.[10]

(8) *Second*, to the extent that the appellants argue that the '[i]nterveners are not allowed […] to introduce arguments contrary to the [Commission] as defendant',[11] they misconstrue the role of the interveners in the present appeal proceedings. The 'interveners' had the formal status of interveners at first instance only. In the appeal, they exercised their right under Article 172 of the Rules of Procedure to file an independent response. They are therefore 'defendants' like the Commission and the restrictions to an intervention set out in Article 129 of the Rules of Procedure do not apply. In any event, the appellants' argument cannot prevent the Court from declaring the action inadmissible of its own motion.

(9) *Third*, the appellants have not complied with their obligation to prove the existence of an interest in bringing proceedings.[12] The appellants do not contest that they possess copies of all four requested standards.[13] They also do not contest that the General Court distorted the evidence by finding that consultation of the standards in public places was 'excessively difficult in practice'.[14] Nor do they allege any special circumstances that might justify an interest in bringing proceedings despite those facts. Rather, the appellants essentially rely on the General Court's erroneous consideration that an interest in bringing

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7 Reply, paragraph 30.
8 Reply, paragraphs 8 to 12.
9 Interveners' response to the appeal, paragraph 7.
10 Judgment of 28 February 2019, *Council v Growth Energy and Renewable Fuels Association*, C-465/16 P, ECLI:EU:C:2019:155, paragraphs 56 to 63 and the case-law cited.
11 Reply, paragraph 10.
12 See, regarding the burden of proof, the interveners' response to the appeal, paragraph 7.
13 Reply, paragraph 14.
14 Reply, paragraph 14; see also the interveners' response to the appeal, paragraphs 9 and 10.

proceedings automatically arises from a denial of access to a requested document.[15] Yet, as the interveners have pointed out in their response, it is clear from the case-law of the Court that there is no such automatism. The interest in bringing proceedings must always be assessed in the light of the specific circumstances at hand.[16]

(10) The appellants also wrongly deduce from the Court's *Leino-Sandberg* judgment[17] that 'third party access' can never entail the loss of an interest in bringing proceedings.[18] It follows only from that judgment that, in the case of disclosure of a document by a third party, it is necessary to examine whether the person requesting access has obtained full satisfaction as a result of such disclosure.[19] In *Leino-Sandberg*, the Court held that this requirement was not met since the requested document emanated from the institution to which access was sought and the person seeking access had 'a genuine interest in obtaining access to an authenticated version […], guaranteeing that that institution [was] the author and that the document expresse[d] its official position.'[20] However, this reasoning is not applicable to the present case.

(11) The appellants have not put forward any other reason that would allow to consider that their interest in requesting access has not yet fully been satisfied, even though they are already in possession of the requested standards. They therefore lack an interest in bringing proceedings. This applies even more since the appellants can access the requested standards at any time without difficulty and free of charge at info points and in public libraries.

(12) In view of the above, the Court should proceed to a substitution of grounds and dismiss the appeal in whole on the ground of inadmissibility of the application.

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15 Reply, paragraph 13.

16 Interveners' response to the appeal, paragraph 8.

17 Judgment of 21 January 2021, C-761/18 P, *Leino-Sandberg v Parliament*, ECLI:EU:C:2021:52.

18 Reply, paragraph 14.

19 Judgment of 21 January 2021, C-761/18 P, *Leino-Sandberg v Parliament*, ECLI:EU:C:2021:52, paragraph 34; see, to that effect, also the judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 47.

20 Judgment of 21 January 2021, C-761/18 P, *Leino-Sandberg v Parliament*, ECLI:EU:C:2021:52, paragraph 48.

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

(13) The first ground of appeal, relating to the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, remains inadmissible, ineffective and, in any event, unfounded.

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

(14) As regards the first part of the first ground of appeal, both the complaint that the requested standards must be excluded from copyright protection (1.) and the denial of the originality of the said standards (2.) must still be rejected.

1. No exclusion of copyright protection of harmonised standards

(15) The argument that the requested standards must be excluded from copyright protection remains manifestly inadmissible and ineffective (a) and, in any event, ill-founded (b).

a) The argument is manifestly inadmissible and ineffective

(16) Regulation No 1025/2012 provides for a system under which access to standards must respect copyright protection and is not generally free of charge.[21] To the extent that the appellants challenge the validity of that Regulation, their arguments are inadmissible. At first instance, the appellants merely asked the General Court to interpret the said Regulation in the light of the principle of the rule of law as not impeding free access to harmonised standards.[22] They have not raised a plea of illegality under Article 277 TFEU.

(17) The appellants' argument that the Court should nevertheless examine the validity of Regulation No 1025/2012 of its own motion[23] cannot succeed. It is clear from the case-law that a plea of illegality must be raised in the application initiating proceedings and

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21 Cf. judgment under appeal, paragraphs 53 and 103; Interveners' response to the appeal, paragraphs 23 to 33.

22 See the Reply of the appellants before the General Court, paragraphs 5 and 6: The appellants submitted essentially that, regardless of the choice of the legislator, Regulation No 1025/2012 could and had to be interpreted in the light of the rule of law principle as not hindering free access, since there was no 'particular provision whereby the legislature gave effect to this alleged choice', so that the 'relevant legislation [was] neutral on whether payment is required'.

23 Reply, paragraph 23.

that such a plea is inadmissible where raised at a later stage.[24] The appellants' reference to the judgment of the Court in *Société des fonderies de Pont-à-Mousson*[25] cannot alter this result. That judgment only concerns the ground for annulment 'lack of competence', which the EU Courts must raise of their own motion. Since the appellants do not challenge Regulation No 1025/2012 for a lack of competence, the said judgment is inapplicable.

(18) In view of the obvious inadmissibility of an exception of illegality, it is hardly surprising that the appellants are primarily seeking to rewrite their appeal. They now argue – for the first time in the present proceedings – that Regulation No 1025/2012 should be considered irrelevant because it 'neither deals with copyright protection of [harmonised standards], nor provides an exemption for an access request'.[26] Such an argument was neither raised by the appellants nor discussed by the parties at first instance. The argument is therefore inadmissible pursuant to Article 58 of the Statute and Article 170(1) of the Rules of Procedure of the Court of Justice.[27] The argument is also inadmissible because the appellants did not raise it in the appeal.[28]

(19) The same applies insofar as the appellants now revert to the argument put forward before the General Court that Regulation No 1025/2012 must be interpreted in the light of the principle of the rule of law to the effect that it does not impede free access to harmonised standards.[29] Such an argument was also not raised in the appeal. Therein, the appellants only challenged the validity of Regulation No 1025/2012.[30] It is clear from the case-law

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24 Judgment of 11 July 1985, *Salerno and Others v Commission and Council*, 87, 130/77, 22/83, 9 and 10/84, EU:C:1985:318, paragraph 37; judgment of the General Court of 15 September 2016, *La Ferla v Commission and ECHA*, T-392/13, EU:T:2016:478, paragraph 41, and the case-law cited.

25 Judgment of 17 December 1959, *Société des fonderies de Pont-à-Mousson* v *High Authority*, 14/59, EU:C:1959:31.

26 Reply, paragraphs 19, 20 and 46 to 51.

27 Cf. 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.

28 Judgment of 14 October 1999, *Atlanta v European Community*, C-104/97 P, EU:C:1999:498, paragraphs 19 and 22; orders of 15 May 2007, *Ricosmos v Commission*, C-420/05 P, EU:C:2007:284, paragraphs 76 and 137; of 6 February 2014, *Thesing and Bloomberg Finance v ECB*, C-28/13 P, EU:C:2014:230, paragraph 30.

29 Reply, paragraphs 21, 22 and 52.

30 In the appeal, the appellants criticised the General Court for having considered, in paragraph 53 of the judgment under appeal, 'that the ECJ did not declare invalid the system of publication of harmonised standards laid down in Article 10(6) of Regulation No 1025/2012, by which only the references of those standards are to be published' (paragraph 21 of the appeal). The appellants also criticised paragraph 103 of the judgment under appeal by submitting that '[i]f these publication rules […] violate the rule of law (which they do since they (allegedly) do not allow for a free publication […]), they will be irrelevant'. Those submissions can only be understood as challenging the validity of Regulation No 1025/2012. By contrast, nothing in the appeal allows to consider that the appellants challenge the interpretation of that regulation relied on by the General Court.

that a plea raised at first instance but not in the appeal cannot be raised in the reply before the Court of Justice.[31]

(20) In the light of the above, the incompatibility of general free access to harmonised standards with the system established by Regulation No 1025/2012 cannot be questioned in the context of the present appeal. Nor can the validity of that system be called into question. Overall, the appellants' arguments remain inadmissible and ineffective.

b) The argument is, in any event, ill-founded

(21) In any event, the argument that the requested standards must be exempt from copyright protection and be freely accessible remains ill-founded. The argument is incompatible with the recent judgment of the Grand Chamber of the Court in *Stichting Rookpreventie Jeugd*[32] (aa)), with Regulation No 1025/2012 (bb)) and with the rules on copyright (cc)). The rule of law requires adequate publicity of harmonised standards, but not free general access to their full text (dd)).

aa) Incompatibility with the Court's ruling in *Stichting Rookpreventie Jeugd*

(22) The argument that the requested standards must be exempt from copyright protection and be freely accessible is incompatible with the Court's judgment in *Stichting Rookpreventie Jeugd.* In any event, the appellants try in vain to reinterpret the said judgment in support of their argumentation.

(23) In this case, the Grand Chamber confirmed that technical standards established by a standardisation body such as ISO and made mandatory by an EU legislative act are binding on the public not only when they have been published in the *Official Journal*, but also if the official and authentic version of the standards is available upon request through the system established by the standardisation bodies. In the words of the Court:

> '[A]ccount 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.'[33]

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31 Judgment of 14 October 1999, *Atlanta v European Community*, C 104/97 P, EU:C:1999:498, paragraph 22; see also the other case-law cited in footnote 31 above.

32 Judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101.

33 Judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101, paragraph 52.

(24) On this point, the Court followed the targeted opinion of the Advocate General, who had explained in detail why the specific features of the standardisation system and the copyright protection of standards had to be respected and free access to them cannot be imposed. In the words of the Advocate General:

> '[A]ccess for a fee to the content of the ISO standards at issue is justified by the fact that those standards are drawn up by a private organisation (ISO) funded, in particular, from sales of the standards which it draws up. The smooth operation of that organisation is based on the possibility for it to receive a return on its investment, in view, in particular, of the fact that, owing to their complexity and their technical nature, those standards entail a significant use of ISO's human and material resources. In addition, since ISO claims copyright in the standards which it adopts, making them directly available free of charge would amount to negating the existence of such copyright.'[34]

(25) The reasoning of the judgment in *Stichting Rookpreventie Jeugd* and the underlying opinion are directly applicable to the present case. The access system established by the respective standardisation bodies is the same in both cases.[35] What is more, the *Stichting Rookpreventie Jeugd* case concerned an ISO standard which had been declared mandatory in an EU legislative act.[36] In contrast, the present case concerns harmonised standards, which are, pursuant to Article 2(1)(c) of Regulation No 1025/2012, voluntary and to which a reference must be published in the Official Journal in accordance with Article 10(6) of that Regulation.[37] The considerations of the Court and the Advocate General therefore apply *a fortiori* to the present case.

(26) It hence follows directly from the Court's recent case-law that copyright protection is not excluded and that free access is not required even if a standard is – exceptionally – made mandatory by a legislative act of the EU.

bb) Incompatibility with Regulation No 1025/2012

(27) In any event, the appellants' claim to general access to harmonised standards free of charge would be incompatible with the system established by Regulation No 1025/2012. The appellants' argument that this Regulation is 'irrelevant' in the present case cannot be upheld.

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34 Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, *Stichting Rookpreventie Jeugd*, C-160/20, EU:C:2021:618, paragraph 74.

35 Cf. Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, *Stichting Rookpreventie Jeugd*, C-160/20, EU:C:2021:618, paragraph 89 with footnotes 64 and 65.

36 See Judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101, paragraphs 37 and 46.

37 See the interveners' response to the appeal, paragraphs 25 and 38.

(28) *First*, the appellants rely in vain on the fact that Regulation No 1049/2001 does not contain an express reference to Regulation 1025/2012.[38] It is clear from settled case-law that the exceptions provided in Article 4 of Regulation No 1049/2001 cannot be interpreted without taking account of the specific rules laid down in other EU acts.[39]

(29) *Second*, the appellants argue in vain that Regulation No 1025/2012 itself does not grant copyright protection on standards.[40] That argument cannot call into question the fact that the said Regulation establishes a system under which access to standards must respect copyright protection under the rules on copyright and is not generally free of charge.

(30) *Third*, the arguments by which the appellants seek to demonstrate that Regulation No 1025/2012 does not establish such a system[41] must also be rejected. Those arguments are clearly refuted by the literal, systematic, historic and purposive interpretation of the Regulation set out in detail in the interveners' response.[42] In particular, the specific provisions on limited publication and rates provided for in the said Regulation would be completely deprived of their meaning if the appellants' claim for general free access to harmonised standards were to be followed. Moreover, it is clear from the legislative history of Regulation No 1025/2012 that the EU legislator deliberately chose a system in which copyright protection is respected and access to harmonised standards is not generally free of charge.[43]

(31) *Fourth*, the appellants cannot successfully argue that the arguments put forward by the Commission and the interveners regarding Regulation No 1025/2012 and its relation with Regulation No 1049/2001 are 'new' and therefore inadmissible.[44] Both the Commission and the interveners have extensively elaborated on those arguments before the General Court.[45] Any supplementary aspect that may be contained in the responses is merely an

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38 Reply, paragraphs 3, 46 and 47.

39 Judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 55; of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 83 et seq., and the case-law cited.

40 Reply, paragraphs 48 to 51.

41 Reply, paragraphs 48 to 51.

42 See the interveners' response to the appeal, paragraphs 23 to 33.

43 See the opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, *Stichting Rookpreventie Jeugd*, C-160/20, EU:C:2021:618, paragraph 87: 'it follows, in particular, from Article 6(1) of Regulation No 1025/2012 that the EU legislature did not envisage that access to standards (in the broad sense) should automatically be free of charge'. This argument is even strengthened by Art. 34(4) of the Commission's recent proposal on the revision of the Construction Products Regulation (COM(2022) 144 final) where the Commission suggests to only publish the references of construction products standards in the Official Journal that have been made available at an affordable price.

44 Reply, paragraphs 43 and 44.

45 See, in particular, the Commission's Defence (paragraphs 26 to 35, 42 to 47 and 60 to 69), its Rejoinder before the General Court (paragraphs 2 to 10) and the Statement in intervention (paragraphs 2 to 16; 53 and 62).

extension of those arguments. According to settled case-law, the said arguments are therefore fully admissible.[46]

cc) Incompatibility with the rules on copyright

(32) In any event, the appellants' claim for general free access to harmonised standards is incompatible with the rules on copyright. As pointed out in the interveners' response and in the Statement in intervention,[47] the EU legislator has not made use of the reservation for official texts provided by Article 2(4) of the revised Berne Convention. A subject matter which constitutes a 'work' within the meaning of the Copyright Directive No 2019/790 therefore enjoys the protection of that Directive, regardless of whether it constitutes a law or an official work.

dd) The rule of law requires appropriate publicity of standards, but not free access to their full text

(33) The conclusions drawn by the appellants from the principle of the rule of law remain unfounded as well. At most, this principle requires appropriate publicity of harmonised standards, but not general access free of charge to their full text.

(34) The appellants dispute in vain that the publication requirement resulting from the rule of law is subject to a proportionality test.[48] Even for legal acts that are intended to impose obligations on individuals, such a test clearly follows from the case-law of the Court and the ECtHR to which the interveners refer in their response.[49] A proportionality test is also required by the protection of intellectual property granted by Article 17(2) of the Charter. The appellants wrongly dispute the applicability of that protection.[50] According to the case-law, subject matter which qualifies as 'work' within the meaning of the Court's case-law is subject to the protection of Article 17(2) of the Charter.[51] Whether and to what extent a restriction to that protection may be justified by other principles such as the rule of law is a question of balancing interests and thus of proportionality, but not of the applicability of Article 17(2) of the Charter.[52]

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46 Judgment of 16 November 2017, *Ludwig-Bölkow-Systemtechnik v Commission*, C-250/16 P, EU:C:2017:871, paragraph 29 and the case-law cited; order of 31 March 2011, *EMC Development v Commission*, C-367/10 P, EU:C:2011:203, paragraph 62 and the case-law cited.

47 See the interveners' response to the appeal, paragraph 49, and the Statement in intervention, paragraph 48.

48 Reply, paragraphs 54 to 56.

49 Interveners' response to the appeal, paragraphs 41 to 47.

50 Reply, paragraph 57.

51 Judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraphs 37 and 38.

52 Cf. judgments of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraphs 32 to 34 and the case-law cited; of 28 October 2020, *BY (Preuve photographique)*, C-637/19, EU:C:2020:863, paragraphs 31 and 32.

(35) In any event, the applicability of the proportionality test to the publication of (harmonised) standards is directly confirmed by the Advocate General's opinion in *Stichting Rookpreventie Jeugd*. In that case, the Advocate General examined in detail whether the specific features of the standardisation system resulted in a 'disproportionate impediment to the possibility for the public to have access to the content of the ISO standards at issue'.[53] After a careful assessment of these specific features – such as the general accessibility of standards against payment of a reasonable fee, the possibilities to consult the standards free of charge, the dependence of the standardisation bodies on the revenue from the sales of standards and the public interest in having an effective and functioning standardisation system which is financially viable – the Advocate General concluded that there was no such 'disproportionate impediment'.[54] In his words:

> 'The conditions of access to those standards do not disproportionately impede the possibility for the public to become aware of them and reflect a fair balance between, on the one hand, the requirements of that principle and, on the other, the various interests involved.'[55]

(36) These considerations, which also underlie the judgment of the Grand Chamber in *Stichting Rookpreventie Jeugd*, are directly and – due to the voluntary nature of harmonised standards – *a fortiori* applicable to the present case.[56] The appellants' claim that the specific features of the standardisation system do not meet the proportionality test[57] must therefore be rejected.

(37) For the sake of completeness, it should be added that the appellants' presentation of the said specific features is factually incorrect and misleading. It is not true that the requested standards are 'only available against payment'[58], nor is it true that libraries and info points – where harmonised standards can be accessed free of charge – are only available 'in a single Member State'.[59] Furthermore, the usual fee for a harmonised standard does not amount to EUR 900:[60] The appellants themselves have pointed out that the standards at issue can be purchased at prices ranging from EUR 43.15 to EUR 295.77.[61]

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53 Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, *Stichting Rookpreventie Jeugd*, C-160/20, EU:C:2021:618, paragraphs 81 to 91.

54 Ibid.

55 Ibid., paragraph 91.

56 See above, paragraph (25).

57 Reply, paragraph 57.

58 Contra Reply, paragraph 56.

59 Contra Reply, paragraph 57; see the opinion of Advocate General Saugmandsgaard Øe of 15 July 2021, *Stichting Rookpreventie Jeugd*, C-160/20, EU:C:2021:618, paragraphs 89 with footnotes 64 and 65.

60 Contra Reply, paragraph 57.

61 Application to the General Court, paragraph 49; see, on that point, already the interveners' response to the appeal, paragraph 44 with footnote 66.

(38) In any event, the present case concerns the appellants' individual request for access to the requested standards. The crucial question is therefore whether the specific features of the standardisation system make access to those standards unreasonably difficult for the appellants. However, the appellants do not even claim that this is the case. Indeed, such claim would be manifestly erroneous: As pointed out in the interveners' replies to the written questions of the General Court,[62] the info point at the premises of the German standardisation body DIN in Berlin, which is open to the general public without registration or any other precondition, is located at a walking distance of 2.6 kilometres from the office of the appellants' German lawyers. Furthermore, the appellants can and could at any time access all four standards free of charge at the National Standards Authority of Ireland (NSAI) in Dublin, where one of the appellants is located.

2. No error in law regarding the originality-criterion

(39) As regards the qualification of the requested standards under the rules on copyright, the appellants limit their criticism to claiming, first, that the General Court did not examine whether those standards constitute 'works' and, second, that it relied only on the length of the standards in question to confirm their originality.[63]

(40) Both claims must be rejected. *First*, in paragraphs 44 to 49 and 58 to 60 of the judgment under appeal, the General Court clearly examined whether the Commission had identified sufficient objective and consistent evidence that the requested standards meet the originality threshold.[64]

(41) *Second*, contrary to what the appellants attempt to suggest, the General Court did not rely solely on the 'length of the documents'. Rather, it also relied on the 'way' in which the requested standards were drafted and the number of 'choices of the authors, including in the structuring of the document'.[65] The General Court also explicitly considered and rejected the arguments by which the appellants sought to demonstrate that the latitude for creative choices was limited by the technical character of the subject matter and by existing constraints on the drafting of standards.[66] Taking into account the Court's decision in *Brompton Bicycle*,[67] the General Court concluded that these standards were 'sufficiently creative to deserve copyright protection'.[68]

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62 Interveners' replies to written questions of the General Court, paragraph 4.
63 Reply, paragraphs 24 to 27.
64 See the interveners' response to the appeal, paragraphs 53 and 59.
65 Judgment under appeal, paragraphs 48 and 59; interveners' response to the appeal, paragraph 60.
66 Judgment under appeal, paragraph 59; interveners' response to the appeal, paragraph 60.
67 Judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, paragraphs 26 and 30 et seqq.
68 Judgment under appeal, paragraphs 48 and 59.

(42) This approach is not erroneous in law. The appellants' criticism consists primarily of a 'misreading' of the judgment under appeal and, for the rest, of an inadmissible request to reassess the factual findings of the General Court.

(43) Even if the criticism could be understood as being directed at the burden of proof or standard of proof applied by the General Court, it would obviously have to be rejected. The appellants themselves acknowledge that under the conditions found by the General Court 'it is […] *likely* that the requirements of the exemption (here: copyright protection) are met'.[69]

(44) To the extent that the appellants complain that the requirements for copyright protection are not 'met with *certainty*',[70] they fail to explain how the standard of proof they require is more demanding than the requirement of 'sufficient objective and consistent evidence' applied by the General Court – which is, in any event, the correct standard.[71]

(45) The appellants also disregard that it is for the General Court alone to assess the value to be attached to the evidence produced before it.[72] They overlook the fact that if the Commission relies on evidence which is in principle sufficient, it is for the applicant to invoke and prove circumstances that call that evidence into question.[73] The appellants also overlook that the General Court's jurisdiction does not amount to a review of its own motion and that it is for the applicant to raise pleas in law against the decision at issue and to produce evidence in support of those pleas.[74]

(46) Having found that the Commission had identified sufficient objective and consistent evidence of free and creative choices reflected in the requested standards and having rejected the appellants' arguments – which were very sparse – disputing that evidence,[75] the General Court therefore correctly upheld the Commission's finding that those standards were sufficiently creative to deserve copyright protection.

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69 Reply, paragraph 26 (original emphasis).

70 Ibid. (emphasis added).

71 Judgments of 22 September 2011, *Belgium v Deutsche Post and DHL International*, C-148/09 P, EU:C:2011:603, paragraph 80; of 18 March 2021, *Pometon v Commission*, C-440/19 P, EU:C:2021:214, paragraph 101 and the case-law cited.

72 Judgment of 17 December 2020, *BP v FRA*, C-601/19 P, EU:C:2020:1048, paragraph 71 and the case-law cited.

73 Judgments of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 76, and of 26 September 2018, *Infineon Technologies v Commission*, C-99/17, EU:C:2018:773, paragraph 66.

74 Judgments of 18 December 2014, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 76 and the case-law cited, and of 26 January 2017, *Villeroy & Boch Austria v Commission*, C-626/13 P, EU:C:2017:54, paragraph 83.

75 See the application to the General Court, paragraph 76.

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

(47) The interveners share the view of the Commission that the second part of the first ground of appeal, which concerns the commercial interest of the interveners, is ineffective if the first part of the first ground of appeal, which concerns copyright protection, is dismissed.[76] The application of the exception does not crucially depend on the 'very large fall in the fees collected' by the interveners in return for access that disclosure of those standards would entail.

(48) In any event, the appellants cannot maintain their claim that disclosure of the requested standards would not adversely affect the commercial interests of the interveners. The appellants refrain from any discussion of the substance of that question.[77] They merely attempt to rely on the incidental reference to a 'general presumption' in paragraph 97 of the judgment under appeal.[78] This attempt remains inadmissible, ineffective and without merits.

(49) *First*, as the interveners and the Commission already pointed out in their responses, the appellants' argument is based on a manifestly incorrect interpretation of the judgment under appeal.[79] The General Court did not assess the impairment of the commercial interests of the standardisation bodies in paragraph 97, but in paragraphs 61 to 74 of its judgment. As is clear from these paragraphs, the General Court did not rely on a 'general presumption' of non-disclosure.

(50) *Second*, the appellants' criticism would have to be rejected even if it were assumed – for the sake of argument only – that the General Court applied such a general presumption. It is for good reason that the appellants refrain from arguing that the Commission applied a general presumption of non-disclosure. Had the Commission relied on such a presumption – which the Commission itself confirmed it did not –,[80] the appellants could and should have challenged this before the General Court. Since they failed to do so, any argument directed against an alleged application of a general presumption by the Commission would be inadmissible at the stage of the appeal.[81]

(51) *Third*, the appellants' claim that the General Court applied a 'general presumption' and thus made 'a completely new finding',[82] is ineffective at the outset. Since it is undisputed

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76 See the Commission's response to the appeal, paragraph 59.

77 See the detailed explanations in paragraphs 66 to 74 of the interveners' response to the appeal.

78 Reply, paragraphs 31 to 33; contra Reply, paragraph 33.

79 See the responses to the appeal by the Commission (paragraphs 60 to 66) and by the interveners (paragraphs 64 and 65).

80 See the Commission's response to the appeal, paragraph 61.

81 See the interveners' response to the appeal, paragraph 63.

82 Reply, paragraph 32.

that the Commission did not rely on such a presumption, even the hypothetical finding of an error by the General Court could not call into question the lawfulness of the Commission's decision.

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

(52) The attempt to establish that the General Court erred in law by denying an overriding public interest in the disclosure of the requested standards is also manifestly flawed.

(53) As regards the first part of this ground of appeal, the appellants have still not put forward any specific circumstances that could justify the disclosure of the requested standards. They limit themselves to repeating – once again[83] – that there is 'a public interest in the free availability of EU law', that the requested standards play 'an important role in protecting members of the public, particularly children,' and that these standards are 'important for manufacturers and all participants in the supply chain'.[84]

(54) Apart from the fact that such a simple reproduction of the arguments put forward before the General Court is inadmissible,[85] the appellants' submissions remain in any event too unspecific to establish an overriding public interest in the disclosure of the requested standards.[86] In particular, the appellants do not even argue that access to these standards is more important to them than to others or more important than access to other standards, such as the health-related standards at issue in the Court's ruling in *Stichting Rookpreventie Jeugd*, for which the Court did not consider general access free of charge necessary.[87]

(55) As to the second part of the second ground of appeal, the appellants concede that their arguments are to be considered only 'if [they] succeed in overturning the [General Court's] finding on the first part'.[88] Since this is not the case, the second part of the second ground of appeal remains ineffective.[89]

(56) In any event, the second part of the second ground of appeal remains unfounded for the reasons set out in paragraphs 80 to 83 of the interveners' response, which are not

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83 See already paragraphs 41 to 43 and 88 to 103 of the application to the General Court and paragraph 85 of the appeal.

84 Reply, paragraphs 35 to 37.

85 Judgment of 15 July 2021, *Deutsche Lufthansa v Commission*, C-453/19 P, EU:C:2021:608, paragraph 96 and the case-law cited.

86 See already the interveners' response to the appeal, paragraphs 76 to 78.

87 See above, paragraphs (22) to (25) and (35) to (36).

88 Reply, paragraphs 41 and 42.

89 See already the interveners' response to the appeal, paragraph 79.

commented on by the appellants in their reply. In view of the specific features of the European standardisation system and the protection of copyright afforded by Article 17(2) of the Charter, the public interests invoked by the appellants clearly do not override the interests of the interveners and the public in the integrity of the European standardisation system.

E.
Forms of order sought

For the reasons set out above, the interveners maintain the forms of order sought in the response to the appeal.

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