OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 22 June 2023(1)

Case C-588/21 P

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

(Appeal – Access to documents of institutions – Regulation (EC) No 1049/2001 – Harmonised standards – Four harmonised standards adopted by the European Committee for Standardisation – Refusal to grant access – Exception relating to the protection of the commercial interests of a third party – Protection deriving from copyright – Rule of law)

1. By their appeal, Public.Resource.Org, Inc. and Right to Know CLG (jointly 'the appellants'), non-profit organisations whose main focus is to make the law freely accessible to all citizens, seek for the judgment of the General Court of 14 July 2021, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2021:445) ('the judgment under appeal') to be set aside. That judgment rejected as unfounded their action seeking the annulment of Commission Decision C(2019) 639 final of 22 January 2019 refusing to grant them access to four harmonised technical standards ('HTS') adopted by the European Committee for Standardisation (CEN) ('the contested decision'). The present case gives the Grand Chamber of the Court an opportunity to rule for the first time on the issue as to whether HTS – which the Court has already recognised as forming part of EU law and having legal effects – are capable of being protected by copyright; and, further, whether the rule of law as well as the principle of transparency and the right of access to documents, as enshrined in Article 15 TFEU, require that access to HTS be freely available without charge.

I. Background to the dispute

2. The appellants made a request to the European Commission, on the basis of Regulation (EC) No 1049/2001 (2) and Regulation (EC) No 1367/2006, (3) for access to documents held by the Commission ('the request for access'). The request for access concerned four HTS adopted by CEN, in accordance with Regulation (EU) No 1025/2012, (4) namely standards: (i) 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; (ii) 'Safety of toys – Part 4: Experimental sets for chemistry and related activities'; (iii) 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and (iv) 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items' ('the requested HTS'). HTS (i) to (iii) refer to Directive 2009/48/EC (5) ('the Toy Safety Directive') and HTS (iv) refers to Regulation (EC) No 1907/2006. (6)

3. By letter of 15 November 2018, the Commission, on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, refused to grant the request for access. The Commission confirmed that refusal by the contested decision.

4. Regulation No 1025/2012 continues the 'New Approach regulation' approach to technical harmonisation and standards developed in 1985, which restricts the content of legislation to 'essential requirements', leaving the technical details to HTS. It formally designates only three European Standards Organisations (ESOs) for the purposes of establishing HTS: CEN (responsible for standardisation in most sectors); Comité européen de normalisation électrotechnique (CENELEC, European Committee for Electrotechnical Standardisation), which is responsible for standardisation in electrical engineering); and European Telecommunications Standards Institute (ETSI), which is responsible for standardisation in information and communications.

II. Proceedings before the General Court and the judgment under appeal

5. By application lodged at the Registry of the General Court on 28 March 2019, the appellants brought an action seeking the annulment of the contested decision. In essence, the appellants' first plea in law alleged that the Commission misinterpreted and/or misapplied the first indent of Article 4(2) of Regulation No 1049/2001; and their second plea in law alleged that the Commission infringed the last clause of Article 4(2) of Regulation No 1049/2001. The General Court rejected both pleas and dismissed the action.

III. Assessment

A. First ground of appeal – Error in the assessment of the application of the exception in the first indent of Article 4(2) of Regulation No 1049/2001

1. First limb of the first ground of appeal – the General Court committed an error of law in incorrectly assessing the copyright protection for the requested HTS

(a) First claim: HTS cannot be protected by copyright since they are part of EU law

6. The appellants submit, in essence, that the General Court's error of law consists in failing to recognise that the requested HTS cannot be protected by copyright since they are part of EU law and the rule of law requires free access to the law. The Commission and the interveners (CEN and the other 14 interveners at first instance) submit that the appeal should be dismissed as unfounded, arguing essentially that the EU standardisation system is based on a recognition of ESOs' copyright over HTS.

(1) Introduction

7. It is necessary to start the present Opinion with an overview of the Court's judgments in *Fra.bo*, in *James Elliott* and in *Stichting*, (7) as they form the backdrop for the present case.

8. First, in the judgment in *Fra.bo* (paragraphs 27 to 32), the Court recognised essentially that, despite being entities governed by private law, national standardisation and certification bodies may exercise public powers and that even though national technical standards are *de jure* voluntary, de facto they may have mandatory effects. This is due to the fact that other means of compliance with EU secondary legislation would be more costly to producers who would need to invest in finding methods that could guarantee at least an equivalent level of protection as that of the standards and taking account of the fact that any alternative method of compliance would not benefit from the presumption of conformity with the requirements of EU secondary legislation. The Court acknowledged the potential de facto mandatory character of a technical standard (paragraph 30) and ruled that '[Article 34 TFEU] must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the

national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body' (paragraph 32).

9. Secondly, the Court held in the key judgment in *James Elliott* (paragraph 40) that, due to their legal effects, HTS form part of EU law. It ruled that '[a HTS] such as that at issue in the main proceedings, adopted on the basis of [a directive] and the references to which have been published in the *Official Journal of the European Union* forms part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption [of conformity] laid down in [that directive] applies to a given product'. Furthermore, according to paragraph 42 of the same judgment, '*although* evidence of compliance of a construction product with the essential requirements contained in [that directive] may be provided by means other than proof of compliance with [HTS], *that cannot call into question the existence of the legal effects of [a HTS]*' (emphasis added). Finally, according to paragraph 43 of the judgment in *James Elliott*, 'it must, moreover, be noted that while the development of such [a HTS] is indeed entrusted to an organisation governed by private law, it is nevertheless *a necessary implementation measure which is strictly governed by the essential requirements defined by that directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the 'C' series of the* [Official Journal]' (emphasis added). It should be noted, however, that since 2018, it is the 'L' series (for legislation) instead of the 'C' series (information and notices), which confirms the recognition that HTS form part of EU law.

10. Thirdly, in the judgment in *Stichting* (paragraphs 33 to 49), the Grand Chamber of the Court held that standards (in that case, the International Organisation for Standardisation (ISO) standards) may be rendered mandatory. The Court ruled, essentially, that it was not necessary that details of a technical nature are set out in the legislative act and, accordingly, the fact that the directive contained *only a reference* to an ISO standard (but not its full text) did not affect the validity of that directive. However, in paragraph 48, the Court held that 'in accordance with the principle of legal certainty …, technical standards determined by a standards body, such as ISO, and made mandatory by [an EU] legislative act are binding on the public generally only if they themselves have been published in the [Official Journal]'.

11. As I will explain in the present Opinion, the above judgments, when read together, in view of the fact that HTS impose certain obligations and their legal effects may be relied on by the general public, provide a solid basis for the Court to rule on the appropriate conditions for access to HTS. At the same time, it should be pointed out that this analysis does not necessarily apply to other types of standards drawn up by ESOs.

12. Furthermore, it is necessary to highlight the fact that one of the four requested HTS – that is standard (iv) in point 2 of the present Opinion – is, in fact, clearly mandatory, as was recognised by the Commission at the hearing. This is because entry 27 in Annex XVII to Regulation No 1907/2006 provides, in relation to nickel, that 'the standards adopted by … CEN … *shall* be used as the test methods for demonstrating the conformity of articles to paragraphs 1 and 2' (emphasis added). Therefore, that requested standard is comparable to the standard at issue in the judgment in *Stichting* (paragraph 30), which was also mandatory because the EU legislation used the same term ('shall').

13. As regards the other three requested HTS at issue in the present case, the Toy Safety Directive provides in recital 2 that 'Directive 88/378/EEC [(8)] … sets out only the essential safety requirements with regard to toys …. Technical details are adopted by … CEN … and … Cenelec … in accordance with Directive 98/34/EC [(9)] … Conformity with [HTS] so set, the reference number of which is published in the [Official Journal], provides a presumption of conformity with the requirements of Directive 88/378/EEC. Experience has shown that these basic principles have worked well in the toys sector and should be maintained'.

14. It is difficult to categorise HTS in any pre-existing category of EU law and, therefore, more in-depth analysis is necessary in order to establish whether access to HTS should be freely available without charge and/or whether they are capable of being protected by copyright. While the Court has already recognised that HTS have legal effects, form part of EU law and may be binding, it has not yet addressed their exact

nature. The appellants' primary plea is that HTS cannot be protected by copyright since they are part of EU law and the rule of law requires free access to the law. Therefore, in order to assess whether that plea can be upheld, it is necessary to analyse the constituent elements of HTS, such as which institution or entity adopts HTS as acts that form part of EU law, under what legal basis and what procedure are HTS adopted, what exactly are the legal effects of HTS and what is the nature of those acts.

15. Indeed, it is necessary to examine whether HTS have evolved over time in such a manner that they constitute *sui generis* EU legal acts (EU standardisation acts) in so far as they are strictly regulated implementing measures of EU secondary legislation. The Court has recognised in the '*Short Selling* judgment', (10) for instance, that Articles 290 and 291 TFEU do not establish a closed system of implementation, and that it is possible to adopt other regulatory instruments in order to flesh out details of a legislative act. Therefore, I invite the Court to seize this opportunity and provide much-needed clarity on HTS' proper legal nature and place in the EU legal order.

(2) Nature of HTS as an EU legal act

(i) Institution or entity adopting HTS

16. My primary contention in the present Opinion is that HTS should be considered as constituting acts of the institutions, bodies, offices or agencies of the European Union. Indeed, the Commission plays a central role in the EU standardisation system, as established by the EU legislature. I consider (as Advocate General Campos Sánchez-Bordona considered previously in *James Elliott* (11)) that '[HTS] should be regarded as "acts of the institutions, bodies, offices or agencies of the Union" for the purposes of Article 267 TFEU' and, as I shall explain below, also for the purposes of EU law in general and for access to EU law in particular.

17. Indeed, as the Opinion in *James Elliott* explains, there are several arguments to support that conclusion: (a) the use of the New Approach directives or regulations may not compromise the Court's jurisdiction; (b) the Commission exercises significant control over the procedure for the drafting of HTS by ESOs; and (c) the operation of the three ESOs (as the only standardisation bodies of the EU) is subject to action by the EU. Accordingly, I will show that the Commission should be seen as the institution adopting HTS (since ESOs, in fact, constitute only preparatory bodies with a limited margin of discretion) or, in any event, as the institution responsible for the adoption of HTS in conjunction with ESOs.

18. It is true that, following the Opinion of Advocate General Campos Sánchez-Bordona, the Third Chamber of the Court recalled in *James Elliott* that 'according to case-law, the Court has jurisdiction to interpret acts which, while indeed adopted by bodies which cannot be described as "institutions, bodies, offices or agencies of the Union", are by their nature measures implementing or applying an act of EU law' (paragraph 34).

19. However, as rightly pointed out in legal literature, the Court's judgment in that case does not preclude the interpretation in that Opinion in so far as the Court 'left unanswered the … question whether [HTS] should be considered as originating from the Commission, [while] the ESO only [acts] as a preparatory organ'. Importantly, in that case, the Court was not required to rule on the question whether the control exercised by the Commission is sufficient in order to transfer the ultimate responsibility for HTS from ESOs to the Commission and whether, in the context of HTS, there has been, in effect, a delegation of certain powers by the Commission to the ESOs. (12)

20. My preliminary considerations lead me to consider that HTS are not simple implementing measures originating from a private-law body (ESO), but are – under the EU standardisation system set out by the EU legislature – to be considered as having been adopted by the Commission or, in any event, that that institution is responsible for the adoption of HTS in conjunction with ESOs.

21. A recent Commission Communication shows that that institution recognises the public nature of the work carried out by ESOs as the EU standardisation strategy must 'also incorporate core EU democratic

values and interests, as well as green and social principles', technical standards being of marked strategic interest for the EU. It also admits that there is a need to shift even more control over HTS from ESOs to the Commission, when it states that in order to ensure that the public interest is taken into account the Commission should be empowered to draw up directly – by way of implementing acts – common specifications (technical documents alternative to HTS drawn up by ESOs). (13)

22. Moreover, the above considerations are further confirmed by analysis of the procedure for the adoption of HTS.

(ii) Procedure for the adoption of HTS

23. First, a HTS originates in a standardisation request (the Commission's 'mandate' to the ESO). Only the Commission – and not an ESO or any other entity – is empowered to request that HTS be developed in order to implement a given directive or regulation. Therefore, the Commission reaches out to the relevant ESO, which then acts as a preparatory body tasked with that mandate. The Commission selects which ESO to task with the preparation of the draft HTS according to strict criteria as to its content chosen by the Commission and within the deadline set by the latter. The mandate is detailed and includes a specific timeline for the drafting of the HTS to support the implementation of particular EU secondary legislation. I note that the mandate includes the criteria, which govern the drawing up of a HTS and that these criteria are, as a rule, very detailed. (14) The ESO is required to keep the Commission informed about the evolution of the drafting process.

24. I would point out in that respect that that mandate has far-reaching effects, as it not only provides the necessary guidance for ESOs in the development process of HTS, but, in accordance with the Court's judgment in *Anstar*, HTS must also be *interpreted in the light of the mandate from which they originate*. (15) Regarding the content of a mandate, the Commission may delegate only technical tasks, and must refrain from any delegation of political discretion to the ESOs. (16)

25. Secondly, once the draft HTS is complete, the ESO must submit it to the Commission and, once again, only that institution is empowered to carry out a compliance assessment in order to verify whether the draft HTS is consistent with the initial mandate. That assessment can take three forms, in accordance with the Vademecum. Importantly, it is the Commission's sole prerogative whether or not the assessment of the draft HTS is satisfactory. The Vademecum (p. 9) provides that 'specifications delivered by the ESOs in support of Union legislation can never be automatically regarded as complying with the initial mandate, as this is a political responsibility. As the requesting authority, the Commission will always have to assess compliance with its initial request, in cooperation with the ESOs … before deciding to publish the references of a delivered standard in the *Official Journal*'.

26. Thirdly, the standard drafted by the ESO under the Commission's close supervision becomes a HTS only if and when the Commission publishes a reference to that standard in the Official Journal. If the Commission considers that the draft HTS is not sufficiently consistent with the mandate, it asks the relevant ESO to modify it or it withdraws the publication of the reference to the draft HTS or of a part thereof from the Official Journal. In addition, ESOs' discretion is limited even further by the power of the European Parliament and of the Member States to raise an objection to the draft HTS.

27. Finally, the Commission not only supervises closely the drafting of HTS, it also provides significant funding (up to 35% of the CEN's budget). The cooperation with the Commission is governed by an agreement in the form of certain general guidelines which are periodically renewed and which emphasise the importance of standardisation for European policy and the free movement of goods and services. (17)

28. The life cycle of the creation and adoption of a HTS starts and ends with the Commission. While the draft standard is prepared by the ESO, the fact remains that it is not a part of EU law until such time as the Commission publishes a reference to it in the Official Journal. Accordingly, it is the Commission that transforms that preparatory document into an act that forms part of EU law.

29. Indeed, as has been widely recognised in the legal literature, (18) 'the "New approach" under EU law entails a more complex technique. According to many commentators, in its current version, enshrined in Regulation No 1025/2012, it sets forth a stronger "juridification", so that the EU institutions cannot disavow their control over the content of [HTS]'. (19)

30. As has already been pointed out by Advocate General Campos Sánchez-Bordona, 'the right of Member States and of the European Parliament to lodge formal objections and the action taken by the Commission prior to the publication of [references to HTS] make it clear that this is a case of "controlled" legislative delegation in favour of a private standardisation body' (point 55). Moreover, that 'CEN is a private body is made quite clear when it draws up non-harmonised standards, but … CEN adopts a different approach when the object of its activities is to perform the mandates given [to] it by the Commission for the purpose of drafting [HTS]' (point 56 of the Opinion). (20)

31. Furthermore, much like delegated and implementing acts, the Commission's standardisation mandates are also governed by the Comitology Regulation, (21) in order to provide a similar level of scrutiny by the Member States and the European Parliament.

32. Next, it is necessary to examine the legal effects of HTS.

(iii) The HTS's effects

33. At the outset, it is important to differentiate between ordinary or non-harmonised standards, which are voluntary and do not have legal effects per se, and HTS. The latter are a specific form of technical standards in that they: (a) form part of EU law; (b) are referred to in mandatory EU legislation or, in any case, they constitute necessary implementing measures of such legislation, as discussed above, and (c) have important legal effects attached to them by EU law as will be shown below. According to the Vademecum (p. 8), HTS 'support the implementation of [EU] legislation', but in reality they are much more than a simple 'aid'. They are actually *indispensable for the correct implementation* of the relevant EU secondary legislation.

34. Those effects are as follows. HTS are adopted based on the procedure set out by the EU legislature in Regulation No 1025/2012 and the all-important presumption of conformity attaches to HTS, that is to say, the conformity with a given HTS implies compliance with the essential requirements of the corresponding EU secondary legislation and so guarantees freedom of movement for the goods or services in question within the EU.

35. In view of the foregoing and given the reference contained in each HTS to the corresponding secondary legislation, which has been pointed out in legal literature, (22) it can be concluded that while HTS were originally conceptualised as a voluntary mechanism of conformity with the essential requirements laid down in EU secondary legislation, they have in fact been recognised by the Court as having potentially mandatory legal effects. (23)

36. *Stricto sensu*, Regulation No 1025/2012 provides that HTS are voluntary, in so far as economic operators have (at least in theory) alternative means to demonstrate conformity with the essential requirements of the relevant secondary legislation. However, as explained above, one of the most important characteristics of HTS is the legal effect of the presumption of conformity. This turns HTS into an essential tool, in particular, for economic operators in order to benefit from the right to free movement because once they meet the requirements of a HTS they benefit from that legal effect and the relevant goods and services may circulate freely within the EU market.

37. In other words, compliance with HTS affords the manufacturer or service provider the benefit of the presumption of conformity and in terms of liability – in case of related problems, accidents or litigation – the manufacturer or service provider can rely on that presumption: indeed, in that scenario, the burden of proof for the manufacturer or service provider is to demonstrate mere compliance with the relevant HTS and it is for the opposing party (a consumer or a competitor) to rebut that presumption.

38. Such important legal effects lead to practical difficulties and an imbalance between the parties. While compliance with HTS gives the crucial presumption of conformity there is no free access to them. This fact makes it challenging for the general public to consult HTS and for both economic operators and the general public to assess and make real use of potential alternatives to HTS in order to meet essential requirements of secondary legislation.

39. The present case is similar to the case that gave rise to the judgment in *Stichting*. In that case, the national court asked the Court to rule on the validity of a directive in the light of the principle of transparency, when that directive incorporated – by way of a reference – an ISO standard which was not freely available. In that case, the Court ruled that the principle of legal certainty requires the publication of EU law before that law can be effective against natural and legal persons. However, that ruling is based on the premiss that that directive provided for no restriction in relation to the access to documents under Regulation No 1049/2001. The Court observed that that incorporation of ISO standards in the directive imposed obligations on legal persons, because they could access those standards via national standards organisations. However, as regards natural persons, it ruled in paragraph 48 of that judgment that the principle of legal certainty requires that technical standards determined by a standards body, such as ISO, and made mandatory by a legislative act of the EU are binding on the public generally *only if the standards themselves have been published in the Official Journal* (as opposed to a mere reference). Indeed, in such a case, the general public cannot know the necessary methods for measurement of emissions of tobacco products, unless it has access to those standards.

40. For instance, in the present case, the essential requirements for toy safety in Annex II to the Toy Safety Directive ('Particular safety requirements'), Part II ('Flammability'), point 3, merely state that 'toys other than toy percussion caps must not be explosive or contain elements or substances likely to explode when used as specified in the first subparagraph of Article 10(2)'. However, as pointed out by the appellants, the list of substances and the maximum quantity permitted in chemical sets, which give rise to the presumption of conformity with the essential requirements, can be discovered only through consultation of the relevant HTS.

41. In other words, the directive and the essential requirements merely set out the result to be attained, but not the means to achieve it. This shows that, in practice, it is impossible for a natural or legal person to investigate the conformity of a product with the essential requirements without having access to the relevant HTS.

42. When a manufacturer (or a service provider) takes the risk and puts on the market a product (or a service) that does not comply with HTS, the consequence is that the product and the manufacturer (or the service and the provider) do not benefit from the presumption of conformity with the essential requirements of the EU secondary legislation. It follows that in case of litigation, it is the manufacturer or service provider who bears the burden of proving that the product did, in fact, comply with the applicable EU secondary legislation. To my mind, that clearly amounts to a situation where de facto all manufacturers or service providers will seek always to be in compliance with HTS because no rational manufacturer or service provider would be willing to expose themselves to huge commercial risk and to bear such a burden.

43. In other words, respecting HTS gives rise to the presumption of conformity with the essential requirements of EU secondary legislation, which means, in turn, that HTS provides the same effect as a mandatory rule for any natural or legal person which seeks to contest that presumption in relation to a given product or service. That means that reliance on HTS directly affects the burden of proof .

44. Therefore, there are legal effects, for manufacturers and service providers and for a person challenging the presumption, which are linked to compliance with HTS – even where the HTS (for the three Toy Safety Directive HTS in question here) are formally and in theory not mandatory.

45. The fact that HTS are de facto mandatory as they are generally the only accepted method in the market for ensuring compliance with the respective EU secondary legislation is confirmed by a study

commissioned by the Commission: 'in practical terms [HTS] are almost obligatory for most economic players'. Moreover, the same study points out that the price for HTS is one of the major barriers to their effective use. (24)

46. Indeed, the essential requirements of EU secondary legislation confer rights on individuals, which can be applied and enforced under EU law. (25) However, the essential requirements in EU secondary legislation cannot be apprehended in isolation, given that, in practice, it is impossible to confirm the conformity of a product or service without reference to the corresponding HTS. In this way, the public cannot exercise their rights against the manufacturer or service provider under that secondary legislation if they cannot rely on the relevant HTS.

47. It follows that HTS are *indispensable* for the purposes of enforcing corresponding EU secondary legislation. The fact that HTS are de facto mandatory was also acknowledged by the General Court in the '*Global Garden*' case (judgment of 26 January 2017, GGP Italy v Commission, T-474/15, EU:T:2017:36, paragraph 67) and by the Court of Justice in the judgment in *Fra.bo*. The latter judgment found that 'in practice, almost all German consumers purchase copper fittings certified by [a German certification body]' (paragraph 30). As the Court also explained in that judgment, it is generally difficult if not outright impossible for economic operators to choose a different avenue to the technical standard, in view of the time and cost that are necessary in that respect. The fact that companies pay for HTS supports this too. I do not see why companies acting in a competitive landscape would pay for HTS if they were not de facto mandatory. Indeed, the whole architecture of the EU standardisation system presupposes that, in principle, all actors use HTS.

48. To my mind, the de facto mandatory character of HTS does not arise solely from the existence of HTS themselves, but also due to the lack of realistic alternatives. There is strong support and incentive for continuous development of HTS. As a result of this process, national standardisation bodies are limited in their ability to provide alternatives to HTS (given that they are, first and foremost, obliged to transpose HTS without any changes), and there seems to be no financial incentive for other private actors to compete on that market. National case-law and legal literature also consider that it is unrealistic to argue that the use of HTS is voluntary. (26)

49. It follows from the foregoing considerations that HTS are de facto mandatory in so far as they are, at the very least, unavoidable due to the probative value which is attached to them.

50. Having said that, even if the Court were to come to the conclusion that HTS are not de facto mandatory (*quod non*), I consider that that would not alter my analysis – in so far as it would arguably be sufficient to hold that – *stricto sensu* mandatory or not – HTS have clear legal effects as attributed to them by EU legislation.

51. Finally, once HTS are finalised and their reference is published in the Official Journal, every Member State must adopt each HTS – unchanged – as a national standard and withdraw conflicting standards within six months. In accordance with Article 17 TEU, the Commission, as the guardian of the EU Treaties, 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them [and] oversee the application of [EU] law'. Hence, the Commission ensures that HTS are fully effective and if necessary brings an action for failure to fulfil obligations under Article 258 TFEU. Indeed, the Court made clear that imposing additional requirements on products covered by HTS violates the respective Member State's obligation to correctly implement EU law. (27) The Court made that ruling in relation to HTS themselves and not in relation to the essential requirements contained in secondary legislation. It follows that the Commission is required to ensure that HTS are fully effective, which implies that HTS should be enforceable. (28)

(3) Impact of the rule of law requirements on HTS

(i) General observations

52. First, it follows from Article 2 TEU that the rule of law requires free access to EU law for all natural and legal persons of the EU. It is based on the fundamental principle that everyone should have the possibility to know the law and everyone is required to respect it. (29) Indeed, that is why Article 297 TFEU provides that EU law must be published in the Official Journal.

53. Secondly, the Court refers in this regard to the principle of legality (30) and the principle of legal certainty, (31) the latter of which also requires that natural and legal persons have knowledge of the law. In that regard, the Court has already held that rules do not produce legal effects on those persons where those rules were not communicated to third parties by way of publication. (32)

54. Thirdly, the notion of free access to the law is also recognised by way of the principle of transparency. (33) It is axiomatic that EU law can only be effective if it can be enforced. As noted above it is the publication of the law that ensures its enforceability. It follows that if HTS are not published they cannot be fully enforced. As posited above in points 33 to 51 of the present Opinion, HTS are part of EU law and have clearly defined legal effects. Therefore, the current arrangement to publish only a reference to HTS, but not their text, denies the general public an essential element of effective and enforceable EU law.

55. Therefore, the statement in paragraph 107 of the judgment under appeal, according to which the appellants did not substantiate the 'exact source of a "constitutional principle" which would require access that is freely available and free of charge to [HTS]' cannot be upheld.

56. Moreover, the Court held in Skoma-Lux that EU law must be accessible for EU citizens: 'in accordance with the principle of legal certainty, [EU] rules must enable the persons concerned to identify precisely the scope of the obligations which they are subject to, which can only be guaranteed by the proper publication of those rules in the official language of the addressee'. On this basis, the Court concluded that EU regulations or directives do not have legal effects vis-à-vis individuals if they are not properly published in the Official Journal in the language of a Member State, 'even though those persons could have learned of that legislation by other means'. (34) Hence, as I will explain below, paid access to HTS or access via certain selected libraries or a few 'info-points' (35) are – contrary to the General Court's view (paragraphs 103 and 107 of the judgment under appeal) – obviously not suited and are insufficient in order to ensure respect for rule of law.

57. Indeed, as was pointed out, for instance, by the Council of Europe, 'the principle of legal certainty is essential to the confidence in the judicial system and the rule of law … It is also essential to productive business arrangements so as to generate development and economic progress … To achieve this confidence, the state must make the text of the law easily accessible'. (36)

58. Therefore, it needs to be assessed whether the principle of legal certainty requires HTS to be freely available without charge or whether certain conditions on that access may be imposed.

(ii) Scope of access to HTS appropriate in the present case

59. At the outset, I would point out that, while in the present case the Commission is striving to preserve the status quo, at the same time, that institution recently clearly advocated in its 2022 EU Standardisation Strategy that '[ESOs] should consider free access to standards and other documents. The Commission is ready to engage in constructive dialogue with [ESOs] through existing fora to help them achieve this objective' (see point 21 of the present Opinion).

60. It follows from the legal traditions of Member States that 'the principle of the rule of law generally requires the promulgation of formally enacted legal norms. The aim is to make them available to the public in such a way that those concerned can obtain reliable knowledge of their content. This possibility must also not be made unreasonably difficult'. (37)

61. I agree with the appellants' argument that citizens should be able to benefit from an act, which has legal effects, forms part of EU law – such as HTS – and therefore should be capable of being enforced.

Indeed, it suffices to refer to the facts underlying the judgment in *James Elliott*, where the question of the interpretation of HTS arose in the context of a private action concerning defective construction products. Given that HTS have real legal effects on natural and legal persons, the rule of law requires that those persons have access to HTS. Indeed, given that HTS represent the public interest and play a role which is functionally equivalent to that of rules of law, their justiciability (and, therefore, their accessibility) must be adapted accordingly. (38)

62. It appears that most Member States (save for Ireland and the former Member State, the United Kingdom) tend to exclude official texts from copyright protection. The situation is different as regards the copyright protection of national standards. However, as I explained in point 33 of the present Opinion, given their special role under EU law, HTS are completely different to national standards.

63. The judgments in *James Elliott* and in *Stichting* strongly indicate that there is a need for the official publication of HTS (this has also been pointed out in legal literature); otherwise, there would be a serious limitation of the effectiveness of legislative references to such rules, since they are unenforceable against individuals in general as well as against undertakings that have not had effective access to HTS. Indeed, making HTS available behind a paywall can never replace the obligation to publish them officially in the Official Journal. This is true even for large undertakings, because those rules still ultimately concern their customers, who are, in reality, the real addressees: how could a citizen know conclusively whether an undertaking has manufactured its product or provided a service in accordance with HTS, if that citizen is not in a position to know the content of those HTS? A citizen may not be deprived of the possibility of 'officially' having knowledge of the substance of the HTS which, directly or indirectly, is capable of affecting him or her. (39)

64. The link between HTS and secondary legislation necessarily brings HTS into the domain of public duties, in so far as they are an indispensable (or 'necessary') complement to the effective implementation of EU secondary legislation (and thus to promote the effective creation of the EU internal market). Given that ESOs carry out public duties (that is, the development of HTS supplementing EU legislation), those standardisation organisations could, where appropriate, be remunerated by public funds for performing those public tasks (as is, already, partially the case in view of the Commission's funding of all three ESOs). (40)

65. It follows from the foregoing that the rule of law requires access to HTS that is freely available without charge. HTS, as standardisation acts that are part of EU law, implement EU secondary legislation and produce legal effects, should be published in the Official Journal in order to ensure their enforceability and accessibility.

(4) HTS, as part of EU law, are not capable of being protected by copyright

66. In view of the above point, the question remains how to reconcile that conclusion with the fact that, under the Commission's and ESOs' contractual arrangements, HTS are protected by copyright.

67. Indeed, CEN's and the Commission's argument that access to the requested HTS is impossible because of that protection, depends on whether one accepts that HTS are capable of being protected by copyright under EU law.

68. My considerations with respect to the principal argument, as set out in point 20 (that HTS are in reality to be considered as adopted by the Commission), are applicable *mutatis mutandis* even if the Court were to come to the conclusion that HTS should *not* be regarded as 'acts of the institutions, bodies, offices or agencies of the Union'. This is because, for the purposes of EU law in general and of the access to EU law in particular, the fact remains that HTS form part of EU law and, given their indispensable role in the implementation of mandatory EU secondary legislation and their legal effects, they should, in principle, not benefit from copyright protection.

69. Therefore, the General Court made an error of law when it failed to deal with that issue and did not assess whether the law (and HTS as an act that forms part of EU law) can at all benefit from copyright protection. It simply referred to the judgment in *James Elliott* and alleged that the Court had not declared invalid the current system of publication of HTS (although this was not at issue in that case). This did not answer the decisive question whether an act that forms part of EU law can be protected by copyright.

70. It should be pointed out that contrary to what the Commission and the interveners contend, Regulation No 1025/2012 cannot be regarded as the basis for copyright protection of HTS. That regulation contains no provision establishing that HTS are capable of being protected by copyright. If the EU legislature regarded HTS as capable of benefitting from such protection, it would have included a provision to that effect in the regulation or at least mentioned it in a recital.

71. It follows that the exception in Article 4(2), first indent, of Regulation No 1049/2001 – on which the General Court based the judgment under appeal and accordingly refused to grant access to the requested HTS – is inapplicable in the context of this case. As a result, the judgment is vitiated by an error of law and must be set aside.

(b) Second claim of the first limb of the first ground of appeal: even if HTS could be protected by copyright , free access to the law has priority over copyright protection

72. In the alternative, the appellants argue, in essence, that even if the requested HTS can be protected by copyright, free access to the law must take priority over copyright protection.

73. At the outset, I note that Regulation No 1049/2001 itself recognises the concept of free access to the law and in its recital 6 provides that 'documents should be made directly accessible to the greatest possible extent … in cases where the institutions are acting in their legislative capacity, *including under delegated powers*' (emphasis added).

74. Furthermore, the judgment under appeal runs counter to the principle of transparency and the settled case-law of the Court. The Court, sitting as a Full Court, confirmed the importance of that principle, for instance, in the legislative process according to which documents that form part of such a process should, in principle, be made public. The Court recalled that the disclosure of documents used in that process increases the transparency and openness of the legislative process and strengthens the right of EU citizens to scrutinise the information which has formed the basis of a legislative measure. Indeed, even the opinions of the legal services of the EU institutions relating to a legislative process do not come within the ambit of the general need for confidentiality and the Court noted that Regulation No 1049/2001 imposes, in principle, an obligation to disclose them. (41) The importance of the principle of transparency should guide the Court also in relation to HTS.

75. Moreover, in the judgment in *Stichting* (paragraphs 40 to 42 and 73), the Court acknowledged that the law needs to be publicised and noted that standards are not binding on the public if they have not been published in the Official Journal.

(1) No copyright protection of the four requested HTS (due to a lack of 'originality')

76. Even though the EU is not a signatory to the Berne Convention, (42) it has agreed to be bound by Articles 1 to 21 thereof. (43) It follows from Article 2(4) of the Convention, that 'official texts of a legislative, administrative or judicial nature' do not automatically benefit from copyright protection. Rather, 'it shall be a matter for legislation in the countries of the [Berne] Union to determine the protection to be granted to [such] official texts, and to official translations of such texts'.

77. EU law does not provide explicitly whether legal or quasi-legal texts emanating from EU institutions are capable of being protected by copyright. However, it can be argued that it follows from Article 297 TFEU that EU law is, in principle, not capable of benefitting from such protection as a work that gives an exclusive legal right to the proprietor to reproduce, publish, sell or distribute that work.

78. As I explained above, I consider that HTS should not be capable of benefitting from copyright protection, but even if the Court were to conclude otherwise (*quod non*), I shall explain that the judgment under appeal fails to show that the four requested HTS should, in any case, benefit from copyright protection.

(i) Jurisdiction for the assessment of copyright

79. The appellants claim that the General Court erred as it found that the Commission was not authorised to examine whether the four requested HTS were capable of being protected by copyright. It should be pointed out that, in fact, it held that such examination would go beyond the scope of the review which the Commission is empowered to carry out in the procedure for access to documents (paragraph 57 of the judgment under appeal).

80. This reasoning is flawed. First, as the appellants rightly submit, this finding directly contradicts paragraphs 48 and 49 of the judgment under appeal, which held that the Commission was entitled to find that the threshold for originality had been met and that it had correctly decided that the requested HTS were capable of being protected by copyright. It is unclear how the existence of a copyright can be determined if the Commission does not have a right to assess this. Thus, the General Court erred in law when it found that the Commission was not authorised to examine whether the requested HTS were capable of being protected by copyright.

81. Secondly, as the appellants rightly point out, the case at hand concerns a request for access to documents that form part of EU law (that is, the four requested HTS), and that request is based on an EU regulation (that is, Regulation No 1049/2001). The Court held in this regard that Article 4 of that regulation does not contain any reference to the national law of a Member State. (44) Access to documents under Regulation No 1049/2001 and particularly access to acts that form part of EU law must therefore be assessed by EU institutions and be subject to a legal review under EU law before the EU Courts. The General Court clearly failed to recognise this. Additionally, if the General Court's view were correct, this would undermine the appellants' fundamental right to effective legal remedies including their right to be heard. This contradiction has also been pointed out by numerous authors in legal literature. (45) Therefore, it is a matter for the EU institutions to decide through the EU's own legislation on the level of copyright protection to be afforded to acts which are implementing measures of EU secondary legislation and so to decide whether HTS are capable of being protected by copyright.

82. Thirdly, the General Court based its finding about the Commission's lack of competence to assess the copyright on the case-law relating to patents. This, however, does not apply here. The Full Court observed in its Opinion 1/09 (46) that 'the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States'.

83. To the extent the General Court seeks to rely on the Opinion of Advocate General Jääskinen in Donner (C-5/11, EU:C:2012:195) (paragraph 40 of the judgment under appeal) that copyright remains, despite progressively closer harmonisation, largely governed by national law, the judgment under appeal is overly theoretical in this respect. This point has already been made in legal literature. Indeed, since 2012, the Court has shown how far the harmonisation in the area of copyright has been brought. In any case, the reference seems drawn out of context, as the focus in *Donner* was on remedies for copyright infringement. It was not about the basis for the existence of copyright protection such as here. (47)

84. However, I note that the present appeal neither concerns a direct action between individuals in relation to a patent (or copyright) infringement nor does it fall outside the jurisdiction conferred on the EU courts under the EU Treaties. Rather, at first instance, the application made sought the annulment of a Commission decision addressed to the appellants, refusing to grant their request for access to EU documents. This is a type of action in respect of which jurisdiction is conferred on the EU Courts. In particular, Article 263 TFEU does not restrict the pleas that may be raised in an application for annulment, as determined by the General Court in paragraph 57 of the judgment under appeal. Therefore, the General Court erred in seeking to draw an analogy between private disputes concerning patent infringement, on the

one hand, and a refusal to grant access to EU documents involving the contested application of the first indent of Article 4(2) of Regulation No 1049/2001, on the other.

85. It follows that the General Court erred in finding that the Commission was not authorised to examine the requirement for originality by considering that such an examination would go beyond the scope of the review which it is empowered to carry out in the procedure for access to documents. Indeed, it is for the Commission and the EU Courts to determine whether the requested HTS are capable of being protected by copyright and whether they meet the requirement of originality.

86. Therefore, the judgment under appeal is vitiated by an error of law.

(ii) No existence of copyright shown in the requested HTS

87. The General Court held essentially that the Commission did not commit an error when it stated that the HTS were drafted by their authors in a way that is sufficiently creative to deserve copyright protection and that the length of the text implies that the authors had to make a number of choices (including the structuring of the document) which results in the document being protected by copyright (paragraphs 47 to 49 of the judgment under appeal).

88. The General Court's approach is erroneous in law.

89. It is well-settled case-law that while copyright is not fully harmonised in the EU, 'the concept of "work" … constitutes … an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, that concept entails that there exist an original subject matter, in the sense of being the author's own intellectual creation. Secondly, classification as a work is reserved to the elements that are the expression of such creation'. (48) In order for the copyright protection to exist, the author must be able to express his or her creative abilities in the production of the work by making free and creative choices. (49)

90. The Court's case-law confirms this result. For example, the Court held that the fact that setting up a database required significant labour and skill on the part of its author could not, as such, justify copyright protection if that labour and skill do not express any originality. (50) That criterion is of fundamental importance in this context.

91. To my mind, this criterion must apply in the context of HTS. Given that, notably in the judgment in *James Elliott*, the Court accepted its competence to interpret HTS, it clearly follows that it is for the EU Courts to assess whether HTS are capable of being protected by copyright and whether ESOs should benefit from that copyright protection. Indeed, it is not possible to allow a situation to arise whereby Member States would decide whether copyright is applicable to a legal text that forms part of EU law and has crucial legal effects under EU law. Such a conclusion in no way contradicts the Berne Convention for the Protection of Literary and Artistic Works, as it is for the parties to that convention to decide whether or not legal texts are capable of being protected by copyright in their legal system.

92. I agree with the appellants that neither the Commission in the contested decision nor the General Court in the judgment under appeal properly examine the originality of the requested HTS and whether they can, in fact, 'reflect the personality of the author'. That applies also to the presence of free and creative choices. In view of the concept and purpose of HTS, which are typically the result of scientific testing followed by an agreement by a committee, I conclude that the originality standard cannot be accepted at face value (51) – as was accepted here by the General Court. That conclusion is only reinforced when we take into account the specific nature of HTS (points 16 et seq. of the present Opinion) and the procedure for their adoption (points 23 et seq. of the present Opinion).

93. Although it is for the Commission and the General Court to establish that the exemption in Article 4 of Regulation No 1049/2001 is applicable, they relied only on very general allegations and assumptions: considering that the requested HTS were protected by copyright because it could be implied from the

length of the texts that the authors had to make a number of choices. However, these factors do not determine whether or not a particular document is original and thus protected by copyright. The judgment under appeal is therefore flawed.

94. Contrary to what the General Court stated in paragraph 59 of the judgment under appeal, the appellants substantiated – to the extent that it was possible without actually having access to the requested HTS – that the choices available to CEN were constrained in several ways. Therefore, as regards the content of HTS and the layout, these are constrained by the relevant provision in the secondary legislation from which the HTS are derived and by the Commission's mandate. In principle, the above heavily restricts room for creativity and originality. Hence, vague reliance on the length of a document is not sufficient in order to prove that HTS are the result of genuine creative choices on the part of CEN. (52)

95. Therefore, the General Court erred in finding that the Commission was entitled to conclude that the requested HTS were protected by copyright and, as a result, the judgment under appeal should be set aside.

2. Second limb of the first ground of appeal – the General Court committed an error of law in its assessment of the effect on the commercial interests of CEN

96. The appellants submit, in essence, that the General Court committed an error of law in its assessment of the effect on the commercial interests of CEN from the incorrect application of a presumption that the disclosure of the requested HTS would undermine the interest protected by the first indent of Article 4(2) of Regulation No 1049/2001 and by failing to assess the specific effects on those commercial interests.

(a) Reliance on a general presumption was illegal

97. Contrary to what the General Court stated in paragraph 97 of the judgment under appeal, the Commission does not seem to have relied on a general presumption of confidentiality under which granting access to HTS would automatically undermine the interest protected by the first indent of Article 4(2) of Regulation No 1049/2001.

98. Such a general presumption is neither provided by Regulation No 1049/2001 nor by Regulation No 1025/2012, or indeed by the Court's case-law. Indeed, it would have to be clearly demonstrated that the disclosure of documents at issue would specifically, effectively and in a non-hypothetical manner (53) seriously undermine the EU standardisation system for such a presumption to be recognised.

99. First, HTS constitute only a minority of the standards established by ESOs and significant funding of ESOs is provided by the Commission. According to CEN's submission at the hearing, 4.6% of the standardisation budget comes *from the sale of HTS*, which equates to approximately EUR 2 million per year, whereas, in CEN's own words, the Commission's funding equals 'some 20% of CEN's *total* budget' (emphasis added). (54) Secondly, it became apparent at the hearing that the EU standardisation system does not actually require paid access to HTS to function (contrary to the findings in paragraphs 102 and 103 of the judgment under appeal); in fact, the payment requirement derives from the contractual relationship and funding arrangements between ESOs and the Commission. For instance, ETSI (which also receives Commission funding for HTS) already allows its HTS to be consulted, printed out and downloaded for free from its website. (55) Furthermore, it appears from legal literature that there are major price differentials between basically the same HTS in different Member States, which is symptomatic of the problems arising from the current access arrangements for HTS. (56)

100. Moreover, as a general presumption of confidentiality constitutes an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document, it must be interpreted and applied strictly. The Court has recognised five categories of documents which enjoy general presumptions of confidentiality: ((i) State aid administrative file documents; (ii) submissions before the EU Courts; (iii) documents exchanged in merger control; (iv) documents in infringement proceedings; and (v) documents relating to a proceeding under Article 101 TFEU). (57)

101. It is clear that HTS do not come within any of those categories. In fact, all of the above categories are related to the specific procedural nature of those documents. This does not apply to the requested HTS, which moreover are already available for inspection in libraries, info-points or for purchase. Thus, the requested HTS are not confidential and, unlike the above categories, they do not relate to any ongoing administrative or judicial proceedings.

102. As a result, the General Court erred when it accepted that the Commission was entitled to rely on such a general presumption to refuse access to the requested HTS.

(b) Failure to assess specific effects on commercial interests

103. The judgment under appeal (paragraph 64) simply adopted the Commission's allegations about copyright protection as apodictic and concluded that there was a resulting effect on commercial interests due to a 'very large fall in the fees collected by CEN'. This is wrong.

104. First, the General Court's considerations mean that the alleged copyright protection for HTS will always take precedence over the presumption of a right of access under Regulation No 1049/2001. This is contrary to the spirit and the letter of that regulation under which any exemptions must be interpreted narrowly to afford the widest possible access rights. (58)

105. Secondly, the General Court did not consider the specific facts of the present case. The alleged effect on the commercial interest appears unfounded (see point 99 of the present Opinion).

106. As a result, the General Court made an error of law because it could not justify the refusal of access to the requested HTS simply by reliance on an alleged negative effect on such commercial interests under Article 4(2), first indent, of Regulation No 1049/2001.

B. Second ground of appeal – Error of law in failing to recognise an overriding public interest

107. First, the appellants submit, in essence, that the General Court committed an error of law, in paragraphs 98 to 101 of the judgment under appeal. As follows from my analysis of the first ground of appeal, I agree with the appellants that their request to access the requested HTS was justified on the basis of the rule of law. The General Court, in ruling that the appellants did not demonstrate specific reasons to justify their request, failed to recognise the value of the appellants' argument and based the judgment under appeal on erroneous considerations.

108. At first instance, the appellants identified that an overriding public interest arose from the fact that the requested HTS form part of EU law, which should be freely available. They further submitted that the requested HTS deal with areas of law where a high level of consumer protection is essential, as protected under Article 169 TFEU, namely toy safety and the maximum rate of nickel as the top contact allergen and suspected carcinogen. It is reasonable to argue that consumers should know the content of those HTS in order to guarantee maximum toy safety and to further prevent cancer. To that end, compliance with HTS plays an important role in protecting members of the public in the European Union (particularly children with respect to the requested HTS) from potentially unsafe and harmful products. To my mind, the appellants also demonstrated to a sufficient degree that the requested HTS are also of significant importance for manufacturers, service providers and other participants in the supply chain.

109. Therefore, the above considerations were sufficient in order to qualify for an overriding public interest in the case at hand. The General Court made an error of law in this respect.

110. Secondly, the appellants criticise, in essence, the finding in paragraphs 102 to 104 of the judgment under appeal that the overriding public interest in ensuring the functioning of the EU standardisation system prevails over free access to HTS.

111. The functioning of the EU standardisation system is a factor that is unrelated to the exception under the first indent of Article 4(2) of Regulation No 1049/2001, which concerns the protection of commercial interests of natural or legal persons, including intellectual property. Therefore, the General Court de facto created a new exception under Article 4 of that regulation, which is not permissible. (59) Indeed, it follows from the foregoing considerations that the functioning of the EU standardisation system is not threatened by granting free and unconditional access to HTS.

112. Next, Article 12 of Regulation No 1049/2001 requires that EU institutions shall – as far as possible – make documents directly available to the public. In particular, legislative documents – documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States – should, subject to Articles 4 and 9 of that regulation, be made directly accessible. As explained under the first ground of appeal, in this context, HTS are documents that form part of EU law that should be enforceable by any person concerned and therefore the requirement of accessibility must also apply to HTS.

113. It follows from all the foregoing considerations that the judgment under appeal must be set aside, the contested decision must be annulled and the Commission must be ordered to grant the appellants access to the four requested HTS.

IV. Conclusion

In the light of the foregoing, I propose that the Court of Justice should (i) set aside the judgment of the General Court of the European Union of 14 July 2021, Public.Resource.Org and Right to Know v Commission (T-185/19, EU:T:2021:445); (ii) annul decision C(2019) 639 final of the European Commission of 22 January 2019, refusing access to the requested harmonised technical standards; (iii) order the Commission to give the appellants access to those standards; (iv) order the Commission to pay the costs of the proceedings at first instance and on appeal; and (v) order the interveners to bear their own costs.

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1 Original language: English.

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2 Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

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3 Regulation of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

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4 Regulation 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 2012 L 316, p. 12).

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5 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ 2009 L 170, p. 1).

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6 Regulation of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European

Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).

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7 Respectively, judgments of 12 July 2012, *Fra.bo* (C-171/11, EU:C:2012:453; 'the judgment in *Fra.bo*'); of 27 October 2016, *James Elliott* (C-613/14, EU:C:2016:821; 'the judgment in *James Elliott*'); and of 22 February 2022, Stichting Rookpreventie Jeugd and Others (C-160/20, EU:C:2022:101; 'the judgment in *Stichting*').

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8 Council Directive of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ 1988 L 187, p. 1).

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9 Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37).

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10 Judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18, paragraphs 83 and 84).

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11 Opinion in James Elliott Construction (C-613/14, EU:C:2016:63, point 40).

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12 Lundqvist, B., '*European Harmonised Standards as 'Part of EU Law': The Implications of the James Elliott Case for Copyright Protection and, Possibly, for EU Competition Law*', Legal Issues of Economic Integration, Vol. 44, No. 4, 2017, pp. 429 and 431.

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13 Commission Communication of 2 February 2022 (COM(2022) 31 final) 'EU Standardisation Strategy', pp. 4 and 5 et seq, respectively. See also the 'Blue Guide' on the implementation of EU product rules 2022 (OJ 2022 C247, p. 1, footnote 192).

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14 For a good example, see mandate M.445/EN of 9 July 2009 on the requested Toy Safety Directive HTS.

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15 Judgment of 14 December 2017, Anstar (C-630/16, EU:C:2017:971, paragraphs 35 to 36).

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16 Commission, Vademecum on European Standardisation – Part I, SWD(2015) 205, pp. 8 and 9 ('the Vademecum').

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17 See General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association – 28 March 2003 (OJ 2003 C 91, p. 7).

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18 See Schepel, H., '*The new approach to the new approach: The juridification of harmonised standards in EU law*', Maastricht Journal of European and Comparative Law, Vol. 20(4), 2013, p. 521.

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19 De Bellis, M., '*Op-Ed: "Private standards, EU law and access – The General Court's ruling in Public.Resource.Org"*', EU Law Live, 10 September 2021.

20 Importantly, see, in this connection, also the judgment in *James Elliott*, paragraph 43 (as cited in point 9 of the present Opinion).

21 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13.

22 Soroiu, A. and Correia Magalhaes De Carvalho, M.F. '*Lawtify Premium: Public.Resource.Org (T-185/19), a Judicial Take on Standardisation and Public Access to Law*', Review of European Administrative Law, Vol. 15(2), 2022, p. 57. See also Schepel, H., op. cit., pp. 521 and 523; Volpato, A., '*The Harmonized Standards before the ECJ: James Elliott Construction*', Common Market Law Review, Vol. 54(2), 2017, p. 591; van Gestel, R., and van Lochem, P., *Private Standards as a Replacement for Public Lawmaking?* in Marta Cantero Gamito, M., and Micklitz, H.-W., (eds), *The Role of the EU in Transnational Legal Ordering*, Edward Elgar Publishing, 2020, p. 31.

23 See the judgments in *Fra.bo* (paragraphs 27 to 32), *James Elliott* (paragraphs 40, 42 and 43) and the judgment of 22 February 2018, SAKSA (C-185/17, EU:C:2018:108, paragraph 39).

24 See EIM Business & Policy Research, Access to Standardisation – Study for the European Commission, [DG] Enterprise and Industry, 2010, pp. 17 and 9, respectively.

25 See the case-law recalled in the judgment of 22 December 2022, Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution) (C-61/21, EU:C:2022:1015, paragraphs 43 to 47).

26 See the judgment of the Rechtbank's-Gravenhage (District Court, The Hague, Netherlands) of 31 Dec. 2008, LJN: BG8465. See Van Gestel, B., and Micklitz, H.-W., '*European Integration Through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies*', CMLR, Vol. 50, 2013, p. 176.

27 Judgment of 16 October 2014, Commission v Germany (C-100/13, not published, EU:C:2014:2293, paragraph 63).

28 See also point 61 of the present Opinion.

29 Judgment of 18 January 2007, PKK and KNK v Council (C-229/05 P, EU:C:2007:32, paragraph 109).

30 Judgment of 29 April 2004, Commission v CAS Succhi di Frutta (C-496/99 P, EU:C:2004:236, paragraph 63).

31 Judgment of 12 November 1981, Meridionale Industria Salumi and Others (212/80 to 217/80, EU:C:1981:270, paragraph 10).

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

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33 It is also recognised by the constitutional principles set out in various provisions of the EU Treaty – such as Article 1(2), Article 10(3), Article 11(2) and (3) – as well as in the Charter of Fundamental Rights of the European Union (Article 42).

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34 Judgment of 11 December 2007, Skoma-Lux (C-161/06, EU:C:2007:773, paragraphs 38 and 51, respectively).

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35 Places managed by national standardisation bodies where HTS can apparently be accessed subject to certain conditions.

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36 Report on the rule of law – Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), CDL-AD(2011)003rev, paragraph 44.

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37 See, for instance, the Bundesverfassungsgericht (German Federal Constitutional Court): judgment of 29 July 1998 – Case 1 BvR 1143/90, DE:BVerfG:1998:rk19980729.1bvr114390, paragraph 26.

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38 See Van Waeyenberge, A., '*La normalisation technique en Europe – L'empire (du droit) contre-attaque*', Revue internationale de droit économique: RIDE, No. 3, 2018, p. 314. See also Aubry, H., Brunet, A., and Peraldi-Leneuf, F., '*Le contrôle des normes: un garde-fou démocratique à perfectionner*', in Aubry, H., et al. (eds.), '*La normalisation en France et dans l'Union européenne. Une activité privée au service de l'intérêt général?*', PUAM, Aix-en-Provence, 2012, p. 104.

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39 Alvarez Garcia, V., *La problemática de la publicidad oficial de las normas técnicas de origen privado que despliegan efectos jurídico-públicos*, Revista de Derecho Comunitario Europeo, No. 72, 2022, p. 467.

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40 See also Alvarez Garcia, V., op. cit., p. 478.

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41 Judgment of 16 February 2022, Hungary v Parliament and Council (C-156/21, EU:C:2022:97, paragraph 58).

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42 Berne Convention for the Protection of Literary and Artistic Works, signed in Berne on 9 September 1886 (Paris Act of 24 July 1971), in the amended version of 28 September 1979.

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43 Through Article 1(4) of the World Intellectual Property Organisation (WIPO) Copyright Treaty, adopted in Geneva on 20 December 1996.

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44 Judgment of 18 December 2007, Sweden v Commission (C-64/05 P, EU:C:2007:802, paragraph 69).

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45 For a critique of the judgment under appeal, see Kamara, I., *General Court EU: Commercial interests block the right to access European harmonised standards*, Journal of Standardisation, vol. 1, 2022, Paper 4, and

Krämer, L., '*L'environnement devant la Cour de justice de l'Union européenne*', Revue du droit de l'Union européenne, 1/2022, p. 15.

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46 Opinion of 8 March 2011, (Agreement creating a Unified Patent Litigation System) (EU:C:2011:123, paragraph 80).

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47 See Blockx, F., '*The General Court of the EU wanders into copyright law, and gets disoriented*', IPKat guest post, 15 July 2021, which contains further references.

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48 Judgment of 12 September 2019, Cofemel (C-683/17, EU:C:2019:721, paragraph 29).

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49 Judgment of 1 December 2011, Painer (C-145/10, EU:C:2011:798, paragraph 89).

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50 Judgment of 1 March 2012, Football Dataco and Others (C-604/10, EU:C:2012:115, paragraph 42).

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51 Blockx, F., op. cit.

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52 Indeed, phone books too are very lengthy and well-structured, but that does not mean that they are the result of creative choices. See, for instance, Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991). See Blockx, F., op. cit. in this regard.

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53 See, for instance, judgment of 1 July 2008, Sweden and Turco v Council (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 43 to 66). See also judgment of 25 January 2023, De Capitani v Council (T-163/21, EU:T:2023:15, paragraphs 87 to 96 and case-law cited) (not appealed to the Court).

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54 However, CEN Annual Report of 2017, p. 22, states it can be up to 35% of CEN's budget.

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55 See https://www.etsi.org/intellectual-property-rights (though their reproduction has to be authorised by that body).

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56 Van Gestel, R., and Micklitz, H.-W., op. cit., p. 181.

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57 Judgment of 4 September 2018, ClientEarth v Commission (C-57/16 P, EU:C:2018:660, paragraphs 80 and 81).

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58 Judgment of 18 December 2007, Sweden v Commission (C-64/05 P, EU:C:2007:802, paragraph 66).

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59 See, to that effect, judgment of 18 December 2007, Sweden v Commission (C-64/05 P, EU:C:2007:802, paragraph 65 et seq.).