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Advocate General's Opinion in Case C-588/21 P | *Public.Resource.Org and Right to Know* v *Commission and Others*

According to Advocate General Medina European Harmonised Technical Standards must be freely available without charge because of their particular legal nature as acts that form part of EU law

The Court should set aside the judgment under appeal and annul a Commission decision refusing access to the requested harmonised technical standards

Public.Resource.Org Inc. and Right to Know CLG are two non-profit organisations whose focus is to make the law freely accessible to all citizens. The organisations had challenged before the General Court a Commission Decision refusing to grant them access to four harmonised technical standards (HTS) adopted by the European Committee for Standardisation (CEN) with respect to the safety of toys in particular. As their challenge was unsuccessful, they appealed the General Court judgment before the Court of Justice.

In today's Opinion, Advocate General Laila Medina looks into the question whether the rule of law as well as the principle of transparency and the right of access to documents of EU institutions require that HTS are freely available without charge.

The organisations had submitted that the General Court had erred in law by incorrectly assessing the copyright protection of the requested HTS. They argued that HTS cannot be protected by copyright as they are part of EU law and the rule of law requires free access to the law.

Advocate General Medina notes that 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 Advocate General then proceeds to examine the nature of HTS as acts that form part of EU law. She considers that HTS are not simple implementing measures originating from a private-law body (namely one of the three European Standards Organisations, like CEN) 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 the Commission is responsible for the adoption of HTS in conjunction with the relevant European Standards Organisation. The adoption procedure for a HTS also confirms the decisive role of the Commission, as it is the Commission that manages the whole process of HTS preparation including transforming a draft standard into an act that forms part of EU law when it publishes a reference to that HTS in the Official Journal of the EU.

Concerning the legal effects of HTS, Advocate General Medina finds that respecting HTS gives rise to the presumption of conformity with the essential requirements of EU secondary legislation. That means that a HTS in fact 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, as well as reliance on HTS directly affects the burden of proof in case of litigation. Finally, once HTS are finalised and a reference to them is published in the Official Journal of the EU, every Member State must adopt each HTS – unchanged – as a national standard and withdraw conflicting

standards within six months.

Advocate General Medina then examines the impact of the rule of law requirements on HTS, noting that the rule of law requires free access to EU law for all natural and legal persons of the EU. The Advocate General considers that the principle of transparency should guide the Court as no citizen may 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. In that context, the Advocate General concludes that the rule of law requires access to HTS that is freely available without charge. Therefore, 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.

Advocate General Medina considers that, **for the purposes of EU law in general and for the access to EU law in particular, and, given HTS indispensable role in the implementation of EU secondary legislation and their legal effects, they should, in principle, not benefit from copyright protection.** According to the Advocate General, it follows from Article 297 TFEU that EU law is, in principle, not capable of benefitting from copyright protection. The Advocate General considers that the General Court erred in law when it failed to assess whether the law (and HTS as an act that forms part of EU law) can at all benefit from copyright protection. She further explains that even if HTS could be protected by copyright, free access to the law has priority over copyright protection. Therefore, the Advocate General proposes that the judgment under appeal should be set aside.

Additionally, Advocate General Medina also proposes that the Court should annul the Commission decision refusing access to the requested HTS.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

The full text of the Opinion is published on the CURIA website on the day of delivery.

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