

MEMORANDUM

To: Member of Parliament (Requested 1-Page Summary)
From: Carl Malamud, Public Resource (Public.Resource.Org)
Date: October 7, 2018
Subj: Public Safety Codes Incorporated Into Law

Technical public safety codes incorporated into law are some of the most important regulations in our modern technical world. Building codes specify egress requirements in case of fire. Toy and infant safety standards protect our children. Hazardous material transport codes make our roads and railroads safe. Occupational safety standards for personal protective equipment protect our laboratories, factories, and hospitals.

In the European Union, EU-wide standards are developed by the officially recognised European Committee for Standardization (CEN) and its sister organisation for electrical standards, CENELEC.¹ The members of these organisations are the 34 national standards bodies of the member states. Most of these standards bodies are ostensibly private non-governmental organisations, such as the British Standards Institution (BSI).² Some, such as the National Standards Authority of Ireland, are governmental bodies.³

Harmonised European standards are a specific type of European standard, developed by the European standardisation organisations in response to standardisation requests from the Commission for the application of EU legislation.⁴ After standards are developed, they are posted for public comment, then issued as a final European Standard. After a harmonised standard has been noticed in the Official Journal of the European Union, each member country has 6 months to issue the standard as a national standard with no changes and to transpose it into national law.⁵

Unlike other regulations and legislation, standards are considered private copyrighted works, and are sold for considerable sums. For example, the EU-mandated safety standard for soothers (pacifiers) for babies and young children is sold by BSI for £254.⁶ The copyright on these documents is strictly enforced, with electronic versions of the standards subject to Digital Rights Management (DRM) to prevent unauthorised copying or even the use of minor excerpts in documents. When Public Resource posted the safety standard for soothers, it was charged by the German standards body and convicted on appeal in a German court.⁷ Should that posting be repeated, Public Resource faces a €250,000, and should we be unable to pay, the “person of the president shall be seized for administrative detention for a period of 1-2 years.”

The regime for harmonised standards and the imposition of copyright and use restrictions is based on an elaborate fiction that somehow the standards are voluntary, not compulsory.⁸ When presented with that issue, however, the Court of Justice of the European Union, in an advisory opinion to the Irish Supreme Court, clearly ruled that harmonised standards noticed in the Official Journal have the force of law.⁹ A core principle of the rule of law is that the law must be promulgated.¹⁰ In the case of public safety laws, that principle has been clearly violated.

¹ [EU Regulation 1025/2012](#)

² BSI was incorporated by Royal Charter on 21 March 1929. [Companies House RC000074](#).

³ [National Standards Authority of Ireland Act \(1996\)](#)

⁴ European Commission Fact Sheet, 1 June 2016, [Memo 16-1963](#).

⁵ European Commission, [References of harmonised standards published in the OJEU](#).

⁶ [BS EN 1400:2013+A2:2018](#)

⁷ Hanseatisches Oberlandesgericht, 27 July 2017, [Docket 308 O 206/13](#).

⁸ See, e.g., [Vademecum on European standardisation](#).

⁹ Court of Justice (Third Chamber), 27 October 2016, [ECLI:EU:C:2016:821](#)

¹⁰ Tom Bingham, Baron Bingham of Cornhill, *The Rule of Law*, Allen Lane (2010).