

MEMORANDUM

To: Potential Signatories, Petition to The National Archives (United Kingdom)
From: Carl Malamud, Public Resource (Public.Resource.Org)
Date: October 23, 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.” Because of strict copyright enforcement, the full suite of harmonized public safety standards is not available to students of engineering, to the general public in libraries, and even to local and regional government officials charged with enforcing the law.

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

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](#).

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.

There are several paths to remedy this situation. The most likely path is also the most difficult: litigation. Public Resource, in partnership with Right to Know Ireland and with the support of the firms Fred P. Logue Solicitors and Morrison & Foerster LLP, is applying directly to the European Commission. We are using the Aarhus Convention, which has special freedom of information provisions for environmental information,¹¹ to request several harmonized standards that have environmental implications, such as the toy safety standard for chemical sets and chemical substances in toys.¹² If the freedom of information request is denied, the parties may appeal directly to the European Court of Justice.

There is, however, a more straightforward path. Under the provisions of the European Union (Withdrawal) Act of 2018, there is a duty and a privilege assigned to Queen's Printer of The National Archives of the United Kingdom (TNA).¹³ The duty is for TNA to publish all retained legislation in effect by the European Union before exit day. This is because this retained legislation will have effect in the United Kingdom after exit, and the European Union (Withdrawal) act ensures that a copy of these laws will be in place on a site under the control of Her Majesty's Government.

In this act, retained legislation is defined to include all EU regulations, decisions, and tertiary legislation. The act applies to "any other document published by an EU entity" and specifies that "the Queen's Printer may make arrangements for the publication of anything which the Queen's Printer considers may be useful in connection with anything published under this paragraph."

The primary objection to posting public safety standards enacted into law by the European Union is an (in our view) misguided assertion of copyright. Under the European Withdrawal Act of 2018, TNA has a duty to publish all binding law and is explicitly exempt from misguided assertions of copyright by other entities if the instruments in question qualify as retained legislation. We believe it is clear that EU-mandated harmonized standards fall within the duty assigned to TNA.

It is our intention to present a petition to Her Majesty's Government stating this position. There is no statutory right to petition, but it is clear that TNA would consider such a request seriously should it come from a number of affected entities and interested parties in the United Kingdom, including Nongovernmental Organizations and possibly even Members of Parliament.

Carl Malamud will be in London on December 3 and 4 and would be pleased to discuss this issue with any organizations or individuals who might be willing to consider joining as co-petitioners. Our hope is to deliver the petition shortly thereafter.

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).

¹¹ UN Economic Commission for Europe, [Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters \(Aarhus Convention\)](#), 25 June 1998.

¹² EN 71-5:2013, [Safety of toys - Part 5: Chemical toys \(sets\) other than experimental sets](#), June 2013 and EN 71-12:2013, [Safety of toys - Part 12: N-Nitrosamines and N-nitrosatable substances](#), June 2013.

¹³ European Union (Withdrawal) Act 2018, [Schedule 5](#), 2018 c. 16.