EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - Gestdem 2018/5137

Dear Mr Logue,

I refer to your letter of 30 November 2018, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter, 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

On 25 September 2018 you submitted, on behalf of your clients[3], an initial application for access to documents under Regulation (EC) No 1049/2001, in which you requested access to documents containing descriptions of four technical standards prepared by the European Committee for Standardisation[4]:

- 'CEN EN 71-5:2015 Safety of toys – Part 5: Chemical toys (sets) other than experimental sets,
- CEN EN 71-4:2013 Safety of toys – Part 4: Experimental sets for chemistry and related activities,

1 Official Journal L 345 of 29 December 2001, page 94.
2 Official Journal L 145 of 31 May 2001, page 43.
3 Public.Resource.Org and Right to know CLG.
4 Comité Européen de Normalisation (CEN).

- CEN EN 71-12:2013 Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances,

- CEN EN 12472:2005+A1:2009 Method for the simulation of wear and corrosion for the detection of nickel release from coated items'.

The European Commission has identified the following documents as falling under the scope of your application:

- European Committee for Standardisation harmonised European standard of 13 November 2015, EN 71-5:2015 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets' (hereafter: 'document 1'),

- European Committee for Standardisation harmonised European standard of 25 May 2013, EN 71-4:2013 'Safety of toys – Part 4: Experimental sets for chemistry and related activities' (hereafter: 'document 2'),

- European Committee for Standardisation harmonised European standard of 29 June 2013, EN 71-12:2013 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances' (hereafter: 'document 3'),

- European Committee for Standardisation harmonised European standard of 13 January 2017, EN 12472:2005+A1:2009 'Method for the simulation of wear and corrosion for the detection of nickel release from coated items' (hereafter: 'document 4').

Your initial application was attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, which provided its reply on 15 November 2018.

In its reply, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to the documents concerned, based on the exception provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001 (protection of commercial interests of a natural or legal person).

In your confirmatory application, you request a review of this position.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Having carried out a detailed assessment of your request in light of the provisions of Regulation (EC) No 1049/2001, I regret to inform you that I have to confirm the refusal to grant access to the documents concerned. The underlying exception is the one provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001 (protection of commercial interests of a natural or legal person).

The detailed reasons are set out below.

2.1. Protection of commercial interests of a natural or legal person

Article 4(2), first indent, of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, […] unless there is an overriding public interest in disclosure'.

Documents 1 – 3 contain European harmonised standards on toy safety. They are part of European harmonised standard EN 71 relating to the safety of toys.

Document 4 includes the harmonised European standard for the method of the simulation of wear and corrosion for the detection of nickel release from coated items.

In line with the provisions of Regulation (EU) No 1025/2012[5], the European Commission may request European standardisation organisations, such as the European Committee for Standardisation, to draft a European standard for the application of legal requirements set out in EU legislation.

The standards included in the four documents concerned aim to support the legal requirements provided for in Directive 2009/48/EC[6] on the safety of toys (Toy Safety Directive) and Regulation (EC) No 1907/2006[7] concerning Registration, Evaluation, Authorisation and Restriction of Chemicals[8].

The standards in question support the above-mentioned legislation by providing specifications and test methods that can be used to demonstrate compliance of the products with the requirements provided for in that legislation.

It needs to be emphasised that a European harmonised standard, once adopted by the European Committee for Standardisation, is transposed by each national standardisation body[9] as an identical national standard. In practical terms, transposition involves adding the reference in line with the national nomenclature. The transposed standards (based on

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5 Regulation (EU) No 1025/2012 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. Official Journal L 316, 14 November 2012, page 12.

6 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys Official Journal L 170, 30 June 2009, pages 1–37.

7 Regulation (EC) No 1907/2006 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. Official Journal L 396, 30 December 2006, page 1.

8 REACH Regulation.

9 https://standards.cen.eu/dyn/www/f?p=CENWEB:5.

the harmonised standards adopted by European Committee for Standardisation) are made available to the public through the sales points of the national standardisation bodies as national standards. The European Committee for Standardisation itself does not make the standard available to the public.

In your confirmatory application, you underline that 'the [r]equested [d]ocuments are harmonised standards which, having been published in the Official Journal, become part of the law of the EU'. In this context, you refer to the Judgment in Case C-613/14[10], in which the Court allegedly confirmed such a status of the harmonised standards adopted based on Directive 89/106.[11]

In that judgment, the Court recognised the presumption of conformity with the requirements of the above-mentioned Directive, of products that satisfy the technical specifications provided for in harmonised standards.[12] It also recalled that evidence of compliance of a construction product with the essential requirements contained in Directive 89/106[13] may be provided by means other than proof of compliance with harmonised standards[14].

The Judgment in Case C-613/14 has thus clarified the legal value of the harmonised standards. However, it does not have the effect of rendering Regulation (EC) No 1049/2001 and, in particular, the legal restrictions to access to documents provided for in its Articles 4 and 9, ineffective.

In this context, in your confirmatory application, you contest the position of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, in so far as the applicability of the exception in Article 4(2), first indent, of Regulation (EC) No 1049/2001 is concerned. In particular, you argue that the documents requested do not benefit from the protection of copyright, as they 'merely contain lists of factual information or procedures and therefore cannot be considered to be the expression of the intellectual creation of the author reflecting his personality and expressing his free and creative choices'.

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10 Judgment of the Court of 27 October 2016, in Case C-613/14, request for preliminary ruling from the Supreme Court of Ireland, in the proceedings *James Elliott Constructions Limited v Irish Asphalt Limited*, (ECLI:EU:C:2016:821).

11 Council Directive of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products. Official Journal L 40 of 11 February 1989, pages 12 – 26. Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC. Official Journal L 88, 4 April 2011, pages 5–43.

12 Judgment of the Court of 27 October 2016, in Case C-613/14, request for preliminary ruling from the Supreme Court of Ireland, in the proceedings *James Elliott Constructions Limited v Irish Asphalt Limited*, (ECLI:EU:C:2016:821), paragraph 38.

13 Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products. Official Journal L 40, 11 February 1989, pages 12–26

14 Judgment of the Court of 27 October 2016, in Case C-613/14, request for preliminary ruling from the Supreme Court of Ireland, in the proceedings *James Elliott Constructions Limited v Irish Asphalt Limited*, (ECLI:EU:C:2016:821), paragraph 42.

Contrary to what you allege, however, the documents in question are protected by copyright. They do contain information that can be considered as factual, or relating to procedures. However, the texts of the standards, while taking into account the specific requirements provided for in the legislation they support, were drafted by its authors in a way that is sufficiently creative to deserve copyright protection. The length of the texts implies that the authors had to make a number of choices (including in the structuring of the document), which results in the document being protected by copyright[15]. Consequently, the document as a whole makes it an original work of authorship, deserving protection under the copyright rules.

In your confirmatory application, you argue that the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs did not provide, in its initial reply, any proper statement of reasons. In this regard, you underline that the initial reply did not explain how the interest protected by the exception in Article 4(2), first indent, of Regulation (EC) No 1049/2001 could be undermined through the disclosure of the documents in question. You also point out that the position of the originator of the documents was not sought at the stage of handling of your initial application.

In this context, I would like to observe that after the Judgment in Case C-613/14, the European Committee for Standardisation, together with European Committee for Electrotechnical Standardisation[16], issued a position paper[17], in which they, as copyright holders for European standards, explicitly considered that, on the basis of the Judgment in Case C-613/14, there were no grounds to challenge their copyright and distribution polices of harmonised standards. Consequently, the European Commission considered that the consultation under Article 4(4) of Regulation (EC) No 1049/2001 was not necessary, as the position of the originator of the documents, the copyright holder in question, was already made publicly known through the above-mentioned position paper.

Please note in this respect that documents that are disclosed under Regulation (EC) No 1049/2001 become, legally speaking, public documents. Indeed, a document released following an application for access to documents would have to be provided to any other applicant that would ask for it.

As explained in the initial reply of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, the national standardisation bodies, members of the European Committee for Standardisation, require payment of a fee in order to acquire a copy of any of the national standards transposing the harmonised standards.

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15 Judgment of the Court of 16 July 2009, in Case C-5/08, request for preliminary ruling from the Danish Supreme Court in the proceedings *Infopaq International A/S v Danske Dagblades Forening*, (ECLI:EU:C:2009:465) and judgment of the Court of 1 December 2011, in Case C-145/10, request for preliminary ruling from the Tribunal of Commerce in Vienna, in the proceedings *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG* (ECLI:EU:C:2011:798).

16 CENELEC.

17 https://www.cencenelec.eu/News/Policy_Opinions/PolicyOpinions/PositionPaper_Consequences_Judgment_Elliott%20case.pdf.

Consequently, the impact of public disclosure of the harmonised standards included in documents 1 – 4 on the commercial interests of the European Committee for Standardisation and of its national members is evident. Economic operators and the public at large would not be willing to pay a fee in order to obtain a copy of the standard, if they could obtain it free of charge from the European Commission. That, in turn, would have implications on the income gained from the fees, which would significantly decrease. Consequently, the commercial interests of the European Committee for Standardisation and its members would be undermined. It needs to be emphasised in this context, that the concept of 'commercial interests' protected by virtue of the exception in Article 4(2), first indent, of Regulation (EC) No 1049/2001, is not limited to the interests of companies and economic operators, but may also encompass the interests of public bodies, or, as in the case at hand, publicly recognised bodies tasked with functions in the public interest.[18] Furthermore, the European Committee for Standardisation and its members, contribute to the performance of tasks of public interest, but remain, however, private entities exercising an economic activity in a situation of competition on the relevant services market.[19]

The fact that the copies of the harmonised standards are available for consultation free of charge in the public libraries does not change the above-mentioned conclusions. Indeed, the effect of public disclosure of the documents in question under Regulation (EC) No 1049/2001 cannot be compared with the possibility to consult the document (on the spot) in public libraries.

In the light of the above, it is evident that there is a reasonably foreseeable risk that public disclosure of the documents concerned would harm the interest protected by Article 4(2), first indent of Regulation (EC) No 1049/2001.

3. NO PARTIAL ACCESS

I have examined the possibility of granting partial access to the document concerned, in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

However, in light of the explanations provided above, no meaningful partial access that would not undermine the protection of the interests provided for in Article 4(2), first indent of Regulation (EC) No 1049/2001, is possible.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

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[18] Judgment of the General Court of 6 December 2012 in Case T-167/10, *Evropaïki Dynamiki v Commission*, (ECLI: ECLI:EU:T:2012:651), paragraph 85-86.

[19] Judgment of the Court of 5 December 2018, in Case T-875/16, *Falcon Technologies International LLC v Commission*, (ECLI:EU:T:2018:877), paragraph 47.

In your confirmatory application, you argue that '[t]he overriding public interest already follows from the fact that according to the […] case law [Case C-613/14], harmonised standards such as the [r]equested [d]ocuments "form part of EU law". Hence, there is a constitutional imperative to publish the [r]equested [d]ocuments […]'.

As already explained in part 2.1 of this decision, the effects of the Judgment in Case 613/14 have to be considered in the context in which this Judgment was rendered. In the view of the European Commission, that Judgment does not create the obligation of proactive publication of the harmonised standards in the Official Journal, nor does it establish an automatic overriding public interest in their disclosure.

With regard to the exception provided for in the first indent of Article 4(2) of Regulation (EC) No 1049/2001, on the basis of which access is refused to the documents concerned, and in line with the provisions of Article 6 of Regulation (EC) No 1367/2006[20], an overriding public interest is deemed to exist in so far as information relating to emissions into environment is concerned.

In this context, by referring to the relevant case law[21] you argue that the documents in question indeed contain environmental information relating to the emissions into the environment. In this regard, you observe that 'the documents requested' are the harmonised standards allowing the public to foresee the quantities and nature of substances emitted into the environment under normal and realistic conditions of use […]'. Consequently, there is, in your view, an overriding public interest in their disclosure.

In its Judgment in Case C-673/13 P, the Court indeed considered that the concept of 'information which relates to emissions into the environment' includes data that will allow the public to know what is actually released in the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question, as well as 'information enabling the public to check whether the assessment of actual or foreseeable emissions is correct'.[22] However, according to the Court's assessment, it 'may not, however, in any event, include information containing any kind of link, even direct, to emissions into the environment'[23], such as general measures aimed at regulating emissions.

It is not clear, how information about the means of verification of compliance of the products with the requirements provided for in Directive 2009/48/EC and Regulation (EC) No 1907/2006 would allow the public to find out what is actually released into the

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20 Regulation (EC) No 1367/2006 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, Official Journal L 264, 25 September 2006, pages 13–19.

21 Judgment of 23 November 2016 in Case C-442/14 *Bayer CropScience* (ECLI:EU:C2016:890), paragraph 79.

22 Court of Justice, 23 November 2016, Case C-673/13 P, *Stichting Greenpeace Nederland and PAN Europe*,, paragraph 79-80.

23 *Idem*, paragraph 81.

environment, in particular considering that the test of compliance is carried out before placing the product on the market.

Please also note that in the recent Judgment in Case T-498/14, the Court ruled that in order to qualify as an environmental information on emissions, the information must contain data that enable to understand to what extent and for which period of time the released substances would contribute to increasing the percentage of emissions risks in the environment.[24]

It follows from this that the documents requested, which are harmonised standards, used by the manufacturers of the products to which the harmonised standards relate, cannot be considered as containing information relating to emissions in the environment in the sense of Regulation (EC) No 1367/2006.

Consequently, I consider that, in the present case, there is no overriding public interest that would outweigh the interest in safeguarding the commercial interests (including copyright) of the European Committee for Standardisation and its members, falling under the exceptions provided for in Article 4(2), first indent of Regulation (EC) No 1049/2001.

5. MEANS OF REDRESS

I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the European Commission
Martin SELMAYR
Secretary-General

[24] Judgment of 12 December 2018 in Case T-498/14, *Deutsche Umwelthilfe v Commission*, (ECLI:EU:T:2018:913), paragraphs 109 - 113.