

5 February 2019

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*On Behalf of the Signatories from the United Kingdom,
Ireland, and the United States as listed in Annex 1*

The Rt. Hon. David Lidington CBE MP
Minister for the Cabinet Office
Cabinet Office
70 Whitehall
Westminster
London
SW1A 2AS

Via Electronic Mail: publiccorrespondence@cabinetoffice.gov.uk

Dear Mr Lidington,

Legal position of European Union (EU) standards

We write on behalf of the organisations listed in **Annex 1**, requesting clarification of the position as to EU harmonised standards under Schedule 5 to the EU (Withdrawal) Act 2018.

Schedule 5 to the EU (Withdrawal) Act 2018

The prospective paragraphs of Schedule 5 to the EU (Withdrawal) Act 2018 impose a duty on the Queen's Printer to publish all EU law which is available and in force immediately before exit day (provided it does not relate to Title V or certain Protocols). Per the Act's explanatory notes, this publication is to preserve the accessibility of EU law which will continue to have force in the UK after its exit from the EU.

Relevance of EU standards under the EU (Withdrawal) Act 2018

It is important that harmonised standards are not overlooked in these publication efforts, as they also form part of this category of EU law. This is clear from **James Elliott Construction Limited v Irish Asphalt Limited** (Case C-613/14), in which it was stated that:

“a harmonised standard...adopted on the basis of Directive 89/106 and the references to which have been published in the Official Journal of the European Union, *forms part of EU law*”.

This unequivocal judicial admission that harmonised standards are EU law has subsequently been reiterated in a recent Commission press release.¹

Consequent need for reconsideration of the Act

Despite this clear and accepted ruling, the drafting of the Act is currently such that harmonised standards are not included in the defined category of EU law with continued force.

This may be legislative oversight, or it may be due to widely-held misconceptions about the nature of EU standards. The **enclosed** document records the 24 October 2018 response of Lord Henley to Lord Sharkey's parliamentary question, HL10856, tabled on 10 October 2018. It is stated in Lord Henley's response that EU standards are not "relevant legislation". However, for the reasons above, this can no longer be an accurate representation of the position at law.

Whatever the cause, this omission will result in important retained EU law going unpublished. We are keen to ensure that the statute is not left in this incomplete state.

Questions for the Cabinet Office

Our questions to the Cabinet Office are therefore as follows:

1. Is it accepted, per the decision in **James Elliott** above, that harmonised standards are EU law?
2. Why, therefore, are standards not expressly covered by the mandatory duty to publish EU law in the EU (Withdrawal) Act 2018?
3. Will the mandatory duty in the EU (Withdrawal) Act 2018 be amended to reflect standards' legal nature and the consequent importance of their publication?

We await your reasoned response to this set of questions and thank you in advance for your consideration.

Yours sincerely,

DocuSigned by:

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Carl Malamud
President
Public.Resource.Org

¹ European Commission, "Commission acts to make standardization in the Single Market more efficient" (*European Commission Press Release Database*, 22 November 2018) <http://europa.eu/rapid/press-release_IP-18-6491_en.htm>

Annex 1: Signatories

Name: Jeni Tennison
Position: Chief Executive Officer
Organisation: Open Data Institute

Name: Javier Ruiz Diaz
Position: Director of Policy
Organisation: Open Rights Group

Name: Karin Christiansen and Catherine Stihler
Position: Interim Executive Director and Chief Executive Officer
Organisation: Open Knowledge International

Name: Lisbet Rausing and Peter Baldwin
Position: Founders
Organisation: Arcadia Fund

Name: Gavin Sheridan
Position: Executive Director
Organisation: Right to Know Ireland

Name: Beth Noveck
Position: Professor and Director
Organisation: The Governance Lab

Name: Carl Malamud
Position: President
Organisation: Public.Resource.Org

Annex 2: Written Questions and Answers and Written Statements, House of Lords

Written question HL10586: Safety Standards

Question asked by Lord Sharkey:

To ask Her Majesty's Government what assessment they have made of whether it is in the public interest that EU-mandated safety standards held by the British Standards Institution may not be accessed without payment; and what consideration is being given to making those standards freely available. (HL10586)

Tabled on: 10 October 2018

Answer by Lord Henley:

Businesses are required to comply with the relevant legislation rather than standards. Standards support safety regulation through providing one means of demonstrating conformity to the essential safety requirements set out in legislation.

The use of standards is voluntary and they are developed outside the regulatory system according to a system of stakeholder involvement. The British Standards Institution, as the UK's National Standards Body, has responsibility for developing and maintaining standards, and supports its work through selling standards. This ensures that those who use standards pay for them. There are no plans to change this.

In some instances, national regulators pay for their enforcement authorities to have access to standards. For example, the Office for Product Safety and Standards pays BSI to give access for local trading standards departments to relevant safety standards.

Date and time of answer: 24 Oct 2018 at 17:50

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