Registry of the General Court of the European Union
Rue du Fort Niedergrünewald

L-2925 Luxembourg (LUXEMBOURG)

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Action for annulment pursuant to Article 263 TFEU

March 28, 2019

Applicants: 1. Public.Resource.Org, Inc. with an address at 1005 Gravenstein Hwy. North Sebastopol, CA 95472, USA legally represented by Carl Malamud,

2. Right to Know CLG, with registered office at 25 Herbert Place, Dublin 2 Ireland, legally represented by Ken Foxe,

Attorneys of record for Applicant 1 and Applicant 2:

FP Logue Solicitors, particularly Dr Fred Logue, 8/10 Coke Lane, Smithfield, Dublin 7, Ireland, and

Morrison & Foerster LLP, particularly Dr. Andreas Grünwald, Dr. Jens Hackl and Christoph Nüßing, Potsdamer Platz 1, 13th Floor, 10785 Berlin, Germany

Defendant: European Commission

Form of order sought by the Applicants:

1. Annul the decision of the European Commission of January 22, 2019, in case C(2019) 639 final (including the initial decision of November 15, 2018 in case GROW/D3/ALR/dr (2018) 5993057),

2. In the alternative, refer the matter back to the European Commission, and

3. Rule on the costs and order the European Commission to pay the costs of the proceedings.

Preliminary remarks

1 The dispute concerns a fundamental issue of the EU, namely the free access to the law following from the rule of law as one of the common values on which the EU is founded (cf. Art. 2 TEU). However, not all provisions with legal effects in the EU are freely accessible today. This is particularly true for harmonised (technical) standards with their various legal effects (in particular the reference in the EU legislation and the corresponding presumption of conformity with the (safety) requirements in the respective EU legislation resulting in the marketability within the internal market).

2 Although the European Court of Justice in *James Elliot Construction* (case C-613/14) acknowledged these legal effects and ruled that harmonised standards "*form part of EU law*", they are – until now – only available against payment of high prices (of up to 900 EUR for the four harmonised standards requested by the Applicants) with very restrictive license conditions.

3 The Applicants, which are both non-profit organizations acting exclusively in the public interest without any intention of making profits, have a focus on making the law freely accessible to all citizens. They seek to digitise, aggregate and publish the law for everybody in a transparent and free manner.

4 In this capacity and by relying on the judgment in *James Elliot Construction*, the Applicants requested four harmonised standards relating to toy safety and the registration, evaluation, authorization and restriction of Chemicals from the European Commission under Regulation (EC) No 1049/2001 and Regulation (EC) No 1367/2006. The European Commission identified the requested standards in its internal database, but refused to grant access due to an alleged copyright of the standardization organization. Despite further arguments provided by the Applicants in the confirmatory application, the European Commission did not change its position but apodictically alleged that the judgment in *James Elliot Construction* does not result in a free access to harmonised standards.

5 As this position contradicts the free access to the law following from the rule of law, the Applicants lodge this action for annulment in order to offer an improved access to all interested citizens by providing formats suitable for the visually impaired, universal access via smartphones or tablets as well as extensive internal crosslinking for a better reader's experience and many other features.

6 In further detail:

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A. FACTS OF THE CASE

7 The Applicants seek (i) annulment of the decision of the European Commission of January 22, 2019, in case C(2019) 639 final (including the initial decision of November 15, 2018 in case GROW/D3/ALR/dr (2018) 5993057) (in the following referred to as the "**Contested Decision**", attached as **Annex A.1**), and (ii) corresponding access to certain harmonised standards to which the European Commission (the "**Commission**") refused to grant access under the Contested Decision.

I. THE APPLICANTS

8 The Applicants are both non-profit organizations (see the latest certificates of incorporations for Applicant 1. (attached as **Annex A.2**) and for Applicant 2. (attached as **Annex A.3**)), which are being represented by FP Logue Solicitors and Morrison & Foerster LLP (cf. **Annex A.4** for the respective authorization, and **Annex A.5** as well as **Annex A.6** for the respective certificates of the attorneys to practice before a court of a Member State). Their focus is on making the law freely available to all citizens.

9 Applicant 1, for instance, operates the website "public.resource.org" since 2007. It initially published US court decision collections as well as other legal information that had previously only been available for a fee on its website. Applicant 1. made these contents available to the general public free of charge without any restrictions. In the meantime, it also made available certain technical norms and standards on its website that Applicant 1. had previously requested from authorities and standardization organizations.

10 In the Applicants' view, an informed citizen is a basic prerequisite for a free and democratic society. The general public must therefore have access at all times and without restrictions to the entire applicable law and comparable regulations. The Applicants seek to digitise and aggregate all legal materials relevant to the general public and to publish them in a transparent and free manner. In this way, all state institutions should be persuaded to make such information available on their own initiative in the same way and without any payment restrictions.

11 The Applicants act at all times exclusively in the public interest and have no intention of making a profit. They will not receive any economic or other benefits from the provision of the content available on public.resource.org. or any other website. Rather, in addition to providing the content itself, they also create additional added value for the general public: the collective provision makes it possible to identify correlations between the individual

standards more clearly. Furthermore, the Applicants prepare the content technically so that it can be searched using search engines and can also be made accessible to people with disabilities, e.g. blind people.

II. BACKGROUND OF THE DISPUTE

12 By way of a letter dated September 25, 2018 (attached as **Annex A.7**), the Applicants requested access to the following harmonised standards (the "**Requested Standards**").

European Standardization Organization ("**ESO**")	Reference and Title of the Requested Standard	First Publication in the Official Journal ("**OJ**")	Reference in the Commission's Database
European Committee for Standardization ("**CEN**")	EN 71-5:2015 Safety of toys - Part 5: Chemical toys (sets) other than experimental sets	November 13, 2015	00052103
CEN	EN 71-4:2013 Safety of toys - Part 4: Experimental sets for chemistry and related activities	May 28, 2013	00052083
CEN	EN 71-12:2013 Safety of toys - Part 12: N-Nitrosamines and N-nitrosatable substances	June 29, 2013	00052091
CEN	EN 12472:2005+A1:2009 Method for the simulation of wear and corrosion for the detection of nickel release from coated items	January 13, 2017	00347006

13 The Applicants based the request on Regulation (EC) No 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission Documents (the "**Transparency Regulation**") and on Regulation (EC) No 1367/2006 of the European Parliament and of the Council of September 6, 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 (the "**Environmental Transparency Regulation**").

14 The request observed that the Requested Standards form part of EU law as confirmed by the European Court of Justice ("**ECJ**") in *James Elliott Construction* (judgment of October 27, 2016 – case C-613/14 James Elliott Construction ECLI:EU:C:2016:821 paragraph 40), since compliance with such standards allows a presumption that the product in question satisfies essential requirements set down by respective EU law for the placing of such products on the market, and that the product can be used freely within the territory of all Member States with the result that Member States may not impose any additional requirements on such products (*ibid* paragraph 41).

15 The Commission identified the Requested Standards in its internal database (cf. letter dated November 15, 2018 (already attached as Annex A.1)), but refused to grant access to the Requested Standards. The Commission mainly argued that the Requested Standards are protected by copyrights of CEN. Hence, the Commission refused to grant access based on Art. 4(2) first indent Transparency Regulation. Without further assessment in detail, the Commission also determined that no overriding public interest as stipulated in Art. 4(2) Transparency Regulation existed.

16 By way of letter dated November 30, 2018 (attached as **Annex A.8**), the Applicants filed a Confirmatory Application under Art. 8 Transparency Regulation. They further deepened their argumentation. The Applicants questioned the copyright protection of the Requested Standards by CEN, but also made clear that there is in any event an overriding public interest in disclosing the Requested Standards. First, the Requested Standards form part of EU law and hence must be freely accessible for all people. Second, the Requested Standards contain environmental information and the Environmental Transparency Regulation acknowledges an overriding public interest in disclosing such information.

17 The Commission, however, confirmed its initial decision and continued to refuse access to the Requested Standards (cf. letter dated January 22, 2019 (already attached as Annex A.1)). Again, the Commission mainly argued that the Requested Standards are protected by CEN's copyright resulting in

a refusal to grant access under Art. 4(2) first indent Transparency Regulation. The Commission also alleged that the judgment of the ECJ in *James Elliot Construction* "*does not have the effect of rendering Regulation (EC) No 1049/2001 and, in particular, the legal restrictions to access provided for in Articles 4 and 9, ineffective.*" The Commission also apodictically contended that there was no overriding public interest in disclosing the Requested Standards. According to the Commission's allegation, the judgment in *James Elliot Construction* "*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.*" The Commission finally argued that the Requested Standards did not contain environmental information (which relates to emissions into the environment) under the Environmental Transparency Regulation.

18 Due to that refusal to grant access to the Requested Standards, the Applicants now lodged this claim in order to annul the Contested Decision and get access to the Requested Standards.

III. THE REQUESTED STANDARDS

19 The Requested Standards are harmonised European standards which form part of EU law according to the ECJ in *James Elliot Construction*.

1. The System of harmonised standards in the EU – delegation of legislation to (private) ESOs performing tasks of public interest

20 With its system of harmonised standards, the EU has delegated its legislation partly to (privately organised) ESOs which perform tasks of public interest.

21 The EU legislative system has used harmonised standards – like the Requested Standards – since 1985 when the EU introduced the so-called "New Approach" in order to facilitate the completion of the internal market. The general rules regarding the standardization process are today mainly stipulated in Regulation (EU) 1025/2012 and Directive (EU) 2015/1535.

22 Under the New Approach, EU legislation lays down – in a very general way – the minimum (essential) requirements applicable to certain products in order to enable the free movement of goods in the internal market. The EU legislation then entrusts ESOs (like CEN in the case at hand) with the subsequent fixing of standards that include the technical specifications necessary to ensure compliance with the basic requirements of the respective EU legislation. Products manufactured in compliance with the harmonised standards are then presumed to satisfy the essential

requirements in the respective EU legislation resulting in the free marketability within the internal market (cf. also below for further details paragraphs 42 to 4244).

23 The procedure for the drafting of harmonised standards by CEN is significantly controlled by the Commission (cf. Opinion of Advocate General Campos Sanchez-Bordona in case C-613/14 – James Elliot Construction ECLI:EU:C:2016:63 paragraphs 46 et. seq.; see also *James Elliott Construction* paragraphs 43 et. seq.), and the Commission furthermore provides significant funding to ESOs for the drafting:

a) Commission gives a (detailed) mandate to CEN

24 First, the Commission always has to give a mandate to CEN for the drafting of a harmonised standard, and the Commission also provides significant funding to CEN to carry out that mandate (cf. also below for further details 33). The mandate includes the basic criteria that have to govern the drawing up of a harmonised standard by CEN. These criteria are, nevertheless, very detailed as the mandate (M.445/EN of July 9, 2009) on toy safety (which also refers to the Requested Standards) demonstrates:

> "*Make the necessary adjustments to standards to take account of the fact that Directive 2009/48/EC revised Directive 88/378/EEC with the effect that new definitions and warnings have been introduced, in particular the definition of activity toys and design speed and warnings for toys in food, imitations of protective masks and helmets, packaging for fragrances, toys intended to be strung across a cradle, toy scooters, toy bicycles and skateboards;*
>
> *Ensure that the standards take account of the new physical and mechanical, chemical, electrical, hygiene and flammability requirements;*
>
> *In particular, make the necessary adjustments to standards to take account of the fact that the Directive 2009/48/EC contains new requirements, to limit the maximum values both for impulse noise and continuous noise emitted by toys in order to adequately protect children from the risk of impairment of hearing;*
>
> *The revised directive foresees that more stringent and comprehensive standards should be established to limit the maximum values for noise levels for all toys that emit sound, both due to high continuous noise and to impulse noise. The measurement result is as a rule be given as the highest value recorded. The emission of sound pressure levels should not impair children's hearing and should be revised taking into account that children are the most vulnerable age group and that their auditory channel is smaller than in adults.*

Address the hazard presented by books made of cardboard and paper in order to cover adequate testing. The requirements must in particular ensure that there is no choking risk as regards books intended for children less than 36 months;

Ensure that the harmonised standards intended to support Directive 88/378/EEC fully satisfy the relevant essential safety requirements of the revised Directive or, failing that, include an indication as to which of the requirements are not satisfied;

Ensure that the standards intended to support the Directive 2009/48/EC include an annex providing information with regard to the relationship between its clauses and the essential safety requirements of the Directive in order to allow the users of the standard to establish to what extend the standard provides for a presumption of conformity with the essential safety requirements in accordance with the agreement on this subject between the Commission and the European Standardisation Organisations;

Ensure that the harmonised standards intended to support the Directive include an informative annex with the background and justification for the requirements."

25 The mandate also provides a detailed timeline for the completion of the drafting, as the mandate (M.445/EN of July 9, 2009) on toy safety (which also refers to the Requested Standards) shows again:

"*CEN and CENELEC are requested to communicate to the Commission, within three months of the acceptance of the mandate, a work plan for the execution of the abovementioned standardisation tasks, indicating the new standards that need to be developed, the standards requiring revision or amendment.*

CEN and CENELEC are requested to communicate to the Commission within twelve months of the acceptance of the mandate, an interim report on the progress of the tasks set out in this mandate, indicating any possible difficulties encountered.

CEN and CENELEC will revise standards which need adaptation to Directive 2009/48/EC within two years from accepting the mandate for all requirements excluding the chemical requirements and within four years from accepting the mandate for the chemical requirements. CEN and CENELEC are also requested to communicate to the Commission, within one year from accepting the mandate a list of harmonised standards supporting the implementation of Directive 2009/48/EC. The list shall include the titles of the standards in all of the official languages of the EU.

CEN and CENELEC will develop the new standards within 2 years for all requirements excluding the chemical and noise

requirements and within four years from accepting the mandate for the chemical and noise requirements.

CEN and CENELEC are requested to draw up the work plan and execute the above mentioned tasks in close cooperation in order to ensure consistency and avoid overlapping standards.

When executing the standardisation tasks covered by this mandate, CEN and CENELEC are requested to take due account of feedback from the stakeholders. Wherever possible, when the abovementioned tasks involve the development of new standards or the revision of existing standards, the tasks should be executed within the framework of the Vienna and Dresden Agreements with a view to preparing international standards that satisfy the relevant essential safety requirements of Directives 2009/48/EC."

26 Without a mandate of the Commission, there is no harmonised standard. In particular, if CEN adopts a standard on its own initiative, this standard will not be a harmonised standard connected to a directive and the products meeting this standard will not enjoy the presumption of compliance with the directive (*ibid* paragraph 49).

b) Review of the standard by the Commission and other EU institutions

27 Second, there are comprehensive reviews of the harmonised standards by the Commission and other EU institutions or Member States before they have a legal effect. Under Art. 11 of Regulation (EU) 1025/2012, before a standard is published, the Commission is required to ascertain whether the standard accords with the mandate that the Commission gave to the CEN (*ibid* paragraph 52, and also Art. 10(6) of Regulation (EU) 1025/2012). Member States and the European Parliament also have the right to lodge formal objections against harmonised standard (*ibid* paragraph 54).

c) Publication in the OJ

28 Third, the reference to a harmonised standard must be published in the OJ. This is necessary for the harmonised standard to have legal effects, i.e. the presumption that conformity with a standard implies compliance with the directive itself and guarantees freedom of movement for the product within the EU (*ibid* paragraph 50).

29 The Commission also recently changed the publication of the references to the harmonised standards. While such references were previously published in the C-series of the OJ (Information and Notices), they now can be found in the L-series (Legislation) of the OJ (c.f. Commission Implementing Decision (EU) 2018/2048 of December 20, 2018). This recent shift in the Commission's practice clearly shows that the Commission is taking steps

towards a full recognition of the legal effects of harmonised standards as part of EU law following the ECJ's judgment in *James Elliott Construction*.

d) Adoption by Member States

30 Fourth, once the standards are completed and published in the OJ, the Commission requires that every Member State adopts each standard – unchanged – as a national standard within six months. The implementation of each of the standards as a national standard, without any changes, is not discretionary, but rather a governmental requirement established by the Commission.

31 Moreover, the Commission ensures (cf. Article 258 TFEU), that harmonised standards are fully effective. Imposing additional requirements on products covered by several harmonised standards for effective market access of those products and their use in a Member State thus violates the respective Member State's obligation to correctly implement EU law (cf. ECJ, judgment of October 16, 2014, C-100/13 – *Commission* v *Germany* EU:C:2014:2293).

e) Conclusion

32 The above shows that standardization performed by the ESOs is not of private nature, but rather – as concluded by Advocate General Campos Sanchez-Bordona – a "*case of 'controlled' legislative delegation in favour of a private standardisation body*" (*ibid* paragraph 55).

33 This result is supported when considering that the ESOs set the standards in order to further facilitate one of the main aims of the EU, namely the completion of the internal market. ESOs do thus not act privately when setting standards; they rather perform a task of public interest. The Commission itself acknowledged this when it described ESOs as "*publicly recognised bodies tasked with functions in the public interest*" in the Contested Decision. This is further supported by the fact that the operation of CEN is influenced by and under control of the EU (cf. also Opinion of Advocate General Campos Sanchez-Bordona in case C-613/14 – James Elliot Construction ECLI:EU:C:2016:63 paragraphs 56 et. seq.).

- First, CEN's activities are based on cooperation with the Commission, governed by an agreement in the form of certain general guidelines which are periodically renewed and which emphasise the importance of standardization for the European policy and the free movement of goods (cf. General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the

European Commission and the European Free Trade Association – March 28, 2003 (OJ 2003 C 91, p. 7).

- Second, the Commission also provides significant financial support to CEN for the drafting of harmonised standards. Decision No 1673/2006/EC provides for the EU to contribute to the financing of European standardization in order to ensure that harmonised European standards are drawn up and revised in the light of the objectives, legislation and policies of the EU (*ibid* paragraph 54). According to publicly available information, the Commission's funding accounts for up to 35% of CEN's budget (cf. CEN Annual Report 2017, p. 22, available under https://www.cencenelec.eu/News/Publications/Publications/Annual_Report_CEN_2017_EN.pdf (last accessed March 26, 2019)).

34 It can thus be concluded that the setting of harmonised standards by ESOs (under Regulation (EU) 1025/2012 and Directive (EU) 2015/1535) is a form of delegated legislation by the EU to private organizations which perform tasks of public interest.

2. The nature of the Requested Standards

35 The Requested Standards are part of the system of harmonised standards as described above and form part of EU law.

36 The first three (i.e. EN 71-4:2013, EN 71-5:2015 and EN 71-12:2013) of the Requested Standards refer to Directive 2009/48/EC on the safety of toys (the "**Toy Safety Directive**"; the three standards collectively referred to as the "**Toy Safety Standards**"):

- EN 71-4:2013 specifies requirements for the maximum amount and, in some cases, the maximum concentration of certain substances and mixtures used in experimental sets for chemistry and related activities. The substances and mixtures include those that are dangerous or which, in excessive amounts, could harm the health of children using them.

- EN 71-5:2015 specifies similar requirements and test methods for the substances and materials used in chemical toys (sets) other than experimental sets.

- EN 71-12:2013 specifies the requirements and test methods for carcinogenic substances, N-nitrosamines and N-nitrosatable, for (i) toys and parts of toys made from elastomers and intended for use by children under 36 months, (ii) toys and parts of toys made from

elastomers and intended to be placed in the mouth; and (iii) finger paints for children under 36 months. These include balloons and teethers.

37 Toys which meet these standards are presumed to be in conformity with the requirements as set out in the Toy Safety Directive (cf. Art. 13 Toy Safety Directive according to which *"toys which are in conformity with harmonised standards or parts thereof […] shall be presumed to be in conformity with the requirements covered by those standards or parts thereof set out in Article 10 and Annex II.*").

38 The fourth (i.e. EN 12472:2005+A1:2009) of the Requested Standards refers to Regulation (EC) No 1907/2006 concerning Registration, Evaluation, Authorization and Restriction of Chemicals (the "**REACH Regulation**", the last standard referred to as the "**REACH Standard**"). The Reach Standard specifies one of the test methods which shall be used for demonstrating conformity with restriction entry number 27 in Annex XVII of REACH. This entry deals with the maximum rate of nickel release from certain products. Nickel is classified as the top contact allergen in the world and is suspected to be a carcinogen (cf. https://en.wikipedia.org/wiki/Nickel#Toxicity (last accessed November 25, 2018)).

39 The REACH Standard stipulates a *mandatory* test method per paragraph 3 of entry 27 of Annex XVII to REACH Regulation which states that "*[t]he standards adopted by the European Committee for Standardisation (CEN)* ***shall be used*** *as the test methods for demonstrating the conformity of articles to paragraphs 1 and 2. [emphasis added]*"

3. Importance of the Requested Standards

40 The Requested Standards are (like all other harmonised standards) very important for the society and market participants, particularly manufacturers and consumers.

41 First, as described above, the Requested Standards deal with very important topics for consumers, namely toy safety and the maximum rate of Nickel as the top contact allergen and suspected carcinogen. Everybody should know their content in order to guarantee maximum toy safety and to further prevent cancer.

42 Second, the Requested Standards are also very important for manufacturers and all other participants in the supply chain. The manufacturer has to know how to manufacture its products in order to comply with the relevant EU product regulation. Just looking at the relevant EU directives does not help

as their scope is most often restricted to high-level regulatory requirements and as they thus do not contain any guidance on how to fulfill these requirements in practice. Thus, the easiest and most common way for manufacturers is to comply with applicable harmonised standards (like the Requested Standards) since there is a presumption of conformity with the respective EU product regulation when meeting the requirements of these standards.

43 All other participants in the supply chain typically also rely on the harmonised standards as these are widely accepted in the market. Compliance with harmonised standards ensures that products can obtain the CE-mark evidencing their marketability within the internal market (cf. *James Elliot Construction*, para. 39). Manufacturers will thus not search for other methods to ensure their compliance with the respective EU product regulation if there are such widely accepted harmonised standards.

44 A study commissioned by the Commission confirms this result:

> "*Standards are still (de jure) voluntary, but economic players get the presumption of compliance with the law (based on European directives) if products and service are in line with the European standards to which the directive refers.* ***This implies that in practical terms these harmonised standards are almost obligatory for most economic players.***" [emphasis added] (cf. EIM Business & Policy Research, Access to Standardisation – Study for the European Commission, Enterprise and Industry Directorate-General, 2010, page 17, (https://www.anec.eu/images/Publications/Access-Study---final-report.pdf, last accessed March 7, 2019))

45 Compliance with harmonised standards plays an important role in protecting members of the public in the EU (particularly children with respect to the Requested Standards) from potentially unsafe and harmful products. Various press reports demonstrate that products – also due to the lack of free accessibility – do not meet the essential requirements:

- According to a report in the Guardian, "*six out of 13 "slime" and putty toys have failed to meet EU safety standards when tested for the presence of a potentially harmful chemical, according to research by a consumer group*" (cf. https://www.theguardian.com/money/2018/dec/13/slime-toys-tested-fail-meet-eu-safety-standards-hamleys-christmas (last accessed March 26, 2019)).

- The Irish Examiner reported that "*FISHER-PRICE is recalling tens of thousands of Dora The Explorer and Lazy Town toys from Irish toy shops due to concerns they contain excessive amounts of lead in*

their surface paint" (cf. https://www.irishexaminer.com/ireland/health/thousands-of-toys-withdrawn-over-lead-fears-38948.html (last accessed March 26, 2019)).

- The German "Stiftung Warentest" evaluated all of its 15 tests from 2017 and 2018 in a meta-analysis. It found that 79 out of 278 products had serious safety problems – more than one in four products. On average, 7% of the products were even considered to be "defective". Stiftung Warentest based its testing on legal requirements such as the limit values of the Toy Safety Directive (cf. https://www.deutschlandfunk.de/produktsicherheit-jedes-vierte-kinderprodukt-hat-maengel.697.de.html?dram:article_id=435227 (last accessed March 26, 2019).

46 Against this background, national standards bodies and consumer protection authorities regularly engage in campaigns to raise public awareness of safety standards (cf. for instance the Irish Competition and Consumer Protection Commission (https://www.ccpc.ie/consumers/2018/12/19/do-you-know-how-to-spot-an-unsafe-toy/ (last accessed March 25, 2019)) or the National Standard Authority of Ireland (https://www.nsai.ie/about/news/nsai-warns-halloween-shoppers-to-look-for-the-ce-mark/ (last accessed March 25, 2019))). The importance of toy and chemical safety is particularly pertinent. In its 2017 report (cf. https://ec.europa.eu/newsroom/just/document.cfm?doc_id=50269 (last accessed March 25, 2019)), the EU rapid alert system for dangerous non-food items identified toys as the most frequently notified product making up 29% of alerts in that year. Furthermore, according to this report, chemicals constitute the second highest risk category making up 22% of the notified risks in 2017. This information highlights the importance of making the Requested Standards available to the public and to civil society given the risks that are posed.

4. The Requested Standards are not freely accessible

47 The Requested Standards are – despite of their importance (see above) – currently not freely accessible to everybody.

48 The Commission does not publish the harmonised standards themselves. The Commission only publishes a reference to the harmonised standards in the OJ (see above).

49 A free access to the Requested Standards is also not provided by other means. Rather, the (national) standard organizations make the Requested Standards available only against payment. The (national) standard organizations have a sales monopoly for their respective territories. This results in high prices for the Requested Standards. One single PDF download of the Requested Standards is, for instance, priced as follows (c.f. www.infostore.saiglobal.com, www.boutique.afnor.org, and www.shop.bsigroup.com (last accessed March 13, 2019)).

Reference and Title of the Requested Standard	Page Number	Association Francaise de Normalisation (AFNOR)	British Standards Institution (BSI)	German Institute for Standardisation (DIN)
EN 71-5:2015 Safety of toys - Part 5: Chemical toys (sets) other than experimental sets	84	241.70 EUR	295.77 EUR	219.30 EUR
EN 71-4:2013 Safety of toys - Part 4: Experimental sets for chemistry and related activities	38	144.40 EUR	230.56 EUR	108.84 EUR
EN 71-12:2013 Safety of toys - Part 12: N-Nitrosamines and N-nitrosatable substances	32	144.40 EUR	204.56 EUR	128.98 EUR
EN 12472:2005+A1:2009 Method for the simulation of wear and corrosion for the detection of	18	43.15 EUR	146.38 EUR	68.30 EUR

nickel release from coated items				

50 As illustrated by the table, prices for the Requested Standards are high, and there are also significant price differences between national standardization organizations. In order to buy the four Requested Standards, people would have to spend more than 500 EUR (573.65 EUR in France and 525.42 EUR in Germany), or even an amount of 877.27 EUR in the UK. This corresponds with a price between 2.39 EUR and 8.13 EUR per page. To put that in perspective, if publishers would charge such prices per page, books would cost several thousands of euros.

51 Further, the national standard organizations also impose very restrictive license conditions on the buyer. The terms and conditions for British Standards are, for instance, the following:

> "*A British Standard purchased in electronic format is licensed to a sole named user who is permitted to install a single electronic copy of it for use on a single computer.*
>
> *A sole licensed user of a British Standard purchased in electronic format may print off a single hard copy for their own, non-commercial purposes. Further reproduction of the single printed copy is not permitted.*
>
> *A British Standard purchased in hardcopy format may not be further reproduced—in any format—to create an additional copy*."

52 Additionally, all purchased copies of the Requested Standards are protected by digital rights management ("**DRM**"). The purpose of DRM is to prevent unauthorised redistribution of digital media, however it also prevents the conversion into formats that are accessible to the disabled, e.g. the visually impaired or computer systems that are not based on Windows, e.g. Apple or Linux. It is thus up to the standardization organization to (arbitrarily) decide how people shall be able to read the harmonised standard.

53 While access to the Requested Standards may be possible through libraries, there are only very few libraries in every Member State that have copies of the Requested Standards. In Germany, for example, the Requested Standards can only be accessed via so called "Normen-Infopoints". These 90 free display locations can solely be found in metropolitan areas of Germany. Moreover, over 90 % of the "Normen-Infopoints" are located in university libraries so that only students or holders of a special reader pass or library ticket can access them. While it is thus already difficult to access the Requested Standards, it is also prohibited to make copies of them except for personal use, educational or scientific purposes. (c.f.

https://www.beuth.de/de/regelwerke/auslegestellen#/ (last accessed March 7, 2019)).

54 The use of harmonised standards is further restricted with respect to educational purposes. Certain harmonised standards are, for instance, essential to engineering education but (because of the cost and restrictions) are not readily available. In that respect, the standard organization may (arbitrarily) deny a request by a student to use the harmonised standard in a class project. The Applicant 1. has seen this happening in the U.S. where students wishing to model things like the energy codes into computer software were told that they are not allowed to do that since the standard organization planned to write its own program.

55 A study commissioned on behalf of the Commission also revealed that the high prices for harmonised standards prevent their effective use in the market (EIM, "Access to Standardisation, Study for the European Commission, Enterprise and Industry Directorate General", Zoetermeer 2009, p. 9 (https://www.anec.eu/images/Publications/Access-Study---final-report.pdf (last accessed March 18, 2019)).

56 It is clear from the above that it is difficult for an average citizen, such as a concerned parent worried about the safety of a particular toy, to access the Requested Standards in a university library or on the Internet. Access requires a great deal of advance planning and a great deal of money or time.

57 To change this situation, the Applicants lodge this action for annulment of the Contested Decision in order to get access to the Requested Standards. The Applicants' aim is to offer an improved access to all interested citizens by providing formats suitable for the visually impaired, universal access via smartphones or tablets as well as extensive internal crosslinking for a better reader's experience and many other features. This will make the law more accessible to the people.

B. LEGAL ASSESSMENT – ACTION FOR ANNULMENT ADMISSIBLE AND WELL-FOUNDED

I. ACTION FOR ANNULMENT ADMISSIBLE

58 The Applicants' action for annulment is admissible.

59 The Applicants are concerned directly and individually (cf. Art. 263(4) TFEU) by the Contested Decision. The Contested Decision directly refers to the Applicants and directly refuses their individual access right to the Requested Standards.

60 The action for annulment is also lodged in time. Under Art. 263(6) TFEU, such action shall be submitted within two months after notification plus an extension of ten days on account of distance (cf. Art. 60 Rules of Procedure of the Court). The Contested Decision was delivered on January 22, 2019. The deadline would thus expire on April 1, 2019. The Applicants' action for annulment is lodged on 28 March 2019 and thus in time.

II. ACTION FOR ANNULMENT WELL-FOUNDED – THE APPLICANTS HAVE A RIGHT TO ACCESS THE REQUESTED STANDARDS

61 The Applicants' action for annulment is also well-founded. The Applicants have a right to access the Requested Standards under Art. 42 Charter of Fundamental Rights of the EU, Art. 15(3) subsection 1 TFEU in conjunction with Art. 2(1) Transparency Regulation and Art. 3 Environmental Transparency Regulation.

62 According to these provisions, any legal person residing or having its registered office in an EU Member State has a general right of access to documents of EU institutions. These requirements are met here, and the Applicants thus have a right to access the Requested Standards:

- First, the Applicant 2. is a legal person having its registered office in Ireland (see latest certificate of incorporation, already attached as Annex A.3) and thus in an EU Member State under Art. 2(1) Transparency Regulation. It is also irrelevant that Applicant 1. is an organization with seat in the U.S. (see latest certificate of incorporation, already attached as Annex A.2). Art. 3 Environmental Transparency Regulation extends the access right under the Transparency Regulation to all (legal) persons regardless of their seat. Additionally, the Requested Standards should be available to everybody (regardless of residence) as the internal market is also open for non-EU suppliers.

- Second, the Requested Standards are documents of EU institutions. Under Art. 2(3) Transparency Regulation, a document is assumed to be a document of EU institutions if it is either drawn up or received by them and thus in their possession. As the Commission noted in the Contested Decision, it identified the Requested Standards in its internal database. The Commission as one of the EU institutions thus received and possesses the Requested Standards.

63 The Applicants' access right must not be denied or restricted in the case at hand. In general, a restriction or denial is only legally admissible if certain exemptions, which are provided in Art. 4 Transparency Regulation, are met. It is to be noted that the Transparency Regulation establishes a relationship of rule and exception according to which "*[i]n principle, all documents of the institutions should be accessible to the public*" (cf. recital 11 Transparency Regulation). It is thus settled case law ECJ that, since "*the purpose of the regulation is to give the public the widest possible right of access, the exceptions to that right set out in Article 4 of the regulation must be interpreted and applied strictly*" (ECJ, judgment of December 18, 2007 – Case C-64/05 P Sweden / Commission ECLI:EU:C:2007:802 paragraph 66).

64 Against this background, access to the Requested Standards must be granted since the exemptions provided in Art. 4 Transparency Regulation are not met here. The Commission based its refusal on an alleged undermining of CEN's commercial interests due to an alleged copyright (Art. 4(2) first indent Transparency Regulation) and also concluded that no public interest in releasing the Requested Standards could be identified. This does not stand up to a legal analysis.

65 In further detail:

1. Art. 4(2) first indent Transparency Regulation not present

66 The Applicants' access right must not be restricted under Art. 4(2) first indent Transparency Regulation. Contrary to what the Commission alleges in the Contested Decision, the Requested Standards cannot be and therefore, are not protected by copyrights of CEN.

a) No Copyright Protection of the Requested Standards possible as they are part of "EU Law"

67 The Requested Standards cannot be protected by copyright since they are part of EU law. And because every person is presumed to know the law, private rights cannot be granted with respect to the text of the law (as the law must be freely accessible for all people).

68 It is clear that the Requested Standards are part of EU law if they are adopted based on the (legislative) procedure described above and if they are associated with the presumption of conformity (see paragraphs 42 to 44, and see also below paragraphs 88 to 94). The ECJ determined this in *James Elliott Construction* (para. 40):

> "*It follows from the above that a harmonised standard such as that at issue in the main proceedings, 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****, since it is by reference to the provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product.*" [emphasis added]

69 Copyright protection of the law is excluded *per se*. The German Constitutional Court (*Bundesverfassungsgericht, BVerfG*) dealt in a widely recognised judgment with the copyright protection of standards by the German private standardization organization called DIN. The BVerfG highlighted in this ruling that the law must be accessible for every citizen and confirmed that this also applies to DIN standards referenced in statutes. In such case, the respective standards can no longer be subject to copyright protection. The court also confirmed that such exclusion of copyright protection does not violate the (constitutional) rights of the standardization organization (c.f. judgment of July 29, 1998 – Case 1 BvR 1143/90 *DIN-Normen* paragraph 26; see also German Federal Supreme Court, judgment of April 26, 1990 – Case I ZR 79/88; German Constitutional Court).

70 This is in line with European principles according to which the concept of copyright protection itself has limits in the context of fundamental rights and the rule of law. Advocate General Szpunar in *Funke Medien NRW GmbH* Case C-469/17 ECLI:EI:C:2018:870 concluded that Art. 11 Charter of Fundamental Rights of the EU read in conjunction with Art. 52(1) thereof precludes a Member State from invoking copyright under Directive 2001/29/EC in order to prevent communication to the public in the context of a debate concerning matters of public interest of confidential documents emanating from that Member State. The same principle must apply in relation to the Requested Standards. The doctrine of copyright cannot affect the constitutional imperative flowing from the idea that the EU is founded on the basis of the rule of law that the law must be publicly accessible and freely available (see for further details also below paragraphs 95 to 103).

71 The vesting of copyright in the Requested Standards in a private person which is free to charge fees or impose other barriers for access is therefore fundamentally incompatible with the status of the Requested Standards as forming part of EU law.

b) No Personal Intellectual Creation

72 Even if copyright protection of the law was theoretically possible (which would not be correct, see above), the Requested Standards would be no personal intellectual creation of CEN.

73 A personal intellectual creation requires that the author (i.e. CEN) was able to express his creative abilities in the production of the work by making free and creative choices (ECJ, judgment of July 16, 2009 – case C-5/08 lnfopaq International AIS v Danske Dagblades Forening ECLI:EU:C:2009:465, and judgment of December 1, 2011 – case C-145/10 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 paragraph 89). This is not the case here so that copyright protection would in any event be excluded.

74 In the Contested Decision, the Commission argues the contrary and alleges that the "*length of the texts implies that the authors had to make a number of choices (including the structuring of the document), which results in the document being protected by copyright.*" Following that statement, the Commission refers to two ECJ decisions (judgment of July 16, 2009 – case C-5/08 lnfopaq International AIS v Danske Dagblades Forening ECLI:EU:C:2009:465, and judgment of December 1, 2011 – case C-145/10 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), which seems to imply that the ECJ affirmed the copyright protection of harmonised standards. Neither of these statements or implications is correct.

75 First, the ECJ did never rule on copyright protection of harmonised standards. Rather, the referenced cases concerned other copyright issues which are obviously irrelevant for the case at hand. For instance, in its judgment in case C-145/10 the ECJ assessed whether a certain portrait photo could be protected by copyright, and case C-5/08 concerned a similar question regarding a data capturing process.

76 Second, when drafting the Requested Standards, CEN is not exercising free and creative choices:

- On the one hand, the choice available to CEN when preparing the standard is constrained by the relevant provision from which the Requested Standards are derived (i.e. the Toy Safety Directive and the REACH Regulation) and then by the Commission's mandate

setting out detailed instructions in terms of the drafting of the standard (see above paragraphs 24 to 26). In that regard, it is important to point out that the Requested Standards merely consist of lists of technical characteristics and/or test methods and therefore there is no genuine creative choice available to the drafter which could be considered to be the expression of the author's personality or his or her own intellectual creation.

- On the other hand, there is also no room for any free or creative choices with respect to the design of the Requested Standards, e.g., regarding layout, structure, language, or any other of their key features. These aspects of standard-setting are governed by own sets of standards which heavily restrict any potential room for creativity of standard-setting bodies. For example, EN 45020 sets out general rules on standardization and related activities. In addition, part 2 of the so-called "ISO/IEC Directives" (available at https://www.iso.org/directives-and-policies.html, implemented for Germany by the DIN 820-2 standards) sets out detailed requirements on the structuring and drafting of standardization documents.

c) Finally: The Commission did not demonstrate in the Contested Decision the alleged undermining of CEN's commercial interest

77 Even if copyright protection of the law (i.e. the Requested Standards) was theoretically possible and even if the Requested Standards were considered a personal intellectual creation (both of which would not be correct, see above), the Contested Decision would still have to be annulled as the Commission did not demonstrate that CEN's alleged commercial interests would be undermined.

78 According to established case law of the ECJ, the Commission must "*explain how disclosure of [a certain] document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying [whereas] the risk of that undermining must be reasonably foreseeable and not purely hypothetical*" (judgment of July 21, 2011 – Case C-506/08 P MyTravel ECLI:EU:C:2011:496 paragraph 76).

79 The Commission does not meet this standard in the Contested Decision. First, the Commission merely observed that the ESO's issued a position paper (c. f. CEN and CENELEC position on the consequences of the judgment of the European Court of Justice on James Elliott Construction Limited v Irish Asphalt Limited issued on May 17, 2017) according to which the *James Elliott Construction* judgment does not challenge their

copyright and distribution policies. However, the observations indicated in this paper are directed towards an undermining of the European standardization system itself and not the undermining of ESO's commercial interests, It thus has little or no relevance to the Contested Decision.

80 Second, while the Contested Decision cannot be criticised for observing that, if the Requested Standards were available free of charge, CEN would not be able to charge for them, the Contested Decision merely says that there is a risk of harm. But the Contested Decision does not say *how* and *to what extent* release of the Requested Standards would actually and foreseeably undermine CEN's commercial interests. In particular, the Contested Decision does not say precisely how the availability of the Requested Standards in public libraries is compatible with this conclusion. It also fails to take into account that access to the Requested Standards under the Transparency Regulation is nonetheless without prejudice to CEN's alleged copyright and that it remains available to assert its copyright against anyone who infringes this right. It seems inconsistent to argue on the one hand that the Requested Standards are protected by copyright, but on the other to consider that such copyright does not afford adequate protection of CEN's commercial interests.

81 Third, CEN's commercial interests regarding the Requested Standards can also not be undermined since CEN is acting as a public authority by performing public functions that are not subject to any commercial interests in the first place (see also above paragraph 33). CEN's status as a body tasked with functions in the public interest has already been acknowledged in the Contested Decision ("*publicly recognised bodies tasked with functions in the public interest*"). The procedure for drafting and adopting harmonised standards such as the Requested Standards further speak for this (see above paragraphs 20 to 34). The fact that the national standards bodies are required to transpose harmonised standards into national law within six months, with no changes permitted, clearly represents a delegation of law-making powers from the Commission to CEN. This again is consistent with the explanation of Advocate General Campos Sanchez-Bordona who defined the harmonised standards as "*a case of 'controlled' legislative delegation in favour of a private standardization body*" (paragraph 55).

82 It has also been shown that the Requested Standards are part of EU law and that, when CEN choses to develop a harmonised standard, it does so subject to authoritative control by the Commission and the Member States. Law-making by its nature is a public function carried out by public authorities that do not have any commercial interest in the product of their work. This cannot be affected by the fact that CEN is established as a private legal

entity exercising an economic activity in a situation of competition on a relevant market. Therefore, its alleged commercial interest is not the type of interest that is protected by the first indent of Art. 4(2) Transparency Regulation. Consequently, it is also not possible for the Commission to justify its refusal of access to the Requested Standards with CEN's alleged commercial interests.

2. In any Event: overriding public interest in disclosure

83 Even if the exemption in Art. 4(2) first indent Transparency Regulation was met (which would not be correct, see above), there would in any event be an overriding public interest in disclosure of the Requested Standards.

84 In the Contested Decision, the Commission apodictically alleges that "*the effects of the Judgment in Case 613/14 [James Elliot Construction] have to be considered in the context in which this Judgment was rendered*" and that, "*[i]n 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.*" A further reasoning for this view is not provided. The Commission finally denies that the Requested Standards contain environmental information (related to emissions into the environment) under the Environmental Transparency Regulation.

85 As we will lay out in further detail in the following, this contradicts the ECJ's judgment in *James Elliot Construction*. If harmonised standards (like the Requested Standards) form part of EU law, then there is an automatic overriding public interest (following from the rule of law and fundamental rights) in disclosing the Requested Standards (see under a)). Moreover, the Requested Standards also contain environmental information resulting in an overriding public interest under the Environmental Transparency Regulation (see under b)). The Contested Decision is finally flawed since the Commission did not provide sufficient reasons for the denial of the overriding public interest (see under c)).

86 In further detail:

a) Rule of law and fundamental rights require free access to the law

87 The overriding public interest in disclosure follows from the fact that the Requested Standards are part of EU law resulting in the constitutional imperative to freely access the Requested Standards.

aa) Harmonised Standards are part of EU Law

88 Harmonised Standards are part of EU law. The ECJ acknowledged in the judgment *James Elliott Construction* (para. 40) that harmonised standards "*form part of EU law*" if they are adopted based on the (legislative) procedure described above and if they are associated with the presumption of conformity. This is true for the Requested Standards (see also above paragraphs 37 to 39).

89 This characterization of harmonised standards as part of the law is further supported by the ECJ's case law on fundamental freedoms under the TFEU. The *Fra.bo* judgment illustrates that. There, the ECJ accepted the major legal effects of (harmonised) standards and held that fundamental freedoms (like the free movement of goods) may be impaired by (harmonised) standards drafted by private institutions "*if the products certified by this institution are regarded as conforming with national law in accordance with the national legal provisions and this makes it more difficult to sell products that have not been certified by this institution*" (ECJ, judgment of July 12. 2012, C-171/11, guiding principle). This is also true for the Requested Standards. Compliance with them is associated with a presumption of conformity under the respective EU directives. This typically results in the better and easier marketability of products within the internal market since the Requested Standards are widely accepted in the market and manufacturers do thus not search for or apply other methods (see also above paragraphs 42 to 44).

90 The Commission further acknowledged the legal effects of harmonised standards as part of EU law by deciding to publish the reference to them now in the L-series (Legislation) of the OJ (c.f. Commission Implementing Decision (EU) 2018/2048 of December 20, 2018), and to no longer use the C-series of the OJ (Information and Notices) for this purpose.

91 The alleged "voluntary" nature of harmonised standards by the Commission in the Contested Decision does also not contradict the character of harmonised standards as being part of the law. With respect to the Requested Standards, this is already not correct as the requested REACH Standard provides a *mandatory* test method where manufacturers cannot deviate from (cf. paragraph 3 of entry 27 of Annex XVII to REACH Regulation, see also above paragraph 39).

92 While the requested Toy Safety Standards may be "voluntary", the ECJ clearly stated in James Elliot Construction that this is irrelevant (paragraph 42):

> "*Although evidence of compliance of a construction product with the essential requirements contained in Directive 89/106 may be provided by means other than proof of compliance with harmonised standards, that cannot call into question the existence of the legal effects of a harmonised standard.*"

93 Further, the "voluntary" nature only exists in theory. In practice, harmonised standards such as the Requested Standards are in any event *de facto* compulsory as they are generally the only accepted method in the market for proving compliance with the respective EU directive. A study commissioned by the Commission confirms this result by finding that "*in practical terms these harmonised standards are almost obligatory for most economic players*" (see already above paragraph 44). The ECJ also acknowledged this in its *Fra.bo* judgment by holding that "*in practice, almost all German consumers purchase copper fittings certified by the DVGW [i.e. a German standardization organization]*" (paragraph 30).

94 Harmonised standards also have the effect of conferring a presumption of conformity with the requirements of the respective EU directives producing a presumption of legality and ensuring free movement through all Member States. Member States are also not allowed to impose supplementary regulations. Consequently, harmonised standards cannot be considered as being "voluntary".

bb) The (EU) law must be freely accessible

95 The (EU) law and thus the Requested Standards as "*part of the EU law*" must be freely accessible.

96 The free accessibility already results from the rule of law, one of the common values on which the EU is founded (cf. Art. 2 TEU). One of the key aspects of the rule of law is that the law must be freely accessible. This is also recognised by recital 6 Transparency Regulation according to which "*documents should be made directly accessible to the greatest possible extent […] in cases where the institutions are acting in their legislative capacity, including under delegated powers*".

97 The ECJ and other (constitutional) courts also acknowledged that the law must be freely accessible. In conjunction with the principle of legal certainty, which follows from the rule of law, the ECJ held that EU law must be feely accessible (judgment of December 11, 2007, C-161/06, paragraph 38):

> *"[I]n accordance with the principle of legal certainty, community rules must enable the persons concerned to identify precisely the scope of the obligations which they are subject to,* ***which can only be guaranteed by the proper publication of those rules in the***

> ***official language of the addressee***." [emphasis added] (see also Case C-370/96 Covita [1998] ECR I7711, paragraph 27; Case C-228/99 Silos [2001] ECR I-8401, paragraph 15; and Consorzio del Prosciutto di Parma and Salumificio S. Rita, paragraph 95).

98 The European Court of Human Rights also ruled that the expression "*prescribed by law*" (which is found in several articles of the European Convention on Human Rights) particularly requires free access to the law (*The Sunday Times v The United Kingdom* [1979] ECHRR 1 at paragraph 49):

> "*In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. **First, the law must be adequately accessible:** the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able-if need be with appropriate advice-to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*" [emphasis added]

99 The German Constitutional Court (BVerfG) also acknowledged that the rule of law requires that all formally set legal norms, but also all other specifications which create a binding effect for the citizen in a binding form (such as harmonised standards), must be made accessible to the public in such a way that everyone who is concerned with the corresponding regulation can reliably obtain knowledge of its content. Obtaining such knowledge must not be unreasonably obstructed (German Constitutional Court, judgment of July 29, 1998 – Case 1 BvR 1143/90 *DIN-Normen* paragraph 27):

> "*Das Rechtsstaatsprinzip gebietet allgemein, daß förmlich gesetzte Rechtsnormen verkündet werden. Damit sollen sie der Öffentlichkeit in einer Weise zugänglich gemacht werden, daß die Betroffenen sich verläßlich Kenntnis von ihrem Inhalt verschaffen können. Diese Möglichkeit darf auch nicht in unzumutbarer Weise erschwert sein.*"
>
> Translation into English by the authors of the complaint:
>
> "*The principle of the rule of law generally requires the promulgation of formally enacted legal norms. The aim is to make them available to the public in such a way that those concerned can obtain reliable knowledge of their content. This possibility must also not be made unreasonably difficult.*"

100 Legal authors support these findings of the courts and further explain why the law must be freely accessible (cf., for instance, Bingham, T, The Rule of Law Penguin Books, 2011, Chapter 3). Bingham gives three reasons for

this, namely: (a) if a person is to be punished for doing or failing to do something they ought to be able to know what it is they ought or ought not do on pain of criminal penalty; (b) if we are to claim our civil rights or to perform our obligations which the law imposes on us we should know what those rights and obligations are; and (c) trade and business generally are promoted by a body of accessible legal rules.

101 The second and third aspects of Bingham's analysis are particularly relevant here. The Requested Standards are intended to give effect to legislation which imposes obligations requiring suppliers of products to conform to safety standards which protect the health and safety of consumers in the EU. The Requested Standards are also designed to strengthen the internal market by imposing harmonised safety standards on all suppliers who place goods on the market in the EU. Therefore, since the Requested Standards are part of EU law, they must be made freely available.

102 The principle of good administration under European law (Art. 298 TFEU, cf. also Art. 41 of the Charter of Fundamental Rights) also speaks for the free accessibility of the Requested Standards. The principle of good administration requires the publicity of all legal acts. (cf. Commission, Communication of April 29, 2000, OJ EC C 121, p. 2 et seq.; *Callies*, in: Calliess/Ruffert, EU Treaty / TFEU, Art. 296 TFEU paragraph 10; *Krajeswki/Rösslein*, in: Grabitz/Hilf/Nettesheim, Recht der Europäischen Union, Art. 298 TFEU, paragraph 18). This publicity of state action therefore includes public access to state documents and in particular to the applicable law (Callies, in: Calliess/Ruffert, EUV/AFEU, Art. 1 EUV paragraph 86). For EU law such as the Requested Standards, the publicity requirement is also laid down in Art. 297 TFEU.

103 The fundamental freedoms, like the free movement of goods (Art. 34 TEFU) or the freedom to provide services (Art. 56 TFEU), also require free access to the Requested Standards. This is because the refusal of access to the Requested Standards infringes these fundamental freedoms. Both fundamental freedoms demand transparent and reliable access to all regulations that must be observed when goods or services are offered across borders (cf. Directive 2014/24/EU, rec. 1, 45, 52; see also *Kau*, in: Beck'scher Vergaberechtskommentar, Bd. 1: GWB, 4. Teil, paragraph 59). Since the Requested Standards are – at least *de facto* – compulsory and implemented as national standards by Member States, they must also be freely accessible. Otherwise, cross-border trade would be impaired without justification. This is supported by a study commissioned on behalf of the Commission which revealed that the high prices for harmonised standards prevent their effective use in the market (cf. EIM, "Access to Standardisation, Study for the European Commission, Enterprise and

Industry Directorate General", Zoetermeer 2009, p. 9 (https://www.anec.eu/images/Publications/Access-Study---final-report.pdf (last accessed March 18, 2019)).

cc) Conclusion

104 To sum up, the overriding public interest in disclosure follows from the fact that the Requested Standards are part of EU law resulting in the constitutional imperative to freely access the Requested Standards.

b) Overriding public interest due to the Environmental Transparency Obligation

105 The overriding public interest in disclosing the Requested Standards also follows from the provisions in the Environmental Transparency Regulation.

aa) The Requested Standards contain environmental information

106 The Requested Standards contain environmental information resulting in an overriding public interest in disclosure.

107 Under Art. 5(3)(b) of the Aarhus Convention as implemented by Art. 4(2)(a) of the Environmental Transparency Regulation, the Commission has an obligation to progressively publish all "*environmental information*", particularly "*Community legislation on the environment or relating to it*".

108 The Requested Standards constitute legislation on or relating to the environment and must thus be freely accessible. They deal with the (chemical) composition of certain products (for instance, toys) thereby aiming at "*preserving, protecting and improving the quality of the environment*" and "*protecting human health*" (cf. the definition of "*environmental law*" in article 2(1)(f) of the Environmental Transparency Regulation). The Requested Standards consequently also constitute "*environmental information*" within the meaning of article 2(1)(d)(iii) Environmental Transparency Regulation as they are "*measures […], such as […] legislation […] affecting or likely to affect elements and factors referred to in points (i) and (ii) [i.e. the elements of the environment]*".

109 This results in an overriding public interest under Art. 4(2) Transparency Regulation with the consequence that the Requested Standards must be disclosed.

bb) The Requested Standards relate to "emissions into the environment"

110 The Requested Standards also relate to "emissions into the environment" resulting in an overriding public interest in disclosure.

111 Art. 6(1) Environmental Transparency Regulation stipulates that when interpreting Art. 4(2) first indent Transparency Regulation, "*an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment*". This is the case here.

112 The ECJ held in several judgments that the term "*emissions into the environment*" must be interpreted widely. The term "*covers emissions which are actually released into the environment at the time of the application of the product or substance in question and foreseeable emissions from that product or that substance into the environment under normal or realistic conditions of use of that product or substance corresponding to those under which the authorisation to place the product in question on the market is granted and which prevail in the area where that product is intended for use*" (cf. judgment of November 23, 2016 – case C-442/14 Bayer CropScience ECLI:EU:C:2016:890 paragraph 79).

113 This is true for the Requested Standards. They are harmonised standards allowing the public to foresee the quantities and nature of substances emitted into the environment under normal and realistic conditions of use of the relevant products and equally to check whether the products themselves conform to the relevant standards for release of substances into the environment and for putting products on the market.

114 In its Contested Decision, the Commission disputes this finding by alleging that "*it is not clear, how information about the means of verification of the products with the requirements provided for in the [respective EU directives] would allow the public to find out what is actually released into the environment, in particular considering that the test is carried out before placing the product on the market.*"

115 This argument is not convincing and contradicts the ECJ's case law including the objective of the Environmental Transparency Regulation. The Requested Standards specify the maximum amount of certain chemicals that can be used in products such as toys in order to put them on the market. This clearly relates to emissions into the environment. It is particularly also irrelevant that the test is carried out before placing the products on the market since most of the cases where the courts have granted access to documents under the Environmental Transparency Regulation concerned approval dossiers for pesticides which are typically generated before a product is put on the market (cf., e.g., General Court, judgment of March 7, 2019, case T-716/14 – Tweedale).

cc) Conclusion

116 To sum up, the overriding public interest also follows from the Environmental Transparency Regulation. Under these rules, the Requested Standards must be freely accessible as they contain environmental information which also relates to emissions into the environment.

c) Finally: The Commission did not state sufficient reasons in the Contested Decision for the denial of the overriding public interest

117 Finally, the Commission did not state sufficient reasons in the Contested Decision for the denial of the overriding public interest.

118 Based on the ECJ's case law, the Commission has to "*balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system*" (judgment of July 1, 2008 – Case C-39/05 P and C-52/05 P Turco ECLI:EU:C:2008:374 paragraph 45).

119 The Commission does not meet this standard. First, the Commission does not even mention this standard of the legal assessment in the Contested Decision. This already shows that the Commission did not weigh the affected interests when denying access to the Requested Standards. The Contested Decision is thus flawed.

120 Additionally, the Commission does not provide any reasoning why the *James Elliot Construction* judgment and its implications should not be regarded as a public interest under the Transparency Regulation. The Commission rather apodictically alleges that it does not "*establish an overriding public interest in disclosure*" (without any further reasoning). Here, the Commission entirely ignores the Applicant's argumentation in the Confirmatory Application (for instance, regarding the rule of law and the necessary accessibility of the law etc.) and thus does not appropriately deal with the issue at stake. The Commission's denial in the Contested Decision is thus flawed as it contains no reasoning at all and must consequently be annulled.

III. CONCLUSION

121 Based on the above-mentioned reasoning, the Contested Decision is flawed and must thus be annulled.

[Deemed to be signed via eCuria]

Dr Fred Logue Dr. Jens Hackl Christoph Nüßing

Schedule of Annexes

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A.7	Letter dated 25 September 2018 sent by FP Logue Solicitors via email to the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission seeking access to the Requested Standards (2 Pages)	28-30	12
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