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EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 14 June 2019
Sj.f (2019) 4262928

Documents relating to judicial proceedings

TO THE PRESIDENT AND MEMBERS OF THE

GENERAL COURT OF THE EUROPEAN UNION

Defence

submitted, pursuant to Article 81 of the Rules of Procedure of the General Court, by the EUROPEAN COMMISSION ("the Commission"), represented by Antoine Buchet, Legal Advisor, Giacomo Gattinara and François Thiran, Members of its Legal Service, acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, and consenting to service by e-Curia

in Case T-185/19

Public.Resource.Org, Inc. and Right to Know CLG

Applicant

- v -

European Commission

Defendant

seeking, pursuant to Article 263 of the Treaty on the Functioning of the European Union, annulment of the Decision of the Commission of 22 January 2019 refusing public access to certain documents requested pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31/05/2001, p. 43)

The Commission is honoured to present the following submissions to the Court:

I. Facts and Procedure

1. By letter dated 25 September 2018, Mr Fred Logue, representing his clients, Public.Resource.Org, Inc. and Right to Know CLG (hereinafter, "the Applicants"), requested public access to four technical standards from the Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW).[1] The request was introduced on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereinafter, "the Public Access Regulation")[2].

2. The Applicants sought public access to the following standards:

   - 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,

   - 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.

3. By letter dated 15 November 2018[3], the Director General of DG GROW refused to give public access to the documents at issue, insofar as their disclosure could undermine the protection of commercial interests of a legal person, including intellectual property, in accordance with Article 4(2), first indent, of the Public Access Regulation.

4. On 30 November 2018, the Applicants submitted a confirmatory application to the Commission seeking a review of the initial reply of 15 November 2018[4].

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[1] Annex A.7 of the application for annulment.

[2] Regulation (EC) No 1049/2001 of the European Parliament and of the Council, of 30 May 2001, regarding public access to European Parliament, Council and Commission documents (OJ L 145, of 31.05.2001, p. 43).

[3] Annex A.1 of the application for annulment, pages 12-14.

[4] Annex A.8 of the application for annulment.

5. The Commission proceeded to carry out a review of the initial reply and adopted a decision on 22 January 2019 ("the contested decision")[5].

6. In that decision, the Commission confirmed the position taken by DG GROW in its initial reply and refused to grant public access to the four documents at issue, based on Article 4(2), first indent, of the Public Access Regulation. The Commission considered that the documents in question are protected by copyright. The Commission recalled that access to those documents requires payment of a fee and that their public disclosure would evidently damage the commercial interests of their authors.

7. The application in the present proceedings was lodged on 28 March 2019 and served on the Commission on 5 April 2019.

II. Legal Framework

The Public Access Regulation

8. Article 4 (2), first indent, of the Public Access Regulation provides:

> *"2. The 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."*

The Aarhus Regulation

9. Article 2(1) point (d) of Regulation (EC) n°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 (hereinafter, "the Aarhus Regulation")[6] provides the following definition of 'environmental information':

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[5] Annex A.1 of the application for annulment, pages 4-11.

[6] OJ L 264 of 25.09.2006, p. 13

d) 'environmental information' means any information in writing, visual, aural, electronic or any other material form on:

(i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);

(iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;

(iv) reports on the implementation of environmental legislation;

(v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);

(vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii);"

10. Article 6(1) of the same Regulation provides:

"1. As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be

deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment."

The Standardisation Regulation

11. Article 6 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation (hereinafter, "the Standardisation Regulation")[7] provides:

"1. National standardisation bodies shall encourage and facilitate the access of SMEs to standards and standards development processes in order to reach a higher level of participation in the standardisation system, for instance by:

(a) identifying, in their annual work programmes, the standardisation projects, which are of particular interests to SMEs;
(b) giving access to standardisation activities without obliging SMEs to become a member of a national standardisation body;
(c) providing free access or special rates to participate in standardisation activities;
(d) providing free access to draft standards;
(e) making available free of charge on their website abstracts of standards;
(f) applying special rates for the provision of standards or providing bundles of standards at a reduced price.

2. National standardisation bodies shall exchange best practices aiming to enhance the participation of SMEs in standardisation activities and to increase and facilitate the use of standards by SMEs.

3. National standardisation bodies shall send annual reports to the European standardisation organisations with regards to their activities in paragraphs 1 and 2 and

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[7] OJ L 316 of 14 November 2012, page 12.

all other measures to improve conditions for SMEs to use standards and to participate in the standards development process. The national standardisation bodies shall publish those reports on their websites."

12. Article 10(6) of the same regulation states:

"6. Where a harmonised standard satisfies the requirements which it aims to cover and which are set out in the corresponding Union harmonisation legislation, the Commission shall publish a reference of such harmonised standard without delay in the Official Journal of the European Union or by other means in accordance with the conditions laid down in the corresponding act of Union harmonisation legislation."

III. Legal Assessment

III.1. Scope of the present proceedings

13. Before addressing the Applicants' claims, the Commission considers it necessary to clarify the subject matter of the present proceedings.

14. The present proceedings concern the legality of the Commission's decision to refuse access to four particular documents which are in the possession of the Commission and which relate to four standards elaborated by the European Committee for Standardisation (hereinafter, "the CEN"). The Applicants challenge this decision on the sole basis of the Public Access Regulation and the corresponding provisions in the Treaty on the functioning of the European Union (Article 15) and in the Charter of Fundamental Rights of the European Union (Article 42).

15. The Commission will address in section III.2 of this Defence the description made by the Applicants of the system of standardisation. At the outset, it is necessary to recall that the Standardisation Regulation provides for a general framework that works together with more specific harmonisation legislation. In the present case, the Standardisation Regulation works together with Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys[8] (hereinafter, "the Toy Directive") and with Regulation (EC) 1907/2006 of the European Parliament and of

[8] OJ L 170 of 30 June 2009, page 1.

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 (hereinafter, "the REACH Regulation")[9].

16. In the light of the foregoing, the Commission underlines that the Applicants do not challenge the legality of the legislative instruments in question. In particular, the validity of the Standardisation Regulation is not addressed. Likewise, the Applicants neither question the various references made to harmonised standard in the Toy Directive, nor do they challenge the reference made in point 27, paragraph 3, of Annex XVII to the REACH Regulation.

III.2. Standardisation in European Union law

17. The Applicants dedicate more than one third of their application for annulment to a very detailed presentation of the system of standardisation, as it results notably from the Standardisation Regulation.

18. The depiction of the current system made by the Applicants is in general accurate. However, the Commission would like to underline that on two very crucial issues, this description is incomplete and misleading.

19. The Applicants explain in their request that the requested standards are not generally freely accessible (section III.4 of the application for annulment, points 47 to 57). This is indeed an undisputed issue. The Commission does not necessarily agree with the considerations made by the Applicants as regards the supposed high level of the price of those standards (points 49 and 50 of the application), or concerning the alleged restrictive nature of the license conditions (points 51 to 54), but such assertions have in any case no bearing on the assessment of the legality of the contested decision. At this stage, suffice it to acknowledge that the Applicants recognise that the standards at issue normally need to be paid to be accessible and that they are protected by a license, subject to derogations granted by the CEN.

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[9] OJ L 396 of 30 December 2006, page 1.

20. The Applicants, however, seem to overlook a very important element in their analysis: the fact that standards are normally accessible in exchange of payment of a fee is the result of a choice made by the legislator of the European Union.

21. It is not the purpose of the present defence to run through the details of the "new approach" of the internal market, defined in the Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards[10] and in the White Paper from the European Commission to the European Council, "Completing the Internal Market"[11], of 14 June 1985. It is however useful to recall that this White Paper proposed to abandon the practice of incorporating detailed technical specifications in legislative instruments and to confine harmonisation to laying down the essential requirements, conformity with which allows a product to be placed on the Union market. The task of defining the technical specifications of products which are deemed to conform to legislated requirements is entrusted to European Standards issued by the European Standards Organisations (hereinafter, "the ESO").

22. Subsequent legislation of the European Union made clear and explicit references to standards adopted by the ESO[12]. According to Article 2(8) of the Standardisation Regulation, an ESO means an organisation listed in Annex I to that Regulation. The CEN is one of the three organisations mentioned by the legislator in that Annex.

23. In the present case, the four standards at issue have been adopted by the CEN. One of the internal guiding rules of the CEN is that it considers having copyright in all of its publications. Publications, including their entire content and their associated metadata, together with their national implementations, are according to the CEN works constituting individuality and originality and are therefore copyright-protected. In order to ensure that CEN can claim copyright in all its publications, all participants in the CEN bodies, working groups and workshops that develop publications assign the copyright in their individual contributions to CEN for the benefit of its Members by

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[10] OJ C 136, 4 June 1985, p. 1.

[11] COM (85) 310 final.

[12] See, as one of the first examples of such legislation, Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment, OJ L 399, 30 December 1989, p. 18–38.

signing copyright assignment statements[13]. CEN assigns the right to exploit publications to each individual member (national standardisation bodies) by means of a specific bilateral exploitation agreement. One of the fundamental principles of the CEN is that members and other parties involved in the distribution of publications or products containing them, in any form or in any language, cannot make them available free of charge. Any request to make publications available free of charge shall be referred to the CEN governance bodies. Any distribution arrangement that might conflict with this fundamental principle shall be notified for consideration by the CEN for its approval before it is implemented.

24. The sale of standards is a vital part of standardisation bodies' business model. A great number of technical experts from industry, associations, public administrations, academia, and societal organisations are involved in the CEN network. The CEN works in a decentralised way; its members operate the technical groups that draw up the standards; the CEN-CENELEC[14] Management Centre in Brussels manages and coordinates the system.

25. It is true that the European Union provides some financial support to the CEN, as it is indicated by the Applicants in point 33 of their application for annulment, but according to the studies made during the preparation of the proposal for a Standardisation Regulation, the system is financed primarily by industry (93-95%), followed by national governments (around 3-5%) and European Commission/EFTA contributions (around 2%)[15]. It is therefore misleading to suggest that the system is largely financed by public money.

26. It is clear that the legislator of the European Union, by deciding to recognise the CEN as one of the ESO empowered to produce European harmonised standards, chose a system in which the access to those standards will not be free of charge.

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[13] See the guidance documents published by the CEN - https://www.cencenelec.eu/ipr/Pages/default.aspx

[14] CENELEC is the European Committee for Electrotechnical Standardisation, also mentioned in Annex I to the Standardisation Regulation.

[15] Commission Staff Working Document – Impact Assessment – SEC (2011) 671 final, 1 June 2011.

27. Article 6 of the Standardisation Regulation reinforces this conclusion. According to paragraph 1 (f) of that provision, national standardisation bodies are encouraged to apply special rates for the provisions of standards in favour of SMEs. The legislator of the European Union therefore endorses the paying nature of the standards and adopts specific provisions designed to facilitate the access of SMEs to those standards. Only draft standards (Article 6(1)(d)) and abstracts of standards (Article 6(1)(e)) are concerned by a potential free access.

28. In the same vein, Annex II to the Standardisation Regulation, relating to technical specifications in the field of information and communication technologies (hereinafter, "ICT technical specifications"), provides in its point 4 (b) that those specifications are publicly available for implementation and use on reasonable terms, including for a reasonable fee or free of charge. Once again, the legislator of the European Union recognises the paying nature of the specifications, but contemplates the need for a cheaper access.

29. For all these reasons, the Commission considers that the system of making use of standardisation in support of legislation put in place by the legislator of the European Union implies that the harmonised standards are of a paying nature.

30. In point 22 of their application for annulment, the Applicants affirm that under the "new approach", the 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.

31. This assertion does not correspond to the actual content of the legislation of the European Union, in particular to the two legislative instruments at issue in the present proceedings. In the Toy Directive, the safety requirements are not vague nor minimalistic. There are indeed some basic requirements described in Article 10 of the Directive, but those requirements are supplemented by Annex II to the Directive. This Annex and its Appendices contain very detailed safety requirements that form part of the legislative instrument and that are of course entirely published in the Official Journal.

32. As regards the REACH regulation, paragraphs 1 and 2 of point 27 of Annex XVII to this Regulation include a series of specific and meticulous requirements concerning the use of nickel. These are comprehensive conditions and restrictions.

33. The Applicants do not make a very clear distinction between the substantial safety requirements and the standards. Their analysis of the current system seems to ascertain that the public is not sufficiently informed of the safety requirements adopted by the legislator of the European Union. In point 41 of their request, they argue that the consumers cannot have access to the full content of the requirements imposed to the industry as regards toy safety and the use of nickel, as if the standards the access of which is sought would themselves contain those requirements.

34. This way of describing the current system is confusing. A standard neither creates new safety substantial requirements nor modifies the existing ones; a standard provides for a process or method to comply with the said requirements without adding to those requirements. In this regard, it is important to highlight that harmonised standards do not take the form of delegated acts of the Commission, which are, in accordance with Article 290 of the Treaty on the functioning of the European Union, the only legal instrument at the disposal of the Commission to amend or supplement a legislative act.

35. The legal effects of a harmonised standard cannot be called into question[16]. However, the standard is not the result of the legislative activity, insofar as it does not set substantial requirements determined by a legislative act.

III.3. The pleas

36. The Applicants invoke two pleas in support of their action. Their first plea relates to the applicability of the exception to the public access to documents based on the protection of commercial interests. This plea is divided in three parts. First, the Applicants claim that the requested standards cannot be protected by copyright since they are part of EU law. Second, they consider that in any case those standards are not the result of personal intellectual creation of the CEN. Third, the Applicants claim that the Commission did not explain how the disclosure of the requested documents would undermine the commercial interests of the CEN.

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[16] C-613/14, *James Elliott Construction Limited*, ECLI:EU:C:2016:821, § 42.

37. In their second plea, also divided in three parts, the Applicants claim that there is an overriding public interest in the disclosure of the documents at issue. First, the Applicants consider that a free access to the requested standards is required by the general principles of EU law. Second, they assert that the Commission breached the Aarhus Regulation by not applying correctly its Articles 2(1), 4(2) and 6(1). Finally, the Applicants claim that the Commission did not state sufficient reasons in the contested decision for the denial of the overriding public interest.

III.3.1. Refutation of the first plea – The public disclosure of the four standards at issue would undermine the commercial interests of a legal person within the meaning of Article 4(2) first indent of the Public Access Regulation

38. The Commission considers it necessary to start by replying to the third part of the first plea of the Applicants, according to which the contested decision did not demonstrate the alleged undermining of the commercial interest of the CEN, which is the originator of the four documents at issue.

39. The Applicants are incorrect in suggesting that the risk of that undermining is not reasonably foreseeable and that the contested decision did not explain how and to what extent the release of the requested standards would actually undermine the commercial interests of the CEN (paragraphs 78 to 80 of the application for annulment). In fact, the Applicants themselves acknowledged in their application for annulment the existence of the commercial interests of the CEN, when they described the prices of the standards and the licence conditions imposed on the buyer of such standards.

40. A fee has to be paid to get access to the standards at issue, whereas their disclosure under the Public Access Regulation would precisely make them freely accessible. In accordance with the *erga omnes* rule[17], documents released pursuant to the Public Access Regulation enter the public domain and become publicly available. Moreover, in accordance with Article 10 of the Public Access Regulation, direct access to documents in electronic form is free of charge. In the present case, the four documents at issue are available in an electronic form. This means that, had the Commission given a positive

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[17] T-439/08, *Kalliope Agapiou Joséphidès*, ECLI:EU:T:2010:442, § 116.

reply to the request for access submitted by the Applicants, it would have made available to everyone, and for free, the four standards.

41. Therefore, as it is clearly stated by the Commission in the contested decision, economic operators and the public at large would not be willing to pay a fee in order to obtain a standard if they could obtain it free of charge from the Commission.

42. As it has been explained previously, the sale of standards is a vital part of standardisation bodies' business model. A public free access to those standards would completely annihilate this model and oblige the ESO to reconsider entirely their organisation, putting at high risk the production of further standards and the chance to have a method showing that a product is deemed to comply with the requirements established in the EU legislation by recourse to a uniform method.

43. The Applicants further explain that the CEN is acting as a public authority by performing public functions that are not subject to any commercial interests (points 81 and 82 of the application for annulment).

44. The Commission cannot agree with this assertion. In accordance with recital 13 of the Standardisation Regulation, the ESO are subject to competition law, within the meaning of Articles 101 and 102 of the Treaty on the functioning of the European Union. In a recent judgment[18], the General Court held that *"bien que les organismes notifiés contribuent à la réalisation de tâches d'intérêt public en fournissant des services de certification relatifs à la conformité avec la législation applicable et à l'apposition du marquage CE, notamment sur les dispositifs médicaux, ils restent des entités privées exerçant une activité économique en situation de concurrence sur le marché des services en cause"*. This case law can be transposed to the current situation: the CEN remains a private entity, even if it performs some tasks that are of a public interest, and its commercial interests should be preserved.

45. In another judgment[19], the General Court held that *"there is nothing to preclude a State-*

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[18] T-875/16, *Falcon Technologies International LLC*, ECLI:EU:T:2018:877, § 47 (only available in French and Italian).

[19] T-307/16, *CEE Bankwatch Network*, ECLI:EU:T:2018:97, § 108.

owned enterprise such as Energoatom from being deemed to hold commercial interests within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001. Indeed, the mere fact that the capital of an enterprise is owned by public authorities is not, as such, capable of depriving it of any commercial interests that may qualify for protection in the same way as those of a private company. In the present case, as pointed out by the Commission, Energoatom engages in commercial activities, in the context of which it faces competition in the electricity market and is thus required to protect its interests in that market. Accordingly, there is no denying that the documents to which access is requested can concern commercial interests and, as such, be covered by the activity mentioned in the first indent of Article 4(2) of Regulation No 1049/2001".

46. As the General Court recalls in the abovementioned *Falcon Technologies International LLC* judgment[20]: *"Bien que, en l'espèce, il ne s'agisse nullement d'une entreprise détenue par les pouvoirs publics, mais d'une entreprise privée qui contribue à la réalisation de tâches d'intérêt public, il convient de constater que, si une entreprise à capitaux publics peut détenir des intérêts commerciaux, il doit a fortiori en aller de même pour une entreprise privée, quand bien même celle-ci contribue à la réalisation de tâches d'intérêt public"*.

47. Against this background, the Commission concludes that the free public access to paying standards emanating from the CEN would obviously undermine the commercial interests of that organization.

48. The arguments submitted by the Applicants with regard to the alleged lack of copyright protection of the four standards at issue – in the first two parts of the first plea – cannot call into question that conclusion.

49. The intellectual property of an ESO is protected by national law. In the present case, the validity of the copyright-protection relating to the standards produced by the CEN falls within the scope of national law and cannot therefore be dealt with under the current proceedings.

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[20] T-875/16, § 49 (only available in French and Italian).

50. In the context of the assessment of the request for public access to documents made by the Applicants, the Commission only observed that the standards at issue were the results of a process during which a very specific technical expertise was provided, in order to establish the specifications which may be used to comply with the requirements set out by the legislation. Such a process includes an intellectual creation of the author of the standards.[21] This creative element is recognised by the applicable national law and cannot be put into question by the Commission in the context of the examination of a request of access to documents submitted under the Public Access Regulation. The Commission also notes that to its knowledge the Applicants did not bring any legal action before the competent national courts to challenge the validity of the copyright protection of the standards at issue.

51. In any event, in the context of Article 4(2), first indent, of the Public Access Regulation, the public access to the standards, free of charge, would definitely undermine the protection of the intellectual property of the CEN, insofar as those standards are subject to licence conditions imposed on the buyers. The absence of any control of any kind in the dissemination of the standards would evidently affect the commercial interests of the CEN.

52. The alleged incompatibility between the copyright protection of the requested standards and the fact that those standards have legal effects under the law of the European Union (points 66 to 71 of the application for annulment) will also be examined by the Commission under the second plea, concerning the alleged existence of an overriding public interest, insofar as some of the arguments presented by the Applicants under this section relate to the need for the general public to have unlimited and free access to the content of the standards. At this stage, the Commission contends that all the arguments related to the validity of the copyright protection have no bearing in the context of the present proceedings. The intellectual property of the standards produced by the CEN is protected under national law. The present proceedings do not and cannot dispute the legality of this protection guaranteed under national law.

53. Therefore, the first plea of the Applicants should be rejected as unfounded.

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[21] C-5/08, *Infopaq International*, EU:2009:C:465, §§ 37-39 ; C-310/17, *Levola Hengelo BV*, EU:C:2018:899, §§ 35-37.

III.3.2. Refutation of the second plea – There is no overriding public interest in the disclosure of the documents at issue.

a) Refutation of the first part of the second plea – The non-existence of an "automatic overriding public interest"

54. According to the Applicants, and insofar as harmonised standards form part of the law of the European Union, there is an "automatic overriding public interest" in disclosing those standards (point 85 of the application for annulment). The Applicants invoke notably the principle of legal certainty, which can only be guaranteed by the proper publication of rules in the official language of the addressee of those rules. They refer as well to the case law of the European Court of Human Rights concerning the accessibility of the law. The Applicants also underline the link between the accessibility of the standards and the proper functioning of the internal market (points 89 and 101 of the application for annulment). Finally, the Applicants consider that the principle of good administration (Article 41 of the Charter), the free movement of goods and the freedom to provide services (Articles 34 and 56 of the Treaty on the functioning of the European Union) require the free access to the standards (points 102 and 103 of the application for annulment).

55. According to a well settled case law, *"the onus is on the party arguing for the existence of an overriding public interest to rely on* ***specific circumstances*** (emphasis added) *to justify the disclosure of the documents concerned and that setting out purely general considerations cannot provide an appropriate basis for establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question"*[22].

56. It is therefore relevant to question whether, in the present proceedings, the Applicants have presented arguments capable of demonstrating that, *"in relation to the documents at issue, the invocation of the general principles raises, having regard to the particular circumstances of this case, any issue of particularly pressing concern"*[23]. The

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[22] C- 562/14 P, *Sweden v. Commission*, ECLI:EU:C:2017:356, § 56.

[23] T-111/11, *ClientEarth*, ECLI:EU:T:2013:482, § 109; see also joined Cases C- 514/07 P, C- 528/07 P and C- 532/07 P *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541, § 158

Applicants cannot merely refer to non-specific considerations unrelated to the particular circumstances of the present case. Non-specific considerations cannot provide an appropriate basis for establishing that the principle of transparency represents in a specific case an issue of particularly pressing concern, which prevails over the reasons justifying the refusal to disclose the documents requested.

57. At the outset, the Commission notes that the very purpose of the application for annulment is to give access at all times and without any payment restrictions to all standards. The Applicants lodge this action *"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"* (point 5 of the application). Likewise, in section 2 a) of their application, the Applicants refer to the standards in general, and not to the four specific documents, which in the present case they sought access to.

58. What are the particular circumstances of the case justifying the existence of a general public interest? What is the pressing concern prevailing, as regards the documents at issue, over the protection of the commercial interests of the CEN? Those questions remain unanswered by the Applicants.

59. The Commission is therefore invited, in the absence of any specific arguments concerning the documents at issue, to examine *in abstracto* the alleged existence of a general public interest that would justify the publication of *all* harmonised standards. Such a demonstration is neither required by the Public Access Regulation nor by the relevant case law, which entail the need to proceed with a concrete and specific analysis of the interests in balance: the exception to the public access, on the one hand, and the general public interest, on the other hand.

60. In this regard, the Commission would like to recall that the current system of making use of standardisation in support of legislation is based on the following elements. First, the legislator defines the substantial requirements applicable to certain products. Those rules are laid down in a Union act that is published in the Official Journal of the European Union. Second, standards containing the technical specifications which can be used to comply with the abovementioned requirements are elaborated by the ESO and endorsed by the Commission, which publishes their references in the Official Journal

under the conditions set out in Article 10(6) of the Standardisation Regulation.

61. The mere publication of the sole references to the standards results from a choice of the legislator of the European Union. The substantial requirements are comprehensively published, while standards being a means to comply with those requirements are subject to a regime of publication as set out in Article 10(6) of the Standardisation Regulation or the relevant applicable sectoral act.[24]

62. This choice has been duly noted by the Court of Justice, in the *James Elliott* judgment, and not called into question[25], neither it is challenged by the Applicants, who do not argue that Article 10(6) of the Standardisation Regulation would be illegal. This provision is then presumed to be legal. In particular, the Applicants do not claim that the Standardisation Regulation breaches the general principle of legal certainty.

63. The references to the four standards at issue in the present proceedings have been published in accordance with the Standardisation Regulation. Neither the Toy Directive nor the REACH Regulation contain specific conditions as regards the publication of the harmonised standards. Once again, the Applicants do not argue that the legislator, either in the Toy Directive or in the REACH Regulation, would have breached the general principle of legal certainty.

64. In the Standardisation Regulation, the legislator has already struck a balance between the various interests at issue and concluded that it was not necessary to make fully and freely accessible by way of publication the content of the harmonised standards adopted by the ESO.

65. The public at large must of course be fully informed of the substantial safety requirements of certain products adopted by the legislator of the European Union. In the present case, this objective is achieved by Article 10 and Annex II of the Toy Directive, and by point 27 of Annex XVII to the REACH Regulation.

66. Conversely, harmonised standards are not fully and freely accessible to the public at

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[24] Such as Article 4 of Directive 2001/95/EC on general product safety. OJ L 11, 15.1.2002, p. 4.

[25] C-613/14 *James Elliott Construction Limited*, ECLI:EU:C:2016:821, §§ 37-40.

large, but are accessible, against payment, to a more restricted group of persons who intend to place on the market the products concerned by the abovementioned requirements and who want to demonstrate that these products actually meet such requirements. Those economic operators make use of the standards in order to have access to the internal market of the European Union. They follow the technical specifications contained in the standards in order to demonstrate that they respect the substantial safety requirements defined by the legislator. A harmonised standard is thus a tool helping an economic operator in the conduct of his or her business within the European Union and therefore does not add to the requirements established by the legislator.

67. Therefore, the payment of a fee and the obligation to respect a licence in order to have access to those technical specifications do not appear to be disproportionate. The obligation to pay for the access to the harmonised standards is provided by law and pursues an objective of general interest, insofar as those standards provide for a means for a product to comply with the safety requirements defined by the legislator of the European Union.

68. In turn, as explained in section III of this Defence, standards are used to ensure that free movement does not occur to the detriment of safety and security. However, in order to achieve this goal, a specific tool was developed, which allows to show that certain requirements are automatically met, and this is the development of a harmonised standard. The fact that the elaboration of this standard is *"entrusted to an organisation governed by private law"*, as the Court of Justice recalled in *James Elliott*[26], and then not to the Commission, which has neither the resources nor the expertise to produce standards, necessarily entails the need to ensure that the author of the standard has a remuneration for this creation. Failing this remuneration, there would be no production of standards and then no way to ensure that free movement occurs by having recourse to a uniform method used to meet the requirements of safety and security stemming from EU legislation.

69. The Commission agrees with the Applicants that the standards are designed to

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[26] C-613/14, § 43.

strengthen the internal market (point 101 of the application for annulment). But this also justifies that those who wish to make use of those tools are asked to bear the costs induced by their elaboration, because they will benefit from their effects, which consist of ensuring a presumption of conformity of the product they will place on the market to the requirements set forth by the legislator of the European Union.

b) Refutation of the second part of the second plea – The non-relevance of the Aarhus Regulation

70. The Applicants assert that the documents at issue contain environmental information, in accordance with Article 2(1)(d)(iii) of the Aarhus Regulation. According to this provision, 'environmental information' means any information on measures affecting or likely to affect the elements and factors referred to in points (i) and (ii) of the same subparagraph.

71. The Commission does not deny that the standards are generally speaking 'measures', that could be relevant within the meaning of that provision. However, such measures do not affect nor are they likely to affect the elements referred in point (i) of Article 2(1)(d) of the Aarhus Regulation pursuant to point (iii) of that provision. Indeed, according to their subject matter, the four standards in question do not relate to the 'elements of the environment'.

72. As to the issue whether the requested harmonised standards relate to some of the 'factors' referred to in point (ii) of Article 2(1)(d) of the Aarhus Regulation, these standards certainly concern some 'substances', but the information contained in the standards at issue is not about the actual or potential affectation of the 'elements of the environment'.

73. The standard CEN EN 71-5:2015 is intended to reduce the risks that may present health hazards to a child when the chemical toys are used as intended or in a foreseeable way, bearing in mind the behaviour of children. The standard CEN EN 71-4:2013 is intended to reduce the risks and health hazards to a child when experimental sets involving chemical experiments are used as intended or in a foreseeable way, bearing in mind the behaviour of children. The standard CEN EN 71-12:2013 specifies the test methods for N-nitrosamines and N-nitrosatable substances for toys and parts of toys made from elastomers and intended for use by children under 36 months, toys and parts of toys

made from elastomers and intended to be placed in the mouth and finger paints for children under 36 months.

74. The fourth standard CEN EN 12472:2005+A1 (linked to the REACH Regulation) specifies a method for accelerated wear and corrosion, to be used prior to the detection of nickel release from coated items that come into direct and prolonged contact with the skin.

75. Those standards describe tests and methods designed to comply with safety requirements, before the placing on the market of certain products. They do not contain information affecting or likely to affect the elements of the environment referred to in point (i) of Article 2(1)(d) of the Aarhus Regulation, but information on the best ways to make toys safer and to avoid some effects of the nickel where it is in prolonged contact with the skin.

76. Against this background, the Commission does not consider that the documents at issue in the present case contain environmental information.

77. Furthermore, the Commission contends that contrary to what claim the Applicants, the Aarhus Regulation does not impose on the institutions of the European Union an absolute and unconditional obligation to publish all environmental information. In particular, Article 4 of the Aarhus Regulation cannot be interpreted as a derogation from the provisions of the Public Access Regulation, namely from those laying down the exceptions to a request for access to documents. In turn, Article 3 of the Aarhus Regulation explicitly provides for the full application of the Public Access Regulation in order to deal with applications for access to documents.

78. Likewise, Article 4(2) of the Aarhus Regulation also refers to the Public Access Regulation. This provision relates to the proactive publication of some information, and does not supersede the exceptions set out in Article 4 of the Public Access Regulation. It has no bearing on the determination of the existence of an overriding public interest.

79. Article 6(1), first sentence, of the Aarhus Regulation, is the only provision of that legislative instrument that contains a clear and specific reference to the overriding public interest. This provision is limited to situations where the information requested relates to emissions into the environment.

80. In the present case, none of the documents at issue contains such information. Contrary to what the Applicants claim in points 112 to 115 of their application for annulment, the definition of the notion of 'emissions into the environment' does not apply to the requested standards.

81. First, the Commission maintains that the documents at issue do not contain any environmental information; accordingly, there cannot be any possibility to apply Article 6 of the Aarhus Regulation in the case at hand. Second, even if it was considered that the requested standards contained environmental information, which would not be correct (see above), there would in any event be no sufficient link between this information and any actual or foreseeable emission into the environment.

82. If it is true that the case law has repeatedly rejected a restrictive interpretation of the concept of 'emissions into the environment', the Courts of the European Union have also excluded a too broad interpretation of that concept, which may not, in any event, include information containing any kind of link, even direct, to emissions into the environment. If that concept were interpreted as covering such information, it would to a large extent deprive the concept of 'environmental information' as defined in Article 2(1)(d) of the Aarhus Regulation of any meaning[27].

83. The Commission fails to see any link between the documents at issue and any actual or foreseeable emissions. The Applicants refer to the judgment of the General Court in the *Tweedale* case. However, in this ruling, the General Court held that *"what mattered* [in that case] *was not so much that the data in question come from studies performed entirely or in part in the field or in laboratories or even from a translocation examination, but that the purpose of those studies is to assess 'emissions into the environment' for the purposes of Article 6(1) of Regulation 1367/2006, that is to say, the actual or foreseeable emissions of the product or substance in question into the environment under circumstances representing normal or realistic conditions of use of that product or substance, or to analyse the effects of those emissions"*[28].

84. In the present case, the purpose of the documents is not to assess 'emissions'. The

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[27] T-545/11 RENV, *Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:T:2018:817, § 58.

[28] T-716/14, *Anthony C. Tweedale v. European Food Safety Authority (EFSA)*, ECLI:EU:T:2019:141, § 110.

objectives of the requested standards have even indirectly no connection with the assessment of 'emissions'. The mere fact that the standards relate in part to substances and contain some information concerning the maximum amounts of chemical substances and mixtures does certainly not create a sufficient link with actual or foreseeable emissions. Such an extensive approach *"would deprive of any practical effect the possibility, laid down in the first indent of Article 4(2) of Regulation 1049/2001, for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would have an adverse effect on the protection of the commercial interests of a particular natural or legal person and would jeopardise the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests. It would also constitute a disproportionate interference with the protection of business secrecy ensured by Article 339 TFEU"*[29].

c) Refutation of the third part of the second plea – the Commission did state sufficient reasons to deny the existence of an overriding public interest

85. Finally, the Applicants argue that the contested decision does not contain sufficient grounds to reject the arguments submitted in the confirmatory application concerning the existence of an overriding public interest (points 117 to 120 of the application for annulment).

86. The Applicants are incorrect in the way they refer to the *Turco* judgment to support their plea. In this ruling, the Court of Justice annulled the decision because the Council took the view that the principles underlying the Public Access Regulation cannot be regarded as an 'overriding public interest' within the meaning of Article 4(2) of that Regulation[30]. The Commission did not take the same view and did properly ascertain whether, in the present case, there was an overriding public interest.

87. The Commission does not share the interpretation made by the Applicants of the *James Elliott* judgment, which according to the Commission does not entail the obligation to publish proactively the content of the harmonised standards. This is explained in section

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[29] C-673/13 P, *Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889, § 81.

[30] C-39/05 P and C-52/05 P, *Turco*, ECLI:EU:C:2008:374, § 78.

3 of the contested decision, which refers also to section 2.1 of the same decision.

88. Insofar as the Applicants did not further explain what in their opinion are the particular circumstances of the case justifying the existence of a public interest, as regards the specific documents at issue, but merely refer to the existence of an 'automatic' public interest stemming from the *James Elliott* judgment, the Commission was not in a position to develop in greater details its own reasoning. As it has been already explained, it is for the Applicants to prove the existence of an overriding public interest.

89. For all these reasons, the second plea should be rejected as unfounded.

CONCLUSIONS

In the light of the above submissions, the Commission respectfully requests that the Court:

— dismiss the application;

— order the Applicants to pay the costs.

Antoine Buchet Giacomo Gattinara François Thiran

Agents for the Commission