IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

GENERAL COURT

CASE T-185/19

BETWEEN:

(1) PUBLIC.RESOURCE.ORG INC.
(2) RIGHT TO KNOW CLG

Applicants

and

THE EUROPEAN COMMISSION

Defendant

REPLY

(Lodged on behalf of the Applicants on 2 August 2019)

Introduction

1. The background facts and procedure leading up to the making of the Application for Annulment in these proceedings are described in the documents filed to date in the written part of the procedure. In brief summary, on 28 March 2019 the Applicants lodged an Action for Annulment of a commission decision dated 22 January 2019 refusing to grant access to four identified harmonised standards pursuant to Regulation (EC) No 1049/2001 (the "Requested Standards").

2. In essence, the applicants plead that harmonised standards form part of EU law and therefore the fact that the Union is founded on the principal of the rule of law means that the Requested Standards should be freely and publicly accessible and in that case access to copies of them should be granted under Regulation (EC) 1049/2001 (the "Transparency Regulation").

3. In its defence, the Defendant seeks to downplay the fact that harmonised standards have been definitively determined to form part of EU law by the CJEU[1] and avoids engaging with the argument that the concept of the rule of law requires free and open public access to the law – including the harmonised standards. Instead, the Defence focusses almost exclusively on the alleged commercial harm that European standardisation organizations (ESOs) would suffer if the application is successful and on the supposed catastrophic undermining of the system of harmonised standards in the European Union that could result.

Paid access to harmonised standards was not a legislative choice

[1] Judgment of 27 October 2016, *James Elliot Construction,* C-613/14, ECLI:EU:C:2016:821, paragraph 40

4. In section III.2 of the defence, the Defendant confirms that the Applicants' description of the system of harmonised standards is generally accurate but takes issue with aspects of the Application which it characterises as "*incomplete and misleading*[2]".

5. In particular, the Defendant alleges that the system whereby harmonised standards are made available in exchange for payment is a result of a choice made by the European legislature. In the Applicants' view, this argument is without any factual or legal basis. While the Applicants do not disagree that this is the system that has in fact emerged, they observe that the Defendant has not pointed to any particular provision whereby the legislature of the European Union gave effect to this alleged choice through legislation. In fact, there does not appear to be any legislative mandate requiring harmonised standards only to be made available in exchange for payment. The relevant legislation rather appears to be neutral on whether payment is required. Therefore, a system that does not depend on payment and strict conditions on reuse without exception would be fully in line with EU law.

6. On a side note, even if the Defendant was correct and the system of harmonised standards being made available in exchange for payment was an intentional choice of the legislature (which it is not), the legislature and resulting legislation must be compatible with the Treaties and the Charter of Fundamental Rights of the European Union. As explained at paragraphs 110 to 115 of the Application, a system requiring payment for access to harmonised standards would not be compatible with these rules due to a violation of the principle of the rule of law.

7. The Applicant also points out that the statements concerning CEN are inconsistent with the previous argument. In particular, the Defendant acknowledges[3] that having

[2] Paragraph 19 of the Defence
[3] Paragraph 23 of the Defence

copyright in harmonised standards, rather than being a legislative choice, is in fact one of CEN's "*internal guiding rules"* which together with other internal measures are designed to facilitate the monetisation of harmonised standards by CEN. There is no suggestion that these monetisation measures are mandated by legislation. However, if monetisation of harmonised standards was in fact a legislative choice, then these "internal" monetisation measures should not be necessary.

8. Therefore, the Applicants disagree that the Defendant has demonstrated[4] that the European Union, by deciding to recognise CEN as one of the ESOs empowered to produce European harmonised standards, chose a system in which access to those standards will not be free of charge. Rather, the system that has emerged is voluntary and not mandatory.

The distinction between the substantial safety requirement and the standards themselves

9. The second aspect of the system of harmonised standards that is criticised by the Defendant concerns the distinction between the substantial safety requirements set down in primary law and the harmonised standards adopted according to the "New Approach". The Defendant appears to downplay the distinction and characterises the standards as merely providing a process or method to comply with the substantial requirements without adding to those requirements[5].

10. The Court in *James Elliot Construction* has already examined this distinction and held that harmonised standards "*give … concrete form on a technical level to the essential requirements"* of the relevant directive[6]. The Court in that decision went on to observe

[4] Paragraph 26 of the Defence
[5] Paragraph 34 of the Defence
[6] Paragraph 36 of *James Elliot Construction*

that it is by reference to the provisions of the standard (and not the directive) that it is established whether or not the presumption of conformity applies to a given product[7].

11. The Defendant then proceeds to refute the Applicants' pleas. The Applicant does not intend to burden the court with arguments that have already been made elsewhere but would like to respond briefly to some of the objections raised by the Defendant.

Released harmonised standards would not enter public domain

12. The Defendant is incorrect to allege that granting the Applicants' request would essentially put the Requested Standards into the public domain[8] and that there would be no control of any kind in the dissemination of harmonised standards[9]. This is a fundamental misunderstanding of the concept of the public domain. The concept of creative works being in the public domain is commonly understood to mean that those works are not subject to exclusive intellectual property rights and are thus free to use by anyone[10].

13. In fact, however, Article 16 of the Transparency Regulation expressly recognises that granting a request does **not** introduce the creative content of a document into the public domain. The granting of access to documents under the Transparency Regulation must be without prejudice to any existing rules of copyright (whether economic rights or moral rights) which may limit or constrain a third party's right to adapt, reproduce, make publicly available or otherwise exploit released documents.

14. While there is a dispute as to whether the content of the Requested Standards is in fact protected by copyright, the Defendant cannot maintain that such copyright exists and

[7] Paragraph 40 of *James Elliot Construction*
[8] Paragraph 40 of the Defence
[9] Paragraph 51 of the Defence
[10] https://en.wikipedia.org/wiki/Public_domain (Last accessed on 1 August 2019)

at the same time claim that granting access puts the requested standards in the public domain.

The ESO business model is not protected by the Transparency Regulation

15. In addition, the Defendant tries to make an argument that the granting of this specific request would undermine the entire system of standardisation. In particular, the Defendant claims that granting this request would "*completely annihilate"* the ESO business model[11], put at risk the entire system of harmonised standards[12] and "*that there would be 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*"[13]. Although not pleaded, the essence of this argument is that access cannot be granted to harmonised standards as a category since the effect of any such access would be catastrophic. This argument gives the incorrect impression that the ESOs are entirely dependent for their survival on the development and monetisation of harmonised standards. The reality is that ESOs, and CEN in particular, produce a wide range of standards only a small number of which are harmonised standards which themselves are produced at the bidding of the Defendant and with financial support. The Defendant has not demonstrated with reference to objective information describing the entirety of CEN's business model just how the claimed catastrophic effects would come about.

16. In the Applicants opinion, these claims are exaggerated and unsupported - particularly given that a release of the requested standards to the Applicants' does not affect copyright and other monetisation measures already alluded to by the Defendant. Even if there were any such effects, they would not support the argument that the Applicant's

[11] Paragraph 42 of the Defence
[12] Paragraph 42 of the Defence
[13] Paragraph 68 of the Defence

request should be denied. The Transparency Regulation does not recognise mere policy considerations such as those regarding alleged effects on the system of harmonised standards that the Defendant is trying to use as a basis to deny requests for access. The Applicants must point out at this juncture that the rule of law is one of the core values of the European Union as expressed in Article 2 TEU and therefore it is a superior norm compared to the alleged impact that granting this request would have on ESOs. It is difficult to understand how the Defendant, in essence, should be able to successfully argue that the rule of law must be sacrificed to protect the commercial interests of the ESOs which are private organisations.

17. It must further be pointed out that the Court has recognised only five categories of documents in respect of which a decision can be based on a general presumption against release as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature[14]. Harmonised standards are not included in any of these five categories of documents which the Court has recognized and therefore the Defendant cannot make general arguments in relation to the effect that granting access may have.

Defendant's argument regarding copyright protection under national law are contradictory

18. The allegation that the intellectual property of an ESO is protected by national law[15] and falls within the scope of national law and cannot therefore be dealt with in these proceedings is inconsistent with the Defendant's first instance and confirmatory decisions. It was, in fact, the Defendant which relied on an alleged copyright in the requested standards to justify the position that granting the request would undermine

[14] Judgment of 4 September 2018, *Clientearth v Commission*, Case C-57/16 P, ECLI:EU:C:2018:660, paragraph 81

[15] Paragraph 49 of the Defence

the protection of the commercial interests of CEN. The Applicants should therefore be allowed to counter these allegations. Otherwise, if the Defendant was correct in its assertion that this is no place to deal with copyright issues under national law then the Defendant itself would be precluded from relying on copyright in its decision. Its justification for denying the Applicant's request would then fall away immediately.

19. In any event, the Applicants consider that the concept of creativity is in fact a well-established harmonised European-law concept[16] and this Court and the Defendant are fully entitled to consider arguments relating to copyright whether as a matter of EU law or national law. The doctrine of supremacy means that national law cannot interfere with the effectiveness of EU law, therefore the fact that the requested standards may be protected by copyright under national law cannot affect the idea that the law should be freely accessible to the public, nor can it affect the public's right of access to documents under the Transparency Regulation.

Overriding public interest: General or specific arguments?

20. The Defendant criticises the Applicants for not identifying specific circumstances to justify the disclosure of the documents on the basis of an overriding public interest[17]. In the first instance it must be pointed out that the Applicants did in fact explicitly point to a specific public interest in relation to toy safety and the safety of chemicals. The Defendant itself has recognised these topics as being among the most frequently identified issues in relation to surveillance of products placed on the market in the EU[18].

21. In any event, the Court has recognised the idea that decisions can be based on general presumptions which apply to certain categories of documents as considerations of a

[16] Judgment of 29 July 2019, *Funke Medien NRW*, C-469/17, ECLI:EU:C:2019:623, paragraphs 19 and 20
[17] Paragraph 56 of the Defence
[18] Paragraph 46 of the Application

generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature[19]. Therefore, the Applicants are entitled to argue that the concept of the rule of law means that harmonised standards, as a class of document, should be freely available to the public and therefore should at the very least be accessible under the Transparency Regulation.

The substantial safety requirements in primary legislation do not satisfy the public interest

22. The Defendant appears to suggest that the public is fully informed of the substantial safety requirements of certain products by reference to primary legislation and that harmonised standards are merely a commercial tool aimed at suppliers placing products on the single market[20]. In that case where payment is sought, according to the Defendant, a proportionate balance is struck between the public interest and the interests of free movement of products on the single market.

23. However, this is not true. *James Elliot Construciton* concerned a claim by a purchaser of a product brought against a supplier which turned *inter alia* on the interpretation of a harmonised standard. This case illustrates clearly that purchasers also have an interest in free access to harmonised standards since they are, in principle, entitled to rely on them to advance legal claims against a supplier. Second, the Court held that it was by reference to the provisions of the standard (rather than the substantial requirements set out in primary legislation) that it is established whether or not the presumption of conformity with the substantial requirements applies to a given product (see footnote 7 above).

[19] Judgment of 4 September 2018, *Clientearth v Commission*, Case C-57/16 P, ECLI:EU:C:2018:660, paragraph 51

[20] Paragraph 66 of the Defence

24. In fact, in the Applicants' view, economic operators seeking to distribute their products on the market on the European Union would seldom rely on their own interpretation of the oftentimes rather broad and unspecific substantial requirements of European product legislation, hoping that market surveillance authorities would share this interpretation. To enjoy greater legal certainty, they would rather seek to apply a harmonised standard to make sure that the presumption of conformity with these substantial requirements under the respective legislation will apply to their products. It therefore seems like a fair assumption, that the decisive steps to be taken for products to comply with EU regulation are actually set forth in the harmonised standards, and not in EU legislation itself.

25. It should thus be immediately clear that the public and their associations (such as consumer protection associations) have an interest in free access to harmonised standards.

Application of the Aarhus Regulation

26. Finally, the Defendant is incorrect to claim that the Aarhus Regulation has no relevance to the request. The requested standards relate to chemical toys and experimental sets which may contain toxic and harmful substances, to test methods for N-nitrosamines and N-nitrostable substances, and to the mandatory test methods for determining conformance with limits on the rate of nickel release from jewellery and other products intended to come into direct contact with the skin. As such the requested standards contain information on factors affecting the environment and are measures or activities affecting or likely to affect the factors and elements of the environment and/or designed to protect the environment, specifically by ensuring that excessively harmful levels of certain chemicals and substances are not released into the environment.

27. While the Applicants do not have access to the precise contents of the requested standards it seems that the objective embodied in an overriding public interest in granting access to information on emissions into the environment is met in this case since members of the public must have access to the Requested Standards in order to perform the relevant tests on products to ensure that they comply with limits in relation to emissions into the environment.

Conclusion

28. The Applicants therefore ask the Court to make the orders sought in the Application.

[Deemed to be signed via eCuria]

Dr Fred Logue Dr. Jens Hackl Christoph Nüßing