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By e-Curia

Berlin, 10 July 2019

Reg. No.: 14/002357-19

APPLICATION FOR LEAVE TO INTERVENE

In Case T-185/19

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

v

European Commission¹

the following organisations:

1. Comité Européen de Normalisation (CEN),
Rue de la Science 23, 1000 Bruxelles, Belgium,
2. Asociación Española de Normalización (UNE),
C/Génova, 6, 28004 Madrid, Spain,
3. Asociația de Standardizare din România (ASRO),
București, Sector 1, Cod 010362, Str. Mendeleev nr. 21–25, Romania,
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¹ Summary of the pleas in law published in OJ C 172 of 20 May 2019, p. 44.

5. Austrian Standards International (ASI),
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6. British Standards Institution (BSI),
389 Chiswick High Road, London, W4 4AL, United Kingdom,
7. Bureau de Normalisation/Bureau voor Normalisatie (NBN),
Rue Joseph II 40, Box 6, 1000 Bruxelles, Belgium,
8. Dansk Standard (DS),
Göteborg Plads 1, 2150 København, Denmark,
9. Deutsches Institut für Normung e. V. (DIN),
Saatwinkler Damm 42–43, 13627 Berlin, Germany,
10. Koninklijk Nederlands Normalisatie Instituut (NEN),
Vlinderweg 6, 2623 AX Delft, Netherlands,
11. Schweizerische Normen-Vereinigung (SNV),
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14. Svenska institutet för standarder (SIS),
Solnavägen 1E, 113 65 Stockholm, Sweden,
15. Institut za standardizaciju Srbije (ISS),
Stevana Brakusa 2, 11030 Beograd, Serbia,

– hereinafter referred to as ‘applicants for leave to intervene’ –

represented by Dr Ulrich Karpenstein, Kathrin Dingemann and Dr Matthias Kottmann, lawyers,²

request leave to intervene in support of the form of order sought by the Commission.

² Certificates for their admission to the German bar are enclosed as **Annex 1**.

A. Facts

- (1) The applicant for leave to intervene mentioned under No 1 above, CEN, is one of three European standardisation organisations (ESOs) recognised in Article 2(8) and Annex I of Regulation (EU) No 1025/2012.³ It fulfils the task of developing, harmonising and adopting standards in support of Union legislation and policies under said regulation. CEN has the legal status of an international non-profit association (AISBL) under Belgian law.⁴
- (2) The other applicants for leave to intervene are national Members of CEN pursuant to Article 6.1 of the Statutes of CEN.⁵ The applicants for leave to intervene listed under No 2 to 14 above are also national standardisation bodies (NSBs) in Member States of the EU or the EFTA in terms of Article 2(10) and Article 27 of Regulation (EU) No 1025/2012.⁶
- (3) The applicants in case T-185/19, Public.Resource.Org, Inc. and Right to Know CLG, request access to four documents containing descriptions of European harmonised standards within the meaning of Article 2(1) lit. c of Regulation (EU) No 1025/2012 adopted by CEN on the basis of a request made by the Commission, namely:
 - European Committee for Standardisation harmonised European standard of 13 November 2015, EN 71-5:2015 ‘Safety of toys – Part 5: Chemical toys (sets) other than experimental sets’;
 - European Committee for Standardisation harmonised European standard of 25 May 2013, EN 71-4:2013 ‘Safety of toys – Part 4: Experimental sets for chemistry and related activities’;

³ Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ L 316, 14 November 2012, p. 12.

⁴ A proof of CEN’s legal status and an authority to act are enclosed as **Annex 2**.

⁵ See the Statutes of CEN, **Annex 3**, and the list of members of CEN, **Annex 4**.

⁶ See Publication of an updated list of national standardization bodies pursuant to Article 27 of the regulation (EU) No 1025/2012 of the European Parliament and of the Council on European Standardisation, OJ C 351, 19 October 2017, p. 13. Proofs of their respective legal status and authorities to act are enclosed as **Annex 5**.

- European Committee for Standardisation harmonised European standard of 29 June 2013, EN 71-12:2013 ‘Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances’;
- European Committee for Standardisation harmonised European standard of 13 January 2017, EN 12472:2005+A1:2009 ‘Method for the simulation of wear and corrosion for the detection of nickel release from coated items’

(hereinafter: ‘requested standards’).

- (4) The procedure for developing such harmonised standards is laid down in Regulation (EU) No. 1025/2012, the internal regulations of the ESOs and the Commission’s Vademecum on European Standardisation in support of Union Legislation and policies⁷. Where Community harmonisation legislation provides for harmonised standards as a means of specifying the essential requirements to which products must conform, the Commission may request CEN (or other ESOs) under Article 10 of said regulation to elaborate a harmonised standard. If CEN accepts the request (“mandate”), the competent Technical Committee managed by a NSB will draw up a draft of a harmonised standard on the basis of a work programme agreed upon in consultation with the Commission. Following a public enquiry, the NSBs then hold a vote on the Technical Committee’s final draft. If the draft is accepted with the required majority of votes, CEN will ratify the harmonised standard in the three official languages German, English, and French, and transmit its basic data (reference number and title) to the Commission. After checking whether the respective harmonised standard complies with its initial request, the Commission will publish (merely) the reference of the harmonised standard in the Official Journal (Article 10(6) of Regulation (EU) No 1025/2012).⁸
- (5) Once adopted by CEN, European standards are to be transposed by the NSBs as identical national standards in one of the three official languages or translated into one of the other

⁷ Commission Staff Working Document, Vademecum on European standardisation in support of Union Legislation and policies, Part I – Role of the Commission's standardisation requests to the European standardisation organisations, Part II – Preparation and adoption of the Commission’s standardisation requests to the European standardisation organisations, Part III – Guidelines for the execution of standardisation requests, SWD(2015) 205 final of 27 October 2015.

⁸ For a detailed description of the overall procedure leading to a harmonised standard cf. European Commission, The ‘Blue Guide’ on the implementation of EU products rules 2016, OJ C 272 of 26 July 2016, p. 1 (43).

languages of the CEN Members.⁹ According to Article 3(6) of Regulation (EU) No 1025/2012, the NSBs are also obliged to withdraw any national standards which are conflicting with a harmonised standard. The NSBs then distribute and sell the implemented national standards to the public against payment.

- (6) CEN and the NSBs are holders of (exclusive) exploitation rights regarding European standards, such as the requested standards. To this effect, CEN's internal regulation provides that all delegates and experts participating in technical committees under the auspices of CEN sign a form, in each meeting, by which they assign solely, exclusively and irrevocably the exploitation rights of their intellectual contributions to CEN.¹⁰ By way of example, we enclose copies signed by the participants in meetings relating to the requested standards on the 'Safety of toys' held between April 2011 and April 2015 that prove the transfer of the respective exploitation rights to CEN.¹¹
- (7) On its part, CEN grants to each of its national Members the irrevocable and exclusive right of exploitation, within their own territories, of the respective standards.¹² As regards the territories of third states, CEN assigns its national Members non-exclusive exploitation rights.¹³ In return, the NSBs fund CEN by means of membership fees.¹⁴ Furthermore, they shall exercise the exploitation rights in a way that recognizes the value of the intellectual property that they contain and the costs of their development and maintenance to CEN and their Members.¹⁵ In general, CEN itself does not make the standards available to the general public/end users. However, it does enter into licence agreements with third party organisations to provide them with standards in view of the

⁹ European Commission, The 'Blue Guide' on the implementation of EU products rules 2016, OJ C 272 of 26 July 2016, p. 1 (45).

¹⁰ See CEN/CENELEC Guide 10 – Policy on dissemination, sales and copyright of CEN-CENELEC Publications, Edition 4, 2017-11, **Annex 6**; Section 4.2, p. 9, and Section 1 lit. (a) of the form 'Assignment of Exploitation Rights', **Annex 7**.

¹¹ See **Annex 8**. The copies are redacted in order to protect the participant's personal data. This appears to be necessary since the applicant Public.Resource.Org already published the contested decision of the Commission on its webpage at <https://law.resource.org/pub/eu/docket/2019-01-22.C.2019.639.F1.DECISION.LETTER.EN.V2.pdf>.

¹² See Article 3.1 of the CEN Exploitation Agreement on copyright and trademark, **Annex 9**.

¹³ See Section 4.3 of the CEN-CENELEC Guide 10, Annex 6.

¹⁴ See Articles 26.1 and Art. 29.2 of the Statutes of CEN, Annex 3.

¹⁵ See Section 4.4 of the CEN-CENELEC Guide 10, Annex 6.

subsequent distribution to end users. Within that context, CEN licences the use of standards to the European Commission, the EFTA Secretariat, recognised international organisations and, under certain conditions, to some national standardisation bodies outside CEN membership.¹⁶

- (8) Regulation (EU) No 1025/2012 foresees that standardisation bodies fulfil a very important task in the public interest. However, it should be noted that CEN and the NSBs heavily rely on the revenues resulting from the sale or licensing of European standards and are only partly publicly funded. This way of financing, which is recognised in Recital 9 to Regulation (EU) No 1025/2012, also serves to ensure the independence of standardisation bodies from undue influence by certain categories of stakeholders.

B. Law

- (9) According to Article 40(1) of the Statute of the Court, Member States and institutions of the Union may intervene in cases before the Court. Pursuant to Article 40(2) of that statute, the same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court.
- (10) According to settled case law, the concept of ‘an interest in the result of the case’, within the meaning of the second paragraph of Article 40 of the Statute of the Court, must be defined in the light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law put forward.¹⁷ Such an interest exists if either the intervener’s legal position or its economic situation may be directly affected by the operative part of the decision to be taken by the General Court.¹⁸

¹⁶ See Recital 5 of the CEN Exploitation Agreement on copyright and trademark, Annex 9.

¹⁷ See order of 15 November 1993, *Scaramuzza v Commission*, Case C-76/93 P, EU:C:1993:881, paragraphs 6 and 9; orders of the President of the Court of 23 July 1998, *Alexopoulou v Commission*, Case C-155/98 P, EU:C:1998:398, paragraphs 11 and 12; of 9 February 2007, *Wilfer v OHIM*, Case C-301/05 P, paragraph 6; of 19 February 2013, *Commission v EnBW Energie Baden-Württemberg*, Case C-365/12 P, EU:C:2007:91, paragraph 7; of 6 November 2013, *Thesing and Bloomberg Finance LP v European Central Bank*, Case C-28/13 P, EU:C:2013:744, paragraph 8.

¹⁸ See judgment of 2 October 2003, *International Power and others v Commission*, Joined Cases C-172/01 P, C-175/01 P, C-176/01 P, C-180/01 P, EU:C:2003:534, paragraphs 49-53; order of 29 May 1977, *British Steel v Commission*, Case T-89/96, EU:T:1997:77, paragraphs 20-21.

(11) Applying these principles to the present proceedings, the applicants for leave to intervene have a clear interest in the result of the case. The applicants in case T-185/19 seek the annulment of the Commission's decision refusing them access to the requested standards ('contested decision').¹⁹ As already set out in the contested decision, disclosure of these standards would directly affect the legal position of CEN and the NSBs as well as their economic situation:

I. Disclosure of the requested standards would infringe upon the exploitation rights of the applicants for leave to intervene

- (12) The requested standards – as well as any other European standard – fulfil the criteria set out by the Court's case law for qualifying as work eligible for copyright protection²⁰ and are therefore protected under Article 17 of the Charter of Fundamental Rights of the European Union (CFREU). When drafting the requested standards, the delegates and experts in the technical committees had to make a number of choices regarding the structure of the subject matter and the wording of the document in order to provide comprehensible linguistic explanations of technically complex matters. It follows that the requested standards are original in the sense that they are their author's own intellectual creation.²¹
- (13) As explained above, both CEN and the NSBs are holders of exploitation rights with respect to the requested standards.²² The delegates and experts involved in the elaboration of the requested standards have assigned the exploitation rights of their intellectual contributions to CEN. In turn, CEN has granted the NSBs irrevocable and exclusive exploitation rights within their respective territories and non-exclusive exploitation rights in the territories of third states. The assigned exploitation rights namely cover the right of each member to use, to reproduce, to sub-distribute, to translate, to rent, to lend, to derive revenue from duplication and loan, to communicate to the public in total or in part, in

¹⁹ See the decision of the European Commission C(2019) 639 final of 22 January 2019, p. 6. The decision was made publicly available by the applicant Public.Resource.Org at https://law.resource.org/pub/eu/docket/2019-01-22.C_2019_639_F1_DECISION_LETTER_EN_V2.pdf.

²⁰ See, in that regard, judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 37 *et seq.*

²¹ See also, to that effect, judgment of the *Oberlandesgericht Hamburg* (Higher Regional Court of Hamburg) of 27 July 2017, DE:OLGHH:2017:0727.3U220.15KART.0A, **Annex 10**, para. 142 *et seq.*

²² See para. (6) *et seq.* above.

summary or with comments, to licence the exploitation and to authorise all sub-licences on these standards, by any means and in any form.²³

- (14) Therefore, disclosure of the requested standards to the applicants in case T-185/19 would result in the infringement of the exploitation rights protected by Article 17 CFREU held by CEN and the NSBs and hence negatively impinge on their legal position. Consequently, for this reason alone, the applicants for leave to intervene may be directly affected by the operative part of the decision to be taken by the Court.

II. Disclosure of the requested standards would harm the economic interests of the applicants for leave to intervene

- (15) It is well-established case law that a legal person is entitled to intervene under Article 40(2) of the Statute of the Court if a request for access to documents has been refused on the grounds of that person's commercial interests.²⁴
- (16) In the case at hand, the Commission indeed refused access to the requested standards on the grounds that it would harm the commercial interests of CEN and its members. The Commission even rightly held that the impact of disclosing the requested standards on the commercial interests of CEN and its national Members was "evident".²⁵
- (17) In this respect, it should be recalled that the requested standards are implemented by the NSBs into national standards.²⁶ The NSBs make these national standards available to the public against payment that represents a major part of their income. CEN is funded by contributions of its members that result, to a considerable extent, from revenues related to the licensing and sale of standards.²⁷ To this effect, Art. 4.3 of the CEN Exploitation Agreement on copyright and trademark explicitly prevents members from publishing standards free of charge without the specific approval of the relevant CEN governing body.

²³ See Section 3 of the form 'Assignment of Exploitation Rights'.

²⁴ See order of 27 July 2018, *Aeris Invest v ECB*, T-827/17, EU:C:2018:512, paragraph 11.

²⁵ See the decision of the European Commission C(2019) 639 final, p. 6.

²⁶ See para. (5) above.

²⁷ See para. (8) above.

- (18) Therefore, disclosure of the requested standards would directly affect the economic situation of both CEN and the NSBs. Economic operators would obviously not be willing to pay a fee to obtain a copy of the requested standards, if they could obtain them free of charge from the Commission on the basis of Regulation (EC) No 1049/2001²⁸. Hence, the revenues generated from the sale or licensing of the respective standards would significantly decline in case of their disclosure.
- (19) It is also for this reason that the applicants for leave to intervene may be directly affected by the operative part of the decision to be taken by the Court.

III. CEN may also intervene as an association representing its members

- (20) In addition, CEN may also intervene under Article 40 of the Statute of the Court as an association representing its members.
- (21) It is well-established case law that representative associations whose object is to protect their members may be granted leave to intervene in cases raising questions of principle that are liable to affect those members. More particularly, an association may be granted leave to intervene in a case if it represents an appreciable number of undertakings active in the sector concerned, if its objects include that of protecting its members' interests, if the case may raise questions of principle affecting the functioning of the sector concerned, and if the interests of its members may therefore be affected to an appreciable extent by the forthcoming judgment or order.²⁹
- (22) It is evident that the present proceedings raise questions of principle affecting the functioning of the standardisation sector and may affect the NSBs to an appreciable extent since the disclosure of harmonised standards would severely undermine their economic bases. In this respect, it should be noted that CEN is not only entrusted with the task of harmonising and developing standards but is also committed to protect the interests of its members relating to their exploitation rights within the framework of the CEN-

²⁸ 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 May 2001, p. 43.

²⁹ See order of 12 December 2017, T-125/17, *BASF Grenzach GmbH v European Chemicals Agency*, EU:T:2017:931, paragraph 19; order of 26 February 2007, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, T-125/03, EU:T:2007:57, paragraph 14 and the case-law cited.

CENELEC Guide 10 in the common ‘Policy on dissemination, sales and copyright of CEN-CENELEC Publications’.³⁰

- (23) CEN is hence to be considered as an association within the meaning of the aforementioned case-law.

C. Conclusion

- (24) In the light of the above considerations, we respectfully request the Court to grant the applicants leave to intervene in case T-185/19 in support of the form of order sought by the Commission.

Ulrich Karpenstein
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Kathrin Dingemann
(Rechtsanwältin)

Matthias Kottmann
(Rechtsanwalt)

³⁰ See Annex 6.

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