Date of acceptance : 26/09/2019

Published ID	:	T-185/19
Document number	:	20
Register number	:	908271
Date of lodgment	:	20/09/2019
Date of entry in the register	:	24/09/2019
Type of document	:	Rejoinder
	:	Document
e-Curia lodgment reference	:	DT115108
File number	:	1
Person lodging document	:	Delaude Sandrine (R111952) Commission

EUROPEAN COMMISSION

Brussels, 20 September 2019
sj.f(2019)6504123

Court procedural document

TO THE PRESIDENT AND THE MEMBERS OF THE GENERAL COURT OF THE EUROPEAN UNION

REJOINDER

Submitted pursuant to Article 83 of the Rules of Procedure of the General Court by the **European Commission**, represented by Sandrine Delaude, Giacomo Gattinara and François Thiran, members of the 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 ("TFEU"), 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, 31.5.2001, p. 43) ("Regulation on the public access to documents").

Contents

On 9 August 2019, the Commission was notified the Reply submitted by the Applicant, a US organisation and a company incorporated in Ireland, in response to the Defence submitted by the Commission on 14 June 2019. The Commission will confine the present Rejoinder to address the few elements raised by the Applicant in the Reply, which does not contain any additional argument compared to the ones developed in the Application. For the sake of clarity, the present Rejoinder will follow the structure of the Reply, which very much focuses on preliminary considerations, and very little on the pleas themselves. The present Rejoinder is without prejudice to what is explained in the Defence (to which the Commission respectfully refers the General Court) in terms of factual background, procedure, legal assessment, costs and conclusions.

1. RESPONSES TO THE CONSIDERATIONS MADE IN THE REPLY

1.1. On the introductory Remark made by the Applicant

1. The Applicant formulates the following introductory remark: "*In its Defence, the Defendant seeks to downplay the fact that harmonised standards have been definitely determined to form part of EU law by the CJEU 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 organisations (ESOs) would suffer if the application is successful and on the supposed catastrophic undermining of the system of harmonised standards in the EU that could result*"[1].

2. Clarifying the scope of the present proceedings, as the Commission did in its Defence[2], is not "downplaying" the lessons drawn from the "James Eliott" judgment[3]. It is engaging the judicial debate on the right track: the Applicant does not challenge the legality or validity of the Standardisation Regulation[4], or of the

---

1 Reply, par. 3.

2 Defence, par. 13-16.

3 Judgement of 27 October 2016 in case C-613/14, *James Elliott Construction Limited*, ECLI:EU:C:2016:821.

4 Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation (OJ L 316 of 14.11.2012, p. 12).

specific harmonisation legislation[5], all legislative acts from the European Parliament and the Council. The Applicant seeks the annulment of a confirmatory decision of the Commission refusing access to four particular documents which are in the possession of the Commission and which relate to four harmonised standards elaborated by the European Committee for Standardisation ("the CEN"), on the sole basis of the Regulation on the public access to documents and the corresponding provisions in the TFUE (Article 15) and in the Charter of Fundamental Rights of the European Union (Article 42).

1.2. On the allegation that partial access to harmonised standards would not be a legislative choice

3. According to the Applicant, the allegation that "*the system whereby harmonised standards are made available in exchange for payment is a result of a choice made by the European Legislature ... is without factual or legal basis*" and the Commission "*has not pointed to any particular provision whereby the legislature of the EU gave effect to this alleged choice through legislation*"[6]. Further, still according to the Applicant, " *the defendant acknowledges that having copyright on 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*"[7].

4. The Commission does not know what the Applicant really means by referring to the lack of "*factual basis*" of "*the system whereby harmonised standards are made*

---

5 In the present case, Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170 of 30.6.2009, p. 1) and Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restrictions 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 (OJ L 396 of 30.12.2006, p. 1) (the "Reach Regulation").

6 Reply, par. 5.

7 Reply, par. 7.

available in exchange for payment", while at the same time the Applicant "*does not disagree that this is the system that has in fact emerged*"[8].

5. In any event, what matters is not the "*factual basis*" of the "*system*", but its legal basis, which lies in Article 6 of the Standardisation Regulation, and in particular in the following provisions:

"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: (…)*

(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****"* (emphasis added by the Commission).

6. It can be drawn from these provisions that (i) SMEs should benefit from a favourable financial regime to facilitate their access to harmonised standards, and (ii) this favourable regime does not result in obtaining the final harmonised standards for free: only special rates or reduced prices apply.

7. The straightforward "a contrario" reasoning is that (i) enterprises that are not small or medium enterprises do not benefit from this favourable financial regime and must pay a full fee to access to harmonised standards, and (ii) harmonised standards are made available against payment and not for free.

8. This conclusion is reinforced by Article 10(6) of the Standardisation Regulation, which provides for a publication of the sole reference of harmonised standard[9].

---

[8] Reply, par. 5.

[9] See also the provisions in the relevant sectoral act, such as Articles 13, 14(2), 19(3), point a), and 27 of Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170 of 30.6.2009, p. 1).

9. There is no inconsistency with what the Commission explained in its Defence[10] as to the "*internal guiding rules of the CEN*" and the way CEN claims copyright protection on the whole content of its publications, for its benefit and the benefit of its national members. These explanations have no other purpose than demonstrating that, decades ago, the legislator chose a system in full knowledge of the fact that it would involve the CEN and its national members, and that access to standards would not be free of charge, as harmonised standards remain the property of the CEN and its national members, and are licensed under copyrights[11].

10. Drafting harmonised standards requires in particular contributions from numerous experts from industry, associations, public administrations, academia and societal organisations who must be paid for their work. The EU contribution to the CEN costs, which takes the form of grants, does not cover all these costs, only a small portion[12].

1.3. On the distinction between the substantial safety requirements and the standards themselves

11. According to the Applicant, the "*Defendant appears to downplay the distinction*" "*between the substantial safety requirements set down in primary law and the harmonised standards adopted according to the 'New Approach'"* and *"characterises the standards as merely providing a process or method to comply with the substantial requirements without adding to those requirements"*[13].

---

[10] Defence, par. 21-26.

[11] See for instance the Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards (OJ C 136 of 4.6.1985, p. 3: "*CEN and CENELEC (one or the other, or both according to the products covered by the Directive) are the competent bodies to adopt European harmonized standards within the scope of the Directive, in accordance with the guidelines which the Commission, after consultation of the Member States, has signed with these bodies*" - see also p. 6: "***The drafting and adoption of the harmonized standards*** *mentioned in paragraph 1 (a)* ***by the CEN and CENELEC****, these bodies being generally considered to be the 'European standards bodies which are particularly competent', and the obligation relating to transposition into national standards* ***are governed by these two bodies' internal rules and their regulations relating to standards work****. The internal rules of CEN and CENELEC are in the process of being harmonized*").

[12] See par. 25 of the Defence. See also articles 15 and 17 of the Standardisation Regulation.

[13] Reply, par. 9.

12. The Applicant does not further explain why the Commission would "*downplay the distinction*". It confines itself to recall that the "James Eliott" judgment "*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*"[14].

    The Commission therefore presumes that the Applicant does not fundamentally disagree with what the Commission explained in its Defence[15] on this regard.

1.4. On the allegation that the released harmonised standards do not enter public domain

13. According to the Applicant, "*the Defendant is incorrect to allege that granting the Applicant' request would essentially put the Requested Standards into the public domain*", as "*the granting of access to documents under the* [Regulation on the public access to documents] *must be without prejudice to any existing rules of copyright (…) which may limit or constraint a third party's right to adapt, reproduce, make publicly available or otherwise exploit released documents"*[16].

14. The Commission observes that this allegation is hard to reconcile with what the Applicant explains about the harmonised standards being part of EU law (or even with the Applicant's allegations that the harmonised standards cannot be protected by copyrights).

15. In any event, the Commission refers to what it explained in its Defence on this regard[17]: the disclosure of the standards at issue under the Regulation on the public access to documents would make them freely accessible *erga omnes*[18].

---

[14] Reply, par. 10 and Judgement of 27 October 2016 in case C-613/14, *James Elliott Construction Limited*, ECLI:EU:C:2016:821, par. 36 and 40.

[15] Defence, par 30-35.

[16] Reply, par. 12.

[17] Defence, par. 40.

[18] See Judgement of 21 October 2010 in case T-439/08, *Kalliope Agapiou Joséphidès*, ECLI:EU:T:2010:442, par. 116: "*… la divulgation d'un document, qu'il contienne ou non des données à caractère personnel, acquiert un effet erga omnes, empêchant l'institution de s'opposer à ce que ce document soit communiqué à d'autres demandeurs et permettant à toute personne d'avoir accès aux données à caractère personnel en cause* ».

16. By definition, an *erga omnes* access to a document cannot be given by the Commission to any applicant requesting access when the document at stake is for sale or is protected by an exclusive right in favour of a third party.

1.5. On the ESO business model that would not be protected by the Regulation on the public access to documents

17. The Applicant contests that "*the ESOs are entirely dependent for their survival on the development and monetisation of harmonised standards*"[19] and it believes that "*these claims are exaggerated and unsupported*"[20]. "*Even if there were any such effects*", the Regulation on the public access to documents "*does not recognise mere policy considerations*" and the rule of law should prevail over the commercial interest of the CEN[21].

18. In its Defence[22], the Commission explained that the sale of standards is a vital part of standardisation bodies' business model. The Commission explained this in response to the first plea relating to the applicability of the exception to the public access to documents when "*disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property*" (article 4(2), first indent, of the Regulation on the public access to documents).

19. The Commission believes that it does not have to prove the exact loss of profit that the CEN and its national members will incur if the harmonised standards are disclosed for free by the Commission to everyone, while they are provided against payment by the CEN and its national members. It seems obvious that nobody will pay anymore the CEN and its national members to obtain a standard that can be obtained for free from the Commission. Hence, *"the protection of commercial interests of a natural or legal person, including intellectual property*" will be

---

19 Reply, par. 15.

20 Reply, par. 16.

21 Reply, par. 16.

22 Defence, par. 42.

undermined, which is the legal criteria to fulfil to apply the exception to the public disclosure, and is not, as the Applicant alleges, a simple "*policy consideration*".

1.6. On the alleged contradiction of the Defendant's argument regarding copyright protection under national law

20. According to the Applicant, "*the allegation that the intellectual property of an ESO is protected by national law* (…) *and cannot therefore be dealt with in the proceedings is inconsistent with the Defendant's first instance and confirmatory decisions* [as i]*t was, in fact, the defendant which relied on an alleged copyright in the requested standards to justify its position* (…) [and] the Applicant "*should therefore be allowed to counter these allegations*"[23]. In any event, "*the fact that the requested standards may be protected by copyrights 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* (…)".

21. The Commission does not contest that the Applicant can challenge the application of the exception to the public access to documents when "*disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property*" (article 4(2), first indent, of the Regulation on the public access to documents).

22. What the Commission explained in its Defence[24] is different: when the requested documents are, as in the present case, intellectual creations protected by a copyright, and where the copyright protection is also contractually guaranteed to the CEN and its members, the Applicant cannot allege that this copyright protection is not legally applicable without supporting evidence. The requested harmonised standards are not a simple compilation of public information; they are an intellectual creation. And the harmonised standards are licensed to the Commission under restrictive conditions:

---

[23] Reply, par. 18.

[24] Defence, par. 49-52.

access is restricted to the sole internal use of the Commission and any external disclosure is not allowed.

1.7. On the alleged overriding public interest

23. According to the Applicant[25], a parallelism should exist between, on the one hand, general presumptions of non-disclosure applying to certain categories of documents, and "*requests for disclosure relating to documents of the same nature*" like harmonised standards, that should be freely available to the public under "*the concept of the rule of law*".

24. The Commission can only but recall that, on the contrary, when assessing the overriding public interest in disclosure needed to overrule the application of some exceptions to public access to documents, the case-law requires "*the party arguing for the existence of an overriding public interest to rely on specific circumstances*" by contrast with "*purely general considerations*"[26]. This is because the institution requested to give access to a document must proceed with a concrete and specific analysis of the interests in balance, being the exception to the public access, on the one hand, and the overriding public interest in disclosure, on the other hand.

1.8. On the alleged absence of satisfaction of the public interest by the substantial safety requirements in primary legislation

25. According to the Applicant[27], who adds no new argument on this regard, the public at large, including purchasers of products, consumer protection associations, etc "*have an interest in free access to harmonised standards*", and "*the decisive steps to be taken for products to comply with EU regulation are actually set forth in the harmonised standards, and not in the EU legislation itself*".

---

[25] Reply, par. 21.

[26] See the case-law referred to under footnote 23 of the Defence.

[27] Reply, par. 22-25.

26. The Commission respectfully refers the General Court to what it explained on this regard in its Defence[28]. The Commission believes that these allegations exceed the scope of the present proceedings, in which the Applicant seeks the annulment of a confirmatory decision of the Commission refusing access to four particular documents which are in the possession of the Commission, on the sole basis of the Regulation on the public access to documents and the corresponding provisions in the TFUE and in the Charter (supra, 2).

1.9. On the alleged application of the Aarhus Regulation

27. The Applicant insists that the requested standards would contain "*environmental information*" within the meaning of Article 2(1)(d) of the Aarhus Regulation[29]. However, the Applicant does not bring any convincing counterargument to what the Commission has already indicated its Defence[30]. According to the Applicant[31], "*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*".

28. In particular, as regards the first three standards, the Applicant highlights the fact that they concern test methods relating to items that may "*contain toxic and harmful substances*" and, as regards the fourth standard, to items "*intended to come into direct contact with the skin*"[32].

29. In this regard, first, tests and methods as such (like those described by the requested harmonised standards) do not correspond to the "*environmental information"*

---

28 Defence, par. 60-69.

29 Regulation (EC) No 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 (OJ L 264 of 25.9.20106, p. 13).

30 Defence, par. 75-76.

31 Reply, par. 27.

32 Reply, par. 26.

contemplated in Article 2(1)(d) of the Aarhus Regulation[33]. Second, contrary to what the Applicant claims, there is no indication that the harmonised standards at issue would affect or likely to affect "*factors and elements of the environment*"[34].

30. Indeed, the indication of the effects on human health of a product or of a substance does not necessarily contain environmental information pursuant to Article 2(1)(d), *sub* vi), of the Aarhus Regulation. According to this provision, it is only when the state of the elements of the environment is affected - or likely to be affected – by these effects that the state of human health and safety can, as a result of this first effect, be considered as being environmental information.

31. This is further confirmed by the case-law, according to which by adopting the Aarhus Regulation, the legislator did not intend to subsume the whole area of public health within environmental law[35]. Therefore, tests and methods concerning hazardous substances such as those described in the harmonised standards at hand do not as such establish a clear link between environment and health for the purpose of the Aarhus Regulation.

32. As to the argument that information on emissions into the environment would be contained in the harmonised standards at issue, it has to be rejected because tests and methods, such as those the requested harmonised standards describe, cannot put anybody in a position to identify the actual or potential level of release of a certain substance into the environment, and this precisely because of their nature of tests

---

33 Article 2(1)(d) of the Aarhus Regulation refers in a nutshell to environmental information on the state of the elements of the environment; on factors such as substance, energy, noise, radiation or waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment; on measures such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors; on reports on the implementation of environmental legislation, cost-benefit and other economic and analysis and assumptions used within the framework of the measures and activities, and on the state of human health and safety.

34 Reply, par. 26, last sentence.

35 Judgment of 14 March 2018 in Case T-33/16, *TestBiotech eV v Commission*, EU:T:2018:135, para. 84, last sentence.

and methods[36]. Thus, the level of emissions of a substance into the environment that can be deduced as stemming from the use of the tests and standards at hand is only "*hypothetical*". This purely hypothetical level of emissions, however, does not correspond to the notion of emissions into the environment enshrined in the Aarhus Regulation[37].

2. CONCLUSIONS

In the light of the foregoing, the Commission respectfully requests the Court:

- to dismiss the Application as unfounded;
- to order the Applicant to pay the costs of the present proceedings.

Sandrine Delaude Giacomo Gattinara François Thiran

Agents of the Commission

---

[36] Judgement of 11 July 2018 in case T-643/13, *Rogesa v Commission*, EU:T:2018:423, par. 103 (under appeal).

[37] Judgement of 23 November 2016 in case C-442/14, *Bayer CropScience*, EU:C:2016:890, par. 80.