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

OBSERVATIONS ON THE APPLICATION TO INTERVENE

(Lodged on behalf of the Applicants on 4 October 2019)

FORM OF ORDER SOUGHT BY THE APPLICANTS

1. Dismiss the application for leave to intervene, and
2. Rule on the costs and order the applicants for leave to intervene to pay their costs and pay the costs of the Applicants.

Reasons

SUMMARY AND RELEVANT LAW

1. The applicants for leave to intervene, i.e. CEN and the National Standards Bodies ("NSBs"), do not have a right to intervene in the current proceedings before the Court.

2. Under Article 40(2) of the Statute of the CJEU (which also applies in proceedings before the General Court), the applicants for leave to intervene must "*establish an interest in the result of a case submitted to the Court*". Settled case law provides that such interest can only be assumed if there is "*a direct, present interest in the grant of the particular form of order sought that the application to intervene is designed to support*" (Judgment of April 12, 2019, *Deutsche Lufthansa/Commission*, Case T-492/15, ECLI:EU:T:2019:252 para. 97). This test is not met here.

NO ALLEGED COPYRIGHT PROTECTION OF THE REQUESTED STANDARDS

3. The applicants for leave to intervene cannot allege that a disclosure of the Requested Standards would infringe their exploitation rights. The Requested Standards are not protected by copyright.

No copyright protection of the law possible

4. Copyright protection of the law is excluded per se. The Requested Standards are – according to ECJ's judgment in *James Elliot Construction* (para. 40) – part of EU law.

And because every person is presumed to know the law, private rights cannot be granted with respect to the text of the law (as the law must be freely accessible for all people).

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

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

which flows directly from the idea that the EU is founded on the basis of the rule of law.

No personal intellectual creation

7. Even if copyright protection of the law was theoretically possible (which would not be correct, see above), the Requested Standards would not be the author's personal intellectual creation.

8. In their brief, the applicants for leave to intervene simply allege that "*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*" (para. 12). By referencing ECJ case law, they also suggest that the ECJ affirmed the copyright protection of harmonized standards in general or the Requested Standards in particular (para. 12). Neither of these statements is true.

9. First, the ECJ did never rule on copyright protection of harmonized standards in general or of the Requested Standards in particular.

10. Second, the Requested Standards do not constitute a personal intellectual creation of the author. This would require that the author was able to express his or her creative abilities in the production of the work by making free and creative choices (ECJ, judgment of July 16, 2009 C-5/08 *Infopaq* ECLI:EU:C:2009:465, and judgment of December 1, 2011 C-145/10 *Painer* ECLI:EU:C:2011:798 paragraph 89). This is not the case here.

11. When drafting the Requested Standards, the applicants for leave to intervene are not exercising free and creative choices:

- On the one hand, the choice available to the applicants for leave to intervene when preparing the substantial content of a standard is constrained by the relevant provision from which the Requested Standards are derived (i.e. the Toy Safety Directive and the REACH Regulation) and then by the Commission's mandate setting out detailed instructions in terms of the drafting of the standard. In that regard, it is important to point out that the Requested Standards merely consist of lists of technical characteristics and/or test methods. Therefore, there is no genuine creative choice available to the author that could allow him to express his personality or his own intellectual creation.

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

No infringement of exploitation rights possible

12. An infringement of exploitation rights would – other than alleged by the applicants for leave to intervene (para. 14) – in any event not be the result of the disclosure of the Requested Standards or "*the operative part of the decision*", even if the Requested Standards were protected by copyright (which is not the case, see above). A "*direct*"

interest of the applicants for leave to intervene in the outcome of the case at hand is thus not present.

13. The Transparency Regulation (Regulation 1049/2001), on which the Applicants base their request for the Requested Standards, explicitly acknowledges that "*this Regulation is without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit related documents*" (cf. Art. 16). The Transparency Regulation hence recognizes any (alleged) copyrights and the related (alleged) exploitation rights and guarantees them. Therefore, disclosure of the Requested Standards to the Applicants cannot violate these (alleged) rights, because disclosure under the Transparency Regulation does not affect these (alleged) rights. I.e., even if the Commission was to disclose the Requested Standards to the Applicants, such disclosure would not include any licence regarding the (alleged) exploitation rights in a favour of the Applicants, and the Applicants would still have to observe any such rights with respect their further use of the Requested Standards.

14. Consequently, there can also be no "*direct*" interest of the applicants for leave to intervene in the outcome of the case at hand.

NO ALLEGED HARM OF ECONOMIC INTERESTS

15. The applicants for leave to intervene cannot allege that a disclosure of the Requested Standards would harm their economic or commercial interest.

16. First, it is to be noted that the case at hand deals with the request for disclosure of *four* harmonized standards to the *two* individual Applicants. After a positive decision by the Court on the Applicants' claim, the Commission would not have to publish the Requested Standards to comply with this decision. To substantiate a relevant

commercial interest, the applicants for leave to intervene would therefore have to demonstrate how the disclosure of these specific *four* harmonized standards that is further restricted to the two individual Applicants could affect their commercial interests. The applicants for leave to intervene did not make any statements in that respect. And it is obvious that they will not be able to substantiate this because the disclosure of the four harmonized standards will have no impact.

17. Rather, the applicants for leave to intervene only make very general arguments. In essence, they contend that the licensing of standards "*represents a major part of their income*" (para. 17) and that third parties would "*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 1049/2001*" thereby leading to a "*decline of revenues*" (para. 18). These arguments are neither substantiated nor can be accepted.

18. The arguments that the licensing of standards "*represents a major part of their income*" (para. 17) or that disclosure would result in a "*decline of revenues*" (para. 18) is not substantiated. It gives the incorrect impression that the applicants for leave to intervene are entirely dependent for their survival on the development and monetization of harmonized standards. The reality is that European Standardization Organizations in general, and the applicants for leave to intervene in particular, produce a wide range of standards. Only a small number of these are harmonized standards under the relevant EU legislation, and these harmonized standards are produced at the bidding and with financial support of the Commission. The applicants for leave to intervene have not demonstrated with reference to objective information what income could be affect by disclosing the four harmonized standards requested by the Applicants.

19. Further, these claims of the applicants for leave to intervene are exaggerated and unsupported – particularly given that a release of the Requested Standards to the Applicants does not affect copyright and other monetization measures (cf. Art. 16 of the Transparency Regulation, see above).

20. Finally, these arguments only constitute general or indirect interests of the applicants for leave to intervene in the future. Because in essence, the applicants for leave to intervene are concerned that other (i.e. third parties) may also request harmonized standards from the Commission based on the Transparency Regulation. These requests of other third parties are, however, not part of the current proceedings before the court in which the Applicants request access to four harmonized standards. Case law confirms this result. The General Court, for instance, decided that a third party has direct interest and hence no right to intervene if "*the judgment in the present case may have repercussions on [another decision of the Commission], which is not the subject of the present proceedings*" (Court of First Instance, order of December 8, 1993, *BVBA Kruidvat*, T-87/92, ECLI:EU:T:1996:191, para. 13).

CEN IS NOT A REPRESENTATIVE ASSOCIATION

21. CEN is also not entitled to intervene as a representative association.

22. Settled case law provides that such intervention is only admissible if – inter alia – the objectives of the association include that of protecting its members' interests. In this context, "*the interest of an association in intervening in a case before the Community judicature must be assessed in relation particularly to the objects defined in its statutes*" (Court of First Instance, order of November 17, 1995, *Salt Union Limited,* T-330/94, ECLI:EU:T:1996:154, para. 18). Further, the case at hand must raise questions of principle affecting the functioning of the sector and its members to an appreciable

extent (Court of First Instance, order of December 8, 1993, *BVBA Kruidvat*, T-87/92, ECLI:EU:T:1996:191, para. 14). These requirements are not met.

23. CEN's statutes (attached as Annex 3 by the applicants for leave to intervene) do not mention at all the protection of its members as an objective of CEN. The applicants for leave to intervene allege that "*the framework of the CEN-CENELEC Guide 10 in the common 'Policy on dissemination, sales and copyright of CEN-CENELEC Publication'*" (attached as Annex 6 by the applicants for leave to intervene) provide that CEN protects the interests of its members. It is already unclear how such unofficial guide should be relevant for assessing this, in particular since such guides can be easily issued and changed all the time. The above referenced EU case law does thus not accept this. Further, it is also not clear which part of this unofficial guide mentions the protection of the members' interests as an objective of CEN.

24. As also indicated above, the case at hand does not raise questions of principle affecting the sector and its members to an appreciable context. Rather, the case concerns an access request to *four* harmonized standards. The applicants for leave to intervene have not demonstrated that the disclosure of these *four* harmonized standards could affect the industry or its members to an appreciable extent. In fact, it is obvious that the disclosure of these four harmonized standards will not have such impact.

25. The applicants for leave to intervene have also not demonstrated that they are dependent for their survival on the development and monetization of harmonized standards in particular. They rather have generally alleged this without providing any specifics to assess this. The reality is that European Standardization Organizations earn most of their money with the sale of non-harmonized standards so that the case at hand cannot have a major impact (see above).

26. Finally, disclosure based on the Transparency Regulation is without prejudice to any (alleged) copyright and any (alleged) related exploitation right. Hence, even these rights of CEN and its member cannot be affected by the judgment in the case at hand.

CONCLUSION

27. Based on the reasoning set out above, the application to grant leave to intervene must be dismissed.

[Deemed to be signed via eCuria]

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