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Berlin, 9 January 2020 **Reg.-No.:** 14/002357-19

STATEMENT IN INTERVENTION

submitted in accordance with the Order of the President of the Fifth Chamber of the General Court dated 20 November 2019, Article 40 of the Statute of the Court of Justice of the European Union and Article 145(1) of the Rules of Procedure of the General Court

on behalf of CEN, UNE, ASRO, AFNOR, ASI, BSI, NBN, DS, DIN, NEN, SNV, SN, SFS, SIS and ISS (“interveners”)

by Dr. Ulrich Karpenstein, Kathrin Dingemann and Dr. Matthias Kottmann, lawyers,

in Case T-185/19

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

v

European Commission

seeking, pursuant to Article 263 TFEU, annulment of the Decision of the European Commission (hereinafter “Commission”) of 22 January 2019 refusing public access to certain harmonised standards requested pursuant to Regulation (EC) No 1049/2001

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Table of Contents

A. Factual and legal background ... 3

I. Harmonised standards under the New Approach ... 3
II. Costs and financing of standardisation ... 4
III. Paid access to harmonised standards as a legislative choice ... 6
IV. Facts of the case ... 7

B. Admissibility ... 8

C. Merits ... 9

I. Harmonised standards are not EU law in the strict sense ... 9
1. The applicants misinterpret the *James Elliott* ruling ... 9
2. The applicants' claim contradicts the New Approach ... 11
II. Harmonised standards are protected by copyright ... 12
1. CEN and the NSBs are holders of copyrights protected under national law ... 12
2. Harmonised standards are an intellectual creation ... 13
3. Harmonised standards are not in the public domain ... 14
III. Free access to the requested standards would undermine the interveners' commercial interests ... 15
IV. No overriding public interest in disclosure ... 17
1. No general obligation to grant free access to harmonised standards ... 17
2. Non-relevance of the Aarhus convention ... 19

D. Conclusion ... 20

A. Factual and legal background

(1) The Commission's defence of 14 June 2019 describes the relevant factual and legal background accurately. The interveners however wish to provide the Court with some supplementary information and to refute inaccurate assertions put forward by the applicants.

I. Harmonised standards under the New Approach

(2) By adopting the so-called New Approach, the Union legislator deliberately refrained from setting out technical specifications in EU legal acts.

(3) Product harmonisation legislation at EU level follows the so-called New Approach which was approved by the Council on 7 May 1985 in its "Resolution on a new approach to technical harmonization and standards"[1] and updated in 2008 by the New Legislative Framework[2]. The main feature of the New Approach is to limit the scope of EU product safety laws to the essential requirements to which products put on the market must conform in order to enjoy free movement on the internal market.[3] The task of defining voluntary technical specifications of products by way of harmonised standards is entrusted to the European standardisation organisations (hereinafter: "ESOs") within the meaning of Article 2(8) of Regulation No 1025/2012[4] (hereinafter: "Standardisation Regulation"). The ESOs have the legal status of private international non-profit associations.[5]

(4) The procedure for developing harmonised standards within the meaning of Article 2(1) lit. (c) of the Standardisation Regulation is laid down in detail in the said Regulation, the Commission's Vademecum on European standardisation[6], the Blue Guide[7] and the internal

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1 OJ 1985, C 136, p. 1.

2 Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, OJ 2008, L 218, p. 82.

3 Cf. the so-called Blue Guide (Commission Notice, The 'Blue Guide' on the implementation of EU product rules 2016), OJ 2016, C 272, p. 1 (7 et seqq.).

4 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 2012, L 316, p. 12.

5 See Article 1 of the Statutes of CEN of 4 July 2018, already submitted as Annex 3 to our application for leave to intervene; Article 1 of the Articles of Association of CENELEC of 5 June 2015; Article 1 of the Statutes of the European Telecommunications Standards Institute of 5 April 2017.

6 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.

7 Blue Guide (footnote 3), p. 40 et seqq.

rules of the ESOs[8]. Where 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 the said regulation to elaborate a harmonised standard. If CEN accepts the request, the responsible CEN technical committee will draw up a harmonised standard on the basis of a work program developed by CEN and taking into account the standardisation requests accepted by CEN. After checking whether the respective harmonised standard, as developed by CEN, complies with its initial request, the Commission publishes the reference of the harmonised standard in the Official Journal (Article 10(6) of the Standardisation Regulation).

(5) It is important to note that the "essential requirements" set out in EU product legislation must not be mistaken as "general", "broad" or "unspecific". The applicants' claim to the contrary[9] is misguided. For example, as the Commission rightly points out,[10] Directive No 2009/48 on the safety of toys sets out specific safety requirements, including limit values, in its Annex II. What is more, Article 46 of Directive 2009/48/EC empowers the Commission to amend and to supplement these requirements in accordance with Article 290 and 291 TFEU. Therefore, products placed on the market in the EU must comply with very detailed requirements set out in legal acts adopted by EU institutions.[11]

II. Costs and financing of standardisation

(6) Standardisation is predominantly refinanced by revenues resulting from the sale or licensing of standards.

(7) According to studies made during the preparation of a proposal for the Standardisation Regulation, the cost of the creation of standards within the ESOs was approximately 3,000 million EUR in 2009. The costs of creating one standard were estimated at approximately 1,000,000 EUR at that time.[12] These costs are primarily borne by industry (93–95 %), followed by national governments (around 3–5 %) and contributions of the Commission and EFTA (around 3 %).[13] The major part of the costs borne by industry stems from revenues from the sale or licensing of European standards.

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[8] Cf., inter alia, CEN/CENELEC-Internal Regulations, Part 2: Common rules for standardization work, July 2018, available at https://boss.cen.eu/ref/IR2_E.pdf.

[9] See paragraph 22 of the application and paragraph 24 of the reply.

[10] See paragraph 31 of the defence.

[11] Cf. Blue Guide (footnote 3), p. 39 et seq.: "The wording is intended to be precise enough to create, on transposition into national legislation, legally binding obligations that can be enforced, and to facilitate the setting up of standardisation requests by the Commission to the European standardisation organisations in order to produce harmonised standards. They are also formulated so to enable the assessment of conformity with those requirements, even in the absence of harmonised standards or in case the manufacturer chooses not to apply them."

[12] Commission Staff Working Paper, SEC(2011) 671 final of 1 June 2011, Impact Assessment, p. 8.

[13] See Commission Staff Working Paper, SEC(2011) 671 final of 1 June 2011, Impact Assessment, p. 133.

(8) As for the NSBs, the average ratio of income from the sale and licensing of standards to total income amounts to approximately 54.4 %. For some of the interveners, the ratio of income from sale and licensing of standards to total income is as high as 70 %. It is evident from these figures that the vast majority of NSBs are highly dependent on the revenues from the sale and licensing of standards in order to fulfil their tasks.

(9) By way of example, we enclose a summary statement of the expenditure and income figures of the German Standardisation Institute DIN for 2017 and 2018.[14] The figures show that the licensing income from the sale of standards and secondary publications (as well as other revenues in connection with the sales of standards) accounts for approximately 55 % of the standardisation costs in average for the years 2017 and 2018. Licensing income for harmonised standards alone accounts for approximately 4.6 % of the standardisation costs in 2017 and 2018 in average. Without these revenues, which amount to well over 2,100,000 EUR annually, DIN would suffer substantial losses with its standardisation activities of more than 1,160,000 EUR p. a. based on the figured for 2017 and 2018 and would not be able to fulfil its statutory purpose to encourage, organise, steer and moderate standardisation. For other NSBs, figures are even significantly higher. It is therefore obvious that the loss of the NSBs' exclusive right to generate revenue from the licensing of these standards would seriously undermine their financial basis, jeopardise the NSBs' objectives and endanger their sustainability and potential to operate for the benefit of the European industry, citizens and other stakeholders.

(10) The same applies – indirectly – for CEN since the NSBs largely fund CEN by their membership fees. In 2018, total membership fees (NSBs and others) amounted to 74 % of the financing of the CEN part of the CEN-CENELEC Management Centre.[15] In this respect, the applicants' claim that Commission funding accounts for up to 35 % of CEN's budget[16] is misleading: As the applicants are well aware of from CEN's annual report 2017, which is cited in their own statement of claim, the share of Commission funding for the operational expenses of the CEN-CENELEC Management Centre has continuously decreased over the years, following conscious CEN governance decisions in this direction, and was already down to 24 % in 2017.[17] In 2018, it dropped further to 20 %.[18] What is more, the CEN system as a whole is larger and goes beyond the operation costs of the CEN part of the CEN-CENELEC Management Centre. Indeed, the vast majority of the costs for the functioning of the CEN system – e. g. for the development (technical committee and national mirror

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14 See "Costs of standardisation versus Licensing income" of 7 January 2020, attached as **Annex 1**.

15 See CEN Annual Report 2018, available online at https://www.cencenelec.eu/news/brief_news/Pages/TN-2019-037.aspx, p. 22, attached as **Annex 2**.

16 See paragraph 33 of the application.

17 See CEN Annual Report 2017, available online at https://www.cencenelec.eu/news/brief_news/Pages/TN-2018-036.aspx, p. 22, attached as **Annex 3**.

18 See CEN Annual Report 2018, Annex 2, p. 22.

committee work), publication, marketing and dissemination of European standards – do not accrue to CEN, but to the NSBs at national level. Therefore, the amount of public funding of CEN is of limited relevance for the functioning of the overall European standardisation system.

III. Paid access to harmonised standards as a legislative choice

(11) Neither the Treaties nor acts of secondary law foresee that harmonised standards are to be published free of charge. Quite to the contrary, the principle of paid access to standards is inherent to the New Approach and is enshrined, *inter alia*, in the Standardisation Regulation.

(12) As the Commission points out,[19] this way of financing the European standardisation system is not only historically founded but also explicitly laid down in the Standardisation Regulation. In addition to the provisions cited by the Commission, it is also recognised in Recital 9 to the Regulation pursuant to which “it is necessary to have an effective and efficient standardisation system which provides a flexible and transparent platform for consensus building between all participants and which is financially viable“.

(13) The EU legislator – in full knowledge of the ESOs’ financing system and their internal regulations and well aware of the potential copyright issues posed by harmonised standards equipped with certain legal effects like the presumption of conformity – opted for a system that involved the ESOs and NSBs, thereby necessarily recognising that access to standards would in general not be free of charge. This is particularly evident in the fact that (notwithstanding minor differences in the wording) all harmonisation acts adopted under the New Approach provide that merely “the references of harmonised standards” shall be published in the Official Journal of the EU.[20] The same is stipulated in Article 10(6) of the Standardisation Regulation, which only provides for the publication of the references of harmonised standards as well. Hence, the Union legislator deliberately opted against the publication of the full text of harmonised standards. None of the relevant legal provisions is contested by the applicants.

(14) Furthermore, the Commission has explicitly recognised the existence of copyrights in relation to technical standards. According to No 5 of the Guidelines agreed between the Commission, the ESOs and the EFTA, it (solely) expects the ESOs to

> “ensure that all interested parties have access to standards, by broad provision of information on their availability, and by ensuring that standards, including any intellectual property

[19] See paragraphs 26 et seqq. of the defence; paragraphs 5 et seqq. of the rejoinder.

[20] Cf. for example Article 17(5) of the Construction Products Regulation No 305/2011; Article 7(2) of Machinery Directive No 2006/42/EC; Article 5(4) of the Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment.

rights (IPRs) they might contain, can be used by market operators on fair, reasonable and non-discriminatory conditions“.[21]

(15) In other words, the principle of paid access to standards is a deliberate choice of the EU legislator and the financial basis of the New Approach. The very foundations of the system of standardisation would be undermined if economic operators were able to obtain free access to the full text of harmonised standards through the back door of Regulation (EC) No 1049/2001. Consequently, the production of further standards and the New Approach as a whole would be put at risk.

(16) In addition, CEN’s cooperation with the International Organization for Standardization (ISO), which ensures that international standards are adopted as European standards, would be jeopardised if harmonised standards were made publicly available free of charge. Given that the ISO’s business model relies largely on the revenues from the sale and exploitation of copyright in ISO standards, its members and partners that adopt ISO standards are obliged to protect ISO’s copyright and trademarks, ensuring that said standards are always made available under a fee, and tackle infringement in their respective countries.[22] Should CEN and its members not be able to generate income from the sale and licensing of ISO standards adopted as harmonised European standards, the cooperation between CEN and ISO would be jeopardised with the consequence of European standards being decoupled from standards in the rest of the world. This would have grave consequences for the ability of European industry to adopt state of the art technologies and to compete internationally.

IV. Facts of the case

(17) The applicants claim to act “exclusively in the public interest”.[23] However, their self-proclaimed mission to “digitise, aggregate and publish the law” appears to be aligned with the business interests of large internet companies that generate enormous profits by monopolising access to information. Hence, it is probably no coincidence that the applicant no. 1, Public.Resource.Org, has received considerable financial support from the search engine operator Google.[24] Moreover, it has also received substantial funding from the Elbaz Family

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21 General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association, OJ 2003, C 91, p. 7.

22 See Section 3 of the Policy for the Distribution, Sales and Reproduction of ISO Publications and the Protection of ISO’s Copyright, as approved under Council Regulation 08/2017, ISO POCOSA 2017, attached as **Annex 4**.

23 See paragraph 3 of the application.

24 See the list of supporters published at https://public.resource.org/about/index.html, attached as **Annex 5.**

Foundation. Gil Elbaz is the Founder and CEO of Factual Inc., a data company that aggregates and organizes huge amounts of online data and aims at creating "the most comprehensive" databases.[25]

(18) Furthermore, the applicants assert that they have already published "certain technical norms and standards that the applicant no. 1 had previously requested from authorities and standardization organizations".[26] It should be noted, however, that the applicants did not obtain and/or publish these standards in accordance with the law. Quite to the contrary, the applicant no. 1 is (in-)famous for numerous copyright infringements related to the illegal publication of technical standards on its website. For example, in July 2017, the Higher Regional Court of Hamburg found that the applicant no. 1 violated DIN's copyright by making seven DIN EN standards publicly available and ordered the applicant no. 1 to refrain from doing so. In this judgment, the court clearly stated that it would undermine DIN's exclusive right to use the DIN EN standards under copyright law if the standards at issue were available free of charge.[27]

B. Admissibility

(19) In the interveners' view, the application is inadmissible since the applicants do not have an interest in bringing proceedings. Such lack of legal interest constitutes an absolute bar of proceedings which, under Article 129 of the Rules of Procedure of the General Court, must be examined by the Court of its own motion, without prejudice to the submissions of the defendant.

(20) It is well-established case-law that an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible.[28] Furthermore, in the context of litigation concerning access to documents, the Union Courts have already held that applicants generally lack an interest in bringing proceedings if the requested documents are already accessible to them.[29]

(21) The applicants explicitly acknowledge that the requested standards are publicly accessible, *inter alia*, through libraries. They argue, however, that visiting a library is time-consuming and that it is prohibited to make copies of standards except for personal use.[30] Yet, it should

[25] Los Angeles Times, https://www.latimes.com/business/la-xpm-2012-feb-05-la-fi-himi-elbaz-20120205-story.html.
[26] See paragraph 9 of the application.
[27] Higher Regional Court (*Oberlandesgericht*) Hamburg, judgment of 27 July 2017, 3 U 220/15 Kart, ECLI:DE:OLGHH:2017:0727.3U220.15KART.0A, already submitted as Annex 10 to our application for leave to intervene.
[28] See judgment of 22 March 2011, Access Info Europe v Council, T-233/09, EU:T:2011:105, paragraph 33.
[29] See order of 15 January 2018, ArcelorMittal Belval & Differdange and ThyssenKrupp Steel Europe v ECHA, T-762/16, EU:T:2018:12, paragraph 17.
[30] See paragraph 53 of the application.

be noted that Regulation No 1049/2001 aims at making the functioning of the Union institutions more transparent. It does not provide for the free delivery of digital content that can be exploited online. Hence, since the applicants undoubtedly can access the requested standards through libraries, they lack an interest in bringing the present proceedings.

C. Merits

I. Harmonised standards are not EU law in the strict sense

(22) Contrary to the applicants' claim, harmonised standards are not EU law in the strict sense.

1. The applicants misinterpret the *James Elliott* ruling

(23) In order to substantiate their right of access to the requested standards, the applicants rely almost exclusively on the ECJ's ruling in *James Elliott*, according to which harmonised standards are "part of Union law".[31] In the interveners' view, however, they misinterpret that ruling.

(24) While the Court indeed concluded in paragraph 40 of its *James Elliott* judgment that harmonised standards, the references of which have been published in the Official Journal of the EU, form "part of EU law", the specific context of this conclusion must be taken into account in order to understand its meaning and scope. The ECJ held in its judgment that it had jurisdiction for a preliminary ruling on the harmonised standard EN 13242:2002 ("Aggregates for unbound and hydraulically bound materials for use in civil engineering work and road construction"), that specifies the essential requirements laid down for buildings in the Construction Products Directive 89/106/EEC. In support of this conclusion, it referred to prior case-law, according to which it has jurisdiction under Article 267 TFEU for the interpretation of – binding and non-binding – acts that, while adopted by bodies which cannot be described as 'institutions, bodies, offices or agencies of the Union' within the meaning of Article 267(1) lit. b) TFEU, were nevertheless by their nature measures implementing or applying an act of EU law.[32]

(25) This can only be fully understood considering the telos and the central significance of Article 267 TFEU for the unity of EU law:[33] The primary function of the preliminary ruling procedure is to ensure uniform interpretation of all rules that form part of the legal order

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31 Judgment of 27 Octobre 2016, James Elliott, C-613/14, EU:C:2016:821, paragraph 40.

32 Judgment of 27 Octobre 2016, James Elliott, C-613/14, EU:C:2016:821, paragraph 34, referring to judgment of 20 September 1990, Sevince, C-192/89, EU:C:1990:322, paragraph 10, and 21 January 1993, Deutsche Shell, C-188/91, EU:C:1993:24, paragraph 17.

33 See, in this regard, also the contested decision, p. 7.

within the EU and to thus preserve the unity and the observance of EU law.[34] Since the extent of EU law delineates the outer limit of the Court's powers of interpretation, in order to establish its competence for the interpretation of harmonised standards and therefore to guarantee its uniform application throughout the Union, the ECJ had to qualify them as forming part of Union law within the meaning of Article 267 TFEU.[35]

(26) The significance of the specific function of Article 267 TFEU for the extension of the Court's jurisdiction is further confirmed by Advocate General Bobek. The fact that the power of interpretation conferred under Article 267 TFEU is "not limited to acts adopted, strictly speaking, by institutions, bodies, offices or agencies of the Union", according to the Advocate General,

> "is justified by the very objective of Article 267 TFEU, which is to ensure the uniform application of all provisions forming part of the EU legal order".[36]

(27) In the light thereof, the applicants are clearly mistaken in affording general significance to the ECJ's qualification of harmonised standards as being part of EU law outside the scope of Article 267 TFEU.

(28) This is supported by the fact that qualifying harmonised standards as EU law in the strict sense would necessarily imply that all requirements and characteristics of Union law – such as primacy, direct effect, the obligation to state reasons, the right to an effective remedy etc. – applied to them. However, this would contradict the *James Elliott* judgment itself: Namely, the ECJ did not rule that harmonised standards take precedence over the laws of Member States. Quite to the contrary, the Court held that national laws on contracts for the sale of goods can impose requirements relating to the usability of products that diverge from said standards.[37]

(29) What is more, there may well be acts which – in a specific context – form "part of EU law" but not part of the EU legal order with all related consequences. For instance, the term "part of EU law" used by the ECJ to classify harmonised standards is used in almost identical terms in Article 6(3) TEU, pursuant to which the fundamental rights, as guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), form part of Union law as general principles. Referring to this provision, the ECJ holds in established case-law that although the fundamental rights of the ECHR formed

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34 Cf. on the significance of the preliminary ruling procedure judgment of 18 October 1990, Dzodzi, C-297/88 and 197/89, EU:C:1990:360, paragraph 33. Cf. also judgment of 13 march 2001, PreussenElektra, C-379/98, EU:C:2001:160, paragraph 38, of 19 February 2002, Arduino, C-35/99, EU:C:2002:97, paragraph 24.

35 Cf. judgment of 3 October 2000, Corsten, C-58/98, EU:C:2000:527, paragraph 24.

36 Opinion of the Advocate General Bobek in Case C-587/15, Lietuvos Respublikos transporto priemonių draudikų biuras, EU:C:2017:234, paragraph 84.

37 Cf. paragraphs 54 et seqq. of the judgment.

"part of EU law", the ECHR currently does not constitute a legal instrument which has been formally incorporated into EU law. [38]

2. The applicants' claim contradicts the New Approach

(30) Moreover, qualifying harmonised standards as EU law would be diametrically opposed to the very nature of the New Approach. As shown before, product legislation following the New Approach is characterised by the fact that the EU legislator restricts itself to determining the essential requirements whilst their further (non-mandatory) technical specifications are elaborated by the ESOs. Considering harmonised standards as EU law in the strict sense would hence be tantamount to returning to the situation before the New Approach.

(31) The Union legislator deliberately chose to pursue a different model. Namely, it explicitly rejected the idea to entrust a European standardisation agency with the task of drawing up harmonised standards. In this respect, an impact assessment conducted by the Commission in the wake of the proposal for the European Standardisation Regulation held that creating such an agency would not ensure sufficient technical expertise and would involve considerable public expenses.[39]

(32) Accordingly, contrary to what the applicants claim, harmonised standards are not "a form of delegated legislation by the EU to private organizations"[40]: Although the Commission's request to the ESOs to draw up a harmonised standard is adopted according to Article 10(2), (1) in conjunction with Article 22(3) of the Standardisation Regulation in the form of an implementing act adopted in line with Article 5 of the Comitology Regulation[41], the harmonised standard itself does not share this legal quality. This clearly derives from the fact that harmonised standards – albeit being drafted on the Commission's request – are drawn up by the ESOs and not by the Commission. The standards cannot be attributed to the Commission either by arguing that it publishes their references in the Official Journal after examining them for their conformity with the requirements specified in its mandate and the harmonisation legislation. The act of publishing the reference (merely) serves the purpose of creating legal certainty with regard to the date from which the harmonised standard's presumption of conformity comes into effect.[42]

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38 Cf. judgment of 15 February 2016, J.N., C-601/15 PPU, EU:C:2016:84, paragraph 45; of 7 May 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 44, with further references.

39 Commission Staff Working Paper, Impact assessment accompanying document to the Proposal for a Regulation on European Standardisation, SEC(2011) 671 final of 1 June 2011, p. 24 ("Policy Option 1.B: create a European Agency for Standards that would manage the standard-setting process. The agency would merge and replace the existing ESOs."), p. 30 et seqq.

40 See paragraph 34 of the application.

41 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011, L 55, p. 13.

42 Blue Guide (footnote 3), p. 1 (47).

(33) The fact that harmonised standards cannot be attributed to the Commission also becomes clear by the *James Elliott* judgment itself. The ECJ based its conclusion to have jurisdiction over the harmonised standard in question precisely on the fact that, in certain cases, it has the power to interpret acts that are *not* acts of the "institutions, bodies, offices or agencies of the Union" within the meaning of Article 267 TFEU but instead have the character of "measures to implement or apply an act of the Union".[43] The ECJ hence does not attribute the harmonised standard to the Commission and does not qualify it as an act of an institution, body or other agency of the Union. Accordingly, the Court also deliberately refrains from adopting the Advocate General's wording cited by the applicants (cf. statement of claim, par. 32) that the process of developing harmonised standards "is a case of 'controlled' legislative delegation in favour of a private standardisation body".

(34) In the interveners' view, the ECJ's prudence is not a coincidence: If the development of harmonised standards was characterised as some form of delegated law-making, it would have to comply with the requirements of the *Meroni* case-law. In this respect, it should be noted that the delegation of decision-making powers to a private body is a far more sensitive issue in terms of the principles of democracy and institutional balance than the delegation of such powers to a Union agency.[44]

II. Harmonised standards are protected by copyright

(35) Harmonised standards, such as the standards at issue, are protected by copyrights of CEN and the NSBs. The applicants arguments to the contrary[45] are incorrect for three reasons:

1. CEN and the NSBs are holders of copyrights protected under national law

(36) First, as the Commission points out,[46] the legality of the copyright protection guaranteed under national cannot be disputed in the context of the present proceedings.

(37) The applicants do not contest the fact that the copyrights for the requested standards have been effectively transferred to CEN and the NSBs. As set out in our application for leave to intervene, 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.[47]

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43 Judgment of 27 October 2016, James Elliott, C-613/14, EU:C:2016:63, paragraph 34.

44 See, to that effect, judgment of 13 June 1958, Meroni v High Authority, 9/56, EU:C:1958:7, p. 152 et seqq.; of 22 January 2014, United Kingdom v Parliament and Council, C-270/12, EU:C:2014:18, paragraph 43.

45 See paragraph 66 et seqq. of the application.

46 See paragraph 52 of the defence and paragraph 22 of the rejoinder.

47 See paragraph (6) et seq. and Annexes 6–9 to our application für leave to intervene.

2. Harmonised standards are an intellectual creation

(38) Second, in any event, the harmonised standards in question – as well as any other harmonised standard – fulfil the conditions for qualifying as work eligible for protection by copyrights.[48]

(39) Copyright within the meaning of Article 2(a) of Copyright Directive 2001/29/EC is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.[49] This requires that the author, when creating his or her work, must express creative abilities by making free creative decisions.[50]

(40) Such creative latitude exists in the process of developing harmonised standards. The experts in the technical committees make free creative decisions both with regard to the individual structure of the subject matter as well as with regard to their specific choice of words.

(41) Regarding the sub-division of the subject matter, the CEN-CENELEC-Internal Regulations provide, *inter alia*, that if there are both common and specific aspects to the subject, common aspects shall be given in part 1 of the standard, whereas specific aspects shall be given in separate individual parts.[51] The guidelines are thus limited to a rough framework, leaving it to the technical experts to divide the standards in logical sub-divisions by choosing from different, equally correct creative approaches.

(42) In addition, the experts also enjoy creative freedom with regard to the wording of the harmonised standards. According to the ECJ's *Infopaq* decision, authors can express their creativity, *inter alia*,

> "through the choice, sequence and combination of those words […] in an original manner and achieve a result which is an intellectual creation."[52]

(43) Although the content of harmonised standards is predetermined by the essential requirements of the harmonisation legislation, by the Commission's request and by the state-of-the-art in technology, the experts are free regarding their linguistic illustration. To explain

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[48] Cf. p. 5 of the contested decision.

[49] Judgment of 16 July 2009, Infopaq International, C-5/08, EU:C:2009:465, paragraph 37; of 22 December 2010, Bezpečnostní softwarová asociace, C-393/09, EU:C:2010:816, paragraph 45; of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 97; of 1 March 2012, Football Dataco et al., C-604/10, EU:C:2012:115, paragraphs 50, 52.

[50] Cf. judgment of 4 October 2011, Football Association Premier League et al., C-403/08 and C-429/08, EU:C:2011:631, paragraph 98; of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 89.

[51] CEN-CENELEC Internal Regulations – Part 3, Principles and Rules for the structure and drafting of CEN/CENELEC Publications, June 2019, available at https://boss.cen.eu/ref/IR3_E.pdf, p. 21.

[52] ECJ, case C-5/08 – Infopaq International, EU:C:2009:465, recital 45.

technically complex issues in a comprehensible manner, a clear and precise form of expression is required that exceeds the mere enumeration of technical requirements and thus gives room for creative originality.[53]

(44) The mere existence of certain structural and substantial predeterminations obviously does not preclude the author of a work from expressing his or her creative capacity by making free decisions. On the contrary, also classical art forms such as poetry and music follow certain strict rules, without anyone doubting their copyright protection.

3. Harmonised standards are not in the public domain

(45) Third, the requested standards are not per se excluded from copyright protection. The applicants' reasoning in this regard[54] remains unclear and ambiguous. Apparently, they assume that the standards in question have somehow lost their eligibility for copyright protection as a consequence of the *James Elliott* ruling. This is incorrect.

(46) As illustrated above,[55] the applicants misinterpret the ruling. The classification of harmonised standards as "part of EU law" is due to the special function of the preliminary ruling procedure for the unity of Union law and cannot be applied beyond the scope of Article 267 TFEU.

(47) Furthermore, even if the standards in question were qualified as EU law in the strict sense (*quod non*), this would not exclude them from copyright protection.

(48) First, it is doubtful whether EU law, taking into account national constitutional traditions, contains a general principle that legal texts belong to the public domain. While some authors in legal literature may claim such general principle, no corresponding provisions can be found in written EU or international law. According to Article 2(4) of the revised Berne Convention – that also applies to the EU via Article 4 of the WIPO Copyright Treaty[56] –, it is reserved to the legislature of the countries to determine the scope of protection of official texts in the areas legislation, administration and jurisdiction.[57] Article 5 of the Copyright Directive 2001/29/EC, that lays down the exceptions and limitations of copyrights, however does not provide any exemptions for laws or official works. As the enumeration of the exemptions and limitations is "exhaustive" in order to secure the functioning of the internal

[53] See also, to that effect, judgment of the Higher Regional Court (*Oberlandesgericht*) Hamburg of 27 July 2017, DE:OLGHH:2017:0727.3U220.15KART.0A, already submitted as Annex 10 to our application for leave to intervene, par. 142 et seq.

[54] See paragraph 67 et seqq. of the application.

[55] See under C.I.1.

[56] WIPO Copyright Treaty of 20 December 1996. Cf. on the binding effect of the Berne Convention on the EU via Article 1 (4) WIPO, WIPO Copyright Treaty ECJ, case C-403/08 and C-429/08 – Football Association Premier League et al., EU:C:2011, recital 189; case C-277/10 – Luksan, EU:C:2012:65, recital 59.

[57] Berne Convention on the protection of literary and artistic works, revised on 24 July 1971.

market,[58] one might even argue that laws of Member States that exempt official works from copyright protection are contrary to EU law.

(49) At Member State level, the legal situation varies. Some Member States foresee the creation of copyrights in official texts, including laws.[59] However, even if national laws provide for an exemption from copyright protection for official works, this exemption does not necessarily apply to technical standards. The laws of some Member States in fact provide – or their case-law recognises[60] – that copyrights are not affected if the legislature refers to the works of third parties, in particular to technical standards.

(50) For instance, such a provision was included in Section 5(3) of the German Act on Copyright and Related Rights (*Urheberrechtsgesetz*)[61] following the judgments of the Federal Constitutional Court (*Bundesverfassungsgericht*) cited by the applicants[62]. According to this provision, copyrights to private normative works like technical standards are not affected if acts, statutory instruments, decrees or official notices refer to such works without reproducing their wording. A comparable provision is also foreseen in Section 9(2) of the Finnish Copyright Act.[63]

III. Free access to the requested standards would undermine the interveners' commercial interests

(51) As the Commission rightly points out in the contested decision, it would seriously undermine the interveners' and the other NSB's commercial interests within the meaning of Article 4(2), first indent, of the Access to Documents Regulation (EC) No 1049/2001 if the requested standards were made available free of charge.

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58 Cf. recital (33) of the Copyright Directive 2001/29/EC.

59 For instance, in the United Kingdom a so-called *Crown copyright* can be created on laws created by civil servants whilst performing their official responsibilities, cf. Designs and Patents Act, 1988, sec. 163(1): "Where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties (a) the work qualifies for copyright protection […], and (b) Her Majesty is the first owner of any copyright in the work." Likewise, the Copyright Act in Ireland grants the Irish Parliament copyrights to laws and regulations, cf. Copyright and Related Rights Act, 2000, sec. 193(1): "The copyright in any Bill or enactment vests in the Houses of the Oireachtas".

60 Cf. judgment by the Dutch *Hoge Raad* of 22 June 2012 – Knooble, LJN BW0393, NL:PHR:2012:BW0393, **Annex 6** (in English translation).

61 English translation available online at https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html.

62 See paragraph 69 of the application.

63 English translation available at https://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf. The provision reads as follows: "(1) There shall be no copyright: 1) in laws and decrees; 2) in resolutions, stipulations and other documents which are published under the Act on the Statutes of Finland (188/2000) and the Act on the Regulations of Ministries and other Government Authorities (189/2000); 3) in treaties, conventions and other corresponding documents containing international obligations; 4) in decisions and statements issued by public authorities or other public bodies; 5) translations of documents referred to in paragraphs 1−4 made by or commissioned by public authorities or other public bodies. (2) The provisions of subsection 1 shall not apply to independent works contained in the documents referred to in the subsection."

(52) It is obvious that economic operators would not be willing to pay a fee to obtain a copy of the requested standards, if they could obtain them from the Commission free of charge on the basis of Regulation (EC) No 1049/2001. The revenues of the sales and licensing of the respective standards obtained by the interveners and the other NSBs would hence substantially decline in case of their disclosure.

(53) As set out above,[64] the NSBs and – indirectly via the NSB's membership fees – CEN heavily rely on the revenues from the sale and licensing of the standards, including harmonised standards, in order to refinance the cost-intensive standardisation processes. Furthermore, as an autonomous and sustainable source of income, the revenues guarantee the independency of the European standardisation system from unilateral influences from any particular category of stakeholder, thereby guaranteeing transparent and inclusive standard development and decision making processes. Substantial declines in revenues could not be compensated and would preclude the NSBs from the production of further standards, thereby undermining their commercial interests and their business model as a whole.

(54) Contrary to what the applicants allege,[65] it is irrelevant in this regard that, pursuant to Article 16 of Regulation (EC) No 1049/2001, access to documents shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

(55) First, the exemption in Article 4(2), first indent, of the Regulation is not limited to copyrights but also protects any other commercial interest of a natural or legal person.

(56) Second, the disclosure of the requested standards would degrade the interveners' copyrights to an empty shell: It is well-established case-law that documents disclosed under Regulation No 1049/2001 become accessible *erga omnes*.[66] What is more, the applicants make very clear that they intend to diffuse the requested standards as widely as possible.[67] Therefore, as a consequence of the disclosure of the requested standards to the applicants, the interveners would not only be deprived of the revenue generated by a potential sale of the requested standards to the applicants, but of all future income from the sale of the requested standards. Since the applicants brought these proceedings to set a precedent, it is to be expected that other requests for access to standards would follow such that eventually all harmonised standards would be publicly accessible free of charge.

(57) The applicants argue that commercial interests of the interveners cannot be affected since the latter are acting "as a public authority by performing public functions".[68] However, it should be noted that the majority of the interveners, including CEN, are governed by private

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64 See under A.II. above.
65 See paragraph 13 of the reply.
66 Judgment of the General Court of 21 October 2010, Kalliope Agapiou Joséphidès, T-439/08, EU:T:2010:442, paragraph 116.
67 See paragraph 3 of the application.
68 See paragraph 81 of the application.

law. In any event, the Court has already accepted that public bodies which perform public functions can have commercial interests in terms of Article 4(1), second indent, of Regulation (EC) No 1049/2001.[69]

IV. No overriding public interest in disclosure

(58) Finally, the Commission rightly assumed in the contested decision that there is no overriding public interest in the disclosure of the requested standards within the meaning of Article 4(2) of Regulation (EC) No 1049/2001.

1. No general obligation to grant free access to harmonised standards

(59) The applicants argue that an overriding interest in disclosure automatically follows from the fact that, according to the *James Elliott* ruling, harmonised standards form "part of EU law". From this, they derive a "constitutional imperative to freely access the Requested Standards".[70] Again, this is incorrect for several reasons.

(60) To start with, as already shown above, the applicants misinterpret the *James Elliott* ruling. Moreover, even if harmonised standards were indeed to be considered EU law in the strict sense (*quod non*), there would be no general obligation to make them accessible free of charge. In particular, such obligation cannot be derived from the ECJ's jurisprudence.

(61) The case-law cited by the applicants concerns the publicity requirement of EU law, that is to say the question whether an EU act needs to be published in the Official Journal. However, this question is to be separated from the overriding interest in the disclosure of a document under Regulation (EC) No 1049/2001. Even if a certain act were to be published in the Official Journal, this would not *per se* constitute an individual's right to access to documents. Obviously, such access to document cannot make dispensable a publication in the Official Journal.

(62) Moreover, neither EU primary or secondary law nor the ECJ's case-law require a publication of harmonised standards. First, such obligation does not arise from Article 297 TFEU since harmonised standards are neither legislative acts nor non-legislative acts of general application. As shown above, secondary law explicitly provides that only „the reference" of a harmonised standard must be published in the Official Journal.

(63) Second, according to the ECJ's case-law, a publication is only required if an act of law creates obligations *vis-à-vis* the individual: The Court indeed emphasised already in 1979

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[69] See judgment of the General Court of 21 October 2010, Kalliope Agapiou Joséphidès, T-439/08, EU:T:2010:442, paragraph 125, concerning the University of Cyprus.

[70] See paragraph 87 of the application.

that a sovereign act of law could not be applied against citizens before they had the opportunity to gain knowledge of it.[71] According to the requirement of legal certainty, a Community rule would have to allow those concerned,

> "to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies."[72]

(64) This case-law was confirmed by two judgments in 2003 dealing with specifications of protected designations.[73] Therein, the ECJ declared that certain conditions for using the protected designations of origin, namely "*Prosciutto di Parma*" and "*Grana Padano*", that were embodied in specifications, could not be held against the economic operators if they were not brought to their knowledge. By referring to previous case-law, it argued that the principle of legal certainty required that the condition in question be brought to the knowledge of third parties by adequate publicity in EU legislation. As this was not the case, the Court held that the condition could not be relied on against them before a national court, whether for the purposes of criminal penalties or in civil proceedings.

(65) It follows from said case-law that publicity is only required for those rules that impose obligations *vis-à-vis* individuals. The publication of such acts seeks to ensure that individuals are able to acquaint themselves with the precise obligations imposed on them.

(66) This rationale does not apply to harmonised standards such as the standards in question. Due to their specific functions and characteristics, such standards are not suited to impose obligations on individuals: As the definition in Article 2 No 1 of the Standardisation Regulation makes clear, it is one of the basic principles of the New Approach that the application of harmonised standards remains voluntary and that proof of conformity of a product with the essential requirements can also be demonstrated by other means. In *James Elliott*, the Court expressly recognised this fundamental principle.[74]

(67) At the same time, the missing mandatory character is the essential difference between harmonised standards and specifications of the protected designations of origin "*Prosciutto di Parma*" and "*Grana Padano*", which were the subject of the above-cited ECJ judgments. Both specifications contained additional conditions exceeding the regulation that related to the use of a protected designation of origin. Manufacturers were forced to comply with them if they wanted to put their products on the market using the protected designation of origin.

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71 Judgment of 25 January 1979, Racke, C-98/78, EU:C:1979:14, paragraph 15; of 25 January 1979, Weingut Decker, C-99/78, EU:C:1979:15, paragraph 3.

72 Judgment of 26 November 1998, Covita, C-370/96, EU:C:1998:567, paragraph 27; of 8 November 2001, Silos, C-228/99, paragraph 15; both referring to the Racke case of 1979 (cf. footnote 71).

73 Judgment of 20 May 2003, Consorzio del Prosciutto di Parma, C-108/01, EU:C:2003:296, paragraphs 87 et seqq.; of 20 May 2003, Ravil, C-245/97 and C-469/00, EU:C:2003:295, paragraphs 91 et seqq.

74 Cf. judgment of 27 October 2016, James Elliott Construction, C-613/14, EU:C:2016:821, paragraphs 35, 42.

The difference to the New Approach is obvious: Manufacturers can clearly put their products on the market throughout the European Union even if they fulfil the essential safety requirements of the applicable harmonisation legislation by other means than proving that the product conforms to the harmonised standards.

(68) However, even if the aforementioned case-law were applicable, the applicants would not be able to establish an overriding interest in disclosure of the requested standards. As the Commission pointed out,[75] the general requirements of legal certainty and publicity are unsuitable by their very nature for justifying an overriding interest which, pursuant to settled case-law, requires the party arguing for the existence of such interest to rely on specific circumstances.

(69) Finally, an overriding public interest in disclosure is excluded because the applicants have access to the requested standards even without such disclosure. It is undisputed that the requested standards are available in hard copy and for PDF download against payment. Furthermore, they are publicly accessible free of charge, *inter alia*, through libraries.

2. Non-relevance of the Aarhus convention

(70) Finally, the applicants have not established an overriding interest in the disclosure of the requested standards on the basis of Regulation No 1367/2006.[76] The harmonised standards at issue do not contain information relating to "emissions into the environment" within the meaning of Article 6(1) Regulation No 1367/2006.

(71) According to the ECJ's case-law, Article 6(1) Regulation No 1367/2006 concerns information which relates to emissions into the environment, in particular information regarding the nature, composition, quantity, time and place of emissions, without, however, including information with a (mere) direct or indirect link to emissions into the environment.[77]

(72) As set out by the Commission,[78] the standards at issue are not even linked and certainly do not relate to emissions into the environment. In particular, contrary to what the applicants claim[79], the mere fact that they contain certain information regarding maximum amounts of

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75 See paragraphs 55 et seqq. of the defence and paragraph 24 of the rejoinder.

76 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 2006, L 264/13.

77 Judgment of 23 November 2016, Commission v Stichting Greenpeace Nederland and PAN Europe, C-673/13 P, EU:C:2016:889, paragraph 81; judgment of the Court of 21 November 2018, Stichting Greenpeace Nederland und PAN Europe v Commission, T-545/11 RENV, EU:T:2018:817, paragraph 58.

78 See paragraphs 81 et seqq. of the defence and paragraph 32 of the rejoinder.

79 See paragraph 113 of the application and paragraph 26 of the reply,

chemical substances and test methods does not allow the public to foresee the quantities and nature of substances that are actually released to the environment.[80]

(73) The further argument raised by the applicants that the standards contain environmental information within the meaning of Article 2(1)(d) of Regulation No 1367/2006 is irrelevant in this context. Even if this were the case (*quod non*), the applicants could not derive an overriding public interest in disclosure from it. Whereas Article 6(1), first sentence, of Regulation No 1367/2006 explicitly states that there is an overriding public interest within the meaning of Article 4(2) Regulation No 1049/2001 where the information requested relates to emissions into the environment, Article 4 does not have a similar effect. This is confirmed by the ECJ's settled case-law: According to the Court, although Article 3 of Regulation No 1367/2006 provides that Regulation No 1049/2001 is to apply to any request for access to environmental information, Article 6 thereof adds more specific rules concerning such requests which in part – namely in Article 6(1) – favour that access.[81] It follows that, with regard to other environmental information not included in Article 6(1) Regulation 1367/2006, the general rules of Regulation 1049/2001 apply.

D. Conclusion

(74) For the reasons given above, the interveners support the form of order sought by the Commission and respectfully request that the Court

- dismiss the application;
- order the applicants to pay the costs.

Ulrich Karpenstein	Kathrin Dingemann	Matthias Kottmann
(Rechtsanwalt)	(Rechtsanwältin)	(Rechtsanwalt)

80 Cf. in this regard judgment of the General Court of 11 July 2018, Rogesa v Commission, T-643/13, EU:T:2018:423, paragraph 103.

81 Judgment of 4 September 2018, Client Earth v Commission, C-57/16 P, EU:C:2017:909, paragraph 99; of13 July 2017, Saint-Gobain Glass Deutschland v Commission, C-60/15 P, EU:C:2017:540, paragraph 65 and the case-law cited.

Table of annexes

Number	Description	Page numbers	Paragraph in the statement in intervention
1	Table "Costs of standardisation versus Licensing income" dated 7 January 2020	1–2	(9)
2	CEN Annual Report 2018, available online at https://www.cen-cenelec.eu/news/brief_news/Pages/TN-2019-037.aspx	3–6	(10)
3	CEN Annual Report 2017, available online at https://www.cen-cenelec.eu/news/brief_news/Pages/TN-2018-036.aspx	7–10	(10)
4	Policy for the Distribution, Sales and Reproduction of ISO Publications and the Protection of ISO's Copyright, as approved under Council Regulation 08/2017, ISO POCOSA 2017 (excerpt, p. 1–4)	11–15	(16)
5	List of supporters of the applicant No 1, Public.Resource.Org, Inc., published at https://public.resource.org/about/index.html	16–18	(17)
6	Judgment by the Dutch Supreme Court (*Hoge Raad*) of 22 June 2012 – Knooble B.V., NL:PHR:2012:BW0393 (in English translation)	19–27	(49)

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