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

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# OBSERVATIONS ON THE STATEMENT IN INTERVENTION

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(Lodged on behalf of the Applicants on 18 February 2020)

**Introduction**

1. The statement in intervention does not alter the merits of the action for annulment. The interveners' submission contains many allegations without any substance or proof, in particular with respect to funding and potential losses if harmonised standards were freely accessible. These allegations are misleading and often contradictory. They are thus irrelevant for the present case, which only concerns access to four specific harmonised standards. As regards the merits, the interveners try to establish a new category of EU law and allege that harmonised standards are not EU law "in the strict sense". This is not correct and simply an artificial creation of the interveners that does not exist in EU law. The Court held[1] in *James Elliot* that harmonised standards are "*part of EU law*". As the Applicants have explained in detail, the law must be accessible to the citizens. The action for annulment is thus well-founded. In further detail:

**Summary of the Statement in Intervention**

2. First, the interveners present certain (selected) financial information relating the financing of National Standards Bodies (NSBs) and the European Standards Organisations (ESOs) which they say indicates that standardisation is predominantly funded by revenues resulting from the sale or licensing of standards[2]. They say that this form of financing is a legislative choice and accordingly the Applicants are seeking to access standards via the back door thereby putting the entire New Approach at risk[3].

3. The interveners claim (without any specific substantiation) that the interests of the first Applicant rather than being a public interest is in fact aligned with the business interests of large internet companies that generate profits by monopolising access to

[1] Judgment of 27 October 2016, *James Elliot Construction,* Case C-613/14, ECLI:EU:C:2016:821, paragraph 40
[2] Paragraph 6 of the statement in intervention
[3] Paragraph 15 of the statement in intervention

information[4]. Despite this, the first Applicant is then criticised for the opposite behaviour since it allegedly disseminates harmonised standards free of charge (ironically threatening the monopoly of private NSBs and ESOs that are financed through monopolisation of access to harmonised standards).

4. The interveners then seek to challenge the admissibility of the application on the basis that the requested information is already available to the Applicants free of charge in libraries although they do not point to any specific library that is easily accessible to either of the Applicants.

5. In terms of the merits, the interveners make several points.

6. First, they say that although the Court in *James Elliot* found that harmonised standards are part of European Union law, this does not mean that they are European Union law "in the strict sense"[5]. By way of example, the interveners incorrectly assert that *James Elliot* found that harmonised standards do not take precedence over national law and that the ECHR is an example of an instrument that is "part of EU law", but which has not been formally incorporated into EU law.

7. The interveners then proceed to allege that the Applicants' claim contradicts the New Approach, that harmonised standards are protected by copyright and not in the public domain, and that free access would undermine the interveners' commercial interests.

8. Finally, the interveners conclude that there is no overriding public interest in disclosure since there is no general obligation to publish harmonised standards and that the Aarhus Convention does not affect this position.

**Preliminary comment**

[4] Paragraph 17 of the statement in intervention
[5] Section C.I of the statement in intervention

9. As a preliminary comment, both the first and second Applicant wish to address the interveners' allegation that this action for annulment would somehow serve the interests of monopolistic internet companies. This is cheap propaganda and an example of "playing the man and not the ball". It should not be entertained by the Court. Suffice it to say that the issues raised in this action were already flagged by Advocate General Campos Sánchez-Bordona in his opinion in *James Elliot* as an important question as to whether the complete publication of standards is necessary for them to have legal effect[6].

**Admissibility**

10. The Applicants action for annulment is admissible. The interveners allegation about the inadmissibility of the Applicant's claim (under Art. 129 of the Rules of Procedure) is without merit. While it is correct that the Applicants must have an interest in bringing proceedings, such interest is present here.

11. It is – contrary to what the interveners allege – not decisive that the documents requested under Regulation 1049/2001 are available at libraries or against payment. Regulation 1049/2001 provides the Applicants a right which it may exercise against the Defendant obliging it to grant free access to any document in his possession. If the Defendant refuses to do so – as is the case here – the Applicants have a right and also an interest in bringing proceedings. The Court has confirmed this by highlighting that "*it follows that a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision*",

[6] Opinion of Advocate General Sanchéz Bordona of 28 January 2016, *James Elliot Construction,* Case C-613/14, ECLI:EU:C:2016:63, paragraph 51

and that "*the fact that the requested documents were already in the public domain is irrelevant in this connection*"[7].

12. Further, the Court emphasised in several decisions that an "*applicant retains an interest in seeking the annulment of an act of an institution in order to prevent its alleged unlawfulness from recurring in the future.*"[8] That is the situation in the present case. The Applicants' allegation of unlawfulness is based on an interpretation of one of the exceptions provided for in Regulation 1049/2001 that the Defendant is very likely to rely on again at the time of a new request. The Applicants may, in future, also submit similar requests for access to the same type of documents.

13. Finally, the interveners misinterpret the Applicants' claims in relation to libraries. As is evident from the action for annulment, the Applicants referred to very limited library access as an example of access that was theoretically possible but in practice excessively difficult[9]. The effort involved is disproportionate in today's digital age, in particular for foreign companies or companies established outside the EU and in consideration that access through Regulation 1049/2001 shall be made accessible "directly in electronic form" (cf. Art. 2(4)). Access through libraries is also in most cases – in contrast to access through Regulation 1049/2001 – not free as libraries charge service and membership fees. There has never been a suggestion from the Applicants that they can easily access library copies of the requested standards. This point has not been contradicted by the interveners who, given their knowledge of the dissemination of harmonised standards, could easily have pointed to which specific libraries accessible to the Applicants they had in mind. In fact, the Requested Standards are only

[7] Judgment of 17 June 1998, Case T-174/95, ECLI:EU:T:1998:127, paragraphs 67 and 69.
[8] Judgment of 22 March 2011, Case T-233/09, ECLI:EU:T:2011:105, paragraph 35.
[9] Paragraph 53 of the action for annulment

available in very selected libraries (sometimes only in one library in one Member State) and thus not widely available to citizens.

**Harmonised standards are part of EU law**

14. As already noted and decided by the Court in *James Elliot*, the harmonised standards whose reference is published in the Official Journal become part of European Union law. The interveners explicitly acknowledge that[10]. They, however, allege that harmonised standards are not EU law "*in the strict sense*"[11].

15. It is not clear to the Applicants what the interveners mean with this statement. Such category of EU law does not exist. It is an artificial creation of the interveners and does not have any foundation in EU law. Either certain rules are "the law", or they are not. Here, the Court has explicitly determined that harmonised standards are "*part of European Union law*". This conclusion also follows since it is by reference to such a standard that it is established whether or not the presumption laid down in the legislation setting out the essential requirements applies to a given product. It is clear that both the legislation setting out the essential requirements and the harmonised standards themselves fall to be interpreted by national courts to ensure that the objective of harmonising these technical standards is not undermined[12].

16. In *James Elliot*, the Court also found that national courts had jurisdiction to interpret harmonised standards and, if necessary, pursuant to Article 267 TFEU, to request the Court to make preliminary rulings on the interpretation of these standards. In light of this, it would be inconsistent if only the legislation setting out the essential requirements was freely available to the public but not the resulting harmonised standards.

[10] Paragraph 23 of the statement in intervention
[11] Paragraph 22 of the statement in intervention
[12] Footnote 6 paragraphs 44 and 45

17. The interveners have incorrectly interpreted the *James Elliot* judgment as proposition for its view that the doctrine of primacy does not apply to harmonised standards, in particular with respect to primacy over national laws on contract.[13] However, this is misleading and not correct. As is apparent from the *James Elliot* judgment, the Court held that the presumption of conformity seeks only to allow a product which meets the requirements laid down by a harmonised standard to circulate freely within the European Union[14]. The Court found that the function of the harmonised standard in question was limited to this purpose and that it was not intended to harmonise the specific conditions and rules for use of the related products or other national rules such as those applicable to sales contracts[15]. Therefore, no primacy can exist with respect to national laws on contract.

18. In fact, the Court has already found that in terms of the harmonising purpose served, harmonised standards do have primacy over national law. The Court in *James Elliot* pointed out that it had already decided that a Member State may not impose additional requirements on products subject to harmonised standards for their effective use on the market and use within that member state's territory[16]. In that sense, therefore, harmonised standards have primacy over national law.

19. The example by the interveners of the European Convention on Human Rights (**ECHR**) is also not relevant. Unlike the present case, the ECHR is an international treaty which is freely available to the public. Therefore, it is not clear what point is being made in this regard.

**Harmonised standards are compulsory**

[13] Paragraph 28 of the statement in interventions
[14] Paragraph 57 of the judgment
[15] Paragraph 51 of the judgment
[16] Paragraph 41 the judgment citing Case C-100/13, *Commission v Germany* paragraphs 55, 56 and 63

20. The harmonised standards are compulsory. As the Applicants explained in prior submissions,[17] the alleged "voluntary" nature firstly does not call into question the legal effect of the standard and in any event only exists in theory. In practice, harmonised standards (such as the Requested Standards) are in any event *de facto* compulsory because they are generally the only accepted method in the market for proving compliance with the respective EU directive. In certain cases, harmonised standards are even binding and thus compulsory *de jure*.

21. The institutions of the EU – as the Applicants described[18] – acknowledged this. The interveners' submission supports this. Assuming that the financial data presented is correct (which the Applicants contest, see below), the interveners generate millions of euro with the sale of standards. It is surprising that market participants buy standards and pay that much money for them if they had no relevance and were just voluntary. No economically reasonable company would voluntarily spend money for standardisation rules if they were not – at least – *de facto* binding.

**Public financing / The New Approach**

22. No great issue is taken with the description of the New Approach by the interveners. However, as the Applicants already explained,[19] the New Approach does not impose an obligation on NSBs to charge for technical standards. There is nothing of a normative nature in the underlying legislation that would prevent technical standards from being made freely available. The interveners' allegation are purely apodictic assertions.

23. In the Applicants' view, the Advocate General was correct to describe the New Approach as a form of "*controlled legislative delegation*"[20]. While it is true that the

[17] Action for annulment, paragraphs 92 and 93
[18] Action for annulment, paragraph 44
[19] Reply, paragraphs 4 et. seq.
[20] Footnote 6 paragraph 55

Court in *James Elliot* did not adopt this precise language of the Advocate General, it nevertheless adopted his conclusion and agreed that the factors recited in his Opinion underpinned this conclusion[21]. Therefore, given that the Court did not expressly deviate from the Advocate General's assessment it is implicit from paragraph 43 of the *James Elliot* judgment that the Court does in fact consider the adoption of harmonised standards to be a form of "*controlled legislative delegation*".

24. In terms of financing, the information provided by the interveners is incomplete and misleading. The Applicants contest that the figures relating to income from the sale of standards are correct[22]. The interveners do not provide any proof to that end, but rather simply allege these figures or only reference to some kind of internal cost assessment (DIN) without any verification (for instance, by accountants). What seems to be presented is aggregate financial dated that covers the sale of both harmonised standards and other non-harmonised standards. This is in itself misleading as only harmonised standards are at issue here. What is more, assuming that the figures presented by the interveners are correct, the interveners mention that income for harmonised standards for DIN only accounts for 4.6% of the standardisation costs, i.e. 95% of these costs are covered by other income. This demonstrates that the interveners – contrary to what they allege – will not be harmed if they cannot generate revenues from the licensing of harmonised standards.

25. Further, it seems as if the misleading presentation of financial data is done strategically by the NSBs. In an Impact Assessment cited by the interveners[23], the Commission noted that "*the vast majority of NSBs were unable to provide an estimate of the income from the sale of European Harmonised Standards separately from the sales of all*

[21] Footnote 1 paragraph 43
[22] In particular, paragraph 8 and 9 of the statement in intervention
[23] Commission Staff Working Paper, SEC(2011) 671 final of 1 June 2011, Impact Assessment, paragraph 9.5.3

*standards"*. According to this assessment, most NSBs actually stated that it would not be possible to separate income data for harmonised standards from other European Standards and/or sales of other publications because this information was not recorded in their information systems.

26. It seems that this strategy has not changed. And indeed in these proceedings, CEN and the NSBs have been presented with the perfect opportunity to put their cards face up on the table to demonstrate exactly what proportion of their activities relates to harmonised standards and to disclose the degree of public financing for this. Yet they have not done so. The Applicants suspect that this is a strategic move because if these figures were on the table, their arguments would be shown to lack foundation. The 4.6% income for DIN with respect to harmonised standards provides an indication of this.

27. In fact, the information available to the Applicants indicates that currently approximately 17%[24] of the European standards published by the first intervener are harmonised standards whereas approximately 20% of its funding comes directly from public sources[25] with further public funding presumably coming indirectly from the NSBs.

28. The amount of public funding (ranging from 20-35%) is also significant for the interveners. The interveners' allegation that this funding is of "limited relevance"[26] contradicts their own arguments around DIN's income from the sale of harmonised standards. There, the interveners suggest that an income of 4.6% with respect to the sale of harmonised standards in relation to standardisation costs is extremely important and

[24] CEN publishes approximately 2706 harmonised standards (data extracted from https://ec.europa.eu/growth/single-market/european-standards/) out of a total of 15605 European Standards published as of the end of December 2019 (https://www.cen.eu/about/ceninfigures/pages/default.aspx).
[25] CEN annual report 2018 page 22 (https://www.cen.eu/news/brochures/brochures/CEN%20Annual%20Report%202018.pdf)
[26] Paragraph 10 of the statement in intervention

DIN would suffer "substantial losses"[27]. It is apparent that CEN or NSBs would in reality suffer more if they lose the massive public funding.

29. Finally, the Applicants contest that the present case has any impact on the cooperation with ISO[28]. This is again a pure allegation of the interveners without any substance. In particular, the interveners fail to present any proof about the income that is allegedly at stake with respect to harmonised standards.

30. In consideration of the above, the financial information presented by the interveners neither supports nor quantifies the alleged undermining of their commercial interests. It rather paints an exaggerated and misleading picture about the alleged dependence of the New Approach on paid access to harmonised standards.

**Free access to the law (i.e. harmonised standards) – Irrelevance of Member State laws**

31. The arguments in relation to the principle of free access to the law, the subsistence of copyright and whether or not these standards are in fact in the public domain have been well rehearsed in earlier pleadings. However, a few specific points need to be made in response to the statement in intervention.

32. First, in the case of harmonised European Union law, the Applicants consider that free access to the law is embodied in the concept of the "the rule of law". In that regard, the interveners' reference to Member State laws is misleading[29]. The present case concerns access to European Union law, not to Member State law. Hence, the European legislature must regulate access to European Union law. The differences in Member

[27] Paragraph 9 of the statement in intervention
[28] Paragraph 16 of the statement in intervention
[29] Paragraphs 48 to 50 of the statement in intervention

State law only support this imperative and show that nothing can be derived from these Member State laws for the present case.

33. Further, it can also not be left to Member States to determine the conditions for access to EU law since this would lead to fragmentation and would undermine the objective served by the creation of European harmonised standards. In that regard, it is important to note that the Advocate General in *James Elliot* noted this fragmentation and pointed to a divergence between different Member States in relation to the requirement to publish harmonised standards[30]. The Advocate General also noted that this divergence in relation to publication was an "important question" but it was not necessary to examine it in more detail for the purpose of answering the questions submitted to the Court by the Irish Supreme Court.

34. The references to Irish and United Kingdom copyright law do not assist the interveners. An examination of the cited provisions shows that the legislatures in these jurisdictions have enacted provisions to ensure that laws are freely available and that copyright cannot act as a barrier to participation in the legislative process or access to justice. The Irish and United Kingdom regimes are very similar reflecting the shared common law heritage of these countries. Chapter 19 of the Irish Copyright and Related Rights Act 2000 (as amended) deals with Government and Oireachtas (i.e. parliamentary) copyright[31]. While admittedly it does provide that enactments qualify for copyright, it expressly vests those rights in the Irish legislature. In fact, section 193 makes express provisions for the vesting of copyright in works made by or under control of the Irish Houses of Oireachtas in that institution. Thus, it is clear that, under Irish law, if there were to be a form of "controlled legislative delegation" as is the case here, the resulting

[30] Footnote 6, paragraph 51

[31] Sections 163 to 167 of the Copyright, Designs and Patents Act 1988 contains similar provisions relating to "Crown Copyright" in the United Kingdom.

works would be owned by the Irish parliament and would, by implication, be made freely available. Additionally, both Irish[32] and United Kingdom[33] law provide that the copyright in a work is not infringed by anything done for the purposes of parliamentary or judicial proceedings - again reflecting the idea that copyright cannot impede access to justice or the proceedings of parliament.

**No effect on commercial interests**

35. The interveners' argument in relation to the undermining of their commercial interests is inconsistent and contradictory. Similarly to the arguments of the Defendant, they fail to explain how on the one hand the copyright in harmonised standards holds such value but on the other hand that the granting of access to four specific harmonised standards would "*degrade the interveners' copyrights to an empty shell*".[34] The fact remains that the alleged risk of degradation exists even where standards are made available for purchase or through libraries. The interveners have not demonstrated why standards made available in this way have not been widely disseminated.

36. Finally, the interveners incorrectly state that the Applicants are not relying on specific circumstances to justify an overriding public interest in disclosure. As described by the Applicants, they specifically rely on the overriding public interest in allowing free access to harmonised standards. This is required as an expression of the rule of law and facilitates the public in identifying their rights and obligations. It also permits them to access judicial remedies in relation to those rights and obligations either before national

[32] Section 71 of the Irish *Copyright and Related Rights Act 2000* (http://www.irishstatutebook.ie/eli/2000/act/28/section/71/enacted/en/html#sec71)
[33] Section 45 of the United Kingdom *Copyright, Designs and Patents Act 1998* (http://www.legislation.gov.uk/ukpga/1988/48/section/45)
[34] Paragraph 56 of the statement in intervention

or Union courts. It is ultimately also irrelevant that the Requested Standards are accessible against payment in libraries and from the NSBs (see above).

37. The overriding public interest also follows from the Aarhus Convention and Regulation 1367/2006. The Applicants have explained that in detail in their prior submissions.[35] The interveners do not add any new arguments to that end.

**Conclusion**

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

[Deemed to be signed via eCuria]

Dr Fred Logue Dr. Jens Hackl Christoph Nüßing

[35] Action for annulment, paragraphs 105 et. Seq., and Reply, paragraphs 26 et. seq.