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EUROPEAN COMMISSION

Brussels, 18 February 2020  
sj.f(2020) 1192046

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

**OBSERVATIONS ON THE STATEMENT IN INTERVENTION OF CEN, UNE,  
ASRO, AFNOR, ASI, BSI, NBN, DS, DIN, NEN, SNV, SN, SFS, SIS AND ISS**

Submitted pursuant to Article 145(2) of the Rules of Procedure of the General Court by the **European Commission**, represented by Sandrine Delaude, Giacomo Gattinara and François Thiran, members of the Legal Service, acting as agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels, and consenting to service by e Curia

in

**Case T-185/19**

**Public Resource.Org, Inc. and Right to Know CLG**

- Applicant -

v.

**European Commission**

- Defendant -

Supported by **CEN, UNE, ASRO, AFNOR, ASI, BSI, NBN, DS, DIN, NEN, SNV, SN, SFS, SIS AND ISS,**

And concerning an application pursuant to Article 263 TFEU in which the Applicant seeks the annulment of a Commission's decision of 22 January 2019 not to grant access to some documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43 – the “Public Access Regulation”).

The Commission has the honour to make the following observations on the Statement in intervention of CEN and Others:

1. The interveners are the European Committee for Standardisation and its members, the national standardisation bodies in Member States of the European Union or of the European Free Trade Association (the “CEN and others”). They have intervened in this case to support the conclusions of the Commission. The Commission welcomes in general the arguments raised by the CEN and Others. In the Commission’s views, those arguments demonstrate that there is no reason to annul its confirmatory Decision of 22 January 2019.
2. The Commission would however recall that the present case is only about whether public access requested from the Commission to four technical standards drafted by the CEN has to be granted<sup>1</sup>, while the Commission has entered into licensing agreements with the CEN under the commitment that the access to the technical standards would be restricted to the sole internal use of the Commission, any external disclosure being not allowed<sup>2</sup>.
3. Indeed, the Applicant challenges the Commission confirmatory Decision of 22 January 2019 on the sole basis of the Public Access Regulation and the corresponding provisions in the TFEU (Article 15) and in the Charter of Fundamental Rights of the European Union (Article 42)<sup>3</sup>.
4. The Commission notes in particular the following statements of the CEN and Others made in points 6-10 and in points 35-44 of their Statement in intervention, that are in relation with the exception provided in the first indent of Article 4(2) of the Public Access Regulation (commercial interest of a legal person, including intellectual property) and with the following explanations given by the Commission to support that this exception applies to the four technical standards drafted by the CEN :

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<sup>1</sup> See Defence, point 14.

<sup>2</sup> See Rejoinder, point 22.

<sup>3</sup> See Defence, point 14.

- the sale of the technical standards is an important part of standardisation bodies' business model<sup>4</sup>;
  - technical standards produced by the CEN are copyright-protected<sup>5</sup>.
5. The Commission also notes that it seems that the Applicant had since 2015 (i.e. long before its request for access to documents of 2019) at least three out of the four requested technical standards<sup>6</sup>.
  6. In the light of the foregoing, the Commission once again<sup>7</sup> underlines that, in the present case, the Applicant does not challenge the legality or validity of the legislative instruments relating to the system of standardisation, be it the Standardisation Regulation<sup>8</sup> or more specific harmonisation legislation referring to technical standards<sup>9</sup>. The Commission therefore believes<sup>9</sup> that the general statements made under points 22-34 and 62-67 of the Statement in intervention of the CEN and Others on what is EU law and whether the technical standards have to be published in the Official Journal, have no direct bearing on the assessment of the legality of the Commission confirmatory Decision of 22 January 2019.
  7. The Commission has explained that the principle according to which technical standards are in principle made available against payment (and are not published in the Official Journal for free) was decided by the legislator of the European Union in the Standardisation Regulation<sup>10</sup>. The Commission has also explained that the legislator decided to lay down in the specific harmonisation legislation the substantial requirements applicable to some products to benefit from the free movement of goods in the internal market, while leaving to the technical standards

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<sup>4</sup> See Defence, points 23-24 and point 42.

<sup>5</sup> See Defence, points 49-50 and Rejoinder, point 22.

<sup>6</sup> See <https://law.resource.org/pub/eu/toys/en.petition.html>.

<sup>7</sup> See Defence, point 16 and Rejoinder, point 2.

<sup>8</sup> Regulation (EC) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European Standardisation (OJ L 316 of 14 November 2012, p. 12).

<sup>9</sup> See for instance Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170 of 30 June 2009, p. 1).

<sup>10</sup> See Defence, points 20, 26-29 and 60-64– see also Statement in intervention of the CEN and Others, point 11-15.

the process or method to comply with the said requirements<sup>11</sup>. These choices relate to issues that are completely different from those discussed in the case at hand, which only concerns the legality of the Commission confirmatory Decision refusing to grant access to four technical standard, even when discussing the existence of an “*overriding public interest in disclosure*” as contemplated in Article 4(2) of the Public Access Regulation, as such interest must be based on specific circumstances and not on general considerations<sup>12</sup>.

8. The CEN and Others rightly point out that “*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*”<sup>13</sup>.

### **Conclusion**

9. In light of the above, the Commission has therefore the honour to maintain its conclusions as set out in its Rejoinder, and in particular its conclusion that the Applicant's action for annulment of the Commission confirmatory Decision of 22 January 2019 should be dismissed as unfounded.

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<sup>11</sup> See Defence, point 31-35, 60-61 and 65-70 – see also Statement in intervention of the CEN and Others, point 5.

<sup>12</sup> See Defence, points 55-58.

<sup>13</sup> See Statement in intervention, point 61.