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

REPLIES TO QUESTIONS

(Lodged on behalf of the Applicants on 14 September 2020)

Replies to the Court's questions for Applicants and Parties

Question 1

1. The Applicants seek the annulment of the decision of the European Commission of 22 January 2019 with reference C(2019) 639 Final, by which the Commission confirmed its refusal to grant their request for access to the Requested Standards.

Question 2

2. The Applicants seek annulment of the decision of the European Commission of January 22, 2019, with reference C(2019) 639 final and thereby pursue a single head of claim.

Question 3

3. In Germany, the Requested Standards can only be accessed via so-called "Normen-Infopoints". These 90 free display locations can solely be found in metropolitan areas of Germany.

4. The main constraint for members of the public, as well as the Applicants, to access the Normen-Infopoints is that most of the "Normen-Infopoints" are located in university libraries. To access any media provided by a university library – either physically or digitally – it is normally required to be a member of the library. Membership at university libraries is generally not offered to the general public, but only to persons associated with the university, i.e. professors, students, academic researchers, etc.[1] There exist a few university libraries in Germany that allow members of the public to

[1] E.g. Braunschweig University of Technology University Library; Frankfurt University of Applied Sciences Library; Dual University Baden-Wuerttemberg Lörrach Library; University Wuppertal Library; Ernst-Abbe-Hochschule Jena University Library; Kiel University of Applied Sciences Library; University Koblenz Library; University Rostock Library.

become a member.[2] Even for this limited circle of people, a membership is sometimes not granted free of charge, but requires the purchase of a membership card.

5. With a membership – that the Applicants would not be able to get – members of the libraries cannot borrow the standards, but have to physically or digitally take a look at the standards without any possibility to record or otherwise hold on to the content (apart from purchasing or taking handwritten notes). In most cases, university library members are not allowed to make a copy of the standards.[3] Even in the rare cases, where members are allowed to make photocopies or print a pdf file of (parts) of a standard, the member is required to pay a fee for the copies made.[4]

6. Several university libraries explained that they have to request a membership or a copying fee for financial reasons, as the licensing fees for the standards are very high.

7. In Ireland, ten third-level educational libraries have access to the National Standards Database through their library services[5]. These libraries are not generally open to the public. According to the National Standards Authority of Ireland, free copies or extracts are not provided due to CEN & ISO copyright and readers are required to purchase the standards. [6]

8. Just like in Ireland and Germany, it is also difficult or impossible to get access to the standards in other European Member States. Worldcat, the world's largest card catalogue, shows very few libraries – which can solely be found in metropolitan areas,

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2 E.g. Hochschule Bremen Library.

3 E.g. Otto-von-Guericke-University Magdeburg, Braunschweig University of Technology University Library; Frankfurt University of Applied Sciences Library; Dual University Baden-Wuerttemberg Lörrach Library; Kiel University of Applied Sciences Library; University Koblenz Library.

4 E.g. Hochschule Augsburg Library.

5 Cork Institute of Technology, Dublin City University, Institute of Technology, NUI Galway, NUI Limerick, TU Dublin, Trinity College Dublin, University College Cork, University College Dublin, and Limerick Institute of Technology.

6 Information provided by EMEA – SAI Global EU IH Standards IE following a request to the National Standards Authority of Ireland (www.nsai.ie).

like Madrid or Warszawa – where the Requested Standards would be available for a review within the institution only or for purchase.

Question 4.1

9. The interveners' objection of inadmissibility is inadmissible and is not allowed based on Article 142 of the Rules of Procedure of the General Court, which limits the intervention to supporting, in whole or in part, the form of order sought by one of the main parties. Since the Commission has not sought an order declaring the application inadmissible, the interveners' objection is inadmissible.

10. The Applicants also do not support the form of order sought by the Commission resulting from the request for annulment of the decision of the European Commission of January 22, 2019, which is – as laid out in our response to question 4.2 – admissible.

Question 4.2

11. The Applicants action for annulment is admissible. The intervener's 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. The Applicants are concerned directly and individually (cf. Art. 263(4) TFEU) by the refusal of the Commission to grant access to the Requested documents. The refusal directly refers to the Applicants and directly refuses their individual access right to the Requested Standards. The refusal thereby brings about a distinct change in the Applicant's legal position.

12. The interveners allege that "*applicants generally lack an interest in bringing proceedings if the requested documents are already accessible to them*". The interveners rely on a case in which the ECHA withdrew the contested decision and adopted a new decision by which it granted the applicants complete access to all the

documents requested.[7] In the case at hand, access to the Requested Documents has never been granted. The interveners' suggestion that the Applicants could access the documents via public libraries is both beside the point and incorrect.

13. It is – contrary to what the interveners allege – not decisive that the documents requested under Regulation 1049/2001 (the "**Transparency Regulation**") are available at libraries or against payment. The Transparency Regulation provides the Applicants a right which it may exercise against the Defendant obliging it to grant free access to any document in its possession. If the Defendant refuses to do so, the Applicants have a right and also an interest in bringing proceedings. It is the Contested Decision, which affects the Applicant's legal position, and not a general unfeasibility to access the standards. 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*", and that "*the fact that the requested documents were already in the public domain is irrelevant in this connection*".[8]

14. 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*."[9] 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 the Transparency Regulation that the Defendant is very likely to rely on again at the time of a new request. The Applicants, which are both non-

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7 See order of 15 January 2018, ArcelorMittal Belval & Differdange and ThyssenKrupp Steel Europe v ECHA, T-762/16, EU:T:2018:12, paragraph 16.

8 Judgment of 17 June 1998, Case T-174/95, ECLI:EU:T:1998:127, paragraphs 67 and 69.

9 Judgment of 22 March 2011, Case T-233/09, ECLI:EU:T:2011:105, paragraph 35.

governmental organisations, may, in future, also submit similar requests for access to the same type of documents.

15. 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.[10] As the Applicants already mentioned above, access via libraries is generally only granted for members of the respective institution and membership to the libraries is not open to everybody, but restricted to students and researchers who study at the respective institutions.

16. The effort involved is disproportionate in today's digital age, in particular for foreign persons or persons established outside the EU and in consideration that access through the Transparency Regulation 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 the Transparency Regulation – not free as libraries charge service and membership fees. Equally there are charges for making copies of the Requested Standards. 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 available in very selected libraries (sometimes only in one library in one Member State or in libraries that are not open to the public) and thus not widely available to members of the public.

Question 5

[10] Paragraph 53 of the action for annulment.

17. It is to be noted that the Transparency Regulation establishes a relationship of rule and exception according to which *"[i]n principle, all documents of the institutions should be accessible to the public*" (cf. recital 11 Transparency Regulation). It is thus settled case law of the ECJ that, since "*the purpose of the regulation is to give the public the widest possible right of access, the exceptions to that right set out in Article 4 of the regulation must be interpreted and applied strictly*".[11] The ECJ confirms this interpretation of the Transparency Regulation in its judgment of 13 January 2017, Deza v ECHA (T-189/14, EU:T:2017:4), insofar as it emphasises the limited scope of the exception. The Court confirms that the protection afforded to intellectual property rights does not systematically take precedence over the presumption in favour of the disclosure of information laid down in the Transparency Regulation.

18. The Court further clarifies, that the first indent of Article 4(2) of the Transparency Regulation must be interpreted in the context of Article 16 of the Regulation providing 'that Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents'. Even if the information contained in the document is disclosed because of a request for access, the holder of the document remains protected against copyright infringement so that its commercial value is fully preserved. Article 16 prevents the information in question from being used for commercial purposes by the requesting party.

19. Therefore, the first indent of Article 4(2) of the Transparency Regulation cannot be interpreted as meaning that the fact that a copyright protects a document implies that the access request can automatically be denied. Instead, the document holder needs to provide how the granting of access to a specified document could harm its commercial

[11] ECJ, judgment of December 18, 2007 – Case C-64/05 P Sweden / Commission ECLI:EU:C:2007:802 paragraph 66.

interests, even though the requesting party cannot use the information for commercial purposes.

20. It is also clear that the system of copyright in the European Union provides for acts, which do not infringe copyright (for example use in judicial proceedings, educational or private use). Therefore, it cannot even be assumed that the release of the Requested Standards would automatically lead to copyright infringement. The protection of copyright is more properly left to the copyright owner to assert on a case by case basis and according to the General Court in *Deza* should not be incorporated systematically into the application of the Transparency Regulation. To do so would fundamentally undermine the principle of the greatest possible access to documents.

21. In this context, the Applicants also reiterate (a) that the Requested Standards cannot be and therefore, are not protected by copyrights of CEN and (b) that the Applicants are both non-profit organisations acting exclusively in the public interest without any intention of making profits. Thus, the Defendant should not have rejected the Applicants' request for access and the Defendant's decision must therefore be annulled – as requested.

Question 6

22. The Applicants refer to their position in their argument, set out in paragraph 18 of the reply, adding that due to the relationship of rule and exception provided by the Transparency Regulation, it is the Defendant who must provide the validity of the copyright protection of the standards as it is the Defendant who seeks to rely on an exception.

Conclusion

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

[Deemed to be signed via eCuria]

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