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## Replies to written questions

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 CLG

v

European Commission

seeking, pursuant to Article 263 TFEU, annulment of the Decision of the Euro-  
pean 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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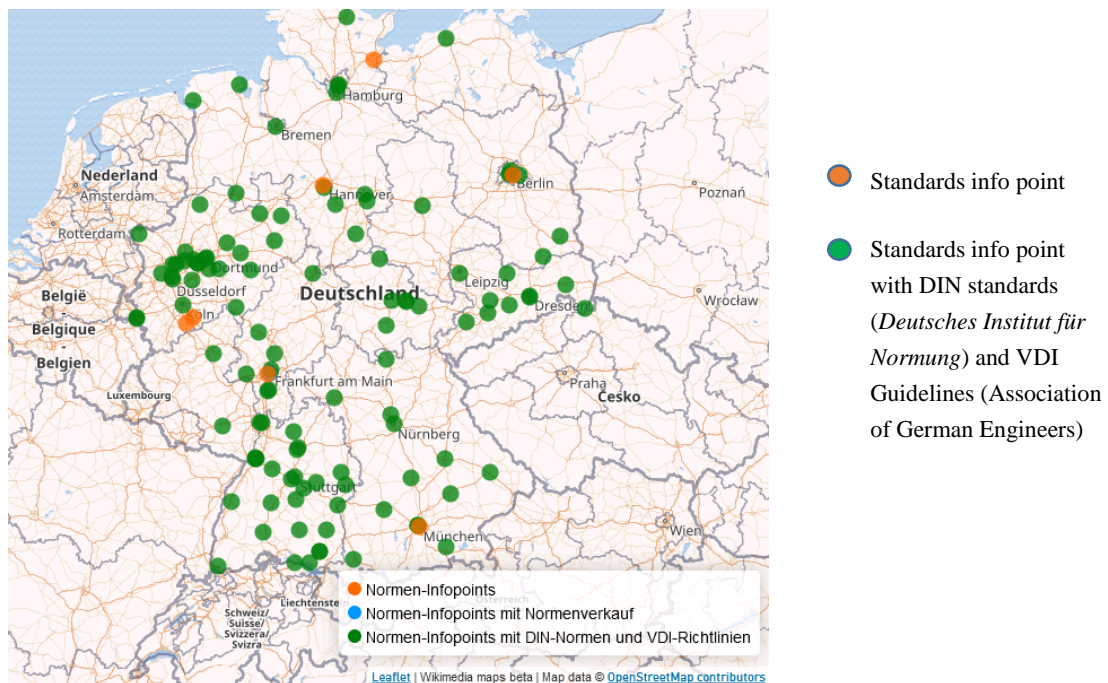
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- (1) By letter of 11 August 2020, received by the interveners on 13 August 2020, the General Court asked the parties to reply in writing to a number of questions. The interveners have the honour to provide answers to Question 3 to 6 that are addressed to all the parties.

### I. Question 3: Possibilities to access harmonised standards free of charge and main constraints

- (2) As set out in Question 3, it is common ground between the parties that it is possible to access harmonised standards free of charge. The applicants acknowledge in paragraph 53 of their application that, in Germany, for example, harmonised standards can be accessed via more than 90 so-called “info points” which are located at the premises of the German standardisation body DIN and at libraries. Yet, contrary to their assertion,<sup>1</sup> access via these info points is neither “difficult” nor limited to “metropolitan areas of Germany”. In fact, the info points are spread all over Germany, including smaller towns with (sometimes far) less than 50,000 inhabitants.<sup>2</sup> A map available online<sup>3</sup> shows the broad distribution throughout Germany and enables users to easily find the info point closest to their place of residence.



<sup>1</sup> Paragraph 53 of the application.

<sup>2</sup> E.g. Mittweida (16,000 inhabitants), Mosbach (25,000 inhabitants), Zittau (28,000 inhabitants), Steinfurt (34,000 inhabitants), Coburg (41,000 inhabitants), Freiberg (42,000 inhabitants), Kleve (49,000 inhabitants), Emden (50,000 inhabitants).

<sup>3</sup> <https://www.beuth.de/de/regelwerke/auslegestellen#/>.

- (3) Moreover, contrary to the applicants' assertion, the possibility to access harmonised standards free of charge is not limited to students and university members but exists for the general public. As a general rule, German university libraries are public places. In many libraries, access to more recent standards is provided via electronic workstations accessible for anybody without further requirements. In general, the standards are made available in a "read-only" electronic form. Older standards are sometimes available in hard copy only, but as such also accessible for all library visitors. In some cases, info points require a valid library card to access the online databases. However, library cards are available not only for students and university members, but also for external users against payment of a very small fee (max. 20 EUR per year, less for welfare recipients) and for institutional users. Standards can be copied for personal use or scientific or educational purposes, in accordance with copyright law. In addition, the German Standardisation Body DIN has a rather proactive approach as it promotes further creation of info points in the country, by inviting universities and other educational bodies to consider all benefits that setting up an info point within their institution could bring them.<sup>4</sup>
- (4) Namely, the info point at the premises of DIN in Berlin, which is open to the general public without registration or any other precondition, is located at a walking distance of 2.6 kilometers from the office of the applicants' German lawyers. A quick internet search with the key words "standard info point Germany" or "normen info point" immediately displays the website of DIN with the interactive map and all relevant information on the closest info points.<sup>5</sup> Against this background, the applicants' claim that access to standards via info points is "excessively difficult"<sup>6</sup> cannot be upheld.
- (5) Finally, it should be noted that the applicants, like any other interested party, may of course also obtain standards at any time and from any place against payment of a reasonable fee. As set out by the Commission<sup>7</sup> and in our statement in intervention<sup>8</sup>, this way of financing the European standardisation system is inherent to the New Approach and enshrined, *inter*

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<sup>4</sup> See <https://www.beuth.de/de/regelwerke/auslegestellen#/>.

<sup>5</sup> See <https://www.din.de/de/service-fuer-anwender/normen-infopoints>.

<sup>6</sup> Paragraph 13 of the observations on the statement in intervention.

<sup>7</sup> Paragraphs 20 et seqq. of the defence.

<sup>8</sup> Paragraphs 11 to 16.

*alia*, in the Standardisation Regulation. In other words, it is the result of a choice made by the Union legislator.

## **II. Question 4: Inadmissibility of the application**

### **1. Question 4.1: Admissibility of the objection of inadmissibility**

- (6) As set out by the Court, under Article 40(4) of the Statute of the European Court of Justice, interveners are limited to supporting the form of order sought by one of the parties. Moreover, under Article 142(3) of the Rules of Procedure of the General Court, the intervener must accept the case as he finds it at the time of his intervention. However, it is settled case-law that an objection of inadmissibility based on public policy must be examined of the Court's own motion under Article 129 of the Rules of Procedure of the General Court.<sup>9</sup>
- (7) The lack of a legal interest in bringing proceedings is an absolute bar to proceedings and as such a question of public policy.<sup>10</sup> Therefore, as set out in paragraph 19 of our statement in intervention, the (in)admissibility of the applicants' action is to be examined by the Court of its own motion, irrespective of whether the interveners' objection of inadmissibility is admissible.

### **2. Question 4.2: The applicants' lack of interest in bringing proceedings**

- (8) 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.<sup>11</sup> Furthermore, in the context of litigation concerning access

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<sup>9</sup> See judgment of 15 June 1993, *Matra v Commission*, C-225/91, EU:C:1993:239, paragraph 13; judgment of 24 March 1993, *CIRFS v Commission*, C-313/90, EU:C:1993:111, paragraph 23; judgment of 11 July 1990, *Neotype Techmashexport v Commission and Council*, C-305/86 and C-160/87, EU:C:1989:404, paragraph 18; judgment of the General Court of 9 June 2016, *Magic Mountain Kletterhallen v Commission*, T-162/13, EU:T:2016:341, paragraph 38.

<sup>10</sup> See, *inter alia*, judgment of the General Court of 10 March 2005, *Gruppo ormeggiatori del porto di Venezia et al. v Commission*, joined cases T-228/00 et al., EU:T:2005:90, paragraphs 13 et seq.

<sup>11</sup> See judgment of 22 March 2011, *Access Info Europe v Council*, T-233/09, EU:T:2011:105, paragraph 33.

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.<sup>12</sup>

- (9) Against this background, the action brought by the applicants is inadmissible for three reasons.
- (10) *First*, it is common ground between the parties that the applicants can access the standards free of charge for non-commercial purposes through libraries. In this respect, it should be noted that Regulation No 1049/2001, on which the applicants base their request, aims at increasing openness in the work of the EU institutions. This aim is fully ensured since the standards are publicly accessible. Consequently, the applicants lack a legal interest in seeking additional disclosure of the very same standards under Regulation No 1049/2001.
- (11) *Second*, the requested standards can be accessed and used for *any purpose* against payment of a reasonable fee. It is also for this reason that the applicants lack a legal interest in disclosure. Regulation No 1049/2001 aims at transparency of the institutions and strengthening the trust of the public in administration but does not give private actors a right to exploit the intellectual property of third parties without paying an adequate license fee.
- (12) *Third*, as the Commission has shown, the applicants in fact have copies of at least three of the four requested standards since 2015 (i.e. long before their request for access to documents of 2019).<sup>13</sup> In the light thereof, it is evident that the applicants have no legal interest whatsoever in bringing proceedings but have turned to the Court for political reasons.

### **III. Question 5: Consequences from the judgment of 13 January 2017 – Deza v ECHA (Case T-189/14)**

- (13) Question 5 relates to the consequences to be drawn for the present proceedings from the judgment of 13 January 2017, Deza v ECHA (T-189/14) in so far it concerns the scope of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

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<sup>12</sup> See order of 15 January 2018, ArcelorMittal Belval & Differdange and ThyssenKrupp Steel Europe v ECHA, T-762/16, EU:T:2018:12, paragraph 17; judgment of 23 September 2015, ClientEarth v ECHA, T-245/11, EU:T:2015:675, paragraph 119 and the case-law cited.

<sup>13</sup> Observations on the statement in intervention, paragraph 5 with reference to <https://law.resource.org/pub/eu/toys/en.petition.html>.

This provision requires institutions and bodies not to disclose documents in the event that such disclosure would undermine certain public or private interest. In this regard, the Court specifically refers to the considerations set out in paragraphs 117 to 120 of the judgment.

- (14) In the interveners' view, the considerations of the judgment referred to in question 5 do not apply to the present case.
- (15) *First*, the Court's reasoning in paragraphs 117 to 120 of the *Deza* judgment relates to a different legal context. In that case, the Court found that the applicant had failed to show that disclosure of the requested documents would undermine their commercial interests in terms of Article 4(2) of Regulation No 1049/2001 (see paragraphs 58 to 88). It then went on to assess an additional argument based on Article 39(2) of the TRIPs Agreement and the protection of business secrets. According to this provision, natural and legal persons shall have the possibility of preventing information from being disclosed to others so long as such information (a) is secret in the sense that it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; and (b) has commercial value because it is secret.
- (16) In the *Deza* case, the applicant had relied on this provision in order to establish a commercial interest within the meaning of Article 4(2) of Regulation No 1049/2001. They had argued that disclosure of the documents in question would reveal business secrets that could be used by their competitors.
- (17) This argument was (rightly) rejected by the Court with reference to Article 16 of Regulation No 1049/2001 and Article 63(1) of Regulation No 1907/2006. These provisions prevent the information in question from being used for commercial purposes by the competitors and thus giving them a competitive advantage (cf. paragraph 120 of the judgment). It is in this context and against this background that the Court stated that "Article 4(2) of Regulation No [1049/2001] cannot be interpreted as meaning that the fact that a copyright protects a documents implies *that it is a commercial secret* and that the proprietor may *thus* rely on the exception provided for by that provision" (see paragraph 119 of the judgment, own emphasis).



- (18) In the present proceedings, however, the situation is entirely different. Unlike the applicant in the *Deza* case, the Commission and the interveners do not rely on the (supposed) protection of business secrets. On the contrary, they have shown that disclosure of the requested standards *as such* would directly and seriously undermine the interveners' intellectual property and commercial interests: It is obvious that economic operators would not be willing to pay a fee to obtain a copy of a harmonised standard, if they could obtain it from the Commission free of charge on the basis of Regulation No 1049/2001. Given that the interveners' business model significantly relies on the revenues from the sale and licensing of copyright-protected standards,<sup>14</sup> free access to such standards under Regulation No 1049/2001 would put their economic viability (and the system of standardisation in general) in danger.
- (19) In this respect, Article 16 of Regulation No 1049/2001, according to which that regulation shall be without prejudice to any existing rules on copyright, cannot prevent the interveners' commercial interest from being undermined. As set out in our statement in intervention,<sup>15</sup> the disclosure of the requested standards would degrade the interveners' copyrights to an empty shell: Pursuant to the well-established case-law that documents disclosed under Regulation No 1049/2001 become accessible *erga omnes*,<sup>16</sup> 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 and, in the long term, of all harmonised standards. What is more, the applicants have already made it very clear that they intend to diffuse the requested standards as widely as possible and thus violate the interveners' copyright.<sup>17</sup>
- (20) In this context, the applicants wrongly claim that the "risk of degradation exists even where standards are made available for purchase or through libraries" and that the interveners "have not demonstrated why standards made available in this way have not been widely disseminated".<sup>18</sup> In contrast to disclosure under Regulation No 1049/2001, the licensed use of harmonised standards is granted against payment of a fee and under certain terms and

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<sup>14</sup> See paragraphs 6 to 10 of our statement in intervention.

<sup>15</sup> See paragraphs 54 et seqq.

<sup>16</sup> Judgment of the General Court of 21 October 2010, Kalliope Agapiou Joséphidès, T-439/08, EU:T:2010:442, paragraph 116.

<sup>17</sup> See paragraph 3 of the application.

<sup>18</sup> Paragraph 35 of the observations on the statement in intervention. Cf. also paragraph 80 of the application.  
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conditions in accordance with general copyright rules. This also applies with regard to access via libraries: While end-users can access harmonised standards free of charge, the libraries conclude licencing agreements with the interveners. Therefore, these forms of dissemination of standards do not impair the interveners' copyrights – unlike disclosure under Regulation No 1049/2001.

- (21) *Second*, paragraph 117 of the *Deza* judgment does not lead to a different conclusion either. In this paragraph, the Courts rejected the applicant's argument, based on Article 39(2) of the TRIPs Agreement, according to which the protection afforded to intellectual property rights systematically takes precedence over Regulation No 1049/2001. However, in the present case, neither party has presented such a claim. Rather, both the Commission and the interveners have shown that disclosure of the requested standard – in the individual case at hand – would specifically and actually undermine the interveners' commercial interests in terms of Article 4(2) of Regulation 1049/2001. According to the clear wording of that provision, which leaves no room for interpretation, the institutions shall refuse access to a document in such a case, unless there is an overriding public interest in disclosure.

#### **IV. Question 6: Relevance of copyright issues arising under national law**

- (22) By Question 6, the Court invites the parties to comment on the applicants' argument, set out in paragraph 18 of the reply, regarding the relevance of issues of copyright arising under national law. In said paragraph, the applicants argue that they should be allowed to counter the Commission's assessment that the intellectual property of the interveners is protected by national law as the Commission relied on this intellectual property to deny access to the harmonised standards in question. In addition, they argue that if the present proceedings were no place to deal with copyright issues under national law, the Commission itself would be precluded from relying on those issues in its decision.
- (23) In the interveners' view, the applicants misunderstand the nature of national law in actions of annulment before the European Courts. As the ECJ stated in relation to the pleas in law admissible under Article 256 TFEU, the content of the national law as determined by the

General Court is a (legal) fact.<sup>19</sup> Hence, as the Commission set out in its defence<sup>20</sup> and its rejoinder<sup>21</sup>, the applicants cannot present allegations regarding the supposed absence of national copyright protection without offering supporting evidence.

- (24) Such evidence was not provided by the applicants. On the contrary, the applicants do not contest that the delegates and experts involved in the elaboration of the requested standards have assigned the sole exploitation rights of their intellectual contributions to CEN and that CEN, in turn, has granted the national standardisation bodies irrevocable and exclusive exploitation rights within their respective territories and non-exclusive exploitation rights in the territories of third states.<sup>22</sup> Moreover, the applicants do not contest that the harmonised standards are licensed to the Commission for internal use only. Finally, the applicants do not contest that national courts have repeatedly confirmed the national standardisation bodies' exclusive right to use standards under copyright law.
- (25) As the Commission explained in paragraph 50 of its defence, the applicants are in no way prevented from challenging the validity of the national copyright protection of the standards at issue. However, they would have to do so before the competent national courts. In this respect, it is recalled that 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.<sup>23</sup> It hence appears that the applicants basically request this Court to overturn a national ruling which has become final on them.
- (26) It follows that the applicants wrongly claim that if the present proceedings were no place to deal with copyright issues under national law, the Commission would be precluded from relying on those issues in its decision, too. In its contested decision, the Commission relies on the copyright protection of harmonised standards generally recognised under national law which constitutes a (legal) fact in the present proceeding. In contrast, the applicants

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<sup>19</sup> Judgment of 5 July 2011, *HABM v. Fioruccim* C-263/09 P, EU:C:2011:452, paragraph 53.

<sup>20</sup> Paragraph 49 to 52.

<sup>21</sup> Paragraph 22.

<sup>22</sup> See in this regard paragraphs 6 et seq. of the application for leave to intervene and Annex 8 to said application.

<sup>23</sup> 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.

argue that the copyright protection established under national law is not applicable, which is not possible without offering supporting evidence.

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