Date of acceptance : 07/10/2020

Published ID	:	T-185/19
Document number	:	65
Register number	:	965190
Date of lodgment	:	14/09/2020
Date of entry in the register	:	01/10/2020
Type of document	:	Reply/replies to the question(s)
	:	Document
e-Curia lodgment reference	:	DT133319
File number	:	1
Person lodging document	:	Delaude Sandrine (R111952) Commission

EUROPEAN COMMISSION

Brussels, 14 September 2020
sj.f(2020)5484117

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

REPLY TO THE QUESTIONS

submitted by the **EUROPEAN COMMISSION**, represented by Ms Sandrine DELAUDE, Mr Giacomo GATTINARA and Mr François THIRAN, Members of its Legal Service, acting as Agents, with a postal address for service in Brussels at the Legal Service, *Greffe Contentieux*, BERL 1/169, 200, rue de la Loi, 1049 Brussels, who consent to service by e-Curia,

in Case T-185/19

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

Applicants

v

European Commission

Defendant

And in presence of **European Committee for Standardisation and Others**

Interveners

The Commission respectfully submits its replies to the questions raised by the General Court and transmitted on 11 August 2020, when they are addressed to the parties or to the Commission in particular.

1. QUESTIONS FOR THE PARTIES

3. In the present case, it is common ground between the parties that, under the European standardisation system, it is possible to access harmonised standards free of charge through certain libraries.

In paragraph 53 of the application, the applicants claim that, in Germany, for example, the harmonised standards requested can, however, only be accessed via the so-called 'NormenInfopoints' system, a group of 90 free display locations that can be found only in metropolitan areas of Germany. The applicants add that over 90% of the 'Normen-Infopoints' are located in university libraries to which only students or holders of a special reader pass or library card have access.

The parties are asked to provide a specific summary of the main constraints and limitations on that possibility of accessing harmonised standards free of charge.

1.1. Commission reply to question 3

1. A free-of-charge access to harmonised standards is organised in the Member States, usually in the premises of the National Standardisation Organisations (NSOs) or in public and university libraries.

2. The main constraints and limitations to this free-of-charge access are therefore that it consists in a consultation taking place in some specific places, which can be only a few.

3. The Commission is not aware that the access be further restricted to some categories of people only. It is the understanding of the Commission that, in Germany for instance, university libraries are open to the public and not restricted to students only. If a special reader pass or library card is needed, it is the Commission understanding that it is only for administrative reasons, and not for preventing the public at large to access the university libraries.

4. The Commission trusts that the Interveners will provide full details on the free-of-charge access to technical standards and its modalities.

4. In paragraphs 19 to 21 of their statement in intervention, the interveners argue that the action is inadmissible as the applicants have no standing to bring proceedings. By contrast, although it seeks to have the action dismissed, the Commission does not dispute the applicants' standing to bring proceedings.

4.1. The parties are asked to inform the Court of their position as to the admissibility of the objection of inadmissibility raised by the interveners, in so far as its purpose is not to support the form of order sought by the Commission.

4.2. The parties are also asked to submit their observations on the objection of inadmissibility relied upon by the interveners in paragraphs 19 to 21 of the statement in intervention, in relation to the applicants' lack of standing to bring proceedings.

1.2. Commission reply to question 4.2

5. In paragraphs 19 to 21 of their statement in intervention, the interveners argue that the action is inadmissible as the applicants have no standing to bring proceedings because the "*applicants undoubtedly can access the requested standards through libraries*".

6. By contrast, the Commission did not apply to the General Court for a decision on inadmissibility.

7. Indeed, in its confirmatory decision of 22 January 2019 (Annex A.1, p. 6), the Commission explained that the "*fact that the copies of the harmonised standards are available for consultation free of charge in the public libraries does not change the above-mentioned conclusions*". The "*above-mentioned conclusions*" were that the requested documents cannot be disclosed as they fall under the exception of Article 4(2), first indent, of Regulation (EC) 1049/2001 (protection of the commercial interests of a natural or legal person, including intellectual property) (Annex A.1, p. 2). In particular, the confirmative decision explained that "*documents disclosed under Regulation (EC) No 1049/2001 become, legally speaking, public documents. Indeed, a document released following an application for access to documents would have to be provided to any other applicant that would ask for it*" (Annex A.1, p. 5) and that "[c]*onsequently, the*

impact of public disclosure of the harmonised standards included in documents 1-4 on the commercial interests of the European Committee for Standardisation and of its national members is evident" (Annex A.1, p. 6).

8. The Commission believes that the Applicants are not prevented from lodging an action based on Article 263 TFEU against the confirmatory decision of 22 January 2019, which did not refuse to disclose the requested documents because of the free-of-charge access to technical standards, but for protecting the commercial interests of a natural or legal person, including intellectual property, as contemplated under the exception of Article 4(2), first indent, of Regulation (EC) 1049/2001.

9. Finally, the case-law referred to under paragraph 20 of the statement in intervention is not applicable here, as the order at stake adjudicated that the action became devoid of purpose for a different reason: after the application for annulment of the contested decision, refusing in part the applicants access to the documents requested, the defendant withdrew the contested decision and adopted a new decision by which it granted the applicants complete access to all the documents requested[1].

1.3. Commission reply to question 4.1

10. The Commission believes that the objection of admissibility must be inadmissible under Article 142 of the Rules of Procedure, in so far as its purpose is not to support the form of order sought by the Commission.

11. However, this position does not prevent the General Court to examine of its own motion the objection raised by the interveners.

12. The Commission refers on this regard to the judgement of 5 September 2014, Editions Odile Jacob v. Commission, in case T-471/11, ECLI:EU:T:2014:739, paragraphs 35-38, and to the case-law quoted in that judgement:

[1] See order of 15 January 2018, *ArcelorMittal Belval ea v ECHA*, in case T-762/16, ECLI:EU:T:2018:12, paragraph 16.

"*35. According to Lagardère and Wendel, the action is inadmissible as the applicant does not have a legal interest in bringing proceedings because, even if the contested decision were annulled, it would not have any way to acquire the assets that were held by Editis and, if an action for damages were brought, it could not apply for compensation for damage greater than that caused by the unlawfulness of the first approval decision.*
36. As a preliminary point, it should be stated that although at the hearing the Commission expressed doubts regarding the applicant's legal interest in bringing proceedings, it has not claimed, either in its written submissions or at the hearing, that the action is inadmissible and has merely claimed that the action should be dismissed on the merits. According to the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, which applies to the procedure before the General Court by virtue of the first paragraph of Article 53 of the Statute, an application to intervene is limited to supporting the form of order sought by one of the parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention.
37. It follows that Lagardère and Wendel, as interveners in these proceedings, are not entitled to raise a plea that the action is inadmissible and that the Court is not therefore required to consider the pleas on which they rely (CIRFS and Others v Commission, C-313/90, ECR, EU:C:1993:111, paragraphs 20 to 22; Kaysersberg v Commission, T-290/94, ECR, EU:T:1997:186, paragraph 76; and Germany v Commission, T-576/08, ECR, EU:T:2011:166, paragraphs 38 and 39). The pleas of inadmissibility raised by Lagardère and Wendel must therefore be rejected.
38. However, as the lack of a legal interest in bringing proceedings constitutes an absolute bar to proceeding with an action which must be raised by the Court of its own motion (G. d. M. v Council and ESC, 108/86, ECR, EU:C:1987:426, paragraph 10, and Sniace v Commission, T-141/03, ECR, EU:T:2005:129, paragraph 22), the General Court should examine of its own motion the objection raised by the interveners (CIRFS and Others v Commission, paragraph 37 above, EU:C:1993:111, paragraph 23, and Neotype Techmashexport v Commission and Council, C-305/86 and C-160/87, ECR, EU:C:1990:295, paragraph 23)".

5. The parties are invited to take a position on the possible consequences to be drawn for the present action from the case-law arising from the judgment of 13 January 2017, Deza v ECHA (T-189/14, EU:T:2017:4), in so far as concerns, in particular, the scope of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, in the light of the considerations set out in paragraphs 117 to 120 of that judgment.

1.4. Commission reply to question 5

13. The Commission believes that the exception provided for in Article 4(2), first indent, of Regulation (EC) 1049/2001 applies to the circumstances contemplated in the present case, while that was not the case in the circumstances contemplated in the "Deza" judgement.

14. Indeed, in the "Deza" judgement, the General Court came to the conclusion that as to the information included in the requested documents (the chemical safety report and the analysis of alternatives), "*part of the information at issue was already publicly available given that it had already been published and (…) another part had to be made publicly available pursuant to Article 119 of*

Regulation No 1907/2006" (see the first complaint of the first plea in law, and in particular paragraph 111 – see also paragraphs 153-156 on the second and third pleas in law).

15. By contrast, in the present case, the technical standards have not been published, and have not to be made publicly available, as both the Regulation on the European standardisation and the sectoral legislation referring to technical standards provide for a publication of the sole reference of the standards[2]. This means that the legislator itself took into account that harmonised standards are intellectual creations that in order to be drafted, require intellectual contributions from numerous experts from industry, associations, public administrations, academia and societal organisations, that those experts need to be paid for their work, and that a copy of the harmonised standards cannot be disclosed as requested by the Applicant[3], without breaching the commercial interests of a natural or legal person, including intellectual property[4].

16. In that sense, the legislator prevents "*the information in question from being used for commercial purposes by the competitors and thus giving them a competitive advantage*" (see paragraph 120 of the "Deza" judgement).

6. The parties are invited to take a position on the applicants' argument, set out in paragraph 18 of the reply, regarding the relevance of issues of copyright arising under national law in the present proceedings.

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[2] See Article 10(6) of 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) and, for instance, Articles 13, 14(2), 19(3), point a), and 27 of 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).

[3] The Applicant explains in particular that its action for annulment is lodged « *in order to offer an improved access to all interested citizens by providing formats suitable for the visually impaired, universal access via smartphones or tablets as well as extensive internal crosslinking for a better reader's experience and many other features* » (Application, p. 2, paragraph 5).

[4] See on that regard the opinion of Advocate General Hogan delivered on 3 September 2020 in case C-637/19, *BY v. CX*, ECLI:EU:C:2020:650, paragraphs 52-56.

1.5. Commission reply to question 6

17. In paragraph 18 of the reply, the Applicants argue that the "*allegation that the intellectual property of an European Standardisation Organisation (ESO) is protected by national law*" can be dealt with in the present proceedings, in particular as the confirmatory decision of 22 January 2019 referred to the existence of copyrights to justify the use of the exception of Article 4(2), first indent, of Regulation (EC) 1049/2001 (protection of the commercial interests of a natural or legal person, including intellectual property).

18. The Commission's position on that regard is expressed under paragraphs 49-52 of its defence, and paragraphs 21-22 of its reply, where the Commission explained in particular the following:

"21. The Commission does not contest that the Applicant can challenge the application of the exception to the public access to documents when "disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property" (article 4(2), first indent, of the Regulation on the public access to documents).

22. What the Commission explained in its Defence is different: when the requested documents are, as in the present case, intellectual creations protected by a copyright, and where the copyright protection is also contractually guaranteed to the CEN and its members, the Applicant cannot allege that this copyright protection is not legally applicable without supporting evidence. The requested harmonised standards are not a simple compilation of public information; they are an intellectual creation. And the harmonised standards are licensed to the Commission under restrictive conditions: access is restricted to the sole internal use of the Commission and any external disclosure is not allowed".

2. QUESTION FOR THE COMMISSION

7. In paragraph 22 of the rejoinder, the Commission argues that copyright protection 'is also contractually guaranteed to the CEN and its members'.
The Commission is asked to provide the Court with relevant information relating to the existence and content of such contracts.

2.1. Commission reply to question 7

19. The Commission (representing the European Union) has entered into "Framework Partnership Agreements" (FPAs) with the CEN in particular. The subject matter

of the FPAs is to award grants to the CEN in order to finance in part its standardisation activity, in accordance with Articles 15 and 17 of the Regulation on the European standardisation. The FPAs include the following provision, applicable to the harmonised standards developed by the CEN and communicated to the Commission as a result of a financed action:

"*By derogation to Article II.8.3 of the General Conditions, without prejudice to Articles II.1, II.3, and II.8.1, the Partner grants the Union the right to use the results of an action for the following purposes, unless otherwise provided on a case by case basis in the Specific Agreements:*

a) Use for Union's institutional purposes, by making available the results to exclusively Commission staff for information purposes only through appropriate means of internal communication. This includes, for example, uploading the results in the intranet of the Commission and copying the results, in whole or in part, for the purpose of making policy reports and analysis. The results must not be disseminated in whole or in part outside the Commission and must not be used for commercial purposes;

b) Storage in paper, electronic or other format;

c) Archiving in line with the document management rules applicable to the Commission.

The Partner will warrant that the Union has the right to use any pre-existing industrial and intellectual property rights included in the results of an action for the same above purposes and under the same conditions applicable to the rights of use of the results of the action.

The Union shall ensure that a copyright notice is displayed in each page of the Partner results that is made available under any of the above modes of exploitation. The copyright notice shall read: "© - name of the Partner copyright owner (year). All rights reserved. Licensed to the European Union under restrictive conditions. Access is restricted to internal use of the European Commission and any external disclosure is prohibited".

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Agents for the Commission