6 February 2025

By Registered Post
Ms Elizabeth Swanwick
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Our Reference: AIE/02-20
Your Reference: OCE-100065-V5F5W9
Appellant's Reference: FLP/642/02744

Submission by National Standards Authority of Ireland in response to Appeal ref. OCE-100065-V5F5W9 pursuant to Article 12(3) AIE Regulations

Dear Ms Swanwick,

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We refer to your correspondence dated 29 November 2024, inviting NSAI to make an updated submission to the Commissioner for Environmental Information ("**the Commissioner**") in connection with the above appeal ("**the Appeal**"), which you advise has recently been reactivated following the judgment of the Court of Justice of the European Union ("**CJEU**") in C-588/21 P *PublicResource.Org and Right to Know v Commission & Ors* ("***Right to Know***"). We are grateful for the extension of time to 7 February 2025 for delivery by NSAI of any further submission in the Appeal.

Given the passage of time since the Appeal was initiated, NSAI considers the most efficient approach is for it to make a single submission to the OCEI, updated to take account of the judgment of the CJEU in ***Right to Know***. That submission is set out below.

1. Factual Background

1.1 This Appeal arises in the context of a request ("**the Request**") made by FP Logue LLP on behalf of the Appellants, Public.Resource.Org Inc and Right to Know CLG ("**the Requesters**"), under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (S.I. No. 133 of 2007, S.I. No. 662 of 2011, S.I. 615 of 2014 and S.I. No. 309 of 2018) ("**the AIE Regulations**") for access to the following standards ("**the Records**"):

I.S. EN ISO 14001:2004	Environmental management systems - Requirements with guidance for use (ISO 14001:2004)
I.S. EN ISO 14001:2015	Environmental management systems - Requirements with guidance for use (ISO 14001:2015)
I.S. EN ISO 14004:2010	Environmental management systems - General guidelines on principles, systems and support techniques (ISO 14004:2004)
I.S. EN ISO 14004:2016	Environmental management systems - General guidelines on implementation (ISO 14004:2016)
I.S. EN ISO 14015:2010	Environmental management - Environmental assessment of sites and organizations (EASO) (ISO 14015:2001)

I.S. EN ISO 14064-1:2012	Greenhouse gases - Part 1: Specification with guidance at the organization level for quantification and reporting of greenhouse gas emissions and removals (ISO 14064-1:2006)
I.S. EN ISO 14064-2:2012	Greenhouse gases - Part 2: Specification with guidance at the project level for quantification, monitoring and reporting of greenhouse gas emission reductions or removal enhancements (ISO 14064-2:2006)
I.S. EN ISO 14064-3:2012	Greenhouse gases - Part 3: Specification with guidance for the validation and verification of greenhouse gas assertions (ISO 14064-3:2006)
I.S. EN ISO 14065:2012	Greenhouse gases - Requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition
I.S. EN ISO 14065:2013	Greenhouse gases - Requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition (ISO 14065:2013)

1.2 On 13 December 2022, NSAI issued a decision ("**the Decision**") in response to the Request and on foot of the decision of the Commissioner for Environmental Information ("**the Commissioner**") dated 21 October 2022 (ref. OCE-100065-V5F5W9) which: (a) annulled a previous decision by NSAI to provide access to the Records by means of *in situ* examination free of charge subject to the acceptance of terms under Article 7(3)(a)(ii) AIE Regulations; and (b) directed NSAI to conduct a fresh decision-making process in respect of the Request.

1.3 The Decision was to **refuse** to grant access to the Records under the AIE Regulations in reliance on the ground for refusal provided for in Article 9(1)(d) AIE Regulations, having weighed the public interests in disclosure of the Records against the interests served by refusal.

1.4 On 22 December 2022, a request for an internal review of the Decision was made on behalf of the Requesters.

1.5 On 19 January 2023 NSAI informed the Requesters of the outcome of that internal review, which was to **affirm** the Decision pursuant to Article 11(2)(a) AIE Regulations ("**the Review Decision**").

1.6 For completeness, NSAI wishes to record that it has not been provided with any submissions made to the Commissioner on behalf of the Requesters / Appellants in connection with the Appeal, whether prior to or subsequent to the judgment of the CJEU in ***Right to Know***. In its previous submission dated 24 May 2021, NSAI requested to be furnished with a copy of those submissions and to have an opportunity to respond as necessary. NSAI respectfully repeats that request.

1.7 For the purposes of the Appeal only, copies of the Records have been made available to the Commissioner.

1.8 It is submitted that the Review Decision is correct and should be affirmed by the Commissioner pursuant to Article 12(5)(b) AIE Regulations, for the reasons set out below.

2. Issues arising on the Appeal

2.1 In circumstances where NSAI accepted in the Decision and the Review Decision that the Records:

(a) constitute information on the environment; and

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(b) constitute information held by a public authority

and no issue is taken by the Requesters with this, it is submitted that these issues do not arise for further consideration on the Appeal.

2.2 NSAI submits that the following issues arise on the Appeal:

(a) the burden of proof and the general obligation to make environmental information available, subject to statute and the AIE Regulations

(b) whether copyright exists in the Records

(c) whether intellectual property rights would be adversely affected by disclosure of the Records

(d) whether the public interest which would be served by disclosure of the Records is outweighed by the interests which would be served by refusal

(e) the very particular features of the standards and legal framework at issue in ***Right to Know***, as distinguished from the Records and legal framework at issue on the within appeal.

3. Burden of Proof

General obligation to make environmental information available

3.1 NSAI notes the Commissioner's observation that the AIE Regulations do not explicitly address where the burden of proof lies on an appeal such as this.

3.2 NSAI accepts for the purposes of the Appeal that it is for NSAI, as a public authority refusing to make environmental information available, to justify that refusal.

3.3 As such, the Review Decision correctly acknowledged the general obligation under Article 7(1) AIE Regulations on any "*public authority … notwithstanding any other statutory provision and subject only to these Regulations [to] make available to [an] applicant any environmental information, the subject of [a] request, held by, or for, the public authority*".

4. Records are entitled to copyright protection

4.1 Article 9 AIE Regulations sets out certain discretionary grounds for refusal of access to environmental information, stating:

> "*A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect –*
>
> *… (d) intellectual property rights.*"

4.2 NSAI accepts that, pursuant to Article 10(4) AIE Regulations, the grounds for refusing requests for environmental information under the AIE Regulations are to be interpreted restrictively:

> "*The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.*"

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4.3 The definition of "*intellectual property rights*", interpreted according to its ordinary meaning, clearly encompasses copyrighted material.

4.4 This is reinforced by the *European Communities (Access to Information on the Environment) – Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) ("**the Guidelines**") which confirm that the reference to "*intellectual property rights*" in Article 9(1)(d) AIE Regulations "*would be likely to include copyright protected material*".[1]

4.5 NSAI submits that the Records should properly be considered copyrighted material, for the following reasons.

4.6 First, the Records were drafted by the International Standards Organisation ("**ISO**"), before being adopted in Europe by the European Committee for Standardization ("**CEN**") under mandates issued by the European Commission. Copyright in the Records has consistently been claimed by their authors. Both ISO and CEN were consulted regarding the Request,[2] and NSAI can confirm that the Records are subject to copyright claims asserted by their authors, who are opposed to the concept of free disclosure of the Records without copyright protection attached.

4.7 Both ISO and CEN ensure that members, including national standardisation bodies such as NSAI who adopt and distribute harmonised standards on a national basis, do so under licence and on the express condition that they act appropriately to protect the copyright attaching to those standards. ISO and CEN have promulgated internal policies setting out how the copyright in standards, including the Records, constitutes their intellectual property and is of demonstrable economic value. ISO and CEN licence this intellectual property to NSAI for publication and sale subject to terms and conditions which are reflected in NSAI's Copyright Terms & Conditions which apply safeguards to the access to and use of copyrighted harmonised standards.[3]

4.8 CEN and CENELEC, following the judgment of the Court of Justice of the EU ("**CJEU**") in ***James Elliott Construction***,[4] issued a statement to the effect that their copyright and distribution policies regarding the protection of harmonised standards implemented by national standardisation bodies remain unchanged by virtue of that judgment.[5]

4.9 That being said, the assertion of a claim of copyright is only the start of the analysis and the view of an author is not itself dispositive of the merits of a claim of copyright. An objective analysis of the nature and content of the Records is required with a view to assessing whether there are intellectual property rights inhering therein which would stand to be adversely affected by disclosure of the Records.

4.10 NSAI submits that the assessment in that regard contained in the Review Decision is correct. An objective examination of the text of the Records reveals the free and creative choices involved in their composition. The authors of the Records clearly drafted them in a manner sufficiently creative as to constitute a reflection of their personality and an expression of their free and creative choices. From the length of the texts alone, it is clear that several choices must have been made by the authors, including in relation to the structuring of the information contained therein and how it was to be presented. The Records are thus an original work of authorship.

[1] Guidelines, § 12.5
[2] Copies of the letters of ISO and CEN were attached to the Decision as Annexes 2 and 3 thereto respectively.
[3] A copy of those Terms & Conditions was attached to the Decision as Annex 1 thereto.
[4] Case C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited* EU:C:2016:821 ("***James Elliott Construction***")
[5] *CEN and CENELEC position on the consequences of the judgment of the European Court of Justice on James Elliott Construction Limited v Irish Asphalt Limited, available at:* https://opil.ouplaw.com/view/10.1093/law-oxio/e246.013.1/law-oxio-e246-document-1.pdf

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4.11 NSAI's conclusion in this respect is strongly supported by the recent judgment of the General Court in ***Right to Know***, that there was "*no support at all*" for the argument that CEN, "*when drafting the requested harmonised standards, does not exercise free and creative choices*".[6] The Court expressly rejected the argument made in that case that "*the requested standards 'merely consist of lists of technical characteristics and/or test methods and therefore there is no genuine creative choice available to the drafter which could be considered to be the expression of the author's personality or his or her own intellectual creation'*".

4.12 The General Court further rejected the argument that "*there is also no room for any free or creative choices with respect to the design of [those harmonised standards], for example, regarding layout, structure, language, or any other of their key features [because] these aspects of standard-setting are governed by [their] own sets of standards which heavily restrict any potential room for creativity [by] standard-setting bodies.*"[7] The General Court considered these arguments were made at a level of assertion, without substantiation, in particular addressing "*how the restrictions on creativity which are imposed by the standardisation legislation are such that those harmonised standards are not capable of reaching the threshold of originality required at EU level.*"

4.13 The fact that ***Right to Know*** concerned different harmonised standards to those at issue in the within appeal does not affect the relevance of the General Court's unequivocal findings regarding the capacity of harmonised standards to enjoy copyright protection. The judgment is relevant insofar as it constitutes a clear rejection of the argument that, simply because the content of standards is to some degree directed by the legislation which they support, standards cannot be sufficiently creative to merit copyright protection. In their submissions made prior to the Review Decision, the Requesters were unable to point to any specific difference between the Records and the records in ***Right to Know*** which should mean that the Records should be treated differently as regards their capacity to enjoy copyright protection.

4.14 The same observation applies to the fact that the records requested in ***Right to Know*** were requested under legislation other than the AIE Regulations. The findings of the General Court in ***Right to Know*** regarding the capacity of harmonised standards to enjoy copyright protection did not depend on the legislation under which access was requested. A work is either sufficiently original to merit copyright protection, or it is not. The entitlement of a work to enjoy copyright does not stand to be affected by the legislation under which access to it might subsequently be requested.

4.15 While the Requesters have repeatedly relied on the judgment in ***James Elliott Construction*** to support an argument that the Records are not protected by copyright, NSAI submits that: (a) ***James Elliott*** does not actually address the question whether harmonised standards can be properly considered copyrighted material; (b) it has since been confirmed in ***Right to Know*** that harmonised standards can enjoy copyright.

4.16 It bears emphasising that the Records are harmonised standards which are *voluntary* instruments containing technical specifications, commonly developed by European and international standardisation bodies (being private entities who work with national standardisation bodies and industry experts and representatives to produce those technical specifications). In line with the provisions of the Standardisation Regulation, harmonised standards are typically formulated following a request from the European Commission to the recognised European Standardisation Bodies (of which CEN is one).[8]

[6] Case T-185/19 *Public.Resource.Org, Inc. and Right to Know CLG v European Commission* EU:T:2021:445, §58.
[7] *Id*, §59
[8] Regulation (EU) No.1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC,

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In the case of the Records, the documents were not even the subject of an initial request from the European Commission, but were developed at global level by ISO some time before they were ultimately adopted in Europe by CEN under mandates issued by the European Commission. The Records themselves were not composed or created by any EU legislative body. Having been adopted by CEN, they were thereafter transposed by NSAI as an identical national standard.

4.17 Nothing in the judgment of the CJEU in ***Right to Know***, on appeal from the General Court,[9] holds that copyright cannot exist in harmonised standards such as the Records or otherwise calls into question the copyrightability of such standards. It is true that the CJEU confirmed that "*a harmonised standard, adopted on the basis of a directive and the references to which have been published in the Official Journal of the European Union, forms part of EU law owing to its legal effects*".[10] It is also true that, on the facts and applicable law in ***Right to Know***, the CJEU found an overriding public interest within the meaning of Article 4(2) Regulation 1049/2001, justifying disclosure of the records requested in that case. First, there is a distinction between the Records and the harmonised standards at issue in ***Right to Know***, in that the Records were originally formulated at the global level by ISO entirely independently, and without having been requested by European Commission. Moreover, the question as to whether the public interest served by disclosure of the Records is outweighed by the interests served by refusal is legally distinct from the logically prior question as to whether copyright protection can attach to harmonised standards such as the Records in the first place. The question of weighing the public interest served by disclosure and the interest served by refusal, as required by Article 10(3) AIE Regulations, is addressed in Section 6 below. For the purposes of this Section 4 and the next Section 5, NSAI emphasises that the CJEU left untouched the finding of the General Court that harmonised standards can indeed attract copyright protection.

4.18 Even if the Records are considered to form part of EU law, the idea that there cannot be copyright in law or legislation is unknown to both EU and Irish law. Article 2(4) Berne Convention (applicable to the EU by means of Article 4 WIPO Copyright Treaty[11]) leaves it to the state parties thereto to determine the scope of protection for official texts in the areas of legislation, and the Copyright Directive 2001/29/EC provides no exemptions for laws or official works. In Ireland, there is copyright protection for legislation.[12] It would be surprising if harmonised standards cannot enjoy copyright protection as a matter of Irish law, notwithstanding that enactments of the Oireachtas do.

4.19 Neither can the Supreme Court judgment in ***James Elliott*** properly be interpreted to mean that there is no copyright attaching to the Records. The reference by the Supreme Court to harmonised standards "*form[ing] … part of EU law*"[13] was made in the context of the Supreme Court deciding whether it had jurisdiction, on a reference for a preliminary ruling, to interpret harmonised standards in that limited context. Like the CJEU in ***Right to Know***, the Supreme Court in ***James Elliott*** did not reject the entitlement of harmonised standards to enjoy copyright.

4.20 Article 7(2)(a) AIE Directive[14] is not relevant here in that, while it requires Member States to take measures to ensure public authorities organise certain environmental information "*with a view to its active and systematic dissemination to the public*", this relates to *inter*

94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (Official Journal L 316, 14 November 2012) (the "**Standardisation Regulation**").

[9] C-588/21 P *PublicResource.Org and Right to Know v Commission & Ors*, EU:C:2024:201

[10] *Id,* §70

[11] WIPO Copyright Treaty of 20 December 1996.

[12] Sections 192-195 Copyright and Related Rights Act 2000

[13] *James Elliott Construction Limited v Irish Asphalt Limited* [2014] IESC 74

[14] Directive 2003/4 on Public Access to Environmental Information [2003] OJ L041/26 (the "**AIE Directive**")

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alia "*texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it*…." The Records were not composed or created by any legislative body and are not "*texts of … legislation, on the environment or relating to it*…."[15]

4.21 In conclusion on this issue, NSAI submits that the Records are sufficiently original as to merit copyright protection. The Requesters are incorrect in their submission that the Records form part of Irish or EU law such that ISO and CEN should be prevented from enjoying copyright in those harmonised standards.

5. Disclosure of the Records would adversely affect intellectual property rights

5.1 In circumstances where the Records are the copyright of ISO and CEN, these intellectual property rights, which protect the income stream to both organisations, would self-evidently be "*adversely affected*" in the event that the Request were to be granted. The Records would become accessible in principle to the world at large, through the possibility of access via the AIE Regulations. The commercial interests of ISO and CEN, who have stipulated that fees must be charged by NSAI for accessing standards authored by ISO and CEN as part of NSAI's entitlement to adopt national versions of harmonised standards and distribute same nationally, would inevitably be damaged by the grant of such access.

5.2 The evidence is that the sale and licensing of standards constitutes a very important part of the business models of ISO and CEN, and the revenues generated from those business activities are extremely substantial.[16] The authors' business models would seriously be undermined in the event that copies of the Records were to be obtainable from NSAI under the AIE Regulations free of copyright protection, as it must be considered extremely unlikely that economic operators and members of the public would be willing to pay to purchase such copies where they are accessible for free under the AIE Regulations. The revenues ordinarily obtained from the commercial sales of standards to industry operators, and which contribute to the funding of sustainable standardisation activities, would no longer be recoverable. This would threaten ISO and CEN's commercial interests, and threaten to undermine the standardisation process generally.

5.3 NSAI notes that the Requesters previously relied upon s.76 Copyright and Related Rights Act 2000 ("**CRRA 2000**") which provides that it is "*not an infringement of copyright to undertake an act under statutory authority as is the case here.*" However, the issue to be considered is not simply whether granting disclosure of the Records would amount to an infringement of the copyright in the Records (being the issue addressed by s.76 CRRA 2000). The issue under Article 9(1)(d) AIE Regulations is whether disclosure of the information "*would adversely affect … intellectual property rights*". The fact that NSAI might have a statutory defence under s.76 CRRA 2000 to any action for breach of copyright by ISO or CEN does not logically entail the proposition that NSAI cannot take the view that disclosure of the Records under the AIE Regulations would adversely affect the copyright contained therein.

5.4 NSAI submits that the Requesters' confirmation that any use by them of the Records (if disclosed) would be confined to lawful acts does not mean that there would not be adverse effects on intellectual property rights through disclosure of the Records. If the Request were to be acceded to, the Records would in principle become available to the world at large, and the protection of intellectual property rights could not be relied upon as against any requesting party.

5.5 Neither does the potential availability of legal remedies for breach of copyright – also relied upon by the Requesters – mean that intellectual property rights would not be

[15] Article 7(2)(a) AIE Directive

[16] The Commission Staff Working Paper, SEC (2011) 671 final of 1 June 2011 estimated the costs of creating standards within the European standardisation organisations at €3bn in 2009, 93-95% of which costs are borne by industry, predominantly through revenues from the sale or licensing of standards.

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adversely affected by disclosure of the Records. Such remedies have always been available in principle for breach of copyright, and it cannot have been the intention of the legislature that the existence of such redress would mean Article 9(1)(d) AIE Regulations cannot be relied upon to justify discretionary refusal of disclosure. On the contrary, the Guidelines specifically state that the reference to "*intellectual property rights*" in Article 9(1)(d) AIE Regulations "*would be likely to include copyright protected material*".[17] This ministerial guidance strongly supports the conclusion in the Review Decision that Article 9(1)(d) AIE Regulations was properly engaged in this case.

5.6 NSAI submits that it is not necessary to quantify precisely the income or revenue which would risk being lost to the copyright-holders through disclosure of the Records. Nothing in Article 9(1)(d) AIE Regulations establishes a specific minimum threshold of economic loss – whether in the context of the income stream of a copyright-holder or otherwise – which must be exceeded before Article 9(1)(d) AIE Regulations can justify refusal of disclosure (although NSAI accepts that any adverse effect on intellectual property rights requires to be weighed against the public interest in release of the Records (addressed in Section 6 below)).

5.7 The Requesters' argument prior to the Review Decision was that, because ISO and CEN are well-resourced organisations, "*in the context of the overall streams of the holders of the alleged copyrights*" the "*loss of revenue would be negligible*" if the copyright in the Records were to be set aside in favour of disclosure under the AIE Regulations. This amounts to an argument that, if an author has produced two original works of authorship 'A' and 'B', and copyright is violated in respect of work 'A', the revenue stream continuing to flow from work 'B' can be taken into account to arrive at a conclusion that the separate intellectual property rights inhering in work 'A' have *not been adversely affected*. It is an illogical proposition which ignores the fact that intellectual property rights are recognised according to the qualities of individual works of authorship, not by reference to the identity of the author.

5.8 Without prejudice to that submission, it is also a proposition which is unsupported by the legislative language of the AIE Regulations. NSAI submits that the AIE Regulations require regard to be had to the implications of a grant of access to the Records for copyright in harmonised standards containing environmental information *generally*: the relevant analysis is not confined to considering the impact on intellectual property rights which would arise if the Records (and *only* the Records) were released to the Requesters (and *only* the Requesters). The reference in Article 9(1)(d) AIE Regulation is in general terms to the adverse effect on "*rights*" (plural) of a grant of access, without further qualification.

5.9 If the Requesters were to be entitled to access the Records via the AIE Regulations then all copyrighted standards (containing environmental information) would, in principle, be immediately available to the world at large via the AIE Regulations. The adverse effect on intellectual property rights of standardisation organisations such as ISO and CEN must be viewed by reference to the loss of income or revenue on *that* scale, not by reference to the loss occasioned by requests in individual cases. In NSAI's submission, there is nothing in the text of Article 9(1)(d) AIE Regulations or elsewhere to support the Requesters' previous contention that the implications of disclosure can only be considered in the context of the impact on the intellectual property rights *attaching to the specific documents requested*.

5.10 As noted above, Article 9(1)(d) AIE Regulations refers to "*intellectual property rights*", without further qualification. It is not limited to (for example) "*the intellectual property rights inhering in the documentation requested*". Given the broad definition legislated for in the AIE Regulations, NSAI was entitled to have regard in the Review Decision to the broad impact on copyright attaching to harmonised standards (containing environmental information) which would be inevitably caused by disclosure of the Records, including that copyright in such standards generally could not henceforth be relied upon to refuse

[17] Guidelines, § 12.5

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disclosure under the AIE Regulations. NSAI submits that, on the Appeal, the Commissioner should similarly have regard to this broad impact on copyright.

5.11 Contrary to a previous submission made by the Requesters, the Review Decision does not mean that the standardisation system "*systematically takes precedence over the right of access*" to standards. A request for access under the AIE Regulations to a harmonised standard would always, as in the present case, fall to be determined based upon a consideration of the nature and content of the records. The fact that many, most or even all harmonised standards might be sufficiently original works as to legitimately be copyrighted, thereby engaging Article 9(1)(d) AIE Regulations, does not mean that the right of access under the AIE Regulations has thereby been "*systematically*" displaced. There is no numerical limit provided for in the AIE Regulations, beyond which refusal of disclosure becomes "*systematic*" and therefore suddenly unlawful. If the Requesters have an objection to the breadth or scope of Article 9(1)(d) AIE Regulations, that is a problem which the Requesters have with the secondary legislation, and is not a matter for the Commissioner to resolve on the Appeal.

5.12 While the Requesters also previously submitted that "*the point of copyright is to allow authors to make their works available*" and therefore "*no impact on copyright*" arises from disclosure, this is not a sustainable proposition. ISO and CEN do make their works available. Harmonised standards are generally available to be purchased through the NSAI webstore and copies are available to be viewed at NSAI Headquarters, subject to terms and conditions designed to protect copyright.

5.13 The question at issue on the within appeal is whether the Records should also be made available *separately*, under the AIE Regulations. NSAI submits it is clear that making available a work through access via the AIE Regulations *simpliciter* – rather than making available that work through purchase or *in situ* examination subject to copyright terms, thereby protecting and vindicating copyright – would have a serious adverse impact on copyright interests.

6. Public interest served by disclosure outweighed by the interest – including public interest – served by refusal

6.1 Article 10(3) AIE Regulations provides:

> "*The public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.*"

6.2 NSAI submits that the public interest served by refusal outweighs the public interest served by disclosure in this case, and the Review Decision was correct so to find, for the following reasons.

6.3 NSAI correctly proceeded on the basis that, having identified the interest which would be served by refusal of the Request – i.e. avoiding the adverse effect on intellectual property rights referred to above – it was thereafter necessary under Article 10(3) to consider the public interest served by disclosure of the Records, and to weigh the various interests at stake before coming to a conclusion as to whether the Request should be granted.

6.4 NSAI also correctly applied Article 10(4) AIE Regulations in this context, to the effect that the starting point for analysis of the competing interests is a presumption in favour of disclosure. Article 10(4) provides that the "*grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.*" In interpreting Article 10(4), the Guidelines state that:

> "*[a]t the very least, this should be construed as obliging public authorities to use grounds for refusal sparingly (and with due regard to the public interest that*

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would be served by disclosure). Essentially, in considering a request/application, public authorities should start from a position of a presumption in favour of disclosure of information."

6.5 NSAI acknowledges the public interest in the disclosure of environmental information. The purpose of the right of access is reflected in Recital (1) AIE Directive, which states:

> "*Increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.*"

6.6 NSAI similarly acknowledges the public interest underpinning the accessibility of harmonised standards. As confirmed by the CJEU in ***Right to Know***, harmonised standards adopted on the basis of EU legislation "*may be binding on the public generally*" where published in the Official Journal,[18] are the product of a European standardisation system in which the Commission plays a "*central role*",[19] and "*products which comply with those standards benefit … from a presumption of conformity with the essential requirements relating to them laid down in the relevant EU harmonisation legislation*",[20] in circumstances where it may be "*difficult, or even impossible, for economic operators to have recourse to a procedure other than that of compliance with such standards….*"[21] In that sense, they form "*part of EU law*".[22]

6.7 NSAI acknowledges that harmonised standards generally can play a significant role in terms of ensuring compliance with EU legislation of processes, products and/or services placed on the European single market and are a fundamental feature of the so-called 'New Approach' (as revised under the 'New Legal Framework'), whereby standards offer a means of demonstrating compliance with essential requirements set out in legislation. Transparency and accountability in the formulation and promulgation of harmonised standards is thus an important public interest. Given the manner in which they may be used as part of the New Legal Framework, there is a public interest in the accuracy, reliability and accessibility of harmonised standards, and in being readily able to subject their content to scrutiny. In the Review Decision NSAI correctly identified these and other aspects of the public interest in disclosure, such as the interest in individuals being able to enhance their understanding of the technical specifications used in harmonised standards and the means of certification of compliance with applicable legislation, especially where the harmonised standards contain environmental information.

6.8 The Review Decision carefully considered the nature of the Records and the standards contained therein, which relate to such matters as *inter alia* environmental management and environmental management systems, quantification and reporting of greenhouse gas emissions and removals, reductions, removal enhancements, validation and verification of greenhouse gas assertions. The Review Decision acknowledged that the Records constituted measures directed towards the protection of elements of the environment.

6.9 However, NSAI was correct to accord strong weight to the protection of intellectual property rights attaching to harmonised standards. This is because protection of such intellectual property is essential to the furtherance and sustainability of the standardisation development processes of ISO and CEN. NSAI was correct to recognise that this interest is not simply concerned with the incentivisation and protection of the operations of third parties engaged in the creation of original copyrightable material – which is itself worthy of protection and represents a fundamental interest underpinning copyright law generally – but is also concerned with the protection into the future of the

[18] *Id*, §71
[19] *Id*, §§72-73
[20] *Id*, §74
[21] *Id*, §75
[22] C-588/21 P *PublicResource.Org and Right to Know v Commission & Ors*, EU:C:2024:201, §70

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standardisation regime itself. NSAI submits that the balancing of interests here should take account not only of the degree and likelihood of harm to copyright caused by release of *the Records*, but also the adverse implications for intellectual property rights inhering in other similar standards and the standardisation system generally. As already set out above, Article 9(1)(d) AIE Regulations refers to "*intellectual property rights*" in plural and general terms, and is not confined solely to the intellectual property rights attaching to the individual Records.

6.10 As explained in the Review Decision, the voluntary use of standards is well established and has long been promoted at both international[23] and at EU[24] level. The standardisation regime is recognised as serving to produce economic efficiencies, reduce costs, ensure safety development, enhance competition and facilitate the acceptance of innovations.

6.11 Again, the evidence is that revenue generation through the sale and licensing of standards is a key means of financing an independent, financially sustainable standards development process, which is itself an integral part of the single market.[25] There is thus a strong public interest in the protection of intellectual property created by the generation of standards, in circumstances where the European standardisation system promotes the free movement of goods while guaranteeing an equivalent minimum level of safety in all Member States.

6.12 The Standardisation Regulation itself explicitly recognises the importance of the financial viability of the standardisation process, and states in Recital (9):

> "*[i]n order to ensure the effectiveness of standards and standardisation as policy tools for the Union, it is necessary to have an effective and efficient standardisation system which provides a flexible and transparent platform for consensus building between all participants and which is financially viable.*"[26]

6.13 The Standardisation Regulation expressly provides for a system of publication which is limited to the references of harmonised standards only and which allows for paid access to those standards for those wishing to benefit from the presumption of conformity attached to them. NSAI submits that, in circumstances where the financial viability of the EU standardisation regime is has been specifically recognised and protected by the EU legislature, this public interest should be afforded considerable weight when it comes to assessing whether the revenues obtained by the commercial sales of standards – which contribute to the funding of sustainable standardisation activity – should be required to risk diminution or elimination through the grant of access to such standards under the AIE Regulations (where the relevant standards contain environmental information).

6.14 NSAI's continuing participation in the standardisation development processes of ISO and CEN is also protected by a refusal of the Request, thereby protecting national economic and trade-related interests on a global scale.

6.15 In this context, it is noteworthy that ISO has confirmed that its copyright policy "*clearly stipulates that ISO and its members are not to make ISO Standards available free of charge*" and that members must "*protect ISO's … intellectual property in their country.*" The ISO Code of Ethics "*reinforces ISO members' adherence to these conditions for the reproduction and distribution of ISO Standards.*" ISO has stated that failing to observe copyright obligations "*could result in serious consequences to NSAI*", including

[23] WTO Agreement on Technical Barriers to Trade ("**TBT**"), Annex 1
[24] Recital (1) Regulation (EU) No. 1025/2012 states: "*The primary objective of standardisation is the definition of voluntary technical or quality specifications.*"
[25] As already noted above, the costs of creating standards within the European standardisation organisations were estimated at €3bn in 2009: Commission Staff Working Paper, SEC (2011) 671 final of 1 June 2011, Impact Assessment, page 8. Approximately 93-95% of those costs are borne by industry, predominantly through revenues from the sale or licensing of standards, followed by national governments (3-5%) and European Commission/EFTA contributions (around 2%).
[26] Recital (9) Standardisation Regulation.

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"*suspension of NSAI's membership in ISO, the consequence being that NSAI would no longer be permitted to participate in the ISO standards development process, nor be allowed to use ISO standards for national adoption, reproduction or distribution.*" This could "*impact Ireland's ability to comply with provisions of the WTO [TBT]*" as, were NSAI to be excluded from ISO, it would be extremely difficult to adhere to the provisions of the TBT which requires members not to take "*measures which have the effect of, directly or indirectly, requiring or encouraging … standardizing bodies to act in a manner inconsistent with the Code of Good Practice*" governing standards development.[27]

6.16 CEN has similarly confirmed that "*the distribution of CEN and CENELEC publications is subject to Exploitation Agreements on copyright and trademarks signed between CEN and CENELEC and their national members, as outlined in the provisions of CEN-CENELEC Guide 10*" and "*should NSAI agree to provide free access to the CEN and CENELEC copyrighted publications …it will imply a direct violation of Article 5.1 of the CEN-CENELEC Guide 10 and Article 4.3 of the Exploitation Agreements*". CEN has stated that failing to observe copyright obligations would be "*regarded as a breach of CEN and CENELEC rules with direct consequences for NSAI membership*" including "*suspension*". Loss of membership would mean that NSAI "*will no longer have access to any CEN or CENELEC European standards, and consequently no rights to distribute them*" and "*Irish experts will not be able to participate in CEN and CENELEC Technical Committees and Working Groups*". This "*would ultimately have serious consequences for [Ireland's] economy and trade as standardisation work greatly contributes to the removal of technical barriers to trade, enhances the development of sustainable industry and opens the door to innovation.*"[28]

6.17 NSAI was correct to accord significant weight to the risk of serious damage to key national economic interests, connected to Ireland's participation in the standardisation development processes of ISO and CEN, which would be occasioned by granting access to the Records under the AIE Regulations.

6.18 Finally, the public interest in transparency, accountability, reliability and accessibility of harmonised standards is already adequately served by the reality that harmonised standards – including the Records – remain available for purchase or *in situ* examination (with copyright protections attached) and so can be accessed and/or consulted through those means. There can be no suggestion that there is an absence of transparency or accountability or accuracy or accessibility attaching to harmonised standards in Ireland. The question on the Appeal is whether the Records must *also* be made available under the AIE Regulations, *in addition to* the methods allowed for by their authors. There is no basis in the AIE Regulations for contending that that must be the case.

7. C-588/21 P *Right to Know*

7.1 For the avoidance of doubt, the above submissions are not undermined by the recent judgment of the CJEU in ***Right to Know***. The matters under consideration by the CJEU in ***Right to Know*** are distinguishable from those at issue here in two key respects, by virtue of:

(a) the **origins** of the harmonised standards the subject-matter of consideration in ***Right to Know***;

(b) the **legal framework** under consideration in ***Right to Know***, i.e. a request made to the Commission under Regulation (EC) No 1049/2001 for copies of harmonised standards held by the Commission.

Different origins of standards at issue

[27] ISO letter, Annex 2 to the Decision
[28] CEN letter, Annex 3 to the Decision

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7.2 Unlike the standards at issue in ***Right to Know***, the Records were originally formulated exclusively at the international level by an international body (i.e. ISO), completely independently and in the absence of any request having been initiated by the Commission or any support having been provided by the Commission for their development. Unlike the standards at issue in ***Right to Know***, therefore, the Records are not standards which originated within the European regulatory framework. It was only subsequently, pursuant to Regulation (EC) No 765/2008, that the Records were adopted into European regulatory framework.[29]

7.3 By contrast, the four harmonised standards at issue in ***Right to Know*** supported the Toy Safety Directive[30] and the REACH Regulation,[31] and had been "*adopted by CEN, in accordance with Regulation No 1025/2012*".[32] Their development had been supported by the Commission as part of the legislative decision-making process. The CJEU placed considerable emphasis on "*the procedure for drawing up harmonised standards*", noting that "*even if the development of those standards is entrusted to a body governed by private law, only the Commission is empowered to request that a harmonised standard be developed in order to implement a directive or a regulation.*"[33] The CJEU observed that the "*development process is supervised by the Commission, which also provides financing in accordance with Article 15*" of Regulation No 1025/2012.

7.4 In other words, even if the standards had been drafted by a private entity, the Commission started, financed and supervised that process, determining content requirements and deadlines, and ultimately deciding on the publication of their references in the Official Journal. By contrast, the Records were not originally requested by, or developed under the supervision of, the Commission. They were formulated by ISO long before they were ever brought into the European regulatory framework as a means of demonstrating presumptive conformity with Regulation (EC) No 765/2008.

Different legal framework

7.5 Furthermore, it is important to emphasise that the **legislative framework** at issue in ***Right to Know*** was Regulation (EC) No 1049/2001, governing the scope and extent of public access to European Parliament, Council and Commission documents. ***Right to Know*** did not concern a request made to a public authority (such as a national standardisation body) for access to records containing environmental information under the AIE Directive or Regulations. ***Right to Know*** thus does not govern the manner in which requests made of public bodies for records containing environmental information are to be addressed.

7.6 The specific provisions of Regulation (EC) No 1049/2001 establish the concept of an "*overriding public interest*" which, in an appropriate case, may override the various exceptions to the principle of disclosure which are recognised by the Regulation (such as "*where disclosure would undermine the protection of … intellectual property*": Article 4(2)). It is clear that a uniquely strong weight is attached to the concept of the public interest in the specific context of Regulation (EC) No 1049/2001.

7.7 In the first place, Recital (1) refers to the "*concept of openness*" as being "*enshrine[d]*" in Article 1 TEU, pursuant to which "*decisions are taken as openly as possible and as closely as possible to the citizen.*" Recital (2) describes "*openness*" as "*guarantee[ing]*

[29] Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93.
[30] Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys
[31] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency,
[32] *Right to Know*, §18
[33] *Right to Know*, §§72-73

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that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system".

7.8 Importantly, Recital (3) explains that Regulation (EC) No 1049/2001 was considered necessary "*to introduce greater transparency into the work of the Union institutions*" and to improve "*the transparency of the decision-making process*". Recital (4) explains that the "*purpose of this Regulation is to give the fullest possible effect to the right of public access to documents*…." Recital (6) states that documents "*in cases where the institutions are acting in their legislative capacity … should be made directly accessible to the greatest possible extent."* Recital (10) explains that access to documents should be granted "*not only to documents drawn up by the institutions, but also to documents received by them."*

7.9 Article 1 confirms that the purpose of Regulation (EC) No 1049/2001 is to govern the right of access to documents of the European Parliament, Council and Commission "*in such a way as to ensure the widest possible access to documents*…." Article 2(1) provides that the right of access to documents of these institutions is a right of Union citizens and any natural or legal person residing or having its registered office in a Member State. Article 2(3) confirms that the Regulation applies "*to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union."*

7.10 Article 4(2) provides that access "*shall*" be refused where "*disclosure would undermine the protection of commercial interests of: a natural or legal person, including intellectual property, … unless there is an overriding public interest in disclosure."*

7.11 Article 4(3) provides that "*[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."*

7.12 The remaining articles of Regulation (EC) No 1049/2001 deal with *inter alia* the manner in which access requests are to be made and processed, how access is to be provided in practice, and ancillary matters.

7.13 All of the above makes clear that the essential objective of Regulation (EC) No 1049/2001 is to "*ensure the widest possible access to documents*…." (Article 1) held by the EU legislative institutions (such as the Commission), having regard to their unique legislative decision-making roles. Regulation (EC) No 1049/2001 thus recognises a very particular statutory public interest as arising where the *Commission* receives a request under the Regulation for documents held by it. Given the unique statutory context of Regulation (EC) No 1049/2001, there is no basis for assuming or contending that this public interest is necessarily the same as that which arises under the AIE Regulations, where access to records containing environmental information is requested of a public authority. The CJEU expressly located its conclusions as to the existence of an overriding public interest favouring disclosure of the requested harmonised standards in ***Right to Know*** in the very specific statutory context of Regulation (EC) No 1049/2001:

> "*To that end, a right of access to documents is ensured under the first subparagraph of Article 15(3) TFEU and enshrined in Article 42 of the Charter, a right which has been implemented, inter alia, by Regulation No 1049/2001, Article 2(3) of which provides that it applies to all documents held by the Parliament, the Council or the Commission (see, to that effect, judgment of 22 February 2022,* Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101, paragraph 36).*

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In those circumstances, it must be held that there is an overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, justifying the disclosure of the requested harmonised standards."[34]

7.14 As can be seen, the conclusion of the CJEU to the effect that there was an "*overriding public interest*" in disclosure by the Commission of the harmonised standards requested of it in ***Right to Know*** was firmly rooted in Article 4(2) Regulation No 1049/2001, and did not establish any principle of wider application to national public authorities operating within individual Member States. Necessarily, the CJEU had nothing to say in ***Right to Know*** about the provisions of the AIE Directive or the manner in which the public interest should be weighed in the case of a request made under AIE legislation. The present appeal is not concerned with whether the Records should be made available on the basis of a request made *to the Commission* for access to the Records, relying on the right of access to documents held *by the Commission* as ensured by Article 15(3) TFEU, Article 42 CFR or implemented in Article 2(3) of Regulation No 1049/2001. The latter is an issue which simply does not arise for consideration on this appeal. To adopt the language of Recitals (1) and (2) of Regulation No 1049/2001, NSAI did not "*take*" any "*decision*", the "*openness*" of which enables "*citizens to participate more closely in the decision-making process*".

7.15 While there is an acknowledged public interest in disclosure of the Records under the AIE Regulations, therefore – indeed a presumption in favour of disclosure as noted above – that is not to be equated with the public interest which falls to be weighed under Regulation (EC) No 1049/2001: the two EU statutory regimes are quite distinct. NSAI is not obliged to weigh the public interest in open access to harmonised standards as if it were somehow in the position of the Commission, holding documents received by the Commission and the development of which was requested and/or supported by the Commission as part of the legislative decision-making process.

7.16 Furthermore, as noted above, NSAI stands to be suspended as a member of ISO and CEN/CENELEC if it were to grant access to the Records, whereas this is simply not a consequence arising for the Commission if a request were to be made of it (and granted by it) for access to the Records under Regulation (EC) No 1049/2001.

Annulment proceedings

7.17 Finally, it is important to note that the manner in which the Commission has elected to implement the judgment in ***Right to Know*** is currently the subject of litigation before the CJEU.

7.18 Following delivery of judgment in ***Right to Know***, the Commission began responding to requests made of it under Regulation (EC) No 1049/2001 for access to harmonised standards in the following manner:

a. in the case of exclusively 'homegrown' European harmonised standards (i.e. formulated in response to a request from the Commission, in order to support EU legislation), access has been granted by means of these standards being uploaded onto a 'read-only' access platform maintained by national members of CEN / CENELEC;

b. in the case of ISO/IEC standards formulated at the international level (i.e. in the absence of any such request from the Commission), these are not uploaded to the 'read-only' access platform and the Commission has adopted a practice of providing individual requesters with electronic links to standards on a case-by-case basis.

Both ISO and IEC have objected to the Commission's practice of granting access to under Regulation (EC) No 1049/2004 to ISO/IEC content which these international bodies have

[34] *Id*, §§84-85 (emphasis added)

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independently formulated, and in which they enjoy copyright. Indeed, on 6 December 2024, ISO and IEC lodged an application for annulment of the relevant Commission decision: T-631/24 *International Electrotechnical Commission and International Standards Organisation v Commission*.

7.19 The consequences for NSAI, if it were to be directed under the AIE Regulations to grant access to the Records, are both obvious and grave as outlined above.

8. Miscellaneous issues

8.1 Certain other of the Requesters' arguments made during the course of the Request, such as their reference to the importance of access to the Records "*in the context of combating climate change and halting biodiversity loss*", were pitched at a very general level with little or no explanation or evidence provided. NSAI respectfully repeats its request to be afforded the right to respond as may be necessary to any submissions made on behalf of the Requesters on the Appeal and which NSAI has not had an opportunity to consider and in respect of which NSAI has not had an opportunity to respond fully.

8.2 NSAI notes that the Requesters asked for the internal review to address the question of *in situ* consultation of the Records, which they said would "*facilitate a more focussed submission on why electronic copies should be provided and therefore this is an additional public interest factor specifically in relation to the form and manner of access.*"

8.3 For completeness, the Review Decision was correct to conclude that *in situ* examination did not arise for consideration and equally it does not arise for consideration on the Appeal. As stated in the Commissioner's Decision dated 21 October 2022 (ref. OCE-100065-V5F5W9) at §23: "*it is only when it has been determined that information should properly be released that article 7(3) of the AIE Regulations can be engaged*". The Requesters' submissions in this regard relate to the form and manner of access to the Records under Article 7(3) AIE Regulations, not the question of access itself. Where access to information is refused, the question of the form and/or manner of access to information – including *in situ* examination – does not arise.

9. Conclusion

9.1 NSAI submits that, on balance, the serious and significant public interests which would be served by refusing access to the Records and protecting the intellectual property of their authors outweigh the public interests which would be served by disclosure of the Records. The Review Decision was correct so to find. Any other result would have grave implications for the ability of NSAI and the State to comply with their international and EU obligations, and would not be in keeping with the respect for intellectual property rights expressly provided for in the AIE Regulations and the AIE Directive.

9.2 Nothing in the judgment of the CJEU in ***Right to Know*** subsequent to the Review Decision, which judgment dealt with the question of access to harmonised standards under Regulation (EC) No 1049/2001, which standards had been drafted and formulated entirely within the European regulatory framework, should be considered as altering the outcome of the balancing exercise which NSAI conducted under the AIE Regulations.

9.3 By reason of all of the foregoing, NSAI requests that the Commissioner **affirm** the Review Decision pursuant to Article 12(5)(b) AIE Regulations.

9.4 For completeness, while NSAI does not consider ***Right to Know*** to be of relevance to the within appeal for the reasons stated above, at the same time NSAI does not object to the Commissioner, if it is considered appropriate to do so, awaiting the outcome of T-631/24 *International Electrotechnical Commission and ISO v Commission* currently before the CJEU and relating to whether the Commission has been acting unlawfully in granting

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access to ISO/IEC-developed standards under Regulation (EC) No 1049/2001. In the event of a deferral of a decision on the within appeal, NSAI would simply reserve its position as to whether further submissions may be appropriate following a resolution of those proceedings by the CJEU.

I look forward to your decision in this regard and if I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely

[Sent by email]

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