

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

CASE OCE-100065-V5F5W9

BETWEEN:

PUBLIC.RESOURCE.ORG INC and RIGHT TO KNOW CLG

Appellants

and

NATIONAL STANDARDS AUTHORITY OF IRELAND

Public Authority

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SUBMISSION BY THE APPELLANTS

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(Lodged on behalf of the Appellants on 13 January 2021)

## Summary

1. The Appellants wish to limit the scope of the appeal to two issues, namely:
  - a) Whether the requested standards constitute legislation under Article 3(1)(c) of the AIE Regulations; and
  - b) Whether the NSAI is entitled to make *in-situ* examination under article 15(1)(c) of the AIE Regulations conditional on the acceptance of terms and conditions.
2. The Appellants submit that the NSAI was incorrect to not to classify the requested standards as legislation and that it is unlawful for it to attempt to make the right of *in-situ* examination conditional on the acceptance of terms and conditions relating to the examination of the requested information.

## Background

3. The request is for access to ten identified EU Harmonised Standards relating to the environment. EU Harmonised Standards are a special category of Technical Standards which are adopted pursuant to EU law aimed at setting essential requirements for products and services laid down by harmonising European sectoral legislation.
4. Historically, technical standards are private and voluntary documents developed by standardisation bodies that set out specifications and other technical information with regard to various types of materials, products, services and processes. They are often developed internationally in order to reduce technical barriers to trade.
5. EU Harmonised Standards have been used by the European Union as part of the achievement and functioning of the single market since the mid 1980s<sup>1</sup>. In this system, called the “New Approach”, essential requirements for products and services on the single market are set down in harmonising legislation while EU Harmonised Standards the reference to which is published in the Official Journal set down the technical details through which conformity with the essential requirements can be demonstrated.

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<sup>1</sup> Council resolution of 7 May 1985 on a new approach to technical harmonization and standards (OJ 1985 C136/1)

6. Regulation 1025/2012<sup>2</sup> sets the legal framework for the use of EU Harmonised Standards by the European Union. Within this framework three private organisations (CEN, CENELC and ETSI) are designated as European Standardisation Organisations (ESO). These organisations bring together industry, other stakeholders and National Standardisation Bodies (NSO) to develop EU Harmonised Standards pursuant to a request from the European Commission (called a mandate) which delegates the development of the precise technical details to the ESOs often with funding from the European Commission<sup>3</sup>. Once the EU Harmonised Standard is adopted by the ESO, it is reviewed by the European Commission before the publication of a reference in the Official Journal.
  
7. Once the reference is published in the Official Journal the adopted EU Harmonised Standard produces legal effects<sup>4</sup>. First, a product or service conforming to the EU Harmonised Standard enjoys a presumption of conformity with the essential requirements and is authorised to circulate on the single market and to be used freely. Second, national authorities may not impose additional requirements on such products for their effective use on the market in their territory. A national authority doing so is subject to enforcement by the European Commission for failure to fulfil obligations under EU law.
  
8. EU Harmonised Standards were confirmed to be part of EU Law in the decision of the Court of Justice of the European Union in *James Elliot*<sup>5</sup> following a preliminary reference from the Irish Supreme Court. In its decision the Court of Justice held that EU Harmonised Standards form part of EU law and that the Court of Justice had jurisdiction to interpret them for the purpose of giving a preliminary ruling under Article 267 TFEU.

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<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1025>

<sup>3</sup> For more details see Vademecum on European standardisation [https://ec.europa.eu/growth/single-market/european-standards/vademecum\\_en](https://ec.europa.eu/growth/single-market/european-standards/vademecum_en)

<sup>4</sup> See para 28 below.

<sup>5</sup> Judgment of the Court of 27 October 2016, Case C-613/14, *James Elliott Construction*, ECLI:EU:C:2016:821

9. Commentators have observed that EU Harmonised Standards are not merely technical in nature but are also considered to involve political choices including in relation to the balancing of rights, it is anticipated that their importance as a regulatory instrument<sup>6</sup> promoting EU public policy is set to increase<sup>7</sup>. In the instant case the standards requested relate to Environmental Management Systems and the assessment and quantification of greenhouse gas emissions and therefore have significant importance in relation to the environment.
10. Once the reference to an EU Harmonised Standard is published in the Official Journal each Member State's NSO must transpose it into a national standard and revoke any conflicting national standards.
11. The National Standards Authority of Ireland (**NSAI**) is the Irish NSO<sup>8</sup>. It is a statutory body corporate established under the National Standards Authority of Ireland Act 1996.

## **Procedure**

12. On 26 August 2020 the Appellants made a request under Article 6 of the AIE Regulations for ten identified EU Harmonised Standards reference to which had been published in the Official Journal. The requested standards relate to Environmental Management Systems and to the assessment of greenhouse gas emissions. The appellants also flagged in the request that they had identified 195 EU Harmonised Standards relating to the environment but that they were limiting this request to 10 particular standards to facilitate a more expeditious handling of the request reserving their right to access the full list in due course.

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<sup>6</sup> See, for example Better Regulation Toolbox No 18  
[https://ec.europa.eu/info/sites/info/files/file\\_import/better-regulation-toolbox-18\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-18_en_0.pdf)

<sup>7</sup> *Judicial review of harmonized standards: Changin the paradigms of legality and legitimacy of private rulemaking under EU Law*, Carlo Tovo, CMLR 55, 1187 -1216, 2018, at page 1118

<sup>8</sup> OJ C 104/03 31.3.2020

13. In its decision dated 23 September 2020, the NSAI purported to grant access to the requested standards via the NSAI webstore where the information is allegedly available. The NSAI also offered the Appellants the facility to examine the requested standards in the NSAI library free of charge at a mutually convenient time.
14. In its decision the NSAI also noted that the NSAI is a licensee of these “worldwide” standards<sup>9</sup> apparently from ISO and CEN-CENELEC and that it “*must adhere to the terms imposed on NSAI in respect of dissemination of the Standards*”.
15. Upon examination of the NSAI webstore the Appellants discovered that the requested standards were only available for purchase and that terms and conditions had to be accepted to complete a purchase. The Appellants wrote to the NSAI on 29 September 2020 requesting the NSAI to forward the requested standards by email and if it was not prepared to do this requested an internal review.
16. The Appellants also pointed out *inter alia* that since the requested standards form part of EU and Irish law, they should be made freely available based on the concept of the rule of law and also based on the duty to actively disseminate environmental information under article 7(2)(a) of the AIE Directive. The Appellants also pointed out that, since access to environmental information is a statutory right, access can only be restricted based on the AIE Regulations. The Appellants noted that it is impermissible for a public authority to agree with a third party how it will perform its statutory functions and that any such agreement is automatically unenforceable insofar as it interferes with the NSAI’s exercise of its statutory obligations.
17. The NSAI issued its internal review decision on 28 October 2020 affirming the refusal to provide the information in the form and manner requested. The internal review found as follows:

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<sup>9</sup> It should be emphasised that the request is for EU Harmonised Standards and not for so-called worldwide standards.

- a) that the requested standards constituted environmental information but were not “*legislation*” since they were not legally enforceable measures. The decision did seem to admit, however, that they were measures designed to protect the element of the environment and/or likely to affect those elements.
- b) the request should be granted, but not in the form and manner sought by the Appellants;
- c) the requested standards are voluntary and developed at a global level and are licensed to NSAI on the express condition that it acts appropriately to protect the copyright attaching to them and is informed by NSAI’s membership of ISO and CEN. The internal review went on to note that it (and the Irish State) had been threatened by ISO and CEN with serious consequences if unencumbered PDFs were released to the Appellants. The internal review alleged that the Appellants were asking it to “*set aside ISO and CEN’s copyright*” and that release could “*destroy the copyright interest*” in the requested standards. The internal review disputed the Appellants’ alleged contention that the status of the requested standards as forming part of Irish and EU law meant that the supposed copyright was set aside or the ruling *in James Elliott* would permit NSAI to grant access without copyright terms and conditions.
- d) The internal review went on to find that the form and manner of access offered by NSAI was reasonable and that it was reasonable to charge for that access.

18. The internal review decision was accompanied by a copy of the proposed terms and conditions and letters from ISO and CEN setting out their positions.

19. On 2 November 2020 the Appellants’ solicitor emailed the NSAI indicating that the Appellants disagreed with the internal review decision but that he had instructions to examine the requested standards *in-situ* without prejudice to the Appellants’ right of appeal to the Commissioner for Environmental Information.

20. The NSAI replied indicating that access could only be granted subject to the terms of use which were attached to the letter. These terms included *inter alia* an agreement not to copy any part of the requested standards and an indemnity in relation to any breach of the terms of use.
21. The Appellants solicitor responded on 4 November 2020 indicating that neither he nor his clients accepted the terms of use pointing out that access to environmental information must be granted subject only to the AIE Regulations and that the imposition of terms of use was not permitted.
22. In its letter dated 5 November 2020 the NSAI indicated that it would not permit *in-situ* access unless the terms of use were accepted which it considered compliant with the AIE Regulations and which were necessary to protect the intellectual property of third parties.
23. The Appellants lodged this appeal on 20 November 2020 and paid the fee. It was accepted on 26 November 2020 and given reference number OCE-100065-V5F5W9. A submission from the Appellants was invited before 17 December 2020 (subsequently extended to 15 January 2021).

### **Scope of the Appeal**

24. The Appellants, having considered the matter wish to limit the scope of the appeal to the following issues:
  - a) Whether the requested standards are “*legislation*” within the meaning of article 3(1)(c) of the AIE Regulations; and
  - b) Whether it is lawful for the NSAI to impose terms and conditions for examination *in-situ* under article 15(1)(c).

25. The Appellants do not wish to contest the imposition of fees at this point, particularly where they have been denied their right to examine the requested standards *in-situ* free of charge.
26. The Appellants fully reserve their rights, following an examination of the requested standards, to make further requests and to dispute the reasonableness of any charge and/or of any proposed form and manner of access.

### **Preliminary observation**

27. By way of preliminary observation, it is noted that the NSAI has not sought to rely on an exception under article 8 or 9 of the AIE Regulations. Although it has identified an alleged risk to the copyright of third parties, it has not sought to invoke article 9(1)(d) which is intended to protect intellectual property rights.

### **Requested standards are legislation**

28. The NSAI was incorrect to determine that the requested standards are not legislation and was incorrect to state that they are not legally enforceable. This contrary position has already been decided by the Court of Justice in *James Elliott* where it found that European Harmonised Standards form part of EU Law and that they have legal effect:

*40. It follows from the above that a harmonised standard such as that at issue in the main proceedings, adopted on the basis of Directive 89/106 and the references to which have been published in the Official Journal of the European Union, forms part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product.*



*41. A product's compliance with the technical requirements defined by such a standard allows the presumption that that product satisfies the essential requirements contained in Directive 89/106. It follows that that product is authorised to circulate, to be placed on the market and to be used freely within the territory of all Member States of the European Union, with the result that, pursuant to Article 6(1) of that directive, Member States may not impose additional requirements on such products for their effective use on the market and use within the territory (see, to that effect, judgment of 16 October 2014, Commission v Germany, C-100/13, EU:C:2014:2293, paragraphs 55, 56 and 63).*

*42. Although evidence of compliance of a construction product with the essential requirements contained in Directive 89/106 may be provided by means other than proof of compliance with harmonised standards, that cannot call into question the existence of the legal effects of a harmonised standard.*

*43. It must, moreover, be noted that while the development of such a harmonised standard is indeed entrusted to an organisation governed by private law, it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements defined by that directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the 'C' series of the Official Journal of the European Union.*

29. It is clear that the requested standards are part of EU law and are necessary implementing measures which have legal effects. The CJEU identified the binding nature of EU Harmonised Standards in the sense that Member States are bound by them and are therefore precluded from imposing additional requirements for products and services conforming to an EU Harmonised Standard for their effective use on the market and use within the territory. Any attempt to impose such restrictions could result in enforcement action by the European Commission against a Member State for its

failure to fulfil its obligations as, in fact, occurred in *Commission v Germany* (Case C-100/13) which is a case where an EU Harmonised Standard was enforced.

30. Therefore, the NSAI erred in concluding that the requested standards are not legislation and that they are not legally enforceable.

### **Imposition of terms and conditions is not permitted**

31. It is well established that neither a public authority nor the Commissioner can grant conditional access subject to terms and conditions.

32. First, article 7(1) of the AIE Regulations expressly provides that access shall be granted “*subject only to these Regulations*”. There are no provisions in the AIE Regulations authorising a public authority or the Commissioner to impose conditions on access to environmental information.

33. Second, in relation to the Freedom of Information Act 1997 the High Court in *EH v Information Commissioner* held<sup>10</sup>:

*31. I accept that neither a head of public body or the Commissioner has any jurisdiction under the Act to impose any conditions on the type or extent of disclosure or the use of the documents after disclosure and hence in permitting disclosure a head of public body and the Commissioner must assume that the disclosure of a record will be to the world at large. Indeed, this is at the heart of the scheme of the Act, which as was submitted by Mr. Hogan creates in the circumstances in which the Act operates, an untrammelled right to information, based on a philosophy of disclosure wholly different to that which is at the root of the discovery process in Court proceedings.*

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<sup>10</sup> [2001] IEHC 58, [2001] 2 IR 453 (page 483 to 484)

34. The scheme of the AIE Regulations does not differ materially from that of the Freedom of Information Act and therefore the finding of the High Court applies with equal force to the interpretation of the NSAI's and the Commissioner's jurisdiction when granting access to environmental information under the AIE Regulations.
35. For completeness the Appellants point out that a public authority cannot enter into an agreement with another party which limits or constrains its statutory functions. The NSAI along with all public authorities are subject to public law obligations which are set down in legislation and which cannot be displaced by contract. The NSAI's concerns about violating certain agreements with ISO and CEN are misplaced since it is clear that any such agreements cannot be interpreted in a way which would result in a public authority being in breach of contract through the lawful exercise of its statutory functions.
36. The Appellants are therefore deeply concerned that two well respected international organisation would (a) consider the lawful exercise of a statutory function to constitute such a breach and (b) threaten retaliation against the NSAI and Ireland for performing that function. Giving them the benefit of the doubt, it seems that the ISO and CEN do not fully understand NSAI's status as a public authority and its obligations and the attendant statutory obligations in relation to access to environmental information. Needless to say, these threats are entirely inappropriate and misplaced and should be dismissed and condemned by the Commissioner.
37. The Appellants also point out that they do not seek to "*set aside*" or "*destroy*" the copyright interest in the requested standards. It is true that in separate litigation before the General Court the Appellants have argued that European Harmonised Standards do not benefit from copyright protection by virtue of being part of EU Law<sup>11</sup>, but that is not an issue in this appeal. In any event copyright is a statutory right and cannot be set aside or be destroyed even if access is granted to records under the AIE Regulations. It is significant that the NSAI, despite its concerns around copyright, has not invoked

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<sup>11</sup> Case T-185/19 (pending before the General Court).

article 9(1)(d) of the AIE Regulations. It is also clear that copyright is not absolute, and the Appellants are fully entitled to rely on an exception to copyright<sup>12</sup> if they so wish.

### **Conclusion**

38. The NSAI was incorrect to state that the requested standards are not legally enforceable and to deny that they are legislation under article 3(1)(c) of the AIE Regulations. As a matter of law, the NSAI has no power to impose terms and conditions on the right to examine environmental information *in-situ* free of charge under article 15(1)(c) of the AIE Regulations.

39. The Appellants therefore request the Commissioner to order the NSAI to facilitate lawful examination *in-situ* free of charge under article 15(1)(c) of the AIE Regulations.

**FP Logue**

**13 January 2021**

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<sup>12</sup> Part II, Chapter 6 of the Copyright and Related Rights Act 2000