



13 December 2022

Our Reference AIE 01/22

By email only

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Re: Decision on AIE request 02-20

Dear Mr Logue,

I refer to your request ("**the Request**") on behalf of Public.Resource.Org Inc and Right to Know CLG ("**the Requesters**") which you made 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

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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)
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The within decision is issued 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) annulling NSAI's decision 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 directing NSAI to conduct a fresh decision-making process in respect of the Request.

1 RESULT OF THIS DECISION

1.1 I confirm I have examined and considered in full all information relevant to the Request, including the text of **the Records**, the terms of the Request and all submissions made on behalf of the Requesters in support of access to **the Records**, the AIE Regulations themselves and the Guidelines issued by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations by public authorities ("**the Guidelines**"¹). I have also considered the provisions of Directive 2003/4/EC of the European Parliament and of the Council on Public Access to Environmental Information ("**the AIE Directive**") and the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).

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1.2 For the reasons set out in greater detail below, I have decided to **refuse** the Request.

2 FINDINGS

2.1 Issue: whether the Records are within the scope of the AIE Regulations

2.1.1 I am satisfied that **the Records**:

- (a) constitute information on the environment; and
- (b) constitute information held by a public authority

for the following reasons.

2.1.2 As to (a), while **the Records** are not legislation, in that harmonised standards are not themselves legally enforceable measures, I am nonetheless satisfied that **the Records** come within the definition of "*environmental information*" in Article 3(1) AIE Regulations on the basis that they may properly be considered "*measures*" designed to protect the "*elements of the environment*" and/or "*likely to affect*" those elements.

2.1.3 As to (b), Article 3(1) AIE Regulations defines a "*public authority*" as meaning, "*subject to sub-article (2)*":

- (a) *government or other public administration, including public advisory bodies, at national, regional or local level,*
- (b) *any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and*

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¹ *European Communities (Access to Information on the Environment) – Guidance for Public Authorities and others on implementation of the Regulations (May 2013)*

(c) *any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),*

and includes ...

(vi) *a board or other body (but not including a company under the Companies Acts) established by or under statute.*

2.1.4 NSAI is the State's official standards body established under section 6 National Standards Authority of Ireland Act 1996 and is thus a statutory body performing public administrative functions. NSAI is the national authority responsible for the development of Irish minimum standards for goods and services, benchmarked against international best practice and is responsible for the publication and sale of Irish national standards. In its capacity as member of international and European standardization organisations, such as ISO and CEN respectively, and as the national standards body in the State, NSAI facilitates and represents Irish interests in the development of the standards in organisations such as ISO and CEN and holds the developed standards for use in Ireland.

2.1.5 In accordance with Regulation (EU) No. 1025/2012 (**the Standardisation Regulation**)², which provides a legal basis for the use of European standards, NSAI is notified as Ireland's national standards body for the purposes of the Standardisation Regulation. Participation in the work of the European Standardisation organisations and the capacity to implement European harmonised standards supporting EU law into national standards is necessitated by the Standardisation Regulation.

2.1.6 For the purposes of the Request, I am therefore satisfied that NSAI is a "public authority" within the meaning of Article 3(1) AIE Regulations.

2.1.7 Furthermore, **the Records** are not "environmental information that, under any statutory provision apart from [the AIE] Regulations, is required to be made available to the public, whether for inspection or otherwise", as referred to in Article 4 AIE Regulations.

2.1.8 Accordingly, I am satisfied **the Records** are within the scope of the AIE Regulations.

2.2 Issue: the general obligation to make the Records available, subject to statute and the AIE Regulations

2.2.1 There is a 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".

2.2.2 Accordingly, as a starting point in my further assessment of the Request set out below, it should be borne in mind that there is a general obligation on NSAI under the AIE Regulations to make available environmental information held by it, subject only to the AIE Regulations and any grounds arising therein which would justify a refusal of the Request.

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² 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, 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, p.12.

2.3 Issue: whether any mandatory grounds for refusal of the Request arise in this case

- 2.3.1 I have considered Article 8 AIE Regulations and I am satisfied that no grounds exist which (subject to Article 10 AIE Regulations) would *mandate* a refusal of the Request.

2.4 Issue: whether any discretionary grounds for refusal of the Request arise in this case

- 2.4.1 I have considered Article 9 AIE Regulations which sets out certain discretionary grounds for refusal of access to environmental information. Article 9 states:

"A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect –

... (d) intellectual property rights."

- 2.4.2 Pursuant to Article 10(4) AIE Regulations, grounds for refusal of requests for environmental information must 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."

- 2.4.3 I am satisfied that the definition of "*intellectual property rights*", interpreted according to its ordinary meaning, encompasses copyrighted material. This is reinforced by the Guidelines, which confirm that the reference to "*intellectual property rights*" in Article 9(1)(d) of the AIE Regulations "*would be likely to include copyright protected material*".³

- 2.4.4 The next question is whether the Records are properly considered copyrighted material.

- 2.4.5 First, copyright in the Records has consistently been claimed by ISO and CEN. Both organisations were consulted regarding the Request, and copies of their letters in response are attached to this decision as Annexes 2 and 3 respectively.

- 2.4.6 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 the Copyright Terms & Conditions which apply safeguards to the access to and use of copyrighted harmonised standards (see Annex 1, NSAI Terms and Conditions).

- 2.4.7 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

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³ Guidelines, paragraph 12.5

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://www.cencenelec.eu/News/Policy_Opinions/PolicyOpinions/PositionPaper_Consequences_Judgment_Elliott%20case.pdf

- 2.4.8 Accordingly, I am satisfied that **the Records** are subject to intellectual property claims on the part of ISO and CEN.
- 2.4.9 However, the views of any party claiming copyright in specific material are not themselves dispositive of the merits of such a claim. I am required to be independently satisfied that intellectual property rights properly inhere in the Records, before the grounds provided for in Article 9(1)(d) AIE Regulations could justify refusal of access to **the Records**. It is therefore necessary to consider the nature and content of **the Records** with a view to assessing: (1) whether copyright can properly be considered to exist in **the Records**; and (2) whether intellectual property rights would be adversely affected by disclosure of **the Records**.

Issue: whether copyright exists in the Records

- 2.4.10 Having considered the nature and content of **the Records**, I am satisfied that the relevant texts, while taking into account the specific requirements provided for in the legislation which they support, were nonetheless drafted by their authors in a manner sufficiently creative as to justify a conclusion that **the Records** reflect the personality of their authors as an expression of their free and creative choices. It is apparent from the length of the texts that several choices were made by the authors of **the Records**, including in relation to the structuring of **the Records** and how the information contained therein is presented, which renders **the Records** an original work of authorship.
- 2.4.11 It is noteworthy that, in its recent judgment in *Public.Resource.Org, Inc. and Right to Know CLG v European Commission*, the General Court considered 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 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’”. The 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 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.”
- 2.4.12 While the standards at issue in *Right to Know* are of course different from the standards at issue in the Request, as indicated above I am satisfied from an examination of the texts of **the Records** that there is objective and consistent evidence to support a conclusion that they meet the necessary threshold of originality for copyright protection. This conclusion is supported, by analogy, by the judgment of the General Court in *Right to Know*, insofar as

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⁶ Case T-185/19 *Public.Resource.Org, Inc. and Right to Know CLG v European Commission* EU:T:2021:445 (“**Right to Know**”) at §58. The judgment related to a request to the Commission for access to harmonised standards under Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents and Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, rather than a request for access to standards under the AIE Directive or AIE Regulations. However, I believe certain findings and conclusions of the Court in *Right to Know* as set out in this decision support the conclusions herein. For completeness, I note that the judgment of the General Court in *Right to Know* is currently under appeal to the CJEU.

⁷ *Right to Know*, at §59

it has not been suggested or established on behalf of the Requesters that **the Records** should be considered not to meet that threshold.

- 2.4.13 The Requesters have submitted that **the Records** are incapable of enjoying copyright protection because they “*form part of Irish and EU law and as a consequence must be made freely available, based on the concept of the rule of law and also based on Article 7(2)(a) of Directive 2003/4.*” The Requesters have referred to the judgments of the Supreme Court of Ireland in *James Elliott Construction Limited v Irish Asphalt Limited* [2014] IESC 74 and of the CJEU in *James Elliott Construction*.
- 2.4.14 In the first place, **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). In the case of the Records, the documents were developed at global level by ISO before being 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. The idea that **the Records** are texts of “*law*” or “*form part of Irish and EU law*” and thus incapable of enjoying copyright protection is not supportable, in my view.
- 2.4.15 The Requesters’ submission in this respect runs directly contrary to the judgment of the General Court in *Right to Know*. The Court held in relevant part as follows:

“... [I]t must be borne in mind that a harmonised standard is defined in Article 2(c) of Regulation No 1025/2012 as a technical specification adopted by a European standardisation organisation on the basis of a request made by the Commission for the application of EU harmonisation legislation, with which compliance is not compulsory.

In the judgment of 27 October 2016, James Elliott Construction (C-613/14, EU:C:2016:821), the Court of Justice held in particular that a harmonised standard such as that at issue in the main proceedings, adopted on the basis of [secondary legislation] and the references to which have been published in the Official Journal of the European Union, forms part of EU law (paragraph 40).

It should be noted, as has the Commission, that it is in no way apparent from the judgment of 27 October 2016, James Elliott Construction (C-613/14, EU:C:2016:821), that the Court of Justice declared invalid the system of publication of harmonised standards laid down in Article 10(6) of Regulation No 1025/2012, by which only the references of those standards are to be published. On the contrary, the Court pointed to the choice of the EU legislature to make the legal effects attached to a harmonised standard subject solely to the prior publication of its references in the C Series of the Official Journal (judgment of 27 October 2016, James Elliott Construction, C-613/14, EU:C:2016:821, paragraphs 37, 40 and 43).

In those circumstances, the applicants are wrong to claim that, since the Court of Justice held in the judgment of 27 October 2016, James Elliott Construction (C-613/14, EU:C:2016:821) that the requested harmonised standards formed part of ‘EU law’, those harmonised standards should be freely accessible without charge with the result that no exception to the right of access can be applied to them.”⁸

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⁸ *Right to Know*, at §§51-54

- 2.4.16 It is therefore incorrect to suggest that, as a matter of principle, copyright protection cannot attach to harmonised standards such as **the Records** on the basis of the role which standards may play for economic operators, at their own election, in establishing compliance with EU legislative requirements.
- 2.4.17 Furthermore, even if **the Records** were considered to be legislation (which in my view they are not), the idea that there cannot be copyright in “*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 Treaty⁹) 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.¹⁰ It would be surprising if harmonised standards cannot enjoy copyright protection notwithstanding that enactments of the Oireachtas do.
- 2.4.18 Finally, having considered the judgment of the Supreme Court referred to by the Requesters, I do not see that any part of that judgment can be interpreted to mean that NSAI is obliged to provide access to **the Records** in the manner and form requested by the Requesters. My understanding of the finding of the Supreme Court in *James Elliott* that harmonised standards, such as those adopted on the basis of Directive 89/106 and the references to which have been published in the Official Journal of the European Union, “*form ... part of EU law*”, is that the court was addressing whether it had jurisdiction, on a reference for a preliminary ruling, to interpret harmonised standards in that limited context. Furthermore, the judgment of the Supreme Court did not address the question of copyright of the harmonised standards and the General Court has confirmed in *Right to Know* that harmonised standards can attract copyright protection.
- 2.4.19 In conclusion on this issue, I am satisfied that **the Records** are sufficiently original as to merit copyright protection and 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.

Issue: whether intellectual property rights would be adversely affected by disclosure of the Records

- 2.4.20 In circumstances where **the Records** are the copyright of ISO and CEN, it is clear that these intellectual property rights, which protect the income stream to both organisations, would inevitably be “*adversely affected*”, within the meaning of Article 9(1)(d) AIE Regulations, in the event that the Request was 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 be damaged by the grant of such access.
- 2.4.21 The sale of standards is an important part of the business models of ISO and CEN. Those 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 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. Self-evidently this would threaten ISO and CEN’s commercial interests, and threaten to undermine the standardisation process generally.

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⁹ WIPO Copyright Treaty of 20 December 1996.

¹⁰ Sections 192-195 Copyright and Related Rights Act 2000

2.4.22 I am therefore satisfied that disclosure of **the Records** through the AIE Regulations would adversely affect the intellectual property rights inhering in **the Records**.

2.5 Issue: weighing the public interest served by disclosure against the interest served by refusal

2.5.1 In assessing whether the grounds arising under Article 9(1)(d) AIE Regulations should justify a refusal of the Request, it is important to note that the fact that granting the Request would adversely affect intellectual property rights is only one step in the relevant analysis. The interest served by the protection of the intellectual property rights in question must be weighed against the public interest which would be served by disclosure.

2.5.2 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."

2.5.3 Accordingly, having identified the interest which would be served by refusal of the Request – i.e. the adverse effect on intellectual property rights referred to above – it is imperative to consider the public interest served by disclosure of **the Records**, and weigh the various interests at stake before coming to a conclusion as to whether the Request should be granted.

2.5.4 Furthermore, as noted above, Article 10(4) AIE Regulations 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 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."

2.5.5 Accordingly I am satisfied that the starting point for analysis of the competing interests is a presumption in favour of disclosure.

2.5.6 There is a public interest in the disclosure of any environmental information. It is important in this context to have regard to the purpose of the right of access as 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."

2.5.7 In relation to harmonised standards and **the Records** in particular, there is a public interest underpinning the accessibility of harmonised standards. Even if harmonised standards do not constitute legislation and are employed on a voluntary basis, they nonetheless 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,

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reliability and accessibility of harmonised standards, and in being readily able to subject their content to scrutiny.

- 2.5.8 There is a public interest in individuals being able to enhance their understanding of the technical specifications used in harmonised standards and, through that, the means of certification of compliance with applicable legislation which is offered by the use of harmonised standards. There is a public interest in members of the public being informed as to the exact technical specifications contained in harmonised standards which may be put forward as a (potential) means for economic operators to demonstrate compliance with applicable EU legislation. There is a particular public interest of this kind where the harmonised standards contain environmental information.
- 2.5.9 As against that, however, I am satisfied that the public interest underpinning the accessibility, transparency and accountability of harmonised standards such as **the Records** is not of the same magnitude as might be the case if harmonised standards themselves constituted "law". It is important to remember, in weighing the public interest in favour of free accessibility of harmonised standards, that **the Records** do not themselves represent legislation.
- 2.5.10 Furthermore, there is also a strong interest in 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. 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 standardisation regime itself.
- 2.5.11 The voluntary use of standards is well established and has long been promoted at both international¹¹ and at EU¹² 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.
- 2.5.12 Recognition of copyright in standards and revenue generation through their sale and licensing is thus a key means of financing an independent, financially sustainable standards development process, which is itself an integral part of the single market.¹³ 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.
- 2.5.13 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

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¹¹ WTO Agreement on Technical Barriers to Trade ("TBT"), Annex 1

¹² Recital (1) Regulation (EU) No. 1025/2012 states: "The primary objective of standardisation is the definition of voluntary technical or quality specifications."

¹³ 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%).

*which provides a flexible and transparent platform for consensus building between all participants and which is financially viable.*¹⁴

- 2.5.14 As noted by the Court in *Right to Know*, the Standardisation Regulation “expressly provides for a system of publication which is limited to the references of harmonised standards only and, secondly, ... allows for paid access to those standards for those wishing to benefit from the presumption of conformity attached to them”.¹⁵
- 2.5.15 In circumstances where the financial viability of the EU standardisation regime is thus specifically recognised by the EU legislature, I believe this public interest should be given 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).
- 2.5.16 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.
- 2.5.17 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 “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.¹⁶
- 2.5.18 For its part, 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.”¹⁷

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¹⁴ Recital 9 Standardisation Regulation (emphasis added)

¹⁵ *Right to Know*, at §103

¹⁶ ISO letter, Annex 2

¹⁷ CEN letter, Annex 3

2.5.19 Accordingly, I believe granting the Request would risk causing serious damage to key national economic interests connected to Ireland's participation in the standardisation development processes of ISO and CEN.

2.5.20 I believe the above conclusions are strongly endorsed by the recent judgment in *Right to Know* referenced above. While *Right to Know* did not concern a request for access under the AIE Directive or Regulations, it appears that the standards sought to be accessed in that case contained environmental information and I believe the General Court's observations regarding the necessity to protect the functioning of the European standardisation system are of relevance to a decision on the Request.

2.5.21 The Court stated in relevant part:

"In the present case, it is clear ... that the Commission based its refusal to disclose the requested harmonised standards on two connected but different infringements of the commercial interests of CEN and its national members, namely, first, the protection of those harmonised standards by copyright and, secondly, the risk of a very large fall in the fees collected by CEN and its national members in return for access to those harmonised standards, if access to them could be obtained free of charge from the Commission.

In that regard, it should be borne in mind, as the Commission submits, that the sale of standards is a vital part of the standardisation bodies' business model. Freely available access to those standards without charge would call that model into question and would oblige those bodies to reconsider entirely the way in which they are organised, thus creating significant risks for the production of further standards and the possibility of having a method which shows that a product is deemed to comply with the requirements established by EU legislation by using a uniform method.

Thus, to the extent that, as was observed in connection with the first and second parts of the first plea ..., the Commission was justified in finding that the requested harmonised standards were covered by copyright protection, under which they were accessible to interested parties solely after the payment of certain fees ..., their disclosure for free on the basis of Regulation No 1049/2001 could specifically and actually affect the commercial interests of CEN and its national members....

In any event, as the Commission rightly argues, supported by the interveners, ... freely available public access to the standards would undeniably undermine the protection of CEN's intellectual property since those standards are subject to licensing conditions imposed on buyers. The absence of any kind of control over the disclosure of the standards would evidently have an impact on CEN's commercial interests.

That conclusion is not called into question by the applicants' argument that, in the process of drawing up the requested harmonised standards, CEN acts as a public authority by performing public functions which are not subject to any commercial interest."¹⁸

2.5.22 I am satisfied that the public interest in ensuring the functioning of the European standardisation system should prevail over the (*prima facie*) entitlement of freely available access to environmental information held by a public body under the AIE Regulations. If harmonised standards containing environmental information were accessible through the AIE Regulations, standards development would cease to be an economically sustainable activity. The revenues obtained from sales of standards contribute to the funding of sustainable standardisation activity, and protect the independence of the European standardisation system from unilateral influences from any particular category of stakeholder, guaranteeing transparent development of standards and making that

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¹⁸ *Right to Know*, at §§64-68

development “*financially viable*”, as required by the Standardisation Regulation. NSAI’s own membership of the standardisation bodies would be at risk, endangering its entitlement to participate in the development process and to use standards developed by ISO / CEN for the purposes of national adoption and redistribution purposes.

2.5.23 Having regard to all of the foregoing I am satisfied that serious and significant public interests would be served by refusing access to **the Records** and, on balance, I am satisfied that those interests outweigh the public interests which would be served by disclosure of the Records.

2.5.24 I am satisfied that the above conclusion is not affected by the fact that 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 which *inter alia* protect the copyright inhering in standards, and the fact that the register of standards (containing title and outline information) is also available to be viewed online. As noted in the Commissioner’s Decision, “*the AIE Regulations are just one access regime*”, and “[t]here is nothing in those Regulations [to] preclude [a] public authority from granting access to the information outside the regime, even if access would be denied as a result of one of the exemptions.”¹⁹ For the avoidance of any doubt, the decision set out herein relates solely to NSAI’s decision as to whether access should be granted to **the Records** pursuant to the AIE Regulations.

2.6 Result

2.6.1 Having weighed the public interests in disclosure of the Records against the interests served by refusal, I am satisfied that NSAI should rely on the ground for refusal provided for in Article 9(1)(d) AIE Regulations to refuse the Request.

2.6.2 The Request is therefore **refused**.

3 RIGHT OF INTERNAL REVIEW

3.1 In accordance with Article 11(1) AIE Regulations, in circumstances where the Request has been refused in whole, you are entitled, not later than one month following receipt of this decision, to request that NSAI review the decision, in whole or in part.

3.2 If you do so request, pursuant to Article 11(2) AIE Regulations NSAI shall designate a person unconnected with the original decision whose rank is the same as, or higher than, that of the original decision-maker to review this decision, and that person shall –

(a) affirm, vary or annul the decision, and

(b) where appropriate, require NSAI to make available the Records in whole or in part, in accordance with the AIE Regulations.

3.3 Pursuant to Article 11(3) AIE Regulations you will be notified, within one month of receipt by NSAI of any such request for internal review, of the outcome of the decision on that review.

4 CONTACT DETAILS

4.1 Please contact me at **AIE@nsai.ie** or mairead.buckley@nsai.ie if I can assist you in any matter relating to your Request.

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¹⁹ Decision OCE-100065-V5F5W9, §23



Yours sincerely,

Mairéad Buckley

Head of Corporate Services

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Annex 1

NSAI - WEBSITE TERMS OF USE AND TERMS OF SALE

Welcome to NSAI InfoStore located at <https://shop.standards.ie/> and <https://shop.standards.ie/nsai/> ('Site'), which is licenced from and operated by ILI Limited, trading as SAI Global ('we', 'NSAI' 'the Company', 'ILI', 'SAI Global', 'our' or 'us', as applicable). For further information about us and our contact details, please go to our Contact Us section.

1) Site Terms of Use and Terms of Sale

1.1 Please read these Terms, our Returns Policy, our Privacy Policy, our Cookie Policy and any other relevant terms carefully before you start to use the Site, as these will apply to your use of the Site and the Publications you order and purchase from the Site. We recommend that you print or save a copy of these Terms for future reference. By using our Site, you confirm that you accept these Terms and that you agree to comply with them.

1.2 Every time you wish to order a Publication from this Site, please check these Terms to ensure you understand the Terms which will apply at that time. These Terms were most recently updated on the date of posting that appears at the top of this page.

2) Accessing and using the Site

2.1 Anyone can access this Site using their web browser and internet connection.

2.2 You may not purchase a physical copy of a Publication from the Site if your delivery address is within the geographical areas listed in paragraph 11.3.

2.3 We try to make the Site available at all times, but, of course, due to the inherent nature of online and internet based services, we cannot guarantee this.

2.4 If you are a consumer, you have legal rights in relation to Publications that are faulty or not as described. Advice about your legal rights is available from your local Citizens' Advice Bureau or Trading Standards office. Nothing in these Terms will affect these legal rights.

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3) Your privacy and our use of cookies

3.1 We take your privacy very seriously. Please read our Privacy Policy to see how we use your personal information.

3.2 Like many online services we use a feature called a 'cookie', which is a small data file that is sent to your browser from a web server and stored on your device's hard drive. References in these Terms to 'cookies' also include other means of automatically accessing or storing information on your device. By agreeing to these Terms, you are providing your consent for us to use cookies in the ways described in our Cookie Policy, however, you may delete any of these cookies at any time if you wish. Please see our Cookie Policy for detailed information on the types of cookies we use on the Site, the purposes for which we use each cookie, how you can disable and enable the use of certain cookies and the consequences of doing so.

4) Account registration

4.1 To create an account please go to the account registration page and provide your e-mail address and a password

4.2 You must make sure that all the information you provide when you register with the Site is true, accurate, current and complete.

4.3 If you change any of your registration details (e.g. email address, postal address), you must update your account.

4.4 To help us maintain the security of the Site, you must keep your registration details confidential. If you become aware of any misuse or unauthorised use of your registration details, then you must inform us immediately by sending us an email at info@standards.ie

4.5 If you have breached, or we have justifiable reason to believe that you have breached, or will breach, these Terms, we may terminate or suspend your registration and/or access to the Site.

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4.6 You can close your account at any time as long as you do not have any outstanding orders.

4.7 We reserve the right to delete your account and any personal data or other information associated with your use of the Site if there is no activity on your account for more than 36 consecutive months.

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6.5.1 where the Publication's correct price is less than the price stated on the Site at the time you placed your order, we will charge the lower amount when dispatching the Publications to you; and

6.5.2 where the Publication's correct price is higher than the price stated on the Site at the time you placed your order, we do not have to provide the Publications to you at the incorrect (lower) price as the Contract between us, formed when we send you the Dispatch Confirmation, will not yet have been formed. We will contact you as soon as possible to inform you of this error and we will give you the option of continuing to purchase the Publication at the correct (higher) price or cancelling your order. We will not process your order until we have your instructions. If we are unable to contact you using the contact details you provided during the order process, we will treat the order as cancelled and notify you in writing.

7) How to pay

7.1 We currently accept various forms of payment for Publications including credit/debit card and other methods, through our third-party provider Worldpay. Please refer to our Site for details of the payment cards and methods that we currently accept. When placing an order, you confirm that the form of payment that you use to make payment to us is yours and that you have authority to place the order. In order to make a payment through our third-party provider, you may have to accept the terms of a licence agreement with that third party. You acknowledge that we have no responsibility or control over such third-party software.

7.2 Payment for the Publications and all applicable delivery charges is taken in advance.

8) Availability of publications

8.1 We may make changes to or discontinue any Publications available on this Site at any time and without notice.

9) Our liability if you are a domestic or private customer

9.1 This paragraph 9 only applies if you are a consumer.

9.2 If we fail to comply with our obligations to you in connection with any Contract, we are responsible for loss or damage you suffer that is a foreseeable result of our breach of these Terms or our negligence, but we are not responsible for any loss or damage that is not foreseeable. Loss or damage is foreseeable if they were an obvious consequence of our breach or if they were contemplated by you and us at the time we entered into the Contract.

9.3 We only supply the Publications for domestic and private use. You agree not to use the Publication(s)

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for any commercial, business or re-sale purposes, and we have no liability to you for any loss of profit, loss of business, business interruption or loss of business opportunity.

9.4 We do not in any way exclude or limit our liability under or in connection with any Contract for:

9.4.1 death or personal injury caused by our negligence;

9.4.2 fraud or fraudulent misrepresentation;

9.4.3 any breach of the terms implied by section 12 of the Sale of Goods Act 1979 (title and quiet possession);

9.4.4 any breach of the terms implied by section 13 to 15 of the Sale of Goods Act 1979 (description, satisfactory quality, fitness for purpose and samples); and

9.4.5 defective publications under the Consumer Protection Act 1987.

10) Our liability if you are a business customer

10.1 This paragraph 10 only applies if you are a business customer.

10.2 We only supply the Publications for internal use by your business, and you agree not to use the Publications for any re-sale purposes.

10.3 Nothing in these Terms limits or excludes our liability for:

10.3.1 death or personal injury caused by our negligence;

10.3.2 fraud or fraudulent misrepresentation; or

10.3.3 breach of the terms implied by section 12 of the Sale of Goods Act 1979 (title and quiet possession).

10.4 Subject to paragraph 10.3, we will under no circumstances whatever be liable to you, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, arising under or in connection with any Contract for:

10.4.1 any loss of profits, sales, business or revenue, whether direct or indirect;

10.4.2 loss or corruption of data, information or software;

10.4.3 loss of business opportunity;

10.4.4 loss of anticipated savings;

10.4.5 loss of goodwill; or

10.4.6 any indirect, consequential loss, special or exemplary damages.

10.5 Subject to paragraph 10.3 and paragraph 10.4 our total liability to you in respect of all other losses arising under or in connection with any Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed 100% of the price of the Publications.

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- 11.3.7 Iran - IR
- 11.3.8 Johnston Island
- 11.3.9 Kiribati Korea, North (North Korea)
- 11.3.10 Mayotte Island Myanmar - MM
- 11.3.11 Nauru
- 11.3.12 Niue
- 11.3.13 Saint Pierre Et Miquelon
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Destinations, so please review the information on that page carefully before ordering Publications.

14.2 If you order Publications from the Site for delivery to one of the International Delivery Destinations, your order may be subject to import duties and taxes which are applied when the delivery reaches that destination. Please note that we have no control over these charges and we cannot predict their amount.

14.3 You will be responsible for payment of any such import duties and taxes. Please contact your local customs office for further information before placing your order.

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16.4.1 you accept our Terms;

16.4.2 you consent to us making the Publication available to you before the end of the legal cancellation period of 14 days; and

16.4.3 you acknowledge that this means you will no longer have any legal right to cancel the Contract.

16.5 If you do not wish to be bound by what you read, or you do not consent to the supply of the Publication within the 14 day cancellation period, you should not place any orders through the Site.

16.6 If you click to confirm your order, you will see an on-screen acknowledgement that your order has been placed. You will receive a receipt for your payment and order confirmation by email.

16.7 A Contract for the sale of the Publication is made between us at the time we make the Publication available to you for download, whether by sending you a link to your purchase in the order confirmation email or otherwise. Accordingly, nothing that we say or do will amount to any acceptance of your offer until we actually make the Publication available to you to view, download or otherwise access, at which point a Contract will be made between us unless, prior to making the Publication available, we have notified you that we do not accept your order.

17) Cancellation rights

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20.3 By using the Site you acknowledge and accept the inherent risks, characteristics and limitations of the Internet, particularly in terms of technical performance of the Site, response times to view, verify or transfer information; and the risks inherent in all third party links, connections and transfers via the Internet. Accordingly we do not make any promises about the availability or accessibility of the Site or promise that your access to the Site, the content on it or the services we provide will be delivered uninterrupted, in a timely manner or error-free.

20.4 We make no promises in respect of any harm that may be caused by the transmission of a computer virus, worm, time bomb, Trojan horse, cancelbot, logic bomb or any other form of programming routine designed to damage, destroy or otherwise impair a computer's functionality or operation including transmission arising from your download of any content, software you use to download the content, the Site or the servers that make it available. In this respect you agree that it is your responsibility to install suitable anti-virus and security software on your computer hardware and other devices to protect against any such bugs, viruses or other such harmful programming routines. Any content downloaded or otherwise obtained through the use of the Site is done at your own risk and you will be solely responsible for any damage to your computer system or loss of data that results from the download of any such content.

20.5 We will not be responsible or liable to any visitors browsing the pages of this Site for:

20.5.1 any form of indirect, consequential or special loss; or

20.5.2 any financial loss or loss of data, opportunity, goodwill or reputation, in each case whether such loss is direct or indirect.

20.6 There are certain liabilities which we cannot exclude by law and nothing in these Terms excludes or limits our liability for the following:

20.6.1 for death or personal injury caused by our negligence;

20.6.2 fraud or fraudulent misrepresentation; or

20.6.3 any other matter for which it would be illegal or unlawful for us to exclude or attempt to exclude its liability.

20.7 If we are found to be liable, our total liability in respect of all claims made against us in connection with these Terms (other than those mentioned in paragraph 20.6) is as follows:

20.7.1 In relation to any claims not mentioned above in this paragraph 20.7, our liability shall be limited to £100.

21) Compensation

21.1 You agree only to use the Site in accordance with these Terms. You agree that you will compensate us (and our employees, officers, agents and suppliers) in full for any damages, losses, costs and expenses,

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including reasonable legal fees we incur that arise out of any breach by you of these Terms (including any actions you take which disrupt access to and/or the functioning of the Site) or any liability we incur as a result of the use of the Site by you and any other person that uses your account.

22) Our content

22.1 All of the content on the Site is owned by (and all copyright, trade mark and other intellectual property rights in that content, shall at all times remain vested in) us or our licensors and is protected by Irish / UK and international copyright and other intellectual property laws.

22.2 Our content includes any information or other material found on or via the Site, including without limitation text, databases, graphics, videos, software and all other features found on or via the Site.

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22.4 To be clear, you are not in any circumstances permitted to:

22.4.1 make commercial use of any such content;

22.4.2 edit any such content; or

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23) General prohibitions on access and use of this Site

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23.1.1 in any way that breaches any applicable local, national or international law or regulation;

23.1.2 in any way that is unlawful or fraudulent, or has any unlawful or fraudulent purpose or effect;

23.1.3 for the purpose of harming or attempting to harm minors in any way; or

23.1.4 to knowingly transmit, send or upload any data or other material that contains viruses, Trojan horses, worms, time-bombs, keystroke loggers, spyware, adware or any other harmful programs or similar computer code designed to adversely affect the operation of any computer software or hardware.

23.2 You also agree:

23.2.1 not to reproduce, duplicate, copy or re-sell any part of the Site in contravention of the provisions of our Terms;

23.2.2 not to access without authority, interfere with, damage or disrupt:

a) any part of the Site;

b) any equipment or network on which the Site is stored;

c) any software used in the provision of the Site; or

d) any equipment or network or software owned or used by any third party.

23.3 You shall not carry out data mining, screen scraping or crawling of this Site, its pages or its content or use any process or processes that send automated queries to this Site unless you have obtained our prior written consent.

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24.2 In order to use such third-party software or technology, you may have to accept the terms of a licence agreement with that third party. You acknowledge that we have no responsibility or control over such third-party software.

25) Links

25.1 You acknowledge that the Site may include links to third-party websites. We do not review these third-party websites nor have any control over them, and we are not responsible for the websites or their content or availability.

25.2 We do not therefore endorse, or make any representations about, them or any content found there or any results that may be obtained from using them.

25.3 If you decide to access any of these third-party websites, you do so entirely at your own risk.

25.4 If you use a linked site, any personal information you give them will be dealt with in line with their privacy policy, not ours, so please ensure that you read their terms and conditions and privacy policy before you use their websites and provide any personal information.

26) Written communications

26.1 Applicable laws require that some of the information or communications we send to you should be in writing. When using the Site, you accept that communication with us will be mainly electronic. We will contact you by email or provide you with information by posting notices on the Site. For contractual purposes, you agree to this electronic means of communication and you acknowledge that all contracts, notices, information and other communications that we provide to you electronically comply with any legal requirement that such communications be in writing. This condition does not affect your statutory rights.

27) General

27.1 Severability. If any part of these Terms is found to be unenforceable as a matter of law, all other parts of these Terms will not be affected and shall remain in force. For the avoidance of doubt, should these Terms or any part of them be deemed void or voidable, this shall not affect the validity of any licence provided under these Terms.

27.2 Reliance on these Terms. We intend to rely on these written Terms and any document expressly referred to in them in relation to the subject matter of any contract between us. We and you will be legally bound by these Terms.

27.3 Events or circumstances beyond our reasonable control. If we are prevented or delayed from complying with our obligations under these Terms by anything you (or anyone acting on your behalf) does or fails to do or due to events or circumstances beyond our reasonable control. In such circumstances including fire, flood and other acts of God, strikes, trade disputes, lock outs, restrictions of imports or exports, riot, accident, disruption to energy supplies, civil commotion, acts of terrorism or war, our inability or delay in performing our obligations will not be deemed to be in breach of contract.

27.4 References to 'including' and other similar expressions. In these Terms, words that appear after the expression 'include', 'including', 'other', 'for example', 'such as' or 'in particular' (or any similar expression) will not limit the meaning of the words appearing before such expression.

27.5 Assignment. You may not assign, sub-license or otherwise transfer any of your rights under these Terms.

27.6 Waiver. If you breach these Terms and we choose to ignore your breach, we will still be entitled to use our rights and remedies at a later date or in any other situation where you breach the Terms again.

27.7 Exclusion of third party rights. These Terms do not create any right enforceable by any person who is not a party to them (or any contract made under them), except that the provisions of these Terms may be enforced by any of our licensors subject to and in accordance with the Contracts (Rights of Third Parties) Act 1999.

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27.8 Language. These Terms may be presented to you in more than one language. However, the English language version of these Terms shall prevail. The contract between us will be concluded in English.

27.9 Governing law and jurisdiction. Any disputes or claims between us arising out of or in connection with these Terms or any contract made under them (including non-contractual disputes or claims) are governed by and construed in accordance with the law of England and Wales from where the licence is operated. Any disputes or claims arising shall be subject to the non-exclusive jurisdiction of the courts of England and Wales. Nothing in this paragraph shall deprive consumers of the right to bring or defend proceedings in their home state nor of the protection afforded to them by the mandatory rules of law of the country in which they live.

28) Changes to these Terms

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29) Contact us

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29.1 If you have any queries or concerns regarding these Terms, you may contact us by telephoning our customer service team at **+353 (0) 1 857 6730** or by e-mailing us at **info@standards.ie**

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Dated: February 2017

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Sergio Mujica
Secretary-General

ISO/LEG/NSAI-MEMBERSHIP

21 October 2020

Enda MCDONNELL
National Standards Authority of Ireland
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1 Swift Square
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Santry D09 A0E4
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COPYRIGHT PROTECTION OF ISO STANDARDS AND POSSIBLE NON-COMPLIANCE WITH THE CONDITIONS OF ISO MEMBERSHIP

Dear Mr. McDonnell

This letter is further to the email from Mairéad Buckley to Sandy Gros-Louis on 8 October 2020 in which Mrs. Buckley advised of the request that NSAI grant access to 10 national version of ISO EN standards relative to environmental information under the AIE regulations (Directive 2003/4/EC on public access to environmental information). We understand that requester has appealed NSAI's decision is an looking for "unencumbered" PDF copies of the standards.

First, as regards the reproduction of ISO standards, ISO's copyright policy (POCOSA) clearly stipulates that ISO and its members are not to make ISO Standards available free of charge (Clause 3.1 of ISO POCOSA). ISO's Code of Ethics also reinforces ISO members' adherence to these conditions for the reproduction and distribution of ISO Standards. While we encourage the broad dissemination of ISO standards, we insist that this cannot alter copyright in ISO standards nor result in making ISO standards available free of charge. We would draw your attention to the fact that ISO POCOSA also requires all ISO members to protect ISO's name and intellectual property in their country.

Secondly, making ISO standards available free of charge could result in serious consequences to NSAI. In so doing, NSAI would be violating its membership obligation to ISO. Such a violation could ultimately lead to the 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.

A suspension of NSAI's membership could furthermore impact Ireland's ability to comply with provisions of the WTO Technical Barriers to Trade (TBT) Agreement. The WTO TBT Agreement stipulates a Code of Good Practice for standards development, appropriate participation in international standards development, as well as the use of relevant international standards as a basis for technical regulations to create a fair and predictable trading environment. The WTO TBT Agreement states that "Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice." Therefore, NSAI's lack of involvement in ISO, resulting from its violation of its membership obligations, would severely limit its ability to adhere to these provisions.

We welcome your invitation to clarify ISO's position, and respectfully urge you take the above serious international implications into account in your response to the appeal.

Best regards,

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes. The signature is positioned above the name 'Sergio Mujica'.

Sergio Mujica



The Director General

Mr Enda MCDONNELL
Director of Standards and Metrology
National Standards Authority of Ireland
(NSAI)
1 Swift Square, Northwood
Santry
Dublin 9
Ireland

Brussels, 26 October 2020

Ref: 15496

Subject: CEN- CENELEC position on free use of standards

Dear Mr McDonnell,

I refer to the email from NSAI of 9 October 2020, whereby CEN and CENELEC were informed of a request addressed to your organization to grant access to 10 national versions of EN ISO standards to a private company. I understand that NSAI has already replied to this request and the decision of NSAI was appealed with a request for 'unencumbered' pdf copies of the standards in question.

I wish to confirm herewith that all European standards developed by CEN and CENELEC, including those supporting European and national public policies and legislation, are private and copyright protected documents. As such, they are protected under Copyright Law and their free distribution would constitute a breach of law, as outlined below.

As you know, 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 on "Policy on dissemination, sales and copyright of CEN-CENELEC Publications".

Any deviation which may result in providing access to standards to third parties should therefore first be considered in the light of licensing terms as set out in the CEN and CENELEC Exploitation Agreements and the obligations ensued from CEN-CENELEC Guide 10. I understand that this is however, not considered acceptable by the requesters.

With this in mind, while we appreciate having addressed this matter and with the aim to preserve the interest of CEN and CENELEC, I am bound by my duties as Director General, and on behalf of the CEN and CENELEC communities, to express our serious concerns that this matter may directly impact your membership obligations and status, should it be wrongly assessed.

Let me underline that, should NSAI agree to provide free access to CEN and CENELEC copyrighted publications and in this case, ten standards, it will imply a direct violation of Article 5.1 of CEN-CENELEC Guide 10 and Article 4.3 of the CEN and CENELEC Exploitation Agreements that set the fundamental principle of our organizations against free availability of European standards.

As this principle is of prime importance for the sustainability of CEN and CENELEC, I inform you that any infringement of the Exploitation Agreements and of the CEN-CENELEC Guide 10, are regarded as a serious breach of CEN and CENELEC rules with direct consequences for NSAI membership.

Furthermore, if NSAI confronts the above-mentioned infringements without being able to take corrective actions and remedy the situation, I will be bound to initiate the procedure of suspension of NSAI membership at the CEN and CENELEC Board level.

Let me also remind you that, should NSAI eventually lose the status of CEN and CENELEC national member, it will no longer have access to any CEN and CENELEC European standards, and consequently no license to distribute them. Furthermore, Irish experts will not be able to participate in the standardization work at the level of CEN and CENELEC Technical Committees and Working Groups. This situation would ultimately have consequences on your country's economy and trade, as the standardization work greatly contributes to a country's removal of technical barriers to trade, enhances the development of sustainable industry and opens the door to innovation.

Considering the severity of this matter, please be informed that I may bring your communication to the attention of the CEN and CENELEC Administrative Boards, should it be needed.

I do hope however, that these actions will not be necessary as I am convinced that you will take all measures to defend the rights of CEN and CENELEC and their respective fundamental principles that you adhere to.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'Elena SANTIAGO CID', is written over the typed name. The signature is stylized and loops around the typed name.

Elena SANTIAGO CID