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EUROPEAN COMMISSION

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C(2019) 1924 final

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[redacted] Berlin
Germany

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/6364**

Dear [redacted],

I refer to your letter of 18 January 2019, registered on the same day, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 30 November 2018, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to 'the full text of all published standards (2018/C 092/06) which are mandatory under Regulation 305/2011'.

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.

In the document to which you referred (2018/C 092/06)[3], references to 444 harmonised European standards in support of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC[4] (hereafter 'Regulation (EU) No 305/2011') were published in the Official Journal. The European Commission has thus identified the full text of those published harmonised European standards as falling under the scope of your request.

In its initial reply, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to the documents concerned, based on the exception provided for in Article 4(2), first indent (protection of commercial interests of a natural or legal person) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of this position. You underpin your request with detailed arguments, which I address in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the relevant Directorate-General at the initial stage.

Having carried out a detailed assessment of your request in light of the provisions of Regulation (EC) No 1049/2001, I wish to inform you that I confirm the refusal to grant access to the documents concerned based on the exception of Article 4(2), first indent (protection of commercial interests of a natural or legal person) of Regulation (EC) No 1049/2001.

2.1. Protection of commercial interests of a natural or legal person

Article 4(2), first indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, […] unless there is an overriding public interest in disclosure'.

[3] Commission communication in the framework of the implementation of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (Publication of titles and references of harmonised standards under Union harmonisation legislation), Official Journal C 92 of 9.3.2018, p. 139.

[4] Official Journal L 88 of 4.4.2011, p. 5.

In line with the provisions of Regulation (EU) No 1025/2012[5], the European Commission may request the European standardisation organisations, such as the European Committee for Standardisation, to draft a European standard for the application of legal requirements set out in EU legislation.

The harmonised European standards included in the requested documents aim to support the legal requirements provided for in Regulation (EU) No 305/2011. The standards in question support the above-mentioned legislation by providing the methods and the criteria for assessing the performance of construction products in relation to their essential characteristics.

In your confirmatory application, you argued that 'listing a standard in the list of harmonised standards makes it mandatory for everyone, just like a law, and should therefore also be accessible by everyone and not copyrighted at all'.

In line with the provisions of Regulation (EU) No 1025/2012, the European Commission may ask the European standardisation organisations to draft a European standard for the application of legal requirements set out in EU legislation. It needs to be emphasised that a European harmonised standard, once adopted by the European Committee for Standardisation, is transposed by each national standardisation body[6] as an identical national standard. In practical terms, transposition involves adding the reference in line with the national nomenclature. The transposed standards (based on the harmonised standards adopted by European Committee for Standardisation) are made available to the public through the sales points of the national standardisation bodies, in the same way as national standards. The European Committee for Standardisation itself does not make the standards available to the public.

In this context, in your confirmatory application, you contested the position of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, in so far as the applicability of the exception in Article 4(2), first indent of Regulation (EC) No 1049/2001 is concerned. In particular, you argued that 'the documents requested do not benefit from the protection of copyright'.

Contrary to what you stated, however, the documents in question are protected by copyright. They do contain information that can be considered as factual or relating to procedures. However, the texts of the standards, while taking into account the specific requirements provided for in the legislation they support, were drafted by their authors in a way that is sufficiently creative to deserve copyright protection. The length of the texts implies that the authors had to make a number of choices (including in the structuring of

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5 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 of 14.11.2012, p. 12.

6 https://standards.cen.eu/dyn/www/f?p=CENWEB:5.

the document), which results in the document being protected by copyright[7]. Consequently, the document as a whole is an original work of authorship, deserving protection under the copyright rules.

In this context, I would like to note that after the judgment in Case C-613/14[8], the European Committee for Standardisation, together with European Committee for Electrotechnical Standardisation[9], issued a position paper[10], in which they, as copyright holders for European standards, explicitly considered that, on the basis of the judgment in Case C-613/14, there were no grounds to challenge their copyright and distribution polices of harmonised standards. Consequently, the European Commission considered that the consultation under Article 4(4) of Regulation (EC) No 1049/2001 was not necessary, as the position of the originator of the documents, the copyright holder in question, was already made publicly known through the above-mentioned position paper.

In your confirmatory application, you further argued that 'the exception in Article 4, paragraph 2, first indent would only be applicable if the European Committee for Standardisation offered the standards itself, but not through their national members', and that 'there cannot be a commercial interest of the copyright owner'.

As explained in the initial reply of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, the national standardisation bodies, which are members of the European Committee for Standardisation, require payment of a fee in order to acquire a copy of any of the national standards transposing the harmonised standards. When doing so, these bodies have to comply with Regulation (EU) No 1025/2012. In particular, in order to strike a balance between the interest of the standardisation bodies to be rewarded for their work and the interest of the enterprises to have access to the standards, Article 6 of Regulation (EU) No 1025/2012 provides that "National standardisation bodies shall encourage and facilitate the access of SMEs to standards and standards development processes in order to reach a higher level of participation in the standardisation system, for instance by […] applying special rates for the provision of standards or providing bundles of standards at a reduced price". Consequently, the impact of the public disclosure of the harmonised standards included in the requested documents on the commercial interests of the European Committee for Standardisation and of its national members is evident. Economic operators and the public at large would not be willing to pay a fee to obtain a copy of the standard if they could obtain it free of charge from the European Commission. That, in turn, would have a negative impact on the income gained from the fees, which would significantly decrease. Consequently, the

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7 Judgment of the Court of Justice of 16 July 2009, *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, request for preliminary ruling from the Danish Supreme Court, EU:C:2009:465 and Judgment of the Court of Justice of 1 December 2011, *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG*, C-145/10, request for preliminary ruling from the Tribunal of Commerce in Vienna, EU:C:2011:798.

8 Judgment of the Court of Justice of 27 October 2016, *James Elliott Constructions Limited v Irish Asphalt Limited*, C-613/14, EU:C:2016:821.

9 CENELEC.

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

commercial interests of the European Committee for Standardisation and its members would be undermined. It needs to be emphasised in this context, that the concept of 'commercial interests' protected by virtue of the exception in Article 4(2), first indent of Regulation (EC) No 1049/2001, is not limited to the interests of companies and economic operators, but may also encompass the interests of public bodies, or, as in the case at hand, publicly recognised bodies tasked with functions in the public interest.[11] Furthermore, the European Committee for Standardisation and its members contribute to the performance of tasks of public interest, but remain, however, private entities exercising an economic activity in a situation of competition on the relevant services market.[12]

The fact that copies of harmonised standards are available for consultation free of charge in public libraries does not change the above-mentioned conclusions. Indeed, the effect of public disclosure of the documents in question under Regulation (EC) No 1049/2001 cannot be compared with the possibility to consult the document (on the spot) in public libraries.

In the light of the above, it is evident that there is a reasonably foreseeable risk that the public disclosure of the documents concerned would harm the interest protected by Article 4(2), first indent of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argued that 'with the documents being protected by copyright, and fees charged that are far above what individuals can or should spend to check if a product is conformant, they have to rely on the self declaration of the manufacturer, notified bodies or the institutions for market surveillance.'

In this regard, it is important to repeat that harmonised standards under Regulation (EU) No 305/2011 do not prescribe product features or their manufacturing methods, but the methods and the criteria for assessing their performance. In this respect, Regulation (EU) No 305/2011 differs from the general rules of the New Legal Framework to which you refer.

Accordingly, pursuant to Article 6 of Regulation (EU) No 305/2011, the declaration of performance provides information on the performance of a product obtained using the assessment methods provided by the applicable harmonised standard. In line with this,

[11] Judgment of the General Court of 6 December 2012, *Evropaïki Dynamiki v European Commission*, T-167/10, EU:T:2012:651, paragraph 85-86.

[12] Judgment of the Court of Justice of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 47.

the 'CE marking'[13] indicates that a performance of a construction product is in conformity with its declared performance and that it has been assessed according to a harmonised European standard. The results of this assessment can thus be trusted throughout the construction value chain and be interpreted on the same basis across the EU.

In order to safeguard the reliability and accuracy of the declaration of performance, a system for the assessment and verification of constancy of performance has been established under Regulation (EU) No 305/2011. According to Articles 28 and 60 of that Regulation, the European Commission establishes which of the five different assessment and verification of constancy of performance systems, defined in annex V of that regulation, is applicable for a certain construction product, product family or essential characteristic. While the assessment and verification of constancy of performance system involves a self-declaration and monitoring by the manufacturer, for all construction products which give rise to certain safety concerns a higher assessment and verification of constancy of performance system applies. This means that large scale involvement by an independent, objective and knowledgeable third party is ensured in the assessment and periodic verification of the constancy of performance of such products.

In addition, EU Member States' market surveillance authorities, established under Regulation (EC) No 765/2008, must ensure that Regulation (EU) No 305/2011 is complied with in their countries.

Through all these mechanisms, I believe that the public interest in the reliability and accuracy of the declaration of performance is to a very high degree protected already by Regulation (EU) No 305/2011 itself and therefore does not amount to an overriding public interest that would outweigh the harm caused by the disclosure of requested documents under Regulation (EC) No 1049/2011.

Finally, in your confirmatory application, you state that 'in case of mandatory standards, the public should be far more involved as if the industry is developing a standard for voluntary use. This can only be achieved if every individual has the possibility to read, evaluate and discuss every mandatory standard during its development as well as its validity period'.

In this context, I would like to underline that, contrary to what you state, individuals are already involved in the development of harmonised standards in support of Union legislation. In particular, they can contribute to the work of national standardisation bodies, which, in turn, participate in the forum that elaborates the European harmonised standards under the umbrella of the European Committee for Standardisation.

Consequently, I consider that, in the present case, there is no overriding public interest that would outweigh the interest in safeguarding the commercial interests (including copyright) of the European Committee for Standardisation and its members, falling under

[13] 'CE marking' is a certification mark that indicates conformity with health, safety, and environmental protection standards for products sold within the European Economic Area.

the exceptions provided for in Article 4(2), first indent of Regulation (EC) No 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

However, in light of the explanations provided above, no meaningful partial access that would not undermine the protection of the interests provided for in Article 4(2), first indent of Regulation (EC) No 1049/2001, is possible.

5. MEANS OF REDRESS

I would like to draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General