

Position Paper

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The Malamud case: the internal market remains in troubled waters

Why is this judgement relevant?

The strength of the European economy is based on the fact that we Europeans can trade with each other on the European Single Market with only minor hurdles. The European Single Market, which is regulated by the New Legislative Framework (NLF) and the product regulations harmonised with it, is based on two pillars:

1. the technical specifications for products are described in harmonised European Norms (hEN) and the protection objectives in legislation.
2. a product that is placed on the market in one of the member states of the internal market and complies with the NLF can be sold in all member states.

In an ideal world, hENs are available for all necessary use cases and always represent the state of technological development. In 2016, the European Court of Justice (ECJ) ruled on specific hENs in what is commonly referred to as the James Elliott case. In order for it to have jurisdiction, the ECJ first established that hENs were part of EU law. In response, the European Commission (COM) tightened the procedure for listing and checking hENs in the Official Journal of the EU (OJEU), which in turn led to a massive backlog in the listing of hENs. This backlog is currently making it difficult for companies to place new products on the European single market and is particularly hurtful for small and medium sized companies. These processes will have a strong impact on the digital industry in the coming years, as a particularly large number of new product regulations affecting it have been and will be adopted in the legislative period that is now coming to an end. In the judgement discussed here, the fundamental findings from the James Elliott case have now been reaffirmed.

What was the judgement?

Carl Malamud, an American internet activist, with the NGOs Public.Resource.Org, Inc. and Right to Know CLG (from here on abbreviated as Malamud), sued the COM after it refused to grant them free access to four hENs via the Access to Documents Regulation (1049/2001). The ECJ has now ruled in the last instance (C-588/21 P).

The lower court decision, which followed the interpretation of the COM, was revised (para. 90), i.e. Malamud was found in the right and the four hENs must be made accessible to Malamud due to the established overriding public interest pursuant to Art. 4(2) 1049/2001 (para. 89). This will probably also be possible for other hENs in the future if, following a request in accordance with 1049/2012, it is established that their access corresponds to an overriding public interest (para. 85). However, this must be examined on a case-by-case basis, as the court did in paragraphs 77 and 78.

The basis of this judgement is the assumption from the James Elliott case that hENs "*adopted on the basis of a directive and the references to which have been published in the Official Journal of the European Union, forms part of EU law owing to its legal effects*" (para. 70 and para. 40 in the James Elliott case). This is further explained in para. 74 by first stating that, unlike laws, hENs are in most cases not binding, but that they grant access to the internal market due to the presumption of conformity.

Assessment

Bitkom welcomes the fact that the Chamber's decision primarily refers to the four requested hENs and therefore does not represent a fundamental judgement on the standardisation system. It is of particular importance that copyright was not called into question here and that the PPP for the creation of standards is still intact. We also welcome the fact that it has once again been clearly emphasised how important hENs are for the European economy, that they are in principle not binding and that they only have a legal effect *via* the presumption of conformity.

The form of access to hENs with an overriding public interest in disclosure should be controlled and effectively organised.

Irrespective of this judgement, but central to this context, the hurdles to the effective review and listing of hENs in the OJEU should be removed, as these have proven to be a bottleneck in the creation of hENs. It must be a common concern of the interested parties in standardisation and the COM that a standard can be listed promptly as soon as it is finalised.

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

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