European Standardisation for Internal Market and its Constitutional Challenges

Background and aim of the special issue

The participation of private parties, such as the social partners or the standardisation bodies, as (co-) decision-makers in the administrative decision-making process is a prevalent phenomenon. Private rule-making has become an important regulatory mechanism in EU administrative governance in sectors such as financial markets, food regulation, consumer protection, product safety, data protection, environmental policy. The Commission's new Better Regulation package issued in May 19, 2015 encourages the use of 'both regulatory and well-designed non- regulatory means'. While the involvement of private parties in EU administrative governance has the clear advantage of delivering policies which are based on the expertise of the regulatees, private-party rule-making raises significant concerns in terms of its legitimacy.

The proposed special issue aims at examining the system of co-regulation via European standardisation from the perspectives of different sectors of the EU law. In this manner, this special issue will also address the wide range of concerns raised by the phenomenon of private-party rule making of which European standardisation is a representative example.

The special issue aims at filling the gap in research in the area of EU standardisation by convening scholars from different backgrounds with the aim of discussing the overarching research question of the legitimacy of using EU standardisation for regulatory purposes. Below is a list of abstracts of the contributing authors.

Co-regulation via European standardization, (un)lawful delegation?

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Private actors can bring fast and effective solutions to certain problems and can make important contributions to the realization of social-economic goals by engaging in private regulation and enforcement. This certainly also goes for European standardization bodies, which has been assigned a regulatory role under the Commission's New Approach to European standardization in the internal market, as revised by the new Regulation on European standardization which took effect as from 1 January 2013. Yet, this role needs further reflection from a constitutional point of view, in the light of the changes not only brought by the mentioned Regulation but also the Treaty of Lisbon and recent case law of the European Court of Justice. In this contribution, the focus will therefore be on the constitutional fit of this role with the principles underlying the EU power-balancing system and more specifically the EU delegation of powers doctrine as this has evolved in recent years. What is the

current constitutional status of the 'New Approach' in EU law and how can we assess this in terms of legitimate rule making in the EU?

Input legitimacy through stakeholder participation? Mapping the legislative processes of contemporary Internal Market regulation

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Today, the continuum of Internal Market regulation comprises various kinds of regulatory measures, including formal legislation, harmonised and non-harmonised standards, and private 'self-regulation' of different origins. Public as well as private actors participate in the continuous development of the regulation. The different actors' competences and roles vary during the processes, but it is evident that both public and private actors obtain a vital position in the common production of Internal Market regulation. The purpose of the paper is to contribute to a mapping of the applied regulatory 'means and measures' in the Internal Market and to assess stakeholder participation and representation in the development process. The paper provides an outline of contemporary EU regulatory policies in the case of Internal Market regulation. The different variants of regulation are allocated within three main categories: a) public legislation; b) co-regulation, and; c) private self-regulation. Case examples of the different categories of regulation are explicated to illustrate the variances among the three types and of the ex-ante regulatory processes. The aim is to provide a more comprehensive and sophisticated typology of Internal Market regulation. The paper builds upon the theoretical literature on European regulatory policy as well as the more recent literature focusing on the role and importance of transnational private actors.

Delegation of Rulemaking Power to European Standards Organisations: Reconsidered

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Entrusting private standard bodies with rulemaking power immediately sparks constitutional law concerns regarding the legality of such delegation. To avoid nit-picking, the official documents about New Approach strategy have never mentioned or admitted the existence of delegation. On the contrary, the New Approach aspired to operate on the 'bright line option' strictly separating the spheres of law and standards. However, the formal separation of the tasks of EU legislator and private standard bodies was not enough to dodge the discussion on the lawfulness of delegation.

The legality of delegation in the context of standardisation is usually questioned due to falling short of the requirements established by the famous *Meroni* case.[1] The present submission reconsiders the

[1] Case 9/56, *Meroni v. High Authority,* ECLI: EU:C:1958:7.

delegation debate in light of the recent case law, namely the *ESMA*[2] and *James Elliott* cases.[3] It argues that *ESMA* 'mellows' the *Meroni* doctrine and leaves room for viewing delegation to European standard bodies as lawful, if constrained by judicial control. In its turn, the *James Elliott* case opens the door for subjecting European standardisation to judicial review. Establishing the CJEU's jurisdiction over harmonised European standards is a good opportunity for expanding judicial supervision over the process of standard-setting and hence ensuring legal accountability.

Do Administrative Law Principles Apply to European Standardisation: Agencification or Privatization?

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Do administrative law principles apply to European standardisation: agencification or privatisation?

Judicial control of EU standardisation: is compliance with the principle of effective judicial protection ensured?

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In a legal system which is based on the rule of law, it is essential to ensure the existence of an adequate set of control mechanisms to review the legality of administrative action. The right of access to court against the acts of the EU administration (a corollary of the principle of effective judicial protection), however, encounters peculiar difficulties in the context of the actions taken by private parties as administrative rule-makers. This paper aims at identifying the possible gaps of judicial protection which exist, in particular, in the EU standardisation process. To this end, the mechanisms of judicial supervision available in the EU legal system will be reviewed in order to establish whether the current level of judicial control of the EU standardization process complies with the principle of effective judicial protection. Finally, it will be considered whether, in light of the highly technical nature of the EU standardization process, more judicial control would actually be desirable.

Standards, barriers to trade and EU Internal Market rules

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[2] Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council (ESMA),* ECLI:EU:C:2014:18.
[3] Case C-613/14, *James Elliott Construction Limited v Irish Asphalt Limited,* ECLI:EU:C:2016:821

In this article the significance of standardisation to achieve the objectives of the Internal Market will be highlighted. Standardisation has played an important role in harmonised areas in the light of the so called New Approach, but standards may also entail trade barriers in non-harmonised areas which trigger the need for European and/or global cooperation and coordination.

Over the years, standardisation has expanded into areas which are not only highly technical but also highly political, such as financial services and possibly public procurement (under discussion). This development put pressure on the system of private rule-making to absorb some features from public rule-making to be considered legitimate and trustworthy by national authorities. The increasing politicisation of standardisation may however render it less efficient from an economic point of view (the process may be more cumbersome, slower and less flexible when it comes to new technical developments). The article will discuss ways of balancing these different interests at stake in order to foster the good functioning of the Internal Market in the European Union.

Standardization and Intellectual Property Law in an Internet of Things World

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The interface between the legal systems triggered by the creation, distribution and consumption of Data is difficult to grasp, and this paper therefore tries to dissect this interface by following information, i.e. ’the data’ from its sources, to users and re-users and ultimately to its consumers in an ‘Internet of Things’, or Industrial Internet, setting. The paper starts with the attempt to identify what legal systems are applicable to this process, with special focus on when intellectual property law may be applicable. The main issue in the Data industry, at its current stage of development, is to create a levelled playing field by trying to facilitate the implementation of Internet of Things. This includes the effort to create open access standards so that devices may communicate with the telecom technology and the Cloud, in the effort to create a flow of Data. Thus, Internet of Things needs open access interoperability standards. The paper conclude that general competition law may not be readily available for accessing generic standards, except for the situation where the standard is indispensable to access an industry or a relevant market; while sector specific regulations seem to emerge as a tool for accessing technology/data held by competitors and third parties. However, to create a levelled playing field and to grant access to the Internet of Things to ‘any comer’ interoperability standards created by relevant SSOs, with adjoining IP guides (regulations) need to be developed.

The Overarching Reach of Competition Law in Standardisation Cases

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The role of standardisation in promoting innovation is represented as one of the vehicles that drive innovation. The benefits of standards are that they act as mediums for information sharing, distributing common technological solutions, facilitating, enabling and encouraging technology transfer and boosting interoperability in manufacturing and processes; positively affecting upstream and downstream markets in the process. However, standards and standard setting processes are subject to abuse for market share gain. In Europe the threat of abuse has become an issue for scrutiny under the rules of competition law. Much of the current debate and cases centre on the intellectual property/competition law intersection, this contribution argues that through the enforcement of competition law the narrative of innovation positives is sorely distorted and irrevocably damaged by the European rules which are unsuited to the complexities of standardisation. The primary argument that will be made in this paper is through the enforcement of national contract law the effect on innovation positives can be better protected and achieved.