(Technical) Standards - a tool of modern governance

The blurring borders between public and private law

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Introduction - Overview

- Introduction
- History and Theory of Standards
- Standards in EU Law and Society
  - New Approach
  - Expansion of Standardisation Policy
  - Risks
INTRODUCTION

- Standards are all around us...

  based on standards...
  e.g. .....EN 71 series (Toys)
  EN 301 908 (Mobile Telecoms)
  EN 420:2003 - General requirements for gloves
  EN 61121 – Tumble dryers...
Increasing importance....

Figure 3.3: Average stocks of standards of the panel countries over time. (Austria, Belgium, Finland, France, Germany, Greece, Italy, Netherlands, Sweden, Spain, United Kingdom)

Source: Perinorm
INTRODUCTION - Definitions

Standards

- (term): traced back to 15th century: "source of authority and level of achievement"
- Largely positive connotation

- today used more closely in the sense of technical standards:
- “a document, established by a consensus of subject matter experts and approved by a recognized body that provides guidance on the design, use or performance of materials, products, processes, services, systems or persons. “ (International Organization for Standardization)

- ‘standard’ means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory… (Regulation (EU) No 1025/2012 on Standardisation, Article 2 (1))

Standardisation

- Traced back to late 19 c. - rise of modern science and manufacturing
- negative connotation (anti-individualist, dullness, dehumanising)

- “standardisation is a voluntary, consensus-driven activity, carried out by and for the interested parties themselves, based on openness and transparency, within independent and recognised standards organisations, leading to the adoption of standards compliance with which is voluntary” (Council Resolution of 18 June 1992 on the Role of European Standardisation in Europe 28/101999)
“Ubiquitous but underestimated phenomena that help regulate and calibrate social life by rendering the modern world equivalent across cultures, time, and geography” (Timmermans et al)
19th /early 20th c.

- 19th c. – industrial standards > mass production, increasing division of labour and the differentiation of economies and societies
- Early 20th c. – national standards associations industry-driven
- Main objective: ensure technical interoperability

- Emile Durkeim: professional corporatism

- state loses competency of making (good) regulatory decisions
- state lays down general legislative principles (for industry)
- professional corporations implement these into specific legal rules
- democracy: communicative process – state as a coordinator
- precursor of systems theory (Habermas/Luhmann)
**Post WWII**

- Emergence of International standards associations
- EU: driven by the internal market

<table>
<thead>
<tr>
<th>Standard Body</th>
<th>Abbreviation</th>
<th>Founded</th>
<th>Coverage</th>
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<tbody>
<tr>
<td>International Electrotechnical Commission</td>
<td>IEC</td>
<td>1906</td>
<td>WW</td>
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<tr>
<td>International Organization for Standardization</td>
<td>ISO</td>
<td>1947</td>
<td>WW</td>
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<tr>
<td>ITU Telecommunication Standardization Sector</td>
<td>ITU-T</td>
<td>1956</td>
<td>WW</td>
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<td>Institute for Reference Materials and Measurements</td>
<td>IRMM</td>
<td>1957</td>
<td>EU</td>
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<tr>
<td>European Committee for Standardization</td>
<td>CEN</td>
<td>1961</td>
<td>EU +</td>
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<tr>
<td>European Committee for Electrotechnical Standardization</td>
<td>CENELEC</td>
<td>1973</td>
<td>EU +</td>
</tr>
<tr>
<td>European Telecommunications Standards Institute</td>
<td>ETSI</td>
<td>1988</td>
<td>EU +</td>
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<tr>
<td>Others: OECD, World Bank, WTO, FATF,…</td>
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Trends Influencing Standardization

Post WW II Trends

- Globalisation
  - Global value chains / division of labour (globalisation / differentiation)
  - Global contractual (supply chain) relations transcend national laws

- Knowledge Society / Technological revolution(s)
  - Economic progress dependent on innovation / science
  - Scientific / technical (industry) knowledge needed to successfully regulate
Trends Influencing Standardization

Post WW II Trends

- Theoretical Explanation

  - Erosion of national regulatory grip over global economic actors
  - Self-organisation of (global) industry > “transnational epistemic communities”
  - Conflict between authority of science and politics (Habermas)
  - Political system loses epistemic authority
  - Transnational private law < > national public law
Standardization – the process in context

Standards today

- State legislates broad public interest principles
- Private actors create corresponding standards / technical specifications
- State coordinates between different knowledge communities “along supply chain”
- Private actors (industry, scientists, NGOs) supply subject expertise
- Transnational standards: “hidden normative backbone of complex societies” (Eller)

Purpose

- Technical and Global Interoperability
- Bridging the governance gap between
  - public interest and technical complexity
  - Global private actors and (trans)national law

Associated Trends:

- Government > Governance,
- Command & control > knowledge / procedure
- National law > transnational regulatory networks,
- Liability > responsibility
Standardization in Europe and EU Law

- **Cassis de Dijon Case (1979)**
  - National product regulatory rules producing effects equivalent to a quantitative restriction on trade (Art 28 TFEU)

- **Impact on EU standardisation policy**
  - Non-essential requirements do not justify marketing restrictions
    - Formulation of essential requirements as basis for product conformity
  - Products legally market in one MS should face no restrictions in another MS
    - Principle of mutual recognition > conformity assessment policy
1985 – New Approach

- Definition of essential requirements in broad framework directives
- Essential requirements: public interest relating to health & safety and fundamental rights
- Commission requests EU Standards Organisation to create standards / technical specifications which meet essential requirements
- Standards published in *Official Journal*
- Compliance with the standard voluntary, but provides presumption of conformity
- 27 New Approach Directives

EU standard organisations – private, non-profit (CENELEC, CEN, ETSI)

- Staffed by national standards organisations
- National standards organisation: industry, science, civil society, regulators

*Article 10 Essential safety requirements*

2. Toys, including the chemicals they contain, *shall not jeopardise the safety or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the behaviour of children.*

The ability of the users and, where appropriate, their supervisors shall be taken into account, in particular, in the case of toys which are intended for use by children under 36 months or by other specified age groups.

*Labels* affixed in accordance with Article 11(2) and instructions for use which accompany toys shall draw the attention of users or their supervisors to the inherent hazards and risks of harm involved in using the toys, and to the ways of avoiding such hazards and risks.

3. Toys placed on the market shall comply with the essential safety requirements during their foreseeable and normal period of use.
Standardisation – How does the New Approach work

Compliance to be assured by:
- self-verification using European harmonised standards (EN 71 – series),
  OR
- third party verification through a notified body

- CE Marking – affix CE mark and produce Declaration of Conformity

- Free movement entrusted to private transnationalism
- Cumbersome technical agreement outsourced to “private inter-government”
- Enforced self-regulation (co-regulation) as preferred policy option
Standardisation and EU Law

Standardisation and Product Certification Process

**EU - MS Standardisation Body**
- Set Essential Requirements (Directive/Reg)
- Request standard
- Publish in Official Journal
- Draw up Technical Specifications
- Create (Voluntary) Harmonised Standard(s)

**Certification Body**
- Input on standards
- Input on standards (Associations)

**Manufacturer**
- Input on standards (Associations)
- Request Certification by Certified Body
- Create declaration of Conformity
- Design Technical Specification
- Product Risk Analysis

**Civil Society**
- Input on standards

**Product Certification**
- Acredit Certification/Notified Bodies
- Market surveillance / Enforcement
- Test and Certify Product
- Create declaration of Conformity
- Design Technical Specification

**Standard Creation**
- Draw up Technical Specifications
- Create (Voluntary) Harmonised Standard(s)
- Publish in Official Journal
- Test and Certify Product
- Create declaration of Conformity
- Design Technical Specification
- Product Risk Analysis
Standardisation and EU Law – Recent Trends

- **Since 1995:** Expansion of Standardisation Approach to various sectors
- **2001** White Paper: Standardisation a Model for European Governance
- Increased reliance on International Standards / Principles (e.g. Food Law)

- **Regulation 1025/2012** on European standardisation extends approach (based on TFEU 114) and addresses perceived weaknesses
  - Possibility to request standards within Treaty competency limits (Art.10)
  - Commission to adopt an annual work program for standardisation (Art 8)
  - Encourages participation of SMEs and civil society in standardisation (Ar. 5)
  - Improve access to standards for SMEs (Art. 6)

- **2016** Standardisation Package – Focus on ICT and services
- **2016** Joint Initiative on Standardization: market access, efficiency, awareness
Example

Data protection

- Regulation (EU) 2016/679 GDPR
  - Encourages voluntary certification and creation of trust marks (Art. 42)
  - Certification bodies to be accredited through standard EU process (Art. 43)
  - Opens possibility of requesting technical standard creation (Art. 43)
  - technical standard on privacy-by-design has been requested (by 04/2019)
Critical Points - to become more prevalent

- Competition law vs economic freedoms – status of standards bodies
  - C-171/11 Fra.bo SpA – Standards bodies subject to economic freedoms if standard referenced in law

- Legitimacy/accessibility – procedural transparency, public accessibility

- Consumer protection – liability of auditors/certifiers (notified bodies)
  - C-219/15 TÜV Rheinland – sets conditions for when failure of obligations can give rise to liability > acknowledge public communicative function of notified bodies

- Constitutionality – “private” standards enacting public interest principles

- Judicial review – the practicality of courts reviewing legality of standards