

(Technical) Standards - a tool of modern governance

The blurring borders between public and private law

Carsten ULLRICH

PhD Researcher

Faculty of Law, Economics and Finance, University of Luxembourg

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

INTRODUCTION

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- 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...

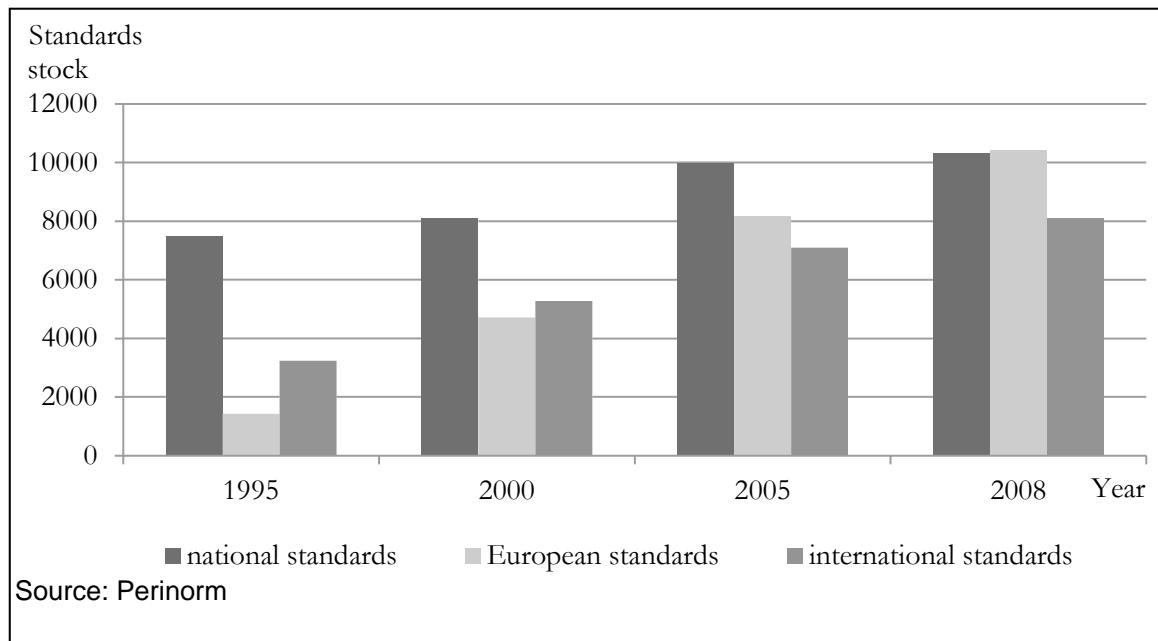


INTRODUCTION - Definitions

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- 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)



INTRODUCTION - Definitions

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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*)

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“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)*

HISTORY OF STANDARDS

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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)

HISTORY OF STANDARDS

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Post WWII

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

Standard Body	Abbreviation	Founded	Coverage
International Electrotechnical Commission	IEC	1906	WW
International Organization for Standardization	ISO	1947	WW
ITU Telecommunication Standardization Sector	ITU-T	1956	WW
Institute for Reference Materials and Measurements	IRMM	1957	EU
European Committee for Standardization	CEN	1961	EU +
European Committee for Electrotechnical Standardization	CENELEC	1973	EU +
European Telecommunications Standards Institute	ETSI	1988	EU +
Others: OECD, World Bank, WTO, FATF,...			

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

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

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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

- *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

Standardisation – How does the New Approach work

Example: Toys Safety Directive 2009/48

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

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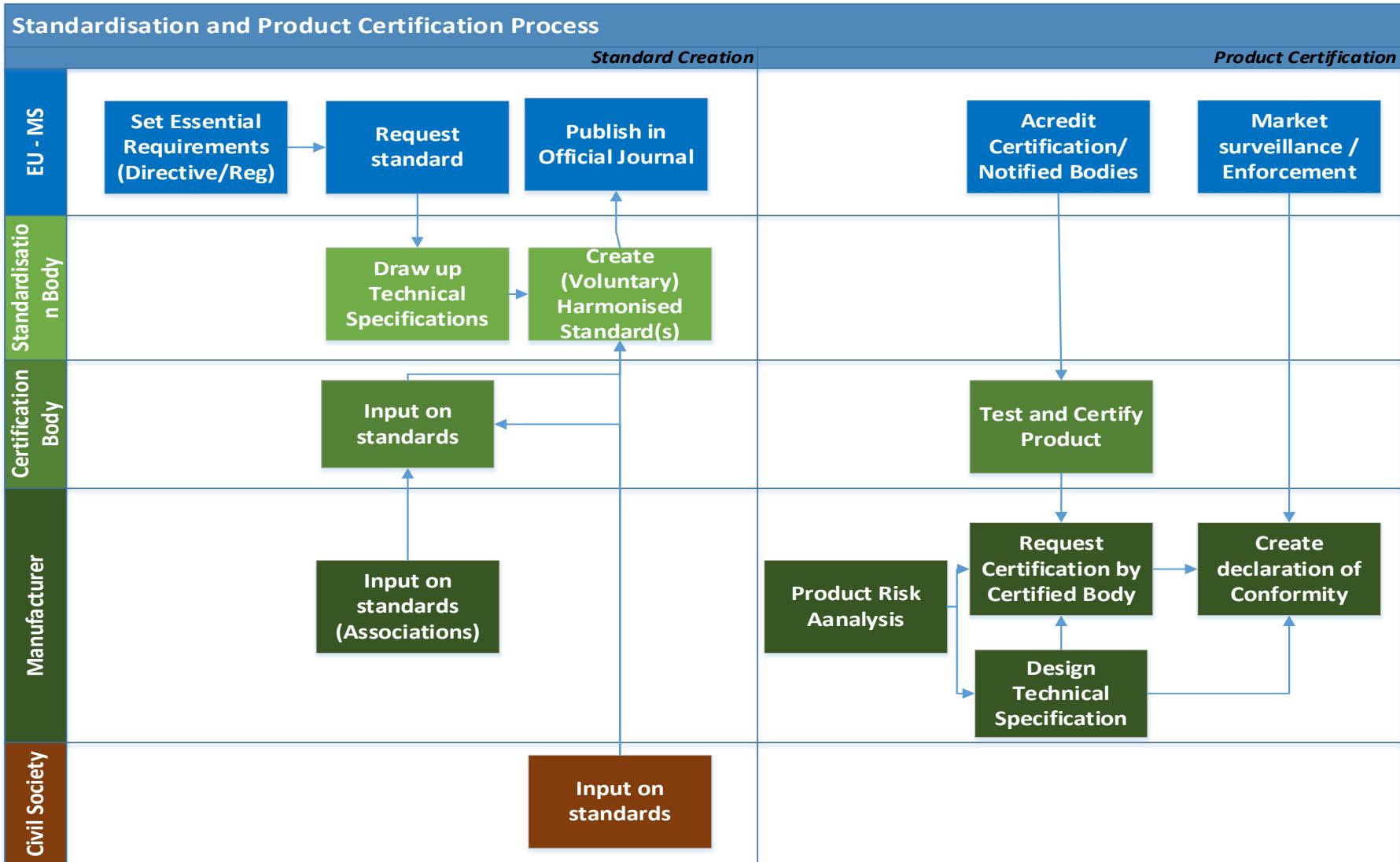


- Compliance to be assured by:
 - self-verification using [European harmonised standards](#) (EN 71 – series),
OR
 - third party verification through a [notified body](#)
 - CE Marking – affix CE mark and produce Declaration of Conformity

- 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

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Standardisation and EU Law – Recent Trends

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- 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