

The Legitimacy of Standardisation as a Regulatory Technique: A Cross-Disciplinary and Multi-Level Analysis

By Mariolina Eliantonio and Caroline Cauffman (eds).

Cheltenham: Edward Elgar, 2020, 320 pp.

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The Legitimacy of Standardisation as a Regulatory Technique is an edited collection of thirteen chapters, divided into two parts. According to the editors' introductory chapter, the book aims to contribute to the literature on standardisation, by examining the legitimacy of standardisation as a regulatory technique in the European Union, against the backdrop of academic, regulatory and legal developments. These include: the increasing interest of lawyers in standardisation (a topic that has largely attracted economic and political science perspectives); increasing displacement of treaty-based transnational law-making by standardisation; and the *James Elliot* ruling of the Court of Justice of the European Union ('CJEU'), which entrenched Harmonised European Standards ('HES') as part of EU law.¹ The book aims to present various sectoral perspectives on standardisation, in order to show the varied nature of the phenomenon at EU level, while underscoring the consistently emerging legitimacy-related issues across the sectors. More specifically, it aims to broaden and deepen earlier scholarly findings by exploring legitimacy concerns from a legal perspective.

The contributions indeed make a coherent and collective effort towards achieving the aims of the book, aided (importantly) by their adoption of a common conceptual definition of 'legitimacy', as the term has so far eluded a consensus definition. The

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¹ Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-Disciplinary and Multi-Level Analysis* (Edward Elgar 2020) 4.

contributions adopt Scharpf's definition, which distinguishes between 'input' and 'output' legitimacy and augment it with Schmidt's additional dimension of 'throughput legitimacy'.² Input legitimacy refers to the representative, 'by-the-people' nature of the rule-making *process*, while output legitimacy refers to welfare-enhancing, 'for-the-people' nature of the rule-making *outcomes*. Throughput legitimacy refers to the transparency and accountability, 'with-the-people' aspects of the standardisation process. Without a doubt, this is a reductive description of the conceptual framework, as each contribution to the volume has elaborated on, and contextualised one or more of the three aspects of legitimacy to various levels and sectors of governance explored and has broadened the original conceptualisations by Scharpf and Schmidt.

The over-arching question explored by the volume is whether standardisation provides sufficient legitimacy guarantees, despite the economic and trade advantages of standardisation, including high levels of expertise, market-based competition, consumer protection and cost-efficiency. The contributions are grouped into two parts: the first part explores what are referred to as horizontal questions, while the second part explores standardisation in specific fields, including banking and finance, government procurement, telecommunications, global food safety, and health products. Even though the editors do not elaborate on the meaning of horizontal questions as a typology for chapters two to eight, a common thread can be delineated: they explore the legitimacy of standardisation from the perspective of different legal disciplines. They include EU constitutional and administrative law, competition law, private law (of tort), and World Trade Organisation law.

Chapters two and three focus on the legitimacy of standardisation from the EU constitutional law perspective. Linda Senden's contribution in the second chapter explores the extent to which the European Harmonized Standards ('EHS'), formulated through the New Approach under the Standardisation Regulation, guarantee throughput legitimacy. How transparent, accessible, accountable and efficient are the standardisation procedures, so as to allow stakeholders to take an important role in the monitoring and enforcement of

² *ibid* 7; Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999); Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political Studies* 2.

standards? The contribution argues that the process of European technical standardisation is not sufficiently anchored in the EU's constitutional framework and principles, despite the CJEU's recognition of EHSs as part of EU law.³ In chapter three, Pierluigi Cuccuru recognises that the New Approach process under the Standardisation Regulation provides European standardisation with constitutional legitimacy, but questions whether it substantially changes the power asymmetry between public and private institutions, which tilts towards private European Standards Organisations ('ESOs'). This is especially considering the contractual nature of the relationship between the EU Commission and the ESOs.⁴ The chapter concludes that the ways in which standardisation mandates are drafted, monitored and enforced shows that EU institutions may not necessarily take the lead in the implementation of EHSs, thus leaving the legitimacy question unresolved.⁵

Focusing on competition law, Cauffman and Gerardy's contribution at chapter four explores the extent to which Article 101 of the Treaty of the European Union ('TFEU'), and in particular the safe harbour criteria, may serve to ensure the input and output legitimacy of the process for the development of EHSs. Article 101 prohibits anti-competitive undertakings and practices, but provides an exception ('safe harbour') for undertakings and practices that improve consumer welfare. The chapter argues that the similarities between the safe harbour criteria (including participation and fair, reasonable and non-discriminatory terms) and Scharpf's criteria for input and output legitimacy demonstrate competition law's potential to enhance the legitimacy of standard-setting within the EU.⁶ However, the authors miss an opportunity to explore throughput legitimacy within the Article 101 requirement for transparency.

In chapter five, Volpato and Eliantonio explore the judicial review mechanism at the CJEU and its potential to enhance the legitimacy of the standardisation process by guaranteeing *ex post* control of the ESOs, thereby improving input, output and throughput legitimacy. The authors also examine the eligibility of EHSs for judicial review, and the required standards of review, noting that the CJEU's stance remains deeply contradictory,

³ (n 1) 37.

⁴ *ibid* 57.

⁵ *ibid* 63.

⁶ *ibid* 90.

to the extent that it has extended its jurisdiction under Articles 267 and 263 of TFEU to non-binding EHSs, but has denied the same jurisdiction for binding standards incorporated by reproduction in EU law.⁷

In chapter six, the book pivots to private law, where Barend van Leeuwen analyses the interaction between European standardisation and private law and explores the potential for tort law to enhance the legitimacy of medical standards by incorporating them into judge-made ‘duty of care’ definitions. It argues that a legitimacy deficit in EU standards makes it less likely that they will be applied in private law liability cases, and hence encourages ESOs to improve the procedural and substantive legitimacy of European standardisation.⁸

Continuing the exploration of liability regimes as legitimating frameworks, Glinski and Rott argue in chapter seven that liability from harm caused by the State is an essential element of the legitimacy of State action, and that, consequently, private standard-setting can only be legitimate if no liability gap arises in relation to harm caused by ESOs through deficient standards.⁹ In addition, the authors extend the related argument that the threat of liability acts as an incentive to guarantee input, output and throughput legitimacy of the standard-setting process.¹⁰

In chapter 12, Dario Bevilacqua explores the legitimacy concerns relating to the regulatory framework of global food safety standards, after demonstrating the role of WTO law in entrenching private international standards as domestic obligations under WTO treaties, and enforcing them through trade sanctions. The chapter examines the standard-setting process under the Codex Alimentarius Commission (‘CAC’), concluding that while the process guarantees input, output and throughput legitimacy, it contains weaknesses and pitfalls, including opaque scientific processes, disparity of interests in representation, and reduced accountability of decision-makers before domestic constituencies.¹¹

⁷ *ibid* 108.

⁸ *ibid* 124.

⁹ *ibid* 132.

¹⁰ *ibid* 155.

¹¹ *ibid* 263.

The book indeed lives up to the aims outlined in the introductory chapter. It examines the multi-faceted relationship between law and legitimacy. This includes how legal principles create legitimacy expectations for the exercise of public power by private organisations, how the entrenchment of private standard-setting mandates in legal frameworks grants them legal legitimacy, and how private law frameworks for duty of care compel standardisation processes to comply with legitimacy frameworks. The book achieves this feat by covering public and private law disciplines at the national, regional and transnational level.

The book also delivers on the examination of multiple sectoral perspectives, including the medical sector, banking and finance, government procurement, telecommunications, global food safety, and health products. The contributions' contextualisation of input, output and throughput legitimacy have undoubtedly broadened and deepened the conceptual reach of Scharpf's and Schmidt's definitions of legitimacy. The book's key contribution is in providing doctrinal legal analyses of the different dynamics between private standards on the one hand, and multiple branches of law, including public and private law, and national, regional and international law on the other hand, and how these legal orders make demands for, or shape the legitimacy of, standard-setting processes. These insights add to an area of scholarship dominated by economic and political science perspectives.

However, the edited collection fails to deliver on the 'cross-disciplinary analysis' the title promises. Other than the chapter eight contribution by Faure and Philipsen that examines standardisation from a Law and Economics perspective, the other eleven chapters are doctrinal analyses. The volume could have benefitted from actual interdisciplinary analyses, combining doctrinal legal analyses with sociological, political and other disciplinary perspectives. In addition, while the title does not indicate an emphasis on any geographical legal order, the volume concentrates predominantly on the EU legal order. Since standardisation is a process that ultimately cascades to the global level, the collection could have benefitted from expanding perspectives to at least two legal orders: the US legal order, which is influential in shaping national, regional and global orders, and developing countries, which bear the brunt of more acute legitimacy deficits in global standard-setting than EU countries. The concentration of the European legal order is perhaps a reflection of

the background of the contributors, most of whom are academics based in European universities, and who specialise in EU Law. Nevertheless, this sampling of contributors certainly delivers a rich and incisive dive into various EU law dimensions of standard-setting legitimacy.

In conclusion, this edited volume is a timely intervention in the legal and governance debate shadowing the increasing proliferation of private standard-setting initiatives in various economic sectors. Its thematic organisation is clear and coherent, and the writing accessible to a wide audience, including legal practitioners, policy makers and students from different disciplines.