The Constitutional Fit of European Standardization Put to the Test

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The adoption of harmonized standards (HSs) within the framework of the 'New Approach' is a long-standing phenomenon of the European decision-making process. Yet, an important question remains how their use actually fits in with the Union's legal system, in particular in the light of the changes Regulation 1025/2012 has brought as well as the hierarchy of norms introduced by the Treaty of Lisbon and the recent case law of the European Court of Justice. In analysing this question, this article concludes that given that HSs are gaining an increasingly EU public law nature and are akin to the Commission's exercise of implementing powers, it can be doubted whether the constitutional safeguards the Regulation provides are sufficient. The 'constitutional fit' of European standardization is in need of improvement as the limited constitutional safeguards for this type of delegation of powers are in sharp contrast with those that have been put into place in the Treaties for the Commission's own exercise of delegated power.

1 INTRODUCTION

There are several drivers concerning the increasing use of and reliance on private regulation within the framework of the EU. For a long time, the Member States have been calling for more subsidiarity and less EU legislation, leaving potentially more to market actors, and co-regulation and self-regulation have also long been propagated as part of the Union's Better Regulation policy.[1] In areas of high technological innovation, (inter)national public regulation often falls short or is not sufficiently flexible and private actors can thus bring rapid and effective solutions to certain problems and can make important contributions to the realization of socio-economic goals by engaging in private regulation. This certainly also holds true for European standardisation organisations (ESOs) which were assigned an important regulatory role under the Council's resolution on a New Approach to technical harmonization and standards, which was introduced in 1985. This role was reconsidered a few years ago, the result of which is reflected in the new

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1 *See* the old Inter-Institutional Agreement on Better Law-Making, *OJ* 2003, C321/1-5.

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Regulation on European standardization that took effect as from 1 January 2013.[2] Against the backdrop of the changes that this Regulation brought about as well as the Treaty of Lisbon and the recent case law of the European Court of Justice (CJEU), the central question which this article seeks to answer is what is the 'constitutional fit' of the evolved 'New Approach' and specifically of the harmonized standards (HSs) that have been adopted within this framework; how does their use fit in with the Union's legal system and what may be considered problematic in constitutional terms? This perspective implies an analysis and an assessment of whether the legal foundations protect against arbitrary powers or their misuse. Clearly, the underlying concern here is one of ensuring the (democratic) legitimacy of the Union system.

While the usual approach in the literature is to assess the legal foundations of the New Approach and European standardization merely through the lens of the delegation of powers,[3] here we will assess them also through the lenses of competence and implementation. The article thus builds on the presumption that other principles that determine the Union's power-balancing system – in particular, that of conferral – bears relevance in relation to the consideration of ESOs' powers as well. This focus implies that other highly relevant constitutional issues will be left aside, including the inclusiveness, speed, responsiveness, transparency, flexibility and scope of the standardization system which the new Regulation has sought to address.[4]

The article will start with a brief consideration of European standardization from a regulatory perspective so as to establish how it links with EU public regulation and enforcement. Or, what is the nature of the public-private relationship as this ensues from the role assigned to ESOs under the latest Regulation 1025/2012 and what constitutional challenges does this relationship potentially pose (section 2)? The legal framing of European standardization will then first be considered through the lens of the foundational principle that guides the existence of Union competences and thereby all EU action, i.e. the principle of conferral (section 3). Next, European standardization will be considered through the lens of the delegation of powers, respectively that of implementing powers, in the light of the Regulation, the Treaty on the Functioning of the European Union (TFEU) and the case law of the CJEU. At a more fundamental level, this discussion will also concern the issue of how HSs actually form part of EU law (section 4). This will lead to some

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2 Regulation 1025/2012, *OJ* 2012, L 316/12.

3 Specifically on the delegation perspective, *see* Megi Medzmariashvili's article in this special issue.

4 *See* Commission Communication, *A Strategic Vision for European Standards: Moving Forward to Enhance and Accelerate the Sustainable Growth of the European Economy by 2020*, COM 2011/311 final.

conclusions on the constitutional fit of European standardization and on where there is room for improvement in this regard (section 5).

2 EUROPEAN STANDARDIZATION AS A FORM OF CO-REGULATION

2.1 BACKGROUND

As a result of the introduction of the 'New Approach' to technical harmonization and standards, harmonization in European Economic Community (EEC) Directives could be limited to establishing essential safety requirements, the development of technical specifications being left to specific private standardization organizations.[5] While such specifications were (formally) of a non-binding, voluntary nature, Member States were obliged to presume that products 'manufactured in conformity with harmonized standards […] conform to the "essential requirements" established by the Directive' and thus to allow them market access.[6] This shift in the EEC's harmonization approach was to bring about faster decision-making with a view to completing the single market, more flexibility in dealing with technological innovations and overall easier market access.[7] It is still seen as 'a central element in the delivery of the single market'.[8]

In 2012, the New Approach was revised so as to make it more future-proof, based on a range of policy documents[9] and a public consultation which the Commission conducted in 2010. The European Parliament (EP) thus emphasized that in order to yield all of its potential benefits in support of public and societal objectives, European standardization must adapt to the challenges that globalization, climate change, new economic powers and the evolution of technology entail.[10] Substance-wise, the new Regulation did not only seek to cover a wider range of policy fields and now also services, but also to align more with international standards

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5 More elaborately, Ch. Joerges, H. Schepel, & E. Vos, *The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardization Under the 'New Approach'*, EU Working Paper LAW No. 99/9, 7 (1999).

6 Council Resolution of 7 May 1985 on a new approach, *OJ* 1985, C136/1.

7 J. Pelkmans, *The New Approach to Technical Harmonization and Standardization*, 25(3) J. of Common Mkt. Stud., 250 (1987) and the Commission Communication, *Enhancing the Implementation of the New Approach Directives*, COM (2003) 240 final, 4–5.

8 Resolution of the European Parliament of 21 Oct. 2010 on the future of European standardization, 2010/2051(INI).

9 *See* in particular the report of the Expert Panel for the Review of the European Standardization System (Express) of Feb. 2010 entitled 'Standardization for a competitive and innovative Europe: a vision for 2020' and the Resolution of the European Parliament of 21 Oct. 2010 on the future of European standardization, 2010/2051(INI); the latter also comprises a wide reference to other major policy documents in the field.

10 *Supra* n. 8, points I and J.

and to be more a leader in global standard-setting. From the point of view of procedure, the revision was to allow for better access to the standard-setting process and the resulting standards, so as to enhance transparency, participation, inclusiveness and the accountability of European standardization. The Regulation thus states that '[i]n order to ensure the effectiveness of standards and standardization as policy tools for the Union, it is necessary to have an effective and efficient standardization system which provides a flexible and transparent platform for consensus building between all participants and which is financially viable'.[11]

2.2 The public–private nature of 'harmonized standards'

While the above already reflects quite a number of qualities which European standardization should meet and that have a bearing on its legitimacy, there is a need to now first consider its public-private nature before we can reflect on its legal foundations as another matter of constitutional concern. So, how are European public legislation and private standardization actually connected; what interaction is there, on what level(s) and with what intensity? As will be seen, 'harmonized standards' are of particular relevance in this regard, fitting the label of co-regulation, which will be the core focus of this article.

Looking at the different stages of the policy cycle, what public involvement is there at the rulemaking, implementation, monitoring and enforcement levels? Recital 24 of the Regulation sets the tone for this, underscoring that:

> Due to the importance of standardization as *a tool to support Union legislation and policies* and in order to avoid ex-post objections to and modifications of *harmonized standards*, it is important that *public authorities participate in standardisation at all stages of the development of those standards* where they may be involved and especially in the areas covered by Union harmonisation legislation for products [emphasis added].

Its Chapter III confirms this, being entitled 'European standards and European standardisation deliverables *in support of Union legislation and policies*' [emphasis added].

So, clearly, at the rulemaking level European standardization is presumed to play a fundamental role with a view to complementing EU legislation. As 'standards' are defined in Article 2 of the Regulation as 'a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory', one would assume on the basis of this presumably voluntary nature that there is no or little interaction with the public implementation, compliance and enforcement level. Yet, as will

[11] Recital 9.

be seen in section 4 hereunder, the role of public enforcement in the form of judicial review is actually increasing as a result of considering 'harmonized standards' to be part of EU law.

Regarding the nature and intensity of public involvement in the European standardization system, it is essential, however, to distinguish clearly between a European 'standard' and a European 'harmonized standard'. Article 2 of the Regulation thus defines a 'European standard' as 'a standard adopted by a European standardisation organisation' and a 'harmonized standard' as 'a European standard adopted on the basis of a request made by the Commission for the application of Union harmonisation legislation'. While the Regulation itself does not use the terminology of the Commission 'mandating' the adoption of HSs by the ESOs, one comes across this terminology in other policy documents, and these requests are also being processed under the label of 'mandates' in practice.[12] HSs are then those standards that the Commission has mandated, the number of which has now increased to some 20% of all European standards.[13] Article 10 of the Regulation provides for their adoption procedure, the Commission issuing requests to the relevant ESO, which has to indicate within one month after its receipt whether it accepts it. If so, the Commission will assess the compliance of the ESO documents with its initial request and when the HS satisfies the requirements which are contained in the corresponding Union harmonization legislation, the Commission shall publish a reference to such a HS in the *Official Journal of the European Union* or by other means in accordance with the conditions laid down in the corresponding act of Union harmonization legislation.

While, formally, compliance is of a voluntary nature, a HS is thus a piece of private regulation that is not only commissioned by a public regulator but whose contents it also assesses and monitors and which it officially publishes, even if this is only a reference to and not the full text of the standard. It is also important that the Regulation incorporates various rules and procedures concerning the contribution of the Union to the financing of European standardization, so as to ensure that European standards and standardization deliverables are developed and revised in support of the objectives, legislation and policies of the Union.[14] While still being adopted by a private organization, a HS is thus not only a standard mandated by a public body but also a top-down highly conditioned, supervised and recognized form of private regulation. In itself, this already evokes the question of what actually distinguishes the ultimately established standards from those set by public bodies

12 *See* e.g. the 'Mandate M 125' at issue in the *Elliott* Case, discussed in s. 4.
13 *See* the Commission Communication, *supra* n. 4.
14 *See* recitals 38 and 39 of the Regulation and Arts 15–19.

themselves (e.g. the Commission or agencies), apart from the private nature of the adopting organizations. Not only can the New Approach be typified as a co-regulatory strategy, but also the HS can be qualified as a co-regulatory norm. What this implies for the status of such norms under EU law will be discussed in section 4.3.

2.3 Constitutional concerns

The New Approach was met with criticism early on as it was considered to concern an undesirable delegation of 'legislative powers' to non-state actors,[15] in particular, because the essential legislative requirements in the New Approach directives were regarded as being vague, thereby giving standardization bodies too much discretion in deciding the safety or hazard level of electronic equipment. The ESOs were also considered to be under insufficient public and democratic control, leaving them open to the risks of capture by business interests.[16] The Regulation has sought to counter this criticism, at least partly, by introducing the Article 10 procedure which allows for more public control and other provisions addressing the broader accessibility of the standardization process by small and medium-sized enterprises (SMEs) and other stakeholders.

More recently, the EP has shown a clear concern for policy discretion on the part of the ESOs being too wide and a resulting loss of democratic decision-making and legitimacy.[17] This is implied in its statement that it is of 'the utmost importance to draw a clear line between legislation and standardisation in order to avoid any misinterpretation with regard to the objectives of the law and the desired level of protection'.[18] In view of this, it stressed that the European legislator must be highly vigilant and precise when defining the essential requirements and that the Commission mandates must define the objectives of the standardization work clearly and accurately. Furthermore, it stressed that the HS must be compliant with EU law, thus underscoring not only the important role of the 'New Approach consultants' in verifying compliance with the corresponding EU legislation but also with other EU policies and legislation beyond that.[19]

While the above concerns relate first and foremost to the way in which public power is exercised in mandating ESOs' activities, they do not as such call into question the legal-institutional foundations upon which ESOs are vested with the

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15 C. Joerges, *Integration Through De-legislation? An Irritated Heckler*, European Governance Papers, No. N-07-03, 11 (2007).
16 Joerges, Schepel, & Vos, *supra* n. 5, at 10.
17 Including, obviously, also its own role in the legislative process.
18 *Supra* n. 8, point 15.
19 *Supra* n. 7, points 13 and 24 of its Resolution.

power to adopt HS. Yet, an analysis of these foundations is essential with a view to assessing how the adoption of HS impacts on the balance of power in the EU, both horizontally between European institutions, and vertically between the EU and the Member States.[20] The division of the power system of the EU relies on a series of fundamental constitutional principles, most importantly in this context those of conferral and inter-institutional balance. Furthermore, the CJEU has developed a delegation doctrine that reflects both concerns of maintaining the inter-institutional balance and the competences of the Member States, concerns which are now also clearly underlying the hierarchy of norms in Articles 288–291 TFEU. We will now turn to these foundations.

3 THE EUROPEAN STANDARDIZATION SYSTEM THROUGH THE COMPETENCE LENS

The principle of conferral provides that the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives identified therein and that competences that have not been conferred upon it have remained with the Member States (Article 5(2) Treaty on the European Union, TEU). The preamble to the Regulation (recital 12) explicitly demands respect for the division of competences between the EU and the Member States and the Regulation itself emphasizes cooperation with national bodies and the need for alignment, coordination and coherency with their standardization activity. From a legal perspective, however, it is the very legal basis of the Regulation itself that warrants attention in this regard: Article 114 TFEU. This provision allocates to the Council and the European Parliament the power to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. It may be questioned to what extent such a provision, which traditionally has been understood to allow for the substantive approximation of national rules and requirements that create obstacles for the internal market, can be interpreted in such a way that it also allows for the conferral of regulatory powers on bodies that are not as such provided for as regulatory authorities in the Treaties. Taken to its letter, that is not a straightforward conclusion. Yet, the CJEU has condoned the extensive interpretation that the European legislator has given to this legal basis. From the famous Tobacco Advertising rulings, it can thus be inferred that the legislator can lawfully use Article 114 as a legal basis for any harmonization or

[20] Cf. also P. Van Cleynenbreughel, *Meroni Circumvented? Art. 114 TFEU and EU Regulatory Agencies*, 21 Maastricht J. Eur. & Comp. L., 1, 79 (2014).

approximation act that has as its 'genuine' objective the improvement of 'the establishment and functioning of the internal market'.[21]

Upon this broad reading of Article 114, at a later date, the CJEU considered it also lawful for the legislator to use this provision for the establishment of new institutions. This was at issue in the *ENISA* case, in which the UK contested the competence of the EU to create the European Network and Information Security Agency (ENISA) on the basis of then Article 95 EC (now 114 TFEU) pursuant to Article 1(1) of Directive 2002/21/EC, establishing a common regulatory framework for electronic communications networks and services.[22] The UK argued that the power which Article 95 EC confers on the Community legislator is the power to harmonize national laws and not one that is aimed at setting up Community bodies and conferring tasks upon such bodies. Yet, departing also from the opinion of AG Kokott, the Court confirmed the lawfulness of the legislator's establishment of an agency on this basis, considering that it may deem this necessary for 'the implementation of a process of harmonization in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'.[23] But the Court did impose some limits on this, which imply a two-step approach: (1) a close link needs to be established between the competences and tasks of the body and the European legislation at issue and, if so, (2) it must be assessed 'whether those objectives and tasks may be regarded as supporting and providing a framework for the implementation of that legislation'.[24]

Other scholars have already concluded that '[t]he vague conditions thus posited by the Court create significant policy opportunities for the other institutions to establish supranational bodies that fall within those vaguely formulated boundaries'[25] and that 'its ambivalent jurisprudence has operated to the advantage of the legislature'.[26] It has even been argued that the Court's approach does not exclude the adoption of binding decisions by such bodies, as long as these contribute to the harmonization of diverging national practices.[27]

The legislator has clearly taken up that advantage by using Article 114 in an increasing number of cases as the legal basis for creating new institutional arrangements, of which the European Securities Market Authority (ESMA) is just one other

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21 Case C-376/98, *Germany v. Parliament and Council* (*Tobacco Advertising*), ECLI:EU:C:2000:8419, para. 84.
22 Case C-217/04, *United Kingdom v. Parliament and Council* (*ENISA*), ECLI:EU:C:2006:279.
23 Paras 44 and 62–64.
24 Para. 47.
25 Van Cleynenbreughel, *supra* n. 20, at 69.
26 E. Fahey, *Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority*, 74(4) Mod. L. Rev., 581–595 (2011).
27 Van Cleynenbreughel, *supra* n. 20, at 69.

example and whose establishment on this basis the UK also disputed. While AG Jaäskinen concurred with the UK view and concluded that the measure should have been based on Article 352 TFEU, the Court considered the use of Article 114 TFEU to be lawful.[28] Even if this use can be understood from the perspective of effectiveness, it reflects a weak and shallow legal foundation from a legitimacy perspective, exacerbated by the fact that the Court has not set any meaningful constitutional boundaries for the establishment of new institutional arrangements.[29]

When considering European standardization in the light of this broad understanding of Article 114 by the European legislator and the Court, one can say, on the one hand, that from a purely legal perspective its development can fit within that interpretation. Interestingly, the Commission in its Explanatory Memorandum of the Regulation did not even provide a justification for basing the proposal on Article 114. It only assessed whether it complied with the subsidiarity and proportionality principles, simply concluding that 'European standardisation supports European legislation establishing the Single Market and contributes to increasing the competitiveness of European industry. The harmonisation of standards of products at European level overcomes technical barriers to trade which could be caused by conflicting national standards. Therefore, problems relating to standardisation at European level require a solution at European level.'[30] Clearly, the effectiveness rationale is very strongly present in this reasoning. On the other hand, from a constitutional perspective, one can observe that, in the case of the European standardization, competences under Article 114 are being considerably stretched, to the extent that it is considered by the Commission to allow for the establishment of an institutional system that provides for the conferral of regulatory power upon private bodies whose status under EU law is far from clear. Are these actually to be seen as 'Union bodies, agencies, offices' in the sense of the Treaties, which at least seemed to be a condition implied in the *ENISA* and *ESMA* cases? And what about the legal status of the rules and standards that ensue from the exercise of this regulatory power; are these merely private ones or somehow part of EU law? We will now turn to these issues.

4 HARMONIZED STANDARDS THROUGH THE LENSES OF DELEGATION AND IMPLEMENTATION

Here we have to start by reiterating the general principle that the CJEU already established in the *Meroni* case, namely that the Commission may not delegate powers

[28] Further discussed in s. 4.2.
[29] Cf. Van Cleynenbreughel, *supra* n. 20.
[30] COM(2011)315 final, 5.

involving a wide margin of discretion to private actors. Only clearly defined powers, which can be strictly reviewed 'in the light of objective criteria' by the delegating authority, may be delegated.[31] These powers may also not be exempted 'from the conditions to which they would have been subject if they had been adopted directly by the Commission'.[32] Judicial control is also considered a key condition to which delegated powers must be subjected. Opponents of the New Approach have thus focused their criticism in particular on the incompatibility of European standardization with this *Meroni* principle,[33] specifically on the lack of supervision of the standard-setting process and judicial control.[34] Protagonists point towards the voluntary application of the standards as producers and importers can show conformity with the essential requirements of the Directive by other means, which would reduce the need for supervision and judicial control.[35]

But other legal developments now also bear relevance for the assessment of the lawfulness of the delegation of regulatory powers to private bodies such as the ESOs, namely the introduction of a formal hierarchy of norms in Articles 288–291 TFEU and the rulings of the CJEU in the *ESMA* and *Elliott* cases.

4.1 Delegation to and implementation by the commission

Articles 288–291 TFEU distinguish between legislative, delegated and implementing acts. The system of delegation contained in these provisions concerns only delegation by the Council and/or the European Parliament to the Commission and not to any other – public and/or private – body.

Article 290 thus provides that 'A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act'. The legislative act is to explicitly define the objectives, content, scope and duration of the delegation of power and essential elements of an area shall not be the subject of a delegation of power. It also clearly defines the procedural conditions to which the delegation of powers is subject to review by the legislator and which must be explicitly defined in the delegating act.

Article 291 provides for the competence of the Commission to adopt implementing acts 'where uniform conditions for implementing legally binding Union acts are needed', and by way of exception, the Council can do so. The Commission's

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31 Case 9/56, *Meroni*, ECLI:EU:C:1958:7.
32 *Ibid*.
33 R. Van Gestel & H.W. Micklitz, *European Integration Through Standardization: How Judicial Review Is Breaking Down the Club House of Private Standardization Bodies*, 50 CMLRev. 523 (2013).
34 Joerges, Schepel, & Vos, *supra* n. 5, at 16.
35 *Ibid*. *See also* Joerges, *supra* n. 15, at 11.

exercise of this implementing power is subject to the rules and general principles which the European Parliament and Council adopt 'concerning mechanisms for control by Member States'. This is an implicit reference to the comitology system that was already in place for decades but which was revised upon this basis, the new Regulation on comitology giving the EP a greater say in stipulating and monitoring the Commission's exercise of powers.

Importantly, the revised Interinstitutional Agreement on Better Law-Making in 2016 now also includes a Common Understanding on Delegated Acts, in which the Commission, with a view to enhancing transparency, commits itself to gathering all necessary expertise through the consultation of Member States' experts and public consultations, prior to the adoption of delegated acts. Regarding draft implementing acts, the Commission will also consult both publicly and targeted stakeholders and make use of expert groups, where appropriate.[36]

This brief account serves to demonstrate that the Commission's exercise of its delegated and implementing powers has become more delineated and subject to stringent control by the Council, the European Parliament and the Member States. The very introduction of this system raises the question of whether the delegation of powers to other – public as well as private – bodies is actually possible at all and, if so, under what conditions. So, is this hierarchy of norms to be understood as a closed or an open system of delegation?

4.2 Delegation to other public EU bodies

This was the underlying question in the aforementioned *ESMA* case,[37] concerning one of the three European financial agencies established in 2012. The UK contested the powers that were delegated to this agency under Article 28 of Regulation 236/2012, which provides that it can adopt legally binding acts in the financial markets of the Member States, if there is a 'threat to the orderly functioning and integrity of the financial markets or to the stability of the whole or part of the financial system of the Union'.[38] The UK held that this entailed too broad discretion for ESMA allowing it to adopt 'quasi-legislative measures', considering this to be contrary to the *Meroni* principle.[39] The UK also contended that Articles 290 and 291 TFEU only provide for the delegation of powers to the Commission.[40]

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36 According to the latest version of the Interinstitutional Agreement on Better Law-Making, *OJ* 2016, L 123/1.

37 Case C-270/12, *ESMA*, ECLI:EU:C:2014:18.

38 Regulation 236/2012 of the European Parliament and of the Council of 14 Mar. 2012 on short selling and certain aspects of credit default swaps, *OJ* 2012, L86/1.

39 Paras 27–34 and paras 56–57.

40 Paras 69–70.

Yet, the Court concluded that Article 28 does 'not confer any autonomous power' on ESMA that goes beyond the bounds of the regulatory framework the Regulation establishes[41] and that its powers are 'precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority'.[42] Furthermore, while the Court agreed that the conferral of powers to ESMA does not correspond with Articles 290–291 and that the Treaties do not as such provide that powers may be conferred on a Union body, it also concluded that a number of TFEU provisions 'nonetheless presuppose that such a possibility exists',[43] referring to Articles 263, 267 and 277 TFEU. These provide judicial review mechanisms that apply to EU bodies, offices and agencies 'which were given powers to adopt measures that are legally binding on natural or legal persons in specific areas'.[44]

The Court thus basically concluded that the hierarchy of norms in the TFEU is an open system, (again) giving an extensive interpretation which condones a far-reaching delegation of powers by the Union legislature to Union bodies, without there being a solid institutional legal foundation for this. This is at odds with the now stringent procedural framing and control of the Commission's exercise of delegated and implementing powers. The CJEU did not take this element into account at all, in contrast with AG Jaäskinen who took a more nuanced view, arguing that outside the system of Articles 290–291 it would only be lawful to confer implementing powers upon another Union body and not powers akin to delegating powers for reasons of democratic legitimacy.[45]

4.3 Delegation to or implementation by private bodies?

How, then, does the delegation of regulatory powers to private bodies fit in with the above line of case law? Here it must be emphasized that the Court considered the delegation of powers to be lawful in *ESMA* because of the very existence of the aforementioned judicial control system. Given that the judicial review provisions in the Treaty apply to 'acts of bodies, offices or agencies of the Union', the Court also considered the delegation system to be an open one. Yet, while ESMA fits this categorization, private standardization organizations do not formally fall within either one of these three categories. This would lead us to the conclusion that the delegation of regulatory powers thereto does not fall within the requirements set in *ESMA*. Yet, there has been an ongoing

41 Para. 44.
42 Para. 53.
43 Para. 79.
44 Para. 81.
45 Points 89–101.

discussion whether HS can be subject to judicial review by the CJEU, and therewith on what the status of both the ESOs and the HS are under EU law. The *Elliot* ruling is the first to shed light on this.

This case concerned a claim for compensation by James Elliott Construction Ltd. which suffered damages as a result of the use of an aggregate of poor quality, supplied by Irish Asphalt Ltd. This should have been produced in accordance with the Irish national standard for aggregates, which itself implemented into Irish law a HS adopted by an ESO following a mandate under a 'New Approach' Directive on construction products.[46] The Irish Supreme Court made a reference to the CJEU for a preliminary ruling on the interpretation of the particular HS under dispute, but also expressed doubts regarding the legal nature of HSs and whether they can be subject to a preliminary ruling at all.[47]

The CJEU answered the latter question in the affirmative, concluding first of all that HS 'form[s] part of EU law'.[48] This is insofar as they are to be considered, by their very nature, as 'a necessary implementation measure' of an act of EU law, in this particular case the New Approach Directive that defines only the essential requirements to be complied with by construction products in order to gain free access to the internal market. Secondly, the Court explicitly stated that HSs must be considered as having legal effects, regardless of them being of a voluntary nature only as compliance with the Directive's essential requirements may be evidenced by other means as well.[49] Also the fact that HSs are issued by organizations governed by private law, which cannot be considered as institutions, bodies, offices or agencies of the Union within the meaning of Article 267 TFEU, 'cannot call into question the existence of the legal effects of a harmonised standard'.[50] This contrasts with the AG's view, who explicitly concluded that HSs 'must be regarded as "acts of the institutions, bodies, offices or agencies of the Union"'.[51] Yet, both the Court and the AG have put particular emphasis on the fact that the process of drawing up HSs takes place within the strictly defined confines of a Commission mandate under the Directive, that it is subject to strict Commission control and that the legal effects of HSs arise from their prior publication in the Official Journal. The AG therefore also concluded that such an HS cannot be treated as 'purely private' and 'unconnected to EU law'[52] and that the New Approach under Regulation

46 *Ibid*., para. 26.
47 Case C-613/14, *Elliott*, ECLI:EU:C:2016:821.
48 Para. 40.
49 Para. 45.
50 Paras 42–43.
51 Point 40.
52 Point 46.

1025/2012 constitutes 'a case of "controlled" legislative delegation in favour of a private standardisation body'.[53]

5 CONCLUSIONS: THE CONSTITUTIONAL FIT OF THE EUROPEAN STANDARDIZATION PROCESS

Given that the focus of the *Elliott* case was on the judicial reviewability and interpretation of an HS, one can understand that neither the Court nor the AG explicitly addressed its fit within the Union's delegation system in the light of the *Meroni-ESMA* rulings[54] and Articles 290–291. Notwithstanding, they both provide interesting clues as to this.

Firstly, by stressing the Commission's control of how the ESOs execute the mandate given to them, as provided for in Regulation 1025/2012, *James Elliot* impliedly takes away the administrative concerns the Court formulated in the *Meroni* case for the lawful delegation of powers to external bodies, i.e. that 'only clearly defined powers, which can be strictly reviewed "in the light of objective criteria" by the delegating authority, may be delegated'.

Secondly, by qualifying HSs as implementation measures of New Approach Directives, they would generally fit in more with an Article 291 type of exercise of implementing powers than an Article 290 type of delegated powers. According to Article 291, such measures are geared towards the implementation of legally binding Union acts. While the Member States are to take these as a general rule, the Commission – and by exception the Council – will do so 'where uniform conditions for implementing legally binding Union acts are needed'. If a specific HS were to be seen, substance-wise, as an act 'of general application to supplement or amend certain non-essential elements of a legislative act', then it would qualify more as a type of Article 290 delegation.

Also from the point of view of procedure, the mandate given to ESOs to adopt HSs can be considered as a form of Commission sub-delegation in the shadow of Article 291, as Regulation 1025/2012 requires that a comitology procedure be followed in the adoption of the Commission's request to the ESO to draft HSs.[55] So, interestingly, this adoption procedure aligns with the one that applies to the Commission's own adoption of implementing acts under Article 291. Therewith, another *Meroni* requirement is actually also met, namely that delegated powers may

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53 Point 55.

54 The AG confined himself in fn. 39 to 'noting the doubts of some authors concerning the compatibility with the *Meroni* case-law of the use, by the Union legislature in the new approach directives, of the method of referring to harmonised technical standards'.

55 *See* Arts 10(2) j. 22(3).

not be exempted 'from the conditions to which they would have been subject if they had been adopted directly by the Commission'. Since the *Elliott* judgment implicitly confirmed the openness of the delegation system under the Treaties as the CJEU interpreted it already in the *ESMA* case, such sub-delegation of implementing powers to ESOs does not in principle contravene EU law. From a constitutional perspective, though, this sub-delegation raises some important legitimacy and accountability issues.

To begin with, in *Meroni* and *ESMA*, the Court made clear that a lawful delegation of powers requires that the acts of agencies and similar bodies to which powers are delegated are judicially reviewable.[56] Clearly, rejecting jurisdiction over HSs established by ESOs would have meant an irreconcilable disparity in approach between the delegation of powers to public and private bodies. That said, the Court was facing a dilemma: either to undermine its own doctrine by opening the doors to the delegation of powers beyond the judicial control of the Court, or to sacrifice, to some extent, the effectiveness of this regulatory approach by allowing the submission of such voluntary acts of private standardization bodies to judicial control.[57] As the first option did not fit well in its previous line of case law, it opted for the latter, thereby strengthening the ex post judicial accountability of HS.

Yet, with Regulation 1025/2012 and the *Elliott* ruling, it is also clear that HSs have been pulled further within the realm of – binding – EU law and are ever more akin to public law norms, except for the private nature of their adopting institution. Furthermore, the *Elliot* case emphasizes once more that HSs can become binding upon market actors as a result of their implementation into national law. This state of affairs calls for certain ex ante checks and balances regarding the adoption of HSs.

First of all, if, substance-wise, certain HSs in practice would reveal themselves to be more of an Article 290 nature, then the procedural safeguard of mere Commission and comitology control would not suffice from a democratic legitimacy and accountability perspective. But also in their above qualification as sub-delegated implementing powers in the light of Article 291, it is not only problematic that the wording of this provision only refers to the Member States, the Commission and the Council by exception as being the responsible implementation bodies. What is more, it also implies that more stringent constitutional requirements apply to the Commission's own exercise of implementing powers than that by ESOs; while the Commission has a duty to conduct open and transparent targeted stakeholder and public consultations – under Articles 11 TEU and 15 TFEU and the

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56 The Treaty of Lisbon has provided for this in the judicial remedies which the TFEU provides for, *see* e.g. Arts 263 and 267.

57 *See* the RENFORCE blog by K. Klinger & L.A.J. Senden, *How Failing Aggregates Brought About a Landmark Decision of the CJEU*, http://blog.renforce.eu/index.php/nl/2017/01/03/how-failing-aggregates-brought-about-a-landmark-decision-of-the-cjeu/#more-529 (accessed 6 June 2017).

Interinstitutional Agreement (IIA) on Better Law-making, the consultation of stakeholders and their participation in the ESO's adoption process of HS is still constrained by financial and other conditions.[58] This can be considered contrary to the *Meroni* principle that the delegated body should be subjected to the same conditions as the delegating one. Another point of concern relates to the accessibility of HSs. It is only the reference to the standard that is published in the OJ, the full standard only being available after purchase. But if an HS becomes in practice the generally applicable norm as if it actually were a public law norm – and opting out of that private norm being very difficult and even more expensive – then it becomes highly questionable whether accessibility only upon payment is lawful.[59]

In conclusion, at face value Articles 290–291 TFEU seem to provide a neat and tidy system of the delegation of powers, but institutional practice reveals that much delegation of regulatory powers to a broad spectrum of bodies – both public and private – remains hidden in the shadow of this system, and cases like *ESMA* and *Elliott* bring this to light. This case law reveals not only that the constitutional test of the CJEU regarding the Union's competence to establish new bodies on the basis of Article 114 TFEU is a lenient one that gives great leeway to the EU legislator, but also that it condones the emerging institutional practice of delegating certain regulatory powers thereto, considering the Treaty delegation system to be an open one. While it has set some conditions for the lawful delegation of powers to – both public and private – bodies other than the Commission, it has also been found that so far the Court puts foremost emphasis on the existence of ex post judicial control, not paying much attention to ex ante checks and balances in the adoption process of HSs. In particular, the lack of constitutional safeguards in the Treaties for this type of delegation is in sharp contrast with those that have been put into place by the Treaty of Lisbon regarding the Commission's own exercise of power.[60] Even if the Regulation has put some safeguards in place, the question remains whether these standards are sufficient, given the fact that HSs are gaining an increasingly EU public law nature and are akin to the Commission's exercise of implementing powers. The lawful delegation of ESOs' power to adopt HSs thus needs further consideration with a view to securing essential constitutional requirements, including in particular transparency, participation and accessibility.

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58 *See* e.g. Arts 5–6 of the Regulation. *See* on this point Morten Kallestrup's article in this special issue.
59 Cf. Van Gestel & Micklitz, *supra* n. 33. *See* on this point Björn Lundqvist's article in this special issue.
60 *Ibid*., at 151–152.