

Public Law, European Constitutionalism and Copyright in Standards

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Should technical standards decided and published by official Standards Development Organizations (SDOs) and referred to in Regulations, Directives or, generally, in EU law be regarded as “law” that must be accessible to the public, or could these standards still be private goods, licensed for royalties and, indeed, only accessible by a few? Access to technical standards may be the next hot topic for the European Standard Setting Organisations (SSOs) and the EU Commission. Some SSOs, as a way to finance their activities to develop technical standards, may charge firms or third persons to access and make use of the technical standards produced. The charges are based on the copyright protection of said standards and may range from low to high depending on the SSO and the market penetration of the standard in question.¹ However, with increasing action by legislators of incorporating standards by reference into legal acts, the question is whether claiming copyright and, thus, charging for access to such technical standards, is still feasible. If technical standards, which are being used to interpret or fill in norms contained in laws and regulations have to be regarded as law, then their content should, according to the general consensus, belong to the public domain. According to several Member States’ Copyright regimes and general legal thinking, laws and regulations should be publicly accessible free of charge since only free access complies with basic standards of democracy, rule of law and transparency.² If instead technical standards are not to be regarded as law, but as products of private intellectual, creative production, access may have to be paid for, by way of buying a license or by otherwise paying the price for the product of the standardization effort.³

¹ Strauss 2013, 497–509 et seq.; Bremer 2015, 279, 317 et seq.

² Van Gestel & Micklitz 2013, 145–181; *Knooble* (The Hague 2008).

³ Van Gestel & Micklitz 2013, 145–181.

The EU procedure to create technical standards, the so-called ‘New Approach’, is a *sui generis* intertwined procedure where the EU Commission plays a large role, but where *de facto* the technical standards are drawn up through collaborative self-regulation by firms under the supervision of a European SDO. Some European standards can achieve the status of harmonized standards through the New Approach, where the standard is included through reference in the relevant EU legal act. The *de facto* material rule to be followed is, generally, included in the harmonised standard, and not in the legal act, while the legal act is a short document that primarily refers to the technical standard document in question. Harmonised standards are not binding, but products manufactured in compliance with harmonised standards benefit from a presumption of conformity with the corresponding essential requirements, and thus with the right to be freely circulated in the EU.

So, in these situations, can the technical standards be copyright protected? Stating this, perhaps this question is, indeed, wider: Is the issue whether the standard-setting process is a legislative procedure creating laws, or, whether is it something else, a private procedure? And, what consequences may this have for the copyright protection of EU technical standards for the benefit of the SSOs? These are the issues which this paper intends to address.⁴

The paper is sparked by the recent *James Elliot* case⁵, where the European Court of Justice (ECJ) stated that European harmonised standards should be considered part of EU law. However, the larger issue will be also be addressed. Indeed, the issue of copyright protection is a (major) sub-issue to the question of whether European harmonised standards constitute EU law, or not, and what that implies. The issue whether standards constitute ‘law’ may not only have consequences for whether ESOs may charge royalties for accessing standards. It may also have consequences on the issue of whether to judge the standard-setting process and the result of that process under competition law, or under the rules of free movement. Competition law under Article 101 TFEU regulates undertakings taking part in collaborations and there are cases where collaborations by undertakings in standard-setting bodies were considered self-regulation to the point of establishing cartels.⁶ When the ECJ in *James Elliot* states that Harmonized Standards are part of EU law, is the Court thereby stating that harmonized standards are not the result of undertakings taking part in collaborations? They are instead the result of a public legislative procedure and should be governed by constitutional rules and principles? Indeed, neither national nor EU laws are, normally, addressed under EU Competition law. Moreover, there are some cases, most recently the *Fra.bo* case, that suggest that SSO-produced technical standards can be judged under Article 34 TFEU. Whether technical standards are law or the result of self-regulation is an issue to be discussed under EU constitutional, Trade and Competition Law.

Initially, a general background to the EU system of creating European standards is presented, as well as the practice of referencing to standards in legislative acts. Second, the modern business practice of developing technical standards is discussed. Thereafter, the copyright problem connected to these standards is discussed and presented, and the *James Elliott* case is analysed. Third, the interface between European harmonised standards, trade and competition law is discussed. In the end, I present my view on whether technical standards should continue to be protected under Member States’ Copyright Acts, or whether they should belong in the public domain.

⁴ For an earlier version, see Lundqvist 2017, 421–436.

⁵ *James Elliott Construction* (CJEU 2016).

⁶ *Pre-insulated Pipe Cartel* (E.C. 1998); *EMC Development* (CJEU 2011); *EN 197-1 Standard* (E.C. 2005). “The Pre-insulated Pipes cartel” where ‘ABB’s internal documentation confirms that compliance with standards was being used as a means of keeping up price levels.

A. THE ORIGINS OF THE EUROPEAN SYSTEM OF EUROPEAN STANDARDS

The general perception is that, in the US, the standard-setting organizations are mostly private sector specific organizations, while in Europe the general model consisted of, and to some extent still comprises, centralized national private non-profit associations enjoying public recognition and (monopoly) power, elaborating and promulgating standards according to a rather homogeneous and harmonized procedure.⁷

The European Standardization Committee (CEN) has a somewhat central position in the landscape of European standard-setting. CEN was established in 1961 by several national standards bodies and acts as an umbrella organization. CEN's national members are the National Standards Organizations of the 28 European Union countries and Macedonia, Serbia and Turkey, plus the three countries of the European Free Trade Association (Iceland, Norway and Switzerland). There is a one member per country policy. The European Commission is a counsellor to CEN and there are also a number of associated members, i.e. representatives of organizations at the European level, e.g. the European Environmental Citizens Organization for Standardization (ECOS).⁸

CEN's national members have exclusive voting rights in the general assembly and on the administrative board of CEN, and they provide delegations to the technical board and the technical bodies of CEN. The technical bodies of CEN are the working units that draw up standards and are, thus, the *de facto* important organs when drawing up the technical specifications for the standard. The persons included in the national delegations are normally from the relevant industry, as are the persons making up the technical bodies. Indeed, it is the composition of the technical bodies that creates *de facto* self-regulation by the industry.

It is the responsibility of the CEN national members to implement European standards as national standards. The National Standard Setting Organisations (NSOs) distribute for remuneration (license/sells) the implemented European standards, and, generally, claim copyright protection for the implemented standards. The NSOs thus claim that the representatives who participate in a technical committee or working group that prepared the standard are the authors of a collective copyright-protected work and the NSO has obtained through contract the exclusive and permanent right to utilise the so-called financial rights connected to the work, i.e. the standard.⁹ Indeed, since most standards take the form of written documents, it is generally understood that they are considered copyrightable works of authorship and protected by copyright law, though this can be disputed.¹⁰ Generally, under the Member States Copyright regimes there are exemptions from copyright for legal and administrative acts, while a narrower exemption may also be found in the EU InfoSoc directive.¹¹

When deciding on a European standard, the NSOs are obliged to remove any pre-dating conflicting national standards.¹² Thus, there is a harmonization effort of standards under CEN under the so-called New Approach. CEN standards not only have precedence and primacy over national standards, they might also be recognized in the EU as European standards, and even as harmonised standards.¹³

⁷ Schepel 2005, 101.

⁸ For further details, see CEN's website: www.cen.eu/cen/pages/faq.aspx

⁹ See, e.g., the Swedish Standards Institute explanation regarding copyright: www.sis.se/en/standards/generaltermsandconditions/copyright/

¹⁰ On the contrary, see Chapter 5; Samuelson 2007.

¹¹ Art. 5 InfoSoc; Art. 2 sect. 4 *Berne Convention for the Protection of Literary and Artistic Works*; WIPO, p. 30.

¹² CEN/CENELEC 2018a.

¹³ *Id.*

The so-called New Approach was an EU effort to deal with several perceived inefficiencies with the EU system of developing technical standards or product requirements, whether the standard originated with public organizations, e.g. Member States, or private NSOs. The ‘old approach’, where the EU or the Member States produced technical standards, was considered too slow and created technical standards of suboptimal quality. Member State-produced standards could also violate EU free trade rules by restricting trade between Member States.¹⁴ Self-regulation by the industry, through standard-setting organisations on an EU level, incorporating the interested parties, seemed to be a more effective way to create – and to update – technical standards and to implement the internal market. Indeed, the technical expertise did not exist within the public authorities to create high quality, up-to-date, standards for the creation of the internal market, while such expertise did exist within EU private firms (‘undertakings’). In essence, the New Approach was and still is a regulatory technique and strategy for de-regulation, first laid down by the Council Resolution of 1985 on the new approach to technical harmonization and standardization.¹⁵ It was the starting point of ‘outsourcing’ the creation of product requirements to the industry on an EU level through self-regulation under standard-setting organisations.¹⁶

The New Approach established the following principles: (i) legislative harmonization in the EU is limited to essential requirements that products and services placed on the Community market must meet if they are to benefit from free movement within the Community; (ii) the essential requirements are set out in (annexes to the) relevant directives concerning the product. Although no detailed manufacturing specifications are included in the essential requirements, the degree of detailed wording differs between directives; (iii) the technical specifications of products meeting the essential requirements set out in the directives are laid down in harmonized standards drafted and produced by organizations competent in standard-setting. Application of harmonized or other standards remains voluntary, and the manufacturer may always apply other technical specifications to meet the requirements; however (iv) products manufactured in compliance with harmonized standards benefit from a presumption of conformity with the corresponding essential requirements, and thus with the right to be freely circulated in the EU.¹⁷

Harmonized standards are a specific category amongst standards. They ensure that products meet the essential requirements of harmonized EU legislation and they are prepared in accordance with the general guidelines agreed upon between the Commission and the European standards organisations, and follow a mandate issued by the Commission after consultation with the Member States. The terminology used in New Approach directives is a legal qualification of technical specifications existing as ‘European standards’, but to which a special meaning has been given by the relevant directives.¹⁸ Harmonised standards are according to Regulation 1025/2012 ‘... a European standard adopted on the basis of a request made by the Commission for the application of Union harmonisation legislation’.¹⁹ Other European standards are adopted outside EU legislation on the initiative of private firms or other stakeholders.²⁰ The New Approach was updated in 2008 and 2012 with a number of regulations, but without altering these basic premises.²¹

¹⁴ See *Dassonville* (European Commission 1974); *Cassis de Dijon* (European Commission 1979).

¹⁵ CJEU 1985.

¹⁶ For further development, see Lundqvist 2018.

¹⁷ European Commission 2017, 27 et seq.

¹⁸ *Id.*

¹⁹ European Commission 2012, Art. 2 (1) (c).

²⁰ European Commission 2011c, 1 et seq.

²¹ European Commission 2008; European Commission 2013; European Commission 2012.

Under the New Approach, the Commission formally requests the European standards organizations (e.g. CEN) to develop harmonized standards by issuing a mandate. The European Standards Organizations, e.g. CEN will formally take a position on a mandate from the Commission in conformity with their internal regulations. Acceptance of the mandate and the subsequent work programme of these organizations initiate the stand-still period as provided in their internal regulations and in EU Regulation 1025/2012.²² The stand-still period was implemented due to the ‘standards war’ over colour TV in the 1960s.²³ Thus, formally, the Commission may initiate the process, but creating a harmonized standard is an ESO matter and, *de facto*, the initiative comes normally from industry.

CEN is one of the three ESOs with the primary objective of removing trade barriers within the EU. However, in order to promote European standards in a globalized world, CEN cooperates more and more with CENELEC, the European Committee for Electrotechnical Standardization, and ETSI, the European Telecommunication Standards Institute. CENELEC is responsible for standardization in the electrotechnical engineering field. It was created in 1973 as a result of the merger of two previous European organizations: CENELCOM and CENEL.²⁴

CENELEC’s set-up is similar to that of CEN and they share the same internal regulations for governance and for drafting and implementing standards.²⁵ CEN and CENELEC are recognized under Regulation 1025/2012, Annex I as ESOs.

The New Approach and its implied methodology for ‘outsourcing’ the creation of product requirements to the industry through self-regulation under standard-setting organizations has in several aspects been successful. Several well-functioning standards have been established and disseminated, not only in the EU but also globally. The EU has become a global leader in technical standards. However, the EU system is facing problems. From a constitutional viewpoint the system is under pressure, with the increasing political importance of the technical standards produced. Technical standards increasingly regulate markets that are not only sources of economic wealth, but also reflect current and future infrastructure for societies at large, e.g. technical standards for telecommunication.²⁶ With increased importance comes calls for ensuring that the standard-setting procedure absorbs features from public rule making in order to be considered as legitimate and trustworthy.²⁷ However, the New Economy and the increased importance of interoperability also puts strain on the system underlying the New Approach.

B. STANDARDS AND BUSINESS CONDUCT IN THE NEW ECONOMY

Interestingly, the New Approach by the EU caters to the old economy and the old model of standardization, *inter alia* promoting the dissemination of already well understood and used technical solutions by consensus among the parties in relevant industries.²⁸ As such, the New Approach contributes to competition in downstream markets, the creation of internal markets without technical barriers to entry, transparency, lessening transaction costs and increased compatibility among products. It is an efficient way to establish ‘the’ technology for an industry that is already well adapted for the same.²⁹

²² *Id.*

²³ Austin & Milner 2001, 411, 423.

²⁴ CENELEC.

²⁵ CEN/CENELEC 2018b, part 1 et seq.

²⁶ For further development, *see* Lundqvist 2014.

²⁷ Hettne 2017, 409–20.

²⁸ Ullrich 2017.

²⁹ *Id.*

However, the new mode for standardization is different. Technical standards, especially technical standards for interoperability in the ICT industry, today represent unilateral or joint innovation projects, often by the leading firm(s) in a market. The innovation process and standardization in these industries are connected – intertwined – to quickly generate innovations, achieve rapid market penetration and to win (tip) network driven markets. Indeed, the standard may very well exist before the market. The question is whether this change should be taken into consideration when analysing the New Approach from an EU Constitutional law perspective.

Indeed, technical interoperability standards have become competitive tools and the official SDOs have become competitive arenas. The idea is to have the technology implemented to establish markets, however, also, among other things, to create a barrier to entry for other competing technologies. Should this standard business conduct be taken into consideration when analysing whether European Standards should be considered EU law? That the legislative procedure in the SDO is, indeed, an arena for rivalry, competition, collusion and abuse of dominance in the form of self-governance *ex ante* the market is established. These issues will be addressed below.³⁰

From the above general description of the procedure to develop technical standards in the EU under the New Approach, a relevant issue has been whether it is a private self-regulatory procedure or whether it is a legislative procedure, or both. Is it a procedure for creating laws or something else, and, thus, do regular constitutional checks and balances apply to technical standards, or not? Indeed, are, for example, European Standards, in general, and harmonized standards, in particular, reviewable by the EU courts? And, if harmonized standards form part of EU law and may be interpreted by the ECJ, can they benefit from copyright protection, or for that matter can the procedure to establish the standards be judged under competition law, if the standard is EU law? Or, are technical standards trade rules that should be reviewed under the free movement rules of the internal market? The recent *James Elliot* case does not answer all of these questions, but gives us some clues and hints regarding how the ECJ might decide future cases.

C. THE *JAMES ELLIOT* CASE: TESTING THE BOUNDARIES OF COPYRIGHT PROTECTION IN THE EU STANDARDIZATION PROCESS

The critical issue in the *James Elliot* case is whether the ECJ may accept a request for preliminary ruling under Article 267 TFEU for interpreting a European harmonized standard, while the ‘sticking point’ is whether a harmonized standard is an act that the ECJ can interpret under Article 267 of the TFEU. Indeed, implicitly, the ECJ, by accepting the case, acknowledged that harmonized standards have some kind of legal standing within the EU legal system.³¹

The case arose from a contractual dispute and whether a breach of contract could be established. James Elliott Construction was to construct a youth facility in Dublin (Ireland), where the specifications given required that the internal floors of the building were to be built *inter alia* in accordance with a harmonized standard. For that purpose, Irish Asphalt supplied James Elliott Construction with a product (concrete) designated in accordance with that standard. When the floor eventually collapsed, the issue was whether Irish Asphalt had breached the contract by not supplying the right concrete with, according to the technical standard, the right content. The Irish Supreme Court eventually heard the case and requested a preliminary ruling from the ECJ

³⁰ See also Chapter 6 (EU Competition Law and Standards) in the companion volume.

³¹ *James Elliott Construction* (CJEU 2016, p. 32 et seq.).

to ask, *inter alia*, whether the interpretation of a harmonized standard is a matter upon which a preliminary ruling may be sought from the ECJ pursuant to Article 267 TFEU.

The ECJ confirmed that it has jurisdiction to interpret non-binding EU acts, while also clarifying that acts adopted by bodies that cannot be described as ‘institutions, bodies, offices or agencies of the Union’ still might be within the Court’s reach under Article 267 TFEU. Indeed, at least harmonized standards created through ESOs, while not considered institutions, bodies, offices or agencies of the Union, may now, according to *James Elliott*, be reviewable under Article 267 TFEU. According to the ECJ, such jurisdiction being justified by the very objective of Article 267 TFEU, which is to ensure the uniform application and interpretation,³² throughout the EU, of all provisions forming part of the EU legal system.³³ Moreover, the fact that the measure of EU law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling under Article 267 TFEU.³⁴

The Court stated that while the development of a harmonized standard is indeed entrusted to an organization governed by private law and is non-binding, it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements defined by the relevant directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the ‘C’ series of the *Official Journal of the European Union*. The Court also specifically stated that a harmonized standard forms part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product.³⁵

The ECJ clarifies that the presumption created through conformity with the essential requirements of Directive 89/106 and the ‘CE’ marking,³⁶ is for the ability to freely circulate and market products within the EU. The objective of a harmonized standard is, thus, limited to the removal of obstacles to trade, not seeking to harmonize the specific conditions and rules for the use of construction products at the time of their incorporation in construction and civil engineering works, but the rules governing market access in respect of those products. Indeed, the ECJ is careful to state that the material technical specifications of the standard create a presumption for free circulations of goods in the EU which cannot bind a national court when establishing what constitutes ‘merchantable quality’ and ‘fit for purpose’ according to the Sale of Goods Act of the Member State.

The court follows Advocate General Campos Sánchez-Bordona’s opinion to a large extent, establishing that European standards adopted under the New Approach may fall under the ECJ’s jurisdiction. However, the ECJ did not submerge itself in the issue of lawful or non-lawful delegation of power under the *Meroni* doctrine³⁷. Moreover, the ECJ did not follow the AG’s opinion in reference to the origin of the standards. While Advocate General Campos Sánchez-Bordona argued in favour of equating harmonized standards to ‘acts of the institutions, bodies, offices or agencies’ under Article 267 TFEU,³⁸ the Court bases its ability to give a preliminary ruling on the interpretation of harmonized standards on the established case law relating to

³² *Sevince* (CJEU 1990); *Deutsche Shell* (CJEU 1993).

³³ *Sevince* (CJEU 1990, p. 11).

³⁴ *James Elliott Construction* (CJEU 2016, p. 34 et seq); *Deutsche Shell* (CJEU 1993, p. 18).

³⁵ *James Elliott Construction* (CJEU 2016, pp. 38, 40, and 43).

³⁶ CE marking is a certification mark that indicates conformity with health, safety, and environmental protection standards for products sold within the European Economic Area (EEA).

³⁷ The *Meroni* criteria stipulates a test for the delegation of power: *Meroni* (CJEU 1958); *United Kingdom v. EU* (CJEU 2014).

³⁸ *James Elliott Construction* (CJEU 2016, p. 40).

Article 267 TFEU, which allows for the interpretation of measures other than those listed in the Treaty, or from other sources.³⁹ This is a material difference. Indeed, the Court seems to imply that the standards are created under private law by SSOs, while the Commission has oversight and a control function over the standards. The Court at least left unanswered the question whether standards should be considered originating from the Commission, while the ESO only acts as a preparatory organ.

By neither discussing whether there is a formal delegation of power to ESOs when establishing harmonized standards or whether harmonized standards should be considered adopted by the Commission, the ECJ makes the issue of copyright protection difficult to answer, *de lege lata*.

The Advocate General took a more bold approach and emphasized that the Commission exercises significant control over establishing harmonized standards. First, the AG pointed out that a harmonized technical standard is always drawn up pursuant to a mandate given by the Commission. Without such a mandate the standard in question would not have been developed. Second, the AG emphasized that reference to harmonized technical standards must be published in the *Official Journal of the European Union*. That is a requirement for ensuring that such standards have the main effect attributed to them by the directive, namely the presumption that conformity with a standard implies compliance with the directive itself and guarantees freedom of movement for the product within the European Union.⁴⁰ The AG continued that only reference is made to the harmonized standard, and its full content is not published, while harmonized technical standards adopted by CEN are drafted in English, French and German. Based on this, it seemed that the AG would consider harmonized standards being law and hence without Copyright protection. However, the AG refused to take a stand in reference to the copyright issue, stating:

national bodies hold the intellectual property rights in the respective national versions of harmonised technical standards and charge for their distribution, a fact which has led to varying case-law in certain Member States on the necessity of official publication of technical national standards when legislatures make a reference to those standards. For the purposes of this reference for a preliminary ruling, I do not consider it essential to examine in more detail the important question of whether the complete official publication of harmonised technical standards is necessary in order for those standards to have legal effect and for the principle of the publication of legislation to be observed. That requirement would have a very significant impact on the European standardisation system, and in particular on the sale of harmonised technical standards by national standardisation bodies. [footnotes omitted]⁴¹

Third, the AG noted that the Commission, the European Parliament and the Member States have the option to object to the standards developed by CEN, and the Commission is even obliged to do this *ex ante*, i.e. before the standard is published. Moreover, decisions relating to the publication of harmonized technical standards, decisions adopted by the Commission concerning formal objections to harmonized technical standards raised by the Member States or the European Parliament are legal acts against which an action for annulment may be brought. Based on this, the AG concluded that harmonized standards should be regarded as drafted under a controlled delegation of legislative power.⁴²

³⁹ Volpato 2017, 591–603.

⁴⁰ *James Elliott Construction* (CJEU 2016, pp. 47–55).

⁴¹ Van Gestel & Micklitz 2013, 145–82.

⁴² *James Elliott Construction* (CJEU 2016, pp. 47–55).

The AG made reference to Member State case law regarding copyright protection. In the famous *Knooble* case⁴³ from the Netherlands, the Dutch Supreme Court seems to argue that reference to standards in the relevant legal document pulls these into the public domain and makes them generally applicable but does not turn the standards into law. An essential condition for this is missing according to the Supreme Court: standards are not based on delegation by a public authority of law-making powers, but rely on private agreements.⁴⁴ In Germany, the highest civil court (*Bundesgerichtshof*) has held that standards should not be copyright protected due to the fact that they were produced pursuant to delegation and they yield external effect and are not only for internal use within the Government. The requirement for this finding is that governmental organizations accept and incorporate the content of the standards into their decision-making.⁴⁵

Notwithstanding this, the AG refused to take a stand in reference to the Copyright issue. The ECJ seems instead to have followed the national courts' line of reasoning, and connects delegation of public power with the elimination of copyright. It is not certain why restricting access to a document that forms part of EU law needs to hinge upon whether the proper delegation of public power needs to be at hand. One could argue that as long as the document is encompassed by the notion of EU law, the EU should have an obligation to make it generally available to the public.

In conclusion, it seems that the ECJ has left unanswered the question whether the control exercised by the European Commission through the mandate and through the publication in the Official Journal is sufficient or insufficient to transfer responsibility for standards from the SSO to the Commission,⁴⁶ and the issue whether there has been a delegation of rule making power when establishing harmonized standards has not been fully determined. Indeed, we do not know yet whether harmonized standards should be considered copyright protected or not.

D. THE WIDER IMPLICATIONS OF THE *JAMES ELLIOTT* CASE: THE APPLICABILITY OF COMPETITION LAW RULES TO THE STANDARD-SETTING PROCEDURE

The *James Elliott* case is not only interesting for the important yet narrow issue of copyright protection for standards. The case also opens the door for a broader discussion regarding which EU rules should be utilized when scrutinizing standard-setting procedures. Should standard-setting be seen as a private initiative governed by property rights and competition law, or is it a public procedure governed by constitutional principles for creating rules, e.g. transparency, participation etc.; indeed, for creating rules for the free movement part of the internal market legal system.

It seems that *James Elliot* implies that the ECJ may not only interpret harmonized standards, but also may invalidate harmonized standards under Article 267 TFEU.⁴⁷ As Hettne points

⁴³ *Knooble* (The Hague 2008)

⁴⁴ Cf. Medzmariashvili 2013; *Knooble* (The Hague 2008); *Hoge Raad* (Netherlands 2007).

⁴⁵ Medzmariashvili 2013.

⁴⁶ Volpato 2017, 591–603.

⁴⁷ In this context, it should be pointed out that the 2012 Regulation on European Standardization provides rules regarding the standard-setting procedure and the quality of the standard as regards when consortia-created standards should be identified for incorporation in public procurement procedures. Indeed, this is a legal basis for addressing standards under the EU Court system based even on quality, i.e. that the standard adopted is not the “best” technology. Regulation (EU) No 1025/2012 of the European Parliament and of the Council of the 25 October 2012 on European standardisation, OJ L 316 of 14 November 2012, Art 13 and Annex II. It should be pointed out that establishing a standard is not a rigorous, scientific process driven by identifying the “best” technology in a particular field. Rather,

out, it could for instance be claimed that a harmonized standard which does not fully respect the limits of the mandate from the Commission or is in conflict with fundamental procedural requirements could be invalidated under Article 267 TFEU. However, these fundamental procedural requirements that Hettne refers to must, without implying that Hettne stated this, be derived from the general principles of the Treaties, while some may also be implied or derived from the Regulation for European standardization, such as Article 10 of the Regulation.⁴⁸ Indeed, European standardization and, hence, the Regulation is founded on principles of coherence, transparency, openness, consensus, voluntary application, independence from special interests and efficiency ('the founding principles'),⁴⁹ which in several ways reflect values that may be used to nullify a standard when such standard was adopted with a procedure that did not meet such values.

Notwithstanding the possible applicability of the EU's general principles to the European standardization procedure, we also do have 'good governance' procedural rules regarding *inter alia* openness, right to participation and transparency for standard-setting in the realm of competition law. In particular, for an SSO to be able to benefit from the 'safe harbour' for standard setting under Article 101 TFEU, it needs to fulfil the procedural soft law contained in the EU Horizontal Guidelines.⁵⁰ The Commission in the Horizontal Guidelines states that European standardization bodies recognized under Regulation 1025/2012 and Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations⁵¹ are subject to competition law to the extent that they can be considered to be an 'undertaking' (i.e., a private firm) or an association of undertakings within the meaning of Articles 101 and 102 TFEU.⁵² As a starting point, this position implies that competition law could be applicable in relation to these organizations, or to the undertakings that *de facto* collaborate under their supervision, for the creation of technical standards.

The Commission acknowledges a broad safe harbour in the Horizontal Guidelines. Any SSO can make use of the safe harbour, and, thus, not worry about the Commission initiating an investigation into whether Article 101 TFEU has been breached, provided that certain procedural requirements are met. Thus, if participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, the standard does not contain any obligation to comply with the standard, and access to the standard is provided on fair, reasonable and non-discriminatory terms, the standard-setting will, according to the Guidelines, normally not restrict competition within the meaning of Article 101(1) TFEU.⁵³ Transparency implies that the standard-setting organization must be open and the SSO needs *de facto* to inform all stakeholders of upcoming endeavours to form new standards. However, if these good governance procedural rules are not met, the prohibitions under Competition law may become applicable.

In light of the above, there might be a concern about regulatory overlap, as to whether standards adopted by an ESO should conform to good governance rules under constitutional

technology is included in a standard through a collaborative process. It draws heavily on prior R&D, standards, and may involve evaluation of, or selection and even compromise among competing technical approaches. See, e.g., Rubin 2007.

⁴⁸ Hettne 2008.

⁴⁹ European Commission 2012.

⁵⁰ European Commission 2011, 1.

⁵¹ European Commission 2011 (Horizontal Guidelines), para. 258.

⁵² *Höfner* (C-41/90); *Selex Sistemi* (C-113/07).

⁵³ European Commission 2011 (Horizontal Guidelines), para. 280; *SCK and FNK* (EGC 1997).

rules and principles of the Treaties and in the general legal principles (General Principles⁵⁴), or under competition law, or both. Indeed, the standard could, at least in theory, be invalidated under both systems of law.

A collaboration leading up to a European standard originating from CEN has been scrutinized under EU competition law by the EU Commission and the EU courts. In the *EMC* case,⁵⁵ the Commission and later the Courts found that a standard developed within the European standard system under CEN at least could be addressed under Article 101 TFEU, providing that the requirements stipulated, *inter alia* that the participants take part in a collaboration akin to an agreement and that there is an economic activity with EU and possible anticompetitive effects. The Commission, and the ECJ, left unanswered whether the work of a technical committee under an SDO can be regarded as an agreement between firms (undertakings).⁵⁶ However, the Commission acknowledged that not only are the members of the technical committees experts representing firms, but also national delegations to CEN are staffed with members who originate from the relevant industry. It seems that they, in their capacity as members of technical committees, still conduct an ‘economic activity’, and do not lose their standing as ‘undertakings’ under EU competition law. The Commission made an analysis of all the requirements for the safe harbour and found it applicable to CEN and the technical committee and the adjoining standard-setting trade association. Since the procedural ‘good governance’ rules in the Horizontal Guidelines had been adhered to, the Commission did not even address the difficult issue of whether the conduct of a technical committee can be considered an agreement under Article 101 TFEU.⁵⁷

James Elliott provides an opening to judge standards under the constitutional rules and principles of the Treaties. The *EMC* case seems to imply that the standard-setting procedure can also be analysed under competition law. Perhaps, both legal systems should to some extent be available, but then be used in reference to the harm they were enacted to govern. Generally, constitutional rules and principles are a better place for judging standard-setting procedure, while competition law should focus on the result of the standard-setting process. Competition law should ask whether the agreement on the technology making up the standard is an anticompetitive agreement. Does it exclude competitors or inhibit innovation to the extent that anticompetitive effects can potentially appear. Indeed, we need to acknowledge the new role of standards for the New Economy, as a market facilitator, and that competition may take place before the markets are established. However, the fundamental procedural rules regarding the standard-setting procedure have more of a constitutional character and should be derived from the general principles and under general EU law, and not from competition law.

E. THE INTERFACE BETWEEN FREE TRADE RULES AND COMPETITION LAW

Private technical standards have also, historically, been presumed immune to the reach of e.g. Article 34 TFEU, while public technical regulations, in cases like *Dassonville*⁵⁸ and *Keck*,⁵⁹ have been under attack for preventing access to markets.

⁵⁴ Hettne 2008.

⁵⁵ *EMC Development* (CJEU 2011); *EN 197-1 Standard* (E.C. 2005).

⁵⁶ *EN 197-1 Standard* (E.C. 2005).

⁵⁷ However, interestingly, if the NSO does claim that copyright protection for standards originates from a *collective* effort of the undertakings involved then that would imply that there is an agreement between undertakings under Article 101 TFEU.

⁵⁸ *Dassonville* (CJEU 1974).

⁵⁹ *Keck and Mithourid* (CJEU 1993).

While the dichotomy between public regulations and private standards is still relevant, the recent *SELEX*,⁶⁰ *Fra.bo*⁶¹ and *OTOC*⁶² cases have, at least, opened up a small opportunity to use Article 34 TFEU in connection with privately produced standards and SSOs.

In the *SELEX* case,⁶³ first the General Court and then the ECJ shed some light on the standard-setting process and the interaction between research and development and standards. The Court had to scrutinize an international standard-setting body, the European Organization for the Safety of Air Navigation (Eurocontrol),⁶⁴ which primarily sets standards in the area of air navigation to enable the participating states to create a uniform system for Air Traffic Management (ATM). Eurocontrol was set up by contracting States, and the ECJ describes its role as being akin to that of a minister, who, at the national level, prepares legislation or regulatory matters which are then adopted by the government. The second area of activity was research and development. The research activity consisted of spearheading joint studies of new technologies in the ATM sector. It acquires and develops prototypes of ATM equipment and systems, for example radar systems, with a view to using that equipment and knowledge to validate and define new standards and technical specifications. Under its research activity, Eurocontrol created a regime of intellectual property rights in relation to the prototypes purchased under research contracts from firms. Access to these rights becomes important for competing firms should the prototype lead to enactment of a standard. Access to these rights was however dependent on whether Eurocontrol or the developer of the prototype held the necessary rights in question. The applicant, *SELEX*, accused the Commission of not taking action against Eurocontrol and the regime of intellectual property rights developed under its research of prototypes. Eurocontrol's research created, according to *SELEX*, factual monopolies in the systems that eventually became standards, and the firms that provided the prototypes were therefore in a particularly advantageous position compared to their competitors. This situation was all the more serious because Eurocontrol did not use a transparent, open and non-discriminatory system for the acquisition of the prototypes and, thus, for establishing the standards.

The case regarding non-action of the Commission was based on the applicability of Article 102 TFEU and not Article 101 TFEU. Nevertheless, some interesting conclusions may be drawn. First, the General Court concluded that Eurocontrol's standardization activities could not be regarded as economic activities and the EU competition rules were therefore not applicable.⁶⁵ The General Court carefully distinguished between researching, developing and adopting standards and, initially, scrutinized each activity individually. According to the General Court there was no market for a technical standardization service in the sector of ATM equipment. Thus, Eurocontrol could not be regarded as offering a service. Secondly, the General Court stated that the research and development activities could not be regarded as economic activities, since the acquisition did not involve the offering of goods or services on a given market. This was further supported by the fact that the intellectual property rights developed under the research were made available to anyone concerned at no cost. Only some confidential information held by the firm which sold the prototype to Eurocontrol was not available to competitors. The intellectual property rights pool was also considered ancillary to 'non-economic' research and

⁶⁰ *Selex Sistemi* (EGC/CJEU 2006/2009).

⁶¹ *Fra.bo SpA* (CJEU 2012).

⁶² *OTOC* (CJEU 2013).

⁶³ *Selex Sistemi* (EGC/CJEU 2006/2009).

⁶⁴ *SAT Flugesellschaft* (CJEU 1994).

⁶⁵ *Selex Sistemi* (CJEU 2009, para. 59 et seq.).

development activity.⁶⁶ The Court continued that even if it were established that Eurocontrol did not have a system in place for distinguishing between rights and technologies, e.g. source code, developed under the research contracts and background software, it did not make the intellectual property rights regime economic in nature.

The ECJ went beyond the findings of the General Court and struck down the General Court's dichotomy between different forms of conduct by Eurocontrol. According to the ECJ the adoption of standards could not be separated from the production of the same, and preparation and production of standards could not be separated from the public task (or the expression of public power) vested in Eurocontrol of managing air space and developing air safety.⁶⁷ Therefore, Eurocontrol was not to be considered an undertaking (private firm).

The Eurocontrol case dealt with an international public body, while the issue is whether the ECJ in this case relieves all SDOs, such as CEN and CENELEC, and also their handling of intellectual property rights and R&D, from the ambit of EU competition law, when assigned to develop European Standards.⁶⁸ Clearly, the case opens up an avenue for arguing that SDOs made up of officials from national public bodies with the public task of producing standards may not be judged under competition law. Somewhat alarming is the way the ECJ did not stop with such a conclusion, but, instead, disregarded the General Court's division of conduct in preparation, production and adoption of standards. The ECJ's method or test for tying the conduct together, and finding that it all fell under the 'public power and thereto connected conduct' exemption, not only seems to be redefining the boundaries between an undertaking and the exercise of public power set out in earlier case law,⁶⁹ it also makes it more difficult to argue that members of technical committees of SDOs, even those representing firms (undertakings), may violate EU competition law when creating a standard that may possibly restrict competitors or exclude competing technical solutions. Nonetheless, the *SELEX* case seems to establish an exemption under EU law, which effectively exempts publicly derived SDOs and their handling of technologies and of intellectual property rights from the ambit of competition law. However, at least in theory, the EU free movement rules may become applicable vis-à-vis the national rules of an EU Member State that might be derived from the Eurocontrol.

In the recent *Fra.bo*⁷⁰ case the ECJ takes a new but expected step in the direction established in the *SELEX* judgment and actually finds that an SSO, and standards, can be scrutinized under Article 34 TFEU. The background of the case is as follows: According to a German Regulation on general conditions of water supply, copper parts of water pipes must comply with recognized rules (standards) for the supply of water. Copper components labelled with the German review and standard body DVGW brand were assumed to fulfil these rules.

DVGW is an SSO, a private non-profit organization made up of members which may be utilities, gas-and-water sector companies, public institutions and independent individuals focusing on the promotion of the gas and water sector. *Fra.bo*, on the other hand, was an Italian company which produced and sold copper parts. In 2000 *Fra.bo* was granted the right to label its products

⁶⁶ The Court also distinguishes Eurocontrol from collective societies since they, according to the Court, collect fees for their members and therefore do conduct an economic activity. See *Selex Sistemi* (CJEU 2009, para. 78).

⁶⁷ *Selex Sistemi* (CJEU 2009, para. 89 et seq.).

⁶⁸ According to the Horizontal Guidelines, the European standardization bodies recognized under Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and on rules on Information Society services (2) are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102 (3). European Commission 2011 (Horizontal Guidelines), para. 258.

⁶⁹ *Belasco* (CJEU 1989).

⁷⁰ *Fra.bo SpA* (CJEU 2012).

with the DVGW mark for a period of five years. Following a complaint from a third party, DVGW reconsidered its decision to grant Fra.bo the right to use the brand. DVGW performed new tests on the copper parts. The copper parts could not pass some of the tests and Fra.bo was given three months to submit a report showing that the copper parts satisfied the technical requirements stipulated. Fra.bo submitted a report from an Italian laboratory, but this was not adopted because the laboratory was not an 'approved' laboratory according to DVGW. In the meantime, DVGW introduced new tests under the standard for copper parts. Manufacturers of certified copper parts were given three months to submit reports on whether their products met the new standards. In 2005, DVGW withdrew the certificate it had issued for Fra.bo in 2000, as Fra.bo had not submitted a report regarding the new tests. Fra.bo appealed the DVGW decision to the Cologne Regional Court, arguing that the decision on revocation of the certificate presented an obstacle to the free movement of goods under Article 34 TFEU or a violation of Article 101 TFEU. The court dismissed the complaint. The ruling was appealed to the Oberlandesgericht Düsseldorf in 2011, which requested a preliminary ruling by the ECJ.

The ECJ considered several factors when analysing whether to use Article 34 or 101 TFEU. The main thrust of the analysis focused on DVGW's special position: it being mentioned in the German Regulation, being *de facto* the only body able to certify copper fittings, and, thus, being able to restrict the marketing and market of products which are not certified by the body. The ECJ concluded therefore that Article 34 TFEU was applicable and breached. The ECJ therefore did not need to establish whether Article 101 TFEU was applicable, or not.

The Fra.bo case is an interesting development. In line with case law development in the other areas of free movement (e.g. the *Laval* case⁷¹), it also provides an opening to judge standards not only in the light of the objectives and aims acknowledged under competition law, but possibly also under other public policy objectives recognized and easily applicable under the Free Trade rules. Clearly, European SDOs risk violating Article 34 TFEU under the *Fra.bo* case.

In a recent case⁷², the ECJ touched upon these issues again. Now in reference to an association for Chartered Accountants in Portugal: *Ordem dos Técnicos Oficiais de Contas* (the OTOC). The OTOC had set up a system of compulsory training for chartered accountants. It seemed clear to the ECJ that even though allowing competing training bodies to provide compulsory training, the OTOC claimed certain courses exclusively.

The ECJ established that OTOC was regulated under public law and held a public service mission. However, this was immaterial, given its wide discretion vis-à-vis the State in setting up this training. It only held a non-exclusive right to provide training under the law, and the OTOC *de facto* was acting in a relevant market for the professional training of chartered accountants. The relevant rules under OTOC by-laws were found in the end to have violated Article 101 TFEU, since they reflected an exclusionary agreement among its members to exclude competing course providers.

In many ways this case follows the older case law concerning exclusionary certifications. However, it seems clear that SDOs connected to trade associations, i.e. consortia and fora, would be considered associations of undertakings according to Article 101 TFEU under OTOC.⁷³ The evaluation includes a test with respect to the freedom to decide what to decide about, and whether SDOs act in a standard-setting market. However, the outstanding issue, even after

⁷¹ *Laval un Partneri* (CJEU 2007).

⁷² OTOC (CJEU 2013).

⁷³ See, e.g., *SCK and FNK* (EGC 1997).

OTOC, is still whether collusion within technical committees in the more official SDOs may be addressed under EU competition law.

It seems clear that the SDOs themselves were exempted under the *SELEX* doctrine. Furthermore, under *Fra.bo* these SDOs may be scrutinized under Article 34 TFEU. The *EMC* case, discussed *supra*, sheds more light on the issue of whether to use Article 34 TFEU or 101 TFEU, and against what entities. According to the Commission in *EMC*, CEN is a recognized standard body under Directive 98/34/EC and therefore a body entrusted with the general economic interest. This would not totally exclude the possibility of EU competition law being applied to CEN, while Article 106 TFEU would possibly need to be applied if the members of CEN were proven to consist of ‘undertakings’. However, neither the EU courts nor the EU Commission have yet made a final decision about whether the members of the technical committees may be scrutinized under Article 101 TFEU. Moreover, a plaintiff could utilize the Regulation on European Standardisation⁷⁴ horizontally vis-à-vis ESOs that are not, for example, transparent. Also, governments making use of ICT consortia-derived standards that do not live up to the requirements in Annex II of the Regulation on public procurement procedures may be challenged.⁷⁵ Thus, a plaintiff that would like to bring an action against CEN does better to use both Article 34, including the Regulation of European Standardisation, and Article 101/102 TFEU.

Private standards have, for a long time, been regarded as immune from the reach of e.g. Article 34 TFEU. It should be acknowledged that the ECJ, has however broadened the definition of the state in several cases, e.g. *Buy Irish*, which could imply that NSOs under EU law could benefit from the application of Article 34 TFEU. Schepel, referring to research conducted in Germany, indicates that standards originating in several NSOs – the Irish, French and the Greek standard bodies – could be capable of being measured under Article 34 TFEU. On the other hand, some NSOs – the German, British and Danish (DIN, BSI and DS) – could not. The respective Member States do not have a dominant influence over these NSOs and the NSOs do not conduct or hold public power in this regard.⁷⁶

A bold approach would be to apply Article 34 TFEU directly to SDOs. In an isolated obiter dictum in *Dansk Supermarked*, the ECJ held in 1981 that ‘it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods’.⁷⁷ Even though the ECJ has subsequently ignored this statement, it gives support to a general principle under free trade rules. The ECJ accepted this reasoning regarding the free movement of workers and services as early as 1974.⁷⁸ The ECJ has furthermore confirmed the principle in *Bosman*,⁷⁹ *Wouters*⁸⁰ and *Laval*.⁸¹ If this principle also applies to the free movement of goods, it could be applicable to standards, given their ability to inhibit free movement of goods and access to markets. Nonetheless, whether this principle also applies to the free movement of goods should be judged in the light of the interface between Article 34 TFEU and the competition rules. The *Dassonville*⁸² formula originates from *Consten and*

⁷⁴ European Commission 2012.

⁷⁵ Whether a government making use of a harmonized standard that does not live up to the requirements in Annex II may also be sued under the EU law generally and the Regulation specifically is presumably a matter for the ECJ to decide.

⁷⁶ Schepel 2005, 43 et seq.

⁷⁷ *Dansk Supermarked* (CJEU 1981).

⁷⁸ *Walrave* (CJEU 1974).

⁷⁹ *Bosman* (CJEU 1995).

⁸⁰ *Wouters* (CJEU 2002).

⁸¹ *Laval* (CJEU 2007).

⁸² *Dassonville* (CJEU 1974).

*Grundig*⁸³ and *Leclerc*,⁸⁴ and the ECJ lays down similar goals for both the rules of free movement of goods and the competition rules.

In the recent *Fra.bo* case,⁸⁵ the ECJ therefore took a new, but expected, step and actually found that SDOs, and SDO-created standards and certifications, can be scrutinized under Article 34 TFEU.

The ECJ considered several factors when analysing whether to use Article 34 or 101 TFEU in *Fra.bo*. The main thrust of the analysis was on the SDO's special position because it was mentioned in the German Regulation, was *de facto* the only body able to certify products under the standard, and, thus, was able to exclude the marketing and market for products which were not certified by the body. The ECJ concluded, therefore, that Article 34 TFEU was applicable and, if one read between the lines, had also been infringed.

The SDO in *Fra.bo* was organized as a limited company but was structured as a consortium, with members from the relevant industry. It held some powers under German law, especially concerning certification. Nonetheless, it seems that *Fra.bo* could also have been judged under Article 101 TFEU, especially if the plaintiff had also included the members of the organization in the suit.⁸⁶

Fra.bo provides an opening to judge standards not only in the light of the objectives and aims acknowledged under competition law, but possibly also under other public policy objectives recognized and readily applicable under free trade rules. In fact, under the free movement of goods regulation, in conjunction with the Regulation on European Standards, it seems clear that a court could actually judge the content, quality, and whether a standard should be implemented in the first place.⁸⁷ Moreover, does Article 34 TFEU require a showing of anti-competitive effect in these cases? That is highly unlikely. In fact, Article 34 TFEU utilizes a *per se* doctrine from a competition law perspective. Clearly, European SDOs risk violating Article 34 TFEU under the *Fra.bo* case, especially if they connect the standard to a certification system.

Furthermore, the Regulation on European Standardization stipulates rules for the standardization process and, to a limited extent, specifies the quality and substance of consortia-derived standards.⁸⁸ Indeed, under the *James Elliot* doctrine perhaps these principles may be used by the ECJ as an inspiration when scrutinizing the procedure for creating technical standards under Article 267 TFEU, i.e. when a plaintiff claims that the technical standard should be declared null and void due to being adopted under a wrongful procedure.

From a free movement of goods perspective, *Fra.bo* is a natural step for the ECJ to take. Similar cases exist under the free movement of workers, of service, and the right to establish.⁸⁹ But from a standard-setting perspective, is it a good development that SDOs should be bound by free trade rules? Was not the whole idea of the New Approach precisely to have standards decided outside the public sphere? Normally, competition agencies and courts refrain from intervening in the substance of standards, but the courts may intervene under the rules of free trade in these circumstances. However, from a free trade perspective, the response might be that

⁸³ *Consten and Grundig* (CJEU 1966).

⁸⁴ *Leclerc* (CJEU 1985).

⁸⁵ *Fra.bo SpA* (CJEU 2012).

⁸⁶ The organizational structure of the SSO in *Fra.bo*, for example, seems similar to the SSO in the German EU competition law case from the Federal Supreme Court (Bundesgerichtshof): *Standard-Spundfass (Germany 2009)*.

⁸⁷ See, for example, the rules in Annex II of the Regulation of European Standards regarding identifying ICT consortia created standards for public procurement procedures. Here, the court clearly can be forced to judge the technical quality of standards.

⁸⁸ European Commission 2012.

⁸⁹ *Bosman* (CJEU 1995); *Wouters* (CJEU 2002); *Laval* (CJEU 2007); *Dassonville* (CJEU 1974).

entities that create infrastructure hold power – perhaps not private power over relevant markets, but public power, creating barriers to entry – and they need therefore to be held accountable for these activities. While their economic conduct should be judged under competition laws, possibly their conduct representing public power should be judged under general constitutional principles (and the Regulation) under the *James Elliot* doctrine. This sounds good in theory, and, given the fact that the scope for scrutiny of standard setting is less under competition law, it is likely that the system will not be held up to closer scrutiny by utilizing only competition law. Some standards, and even firms' conduct in SDOs, can be scrutinized under the free trade rules under *Fra.bo* and, when applicable, the Regulation of European Standards and general principles now under *James Elliot*.

Furthermore, the application of free movement of goods rules is different from that of competition rules. The notions of restriction of trade and discrimination are based on nationality, while the competition rules mainly turn on whether competition has been restricted. Hence, Article 34 TFEU would seldom be applicable to the EU-wide SDOs, e.g. CEN and ETSI. The notion of restriction of trade or discrimination based upon nationality may exist, but more predominant would perhaps be restriction of trade or restriction of access to markets. However, the general principles of EU law and EU constitutional rules, and the Regulation on European Standardization might be applicable in these circumstances. This is perhaps what *James Elliot* is telling us. For example, SMEs will not be able to get their innovations recognized by SDOs adequately, and this would constitute a breach of stakeholder participation under the Regulation.⁹⁰ But these rules are not about discrimination or restriction of trade based on nationality. Instead, they concern restrictions to accessing the regulatory procedure and markets and trade. In other words, they are principles equivalent to the rules and principles under *James Elliot*, but also regarding 'good governance' found in the Horizontal Guidelines. In fact, there may be some overlap in the regulation of SDOs between, on one hand, the *James Elliot* doctrine, Regulation on European Standardization and, on the other hand, the rules for the 'safe harbour' in the Horizontal Guidelines. It depends on the definition of undertaking under competition law, the origin of the standard under the *James Elliot* case and the position of the standard setter under *Fra.bo*. Indeed, it is possible that the Regulation and the principles making up the rules under that Regulation offer more benefits to private plaintiffs than the competition rules.⁹¹

It seems that the EU legislature needs to make a choice how to regulate SDOs and their members. Clearly, given the *Fra.bo*, *EMC* and *SELEX*⁹² decisions, the legislature will have a difficult choice. The SDOs may be scrutinized under the free movement rules, while economic conduct in SDOs, consortia and the members of technical committees, and thereby indirectly the SDOs, may be judged under the competition rules. These entities fulfil the requirement for an 'undertaking', while ETSI, CEN and even IEEE should, presumably, be judged particularly under Article 34 TFEU.

While it is at best uncertain whether it is possible to use Article 34 TFEU against SDOs, the application of the somewhat equivalent rule in the United States, the dormant commerce

⁹⁰ The regulation on European Standardization is far from clear. Thus, it is possible that the Regulation may not have direct effect, while still such a rule may be regarded when ECJ would apply Article 267 TFEU.

⁹¹ The public interest exemptions in Art. 36 TFEU, and under the doctrine of mandatory requirements of *Cassis de Dijon*, are furthermore less forgiving than Art. 101(3) TFEU in exempting rules on the basis of the procedure of the organization in question. Art 36 TFEU is focused on public policy exemptions such as the environment, public health etc. which are difficult to fit inside a competition law analysis. Cf. *Rewe-Zentral AG vs. Bundesmonopolverwaltung für Branntwein* (CJEU 1979).

⁹² *Selex Sistemi* (EGC/CJEU 2006/2009).

clause⁹³ vis-à-vis a standard from an SDOs that is a barrier to trade between US states, is unlikely, or even alien, to American jurists. Similar case law to *Dassonville* may be found in the United States under the dormant commerce clause; see *Minnesota v. Clover Leaf Creamery Co.*⁹⁴ and *Bibb v. Navajo Freight Lines.*⁹⁵ Furthermore, the ‘state action’ exemption under US antitrust law, first established in *Parker*⁹⁶ immunizes federal and state government and agencies from antitrust scrutiny. This implies that, for these agencies, other rules apply, such as, possibly, the dormant commerce clause.

Actually, very few commentators in the US academic debate have ever approached the dormant commerce clause from this point of view. Nonetheless, in several antitrust standard-setting cases, the *Noerr* defence was raised and the defendants argue that the SSO should be regarded as a public body.⁹⁷ The Courts have been reluctant to accept that line of reasoning.⁹⁸ However, if courts did allow the *Noerr* doctrine to be applicable, would that imply that the dormant commerce clause might be available vis-à-vis the SDO? In the United States, delegation of Federal power is benign from a constitutional perspective, while state courts may have a different opinion. The heavy use of private standards by public agencies triggered the so-called non-delegation doctrine, i.e. that public power to legislate cannot be delegated to private parties under (state) constitutions.⁹⁹

Notwithstanding the above, in the EU it is clear that economic conduct that falls within the exemption for conduct that reflects activities in accord with the concept of public power, i.e. act of public power and thereto connected activities, will not be scrutinized under competition law, while it is possible that such conduct can now be judged under both EU constitutional principles and rules, and under the free trade doctrine. In addition, when deciding when competition law is applicable, the variable that competition law regulates markets needs to be taken into consideration. Indeed, pre-competition conduct when selecting technologies, or, for that matter, when construing infrastructure standards should only be regulated under competition law if an anti-competitive harm and effect can be identified.¹⁰⁰ Otherwise, a plaintiff needs to utilize other regulations, such as the free trade rules or general EU constitutional principles, under the *James Elliot* precedent.

Indeed, the *James Elliot* case should be embraced if it implies that standards can now be analysed by EU courts in light of EU fundamental procedural law, while, before this case, it seemed that several forms of conduct, by firms and others, in reference to an SDO, neither fell under competition law, nor under free movement rules. Now we see the contours of a dichotomy: procedural rules for the SDOs can be derived from the general EU legal system for the internal market, i.e. the general principles, rules and doctrines under the free movement of goods and services, and the Regulation for European standardization. Indeed, even the content

⁹³ See Chemerinsky 2013, 455–56 (‘The “dormant Commerce Clause” is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. There is no constitutional provision that expressly declares that states may not burden interstate commerce. Rather, the Supreme Court has inferred this from the grant of power to Congress in Article I, §8 to regulate commerce among the states’). In reference to standards, the dormant commerce clause might in theory be applicable should a state in law refer to a technical standard if that standard would ‘improperly discriminate against interstate commerce’.

⁹⁴ *Clover Leaf Creamery Co.* (U.S. 1981).

⁹⁵ *Navajo Freight Lines* (U.S. 1959).

⁹⁶ *Parker* (U.S. 1943).

⁹⁷ *Noerr-Pennington* doctrine. See *Noerr Motor Freight, Inc.* (U.S. 1961); *United Mine Workers of America*, (U.S. 1965).

⁹⁸ *Union Oil Co. of Cal.* (FTC Dkt. No. 9305); Ohlhausen 2006.

⁹⁹ *Rice* 2017.

¹⁰⁰ *Drexel* 2012, 507.

of a harmonized standard can, to some extent, be reviewed under these rules and doctrines, while anticompetitive effects of the firms collaborating within an SDO may be judged under EU competition law.

CONCLUSION

It is obvious that the ECJ and the EU legislature want both to obtain the benefits of self-regulation, while still upholding the possibility of judicial review of standards and standard-setting from constitutional, trade and competition law perspectives. Indeed, under the EU system, a plaintiff may make use of different lines of argument, which may prove contradictory, if it wishes to bring an action regarding a standard, an SSO or the members (of the technical committee) of an SSO under EU law. Article 34 TFEU could best be utilized for addressing the MS standard and vis-à-vis the NSO if the matter is seen as connected to the State (see *Fra.bo*¹⁰¹), while Article 101 TFEU could be applied to the members of the technical committees, should they be undertakings (firms). We now know that harmonized standards form part of EU law, and may be interpreted by the ECJ, and could very likely also be scrutinized under Article 267 TFEU.¹⁰² Indeed, this implies that standards and standard-setting procedure can also be scrutinized in light of the general principles of EU law, some of which can be implied from the Regulation for European standardization. This seems to be the distinction that the Commission and the courts have carved out in the *EMC*, *Fra.bo* and now *James Elliott* cases. The question is whether this dichotomy between form, content and authorship can also be applicable in reference to the copyright issue discussed in this chapter.

It seems clear that the content and authorship for many technical standards lie with the SDO and the private firms that develop the standards in technical committees, while legal effects of harmonized standards in the EU clearly reflect the result of public power. The right solution could be that the harmonized standards, or at least the part of the standards that reflect law, should not be copyright protected, while access to the standard with possible connected comments and guidelines can, mainly, be achieved through databases connected to the IT, where the SDO (perhaps through the Commission) could still obtain fees reflecting its marginal cost for creating, developing the standard and maintaining and upholding the databases (see to that effect the PSI directive¹⁰³). That would possibly be a just compromise for the few standards that actually become harmonized standards.

¹⁰¹ *Fra.bo SpA* (CJEU 2012).

¹⁰² Volpato 2017, 591–603.

¹⁰³ European Commission 2003; Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information Text with EEA relevance..