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Standards as Transatlantic Trade Barriers: Is There a Future for EU-US Regulatory Cooperation?

by

Iulianna Romanchyshyna*

Abstract

Despite that transatlantic trade negotiations are in halt, an economic and strategic case for cooperation continues to prompt the EU and US to look for other options to engage in reducing trade barriers. One of the areas that carry a great potential is regulatory cooperation, on which, despite the TTIP's 'deep freeze', the parties have made several follow-ups within the bilateral meetings. Following this route, it is likely that eventually some of the problematic regulatory cooperation topics that have been troubling policymakers when TTIP was under discussion would reemerge. This paper addresses the possibilities for transatlantic cooperation on standards. It describes the main features of the EU and US standards development systems to pinpoint their fundamental differences, which confine the possibilities for future cooperation. It also outlines the risks that closer forms of cooperation could entail, as well as discusses some opportunities to address divergences in standards across the Atlantic.

Keywords: European standardization, US-EU regulatory cooperation, TTIP, mutual recognition, SDBs.

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Introduction

Long gone are times when Transatlantic Trade and Investment Partnership (TTIP), contemplated to become an overarching framework for economic cooperation between the US and EU, was hovering on a horizon. Nonetheless, its negotiations brought into a clearer view some important aspects of transatlantic relationships. Regulatory cooperation between the US and EU was deemed to be one of the most promising domains in terms of possible value added being targeted at reducing non-tariff measures (NTMs) (accounting for nearly 70 % of costs in certain domains) but, at the same time, was one of the most controversial areas.¹ Its opponents in Europe had been outraging the public by depicting cases of GMO products and chlorine chicken contaminating the European markets. Aside from polarizing media coverage, there was a general apprehension that because of fundamental differences in regulations across the Atlantic it would be quite uneasy to achieve mutually satisfactory solutions, although forsaking the area of regulatory cooperation altogether would upset the ambitious goals of economic integration.

Notwithstanding the TTIP halt, the parties continued looking for options to tackle regulatory barriers. A meeting between the President of the EU Commission Junker and US President Trump in late July 2018 flagged an enduring mutual interest in reducing non-tariff barriers, as well as initiated ‘*a close dialogue on standards in order to ease trade, reduce bureaucratic obstacles, and slash costs*.’² Later on, in January 2019 the European Commission published the draft negotiating mandates for further cooperation with the US notably much less ambitious than previous TTIP plans, outlining two principal areas, namely elimination of tariffs on industrial goods and cooperation on conformity assessment. The latter was aimed to deal with regulatory divergence. It is noteworthy that conformity assessment cooperation

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¹ BERDEN Koen, FRANCOIS Joe at al., *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, In: ECORYS, *Study for the European Commission, Directorate-General for Trade*, [2013], available at: http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf.

² EU Commission – Press Release, [2018], available at: http://europa.eu/rapid/press-release_STATEMENT-18-4687_en.htm.

does not deal with the substance of regulatory disciplines and only implies recognition of certificates, testing and/or approvals issued by each party's regulatory authorities, which, on the one hand, would probably cause less drama associated with '*race to the bottom*' concerns (fears that cooperation would lead to a decrease in regulatory protection), but, on the other hand, is not an easy task given a lack of a common ground at least with regard to essential regulatory requirements. Recognition of conformity assessment still requires a high degree of assurance that the other party's regulatory authorities are capable of providing high quality testing. As the history of the Mutual Recognition Agreement between EU and US (1998) demonstrated, regulatory compatibility is an important precondition for this type of arrangements: Only sectors with a high degree of substantive convergence have become successfully operational.³ Therefore, aside from this procedural type of regulatory cooperation, a need for cooperation in substance is likely to reappear. One of the areas of this cooperation in substance is the area of industrial standards.

There is also another angle to an ever-increasing relevance of transatlantic regulatory cooperation – strategic. When TTIP was under discussion, it was largely seen as a way for the united western democracies to set regulatory standards for the twenty-first century.⁴ This process would also deem to circumscribe the powers of the emerging economies making them adhere to the international liberal order.⁵ Especially, this reasoning becomes relevant with the growing technological capacities in China (e.g., in areas such as autonomous vehicles, bike-sharing, payment systems and facial recognition⁶) and its underlying strategy to push its standards globally, which would allow to lock-in preferences of its domestic industries.⁷

Against this backdrop, this paper addresses the possibilities for transatlantic cooperation on standards. Standards development represents a peculiar field of rulemaking that is mostly industry-driven and of a soft law nature but, at the same time, constitutes a powerful innovative, as well as a trade-facilitative tool. Building on the results of the Trump and Junker's meeting, the EU and US created the Executive Working group, where cooperation on standards is included as one of the working areas. As reported by the European Commission, there have been numerous transatlantic trade talks, especially regarding emerging technologies, such as 3D printing, robotics and connected vehicles.⁸ Also, recently, various

³ ROMANCHYSHYNA Iulianna, *The Post-TTIP Cooperation on Trade: Stepping Up Conformity Assessment*, [2019], available at <https://www.cjiltalk.org/the-post-ttip-transatlantic-cooperation-on-trade-stepping-up-conformity-assessment/#more-16939>.

⁴ See, e.g., ODENDAHL Christian and KORTEWEG Rem, *Shaping 21st Century Trade. TTIP, Global Standards and Multilateralism*, Centre for European Reform, available at https://www.cer.eu/sites/default/files/pb_ttip_trade_8april16_0.pdf.

⁵ HAMILTON Daniel and BLOCKMANS Steven, *The Geostrategic Implications of TTIP*, CEPS Special Report No. 105, April 2015, available at http://aei.pitt.edu/63763/1/SR105_Geopolitics_of_TTIP_Hamilton_and_Blockmans.pdf.

⁶ BEATTIE Alan, *Technology: How the US, EU and China Compete to Set Industry Standards*, Financial Times, 24 July 2019, available at <https://www.ft.com/content/0c91b884-92bb-11e9-aea1-2b1d33ac3271>.

⁷ *ibid.*

⁸ *European Commission – EU-US Trade Talks – One Year On, Commission Presents Progress Report*, Press release, [2019], available at https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4670.

voices have been calling for consideration of an even closer cooperation on standards between EU and US counterparts. It has been brought up in the European Parliament's recent study, which even goes as far as making a case for mutual recognition of standards if they meet the regulatory objectives of both sides.⁹

Although closer cooperation on standards in theory is deemed to be a progressive trade facilitative tool, it is in fact more complicated than it may seem. By analyzing the intricacies of the EU and the US standards development systems, this paper seeks to evaluate the limits of cooperation on standards post-TTIP and to understand the risks that deeper forms of cooperation could present for the European system. This paper is structured as follows. Section I addresses the nature of standards and their role in facilitating, as well as restricting trade. Section II addresses specifically two forms of deeper cooperation on standards: mutual recognition of standards and allowing for US stakeholders to participate in the standards development process in the EU. Section III describes the main features of the EU and US standards development systems to pinpoint their fundamental differences. Given these differences, sections IV and V respectively outline the risks that the closer forms of cooperation on standards might pose. Section VI focuses on some alternative options for the EU and US to work together in the process of standards development that could address the regulatory divergences across the Atlantic.

I. Standards: definition and role in trade

By nature, standards constitute non-mandatory technical specifications with regard to product characteristics or its production methods. As a rule, they are written by experts from an industry and, as Delimatsis (2015) aptly pointed out, it '*ensure[s] that the best available technology will be adopted in the standard*', since '*the industry as a self-maximizing entity will necessarily converge towards a standard that is the best for it and, by implication, for the society overall*'.¹⁰ From the business perspective, benefits could be derived from the increased interoperability between technologies that would facilitate business operations and increase trade within supply chains. Thus, standards could be trade promoting. The positive impact of standards for trade, innovation and development has been widely recognized. By providing uniform technical specifications intended for a repeated use, they lead to various macro- and microeconomic benefits. A recent study on the impact of standards for the Nordic economies (2018), for instance, demonstrated that standards lead to labor productivity, increased market access,

⁹ European Parliament, 'Consequences of US trade policy on EU-US trade relations and the global trading system, Study Requested by the INTA Committee', [2018], p. 46.

¹⁰ DELIMATISIS Panos, *Introduction: Continuity and Change in International Standardization*, in Delimatsis Panos (ed.). "The Law, Economics and Politics of International Standardisation", Cambridge, Cambridge University Press, (2015), pp. 1-16, p. 4.

production and supply chains efficiency¹¹. They also bring about economic growth by codifying technological know-how.¹²

Despite their non-mandatory force, standards may have a significant impact on market access. First, in certain cases the lines between non-binding standards and binding technical regulations may be blurred. Here, it is important to delineate the definition of a ‘standard’ from a related concept of a ‘technical regulation’, which it is oftentimes conflated with. The WTO Technical Barriers to Trade (TBT) Agreement is quite clear in this regard: Although both standards and technical regulations set certain product characteristics or ‘related processes and production methods’, technical regulations are mandatory, while standards are of voluntary force.¹³ In contrast to ‘technical regulations’ enacted by the governments, standards may be produced by a variety of actors: governmental or non-governmental organizations, international bodies such as the International Standardising Organisation (ISO), International Electrotechnical Commission (IEC), International Telecommunication Union (ITU) and others.¹⁴ However, governments may endow standards with a certain degree of legal force – for instance, by way of their direct reference in legislation, in which case they may have a de-facto similar trade affect as technical regulations. Although industrial standards a priori have nothing to do with government regulations, governments might use them as a means to regulate (or co-regulate) certain relations. The basic idea behind it is to have flexible guidelines that, in contrast to rigid laws, would easily adjust to fast-growing technological changes and innovative solutions reflecting primarily the business preferences. However, when standards are used as the so-called ‘exclusive references’ (compliance with the given standard is the one and only means to meet the requirement of a technical regulation¹⁵), they are particularly restrictive. This might be illustrated with the example of the *US-Tuna* case, where the US government restricted dolphin safe labeling to compliance with a specific technical standard. Despite that it did not prevent the market access for tuna without label, it nevertheless constituted the only way to ‘*regulate the “dolphin-safe” status of tuna products in a binding and exclusive manner*’, which put imported tuna in a less competitive position by availing it from the opportunity to be marketed as ‘dolphin safe’ unless a prescribed standard is strictly followed.¹⁶ Therefore, it limited significantly marketing opportunities of imported tuna and was even found a de-facto ‘technical regulation’.

Secondly, even without being used in legislation, standards may have a powerful impact on market access when market actors themselves choose to endorse them. This might lead to

¹¹ Menon Economics - *The influence of standards on the Nordic economies*, [2018], available at <https://www.menon.no/wp-content/uploads/2018-31-Nordic-market-study-influence-of-standards.pdf>.

¹² DIN - *The Economic Benefits of Standardization*, [2000], available at <https://www.din.de/blob/89552/68849fab0eacea56c5a3ffec9959c5/economic-benefits-of-standardization-en-data.pdf>. BLIND, Knut and JUNGMITTAG Andre, *The Impact of Patents and Standards on Macroeconomic Growth: A Panel Approach Covering Four Countries and 12 Sectors*, *Journal of Productivity Analysis* 29 (1), (2008), pp. 51-60.

¹³ See the *WTO Agreement on Technical Barriers to Trade*, Annexes 1.1 and 1.2.

¹⁴ APPLETON Arthur, *Regulatory Barriers to Trade: Regulations and Standards*, in Cottier Thomas et al. (eds), “*Elgar Encyclopedia of International Economic Law*”, Cheltenham, Edward Elgar (2017), pp. 411-412, p. 412.

¹⁵ *ISO and IEC – ISO/IEC Guide 2. Standardisation and Related Activities*, [2004], p. 17.

¹⁶ Panel Report United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, DS381, [2012], para. 7.144.

a situation when companies using different technical solutions find themselves in a competitive disadvantage being de-facto forced to adjust to a given standard. Standards might have a significant effect on supply chains. One of the examples could be a competition between video standards VHS and Betamax: since the former became more commonly used, despite the availability of Betamax video recorders on the market, consumers would prefer VHS as most of videotapes they could buy or rent implemented this format.¹⁷ Another example could be a direct prescription of some market actors to use a certain standard as a condition for a contractual relationship - for instance, a supermarket chain requiring its suppliers to use a certain label.¹⁸

Against this backdrop, international cooperation on standards is desirable as a means to facilitate trade. This argument is based on economic and technological rationale, which implies that regulatory coherence could lead to trade benefits.

There is also another angle of standardization, which is in strategic concerns. There may be different understandings of what is strategic. Swann (2000) draws attention to the ‘*competitive advantage*’ rationale, which is built on the premise that with the diffusion of standards, domestic companies ‘*use their home market base to build international market share*’.¹⁹ Promotion of standards as a way to advance the competitiveness of domestic industries could be also used as a governmental strategy. Such strategic aspects of standard setting could be found in both EU and US, which frame standardization as a means to attain global competitiveness.²⁰ It justifies a certain level of governmental coordination, which ensures a prioritization of long-term goals within the standardization process that might be neglected by industries in the interest to gain immediate benefits.²¹ It could be also argued that there are other strategic objectives, which are related to public policy, such as ensuring the attainment of a certain level of environmental and consumer protection and creation of a balanced representation of various interests, such as of consumers and small and medium-sized enterprises (SMEs).²²

¹⁷ APPLETON Arthur, *The Agreement on Technical Barriers to Trade*, in: Macrory Patrick, Appleton Arthur et al. (eds.), “The World Trade Organisation: Legal, Economic and Political Analysis”, Boston: Stringer, (2005), pp. 371-409, p. 379.

¹⁸ WOUTERS Jan, MARX Axel and HACHEZ Nicolas, *Private Standards, Global Governance and Transatlantic Cooperation. The Case for Global Food Safety Standards*, Leuven Centre for Global Governance Studies, (2008), available at https://ghum.kuleuven.be/ggs/research/biosafety_biodiversity/publications/wouters-marx-hachez_final.pdf, p. 15.

¹⁹ SWANN Peter, *The Economics of Standardization. Final Report for Standards and Technical Regulations Directorate, Department of Trade and Industry*, Manchester Business School, (2000), 57 p., available at: http://www.assalweb.org/assal_nueva/documentos/Estandares/file11312.pdf, p. 17.

²⁰ For instance, it is recognized by the EU Commission that the objective of standardization is to ‘promote a European standardisation hub with global impact [...] to increase competitiveness of European companies in increasingly global value chains’. See at *European Commission – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘European Standards for the 21st Century’, [2016]*, available at <https://eur-lex.europa.eu/legalcontent/EN/TEXT/PDF/?uri=CELEX:52016DC0358&from=EN>.

On the other side of the Atlantic, the US Department of Commerce also reports that US ‘standards are a critical issue for manufacturing competitiveness in global markets’. See *US Department of Commerce – Standards and Competitiveness – Coordinating for Results, [2004]*, available at https://share.ansi.org/shared%20documents/News%20and%20Publications/Links%20Within%20Stories/trade_barriers_report.pdf.

²¹ Swann (2000), supra at 19, p. 49.

²² Ibid.

Given the role that standards play in trade, one could suggest that there is a case for the EU-US deeper cooperation in this area as it could bring additional economic benefits by reducing adjustment costs for businesses. The considerations might be, however, more complex when it comes to strategic concerns. As was mentioned above, the TTIP negotiations were in part predicated on a need to cooperate in setting global standards in view of an ever-increasing growth of emerging economies. One might argue that it is especially relevant nowadays with a changing power structure in a global economy in contrast to about ten of fifteen years ago where there were only two major regulators competing with each other. Nevertheless, the urge to cooperate in view of geo-economic situation has to be also balanced against other important strategic objectives. For example, for the EU its internal goals are equally important: preservation of its internal market is a key to its global competitiveness. The relative importance of this objective suggests that any further cooperative efforts with the US have to be framed in a manner, which would not risk undermining it.

II. Calls for deeper integration: the EU-US dimension

Ideas calling for deeper cooperation on standards most prominently materialized within the negotiations on TTIP, which was aimed, among other goals, to reduce technical barriers to trade. Notably, aside from a fairly generic requirement to encourage exchanges between the standards developing bodies (SDBs) on both sides, a more specific instrument appeared on the table – *mutual recognition* meaning essentially that standards developed by both parties would reciprocally be recognized as equivalent in meeting each party's objectives and thus could be used interchangeably.²³ The latest EU negotiating text on TTIP does not explicitly refer to mutual recognition of standards, however, it does include a provision that might be construed as effectively opening the doors to it. It is an obligation to consider other party's standards for reference in technical regulation (Art 6.3 of the TBT Chapter). Hence, it could imply mutual recognition (or unilateral recognition of equivalence) with respect to standards referred to in technical regulations. Although the TTIP negotiations are in the past, the idea of mutual recognition occasionally reappears within the context of cross-Atlantic regulatory cooperation talks. In the recent European Parliament's study (2018), it is depicted as a one of possible options to further transatlantic trade talks as it allows flexibility in dealing with regulatory divergences being rather focused on standards' objectives than their origin.

On its face, such an approach might seem reasonable. Recognition of equivalence with regard to technical regulations is even encouraged by the TBT Agreement (Article 2.7). Within the context of the EU-US regulatory cooperation, it has oftentimes been brought

²³ See references to these proposals in *CEN and CENELEC - The Risks of Mutual Recognition of Voluntary Industry Standards within the Context of a Future EU-US Trade Agreement (TTIP) and Alternative Solutions*, [2013], Available at https://www.cencenelec.eu/news/policy_opinions/PolicyOpinions/TTIP_std_mutual_recognition.pdf.

to attention that in many areas the US and EU regulations have similar goals and it is only that different procedural solutions are pursued to achieve them.²⁴ If the regulatory objective is not undermined, it appears apposite to accept both of these solutions.

Another angle of discussion on possible options for deeper cooperation in standards is cooperation between the parties at the stage of standards development, which would imply that the EU standardization system should allow for equal participation of representatives from the US. This is based on the US narrative that the EU system is not as transparent as in the US, where many of its SDBs have an open membership.²⁵ The US frustration with the closed features of the European system is expressed in its annual Foreign Trade Barriers Report, where the EU's exclusion of participation of non-EU businesses is identified as a trade barrier for US companies.²⁶ The argument in favour of a greater openness is based on technological rationality (a need to exchange expertise) and could theoretically increase regulatory coherence.

The above description of both of these cases, however, is quite a shallow one and thus requires further examination. Is it really so that it *'cannot hurt the EU to recognize that other standards actually may meet its regulatory requirements'*, as the European Parliament's study suggests?²⁷ And can it be beneficial for the European system to allow for the direct participation of US representatives, especially in view of its strategic considerations regarding the preservation of the internal market? To better understand these issues, it is worthwhile to examine deeper the intricacies of the EU and the US standards development systems.

III. European and American systems of standards setting: general features

A. The European system

The European system for standards development represents a certain model of a 'hybrid public-private partnership',²⁸ where the control over the process of standards development belongs to three specific bodies – European Committee for Standardisation (CEN), European Committee for Electrotechnical Standardisation (CENELEC) and European Telecommunications Standards Institute (ETSI) with a certain level of involvement from the European Commission. CEN and CENELEC (ETSI is responsible for telecommunication

²⁴ BERCERO Ignacio Garcia, EMBERGER Geraldine, Vandenberghe Jan, *EU-US Engagement in Regulatory Issues: Lessons Learned, Notably in the Context of TTIP Negotiations*, European Foreign Affairs Review, 23(2), (2018), pp. 149-166, p. 150.

²⁵ It is hinted in the US line of questioning in *CEN and CENELEC - Questions and Answers Regarding the European Standardization System*, [2015], Question 13, available at https://www.cencenelec.eu/intcoop/Agreements/Cooperation/Documents/ANSI-CEN-CENELEC-ETSI_Q_As_ESS_Updated_Feb2017.pdf. See also PELKMANS Jacques, *TTIP: Opportunities and Challenges. Technical Barriers to Trade Including Standards. A study for the EP IMCO Committee*, [2015], p. 25.

²⁶ *United States Trade Representative – 2019 National Trade Estimate Report on Foreign Trade Barriers*, [2019], available at https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf, p. 175.

²⁷ European Parliament (2018), *supra* at 5.

²⁸ Delimatsis (2015), *supra* at 10, p. 5.

standards and is not further addressed in this paper as it operates under a totally different model) are not governmental institutions, but private non-profit associations driven by its 34 members - national SDBs and electrotechnical standardization committees of EU Member States, EFTA²⁹, as well as of EU accession countries that acceded to CEN and CENELEC by having satisfied a list of conditions - at the time being, these are Turkey, Serbia and Macedonia. The process of standards development takes place in technical committees, where to national SDBs and electrotechnical committees send their expert delegates, usually representatives from their own members (predominantly businesses), who actually draft standards to be later voted by the CEN and CENELEC members.

There are two fundamental pillars on which the European system of standardization is built. First is the *national delegations principle* meaning that decision-making in standards development is exercised by national SDBs and electrotechnical committees, which convey a unified position of their domestic stakeholders to the European level.³⁰ Individual companies do not participate directly within this process, but instead could lobby for their interests at the national level. Although the process of standards development is open to other limited categories of participants who can provide a technical input,³¹ these participants are not entitled to vote.

The second pillar is the *single standard principle*. By analogy with the EU harmonized legislation, it implies that once a common standard is adopted (EN), the national bodies (SDBs and electrotechnical committees) are obliged to withdraw their conflicting national standard. Moreover, the European system also ensures *ex-ante* regulatory coherence: Once an EN is under preparation, the national bodies shall not take any action that is not in line with this contemplated standard (*'standstill policy'*).³² By striving to dismantle internal barriers caused by standards disparities, this policy ensures regulatory coherence across the internal market.

The role of the European Commission is coordinating. It directs the standardization efforts for policy objectives related to matters of public concern and interests of the internal market, although it is clearly recognized that standardization is a '*voluntary and independent activity*' of SDBs.³³ The Commission may send a standardization request to CEN or CENELEC,

²⁹ There are three SDBs representing EFTA Members, since Liechtenstein participates through the Swiss one.

³⁰ CEN and CENELEC – *Internal Regulations, Part I. Organization and Structure*, [2018], p. 39.

³¹ These are Partner or Liaison organisations representing the interests of the so-called 'weak stakeholders': SMEs, consumers, labour and environment (see CEN-CENELEC - *Guide 25*, available at [ftp://ftp.cenelec.eu/EN/EuropeanStandardization/Guides/25_CEN-CLCGuide25.pdf](http://ftp.cenelec.eu/EN/EuropeanStandardization/Guides/25_CEN-CLCGuide25.pdf)), Affiliates representing SDBs of EU candidate countries (see CEN-CENELEC – *Guide 12*, available at [ftp://ftp.cenelec.eu/EN/EuropeanStandardization/Guides/12_CENCLCGuide12.pdf](http://ftp.cenelec.eu/EN/EuropeanStandardization/Guides/12_CENCLCGuide12.pdf)) and Companion Standardization Bodies which are represent national standardization bodies of foreign countries, which have special arrangements with CEN and CENELEC (see CEN-CENELEC - *Guide 25*).

³² See paragraph 14 of the Preamble of Regulation of the European Parliament and of the Council on European Standardisation, [2012], OJ L 316/12; Additionally: CEN and CENELEC Internal Regulation. Part 2, available at: https://boss.cen.eu/ref/IR2_E.pdf, para. 11.2.4.2 and section 5.

³³ See *General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association*, [2003], OJ C 91/7.

however, it is not mandatory and could be as well rejected by the CEN and CENELEC national members.

Another important aspect of the European system is its orientation towards international standards. The way European system of standardization is organized largely permits it to work in tune with international standards developing bodies - ISO and IEC. Several key points are to be made here. First is the pivotal role that the European system assigns to ISO and IEC: The work of these bodies is relied upon under the EU Regulation 1025/2012 recognizing ISO, IEC and ITU as the only ‘international standards developing organisations’, which, as might be assumed, emanates from the historical development of these bodies, in which the EU Member-states played a paramount role.³⁴ By the same token, this understanding limits the definition of ‘international standard developing body’ under the WTO TBT Committee Decision (2000), which is based on a set of criteria and does not list any specific fora.³⁵ A broad definition by the TBT Committee was pushed by the United States, dissatisfied that the EU dominated international standards development at ISO and IEC.³⁶ At the time being, the US is still frustrated with this EU’s limiting reading of the TBT Committee Decision complaining that EU is illegitimately trying to ‘*reinterpret which standards should be deemed international*’.³⁷ Another key point is the set of procedures built around interaction between the CEN and CENELEC (regional layer of governance) and ISO and IEC (international layer). Here, it is important to point out that there is no single representation of the European regional standardization system at the international level; instead, national members (SDBs and electrotechnical committees of EU and EFTA Member-states) are simultaneously members of ISO and IEC. The ISO and IEC deliverables can be adopted either by national members directly, in case it does not conflict the ‘standstill policy’, or at the European level. In the latter case, they are adopted as ENs with all respective legal consequences meaning that national members must withdraw conflicting standards. Despite that CEN and CENELEC are not members of international SDOs in their own right, it is crucial that there is a system in place that allows for a high level of coordination between their work. The principles of cooperation between CEN and ISO and CENELEC and IEC are respectively depicted in the Vienna and the Frankfurt Agreements.³⁸ They essentially provide for two types of coordination: CEN and CENELEC can adopt the ISO and IEC deliverables *a posteriori* or align their work within the process of

³⁴ Article 1.9 of the Regulation of the European Parliament and of the Council on European Standardisation, *supra* at 28.

³⁵ See WTO, TBT Committee - Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, Annex 4: Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to art. 2, 5 and annex 3 of the Agreement, G/TBT/9, [2000].

³⁶ DELIMATIS Panos, *Global standard-setting 2.0: How the WTO spotlights ISO and impacts the transnational standard-setting process*, Duke Journal of Comparative and International Law, 28, (2018), pp. 273-326, p. 281, footnote 31.

³⁷ United States Trade Representative – 2019 National Trade Estimate Report on Foreign Trade Barriers, *supra* at 27, p. 176.

³⁸ See Agreement on Technical Cooperation between ISO and CEN (Vienna Agreement), [1991], available at [https://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230458/01_Agreement_on_Technical_Cooperation_between_ISO_and_CEN_\(Vienna_Agreement\).pdf?nodeid=4230688&vernum=-2](https://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230458/01_Agreement_on_Technical_Cooperation_between_ISO_and_CEN_(Vienna_Agreement).pdf?nodeid=4230688&vernum=-2); The IEC-CENELEC Frankfurt Agreement, [1991], available at http://www.iec.ch/about/globalreach/partners/pdf/IEC-CENELEC_Frankfurt_Agreement%7B2016%7D.pdf.

standard's development (parallel work). The latter is an especially interesting case: In practice, it means the creation of parallel technical committees at regional and international level under ISO and IEC leadership, which entails information and expertise exchanges and ends up with parallel approval. Interestingly, the Vienna Agreement also foresees that in exceptional cases, the CEN leadership in standards development may also be accepted upon the ISO decision, which means that the main technical work is performed at CEN and further approved by ISO.³⁹ The empirical evidence demonstrate a strong involvement of CEN and CENELEC within the process of international standards development. For CEN, out of 33 per cent of adopted international deliverables, only 31 per cent was adopted *a posteriori*, the rest 57 and 12 per cent were adopted as a result of parallel work either under ISO or CEN leadership respectively. The same is true for CENELEC: out of 72 per cent of adopted IEC standards, 87 per cent result from the parallel work.⁴⁰

This congruous work between the European level and international level of standardization is classified by Mattli and Büthe (2003) as an example of '*institutional complementarities*' that has a strategic dimension to it geared towards facilitation of the global market access.⁴¹ The basic consideration underpinning this argument is that the consolidated standardization system (CEN and CENELEC at the EU-wide level) helps to better translate the interests of EU stakeholders to the international arena and thereby have a wider impact on international standardization. This system permits to better aggregate various interests and then project national consensus on the international arena. Mattli and Büthe (2003) identify these complementarities as a strategic advantage of the European system.⁴² Such state of the art respectively prompts the European system to prioritize the standards development at the international level (as it is a way towards global impact). In its strategic document 'Ambition 2020' CEN and CENELEC note their goal to strengthen the ISO and IEC role as the '*leading international standardization platforms*'.⁴³ The standardization model with a key role of ISO and IEC is also promoted within EU's free trade negotiations: Agreements with Korea, Singapore, Vietnam and Japan contain clear references to ISO and IEC as relevant international standard developing bodies.⁴⁴

What is also relevant to mention when it comes to the European standardization system is the institutionalized ability to accommodate the interests of the so-called 'weak stakeholders': SMEs, consumers, and environmental groups (called so for their lack of resources and information asymmetries). At the European level, their participation is largely based on the

³⁹ ISO – *The Vienna Agreement FAQs*, [2016], available at https://boss.cen.eu/ref/VA_FAQ.pdf, p. 5.

⁴⁰ See CEN and CENELEC – *Quarterly Statistical Report*, [2018], available at ftp://ftp.cenelec.eu/EN/AboutUs/InFigures/CEN-CENELEC_StatPack2018-Q2.pdf, p. 20, 21.

⁴¹ MATTLI Walter and BÜTHE Tim, *Setting International Standards. Technological Rationality or Primacy of Power?*, World Politics 56, (2003), pp. 1-42, p. 18-22.

⁴² Ibid., p. 25.

⁴³ CEN and CENELEC – *Ambitions to 2020*, [2013], available at: ftp://ftp.cenelec.eu/EN/AboutUs/Mission/CEN_CENELEC_Ambitions2020.pdf, p. 3.

⁴⁴ See Annex 2-B of EU-Korea FTA; Annex 4-A of EU-Singapore FTA; Chapter 5 of EU-Vietnam FTA; Chapter 7 of EU-Japan EPA.

financial support from the EU Commission to four organizations representing the following interests: SMEs (SBS), consumers (ANEC), workers (ETUC) and environmental stakeholders (ECOS). These organisations have a partnership status at CEN and CENELEC, which provides them with a right to participate in technical committees.⁴⁵ Although they do not have voting rights, they may take part in the deliberations, send their experts and submit comments. In addition to mechanisms foreseen at the European level, there is also a list of consolidated requirements for participation of ‘weak stakeholders’ at the national level. In fact, national standard developing bodies are bound by the obligation to facilitate access of SMEs to the standardization activities.⁴⁶ They are also obliged to report annually on the participation of SMEs and societal stakeholders.⁴⁷ Moreover, as regards SMEs, it could be assumed that they strongly benefit from the very state of coherence of the European standardization system, which facilitates business operations across CEN and CENELEC membership: They do not need to invest additional resources into the compliance with a variety of standards as the use of one EN provides access to markets of all CEN and CENELEC membership.

When it comes to market access, it is especially important to point out the role of the so-called ‘*harmonized standards*’ meaning that they are to be adopted for the ‘*application of Union harmonized legislation*’.⁴⁸ This is a particular case of co-regulation, where the role of the European Commission is the most prominent. The model of co-regulation follows the ‘New Approach’, a specific regulatory technic introduced by the EU in 1985 and further developed and rebranded in 2008 as the ‘New Legislative Framework’, which provides that mandatory regulations set only ‘essential requirements’ to product safety, consumer protection and environmental impact, which shall be met so that the products could be certified with the ‘CE’ marking allowing for access to the EU market. These ‘essential requirements’ are usually quite generic and do not provide exact technical characteristics. The latter are to be set in harmonized standards produced by the standardization community at the request of the European Commission and cited in the Official Journal of the European Union as recognized methods to match the ‘essential requirements’.⁴⁹ It is critical, however, to point out that references to EU harmonized ENs are not *per se* the ‘*exclusive references*’: Theoretically there could be other ways to meet the ‘essential requirements’ aside from the use of harmonized ENs. However, in case other methods are opted for, it might be also difficult to translate the exact intent of the regulator when formulated in a quite vague legal form of ‘essential requirements’ into certain technical specifications rather than the ENs, while the

⁴⁵ See CEN-CENELEC - Guide 25, *supra* at 31.

⁴⁶ Article 6 of the Regulation of the European Parliament and of the Council on European Standardisation, *supra* at 32.

⁴⁷ CEN-CENELEC – Guide 20, available at: [ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/20_CENCLCGuide20.pdf](http://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/20_CENCLCGuide20.pdf), para. 2.2.

⁴⁸ Article 2 (c) of the Regulation of the European Parliament and of the Council on European Standardisation, [2012], OJ L 316/12.

⁴⁹ European Commission - The ‘Blue Guide’ on the implementation of EU products rules [2016], OJ 272/1, p. 7.

use of ENs (as a result of co-regulation between the EU Commission and the standardization community) would provide more certainty for the producers. Also, the use of ENs simplifies conformity assessment procedures by creating the ‘*presumption of conformity*’ with the essential requirements of EU regulations. In many cases it means that their use requires only manufacturer’s declaration of conformity, while other methods would necessitate a third-party certification generating costs and uncertainty.⁵⁰ It is worthwhile mentioning that this system is often criticized by the US stating that it de-facto conditions market access upon compliance with harmonized standards (despite that they are voluntary) and because alternative methods to satisfy the ‘essential requirements’ generate costs and uncertainty, its producers are de-facto compelled to use ENs without being able to provide any technical input in their development.⁵¹ The US juxtaposes it to its own system, where regulators are free to choose from a variety of standards in support of regulations, not necessarily the ones produced by the US SDOs. However, at the same time, in the US there is no common denominator as regards the process of choosing standards for referencing in support of regulation, as well as no prescription on the mode of referencing: Whether a standard may be provided as one of forms of compliance with relevant laws, or an exclusive form of compliance is left for the discretion of the regulatory authorities.

B. The American system

The US standardization system is deeply rooted in the historical development of its market – fragmented and competition-based, with significant power to regulate granted to the sub-federal level. It is based on the logic that is very distinct from the European with its premise that ‘*no single method of standards development can satisfy the needs of all sectors*’.⁵² Thus, there is a variety of SDBs (around 600⁵³) that may be established in the form of private consortia, non-governmental organizations such as professional associations or scientific institutes, or public bodies. Not even is there a requirement for standardization to be their main area of activity.

A certain level of structure to the standardization activities of SDBs is introduced by the American National Standards Institute (ANSI), which is a non-governmental membership-based organization, which provides a certain level of coordination. ANSI combines private and public interests with its membership being as diverse as including SDBs, companies, government agencies, professional associations, organizations for societal stakeholders (representing labor and environmental interests), and scientific organizations. ANSI accredits its SDBs based on a list of requirements regarding transparency, openness and stakeholders’

⁵⁰ European Commission - ‘The ‘Blue Guide’, *supra* at 35, para. 1.1.3.

⁵¹ *United States Trade Representative – 2019 National Trade Estimate Report on Foreign Trade Barriers*, [2019], *supra* at 27, p. 175.

⁵² *ANSI – Overview of the US Standardization System*, available at https://www.standardsportal.org/usa_en/standards_system.aspx.

⁵³ *Ibid.*

participation (there are around 200 ANSI-accredited SDBs), as well as approves standards issued by SDBs as American National Standards (ANS).⁵⁴ ANSI, however (in contrast to the CEN and CENELEC position in the EU), hardly could be claimed to be an overarching structure for all standardization activities in the US. Its accredited SDBs (subject to a defined high equality requirements) co-exist with a manifold of other standards setters, which may compete with accredited SDBs if the industries find them relevant.

It is also important to point out that some of US-domiciled SDBs have an open membership and a global reputation, such as the American Society for Testing and Materials (ASTM), the Institute of Electrical and Electronics Engineers (IEEE), the American Society for Mechanical Engineers (ASME). It gives rise to the US' claim that these SDBs have an international status producing standards with global application on a par with ISO and IEC, especially given the fact that they satisfy the requirement for international SDBs identifies in the WTO TBT Committee Decision (2000). In fact, a variety of participants may take part in the work of these SDBs, including the ones from Europe. This fact is often referred to by the US when criticizing the European standardization system, which does not provide the same level of openness.

When it comes to the link between standards and regulations, similarly to the European system, the US regulatory framework incorporates references to standards. However, it does not have similar rules for incorporation of ANS only. As was mentioned above, there is no common denominator as regards the process of choosing standards in support of regulations, hence, substantial discretion is left to regulatory agencies. At the federal level, there are only general indications of the attributes of standards, which are to be referenced, such as openness, balance of interest, due process, appeals process and consensus.⁵⁵ Also, at the sub-federal level, the rules for use of standards in support of regulation could vary depending on the regulatory needs of a local jurisdiction and there is no overarching policy to ensure coherence of this process.

The fundamental difference between the US and EU standardization systems also lies in treatment of international standards. As it has been noted above, the US advocated for a broader interpretation of a definition of 'international standard' by the TBT Committee denying the idea of ISO and IEC having a monopoly for standards setting, especially given its own SDBs' claim. In contrast to the European system, there is no comparable overarching policy on promoting the adoption of ISO and IEC standards; instead, there is a mere recommendation for ANSI-accredited SDBs to consider these international deliverables

⁵⁴ ANSI- *ANSI Essential Requirements: Due Process Requirements for American National Standards*, [2018], available at: <https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures%2C%20Guides%2C%20and%20Forms/ANSI-Essential-Requirements-2018.pdf#page=19>.

⁵⁵ Circular No A-119. Memorandum for Heads of Executive Departments and Agencies, [1998], available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf>, Section 4.

when developing American National Standards (ANS).⁵⁶ Although there is a mechanism for the US participation in the ISO and IEC led by ANSI,⁵⁷ it is far from being comparable to the European system. The statistics from 2014 suggests that the level of adoption of ISO and IEC standards as ANS is only 15.5 % compared to the 41.8 % in Europe (adoption as ENs).⁵⁸ Moreover, the American system does not prescribe referencing ANS only in regulations meaning that regulatory agencies are free to choose which standards to choose – ANS, ISO and IEC or others. In practice, this could be assumed as a factor leading to actual differences between EU and US standards and the resulting negative effects on trade.

When comparing the US and EU cooperation with ISO and IEC, it is clear that the European model provides more possibilities to work in tune with these organisations due to internal coherence allowing to channel the consolidated national consensus into the international field. It is more complicated in the fragmented US system, where it is harder to reach consensus internally. The empirical evidence collected by Mattli and Bütte (2003) confirm this statement by showing that because of the institutional structure for participation at ISO and IEC, US companies are less involved in ISO and IEC work than European ones and it is more difficult for them to project any consolidated stance at the international level.⁵⁹

IV. Mutual recognition of standards as a way forward?

The above comparative analysis confirms that there are fundamental differences with regard to main pillars of standards development in the EU and US. In the light of this difference, mutual recognition might be an extremely difficult and risky undertaking. First of all, the same risks associated with mutual recognition of regulations would apply in relation to harmonized standards in the EU (as they build on EU harmonized regulations). As empirical studies demonstrate, mutual recognition of regulations is hazardous unless there is ‘*a very high level of confidence in partners’ regulatory, conformity and enforcement systems*’.⁶⁰ The examples of a wide-scale recognition are in fact only limited to the European Union internal market and the Trans-Tasman MRA between Australia and New Zealand demonstrating a high level of integration of regulatory systems. Moreover, there have been numerous discussions in the context of TTIP that mutual recognition could undermine democratic development

⁵⁶ ANSI – ANSI Procedures for the national Adoption of ISO and IEC Standards as American National Standards, [2007], available at : https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/National_Adoption_Procedures_Jan3107.pdf p. 3.

⁵⁷ ANSI is official member, although its status is of particular nature, since it is not involved in technical work directly and only provides procedural mechanisms through which American SDOs and other interested parties can participate.

⁵⁸ National Institute for Standards and Technology – *A Review of the U.S.A participation in ISO and IEC*, [2014], available at : https://www.nist.gov/sites/default/files/nistir_8007-reviewofusparticip_isoiec-2014_0.pdf , p. 25.

⁵⁹ Mattli and Bütte (2003), *supra* at 45, p. 40.

⁶⁰ OECD, *International Regulatory Co-operation and Trade. Understanding the Trade Costs of Regulatory Divergence and the Remedies*, Paris: OECD Publishing, 2017, p. 42.

of domestic legislation.⁶¹ It is based on the premise that recognized regulation of the other party, while being used interchangeably with national laws, is not subject to a similar oversight. Mutual recognition of regulations in the transatlantic context has been tested only in a very limited sector-specific area of organic products, where the EU and US concluded the equivalence arrangement and it hardly could immediately create a workable precedent for other areas.⁶²

Secondly, mutual recognition could be hazardous for the internal coherence of the European system, the backbone of which is a *single standard principle*. This principle preserves regulatory coherence throughout the CEN and CENELEC membership and thereby creates more predictability within the EU internal market. Opening doors to other solutions apart from the one that is adopted as EN could undermine this coherence and give rise to questioning why standards within the EU internal market have to be withdrawn instead of being mutually recognised. It would also risk undermining the objective of the European system to strive for harmonization towards international approaches (adopted by ISO and IEC) instead of promoting a multiplicity of standards.

Thirdly, mutual recognition could create a disadvantage in terms of participating costs in the process of standards development. While a development process is already not a cheap activity, businesses in Europe would need to spend even more resources to be involved in both development procedures in EU and US in order for their interests to be sufficiently represented. The ‘weak stakeholders’ in the EU could be especially disadvantaged, as they would not be endowed with the same right of participation in US SDBs as they have under the European system.

Finally, mutual recognition of standards would hardly be effectively reciprocal. As the US standards development process is fragmented and regulators at different levels are free to choose any standards in support of regulation, it is not to be expected that in case of mutual recognition the US would provide equivalent treatment of European standards.

V. Do we need more openness within the European system?

As was indicated above, one of the main complaints of the US about the EU standards development system is that it does not provide enough openness. The US stakeholders are especially frustrated that under the ‘New Approach’ they are compelled to use harmonized ENs, while not being able to participate in their development. The US juxtaposes it to the American system, where SDBs that claim international status have inclusive membership,

⁶¹ See, e.g., DE VILLE Ferdi, SILES-BRÜGGE Gabriel, *Why TTIP is a Game-Changer and Its Critics Have a Point*, Journal of European Public Policy 24 (10), (2017), pp. 1491-1505.

⁶² Commission Implementing Regulation No 126/2012 of 14 February 2012 amending Regulation (EC) No 889/2008 as regards documentary evidence and amending Regulation (EC) No 1235/2008 as regards the arrangements for imports of organic products from the United States of America [2012], OJ L 41/5.

which allows stakeholders, either domestic or foreign to participate directly in the decision-making process. This also includes European companies.

There are a few considerations to be made here. Indeed, the *national delegation principle* underpinning the European system implies that decision-making powers are only endowed upon CEN and CENELEC membership. The reasoning is that the national bodies already translate their domestic consensus, and, equally important, the adoption of ENs provide substantial legal consequences for them – obligation to withdraw conflicting standards. In this regard, it is also fair to state that the European system of standardization is a regional system, which serves the internal market and does not claim the international status that would oblige it to be universally open. Also, it is not entirely true that the US companies are not involved within the process of European standards development. As long as they have establishment in the EU or EFTA states, they can equally participate in the CEN and CENELEC standards development process with full rights via respective national SDBs and electrotechnical committees. Indeed, in practice many US companies' experts do sit in CEN and CENELEC technical committees. Moreover, US representatives can also have impact through the international intermediary: As the European system is closely integrated with ISO and IEC, it could be assumed that standards transposed from the international level have also been produced in cooperation with US representatives at ISO and IEC technical committees.

Based on the above, it might be concluded that these forms of deeper cooperation on standards between EU and US would not be warranted being of risk to the core principles of the European standardization system, which is a key component of the EU internal market. Undermining internal institutional structure for standards setting could also impact the global competitiveness of the EU industries. This argument is grounded on the Bradford's (2014) observations regarding conditions for the so-called 'Brussels effect' (EU external regulatory influence), suggesting it has '*emerged largely as an inadvertent byproduct of its [EU's] internal goal to create a single market*'.⁶³ Although Bradford mostly referred to externalization of the EU mandatory regulations, the same might be true with regard to voluntary standards. The EU standardization system, which balances private and public interests and creates coherent voluntary standards within the internal market, does not have analogues within other regional integration blocks. From the empirical observations of Mattli and Buethe (2003)⁶⁴ we may also conclude that strong institutional capacity built at the European level creates more effective impact at the international level at ISO and IEC and thereby contributes to the global EU leadership.

⁶³ BRADFORD Anu, *Exporting Standards: The Externalization of the EU's Regulatory Power via Markets*, International Review of Law and Economics 42, (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770661##.

⁶⁴ Mattli and Buethe (2003), *supra* at 45, p. 40.

On the other hand, the case for EU-US cooperation on standards remains an economic, as well as a strategic imperative. In view of global technological rivalry, it becomes more and more clear that the coordination of transatlantic efforts is vital. This cooperation is especially important when it comes to new technologies where there is a potential to impact the global regulatory framework.⁶⁵ There is, however, a need to elaborate approaches that would create coherence without undermining the existing institutional setup.

VI. Exploring the alternative options to EU-US cooperation on standard

One of the most evident options for further cooperation is the intensification of efforts at the international level (ISO and IEC), as both parties are already involved in the work of these bodies, although to varying degrees. In fact, there have already been cases when standards originally developed by the US SDBs, which were adopted as ISO standards were further transposed into the European system as ENs. For instance, there are three cases, when ASTM standards have been already published as European standards and some others are pending.⁶⁶ The intensification of cooperation at the international level is included as one of key pillars in the regulatory cooperation provisions of the EU ‘new generation’ free trade agreements.⁶⁷ Similarly, pursuing this strategy with the US, although outside the framework of an FTA, could also bring benefits.

The communication by CEN and CENELEC suggests further alternative technical solutions as a second best in comparison to ISO and IEC cooperation. First is inspired by the existing framework of cooperation respectively between CEN and ISO and CENELEC and IEC, which facilitates technical exchange without interference into each others’ internal procedures. Similar agreements could be concluded with most prominent US SDBs, which would promote exchange of technical expertise. Another solution is for CEN and CENELEC to consider the adoption of existing US standards as ENs in cases where there are no corresponding international standards. The European system, does, in fact, provide an option for a possible inclusion by reference of standards developed by foreign SDBs in case they pass all the necessary procedures for adoption at CEN and CENELEC.⁶⁸ To date, however, there have been no cases where this mechanism was used.

These options for further cooperation and technical dialogue demand sustained political and diplomatic efforts. This is where the TTIP was supposed to bring an exceptional value

⁶⁵ Bercero et al. (2018), *supra* at 24, p. 159.

⁶⁶ This information is provided in public access at the CEN website <https://standards.cen.eu/dyn/www/?p=CENWEB:105::RESET>. The following standards originally developed by ASTM have been adopted ENs: EN ISO/ASTM 52900:2017, EN ISO/ASTM 52915:2017, EN ISO/ASTM 52921:2016.

⁶⁷ See, e.g., the Regulatory Cooperation chapter of the EU-Japan EPA (Art. 18.14.3(f)).

⁶⁸ CEN-CENELEC - Guide 23 “Consortium bridge — Adoption of third-party specifications as European Standardization Publications”, [2013], available at http://ftp.cenelec.eu/EN/EuropeanStandardization/Guides/23_CENCLCGuide23.pdf.

added. It was deemed to be a ‘living agreement’, which would create a framework for incremental regulatory approximation allowing the parties to dynamically update the relevant regulatory provisions, especially considering new rules.⁶⁹ At the time being, the possibilities regarding standards are discussed within the Executive Working Group created after the Trump and Junker’s meeting on further transatlantic trade talks after the TTIP freeze, the effectiveness of which will be shown over time. The future efforts, however, may still demand an overarching mechanism that would be dynamically updated and involve constant discussions with various stakeholders. It may be especially instrumental in the early stage of standards development for new technologies (e.g., smart manufacturing, robotics, smart textiles, cyber security).

Conclusion

As in times when TTIP was on the table, to date the case for regulatory cooperation between EU and US still persists, which is evidenced by continuous (although quite fragmented) efforts to engage in its various areas. It is predicated on economic ground, as well as on strategic imperatives given the realities of today’s globalized world. It is important, however, that both sides agree that the fundamentals of each other’s systems have to be duly respected. For the EU, one of the red lines is the integrity of its internal market, which some close forms of cooperation discussed in this paper risk to shatter. Its standardization system is unique in serving the interests of the internal market by securing its competitiveness, which is also strategically important. Cognizant of these limitations, the parties should not forsake the efforts of regulatory approximation especially in areas of emerging technologies where they could have an advantage of collectively shaping the new global standards. The regulatory cooperation ambitions could be channeled through safer ways, as discussed in this article. What important is the sustained political will that would drive the coordination of regulatory cooperation efforts. This is where the benefit of TTIP was most prominent as it was aimed to create an institutional framework to maintain such coordination on a continuing basis. Nevertheless, even outside of the scope of a comprehensive trade and investment deal transatlantic regulatory cooperation could thrive given the urgency of such a process.

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⁶⁹ COTTIER Thomas, *Trade Policy in the Age of Populism: Why the New Bilateralism Will Not Work* in Fitzgerald Oonagh and Lein Eva (eds.), “Complexity’s Embrace: The International Law Implications of Brexit”, Centre for International Governance Innovation (2018), p. 79.

List of abbreviations

ASME	American Society for Mechanical Engineers
ANEC	European Association for the Co-ordination of Consumer Representation in Standardisation,
ANS	American National Standard
ASTM	American Society for Testing and Materials
CEN	European Committee for Standardisation
CENELEC	European Committee for Electrotechnical Standardisation
ECOS	European Environmental Citizens Organization for Standardisation
EFTA	European Free Trade Association
EN	European standard
ETSI	European Telecommunications Standards Institute
ETUC	European Trade Union Confederation
EU	European Union
IEC	International Electrotechnical Committee
IEEE	Institute of Electrical and Electronics Engineers
ISO	International Standardisation Organisation
ITU	International Telecommunication Union
SBS	Small Business Standards
SDBs	Standards developing bodies
SMEs	Small and medium-sizes enterprises
TTIP	Transatlantic Trade and Investment Partnership

Bibliography

Legal and procedural documents

The WTO Agreement on Technical Barriers to Trade

Commission Implementing Regulation No 126/2012 of 14 February 2012 amending Regulation (EC) No 889/2008 as regards documentary evidence and amending Regulation (EC) No 1235/2008 as regards the arrangements for imports of organic products from the United States of America [2012], OJ L 41/5

European Commission - 'The 'Blue Guide' on the implementation of EU products rules [2016], OJ 272/1

General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association, [2003], OJ C 91/7

ISO and IEC – ISO/IEC Guide 2. Standardisation and Related Activities, [2004]

CEN-CENELEC – *Internal Regulations, Part I. Organization and Structure*, [2018], available at: https://boss.cen.eu/ref/IR1_E.pdf

CEN-CENELEC – *Internal Regulation. Part 2*, available at: https://boss.cen.eu/ref/IR2_E.pdf

CEN-CENELEC – *Guide 12*, available at ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/12_CENCLCGuide12.pdf

CEN-CENELEC – *Guide 20*, available at: ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/20_CENCLCGuide20.pdf

CEN-CENELEC – *Guide 23 “Consortium bridge — Adoption of third-party specifications as European Standardization Publications”*, [2013], available at ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/23_CENCLCGuide23.pdf

CEN-CENELEC – *Guide 25*, available at ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/25_CENCLCGuide25.pdf

Agreement on Technical Cooperation between ISO and CEN (Vienna Agreement), [1991], available at [https://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230458/01_Agreement_on_Technical_Cooperation_between_ISO_and_CEN_\(Vienna_Agreement\).pdf?nodeid=4230688&vernum=-2](https://isotc.iso.org/livelink/livelink/fetch/2000/2122/3146825/4229629/4230450/4230458/01_Agreement_on_Technical_Cooperation_between_ISO_and_CEN_(Vienna_Agreement).pdf?nodeid=4230688&vernum=-2)

The IEC-CENELEC Frankfurt Agreement, [1991], available at http://www.iec.ch/about/globalreach/partners/pdf/IEC-CENELEC_Frankfurt_Agreement%7B2016%7D.pdf

ANSI- *ANSI Essential Requirements: Due Process Requirements for American National Standards*, [2018], available at: <https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures%2C%20Guides%2C%20and%20Forms/ANSI-Essential-Requirements-2018.pdf#page=19>

Circular No A-119. Memorandum for Heads of Executive Departments and Agencies, [1998], available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf>

ANSI – ANSI Procedures for the national Adoption of ISO and IEC Standards as American National Standards, [2007], available at: https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/National_Adoption_Procedures_Jan3107.pdf

Doctrine

APPLETON Arthur, *Regulatory Barriers to Trade: Regulations and Standards*, in Cottier Thomas et al. (eds), “Elgar Encyclopedia of International Economic Law”, Cheltenham, Edward Elgar (2017), pp. 411-412

APPLETON Arthur, *The Agreement on Technical Barriers to Trade*, in: Macrory Patrick, Appleton Arthur et al. (eds.), “The World Trade Organisation: Legal, Economic and Political Analysis”, Boston: Stringer, (2005), pp. 371-409, p. 379

BERCERO Ignacio Garcia, EMBERGER Geraldine, Vandenberghe Jan, *EU-US Engagement in Regulatory Issues: Lessons Learned, Notably in the Context of TTIP Negotiations*, European Foreign Affairs Review, 23(2), (2018), pp. 149-166

BERDEN Koen, FRANCOIS Joe et al., *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, In: ECORYS, *Study for the European Commission, Directorate-General for Trade*, [2013], available at: http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf

BLIND, Knut and JUNGMITTAG Andre, *The Impact of Patents and Standards on Macro-Economic Growth: A Panel Approach Covering Four Countries and 12 Sectors*, Journal of Productivity Analysis 29 (1), (2008), pp. 51–60

BRADFORD Anu, *Exporting Standards: The Externalization of the EU’s Regulatory Power via Markets*, International Review of Law and Economics 42, (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770661##

COTTIER Thomas, *Trade Policy in the Age of Populism: Why the New Bilateralism Will Not Work* in Fitzgerald Oonagh and Lein Eva (eds.), “Complexity's Embrace: The International Law Implications of Brexit”, Centre for International Governance Innovation (2018), pp. 71-84

DELIMATISIS Panos, *Introduction: Continuity and Change in International Standardization*, in Delimatisis Panos (ed.). “The Law, Economics and Politics of International Standardisation”, Cambridge, Cambridge University Press, (2015), pp. 1-16

DELIMATISIS Panos, *Global standard-setting 2.0: How the WTO spotlights ISO and Impacts the Transnational standard-setting process*, Duke Journal of Comparative and International Law, 28, (2018), pp. 273-326

DE VILLE Ferdi, SILES-BRÜGGE Gabriel, *Why TTIP is a Game-Changer and Its Critics Have a Point*, Journal of European Public Policy 24 (10), (2017), pp. 1491-1505

HAMILTON Daniel and BLOCKMANS Steven, *The Geostrategic Implications of TTIP*, CEPS Special Report No. 105, April 2015, available at http://aei.pitt.edu/63763/1/SR105_Geo-politics_of_TTIP_Hamilton_and_Blockmans.pdf

MATTLI Walter and BÜTHE Tim, *Setting International Standards. Technological Rationality or Primacy of Power?*, World Politics 56, (2003), pp. 1-42, p. 18-22

SWANN Peter, *The Economics of Standardization. Final Report for Standards and Technical Regulations Directorate, Department of Trade and Industry*, Manchester Business School, (2000), 57 p., available at: http://www.assalweb.org/assal_nueva/documentos/Estandares/file11312.pdf

WOUTERS Jan, MARX Axel and HACHEZ Nicolas, *Private Standards, Global Governance and Transatlantic Cooperation. The Case for Global Food Safety Standards*, Leuven Centre for Global Governance Studies, (2008), available at https://ghum.kuleuven.be/ggs/research/biosafety_biodiversity/publications/wouters-marx-hachez_final.pdf

PELKMAN Jacques, *TTIP: Opportunities and Challenges. Technical Barriers to Trade Including Standards. A study for the EP IMCO Committee*, [2015]

Other documents

Menon Economics – *The influence of standards on the Nordic economies*, [2018], available at <https://www.menon.no/wp-content/uploads/2018-31-Nordic-market-study-influence-of-standards.pdf>

DIN – *The Economic Benefits of Standardization*, [2000], available at <https://www.din.de/blob/89552/68849fab0eeeaafb56c5a3ffee9959c5/economic-benefits-of-standardization-en-data.pdf>

Panel Report United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, DS381, [2012]

European Commission – *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'European Standards for the 21st Century'*, [2016], available at <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52016DC0358&from=EN>

US Department of Commerce – *Standards and Competitiveness – Coordinating for Results*, [2004], available at https://share.ansi.org/shared%20documents/News%20and%20Publications/Links%20Within%20Stories/trade_barriers_report.pdf

CEN and CENELEC – *The Risks of Mutual Recognition of Voluntary Industry Standards within the Context of a Future EU-US Trade Agreement (TTIP) and Alternative Solutions*, [2013], Available at https://www.cencenelec.eu/news/policy_opinions/PolicyOpinions/TTIP_std_mutual_recognition.pdf

OECD, *International Regulatory Co-operation and Trade. Understanding the Trade Costs of Regulatory Divergence and the Remedies*, Paris: OECD Publishing, 2017

CEN and CENELEC – *Questions and Answers Regarding the European Standardization System* [2015], Question 13, available at https://www.cencenelec.eu/intcoop/Agreements/Cooperation/Documents/ANSI-CEN-CENELEC-ETSI_Q_As_ESS_Updated_Feb2017.pdf

United States Trade Representative – *2019 National Trade Estimate Report on Foreign Trade Barriers*, [2019], available at https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf, p. 175

CEN and CENELEC – *Quarterly Statistical Report*, [2018], available at ftp://ftp.cencenelec.eu/EN/AboutUs/InFigures/CEN-CENELEC_StatPack2018-Q2.pdf, p. 20, 21

CEN and CENELEC – *Ambitions to 2020*, [2013], available at ftp://ftp.cencenelec.eu/EN/AboutUs/Mission/CEN_CENELEC_Ambitions2020.pdf

ANSI – *Overview of the US Standardization System*, available at https://www.standardsportal.org/usa_en/standards_system.aspx

National Institute for Standards and Technology – *A Review of the USA participation in ISO and IEC*, [2014], available at https://www.nist.gov/sites/default/files/nistir_8007-reviewofusparticip_isoiec-2014_0.pdf, p. 25



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