'The European standardisation regimes are dangerous and inefficient'. Discuss

To involve oneself in a thorough discussion of European standardisation one has to allow an escape into a brief history of the system which has insofar taken two separate forms with distinctly separate aims. The Europeanisation of standards has been used as a means to different ends: the first as a means to remove the obstacles to trade represented by divergent national standards, and the second as a way of relieving political decision-making from technical and cumbersome detail. This essay requires a qualitative evaluation of the regime as it stands, but for this to be achieved one may have to explore the reasons behind its initial and much-publicised failure and consequent 1992 're-packaging' requirement. Standardisation is now established as a legitimate alternative to Community legislation[1] suggesting already that it secured its raison d'etre as a mere accessory instrument for the implementation of Community law. What would have to be considered is whether this should in fact be its designated role. By 1985, most observers appeared willing to accept Jacques Pelkmans's verdict that the old harmonisation approach was a disaster,[2] prompting a conclusion that the most applauded next-step would involve not only a new procedure but also a new vision for the role standardisation was going to take in the European context. Thus for a current valuation, one is left with the following points for consideration: has the new approach been successful in eliminating the weaknesses inherent to the old-style harmonisation? Further, how successful has it been in securing its latterly formulated aims? This essay shall argue that there is some way to go before European standardisation regimes embody all the desired accountability, representation, formal and functional efficiency; nevertheless it shall become apparent in the course of this discussion that the European union has done much to improve the system, which will invariable further the underlying aim of political and economic integration within the Community.

One can not go far with out highlighting the drawbacks of the once contentious process of the 'traditional approach' for it was the existence of these that necessitated the creation of a 'new' approach. The old convoluted process went something along these lines: set in motion by the council or commission for a particular field or product, the process centred on teams of experts from each country meeting to compare existing regulations and to negotiate a common position. Thus when successful, a standard was borne out of a negotiated consensus. One can only imagine the destined stalemate some of these negotiations were to meet, especially in the face of delicate issues in health and safety regulation. However achieving international reconciliation by painful mediation was not in principle different from the process most countries operate with domestically. The more common and perturbing criticism was that the approach was too bound up in trivia, technical detail and sophistication. In the layered structure of Community decision-making, disagreements were 'kicked-up' to the level of 'political' decision-making[3], resulting in the kind of legislative impotence that has given Brussels a bad reputation such as

[1] Harm Schepel, '*The European Community: Market Integration and Private Transnationalism'*
[2] Krislov, '*How nations choose standards and how standards change nations'*

[3] Harm Schepel, '*The European Community: Market Integration and Private Transnationalism'*

overly complicated and exhaustive Directives on matters of dubious importance, examples include Directive 87/402/EEC on roll-over protection structures mounted in front of the driver's seat on narrow-track wheeled agricultural and forestry tractors, which runs for 43 pages. Moreover, these directives took so long to adopt that they were often outdated long before they actually came into force such as Directive 87/438/EEC on the permissible sound power level of lawnmowers, adopted 6 years after the Commission's proposal and Directive 84/526/EEC on seamless, unalloyed aluminium which was adopted ten years after the Commission's proposal!

It seems therefore unsurprising that for the 'New Approach' two major aspects pf legislative technique were to be changed fundamentally. First, directives were to limit themselves to the laying down of only the 'essential requirements' imposed on products. The latter represented to the member states the maximum requirements that they may impose on products.[4] Second, the focal point for legislative activity was now to be 'horizontal' directives that covered a whole sector. Thus making it possible "to settle at stroke, with the adoption of a single directive, all the problems concerning regulations for a very large number of products, without the need for frequent amendments or adaptations of that directive."[5] Another 'new' aspect was introduced by the ECJ in its *Cassis de Dijon* judgement, this being the concept of mutual recognition, a process by which states could bring about harmonisation. In *Neeltje Houtwipper* the ECJ summed up the case law concerning mutual recognition: 'in the absence of harmonisation of legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect prohibited by Article 28. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.'[6] Theoretically therefore, the new approach emphasised mutual recognition of each nation's standards. In practice, the bureaucracy has focused on the product regimes outlined in the master plan. Essentially, the threat of free circulation of goods was leverage to obtain an agreement to standardise and harmonise an enormous number of products and processes at a dizzying pace. Mutual recognition could thus be seen as a device to speed up the completion of the common market. Initially applied to food standards, mutual recognition has gained wider application through the legislative activities of the Council and Commission- these latter institutions have begun to promote product quality at EC level and have made proposals regarding controlled origin designations and the use of EC-quality marks.[7]

If designed as a strategy to accelerate Community legislation for the internal market, the New Approach could be deemed enormously successful. By 1992, the Council had already put in place regulatory frameworks for the whole industrial sectors by adopting Directives on toys,[8] construction products,[9] electromagnetic compatibility,[10]

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[4] Case C-112/97 *Commission v Italy* [1999] ECR I-1821 confirmed this.
[5] Annex II (The 'Model Directive'), Council resolution on a new approach to technical harmonisation and standards.
[6] Case C-293/93 *Neeltje Houtwipper* [1994] ECR I-4249
[7] Document SEK (9) 2415 final, January 21, 1991. From Hans Christoph von Heydebrand, *'Free Movement of Foodstuffs, Consumer Protection and Food Standards in the EC: Has the court of Justice* got it Wrong?
[8] Directive 88/378/EEC
[9] Directive 89/106/EEC

machinery,[11] telecommunications equipment,[12] and a large range of other product groups. Considering the breadth of products covered,[13] its seems easy to conclude that not only did this novel procedure successful carry out its aim, it did so with efficiency unknown to the previous regime. It is perhaps worth noting at this point that the Commission wanted to improve efficiency even further, publishing in 1991 the Green Paper: 'Action for faster integration in Europe' which contained wide ranging proposals to improve efficiency in the delivery of mandated standards. However the paper was destined for refutation because it sought to eliminate inefficiency by doing away with national interests, nearly at their entirety! The Commission thought that 'bringing together 18 national delegations to discuss conflicting technical solutions…is costly, laborious…inefficient'[14] however it was cast under some think-positive spell if it thought the member states would give up their chance to input on such delicate issues and instead delegate this task to 'project teams.'

Though perhaps not ready to have the standard-setting procedure elevated out of their reach,[15] and understandably so, member states were nevertheless increasingly reliant on standards set at the European level,[16] suggesting that unless the latter's governments have a taste for danger, European standardisation was becoming a way of guaranteeing consumer understanding and product safety.[17] Under the climate of Maastricht, standardisation took on fresh significance and an autonomous value in the project of European integration. The process of standardisation seemed to dissolve the tension between negative and positive integration and worked in congruence with the principle of the moment- subsidiarity.[18] Not only did the new process follow subsidiarity to a high degree, it avoided the unnecessary stifling of technological and economic initiative by advocating a 'less is more' attitude to regulation.

If the New approach has led to more standards, it is necessary to consider how and to whom all these might benefit. If standards are not efficient in themselves, the fact that they are set at European level will not add much in terms of effectiveness. Standards, especially food standards, are necessary to help prevent the consumer from being misled. Often simple labelling is not enough, especially if one looks at the statistics: approximately only 20% of purchasers will ever look at the labelling.[19] Furthermore they can ensure that the expectation of the buyer as to quality is not frustrated. Consumers have, to a certain degree, certain expectations as to the quality of products in circulation, and they want the government to ensure that their expectations are not frustrated. In other words by setting standards at the European

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[10] Directive 89/336/EEC
[11] Directive 98/37/EC
[12] Directive 90/396/EEC
[13] The regime expanded to cover products representing 17% of intra-Community trade: Commission Report, *Efficiency and Accountability in European Standardisation under the New Approach,* (98) COM 291
[14] COM (90) 456 final, para. 38 (i)
[15] This may have happened had the Commission's Green Paper (see p2) been endorsed
[16] In its 1995 Communication on *The Broader Use of Standardisation in Community Policy*, the Commission highlighted the endorsement of the of the Community's increased reliance on standards.
[17] These will be discussed at a later stage in this essay.
[18] Commission Communication, *On the Broader Use of Standardisation in Community Policy,* COM (95) 412
[19] Walter Woods, '*Consumer Behaviour'* (1981)

level, the EU is providing that certain amount of paternalism expected by the public – a far cry from establishing a 'dangerous' regime as suggested by the title laid for discussion. Moreover, standards could be said to be intrinsically efficient because they save time and money by facilitating consumer choice and by promoting fair trading.[20] It is perhaps a shame that the ECJ has assumed that adequate labelling can be as effective as standards in assuring all the above. Given that the majority of consumers apparently do not read labels,[21] how does the ECJ know for example that German consumers will not be mislead by the traditional champagne-type bottles which a French importer used for marketing of partially fermented grape juice having an alcoholic strength below 3 per cent.?[22] As von Heydebrand remarks, mutual recognition can lead to a discrimination against manufacturers situated in the importing state; if that member state does not timely adjust the standard the domestic manufacturers may suffer from serious disadvantage and will lose an opportunity to secure market shares. There are always pros and cons to every regime. Regulatory mutual recognition has in any case come in useful from an economic point of view since in many cases there is no economic justification for pursuing comprehensive EC regulation.[23]

In terms of safety for the consumer European standardisation appears to promote this by securing the aforementioned advantages and by ensuring safety in the product itself, the last is guaranteed by Directive 92/59/EEC, which contains the general requirement to put only 'safe' products on the market.[24] So how might one possibly thus be tempted to cast the regimes aside as dangerous? Hazards only seem to surface when one starts to question the very people setting the standards at the European level. Who are these people? Essentially these are technical committees such as CEN and CENELEC who work under three procedures.[25] What is immediately striking to the procedure is its lack of plurality. In 1992 ANEC was created by electing 1 representative from each consumer council, this move was promising at the time had the group not been relegated to an inadequate opinion-issuing role.[26] Nonetheless, this role was substantial if you consider that manner by which the environmentalists were unabashedly cast aside without even a symbolic role.[27] That ISO develops over

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[20] For example, if a producer adds soya to meat and the soya is not easily detectable by vision, the notion of fair trading may require that the consumer is informed about the composition of the meat, that the product may not be designated as meat or standards are enacted on how much soya may be added until the product ceases to be eligible to bear the designation meat. Otherwise the producer of 'soya meat' may gain an unfair advantage vis-à-vis the producers of pure meat from the possible confusion of the consumer as to the composition of the product, since soya is much cheaper to produce than meat. Example taken from Hans Christoph von Heydebrand, *'Free Movement of Foodstuffs, Consumer Protection and Food Standards in the EC: Has the Court of Justice* got it Wrong?

[21] Supra, n.19.

[22] Case 179/85 *Commission v Germany* [1986]

[23] Jeanne-Mey Sun and Jaques Pelkmans, '*Regulatory Competition in the Single Market'*

[24] This is defined as: 'any product which, under normal or reasonably foreseeable conditions of use, including duration, does not present any risk or only minimum risk compatible with the product's use, considered as acceptable and consistent with a high level of protection for the safety and health of persons.' Article 2 (b).

[25] The Questionnaire procedure, the TC procedure and the Unique acceptance procedure.

[26] One should not however forget the pressure from consumer programmes such as Watchdog, which act as a more practical voice for the consumer.

[27] That is not to say that environmental issues are not considered. Standards have to pass an environmental impact assessment. The Community has also gone some way in developing 'green

CEN only exacerbates these worries given that his organisation has neither representation for consumers nor environmentalists. What of accountability? National governments have a tenuous hold over proposed directives, if they do not like it they can suggest this to the Commission. As for the consumer, she can still sue the industry concerned through producer liability; then again there is a loop hole that may emerge pertaining to Article 7 (e) which allows for an exception to liability if the fault could not be scientifically detected at that time. It is possible that the standard will set the scientific knowledge and thus erect a safety barrier for the producer.

To be truly efficient European standardisation regimes need to be coordinated and enforced. This rests with Directive 98/34, the member states and the ECJ. The 'standstill requirement' would go some way if member states followed its requirement to notify all technical standards to the Commission. However the EU has seen very uneven notification- in 1999 there were 591, for which 3 states were responsible for nearly half.[28] Further it is possible that Directive 98/34 has led to questionable results such as in *Unilever.*[29] At issue was a company's refusal to pay for the delivery of a batch of oil, which was not labelled according to the requirements of a regulation enacted in breach of Italy's obligations under the Directive. The ECJ decided the national legislation enacted in breach of the obligations of the Information Directive is to be declared inapplicable in proceedings between private parties. The undesired oil was not completely processed in Italy, would consumers really benefit by having a 'made in Italy' mark on oil not made in Italy in its entirety? Yet, looking at its overriding aim, the Directive is well construed- at the very least it provides incentive for national governments to comply with the procedural requirements.[30]

In conclusion it would appear that standardisation is an efficient and necessary process that advances consumer choice, safety and manages expectation, it allows for fair trading and forecloses competition. For those whose standard is set, life is rosier than usual till the competitors adjust to the newly set norm, however this advantage may not linger as the standards represent the minimum requirements and allow a lot of room for manoeuvre. The new approach thus grants more power to individuals and firms to certify their own compliance with the necessary requirements, the move away from excessive regulation leaves room for technological innovations. It has been pointed out that the 'Achilles'' heel of the Community remains its lack of enforcement mechanisms,[31] this should be borne in mind for future reformers. The standard setting rational is no longer merely that it is the best compromise possible among competing states; the claim may now be that it is technologically sound. This will no doubt push the Community to accept greater transparency in standard setting, as it has already been forced to do under international pressure.[32] Accountability and representation should also be at the forefront of the next reform schedule. With such

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marks' indicating environmentally sound products, as well as subsidiary marks for irradiated foods and other products consumers might be leery of.

[28] Single Market Scoreboard (SEC (2000) 879, May 2000) p.20

[29] Case C-443/98 *Unilever v Central Food* [2000]

[30] This only partially worked as an incentive, but the *CIA v Signalsson* judgement improved this. Harm Schepel, '*The European Community: Market Integration and Private Transnationalism'*

[31] Krislov, '*How nations choose standards and how standards change nations'*

[32] Supra, n. 32.

improvements considered European standardisation will become its destined efficient safe haven for the Community.