Standards on the rise in procurement procedures: Are legitimacy concerns justified?

10. Standards on the Rise in Procurement Procedures: Are Legitimacy Concerns Justified?

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1. INTRODUCTION

The European standardisation regulation defines a standard as a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is either an international standard, a European standard, a harmonised standard or a national standard.[1] Indeed, the primary objective of standardisation is the definition of *voluntary* technical or quality specifications with which current or future products, production processes or services *may* comply. The fact that compliance with standards is not mandatory makes sense, as standards are in principle adopted by recognised standardisation bodies (and hence private organisations) and not by the legislator.

In public procurement procedures, standards are used to ensure that the offers of economic operators fulfil the needs and desires of the contracting authorities. Indeed, standards are considered to be a tool to help express the characteristics of a supply, a service or work which a contracting authority wants to purchase. Contracting authorities often refer to standards as part of the technical specifications as this is considered to be easier, more convenient and sometimes more professional compared to personally drafting specific functional or performance specifications. The use of standards in procurement documents raises, however, a number of problems.

[1] Article 2 Regulation 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No. 1673/2006/EC of the European Parliament and of the Council, OJ L316, 14.11.2012, 12–33.

First, the emphasis on standards in procurement documents may lead to economic operators believing that, if they do not deliver products or services that comply with those standards, the contract will not be awarded to them. The perception or presumption that compliance with standards is mandatory, or at least strongly desirable, in procurement procedures is not groundless, since technical specifications are mandatory requirements that have to be fulfilled in order to win a procurement contract. If economic operators want to sell, they should fulfil the wishes of the buying contracting authority.

Since standards are developed by standardisation organisations which are composed of business operators and experts that are not democratically elected, this might be problematic, as it seems that these non-democratically elected organisations can adopt (quasi) binding rules.

This contribution will discuss the legitimacy concerns that are related to the use of standards in public procurement, by focusing on the fact that compliance with standards is often a prerequisite for market access, while those standards are not developed by democratically chosen institutions, representing the common will of the legal subjects.[2] Hence, this chapter will address the input-oriented legitimisation of standards as it involves political participation by the people,[3] the *de facto* binding nature that standards may have and the fact that standards are often used and perceived as a tool to exclude competition in procurement procedures. The focus on input legitimacy as the participatory quality of the process leading to laws and rules as ensured by the 'majoritarian' institutions of electoral representation is important to understand the status of standards in general and to analyse their use in public procurement procedures.

In this contribution, special attention will be given to the development of ICT standards. This choice is motivated by the fact that Recital 37 and Articles 13 and 14 of the European standardisation Regulation contain a specific regime for the identification of ICT technical specifications that can be referred to in public procurement procedures. More specifically, Article 13(3) stipulates that, whenever the European Commission decides to identify ICT technical specifications which may be eligible for referencing in public procurement, the Multi Stakeholder Platform established by the Commission should be used

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[2] Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 6; Sébastien Mena and Guido Palazzo, 'Input and Output Legitimacy of Multi-Stakeholder Initiatives' (2012) Business Ethics Quarterly 22(3): 537–41.

[3] Fritz W Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Universitätsverlag 1970); Fritz W Scharpf, *Games Real Actors Play* (Westview 1997); Scharpf, above n. 2, 7–21. Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* "Throughput"' (2013) Political Studies 61(1): 4.

as a forum for consultation of European and national stakeholders,[4] European standardisation organisations and Member States. This provision is interesting for the purposes of this chapter and its overarching aim of assessing the legitimacy concerns that are related to the use of standards in public procurement, because it clearly resembles a requirement of appropriate representation, albeit in a very light version if compared to the adoption of legal rules by democratically elected representatives.

Finally, the Dutch 'comply or explain' policy on the use of open standards in public procurement will be discussed as it mandates the use of certain standards, a fact which, as will be shown below, can be considered problematic from an input legitimacy point of view.

By studying the issues mentioned above, the underlying research question which this contribution aims to answer is the following: 'To what extent does the use of standards in public procurement procedures give rise to legitimacy concerns?' The structure of this contribution is as follows. Section 2 addresses the relevance of standards in a procurement context and their (quasi) binding nature. Section 3 focuses on ICT standards in public procurement and the role of the European Commission. Section 4 discusses the use of open standards in ICT procurement and the policy of the Dutch government that renders the use of open standards in ICT procurement mandatory. Section 5 focuses on the input legitimacy concerns relating to the use of standards in procurement procedures, and concludes.

2. THE RELEVANCE OF STANDARDS IN A PROCUREMENT CONTEXT AND THEIR (QUASI) BINDING NATURE

Before awarding a contract in the framework of a public procurement procedure, contracting authorities have to evaluate the candidates (tenderers) by means of selection criteria, and their respective proposals (tenders) by means of award criteria published in advance.[5] Furthermore, contracting authorities

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[4] Commission Decision of 28 November 2011 setting up the European multi-stakeholder platform on ICT standardisation (2011/C 34904).

[5] Only in exceptional circumstances is it permitted to award a contract on the basis of the negotiated procedure without prior publication of a contract notice. In such cases no advertisement is placed in the Official Journal of the European Union and negotiations are entered into directly with one or a number of suppliers with a view to agreeing the terms of the contract. This can occur if no tenders have been submitted that comply with the technical specifications and these specifications were regarded as essential to meeting the needs of the contracting authority. See Case C-250/07, *Commission v Hellenic Republic* [2009] ECLI:EU:C:2009:338.

have to check whether the tender complies with the required technical specifications, which, as mentioned in the introduction, may contain references to standards.

The most important procurement instrument, Directive 2014/24/EU,[6] includes a definition of the term 'standard' in Annex VII, point 2. It provides that a standard is a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory. In procurement procedures, technical specifications aim to ensure that the offers of the economic operators fulfil the needs and desires of the contracting authority and define the subject matter of the contract.[7]

According to the case law of the European Court of Justice, technical specifications are to be formulated in such a way that economic operators are granted equal access to the procurement procedure. They may not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.[8] Specifically for high-tech and complex products or services such as ICT products, which will be further analysed in this contribution, technical specifications are often characterised by their high level of specificity: overdetailed specifications can hamper the rise of new or innovative products or services on the market. Hence, as held by the Court of Justice in *Roche Lietuva*,[9] the level of detail has to comply with the principle of proportionality, which implies, in particular, an examination of the question establishing whether that level of detail is necessary to achieve the desired objectives. It follows that there is a tension between, on the one hand, the broad level of discretion of contracting authorities to decide and determine what they want to buy,[10] and, on the other, the fact that technical specifications can risk artificially reducing competition.

The link between standards and technical specifications can be found in Article 42(3) of Directive 2014/24/EU. To ensure an optimal level of competition, this provision stipulates that technical specifications, to the extent that they are compatible with Union law, can only be formulated in certain ways.

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[6] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L94, 28.3.2014, 65–242.

[7] Article 42(1) of Directive 2014/24/EU.

[8] Article 42(2) of Directive 2014/24/EU; Case C-552/13, *Grupo Hospitalario Quiron* [2015] ECLI:EU:C:2015: 713.

[9] Case C-413/17, *Roche Lietuva* [2018] ECLI:EU:C:2018:865.

[10] Case C-513/99, *Concordia Bus Finland* [2002] ECLI:EU:C:2002:495.

The first possibility is to formulate specifications in terms of performance or functional requirements.[11] Another possibility is to formulate technical specifications

> by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications,[12] international standards, other technical reference systems established by the European standardisation bodies or – when none of these exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies.[13]

The peculiar wording of Article 42(3)(b), where it states that technical specifications can be formulated by referring to 'technical specifications', aims to clarify that it is not sufficient to only refer to standards for ensuring that a product, work or service contains certain characteristics, as the provision explicitly requires that standards have to be accompanied by actual technical specifications.

Furthermore, when technical specifications are formulated in terms of performance or functional requirements, solutions that do not strictly comply with the technical specifications but which meet their requirements by way of performance or functional equivalence cannot be directly or indirectly discriminated against by contracting authorities and have to be evaluated in the same way.[14] The same holds true when standards are referred to in technical specifications: as stated in Article 42(3)(b) of Directive 2014/24/EU, works, supplies or services that comply with equivalent standards or with technical specifications that are equivalent to the underlying specifications of the mentioned standard have to be accepted as well.[15] Indeed, as held by the Court of Justice in *Dundalk*, imposing a specific standard without incorporating in the tender notice the words 'or equivalent' is contrary to EU law, as this may cause economic operators to refrain from tendering and has the effect of restricting supply.[16] Finally, where a contracting authority only refers to performance or functional requirements, a tender for works, supplies or services which com-

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[11] Article 42(3)(a) Directive 2014/24/EU.

[12] See Section 3 below.

[13] Article 42(3)(b) Directive 2014/24/EU. The third possibility is to formulate technical specifications by combining performance or functional requirements with reference to the technical specifications and standards. See Article 42(3)(c) and (d) of Directive 2014/24/EU.

[14] Article 42(6) Directive 2014/24/EU, Albert Sánchez Graells, *Public Procurement and the EU Competition Rules*, 2nd ed. (Hart Publishing 2015) 336.

[15] Article 42(5) Directive 2014/24/EU.

[16] Case C-45/87, *Dundalk* [1988] ECLI:EU:C:1988:435.

plies with a standard that addresses these requirements cannot be rejected.[17] In conclusion, compliance with a specific standard in a procurement procedure is not mandatory as such, since the procurement Directive specifically stipulates that offers composed of equivalent solutions have to be accepted as well.

In addition, contracting authorities cannot merely refer to a standard, but always have to refer to the underlying technical specifications as well. In light of the copyright protection that is mostly connected to standards as they are the result of private intellectual creativity for which standard-setting organisations charge access,[18] these underlying technical specifications will in principle not be fully identical to the exact requirements of the standards. However, as technical specifications should contain the totality of technical prescriptions/characteristics of a work, supply or service, they will provide economic operators with a fairly good idea of what it is the contracting authority wants to buy. It follows that economic operators may not necessarily have to buy the standard to know what the contracting authority wishes for.[19]

The fact that economic operators are therefore not bound to hand in proposals that specifically comply with certain standards means that, as long as contracting authorities respect the provisions of the procurement Directive, standards seem to be used, in principle, in a 'legitimate' manner in procurement procedures. It should be noted, however, that even though equivalent solutions have to be accepted, economic operators will always face insecurity about whether their solution will actually be considered as equivalent. This risk is not present for operators that deliver works, supplies or services that exactly comply with the standards and/or the characteristics that are specifically mentioned in the procurement documents. Moreover, contracting authorities may not have the capability to correctly assess whether the solution proposed is equivalent to the original request. In addition, there is always the risk that the contracting authorities prefer to select the tender that complies with the standardised solution they already know instead of with an equivalent solution, as they might not want to take any risks regarding the desired result of

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[17] Article 42(6) Directive 2014/24/EU.

[18] In *Elliot*, the Court of Justice has held that harmonised standards are part of EU law, which raises the question whether these standards should not be copyright protected. Case C-613/14, *James Elliott Construction* [2016] ECLI:EU:C:2016:821.

[19] With regard to European standards, it should be mentioned that they are implemented as national standards by CEN national members and are distributed for remuneration by those national members as they generally claim copyright protection for the implemented standards. See Björn Lundqvist, 'European Harmonized Standards as "Part of EU Law": The Implications of the *James Elliot* Case for Copyright Protection and, Possibly, for EU Competition Law' (2017) Legal Issues of Economic Integration 44(4): 424.

the procurement contract. These are all considerations which cast doubt on the input legitimacy of the standards when used in a procurement context.

It should be noted that, from a procurement perspective, harmonised European standards are, in principle, subjected to the same principles as all standards: they may be referred to together with technical specifications, and as long as equivalent solutions are accepted as well. Nevertheless, due to the presumption of conformity that characterises these standards, harmonised European standards provide an easier road for the CE marking and this has an important influence on the discretion of contracting authorities to reject products bearing the CE marking. Indeed, in *Medipac*,[20] as well as in *Commission v. Hellenic Republic*,[21] the contracting authorities of Greek hospitals were not allowed to reject tenders containing the CE marking without following the safeguard procedure, even if they considered certain devices to be inadequate from a technical standpoint and hence considered there to be overriding reasons of public interest justifying the purchase of other devices.[22] It follows that harmonised standards represent a significant limitation on the discretion of contracting authorities to buy what they want and to run the procedure as they wish, specifically because they have to suspend the tendering procedure until the end of the safeguard procedure of which the outcome is binding.[23] This fact is problematic from an input legitimacy point of view as these harmonised standards are in fact dictating the course of a procurement procedure and have an imperative effect on the decision-making power of contracting authorities, while they are not developed by democratically elected institutions.

Even though harmonised standards are not developed by democratically elected institutions, due to the presumption of conformity, compliance with these specific standards may be the only possibility for producers and service providers to market their products, except if they want to undergo some costly and time-consuming procedures to prove that their products conform to the essential requirements of the underlying measures.[24] In this regard, it is quite clear that harmonised European standards can constitute a barrier to the further development of products that comply with more ambitious demands by means

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[20] Case C-6/05, *Medipac* [2007] ECLI:EU:C:2007:337.

[21] Case C-489/06, *Commission v Hellenic Republic* [2009] ECLI:EU:C:2009:165.

[22] The contracting authorities held the position that knots done with certain sutures (holding the CE marking) during surgery slip easily and close prematurely and that certain needles frequently twist or break or sutures do not hold sufficiently.

[23] Case C-6/05, *Medipac* [2007] ECLI:EU:C:2007:337. Economic operators are free to comply with the harmonised standards as long as they comply with the mandatory essential requirements via their own production standards.

[24] Matteo Gnes, 'Do Administrative Law Principles Apply to European Standardization: Agencification or Privatization?' (2017) Legal Issues of Economic Integration 44(4): 376.

of public procurement procedures, since manufacturers of such products that do not bear the CE marking may refrain from participating in tendering procedures.[25] This is specifically true in the ICT sector, where a system or solution will generally encompass many standards and provide functionally beyond the scope of those standards. It is to this type of standards that this contribution now turns.

3. ICT STANDARDS IN PUBLIC PROCUREMENT AND THE ROLE OF THE COMMISSION

3.1 The Use of ICT Standards in Public Procurement Procedures

If looked at from a standardisation perspective, the ICT sector presents itself almost as a 'worst practice' case. Indeed, while standardisation enables mutual recognition between different solutions, promotes competition among suppliers and reduces the risk of lock-in,[26] many organisations are locked into their ICT systems because detailed knowledge about how the system works is often available only to the provider, so that when new components or licences are needed, contracting authorities are not able to describe the system with sufficient precision. Along with these technical factors, there are also institutional concerns, such as the costs of retraining staff to work with a new system. It has been estimated that the lack of competition due to lock-in and lack of interoperability accounts for a loss of 1.1 billion euros per year in the public sector.[27]

This problem can be mitigated by an increased use of standards, as it is believed that they increase the interoperability of ICT solutions.[28] Nevertheless, even though the use of standards saves on costs and creates potential synergies among digital solutions, 35 per cent of contracting authorities never mention

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[25] It should be noted however that if the implementation of this procedure gives rise to delays that may jeopardise public health, contracting authorities are entitled to take all interim measures required to be able to procure the materials necessary, subject to compliance with the principle of proportionality.

[26] This term refers to situations in which, when buying ICT products or services public authorities are becoming excessively dependent on a single vendor for the provision of ICT products or services beyond the timeframe of the initial procurement contract. European Economics Chancery House, *Guide for the Procurement of Standards-based ICT – Elements of Good Practice SMART 2011/0044,* 1 March 2012, 10.

[27] European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMESs, *Building an Architecture for the Professionalisation of Public Procurement: Library of Good Practices and Tools* (2017) 42.

[28] Interoperability refers to the ability of multiple and disparate organisations' databases to freely and securely exchange and reuse data between their respective systems.

ICT standards in tendering documentation.[29] Indeed, translating ICT needs by means of specific standards or even by means of functional requirements is not easy for contracting authorities, as this requires a high level of technical expertise.[30] For this reason, under Action 23 of the Digital Agenda of the European Commission,[31] the European Union encourages public authorities to replace vender lock-in scenarios with alternatives that advance the use of standards in order to create a level playing field for all ICT suppliers and increase competition.

The creation of the (draft) European Catalogue of ICT Standards for Public Procurement by which the European Commission supports digitalisation is an important instrument in this regard. Focusing on the technological aspects of the professionalisation of ICT public procurement, it offers a one-stop shop for procurers with guidelines for procurement, including vendor lock-in, the use of standards and a lifecycle costing scheme that accounts for the often neglected interoperability costs.[32] In this way the Catalogue, which is intended to be used as a non-binding list for all public procurers to help them achieve interoperable solutions when purchasing digital products or services, calls for an increased use of standards and lists proposed needs and standards that can be referred to in procurement documents.[33]

The Commission even indicates that, to overcome lock-in problems in their ICT systems, contracting authorities 'should consider' standard-*compelling* alternatives.[34] Even though the Commission indicates that contracting authorities should only *consider* such alternatives, it is clear that the Commission feels that contracting authorities *should* think about buying solutions that comply with certain standards. This rather strong wording on the website of the Commission where it calls for a greater uptake of standards in procurement is

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[29] European Commission, Study by Price Waterhouse Coopers, *Study on Best Practices for ICT Procurement Based on Standards in Order to Promote Efficiency and Reduce Lock-in* (2016) 11.

[30] Ibid, 65.

[31] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe,* 19 May 2010, COM(2010) 245 final and 26 August 2010, COM(2010) 245 final/2.

[32] COM(2017) 572 final, 8. The Catalogue is created by the European Commission in collaboration with Member States, European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMESs, above n. 27, 46.

[33] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region of 6 May 2015, A Digital Single Market Strategy for Europe, COM(2015) 192 final.

[34] European Commission, Open Standards, available at https://ec.europa.eu/digital-single-market/en/open-standards.

remarkable, as Directive 2014/24/EU does not stipulate that the use of standards is preferred over a reference to performance or functional requirements. This wording is also problematic from an input legitimacy point of view, as the weight given to standards in procurement procedures seems to become rather high while they are merely developed by private undertakings or standardisation organisations. This concern is however softened by the fact that the (draft) European Catalogue of ICT Standards for Public Procurement is characterised as a non-binding toolset to help contracting authorities achieve interoperable solutions.

3.2 The Identification of ICT Specifications by the European Commission

Another peculiarity of ICT standards which gives rise to legitimacy concerns is the special value which can be granted to some of them by the Commission. As a starting point, it should be highlighted that, specifically in areas such as the internet and the World Wide Web, many technical specifications are developed by private ICT forums and consortia and do not originate in the formally recognised standardisation organisations such as CEN and CENELEC.[35] Even though such technical specifications in principle do not hold an equivalent status to European standards and do not fall within the formal categories of standards mentioned in the procurement Directive, Article 13(1) Regulation 1025/2012 lays down a procedure for the identification of ICT technical specifications that can nevertheless be referred to in public procurement procedures as so-called common technical specifications.[36]

As such, Article 13(1) allows the Commission to identify and hence recognise, either on a proposal from a Member State or on its own initiative, ICT technical specifications that are not national, European or international standards in public procurement, but which meet the requirements set out in Annex II.[37] These requirements relate to market acceptance, interoperability and congruence with the implementation of existing European or international standards, coherency and development by a non-profit organisation through processes that are open,[38] are transparent and rely on consensus. The technical specifications also need to meet requirements with regard to maintenance, availability, intellectual property rights, relevance, neutrality, stability and

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35 European Economics Chancery House, above n. 26, 11.

36 Article 42(3)(b) and Annex VII Directive 2014/24/EU.

37 See also Recital 55 and 56 of Directive 2014/24/EU.

38 This entails that the technical specifications were developed on the basis of open decision-making accessible to all interested parties in the market or markets affected by those technical specifications.

quality.[39] It follows that Article 13 of the Regulation provides for the opportunity to formally recognise and refer to privately developed ICT specifications in public procurement documents.[40]

The fact that the Commission can identify ICT specifications allows public authorities to make use of the full range of specifications when buying IT hardware, software and services, allowing for more competition in the field and reducing the risk of lock-in to proprietary systems.[41] By allowing the Commission to identify technical specifications that are not adopted by European standardisation organisations through a more formal procedure, Article 13(1) aims to respond to the rapid evolution in the field of ICT, facilitate the provision of cross-border services, encourage competition and promote interoperability and innovation.[42] It is important to note that the Commission can only take this initiative after consultation with the European multi-stakeholder platform on ICT standardisation, which includes European standardisation organisations, Member States and relevant stakeholders.[43] This platform will assess the process used to develop the standard and will, for example, verify whether the process was open and transparent.[44] Once

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[39] Annex II of Regulation 1025/2012. These requirements resemble those mentioned in the European Interoperability Framework 1.0 for 'open standards'.

[40] Morten Kallestrup, 'Stakeholder Participation in European Standardization: A Mapping and an Assessment of Three Categories of Regulation' (2017) Legal Issues of Economic Integration 44(4): 390.

[41] *See* European Commission, *ICT Technical Specifications,* https://ec.europa.eu/growth/industry/policy/ict-standardisation/ict-technical-specifications_en. Several decisions have already been made, the first one being Commission Implementing Decision 2014/188/EU of 3 April 2014 on the identification of ICT technical specifications eligible for referencing in public procurement. This Decision refers to DKIM (DomainKeys Identified Mail Signatures) technical specifications as specifications that are eligible for referencing. They permit a person, role or organisation that owns a signing domain to claim some responsibility for a message by associating the domain with the message. This is often used in the financial and banking sectors and by email providers, social networks or internet commerce providers. If used by public authorities, DKIM would establish a basic level of trust in the origin of communications so that interoperability between sending and receiving organisations improves.

[42] Recital 30 Regulation 1025/2012.

[43] Article 13(3) Regulation 1025/2012. The Article indicates that the committee set up by the corresponding Union legislation, if it exists, should also be consulted. If this is not the case other forms of consultation of sectoral experts should take place.

[44] If the assessment of a technical specification produced by a forum or consortium has led to the conclusion that this specification would be good to use for certain procurements but has not yet been assessed by the Multi-Stakeholder Platform, the Platform should be informed that this is a candidate for assessment.

approved by the Commission, the ICT technical specification can be used in future public procurement procedures.[45]

The peculiar procedure provided for by Article 13(1) Regulation 1025/2012 and the special value granted by the Commission to certain 'recognised ICT standards' is problematic from an input legitimacy point of view. Indeed, even though the ICT technical specifications that may be eligible for referencing in public procurement must comply with the requirements set out in Annex II of Regulation 1025/2012 such as openness, fairness, objectivity and non-discrimination, the fact that the European Commission is not composed of democratically elected representatives raises issues from an input legitimacy point of view. While the Regulation states that the consultation of the European multi-stakeholder platform on ICT standardisation, which includes European standardisation organisations, Member States and relevant stakeholders, might be considered as ensuring the legitimacy of the process, it should be noted that this is just a light version of representation compared to the legal rules that are adopted by democratically elected representatives. Indeed, while the 'advice' of these stakeholders has important consequences, since it is mostly followed by the Commission due to the status of the experts involved, they are far from being democratically legitimised as elected representatives would be.[46]

4. OPEN STANDARDS IN ICT PROCUREMENT AND THE DUTCH POLICY OF MANDATORY OPEN STANDARDS

ICT standards can be open or closed. An open standard can be used by anyone without restriction and is freely available (there are no patent royalties or licence fees), and users are free to propose changes to the standard with the guarantee that their suggestions will be handled in a transparent manner.[47] This allows for innovation. A closed standard, which is also called a supplier-specific standard, increases the risk of lock-in and is often linked to an intellectual property right. The user is dependent on the owner of the

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[45] Commission Staff Working Document of 25 June 2013 'Guide for the procurement of standards-based ICT – Elements of Good Practice', SWD(2013) 224 final, 14.

[46] Recital 37 and Article 13(3) Regulation 1025/2012/EU.

[47] European Commission, *European Interoperability Framework of Pan-European e-Government Services* (2004) 9. To illustrate the use of open standards with an example: the breaking of large and complex ICT contracts into smaller components (such as desktops, networks, hosting, telephony, service management, applications) can be a means to escape overall lock-in to a supplier. With regard to these smaller components, open standards were used in the UK to plug them together and to move data around. European Commission, *Standards for ICT Procurement: Sharing of Best Practices*, Workshop report, 3 December 2014, 14.

standard when it comes to making the specifications available and permitting reuse in systems belonging to third parties.

The European Commission has set up various initiatives in the area of e-government, such as the Interoperable Delivery of European eGovernment Services to Public Administrations, Businesses and Citizens (IDABC Programme).[48] Within the scope of the IDABC Programme, the first version of the European Interoperability Framework (EIF) was published in 2004.[49] This Framework recommends to public authorities developing crosscutting coordination of interoperability and giving preference to open ICT technical specifications. The EIF stipulates that a criterion for the selection of standards for e-government deployment is openness. The criteria enlisted in the EIF to define an open standard are largely comparable to the criteria listed in Annex II of Regulation 1025/2012/EU that were mentioned in paragraph 3.2 above. It follows that open standards fulfil the same criteria as the technical specifications that are eligible for referencing in public procurement on the basis of Article 13(1) of Regulation 1025/2012/EU. The European Commission's Implementation Strategy for the European Interoperability Framework, adopted in March 2017, recommends public authorities should also develop crosscutting coordination of interoperability and give preference to open ICT specifications.[50]

While it is believed that open standards will help to achieve interoperability, reduce costs and enhance innovation and efficiency, the use of (open) standards is in principle not mandatory and the standards enlisted in the (draft) European Catalogue of ICT Standards for Public Procurement serve merely as suggestions to which contracting authorities may refer when buying ICT products or services. Nevertheless, in procurement procedures, openness of standards can be made mandatory in the technical specifications or can be given preference through weighting as part of the award criteria when no specific standards are referenced in the requirements and detailed technical specifications are expected to be proposed by bidders.[51]

In the context of open standards in ICT procurement, the Dutch policy on open standards has to be scrutinised as certain open standards have been granted a somewhat 'superior' status. In the Netherlands, the use of open

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[48] Decision 2004/387/EC of the European Parliament and of the Council of 21 April 2004 on interoperable delivery of pan-European eGovernment services to public administrations, businesses and citizens (IDABC).

[49] European Commission, above n. 47, 5.

[50] COM(2017) 134.

[51] European Economics Chancery House, above n. 26, 11. See also IDABC European eGovernment Services, *Guideline on Public Procurement of Open Source Software* (2010) 42–3.

standards has been made (semi-)mandatory for contracting authorities when buying ICT products or services if certain conditions are fulfilled. From a legitimacy point of view, this is interesting, since, as mentioned above, ICT standards are often developed by private forums.

The Dutch Standardisation Forum and Board were established by decree by the Minister of Economic Affairs in 2006,[52] to support the Dutch government in the development, use and establishment of open standards for electronic information exchange. They do not develop the standards themselves.[53] In 2014, the Board was replaced by the National Deliberation of Digital Government, which was in turn replaced by the Government-wide Consultation Digital Government (GCDG) in March 2018.[54]

While anyone can submit a standard for inclusion on the open standards lists, the selection and testing is performed by the Standardisation Forum and GCDG in their respective capacities of advisory and decision-making body. The Forum appoints an expert,[55] who verifies whether the standard is sufficiently open and suitable for the intended area of application, whether it is broadly supported on the market and whether it enhances supplier independence and interoperability. After the assessment is made, all interested parties have the opportunity to respond. Based on the assessment, the consultation and the recommendation made by the Forum in response, the GCDG will decide whether the standard will be put on the list.[56]

The open standard list is composed of required and recommended common open standards for the public sector and is created to promote interoperability, prevent vendor lock-in and maintain a degree of control on ICT.[57]

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[52] Decision of the Minister of Economic Affairs of 7 March 2006, No 6022730, on the Establishment of the Standardisation Board and the Standardisation Forum, *Stcrt*, 7 April 2006.

[53] The administration of standards is done by standard organisations such as Logius.

[54] Decision of the Secretary of State of the Interior and Kingdom Relations of 19 January 2018, No 2018-43396, on the institution of the governmentwide policy consultation digital government and the programming council Logius. Due to the increased digitalisation, the tasks of the GCDG are wider than maintaining the open standards list. It also advises the Secretary of State on general policies relating to digitalisation: *Stcrt*, 22 February 2018.

[55] These experts come from different government layers, companies and academia. The members are appointed by the Minister of Internal Affairs.

[56] Article 4(2) of the Decision of the Secretary of State of the Interior and Kingdom Relations of 19 January 2018 on the institution of the governmentwide policy consultation digital government and the programming council Logius.

[57] Article 1(1) of 9 March 2018, No 2018-0000021715, on the prolongation of the institution of the Forum Standardisation, *Stcrt*, 15 March 2018.

The 'required' system entails that, within the public sector,[58] all organisations are obliged to ask for relevant open standards from the list of open standards,[59] whenever they buy ICT systems and services costing above 50,000 euros. An organisation is only allowed to deviate from this requirement if it provides a justification in its annual report. This reporting obligation, which is also called the 'comply or explain policy', is embedded in the decree and government agreements.[60] In its annual report, the governmental department that has procured an ICT service or supply has to explain if and to what extent the comply or explain policy has been respected.[61] Recommended standards are standards that are widely accepted and compliance is self-evident.

The Dutch policy entails that procurement officials should embed open standards in their procurement strategy and incorporate a list of open standards into specifications documents. In the event they do not have sufficient technical knowledge to do this, they can ask the market to assist them to select such standards. As such, only tenderers that provide a solution that complies with the list of open standards can win the contract. Suppliers are thus not only assessed in terms of pricing and product quality, but also in terms of their use of open standards.[62] This does not restrict the freedom of choice of the contracting authority, as open standards are not software-specific and can be built in by every supplier.[63] The use of open standards can even be incorporated as a quality aspect. Of course, when contracting authorities refer to open standards as part of their technical specifications they have to include the words 'or equivalent' in order not to violate the principle of non-discrimination or restrict competition. When assessing equivalence, contracting authorities can test the criteria for inclusion on the 'comply or explain' list and refer to the underlying goals of interoperability and supplier independence. Unless the assessment method was communicated in advance, suppliers can freely decide how to demonstrate equivalence.[64]

The Dutch policy of mandatory open standards raises a number of legitimacy concerns. First of all, contracting authorities are no longer free to decide

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[58] Since 2008 this policy is also applicable to municipalities, provinces and water authorities and to education and healthcare institutions.

[59] This is required if the list contains a standard for the application concerned.

[60] Decision of the Secretary of State of Economic Affairs of 8 November 2008, No WJZ/8157380, establishing the Instruction of the state service regarding the purchase of ICT-services and ICT-products, tot vaststelling Instructie rijksdienst inzake aanschaf ICT-diensten en ICT-producten, *Stcrt.* 21 November 2008.

[61] Ibid.

[62] The Standardisation Forum, *Governance of Open Standards* (2011), 41.

[63] Forum Standaardisatie, *Handreiking: Vragen om open standaarden bij inkoop* (2016) 9.

[64] Ibid, 17.

whether they want to refer to standards in the first place, as they are obliged to use standards when buying ICT systems or services. Nevertheless, Directive 2014/24/EU indicates that technical specifications can be referred to by means of performance or functional requirements. In addition, only open standards can be referred to in the procurement documents, while the Directive does not foresee this limitation. Even though equivalent solutions have to be accepted as well, the Dutch policy turns a reference to open standards by contracting authorities into a binding component of procurement documents. As these standards are developed by private organisations, this poses problems in terms of input legitimacy. Indeed, while input legitimacy depends on citizens expressing demands institutionally and deliberatively through representative politics while providing constructive support via their sense of identity and community,[65] citizens will not have been able to meaningfully express which (type of) standards are desirable in the first place, nor what the requirements of a specific standard should be. As they are not involved in the standard-setting process, there was no participation by the people, which means that the content of the standards does not necessarily represent the will of the people.

Furthermore, the policy increases the risk that open standards are demanded without a concrete need for them or without them being suitable. In addition, the risk exists that in the event that no suitable open standard is available and a contracting authority has an urgent need to buy an ICT product or service, the duty to refer to an existing open standard constitutes a barrier to the further development of products and services that comply with more ambitious demands. Such a risk can be mitigated by the recently introduced innovation partnership procedure in Directive 2014/24/EU that is specifically designed for situations where contracting authorities are in need of an innovative product, service or works that cannot be met by solutions already available on the market.[66] The partnership aims at the development of an innovative product, service or works, and the subsequent purchase of the resulting solutions if they correspond to the performance levels and maximum costs agreed upon. The innovation partnership will allow parties to select new standards that can be submitted to standardisation organisations. This can help to move the bar upwards in terms of quality as the market will be directly involved in the development of a product or service that does not yet exist and which will generally provide functionalities beyond the scope of the existing standards. In terms of legitimacy it can be considered that these standards are developed as a result of participation by the market and are thus responsive to actual needs of the market. In addition, due to the strong involvement of market parties in the

[65] Schmidt, above n. 3, 7.
[66] Article 31 Directive 2014/24/EU.

development of new standards, these standards will most likely be facilitated and supported more easily by the market.

5. CONCLUSION

This chapter aimed to examine whether and to what extent the use of standards in public procurement procedures gives rise to legitimacy concerns. To answer this question, this contribution focused, first, on the rationale for using standards and their relevance in a procurement context. While standards are by definition voluntary technical or quality specifications, in public procurement they can be referred to as part of the technical specifications. These are mandatory requirements that have to be fulfilled by economic operators in order to win a contract. Due to the importance that is attached to technical specifications, economic operators taking part in procurement procedures may feel bound to strictly comply with them. Indeed, solutions based on standards that are referred to in the procurement documents are often presented or perceived as the ideal solution for a contracting authority so that economic operators may feel pressured to only provide solutions satisfying the specific standard. The procurement Directive, however, does not allow contracting authorities to merely refer to a specific standard in the procurement documents. First of all, contracting authorities always have to include the underlying technical specifications including the totality of technical characteristics of the work, service or supply they want to buy. In this way, economic operators are aware of the actual needs of the authority and do not necessarily have to buy the standard to be well informed. In addition, the Directive stipulates that offers composed of equivalent solutions have to be accepted as well. It follows that actual compliance with a specific standard is not mandatory so in this sense, there are, strictly speaking, no input legitimacy concerns.

Harmonised standards on the other hand can represent a *de facto* barrier to the discretion of contracting authorities to buy what they want and to run the procedure as they wish. As such, contracting authorities are not allowed to reject tenders containing the CE mark without following the safeguard procedure. For economic operators compliance is often the only real viable possibility to market their products. This contribution has demonstrated that this is problematic from an input legitimacy point of view as standards, including harmonised standards, are not developed by democratically elected institutions, yet they are treated as quasi-binding requirements in procurement procedures.

When it comes to the use of standards in ICT procurement, the European Commission strongly advocates the use of standards to achieve interoperable solutions. Even though this may not be surprising due to the special nature of the ICT sector that is characterised by high risks of lock-in, this fact is still

remarkable, especially given that the procurement Directive does not indicate that standards are to be preferred over performance or functional requirements as part of the technical specifications. Many ICT technical specifications are not developed by the formally recognised standardisation organisations and do not fall within the formal categories of standards that are mentioned in the procurement Directive. On the basis of Article 13 of Regulation 1025/2012 the Commission has the possibility of identifying such specifications as common specifications which can be referred to in public procurement procedures. This raises concerns from an input legitimacy point of view, as the European Commission is not composed of democratically elected representatives. As the consultation of the European multi-stakeholder platform on ICT standardisation is required, input legitimacy concerns may be softened. Of course, this process constitutes just a light version of democratic representation.

Finally, the contribution discussed the Dutch 'comply or explain' policy, which requires the use of open standards in procurement procedures to purchase ICT solutions. While this contributes to the interoperability of solutions, it severely restricts the discretion of contracting authorities, which are obliged to use open standards that are developed by private organisations when buying ICT solutions. Even though equivalent solutions should be accepted as well, this poses input legitimacy concerns as the use and application of standards are becoming mandatory in procurement procedures and contracting authorities cannot merely refer to performance or functional requirements. There is a risk that contracting authorities will not feel comfortable awarding contracts to economic operators that provide equivalent solutions, as there is a chance that the solution chosen may not be fully equivalent and contracting authorities do not always have the knowledge to make a correct assessment. From a tenderer's perspective, an increased reference to standards, while bringing about several positive effects in terms of quality, can constitute a barrier to the development of products and services that comply with more ambitious demands. A more deeply rooted use of the innovation partnership procedure will ensure that new and innovative products and services will be developed that go beyond the existing standards.

Public procurement procedures are characterised by a meeting of minds between a public authority and a private party. The latter will often feel it is the weaker party, as it has to ensure that it lives up to the demands of the former in order to win the contract. When the public authority refers to standards, economic operators should offer a solution that complies with the standard or prove that their offer is equivalent, which is not always easy. The fact that standards are not set by democratically elected institutions while they are widely used in procurement procedures and can, if certain conditions are fulfilled, dictate (harmonised standards) or quasi-dictate (Dutch comply-or-explain policy) the course of a procurement procedure indicates

that input legitimacy concerns relating to the use of standards in procurement procedures are, at least to a certain extent, justified.