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***Law & Governance Taking a Technocratic Turn?***

***The Future of Law & Technocratic Regulation by Standardisation, Certification, Accreditation & Normalisation (‘SCAN’)***

***NILG General Conference***

**Sponsored by:**

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**Where: West-Indisch Huis Amsterdam, the Netherlands**

**When: Friday, 01 December 2017**

**Programme**

1. Welcome 10:30 – 11:00
2. **First Plenary Session: Taking the Technocratic Turn** 11:00 – 12:30

Chair: Prof. Dr. Michiel A. Heldeweg, University of Twente (NL)

Keynote: Prof. Dr. Harm Schepel, University of Kent (UK)
 *An Economic Law Perspective on Law Taking a Technocratic Turn*

Keynote: Prof. Dr. Martijn Scheltema, Erasmus University Rotterdam (NL)
 *Resilient multi-level legal order for sustainability: an oxymoron*

Keynote: Prof. Dr. Peter Rott, University of Kassel (FRG)
 *A Private Law Perspective Certification*

1. Lunch 12:30– 13:30
2. **Second Plenary Session: Legal Governance of ‘SCAN’** 13:30 – 15:00

Chair: dr. Victoria I. Daskalova, University of Twente (NL

Keynote: Prof. Dr. Bjorn Lundqvist, University of Stockholm (SE)
 *SCAN in Competitive Markets*

Keynote: Prof. Dr. Geert van Calster, University of Leuven (B)
 S*CAN in Civil Society*

Keynote: Prof. Dr. Richard Neerhof, VU University of Amsterdam (NL)
 *Standardization and conformity assessment: examples of successful*

 *decentring of regulatory governance?*

Discussant: E.Ronteltap MSc, Dutch Ministry of Economic Affairs & Climate (NL)

1. Tea/Coffee 15:00 – 15:30

6. **Parallel Session I: SCAN in Competitive Markets**  15:30 – 17:00

Chair: Prof.dr. Peter Rott, University of Kassel (FRG)Speakers: [Dr. Victoria Daskalova, University of Twente (NL)](#_Challenges_for_Responsible)

*[Challenges for Responsible Certification in Institutional Context: Competition Law Enforcement in Markets with Certification](#_Challenges_for_Responsible)*

[Dr. Paul Verbruggen, University of Tilburg (NL)](#_Tort_liability_of)

*[Tort Liability of Standards-development Organizations](#_Tort_liability_of)*

[Dr. Agniezska Janczuk, Utrecht University (UU)](#_Hybridization_of_the)

*[SCAN & Credit Rating Agencies](#_Hybridization_of_the)*

7**. Parallel Session II: SCAN in Public Hierarchy**  15:30 – 17:00

Chair: prof.dr. Richard Neerhof, VU University of Amsterdam (NL)

Speakers: [Prof. Dr. Ramses A. Wessel, University of Twente](#_Public_Authority_in)

*[Public Authority in Multilevel Technocratic Regulation](#_Public_Authority_in)*

[Mr.dr. Peter de Haan, Ministry of Infrastructure & Environment](#_Privatizing_the_Dutch)

[(Rijkswaterstaat)](#_Privatizing_the_Dutch)

*[Privatizing the Dutch building supervision](#_Privatizing_the_Dutch)*

8. **Parallel Session III: SCAN in Civil Society**  15:30 – 17:00

Chair: Dr. Nadia Bernaz, Wageningen University (NL)
Speakers: [Dr. Enrico Partiti, Asser Institute (NL)](#_Title:_'EU's_engagement)

*[EU’s Engagement with Transnational Private Regulation: Mobilising Voluntary Sustainability Standards](#_Title:_'EU's_engagement)*

[Dr. Phillip Paiement, University of Tilburg (NL)](#_Civil_Society_at)

*[Civil Society at the Interface of Public and Private Spheres in Transnational Sustainability Standards](#_Civil_Society_at)*

[Dr. Rebecca Schmidt, University College Dublin (IE)](#_Consolidating_Regulatory_Authority)

*[Consolidating Regulatory Authority in a Fragmented Context: Cooperation in the ISO 26000 Standard Setting Process](#_Consolidating_Regulatory_Authority)*

9**. Third Plenary Session: Concluding remarks** 17:00 – 17:45

Speaker Prof. Dr. Laurence Gormley, University of Groningen (NL)

10. Drinks 17:45 – 18:30

# **Challenges for Responsible Certification in Institutional Context: Competition Law Enforcement in Markets with Certification**

*Dr. Victoria Daskalova*

*University of Twente*

This contribution is about a legal governance perspective on certification, focussing on the legal positioning and fit of certification within particular institutional contexts. In the context of a competitive market, the focus is in particular on preserving the opportunities for market access and limiting the negative externalities. Competition law doctrines are particularly helpful in outlining the dangers of a laissez-faire approach to certification, and competition law enforcement can be helpful in preventing the damage from collusive or abusive behaviour occurring within SCAN bodies. However, there is a limit to what competition law can do to achieve the goal of responsible use of certification in the context of a competitive/unregulated market. A reliance on the competition rules alone does not eliminate all the market failures and externalities that unregulated SCAN can bring about. There is consequently an increasing interest in public enforcement and additional rules – especially related to the governance of SCAN bodies – to complement enforcement of the competition law provisions. The presentation is based on V.I.Daskalova and M.A.Heldeweg, ‘Challenges for Responsible Certification in Institutional Context: Competition Law Enforcement in Markets with Certification’ forthcoming in P. Rott (ed), *Certification – Trust, Accountability, Liability?* (Springer 2018).

# **Tort liability of standards-development organizations**

*Dr. Paul Verbruggen, Tilburg Law School*

**Abstract**

Standardization is typically cast in technocratic language. Beneath the technical veneer, however, there is politics and policy making (Büthe & Mattle 2011). While the development of new technical standards brings about opportunities for innovation and market access for some firms, for others it entails significant switching costs. With so much at stake, there are strong incentives to influence standards development. Private interests may trump public interests, even to the extent that “bad” standards are set. Parties relying on those standards for economic transactions (both businesses and consumers) may as a result suffer harm and, inevitably, the question of tort liability for standards development arises.

This contribution addresses three basic and interrelated questions regarding the liability of standards-development organizations (SDOs). First, what theories of tort law govern the liability for standards development? In answering this question, the chapter will survey case law on SDO liability in Europe and the US, and assess what standards of liability apply and what standard of care is required. As noted, standards development involves politics and implies the making of policy-bound trade-offs. This raises a second question, namely that of whether and how courts take this policy dimension into account when considering the liability of SDOs. Finally, it will be assesses what is known about the potential of tort law to regulate SDOs and influence the policy choices they make while developing standards.

**Reference**

Tim Büthe & Walter Mattli, The New Global Rulers. The Privatization of Regulation in the World Economy (Princeton University Press. 2011)

# **Hybridization of the European retail payments law: Between effectiveness and legitimacy**

*Dr. Agnieszka Janczuk-Gorywoda
Utrecht University School of Law (NL)*

This contribution will discuss the limits of using SCAN to attain public goals. It is based on a book forthcoming with Cambridge University Press entitled “Evolution of Private Regulation in the European Integration: Between Effectiveness and Legitimacy”.

The goals of market integration have reconstructed EU retail payment systems into a hybrid governance system. What was once based largely on private governance in the form of multilateral contracts among banks has been transformed by a variety of public policies. Essentially, public rule-makers – the European Commission and the European Central Bank – wanted to capitalize on banks’ expertise and financial resources and ‘engaged’ them – under the auspices of a private association, the European Payments Council – to create private rules that would realize public goals. The resultant European payments’ governance is an amalgam of traditional hard law, soft law and privately produced rules. The public and private systems of rules – public in the form of European directives and regulations and private in the form of multilateral agreements among payment service providers – coexist and mutually shape the structure of the European payments system. These two systems of rules have formally been produced in independent rule-making processes and by discrete rule-makers – public and private respectively. However, both public and private actors have exercised considerable influence over each other during the rule-making process.

The hybrid nature of the European governance for payments has evolved over time. It turned out that the engagement of a private rule-maker dominated by one type of stakeholders was bound to generate conflicts in a field populated by multiple players with conflicting interests. Payments landscape does not only feature banks, merchants and consumers – each of which is itself a very heterogeneous group – but also emerging fintech companies, technology providers and providers of various payments-related services. As a result, not only was the European Payments Council accused of restricting competition but it was also reproached for ignoring the interests of practically all other stakeholders. The initial blessing by the European Commission faded, especially as it itself proved to be internally conflicted when the DG COMP – echoed by the national competition authorities – questioned legality of the arrangement and as the public goals pursued by the Commission changed. Consequently, the public element of the governance became much stronger. Ultimately, this example shows that in a field populated by a variety of strong stakeholders, SCAN can be successful only if its governance structure is carefully designed to ensure all stakeholders’ voice and participation.

# **Public Authority in Multilevel Technocratic Regulation**

*Prof. Ramses A. Wessel*

*University of Twente*

The relationship between law, innovation and technology has been studied extensively. The present contribution purports to add to the existing body of literature by focusing on one specific phenomenon, that has proven to complicate the institutional setting even further: rule-making beyond the state, by a combination of public and private actors in a multilevel or transnational setting. From the outset, international institutions have played a role in the international regulation of technology. In fact, some of the oldest international organisations were established exactly to regulate and facilitate international technological cooperation (think of the International Telecommunication Union, ITU). Indeed, international organisations are engaged in normative processes that, de jure or de facto, impact on states and even on individuals and businesses. As far as regular formal international organisations are concerned, their competence to take binding decisions vis-à-vis their member states is undisputed. But what about the public authority of the many other more informal international rule-making bodies? Indeed, in addition, and apart from formal international organisations, an increasing number of other fora and networks have been recognised as playing a role in international or transnational normative processes. This presentation will assess some of the new questions that have emerged over the past years in recognizing rule-making beyond the state by new actors, with a focus on the legal status of the norms and possibilities for their enforcement. The presentation builds on work by the author in the so-called INLAW project; see for instance J. Pauwelyn, R.A. Wessel and J. Wouters (Eds.), [Informal International Lawmaking](https://global.oup.com/academic/product/informal-international-lawmaking-9780199658589?cc=nl&lang=en&), Oxford: Oxford University Press, 2012.

# **Privatizing the Dutch building supervision**

*dr. Peter M.J. de Haan LLM.*

After twenty years of preparation the Dutch government wants to introduce a private

system of building supervision. In the nineties of the previous century similar systems

were introduced in other European countries. The aim of the Dutch government is

to improve the building quality and to impose more responsibility on the private

construction branch.

The legislative proposal of quality of constructing (wetsvoorstel Wet kwaliteitsborging

voor het bouwen) regulates that 60% of the constructions which require a

permit are free of being tested to the technical regulations for new constructions.

Further, the legislative proposal organizes that other constructions which need a

permit will be put in the private system of quality assurance. A private approved inspector

verifies in his plan of assurance whether the building plan meets the technical regulations

for new constructions.

When the building plan does not agree do that, he will give directions to amend

the building plan. Next to that the approved inspector will audit the completed

construction.

The approved inspector will issue a declaration only if the construction meets the

technical regulations for new constructions. Without this positive declaration it is

not allowed to use the construction. The notification of completion does not sufficient.

The local authority can decide that using the construction is not allowed,

because the positive declaration is missing. In theory this forces the contractor to

accomplish construction work that complies with the technical regulations for new

constructions.

How does this ‘technocratic turn’ concerning permits play out in the enforcement of the technical regulations by the local authority?

# **Title: 'EU's engagement with transnational private regulation: Mobilising voluntary sustainability standards'**

***Speaker: Dr. Enrico Partiti, ASSER Institute***

**Abstract**

EU authorities make an increased use of orchestration regulatory techniques to engage with different regulatory intermediaries, also by means of legislative instruments. This trend is particularly evident in the domain of sustainability. In recent years, EU measures have come to more or less explicitly incorporate transnationally-defined private standards in the pursuit of public goals. Voluntary sustainability standards (VSS) are therefore more and more used by EU public authorities in domains as different as biofuel sustainability, procurement, and verification of regulatory compliance. This article describes the main regulatory features of VSS, and explains how they contribute to fundamental policy objectives connected to social and environmental sustainability. It then analyses the regulatory strategy of orchestration, and identifies a group of EU measures which employ such an approach vis-à-vis VSS. The article assesses the influence exercised on the substance of VSS and the procedures of the organisations that set them stemming from the interaction with EU measures. It will showcase a variety of direct and indirect means enshrined in EU legislative instruments through which EU public authorities affect transnational regimes for sustainability, and will analyse the consequences of such interactions on the practice of sustainable standardisation as a whole.

# **Civil Society at the Interface of Public and Private Spheres in Transnational Sustainability Standards**

*Phillip Paiement*

*Tilburg Law School*

The concept of Global Civil Society has had a remarkable impact on how we understand global governance in the post-1990’s era. Actors ascribed to the Global Civil Society have been particularly successful in creating and implementing transnational standards related to the social and environmental sustainability of production in global value chains. Well-known examples include the Forest Stewardship Council and the Fair Trade standards, but lesser-known initiatives also exist in more remote industries such as hotel and golf course management and fireplace manufacturing. It is widely maintained by political science, sociology, and legal researchers that multi-stakeholder organizations belonging to the Global Civil Society provide the most legitimate organizational format for creating such standards. This paper interrogates the way in which these organizations, as sites of global civil society, serve as an interface for public and private spheres of action. In particular, it explains how multi-stakeholder standard-setting and subsequent referencing by public governance actors can reinforce economic disparities in industries and global value chains. And vice versa, the paper examines how the referencing of legal requirements within sustainability standards creates a compliance role of public significance for the private auditors and monitors accredited by these transnational standards. In summary, the paper argues that the Global Civil Society functions as an interface of public and private spheres in the governance of global trade, and draws attention to new governance concerns that arise from this interfacing.

# **Consolidating Regulatory Authority in a Fragmented Context: Cooperation in the ISO 26000 Standard Setting Process\***

 ***By Rebecca Schmidt***

**Abstract**

The paper analyses the ISO 26000 process as an example of public private cooperation in a decentralized and fragmented transnational setting. After deciding to create the 26000 standard for social responsibility the International Organization for Standardization (ISO) concluded cooperation agreements with international public organizations. It furthermore included state actors, labor union and NGO representatives and a variety of different actors in the standard setting process. The paper argues that the analysis of regulatory cooperation must take into account the devolution of (political) authority from the traditional centres of power to a more heterogeneous set of actors (including private expertise driven entities). Through cooperative processes regulators exchange necessary resources (e.g. power, legitimacy or expertise) and thereby foster and stabilize their own authority. This mechanism leads to increased levels of consolidation and restoration of authority patterns throughout territorial and functional domains. The story which unfolds in this study goes beyond the conventional narrative of a linear trend towards technocratic rulemaking. It shows that with greater power, expertise driven actors are (sometimes) also required to open up their regulatory processes and allow for broader participation. This is the moment where both democratic elements and broader public policy considerations can find entrance into private rule making processes.