Europese productnormen en privaatrechtelijke normstelling

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Summary

European Product Standards and Private Law Standard Setting

1 Background, central question and aim of the research.

European product safety law for non-food products has been a focal point for European harmonisation, in support of the establishment of a single European market. From 1985 onwards, positive harmonisation received a significant boost due to the introduction of the so-called New Approach to technical harmonisation. In accordance with this New Approach, product standard setting by the European legislator shifted from rules towards more open standards, the so-called essential requirements. The European legislator decided to use private standardisation within a European legal framework to give substance to these essential requirements. Private standardisation that is drafted within the legal framework of the New Approach and reference to which is published in the European Journal, are known as harmonised standards. Economic operators that decide to adhere to these harmonised standards enjoy the benefit of a legal presumption of conformity that their products meet these binding, essential requirements. Harmonised standards are, *de jure,* perceived to be voluntary. Nevertheless, because of practical restraints for economic operators in providing alternative proof of conformity, in practice, they are experienced as being, *de facto,* binding. In exceptional circumstances in certain product sectors, the EU legislator still uses the old approach consisting of detailed rules on product characteristics. Therefore, different types of European product standards are used in EU law. European product standards form the basis of other legal pre- and post-marketing obligations of economic operators and are embedded in a framework of public enforcement and sanctioning.

Although European law does not differentiate between public and private law, product safety law is often characterised as being (more) public in nature. At the same time, the fact that European product safety standards may produce legal effects in private law or horizontal relationships has been fully recognised in the doctrine. Until now, the extent to which product standards may influence private standard setting and the circumstances this influence is dependent on, have been unclear. In light of this uncertainty, this thesis answers the following research question:

> How do European product standards affect the private law duties that economic operators in the supply chain owe to consumers, to each other and to their competitors?

The aim of this research is to raise awareness of the uncharted territory that is European product safety law, at least from a private law perspective. Furthermore, the thesis compiles a catalogue of relevant factors that may

influence the impact and therefore, the significance of European product standards for private law standard setting under Dutch law.

2 European Product Standards and how they are embedded in the European and national legal framework.

The first step in answering this question was to provide an overview of the most important sources of European product safety law – the regulations and directives – and their material scope. Moreover, this chapter provides insight into the drafting process of product rules and essential requirements. Furthermore, it illustrates the way European product safety law uses product standards in connection with other pre- and post-marketing obligations that shape each economic operator's legal responsibilities and, as is shown later, duties of care. The legal embodiment of these obligations in European and national law, provides a clear indication that European product safety law may be characterised as being more public in nature. Recent developments show however that more hybrid provisions are also being included in new instruments.

3 The scope of harmonisation of product standards and connected obligations and the ambit of protection from a European perspective.

Chapter three discusses three important ECJ cases that provide benchmarks with regard to the scope of harmonisation of European product safety law: *Muñoz/Frumar*, *Schmitt/TÜV* and *James Elliott Construction/Irish Asphalt*. Moreover, it outlines the specific goals and objectives that can be found in the preambles of product safety law that provide some indications with regard to the parties that may derive some form of legal protection from the obligations mentioned therein.

The analysis of case law shows that European product safety law does not appear to result in full harmonisation of private law standards between parties in the supply chain and end users, nor between competitors. The scope of harmonisation with regard to national non-contractual liability appears limited in light of the case *Schmitt/TÜV*. Moreover, in terms of the ruling in the case of *James Elliott Construction/Irish Asphalt,* European product safety law does not harmonise national sales law and the requirements therein as followed from the case *James Elliott Construction/Irish Asphalt*. This implies that the source of the private law right and remedy (under Dutch law: *verbintenis*) is European law in combination with or applied through the framework of national law. At the same time, the application of national law through which an EU obligation may take effect is subject to the principles of equivalence and effectiveness that stem from the joint cases *Rewe* and *Comet*. A 'hybridisation' takes place of national law through which EU law is applied. In the absence of clear guidance from the national legislator, it is up to the national court to let the principle of effectiveness come into effect, in which case, the rule of reason as mentioned in *Peterbroeck* and *Van Schijndel* may be applied. The ECJ functions as a mere 'linesman' in safeguarding the effectiveness. The aims and objectives as

mentioned in the preambles of the product safety instruments provide some indications to national courts as to the parties that may derive some form of legal protection from these obligations and/or may contribute to the enforcement of these through civil proceedings.

4 Preconditions for the significance and weight of harmonised standards.

Chapter four focuses on harmonised standards as a form of private regulation. They are norms of private origin that are used within the European law framework. Private regulation has its own advantages and challenges that, based on the doctrine, may influence its significance and meaning for private law contractual and non-contractual standard setting. Although private standards benefit from the expertise of their developers, there is a risk that standards set by industry are either too flexible or too strict. Especially in the latter case, they could then have an anti-competitive effect and may form disguised cartel agreements. The common core of the Dutch private law theoretical debate on the meaning of private regulation for private law standard setting holds that if traditional democratic legitimacy is lacking or is in doubt, these disadvantages must first be overcome to some extent, if this type of norm is to have any legal effects in a private law context. In assessing the weight of these standards, private law scholars are quick to join their public law counterparts who focus on assessing the procedural safeguards in the process of establishing such standards and the ex-post controls on this type of standard as forms of alternative legitimacy or new forms of governance.

It has long been doubted whether the European standardisation process is covered by sufficient safeguard. The most important criticism has been, *inter alia,* the relatively closed development process. A limited number of stakeholder organisations are permitted to participate, however, they do not have voting rights and are required to pay to be able to participate. Harmonised standards are also copyrighted, which means they are only available for a fee. The audit of the harmonised standards before publication of the reference by the Commission was considered to be an empty shell, due to the lack of expertise on the part of Commission officials. Under the New Approach, officials are assisted in carrying out this audit by advisers known as New Approach Consultants. Until recently, they have come from the ESO's own ranks. Further control mechanisms on harmonised ex-post standards are in place, but nevertheless have their limitations. Based on these downsides, the tone of voice in academic literature in assessing these kinds of standards is often extremely negative.

This criticism has not, however, been without consequence. At European law level, the safeguards under the New Approach have been increasingly improved through a Standardisation Regulation in 2012 and - certainly in the wake of the *James Elliott* ruling - through numerous additional practical measures introduced by the Commission. The participation of certain European interest groups has been codified by this Regulation. For the most part, these interest groups are financially supported by the Commission. Their

participation fees are limited. Improved internal objection procedures have also been introduced within the ESOs. The Commission's control of the harmonised standard has sought to be improved through the use of external consultants.

All in all, a relatively large number of safeguards have now been built in on paper, which means that various stakeholders have a say both during the design phase of the mandate, during the development phase of the standard, and after it has been adopted. Standardisation within this European legal framework is, therefore, not entirely comparable with standardisation at national level or standardisation outside a legal framework within which there are no such checks and balances. For the time being, the weaknesses in the system of standardisation are limited to the non-public access to (information about) the harmonised standard during and after the development process, the high costs for purchasing knowledge by stakeholder organisations, the voting right that is limited to national standardisation bodies and the fact that the official ex-post objection procedure is only open to Member States and to the European Parliament. One of the potential routes that has been suggested for greater control and accountability, namely the liability of ESOs, also seems to offer very limited control over ESOs. Thus, there is still a risk that certain Member States and/or interest groups will be sidelined. But doesn't this risk also exist in government legislation?

While there is room for improvement, the safeguards already in place in the process of creation on and ex-post controls of harmonised standards may be greater than any other form of alternative regulation. In my view, this means that harmonised standards should always be approached with healthy scepticism and in a critical manner, however, they should not always be dismissed as dubious and completely unreliable from the outset.

This does not alter the fact that, also from a private law perspective, the lack of awareness of, and the non-public accessibility to harmonised standards are important obstacles for the application of harmonised standards. After all, a judge cannot consult the standard himself, but instead is dependent on the parties and experts for information. According to many, considering the costs, the lack of knowledge and the time frame of the legislative process, government legislation is not a viable alternative. However, it seems desirable to me to review the extent to which harmonised standards can be made available free of charge.

5 Translating European Product standard into private law standards.

The mantra explaining the relationship between generally binding regulations and private law standards can be phrased as follows: the violation of a legal standard is an important indication of unlawfulness or defectiveness, but compliance does not, by definition, relieve liability. The main justification for this premise is that, generally, the legislator is in a more informed position than the judge when it comes to assessing complex risks, however for various reasons, laws and regulations may fall short. Written standards become

outdated quickly, may contain gaps or may have been created on the basis of incorrect information or under the influence of lobbying (also known as regulatory failure). The idea that private law, to a certain extent, acts as a safety net for public law, is the reason why limited weight is given to compliance with legal *ex-ante* standards. That is why unwritten law may sometimes contain stricter standards and may legitimise stricter standards, based on the specific circumstances of the particular case, to be set by the private law judge. For this reason, amongst other things, the Product Liability Directive has a limited regulatory compliance defence, which forces the producer to look beyond regulation, and which only applies if a regulation actually compels the production of defective products. Furthermore, it is considered that the general balancing of interests made by the legislator need not correspond with the balancing of interests that should be made in an individual case in the light of the specific circumstances of that case. In addition, the restorative function of private law, in particular, the compensatory function of liability law as well as the nature of the compensation remedy, means that the underlying standard in unwritten law need not be the same as in written law, where prevention is the main objective. This is partly the reason that, for example, the Product Liability Directive applies a more open defect criterion as a prerequisite for establishing liability. Therefore, European product standards and private law standards may sometimes connect and coincide yet on other occasions may differ.

In the subsequent chapters, this relationship is studied in depth and emphasis is placed on the private law framework and private law perspective. As the analysis in these chapters shows, the assessment of European product standards from this point of view shifts from an institutional analysis, focusing on such aspects as the attributions of powers and the scope of harmonisation in the light of EU principles and traditional or alternative legitimisation, to a more substantial assessment. This assessment regards the material scope of a standard, its normative content, the information on which it has been based (risk assessment) and the balancing of the interests that the norm has resulted from (risk management). The goal of this assessment is to translate the European product norm to a private law rule or standard of conduct in order to determine its significance for the private law standard.

6 Contractual standards.

This Chapter analyses how European product norms become contractual standards and what the legal consequences are of application of European standards as a contractual obligation. Additionally, it analyses how European product norms may affect other contractual provisions that deviate from the EU law based on the restrictive effect of reasonableness and fairness, the provisions on unfair contract terms and the provisions on nullity based on the violation of the public order.

Contractual standards essentially originate from private autonomy and consensus. Therefore, the primary route for entering a contract is through an

explicit agreement. If an explicit agreement is absent, European product standards may become part of the agreement through contractual interpretation (see also English and German law). Under Dutch law, the well know *Haviltex*-criterion stipulates that for the interpretation of an agreement, one has to look at the meaning which parties may have reasonably given to the provision in light of the circumstances of the particular case and, what they could reasonably expect from one another. It is a subjective-objective criterion. On a theoretical level, the interpretation consists of two phases: 1) the interpretation itself and 2) the filling of gaps based on the law, custom and reasonableness and fairness (or restriction of the application of terms based on unacceptable results in light of reasonableness and fairness). The current academic debate focuses on the question: to what extent do reasonableness and fairness play a role in the first phase? I concur with the authors that see this role as limited (reasonableness and fairness plays second fiddle to the doctrine of will and reliance). In the second phase, European product norms may enter the contract through completion by the law, by reasonableness and fairness or as a result of custom. Due to the limited scope of harmonisation, which excludes sales (*James Elliott*) and the fact that there have not been many indications that the purpose of product safety obligations is to supplement contracts, the preferable route through which European product safety provision may impact on contracts is through reasonableness and fairness. Since reasonableness and fairness is assessed in the light of all the circumstances of the particular case and due to the fact that these circumstances may differ in each case, supplementing a contract on the basis of European product norms may not always take place automatically. In my view, the more a contract is connected to the European legal sphere, based on indications such as, the fact that the product has been placed on the EU market (Chapter 2, nr. 34), delivery is in Europe or the execution of the contract is on European soil and that the contracting parties have their place of business in the EU, the more likely it is that a party could reasonably expect the direct application of EU product standards by its contracting party.

A product standard could be a direct part of a private law standard of conduct in terms of unwritten law, such as, for instance, good craftsmanship (*directe toepassing*). Moreover, although harmonised standards are not binding, they can provide a clear indication as to whether a product complies with binding product regulations. This is what I call layered application (*gelaagde toepassing*). Besides direct application and layered application, indirect application may occur in the case where a product standard gives an objective level of knowledge or information. Here it is debatable whether a product standard is binding. In this case, the standard is not a direct part of a private law standard of conduct, but used as an objective benchmark or point of reference (see for example 'satisfactory quality or fitness for purpose in sales' hereafter).

Previously, Giesen has shown two more hybrid routes that may justify a legal connection or direct application of alternative regulation or non-binding

standards through private law. This is based on the concept of, what he calls, consensus. Firstly, when an association makes alternative regulation binding on its members by virtue of a unilateral declaration. The binding effect then originates the membership and the applicable statutory provisions of the association (see also the Dutch *NVM*-case). Secondly, when a unilateral declaration is made in public by an actor himself (for example though websites, advertisements or indeed the product itself). As I see it, the latter route is extremely important in the context of European product safety law because of the fact that EU law prescribes certain mandatory declarations, such as, the CE-mark and the declaration of conformity through which the manufacturer shows which regulations and directives are applicable and which harmonised standards were followed in making the product. In my opinion, in line with previous arguments made by Menting regarding codes of conduct, a third route may be added here. That is direct application based on consensus in court between parties in light of judicial passiveness. Case law from the lower courts regarding other standardisation norms in private disputes appears to confirm the considerable influence of the (limited) scope of the dispute, as well as the significant weight attributed to (court-appointed) experts.

A specific type of contract that is elaborated upon in this chapter is the sales contract, since this is the most important contract through which products find their way to the European market. Furthermore, European consumer sales law, as well as the national commercial sales law (English, German and Dutch law) is characterised by the fact that the content of the contractual obligations does not only dependent on subjective factors but is also determined by taking into account objective factors such as satisfactory quality and fitness for purpose (under EU and Dutch law: *normaal gebruik*). Under Dutch sales law, in the context of the sale of immovable property, the Supreme court considered that, generally, the purchaser may rely on the fact that a build or rebuild of a property was done in line with the construction regulations applicable at the time. In my view, such a principle is also applicable in cases regarding the sale of movable goods, as long as the case has a close connection with the European legal sphere (due to the fact that the buyer and the seller have their offices in Europe and delivery takes place in Europe). Such a principle is especially relevant in cases where one can argue whether breach of a product norm stands in the way of ordinary use (*normaal gebrui*k) of a product. At the same time, exceptions to this rule may also apply, for example, based on specific information or indications provided to the buyer, from which it should have been clear that conformity with European product standards could not have reasonably been expected. In my view, the recent revision of the European Consumer Sales directive and article 7(1) thereof, is in line with this approach because it summarises both Union and national law, as well as technical standards, as factors to be taken into account in determining 'ordinary use'. This new article may therefore be positively welcomed.

At the same time, based on a comparison with the CISG, I would like to argue that, in international global trade between commercial parties, such a principle might not apply. In my view, the assessment framework set down in the German *Mussel* case may also be useful under and transposable to Dutch commercial sales law under article 17 para.1, and through contract interpretation. Case law from the lower courts regarding sales law and standardisation shows mostly indirect application of standards.

Applicability of a European product standard makes the standard relevant for the further assessment of the product in cases where performance is demanded, or in light of other possible remedies for breach of contract (6.4.) This is often when the substance of the standard itself and its interpretation becomes relevant. In interpreting the standard itself, more weight should be awarded to objective factors such as the wording of the standard and the annexes. For European harmonised standards, the mandate may also be included, however any other supplementary explanations or comments that are not part of the harmonised standard itself should, according to the ECJ, be excluded. The civil law judge should clearly distinguish between the interpretation of the harmonised standard, which is a matter of EU law, and the interpretation of the contract to which the standard is relevant and the standard of conduct between parties, which is a matter of contract interpretation. In so far as the latter is concerned, established sector practises may also be taken into account.

Regarding fault or imputation (*toerekenbaarheid*), an incorrect European product standard does not stand in the way of imputing a breach to a party if a higher level of knowledge could have been expected from this party. Furthermore, art. 6:77 BW concerns imputation of a breach that is as a result of inadequate auxiliary material, which could lead to imputation, as well as imputation based on public opinion. (*verkeersopvatting,* see for sales *Oerlemans/Driessen*).

Violation of a product standard rarely leads to unacceptable consequences in the light of reasonableness and fairness. Exoneration of liability could be an unfair term in consumer sales in the case of a violation of product safety law, but may be allowed in *B2B*-contracts. Nullity based on violation of the public order or inapplicability of a provision in a certain case based on a violation of product safety provisions will also rarely apply.

7 Non-contractual standards

This chapter discusses the significance of European product standards for non-contractual private law standards.

The first ground for private law standard setting that is discussed stems from the European Product Liability Directive (85/374/EEC, hereafter: the Directive). According to the European Commission, this directive and product safety law have complementary functions. Hence this is why the personal scope and material provisions in the first differ from the latter. The Directive contains a limited number of defences, two of which have been discussed

here. The first is the regulatory compliance defence in article 7(e). It is deemed to be limited because, according to the prevailing views in legal doctrine, it only applies if the origin of the defect lies in a binding but erroneously drafted legal provision. Consequently, it only applies if the manufacturer is compelled by law to manufacture a defective product. This restrictive interpretation is justified by the aforementioned risk of regulatory failure. In addition to the regulatory compliance defence there is the development risk defence. The development risk defence has also been interpreted restrictively by the ECJ in *UK/Commission*. According to the ECJ, the manufacturer must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation, was not such as to enable the existence of the defect to be discovered. In light of his threshold, it is clear that the relevance of European product safety law for this defence is limited. European product norms will more often than not be based on a lower level of knowledge and soon become outdated if this state of scientific knowledge has to be taken into account. However, in some product sectors, like toys and cosmetics, the EU legislator uses very specific product standards with maximum thresholds of substances based on the precautionary principle. In my view, violation of such a standard has the potential to neutralise the discussion on the development risk defence, in the sense that it immediately stands in the way of this defence being successfully invoked.

The core requirement for liability under the Directive is 'defect' or defectiveness. A product is defective if it does not provide the safety that a person is entitled to expect, taking all the circumstances into account. This so-called European consumer expectation test is very openly worded and leaves room for various interpretations. Although the ECJ has provided some benchmarks in the *Boston Scientific*-case, it is still unclear the extent to which the current national interpretations that often allow for some form of cost- or risk/benefit-analysis, especially with regard to design defects, are permitted under the directive. In my opinion, risk/benefit-analyses may be relevant under this criterion because they provide more legal certainty over the frequently cited consideration from the preambles that the directive serves 'a fair apportionment of risk'. Some authors wrongly use this as a criterion for defectiveness. If risk/benefit-analysis is relevant, compliance with European product standards may have some weight in arguing against defectiveness, especially in the case of alleged design defects. Product standards may be taken into account in the assessment of the manufacturers challenge in respect of alleged defectiveness with reference to European product standards. To prevent the victim having too much of an information disadvantage, the judge may use strengthened obligations to state reasons under Dutch procedural law (*verzwaarde motiveringsplicht*) by giving the manufacturer the burden of substantiating the accuracy, applicability, content and purport of the product standard as part of his defence. The risk/benefit-analysis at a macro level can then be weighed against the risk/benefit-analysis

at micro/individual level. If the same factors and/or interests have been taken into account, it seems fair that more weight is placed on the standard than on other macro information based on the more informed position of the legislator compared to the judge, who is, of course, bound by the arguments put forward by the parties.

The mirror image, a *violation* of a product standard including a harmonised standard, is a strong indication that a product is defective. It seems to me that it could be a ground for a rebuttable presumption of proof of defectiveness based on law (*vermoeden op grond van een regel van ongeschreven recht*).

From my perspective, the general safety criterion as mentioned under the General Product Safety Directive (GPSD) cannot be fully aligned with the defectiveness test because of the fact that both instruments serve different aims. Nevertheless, the current expert group developing guidance regarding the Directive in light of new technologies could use the criterion from art. 2(b) GPSD as an inspiration to further substantiate the defectiveness in a guidance document. Furthermore, the group might consider including a list, which is mirrored and non-hierarchal compared to art. 3(2) and 3 GSPD (a list of norms, violation of which is a strong indication for defectiveness). Moreover, the product liability directive and the defectiveness thereunder should function as a secondary ground for collective actions regarding injunctions to prevent the level playing field that is created by product safety law to be undermined. Binding product standards from EU directives (after implementation) and regulations appear more suited for private *ex ante* enforcement.

The second ground for non-contractual private standard setting is the unlawful act based on violation of a statutory provision (*strijd met een wettelijke plicht*). Binding product regulations form binding statutory provisions in combination with the other obligations for economic operators which can be found in product safety instruments (cf. Chapter 2), (*algemeen verbindende voorschriften*). Violation of a non-binding, harmonised standard does not constitute a violation of a statutory provision directly but may be a strong indication that such a provision has been violated. The legal presumption of conformity that applies under the New Approach also requires to be applied under this category of unlawful act in the sense that, if applicable, the injured party has to provide evidence to the contrary (*tegenbewijs*) that, notwithstanding the fact there has been compliance with a harmonised standard, an essential requirement as part of a statutory provision has still been violated.

Comparable to English law (*protective scope*) and German law (*Schutzgesetz*), Dutch law requires that both the interests of the injured party, his damage, and the way the damage occurred, fall within the protective scope of a statutory provision (know under Dutch law as *relativiteit*). Both English and German law recognise that product safety provisions aim to protect the private law interests of victims against personal injury and (sometimes) damage to goods, but do not have the aim of protecting businesses and/or pure economic loss. Whether pure economic loss sustained by competitors as

well as other parties in the supply chain falls within the protective scope of product safety standards is a point of debate. The answer whether *relativiteit* under Dutch law is present, requires interplay between the ECJ and the national judge. The aims of the provisions are a matter of EU-law, the choice of remedies a matter of national law. When applying the framework as set out by the Supreme Court in its case law regarding *relativiteit*, it appears that the interests of other parties in the supply chain and their economic losses are not protected by European product safety regulations. European product safety law focuses on the general interests and the national legislator remained silent on this issue during the implementation of these provisions into national law. One could choose not to apply such a high threshold for *relativiteit* under Dutch law, by deriving the protection of individual interests from general interests that are explicitly mentioned in product safety law (public health corresponds with individual health and fair competition with the protection of individual competitors etc.). At the same time, effective legal protection may also be created by viewing the violation of a statutory provision as an extra argument for violation of unwritten law (*correctie Langemeijer*). Under English law, the remedy of damages based on violation of a statutory provision does not require fault. Dutch law however requires imputation (*toerekenbaarheid*). In my view, violation of a statutory duty may be easily imputed to the economic operator based on public opinion (*verkeersopvatting*).

The third ground for non-contractual private standard setting is violation of unwritten law (cf. *negligence* under common law). Under Dutch law, the objective accessibility of the risk (*kenbaarheid*) and the foreseeability of the risk (*voorzienbaarheid*) are important factors in determining the unwritten duty of care of the person concerned. However, in our national law, in contrast to Germany, we do not further classify the type of knowledge that can be expected from the party causing the injury or loss, which can be related to the level of information contained in a particular standard. In Germany, a division in respect of various knowledge levels is made: *'anerkannte Regeln der Technik* ',' *Stand der Technik*' and *'Stand von Wissenschaft und Technik*'. In the light of product safety law, a further level can be added: product requirements established as a precaution (no. 236). This classification may also be useful under national law to translate the content of the product standard and the level of information contained therein into the knowledge that can be expected from a particular party (see Concluding Observation Nos. 276 and 279), as a reason as to why a product standard has more or less significance for private law standard setting. In the Netherlands, case law is developing whereby the assessment factors that are considered relevant by the Supreme Court under unwritten law regarding hazardous negligence are being objectified and being used to fill in requirements under vicarious liabilities. When determining the meaning of other legal standards and standardisation of private law standards in other legal relationships, it has been evident that these standards have been considered indirectly relevant and must often be related to the assessment criteria under hazardous negligence (or outside

hazardous negligence: the criteria for other duties of care). However, in practice, the meaning and application always seems to be indirect, in the sense that, the standard is only one of the relevant factors. The written standard is seldom decisive, be it a statutory provision, permit conditions, other alternative standards or standardisation. The weight of the standard increases as it becomes more concrete. The weight also increases as the standard focuses more on the risk in question and takes account of its possible management (read: the precautions to be taken). See further no. 278.

Regarding the legal relationships that are at the core of this research, the doctrine accepts some consequential, spillover effect of the product liability directive on unwritten law. As mentioned, it is unclear which interpretation of defect the ECJ will give in future. If it is assumed that defect has a spillover effect on negligence in the sense that the criterion of defect fulfils the duty of care under unwritten law, it is plausible that in practice more emphasis will be placed on the requirement of imputation (*toerekenbaarheid*, cf. fault under English law), since the prevailing view is that the duties of care and responsibilities of the various parties in the supply chain differ. Considering the fact that the unwritten obligations of market participants in the chain, other than the manufacturer, towards users are hardly elaborated in the doctrine, inspiration can be drawn from written law to fill in these duties (Chapter 2), as well as from German and English law. In foreign case law, specific circumstances have been mentioned on the basis of which the unwritten duties of care of these actors can also be further developed in the Netherlands. Product standards are of indirect significance for these duties of care. The standard is only a first indication of a violation and is only one of the relevant circumstances of the case. The duty of care of market participants with regard to the interests of other parties in the commercial chain (B2B) is most unclear. Since there appears to be no relativity of the written duties in view of these interests, I believe that there are already good arguments for granting some legal protection to these parties through unwritten law. However, further empirical research is needed to obtain a more complete picture of the actual effects of such liabilities (point 287).

A fourth and fifth ground for private law standards setting in regard of which product safety standards can play a role are unfair commercial practices and misleading advertisements. These grounds can play a role between traders and consumers and competitors respectively. Finally, the liability of the authorised representative under the new Medical Devices Regulation ((EU) 2017/745 is based on violation of product standards by the manufacturer, however this ground remains an ‘odd man out’ in our legal system.

A final requirement that is influenced by private law standards of conduct that can be influenced by product standards is the requirement of a causal link in tort. Product standards may form a ground for application of the so-called ‘rule of reversal’ (o*mkeringsregel*) of the burden of proof, which, unlike its name suggests, is not a reversal of the burden of proof but rather a presumption. However, this “rule” may not be applied in cases of standards

based on the precautionary principle where the risk is too uncertain. Other factual presumptions may also be applied when a product standard is violated. The influence of product standards on the assessment of this requirement is nevertheless mostly indirect.

8 Concluding observations

This chapter summarises the findings of the previous chapters and pays special attention to the results of the analysis of case law from the lower courts where standardisation has been relied upon. This analysis has shown the substantial influence of the debate between parties, the complexity of the norms and an important role for experts. Open standards are a gateway to the application of standardisation in private law, however, they are also the cause of a fragmented influence of these norms. The analysis has also shown that standardisation also has effects on other, sometimes unexpected, legal relationships. For the most part, the significance of standardisation is indirect in the sense that the standard does not fill in the private law standard completely. The expectation is therefore that the decision by the ECJ in *James Elliott Construction/Irish Asphalt*, which held that harmonised standards are part of EU law, may contribute to the development of the law because it enlarges control over these norms. However, because of their technical content, the application of standardisation in a private law setting is strongly interwoven with the facts of the case and therefore highly dependent on the initiative of parties to bring these facts and standards to the table in proceedings.

The final chapter also contains an extra normative point of view to the descriptive analysis that has been at the heart of this research as to why it would be desirable to actively include product standards in private law standard setting. This could contribute to the process of establishing the truth and could prevent private law losing connection with an increasingly complex social reality.

The core of the conclusion consists of a list of questions or points for consideration that are relevant in determining the significance of European product standards for private law standard setting. These questions or points can be categorised as, firstly, questions or points that relate to the standard itself (its source and origin, embedment, the scope of its application, its content and the information on which it is based). Secondly, the relationship between the standard and the party causing injury or loss. Thirdly, the connection between the standard and the private law standard of conduct, and finally, special points of considerations that follow from the specific legal ground or assessment framework. With regard to liability law, the relationship between standard, protected interest and damage, and the relationship between the norm violation and the damage, are special points of consideration.

The concluding remarks end with some final points to consider and topics that need further research.

To sum up, this research further opens up the world of product standards to private law scholars. It lists a number of factors that determine the significance of these standards for private law standards that stem from a European, institutional and private law perspective. Private law standard setting fulfils its own autonomous role, however these factors may help to strive towards a more coherent approach. This is important so that private law does not lose its connection with an increasingly complex social reality. Hopefully, this research may contribute to a more active use of standards by parties and be of inspiration to the Supreme Court in the further development of the law.