Regulating AI and the key-role of standard in the co-regulation of ICT: EU, Members States and private entities[*]

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Abstract

This article aims at highlighting the role and (legal) limits of the standards used in the proposal for an Artificial Intelligence Regulation of the EU Commission and some implications for their implementation within the ICT sector. So far, various forms of co-regulation have been implemented in the ICT sector in the AVMS Directive, in the P2B Regulation, as in several actions on digital services where the use of AI techniques is increasingly frequent. The tool of the standard could, therefore, be implemented in the development of applications related to the digital world where human intervention is no longer necessary.

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Keywords

ICT – standard – Artificial Intelligence – interoperability – private entities

1. Introduction

The article seeks to analyse the key-role played by standards and co-regulation in the ICT world fostered by Artificial Intelligence (AI) systems and means, from the perspective of the intersection of EU law and its enforcement by national law (and its horizontal effects)[1]. The EU Commission proposal for a Regulation laying down

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harmonised rules on artificial intelligence (thereinafter "AI Proposal"),[2] seems to assign the utmost expectations to the standards as tools to ensure better governance and a balanced approach. Its legal basis founded in Article 114 TFEU is thus likely to determine uniform and directly applicable constraints throughout the territory of the Union[3]. Indeed, the Union interest is to preserve the EU's technological leadership and to ensure that citizens, firms, as well the whole society, can benefit from new technologies developed and functioning, according to the EU legal framework (above all fundamental rights and principles)[4]. As in the context of Regulation 1025/2012 on EU standardisation[5], also in the proposal for an AI Regulation, the determination of standards with private actors is pivotal for more competition and freedom in the market. Moreover, as far as ITC are involved and strictly connected with AI systems, reducing risk of lock-in on the demand side is essential. Due to the pervading feature of AI systems and tools, the EU legislator has proposed a legal framework inspired by risk analysis. This approach is already used in the chemical sector,[6] where private and public actors co-exist in determining rules, standards, and practices.

Against this background, the risk-based approach is analysed in Section 2; whereas in Section 3 the role of standards is argued according to some legitimacy and effectiveness issues. From a practical point of view, standards are to be concretely implemented by national law. Such a fact leaves many open questions regarding judicial protection and accountability of the process.

Since the Notification Directive[7], various forms of co-regulation have been carried out in the ICT sector[8] to ensure more protection for "interested parties". In this re-

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conformità all'art. 15 del regolamento della Rivista

[1] O. Pollicino, *Judicial Protection of Fundamental Rights in Internet. Towards Digital Constitutionalism?*, Oxford, 2021, 184 ss.

[2] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM (2021) 206 def.

[3] C. Casonato - B. Marchetti, *Prime osservazioni sulla proposta di regolamento della Commissione Ue in materia di intelligenza artificiale*, in *BioLaw Journal - Rivista di BioDiritto*, 3, 2021, 415 ss.

[4] Ivi, recital 1.

[5] Regulation 2012/1025/EU 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 Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council.

[6] Regulation 2006/1907/EC of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation 94/1488/EC as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC. See Recitals 29, 58 and 86; Annexes VII; VIII; IX; X; XI.
See also F. Fleurke - H. Somsen, *Precautionary regulation of chemical risk: How REACH confronts the regulatory challenges of scale, uncertainty, complexity and innovation*, in *CMLR*, 2, 2011, 357 ss.

[7] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (Notification Directive).

[8] Above all, Communication from the Commission to the European Parliament, the Council, the

gard, examples are blossoming in the AVMS Directive[9], in Regulation P2B[10], in the Digital Services Act[11] and more generally in Data Strategy[12] goals. Indeed, trusted mechanisms and tools for the re-use, sharing and pooling of data are essential for the development of AI models of high-quality steered by data (Section 4). In addition, the promotion of trustworthy AI allows shaping an intelligible regulation environment that can counterweight the ambiguity and the speed of changes within the ICT sector.

2. The proposal for an AI Regulation and the risk-based approach

Before going to the core of the analysis, that is the role of standards applied in the implementation of many online policies, a general overview of the AI Proposal is necessary. The backdrop mirrors the top-down regulatory framework: it is typical and peculiar to the nature of the relationship between EU institutions and Member States, as well as specific to the relationship between risk assessment and risk management. These two activities have been increasingly kept distinct also at EU level: the former is entrusted to technicians; the latter to decision-makers/regulators. Regarding the AI Proposal, a legislative action has to ensure a well-functioning internal market for AI systems, where both benefits and risks of AI are adequately addressed at Union level. Hence, national approaches in addressing the problems «create additional legal uncertainty and barriers», slowing down the market uptake of AI[13]. Even though the top-down approach - differently from the bottom-up approach - seems to ignore some interests that deserve protection[14], the setting of the AI Proposal does not detract from the multilevel and multi-layered governance of standard rulemaking[15].

After all, a "classical" and shared definition of AI in scholarship is lacking. In 1950, the English scientist Alain Turing, who is considered to be the forerunner of the idea

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European Economic and Social Committee and the Committee of the Regions - ICT standardisation priorities for the digital single market, COM (2016) 176 def., para. 3.1.; C. Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, Cambridge, 2011, 241 ss; A. Harcourt-G. Christou-S. Seamus, *Global Standard-Setting in Internet Governance*, Oxford, 2020, 1 ss.

[9] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), amended by Directive (EU) 2018/1808.

[10] Regulation 2019/1150/EU of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[11] Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 def.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European strategy for data, COM (2020) 66 def.

[13] Proposal for an AI Regulation, 2.2. Subsidiarity (for non-exclusive competence)

[14] O. Pollicino - G. De Gregorio -F. Bavetta -F. Paolucci, *Regolamento AI, la "terza via" europea lascia troppi nodi irrisolti: ecco quali*, in *Agenda Digitale.eu*, 21 May 2021.

[15] C. Tovo, *Judicial review of harmonized standards: Changing the paradigms of legality and legitimacy of private rulemaking under EU law*, in *CMLR*, 55, 2018, 1188 ss.

of AI, tried to skip the problem of providing a real definition, rather explaining the «test of Turing». According to this test, a machine could be considered intelligent if its behaviour, observed by a human being, was considered indistinguishable from the behaviour of a person. Besides, AI overlapping humans and machine intervention can not only distort human behaviour, but also mislead reality and potentially harm another person. So, the legislator must act with precaution if the emerging risk is high and conceivably harmful. In this way, the choice of a Regulation as a legal tool is justified by the need for a uniform application of the new rules. These are consequently linked with the definition of «risk», «high-risk», «low-risk», «remote biometric identification» and «harm». Hence, art. 3 of the Proposal defining the AI system recalls the invite of EU Parliament in resolution of 20 January 2021 on AI and refers to «software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with». This definition outlines well both the specification of autonomy of AI systems and the machine-learning approaches[16].

Framing a uniform legal picture for these new digital phenomena, ethical and legal issues also arise regarding risk management and liability[17]. This fact is underpinned by the nature of AI as an autonomous and self-learning system[18]. According to the AI Proposal, the risk-based approach involves the participation of producers, firms and private companies in determining standards to be applied to AI systems. Consequently, AI systems identified as «high-risk» should be limited to those that have a significant harmful impact on the health, safety and fundamental rights of persons. Again, such limitation minimises any potential restriction to international trade. In this case, the risk assessment applies the «precautionary principle»[19] where there are public interests and fundamental rights to be protected. In addition to this framework, the cross-cutting model of the AI Proposal is based on the development of standards, rather than making the placing of a product on the market subject to authorisation by national and European administrations, which directly regulate the technical and procedural aspects of the production and control of the safety of goods[20]. In other words, regulating by standard gets private operators involved in the development of the standard, as is the case with the REACH Regulation in the chemical sector. Standards, as such, bind not only economic operators but also public authorities in the ap-

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[16] See, Annex I. - Machine learning approaches include supervised, unsupervised and reinforcement learning. See also EU Parliament resolution of 20 January 2021 on artificial intelligence: questions of interpretation and application of international law in so far as the EU is affected in the areas of civil and military uses and of state authority outside the scope of criminal justice (2020/2013(INI)).

[17] Expert Group on Liability and New Technologies, *Liability for Artificial Intelligence and other emerging digital technologies*, in *europarl.europa.eu*, 2019.

[18] D. Imbruglia, *L'Intelligenza Artificiale (IA) e le regole. Appunti*, in *Rivista di diritto dei media*, 3, 2020, 27.

[19] For a general analysis of the implications of this principle on legal systems and on regulation policies, see, C. R. Sunstein, *Beyond the Precautionary Principle*, in *SSRN*, January 2003.

[20] C. Joerges- H. Schepel- E. Vos, *The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardisation under the 'New Approach'*, in *EUI LAW*, 8, 1999, 27 ss.

plication of tested and predefined methods of risk assessment and risk management. This regulatory method refers to «voluntary technical or quality specifications with which current or future products, production processes or services may comply»[21]. Moreover, it enables the identification of the most effective standards for predicting, combating and correcting risk, thus promoting compliance. Consequently, private operators cannot refuse to apply rules developed with their participation.

It is no coincidence that the AI Proposal, based on Article 114 TFEU, refers to Regulation 1025/2012 on EU standardisation. This act lays down rules for cooperation between national standardisation bodies, Member States and the Commission in drawing up "technical specifications" that a product must comply with (above all in terms of quality, environmental protection and health). It is quite evident that this approach of co-regulation involves private parties, also respecting the requirements of transparency and participation imposed by the EU Commission[22]. In this sense, the apparent rigidity of the top-down approach is mitigated by the involvement of the various stakeholders in risk regulation. This involvement will obviously be greater where the level of risk in the AI system is less high, and there is no predominant need to protect public interests. Nevertheless, the employment of standards for regulatory purposes supports innovation by stimulating dissemination of new technologies and enhances competition too[23]. How these activities face uncertain grade, and a multiplicity of risk will be better outlined in the following paragraphs. This backdrop is applied also to ICT and the exploitation of AI systems and tools in this sector.

3. The role of standards: legitimacy and implementation

The above-outlined paragraphs have shown how the top-down design of the AI Proposal relies on standard, as a tool to decrease the distinction between public and private. In this way, compliance with «harmonised standard»[24] may be a means for "providers" to demonstrate the conformity with AI risk management. As already mentioned, "private parties" participate as co-decision makers in European standardisation, which combines public and private elements using non-legal instruments as an alternative to binding-decision[25]. Hence, private certified regulators, as European Standards Organizations (ESOs) listed in Annex I of the Regulation on Standardisation are called upon by the Commission to write Harmonized European Standards (HESs). They embody technical specifications for essential health and safety requirements for products contained in EU secondary legislation.[26] Besides, «harmonised

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[21]   Recital 1, Regulation on Standardisation.

[22]   S. Pugliese, *Il rischio nel diritto dell'Unione europea*, Bari, 2017, 14 ss.

[23]   M. Eliantonio, *Private Actors, Public Authorities and the Relevance of Public Law in the Process of European Standardization*, in *European Public Law*, 3, 2018, 472.

[24]   Art. 2, no. 1), lit. *c*), Regulation on Standardisation.

[25]   M. Eliantonio - C. Cauffman (eds.), *The Legitimacy of Standardisation as a Regulatory Technique*, London, 2020, 6 ss.

[26]   M. Eliantonio, *Private Actors, Public Authorities and the Relevance of Public Law*, cit., 474.

standards» are adopted on the basis of a request made by the Commission for the application of Union harmonisation legislation. Some key points of the Regulation of standards are quoted by the previous Notification Directive of 1998. This Directive, which couldn't be applied in a dispute between individuals (unlike the current Regulation of 2012), required the Member States to notify technical regulations to the Commission. In particular, this obligation may apply to co-regulatory schemes that are *de facto* technical regulations under this Directive[27]. These include: references to technical specifications in the laws, regulations or administrative provisions of a Member State which confer a presumption of conformity with legal obligations; «voluntary agreements» between a public authority and, for example, industry representatives that include compliance with technical specifications in the public interest. The term «technical specification» covered private and market-based standards that are not developed by recognized standards bodies. Briefly, the co-regulatory schemes formed in the Directive referring to private standards (by way of legislative or administrative measures), voluntary agreements, or fiscal measures «should also be notified or else risk becoming a dead letter»[28].

As far as AI Proposal is concerned, the Commission can adopt common technical specifications if no harmonised standards are existing or are not sufficient[29]. This means that the Commission has to monitor the implementation of standard. In case there is the need to address specific safety measures or fundamental right, the Commission may, by means of implementing acts (*ex* art. 291 TFUE), adopt common specifications. With regards to high-risk AI systems, the Commission is empowered to adopt delegated acts (*ex* art. 290 TFUE) in order to introduce elements of the conformity assessment procedures that become necessary in the light of technical progress[30]. On this path, the Commission establishes and manages an EU database for a high-risk AI system[31], as to comply with transparency and accountability duties with the objective of promoting the development of an anthropocentric artificial intelligence[32]. Already according to the Regulation on Standardisation, ESOs encourage and facilitate an appropriate representation and effective participation of all relevant stakeholders.[33] In this regard it should be pointed out how soft law[34] is increasingly being used to make the procedure of arts. 290 and 291 TFUE more accountable and

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[27]   Art. 1, para. 11, Notification Directive.

[28]   M. Mataija*, Private Regulation and the Internal Market: Sports, Legal Services and Standard Setting in EU Economic Law*, Oxford, 2016, 230.

[29]   Recital 61, AI Proposal.

[30]   Ivi, art. 43, para. 5.

[31]   Ivi, recital 67.

[32]   On transparency as a key milestone when outlining the scope of the application of algorithmic systems see G.G. Lo Sapio, *La trasparenza sul banco di prova dei modelli algoritmici*, in *Federalismi.it*, 2021, 11, 239-252

[33]   Art. 5, Regulation on standardisation.

[34]   Soft law is «rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects», in L. Senden, *Soft law in European Community Law*, Oxford, 2004, 112.

shared among stakeholders, defining specific aspects of these acts.[35] Soft law is a tool that allows private actors to converge with joint practices and behaviours (with the final goal of «common standards»). Thereby, soft law acts may also counterbalance the apparently top-down design of the AI governance, «enhancing the effectiveness of EU action and thereby substantive legitimacy».[36]

Consequently, with the increasing involvement of private parties in the design and implementation of standards, new issues regarding the legitimacy and the account-ability of these tools in the EU's multilevel system come to light[37]. Standards and their application represent a straight example of «composite procedures»[38] and, in this sense, they well embed several issues about their enforcement, as recently enshrined in *Berlusconi* C-219/17[39]. Above all, in the case of an appeal, *ex* art. 263 TFEU, it will be necessary for private parties to determine the interest in bringing an action, since many standards approved at the EU level (as «acts open to challenge» according to well-established case law *Les Verts*[40], or *AthinaïkiTechniki*[41]) need to be translated and implemented by national standards. In this regard, private parties have to institute proceedings against an act, not only if it is addressed to them or which is of direct and individual concern to them, but also if the standard can be assumed to be a «reg-ulatory act» affecting them (art. 263 TFEU, para. 5). In this case, it does not have to entail implementing measures.

The CJUE in judgment James Elliott has clarified its competence in the interpretation of harmonized rules entrusted to an organisation governed by private law as its im-plementation measure is strictly governed by the essential requirements defined by the EU secondary law[42]. Transposing this to the AI Proposal, standards have to be con-stantly updated, as a consequence of the level of risk embedded or involved in their application. These features further complicate the picture[43]. Obviously, no control of legality is possible during the determination of a standard (*ex-ante*), due to the nature of the standard coming up as a negotiation among interested parties involved in the rulemaking activity.

In order to assure the utmost use of standards approved, «interoperability» is the core,

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[35] Agreement on Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union, 18 June 2019, (OJ C 223 of 3 July 2019).

[36] L. Senden, *Soft Post-Legislative Rulemaking: A Time for More Stringent Control*, in *ELJ*, 1, 2013, 70.

[37] C. Joerges- H. Schepel- E. Vos, *The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes*, cit., 45 ss.

[38] H. Hoffmann, *Composite Procedures in EU Administrative Law*, in H. Hoffmann-A. Turk (eds.), *Legal Challenges in EU Administrative Law: The Move to an Integrated Administration*, Cheltenham, 2009, 137 ss.

[39] The CJEU specifies that, regarding «composite procedure», «acts that fall within the national phase could be subject to judicial review at national level, even though that national phase is brought to a close by an act that is not binding on the EU authority competent to adopt the final decision»: CJEU, C-219/17, *Berlusconi*, (2019), § 38.

[40] CJEU, Case 22/70, *AETS*, (1971), § 43.

[41] CJEU, C-521/06 P, *AthinaïkiTechniki*, (2008), § 46.

[42] CJEU, C-613/14, *James Elliott*, (2016), para 43.

[43] EDPB-EDPS, Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 18 June 2021.

as well as the tool to boost the accountability of the governance. This is even more true in a problematic field such as AI. Indeed, interoperability prevents an interested party (individual or organizations) being locked into a single dominant entity[44]. This point directly introduces the next paragraph because standard development is crucial to the way in which citizens – *alias* "users" - surf and interact in Internet.

4. ICT, AI and standards

First, before reviewing how the ICT sector has been reformed, it is essential to remember how in the Treaties does not exist a specific legal basis to tailor a peculiar framework for ICT. Hence, every legislative act concerning also ICT has to be based on another specific legal basis. In other words, the cutting-edge nature of ICT, makes them a tool that crosses many sectors of policies. This feature also implies that ICT are strictly linked to the development of the internal market, as well clarified in the Digital market strategy in 2015[45]. At the same time, it is important to underline which implications stem from Regulation on standardisation of 2012 and "ICT technical specification". Indeed, art. 14 of this Regulation provides that every identification as «technical specification» - to be applied specifically to foster interoperability in public procurement or to improve the internal market[46] - has to fulfil criteria such as «openness», «consensus», «transparency». In other terms, all standards are adopted after consultation of the EU multi-stakeholder platform on ICT standardisation. Again, the circularity of the decisional process is a recurring pattern: the platform includes ESOs, Member States and relevant stakeholders. The Consultation of the committee set up by the corresponding Union legislation is expected, or other forms of consultation of sectoral experts, if such a committee does not exist. Secondly, as already mentioned, the issue of interoperability is properly relevant. A definition is given in the EU Decision 2015/2240[47] addressing the energy sector. Interoperability is «the ability of disparate and diverse organisations to interact towards mutually beneficial and agreed common goals, involving the sharing of information and knowledge between the organisations, through the business processes they support, by means of the exchange of data between their respective ICT systems». Concisely, it is the ability to integrate two or more datasets significantly affecting the efficient use of data

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[44]   ICT standardisation priorities for the digital single market, COM (2016) 176, § 3.1.1.

[45] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Digital Single Market Strategy for Europe, COM (2015) 192 def.

[46]   Art. 13, paras. 1-2, Regulation on standardisation.

[47] Council Decision (Euratom) 2015/224 of 10 February 2015 amending Decision 2007/198/Euratom establishing the European Joint Undertaking for ITER and the Development of Fusion Energy and conferring advantages upon it.

(moreover if AI systems are involved)[48] and «knowledge that can be mined from it»[49]. Also, a lack of data standards inhibits the flow of data, sharing and valuable extraction. According to Data Strategy 2020, «data interoperability and quality, as well as their structure, authenticity and integrity are key for the exploitation of the data value, especially in the context of AI deployment».

Against this backdrop, not surprisingly, the AI Proposal, in art. 10, deals with defining the essential requirements for correct governance of sets of data in high-risk processes. Therefore, all the obligations imposed on private entities such as "service providers" operating in the EU territory by the various measures to boost the transparency of the sector shall be read bearing in mind some points: "interoperability", "shared standards", "fairness of the process". With regard to interoperability and standards, some seminal features have already been clarified, whereas concerning duty of "fairness" some considerations are noteworthy.

Examples of fairness boosted also by co-regulation practice can be quoted from Regulation P2B, which attempts to promote fairness and transparency for business users of online intermediation services and by the AVMS Directive (as emended in 2018). The latter, as to better coordinate the audio-visual sector, redefines the role of intermediation services in the organisation of the content, namely programmes, user-generated videos and audio-visual commercial communications. Many of these contents are often carried out by automatic means[50]. In fact, AI tools are employed as to mitigate risk of violation and to monitor content forbidden for some target or for their message of hate[51].

To allow consumers to enhance the maximum benefit by the internal market, Regulation P2B tailors a competitive, fair, and transparent online ecosystem where responsible behaviour of companies is also essential[52]. At the core of the Regulation act there is the «business user». This means any private individual or any legal person who, through online intermediation services, offers goods or services to consumers[53]. Practically, it means that providers of online intermediation services shall notify to the «business users» concerned any proposed changes of their terms and conditions on a durable medium. An internal system for handling the complaints of business users is appointed by providers, «based on the principles of transparency and equal treatment applied to equivalent situations and treating complaints in a manner which is proportionate to their importance and complexity». For this activity - before a possible extra-judicial settlement through mediation or even before the courts - many AI tools are employed. Furthermore, the Commission shall encourage the drawing up of «codes of conduct» by providers of online intermediation services and by organi-

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[48]   I. M. Cockburn - R. Henderson - S. Stern, *The Impact of Artificial Intelligence on Innovation: An Exploratory Analysis,* in A. Agrawal - J. Gans - A. Goldfarb (eds.), *The Economics of Artificial Intelligence: An Agenda*, in *nber.org*, 2019, 115 ss.

[49]   M. Gal - D. Rubinfeld, *Data Standardization*, in *NYU Law Review*, 94, 2019, 737 ss.

[50]   Recital 47, AVMS.

[51]   Ivi, recital 18 and 19.

[52]   Recital 3, Regulation P2B.

[53]   Ivi, art. 2, para. 1.

sations and associations representing them, along with business users, including their representative organisations[54]. Despite the increasing development of self-regulation activities[55], on this specific aspect, standards as a practice of co-regulation could be encouraged too as to give more guarantees to users regarding enforcement and legitimacy.

Besides, concerning the duty of transparency of "ranking activities" the Commission shall accompany the transparency requirements with guidelines. "Ranking" is normally pushed by algorithm and AI tools. Even though providers are not required to disclose them and other related information[56], for better compliance with transparency and fairness, some standards can be promoted also by soft law acts. Apparently, it seems to be a process that does not present a high-level of risk, rather the risk is probably linked with processing of personal and sensitive data[57]. In this regard, fairness is to be guaranteed handling data sets. For the purpose of personal data protection, CJEU has clarified[58] how a search engine setting up a filtering system could access and make a systematic analysis of all content -also personal data - even though that activity takes place in a completely automatic manner. Again, according to the *Google Spain* judgment[59], the search engines act as «data controller»[60] of personal data when indexing the content of the web pages, also they do not have knowledge about the existence of personal data in the indexed pages. On this point, no precise criteria (or tools) are given to providers. In any case, they effectively have to balance all fundamental rights at stake (data and private life protection, intellectual propriety, freedom of expression)[61] as well as the "private emerging interest" deserving protection. The lack of a «digital due process» leaves wide margins of power to private actors as platforms and service providers[62]. Some due diligence duties for the providers are catered for in Digital Services Act of December 2020, regarding risk evaluation for very large online platforms (art. 26), or notice and action mechanisms (art. 14), internal complaint-handling system (art. 17). Therefore, a decision based on automatic means shall be motivated or supported by information on such use. Ensuring the alleged neutrality of algorithms is one of the most debated points from the perspective of fundamental right, as well as for all the implications on competition. Regarding the «notice and action mechanism» the Commission shall «support and promote the development and implementation of voluntary industry standards», as well as interoperability of data specifically

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[54] Ivi, art. 17.

[55] C. Fontana, *La nuova riforma europea sul digitale*, in *Medialaws*, 29th June 2021.

[56] Art. 5, para. 6, Regulation P2B.

[57] On this point see also art. 35 of Regulation 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (GDPR).

[58] CJEU, C-70/10, *Scarlet Extended*, (2011), § 51; CJEU, C-360/10, *Sabam*, (2012), § 49.

[59] CJEU, C-131/12, *Google Spain* (2014), § § 36, 38, 41.

[60] Art. 4, 7, GDPR.

[61] O. Pollicino, *L'"autunno caldo" della Corte di giustizia in tema di tutela dei diritti fondamentali in rete e le sfide del costituzionalismo alle prese con i nuovi poteri privati in ambito digitale*, in *Federalismi.it*, 19, 2019, 15; M. Bassini, *Fundamental Rights and Private Enforcement in the Digital Age*, in *Eur Law J.*, 25, 2019, 182 ss.

[62] O. Pollicino, *Google rischia di «vestire» un ruolo para-costituzionale*, in *Il Sole 24 Ore*, 14 May 2014.

between advertising intermediaries[63].

To conclude, the ongoing reform process of ICT, AI and data law (intellectual property and liability)[64] represents an ambitious regulatory framework that tries to find a balance among the protection of fundamental rights, the improvement of competition, the welfare of consumers and the risk management of AI means. In this regard, the legislator at the EU level and at the national level - since it is up to Member states to provide the implementation of EU law – must not disregard forms of co-regulation that have to be proportionate, justified and overall enforceable.

5. Conclusion

To recap, the AI Proposal relies on standards (and the legal framework of Regulation on EU standardisation) in order to determine and manage the level of risks applied to AI systems. This form of co-regulation, likely to be more widely "recognized" by a wide range of industries, associations, and stakeholders, because «derived from practices that have been experienced»[65]. So, the definition of an EU standardisation roadmap for implementing the Artificial Intelligence Act (AI Proposal) will simplify also «interoperability»[66]. Moreover, in the Proposal, participation in rulemaking (as with transparency) is theoretically ensured. Again, when the normative act is not sufficiently detailed, soft law acts are helpful to better explain their content, also because they are based on the idea of quality regulation. The turning point is represented by the aspiration to the "quality of regulation", itself linked with a public emerging interest toward better regulation[67].

On this path, ICT development and application in many activities no longer carried out only by humans challenge society and the legal order potentially affecting health, environment and fundamental rights. Standards seem to have opened new routes, not only in the *ex-ante* negotiation of them, but also in their implementation and enforcement. Rather, there is a huge consensus on the difficulties with effective judicial control for many standards embedded in a «composite procedure». For this reason, a more mature system of legal and judicial controls on European standardisation is still to be established[68], allowing private parties to challenge standards too. According to the AI Proposal, the Commission can adopt «common specifications» by means of implementing acts *ex* art. 291 TFEU if a «harmonized standard» (as defined in the Regulation on standardisation) does not exist. At the same time, the «harmonized

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[63] Art. 34, Digital Services Act.

[64] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[65] D. Piana, *Legal Service and Digital Infrastructures. A new Compass for Better Governance*, London, 2020, 77.

[66]   In this regard, S. Nativi - S. De Nigris, *AI Standardisation Landscape: state of play and link to the EC proposal for an AI regulatory framework*, EUR 30772 EN, Luxembourg, 2021.

[67] M. De Benedetto - M. Martelli - N. Rangone, *La qualità delle regole*, Bologna, 2011, 23.

[68] C. Tovo, *Judicial review of harmonized standards*, cit., 1216.

standards» themselves seem to have many things in common with implementing acts[69], but the Court in *James Elliot* has repeatedly pointed out that they are acts of private organizations. At the time being, this complexity linked to legitimacy issues cannot be overridden even in the automated means used in ICT by service platforms, as to dealing with complaints of business users, as well as monitoring activities of content. Conversely, the ICT legal framework enshrines the need for a multilevel and granular governance. The flexibility, stemmed by the uncertain nature and consequent ambiguity in the employment of ICT, has to be balanced with some principle to be applied in rulemaking. The goal is to ensure the accountability and the intelligibility of the process. As to complying with this ambitious intent, the «principle of proportionality» seems to be the key[70], not only to measure the legitimacy of standards, but also to ensure that those private powers do not abuse of their role on the web and in the society (as far as AI development is concerned). Proportionality binds regulators to adopt rules of the utmost effectiveness among those equally suitable, without restricting individual autonomy beyond what is necessary[71]. Clearly, the legislator is called upon to depict a legal environment where, case by case, it is possible to balance many different fundamental rights at stake and preserve social order. At the same time, the liability of every stakeholder is to be clearly defined[72]. For the time being, procedural rules have not yet been codified regarding the application and implementation of ICT, and independent administrative authorities have not been assigned with sanctioning and quasi-judicial powers too[73]. So far, co-regulation seems to be a path to be pursued, but handled with care.

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[69] A. Volpato, *Controlling the Invisible: Accountability Issues in the Exercise of Implementing Powers By EU Agencies and in Harmonised Standardisation*, in *Review of European Administrative Law*, 4, 2019, 82.

[70] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Better regulation for better results - An EU agenda, COM (2015) 215 def.; 2.2. Explaining better what we are doing, and why, 5.

[71] F. Di Porto, *Regolazione, principio di proporzionalità e scienze cognitive*, in *Federalismi.it*, 4, 2018, 2 ss.

[72] On this point, see art. 53 of the AI Proposal allowing regulatory sandboxes as to foster AI innovation by establishing a controlled experimentation and testing environment in the development and pre-marketing phase, with a view to ensuring compliance of the innovative AI systems with AI Regulation and other relevant Union and Member States legislation.

[73]