

# Good Practice Standards – a Regulation Tool

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*“In a number of areas, by introducing an increasing number of general clauses consisting only of references to fairness or good practice within a certain area, the legal system has surrendered to an unknown development. The legal system does not control, but follows the development, regardless of whether it is, for example, faith in personal liability, independence and respect for settled agreements or a wish to control and interfere with citizens’ affairs, in particular, that is widely accepted by the population.”*<sup>1</sup>

In the quotation above (1st part), Gomard suggests that regulation via what he refers to as general clauses (also known as legal standards, good practice standards etc.) may entail problems in terms of due process.<sup>2,3</sup> At the same time, he highlights one of the considerations that the legislature, by introducing general clauses, has attached more importance to than due process of law, namely flexibility (2nd part). Thus, the quotation indicates the balancing of considerations that takes place in connection with the introduction of general clauses, but also in general in connection with any control measure. These considerations can be widely different (legal, financial, social, political etc.), and each category may likewise contain diverse considerations, characterised by different ideologies, values etc. The purpose of this article is to identify the considerations weighed in regulation with good practice standards.<sup>4</sup> In this article, potential due process problems with regulation via legal standards are identified and compared to other considerations, which this regulation technique meets. In this connection, the concept of *due process* is divided into two overall themes under the headlines *inside or outside the legal system* and *pre-determinability*. Here, the legal system comprises the *formal* legal system, including procedures for the adoption of laws. The themes are related to two identities that often accompany the concept of due process. The two mentioned themes are clarified from a private law and a public law perspective. The article’s empirical framework consists primarily of a comprehensive study of legal practice, concerning good practice standards for lawyers and auditors.<sup>5</sup>

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1 Gomard, Bernhard, *Juraen under forandring og udvikling*, U 1993B.385. My translation.

2 The Danish translation of this term is “retssikkerhed”.

3 In continuation of the opening quotation by Gomard, it is tempting to mention that today’s politicians are blamed for regulating according to people’s humour, based on scandalous sensation stories; so perhaps Gomard’s concern should not be limited today to apply only to legal standards.

4 The Danish translation of this term is “god skik standarder”.

5 This legal practice includes all published Danish rulings concerning lawyers and auditors in the years 2005 to 2011.

## 1 Introduction

In our complex society, law is made in different places and on the basis of different sources. Hence, it becomes gradually more difficult to perform the discipline of traditional legal dogmatics, as existing law is not established exclusively by the legislative authority and the courts. Therefore, the traditional notion of due process, bound by the dogmatic legal system, also becomes more difficult. However, both the theoretical and practical framework continue to a great extent to be hooked up on the formal structure of the formation of legislation, and this article therefore takes as its starting point the fact that the law in force is the law laid down by the legislative authority and the courts and that due process should be seen in relation to knowledge and the creation of this “law”. In this light, soft law is as a rule regarded as norms outside the traditional legal system and the article will address how this soft law becomes part of the “law” mentioned above.

To begin with, the legal character of good practice standards should be commented on, as it is relevant in order to understand the article’s inclusion of both the private law and public law perspective. As a statutory standard, good practice standards traditionally belong under public law. Conduct standards in the form of good practice standards are not always directly sanctioned in Denmark, but when they are, they are sanctioned with a fine and can be considered a part of the criminal law. Seeing as the requirement to follow a good practice standard is a conduct requirement, which is related to another party (and thus a form of intervention in the autonomy of private law), the standard can be considered a combination of public and private law. This combination of conduct standards of a private and public law character, respectively, is also evident in legal practice, and the use of these standards of conduct in the evaluation of the concrete conduct of a professional brought before the court contains potential due process problems, regardless of whether it is in relation to negligence under sanctioned regulation (public law) or negligence in connection with an evaluation of fault (private law). Due to the special duty to prove title in connection with sanctioning, the formal forms of the due process consideration differ, but, as will be evident from the detailed clarification of the potential due process problems in the use of good practice standards, the basic elements in the due process assessment regarding good practice standards are the same from a public law and a private law perspective.

The article focuses on how professional good practice standards are used and implied by the *courts*. Thus, the article does not include the specific latent due process problems evident in alternative conflict resolution – in complaints boards for example. In Denmark, both the private and public complaints boards comprise well-used conflict resolution bodies, and the majority of cases concerning compliance with both statutory and un-statutory good practice standards are decided upon here. Neither does the article study good practice stand-

ards as a means of general control of conduct in the everyday lives of professionals or as an instrument for internal management.<sup>6</sup>

The overall function of codification is that the legislature may implement values that the legislature considers valuable at the given time. These values are articulated in the regulation of economy, inter-human relations etc. The adoption, enforcement and administration of laws are ensured via regulation by the legislative, judicial and executive powers, as specified in the Danish constitution. The Danish Parliament passes laws via democratic vote and by following other formal decision-making procedures. The effect of a law and thus the successful implementation of the desired values depend on a number of factors; it can, among other things, be significant which regulation technique is used.<sup>7</sup> However, as the law has come into existence in the correct way, it enjoys legal legitimacy and, as a rule, societal recognition. The laws stipulate what is allowed and what is not and which rights the citizens have in different situations. *But what is the value of legal legitimacy, ensured by the legislative procedure, when the law includes general standards of conduct in the form of requirements to comply with a general standard – a good practice standard?* The actual legislative competence is thus passed on to the court, and the actual implication of the standard may become the responsibility of the concerned actors' trade organisations. The courts set terms of employment, procedures etc. to ensure that the judges have the required *legal* competence and to ensure that cases take place in the way that the legislature believes provides both parties with the best due process protection. Some actors choose to try their case in court and thereby provide society with an insight into what the courts consider good (or not good) conduct in the concrete case and, thus, how the good practice standard must be implied in the area in question. The actors who are often subject to good practice standards exercise a profession that is almost always represented by a trade organisation. These trade organisations produce their own guidelines (ethical rules, instructions etc.) for what *they* consider good practice and comments, among other things, on the same in expert opinions for use in courts. The courts appear to listen (see below), perhaps naturally so, to the industry, and the industry thus has a direct influence on the content of the statutory good practice standard and, hence, the rules/comments of the industry become soft law that is used in court. Thus, the implication of the legal standard, adopted by the Danish Parliament *secundum artem*, is in actual fact delegated to actors outside the legal system – of course under the judging of judges at the courts.

Even if no statutory good practice standard existed, professionals in Denmark would still have to meet a standard when performing their work. Thus, with or without standard regulation, the courts must, both in criminal cases and

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6 See e.g. Rupp, Deborah E.; Williams, Cynthia A., *The efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum*, in *Theoretical Inquiries in Law*, Volume 12, no. 2, 2011, article 8; and Bartley, Tim, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, article 6 in the same.

7 Cf. note no. 6.

actions for damages, evaluate the conduct of the accused party, which must necessarily be done on the basis of an evaluation of what constitutes justifiable/good conduct. From a public law perspective, the answer to the above-mentioned question of the value of regulation via good practice standards must be that this form of regulation creates the necessary legal basis for *sentencing* for failure to comply with good conduct. From a public law perspective, regulation via good practice standards is likely to be of less independent importance to the parties' legal status, seeing as the same formal legitimacy requirements do not exist for incurring sanctions of a private law character. However, both perspectives raise the question: how do you ensure that the implication of standards of conduct takes due process into account – that is, if this consideration is of vital importance, compared to other considerations. Overall, one might consider how you ensure that the soft law that is included in the court rulings of a case is good enough/correct – and how you determine when this soft law is good enough/correct and thus is or is not considered legitimate for use in court.

The subject of this article is addressed below as follows: section two is concerned with where we might find good practice standards, their character and how they are used and implied. Subsequently, section three includes a discussion of the two mentioned themes regarding due process in relation to good practice standards. Due process is one of a number of considerations that are considered in connection with regulation and the application of the law and, therefore, section four includes mention of other relevant considerations vis-à-vis regulation with good practice standards. Section five summarises and concludes the article.

## 2 Regulation with Good Practice Standards

### 2.1 *Where do we find Regulation with Good Practice Standards?*

There are a number of statutory good practice standards in Denmark. In the lawyer and auditing industries, good practice standards have existed for a long time. In the financial sector there are a number of good practice standards, such as good practices for financial companies<sup>8</sup> and good practices for unit trusts.<sup>9</sup> In addition, there is good practice regulation for attorneys,<sup>10</sup> land surveyors,<sup>11</sup>

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8 Consolidation act no. 705 of 25 June 2012 on financial undertakings, incl. executive order no. 749 of 20 June 2011 on good business practice for financial companies and guidelines no. 86 of 13 October 2009 pursuant to executive order on good practice for financial companies.

9 Consolidation act no. 935 of 17 September 2012 on unit trusts, special investment associations and other collective investment arrangements etc.

10 Consolidation act no. 1008 of 24 October 2012 on the administration of justice, incl. executive order no. 1475 of 12 December 2007 on attorneys.

11 Consolidation act no. 400 of 3 May 2012 on land surveyor companies.

insurance companies,<sup>12</sup> legal advisors,<sup>13</sup> marketing<sup>14</sup> and many others. A series of other laws contain other references to standards, though they do not use the term “good practice” to describe them. For example, section 38 c of the Contracts Act reads, “In so far as it will be inconsistent with honest business practice”.<sup>15</sup> Similarly, section 84 of law on payment services<sup>16</sup> states that companies must be managed in accordance with “good faith and fair dealing in the area of business”. Regulation with different forms of good practice standards is a well-known phenomenon – perhaps especially in the Nordic Countries. As mentioned initially, there are also un-statutory good practice standards, such as good craftsman’s practices etc. Even though the fault standard developed in legal practice is not traditionally referred to as a good practice standard, this legal standard can however be regarded as a good practice standard for justifiable conduct.

There is a regulation-technical tendency to delegate the implication of statutory good practice standards to relevant ministries. The ministries have utilised this competence and implicated the general standard stated in the good practice executive orders in a (sometimes just slightly) more detailed way.

In order to qualify the discussion of potential due process problems with regulation via good practice standards, two well-known good practice standards, good practice for lawyers and good auditing practice, will be addressed. Below the legal foundation for each of the two standards is presented.

Lawyers must observe a code of professional standards, cf. section 26, subsection 1 of the Danish Administration of Justice Act:

“A lawyer must demonstrate conduct that is consistent with good practice. This entails that the lawyer performs his job thoroughly, conscientiously and in accordance with what justified consideration for the client’s interest dictates. Cases must be advanced with the requisite speed”.<sup>17</sup>

The bye-laws of the Danish Bar and Law Society are subject to approval by the Danish Ministry of Justice. This authorisation requirement is unique for lawyers. Section 31 of the bye-laws of the Danish Bar and Law Society states that the General Council of the Danish Bar and Law Society takes part in implying the good practice standard:<sup>18</sup>

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12 Consolidation act no. 930 of 18 September 2008 on insurance mediation, incl. executive order no. 1253 of 24 October 2007 on good business practice for insurance brokers.

13 Law no. 419 of 9 May 2006.

14 Consolidation act no. 58 of 30 January 2012 on marketing.

15 My translation.

16 Law no. 365 of 26 April 2011 on payment services.

17 My translation.

18 The latest version of the bye-laws is attached as the second supplement to executive order no. 907 of 16 September 2009.

- “(1) The General Council shall draw up indicative guidelines for lawyers’ professional conduct, referred to as the “Code of Professional Ethics”.
- (2) The Code of Professional Ethics shall reflect the General Council’s practice and case law.
- (3) In areas where the General Council’s practice or case law is not clearly defined, the Code of Professional Ethics shall reflect the General Council’s opinion of professional conduct and provide guidance to lawyers and the public at large”.

Authorised (state authorised and registered) auditors’ work is in part regulated by the Auditors Act. In addition to the authorisation requirement, the act regulates auditors’ work with proclamations – including requirements of *good auditing practice* regarding proclamations of safety, cf. section 16, subsection 1 of the Auditors Act:

“Auditors act as representatives of the public at large when performing tasks under section 1, subsection 2. Auditors must perform these tasks in accordance with good auditing practices, and demonstrate accuracy and speed, as allowed by the nature of the tasks. In addition, included in good auditing practice is that auditors demonstrate integrity, objectivity, confidentiality, professional conduct, professional competence and requisite care when performing the tasks”.<sup>19</sup>

In section 16, subsection 4 of the Danish Auditors Act, the Danish Business Authority<sup>20</sup> has the actual authority to issue detailed rules on ethics, among other things. The agency has not made use of this opportunity to draw up actual ethical rules, but has, among other things, issued an executive order on specified requirements for declarations.<sup>21</sup> Section 4.2 of the bye-laws of the FSR – Danish Auditors<sup>22</sup> states that auditors must meet the standards for good auditing practice – including the existing guidelines for auditors’ ethical conduct. The FSR – Danish Auditors has, like lawyers, drawn up a set of ethical rules and, in addition, auditors have drawn up detailed guidelines, taking into account different aspects of auditing. Furthermore, auditors also observe international standards. The auditors’ bye-laws and additional self-regulation are *not* approved by a ministry and therefore has no *formal* legitimacy in connection with the implication of good practice standards for auditors.

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19 My translation.

20 FKA The Danish Commerce and Companies Agency.

21 Executive order no. 668 of 26 June 2008 on authorised auditor’s declarations.

22 FSR – Danish Auditors was formed after a merger between the Association of State Authorised Auditors, the Danish Association of Auditors (previously the Association of Registered Auditors) and REVIFORA, an association for young auditors.

## 2.2 What are Good Practice Standards?

### 2.2.1 Definition

As a concept, good practice consists of two elements: “good” and “practice”. “Practice” refers to the way in which a person normally acts in a society.<sup>23</sup> The fact that this practice must be *good* can be said to express that one must meet a *certain* standard. Thus, it is not enough that one “usually” does something, if that is not good enough. The *goodness* criterion thus means that it is only the *good* “usually” and not the *substandard* “usually”. Therefore, the practice/custom itself is not crucial.<sup>24</sup> Thus, one might claim that the wording of the concept is misleading, as good practice standards used in a legal context are *not* oriented backwards, as the wording suggests. Court practice concerning good practice for lawyers and good auditing practice show that these industries, in board decisions and expert opinions, consider the good practice standard a normative standard, in the sense that the industries comment on what a lawyer or an auditor *should* have done and not necessary what is normal practice. See for example U 2006.2210 H.

The standard in itself says nothing about what constitutes *good* practice and what does not. As evident from the regulation of lawyers and auditors, the standards are supplemented/implied in the law with general requirements of speed, safeguarding the client’s interests etc., which may provide a guideline for what the law-maker finds should be included in the standard. These requirements, however, are also expressed in general wording and concepts that must be implied further. Hence, the *level* – when something is good or not good – is not regulated by the use of good practice standards. Based on the fault terminology, a number of researchers have suggested a general level for professional good practice standards. Most agree on a definition that is expressive of a standard view.<sup>25</sup> Thus, we are *not* talking about an expert standard. The standard view thus becomes a minimum standard that professionals *must* observe to act in accordance with the good practice standard.<sup>26</sup> It should be mentioned that we are talking about a standard view in relation to the individual *profession* and thus not as a “bonus pater familiaris”.

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23 Politikens Nudansk Ordbog, 2000.

24 Munukka, Jori, *Kontraktuell lojalitetsplikt*, 2007, p. 129 ff. Cf. also Hagstrøm, Viggo, *Obligationsrett*, 2003, p. 58.

25 See for example Gomard, Bernhard, *Moderne erstatningsret*, 2005 (online), pp. 39-40, Hjelmeng, Erling, *Revisors erstatningsansvar*, 2007, p. 77, Bryde Andersen, Mads, *Advokatretten*, 2005, p. 521.

26 For more information on the “comparison” of the standard, see Langsted, Lars Bo, *FSR’s Responsumudvalgs 75 års jubilæumsskrift*, 2000, p. 25 ff. Also see Halling-Overgaard, Søren, *Advokaters erstatningsansvar*, 2011, p. 20 ff.

### 2.2.2 Public Law versus Private Law

In Denmark, regulation with good practice standards is, as mentioned, traditionally categorised as public law regulation. This categorisation is connected to the chosen form of sanction, which in most cases regarding professional standards is a fine and is expressive of the fact that the safeguarded interest is related to society at large *primarily* (the collective) and that its primary focus is not to safeguard or expand the rights of the *individual* of a private law character. In connection with public law regulation of the business community, it is thus the market that is attempted regulated/controlled in a direction that complies with the existing societal/political values. Naturally, such societal values are also at play in private law regulation, but here they are expressive of the rights and duties of the individual to other citizens and to companies. Similarly, the sanctions are payment by the citizen/company to the public (society) via public law and from the citizen/company to *other* citizens/companies via private law regulation, respectively.

The differentiation between public law and private perhaps some times make most sense in a *theoretical* categorisation in the legal dogmatic structure; however, this differentiation *does* serve as a reminder of what the different laws safeguard and, thus, how the legislature wants the law to be applied. Public laws can thus be regarded as an indication that the legislature does not want to expand the individuals' existing rights and duties of a private law character.

The requirement that, for example, lawyers and auditors must observe good practice is thus expressive of a wish, on the part of the legislature, that society's advisors should meet a certain standard, believing that this benefits society at large. As the regulation, at the same time, affects one party's duty to another party, and as the parties are often in a contractual relationship, however, regulation with good practice standards, as previously mentioned, intervenes with the freedom of contract (private law). Regulation thus binds the one party (the advisor) – but without creating actual rights for the other party (the client).

In practice, the intermixture of the two legal disciplines, public law and private law, rarely causes problems, but it *can* have an undesirable effect in cases where public law regulation and the private law use of the same regulation do not have the same fundamental consequence. If public law regulation serves to protect the client, but private law use of this regulation has the opposite effect, this regulation technique – this intervention – becomes problematic. This can, for example, be the case with regard to professionals' obligation to provide tangible information prior to the formation of a contract with a client/customer. One example is the Danish public law on legal counselling.<sup>27</sup> The law on legal counselling is a unique Danish law that includes conduct standards for legal advisors who provide legal counselling, but are not trained lawyers. Legal counselling provided by financial institutions is not included in the law either. The law includes a general requirement that the advisor must observe good practice for legal counselling, and in addition the law includes specific information obligations in connection with the signing of counselling contracts.

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27 Law no. 419 of 9 May 2006.

Section 2 of the law includes the advisor's duty to provide very specific information on his education and insurance in the required written contract that he enters into with the client.<sup>28</sup> The purpose of the law is to protect the client via preventive regulation, as this information is considered a help to increase transparency for the sake of the client, enabling the client to make (more) rational, well-informed choices. However, the consequences of a private law character *can* be that the client, precisely because of this information, in concrete cases may be regarded as having accepted a risk by signing this contract on an informed basis.<sup>29</sup>

The *purpose* of using good practice standards in legislation is to be able to determine whether a concrete case – such as for example a concrete counselling situation – is *in accordance with* good practice or *inconsistent with* good practice in the area in question. Hence, the result can be used to determine whether the individual advisor can be sanctioned. Such a risk of sanction must thus have a preventive effect on advisors. Putting good practice standards into statutory form turns the act of following a standard of conduct into a *legally* sanctioned duty – rather than “merely” a potential *ethical/moral* duty. *As mentioned, this ethical/moral duty is presumably included in the evaluation of the conduct requirement in private law contexts, the evaluation of fault for example, and thus in this connection the duty is also a legal duty.* The conduct requirement following a good practice standard of a public law character and the conduct requirement that is included in evaluation of fault (of the same situation) are not necessarily the same. However, the consistency motive suggests that they will be implied in the same way, which conduct evaluations in legal practice do not contradict.<sup>30</sup>

Regarding the good practice rules for financial companies, Lynge Andersen and Legind criticise the fact that good practice standards are categorised as public law. They believe that the value of this regulation is that of sources of law – as if the area had been regulated by the general law of contract with the same content.<sup>31</sup> Regardless of the differences between public law and private law regulation in purpose and sanction, among others, several authors agree that public law regulation *can* have an impact on the norms that are included in the liability assessment in a concrete case of a private law character.<sup>32</sup> There may be a *presumption* concerning liability, even though breach of the law in

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28 Sørensen, Marie Jull, *Lov om juridisk rådgivning – hvad, hvem og hvorfor?* Revision og Regnskabsvæsen, no. 6, 2012. P. 24.

29 See detailed mention of this potential problem, clarified in a discussion of role expectation and professional liability, Sørensen, Marie Jull, *God skik for juridisk rådgivning – en retlig standard*, 2011, p. 294.

30 See analysis of legal practice regarding good practice for lawyers and good auditing practice, Sørensen, Marie Jull, *God skik for juridisk rådgivning – en retlig standard*, 2011, p. 107 ff.

31 Lynge, Andersen Lennart; Legind, Nina Dietz, U 2005B.337.

32 von Eyben, Bo; Isager, Helle, *Lærebog i erstatningsret*, 2011, p. 89 ff., Ulfbeck, Vibe, *Erstatningsretlige grænseområder*, 2010, p. 34, Vinding Kruse, Anders, *Erstatningsretten*, 1990, p. 287, and others.

general is neither a necessary nor a sufficient prerequisite in the Danish (unwritten) rules of torts for incurring liability for damages.<sup>33, 34</sup> *Ussing* conditions the use of private law sanctions according to public law regulation of the content of the regulation: “Where a (public) law ... in general must be considered a fixation of what constitutes a justifiable approach and thus overall corresponds to what is or could be expected of custom practice without the help of the law, it must be assumed in general that actions that can be convicted under this law are also suitable for incurring liability for damages”.<sup>35, 36</sup> Naturally, the interplay works appropriately from a due process predictability assumption, but it is also has a legitimating/qualifying effect on conduct evaluations in private law contexts. The value of this legitimation/qualification, however, depends on how the standard is implied which, as suggested above, is where due process problems may arise.

### 2.3 How are Good Practice Standards used and Implied?

A majority of statutory good practice standards are *professional* good practice standards, and naturally it is not possible for the individual judge to be knowledgeable of what constitutes good practice in every profession-specific area. The procedure for establishing the content of professional good practice standards must thus be to obtain knowledge via representatives of the professional area in question – as mentioned, often a trade organisation. In addition to the courts, good practice standards are also used in the individual industry boards. Here, the industries may discipline their own members, establishing whether members have observed the good practice standard and sanction potential breaches hereof.

It appears from an analysis of legal practice concerning lawyers and auditors in the period from 2005 to the beginning of 2011 that good practice for lawyers and good auditing practice are used differently in legal practice.<sup>37</sup> In *actions for damages* against *auditors* judges are more explicit in their references to good auditing practice than they are to good practice for lawyers in cases concerning *lawyers’ liability for damages*. Furthermore, it is also only with refer-

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33 Vinding Kruse, Anders, 1990, *Erstatningsretten*, p. 287.

34 See also the element of unlawfulness or expected responsibility in connection with breach of the law in the fault standard, Vinding Kruse, Anders, *Erstatningsretten*, 1990, p. 30 ff. and p. 87 ff. See also Nygaard, Niels, *Skade og ansvar*, 2007, p. 10 ff. von Eyben, Bo; Isager, Helle, *Lærebog i erstatningsret*, 2011, p. 89 ff. Ulfbeck, Vibe, *Kontraktens relativitet*, 2000, p. 73 ff.

35 Ussing, Henry, *Erstatningsret*, 1962, p. 27. My translation.

36 See also Hveem, Jørgen Dag, *Bankers ansvar ved rådgivning og kreditgivning, i Finansielle kriser - betalingssystem och skuldförhållanden*, 2009, p. 216 ff. Hveem does not find that there is anything to prevent, neither in terms of source of law or method, that public law conduct regulation is used in an evaluation of fault. He believes that this evaluation comes within the legitimate.

37 Sørensen, Marie Jull, *God skik for juridisk rådgivning – en retlig standard*, 2011, p. 107 ff.

ence to auditors that the judges say the following in a prejudice ruling, reproduced in U 1978.653 H: “A precondition for imposing an auditor liability for damages must be that he performs his job at variance with good conduct for auditors”.<sup>38</sup> The court ruling states that it is a *necessary* precondition for imposing liability for damages that an auditor has acted at variance with the good practice standard. From a business equality point of view this necessary precondition should not be limited to auditors. To the best of this author’s knowledge, however, the same precondition has not been presented clearly for lawyers or in other areas.

It is a widely held view that expert opinions in the form of advisory from the industry are often obtained in cases concerning professionals’ liability for damages. Even though it is difficult to quantify court rulings, on account of their heterogeneity, it should be noted that in the period from 2005 to 2011 expert opinions were only procured in 8 out of 60 rulings concerning actions for damages against lawyers. For auditors, the number was 10 out of 34. Only in one ruling in the same period, U 2008.220 H, do the judges state that they do not feel adequately informed of the professional standard.<sup>39</sup> With a single exception, cf. U 2007.2880 H, the analysed rulings are in accordance with industry opinions – even though the judges far from every time (and not at all concerning the lawyers) refer explicitly in the grounds to the good practice standards or industry opinions. In Denmark the lack of reference in the reasons to a source should probably not be regarded as an indication that this source has definitely *not* taken part in the deliberations concerning the result of the ruling, as rulings are rarely thoroughly reasoned. Naturally, when this is not clear, it becomes more difficult to say anything *accurately* about the grounds for the rulings. There is a tendency, however, to what one might call an objectification of liability. This objectification tendency is evident, among other things, from court rulings’ widespread use of *damages* argumentation. It is evident from the argumentation that the judges evaluate whether the given counselling conflicts with good practice and is thus insufficient; subsequently, liability is imposed or acquitted, depending on the presence of this damage, cf. e.g. U 2008.410 H, U 2008.2323 V and FED 2006.210 Ø. Thus, there is no evaluation of the lawyer’s or the auditor’s subjective bases of liability. Seeing as actions for damages against lawyers and auditors often stem from the advisors’ contractual relationship with their clients, this argumentation may not be unnatural and can be regarded as an analogue use of the Danish Sale of Goods Act’s rules regarding lack of conformity. It is debatable, though, whether an actual evaluation of fault is made in these cases or whether the judges find that it is sufficient to determine that the advisor failed to act in accordance with the accepted course of conduct (good practice) and, consequently, deduces that he did not act according to contract. In cases where expert opinions have been obtained, the expert

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38 My translation.

39 See also, before this period, U 2004.1153 V, FED 1997.298 Ø and FED 1997.1793 V.

committee's statements on good practice appear to control whether the judges believe there is damage or not, cf. e.g. U 2006.2039 H and U 2007.422 H.<sup>40</sup>

In quite a lot of the remaining cases in which the judges fail to refer to good practice, concepts such as “was actionable” and “should have” are used, concepts which to a greater terminological extent point to evaluation of fault.<sup>41</sup> However, it appears to be difficult to establish differences in the judges' evaluation of the advisors' responsibility, depending on the use of fault concepts and good practice views, respectively.<sup>42</sup> Terminologically, the concepts traditionally belong in law of torts and disciplinary/public law contexts, respectively, and it is therefore natural to assume that *tradition* may be a contributing factor to the fact that the courts only to a lesser extent refer explicitly to good practice standards in these actions for damages. In that connection, the judges may wish to render visible/highlight the fact that damages is *not* a punitive sanction and thus not related to the statutory (public law) good practice standard.

Where other regulation or industry rules fail to imply the standards in a *concrete* manner, good practice standards act as a reference to more overall principles – including *professional* principles – understood as principles that state overall values concerning the formation and performance of agreements on professional services. Among other things, these principles are in part stated in complementary law or executive order regulation and, in part, by the industry in for example trade rules. Hence, lawyers must, among other things, act conscientiously and perform their job thoroughly and with the requisite speed. Lawyers and auditors both have their own principles concerning, among other things, renunciation of the counselling job in certain cases and prohibitions of conflicts of interest. These principles are used in legal practice – though not necessarily explicitly. See for example U 2009.1 S and U 2008.410 H. Characteristic of overall principles is that in the concrete case implication is still required: When is counselling concerning, for example, testaments and the drawing up of testaments performed in a thorough and quick enough manner?

### 3 Is Due Process Taken into Account in Regulation with Good Practice Standards?

Along with the introduction, the two previous sections have set the framework for a discussion of due process in relation to good practice standards. The question posed in the headline of this section is answered by addressing two themes which are traditionally included in the concept of due process. The first theme – *inside or outside the legal system* – focuses on the professional's security that

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40 For the discussion of implying good practice as the law or the facts of the case, see Langsted, Lars Bo and Bønsing, Sten, each their contribution to *Erstating – en antologi*, 2006.

41 See e.g. FED 2008.207 V and U 2008.1079 V.

42 For more information on the connection between fault and good practice standards, see Vinding Kruse, Anders, *Advokatansvaret*, 1990, p. 11 ff. See also Hansen, Jørgen, *Advokatgerningen*, 1986, p. 251 and Langsted, Lars Bo, *Revisoransvar*, 2008, p. 241.

he will be judged according to the legal norms of the legal system. Here “legal norms” should be contrasted with purely ethical/moral norms that are not subject to a balancing of considerations via overall legal principles embedded in the system of justice and/or developed in legal practice. Under this theme, the classical figure in criminal law is the duty to prove title, and in private law it may be the criteria that consciously or unconsciously determine which sources of law are included in the legal evaluation of a concrete conduct. The other theme – *predeterminability* – is, from a public law perspective, linked to the transparency criterion in connection with sentencing or sentence-like sanctions. From a private law perspective, predeterminability constitutes the safety in knowing the existing law and thus be able to accommodate to it.

### 3.1 *Inside or Outside the Legal System*

In line with the introductory quotation by Gomard, Pedersen describes good practice standards as legal standards that refer to a standard outside the legal system.<sup>43</sup> When you act outside the legal system, you also act outside the formal part of the source of law structure, the purpose of which, among other things, is to ensure objectivity and, to a certain extent, democratic legitimacy in the used sources of law, and which thus presumably contributes to ensuring the basis for legally correct rulings.

From the public law perspective, the matter at hand is thus that the regulation (the statutory good practice standard), which there is a legal basis for sentencing according to, is implied by sources (soft law) that do not belong in the formal legal system. One can therefore be sentenced on the basis of these sources which, on the basis of the duty to prove title in connection with a traditional source of law perspective, can be considered a due process problem for the individual actor. Even though we are “merely” talking about fines, these fines can be of such a size that they will affect the sentenced significantly. In addition, in certain cases the rules form a basis for the removal of one’s rights to perform a given profession.

From a private law perspective, it is a matter of which sources are included in the evaluation of whether a potential agreement is observed correctly or whether a certain action will lead to liability for damages.<sup>44</sup> This could also be described as a requirement that the norms one is sentenced according to, in connection with an evaluation of fault, for example, must have a certain legal

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43 Pedersen, Axel H., *Indledning til advokatgerningen I*, 1962, p. 39.

44 A conduct evaluation is made both with regard to cases inside and outside of contract. In relation to the mentioned analysed legal practice, it should be noted that the content of the contract appears to be of greater significance in the evaluation of conduct in cases concerning auditors than in cases concerning lawyers, Sørensen, Marie Jull, *God skik for juridisk rådgivning – en retlig standard*, 2011, p. 161 ff.

legitimacy and thus not be based on “gastronomical jurisprudence”<sup>45</sup> or in any other way be influenced by non-relevant subjective considerations.

The norms of the industry lie outside the legal system, and whether this poses a problem in terms of due process depends, among other things, on the content of these norms. It is difficult to determine whether the statements and rules of the industry are evidence of higher or lower standard than the *normal* scope of a conduct evaluation in connection with criminal cases, disciplinary actions or actions for damages. As the judges seem to comply with the industries, when the industries provide statements for use in court, it is however important to consider the matter. Naturally, there is no problem if the evaluations are identical, but if the industry-standard evaluation is above or below what would normally be included in for example an evaluation of fault or a criminal liability evaluation, a number of problems/concerns are imaginable. If the level of the industry-standard evaluation of the content of the good practice standard is below the level of the evaluation of fault and/or the evaluation of propriety, the professional receives a milder sentence, because the judge draws on soft law. If such a lowering of the standard conflicts with the legislature’s wishes, it is likely that the legislature will soon compensate for this imbalance in the standards, as evident in for example the area for financial companies. That is, the legislature intervenes with more detailed regulation, when the industry and/or the judges fail to set the wanted standard. If the industry-standard evaluation is *above* the “normal” evaluation of fault/ evaluation of propriety, the professional will be sentenced according to a stricter standard. From a societal perspective, this may appear to be an advantage, as the standard in the area can thus in general be expected to be high. However, from a market-related/financial perspective, the professional’s increased risk of incurring liability will in all probability be directly evident from the prices of the professional’s services, and in this way the citizens will thus come to pay for this (perhaps unnecessarily) high standard. The individual professional may experience that his individual legal rights are not taken into account, as he receives a *harsher* sentence than if the industries, via soft law, had not had this degree of influence.

In practice, the implication of good practice for lawyers has been addressed in several cases. In for example U 2006.429 H, U 2007.111 H, U 2007.1015 H and U 2009.1 S allegations are raised as to whether the concrete implication of good practice for lawyers in form of the code of professional ethics can legitimise the sanctions that the lawyer is liable to if he violates good practice for lawyers.

U 2007.111 H addresses breach of the insurance provision (formerly section 44, now section 61) in the bye-laws of the Danish Bar and Law Society, which places the lawyer under obligation to take out an indemnity insurance. The lawyer failed to report a case to his insurance company and, in addition, declined coverage in the concrete case, which the Disciplinary Board of the Danish Bar and Law Society found was at variance with good practice for lawyers. The lawyer in question does not believe that “a widespread interpretation of

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45 Evald, Jens; Schaumburg-Müller Sten, *Retsfilosofi, retsvidenskab og retskildelære*, 2004, p. 54.

this bye-law provision can underlie a sanctioned ruling”.<sup>46</sup> The High Court does not appear to agree with the lawyer (which the Supreme Court endorses), as the High Court judges find that the lawyer’s “conduct has created such uncertainty concerning the [client’s] chances of getting the claim for compensation covered that he has ignored good practice for lawyers, cf. section 126, subsection 1 of the Danish Administration of Justice Act, compared to section 44 of the bye-laws of the Danish Bar and Law Society”. The Supreme Court supplements by stating “that it was an independent breach of his legal obligation that [the lawyer] waived the insurance coverage, as he did”. The formulation of these grounds indicate that the judges consider the bye-laws of the Danish Bar and Law Society fully useable for implying good practice for lawyers, which means that a breach of the bye-laws in this case entails breach of good practice for lawyers.

In U 2009.1 S a law firm had been engaged by two different clients with the same inconsistent interest (buying the same company). Here the lawyer believes that “the code of professional ethics is a guideline – a moral codex for lawyers”.<sup>47</sup> Thus, they are not legally binding. In addition, he states that “The code of professional ethics and good practice for lawyers are not equal, cf. section 126 of the Danish Administration of Justice Act, as the code of professional ethics are established by the lawyer authorities”. The client responds as follows: “The code of professional ethics is exclusively guiding/advisory for the conduct of lawyers, but they are generally accepted as norms or standards in lawyers’ relations to their *clients*. These legal standards apply concurrently with the rules of good practice for lawyers in section 126 of the Danish Administration of Justice Act. We are thus talking about rules or standards that can be breached, which is what happened in this case”. In the case, the plaintiff claimed that the defendant “should recognise that they in relation to [the plaintiffs] ... have breached the ethical rules for lawyers, primarily section 3.2.1-6 (conflict of interest), adopted on 17 January 2002 by the General Council of the Danish Bar and Law Society”. The claim was dismissed by the judges on the grounds that “the purpose of the provisions in the Danish Administration of Justice Act on the lawyer authorities’ self-regulation has been to award them a competence in areas where there must be an evaluation of the professional standards”. However, the court finds that it is capable of considering *claim no. 2* concerning the law firm’s reimbursement of the fee to one of the clients, who the firm, according to the court, had exposed to a possible risk of conflict of interests. The judges say that the lawyer’s “conduct must be considered highly criticisable and in breach of a lawyers’ duties to safeguard the law firm’s client interests”. Thus, the judges upheld the lawyer’s claim that the judges alone do not have the competence to determine whether a lawyer has acted in breach of the ethical rules of the General Council of the Danish Bar and Law Society. However, when this evaluation is seen in *another* light (here in connection with the right to a fee), the judges *can* determine which *duties* lawyers have. Even

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46 My translation.

47 My translation.

though the grounds do not directly refer to the code of professional ethics on conflicts of interest, there is a close connection. In this case, no expert opinions were obtained. It should be noted that the judges' dismissal of the trial of the potential breach of the code of professional ethics is not based on the rules' failure to have source of law value, but exclusively on the interpretation of the formal examination as to jurisdiction.

U 2007.1015 H addresses fines and suspension of the admission to practice law due to repeated breaches of the client account provision on handling entrusted means. In the case, the lawyer bases his acquittal claim, among other things, on "the fact that what he did was not a crime, but merely a failure to meet the regulatory provisions set down by an association. Moreover, these regulations are not in accordance with other laws and legislative provisions. He is under no obligation to bend for such rules, only legislation".<sup>48</sup> Furthermore, he believes that sentencing people for breaching rules established by an association conflicts with the Danish Constitution. Apparently, the judges are not sympathetic to these views. The High Court's grounds (which the Supreme Court endorses) state that he failed to meet the client account provision. "Failure to do so is in breach of good practice for lawyers and thus entails breach of section 126 of the Danish Administration of Justice Act". The High Court proceeds and mentions that the lawyer has repeatedly acted in breach of his duties as a lawyer and that it is unlikely that he will practice law in a justifiable way in the future. This is grounds for a suspension of his admission to practice law, until further notice carried out by the Disciplinary Board of the Danish Bar and Law Society, cf. section 147 c, subsection 3 of the Danish Administration of Justice Act.

The defendant lawyers from the cases mentioned above find that consideration of due process related to the use of sources of law which, naturally, belong under the legal system (the traditional) is ignored. The judges' missing comments on these objections in interplay with the judges' missing explicit reference to trade rules, expert statements and good practice standards *can* be said to suggest that the judges do not believe that use of industry sources constitutes a problem.<sup>49</sup> From a polycentric source of law perspective, we are merely talking about an extension of the traditional sources of law to include soft law to a greater extent. From a traditional source of law perspective, the due process consideration is formally ignored, which entails a risk that the professional, for example, potentially is judged in a more harsh way than otherwise. If the trade rules did *not* exist or were *not* involved, the judges would nevertheless have to determine which conduct can be expected of the professional in order to estimate whether this line of behaviour was observed in the concrete. Thus, this is done by obtaining information in another way – for example, via legal or expert opinions. It is debatable whether legal and expert opinions comprise jus or facts of the case, when they contain statements of what constitutes good prac-

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48 My translation.

49 See Bønsing, Sten, *Brancheregler og Brancheproses*, 2001, p. 90 for a discussion of the content and character of the individual trade rules.

tice.<sup>50</sup> If these statements, which, as mentioned, often contain a normative assessment, come to function as the law, in that the judges appear to use the assessments uncritically to determine whether the professional did act negligently, it can be argued again that sources of law from outside the legal system are used. Even though the industries in principle cannot say anything normative, normative concepts such as good practice standards suggest that a discretion is exercised, which cannot be distinguished from a normative evaluation, and it can therefore be difficult for the industries to avoid saying anything normative when they make statements about the content of good practice standards. It is also difficult to determine whether trade rules contain ethical principles or other considerations which seriously sharpen the liability evaluation or which include subjective considerations. Naturally, the judges must evaluate which considerations and values underlie the trade rules and statements. Do lawyers' industry rules indicate that the identity of a professional lawyer is that of a *servant to the court*, a *part of an order*, a *businessman* or other?<sup>51</sup> These identities *can* be a determining factor in which values and considerations are represented in the trade rules and statements, and therefore there is a potential risk that the industry fails to make the purely legal balancing of considerations that is the aim of the courts.

Finding a solution to the due process problem in relation to the *inside or outside the legal system* theme is not easy when we are talking about standards of conduct. The reason for this is that a fundamental principle for evaluating conduct in areas of complex counselling is, necessarily, evaluations made in part by representatives of the industry, relevant to the case in question. Such an evaluation and utilisation of sources of law outside the legal system is well-known in the private law area, among other things due to the fault evaluation; however, it is still necessary to be aware of the fact that the conduct evaluation is based on sources that do not enjoy formal legal legitimacy. Formally, this awareness is increased in a public law perspective because of the duty to prove title, but civil law sanctions can also be rather prejudicial to a professional.

### 3.2 *Predeterminability*

Predeterminability refers to the chance to be able to predict the state of the law, including the security that the authority to sanction is related to a clear rule of law. Regarding the latter, one could claim that regulation with sanctioned legal standards is at variance with the transparency criterion towards which criminal law normally strives to impose sanctions.<sup>52</sup> This is also stated, directly or indi-

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50 Concerning the discussion of implying good practice as the law or the fact of the case, see Langsted, Lars Bo and Bønsing, Sten in their individual contributions to *Erstating – en antologi*, 2006.

51 For studies of professional identity and ethical rules for lawyers, see Blomquist, Helle, *Lawyers' Ethics*, 2000.

52 Langsted, Lars Bo, *FSR's Responsumudvalgs 75 års jubilæumsskrift*, 2000, p. 20.

rectly, in some of the above-mentioned court rulings. In the mentioned U 2007.1015 H, concerning breach of the client account provision, the defendant believes, among other things, that disqualification “[is] almost of a criminal law-like character, and it is thus fair that he should receive the same legal protection”.<sup>53</sup> Here the lawyer refers to normal preconditions for incurring a sentence, including transparency in the rules.

As mentioned, the fault standard has a prominent place in the general law of damages. The standard is developed in legal practice and, like the good practice standards, contains an evaluation of whether a given conduct is inconsistent with the (hypothetical) conduct that is regarded as justifiable and/or good conduct. To determine whether an advisor is liable for damages, as mentioned, the industry’s evaluation of good practice in the form of trade rules or statements is thus included and emphasised in the fault evaluation. The judges must consider a number of different situations of which only a few are regulated by law or previously addressed in legal practice, and they can be so specific that the judges apparently, in cases with no prior practice, must make a more or less vague evaluation. In Denmark the legislature and the citizens appear to accept the fault standard and the way in which judges imply it. The courts independently create legal relations in connection with the implication of legal standards, and it is thus accepted that all existing law cannot be found in for example law books.<sup>54</sup> In cases where the legislature predicts a possible undesirable conduct they want to regulate, naturally, this is done – as has been seen in the financial area among others. This acceptance of the courts’ autonomy is probably attributable in part to the fact that legal practice appears to be rather consistent, and principles and considerations can thus be deduced from legal practice and used in future cases. Regarding the implication of good practice standards in relation to, for example, lawyers and auditor, as mentioned, the courts are on a par with the industries. The advisors’ trade organisations set up guidelines, and these guidelines are communicated to the members, who are expected to follow and abide by them. If the evaluation of an advisor’s conduct in for example an action for damages at the courts corresponds to the norms that underlie the given industry’s set of rules (which the members are expected to abide by), then there is consistency in the conduct evaluation, which increases the degree of predictability. Hence, “all” the advisor has to do to be more or less sure that he will avoid sanction of either a private law, public law and disciplinary character is to abide by the trade rules. When trade rules and norms have impact on the implication of good practice standards at all, it thus means that for most industries that have a high degree of self-regulation the professionals’ field of work is governed to such an extent that they are able to predict the demands placed on them. In addition, there is assumed to be a high degree

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53 My translation.

54 Thus, *see* among other things the legislative history behind the provisions on unfair terms of contract in the Contracts Act L 27, 1994, section 5.2.7., regarding Denmark’s reluctance to introduce blacklists, on account of the freedom to make an evaluation in the concrete case.

of consensus between the members of the industry concerning the trade norms in question.<sup>55</sup>

In relation to the theme of predeterminability there is thus in connection with regulation with good practice standards a high degree of ambiguity with regard to the content of most of the standards, if you consider the statutory part of the regulation and thus the transparency criterion exclusively. However, the use of trade standards to imply the rules, where possible and relevant, contributes to a greater degree of predeterminability in concrete areas. Naturally, this is most distinct in industries that provide detailed guidelines for the individual professional services – this is for example the case for auditors – and less so in industries that in their trade rules adhere to inclusive and open formulations – this is for example to a certain extent the case for lawyers. However, it is true for lawyers, auditors as well as a number of other industries that some guidance of conduct can be found in the extensive use of complaints boards.<sup>56</sup>

#### **4 Which other Considerations do Good Practice Standards Meet?**

Regulation with good practice standards raises a number of questions in terms of due process. These questions arise primarily because of the comprehensive character of the standards and implication via industrial norms that fail to live up to the traditional sources of law criteria. It is thus relevant to ask why the legislature accepts these potential due process problems. The explanation must be that there are other considerations to take into account. As mentioned, there is a relatively high degree of predeterminability in practice, especially in industries with a high degree of self-regulation. This predeterminability is probably instrumental in accepting in general some disregard for the legitimacy of sources of law, but safety in being able to predict the state of the law is not enough of course, if this state of the law is considered unfair. Regulation with good practice standards does accommodate considerations, though, that help ensure that the state of the law is in fact regarded as fair – also prospectively. These considerations include in part the consideration that rulings are made on the basis of professional competence, which helps increase judgements' material accuracy, and in part that the state of the law is flexible. These considerations are elaborated below.<sup>57</sup>

In addition to the mentioned considerations, regulation with good practice standards is also likely to be based on the fact that it is difficult to find regula-

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55 Pedersen, Axel H., *Indledning til advokatgerningen I*, 1962, p. 40.

56 However, Hansen, Jørgen suggests that the lawyer industry, via its complaints board, does not contribute to predeterminability. On page 109 in his book *Advokatgerningen som liberalt erhverv*, 1986, he compares Winnie the Pooh's view of the honey bees to the members of the Disciplinary Board of the Danish Bar and Law Society: "It is difficult to know what they are thinking". My translation.

57 It is debatable whether these considerations, terminologically, are due process considerations.

tory technical *alternatives* to these standards, if the legislature wishes to govern or, as a minimum, be able to sanction the area.

#### 4.1 Proximity

When the legislature regulates via good practice standards, concerning lawyers and auditors for example, the detailed establishment of the state of the law is *formally* delegated to the judges. However, in actual fact, the implication of the standards is to a certain extent delegated to the industries – which the legislature must be aware of, cf. legal practice. Thus, apparently the legislature desires a degree of “privatisation” in this area. The industries draw up the rules and, to a certain extent, even discipline their members via trade boards. This accepted self-regulation entails that the rules gain a status that makes them more legitimate to use, even in private law and public law contexts. In this way, existing law which emerges via legal practice is defined as close as possible to the actors concerned. Thus, the rules enjoy internal as well as external authority. The advantages are obviously that the professional competence lies with the industries, that a state of law built on professional competence is achieved and that rulings contain the best possible *professional* evaluation. As mentioned, it is thus left to the judges to counterbalance potential irrelevant considerations which may be represented in the trade rules and to safeguard other considerations (consumer protection and others), if the industry in question fails to (sufficiently) safeguard these considerations.

This actual delegation of the implication of the standards to the industries can, as mentioned, be regarded as a legitimacy problem concerning sources of law. The reason for this is that the trade rules have not been properly adopted and therefore do not enjoy democratic legitimacy. When great importance *can* be attached to the proximity consideration at all, it is expressive of the fact that the legislature trusts that the industries can act in the wide interests of society – of course, with the courts as an overall sought after guarantee that subjective considerations are not taken into account. It can also be mentioned here that we are talking about limited areas of business.<sup>58</sup> Subject to the proviso of the mentioned risk concerning the level of the industry’s implication of good practice standards, the proximity and thus the professional competence have a positive effect on the conception that the standard and thus the rulings concerning the standard are (professionally) fair.

The self-regulation and thus the formation of soft law, which regulation via good practice standards prepares the ground for, have, in connection with the professional proximity, another influence on the governed actors. Researchers believe that this freedom of self-regulation gives the governed actors a re-

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58 Pedersen, Axel H., *Indledning til advokatgerningen I*, 1962, p. 40.

sponding and not merely reactive approach to the regulation of their area.<sup>59</sup> The actors accept joint liability, as they influence what constitutes existing norms. To be able to *maintain* the option of self-regulation they are, at the same time, forced to help make and maintain balanced regulation in which certain considerations, aside from subjective considerations, must be included.

## 4.2 *Flexibility*

An often used argument *for* regulation with standards is that the present state of the law remains flexible and, at the same time, the codification makes it possible to sanction breaches of the standard. This flexibility is evident both in the ability to quickly change the state of the law if required and in that the standard applies to *all* situations and not just the situations that the legislature or others were able to predict at the time of the codification.

This flexibility can seem to disrupt predeterminability, but this is not *necessarily* the case if the state of the law moves at a pace and in a direction that the actors are able to follow.

Naturally, it can be difficult to predict the result of a number of cases concerning the question of compliance with good practice standards. This is probably true for all cases that become a case to be presented for the courts precisely because existing law does not clearly specify how the conflict should be solved and must thus be settled by the court. In the analysed legal practice there are no signs that the flexibility in the content of the good practice standard leads to arbitrariness, even though it is of course difficult to say for sure, as the cases are not identical. In this connection, it would be desirable if the judges, especially in cases concerning good practice standards, made a special effort to clarify which considerations/principles they give emphasis to in concrete cases. This would further increase the predeterminability and form a basis for making the applied principles subject to evaluation and debate in a wider forum and thus counteract the trade rules' lack of democratic legitimacy, cf. above.

## 4.3 *What are the Alternatives?*

In 2000, in her then role as Minister for Business, Pia Gjellerup bluntly stated that legal standards are a convenient way for the legislature to legislate.<sup>60</sup> The convenient aspect is naturally the fact that the legislature in this way does not have to consider the *content* of the standard. However, this convenience is paid for by surrendering some influence with regard to the content. If the legislature wishes to have an influence on the content, the legislature must do the exten-

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59 See, among others, Rupp, Deborah E.; Williams, Cynthia A., *The efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum*, in *Theoretical Inquiries in Law*, volume 12, no. 2, 2011, article 8.

60 Gjellerup, Pia, *FSR's Responsumudvalgs 75 års jubilæumsskrift*, 2000, pp. 8-9.

sive work of understanding what should apply in the relevant situations. Other situations which the legislature has not been able to predict will fall outside this detailed regulation. The obvious weakness of detailed regulation is of course an extensive and inflexible set of rules that will, nevertheless, fail to cover all imaginable situations.

Another alternative to regulating with standards is to not regulate at all.<sup>61</sup> If the legislature decides to not regulate these areas, it means that public law sanctions are no longer an option, and thus the potential (but perhaps also doubtful) preventative effect of criminalising bad conduct is annulled.<sup>62</sup> In private law contexts *regulation* with good practice standards is not as important, unless the standards are implied further and more concretely by the legislature. Agreements must be met, and whether an agreement is met depends, among other things, on whether each party has rendered his performance. This is determined on the basis of the contract and supplemented with what *should* be performed – good practice. In questions concerning damages, the fault evaluation is likewise an evaluation of the accepted pattern of conduct in the given situation, and here regulation with a general good practice standard does not have a great effect. Thus, the professional good practice standards that have been introduced at a great scale under public law in the last couple of years do *not* in themselves affect how the conduct of professionals are judged (the *level* of the standard), aside from the increased focus and potential convergence between conduct evaluations under public law and private law, respectively. Statutory good practice standards must therefore, according to this author, be seen only as a sanction tool that serves a potentially preventive purpose (if you fail to do the right thing, you must be punished) and also help ensure citizens' sense of justice (when you have done something wrong, you get punished).

With regard to the influence of the industry, which may work in practice, but has a legitimacy problem, one alternative could be to increase the use of assessors.<sup>63</sup> Expert opinions are thus made legitimate by being a part of the court system and its procedures and appointment rules. The obvious danger of this solution is that the assessor may emphasise circumstances or factors that have not been sufficiently clarified by the one party.<sup>64</sup> Thus, the other party does not

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61 The area of auditor regulation has uniquely experienced that the field of application of the Danish Auditors Act and thus the good auditing practice standard have been *curtailed*. However, based on a wider definition of good auditing practice, the FSR – Danish Auditors in Denmark's rules of procedure present a wider field of competence than indicated in the law and the legislative material; see the 2003 and 2008 Danish Auditors Acts and the expert committee's 2011 rules of procedure.

62 On the (possibly missing) preventive effect of conduct regulation, Greve, Vagn, *Revisors ansvar retspolitisk set*, R&R, no. 8, 1989 and Gomard, Bernhard, *Juraen under forandring og udvikling*, U 1993B.385.

63 Today assessors are used to a letter extent. See U 2008.566 Ø and U 2010.377 V, as examples of appealed district court judgements concerning requests for appointing assessors where the High Court finds that assessors should participate. See also U 2008.16 V and U 2010.2034 V, where the High Court reaches the opposite result.

64 See comments to proposal for changing the Danish Act of Administration of Justice and several other laws, law no. 168, 2006, section 4.2.2.1.

get a chance to comment on or defend himself against factors that form the basis of the ruling. In order to counteract this potential problem, the experts could step forward in the grounds and clarify their justification for the judgement and thus also prepare the basis for an assessment of a potential appeal. In each case, it must be evaluated whether it would be an advantage to have the professional aspects clarified via for example an expert opinion or whether the case is too complicated to summon an assessor.<sup>65</sup>

Naturally, regulation with good practice standards is not suitable for the regulation of all conduct. Here, the legislature must be conscious of the governed actors. When standards require detailed professional implication, one could argue that this regulation technique depends on the presence of relevant representatives of the given profession to imply the standard – at least if you want to gain the advantage of proximity and professional competence in connection with the implication of the standard. When the above-mentioned law of legal counselling was adopted in 2006, no organ existed that could naturally take part in the implication of the good practice standards in the law. As mentioned, lawyers are excluded from the law and nowhere do the legislative material refer to the notion that good practice for legal counselling should be regarded as the same standard as good practice for lawyers. Today, there is still no trade association for legal advisors under the law of legal counselling. The reason for this is probably that legal advisors comprise a very diverse group of advisors, including auditors, architects, engineers, various consultants, independent legal advisors, researchers etc. These actors may find it difficult to get together in a professional community, partly because they work with very different areas, some of which are similarly subject to other standards, and partly because one of the most obvious preconditions for establishing an actual trade association is absent: joint education or authorisation. So far there is thus no trade association to differentiate good legal counselling from good practice for lawyers, and therefore the obvious legal solution is that legal advisors, qua the so-called professional liability, are judged under the same standard as lawyers – a standard that lawyers as mentioned take part in establishing and which other legal advisors therefore have no influence on.<sup>66</sup>

## 5 Conclusion

As mentioned in the introduction, the incentive to legislate in a given area is often to regulate a specific conduct in order to secure the values that are ruling at the time of the adoption of the law. In several cases, the law will represent a compromise between diverse values – a balancing of considerations. At the

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65 Concerning this weighing *see* for example U 2008.16 V.

66 For more information on legal counselling, *see* Sørensen, Marie Jull, *God skik for juridisk rådgivning – en retlig standard*, 2011 and Sørensen, Marie Jull, *Lov om juridisk rådgivning – hvad, hvem og hvorfor?* Revision og Regnskabsvæsen, no. 6, 2012. P. 24.

courts another balancing of considerations takes place, just as the industry in their rules and statements has also weighted different considerations. As mentioned, Gomard expresses worry that the balancing of considerations concerning legal standards will follow the development which depends on what is widely accepted by the general population. Gomard's concern can be regarded as fear of losing the due process of law that is embedded in the above-mentioned formal legislative procedure and court control that help filter people's humour via a democratic and legal filter. Thereby, Gomard also indirectly reveals concern for the use of soft law that legal standards suggest. Concerning legal standards in the form of good practice standards there is, cf. the above, nothing to directly suggest that there is cause to worry about this development in practice. In the balancing of considerations for good practice standards, greater importance is attached to proximity/professional competence and flexibility than to for example the advisor's security that he will be judged according to norms in the traditional legal system and be sanctioned on the basis of clear rules of law. This balancing of considerations is apparently accepted by the actors concerned. The state of the law is somewhat predictable, even though it is not based exclusively on an interpretation of traditional sources of law, but to a great extent on soft law. To conclude that the trade norms do in fact contain some legitimacy in that they exist, are observed and met is of some value.<sup>67</sup> Embedded in the mentioned balancing of considerations are certain preconditions, such as the will and ability of the industries to set a fair level – from a societal point of view – for the good practice standard. However, the legislature can of course establish a formal framework for the industries' activities. The weighing of the mentioned considerations reveals a degree of confidence in the judges' and industries' ability to ensure professionally and legally correct judgements and thus compensate for the missing due process considerations. It is the shared job of the legislature, the judges and perhaps also researchers to pay attention to whether these preconditions fail and thus whether the trade rules' source of law status, as used in soft law, and the value of the industries' statements should be revised.

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67 van der Sluijs, Jessika, *Soft law-reglering av försäkringsrätten*, JT, no. 2, 2010/11.

