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Public play upon private standards

How European and international economic law enter into voluntary regimes for sustainability

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Chapter 4
VSS in the internal market
Competition law rules

1 Introduction

While the freedom of movement provisions discussed in Section 2 of the previous Chapter have an effect of preventing fragmentation of regulatory regimes, EU competition rules can be conceived as pushing towards decentralisation of (private) regulatory approaches and even regulatory competition in the interests of consumers.¹ Cartels represent an important tool of transnational regulation which transcend the market-based jurisdictional reach of public regulation.² In spite of such transnational features, EU competition law nonetheless applies by virtue of an effect-type doctrine whereby the implementation of an agreement in the EU suffices to trigger competition scrutiny.³

A common element between the three types of VSS is a minimal, if absent, role of the State and the presence of business operators or undertakings in the standard-setting. The resulting standard can thus be construed as an agreement between undertakings in the meaning of EU competition law. The regulatory rationale behind VSS schemes, however, differs considerably. As shown in Chapter 2, in spite of the common presence of an extent of contribution to public goals, VSS' rationale can be construed on a continuum between regulatory and economic goals. It ranges from encompassing markedly regulatory intentions for multi-stakeholder VSS, to self-regulatory goals for sectoral VSS and to mostly economic objectives for company VSS. All these three situations do not exclude *per se* the application of competition provisions, albeit different considerations may be relevant whenever an agreement pursues also non-economic objectives.

It is very important to investigate the potential application of competition law to VSS. Such schemes directly affect market parameters which are routinely under the scrutiny of competition authorities, competition itself, but also product quality - for example in the form of social and environmental product features - and, of course, prices. The implementation of a scheme may or may not generate certain efficiencies on a EU market both for producers and - most importantly - for consumers. By providing products that conform to consumers' tastes, VSS directly enhance consumer welfare. Cartels can also correct externalities and market failures. By providing information by means of labels about hidden product features, VSS empower consumers to make

¹ Marengo, G. (1987) Competition between national economics and competition between business - A response to Judge Pescatore. *Fordham International Law Journal* 10(3), 420-443.

² Maher, I. (2011) Competition law and transnational private regulatory regimes: Marking the cartel boundary. *Journal of Law and Society* 38(1), 119-137.

³ Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85. *Ahlström v Commission (Wood Pulp)* [1988] ECR I-5233, paras. 12-13. See also Geradin, D., Reysen, M., Henry, D. (2011) 'Extraterritoriality, comity, and cooperation in EU competition law'. In Guzman A.T. (Ed.) *Cooperation, comity, and competition policy*. Oxford: Oxford University Press, 22-54; Wagner-von Papp, F. (2012) 'Competition law and extraterritoriality'. In Ezrachi, A. (Ed.) *Research Handbook on international competition law*. Cheltenham: Edward Elgar, 21-60.

informed purchase decisions, and allow a market for sustainable products to function. Effective, non-discriminatory and proportional VSS also pursue fundamental policy objectives which are aligned to the public interest and at the same time may have a positive impact on market parameters and on the welfare of consumers, such as environmental, social and consumer protection. Under certain conditions, restrictive agreements between undertakings can either be excluded altogether by competition rules if in the pursuit of national or EU public interest goals or, more relevant for our case, be justifiable because they generate net positive efficiencies.

VSS can however also impact negatively on competition in many ways. As a starting point, trade barrier effects and consumer confusion may have repercussions on market parameters, especially on competition, and on consumer welfare. In the most straightforward scenario, a scheme is established with the purpose of excluding certain competing, possibly foreign, products from the market. Such a protectionist standard, arguably, often generates considerable inefficiencies to result in breach of competition provisions. Alternatively, a scheme may discriminate against specific producers with a similar negative outcome in terms of efficiencies.

Unfortunately, the situation is not always clear-cut. The case of food-miles labels offer interesting grounds for discussion. Studies have found that producers in developing countries will not qualify for the label in EU markets, or will be severely penalised by it as clearly the transport carbon emission per unit is much higher than for local products. However, the overall carbon emission during production and transport combined is much lower than that of EU products, due to the more extensive and less mechanised production methods.⁴ Another example is private food standards concerning health and safety, and environmental and social impact required by sectoral associations of retailers on food producers. The stringency of the standards is questionable and not always associated with clearly defined risks or sound risk assessment procedures. Their effect is therefore the prevention of market access to producers that are otherwise price and quality-competitive. Consumer confusion is a closely connected phenomenon, which arises because of the appearance of several schemes making the same claim. Even more confusion is created by the proliferation of several initiatives making *slightly different* claims, which could counter the possible efficiencies these instruments generate.⁵

⁴ See generally Smith, A., Watkiss, P., Tweddle, G., McKinnon, A., Browne, M., Hunt, A., Treleven, C., Nash, C., Cross, S. (2005) The validity of food miles as an indicator of sustainable development. Final report produced for the Department of Environment, Food, and Rural Affairs. Available at <http://webarchive.nationalarchives.gov.uk/20130131093910/http://www.defra.gov.uk/statistics/files/defra-stats-foodfarm-food-transport-foodmiles-050715.pdf>.

⁵ Eilperin, J. (2012, April 23) Some question whether sustainable seafood delivers on its promise. *Washington Post* Available at http://www.washingtonpost.com/national/health-science/some-question-whether-sustainable-seafood-delivers-on-its-promise/2012/04/22/gIQAaYzAT_story.html?wpisrc=emailtoafriend. For a recent instance on the Dutch press see 'Nederlander weg kwijt in woud duurzaamheidskeurmerken' online at <http://nos.nl/artikel/2006000-nederlander-weg-kwijt-in-woud-duurzaamheidskeurmerken.html> Recent.

Understanding how the interplay between VSS and competition rules unfolds is crucial not just for the purpose of this research. Competition authorities are striving to elaborate satisfactory and coherent approaches to deal with agreements between undertakings which also pursue public goals, and whose choice may have potentially inhibiting consequences for private regulation. Two main approaches are possible, which have spurred a considerable debate in scholarly literature. An economic perspective either limits the analysis to a strict neoclassical economic approach⁶ or, more broadly and more popularly, takes a wider understanding of accountable efficiency.⁷ Another view holds that agreements necessary for pursuing public goals can be excluded altogether by competition scrutiny.⁸ Social, and especially, environmental agreements have elicited discussion both among academics and practitioners about the proper competition approach towards them.⁹

This Chapter aims at investigating the extent of review which can be exercised on VSS by means of EU competition law enforcement. It starts from the assumption, grounded on solid empirical evidence, that some VSS may have widespread negative effects on market parameters, structurally affect competitive conditions on the market and generate distributional concerns. It therefore does not further elaborate normatively on whether undertakings are legitimised to restrict competition to pursue public goals, and to what extent. Nonetheless, a margin for economic operators to pursue goals other than economic ones must be permitted and should be operationalised by means of a broad economic approach to accountable efficiencies. The aim of the Chapter is limited to showing under which conditions infringements of EU competition law may occur and to understand the extent to which competition enforcement could contribute to lessen market access concerns and consumer confusion generated by VSS. The Chapter also suggests a normative approach to ensure that market access

Eurobarometer surveys report that 48% of consumers claims that environmental standards are not clear and a mere 6% of EU citizens trust producers' claims regarding environmental attributes of their products. See http://ec.europa.eu/environment/eussd/smgrp/facts_and_figures_en.htm.

⁶ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01; Kjølbye, L. (2004) The new Commission Guidelines on the application of Article 81(3): An economic approach to Article 81. *European Competition Law Review* 25(9), 566-577; Odudu, O. (2006) *The boundaries of EC competition law. The scope of Article 81*. Oxford: Oxford University Press.

⁷ Townley, C. (2009) *Article 81 EC and public policy*. Oxford: Hart Publishing; Casey, D.K. (2009) Disintegration: Environmental protection and Article 81 EC. *European Law Journal* 15(3), 362-381; Kingston, S. (2012) *Greening EU competition law and policy*. Cambridge: Cambridge University Press.

⁸ Mortelmans, K. (2001) Towards convergence in the application of the rules on free movement and competition? *Common Market Law Review* 38(3), 613-649; Monti, G. (2002) Article 81 EC and public policy. *Common Market Law Review* 39(5), 1057-1099.

⁹ Townley, C. (2009) *Supra* at 7; Casey, D.K. (2009) *Supra* at 7; Lavrijssen, S. (2010) What role for national competition authorities in protecting non-competition interests after Lisbon? *European Law Review* 35(5), 636-659; Kingston, S. (2012) *Supra* at 7; Report from the Nordic Competition Authorities (2010) Competition policy and green growth, Interactions and challenges. Available at <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pmyhteisraportit/competition-policy-and-green-growth.pdf>; Autoriteit Consument & Markt (2014) Vision document. Competition and sustainability, 8-9. Available at <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/>.

and consumer confusion can be properly caught by the legal tests under EU competition rules, without undermining the contribution to public goals made by VSS. It will also illustrate the means by which EU competition law may exercise an extent of influence on the procedures employed by VSS bodies, as the Commission grants EU competition immunity to voluntary standards drafted by means of a transparent and unrestricted standard-setting procedure.

The main focus of this Chapter is on Art. 101 TFEU and follows the approach and standard of review outlined by the European Commission, mindful that the enforcement of competition rules by national competition authorities (NCAs) may differ. Throughout this Chapter it will be seen that especially for certain types of instruments, the lack of positive efficiency generated by informing consumers may on occasions have the effect of complicating the justification of their restrictive effects on competition. This holds particularly true if a narrow approach to accountable positive efficiency is adopted, as supported by the Commission. Enforcement of EU competition law against certain VSS could therefore be a tool to review schemes that, among other negative effects, unduly hinder market access. Also confusion generated by the proliferation of several schemes, and the mismatch between claims made and consumer perceptions, is a matter that could be tackled through competition law's approach to efficiencies. Labelling schemes generate positive efficiency insofar as they provide information to consumers, ensure that products whose features correspond to consumer taste are brought to the market and, by permitting producers to set the correct price, contribute to market functioning. In case of a discrepancy between the claim made by a scheme and its impact considered in terms of efficiencies, competition law could be a possible legal tool to overturn certain VSS to the advantage of more effective ones.

This Chapter starts from the assumption that potentially all VSS are under the scrutiny of competition law. Section 2 discusses the application of Art. 101 TFEU to VSS. It begins by demonstrating the applicability of competition rules to the schemes in Sections 2.1. Standard-setting bodies can be considered associations of undertakings, and the resulting standard can be considered as a decision; in the alternative, the standard can be seen as an agreement between undertakings. Specifically, multi-stakeholders and sectoral VSS are horizontal agreements, whereas company VSS are to be assessed separately as vertical agreements entered into between a retailer and a supplier. Standardisation in the domain of sustainability constitutes an economic activity to which competition rules apply. Section 2.2 discusses the possibility to exempt agreements in the public interest from the scrutiny of competition law. Section 2.3 then discusses restrictions to competition generated by VSS within the framework of the Commission Guidelines on horizontal agreement, which also identifies safe harbour requirements for standardisation agreements. Restrictions to competition which may be generated by horizontal VSS schemes are discussed with the assistance

of economic literature over the effects on competition and market parameters of different types of schemes. Section 2.4 discusses positive efficiencies generated by VSS according to the approach to efficiencies and public policy objectives followed by the Commission. Finally, it concludes by attempting to balance positive and negative effects on competition in order to show which VSS are more problematic under Art. 101 TFEU. Section 2.5 discusses briefly company VSS as vertical agreements. Section 3.1 and 3.2 respectively address exploitative and exclusionary abuses for VSS under Art. 102 TFEU, under the assumption that a VSS body may be considered as an undertaking on its own. Section 4 investigates the possibility of exempting from competition law scrutiny a Member State's legislation recognising a VSS scheme for legislative and regulatory purposes, i.e. a case of public use of VSS. Section 5 concludes the Chapter.

2 VSS under Art. 101 TFEU

Art. 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Such agreements are considered to be automatically void. Agreements which contribute to efficiencies, technical or economic progress, and at the same time provide consumers with a fair share of the resulting benefit, are exempted by the prohibition provided that the restrictions to competition are indispensable to achieve those objectives and competition is not eliminated in respect of a substantial part of the products in question.

This Section follows the logical analytical structure determined by the letter of Art. 101 TFEU. However, the analysis of VSS within a competition law framework also requires addressing a number of disputed issues, which are touched upon at several junctures within Section 2. Firstly, certain agreements between undertakings, by virtue of their objectives, can either be excluded altogether by competition review or can be considered as not restricting competition. These two related topics will be addressed respectively in Sections 2.1.1 and 2.2. Secondly, the role which concerns other than competition and public policy objectives can play in the justification of a restrictive agreement is addressed in Section 2.4.1. Also the relation between standard-setting and EU competition law bears a close connection to the subject matter of this dissertation. The competition law treatment of European Standardising Bodies (ESBs) is addressed in Section 2.1.1 and in Sections 2.3.3 and 2.3.4. The related requirements for competition immunity of other standard-setters determined by the Commission are discussed in Section 2.3.4.

2.1 VSS and economic activity

The first step in the assessment under Art. 101 TFEU concerns the presence of an agreement between undertakings or a decision of an association of undertakings. For the moment, company VSS will be set aside and will be addressed in Section 2.5. Sectoral and multi-stakeholder schemes are drafted by undertakings. Both types of standards are set and approved by specific bodies within an organisation, whose composition could vary from case to case and may not exclusively consist of business representatives. Standards may thus be drafted and approved by bodies which, in spite of the presence of undertakings, do not always clearly exercise economic functions. While it is rather uncontroversial to consider company VSS as grounded on economic motivations, Section 3 of Chapter 2 highlighted explicit regulatory and self-regulatory objectives, respectively for multi-stakeholder and sectoral VSS. Indeed, the fact that in many cases standards are sold on what arguably constitutes a market for sustainability standards, it at least mitigates the unfettered regulatory claim made by certain schemes, and brings to the fore the presence of economic activity by the VSS body at hand. On the other hand, the objectives pursued by VSS are often in consonance with the public interest. Generally, private regulation and standard-setting could be considered as activities in the public interest, provided that certain conditions are met. Is it possible to conclude that all VSS are covered by the scope of Art. 101 TFEU and also, provided that they exercise a dominant position, of Art. 102 TFEU?

2.1.1 Standard setting as an economic activity

Similarly as under the four freedoms,¹⁰ in order to determine whether EU competition rules are applicable, a functional approach is employed. This looks at the activity rather than at the private or public character of the body carrying out that activity. Under a functional approach, competition rules apply to all activities concerning market participation, whereas freedom of movement rules apply to activities involving market regulation.¹¹ The latter activities include functions connected with the exercise of the powers of a public authority.¹² As at least certain VSS have been framed in Chapter 2 as possessing strong regulatory features, it is relevant to discuss whether, under certain conditions and circumstances, multi-stakeholder VSS may be excluded

¹⁰ See discussion in Section 2.2.1 of Chapter 3. The choice of a functional approach is a consequence of the presence of public/private divide in the Treaties - whereby Treaty freedoms apply to State measures and competition law to the conduct of private parties - which is not reflected in a similarly clear divide in the real world.

¹¹ Sauter, W., Schepel, H. (2009) *State and Market in European Union law: The public and private spheres of the Internal Market before the EU Courts*. Cambridge: Cambridge University Press, 79; Odudu, O. (2010) The public/private distinction in EU internal market law. *Revue Trimestrielle de droit Européen* 46(4), 831-834.

¹² C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 57.

from competition purview as they may be considered as exercising functionally equivalent forms of public authority.

Can certain tasks like standard-setting constitute economic activity even if regulation is involved or if they are perceived as possessing a strong regulatory rationale? The companies participating in the management of the schemes and setting the standards constitute undertakings.¹³ For sectoral and multi-stakeholder VSS in particular, however, while contemplating the presence of undertakings in the standard-setting at varying degrees, the resulting standard may not be drafted and approved exclusively by business representatives. If the agreement is concluded by a body whose composition does not only include business representatives, the composition of the body is not determinative for its qualification as association of undertakings for the purpose of EU competition law.¹⁴ An association of undertakings may however also perform non-economic activities which are not subject to Art. 101 TFEU.¹⁵ It is therefore necessary to separate between possible economic and non-economic activity undertaken by such a body¹⁶ and assess whether standard-setting itself could constitute an economic activity.

A task in the public interest or generally activities in the exercise of powers typical of those of a public authority are not considered by the Court to fall within the domain of economic activity and are therefore excluded by the application of competition law.¹⁷ It is thus important to appraise whether social and environmental standard-setting taking place in highly proceduralised and 'democratic' fora could be considered as an activity typical of public authority, which would exclude VSS from the scope of EU

¹³ The definition of undertaking, which has the same meaning under Art. 101 TFEU and Art. 102 TFEU, revolves around the fundamental element of economic activity. C-41/90 *Hofner and Elser v Macroton GmbH* [1991] ECR I-1979, para 21. In *Pavlov*, the Court clarified that any activity consisting of the offer of goods or services on a given market constitutes economic activity. See Joined Cases C-180/98, 181/98, 182/98, 183/98 and 184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para 75. The assessment of whether an activity possesses economic character, looks at whether, *in principle*, it could be carried out by a private undertaking with the view to make profits. (Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2003] ECR I-02493, para. 28). The activity does not necessarily have to be performed in return for an economic contribution; it suffices that it could theoretically be performed under a system of competition. The lack of profit-seeking or economic purpose in a specific case does not mean that the activity is not economic.

¹⁴ See Joined cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API - Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo Economico* [2014] ECR I-0000, para. 113. Arguably, the outcome would differ in case the majority of the members of the association with the power to take decisions would include public officials, and a Member State would specify public interest criteria. In the presence of economic activity it is however irrelevant whether the composition of a VSS body includes even a majority of public (or, generally, non-business) officials. This seldom happens, as industry is present virtually in all VSS bodies. If a VSS body does not foresee industry participation at all, the resulting standard cannot be qualified as a horizontal agreement between undertakings. The extent of competition review would be limited to Art. 102, provided that the VSS body has a dominant position on the market for sustainable standards.

¹⁵ C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, paras. 50-71; C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECR I-000, paras. 39-59.

¹⁶ C-49/07 *MOTOE v Elliniko Dimosio* [2008] ECR I-4863, para 25.

¹⁷ C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA* [1997] ECR I-1580 paras. 22-24.

competition law.¹⁸ The performance of a public task or a task in the public interest is required to exclude a private body from Art. 101 TFEU.

A public task constitutes part of the essential functions of the State.¹⁹ Such functions have not been listed by the Court, but seem to include tasks intimately associated to the State such as fiscal administration, justice, and security and also more expansively, goals such as supervision and control of the air space²⁰ and the protection of the environment.²¹ The assessment of the CJEU is however not limited to the nature of the activity, but also includes aims and the rules to which it is subject, and in particular if the undertakings operate in compliance with rules laid down by public authorities.²² The Court's treatment of Eurocontrol in *SAT* is illustrative of the rules to which a body shall be subject. In his Opinion, AG Tesouro discussed the control activities of Member States over Eurocontrol's tasks, specifically concerning its ability to independently dispose of the capital in its possession. It was found that Eurocontrol had no financial independence in the absence of agreements from the States which established it. Therefore, also the rules to which Eurocontrol was subject were connected to the exercise of public authority.²³ This approach was confirmed by the Court.²⁴

Different types of standards can be found on the market, of which EU technical standards represent a particular group which defines product characteristics and health and safety requirements under a Commission mandate and give rise to a presumption of conformity with EU product Directives. Before the major overhaul of the system introduced by Regulation 1025/2012, it was held that, in spite of the official character bestowed on European Standard-Setting Bodies (ESBs) by EU legislators, technical standard-setting carried out by ESBs could not benefit from an exemption on the ground that they exercise tasks typical of those of public authorities.²⁵ The Commission does believe that EU technical standard-setters such as CEN are entrusted with a task in the public interest. Nonetheless, to the extent that the technical committees responsible for standards development are composed of industry representatives, competition law becomes applicable.²⁶ Procedures also

¹⁸ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 258.

¹⁹ *Ibid.*

²⁰ Opinion of AG Tesouro in Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1993] ECR I-45, para. 27

²¹ C-343/95 *Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA* [1997] ECR I-1580 para. 23.

²² Opinion of Advocate General Cosmas in C-343/95 *Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA* [1996] ECR I-1549, para. 42.

²³ Opinion of Advocate General Tesouro in C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1993] ECR I-45, para 12.

²⁴ C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1993] ECR I-43 paras. 28-31. The criteria of nature, aims, and rules are quite undefined, and it has been observed that they may offer a certain margin of manoeuvre for undertakings aiming to be exempted from competition rules by claiming to be acting in the public interest. See Sauter, W., Schepel, H. (2009) *Supra* at 11, 85.

²⁵ Schepel, H. (2005) *The constitution of private governance. Product standards in the regulation of integrating markets*. Oxford and Portland: Hart Publishing, 315.

²⁶ The Commission makes that explicit in Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249, paras. 73-74.

matter. The regime pre-Regulation 1025/2012 was rather problematic *vis-à-vis* its criteria for delegation of powers and executive control; according to some scholars it even constituted an illicit form of delegation.²⁷ Limited procedural control from public authority would not suffice for ESBs to be considered as carrying out tasks typical of public authority.²⁸

The Commission in its 2010 Guidelines on Art. 101, takes the explicit position that technical standard-setters recognised under Directive 98/34/EC are subject to competition law to the extent that the standard-setting body is an undertaking or an association of undertakings within the meaning of Art. 101 and 102 TFEU.²⁹ This is in spite of the fact that ESBs' standards are a peculiar group of standards with a particularity close connection to the EU rule-making process. The practice of the Commission has addressed a number of technical standards drafted by sectoral organisations, consortia, and private entities outside the EU system of standardisation without excluding the standards in question by means of a public authority argument.³⁰ Private standard-setting has been addressed also by the Court, for the first time in *SELEX*. There, the standard-setting activities of the body in question - Eurocontrol, an international organisation - were found by the General Court not to constitute economic activities.³¹ Such a finding must however be put in the right perspective considering the specificity of the case. The General Court concluded that standard-setting activities of Eurocontrol in that specific case did not constitute economic activity, not because the body was in the exercise of public authority, but

²⁷ Joerges, C., Schepel, H., Vos, E. (1999) The law's problems with the involvement of non-governmental actors in Europe's legislative processes: The case of standardisation under the 'New Approach'. EUI Working Paper LAW No.99/9, 26 and the literature referred to therein.

²⁸ An argument could be made that the extent of legalisation brought into the regime by Regulation 1025/2012, with the presence of legal acts at several critical junctures of the standard-setting such as the definition of the mandate - which now appears to take the form of a full-fledged delegation of regulatory powers - and the objection procedure, as well as the explicit Commission pre-emptive control over the publication of the standards in the Official Journal, aim to subject ESBs to the same rules public authorities are subject to, thereby excluding them from competition purview. It is therefore possible that technical standards drafted by ESBs could, in the future, be excluded altogether from competition rules. This outcome is a result of Regulation 1025/12 which appears to be turning technical standards into acts of the Union. In his Opinion in *James Elliot Construction*, Advocate General Campos Sánchez-Bordona held that standards drafted by ESBs are the result of 'controlled legislative delegation in favour of a private standardisation body', because of Commission's significant control over the procedures of drafting standards, their close connection to EU Directives, their adoption upon Commission's mandate, and their publication in the Official Journal from which stems a presumption of conformity with EU law for products in compliance with the standards. Further, adoption of the standards is financed and governed by EU law. See Opinion of Advocate General Campos Sanchez-Bordona in C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited* [2016] ECR I-0000, paras. 42-63.

²⁹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para 258.

³⁰ Commission Decision IV/31.458 *X/Open Group* [1987] L 35/36; Commission Decision IV/35.691 *Pre-insulated pipe cartel* [1998] L 24/1; see also Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249 for a determination of the circumstances under which standard-setting does not normally give rise to competition concerns, as Section 2.3.4 discusses. Under Art. 102, more recently, see Commission Decision AT.39939 *Samsung - Enforcement of UMTS standard essential patents* [2014] C(2014) 2891 final; Commission Decision AT.39985 *Motorola - Enforcement of GPRS standard essential patents* [2014] C(2014) 2892 final.

³¹ Case T-155/04 *SELEX Sistemi Integrati v. Commission* [2006] ECR II-4803, para. 69.

because of the lack of a market for technical standardisation services in the sector of air traffic monitoring equipment.³²

In general, for all cases of standard-setting, a market for standardisation is found, or the presence of undertakings in the standard-setting which do not operate under procedures typical of public authority (or, indeed often, both) is found. With respect to ESBs, as seen, it is the presence of undertakings that triggers the application of EU competition rules.³³ In such a case, the standard-setting body itself could be considered as an undertaking as well, to be subject to Art. 102 provided that its position is of dominance. For multi-stakeholder VSS, a market for sustainability standards exists, at least within certain domains.³⁴ Several schemes compete to attract new participants to the regime, which normally pay a fee to partake in the scheme and lawfully employ the scheme logo and the sustainability claim it includes. It is not relevant that the body adopting the standard, i.e. the VSS body itself, may not be the body that drafts the standard, which may be a committee of experts, a committee at a decentralised level, or a multi-chamber committee. *Adoption* of standards suffices to link a standard-setting body with economic activity. Conversely, if approval takes place by a body in the exercise of public authority, competition law will not be applicable even if standards are set by undertakings.³⁵

Even conceding that goals pursued by certain VSS can be generally considered as aligned to the public interest and to the tasks performed by public authority - and assuming the lack of a market for standards - VSS would still not pass the EU competition test identifying whether a body is in the exercise of public authority. VSS' rules and procedures may, if particularly inclusive, present some resemblance to those of public authority. However, forms of state control are missing altogether. By definition VSS are entirely private, in the sense that, as seen in Section 4 of Chapter 2 and Section 3 of Chapter 3, the weak forms of contact with public authorities, where present, do not even remotely meet the test for delegation of powers under EU law.³⁶ It is therefore reasonable to consider also sectoral and multi-stakeholder VSS bodies

³² Case T-155/04 *SELEX Sistemi Integrati v. Commission* [2006] ECR II-4803, para. 61. This is not surprising, as air-traffic control is the classic public good which can only be supplied in a situation of natural monopoly. It is essential that air-traffic control systems in different states are integrated and standardised, but at the same time it is not feasible that more than one air traffic control entity operates in a single territory. This prevents the creation of a market.

³³ As technical standards are sold by ESBs and national standardisation bodies, at least theoretically, also the claim that a market for technical standards exists could be made. See Koenig, C., Spiekermann, K. (2010) EC competition law issues of standard setting by officially-entrusted versus private organisations. *European Competition Law Review* 31(11), 451. The US system of standardisation shows that competition between technical standardising bodies is well possible. See Maher, M (1998) An analysis of internet standardisation. *Virginia Journal of Law and Technology* 3(5), 1522-1687.

³⁴ Reinecke, J., Manning, S., Von Hagen, O. (2012) The emergence of a standards market: Multiplicity of sustainability standards in the global coffee industry. *Organisation Studies* 33(3), 791.

³⁵ See Case T-155/04 *SELEX Sistemi Integrati v. Commission* [2006] ECR II-4803, para. 59.

³⁶ The situation may nonetheless differ for instances of interactions such as recognition, as Section 4 will elucidate.

to be in the exercise of economic activity. The same applies for sectoral standards which present a more markedly economic purpose. Since standard-setting in the domain of sustainability is likely to constitute economic activity, it does not matter whether the VSS is qualified as an agreement between undertakings or a decision of an association of undertakings.

2.1.2 Multi-stakeholder and sectoral VSS as horizontal agreements between undertakings or decisions of an association of undertakings affecting trade between Member States

Concerning the second requirement of scope in the application of Art. 101 TFEU, it is necessary that undertakings enter into an agreement or that an association of undertakings issues a decision. Very likely, a VSS would be considered as an agreement. Standards and the outcomes of standardisation process are considered as under the scope of the Guidelines on horizontal cooperation agreements.³⁷ In the case of VSS, where certification is employed to verify compliance and contractual arrangements between the scheme-holder and the entity seeking certification, the situation does not differ, since legal contracts qualify as agreements.³⁸ A VSS would also easily qualify as a decision of an association of undertakings. The non-binding character of VSS does not prevent the applicability of competition rules, as even non-binding recommendations are considered to be covered by the scope of Art. 101(1) TFEU, subject to the condition that it is common practice to follow them.³⁹

As agreements with a limited impact do not fall by Art. 101(1) TFEU, an assessment of a potential *de minimis* character of VSS shall also be made. As a rule, for horizontal agreements which do not involve hardcore restrictions, if the aggregate market share held by the undertakings participating in the agreements is less than 10% of the relevant markets, then the agreement does not appreciably restrict competition.⁴⁰ The assessment must obviously be performed on a case-by-case basis. For sectoral VSS, where a majority, if not the totality, of undertakings in a given economic sector participates, it is rather unproblematic to consider the 10% threshold as met. For multi-stakeholder VSS, a greater degree of variation as far as industry participation can be observed. The popularity of the scheme is, in this case, strictly connected with the

³⁷ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 257.

³⁸ For a recent application see T-419/03 *Alstoff Recycling Austria v Commission* [2011] ECR II-0000, para. 9.

³⁹ For example, a recommendation by an association of water-supply undertakings to its members suggesting that they do not connect to the water system dish-washers which were not bearing a certificate of conformity by the relevant certification body, was considered to be caught by the scope of Art. 101(1) TFEU. C-96/82 *IAZ International Belgium NV v Commission* [1983] ECR I-3369. Albeit VSS could also qualify as a decision of an association of undertakings, throughout this Chapter, the term agreement will anyway be employed to encompass also decisions of associations of undertakings.

⁴⁰ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*). [2001] C 368/07, para. 7.

possibility of finding that the agreement falls within the scope of Art. 101(1). Furthermore, if the relevant market is defined narrowly⁴¹ and encompassing, for example, the market of a sustainable product, it is more likely that the agreement would fall outside the scope of the *de minimis*.

2.2 Exclusion from Art. 101(1) TFEU

Certain agreements between undertakings under the definition in Art. 101(1) TFEU can nevertheless be excluded from the application of EU competition law, by virtue of their special objective. This was the case in *Albany* and in the similar judgements of *Brentjens* and *Drijvende Bokken*.⁴² Collective agreements in the social sphere aiming at improving working conditions are altogether excluded from the application of competition provisions, since the social policy objectives pursued by those agreements would be undermined by the application of Art. 101(1) TFEU.⁴³ The reasoning of the CJEU was based on the acknowledgement that the EU does not only have a policy to ensure undistorted competition, but also constitutionally pursues the harmonious development of economic activities and a high level of social protection in the EU territory.⁴⁴ A broad reading of the judgment is also possible to justify all agreements in the social sphere.⁴⁵ Nonetheless, the Court has been quite strict in the assessment of whether the nature and the purpose of the agreement justify the application of the exemption.⁴⁶

This strictness can be seen as a sign of the constitutional nature of the *Albany* exception, i.e. based on a holistic interpretation of the Treaties, rather than on competition law.⁴⁷ In spite of its strictness, which does not allow its application outside the domain of collective agreements in the social sphere aiming at improving working conditions, a number of other policy objectives which are part of and included in a collective agreement might benefit from the exemption as well. Collective agreements addressing environmental concerns directly related to working conditions may also

⁴¹ See Section 2.3.2 for further discussion.

⁴² See C-67/96 *Albany International BV v Stichting Bedrijfspensioenenfonds Textielindustrie* [1999] ECR I-5751; Joined Cases C-115/97, C-116/97, C-117/97 *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenenfonds voor de Handel in Beouwmaterialen* [1999] ECR I-6025; *Drijvende Bokken v Stichting Pensioenenfonds voor de Vervoer-en Havenbedrijven* [1999] ECR I-6121.

⁴³ C-67/96 *Albany International BV v Stichting Bedrijfspensioenenfonds Textielindustrie* [1999] ECR I-5751, para. 59.

⁴⁴ C-67/96 *Albany International BV v Stichting Bedrijfspensioenenfonds Textielindustrie* [1999] ECR I-5751, paras. 53-55.

⁴⁵ Monti, G. (2007) *EC competition law*. Cambridge: Cambridge University Press, 98.

⁴⁶ To the extent that the slight difference between the sectoral pension fund in *Albany* and the occupational pension fund at issue in *Pavlov* was sufficient to deny the application of the *Albany* exception in the latter case. What mattered was the fact that an occupational pension fund is not concluded within the framework of collective bargaining. See Joined Cases C-180/98, 181/98, 182/98, 183/98 and 184/98 *Pavlov v Stichting Pensioenenfonds Medische Specialisten* [2000] ECR I-6451.

⁴⁷ Vedder, H.H.B. (2003) *Competition law and environmental protection in Europe. Towards sustainability?* Groningen: Europa Law Publishing, 129; Sauter, W., Schepel, H. (2009) *Supra* at 11, 90-91.

benefit from the exemption.⁴⁸ This exemption would be of relevance for VSS only in the event social and/or environmental standards are inserted in collective agreements. Granted, VSS addressing social and labour practices may be drafted by representatives of both industries and trade unions which aim at improving working conditions. Normally, however, the aim of such an agreement would be the protection of workers *outside* the EU. The agreement would thus fail to qualify for the *Albany* exemption based on Articles 154 and 155 TFEU, arguably unless protection of workers outside the EU could be construed as a policy objective under Art. 3(5) TEU.⁴⁹

More relevant for our subject matter, the CJEU has also exempted an agreement between undertakings from the scope of Art. 101(1) TFEU because the objective of the decision was aimed at protecting a public interest, albeit one not recognised in EU legal sources. The Court, most famously in *Wouters*, applied a so-called 'EU-style rule of reason'.⁵⁰ A decision of the Dutch Bar prohibiting lawyers from entering into registered partnership with accountants was found to be restrictive of competition - and also of the freedom of establishment. It was however conceded that a restrictive measure should be assessed in the light of its objectives under Art. 101(1) TFEU, in particular whether its restrictive effects are inherent in the pursuit of those objectives.⁵¹ The decision was eventually found to be 'reasonably necessary' to ensure the proper practice of the legal profession, did not appear to go beyond what is necessary to fulfil that objective, and was therefore not considered as a restriction of competition.⁵²

The reasoning of the CJEU shows similarities with the 'rule of reason', or 'mandatory requirement' type of justification in freedom of movement. The application of a rule of reason in the domain of EU competition law in the same guise as under US antitrust law has been outrightly discarded by the Court of First Instance in *Métropole*.⁵³ The 'rule of reason' employed in *Wouters* does not concern any form of economic assessment of pro- and anti-competitive effects, which would otherwise render Art. 101(3) TFEU nugatory. It rather looks at whether the contested agreement effectively pursues a public policy goal, and whether the restriction to competition is necessary in

⁴⁸ Vedder, H.H.B. (2003) *Supra* at 47, 130-131. It is nonetheless difficult to fathom why only agreements in the area covered by Articles 154 - 155 TFEU, i.e. in the context of collective negotiations, can be exempted from Art. 101(1) TFEU, and not in other areas of Union policies.

⁴⁹ To the extent that compliance with international labour right obligations pursued by an agreement can be considered as international law, the respect of which the EU must uphold in its 'relations with the wider world' under Art. 3(5) TEU.

⁵⁰ Monti, G. (2002) *Supra* at 8, 1086.

⁵¹ C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 97.

⁵² C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, paras. 107 and 109.

⁵³ T-112/99 *Métropole Télévision v Commission* [2001] ECR II-2459, para 72-77. The rule of reason, at least in its understanding from US antitrust law, would require that an assessment of the pro- and anti-competitive elements of an agreement is to be performed during the analysis of whether the agreement results in restrictions in competition by object or effect. According to the Court, this assessment, to be performed in Art. 101(1), would render useless Art. 101(3) if it addressed also pro- and anti- competitive elements.

order to exclude the application of Art. 101 TFEU. To this assessment of necessity, the requirement of proportionality was then added in *Meca-Medina*.⁵⁴ Conversely, in the *Albany* line of cases, no appraisal of necessity was performed, and the agreement was excluded without any further assessment. There, two EU policies were balanced against each other, whereas in *Wouters* competition was balanced against an allegedly national interest, i.e. safeguarding the proper practice of the legal profession.

Importantly, such a national interest had already been accepted as legitimate by the Court in the context of freedom of movement rules.⁵⁵ This element should not be disregarded; the body at hand was in the exercise of regulatory powers functionally equivalent to those of public authority, and therefore covered by Article 49 TFEU.⁵⁶ Although the Court assessed the compatibility with competition rules before addressing freedom of movement rules, it was necessary to justify the agreement also under Art. 101 TFEU, and to ensure the same outcome under both sets of rules avoiding a complex economic analysis. The Court thus, in this instance,⁵⁷ dispelled the concerns concerning different standards of legality between the two sets of legal provisions, and the claim that EU institutions should be neutral *vis-à-vis* the regulatory or legislative techniques chosen by Member States to pursue their policies.⁵⁸

The type of balancing performed in *Wouters* results therefore in an increased convergence between competition and freedom of movement rules.⁵⁹ The EU-style rule of reason has so far been applied only where private actors undertake compulsory and collective regulatory functions in the exercise of functionally equivalent forms of public authority, which however fail to qualify for the exclusion for activities in the exercise of public authority under competition law.⁶⁰ The Court has applied the EU-

⁵⁴ C-519/04P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006, paras. 42-45.

⁵⁵ Monti, G. (2007) *supra* at 45, 111-112. See C-3/95 *Reisebüro Broede v Gerd Sandker* [1996] ECR I-6511, para. 37.

⁵⁶ As discussed in Section 2.2.1 of Chapter 3.

⁵⁷ In other areas, the Court has taken a different approach under the Treaty freedoms than under competition law. For example, there are different standards for economic activity, and a substantially different approach to *de minimis*. See Mataija, M. (2016) *Private regulation and the internal market. Sport, legal services, and standard setting in EU economic law*. Oxford: Oxford University Press, 124-128.

⁵⁸ Member States may enforce legislation, to be subject to the scrutiny of the freedoms of movement rules, whereas other Member States may prefer de-regulatory or market-based instruments enforced by private parties, to be caught by EU competition law. Different standards of legality between the two sets of legal norms may unduly straightjacket the policy choices of national legislators. This is the so-called 'seamless web' approach between internal market and competition rules, which prescribes the same standard of legality between the two sets of norms. See Gyselen, L. (1994) 'The emerging interface between competition policy and environmental policy in the EC'. In Cameron, J., Demaret, P., Geradin, D. (Eds.) *Trade and environment: The search for balance*. London: Cameron May, 245. See also Pescatore, P. (1986) Public and private aspects of European Community competition law. *Fordham International Law Journal* 10(3), 373-419.

⁵⁹ Mortelmans, K. (2001) *Supra* at 8.

⁶⁰ In addition to *Wouters*, see C-519/04P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006; C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECR I-000; C-136/12 *Consiglio Nazionale dei Geologi v Autorità Garante della Concorrenza e del Mercato* [2013], ECR I-000; Joined cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API - Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti*

style rule of reason not only to cases where forms of delegation of regulatory functions could be found, such as in *Wouters*⁶¹ and in other cases of professional self-regulation,⁶² but also in cases where no delegation whatsoever was present and outside the domain of professional rules. *Meca Medina* was a sport case where the sport federation at issue operated in the absence of explicit state delegation but nevertheless the restriction was not considered as unjustified under 101 TFEU because it was necessary and proportionate to pursue a legitimate regulatory goal.⁶³

The scope of application of the *Wouters* exemption has been interpreted as standing for the possibility to justify any restriction of competition which is necessary to achieve a national public interest.⁶⁴ Narrow interpretations of *Wouters* are also possible, among which the 'regulatory ancillarity' approach. Under such a perspective, *Wouters* represents the extension of the doctrine of the Court to exonerate restrictions that are inherent in the pursuit of a legitimate economic goal⁶⁵ - if necessary and proportionate to that objective⁶⁶- to legitimate regulatory activity of associations of undertakings.⁶⁷ The extent to which the *Wouters* exemption can be applied outside the domain of professional mandatory self-regulation and the conceptually not dissimilar sport domain is still open to debate. Would it be possible to invoke the exemption if private parties engage in regulatory activity, for example in the environmental field or in the domain of consumer protection, and in the lack of delegation or other connecting elements to a Member?

It has been suggested that legitimate regulatory activity should not be limited to professional mandatory self-regulation, but should also cover any public task in the public interest carried out by undertakings. This is where such activity might be

and Ministero dello Sviluppo economico [2014] ECR I-000. T-90/11 *Ordre national des pharmaciens (ONP) and Others v European Commission* [2014] ECR II-0000 was the first case, upheld by the General Court, where the Commission imposed a fine on a trade association.

⁶¹ In *Wouters*, Dutch legislation in force recognised the self-regulatory activities of professional associations and bodies.

⁶² C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* [2013] ECR I-0000 and in C-136/12 *Consiglio Nazionale dei Geologi v Autorità Garante della Concorrenza e del Mercato* [2013] ECR I-0000.

⁶³ C-519/04P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006, paras. 42-45.

⁶⁴ Monti, G. (2007) *Supra* at 45, 112.

⁶⁵ As far as the application of economic or commercial ancillarity to VSS, it should be noted that the approach applies to contractual clauses restrictive or conduct, which are ancillary and objectively necessary to a legitimate agreement. For VSS, the restrictions arise from the whole agreement itself and not from clauses connected to its implementation or enforcement. See C-250/92 *Gøttrup-Klim e.a. Grovvaforeninger v Dansk Landbrugs Grovareselskab AmbA* [1994] ECR I-5641, paras. 35-45.

⁶⁶ C-250/92 *Gøttrup-Klim Grovvaforeninger v Dansk Landbrugs Grovareselskab AmbA* [1994] E.C.R. I-564, para. 42.

⁶⁷ Whish, R., Bailey, D. (2015) *Competition Law*. Oxford: Oxford University Press, 140. See also Sauter, W. (2014) Proportionality in EU competition law. *European Competition Law Review* 35(7), 328-329; Schmid, C.U. (2000) Diagonal competence conflicts between European competition law and national regulation - A conflict of laws reconstruction of the dispute on book price fixing. *European Review of Private Law* 8(1), 166-167. For an even narrower interpretation of *Wouters* as limited to a strictly defined 'deontological ancillarity', see Loozen, E. (2006) Professional ethics and restraints to competition. *European Law Review* 31(1), 28-47.

carried out by the State and to the extent that restrictions to competition are necessary to the pursuit of the agreement itself.⁶⁸ Conversely, as Art. 101(1) TFEU is merely concerned with the *existence* of agreements that restrict competition, some commentators and the Commission seem to agree that public policy concerns resulting from policy linking clauses must be addressed under Art. 101(3) TFEU, since they do not have a bearing on the notion of *restriction* to competition.⁶⁹ Nonetheless, the practice of the Commission concerning environmental agreements has been described as too unclear to claim unequivocally whether the Commission has effectively excluded altogether the agreements in question by the scope of Art. 101(1) or after an assessment under Art. 101(3).⁷⁰

The problem with accepting that any public policy objective pursued by private parties could exempt restrictions, which are inherent for its achievement, is that it requires considerable faith in the capacity of private actors to pursue the public interest and forgoes entirely any other consideration.⁷¹ In the domain of professional self-regulation, the private interest of ensuring the proper practice of a profession by means of rules on professional behaviour arguably coincides considerably with the public interest. The same occurs for sport rules, for example, concerning doping, which bear a direct connection to the credibility of the sporting activity at hand. In other domains, however, such an overlap between private and public interests is not unambiguous and at best it can be described as an alignment.

Firstly, a broad approach to ancillary regulatory restraints requires the identification of the main objective of an agreement, against which the necessity of the restrictions is to be assessed. Needless to say, this requires a value judgement. Secondly, there is no guarantee that private actors act completely and exclusively in the public interest. Multi-stakeholder VSS permit a mediation of different interests but it cannot be ensured that, for example, the goal of environmental protection does not result in distortion of market parameters under the pursuit of the economic self-interest of business operators. The procedural requirements for interests other than business' are much more limited for sectoral and company VSS. In other words, the risk that private self-interest is pursued under the cloak of public interest is too high to entirely renounce the appraisal of efficiency and the welfare considerations at issue under Art. 101(3), and simply deal with it through a proportionality test. This would not be in

⁶⁸ Kingston, S. (2012) *Supra* at 7, 237-238. See also Mataija, M. (2016) *Supra* at 57, 98. It is evident that the among the two conditions raised above, the fact that a regulatory activity would be carried out by the state in order to benefit from the *Wouters* exemption is rather difficult to reconcile with VSS, as public authorities face considerable legal and political barriers to the extraterritorial regulation of processes.

⁶⁹ Faull, J., Nikpay, A. (Eds.) (2014) *The EU law of competition*. Oxford: Oxford University Press, 186. See also Townley, C. (2009) *Supra* at 7.

⁷⁰ Townley, C. (2009) *Supra* at 7, 128.

⁷¹ Schweitzer, H. (2009) 'Competition law and public policy: Reconsidering an uneasy relationship - the example of Article 81'. In Drexel J., Idot, L., Monger, J. (Eds.) *Economic theory and competition law*. Cheltenham: Edward Elgar, 138.

contradiction with the emphasis on self-regulation and co-regulatory arrangements of EU institutions,⁷² as long as the efficiencies that can be employed to offset anti-competitive effects are not interpreted narrowly. Quite the opposite, and thirdly, it may even be reasonable for public authorities to at least retain the possibility of exercising forms of control on private regulators. The effect-based reach of competition law could be one of the few tools for control, in particular *vis-à-vis* transnational private regulators operating outside the traditional national borders which draw the limits of public enforcement.

All in all, the possible boundaries of the *Wouters* exemption remain difficult to define. In spite of the perspective adopted regarding its breadth, two major problems remain for the application of the *Wouters* exemption to VSS - albeit its application may still be more plausible than the exclusion of VSS from competition purview by means of a public authority argument. Firstly, VSS pursue policy objectives such as environmental protection, consumer protection, and animal welfare, which are covered by policy linking clauses,⁷³ and not necessarily in a national interest. Granted, a national sectoral VSS containing quality requirements could be framed as necessary to ensure the 'proper functioning' of a sector, as discussed in Section 2.3.3 of Chapter 3. By not falling under any of the expressed Treaty goals, it could be considered as a national interest like that in *Wouters*. Also for these objectives, however, Art. 101(3) TFEU seems the best place for an appraisal.

Secondly, VSS possess a *de jure* voluntary character, whereas the exemption has so far covered only mandatory private rules applying to members of a profession of a sport federation. It is possible to frame the exemption as also to cover the competition law side of private measures that fall under the freedom of movement under the functional approach to collective regulation discussed in Section 2.2.1 of Chapter 3. However, the CJEU has not applied yet the Treaty freedoms to private *voluntary* rules, and not even to *de facto* mandatory ones in the lack of connecting elements with the State. As Section 2.3.1 of Chapter 3 shows, only if the CJEU is willing to expand the reach of Art. 34 TFEU to bodies drafting *de facto* compulsory standards, may it then be expected that under specific circumstances certain multi-stakeholder and sectoral VSS could benefit from an exemption from Art. 101(1) TFEU.

It should not be forgotten that the Commission always looks at the effects of standardisation agreements, in spite of whether the agreement pursues explicit public goals. In *CECED*, a standardisation agreement concerning washing machine efficiency was considered by the Commission as generating sufficient efficiencies to be justified,

⁷² Commission Communication COM(2001)428 final. A white paper on European governance. C 287; European Parliament/Council/Commission. Inter-institutional agreement on better law-making [2003] C 321/1.

⁷³ Respectively Articles 11, 12 and 13 TFEU.

but only after an assessment of efficiency.⁷⁴ In a case where arguably a standardisation agreement was at hand, the CJEU refused to apply a proportionality test to conclude that the agreement did not generate restrictions. In *IAZ*, the fact that a certification scheme for washing machines also pursued the goal of public health did not play a role in the conclusion that the agreement restricted competition by object.⁷⁵

2.3 Restrictions of competition generated by multi-stakeholder and sectoral VSS

Having argued that, likely, VSS can be considered as agreements between undertakings which fall under Art. 101(1) TFEU, the following two Sections now discuss the second and the third step in the assessment under Art. 101 TFEU. Section 2.3 addresses the presence of restrictions to competition generated by VSS, and Section 2.4 whether such restrictive effects can be more than offset by the efficiencies generated by the agreement under Art. 101(3). Section 2.3 and 2.4, taken together, illustrate certain differences between VSS and technical standards, which are the standards which the Commission arguably refers to in the Guidelines on horizontal restraints. As a consequence, the assessment of VSS under Art. 101 may differ from that of standards, especially because of different efficiencies generated.

It is submitted that the different effects of the two types of standards should affect also the Commission's approach towards the safe harbour requirements. VSS should be approached less deferentially, possibly by not being considered as pro-competitive merely if in compliance with procedural requirements, but only after including in the assessment their effects as well. Section 2.3.1 briefly elucidates the notions of object and effect restrictions to competition. Section 2.3.2 illustrates the test for market definition. Subsequently, Section 2.3.3 introduces the Commission Guidelines on horizontal agreements and focuses on the treatment of VSS under the guidance for standardisation agreements. Section 2.3.4 discusses in detail the procedural requirement of the Guidelines and the possibility for VSS to qualify. Section 2.3.5 discusses restrictive effects of VSS; restrictions and efficiencies resulting from the schemes are analysed by reference to empirical studies assessing the impact of standards on market parameters.

2.3.1 Object and effects restrictions

The prohibition contained in Art. 101(1) TFEU refers to all agreements that have as their object or effect the restriction, prevention or distortion of competition.⁷⁶ For

⁷⁴ Commission Decision IV/36.718 *CECED* [2000] L 187/47.

⁷⁵ Joined cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission* [1983] ECR I-3369, para. 25.

⁷⁶ Hereinafter the term 'restriction' will be employed to include also prevention and distortion of competition.

certain agreements that restrict competition, their anti-competitiveness can be inferred from their object, i.e. by the meaning and purpose of the agreement.⁷⁷ Those agreements will always be considered as infringing Art. 101(1) TFEU without being necessary to demonstrate appreciable adverse effects on competition,⁷⁸ or on consumers.⁷⁹ Agreements restricting competition by object can still be saved by Art. 101(3) TFEU, but it is up to the undertakings to prove that their agreement generates efficiency-enhancing effects and fulfils the four criteria of Art. 101(3) TFEU.⁸⁰ Price-fixing, market-sharing and output control including, but not limited to, the grounds mentioned in Art. 101(1) TFEU itself, are the typical forms of restriction of competition by object.⁸¹ The intention of the parties does not matter in order to determine a restriction of competition by object, nor does the aim of the agreement, however laudable.⁸²

In other cases, it is necessary to prove that the agreement brings about restrictive effects on competition to lead to an infringement of Art. 101(1) TFEU. For an agreement to be restrictive by effects, 'it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. Such negative effects must be appreciable. [...] It is not sufficient in itself that the agreement restricts the freedom of actions of one or more parties.'⁸³ A restriction of conduct is therefore not necessarily a restriction of competition unless it affects market parameters such as prices, output, product quality, product variety, or innovation.⁸⁴ The dividing line between the two groups of agreements is blurred: the Commission has on several occasions characterised an agreement as restrictive by effect, where it could have instead been considered as restrictive by object.⁸⁵ The CJEU has not contributed much to bring clarity on the distinction between restrictions by object or effect.⁸⁶ In fact, it has been argued that the choice to classify a restriction of competition by object or by effect is a decision of

⁷⁷ C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, para. 58.

⁷⁸ Opinion of AG Kokott in C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paras. 43-44.

⁷⁹ C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paras. 62-64.

⁸⁰ C-209/07 *Competition Authority v Beef Industry Development* [2008] ECR I-8637, para. 21.

⁸¹ Opinion of AG Trstenjak in C-209/07 *Competition Authority v Beef Industry Development* [2008] ECR I-08637 para. 48.

⁸² C-96/82 *IAZ International Belgium NV v Commission* [1983] ECR I-3369, para. 25, where an agreement contributing to the protection of public health and the reduction of conformity inspections cost was considered to appreciably restrict competition within the internal market, and in spite of the fact that it was not the intention of the parties.

⁸³ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 24.

⁸⁴ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 25.

⁸⁵ Whish, R., Bailey, D. (2015) *Supra* at 67, 123.

⁸⁶ C-32/11 *Allianz Hungária Biztosító and Others* [2013] ECR I-0000, para. 48. For a more recent restrictive approach to object restrictions see C-67/13P *Groupement des cartes bancaires (CB) v European Commission* [2014] ECR I-000.

policy for the EU institutions.⁸⁷ Given the inherent uncertainty in classifying a restriction, in Section 2.3.5 the two types of restrictions are discussed together.

2.3.2 Market definition

Restrictions of competition are to be assessed on a specific product market or more markets if that is the case. The Commission reckons that technical standardisation agreements produce effects on four possible markets: the market for the standardised product; the market for the technology - in case the standard requires the employment of a certain technology; the market for standard-setting; and the market for testing and certification.⁸⁸ Given the lack of empirical data concerning the effects on the last two markets and the absence of a market for technology, we will focus here only on the first market, that for VSS-certified products. In spite of the frequent absence of physical differences between VSS-certified and non-certified products, it is common practice for the Commission to consider *all* features that matter to consumers, also those that are immeasurable in objective terms, to delimitate the boundaries of a relevant market. Non-economic parameters may render the assessment more complex.⁸⁹ Product substitutability is the main factor to be considered in the definition of a market, which basically requires the identification of an alternative source of supply for the customers of the undertaking.⁹⁰ This necessitates an assessment of whether certain products are perceived as substitutable by consumers, normally by means of a speculative test investigating the reaction of consumers after a small relative price change between two products.⁹¹

The presence of higher prices for certified products could, in itself, be indicative of the presence of separate markets for certified and non-certified products.⁹² After the application of a price test, if the market definition was broader and included both certified and non-certified products, the likelihood of a finding of restriction would diminish considerably.⁹³ The boundaries of a market shall not just define which

⁸⁷ Faull, J., Nikpay, A. (Eds.) (2014) *Supra* at 69, 237.

⁸⁸ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 261.

⁸⁹ OECD (2013) The role and measurement of quality in competition analysis. OECD Competition Committee, 78-79.

⁹⁰ Commission Notice on the definition of relevant market for the purpose of Community competition law [1997] C 372/5, para. 13.

⁹¹ Commission Notice on the definition of relevant market for the purpose of Community competition law [1997] C 372/5, para. 15.

⁹² T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* [2010] ECR II- 5865, para. 74.

⁹³ It is interesting to note a possible conceptual similarity between the test for market definition under EU competition law and the WTO test for likeness discussed in Section 3.1.1 of Chapter 6. As will be seen, it is likely that 'sustainable' products and 'regular' products are considered as like under WTO law. Differently, under competition law, the products will be considered on two separate markets. The reason arguably is to be found on the focus on consumer preference of the competition test, whereas the WTO test looks more comprehensively also at different factors. Curiously, the outcome is the same, i.e. it is more difficult for the measures considered not to

products are included, but also its geographical delimitation. For the purpose of our analysis it is assumed that the relevant market has an EU-wide dimension or, in the presence of locally successful schemes, that the relevant market encompasses the market of several EU Member States.

2.3.3 Standardisation agreements and VSS under the Commission Guidelines

Standardisation agreements are defined in the Commission's guidance on horizontal agreements as agreements whose objective is 'the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply'.⁹⁴ Also covered by the definition are terms of access to a particular quality mark and standards-setting agreements concerning environmental performance.⁹⁵ Both sectoral and multi-stakeholder VSS appear to fall under the guidance offered by the Commission concerning standardisation agreements, at least environmental VSS and all schemes which can be construed as quality standards.

It seems that the guidance offered in the 2001 Guidelines could be generally considered as valid nowadays,⁹⁶ in particular because the category of environmental agreements discussed there at length is not addressed in such detail in the 2011 Guidelines. For the purpose of our analysis concerning VSS, however, only the latest version of the Commission's Guidance is taken into account. The reason is that VSS represent a smaller and somewhat peculiar group of environmental agreements which can be more fittingly brought under the heading of standardisation agreements as discussed in the 2011 Guidelines. Environmental standardisation is explicitly mentioned as an example of a standardisation agreement covered by the latest version of the Guidelines.⁹⁷ The scope of environmental agreements is much broader and includes also agreements not involving standardisation and covering, for example, packaging and waste collection and disposal, and direct emission reduction. In any event, under the 2001 Guidelines, VSS would be considered as 'agreements that may fall under Art. [101(3)]', insofar as they 'appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them'.⁹⁸ The analytical approach to restrictions would thus not differ, but it would not be possible

be in breach of the relevant provisions. Restrictions to competition are easier to be found on a small market and it is more likely that detrimental treatment occurs for certain products if the group of products considered is large.

⁹⁴ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 257.

⁹⁵ *Ibid.*

⁹⁶ Kingston, S. (2012) *Supra* at 7, 243.

⁹⁷ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 329.

⁹⁸ See Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] C 3/02, para. 189.

for environmental agreements under the old Guidelines to make use of the safe harbour provisions.

The Commission acknowledges that generally, standardisation agreements produce significant positive effects.⁹⁹ However, restrictions to price competition, control or limitation of production, markets, innovation and technical development may materialise as well.¹⁰⁰ Standards may have the object of restricting competition, for example, where pressure is put in order not to market products not in compliance with the standards.¹⁰¹ Standards may also have the effect of restricting competition in the presence of market power.¹⁰² Restrictive effects are unlikely where there is effective competition between a number of voluntary standards.¹⁰³ Generally, restrictive effects do not materialise if participation to the standard-setting is unrestricted and transparent, compliance with the standards occurs voluntarily, and access to the standard takes place on fair, reasonable and non-discriminatory terms.¹⁰⁴

2.3.4 Safe-harbour requirements

With a faith in procedural requirements not shared by other enforcement authorities,¹⁰⁵ the Commission, in the 2010 Guidelines on Horizontal Agreements, acknowledged that certain procedures in the standard-setting process are normally sufficient to ensure that the standard will not result in a restriction of competition. Different from safe-harbours in the form of market share, four procedural requirements are spelled out in the Guidelines: unrestricted participation to the standard-setting; procedural transparency for adoption; no obligation to comply with the standard; access to the standard technology on fair, reasonable and non-discriminatory (FRAND)

⁹⁹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 263.

¹⁰⁰ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 264.

¹⁰¹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 273.

¹⁰² Market power describes an objective position of economic strength by an undertaking, which allows it to raise prices above the competitive level without losing sales so rapidly as to not profit from the price increase. Most undertakings in non-perfectly competitive markets enjoy some form of market power. As perfect competition can hardly be found outside micro-economics textbooks, the presence of market power is diffuse, and competition issues materialise only when market power is significant. Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 39-47.

¹⁰³ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 277.

¹⁰⁴ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 280.

¹⁰⁵ US antitrust law does not allow 'good' procedures to immunise technical standard setting between companies from antitrust scrutiny, although 'bad' procedures have always been considered as evidence of anti-competitive behaviour. See Anton, J.J., Yao, D.A. (1994) Standard-setting consortia, antitrust, and high-technology industries. *Antitrust Law Journal* 6, in particular at 256-257.

terms.¹⁰⁶ Compliance with these requirements does not grant undertakings a public interest exclusion from competition rules, but is instead very likely to result in immunity for private bodies operating on the basis of certain procedural guarantees of public interest.¹⁰⁷ The requirements can thus be seen as a form of influence over general standardisation procedures, including those of VSS.

The belief that these four requirements are sufficient to guarantee that the outcome of a standard is at least aligned to the public interest and that they are sufficient to mediate between a multitude of private and public interests seems to disregard the unavoidable power imbalance within many private standard-setters,¹⁰⁸ and the findings of public-choice literature showing that even the fairest procedural requirements can be manipulated to the advantage of some parties.¹⁰⁹ The importance of such requirements in competition enforcement should however not be underestimated. The Commission, in its assessment of standardisation agreements, begins its assessment by looking at the procedural aspects of standardisation and does not continue its analysis if the requirements are met.¹¹⁰

As hinted above, technical product standard-setting may have been the main objective of the Guidelines and the safe-harbour exemption, as the presence of a detailed FRAND obligation seems to suggest.¹¹¹ Technical standards include standards drafted by ESBIs, national standard-setters and other private standard-setters to solve network externalities such as interconnectivity between products and product uniformity. The Guidelines explicitly cover¹¹² standard-settings by bodies operating within the EU standardisation system as resulting from the 'new approach to standardisation'.¹¹³ The Guidelines also cover technical standards with the objective of

¹⁰⁶ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 280.

¹⁰⁷ Schepel, H. (2005) *Supra* at 25, 320, who argues that the requirements are imported from the *effet utile* doctrine for anti-competitive state legislation.

¹⁰⁸ Büthe, T., Mattli, W. (2012) *The new global rulers: The privatisation of regulation in the world economy*. Princeton: Princeton University Press.

¹⁰⁹ Anton, J.J., Yao, D.A. (1994) *Supra* at 105, 256.

¹¹⁰ Mataija, M. (2016) *Supra* at 57, 240.

¹¹¹ Also most of the literature discussing standard-setting from a competition perspective seems to have a focus on technical standards and on standards incorporating patented technology. See for example Shapiro, C. (2000) 'Setting compatibility standards: Cooperation or collusion'. In Dreyfuss, R.C., Zimmermann, D.L., First, H. (Eds.) *Expanding the boundaries of intellectual property*. Oxford: Oxford University Press; Geradin, D., Rato, M. (2007) Can standard-setting lead to exploitative abuse? A dissonant view on patent hold-up, royalty stacking and the meaning of FRAND. *European Competition Journal* 3(2), 101-162; Koenig, C., Spiekermann, K. (2010) *Supra* at 33, 449-459; Layne-Farrar, A. (2010) Non discriminatory pricing: Is standard-setting different? *Journal of Competition Law and Economics* 6(4), 811-838; Mariniello, M. (2011) Fair, reasonable and non-discriminatory (FRAND) terms: A challenge for competition authorities. *Journal of Competition Law and Economics* 7(3), 523-542.

¹¹² Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 258.

¹¹³ Council Resolution on a New Approach to technical harmonisation and standards [1985] C 136/01. As seen above in Section 2.1.1 it is open for discussion whether this still holds true.

environmental protection and apparently also other public objectives.¹¹⁴ Technical standards generate increased market integration and penetration, interoperability between products and encourage the development of new, improved products and foster innovation¹¹⁵ They may contain patented technology, or may even consist exclusively of a patented technology. It was noted already prior to the introduction of safe harbour requirements that the Commission was particularly generous in offering procedural grounds for competition law immunity to technical standard-setting, arguably in order to accommodate Member States' different standard-setting systems and to offer the EU regime a shield from competition litigation.¹¹⁶

It should not be taken for granted that different types of standards generating different effects should benefit from the same safe harbour requirements. Standards like VSS aim at correcting physical and political externalities. Indeed, they result in positive gains from externality abatement. But, by levelling the playing field, VSS inherently bring about modification in the conditions of competition. Generally, as Section 2.4.2.4 shows, VSS also generate different positive gains, and do not generate some of the efficiencies normally associated with technical standards. It is therefore here submitted that, for agreements concerning objectives other than efficiency (interoperability standards) and health and safety (the 'new approach' standards - which are already treated more deferentially, as it will be discussed below), qualifying for the safe harbour requirements should not let enforcement authority necessarily conclude that a standard is pro-competitive. A throughout case-by-case assessment of the effects of the standard would be a more suitable approach. Or, at the very least, a very strict appraisal should be made of a standard-setting body's procedural requirements.

The remainder of this Section discusses the four requirements of the Guidelines *vis-à-vis* VSS. Obviously, an assessment of VSS' compliance with safe-harbour requirements must be performed on a case by case basis. It has been shown in literature that private technical standard-setters operating in a regime of competition between standards do not always ensure the same procedural safeguards that officially-entrusted bodies comply with.¹¹⁷ The same can be said for VSS. Generally, compliance with the ISEAL Code ensures a good deal of compliance with the procedural requirements provided for in the Guidelines. However, a body's compliance *only* with the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (hereinafter: the

¹¹⁴ See the examples in Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 329-330.

¹¹⁵ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 263 and 321. For an account of the features of technical standardisation see Swamm, P. (2000) The economics of standardisation. Final report for standards and technical regulations Directorate Department of Trade and Industry, study for the United Kingdom Department of Trade and Industry, 16-17.

¹¹⁶ Schepel, H. (2005) *Supra* at 25, 312-313.

¹¹⁷ Koenig, C., Spiekermann, K. (2010) *Supra* at 33, 458.

'TBT Code of Good Practice', or the 'TBT Code'), does not automatically lead it to qualify for the safe-harbour requirements under the Commission Guidelines. The TBT Code does not require unrestricted participation to standard-setting activities.¹¹⁸ The safe-harbour requirements seem to constitute more codification of previous case law than to be based on the TBT Code's provisions. Non-compliance does not automatically imply that Art. 101 TFEU is infringed, but requires the parties to self-assess whether the standard is likely to produce negative effects on competition.¹¹⁹

Interestingly, failure to comply with certain procedural requirements such as the voluntary character of a standard and non-discrimination has the effect of considerably increasing the chances of a finding of an effective restriction to competition, or even to constitute an object restriction in itself. This shows the thin line along which standard-setters walk when they establish procedures for participation, the importance of good administration principles in standard-setting and, more specifically, the negative consequences on market parameters that are presumed to stem from the lack of an effective voluntary character.

2.3.4.1 Unrestricted and non-discriminatory participation

Generally, associations with market power, and from which exclusion would generate restrictive effects, do not enjoy unfettered discretion in setting up their procedural rules.¹²⁰ The requirement of unrestricted participation aims at guaranteeing that all competitors affected by the standard can participate in the standard-setting. It also requires non-discriminatory voting procedures and objective criteria for allocating voting rights.¹²¹ Participation must give the possibility to influence the result of standard-setting and allow participants to acquire know-how on the standard, which is essential in the decision of whether to follow it.¹²² The Commission has considered the use of environmental quality labels as restrictive of competition where exclusive sale and purchase networks are established on the basis of the label, with the effects of excluding competitors from joining the scheme.¹²³

For multi-stakeholder VSS, in particular those in compliance with the ISEAL Code of Good Practice for standard-setting, inclusive procedures are put into place that aim at ensuring broad participation, also in the governance of the standard-setting body and

¹¹⁸ See Section 2.2 of Chapter 6 for discussion over the provisions of the TBT Code of Good Practice.

¹¹⁹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 279.

¹²⁰ Joined Cases T-528/93, T-543/93, T-546/93 *Métropole and Others v Commission* [1996] ECR II-649, para. 95.

¹²¹ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 281.

¹²² Commission Decision IV/31.458 *X/Open Group* [1987] L 35/36. There, the Commission recognised that publicness of a standard would still not permit the undertakings excluded from the standard-setting to influence the content of the standard.

¹²³ Commission Decision IV/32.202 *APB* [1990] L 18/35.

the broader organisation, when present. For other schemes, a less positive account can be found in literature.¹²⁴ If the requirement is intended to mean that all competitors affected by the standards must effectively participate in the standard-setting, then not many schemes could be exempted. It seems, however, that the Commission is flexible with respect to such a requirement and does not consider problematic situations of limited participation if in view of achieving an agreement on the standard at hand.¹²⁵

Intentional exclusion of certain competitors from joining the standard could occur during the standard-setting phase, whenever a standard is set with the outcome that certain actual or potential competitors will never be able to comply. This may occur, for example, by designing product categories for environmental schemes which are very narrow, and thus exclude or disadvantage certain competitors. Similar outcomes can occur where the standard directly or indirectly discriminates against competitors, or where the stringency of the standard is set above the level that well-informed consumers will choose, in order to raise the entry barriers to the market for sustainable products.¹²⁶ These situations are tantamount to an object restriction to competition.¹²⁷ As will be seen in Section 3.2.2, exclusion can also be addressed under Art. 102 TFEU, provided that the standard-setting organisation exercises a dominant position.

2.3.4.2 Transparency

Procedural transparency requires mechanisms in place to allow stakeholders to be informed about present and future standard-setting activities. It mandates active engagement with a group broader than just the competitors, also encompassing all interested stakeholders.¹²⁸ ISEAL Membership ensures access to a great deal of information surrounding the standard at several stages in the adoption process; the same cannot be said for all other standard-setting bodies. A body's compliance with the transparency provisions of the TBT Code of Good Practice could also ensure compliance with the transparency obligation of the Guidelines.

Transparency in standard-setting is fundamental as it permits companies to make informed decisions about whether or not to embrace the standard. Arguably, the

¹²⁴ See generally Ozinga, S. (2001) *Behind the logo. An environmental and social assessment of forest certification schemes*. Moreton-in-Marsh: Fern; Cadman, T. (2011) *Quality and legitimacy of global governance. Case lessons from forestry*. Basingstoke: Palgrave Macmillan.

¹²⁵ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 295.

¹²⁶ Report from the Nordic Competition Authorities (2010) *Competition policy and green growth, Interactions and challenges*, 62. Available at <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf>

¹²⁷ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 273.

¹²⁸ Faull, J., Nikpay, A. (Eds.) (2014) *Supra* at 69, 1013.

inclusion of a transparency requirement in the Guidelines is a consequence of an investigation conducted by the Commission where a patent-holder did not disclose in due time the existence of patented technology essential for a standard, which was about to be approved. In the *Rambus* case, the undertaking at hand revealed the patent in its possession only after the sector was locked into the technology in question and was thus enjoying considerable gains from royalties.¹²⁹ Given the lack of patented technology in VSS, such cases of ‘patent ambush’ would not occur.

2.3.4.3 Voluntary nature of the standards

The requirement that standard acceptance must be voluntary and that producers must retain the possibility to develop alternative standards or products that are not in compliance with the VSS deserves detailed treatment. It does not only refer to standard-setting *per se* but, more generally, to the consequences stemming from non-adoption. If requirements are not met, the prospect of restrictive effects to competition is likely to increase and in some cases even constitute an object restriction to competition.¹³⁰ The voluntary nature of a standard is thus a crucial factor for a finding of restriction.¹³¹ The requirement can be considered as fulfilled as long as certification is limited to certain products or supply chains and producers are then effectively free to decide whether or not to comply with the standard and to produce non-certified products.¹³² Potentially problematic for VSS is the requirement of producer certification, which curtails the possibility to manufacture non-compliant products. More generally, however, it is important to investigate the treatment of the factual mandatory character of an agreement under EU competition law.

In line with the non-formalistic approach employed by the CJEU in analysing *de facto* mandatory measures under Art. 34 TFEU,¹³³ it is acknowledged under competition rules that compliance with a private standard, however voluntary, may become a *sine qua non* for acceding to a certain market.¹³⁴ Certain factors discussed by the Court under the Treaty freedoms¹³⁵ seem to be playing a role also under competition rules. For example, if producers wish to remain in the supply-chain, would strong retailers’ choice (which is a reflection of consumer preferences) for VSS-certified products reduce the effective voluntary character of compliance? The *Ship Classification* shows

¹²⁹ Commission Commitment Decision COMP/C-3/38.636 *Rambus* [2009]. A press release with the commitment on the side of Rambus can be found at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1003_5.pdf

¹³⁰ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 293.

¹³¹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 277, 293, 317.

¹³² The requirement concerning the possibility to produce non-compliant products stems from the *Philips/VCR* case. See Commission Decision IV/29.151 *Philips/VCR* [1978] L 47/42.

¹³³ Section 2.2.3 of Chapter 3.

¹³⁴ Faull, J., Nikpay, A. (Eds.) (2014) *Supra* at 69, 1006.

¹³⁵ C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, paras. 29-30.

the Commission's partial acknowledgement of this problem. Classification Societies (CSs) set and verify safety and environmental requirement for commercial vessels. Certification of a CS by the International Association for Classification Society (IACS), the relevant international standard-setter for maritime safety and regulation, is essential to be able to pursue certain verification tasks. The Commission acknowledged that restrictive effects to competition could be generated if access to IACS certification was unduly impeded. This was because of States' strong preference for CSs which are members of the IACS to perform statutory survey.¹³⁶ The Decision shows that preference for certain certified services can generate and enhance restrictive effects in case certification can not be achieved, although it was not the only factor which brought the Commission to apply competition rules on the IACS. The reasoning could be extended to certified products. EU competition law therefore acknowledges and gives a certain weight to the fact that strong consumer or supplier preference for VSS-certified products would reduce the effective voluntary character of standards.

In another case where the standard at hand was an ESB standard, conversely, a very high market share of a standardised product was not considered as affecting the voluntary nature of the standard, as long as non standard-compliant products were in theory permitted on the market. The Commission was not impressed by the argument that it was very difficult and costly to employ other methods to demonstrate compliance with the standard requirements.¹³⁷ In the domain of the freedom of circulation of goods, it shall be recalled that the CJEU has been receptive to this type of argument and has more easily accepted the possibility that standards can become *de facto* mandatory because the alternatives are unfeasible.¹³⁸ The Commission's stricter approach with respect to the voluntary character of the standard may be due to the fact it was drafted by an ESB. It has been submitted that the Commission treats ESBs more deferentially, for example by presuming that the procedural requirements are complied with unless demonstrated otherwise.¹³⁹

It is difficult to elaborate an approach on how to weight and take into account elements affecting the voluntary character of standard which are outside the control of the standard-setters - such as consumer preferences. The Commission seems more likely to accept that a standard may be not as voluntary as it is professed to be for standards outside the EU system of standardisation. Actions which can be attributed to the standard-setter and which negatively affect the voluntary character of a VSS are covered. Pressure put to bear by the standard-setters on third parties not to market products which fail to comply with the standards also matter in assessing whether a standard is indeed voluntary. Putting pressure may also be considered as a restriction

¹³⁶ See Commission Decision COMP/39.416 *Ship Classification* [2009] C(2009)7796 final, para 12-13.

¹³⁷ Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249, paras. 80-90.

¹³⁸ See C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, paras 29-30.

¹³⁹ Mataija, M. (2016) *Supra* at 57, 241.

by object, especially when standards are set by a sectoral association of manufacturers with large market share.¹⁴⁰ Indeed VSS bodies promote their standards and encourage their acceptance from producers and retailers. Such activities may raise concerns under competition law, especially for sectoral schemes where all members of a sector feel compelled to employ a standard. To this extent, different factual elements can influence the formally voluntary character of a standard.

2.3.4.4 FRAND terms

The fourth safe-harbour requirement concerns the presence of IP-rights and access to the standard. For technical standards, the crucial issue is access to the standard itself as it may necessitate the acquisition of relevant intellectual property (IP) rights to have access to a certain technology. Restrictions to competition arise when access to IP rights is not made available by the right-holder or is not made available under fair, reasonable and non discriminatory terms, or the presence of patented technology is not disclosed at the moment of the standard-setting. Recent investigations in the area of technical standard-setting by the Commission have focused on such problems, within the framework of Art. 102 TFEU.¹⁴¹

The occurrence of such IP rights-related concerns, to which considerable attention is devoted in the Guidelines on horizontal restraints,¹⁴² is not present for VSS as no pre-determined technology is mandated in the standard to achieve the desired outcome. This is obvious for standards addressing labour conditions, where technology does not play a role at all. Standards addressing environmental aspects related to the production of goods are normally performance-based and simply prescribe a certain result to be met. The producer retains full autonomy in implementation by means of any necessary technology. Given that many schemes contain management standards, the lack of IP-related concerns is all the more evident and should be considered as a factor that limits a finding of restriction.

2.3.5 Assessment of restrictions to competition generated by VSS

The Guidelines acknowledge that standardisation, under circumstances of market power, may have the effect of restricting competition.¹⁴³ Certain VSS may contribute to

¹⁴⁰ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para 273.

¹⁴¹ The situations described refer respectively to the *IPCom*, *Qualcomm*, and *Rambus* investigations by the EU Commission. See the Commission's press releases for *IPCOM*: http://europa.eu/rapid/press-release_MEMO-09-549_en.htm; for *Qualcomm*: http://europa.eu/rapid/press-release_IP-15-6271_en.htm; and for *Rambus*: http://europa.eu/rapid/press-release_IP-09-1897_en.htm.

¹⁴² Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 267-269; 280; 284-291; 298-299.

¹⁴³ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01 para. 277.

the creation of market power for certified undertakings and have a positive effects on their market shares. By 'rewarding' certain producers, labelling schemes awarded to quality products establish a situation of monopolistic competition.¹⁴⁴ Restrictions may also occur in the event compliance with certain safe-harbour requirements is not ensured. The Commission considers restrictive effects without delving into the substance of the standards, at least for ESB standards. For example, it does matter whether restrictive effects are due to the presence of prescriptive requirements which could have been avoided with the employment of performance requirements. In other words, the fact that a ESB standard does not permit an operator to qualify would not be automatically dispositive of a restriction to competition.¹⁴⁵ Nonetheless, the very purpose of VSS which ensure compliance with legal requirements may be also be problematic in itself. The Court explicitly held that ensuring compliance with statutory requirements is a prerogative for public authorities and not private undertakings, as it 'may call for complex assessments which are not within the area of responsibility of those private undertakings'.¹⁴⁶

2.3.5.1 Exclusion and negative effects on competition

Exclusion from a standard may occur when certain companies are prevented effective access to it.¹⁴⁷ Exclusion due to the impossibility of complying with the standard is a relevant factor in a finding of anti-competitive effects. Although multi-stakeholder and sectoral VSS are normally open for other undertakings to join, exclusion of third parties could result from *de facto* impossible, or excessively costly, compliance with the standard. Whether or not this type of exclusion is intrinsic for instruments that aim at certifying 'quality' products, it does however matter for the purpose of finding a restriction of competition.¹⁴⁸ A finding of restriction is linked to the presence of detrimental effects on market parameters in the event of failure to achieve certification, and in particular to negative consequences for competition on the relevant market.¹⁴⁹

¹⁴⁴ Markandya, A. (1997) 'Eco-labelling: An introduction and review'. In Zarrilli, S., Veena, J., Vossenaar, R. (Eds.) *Eco-labelling and international trade*. Basingstoke: Palgrave Macmillan, 18.

¹⁴⁵ Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249, para. 107.

¹⁴⁶ C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľ (Akcenta)* [2013] ECR I-0000, paras. 19-20. The facts in *Akcenta* should be kept in mind. Three banks decided not to enter into business with *Akcenta*, a financial institution and a competitor of the three banks on the market for foreign exchange operations, on the alleged ground it lacked a necessary licence to operate on the market. Standards certifying legal compliance may be treated more leniently, especially as they can also be seen as certifications for fitness of purpose. Nonetheless, a certain condemnation of unilateral market policing remains from the case in question.

¹⁴⁷ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01 para. 264.

¹⁴⁸ Anton, J.J., Yao, D.A. (1994) *Supra* at 105, 265.

¹⁴⁹ Anton, J.J., Yao, D.A. (1994) *Supra* at 105, 260.

Empirical evidence of exclusion from VSS is abundant in particular for small producers, which is in turn reflected in market access impediment.¹⁵⁰ This is particularly the case for agri-food producers in developing countries.¹⁵¹ The small size of the producers is related to the likelihood of a negative impact of the cost of compliance with a scheme, as the per-unit cost is higher. Small firms also find it more difficult to generate economies of scale. A negative impact on producers is not taken into account in a competition law analysis, as producer welfare is not considered by the Commission. However, generally, a negative impact on producers may translate into negative effects on market parameters and competition. As the cost of compliance can be very high,¹⁵² certain VSS have been observed to bring about higher prices, normally as a pass-on of the cost increase for producers. There is moderate evidence that, in certain markets and under certain circumstances, the price increase accrues to producer or retailer profits.¹⁵³

The impact of VSS on competition in the market for sustainable products differs in the short and in the long term. Assuming demand for certified products, the creation of a standard confers a first mover advantage to the producers that immediately opt in. This contributes to a situation of market power for undertakings operating in the new market for VSS-certified products, which may enjoy oligopoly gains in the short period with a consequent reduction in allocative efficiency. Unless the scheme is not designed in a way to exclude actual or potential competitors, in the long term, the presence of gains should attract other firms in the market willing to undertake the necessary investments to comply with the scheme, thereby increasing competition and allocative efficiency. The demand for certified products is however limited, as certain consumers simply look at price, and sustainable features of products do not affect their purchase decisions. Unless prices for certified products decrease or even equate non-certified products, the theoretical growth in supply will no longer be matched by corresponding demand. As a result, a situation of oligopoly and market power could persist. Where no barriers to certification exist, a growth in popularity of the scheme

¹⁵⁰ Among the many from different perspective and addressing different types of instruments: Chang, S.W. (1997) GATTing a green trade barrier. Eco-labelling and the WTO Agreement on Technical Barriers to Trade. *Journal of World Trade* 31(1), 137-159; Dolan, C. and Humphrey, J. (2000) Governance and trade in fresh vegetables: The impact of UK supermarkets on the African horticulture industry, *Journal of Development Studies* 37(2), 147-76; Graffham, A., Karehu, E., Macgregor, J. (2007) Impact of EurepG.A.P. on small-scale vegetable growers in Kenya. International Institute for Environment and Development: Fresh Insights 6; Henson, S. (2008) The role of public and private standards in regulating international food markets. *Journal of International Agricultural Trade and Development* 4(1); Maertens, M., Swinner, J.F.M. (2008) Standards as barriers and catalyst for trade, growth and poverty reduction. *Journal of International Agricultural Trade and Development* 4(1); Bonsi, R., Hammet, A.L., Smith, B. (2008) Eco-Labels and international trade: Problems and solutions. *Journal of World Trade* 42(3), 407-432.

¹⁵¹ Since such effects do not materialise on the EU market, they cannot be taken into account for the purpose of a competition law assessment.

¹⁵² Henson, S., Humphrey, J. (2009) The impact of private food safety standards on the food chain and on public standard-setting processes. Paper Prepared for FAO/WHO Codex Alimentarius Commission, 29.

¹⁵³ Mendoza, R., Bastiaensen (2003) Fair trade and the coffee crisis in the Nicaraguan Segovias. *Small Enterprise Development* 14(2).

among producers could even affect detrimentally the entities holding certification, if the market for certified products does not grow.¹⁵⁴

VSS' levelling-the-playing-field rationale can have a varying impact on production costs. For some companies, the cost of compliance may be lower and therefore they are placed at a cost advantage *vis-à-vis* their competitors, which may last in the long term.¹⁵⁵ However, if compliance with the standards is an entirely voluntary decision, it can be assumed that the long-term gains will more than offset the initial loss of compliance, as no company would increase its costs without expecting increased returns in the future. The impact on competition, also taking into account potential competitors in the non-certified market, is therefore complex to assess and several factors must be considered. It seems, however, that most restrictions to competition could be limited to the short run.

2.3.5.2 Negative effects on other market parameters

As a certain feature is chosen over others, by definition, the social cost of technical standardisation is the decline in product variety and innovation.¹⁵⁶ Standard-setting can be used with the object of unduly restricting the freedom of the members to the standard-setting organisation to differentiate their products.¹⁵⁷ Technical development and innovation may be inhibited by the presence of rigid and pre-determined requirements addressing certain aspects of a product, and additional foreclosure on the markets for alternative features or technologies can occur.¹⁵⁸ Such issues are relevant for all standardisation agreements, including VSS.

The possibility for producers to develop and resort to alternative standards for products is crucial to avoid the creation of such negative effects.¹⁵⁹ VSS do not impose specific requirements nor do they prohibit producers from producing 'regular' products as well, although it may be more expensive under certain circumstances to have a product line for sustainable products and another for 'regular' products. In areas like organic agriculture or where chain of custody certification is required, this

¹⁵⁴ In economics, this situation has been defined as 'entry-dissipating rent', and has been studied with specific respect to declining market advantages generated by Fairtrade certification. In the lack of a corresponding market growth, the more producers are FairTrade certified, the more their individual market share and sales shrink. See Dragusanu, R., Giovannucci, D., Nunn, N. (2014) The economics of Fair Trade. *Journal of Economic Perspectives* 28(3), 226-227. The presence of entry dissipating rents partially challenges the non-rivalry character of the uptake of certain VSS constituting global public good.

¹⁵⁵ Frontier Economic (2008) The competition impact of environmental product standards. Office of Fair Trading, 64.

¹⁵⁶ Casella, A. (2001) Product standards and international trade. Harmonisation through private coalitions? *Kyklos* 54, 245; Dolmans, M. (2002) Standards for standards. *Fordham International Law Journal* 26(1), 174-175. Conversely, in certain situations, innovation can only take place in the presence of at least a degree of standardisation.

¹⁵⁷ Commission Decision IV/31.371 *Roofing felt (Belasco)* [1986] L 232/15.

¹⁵⁸ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 264-266.

¹⁵⁹ Commission Decision IV/29.151 *Philips/VCR* [1978] L47/42, para. 23.

may be particularly complicated and expensive to implement. For social standards, it is expected that the whole production site or even an entire supply chain complies with certain labour requirements. In these two scenarios, the possibility to employ alternative requirements is considerably diminished.

For other VSS, such decline in product variety cannot be always easily demonstrated, as they do not prescribe specific technologies or methods of production, but normally allow the firm seeking certification to implement the requirements in a flexible manner by simply setting a target to achieve through management system standards. A certain decline in variety is demonstrable, as products that become VSS-compliant share certain common features. Specifically, 'sustainable' characteristics are now the same for all VSS-certified products. Other product features still differ and products are still competing with respect to those features.

A finding of restrictive effects is more likely if the standard covers a large part of the end product.¹⁶⁰ Since sustainability claims are important for some consumers, it is possible that this is deemed to have occurred. In order to comply with certain schemes, particularly those addressing environmental protection, a complete re-design of the product may be required, although producers are often given freedom over implementation by means of performance requirements. This may lessen negative impacts on competition as generally findings of restrictions are connected to the autonomy of the parties to attain the objective of the agreement. In the previous version of the Guidelines on horizontal agreements, the Commission while discussing environmental agreements considered the presence of loosely-defined commitments and the possibility of implementing agreements without having to resorting to pre-determined technical solutions to limit the likelihood of a finding of restriction.¹⁶¹ The frequent employment of management system requirements which do not bear directly on product features may lower the chance of a finding of negative effects on product variety.

VSS can also restrict competition by object if the standard has the object of limiting output or increasing prices. Initiatives such as the MSC, for example, provide for a yearly maximum fish catch for each certified fishery, which clearly constitutes a restriction in quantity for MSC-certified fish. Similar considerations apply for sustainable timber certification programs. For standards such as Fairtrade certifications, the underlying rationale of the scheme itself is to pay a product premium in order to increase producers' profit. Fair trade standards can thus be seen as restricting competition by object. Furthermore, as for any other horizontal agreement,

¹⁶⁰ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 293.

¹⁶¹ Commission Notice C3/02 on Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001), para. 177. See also Townley, C. (2009) *Supra* at 7, 125.

there is a generalised risk that the parties to the scheme coordinate their behaviour in a collusive way through information exchanges. If the standard-setting process is used to engage in discussions or exchange information for this purpose, a reduction in competition could occur.¹⁶² Risks of collusion could be exacerbated by the permanent structure of certain standard-setting bodies since participants regularly meet even after the standards have been drafted.

2.4 Assessment of pro-competitive effects under Art. 101(3) TFEU

After a finding of restriction of competition under Art. 101(1), the restrictive effects on the market will then be balanced against the pro-competitive effects under Art. 101(3) TFEU.¹⁶³ The assessment under Art. 101(3) TFEU also requires an analysis of economic efficiencies; a requirements of a pass-on to consumers of the resulting benefits; an inquiry on whether the agreement is proportionate; and whether it does not eliminate competition with respect to a substantial part of the market for the products in question. This Section addresses the positive efficiencies generated by VSS and attempts to balance them with the anti-competitive effects described in Section 2.3.5. A preliminary discussion is required in Section 2.4.1 to elucidate which types of efficiency can be taken into account, and the extent to which an agreement's objective pursuing public goals can account for its justification under Art. 101(3) TFEU. Section 2.4.2 discusses then the positive efficiencies generated by VSS, which include market creation by means of provision of information to consumers, the abatement of externalities, and a number of other positive efficiencies on market parameters. The Section also analyses the extent of pass-on to consumers of such efficiencies, whether the restrictions are proportionate and whether competition is not eliminated. Section 2.4.2.4 devotes particular attention to the different efficiencies generated by VSS *vis-à-vis* technical standards.

2.4.1 Accountable efficiencies after the modernisation of EU competition law

In the Commission's practice before the modernisation of the competition regime initiated by Regulation 1/2003, public policy goals - i.e. goals other than economic efficiencies and competition - have played a variable role, ranging from less-than-supportive to almost-decisive, in the justification of agreements that otherwise restrict competition.¹⁶⁴ Competition rules were interpreted by the Court in light of broader EU

¹⁶² In the *Pre-insulated pipes* decision, the Commission dealt with a standard-setting organisation created by a cartel, whose main goal was to use standards to delay technological innovation which would have generated price reduction. See Commission Decision IV/35.691 *Pre-insulated pipe cartel* [1998] L 24/1.

¹⁶³ Joined Cases T-374/94; T-375/94; T-384/94; T-388/94 *European Night Services v Commission* [1998] ECR II-3141, para. 136.

¹⁶⁴ 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para 20; Joined Cases T-528/93, T-543/93, T-546/93 *Métropole & Others v Commission* [1996] ECR II-649, para. 118. See also Wesseling, R. (2000)

goals.¹⁶⁵ In assessing the restraints to competition against a public policy objective, in practice, the Commission and the Court engaged in a balancing exercise featuring elements of proportionality, and in the lack of strict economic terms.¹⁶⁶ Either the first condition of Art. 101(3) TFEU - requiring improvement of production or the promotion of progress - was interpreted expansively, or the literal meaning of Art. 101(3) was set aside and policy goals were brought into the analysis. This would also be permitted by the presence of policy linking clauses in the Treaty.¹⁶⁷

In several Decisions, the protection of the environment was one of the public goals which played a role in the justification of an otherwise anti-competitive agreement. In early cases, environmental concerns played a supportive role in the justification.¹⁶⁸ In *DSD*, the fact that an agreement gave direct practical effect to the environmental objectives of EU legislation¹⁶⁹ was regarded as a decisive factor in granting an exemption.¹⁷⁰ The approach is remarkable as the Commission equated the contribution to the implementation of the Community's objectives to a direct gain in economic efficiency. The productive efficiencies actually generated by the agreement, however, played only a marginal role in granting the exemption.¹⁷¹ The subsequent *CECED* decision showed that the environmental objective of an agreement can be a major ground on which to offset a cost increase, a reduction of consumer choice and even a competitive disadvantage that the agreement was imposing on certain producers.¹⁷² The Commission adopted a very broad approach to welfare by insisting that the collective benefits generated by the agreement were of such a magnitude that they allowed consumers to enjoy a fair share of the benefits even in the absence of individual benefits accrued to individual purchasers.¹⁷³ Concepts typical of

The modernisation of EC antitrust law. Oxford and Portland: Hart Publishing, 49. Monti, G. (2002) *Supra* at 8, 1057-1099; Parret, L. (2010) Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy. *European Competition Journal* 6(2), 346-350.

¹⁶⁵ 6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR I-215, paras. 22-27.

¹⁶⁶ Faull, J., Nikpay, A. (Eds.) (2014) *Supra* at 69, 186. Townley, C. (2009) *Supra* at 7, 6-7, and 64 and following. For discussion of proportionality and its variation according to the public policy objective considered see Lavrijssen, S. (2010) *Supra* at 9, 636-659.

¹⁶⁷ Townley, C. (2009) *Supra* at 7, 65-66. Policy-linking clauses were introduced with the Treaty of Maastricht and require that certain policy be taken into account at all times during the pursuit of all other EU policies. It should be noted that public policies were taken into account even prior to the introduction in the Treaties of policy-linking clauses, whose constitutional standing and the resulting 'hierarchy' with other EU policies (including competition) are still debated. Policy-linking clauses are however not merely programmatic, but instead impose legal obligations. See Opinion of Advocate General Jacobs in *C-379/98 PreussenElektra AG v Schlesweg AG* [2001] ECR I-2099, para. 231.

¹⁶⁸ Commission Decision IV/33.640 *Exxon-Shell* [1994] L 144/2, para. 67-69, and Commission Decision IV/34.252 *Philips-Osram* [1994] L 378/37, paras. 25-26.

¹⁶⁹ The relevant piece of legislation was Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, which aims at preventing or reducing the environmental impact of goods packaging.

¹⁷⁰ Commission Decision IV/34.493 *DSD* [2001] L 365/5, paras. 143-146.

¹⁷¹ Casey, D. (2009), *Supra* at 7, 372.

¹⁷² Commission Decision IV/36.718 *CECED* [2000] L 187/47, paras. 30-34.

¹⁷³ Commission Decision IV/36.718 *CECED* [2000] L 187/47, para. 56. See also Townley, C. (2009) *Supra* at 7, 150.

environmental economics such as ‘marginal environmental damage’ were employed, possibly because to some extent they can be translated into economic values. The Commission was also lenient in its analysis of proportionality,¹⁷⁴ in a way which is reminiscent of the necessity test under the four freedoms.¹⁷⁵

A broad approach to policy goals other than competition was criticised as hindering predictability and legal unity.¹⁷⁶ The modernisation of the EU competition regime which culminated with Regulation 1/2003 reduces dramatically the role public policy goals can play in the justification of an agreement. This stems from the need to ensure uniform application by national competition authorities (NCAs) resulting from direct applicability, and also to reduce the political complexity of the issues they address.¹⁷⁷ Public policy goals can only be taken into account if subsumed in economic terms into one of the four conditions of Art. 101(3).¹⁷⁸ The Commission also requires undertakings to provide precise substantiation of all alleged efficiencies in order to demonstrate that they effectively constitute objective economic benefits.¹⁷⁹ Certain public policy goals, such as environmental protection, can indeed be transposed into economic terms. Some environmental gains take the form of qualitative efficiencies, which constitute a type of efficiency that together with cost efficiencies, the Commission has recognised as a relevant element for an assessment under Art. 101(3) TFEU.¹⁸⁰ The Guidelines are not binding, however, and national enforcement practices may differ.

The modernisation process was accompanied by a sharp focus on consumer welfare, a controversial concept in itself, which has been described as ‘the ultimate objective of the Commission intervention in the area of antitrust’.¹⁸¹ Departing from previous practice, the Commission equates consumer welfare with economic efficiency, even though the two concepts can at times be in conflict.¹⁸² The CJEU explicitly held that the objectives of EU competition law also include the protection of the structure of the market and competition as such.¹⁸³ This means that a *prima facie* violation of Art.

¹⁷⁴ Lavrijssen, S. (2010) *Supra* at 9, 647.

¹⁷⁵ de Vries, S.A. (2006) *Tensions within the Internal Market. The functioning of the Internal Market and the development of horizontal and flanking policies*. Groningen: Europa Law Publishing, 208.

¹⁷⁶ See for example Odudu, O. (2006) *Supra* at 6, 163-173. Specifically Odudu’s approach rejects all goals pursued that cannot be ascribed to efficiency-based considerations.

¹⁷⁷ Amato, G. (1997) *Antitrust and the bounds of power: The dilemma of liberal democracy in the history of the market*. Oxford: Hart Publishing, 118-122.

¹⁷⁸ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 42.

¹⁷⁹ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 57.

¹⁸⁰ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 59.

¹⁸¹ Lowe, P. (2008) The design of competition policy institutions for the 21st century - The experience of the European Commission and DG Comp, *Competition Policy Newsletter* 3, 1.

¹⁸² Cseres, K. (2007) The controversies of the consumer welfare standard. *The Competition Law Review* 3(2); Lovdahl Gormsen, L. (2007) The conflict between economic freedom and consume welfare in the modernisation of Article 82 EC. *European Competition Journal* 3(2), 329-344. Parret, L. (2010) *Supra* at 164, 250. Economists in particular highlight an inherent arbitrariness in the concept of consumer welfare, which favours one social group over another and impede the maximisation of efficiency and economic growth.

¹⁸³ C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 38. Joined Cases C-501/06 P, C-

101(1) TFEU can be made merely in the presence of an agreement restricting economic freedoms without demonstrating negative implications for consumers. The protection of the competitive process can, at times, go against the interests of consumers.¹⁸⁴ Consumer welfare is identified with the maximisation of consumer surplus, which is realised by direct and explicit economic outcomes such as better quality or lower prices.¹⁸⁵ The increase or decline in *total surplus* is not relevant.¹⁸⁶ Direct and indirect users of the products covered by the agreement are to be considered as relevant consumers,¹⁸⁷ which also generates problematic situations, especially under Art. 102, as *customer welfare* is unrelated to *consumer welfare*.¹⁸⁸ The approach is broader than under other areas of law, such as consumer protection, where the consumer who is protected is limited to the final consumer, whereas in competition law all intermediate customers are also considered as consumers.¹⁸⁹ It should be noted that CJEU seems to support a broader view towards efficiencies whereby EU competition law is enforced to the benefit of the whole EU, and not just consumers.¹⁹⁰

Further, only gains accruing to the relevant product market can be taken into account.¹⁹¹ This means that if an agreement benefits society as a whole, it would still be considered as anti-competitive if it does not generate enough positive efficiency for the purchasers.¹⁹² The approach is basically the opposite of the Commission's expansive reasoning in *CECED* described above. This strict approach to consumer welfare is also reflected in its temporal application. If the gain for consumers will take place in the future, then it has to be greater in order to compensate for the present loss since consumers value a present gain more than a future gain.¹⁹³ Also this condition is rather strict, in particular for the justification of agreements that generate their efficiencies over a larger temporal span, such as environmental agreements.

The fundamental problem with the post-modernisation stance of the Commission is that it disregards the constitutional structure of EU competition law in general and of Art. 101 TFEU in particular. Art. 101 TFEU is not structured to permit a defence based

513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-09291, para. 63.

¹⁸⁴ Cseres, K., Mendes, J. (2014) Consumers' access to EU competition law procedures: Outer and inner limits. *Common Market Law Review* 51(2), 489.

¹⁸⁵ Brodley, J.F. (1987) The economic goals of antitrust: Efficiency, consumer welfare, and technological progress. *New York University Law Review* 62, 1033. It should be kept in mind that the concept of welfare, at least intuitively, encompasses more than just surpluses accruing from price and quality, and could be construed around the economic concept of utility.

¹⁸⁶ Cseres, K. (2007) *Supra* at 182, 149.

¹⁸⁷ Guidelines on the application of Art. 81(3) or the Treaty, [2004] C 101/08, para. 84.

¹⁸⁸ Akman, P. (2010) 'Consumer' versus 'customer': The devil in the detail. *Journal of Law and Society* 37(2), 315-344.

¹⁸⁹ Cseres, K. (2007) *Supra* at 182, 132-133.

¹⁹⁰ See C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000, para. 22.

¹⁹¹ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 43.

¹⁹² Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 85.

¹⁹³ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 88.

exclusively on proving that a restrictive agreement has pro-competitive effects, but instead contains a built-in public interest defence (i.e. the agreement would result in economic progress which benefits consumers), delimited by a proportionality test. Public policy considerations must therefore be allowed to play a role as long as they fall under the first positive condition of Art. 101(3), regardless of whether or not such benefits possess strictly pro-competitive effects.¹⁹⁴ The presence in the Treaties of policy linking clauses and the principle of coherence enshrined therein shall not be disregarded. Agreements which can enjoy justification, *inter alia*, on the basis of public policy objectives, should not be in direct conflict with competition to the extent that they challenge the policy choice in favour of a policy other than competition. In other words, no value judgement should be required to justify an agreement which is directly opposed to competition policy's rationales.¹⁹⁵ Also the Court acknowledges that non-competition objectives alone will not suffice to save an otherwise restrictive agreement.¹⁹⁶

With this in mind, it is now appropriate to turn to the positive efficiencies generated by VSS which can be taken into account under Art. 101(3).

2.4.2 Positive efficiencies generated by VSS

Standardisation agreements in all domains have the potential to generate significantly positive economic effects. In the Guidelines on horizontal agreements, the Commission notes that, in general, technical standards engender efficiencies in the form of increased market integration and penetration, interoperability between products and encourage the development of new, improved products and foster innovation. All these efficiencies can be passed on to consumers.¹⁹⁷ Generally, the Commission considers standards facilitating competition between new or already existing products as benefitting consumers as well.¹⁹⁸ Standards facilitate market penetration by lowering barriers to entrance, with the result of increasing efficiency-

¹⁹⁴ Schweitzer, H. (2009) *Supra* at 71, 144; See also Wesseling, R. (1999) The Commission White Paper on modernisation of EC antitrust law: Unspoken consequences and incomplete treatment of alternative options. *European Competition Law Review* 20(8), 423; Townley, C. (2009) *Supra* at 7, in particular at 80-81; Van Rompuy, B. (2012) *Economic efficiency: The sole concern of modern antitrust policy? Non-efficiency considerations under Art. 101 TFEU*. Alphen aan de Rijn: Wolters Kluwer, especially at 391-393 and 400-401. For an analysis of industry agreements in the area of social responsibility against US antitrust law, and the specific problems generated by the US Courts approach to *per se* restrictions see Scott, I. (2016) Antitrust and socially responsible collaboration: A chilling combination? *American Business Law Journal* 53(1), 97-144.

¹⁹⁵ Schweitzer, H. (2009), *Supra* at 71, 149.

¹⁹⁶ Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para. 139.

¹⁹⁷ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 263 and 321. Generally, for a very comprehensive account of the features of technical standardisation see Swamm, P. (2000) *The economics of standardisation*. Final report for standards and technical regulations Directorate Department of Trade and Industry, study for the United Kingdom Department of Trade and Industry, 16-17.

¹⁹⁸ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 321.

enhancing price-competition.¹⁹⁹ Section 2.4.2.1 analyses the efficiencies for consumers generated by the schemes in term of provision of information. Such efficiencies may have important positive effects on innovation and on the creation of new markets. Section 2.4.2.2 discusses general positive effects on market parameters. Section 2.4.2.3 assesses the efficiencies in terms of abatement of externalities, which can only partially be accounted for if a strict approach to efficiency is employed. Section 2.4.2.4 assesses the efficiencies which the Commission discusses generally for standardisation, but that are not generated by VSS. Section 2.4.2.5 addresses the last two conditions of Art. 101(3) TFEU, i.e. indispensability of the restriction and elimination of competition.

2.4.2.1 Market creation by means of provision of information

VSS, as all standards, reduce consumer uncertainty by lowering transaction and search costs.²⁰⁰ The most important positive effect brought about by VSS lies in the form of allocative efficiency and facilitates consumer choice by providing information.²⁰¹ In particular, schemes which contemplate a label to be applied to products provide information to consumers about specific product features, and thus generate considerable efficiencies.²⁰² This is all the more true for credence goods such as sustainable products.²⁰³ Since a sought-after characteristic may be unobservable to consumers even after consumption, information gaps can be exploited by suppliers, which can manufacture sub-optimal goods with respect to the sustainable quality in question or charge higher prices than value of the actual good's social or environmental quality. If consumers are aware of this possibility, they may even refrain from purchasing such products, either because the price is too high, or to avoid the moral taint of indirectly contributing to an adverse practice. The resulting outcome could be the failure of the market for sustainable products as a result of adverse selection.²⁰⁴ VSS therefore increase, or even create, competition for standardised

¹⁹⁹ Koenig, C., Spiekermann, K. (2010) *Supra* at 33, 449.

²⁰⁰ Blois, K.J. (1990) Transaction costs and network. *Strategic Management Journal* 11(3), 493-496. With specific reference to the organic food market: McCluskey, J. J. (2000) A game theoretic approach to organic foods: An analysis of asymmetric information and policy. *Agricultural and Resource Economics Review* 29(1), 1-9.

²⁰¹ As it is acknowledged for all standards. See Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 310.

²⁰² Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 263, 308. See also Office of Fair Trading (2008) *The competition impact of environmental product standards*, Report prepared by Frontier Economics for the Office of Fair Trading, 52-54. Available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/research/economic-research/completed-research#named7>.

²⁰³ Darby, M., Karni, E. (1973) Free competition and the optimal amount of fraud. *Journal of Law and Economics* 16(1), 68-69.

²⁰⁴ Akerlof, G. (1970) The market for lemons: Quality uncertainty and the market mechanism. *The Quarterly Journal of Economics* 84(3), 488-500; Darby, M., Karni, E. (1973), *supra* at 203, 67.

products.²⁰⁵ Labelling instruments can also insure that correct prices are set for sustainable products, which offer the proper incentive for innovation.

The provision of information by means of logos and brands signalling and reassuring about certain features thus contributes to the proper functioning of the market. However, the efficiency generated from informing consumers can diminish in the presence of multiple claims from multiple initiatives, as consumers may have to spend additional time and resources to determine which claims are accurate and trustworthy.²⁰⁶ The proliferation of VSS in the form of labelling schemes for certain products thereby limits the possible gains in allocative efficiency and reductions in transaction costs.²⁰⁷ Proliferation is not a 'fault' of a specific standardisation agreement insofar it depends on factors outside the control of a scheme.²⁰⁸ An additional scheme on the market however generates lower gains. Certain NCAs have explicitly taken issue with the high number of overlapping technical standards, and recommended increased oversight and a stronger steering role from relevant national standardising bodies.²⁰⁹

Gains accruing from the provision of information should generally be put in the right perspective, in particular for certain schemes whose impact and efficacy is contested. With respect to Fair Trade products, and arguably also organic products, it has been noted that due to consumers' uncertainty about the ability of the products to contribute to their goal (i.e. greater equity and fairness in trade relations), Fair Trade products should be considered as 'indeterminate goods'. The main feature of an indeterminate good is that 'information about the characteristics of these goods/services is not available, taking into account the actual knowledge at the time, and is not possessed by any agent'.²¹⁰ A market for indeterminate goods could collapse, if doubts about the effectiveness of product characteristics persist, and the certifications in place to achieve the objectives sought by consumers are not effective.²¹¹ For indeterminate goods, gains accruing from the provision of information

²⁰⁵ Link, A.N. (1985) Market structure and voluntary product standards. *Applied Economics* 15, 394.

²⁰⁶ Lowe, E.R. (2014) Technical regulations to prevent deceptive practices: Can WTO Members protect consumers from (un)Fair-Trade coffee and (less-than) free-range chicken? *Journal of World Trade* 48(3), 625.

²⁰⁷ This is also recognised by national competition authorities. See Conseil de la Concurrence. Avis relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A-07 du 22 mars 2006, para. 78.

²⁰⁸ Notwithstanding this, it shall not be forgotten that avoidance of overlapping standards is one of the requirements that the TBT Code of Good Practice imposes on standardising bodies. See Section 2.2 of Chapter 6 for further discussion.

²⁰⁹ Conseil de la Concurrence. Avis portant sur l'examen, au regard des règles de concurrence, des activités de normalisation et de certification. N° 15-A-16 du 16 novembre 2015, paras. 20-21.

²¹⁰ Lupton, S. (2005) Shared quality uncertainty and the introduction of indeterminate goods. *Cambridge Journal of Economics* 29(3), 413.

²¹¹ Balineau, G., Dufeu, I. (2010) Are Fair Trade goods credence goods? A new proposal, with French illustrations. *Journal of Business Ethics* 92(2), 342.

are to be considered very carefully, and the lack of knowledge about the scheme's actual impact may affect detrimentally the information gains generated by the label.

2.4.2.2 *Positive effects on other market parameters*

As all standards have a positive impact on product quality,²¹² it is uncontroversial to hold the same for VSS. Higher product quality is a crucial outcome which can compensate for the increased cost faced by consumers.²¹³ Certified products could be more efficient and more environmental-friendly; both are characteristics that can be translated into economic terms and therefore capable of being balanced under Art. 101(3) TFEU. For standards addressing working conditions, certified products embody the non-physical quality sought after by 'responsible' consumers.

The effect on other market parameters, as discussed in the previous section, is moderately negative, at least for prices, since increases are likely in certain cases. Depending on the circumstances and the nature of the scheme, VSS may generate positive effects as well on market parameters, including prices. Some schemes have engendered positive externalities for producers, such as less waste, more efficient energy and resource use, all of which can - at least theoretically - bring about lower prices. For output restrictions, which in the section above were observed to arise for some schemes, other VSS may generate positive effects on output, which increases as a result of more efficient production methods.²¹⁴ Since sectoral VSS can be considered as devices for supply-chain coordination, it is expected that they generate productive efficiencies. They may be passed on to consumers in the form of lower prices.

2.4.2.3 *Externality abatement*

Other positive effects are to be taken into account as well, to the extent they can be subsumed into economic terms, even if they are ascribed to public policy considerations.²¹⁵ Among the different goals pursued by VSS that can broadly fall under the heading of 'sustainability', environmental effects are very important, and have been considered by the Commission as relevant in balancing anti-competitive effects.²¹⁶ Evidence of VSS' effects on the environment is normally positive, although not always easy to appraise.²¹⁷ One often quoted study challenging the effectiveness of labelling schemes has shown, however, that eco-labels do increase the

²¹² Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 308.

²¹³ C-382/12P *MasterCard v Commission* [2014] ECR I-2201, para. 234.

²¹⁴ Van Hagel, O., Alvarez, G. (2011) The impact of private standards on producers in developing countries. International Trade Center Literature Review Series on the Impact of Private Standards, 14.

²¹⁵ Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 42.

²¹⁶ *Ibid.*

²¹⁷ Blackman, A., Rivera, J. (2010) The evidence base for environmental and socio-economic impacts of 'sustainable' certification. Washington DC, Resources for the Future Discussion Paper Series.

consumption of certified goods, but also of non-certified goods, with the potential total outcome of a net negative impact on the environment.²¹⁸ Most positive effects generated by some VSS, however, are more qualitative issues such as diversity preservation, soil erosion, resource management. not the reduction of polluting emissions, which are more promptly quantifiable and comparable.

Not all of the environmental gains above can be transposed into economic terms that can be accounted for, if the strict approach of the Commission is followed. The situation for social gains is even more unfavourable. Social gains such as a positive impact on the livelihood of indigenous communities or improvements of the working condition of workers *outside* the EU can hardly be transposed in economic terms, and are in any case generated on markets which are difficult to be taken into account unless a very expansive approach to social welfare is adopted. The positive social and environmental impact resulting from the abatement of externality would therefore be included in the assessment of pro- and anti-competitive effects only in certain cases, and limited to measurable - mostly environmental - effects. It should however be considered that products incorporating social values, such as acceptable working conditions, are considered by economists to be 'mixed product bundles'.²¹⁹ Such products incorporate characteristics equivalent to the purchase of a product and the performance of an additional action, such as, for example, the expression of consumers' social dedication by means of a donation to a charity improving working conditions.²²⁰ Mixed product bundles contribute to the maximisation of consumer utility and, at the same time, increase chances of ethical behaviour by eliminating the additional transaction costs to consumers - in the example above resulting from the donation - which is an economically measurable feature.

2.4.2.4 Efficiencies not generated by VSS

Some of the gains normally generated from standardisation agreements and discussed in the 2010 Guidelines are not always demonstrable for VSS. Gains in the form of product interoperability are normally limited. Such gains are given considerable weight by the Commission, as they avoid lock-in with a specific supplier, and they are presumed to generate efficiency.²²¹ Different from technical standards, VSS do not directly contribute to product interoperability and compatibility. Granted, an extent of uniformity with respect to intangible features is provided but, also due to the fact that actual product characteristics may vary because of the frequent presence of

²¹⁸ Mattoo, A., Singh, H.V. (1994) Eco-Labeling: Policy considerations. *Kyklos* 47(1) 53-65.

²¹⁹ See, generally, Chao, Y., Derdenger, T. (2013) Mixed bundling in two-sided markets in the presence of installed base effects. *Management Science* 59(8), 1904-1926.

²²⁰ Steinrucken, T., Jaenichen, S. (2007) The Fair Trade idea: Towards an economics of social labels. *Journal of Consumer Policy* 30, 205-206.

²²¹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 311.

performance standards, such gains are limited or absent. Similarly, positive network externalities originating from standardisation, which refer to the increase in consumer utility from a given good that derives from the number of other goods or users who are in the same 'network'²²² cannot be observed either. There is no increase in utility accruing to consumers resulting from an additional firm or product in compliance with a scheme, only more choice.²²³ Network gains from sustainability in general and environmental VSS specifically, however, correspond to the arguably lower cost in developing environmentally-friendly solutions when more companies are involved. These network gains however do not directly accrue to consumer welfare. For social standards, network gains are even more difficult to observe.

Different from technical standards in the EU, for VSS a regime of competition between schemes is normally observable,²²⁴ which could possibly result in a detrimental effect on complete integration on the internal market. A certain extent of harmonisation is occurring depending on the standard considered and, therefore, some gains from market integration are still observable. VSS applying to food products represents an exception, as the rationale for the creation of private food standards is to favour integration and coordination between supply chain actors.²²⁵ Competition between standards is, nevertheless, explicitly considered as a factor that lowers the risk of a restriction to competition.²²⁶

To conclude, as gains resulting from interoperability, network externality, market penetration and integration are limited, the major pro-competitive and consumer-welfare enhancing effect of VSS is market creation by means of the provision of information to consumers. Importantly, this fundamental type of efficiency is presumed to be always generated by labelling schemes, provided that the claims are truthful, and excessive proliferation is not present. An analysis of market effects also finds other

²²² Katz, L.M., Shapiro, C. (1985) Network externalities, competition, and compatibility. *The American Economic Review* 75(3), 424-440.

²²³ For technical standards, the market can be construed as a two-sided market where the technical standard at issue constitutes the economic platform allowing the two sides of the market to interact and reap network benefits (for example a standardised technology such an operative system enables end-users and developers to directly interact). VSS cannot be considered as economic platforms allowing two sides of the market, i.e. producers and consumers/retailers to interact. An increase in usage of VSS by consumers, which corresponds to their intention to purchase VSS-certified products, increases the value to and participation of producers, which decide to comply with the VSS because of new marketing opportunities. Consumers in return benefit from the positive feedback loop that generated the increase in supply. However, the opposite process cannot be observed, i.e. that more producers deciding to comply with the VSS will result in an increase of usage (consumption) and increase value by producers/retailers. The promise of purchase VSS to a large extent pushes producers to employ the standard. On two-sided markets see, generally, Rochet, J.C., Tirole, J. (2003) Platform competition in two-sided markets. *Journal of the European Economic Association* 1(4), 990-1029.

²²⁴ There are for example four main schemes for the certification of sustainable forestry products, and around five main programs for sustainable coffee, however with different claims.

²²⁵ Gereffi, G. Humphrey, J., Sturgeon, T. (2005) The governance of global value chains. *Review of International Political Economy* 12(1), 78-104.

²²⁶ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 277.

important positive effects such as increased product quality and productive efficiencies which may be partially passed on to consumers. If the purpose of the scheme is the abatement of an externality, such as rectifying environmental damages or addressing the social practices incorporated in a product, at least some environmental and social gains are generated, unless the scheme is completely unsuccessful. Nonetheless, only some of the efficiencies resulting from externality abatement can be taken into account under the strict approach followed by the Commission, and these are mostly limited to certain environmental gains.

2.4.2.5 Indispensability of the restriction and substantial elimination of competition

The criterion of indispensability of the restriction looks at whether certain restrictions go beyond what is necessary to achieve its intended efficiency gains.²²⁷ Generally, an agreement should not cover more than is necessary to achieve its aims, including for standardisation agreements defining product quality such as VSS.²²⁸ It can thus be presumed that as long as the objective of a standard is to set a high level of quality, the indispensability criterion is likely not to raise problems. If a standard aims at high product quality, which is demanded by consumers, even extensive restrictions resulting from product re-design are likely to be accepted as necessary. A voluntary standardisation agreement, different from agreements which apply mandatorily to a whole industry, for example to level the playing field in the environmental domain, is likely to be much less problematic under this perspective. Other examples of non-indispensable restrictions in the Guidelines overlap with certain safe harbour requirements. Closed access to the standard-setting is normally not indispensable, unless the parties demonstrate significant inefficiencies from unfettered participation.²²⁹ Also making a standard formally binding and obligatory for an industry is normally non indispensable.²³⁰

The fourth criteria of Art. 101(3) concerns the elimination of competition on the relevant market. The Commission looks at the competitive constraint imposed on the parties and the impact of the agreement. In practice, this is done by taking market shares into account.²³¹ As discussed in Section 2.3.5, a VSS may lower competition in a market for sustainable products, especially in the short term, which on occasions can be considered as a substantial elimination of competition.

²²⁷ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 314.

²²⁸ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 317.

²²⁹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 315.

²³⁰ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 318.

²³¹ Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 324.

2.4.3 Balancing pro- and anti-competitive effects of VSS

The balancing of pro- and anti-competitive effects of VSS is necessarily a complex exercise, which obviously depends on the specific factual situation. If the balancing assessment is performed within the economic efficiency test, following the Commission's standard in the aftermath of modernisation, fewer elements are allowed to be taken into account to find positive efficiency arising from the agreement. As seen in Section 2.4.1, only efficiencies that can be transposed into economic terms are taken into account. Undoubtedly, for VSS which provide information to consumers, market creation effects are given a great weight in the Guidelines. These are, therefore, presumed to offset restrictive effects on market parameters - as long as blatant exclusionary effects do not arise as a consequence of discrimination or unnecessarily strict standards, and at least partially contribute to their objective.

The above is based on the assumption that the claims made by the label are truthful. Also the inclusiveness of the claim is important and should not be disregarded by competition authorities, as well as its understanding by consumers.²³² For example, if the label focuses on a certain pro-environmental feature, but disregards other anti-environmental, or less positive features possessed by the product, it still does generate a partial increase in allocative efficiency and consumer welfare. However, consumer welfare could be increased more if the label provided more complete information that would permit consumers to make even better informed purchases and, importantly, would not penalise producers which do not qualify for the label. Even if producer welfare is not taken into account in competition analysis, the impact of a label on competition must be taken into account. It is therefore here advocated that the allocative efficiency effects of a label be carefully scrutinised, in particular those relating to the completeness of the information it provides, and that it is not quickly concluded that the presence of a label always generates positive effects capable of offsetting anti-competitive ones.²³³

In other cases, i.e. in the absence of a label, as VSS do not possess several of the positive efficiencies normally arising from standards, a careful in-depth assessment of

²³² Ogus, A. (2004) *Regulation: Legal form and economic theory*. Oxford: Hart Publishing, 41. See also Cheyne, I. (2009) Proportionality, proximity and environmental labelling in WTO law. *Journal of International Economic Law* 12(4), 935.

²³³ For an example of a labelling scheme which provides only partial information, see the recent debate at the European Parliament on nutrient profile labelling, also known as 'traffic-light' labels (Regulation (EC) No 1924/2006 on nutrition and health claims made on foods [2006] L 404/9). The scheme mechanically rates products on the basis of the amount of nutrients contained in it; for example, a product with a high content of fats will receive a red label. To the eyes of consumers, the system classifies products as 'healthy' and 'unhealthy' on the basis of its content, but in fact it disregards that the impact of a product's nutrients is strictly correlated to its consumption. Certain products high in fats, but for which a very moderate consumption is the norm, would be severely penalised. The European Parliament eventually voted in favour of rejecting the system, as it distorts the competition and was not based on sound scientific methodology. European Parliament Resolution of 12 April 2016 on Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook (2014/2150(INI)), para. 47.

all pro- and anti-competitive effects is required. If the impact on market parameters is negative, such effects shall be compared against consumer welfare gains and the possible, but limited, environmental gains that can be transposed into economic terms. The final assessment is in theory open to a finding either of net restriction or net efficiency, but a scheme may fail to generate significant efficiencies to offset possible restrictions to competition resulting from the agreement.

However, even within an economic balancing, defined by Townley as market balancing, a margin of manoeuvre is still permissible to indirectly accommodate, or give more weight to, public policy-related efficiencies - as the concept of economic efficiency is in itself value-laden.²³⁴ One avenue is to give more weight to productive and dynamic efficiencies.²³⁵ In this manner, also future investments and the long-term need for innovation can be included, and environmental arguments can play a role in the justification of the agreement. Agreements with an environmental objective normally result in additional research and development and innovation, and generate positive environmental spillovers, which are typical factors accruing productive and dynamic efficiencies.²³⁶ The outcome is thus a balance in economic terms between a public policy goal, such as environmental protection, and the restriction in competition. In this way, greater weight is given to long-term consumer interests and overall societal welfare at the expense of short-term consumer interests. This would be allowed only if the agreement enhances social welfare by introducing innovation efficiency, if it is necessary, reasonable and proportionate, and if it does not permanently impair competition.²³⁷

In any event, a narrow approach to public policy goals has the potential to straightjacket the possibility to employ self-regulation and market-based instruments to pursue CSR-related objectives. This is not just in contrast with the legal status of policy linking clauses and the trend of convergence between freedom of movement and competition,²³⁸ but also goes against the EU and Member State's expressed

²³⁴ Townley, C. (2009) *Supra* at 7, in particular 177-195.

²³⁵ Productive efficiency describes the optimal distribution between inputs that permits the maximisation of production given certain resources. In perfect competition, productive efficiency is maximised where the cost of a product is equal to its marginal cost. This corresponds to a situation in which producer welfare is at its minimum and consumer welfare is maximised. A high level of competition is consistent with a consumer welfare standard, but only to the extent it does not squeeze producer margins to the point that new investment does not occur because it cannot be recouped anymore. In this scenario, allocative efficiency in the long term - which measures the capacity of producers to offer goods and services that are most desirable in a society and the allocation of scarce resources in the areas where they are most valued - cannot be maximised. Maximising allocative efficiency is particularly important in competition law, since it corresponds to a maximisation of consumer welfare in the long term. This is however not always possible, because it might come at the expense of productive efficiency and dynamic efficiency (i.e. productive efficiency of a firm over time).

²³⁶ de Vries, F.P., Nentjes, A., Odam, N. (2012) Voluntary environmental agreements: Lessons on effectiveness, efficiency and spillover potential. *International Review of Environmental and Resource Economics* 6(2).

²³⁷ Cseres, K. (2007), *Supra* at 182, 126.

²³⁸ Kingston, S. (2010) Integrating environmental protection and EU competition law: Why competition isn't special. *European Law Journal* 16(6), 780-805.

preference for private sector-driven regulatory initiatives, especially in the domain of sustainability.²³⁹ A broader approach than the Commission's hard line is however supported by the Treaty and, to a certain extent, even the CJEU's practice. The bottom line is that public policy goals alone cannot justify anti-competitive effects. This does not seem the case for VSS, as most schemes to some extent generate at least some positive efficiencies, even excluding allocative efficiencies deriving from the provision of information. To include more types of positive efficiencies, including those not strictly quantifiable in economic terms, would allow enforcement authorities to possess enough evidence to justify all VSS which do not have clear exclusionary intention or effects, and are not too strict in the pursuit of their objective. In particular, the fact that VSS pursue public objectives mentioned in the Treaties and even in policy linking clauses is likely to play a role, especially in the lack of specific EU rules in the area.

Some NCAs seem to share a more relaxed stance towards public policy goals, noticeably so in the domain of sustainability, and offer interesting suggestions on how to accommodate public policy considerations in the balancing exercise. The Dutch Competition Authority (ACM) considers that if a sustainability initiative benefits a certain interest which is deemed valuable by consumers and society, and no key competition parameters are restricted, even market-wide arrangements may be reconcilable with Art. 101 TFEU. Even if this may not sound surprising, especially in light of the positive impact of standardisation discussed by the Commission in the Guidelines, the ACM continues by noting that Art. 101(3) offers enough margin also to justify agreements which deeply affect prices or qualities, as long as 'regular' products can still be purchased on the market and there is evidence of consumer's willingness to pay a premium for socially and environmentally responsible products. Only in the presence of a market-wide agreement affecting prices and quality is an appraisal of the benefits for consumers to be made.²⁴⁰

The ACM therefore assesses whether consumers are willing to pay for a certain sustainable feature of a product.²⁴¹ On the basis of such an approach, an agreement between producers and retailers aimed at replacing regularly-raised chicken products

²³⁹ Commission Communication COM(2011) 681 final on a renewed EU strategy 2011-14 for Corporate Social Responsibility.

²⁴⁰ Autoriteit Consument & Markt (2014) Vision document. Competition and sustainability, 8-9. Available at <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/> See also Report from the Nordic Competition Authorities (2010) Competition policy and green growth, Interactions and challenges. Available at <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf>. Generally, on the Dutch competition authority's initiatives in the sustainability domain see Smits, R. (2014) 'Sustainable competition law enforcement: Animal rights. An essay on integrating other sentient beings' interests in the work of a competition authority'. In Arts, D., Devroe, W., Foqué, R., Marchand, K., Verougstraete, I. (Eds.) *Liber Amicorum Jacques Steenbergen, Mundi et Europae Civis*, Brussels: Larcier, 533-542.

²⁴¹ It shall be noted that the Dutch NCA seems open to accept a broad list of public policy goals, as long as they constitute a societal concern, and arguably without resorting to a national legal basis. Autoriteit Consument & Markt (2014) Vision document. Competition and sustainability, 6.

sold in supermarkets with chicken raised under improved animal welfare conditions was found to be restrictive of competition. The so-called 'Chicken of Tomorrow' agreement would have marginally increased animal welfare conditions from the baseline standards provided for in legislation; it would have restricted competition as 'regular' chicken would not be sold anymore in supermarkets, and it would have resulted in a price increase higher than what consumers were willing to pay for the animal welfare improvement. The agreement was therefore found not to generate benefits for consumers as its costs exceeded its benefits.²⁴²

To quantify in economic terms the value to consumers of a public policy goal and to compare it with the costs generated by the agreement is thus one possible approach. The French NCA seems to have applied a different method, which requires an objective evaluation of the actual effects of the initiative at hand on the public policy objective it aims to pursue,²⁴³ something which cannot be measured by means of a willingness-to-pay test.²⁴⁴ This approach is rather broad in considering accountable efficiencies, as it does not require strict economic quantification, but simply that the effects must not be subjective. Consumer benefits are still obviously required. Improvement taking place outside the EU - such as social improvements experienced by Fairtrade producers in developing countries - must at least bear a connection with national consumers and their possibility to enjoy some indirect benefit. For example, clearly and objectively defined Fairtrade standards may improve downstream competition and increase efficiency.²⁴⁵

The latter approach seems more suitable for the purpose of weeding out ineffective VSS, as it takes into account the efficacy of the agreement. In addition, it also does not require that consumers actually fully understand the claims underpinning the scheme. Consumer preferences may be influenced by a suboptimal understanding of the consequences of a scheme, in addition to the complex consequences on the market parameters which may be unknown to consumers, and which may have affected their choice. Let us assume a situation with an agreement between market participants concerning organic agriculture standards, in a context where all consumers very much value organic agriculture because they believe it is healthier and especially more sustainable than conventional agriculture. The agreement surely is pro-competitive if

²⁴² Autoriteit Consument & Markt (2015) ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'. Available at <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/>.

²⁴³ In the case of Fairtrade, the French NCA aims at measuring the social impact on foreign producers, which is the public policy pursued by the standards. See Conseil de la Concurrence. Avis relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A-07 du 22 mars 2006, para. 97.

²⁴⁴ In particular because the willingness-to-pay analysis appraises how much consumers are willing to pay for the effects on a public policy objective pursued by an agreement, regardless of whether the agreement in fact sorts those effects (which in any case may not be manifested yet on the market for agreements not yet implemented).

²⁴⁵ Conseil de la Concurrence. Avis relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A-07 du 22 mars 2006, paras. 101-103.

prices do not increase more than what consumers are willing to pay. However, a willingness to pay test does not cover other inefficiencies that may be generated. For example, the actual sustainability of organic agriculture on a massive scale is profoundly questioned, as its yields are lower than normal production and would thus require larger amounts of arable land.²⁴⁶ These effects surely deserve consideration in an economic balancing. An approach which measures efficiencies - understood broadly - is thus preferable to a willingness-to-pay test, as it allows a holistic evaluation of all effects generated by a VSS, and not just the fact that it pleases consumers who may misunderstand its claims and actual outcomes.²⁴⁷

All in all, if enforcement authorities agree that private regulation in the domain of sustainability in the form of VSS is generally desirable, it will often be possible to find evidence of efficiencies which offset anti-competitive effects. In the simplest way (and the one most in line with the Commission's approach), it can be done by giving great weight to allocative efficiency generated by provision of information and market creation. An expansive approach to the accountable efficiencies can also be employed, to the extent that the objective of a scheme is the abatement of an externality, and the VSS is at least partially effective in doing so. Conversely, the same margin of manoeuvre offered by Art. 101(3) can be employed to address schemes which discriminate, are unnecessarily strict or burdensome, or ineffective in the pursuit of their professed objective. In such cases all effects must be carefully investigated. Discriminatory and protectionist objectives, if implemented successfully by the scheme-holders, are likely to also bring about negative effects on competition, which will be more evident in the lack of labelling. This occurs more often for those sectoral schemes with a business-to-business component. Competition law enforcement could therefore offer a solution to address market access and consumer confusion.

2.5 Company VSS as vertical agreements under Art. 101 TFEU

Under Art. 101 TFEU, the second scenario to be addressed concerns the possibility for company VSS to qualify as vertical agreements. Company VSS are normally implemented between retailers and suppliers concerning the supply of products in conformity with certain sustainability requirements specified by them, or may require compliance with one or more VSS. In either case, this is done by means of contractual arrangements regulating features of the products. Company VSS therefore qualify as

²⁴⁶ Seufert, V., Ramankutty, N., Foley, J.A. (2012) Comparing the yields of organic and conventional agriculture. *Nature* 458(7397), 229-232.

²⁴⁷ It shall be kept in mind that sociologists have extensively questioned the motives behind 'conscientious consumerism' and have stressed its frequent shallowness, which detracts from more efficient pathways of social change, and is instead an expression of parochial and self-serving, lifestyle-related, values which may even legitimise overconsumption. See Szasz, A. (2007) *Shopping our way to safety: How we changed from protecting the environment to protecting ourselves*. Minneapolis: University of Minnesota Press; Maniates, M., Meyer, M.J. (2010) *The environmental politics of sacrifice*. Cambridge MA: MIT Press.

vertical agreements. A vertical agreement is defined as an agreement entered into between two or more undertakings operating at a different level of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.²⁴⁸

Contractual constraints to competition may serve a host of legitimate economic purposes, such as a reduction of transactional costs.²⁴⁹ Vertical restraints to competition are thus generally considered less detrimental to competition and consumer welfare than horizontal ones.²⁵⁰ Several positive externalities are generated by vertical agreements, the most relevant of which for our purpose are standardisation gains deriving from product uniformity and quality.²⁵¹ VSS ensure access to 'premium' retailers that only stock quality products and, especially, ensure a certain measure of uniformity and quality standardisation in order to appeal to specific consumer tastes.²⁵² Given the assumption that vertical agreements generate efficiencies in most cases, the coverage of the block exemptions is rather broad.

To the extent that such agreements are bilateral, i.e. they are entered into by one supplier and one retailer at the time, it is likely that they will qualify under the block exemption, as the market share of retailer and especially that of supplier may fall below the threshold. The market shares are rather lenient. Below a 30% market share on the purchasing market and 30% on the supply market, the agreement is considered non-restricting, and often even pro-competitive.²⁵³ It also appears that the content of the agreement, mostly specifying product features, would not have as a direct or indirect object one of the hardcore restrictions or excluded restrictions at issue under Articles 4 and 5 of the Block Exemption Regulation. Even in the unlikely situation the company VSS would take the form of a network of contracts entered into collectively by the retailers and several suppliers, the applicability of the *de minimis* is likely. Vertical agreements entered into by non-competing undertakings whose *individual* market share on the relevant markets does not exceed 15% are normally considered as falling outside the scope of Art. 101(1) TFEU.²⁵⁴ Only in the event of a parallel network of contracts covering more than 50% of a relevant market can the

²⁴⁸ Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1, Art. 1.1.

²⁴⁹ Commission Guidance on vertical restraints [2010] C 130/1, para. 106.

²⁵⁰ C- 32/11 *Allianz Hungaria Biztosító Zrt* [2013] ECR I-160, para. 43. Guidance on vertical restraints, C 130/1, para. 98.

²⁵¹ Whish, R., Bailey, D. (2015) *Supra* at 67, 647.

²⁵² Commission Guidance on vertical restraints [2010] C 130/1, para 107(c) and 107(i).

²⁵³ Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1, Articles 4 and 5.

²⁵⁴ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] C 368/07, para. 7.

Commission declare the block exemption Regulation inapplicable.²⁵⁵ Also in this scenario it is rather likely that company VSS would still fall under the block exemption.

3 VSS under Art. 102 TFEU

The analysis of VSS under competition law must include also an assessment of Art. 102 TFEU prohibiting the abuse of dominant position. Art. 102 addresses the unilateral conduct of undertakings.²⁵⁶ With respect to VSS, Art. 102 is obviously applicable to company VSS, provided that the company is dominant and in a scenario whereby the superior bargaining power of a dominant retailer translates into exploitative or exclusionary conduct. Art. 102 is also applicable to multi-stakeholder and sectoral VSS, provided that standard-setting bodies can be considered as undertakings. This would be the case if the standard is offered for acceptance to other entities on a narrowly defined market for sustainability standardisation.

Exploitation could occur whenever unfair contractual obligations are imposed by a dominant retailer over suppliers in a situation of different bargaining power, whereby the retailer could reap most of the benefits - because of the possibility of charging higher prices - and the suppliers most of the costs - because of the costly compliance with strict social-environmental product requirements. A joint abuse of dominance by more undertakings, i.e. an abuse of a collective dominant position could occur when a group of undertakings or retailers, as a sector or in a part of it, formulates certain VSS and imposes them downstream on their suppliers.²⁵⁷ Exclusionary conduct could occur as well whenever a dominant supplier, by means of its contracting practice, has the effect of creating foreclosure on the upstream market.²⁵⁸ Exclusionary conduct from a dominant multi-stakeholder or sectoral VSS may arise if the VSS body excludes certain customers - i.e. the companies seeking uptake - from the market for sustainable products.

The first step of an assessment under Art. 102 TFEU concerns the market shares an undertaking must possess to be considered as dominant. Dominance confers a position of economic strength so as to enable an undertaking to prevent effective

²⁵⁵ Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1, Art. 6.

²⁵⁶ Wijckmans, F., Tuytschaever, F. (2011) *Vertical agreements in EU competition law*. Oxford: Oxford University Press, 13.

²⁵⁷ A dominant position can be held collectively by undertakings that, taken singularly, do not meet the market share threshold for dominance. See Joined Cases T-24/93 *Compagnie Maritime Belge v. Commission* [1996] ECR II-1207.

²⁵⁸ It should be noted that some commentators suggest that in order to modernise the approach to Art. 102, to ensure predictability and to dispel the critique that Art. 102 'protects competitors and not competition', the component of abuse should be exploitation *and* exclusion, matched with no increase in efficiency. For our purpose, exploitative and exclusionary abuses will be discussed separately. See Akmann, P. (2012) *The concept of abuse in EU competition law. Law and economic approaches*. Oxford and Portland: Hart Publishing, in particular at 300-325.

competition in the relevant market, and to afford the possibility of acting independently from its competitors and consumers.²⁵⁹ Dominance is normally presumed to occur with a market share of 50% or more of the relevant market.²⁶⁰ The Commission does not allow for a 'safe harbour' threshold below which there is no dominance, but it considers that dominance is 'not likely' below a 40% market share. There could be cases below that threshold that nevertheless deserve the attention of enforcement authorities.²⁶¹ European retailers, such as supermarkets and food retailers which normally enforce company VSS, normally do not possess such a considerable market share. However, as the Commission seems open to at least consider situations below that threshold, it is here presumed that the 40% market share can be at risk in some cases. Conversely, it is rather likely that the market shares on the market for sustainable standards for multi-stakeholder and sectoral VSS are close to, or above, such threshold. In spite of the above mentioned proliferation of VSS initiatives, for each product there are normally one or two major standard-setters. For example, the market share in the Netherlands of PEFC is around 66% of certified forestry products.²⁶² MSC basically holds a position of monopoly in the standard-setting of sustainable fisheries requirements.²⁶³

3.1 Exploitative abuses

Exploitative practices are made possible by the dominant undertaking's market power and directly harm customers. These include charging high prices or imposing unfair trading conditions, specifically those that are above or more onerous than those that would be applied in a competitive market.²⁶⁴ These types of abuses are controversial in literature as enforcement authorities are required to make judgments on a dominant undertaking's price and output decisions, a role which is closer to market regulation than to that of market supervision which competition authorities are normally expected to play.²⁶⁵ Nonetheless, it has been noted that the spirit of Art. 102 TFEU as drafted in the Treaty of Rome was actually to protect from this type of abuse.²⁶⁶ A few cases concerning excessive prices were pursued successfully, but under limited

²⁵⁹ C- 22/76 *United Brands Company and United Brands Continental BV v Commission* [1977], ECR I-207, para. 65.

²⁶⁰ C- 62/86 *AKZO v Commission* [1991] ECR I-3359, para. 60.

²⁶¹ Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para. 14.

²⁶² <http://www.pefc.org/news-a-media/general-sfm-news/1249-pefc-the-preferred-choice-for-certified-timber-in-the-netherlands>

²⁶³ van Oorschot, M., Kok, M., Brons, J., van der Esch, S., Janse, J., Rood, T., Vixeboxse, E., Wilting, H., Vermeulen, W. (2014) Sustainability of international Dutch supply chains. Progress, effects and perspectives, PBL Netherlands Environmental Assessment Agency, 53. Available at http://www.pbl.nl/sites/default/files/cms/PBL_2014_Sustainability%20of%20international%20Dutch%20supply%20chains_1289.pdf.

²⁶⁴ Faull, J. Nikpay, A. (Eds.) (2014) *Supra* at 69, 387.

²⁶⁵ Schweitzer, H. (2007) 'The history, interpretation and underlying principles of Section 2 Sherman Act and Article 82 EC'. In Ehlermann, C.D., Marquis, M. (Eds.) *European competition law annual 2007: A reformed approach to article 82 EC*, 119-163.

²⁶⁶ Akman, P. (2009) Searching for the long-lost soul of Article 82 EC. *Oxford Journal of Legal Studies* 29(2), 271.

circumstances where the dominant undertaking either enjoyed a *de facto* monopoly, or where its actions were creating serious impediments to the internal market by erecting artificial barriers to parallel trade.²⁶⁷

Exploitative abuses can occur in the presence of substantive buyer power, sometimes referred to as monopsony power, which is typical of vertically structured industries where the downstream market is much less concentrated than the upstream market.²⁶⁸ Large supermarket chains often possess such buyer power. Undertakings with substantive buyer power can 'exploit' their suppliers, for example by offering abnormally low prices. For the purpose of our analysis, it could be hypothesised that to enter into contractual obligations with suppliers on terms allegedly more favourable to the retailer could constitute an unfair trading condition in the meaning of Art. 102(a) TFEU. Art. 102 can be applied to an agreement contrary to Art. 101 where one of the parties is dominant and imposes unfair contractual terms on the other.²⁶⁹

Whereas this practice may have an impact on welfare distribution between undertakings, specifically redistributing welfare from producers to retailers, it does not necessarily affect consumer welfare. Consumers, for example, can benefit from increased quality.²⁷⁰ A careful examination of the effects on efficiency and consumers is therefore essential.²⁷¹ The extent to which the effects of company VSS translate into negative effects on market parameters and competition may be limited to the short term. In the medium run, it is likely that suppliers adapt and improve their production methods in order to comply in a cost-effective manner with retailers' requirements. In such a case, since the competitive structure of the market is not impaired, no abuse of dominant position can be said to occur. Further, the presence of profits due to a dominant position attracts other players in the market, with the effect of reducing the profits made by the dominant undertakings from the alleged exploitation of suppliers.

Case-law so far has only considered unfair trading conditions with respect to customers and not with respect to suppliers. In *BRT v SABAM* and in *GEMA*, the Commission argued that a contractual clause, in order not to be unfair, must be indispensable for the purpose of the contract and equitable - which means that it shall not limit the freedom of one of the parties more than necessary.²⁷² In subsequent

²⁶⁷ Case 26-75 *General Motors Continental NV v Commission* [1975] ECR I-1367; Case C-226/84 *British Leyland Public Limited Company v Commission* [1986] ECR I-9297. See also Motta, M., de Streeck, A. (2006) 'Excessive pricing and price squeeze under EU law'. In Ehlermann, C.D., Atanasiu, I. (Eds.) *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?*, 107.

²⁶⁸ O'Donoghue, R., Padilla, A.G. (2013) *The law and economics of Art. 102 TFEU*. Oxford and Portland: Hart Publishing, 840-841.

²⁶⁹ C-66/86 *Ahmed Saeed* [1989] ECR I-803, paras. 37-38.

²⁷⁰ O'Donoghue, R., Padilla, A.G. (2013) *Supra* at 268, 841.

²⁷¹ Akmann, P. (2009) 'Exploitative abuse in Article 82 EC: Back to basics?' in Barnard, C., Odudu, O. (Eds.) *Cambridge Yearbook of European Legal Studies 11*, Oxford: Hart Publishing, 165.

²⁷² C-127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR I-313. para 15; Commission Decision IV/26.760 *GEMA* [1982] L 94/12, paras. 36 and 46.

cases, the second condition has been elaborated on and interpreted in a very similar fashion to the classic proportionality test.²⁷³ The Commission therefore looks at: whether the contested clause pursues a legitimate objective rather than just exploitation; whether it is effective for the achievement of the goal; whether it is necessary, i.e. there are no alternatives that are equivalently effective in achieving the same goal with a lesser degree of restrictive or exploitative effect; and whether it is proportionate, i.e. the exploitative effect does not outweigh the legitimate goal.²⁷⁴ It could be suggested that a clause would be unfair if it would not be proposed and accepted in a regime of competitive conditions. In both contract law and competition law the concept of 'unfairness' describes a situation of significant imbalance between the rights and obligations of the parties to the contract. In competition law, the concept is associated with the concepts of transparency, objectivity, certainty and limited discretion.²⁷⁵ Arbitrariness,²⁷⁶ oppressiveness and a one-sided contract²⁷⁷ have contributed to a finding of unfairness.

The imposition of VSS in the form of stringent requirements, with which products must be in compliance, has been observed to produce a disparate impact when the producers bear most of the costs and the retailer reaps most of the benefits. Such practices do not appear unfair *per se* as VSS are clearly spelled out in contracts in clear terms, and are transparent to the extent the content of a VSS is made public, reasonably well-known, and even used for promotional activities concerning the characteristics of products. The inclusion of VSS in supply contracts appears also in compliance with the proportionality test designed by the Commission, unless the stringency of the standards is deemed unnecessary. VSS clearly pursue a legitimate objective, which is the supply of products with certain socio-environmental characteristics that appeal to a group of consumers. This can be framed as an economic objective normally pursued by companies. VSS are at least partially effective in the pursuit of the objective since normally certification is mandated to prove compliance. Finally, it is hard to imagine a less restrictive alternative, in particular when it is permissible to employ alternative means for compliance such as equivalent forms of certification. Concerning *stricto sensu* proportionality, the objective pursued of ensuring a certain sought-after product characteristic for the purpose of competition law clearly outweighs the exploitative effects if a consumer welfare standard is employed.²⁷⁸

²⁷³ In particular in Commission Decision IV/34.493 *DSD* [2001] L 365/5, para. 111.

²⁷⁴ O'Donoghue, R., Padilla, A.G. (2013) *Supra* at 268, 856.

²⁷⁵ Cseres, K. (2011) 'Competition law and contract law' In Hartkamp, A., Hesselink, M., Hondius, E., Mak, C., du Perron, E. (Eds.) *Towards a European civil code*, Nijmegen: Wolters Kluwer, 221.

²⁷⁶ Case C-26/76 *United Brands Company and United Brands Continental BV v Commission* [1977] ECR I-207, para. 190.

²⁷⁷ C-247/86 *Alsatel v SA Novasem* [1988] ECR I-5987, para. 10.

²⁷⁸ It might be difficult in general to disentangle distributional effects from efficiencies, but in the case at hand it seems uncontroversial to claim that consumers directly benefit from an increase in quality and new product choice and the distributional effects are circumscribed to retailers and suppliers.

Exploitative abuses in the form of unfair trading conditions for company VSS are therefore unlikely to arise. Even assuming that certain food retailers or supermarkets are in a position of dominance, most anti-competitive effects of those practices are likely to be limited to the short term. Furthermore, in light of the proportionality test devised by the Commission to assess whether a contractual clause is fair, i.e. it is indispensable for the purpose of the contract and equitable, it is doubtful that a VSS would not be justifiable.

3.2 Exclusionary abuses

Exclusionary abuses cover practices from a dominant undertaking aiming to exclude a competitor from the market or from the entrance thereof, which have a detrimental effect on competition and thus, on consumer welfare.²⁷⁹ The Commission has made this type of behaviour as one of its enforcement priorities.²⁸⁰ Competition law and Art. 102 also protect the competitive process as such. This cannot be done without protecting individual competitors from illegal practices which exclude them from market participation.²⁸¹ Foreclosure on the upstream market occurs for certain VSS which are implemented upstream between retailers and producers, in particular in certain domains. For example, there is moderate evidence of a reduction in competition by means of consolidation and concentration in the supply chain.²⁸² This is more evident for VSS addressing food standards, which at times facilitate and even require vertical integration within the global sourcing network.²⁸³

Not only company VSS, but also multi-stakeholder and sectoral VSS may be in breach of Art. 102, provided that they are in a position of dominance. A multi-stakeholder or sectoral VSS organisation can be framed as an undertaking operating on the market for sustainability standards, if producers and business entities operating on a product market are allowed to employ its standard - regardless of whether they pay for it or not. Exclusionary practices may affect entities seeking access to certain standards, if access is being denied by the standard-setter, and not by the third-party certifier which assesses conformity with the standard.

It should be noted from the outset that EU law does not require that the dominant undertaking must be competing with the companies which suffer the abuse, or are

²⁷⁹ See Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 5.

²⁸⁰ Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para 7.

²⁸¹ Schweitzer, H. (2007) 'The history, interpretation and underlying principles of Section 2 Sherman Act and Article 82 EC'. in Ehlermann, C.D., Marquis, M. (Eds.) *Supra* at 265, 119-163.

²⁸² Henson, S., Humphrey, J. (2009) *Supra* at 152, 31.

²⁸³ Van Hagel, O., Alvarez, G. (2011) *Supra* at 214, ix; Lee, J., Gereffi, G., Beauvais, J. (2012) Global value chains and agrifood standards: Challenges and possibilities for small-holders in developing countries. *Proceedings of the National Academy of Sciences* 109(31), 12326-12331.

active on the same market where the abuse is felt.²⁸⁴ It suffices that a link between the two markets is established. In *Aéroports de Paris* the Court established that, where an undertaking in receipt of a service operates on a separate market from that in which the undertaking supplying the service is present, the conditions for the applicability of Art. 102 are satisfied provided that 'owing to the dominant position occupied by the supplier, the recipient is in a situation of economic dependence *vis-à-vis* the supplier, without them necessarily having to be present on the same market. It is sufficient if the service offered by the supplier is necessary to the exercise by the recipient of its own activity.'²⁸⁵ In the case of VSS, a link would clearly exist between the market for standardisation services for a certain product and the market of the product in question.

In the event that a VSS is essential to enter a product market, a dependence relation might exist. Therefore, even if the VSS body is not operating on the same market as the companies being foreclosed on, practices excluding undertakings from seeking access to the standards can be considered as abusive under Art. 102 TFEU. A VSS body whose standards are essential to market a certain product - mostly because of intense consumer preference - can undoubtedly be said to hold market power, as it is allowed to behave independently of its customers, i.e. the producers seeking access, especially if the latter cannot resort to any other standard in order to market their products.

To refuse an entity access to the standards constitutes therefore a refusal to supply.²⁸⁶ Alternatively, a dominant undertaking's decision to refuse to supply non-certified products can fall under the definition. Under EU competition law, the conditions under which refusal to supply may give rise to a breach under Art. 102 TFEU are very narrow. This is especially true under the 'essential facility' doctrine, which involves the denial to a facility which is necessary to compete in a downstream market. The approach is not limited to a physical facility or service,²⁸⁷ but can include a standard, as long as it constitutes the essential condition to accede to a sustainable market. In *Bronner*, the CJEU ruled that i) access to the facility (in our case, the standard itself or the supply chain and the distribution network controlled by a retailer) must be indispensable, i.e. there must not be any actual or potential substitute; ii) duplication of the facility must be impossible; iii) refusal to deal must result in the elimination from competition of the undertaking being denied access; iv) refusal to deal occurred in the lack of any objective justification.²⁸⁸ The Commission's Guidance partially deviates from these

²⁸⁴ Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 76.

²⁸⁵ T-128/98 *Aéroports de Paris v Commission of the European Communities* [2000] ECR II-03929, paras. 164-165.

²⁸⁶ Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 78.

²⁸⁷ Faull, J. Nikpay, A. (Eds.) (2014) *Supra* at 69, 465 and 473.

²⁸⁸ C- 7/97 *Oscar Bronner GmbH & Co. v Mediaprint* [1998] ECR I-7791, paras. 37-41.

requirements and instead requires that the refusal relates to a product or service which is objectively necessary for the competition on a downstream market; the refusal is likely to eliminate effective competition in the downstream market; and the refusal is likely to lead to consumer harm.²⁸⁹

The refusal by a dominant undertaking to source certain products, all the more in the presence of at least a degree of consumer preference, would hardly fulfil these criteria. A narrow approach to exclusion is based on economic freedom and the right to choose trading partners,²⁹⁰ which as discussed in Section 2.3.3 of Chapter 3 is even considered as a fundamental right under EU law. Such strictness seems justified as an 'open access' obligation may undermine undertakings' incentive to innovate, thereby harming consumers.²⁹¹ It is therefore to be excluded that, for company VSS, a preference for products with certain features can be considered as in breach of the 'refusal to deal' doctrine.

For multi-stakeholder and sectoral VSS, a finding of a breach depends on a number of factors. For several products, an alternative for VSS may be available on the market. The duplication by a producer of the standard he is being denied access to is very complicated, for the reason that the establishment of a scheme on the market is a function of consumer trust and consumer preferences, which hardly are under the control of a single company. As per the third requirement in *Bronner*, the undertaking being denied access faces a complete restriction of competition on the market for sustainable products, which may be theoretically offset by the possibility to market its products as regular products. Finally, the last criterion requiring that denial occurred in the lack of objective justification allows the identification of which type of exclusionary behaviour can be sanctioned under Art. 102. Clearly, the mere fact that a producer does not qualify for the standard cannot be the basis for a breach. On the contrary, to discriminatorily refuse to allow certain producers to apply the standards or to set standards which visibly discriminate against certain producers may be considered as lacking an objective justification.

At least in theory, therefore, discriminatory practices concerning access to the standard, or during the standard-setting aiming at preventing producers to employ the VSS, can be seen as exclusionary abuses under Art. 102 TFEU. This would more easily occur for multi-stakeholder and sectoral initiatives enjoying a position of dominance on the market for sustainability standardisation, and in the lack of

²⁸⁹ Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, paras. 81-85.

²⁹⁰ Opinion of Advocate General Jacobs in C-7/97 *Oscar Bronner GmbH & Co. v. Mediaprint* [1998] ECR I-7794, para. 56. See also T-41/96 *Bayer v Commission* [2000] ECR II-3383, para. 180.

²⁹¹ Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 75.

alternative schemes producers can resort to in order to market their products as sustainable.

4 Member States use of VSS and application of competition rules to State measures

A final situation deserving attention under EU competition law is the possibility to apply competition rules to legislation delegating market regulation to private parties, whose actions can result in restrictions to competition. For VSS, this could occur where States delegate the regulation of certain social and environmental aspects of the production of goods to private bodies. It has been seen in Chapter 2 that delegation *tout court* cannot be observed for VSS, but *ex post* public recognition for different purposes may occur, among which the conferral of a presumption of conformity with regulatory requirements. These situations correspond to Member State use of VSS as discussed in Section 3.4 of Chapter 3. Would Member State's legislation recognising a VSS be subject to the application of competition rules?

Competition rules do not apply to legislation, regardless of its impact on competition. The Court has however set limits to this exemption when the requirements for the application of Art. 101 are met, i.e. when undertakings are involved.²⁹² In a particularly unfortunate formulation, the CJEU held that Member States must not introduce or maintain in force measures, including those of a legislative nature, which may render ineffective the competition rules applicable to undertakings. That would be the case 'where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to [Art. 101] or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere.'²⁹³

From the first condition it can be inferred that competition law would still be applicable if Member State recognise an anti-competitive VSS for the purpose, for example, of demonstrating regulatory compliance. The second condition clearly cannot be interpreted as a condemnation of delegation in every instance, including where no anti-competitive behaviour has been committed by the undertakings. The Court instead has looked at whether the final responsibility for the measure established by the private parties lies on public authority and, most importantly, whether procedural obligations ensure that the undertakings operate in the public interest.²⁹⁴ Public interest is therefore not defined in substantive or institutional terms,

²⁹² C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513, para. 70.

²⁹³ C-267/86 *Van Eycke v ASPA* [1988] ECR 4769, para. 16.

²⁹⁴ C-185/91 *Reiff* [1993] ECR I-580, para. 22; C-96/94 *Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo* [1998] ECR I-2883, para. 25 ; C-38/97 *Librandi* [1998] ECR I-5955, para. 34.

but is instead defined procedurally.²⁹⁵ The delegation of decision making and regulatory tasks to private bodies which could not be overruled by private authorities, nor subject to any degree of procedural control, would thus result in the application of competition law.²⁹⁶

This approach is clearly noticeable in *Arduino* and *Cipolla*, where procedural requirements were somehow disregarded and the focus was on State approval. The formal adoption by the Italian government of minimum fees for legal services drafted by the Italian Bar (which were not binding before adoption) was considered sufficient evidence of residual control exercised by the Italian State, which had not engaged in unlawful delegation.²⁹⁷ This finding was made in spite of the lack of special procedures to ensure that the Italian Bar acted in the public interest in its price-setting tasks.²⁹⁸ The price-fixing scheme therefore escaped competition scrutiny, but could still be challenged under freedom of movement.²⁹⁹ Conversely, in *API*, minimum prices for road-haulage were established by an association of undertakings which was operating in the lack of procedural constraints aiming at incorporating broader public interest considerations, the lack of control and approval by the State. The rules were found to be emanations of undertakings and therefore covered by EU competition law.³⁰⁰

It should be noticed from the outset that the extent of control exercised by Member States in recognising VSS could vary from case to case. Recognition as such can be seen as the acknowledgement by public authorities that the substance of a pre-existing scheme is aligned with, or contributes to, the public interest.³⁰¹ Public authorities cannot however modify the content of a VSS nor can they normally influence the substance of the standards, but they ultimately make the decision of whether or not to recognise it. This could be seen as evidence of the Member State retaining final responsibility for the measure not engaging in illegal delegation. Freedom of movement rules would however be applicable to the recognised VSS.

Nevertheless, the procedures under which the VSS has been drafted, however sophisticated and inclusive they may be, are not aligned to those of public bodies and

²⁹⁵ Schepel, H. (2002) Delegation of regulatory powers to private parties under EC competition law: Towards a procedural public interest test. *Common Market Law Review* 39(1), 48.

²⁹⁶ Sauter, W. (2015) Containing corporatism: EU competition law and private interest government. *European Competition Law Review* 36(5), 188.

²⁹⁷ C-35/99 *Criminal proceedings against Michele Arduino* [2002] ECR I-1529 paras. 41-42; C-94-04 *Federico Cipolla v Rosaria Fazari* [2006] ECR I-11455, paras. 52-53.

²⁹⁸ C-35/99 *Criminal proceedings against Michele Arduino* [2002] ECR I-1529, para. 39; C-94-04 *Federico Cipolla v Rosaria Fazari* [2006] ECR I-11455, para. 49.

²⁹⁹ C-94-04 *Federico Cipolla v Rosaria Fazari* [2006] ECR I-11455, paras. 58-61.

³⁰⁰ Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API - Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico* [2014] ECR I-0000, para. 41.

³⁰¹ The adoption by the Italian government of a Decree approving the tariffs set by the National Council of Customs Agents was considered to be in breach of a combined reading of Art. 101 TFEU with Art. 4(3) TEU. See C-35/96 *Commission v Italy* [1998] ECR I-3851, para. 59.

therefore do not ensure that the standard-setting body acts exclusively in the public interest.³⁰² Firstly, Member States recognise VSS only *ex post*, i.e. after the standard has been created, which limits considerably their influence on procedures. Granted, public authorities may decide not to recognise standards which are unsatisfactory from the perspective of input legitimacy but, even so, it is impossible to ensure that the private body operates in the public interest. Secondly, the presence of undertakings in the standard-setting process does not take place in the dispossession of their formally private capacity. As such, it is not just concerned with public interest, but also with economic feasibility, profitability, credibility, and the necessity to ensure broad market uptake of the resulting standard.

The act of recognition of a VSS could however suffice to immunise from competition scrutiny Member State legislation recognising possibly restrictive private standards. If, on the one hand, recognition can be seen as the retention of the possibility for public authorities to exercise control of the standards, on the other hand, standard-setting procedures employed by VSS bodies are unlikely to ensure that the VSS is drafted with the exclusive objective of pursuing the public interest. It is also reasonable to assume that VSS bodies could not invoke the state action doctrine as a defence for their anti-competitive conduct. In order to qualify for the defence, anti-competitive behaviour must be required by national legislation, or legislation must create a legal framework eliminating the possibility of competitive activity.³⁰³ For VSS, the strictest means of pressure from public authority on undertakings to enter into standardisation agreements, where present, takes the form of encouragement, and clearly does not meet the threshold provided from the state action doctrine.³⁰⁴ This would mean that other forms of interaction at a Member State level would also not result in competition law exclusion under state action.

5 Conclusion

This Chapter has assessed multi-stakeholder, sectoral and company VSS against EU competition law provisions to evaluate the extent of review which can be exercised on VSS generating negative effects on the market. The reformed EU competition law system - at least according to the Commission's post-modernisation view - results in an inherent unfriendliness towards business self-regulation when it pursues objectives

³⁰² It should not be forgotten that the regulatory authority of VSS is formally disconnected from public authority. There is simply no delegation. Procedural requirements could immunise private agreements which do not need State approval to become binding, but are nevertheless the outcome of a delegation process. Nonetheless, VSS operating without any connection to the State are not generally exempted from the application of EU competition law unless recognised by Member States. This holds true irrespectively of the inclusiveness of the standard-setting process, and possible claims from the standard-setting body of acting in the public interest.

³⁰³ Joined Cases C-359/95P and 379/95P, *Commission and France v Ladbroke Racing* [1997] ECR I-6265, para. 33. See generally Blomme, E. (2007) State action as defence against 81 and 82 EC. *World Competition* 30(2), 243.

³⁰⁴ Kingston, S. (2012) *Supra* at 7, 344.

other than competition and efficiency, which derives from the limited grounds which are allowed to justify the anti-competitive effects of an agreement. In spite of that, it does not seem that self-regulatory initiatives pursuing non-efficiency goals have so far been hindered as testified by the proliferation of VSS on the EU market. The possibility is therefore open for the Commission to use such inherent 'unfriendliness' of competition law towards self-regulation to 'regulate' self-regulation and private regulation, and VSS in particular. Enforcement can contribute to lessen their negative effects on market access and to allow the mediation between trade and societal concerns to be performed under the scrutiny of institutions that are democratically legitimised to undertake such a task. Enforcement or, better soft forms thereof, could also 'pick a winner' among several similar standards making the same claim.

Sectoral and multi-stakeholder VSS can be considered as horizontal agreements between undertakings, or decisions of an association of undertakings in the meaning of Art. 101(1) TFEU. In spite of the strongly regulatory character possessed by some initiatives, the presence of undertakings in the standard-setting process has the effect of rendering competition rules applicable, even if firms constitute a minority of the actors involved. Standard-setting in the domain of sustainability constitutes an economic activity due to the presence of undertakings and of a market for sustainability standards. It would not be possible to exempt VSS with a strong professed regulatory rationale from competition scrutiny under the public authority venue for immunity. Similarly, it is unlikely that VSS would be excluded from competition law because they pursue a public policy goal. Possibly only national sectoral VSS can be considered in the pursuit of a national interest, provided that the Court accepts their objective as to contribute to the proper functioning of a sector. Also their formally voluntary character is difficult to reconcile with the application of the *Wouters* exception only to mandatory private measures. VSS are thus covered by competition rules, and present a number of problematic features *vis-à-vis* Art. 101 TFEU, and also Art. 102 TFEU.

The Commission's Guidelines on standardisation agreements is the starting point of an analysis of VSS under competition provisions. It prescribes procedural requirements compliance with which by standardising bodies normally result in a standard generating pro-competitive effects. Participation in the standard-setting should be unrestricted and non-discriminatory; access to the information concerning the standard should be possible and transparent, possibly for all interested parties, competitors included. A standard should also be voluntary. Such an assessment may, to some extent, include factual factors which negatively affect the actual voluntary character of the standard, such as consumer preferences and pressure put by the standardising body to comply with its standards.

Restrictions to competition generated by VSS are to be assessed on the market for the sustainable product covered by the scheme. Empirical studies demonstrate a host of possible negative effects on market parameters in specific cases. Restrictions to competition are connected to the lack of an effective voluntary character of the scheme, and to the possibility offered to producers to use alternative schemes, or market their products as 'regular' products. VSS confer a competitive advantage on producers which qualify and contribute to the establishment of monopolistic competition. Generally, however, in the lack of market power and barriers to enter the market, detrimental effects on competition can be expected to be circumscribed to the short term. The limited, albeit growing, demand for sustainable products may nonetheless contribute to the existence of detrimental outcomes also in the longer term. Other negative effects on market parameters can materialise as well, such as a decline in product variety, a price increase or even output restrictions.

This is not to say that VSS do not generate pro-competitive effects. As a matter of fact, crucial positive gains for consumers come about in the form of increased product quality. Labelling schemes are fundamental in empowering consumers to confidently purchase certain products which incorporate 'invisible' sustainability features, and thereby permit a market for sustainable products to exist and operate effectively. The main objective of many initiatives is the abatement of an externality arising in the production process, which can also be included among the pro-competitive factors under Art. 101(3). However, the narrow approach to efficiencies advocated by the Commission limits the accountable efficiencies resulting from the abatement of an externality to a number of environmental gains which can be transposed into strict economic terms, such as the reduction of polluting emissions. Accounting for other gains, in particular those generated in developing countries' markets and which benefit workers, is even more complicated.

The final outcome of an assessment under Art. 101(3) TFEU is unpredictable and depends on the scheme in question, but it is conceivable that certain schemes may fail to generate sufficient positive efficiency to pass the narrow consumer welfare test. The simplest situation concerns labelling schemes. As long as the claim is truthful and compete, it is likely that the gains resulting from the provision of information to consumers and the market creation effects of a label, in combination with the increase in product quality bought about by the standards, are sufficient to more than offset possible anti-competitive effects. In the lack of a label, as VSS fail to generate most of the positive efficiencies normally associated to standardisation, a careful assessment of all pro- and anti- competitive effects is required. Depending on the extent of the negative effects on market parameters, and on the possibility to employ a broader approach to the efficiencies that can be taken into consideration, a finding of either net restriction or net efficiency is possible. It should be noted that a narrow approach to accountable efficiencies is particularly detrimental to justify social schemes

addressing labour conditions, and environmental schemes which address environmental externalities which are of a more general nature and are not easily transposable in economic terms, such as the protection of biodiversity.

Generally, from a review of the applicable provisions, it can be concluded that standard-setting bodies should closely follow the safe harbour requirements to minimise the chance of a breach of Art. 101 TFEU. Compliance with the procedural requirements contained in the ISEAL Code of Good Practice is likely to result in compliance also with the safe-harbour requirements. Other features of the standards in question also could limit the generation of restrictive effects to competition according to the Commission's Guidelines, such as the standard coverage of a limited part of the end features of a product, and the presence of management system standards which do not rigidly specify product requirements.

Company VSS seem to escape the application of most competition provisions. They are likely not to fall under the block exemption for vertical agreements and are likely not to raise exploitative concerns under Art. 102 TFEU. The prohibition of exclusionary abuse enshrined by Art. 102, however, may be relevant for sectoral and multi-stakeholder VSS. Discriminatory and unjustified denial of access to an essential VSS for the purpose of market access may constitute a breach of Art. 102 TFEU. Schemes which are very popular on the market may be subject to such discipline and should therefore be attentive about their criteria for acceding to the standards, and ensure that denial to the certification only occurs if the entity at hand does not comply with the standards.

In case of public use of a VSS at a Member State level, it is possible that the act of approval would immunise the scheme at hand from competition scrutiny. This does not just confirm that structured interactions with public authority enhance the schemes' legitimacy, but also shows that they may offer shelter from legal scrutiny. It is thus essential that legislators exercise the proper amount of scrutiny on the schemes recognised, both concerning their effects and their procedures. A State-orchestrated effort to set social and environmental standards involving a broad set of actors under open and deliberative procedures is very likely to result in competition immunity. Freedom of movement and, most likely, WTO provisions are nonetheless applicable.

From a normative perspective, certain conclusions can be drawn concerning the possibility to employ the current EU competition law framework to address the challenges posed by VSS. The guidance offered by the Commission in its Guidelines on Art. 101 *vis-à-vis* standardisation agreements should be approached with caution when dealing with VSS. VSS generate much lower gains than those generated by technical standards which are given considerable weight in the Guidelines, such as gains from product interoperability, network externality, market penetration and

integration. Their lack may therefore complicate the justification of anti-competitive effects. As anti-competitive effects are indeed possible and sometimes absent certain gains conventionally associated with standardisation, it is here submitted that enforcement authorities should be less deferential in their appraisal of VSS than of technical standards. In particular, the assessment of safe harbour requirement should be matched by a careful appraisal of the effects of the schemes.

A more intrusive inquiry should be counterbalanced by a broad approach towards accountable efficiency. An appraisal inuring into the broad effects of the scheme is further to be preferred over considerations of whether consumers are willing to pay for the improvements brought about by the standards. An approach towards efficiencies which is not too narrow would be able to encompass also market access and consumer confusion. Efficiency and consumer welfare are affected by restrictions to market access whenever standards exclude producers that are price and quality-competitive but cannot qualify, either because of the high cost of compliance and certification, or because the standard puts them in an objective disadvantage, or simply is inapplicable. Only Court guidance could clarify the extent to which certain elements in the competition analysis can accommodate social welfare considerations, and in particular its jurisdictional borders.

Confusion among consumers can be considered in economic terms, if partially. For example, the proliferation of initiatives lessens the allocative efficiency gains generated by labelling schemes. Incorrect or partial claims from schemes can also be considered as diminishing the gains for consumers because they penalise certain products which do not qualify, or which in fact possess very similar sustainable features, if a perspective broader than that of the label is employed. It is therefore important that competition authorities do not equate the presence of a label with the provision of information gains and efficiencies. A careful appraisal should look at how the label communicates the objective of the scheme, whether the scheme generates other effects which may impact consumer preference, and whether the understanding consumers have of the label matches the information it actually provides.

VSS negatively impact consumer welfare also if they have the effect of depriving final consumers from the opportunity of consuming cheaper products, or limiting the offer of products that actually share the same features - with a direct negative impact on consumer welfare. Granted, to return to the two examples mentioned in the Introduction, at least theoretically, air-miles labels contribute to enhance consumer welfare at least for some consumers. To those who want to purchase labelled products, transport emissions matter regardless of whether more price-competitive products are on sale. Their welfare is therefore increased; similar considerations could apply to a number of schemes. But, at the risk of adopting a paternalistic perspective - which does not seem unwarranted where the livelihood of producers in the global

South could be threatened by the lack of market access - it must be noted that consumer welfare could be increased even more if overall 'green' products are to be allowed on the market.

If the maximisation of efficiency is the task of competition law, certain situations are controversial under a narrow approach to consumer welfare and economic efficiency. There are scenarios where a VSS is sub-optimal from the perspective of social welfare, but still generates *some* positive efficiency when the welfare of consumers is considered - who can be a smaller group and are the professed ultimate target of EU competition law. This could occur where a scheme makes a claim which is at least partially correct, which results in products of improved quality, and generates at least some effects in terms of externality abatement - regardless of its negative effects on market access. This poses the question of the extent to which consumer welfare, in the specific form of allocative efficiency resulting from meeting and fulfilling specific consumer preferences, is allowed to trump social welfare considerations, another issue that deserves Court guidance. Can it be assumed that at *any* time consumers will benefit from *any* VSS as long as it generates *some* positive effects in terms of ensuring sustainable features of a product and related externality abatement? Hopefully, this Chapter has offered some food for thought.

From a policy perspective, the question is whether competition between VSS, under the belief that innovation and efficiencies are always delivered under a competitive process, is something inherently desirable. Generally, a debate is required over whether the possibility that cut-throat market competition between regulatory regimes may, ultimately, affect their perception and effectiveness to the irreparable damage of their trustworthiness, the crucial driver behind labels and certification. This is all the more true at a stage in which momentum is arguably required for consolidation between initiatives that do not have an inherent economic interest in reciprocal recognition and equivalence. In other words, unfettered competition is likely to neither stop proliferation nor guarantee that VSS effectively correct externalities. It should not be forgotten that recognition and equivalence agreements by private standard-setters may be considered as restrictions of competition by object, and whose main beneficiaries are economic operators which would face lessened market entry hurdles, with more limited gains for consumers. Under competition law a tension could arise between the need to avoid concentration in the standardisation domain on the one hand and the need to prevent that the proliferation of schemes from negatively impacting allocative efficiency and the related imperative of mutual recognition and equivalence on the other.

A certain amount of optimism is required to believe in the capacity of *all* private actors to deliver public good *all* the time - especially without encroaching upon other public and private interests, as well as on the international obligations concerning market

access into which WTO Members have entered. The political cost of 'patrolling' sustainability, and private parties' interests therein could be high. But the employment of competition law could also ensure that the EU will not be held responsible under international trade law for regulatory activities that might be difficult to reconcile with international economic law. Other forms of actions such as official endorsement or use of VSS may have the result of triggering the WTO rules for state attribution of private conduct, and therefore the EU may be responsible for possible infringements of WTO law resulting from the regulatory activities of private parties, as the following Chapters will show. At the same time, an obligation is likely to be present to enforce competition law against private standards which restrict trade which are covered by, and in breach of, the TBT Agreement - to which Chapter 5 and 6 now turn.