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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 7
Conclusion

In the international trade domain, where a mediation is required between opposing values and interests, private standards are likely to proliferate and consolidate their positions as transnational regulators. The growing popularity of voluntary sustainability standards (VSS) is steered by economic forces such as increasingly intense consumer preferences and retailers liability-limitation strategies, which are not going to decline in the medium run. Political factors account for VSS' diffusion as well, as testified by a public preference for private market-based approaches in the domain of sustainability. Most importantly, as public institutions fail to deliver multilateral solutions to global issues connected to the mediation between trade, and labour and environment, the regulatory role of private actors at the transnational stage in such domains increases.

It is therefore important to explore the venues by means of which legal tools of European and international economic law can directly and indirectly contribute to the regulation and review of VSS. This book has appraised different means to control, review, coordinate and influence VSS with the view to ratchet-up the quality and better exploit the regulatory potential of private parties, and to offer a remedy to problems arising on the market. It has considered and assessed several available possibilities at different regulatory levels, such as meta-regulation deriving from WTO obligations; influence, coordination and review resulting from certain EU instruments of regulation; and the application of legal rules pertaining to the domain of internal market law such as the Treaty freedoms and competition law. It has tried to predict the impact of such rules on VSS and has designed normative tests to enhance such an impact and their influence on VSS' substantive requirements.

1 A multi-level system of control

In spite of a possible perception that transnational private regulatory activity may be elusive to certain rules and principles of European and international economic law, this book illustrates the presence of a multilevel system of control with the potential to apply to many types of VSS. It takes the form of a broad set of 'constitutional' meta-requirements laid down by WTO law, as discussed in Section 2.2 of Chapter 6. WTO rules additionally set the boundaries of an enforcement obligation for Members to take reasonably available measures to ensure compliance by standardising bodies with such substantive and procedural requirements contained in the TBT Code of Good Practice. As seen in Sections 4.2 and 4.3 of Chapter 5, the bodies to which these requirements are addressed do not just include bodies exercising elements of public authority, but also encompass a large number of private standardising bodies, and possibly even a broad group of economic actors. The WTO potential to indirectly impose procedural and substantive meta-requirements on private regulation taking the form of standards is therefore far reaching.

Among the reasonably available measures for compliance with the TBT Code which WTO Members are required to undertake, Section 3 of Chapter 3 discussed the incentives and control mechanisms on standards' substance and procedures which find their way in to a number of EU instruments for market regulation and which, at a varying extents, apply to VSS. Reasonably available measures may also include competition law enforcement. Sections 2 and 3 of Chapter 4 illustrated that, at least under EU law, competition rules are implemented by sophisticated legal tests to appraise and balance positive and negative effects generated by a private regulatory scheme, and its impact on the welfare of consumers. Section 2 of Chapter 3 has also shown that EU freedom of movement provisions have the potential to apply to private standards which constitute barriers to market acces.

Such a multilevel system of control does not just consist of meta-rules and procedural requirements capable of exercising an indirect influence on the substance of the standards and the procedures underpinning it (the TBT Code). It also empowers public authorities to directly evaluate VSS' effects both on the market (fundamental freedoms and competition law) and on the externality they aim at addressing (competition law). It can thus be expected that the substance of VSS - and consequently their trade barrier effects and possibly even the consumer confusion they generate - may be affected by the application of certain provisions of economic law.

1.1 Normativity in the application of the legal provisions

This multilevel system of control requires normative interpretation to remedy the legal underdevelopment of certain provisions here considered to be effectively applied to VSS with the objective of their review for the elimination of trade barriers and consumer confusion. As a starting point, it must not be forgotten that certain legal rules do not apply directly to VSS. This is the case of the WTO provisions of both the GATT, and the TBT and SPS Agreements. In the lack of connecting links with WTO Members, Chapter 5 concluded that private standards are very unlikely to be directly covered by the scope of such agreements. Other legal provisions are instead applicable to VSS, but require an extent of adaptation in order to address the issues here considered. This is the case of EU competition provisions, which are likely to apply to private standards in the domain of sustainability. However, Sections 2.3 and 2.4 of Chapter 4 showed the necessity to employ a different approach to the frame of analysis that competition authorities apply to technical standards, in light of the different objectives and effects of VSS. Also, the TBT Code meta-rules for technical standards are applicable to many VSS. In Sections 3 and 4 of Chapter 6 it was submitted that such provisions should be interpreted and applied in a manner that does not conflict with measures like VSS which structurally modify the conditions of competition, and often do so to the detriment of the group of imported products.

Other legal rules necessitate a new legal test altogether in order to even subject VSS under their scope of application. As seen, Art. 34 TFEU does not seem to be applicable to private measures. Under a closer scrutiny of case-law, however, such a position is untenable. Therefore, Section 2.3 suggested a test for the application of Art. 34 TFEU to VSS which is different from the test that would be applicable to public measures, and also mediates between the fundamental freedom to accede to a market and the fundamental rights which may be at stake for certain schemes.

Finally, other provisions apply as they are to VSS. Albeit not always resulting in review, they instead bring about an extent of coordination of regulatory effects and influence on the substance and the procedures of schemes. As discussed in Section 3 of Chapter 3, several EU measures in the domain of market regulation are capable of sorting such effects on VSS. These measures are as diverse as the supply-chain regulatory tools in the Renewable Energy Directive or the FLEGT scheme, the system of incentives and requirements established by the Public Procurement Directive and explicitly harmonising instruments which guarantee baseline requirements in view to ensure consumer trust such as the Organic Products Regulation. As argued in Section 3.4 of Chapter 5, some of these measures which more explicitly incorporate private instruments into public measures may result in the establishment of a sufficiently strong link to trigger WTO review over the VSS in question, for which the EU would bear full responsibility.

This book therefore shows that provisions of EU and international economic law can be interpreted with the view to apply to private standards in the domain of sustainability in a manner which protects private autonomy and permits private actors to experiment with a host of regulatory approaches. At the same time, however, in order to preserve private autonomy, this results in the capacity to address and remedy only the worst instances of discrimination, trade-restrictions under protectionist motives, and blatantly ineffective regimes which, in the EU, enjoy a market gate-keeping power. The potential to employ economic law tools to influence and review private regulation in the domain of sustainability is encouraging in areas like EU competition law, and is therefore worthy of further exploration.

1.2 Variations due to different VSS' rationales

As discussed in Chapter 2, VSS can be understood as public, sectoral and private goods. A framework which classifies private standards on the basis of their institutional arrangement and outputs allows to catch the nuances in regulatory approaches, and to fine-tune the application of legal rules by taking into account an argument of private autonomy. Albeit all contributing at varying extents to the production of global public goods, multi-stakeholder VSS are public goods which pursue public policy objectives; sectoral VSS are club goods pursuing self-regulatory goals concerning

product quality; company VSS are private goods pursuing efficiency and profitability-based objectives. Private regulatory regimes in other issue areas may potentially be fitted in such a categorisation, with the same normative implications *vis-à-vis* the expected role of the State in their regulation.

This book has shown that EU and international economic law can also be interpreted in a nuanced manner which is appropriate for the specific rationales behind multi-stakeholder, sectoral and company VSS. A rather accepted normative approach to free movement shows that it can discipline, however differentially, multi-stakeholder and sectoral VSS which are indispensable for market access. Sectoral schemes applying mandatorily in a supply chain are more likely to be indispensable, and can be considered in the same manner as other forms of self-regulation also with respect to their justification. Multi-stakeholder schemes appear to give more weight to the pursuit of typically public goals over private goals, and may be allowed to employ public policy grounds when failure to comply with the standard results in the lack of market access. Company standards are likely to be excluded from the application of freedom provisions, and most likely also to fall within the scope of the *de minimis* for vertical agreements between undertakings. EU competition law applies with the same standard of review both for multi-stakeholder and sectoral VSS. A broad approach to accountable efficiencies would be more likely to result in a finding of net efficiency for multi-stakeholder VSS, and therefore gives more leeway to affect market parameters for initiatives which make a *prima facie* valid claim to regulate in the interest not just of business constituencies.

WTO meta-requirements in the TBT Code have never been subject to interpretation by the Appellate Body. Nonetheless, with the assistance of similar provisions in the TBT Agreement, they can be interpreted with refinements which recognise more deference *vis-à-vis* the non-discrimination obligation for schemes pursuing efficiency-based and product quality goals, which is a possible way to frame the legitimate objective of, respectively, company and sectoral VSS. Multi-stakeholder VSS pursuing public policy objectives can be addressed differentially as well, if their standards are closely aligned to multilateral agreements, or they constitute a form of implementation thereof. Conversely, the concept of non-discrimination can be applied more strictly to multi-stakeholder schemes in contested domains or based on controversial methodologies. Non-discrimination for those schemes can be operationalised in a more stringent manner which resembles its application under the TBT Agreement to public measures. Members would therefore be under an obligation to take reasonably available measures in particular for these types of schemes.

Indeed, the tests discussed above under freedom of movement and the TBT Code meta-requirements are able to address only the most severe cases of trade barriers, arguably connected with protectionism resulting from multi-stakeholder and sectoral

schemes. This is consistent with an argument that holds that private parties should be allowed to self-regulate, to respond to consumer demand, and even to pursue public goals within the frame of their autonomy. At the same time, at least under EU freedom of movement, schemes possessing features typical of public rules such as a deliberative process for their creation, broad representation of conflicting constituencies and a claim to regulate in the public interest may be subject to forms of review which are similar to those public measures would be subject to. Such similarity is however limited to a large set of grounds for justification and a relatively accommodating proportionality appraisal, and not so much to the requirement that they should not constitute an hindrance to market access. Competition law has the potential to address a broader set of transnational private regulatory instruments, and possibly with a more stringent approach. While hard forms of enforcement may be inappropriate, competition authorities have the possibility to use competition tools to evaluate comprehensively the effects of many schemes, and establish soft forms of enforcement or competition advocacy.

Specific forms of interactions between public and private authority under EU law show that synergies can be created by formally recognising VSS' implementing role and by coordinating such role by means of public regulatory instruments - which can also lessen negative effects on the market. This incorporation of private parties in regulatory governance takes place by means of mechanisms which do not always clearly fit into the classic categories for delegation, or self- and co-regulation. Nonetheless, EU regulatory instruments operating in tandem with VSS represent compelling *ad hoc* solutions to influence both substantively and procedurally VSS by means of soft and harder tools which operationalise WTO meta-requirements. This case-by-case approach, at least in theory, is a powerful mechanism for coordinating regulatory effects, for influencing VSS, and possibly even for subjecting them to Court review. Granted, concerns of WTO-compliance may arise and render problematic the employment of instruments affecting processes extraterritorially. EU regulators should therefore carefully ensure that the schemes employed are in compliance with all relevant WTO obligations.

2 Structural difficulties

Certain characteristics of VSS remain however problematic under all legal areas here considered even by embracing a normative vantage point *vis-à-vis* legal provisions. Such features reveal a persistent uneasiness of EU and international economic law with specific recurring features of transnational private regulation limiting the influence which can be exerted by means of such legal regimes. These features concern all three of VSS' definitional elements, i.e. their voluntary character, their domain of application to the pursuit of sustainability, and their taking the form of standards.

2.1 Voluntary character

The treatment of voluntary private measures has been addressed by adjudicatory organs under all three legal areas here reviewed. WTO law explicitly rejects that a private standard may become mandatory for the purpose of WTO rules because of market forces. Only elements connected to public authority, such as delegation of regulatory powers, may turn a private voluntary measure into a (public) mandatory one under the TBT Agreement. In other words, a private standard cannot become a technical regulation because it is mandatory for market access. Under the GATT, voluntary private measures may be covered, but only if connected to public authority by means of attribution. *De facto* mandatory private measures cannot be directly reviewed under WTO law, if such *de facto* mandatory character is exclusively connected to market forces, as it happens for VSS. Functionally equivalent forms of public authority can thus be exercised by private actors only by virtue of delegation or attribution.

Conversely, EU internal market law has been more open to different factors affecting the voluntary character of a measure, which may trigger the application of the Treaty rules. Under the Treaty freedoms, albeit not explicit yet, functionally equivalent forms to public authority of collective regulation may also be exercised by virtue of factors like consumer and retailer preferences. It should be noted that in the lack of such an acknowledgement it is rather unlikely that VSS would be caught under the Treaty freedoms. A private standardising body drafting formally voluntary standards, including in the domain of sustainability, may exercise a gate-keeping power on the market or on a subset thereof, especially if such power is viewed in light of a broader regulatory framework supporting private regulation. Also multi-stakeholder and sectoral VSS, whose standards may be formally voluntary, could therefore be caught by the Treaties even if their standards are not *de jure* mandatory.

This flexibility towards the determinants of functionally equivalent forms of public authority is the outcome of the elevation of Treaty freedoms to the status of fundamental rights; other fundamental rights may however counterbalance and limit the expansion of the personal scope of Art. 34 TFEU. It should however not be forgotten that the test for market access appears to be very strict and arguably requires the impossibility to market a product in order for a breach to be triggered. This means that the voluntary character must turn into a fully mandatory character in the actual presence of no available alternative than compliance with the standards. Again, not many schemes would be capable of generating such effects, albeit the situation may be evolving in certain commodity sectors. Also EU competition law seems to acknowledge that different elements may inhibit the actual voluntary character of a standardisation agreement. A 'less voluntary' agreement between

undertakings is increasingly more prone to generate anti-competitive effects. This shows that, under EU law, a scheme may be subject to increased scrutiny as it becomes more popular, and its actual voluntary character evolves.

2.2 Pursuing sustainability through management system standards

The second contentious point concerns the approach followed by VSS to pursue sustainability, which is often operationalised by means of management standards. As explained in Section 5 of Chapter 2, such an approach to the prescription of sustainable practices makes it complex to appraise the effects of a set of standards, as it leaves a wide margin for its implementation to the entity seeking certification. The impossibility to even just generally evaluate the impact of a scheme remains a problem for the legal analysis, in spite of a certain agreement that management standards can be an effective tool for change. This is particularly true under legal tests which require quantification of the effects, such as the appraisal of efficiencies in the form of externality abatement under EU competition law. The resulting outcome may exacerbate the tension between EU competition law and agreements pursuing also non-competition concerns, since EU competition law requires an overall effect substantiation in economic terms which cannot be made if not on a producer-by-producer basis.

Also under WTO law management system standards are problematic as such standards do not seem to be covered by the scope of the TBT Agreement. In spite of an obligation to comply with the TBT Code which arguably applies to all standardising bodies excluding certain companies' standards, WTO Members may not be under an obligation to take reasonable measures to ensure compliance for standards which are in breach with the provisions of the TBT Code, but are not standards covered by the scope of the TBT Agreement. This may be seen as a formalistic issue, but it is evidence of economic law's uneasiness with instruments incorporating prescriptive elements in procedural forms, and not in more 'common' forms which directly prescribe product characteristics and production methods. Formalistic considerations should nonetheless not be a reason to exclude regulatory instruments impacting on the market from scrutiny, both under WTO law and competition law.

2.3 Normative standards

The third point of contention generally concerns the treatment of standards which are not technical standards, but that instead incorporate normative considerations. Under EU internal market law, a long and still ongoing process has finally contributed to bring an extent of clarification over the substantive and procedural discipline of private technical standards, both within and outside formal delegation of regulatory powers by EU institutions and Member States. For normative private standards

addressing policy externalities or mediating between different values, there are many arguments against the extension of a similarly hands-off approach. This process of 'constitutionalisation' of this specific form of private regulation should begin by recognising the obvious, i.e. that standards like VSS are not like technical standards pursuing network coordination problems.

Their differences do not just pertain to questions of legitimacy to regulate and mediate between conflicting interests in the generation of distributional concerns but, very important under EU competition law, also encompass different economic effects. It would thus be inappropriate for competition authorities to embrace the same deferential approach as for technical standards, which gives rise to a presumption of net efficiency to standards elaborated under certain procedural requirements, in the lack of many of the efficiencies normally generated by technical standardisation. Also under freedom of movement law, arguments that technical standards may be difficult to approach by Courts and a procedural review would be sufficient, should be reconsidered for normative standards which are well-spread and increasingly important to enter a market. In the end, freedom of movement frequently deals with conflicting objectives. This does not necessarily encroach upon the domain of private autonomy, provided a relaxed assessment of proportionality and the presence of a comprehensive justificatory regime which recognises the possibility to pursue product quality as a goal private actors can attain in the exercise of self-regulatory functions.

3 Implications for VSS

The multilevel system of control which EU and international economic law has the potential to exert on VSS can be translated into certain substantive requirements VSS should abide by, in order to err on the side of caution. Scheme holders' perception of legal constraints are difficult to appraise in the absence of an empirical assessment; especially multi-stakeholder and sectoral bodies should however be aware of the direct and indirect implications stemming from the legal provisions discussed in this book. From the meta-rules of the TBT Code, to avoid discrimination a requirement can be distilled that standards must be based as close as possible on the requirements or objectives of an international agreement or, in the lack thereof, must bear a rational connection with scientific evidence. Also coherence towards the risks regulated within the objective of the schemes is required, in particular if the inclusion or exclusion of certain requirements is likely to have different impacts among different groups of entities seeking certification. Whether this requirement can be difficult to transpose from abstract to more practical terms, generally a scheme should address similar concerns in a similar manner, which can be described as in practice requiring a consistent and all-embracing approach in the pursuit of its objective.

A certain amount of effectiveness in the achievement of the goal pursued is required in order to separate trade-barriers with an arguably protectionist rationale from schemes legitimately pursuing public goals. To draft standards which allow one to more or less precisely quantify a scheme's effectiveness - including its consequences on competition parameters - would be ideal, especially for the purpose of competition rules. Since it is at times difficult to ensure that a standard's effects are quantifiable and therefore the substance of the rules may be difficult to approach from public authorities, procedural requirements are of paramount importance. They include transparency and openness during the standard-setting, albeit the actual extent may vary according to the provisions considered. The voluntary character of the standard should be ensured by not putting pressure on undertakings for compliance, albeit factors outside the control of VSS, such as consumer preferences, may increase the chances of legal scrutiny. The basic substantive and procedural requirements listed here should be uncontroversial, and are actually in the interest of transnational bodies with a meaningful intention to contribute to public goals, and not just pursue the self-serving interests of their business members.

4 Towards ad hoc solutions?

All in all, this book has shown that direct review and influence over a specific subset of global public goods may be limited to instruments indispensable for market access under freedom of movement, and may be more thoroughly exercised by means of competition law enforcement. The question that remains open is whether this frame of EU public influence and control, in the frame of WTO meta-requirements, is sufficient and appropriate for private rules which, some more explicitly than others, build on existing multilaterally agreed instruments and affect the rights deriving from them. A 'light-touch' analysis, for example resulting from the application of EU competition law to technical standards, or sport rules under the freedom movement, is less controversial and indeed appropriate for rules which are either novel and therefore clearly filling a regulatory void, or are part of a 'self-contained' regime where state activity has traditionally been minimal - and are generally less prone to structurally generate distributional concerns.

It seems thus that the supervisory role which can be exercised over VSS via certain EU economic law provisions is not fully capable of addressing distributional concerns for the large number of standards which are below the radar of legal review. While the normative approaches here elaborated are appropriate in light of the regulatory autonomy of the bodies considered, the provisions of economic law considered here struggle much more when it comes to identifying a balance between private autonomy and the impact on the schemes on pre-existing rights and obligations of the affected actors not merely understood in terms of market access, and which at times are even located outside the EU. Granted, the growing popularity of certain schemes

may result in an increased amount of legal review under freedom of movements but, currently, many schemes escape its application. It is however unlikely that expanding the application of EU internal market provisions to address more schemes would not generate equally serious concerns over private autonomy to regulate and self-regulate.

However, the promising regulatory capacity of *ad hoc* public regulatory solutions where public and private authority work in partnership towards the achievement of public goals should be further explored, and combined with the interpretation of international and European economic law provisions here provided. Future research should investigate which policy area may benefit from increased forms of coordination between public and private authority, lay down more detailed criteria to identify suitable private instruments to be incorporated in public regulation, and identify regulatory patterns that could be fruitful for that purpose in order to coordinate and influence VSS in a host of regulatory domains.

Private rules can be employed for the implementation of broader requirements, or for extraterritorial verification of regulatory compliance which can remedy enforcement problems in jurisdictions abroad. For example, the potential of VSS to guarantee regulatory compliance within a commodity supply chain should be further explored by EU regulators within a more structured legal frame, whose both private and public elements are in line with the obligations, among others, of EU and WTO law. These types of interaction do not just constitute promising mechanisms to exert influence on private standards and steer private transnational regulation by means of incentives and the legitimacy generated by the association of private standards to public authority, but also bring back, if partially, the regulation of transnational phenomena to public authority.