Food chain certification and the social pluralism of competition law

Eller, K.H.

DOI
10.1017/9781108554947.017

Publication date
2022

Document Version
Final published version

Published in
Global Food Value Chains and Competition Law

17

Food Chain Certification and the Social Pluralism of Competition Law

Klaas Hendrik Eller

I. INTRODUCTION

The emergence of a global food system has brought about drastic change in the production and perception of food as a commodity. Food, a means of human subsistence, has not only been transformed by the capitalist dynamics of global value chains ('GVCs') with its fragmentation across stages of production, trade, processing and retailing. As a related trend, it has been geared towards corporatisation under a growing influence of finance, concentrating control over critical resources into the hands of a limited number of corporate actors, as demonstrated by the salient Monsanto/Bayer merger.[1] In other words, food is a distinctively multifaceted commodity that links, on its way 'from farm to fork', various local and global phenomena.[2] The local availability of food, the rise of processed (i.e. "fast") food, and even nutritional diseases are largely dependent upon global food chains.[3] While this can be read as a story about shifts within the economic organisational structure of the food industry, an event which has similarly occurred in various other industries, that which makes the global food industry distinct is that it has also become the site of vibrant debate concerning competing types of agriculture and production.[4] The links between daily shoppers and farming sites in developing countries, links which are inherent in GVCs but have traditionally not

[1] See the European approval in European Commission Decision of 21 March 2018, C(2018)1709 final, Case No. M.8084 *Bayer/Monsanto*.

[2] See S. Mintz, *Sweetness and Power: The Place of Sugar in Modern History* (Viking, 1985); A. Tsing, *The Mushroom at the End of the World* (Princeton University Press, 2015).

[3] G. Gereffi and M. Christian, "Trade, Transnational Corporations and Food Consumption: A Global Value Chain Approach", in *Trade, Food, Diet and Health. Perspectives and Policy Options* (edited by C. Hawkes, C. Blouin, S. Henson, N. Drager and L. Dubé, Wiley-Blackwell, 2010), 91 and 94–96.

[4] T. Havinga, D. Casey and F. van Waarden, "Changing Regulatory Arrangements in Food Safety" in *The Changing Landscape of Food Governance. Public and Private Encounters* (edited by T. Havinga, D. Casey and F. van Waarden, Edward Elgar, 2015) 3 and 7–9.

been perceived by the legal regimes that govern them, are suddenly considered to be normatively significant. In addition, food habits have become a code of societal belonging and individualism in Western societies.[5] Thus, the institutions and normative arrangements which govern the food system have been confronted with conflicting views on numerous debates ranging from the preferability of industrial farming as against small-scale farming, to genetically modified production as against organic production and to global production as against local production. Following a general trend towards a "moralisation of markets",[6] the political and moral dimension of the food market, in particular, is increasingly emphasised.

This trend, which has translated into the division and fragmentation of the food market, intersects with a complementary trend, that of market integration and trade liberalisation. Competition law figures prominently among the legal regimes shaping the present structure of GVCs.[7] Under the focus on EU competition law adopted in this article but also beyond, practical cases traditionally stemmed from merger control, addressing concerns of oligopoly, especially under the growing importance of supermarkets as drivers of food chains.[8] More recently, attention has been drawn to various sustainability initiatives,[9] which have led to some degree

[5] See A. Reckwitz, *The Society of Singularities – On the Structural Transformation of Modernity* (Polity, 2020); on rendering visible the invisible in food, see M. Gilbert, *Voir son steak comme un animal mort. Véganisme et Psychologie Morale* (Lux 2015).

[6] N. Stehr, C. Henning and B. Weiler (eds.), *The Moralization of the Markets* (Transaction Publishers, 2005).

[7] On the co-constitutive role of law for GVC, see IGLP Working Group on Law and Global Production, "The Role of Law in Global Value Chains: A Research Manifesto", (2016) 4 *London Review of International Law*, 57; K. Eller, "Private Governance of Global Value Chains from Within. Lessons From and For Transnational Law", (2017) 8 *Transnational Legal Theory*, 313–316.

[8] See, for example, Competition Appeal Court of South Africa, *Minister of Economic Development and Others v. Competition Tribunal; South Afri.can Commercial, Catering and Allied Workers Union ('SACCAWU') v. Wal-Mart Stores Inc.* (110/CAC/Jul11, 111/CAC/Jun11), Judgement of 9 March 2012; T. Lettl, "Legal Evaluation of Issues of Antitrust Law Relative to Market Concentrations Specifically in the Sectors of Agriculture and Retail Food", 2018, Opinion on behalf of Oxfam Germany, <http://fairtrade-advocacy.org/images/Legal-evaluation-competition-law-Lettl-2018.pdf>; G. Lawrence and D. Burch, "Understanding Supermarkets and Agri-Food Supply Chains" in *Supermarkets and Agri-food Supply Chains. Transformations in the Production and Consumption of Foods* (edited by G. Lawrence and D. Burch, Edward Elgar, 2007), 1. On normative power, see M. Vandenbergh, "The New Wal-Mart Effect: The Role of Private Contracting in Global Governance", (2007) 54 *UCLA Law Review*, 913; L. Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator", (2007) 39 *Connecticut Law Review*, 1739; T. Havinga, "Private Regulation of Food Safety by Supermarkets", (2006) 26 *Law and Policy*, 515.

[9] For an overview of tensions between corporate activity and sustainability, including the issues of definition that are not addressed by this chapter, see B. Richardson and B. Sjafjell, "Capitalism, the Sustainability Crisis, and the Limitations of Current Business Governance" in *Company Law and Sustainability. Legal Barriers and Opportunities* (edited by B. Richardson and B. Sjafjell, Cambridge University Press, 2017), 1.

of horizontal or vertical coordination. Despite their diversity in design and purpose,[10] these initiatives all make a value-based claim on the structure of the food market, combining ethical, industrial, nutritional, societal and other concerns. However, such initiatives have themselves become the subject of various criticisms. Consumer and ecological activists point to the lack of transparency and often contestable results of these initiatives in actual food chain practices, whilst small- and medium-sized enterprises ('SMEs') and small farmers highlight the shift of compliance costs down the chain and stress that the effect of these initiatives is that, by imposing high barriers of entry, they can be used by lead firms for the purpose of securing rents.

Hence, when assessing the potentially anti-competitive dimension of sustainability initiatives, competition law faces a twofold task. Firstly, it needs to consider the paradoxical nature of sustainability initiatives and how they present themselves from the perspective of competition law analysis. Here, it needs to detect the fine line between those initiatives that serve a legitimate, transformative goal and others which are primarily set up for exclusionary purposes. Secondly, competition law needs to consider whether it is within its capacity to ensure that sustainability initiatives do actually result in sustainable outcomes or whether it is intervening in a debate in which its functional orientation towards consumer welfarism is, in fact, inadequate. In other words, when competition law is considering sustainability initiatives, it is effectively assessing a normative tool that seeks to anchor multiple non-consumer-welfare-centric objectives within the market economy. This constitutes a crucial challenge at a time in which the debate concerning the goals of competition law,[11] particularly in light of the increasing recognition of social and environmental concerns,[12] is becoming more and more vivid.

Following on from the introductory Section I of this chapter, Section II will outline the governance structures, institutions and actors in food value chains. Section III will carve out the legal and practical design of certification labels for sustainable production before proceeding to depict certification as a multifaceted institution that defies a solely institutional economic understanding. Section IV will present the possible competitive effects that may result from sustainability certification, assess them under EU competition law and then link these to the emerging debate concerning the goals of competition law. This chapter will argue that

[10] P. Paiement, *Transnational Sustainability Laws* (Cambridge University Press, 2017).

[11] On the normative stakes, see O. Andriychuk, *The Normative Foundations of European Competition Law. Assessing the Goals of Antitrust through the Lens of Legal Philosophy* (Edward Elgar, 2017); I. Lianos, "Some Reflections on the Questions of the Goals of EU Competition Law" in *Handbook on European Competition Law* (edited by I. Lianos and D. Geradin, Edward Elgar, 2013), 1.

[12] See I. Scott, "Antitrust and Socially Responsible Collaboration: A Chilling Combination", (2016) 53 *American Business Law Journal*, 97; S. Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press, 2012).

competition law ought to acknowledge that certification not only provides for product differentiation but also for discourse differentiation as it engenders public debate on the politics of markets in foodstuffs.

II. GOVERNANCE STRUCTURES AND BLIND SPOTS OF FOOD VALUE CHAINS

The global food system, although it still fails to adequately nourish around 800 million people,[13] has undergone a vast increase in agricultural productivity due to both the use of science and technology and the development of novel forms of economic organisation. Regulators, in turn, reacted by intensifying their cooperation with private actors so that nowadays a mixed governance approach has become dominant in the food sector.[14] Science and technology have enabled different stages of the value chain, ranging from research and development, to growing, trading, processing, distributing and to retailing, to be spread across the globe. These stages are much more closely interlinked in the field of agricultural production than in that of manufactured goods. While the geographical expansion of food value chains is growing, the need for fertile land still reserves a considerable material and territorial dimension of food GVCs.

The interconnected nature of different 'nodes' along the chain permits financial and reputational risks, as well as risks to food safety and security,[15] to spread easily along the chain. A general structural feature of GVCs is that, despite the legal independence of actors along the chain, companies, regulators and civil society increasingly look behind the 'contractual veil'[16] in order to identify coordination or, in line with the terms employed by GVC analysis, 'governance'.[17] From the perspective of the lead firm, it is precisely this ambiguity between the legal autonomy of chain actors and the various

[13] Food and Agriculture Organisation ('FAO'), International Fund for Agricultural Development ('IFAD'), United Nations Children's Fund ('UNICEF'), World Food Programme ('WFP') and World Health Organisation ('WHO'), "The State of Food Security and Nutrition in the World. Building Resilience for Peace and Food Security", (2017) FAO Report, <http://www.fao.org/3/a-I7695e.pdf>.

[14] P. Verbruggen, "Understanding the 'New Governance' of Food Safety: Regulatory Enrolment as a Response to Change in Public and Private Power", (2016) 5 *Cambridge Journal of International and Comparative Law*, 418.

[15] For the United States, the Center for Disease Control and Prevention ('CDC') estimates a total number of 48 million illnesses, 128,000 hospitalisations and 3,000 deaths due to foodborne diseases every year, see E. Scallan, R. Hoekstra, F. Angulo, R. Tauxe, M.-A. Widdowson, S. Roy, J. Jones and P. Griffin, "Foodborne Illness Acquired in the United States – Major Pathogens", (2011) 17(1) *Emerging Infectious Diseases*, <https://wwwnc.cdc.gov/eid/article/17/1/p11101_article>.

[16] Term by G. Teubner, "Piercing the Contractual Veil? The Social Responsibility of Contractual Networks" in *Perspectives of Critical Contract Law* (edited by T. Wilhelmsson, Dartmouth Publishing, 1993), 211.

[17] G. Gereffi, J. Humphrey and T. Sturgeon, "The Governance of Global Value Chains", (2005) 12 *Review of International Political Economy*, 78.

governance techniques employed along the chain that makes GVCs a prosperous form of economic organisation. The intensity, legal and para-legal means of governance vary significantly by issue area. Whilst food security and safety have long been recognised as issues that are determined by chain-specific risks (as contamination can arise at multiple stages of the chain), only recently have the elements of sustainability been considered in a similar vein.

Food value chains go well beyond the stages of production to consumption, thus, analysis should also include the factor market, such as seed and land provision as well as waste.[18] It would hence be too narrow to conceive of GVCs solely from a management studies perspective in that GVCs would follow the same physical processing as a commodity.[19] Increasingly, actors, such as financial firms and IP rights holders, who do not make physical contributions are essential to the shaping of GVCs. Therefore, the approach employed when tracing a commodity is insufficient to conceptualise a GVC. More crucially, the linear depiction of processing is inaccurate when it comes to analysing a GVC's power dynamics and structural features, both of which are conducive to the generation and distribution of rents. For instance, increasing consolidation in the seed market has generated bottlenecks for value chains, which have, in turn, allowed for the capturing of value. Moreover, the parameters of competition are being increasingly determined by branding and labelling. For example, in the field of canned tuna, large retailers have preferred to promote their own private labels while drawing on beneficial marketing and lower supply chain management costs. As a result, branded products, which usually follow a 'captive chain' structure, and non-branded products, which typically follow a 'modular' or 'relational' model, are put into competition.[20]

A. *Upholding Complexity: Contract Governance Meets Standard-Setting*

Nowadays, the organisational structure of global food value chains is dominated by a small number of multinational lead firms and global buyers with recognizable brands. Typically, these actors are agrobusiness leaders, food manufacturers, fast-food franchises and global retailers.[21] These actors orchestrate such chains over

[18] Including waste leads to a more circular conception of value chains, see A. Herod, G. Pickren, A. Rainnie and S. McGrath-Champ, "Global Destruction Networks, Labour and Waste", (2014) 14 *Journal of Economic Geography*, 421.

[19] For this internal perspective of supply chain management, see D. Simchi-Levi, P. Kaminsky and E. Simchi-Levi, *Designing and Managing the Supply Chain: Concepts, Strategies and Case Studies* (McGraw-Hill Education, 3rd ed, 2007). For a critique of the inculturation of supply chain managers, see S. Ponte and P. Gibbon, "Quality Standards, Conventions and the Governance of Global Value Chains", (2005) 34 *Economy and Society*, 1.

[20] E. Havice and L. Campling, 'Where Chain and Environmental Governance Meet: Inter-Firm Strategies in the Canned Tuna Global Value Chain", (2017) 93 *Economic Geography*, 292.

[21] G. Gereffi and J. Lee, "A Global Value Chain Approach to Food Safety and Quality Standards", (2009) Final Report, prepared for the Global Health Diplomacy for Chronic Disease Prevention Working Paper Series, 5.

ever longer distances and across an ever-growing number of stages in the chain. Consequently, the resulting chain structure stems from the interplay of governance by lead firms and the relevant regulatory (or 'governance')[22] framework. It is at this point where the project-driven logic, which animates a GVC (i.e. its 'inner' governance), can conflict greatly with attempts to render it compatible with the public interest (i.e. 'external' regulation).

More recently, under the influence of common food trends, including the dynamics of globalisation and industrialisation, chain structures have become even more fluid. The 'just-in-time' production model aims to make comprehensive use of capital-intensive facilities and requires a smooth, yet fragile, interplay of decentralised processes. Overall, contracts have become the bedrock of the agri-food system, thereby replacing the former 'spot-market' transactions by (often) institutionally-embedded or relational contracting models,[23] which imply a higher degree of project-specific elements and include intermediaries. Under the umbrella terms of 'contract agriculture' or 'contract farming',[24] two contractual models can be distinguished. 'Marketing' contracts are those in which only sale and purchase conditions are determined through quantity and quality standards, whereas 'production' contracts specify that some or all inputs be supplied by the contractor. These inputs can be material but they may also be technology and know-how. Scholars in 'contract farming' have recently been paying significant attention to the divergence between the contractual and broader social relation between local farmers and (often international) buyers as key players in the understanding of 'contract farming' as an institution. Given that the buyer will often be a subsidiary of a multinational incorporated in the country of production, access to global value chains is effectuated through this contractual arrangement. Therefore, at this stage, issues of power imbalance and opportunistic behaviour have the potential to exert significant leverage along the chain.[25]

This does not signify that local producers and retailers are automatically deprived of agency vis-à-vis global lead firms. Rather, their leverage depends on a combination of factors: the complexity of their own capacities, the competitive setting and

[22] It is noteworthy that the multifaceted term of 'governance' is, in the GVC literature, used to specifically denote means of control of lead firms along the chain, whereas, in political science and global governance studies, its use is much broader.

[23] I. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law", (1978) 72 *Northwestern University Law Review*, 854.

[24] On the institutional design and variety of usages, see C. Pultrone, "An Overview of Contract Farming: Legal Issues and Challenges", (2012) 17 *Uniform Law Review*, 263; C. da Silva, "The Growing Role of Contract Farming in Agri-Food Systems Development: Drivers, Theory and Practice", (2005) FAO Report, <http://www.fao.org/tempref/docrep/fao/010/ah924e/ah924e00.pdf>.

[25] C. Rodríguez, 'Enforcing Contracts and Resolving Disputes in Contract Farming: How ADR can Address the Specificities of Agricultural Production Contracts", (2015) 20 *Uniform Law Review*, 181–182.

the institutional and regulatory environment of the chain.[26] Contrasted with the typology of intra-firm relations in GVCs,[27] contract farming seems closer to a mode of relational governance. Further work by GVC scholars has highlighted how intra-firm relations and environmental and social aspects of global production are interlinked under the capitalist profit rationale. According to such literature, intra-firm relations and strategies such as centralisation, standard-setting and association-building ought to be regarded as sites of struggle vis-à-vis the distribution of value and the co-production of environmental conditions.[28]

While the private governance of food chains makes up for weak enforcement opportunities in host states,[29] it embodies the ambivalent autonomy of transnational legal ordering. The regulatory power absorbed by multinational private buyers produces chilling effects on national legislation – sometimes very directly, sometimes in more opaque ways – and occupies legal space in which regimes of production and economic coordination converge.[30] This is further promoted by a dense mesh of private and public standards that link both sides of the chain. Across many problematic areas, standards are the central facilitator of the social complexity of GVCs, in particular through their integration into contractual regimes.[31] The contractual arrangement provides a filter through which fundamental rights, entitlements to basic resources and questions of power and equality are recognised and addressed.[32] In GVCs, individual rights (of both corporate actors and natural persons) have to be conceived of in their institutional context in which only they can become effective. This 'institutional turn' of legal analysis[33] is equally significant for competition law analysis, as will be shown below.

[26] Gereffi and Lee, (21), 5.

[27] See Gereffi, Humphrey and Sturgeon, (17), 78. For a fine-tuned connection to contract governance, see J. Salminen, "Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities", (2016) 23 *Indiana Journal of Global Legal Studies*, 719–722.

[28] Havice and Campling, (20), 292.

[29] See H. Gow and J. Swinnen, "Private Enforcement Capital and Contract Enforcement in Transition Economies", (2001) 83 *American Journal of Agricultural Economics*, 687–690.

[30] T. Ferrando, "Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation", (2014) 5 *Transnational Legal Theory*, 44–55.

[31] F. Cafaggi, "Transnational Governance by Contract: Private Regulation and Contractual Networks in Food Safety" in *Private Standards and Global Governance. Economic, Legal and Political Perspectives* (edited by A. Marx, M. Maertens, J. Swinnen and J. Wouters, Edward Elgar, 2012), 195.

[32] See Eller, (7), 316–317; F. Cafaggi, "Transnational Private Regulation and the Production of Global Public Goods and Private 'Bads'", (2012) 23 *European Journal of International Law*, 710.

[33] Legal analysis ought to focus simultaneously on rights and institutions, both of which form the preconditions of their realisation, see D. Wielsch, "Responsible Contracting. The Requirements of EU Fundamental Rights on Private Law Regimes" in *European Contract Law and the Charter of Fundamental Rights* (H. Collins, Cambridge University Press, 2017), 257.

B. *The Hybrid Role of Standards: Consolidating the Social Autonomy of the Food Chain*

Traditionally, standards were seen as drivers of efficient markets because of their capacity to reduce transaction costs. However, nowadays, standards are regarded as more ambivalent devices.[34] The potentially positive effects of standards as the backbone of international trade have led to the WTO developing its favourable three-step test under the Agreement on Technical Barriers to Trade ('TBT Agreement').[35] Equally though, standards have long been exempted from closer legal scrutiny due to their allegedly non-binding nature.[36] Today, the practical and normative stakes of standards are no longer hidden behind technical obscurity, rather they have been clearly demonstrated. The setting of standards goes beyond filling a governance gap – it has had transformative effects on the actors, norms and processes that govern economic globalisation.[37] Consequently, the literature addresses the normative issues surrounding the legitimacy of private food governance and concludes that these initiatives fall short of classical ascriptions of democratic support. Hence, the criteria of participation, transparency and accountability have commonly been used as a proxy.[38] Beyond the bypassing of legislative procedures, questions of legitimacy become all the more pressing when we take the mixed economic results of standards into the picture. Namely, standards have become a central determinant of market access and market closure policy and they shape the diverse structures of entire industries. In developing countries, for instance, more filigree product standards have led to a formidable distinction in terms of quality between goods that are exported and those that are imported.[39] Also, important spill-over effects to public governance have been recognised when legislatures either piggyback onto private standards or refrain from setting up competing ones in order to avoid duplication.[40]

[34] For illustrations, see A. Marx, M. Maertens, J. Swinnen and J. Wouters (eds.), *Private Standards and Global Governance* (Edward Elgar, 2012).

[35] On the three-step test, see M. Maidana-Eletti, "International Food Standards and WTO Law", (2014) 19 *Deakin Law Review*, 219–224; C. Struck, *Product Regulations and Standards in WTO law* (Kluwer Law International, 2014).

[36] For an attempt to establish a comprehensive 'standards law', see H. Schepel, *The Constitution of Private Governance* (Hart, 2005), 7.

[37] On actors, norms and processes as a matrix for the analysis of transnational law, see P. Zumbansen, "Lochner Disembedded: The Anxieties of Law in a Global Context", (2013) 20 *Indiana Journal of Global Legal Studies*, 29.

[38] D. Fuchs, A. Kalfagianni and T. Havinga, "Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation", (2011) 28 *Agriculture and Human Values*, 359–364.

[39] N. van der Grijp, T. Marsden, and J. Cavalcanti, "European Retailers as Agents of Change Towards Sustainability: The Case of Fruit Production in Brazil", (2005) 4 *Environmental Sciences*, 445.

[40] S. Henson and J. Humphrey, "The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes", (2009) Paper Prepared for FAO/WHO <http://www.fao.org/3/a-i1132e.pdf>.

Standards with regard to food safety and sustainability animate chain dynamics by enabling cooperation across heterogenous regulatory spheres. A common typology of standards becomes ever harder to establish since standardisation criss-crosses classical boundaries, such as those between public vs. private, mandatory vs. voluntary, national vs. international etc. However, the degree, extent and effects of industry self-regulation call for a cautious reconstruction of trade and competition law concerns. In this assessment, the public or private origins of standards has only a limited heuristic value.[41] Typically, private standards may result either from the need for harmonisation in the wake of outdated or impractical public standards or, conversely, may be developed as a means of compliance with public food laws. For instance, the UK's Food Safety Act of 1990, led to the creation of the predecessor of today's GLOBALG.A.P., a private B2B certification system for food safety.

III. CERTIFICATION AS POLYCONTEXTURAL GOVERNANCE

The proliferation of private standards is occurring in parallel to an increase in use of third-party certification,[42] for both sustainability and food safety purposes.[43] Third-party certification, the rise of which has been termed as 'certification revolution',[44] has its origins in the food chain, with religious (kashrut and halal) and organic certification.[45] Both can be described, *inter alia*, as a specific response to the complexity and opaqueness of the chain as capable of producing specific risks and uncertainties. Today, not only has the number of available schemes skyrocketed but there is also growing governmental support for third-party certification to form part of the regulatory toolkit.[46] The tiny labels displayed on product packages are merely

[41] For an overview drawing on Abbott and Snidal's 'Governance Triangle', see P. Verbruggen and T. Havinga, "Hybridization of Food Governance: An Analytical Framework" in *Hybridization of Food Governance. Trends, Types and Results* (edited by P. Verbruggen and T. Havinga, Edward Elgar, 2017) 1, 7–11.

[42] 'First-party certification' generally relates to a process self-verification which is conducted by the seller himself, whilst 'second-party certification' implies the process of verification being carried out by the standard-setter or the buyer.

[43] Without overlooking the institutional differences between those two main fields of application, the remainder of this chapter will present a general argument on the elements of production that are largely unregulated, due to the complexity of chains. For the most part, this does not require further differentiation between safety and sustainability concerns.

[44] M. Conroy, *Branded! How the 'Certification Revolution' is Transforming Global Corporations* (New Society Publishers, 2007).

[45] T. Lytton, *Kosher. Private Regulation in the Age of Industrial Food* (Harvard University Press, 2013), 9 et seqq.

[46] Building on the long-standing use of firm management processes in European environmental law (see G. Lübbe-Wolff, "Öko-Audit und Deregulierung", (1996) *Zeitschrift für Umweltrecht*, 173), the German government has introduced a meta-certificate in the field of textiles, called the "Green Button" (*Grüner Knopf*), cf <https://www.gruener-knopf.de>. On the recent extension of certification to corporations as a whole, see F. Möslein and A.-C. Mittwoch, "Soziales Unternehmertum im US-amerikanischen Gesellschaftsrecht – Benefit Corporations und Certified B Corporations", (2016) 80 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 399–434.

the tip of an iceberg encompassing a complex and established regulatory regime which escapes classifications of regulatory matrices. Generally speaking, certification combines standard-setting with a particular way of guaranteeing compliance and of offering tailored resources for enforcement. The result varies greatly from scheme to scheme with regard to the robustness of the relevant substantive standards and control, its role on the market and the set of actors involved. Certification contains elements of regulation by information; it deploys regulatory intervention through markets, appeals to ethical consumerism and also creates an arena for debate on food policies and sustainability. It may overcome what has been called a 'green gap' in the field of environmental concerns,[47] namely a market distortion through 'credence attributes' that prevents competition in the segment of environmentally friendly products.[48] By 'voicing the market',[49] certification permits normative convictions about alternative structures of and for the global food system to be expressed in legal terms. It challenges the conventional image of market relations as technical exchanges centred on the binary choice of buying or not buying. The often repressed political dimension of markets is put to the forefront.

Overall, the changeable nature of certification turns it into a fragile regulatory device the actual effects of which are highly context-sensitive and exposed to a high risk of regulatory capture.[50] In the following sections, the central claim will be that law, most notably contract law and competition law, play a crucial role in forming the context in which certification is carried out. In this view, it would seem reductionist to describe certification as 'market governance'[51] or as mere information intermediaries in the technical sense of rating agencies;[52] rather, certification brings together features and resources of markets, law, politics, ethics and civil society. Through the *simultaneous* significance of certification in these different social contexts of meaning production, food certification qualifies as a form of 'polycontextural' governance.[53] This concept provides a helpful starting point for understanding certification as a social practice. It also suggests that normatively, a legal regime

[47] M.-L. Johnstone and L. Tan, "Exploring the Gap between Consumers' Green Rhetoric and Purchasing Behaviour", (2015) 132 *Journal of Business Ethics*, 311.

[48] J. Caswell and S. Anders, "Private versus Third Party versus Government Labelling" in *The Oxford Handbook of the Economics of Food Consumption and Policy* (edited by J. Lusk, J. Roosen and J. Shogren, Oxford University Press, 2011) 472, 491.

[49] For a clear-sighted analysis of the growing interplay between contracts, markets and morality, see R. Kreitner, "Voicing the Market: Extending the Ambition of Contract Theory", 69 *University of Toronto Law Journal* 295 (2019).

[50] P. Dauvergne and J. Lister, *Eco-Business. A Big-Brand Takeover of Sustainability* (MIT Press, 2013).

[51] B. Cashore, G. Auld, and D. Newsom, *Governing through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, 2004).

[52] For an information economics perspective, see J. Deaton, "A Theoretical Framework for Examining the Role of Third-Party Certifiers", (2004) 15 *Food Control*, 615.

[53] On the roots in theories of societal differentiation, see G. Teubner, "Constitutionalizing Polycontexturality", (2011) 19 *Social and Legal Studies*, 17.

of certification ought to take into account each of these contexts and be prepared to formulate rules capable of resolving conflicts between them.

A. *Institutional Design of Certification and Accreditation*

The basic functional components of a certification mechanism are: (i) a standard-setter (or scheme-owner), (ii) a certification body, which issues a certificate upon finding compliance with the respective standards, and (iii) auditors, who are in charge of the verification process.[54] Often, the certification body seeks accreditation from a public or private body, with this latter body attesting to the former's professional ability to diligently certify entities.[55] Accreditation is widely governed by the International Organisation for Standardisation/ International Electrotechnical Commission ('ISO/IEC') 17065 in order to ensure international consistency. Sometimes, the processes of standard-setting and certification are performed by the same body (as is the case with Fairtrade Labelling Organizations International and its national members); the same may be true for the processes certification and auditing. Ideally, however, the processes of inspection and review are carried out by separate entities. If all functions are separated, the scheme-owner typically will select a certification body, which is entitled to carry out the process of certification, to certify the relevant product against its standard. Equally, third-party certifiers may themselves be involved in the processes of monitoring compliance, providing assistance and undertaking enforcement; for example, by offering capacity-building resources to ensure continued compliance. Auditors are ultimately mandated by entities that contract with the relevant certification body.

B. *The Politics and Economics of Certification*

From the 1990s onwards, certification has been presented as a potentially transformative instrument with the capacity to re-orient the structure of food value chains towards more sustainable sourcing practices. Jumping on the bandwagon of sustainability, consumer rights' groups, environmental activists and political actors from national governments to the EU alike have come to rely heavily upon and have placed much faith in the process of certification.[56] The principal reasons for this

[54] For an illustration of food safety labels, see P. Verbruggen, *Enforcing Transnational Private Regulation* (Edward Elgar, 2014), 175–213.

[55] On the functional specification of both certification and accreditation, see G. Dimitropoulos, *Zertifizierung und Akkreditierung im Internationalen Verwaltungsverbund* (Mohr, 2012), 224–242.

[56] See the EU Eco-Label as put in place by Council Regulation (EEC) No. 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91.

wide range of support are based on the softness and ease with which certification can be implemented as well as its intuitive appeal. In an attempt to attach more weight to sustainability, big retailers can either opt for certified products or change their own procurement strategies. In the conventional narrative, consumers, retailers, farmers and the environment seem to simultaneously benefit from sustainable products, which can be flagged up as such. At the same time, it is clear that under the conditions present in the growing market for labelled food, certification has fostered a shift in the parameters of competition. Competition is no longer solely based on price. Rather, more factors pertaining to quality are now also considered, such as increased investment into product differentiation.

On the flipside of this, deficits in the incentive structure and issues concerning its legitimacy and economic effects have been highlighted.[57] It has been suggested that the practice of certification, the appeal of which essentially rests on the idea of independent assessment of conformity,[58] would need to become self-reflective. In other words, certification has, at some point during its proliferation, lost its regulatory innocence and it needs to acknowledge the political and economic implications of the many paradoxes, contradictions and tensions that underlie it.[59] The economic significance behind private labels was emphasised in the case before the European Court of Justice ('ECJ') of *Fra.bo SpA*,[60] in which the Court held that a private certification scheme that had amounted to an industry standard can contravene the guarantee of freedom of movement for goods. Similar grounds have recently led the Israeli Supreme Court to question the monopoly of the Chief Rabbinate on kashrut labelling, thereby allowing for the establishment of an independent labelling authority.[61]

Some of the intricacies that surround product certification are, for example, that: (i) it operates by signalling exclusively positive information,[62] (ii) despite its alleged technical accuracy, certification has missed major standards violations, which have

[57] See G. LeBaron and J. Lister, "Benchmarking Global Supply Chains: The Power of the 'Ethical Audit' Regime", (2015) 41 *Review of International Studies*, 905; F. Albersmeier, H. Schulze, G. Jahn and A. Spiller, "The Reliability of Third-Party Certification in the Food Chain: From Checklists to Risk-Oriented Auditing", (2000) 20 *Food Control*, 927.

[58] M. Hatanaka and L. Busch, "Third-Party Certification in the Global Agrifood System: An Objective or Socially Mediated Governance Mechanism", (2008) 48 *Sociologia Ruralis*, 74.

[59] For such an approach, see G. LeBaron, J. Lister and P. Dauvergne, "The New Gatekeeper. Ethical Audits as a Mechanism of Global Value Chain Governance" in *The Politics of Private Transnational Governance by Contract* (edited by A. Cutler and T. Dietz, Routledge, 2017), 96; A. Loconto and E. Foullieux, "Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance", (2013) 8 *Regulation and Governance*, 166.

[60] ECJ, Case C-171/11 (*Fra.bo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches*), Judgement of 12 July 2012.

[61] Supreme Court of the State of Israel (SCOI), Case 16/5026 (*Shay Gini v. Chief Rabbinate*), Judgement of 6 June 2016, confirmed by Judgement of 12 September 2017.

[62] T. Ferrando, "Corporate Governance through Certification Schemes and Eco-Labelling: The Value of Silence" in *The Corporation. A Critical, Interdisciplinary Handbook* (edited by G. Baars and A. Spicer, Cambridge University Press, 2017), 372.

led to food crises,[63] (iii) the process of certification is often financed by the very same corporations whose products are to be assessed,[64] and (iv) certification has become a gatekeeper,[65] which structures value chains and sets the costs of compliance to the detriment of small-scale farmers who might be excluded from the market.[66] Audits, in particular, have been identified the Achilles' heel and doubt has been cast on the independence, competence, design and transparency of the auditing process.[67] However, it should be noted that a considerable number of these deficits are also issues with which state regulation is confronted, if not to an even greater extent.[68]

IV. COMPETITION LAW CHALLENGES OF THIRD-PARTY CERTIFICATION

The proliferation of third-party certification in food and in other sectors has profoundly changed the character of certification. Questions of public recognition of labels, of inter-operability among different schemes and, most essentially, of market access and distribution of rents have become pressing because third-party certification has undergone an unprecedented rise as a regulatory tool. This resonates with many observations in the field of corporate social responsibility ('CSR'), which started off as an experimentalist bottom-up project and has subsequently been restrained and reduced to an instrument largely at the disposal of corporate actors and as such has given rise to questions similar to those with which the certification process is confronted. In addition, similarly to CSR, (food) certification has progressively moved into the focus of legal analysis, notably with regard to liability and market distortion. Given that certification as a social institution began as distinctively extra-legal or as a complement to legal regulation, this recent development of 'juridification'[69] is significant and may alter the practice of certification and its effects in unexpected ways.

[63] E. Fagotto, "Resolving Gaps in Third-Party Certification for Food Safety Hybridization" in *Hybridization of Food Governance. Trends, Types and Results* (edited by P. Verbruggen and T. Havinga, Edward Elgar, 2017), 57.

[64] L. McAllister, "Regulation by Third-Party Verification", (2012) 53 *Boston College Law Review*, 44–46.

[65] R. Kraakman, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy" (1986) 2 *The Journal of Law, Economics and Organization*, 53.

[66] S. Ponte, "Greener Than Thou: The Political Economy of Fish Ecolabelling and Its Local Manifestations in South Africa", (2007) 36 *World Development*, 168–170.

[67] Fagotto, (63), 58–66.

[68] T. Lytton, "Competitive Third-Party Regulation: How Private Certification Can Overcome Constraints That Frustrate Government Regulation", (2014) 15 *Theoretical Inquiries in Law*, 539.

[69] The history of the welfare state is telling about the limits of juridification, see G. Teubner, "Juridification: Concepts, Aspects, Limits, Solutions" in *A Reader on Regulation* (edited by R. Baldwin, C. Scott, and C. Hood, Oxford University Press, 1998), 389.

Recently, competition law has played a prominent role in the 'juridification' of sustainability labelling. This section will outline the perceived tension between competition law and sustainability initiatives and argue for a tailored competition law approach that will not only refrain from posing obstacles to the goal of sustainability. Rather, competition law may even assist in signalling which initiatives represent a genuine step towards designing sustainable food chains. The exact position of the Commission will be formulated in guidelines to be published in the second half of 2022, as recently announced in its "Farm to Fork Strategy".[70] In the meantime, national competition authorities are paving the way for a more facilitative role of competition law in this regard.[71]

A. *Holistic Competition Law: Intra-/Inter-Regime Collisions*

It is worth noting that even within the different branches of competition law, there is an interesting dialectic in the sense that unfair competition law is used to strengthen the impact of sustainability standards whilst antitrust law remains preoccupied with such standards having too much of an impact. Concerns related to price increases and market access in horizontal and vertical relationships were raised by authors with diverging backgrounds and orientations.[72] Ironically, the anti-competitive effects of certification have garnered notoriety at a time when the effectiveness of private regulation in other fields has come under attack.[73] While civil society organisations denounce its neoliberal rationale and weak empirical evidence that certified products hold up to its promise, corporate actors fear being overburdened by the multiplicity and vagueness of sustainability initiatives.[74] If critics are correct by stating that certification effectively constitutes a form of window-dressing that upholds and endorses present patterns of production, competition law concerns could, to some extent, be discarded. However, the effect of certification on the structure of markets is real and sufficiently demonstrated.

Sustainability certification holds a mirror up to competition law theory. It has entered into a vivid debate surrounding the goals of competition law and has

[70] Communication from the Commission to the European Parliament of May 20, 2020, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM(2020) 381 final.

[71] See the guidelines by the Dutch Competition Authority, Sustainability agreements: Opportunities within competition law (2020), <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>.

[72] Organisation for Economic Co-operation and Development ('OECD') Roundtable on Due Diligence in the Garment and Footwear Supply Chain, "Competition Law and Responsible Business Conduct", (2015) Paris, <https://www.oecd.org/daf/inv/mne/Garment-Footwear-Roundtable-2015-Competition-Law-RBC.pdf>.

[73] R. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press, 2013), 126–155.

[74] For a related argument, see B. Spiesshofer, *Unternehmerische Verantwortung. Zur Entstehung einer globalen Wirtschaftsordnung* (Nomos and Beck, 2017), 45 et seqq.

challenged the ability of competition law to conceptualise the relationship between GVCs and their plural and transnational social environments. Certification serves as rare test-case that raises principled and conceptual questions which underlie the entire field. It links the *a priori* debate surrounding the normative rationale of competition law, as elaborated on in introductory chapters of textbooks, to concrete case studies. Overall, the rationale of competition law can be addressed as a matter that can be either internal or external to the doctrines of the field. In positioning itself vis-à-vis the public policy interests of sustainability, product safety and/or the environment, competition law has become part of a series of recent collisions between public policies and legal regimes and doctrines.[75] This phenomenon has become increasingly frequent in new fields and/or those which have recently become transnational. For instance, several regimes have recently reformulated their intersections with human rights law, including international investment law,[76] trade law and contract law.[77] Potential conflict rules can take two basic forms, both of which are unrelated to the nature of the outcomes; conflicts may be resolved by doctrines developed *within* a given regime (i.e. 'intra-regime collision') or by doctrines developed *outside* of it (i.e. 'inter-regime collision').

The debate around the goals of competition law is not per se new. In a provocative intervention that triggered the debate until today, Bork[78] had claimed to make the protection of competition, not competitors, the sole objective of US antitrust law in order to enhance consumer welfare. His intervention marked the beginning of a renewed debate characterised by the opposition between consequentialist and deontological, institutional and rights-based, welfarist and more pluralistic perspectives.[79] At the heart of this debate, there seems to be diverging views on the nature and intrinsic normative value of the competitive process. It is widely acknowledged that competition law may *de facto* further non-welfarist goals, such as market integration, consumer protection and/or in some cases even distributive justice.[80] However, competition law appears to be deliberately agnostic when it comes to its normative compass about the *character* of competition it protects.

Competition law is concerned with the nexus between the individual exercise of economic power through rights and the institution emerging from the exercise of

[75] A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Law Journal of International Law*, 999–1045.

[76] For an integrative approach on human rights in international investment law, see J. Scheu, "Trust Building, Balancing and Sanctioning – Three Pillars of a Systemic Approach to Human Rights in International Investment Law and Arbitration", (2017) 48 *The Georgetown Journal of International Law*, 449.

[77] M. Starke, *EU-Grundrechte und Vertragsrecht* (Mohr, 2016).

[78] R. Bork, *The Antitrust Paradox. A Policy at War with Itself* (Free Press, 1978), 50.

[79] For a compelling overview, see the contributions to D. Zimmer, *The Goals of Competition Law* (Edward Elgar, 2012); Lianos, (11), 1.

[80] I. Lianos, *La transformation du droit de la concurrence par le recours à l'analyse économique* (Bruylant, 2007).

these rights, namely the 'market'. While neo-classical approaches adhere to the standard of allocative efficiency, ordoliberal perspectives see normative value in individual economic freedom. Putting particular emphasis on this nexus and placing competition in a democratised political economy, the ordoliberal tradition rejects a pre-given monistic market logic to which other concerns would be external. Rather, it perceives of competition law as cornerstone of a constitutional order of markets. It sees purportedly non-market goals not as external to it but as shaping the market and its rules in its institutional dimension in the first place. Only then, under this perspective, can consumer sovereignty[81] become the controlling force for markets and even be justified in light of the parallel identity as consumer *and* citizen.[82] Monti has vigorously argued that the "structure [of Article 101 of the Treaty on the Functioning of the European Union ('TFEU')] bears the imprint of (ordoliberal) philosophy".[83] Ordoliberal thinking distinguishes between (i) the rules themselves and the procedures for choosing the rules of the game, (ii) the rules of the game, and (iii) the playing of the game.[84] CSR and sustainability labelling can, in principle, intervene at all three levels, thereby enabling different qualities of justification. Vanberg calls a 'soft' version of CSR as being one that is concerned with how corporations are playing the market game within existing rules. Conversely, a 'hard' version focuses on how the rules of the market ought to be changed in order to achieve 'socially responsible' corporate activity, whilst a 'radical' version contrasts CSR with the logic of the market game altogether and undertakes enquiries into an alternative economic regime.[85] These characterisations should not be understood as being mutually exclusive. Rather, the changeable nature of sustainability certification outlined above suggests it can fall under any or all of the three variants simultaneously. Some actors, e.g. corporations, may understand sustainability certification as constituting minor refinements of the interpretation of rules of the market ('soft'), while for consumers or food activists, it may represent a challenge to these rules ('hard') or even the capitalist economic order ('radical'). Hence, both the virtues and pitfalls of certification lie in the plurality of discourses, which are insufficiently accounted for in institutional economic descriptions.[86]

[81] For a contemporary assessment in light of behavioural insights, see A. Künzler, *Restoring Consumer Sovereignty. How Markets Manipulate Us and What the Law Can Do about It* (Oxford University Press, 2017),.

[82] V. Vanberg, "Market and State: The Perspective of Constitutional Political Economy", (2005) 1 *Journal of Institutional Economics*, 23–49.

[83] G. Monti, "Article 81 EC and Public Policy", (2002) 39 *Common Market Law Review*, 1060.

[84] V. Vanberg, "Corporate Social Responsibility and The "Game of Catallaxy": The Perspective of Constitutional Economics", (2007) 18 *Constitutional Political Economy* 199, 200 et seqq.

[85] *Ibid*, 199–222.

[86] For an illustration of the institutional economics view, see H. Kim, "Eco-Labels and Competition: Eco-Certification Effects on the Market for Environmental Quality Provision", (2015) 22 NYU *Environmental Law Journal*, 181–224.

B. *Non-welfarist Rationalities under EU Competition Law*

Under positive EU competition law, the goals of competition law seem to be inherently pluralistic,[87] as demonstrated by a cross-section of provisions found in the TFEU, such as ensuring a high level of occupation (Article 9), environmental protection (Article 11) and consumer protection (Article 12). While competition law clearly does not operate in a vacuum, the normative conundrum also remains unsolved under positive EU competition law,[88] thereby giving rise to competing legal, systematic, governance and economic arguments.[89]

1. Assessing Sustainable Food Labelling under Article 101 TFEU: Product and Discourse Differentiation

In order to be valid in accordance with Article 101 TFEU, sustainability initiatives must either not constitute a restriction on competition in the first place or must fall outside the scope of Article 101(1) TFEU because the legitimate objectives it seeks to protect constitute a permitted ancillary restraint. Even if the relevant initiative fails to satisfy the criteria under Article 101(1), it may still benefit from an exemption under Article 101(3) TFEU or, ultimately, be turned into legislation that is consistent with free movement law.

The dispute as to the legally binding nature of sustainability certification requirements does not discard labelling from the scope of application of Article 101(1) TFEU. In principle, voluntary environmental agreements made with the view of the parties imposing upon themselves the obligation to use environmentally friendly products can also be covered. It is noteworthy, however, that the unilateral measures of one party towards one or several others and internal restrictions of production as well as mere parallel action do not fall under Article 101 TFEU.[90]

Certification, when performed by a third-party certification body, is an archetypal case of parallel action. A certified company will usually neither be aware of the totality of its competitors who are certified nor of those applying for a certificate. On

[87] Core argument by Monti, (81), 1059–1083.

[88] Ioannis Lianos, (11), 'Some reflections on the questions of the goals of EU competition law' in Ioannis Lianos and Damien Geradin (eds), Handbook on European Competition Law (Edgar Elgar 2013) 1, 2.

[89] Kingston, (12), 97–194.

[90] See Commission Decision 85/74/EEC of 23 November 1984, Case No. IV/30.907 – *Peroxygen products* [1985] OJ L 35, [45], which highlights the necessary independent decision on business policies; H. Schröter and P. Voet van Vormizeele, "Art. 101 TFEU" in *NomosKommentar Europäisches Unionsrecht* (edited by H. von der Groeben, J. Schwarze and A. Hatje, Nomos, 7th ed, 2nd vol, 2015), [47].

the contrary, a certain degree of exclusivity is necessary for the signalling effect of certification.[91] Unlike in the present 'leading cases' on private sustainability initiatives, which include concerted action between companies,[92] no direct agreement between competitors is involved. Furthermore, the certification body, as an intermediary, has a genuine purpose as a third party and is not recurred to in a fraudulent way with the objective to circumvent the scope of Article 101(1) TFEU.

Against this background, only labels that are based on an understanding between competitors to use them in order to raise minimum standards on a broader scale are likely to be problematic. Equally, those initiatives would not likely benefit from the ancillary restraint principle privileges that Article 101(1) TFEU grants to standardisation agreements (essentially agreements by professional associations, which are non-discriminatory, open to all market actors and follow transparent procedures).[93] Despite the balancing that is performed within Article 101(1) TFEU, Article 101(3) TFEU provides a clearer structure and forum within which to include public policy interests.[94]

Under Article 101(3) TFEU, four cumulative conditions have to be met for a *de jure* exemption. The first condition, which concerns there being an "improvement in the production or distribution of goods" or the "promotion of technical or economic progress", forms the most complicated bottleneck for sustainability initiatives. The Commission ultimately remains in a reasoning around efficiency, either in terms of costs or product variety.[95] This is well illustrated by the *CECED* case,[96] which concerned an agreement between the majority of manufacturers of washing machines in the EU. The purpose of the agreement was to phase out those washing machines with particularly high levels of electricity consumption. Although the agreement limited consumer choice and may have put market actors who would find it more difficult to adapt to a more energy-efficient design at a disadvantage, the Commission granted the exemption. However, the Commission did not ground its reasoning in sustainability policies, rather such was based on economic efficiency

[91] This exclusivity contrasts with network effects, which require a critical mass (i.e. an 'installed base') of certified competitors; for details, see Kim, (84), 217 et seqq.

[92] See Case C-309/99, *Wouters* (2002) ECR I-1577; Case C-519-04 O, *Meca-Medina* (2006) ECR I-6991; for a narrow interpretation of these cases, see H. Schweitzer, "Competition Law and Public Policy: Reconsidering an Uneasy Relationship – The Example of Article 81" in *Economic Theory and Competition Law* (edited by J. Drexl, L. Idot and J. Monéger, Edward Elgar, 2009), 136–139.

[93] *Ibid.*

[94] For a critique of foreseeability of results under (today's) Article 101(1) TFEU, see C. Townley, *Article 81 EC and Public Policy* (Hart, 2009), 249–250.

[95] Communication from the Commission, "Guidelines on the Application of Article 81(3) of the Treaty", [2004] OJ C101/97, [59] et seq.

[96] Commission Decision 2000/475/EC of 24 January 1999, Case No IV.F.1/36.718 – CECED [2000] OJ L 187, 47.

justifications.[97] Such a widened definition of efficiency may indeed incorporate some environmental benefits, those which can be economised and quantified,[98] whilst excluding other concerns, such as ecological diversity or animal welfare, that cannot. Hence, in the absence of objective economic benefits, non-economic justifications are only likely to succeed if they can piggyback on efficiency justifications, which support them in any event.[99]

However, 'economic progress' seems a viable entry-point for a broader set of considerations. In fact, it calls for the recapitulation of the functioning of sustainability labelling in the manner set out above. It is widely regarded as part of the genius of the price code to allow for market exchanges to occur under conditions that would otherwise involve high levels of disagreement.[100] Despite this prototype of impersonal market transactions, contemporary practice reveals them as communications about a variety of factual and normative convictions that are irreducible to price alone.[101] In other words, sustainability initiatives, such as labelling, not only allow for product differentiation but also for discourse differentiation. In relation to the latter, sustainability initiatives enable societal reassurances to be given with regard to modes of consumption and production. While some consensus on these questions could likely be assumed and upheld within a nation state under the nexus between capital, labour and the state, they require adjusted responses under globalisation.[102] Providing for the establishment of 'structural couplings'[103] between the economic system and the food system, respectively, with law, politics, environment, health etc. is normatively valuable and can be qualified as 'economic progress'.[104]

This proposition would not necessarily give rise to legal uncertainty. When Article 101(3) TFEU began to be applied directly by a decentralised set of actors, which included national courts and competition authorities, concerns relating to political

[97] *Ibid*, [56], which states that "such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines".

[98] Kingston, (12), 293.

[99] *Ibid*, 267.

[100] On the condensation of knowledge in prices, see D. Wielsch, "Die epistemische Analyse des Rechts", (2009) *Juristenzeitung*, 71; on the narrow scope of consensus among market actors required by prices, see D. Satz, *Why Some Things Should Not be for Sale* (Oxford University Press 2010), 21.

[101] A. Dorfman, "Against Market Insularity: Market, Responsibility and Law", (2018) *Cornell Journal of Law and Public Policy*, 553.

[102] On the normative, political and technological (amongst other) dimensions of uncertainties emanating from globalisation, see U. Beck, "World Risk Society and Manufactured Uncertainties", (2009) 1 *Iris*, 291.

[103] On the concept, see N. Luhmann, *Theory of Society* (trans by Rhodes Barrett, Stanford University Press 2012, vol 1), 49 et seqq.

[104] My claim seems to be a variant of deontological arguments along the lines of O. Andriychuk, "Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process", (2010) 6 *European Competition Journal*, 575.

discretion and inconsistency intensified.[105] The incommensurability of policies and interests is a basic problematic feature of balancing as a philosophical[106] and legal exercise[107] that competition law has been able to avoid so far only due to the constructed simplicity of the leading paradigm of consumer welfare. Given this tight link with a specific paradigm that it petrifies, the methodological difficulties of incommensurability[108] are not as such an argument against public policy considerations under Article 101(3) TFEU but rather call for more sophisticated case-law and doctrinal work. By not formulating a hierarchical set of values, the TFEU specifically instigates these reflections. At this stage, competition law, as a legal regime interested in actual market processes, seems to be the ideal forum in which to separate 'the wheat from the chaff' among sustainability initiatives and deal with the crises of legitimacy and trust surrounding the certification process, with key issues being the proliferation of schemes,[109] the problem of free-riders and first-mover disadvantages. It has been noted that big brands may capture labelling.[110] They do this in order to increase the costs incurred by their competitors.[111] A high degree of specificity in labelling standards may decrease the number of competitors by generating a niche market for product differentiation. In addition, the character, number and costs of audits may, in effect, provide a significant advantage rather to bigger than to smaller firms. Ultimately, the economic benefit of a certificate may be impeded by a non-certified competitor who seeks to undermine the integrity and reputation of a certification scheme. Each of these scenarios illustrates possible, serious anti-competitive concerns. The risk that these concerns materialise, however, can be detected by competition law relatively early on. A competition law

[105] R. Ellger, "Article 101(3) TFEU" in *EU-Wettbewerbsrecht* (edited by U. Immenga and E.-J. Mestmäcker, CH Beck, 5th ed, 2012), [314].

[106] For foundations on value pluralism, see I. Berlin, *Historical Inevitability* (Oxford University Press, 1955).

[107] On the structure of balancing, see R. Alexy, A *Theory of Constitutional Rights* (Oxford University Press, 2002); for a forceful critique of its 'hidden agenda', see K.-H. Ladeur, "A Critique of Balancing and the Principle of Proportionality in Constitutional Law – a Case for "Impersonal Rights"?" (2016) 7 *Transnational Legal Theory*, 228; in the context of Article 101(3) TFEU, see Andriychuk, (11), 178–234.

[108] As pointed out by E.-J. Mestmäcker and H. Schweitzer, *Europäisches Wettbewerbsrecht* (Beck, 3rd ed 2014), §14, para 86; similarly O. Odudu, "The Wider Concerns of Competition Law", (2010) 30 *Oxford Journal of Legal Studies*, 599, which focuses on the excess of competences and the limits of justiciability.

[109] Interestingly, problems arising from the proliferation of diverging schemes are already addressed by private initiatives. The Global Food Safety Initiative ('GFSI'), <https://www.mygfsi.com>, which is run by industry leaders from the Consumer Goods Forum association, sets benchmarks and harmonises private food safety standards for products already on the market. Schemes that are recognised by the GFSI are deemed as guaranteeing a comparable level of protection.

[110] Dauvergne and Lister, (50).

[111] G. Grolleau, L. Ibanez and N. Mzoughi, "Industrialists Hand-In-Hand with Environmentalists: How Eco-Labeling Schemes Can Help Firms to Raise Rivals' Costs", (2007) 24 *European Journal of Law and Economics*, 215–236.

assessment which cares to decipher the ambitions behind sustainability initiatives by taking their design, participation structure, substantive standards and accessibility into account may, therefore, serve competition and sustainability alike.

2. Unbundling the 'Private' in 'Private Sustainability Governance'

More specifically, such an assessment could serve as a valuable contribution to developing a more context-sensitive understanding of the normative and practical implications of the 'private' nature of such initiatives. While the dividing line between the public and a private realm has lost the structuring force that it traditionally had under liberal political (and classic legal) thought,[112] the category of 'private' today sometimes serves more to obscure than to clarify. As such, the private character of sustainability labelling does, in fact, challenge the conventional division of labour in competition and trade law when addressing private and public regulatory power respectively. Indeed, framing matters because of the different background assumptions, default rules and exemptions of either legal field.

Responding to growing public awareness around animal welfare, supermarkets, poultry farmers and meat processors in the Netherlands, in 2013, decided to introduce a sector-wide minimum sustainability requirement (i.e. the 'Chicken of Tomorrow' requirement). The initiative was welcomed by the Dutch Government, which is currently seeking to phase out conventional poultry methods through industry-based initiatives. When conducting the test under Article 101(3) TFEU, the Dutch competition authority, the Authority on Consumers and Markets ('ACM'), focused on consumer's willingness to pay. It concluded that the Chicken of Tomorrow initiative would harm consumer welfare. The ACM proceeded to add that eco-labels would be preferable for achieving the goal of informed sustainability. The focus on willingness to pay has rightly been criticised. It is a criterion that is insensitive to consumer motivations and, more importantly, does not represent the views of consumers who either do not purchase chicken at all or who cannot afford sustainable chicken although it might, in fact, be their preferred option.[113] The Dutch government responded with a policy that called for the consideration of the long-term effects, effects on society as a whole and the overall effects of a package of measures (not each measure individually).[114] This move by the Dutch government

[112] D. Kennedy, "The Stages of the Decline of the Public/Private Distinction", (1982) 130 *Pennsylvania Law Review*, 1354, which suggests a non-linear process of decline that may include 'loopification'.

[113] G. Monti and J. Mulder, "Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives", (2017) 42 *European Law Review*, 641.

[114] Beleidsregel van de Minister van Economische Zaken van 30 september 2016, nr. WJZ/16145098, houdende beleidsregels inzake de toepassing door de Autoriteit Consument en Markt van artikel 6, derde lid, van de Mededingingswet bij mededingingsbeperkende afspraken die zijn gemaakt ten behoeve van duurzaamheid, Official documents Stcrt. 2016, 51945 <https://zoek.officielebekendmakingen.nl/stcrt-2016-52945.html>.

https://doi.org/10.1017/9781108554947.017 Published online by Cambridge University Press

was confronted by strong opposition from the EU Commission as the latter has endorsed regulation, not competition law, as a means for protecting extra-competitive values.[115]

This situates the debate on a level which comprises the fundamentals of private ordering and the mono-functionality of the concept of 'consumer welfare'. Ironically, by reviving an overly classical view of state-market relationships and, thereby, assuming separated spheres of rationality for the 'market' and 'regulation', the Commission has contributed to a totalising reading of consumer welfare that may result in structural corruption of other social spheres by the market. Furthermore, competition law needs to consider the plurality of motivations behind sustainability initiatives on both the scheme holder side and the consumer side. As one commentator on the *CECED* case put it, when "private restraints reflect a value judgment that private planning better protects the public interest than the competitive process and that the former may therefore replace the latter, the limit for exemptions ... is reached".[116] While some scepticism towards a private representation of public interests is justified,[117] this view loses some of its persuasive power in light of the global processes of production. In fact, the example of GVCs, in many ways, illustrates an unwillingness or inability of states to serve as advocates of the public interest. Those private initiatives and consumers that politicise their market activity and purchasing decisions in order to fill this void object to the isolation of a market sphere in a pre- or post-regulatory world. In addition, the majority of contemporary regulatory theories suggest that, nowadays, effective regulation requires inclusive arrangements that link public and private actors and their knowledge and expertise. Most labelling and multi-stakeholder initiatives try to make use of similar regulatory resources.

V. CONCLUSION

The structure of the modern global food system into GVCs has stemmed from a combination of deregulation as well as new technological and legal modes of organisation. The risks associated with the complexity of GVCs for food safety, sustainability, animal welfare, environmental concerns and workers' rights are addressed by a variety of initiatives, which have become an important part of the competitive food order. Rather than creating an external distortion of the market, these initiatives pluralise markets from within by allowing for differentiated discourses on viable modes of production. This resonates with the constitutional dimension of the market order as conceived by the ordoliberal tradition and shows

[115] Commisison Letter, attachment to Kamerbrief Minister van Economische Zaken aan de Tweede Kamer inzake Mededinging en Duurzaamheid of 24 June 2016, Kamerstukken II 2015/16, 30196, 463.
[116] Schweitzer, (90), 149.
[117] See, however, Cafaggi, (32), 695.

that some leniency with such initiatives can be reconciled with competition law and even positively justified in light of theories concerning it. In fact, by reconciling the different social rationalities under which a GVC operates, certification equally displays such a constitutional dimension in a non-statist sense.[118] For competition law, recognising the positive and necessary ordering effects of private governance of food GVCs in light of globalisation is not meant to imply that private sustainability initiatives should just be validated without closer scrutiny. Rather, the argument has been made in this chapter that competition law should formulate guidelines to meaningfully distinguish between different private ordering initiatives. In light of the known flaws in the incentive structure of certification, competition law may decipher the ambitions and robustness of claims of private ordering by looking at their design, participation structure, substantive standards and accessibility. This would link effective vigilance vis-à-vis anti-competitive effects with a renewed understanding of the public interest in a fragmented transnational sphere and might help to moderate spill-over effects of competition law to various non-market social spheres.

[118] Eller, (7), 321–322.

https://doi.org/10.1017/9781108554947.017 Published online by Cambridge University Press