



Public Play upon Private Standards. How European and International Economic Law Enter into Voluntary Regimes for Sustainability
E.D. Partiti

Summary

The emergence, consolidation, and proliferation of private product standards in the domain of sustainability has been one of the most striking features in global governance in the social and environmental fields. Companies, sectoral associations and multi-stakeholder organisations set and enforce standards defining products and process features in domains ranging from forestry to fisheries, from agricultural products to raw materials, and from textiles to biofuels. Certified goods, as well as Fair trade and animal welfare-compliant products are now ubiquitous in European stores and homes. Voluntary sustainability standards (VSS) are non-mandatory (in some cases market-based) regulatory schemes designed by private bodies with the purpose of addressing, directly or indirectly and by means of third-party certification of products and processes, the social and environmental impact resulting from the production of goods. As these initiatives do not just represent a market niche but go mainstream, the study of their effects and the possibilities for regulators to intervene in their coordination, influence and review becomes pressing. Following the assertion that public authorities should play an increasingly visible role in transnational private regulation by means of directing mechanisms, this book examines the interaction between VSS and the rules and meta-rules of European and international economic law regimes. The goal of this dissertation is to assess the extent to which European Union (EU) internal market law and World Trade Organisation (WTO) law apply, or can be interpreted to apply to VSS, in particular with the goal to address and remedy barriers to market access and consumer confusion generated by private standards.

This book illustrates the presence of a multilayered system of norms at the WTO and EU level which applies or has the potential to apply to many different types of VSS. WTO provisions enshrined in the Technical Barriers to Trade (TBT) Agreement lay down broad 'constitutional' meta-requirements applying to private standards also in the sustainability domain. Such application is however indirect, i.e. mediated by 'reasonably available' measures WTO Members are required to take to ensure private standards' compliance with such principles. EU internal market law, and in particular freedom of movements provisions, could apply under certain conditions to voluntary private standards which affect market access. Furthermore, standards which are drafted by undertakings and have an impact on market parameters and consumer welfare fall under the scrutiny of EU competition law. The underdevelopment of these legal areas, in particular *vis-à-vis* private standards, however requires normative interpretation to understand their possible application to VSS. This book shows that the non-discrimination and necessity provisions applicable to private standards and contained in WTO Agreements, freedom of movement obligations under Art. 34 TFEU, and EU competition law discipline under Articles 101 and 102 TFEU, can all be interpreted in a manner which remedies the most serious trade barrier effects and

confusion generated by the schemes, potentially even permitting an extent of review over the standards' contribution to their objective.

The analysis in Chapter 3 concluded that, in addition to the freedom of circulation of persons, also Art. 34 TFEU is in principle applicable to private measures, provided that compliance with a standard is an essential condition for market access. Where a VSS exercises a market gate-keeping power it could be held in breach of Art. 34 TFEU. However, in many cases, such an infringement would be justifiable under public policy objectives, or under the fundamental right of private autonomy. Chapter 4 revealed a host of problems in treating VSS in the same deferential manner as technical standards under Art. 101 TFEU. The hands-off approach which characterises competition scrutiny of technical standards would be inappropriate for highly normative standards that do not generate many of the efficiencies traditionally associated to technical standardisation. Instead, Chapter 4 argued that a better analytical approach to VSS should always include a full appraisal of their anti-competitive effects and the efficiencies generated. The latter should be understood broadly as to permit all positive effects generated by private standards to account for their justification, and to empower a competition authority to fully appraise all negative and positive effects generated by a private scheme.

Chapter 6 elucidated how the WTO principle of non-discrimination may be structurally conflicting with standards whose explicit objective is to modify the conditions of competition between products by identifying 'quality' goods. In addition, WTO Members' implementation of the provisions of the TBT Code of Good Practice for standards would be very burdensome if the obligation to scrutinise all the regulatory distinctions of a standard were to be interpreted in the same manner as for public measures. A possible deferential approach to non-discrimination could limit the appraisal to assessing whether the standard is aligned to provisions of internationally agreed upon agreements in the social and environmental domains, and to conduct and in-depth assessment only in cases of deviations, more stringent requirements, or in the absence of international agreements. This disciplined approach to non-discrimination, coupled with a necessity obligation taking the form of a suitability test and a relaxed application of the obligation to base standards on international standards, would be capable to address and remedy the most blatant cases of discrimination and market restriction, possibly under a protectionist rationale, while leaving sufficient scope for private autonomy and experimentation in regulatory approaches.

This dissertation has exposed a tension between EU and international economic law and voluntary measures which are an emanation of authority unconnected to public authority. As the actual voluntary character of a private standard may vary in practice,

under EU freedom of movement and competition law a closer scrutiny of VSS is to be expected as standards become less of a voluntary choice for producers. A certain uneasiness of the law, especially under WTO rules, can be observed with respect to the formal features of the prescriptive content of standards. The frequent employment of management system requirements could exclude certain VSS from the application of WTO discipline, and would complicate considerably the assessment under competition law of the positive effects generated by a scheme. All in all, the highly normative content of VSS and the potential distributive effects generated require different legal approaches than those applied to other private regimes. The process of constitutionalisation of this specific form of private regulation has a long way to go.

This book also shows that *ad-hoc* solutions such as those employed under EU law could be effective under specific circumstances to direct, orchestrate and coordinate private standards to limit trade barrier effects, ensure consumer trust, and schemes' effectiveness. These solutions encompass a host of different measures in the domain of market regulation that, without directly regulating private schemes, are nevertheless capable of indirectly addressing and improving procedural and substantive features of VSS. The employment of private standards is increasingly permitted in trade measures to serve as a verification of compliance with certain requirements, or as a tool to demonstrate the legality of the products in question. The possibility to employ a standard comes with strings attached; often requirements are laid down addressing features of the standard or the process that brought it to existence. These types of interaction between public and private authority constitute promising mechanisms to exert influence on private standards and steer transnational private regulation by means of incentives and the legitimacy generated by the association of private standards to public authority. They also bring back, if partially, the regulation of transnational phenomena under a degree of control of the public authority.