Sustainability Standard-Setting in the Shadow of the Law

Eva van der Zee

Propositions

1. Insights from social sciences are necessary to conduct critical legal research in the field of international and EU economic law. (this thesis)

2. Legal interpretation based on the noncritical application of neoclassical law and economics unduly inhibits sustainable development. (this thesis)

3. Wicked problems cannot be dealt with by focusing solely on personal responsibility but require a focus on the underlying system.

4. Systematic application of the Socratic method by politicians reduces polarisation.

5. A healthy lifestyle increases productivity.

6. Animal welfare trumps human pleasures.

Propositions belonging to the thesis, entitled:

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Table of Contents

List of Abbreviations

ACC	Advertising Code Committee
ACM	Autoriteit Consument en Markt
AICDP	Agreement on the International Dolphin Conservation Program
ASC	Aquaculture Stewardship Council
CAC	Command and control
CBA	Cost-benefit analysis
CECED	European Committee of Domestic Equipment Manufacturers
Cf	Compare
CFR	Charter of Fundamental Rights of the European Union
d	Effect size
DAC	Dutch accreditation body
E.g.	For example
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
ETP	Eastern Tropical Pacific
EU	European Union
EVU	European Vegetarian Union
FDA	Food and Drug Administration
FIR	Food Information Regulation
GATT	General Agreement on Tariffs and Trade
GFL	General Food Law
GLOBALG.A.P.	Global good agricultural practice
GM	Genetically modified

HAP-LH	Human, animal, or plant life or health
i.e.	That is
ICJ	International Court of Justice
IEC	International Electrotechnical Commission
IGO	Intergovernmental organization
IIA	International investment agreement
ISEAL	International Social and Environmental Accreditation and Labelling
ISO	International Standard Organization
ITA	International trade agreement
KPMG	Klynveld, Peat, Marwick and Goerdeler
LSD	Least significant difference
M	Mean
MSC	Marine Stewardship Council
n	Sample size
NCA	National competition authority
NGO	Non-governmental organization
p	Significance
PDO	Protected designation of origin
PGI	Protected geographical indication
PPM	Process and production method
SD	Standard deviation
SPS	Sanitary and phytosanitary measures
SWB	Subjective well-being
TBT	Technical barriers to trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSG	Traditional specialty guaranteed
UCPD	Unfair Commercial Practices Directive

UK	United Kingdom
UN	United Nations
USA	United States of America
VSS	Voluntary sustainability standard
WTO	World Trade Organization
WTP	Willingness to pay

1

General Introduction

1.1. Introduction

Western governments seem to consider voluntary sustainability standards (VSSs) as instrumental to the objective of promoting sustainable development.[1] This fits within a shift in governance that has taken place from traditional command-and-control regulatory (CAC) instruments used by classical government institutions to market-based regulatory instruments used by NGOs, industry associations, and public-private partnerships.[2] VSSs are voluntary regulatory schemes designed and enforced by private bodies, sometimes in cooperation with public bodies, with the purpose of promoting sustainable development. They set norms for markets in a large number of developed and increasingly also developing countries to produce more sustainably,[3] they monitor compliance through certification schemes,[4] and they have mechanisms in place for holding the behaviour of regulated actors within the set norms through granting or withholding market access.[5] VSSs are decentred from the state as they are based on interactions and interdependencies between social actors and/or governments.[6] Yet they may derive regulatory authority from the manipulation of global markets and attention to consumer preferences.[7] As such, they can be considered regulatory instruments aimed at promoting sustainable development.

An example of a VSS that effectively promotes sustainable development is the private initiative by all Dutch supermarkets to individually stop the sale of eggs from laying hens in battery cages (battery eggs). Although Dutch supermarkets successfully stopped the sale of battery eggs to the extent that virtually no battery egg can be found in Dutch supermarkets today,[8] numerous food products using conventional and possibly

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[1] World Summit on Sustainable Development (WSSD) 2002. Plan of Implementation. Johannesburg: United Nations.

[2] See e.g. Tom Tietenberg, 'Disclosure Strategies for Pollution Control' (1998) 11 Environmental and Resource Economics 587; Daniele Giovannucci and Stefano Ponte, 'Standards as a New Form of Social Contract? Sustainability Initatives in the Coffee Industry.' (2005) 30 Food Policy 284; Fabrizio Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 Fordham International Law Journal 1557; Kai Purnhagen, 'Mapping Private Regulation – Classification, Market Access and Market Closure Policy and Law's Response' (2015) 49 Journal of World Trade 309.

[3] Thomas Reardon, Peter Timmer and Julio Berdegue, 'The rapid rise of supermarkets in developing countries: Induced organisational, institutional and technological change in agri-food systems' (2004) 1 Journal of Agricultural and Development Economics 525 at 15.

[4] See Maki Hatanaka, Carmen Bain and Laurence Busch, 'Third-party certification in the global agrifood system' (2005) 30 Food Policy 354; see also Commission Communication, EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuff [2010] OJC 341.

[5] Axel Marx and others, *Private Standards and Global Governance Economic, Legal and Political Perspectives* (Edward Elgar Publishing ed, 2012); Purnhagen (2015).

[6] Julia Black, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy; Jan Kooiman, 'Findings, Speculations and Recommendations ' in Jan Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage London 1993), n 6, 253; Roderick Arthur William Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Open University Press, Buckingham, Philadelphia 1997); Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press 1999), chapter 1; Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press, Oxford 1989).

[7] Benjamin Cashore, 'Legitimacy and the Privatisation of Governmental Governance: How NSMD Governance Systems Gain Rule-Making Authority' (2002) 15 Governance: An International Journal of Policy, Administration and Institution.

[8] Trouw, "Alleen maar eerlijke eieren", 1 April 2010.

unsustainable production processes continue to be sold. Unlike for battery eggs, supermarkets may not be willing to *individually* ban all products produced in an unsustainable way due to a higher risk of first-mover disadvantages.[9] For example, the risk of first-mover disadvantages is higher for meat products, because consumers do not select a supermarket based on the price of eggs, but they do select a supermarket based on the price of meat.[10] Agreements between supermarkets could prevent such first-mover disadvantages but such private sustainability agreements may be prohibited by EU competition law as they can be considered to withhold market access.[11] When supermarkets do not *individually* ban unsustainable products, governments may regulate unsustainable products and production-processes. However, unsustainable products and production-processes may not be effectively regulated through public CAC regulation[12] or such public regulation may be prohibited by WTO law.[13] When private and public initiatives fail to regulate unsustainable products and production-processes effectively, it is left to the market to promote sustainable consumption. For the market to promote sustainable consumption successfully, consumers have to be able to recognize sustainable products and production-processes and willing to pay a price premium. Product labelling may increase the ability of consumers to recognize sustainable products and production-processes. The clarity of such product labels to consumers partly depends on the leeway EU consumer law gives to public authorities to regulate misleading information.

In other words, public and private initiatives aimed to promote sustainable development may be limited by laws, such as EU competition law, EU consumer law, and WTO law. Laws may, thus, set boundaries to the regulatory space VSSs have to promote sustainable

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[9] Giorgio Monti and Jotte Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' (2017) 42 European Law Review, 636.

[10] Patrick DeGraba, 'The Loss Leader is a Turkey: Targeted Discounts from Multi-product Competitors' (2006) 24 International Journal of Industrial Organization 613, 613-28.

[11] See for an example in which the Dutch National Competition Authority argued that a private sustainability agreement between supermarkets to stop the sale of conventional chicken was in violation of EU and Dutch competition law. Autoriteit Consument en Markt, 'Analyse ACM van Duurzaamheidsafspraken 'De Kip van Morgen'' (2015) https://www.acm.nl/nl/download/publicatie/?id=13758 accessed 31 March 2017.

[12] Robert Baldwin and Antao Fernandez, *Is Regulation Right?* (CARR Discussion Paper 0 (Launch Paper), 2000); James Evans, *Environmental Governance* (Routledge London 2011); David Downie, 'Global Environmental Policy: Governance Through Regimes' in Regina Axelrod, David Downie and Norman Vig (eds), *The Global Environment: Institutions, Law and Policy* (2nd edn, CQ Press 2005), 64-82; Michael C Appleby, Daniel M Weary and Peter Sandoe (eds), *Dilemmas in Animal Welfare* (CABI Publishing 2014) at chapter 5.7; Laura T. Raynolds, Douglas Murray and John Wilkinson (eds), *Fair Trade: The Challenges of Transforming Globalization* (Routledge 2007); Black (2002), n 6; Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998); Jonathan Cave, Chris Marsden and Steve Simmons (2008) Options for and Effectiveness of Internet Self- and Co-Regulation, *Options for and Effectiveness of Internet Self- and Co-Regulation* (RAND Europe 2008), 111; Darren Sinclar, 'Self-regulation versus Command and Control? Beyond False Dichotomies' (1997) 19 Law and Policy at 529-559.

[13] See for an example of how WTO law could prohibit public measures aimed at promoting sustainable production-processes: WTO Appellate Body, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II)* [16 May 2012] WT/DS381/AB/R.

development. Regulatory space is an analytical construct employed to describe and examine the environment within which regulation takes place.[14] Within this regulatory space there are exchanges and interdependence relationships between a range of non-state and state organizations, which are linked through networks and often compete for power.[15] These exchanges and interdependence relationships may be governed by law. Laws, therefore, also exist in the regulatory space,[16] and may compete for power with VSSs. The extent to which laws set boundaries to the regulatory space of VSSs depends on the interpretation and applications of these laws, which in turn depends on the underlying normative assumptions. The interaction between the interpretation and application of laws and VSSs determines the boundaries set by these laws to the regulatory space available to VSSs to promote sustainable development.

The regulatory space for VSS-setters to promote sustainable development that follows from the interaction between the application and interpretation of laws and VSSs remains unclear. From the perspective of promoting sustainable development, this is problematic as this lack of clarity may allow for an interpretation and application of specific legal provisions that inhibits the potential of VSSs to promote sustainable development. This is especially problematic in international and EU economic law, where sustainable development is an important objective.[17] As such, a complex situation has arisen where sustainable development is an important objective in international and EU economic law, while clarity as to the regulatory space left by international and EU economic law for VSSs to promote sustainable development is lacking.

This dissertation describes and examines the interaction between the interpretation and application of international and EU economic law and VSSs within the regulatory space to promote sustainable development.[18] This interaction emerges as the interpretation and

[14] Eric Windholz, *Governing through Regulation Public Policy, Regulation and the Law* (Routledge 2017) at Chapter 4; See Hancer & Moran (1989), who are generally acknowledged for having coined the term, Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press Oxford 1989). See Scott (2001) about a more elaborate discussion on the concept of regulatory space and the role of law therein, Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) Public Law 329.

[15] Bettina Lange, 'Regulatory Spaces and Interactions: An Introduction' (2003) 12 Social and Legal Studies.

[16] Ibid.

[17] See e.g. the preamble to the Treaty on European Union (TEU) stating the determination "to promote economic and social progress for their peoples, taking into account the principle of sustainable development"; Article 3 TEU states that the Union's "aim is to promote (...) well-being of its peoples, which can arguably be equated with sustainable development or at least is an important component of it (see e.g. Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Report by the Commission on the Measurement of Economic Performance and Social Progress* (Paris, 2009)); the preamble to the Charter on Fundamental Rights (CFR) states that the EU "seeks to promote balanced and sustainable development; preamble to the 1994 Marrakesh Agreement Establishing the WTO recognising sustainable development as an overarching objective. The importance of this objective was confirmed by the WTO Members in the 2001 Doha Declaration (2001 Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, Adopted 14 November 2001). See also WTO Appellate Body *United States-Import Prohibition of Certain Shrimp and Shrimp Products(US-Shrimp)* [12 October 1998] WT/DS58/AB/R.

[18] Although other factors may limit this regulatory space of VSSs as well, these factors are outside the scope of this study.

application of international and EU economic law to VSSs differs depending on the underlying normative assumptions. To describe and examine this interaction, this dissertation focuses on a selection of case studies, i.e. EU consumer law, EU fundamental rights law, WTO law, and EU competition law, to illustrate that the extent to which these areas in law set boundaries to the regulatory space of VSSs to promote sustainable development depends on the different normative assumptions underlying legal interpretation and application. It is shown that the normative assumptions that underlie legal interpretation and application within this areas in law are often derived from a noncritical application of neoclassical law and economics.[19] Such assumptions may have an inhibiting effect on the potential of VSSs to promote sustainable development. This inhibitive effect can be remedied by critically examining the normative assumptions derived from neoclassical law and economics by critically applying insights from welfare economics, consumer science, moral philosophy, and new governance theory in the legal interpretation and application of international and EU economic law.

Within the remainder of this general introduction I will show in Section 1.1.1. that VSS-setters are increasingly regulating sustainable consumption and production, thereby operating as a regulatory authority to promote sustainable development. In Section 1.1.2., I will show that international and EU economic law may inhibit the potential of VSSs to promote sustainable development when legal interpretation and application is based on the noncritical application of normative assumptions derived from neoclassical law and economics. In Section 1.1.3., I will show that such an inhibitive effect is problematic as sustainable development is an important objective in international and EU economic law. In Section 1.2. I will introduce the aims and research questions of this dissertation, followed by the methodology (Section 1.3) and the structure of this dissertation (Section 1.4).

[19] See on the impact of neoclassical law and economics in EU unfair commercial practices law: Hans W. Micklitz, 'Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' in Hugh Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law,* (Kluwer Law International 2008); Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms – Cautions and Considerations' (2011) 34 Journal of Consumer Policy. See on the impact of neoclassical law and economics in EU competition law: Andreas Heinemann, 'A "More Realistic Approach" to Competition Law' in Klaus Mathis (ed), (Springer 2015). See on the impact of neoclassical law and economics in WTO law: Robert Howse, 'Consumer Labelling on Trial at the WTO: Misunderstanding the Behavioural Law and Economics of Consumer Information' in Marise Cremona and others (eds), *On the Constitutionalism of International Economic Law Liber Amicorum for Ernst-Ulrich Petersmann* (Brill 2013).

1.1.1. VSSs Replacing Command-and-Control Regulation in Regulating Sustainable Development

By setting norms, monitoring and enforcing compliance, VSSs have largely complemented or replaced CAC regulation to regulate international trade in a sustainable manner.[20] This can hardly be considered a coincidence as CAC regulation is generally considered to suffer from a number of shortcomings,[21] especially as transboundary complex problems, such as climate change, animal welfare, and fair trade, have risen in prominence.[22] Black defines a number of main shortcomings of CAC.[23] First, the instruments used by CAC regulation are laws backed by sanctions which are considered inappropriate and unsophisticated in such complex cases (instrument failure). Second, CAC regulation is based on the premise that the government alone has sufficient knowledge to regulate, while solving complex, diverse and dynamic problems requires collaboration between several actors (information and knowledge failure). Third, CAC regulation often does not provide enough incentives for regulatees to comply (motivation failure), while regulators act in favour of the regulated industry or themselves instead of the public's interest (capture theory).[24] Others add that CAC regulation is slow,[25] costly, and inhibits innovation.[26]

Regulation that is decentred from the state may remedy these shortcomings of CAC regulation.[27] Decentred regulation has at its core the existence and complexity of interactions and interdependencies between social actors, and between social actors and

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[20] Kenneth Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) [42] VanderBilt Journal of Transnational Law 501; Cafaggi (2013), n 2.; Purnhagen (2015), n 2.; Marx and others (2012), n 5; Joost Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties' (2014) 17 Journal of International Economic Law 739; Erik Wijkström and Devin McDaniels, 'Improving Regulatory Governance: International Standards and the WTO TBT Agreement' (2013) 47 Journal of World Trade 1013.

[21] Baldwin and Fernandez (2000), n 12.

[22] See on the complexity of climate change governance: Evans (2011), n 12; Downie (2005), n 12, 64-82; see on the complexity of animal welfare governance: Appleby, Weary and Sandoe (2014), n 12, at chapter 5.7; see on the complexity of fair trade governance: Raynolds, Murray and Wilkinson (2007), n 12.

[23] Cf Black (2002), n 6, 2.

[24] See also Makkai and Braithwaite (1998), n 12.

[25] Cave, Marsden and Co-Regulation (2008), n 12, 111.

[26] Sinclar (1997), n 12, 529-559.

[27] Black (2002), n 6, at 4; Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Anti-Trust, and Social Welfare Law* (Walter de Gruyter Inc, Berlin 1987);
Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter Inc, Berlin 1986); Gunther Teubner and Alberto Febbrajo (eds), *State, Law, Economy as Autopoietic System:s Regulation and Autonomy in a New Perspective* (Giufre Milan 1992); Gunther Teubner, Lindsay Farmer and Declan Murphy (eds), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-organization* (Wiley, New York 1994); Roeland In't Veld and others (eds), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Kluwer Academic Publishers Dordrecht 1991); Michel Foucault, 'Govemmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Govemmentality* (Harvester Wheatsheaf, London 1991) Nikolas Rose and Peter Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 British Journal of Sociology 173 Rose (1999) n 6; Kooiman (1993), n 6.

government in the process of regulation.[28] In addition this process of regulation goes well beyond the national territorial boundaries,[29] which is necessary when regulating transboundary complex issues. Decentred regulation, such as Rainforest Alliances, EU organic, Fair Trade International, and Marine Stewardship Council, could be considered more effective in solving such transboundary complex issues, than CAC regulation. These VSSs set norms for sustainable development which are monitored through certification schemes, and enforced through granting or withholding market access. In addition, the standards are not based on laws backed by sanctions, but they are market based, which may remedy the instrument failure of CAC regulation.[30] In addition, these VSSs are 'co-produced',[31] i.e. the standards are the result of a collaboration between all those involved in the standard-setting process,[32] which may remedy information and knowledge failure, implementation failure, and motivation failure and capture theory that is often associated with CAC regulation. Such VSSs may have a great potential to promote sustainable development.

Practice shows that international and EU economic law is often interpreted in a way that inhibits the potential of such VSSs to promote sustainable development. Seemingly, the root of this inhibitive effect of international and EU economic law on VSSs is the noncritical application of normative assumptions derived from neoclassical law and economics. The next section provides an overview of the inhibiting effect of the noncritical application of normative assumptions derived from neoclassical law and economics in the interpretation and application of international and EU economic law to VSSs.

1.1.2. An Overview of the Inhibiting Effect of Neoclassical Assumptions in International and EU Economic Law

Neoclassical theory has severely impacted the interpretation and application of international and EU economic law.[33] Neoclassical theory assumes that individuals act as "rational preference-maximizers who respond to incentives".[34] Law is then considered within neoclassical theory as a price that shapes such incentives.[35] It is assumed that when

[28] Black (2002), n 6; Kooiman (1993), n 6, 253; Rhodes (1997) n 6, at 50-59; Rose (1999) n 6, at chapter 1; Hancher and Moran (1989), n 6.

[29] Ibid.

[30] Dennis Patterson and Ari Afilalo, *The New Global Trading Order* (Cambridge University Press 2008).

[31] See Claus Offe, *Contradictions o fthe Welfare State* (MIT Press ed, 1984).

[32] Julia Black, 'Talking about Regulation' (1998) 77 Public Law.

[33] See on the impact of neoclassical law and economics in EU unfair commercial practices law: Micklitz (2008), n 19; Faure and Luth (2011), n 19. See on the impact of neoclassical law and economics in EU competition law: Heinemann (2015), n 19. See on the impact of neoclassical law and economics in WTO law: Howse (2013), n 19.

[34] Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2009) 95 Cornell Law Review 61, 66.

[35] Ibid.

an individual, the *homo economicus*, is confronted with a variety of choices it will choose the option that yields it the most expected economic welfare.[36] This *homo economicus*, is assumed to be aware of all its preferences, knows all ins and outs of the options with which it is presented and is perfectly able to choose the option that maximizes its own welfare.[37]

Practice shows that the implications of using the noncritical application of these normative assumptions in the interpretation and application of international and EU economic law may have an inhibiting effect on the potential of VSS-setters to promote sustainable development. When the interpretation and application of international and EU economic law based on neoclassical assumptions have such an inhibiting effect can be illustrated by four examples.

The first example is the practice by the Dutch Competition Authority (ACM) who applied Article 101 TFEU (Treaty on the Functioning of the EU) in such a way that the VSS Chicken of Tomorrow was interpreted to be an anti-competitive agreement, which could not be justified as consumers did not receive a fair share of the resulting benefits.[38] Chicken of Tomorrow is a VSSs developed in 2013 by Dutch supermarkets to collectively stop the sale of conventional chicken meat.[39] Although the VSS Chicken of Tomorrow may lead to increased animal welfare, it may also limit competition as it restricts market access to producers of conventional chicken meat. Depending on whether a VSSs can be considered an agreement that limits competition, and how consumer fair share of such an agreement is interpreted under EU competition law, affects whether a private sustainability agreement would be prohibited under Article 101 TFEU.

The ACM seemed to have based its interpretation of 'consumer fair share' on the normative assumption of the rational actor derived from neoclassical theory. The ACM interpreted 'consumer fair share' as the economic welfare in monetary terms of the individual consumer of the product. To examine how much the individual consumer gained in economic welfare in monetary terms from the Chicken of Tomorrow agreement, the ACM used a classical cost-benefit analysis (CBA) based on rational choice theory. The ACM assessed the costs and benefits of private sustainability agreements, using shadow prices and consumer willingness to pay (WTP) to monetarize sustainability benefits. In doing so, the ACM based its assessment of 'consumer fair share' on the assumption of the consumer as a *homo economicus*, who would be perfectly capable to choose the option that would maximize their welfare in monetary terms. Based on the CBA, the ACM concluded that the

[36] For a summary and defence of rational choice theory, see the founding father of law and economics, Richard Posner, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 Stanford Law Review 1551.

[37] Faure and Luth (2011), n 19.

[38] Autoriteit Consument en Markt (2015), n 11.

[39] 'Kip van Morgen' (26 February 2013) <www.cbl.nl/fileadmin/user_upload/formulieren.../Factsheet_Kip_van_morgen.pdf> accessed 18 July 2017.

increased price that the ACM assumed to result from the agreement, did not exceed the monetarized benefits to the individual consumer. The ACM advised the supermarkets to dissolve the agreement.

Crucially, the analysis of the ACM is explicitly publicised as a guide to companies to assess whether their private sustainability agreements comply with the EU competition rules.[40] However, the analysis by the ACM fails to accurately estimate the benefits of private sustainability agreements as monetizing sustainable development benefits based on the idea that how much money an individual consumer is willing to pay or accept for increased sustainable production assumes that human beings are rational decision makers, while human beings are often not rational but subject to several biases.[41] As a consequence, the analysis by the ACM may discourage private sustainability initiatives that may be subject to the risks of free-riders (competitors free ride on the sustainability efforts – e.g. information campaigns - made by another company) and first-mover disadvantages (first company only selling sustainable products loses customers to competitors offering cheaper unsustainable alternatives).[42]

A second example of how the interpretation and application of international and EU economic law based on the noncritical application of neoclassical assumptions may have an inhibiting effect on VSS-setting is the practice by the Dutch Advertising Code Committee (ACC)[43] regarding a private label stating “sustainable eel fund”. This label does not require sustainable eel fishing, which would be an impossible requirement according to many environmental organizations,[44] but solely requires that the eel fisher contributes money to the fund. According to Greenpeace this label was misleading, and it filed a complaint with the ACC. The ACC is a self-regulatory initiative by Dutch businesses to regulate advertisements, which offers a low-threshold forum for individuals to complain about misleading advertisements.[45] The ACC held that the label was not misleading as consumers would understand that by referring to a “fund" the label did not claim that the eel was sustainably fished.[46] To come to this decision, the ACC relied on the normative benchmark of the “average consumer” who is ‘reasonably well-informed, reasonably observant and

[40] Autoriteit Consument en Markt (2015), n 11; Monti and Mulder (2017), n 9, 641

[41] The revolution in psychology that has changes perceptions of how people act in economic circumstances may have started with Herbert Simon’s paper in 1955 for which he won the 1978 Nobel Prize in economics that introduced the concept of bounded rationality. Herbert Simon, ‘Behavioural Model of Rational Choice’ (1955) 69 Quartely Journal of Economics 99.

[42] Monti and Mulder (2017), n 9, 636.

[43] See for more information on the working procedures of the Advertising Code Committee: Stichting Reclame Code, ‘The Dutch Advertising Code’ (2017) https://www.reclamecode.nl/bijlagen/SRCNRCEngelsmei2017.pdf accessed 1 August 2017.

[44] Beslissing van de Reclame Code Commissie, *Greenpeace v DUPAN* [2011] Dossier 2011/00590.

[45] See Dutch government, ‘Where can I file a complaint about misleading advertising?’ https://www.rijksoverheid.nl/onderwerpen/bescherming-van-consumenten/vraag-en-antwoord/waar-kan-ik-een-klacht-indienen-over-misleidende-reclame accessed 1 August 2017.

[46] Beslissing van de Reclame Code Commissie, *Greenpeace v DUPAN*, n 44.

circumspect' as clarified by the European Court of Justice (ECJ).[47] The ACC interpreted the normative benchmark of the "average consumer" in such a way that the "average consumer" would understand the "sustainable eel fund" label.

It may well be that this interpretation of the "average consumer" benchmark is inadequate. Although the "average consumer" test is often, especially at EU level, interpreted to reflect the *homo economicus,*[48] it is also often been criticized for overlooking real consumer behaviour.[49] Interpreting the "average consumer" as a *homo economicus* may have the effect that labels that give consumers the false impression of sustainability may not be prohibited. When many labels on the market give a false impression of sustainability, it may become difficult for consumers to distinguish the true from the false claims. As a consequence, free-rider problems may emerge where consumers purchase the cheaper conventional product thinking it is sustainable, which may outcompete the producer of the sustainable alternative. This may reduce the potential of reliable and credible VSSs to promote sustainable development.

A third example of how the interpretation and application of international and EU economic law based on the noncritical application of neoclassical assumptions may have an inhibiting effect on VSS-setting follows from WTO law. In *US-Tuna II (Mexico)* case, the WTO judiciary used neoclassical reasoning based on the assumption of the rational actor model.[50] The case revolved around a voluntary labelling scheme introduced by the USA based on a VSSs that requires tuna to be harvested without killing or seriously injuring dolphins. Access to the label was conditional upon the requirement as to how the tuna was harvested. Mexico contested the requirement that tuna harvested within the Eastern Tropical Pacific (ETP) may not be caught with the help of purse-seine fishing. Purse-seine fishing involves purposely encircling dolphins under purse-seine nets to reach the tuna that swim below.

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[47] See e.g., Case C-315/92 *Clinique* [1994] ECLI:EU:C:1994:34 and Case C-210/96 *Gut Springheide* [1998] ECLI:EU:C:1998:369.

[48] Rossella Incardona and Cristina Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution,' (2007) 30 Journal of Consumer Policy; 21; Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot: Ashgate Publishing Group. 2005).

[49] Jens-Uwe Franck and Kai Purnhagen, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis' in Klaus Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer Netherlands 2014); Incardona and Poncibò (2007); Hanna Schebesta and Kai Purnhagen, 'The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne' (2016) 4 European Law Review 590; Anne-Lise Sibony and Geneviève Helleringer, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform? ' in Alberto Alemanno and Anne-Lise Sibony (eds), *About Nudge and the Law* (Hart 2015); Anne-Lise Sibony, 'Can EU Consumer Law Benefit From Behavioural Insights? An Analysis of the Unfair Practices Directive' in Klaus Mathis (ed), *Behavioural Law and Economics: AMerican and European Perspectives* (Springer 2015); Jan Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practises Directive' (2011) 34 Journal of Consumer Policy 377 at 383; Kai Purnhagen, 'More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?' (2017) 8 European Journal of Risk Regulation 437.

[50] Howse (2013), n 19; WTO Appellate Body, *US-Tuna II*, n 13.

Amongst others, Mexico argued that there was an alternative measure capable of attaining the USA level of protection that was less restrictive of trade, i.e. introducing an alternative "dolphin safe" label established by the private standard-setter AIDCP, which allows tuna caught by setting on dolphins. The panel agreed that the co-existence of two labels with a "dolphin-safe" designation could confuse consumers.[51] To prevent such consumer confusion, the WTO panel proposed that both labels would be allowed on the marketplace accompanied by detailed (mandatory) information about the meaning of the different labels on each can of tuna.[52]

The understanding by the WTO panel of how consumers perceive information seems based on the traditional understanding of the *homo economicus* that the disclosure of more information would always lead to consumers being more clearly or accurately informed leading to more optimal decisions.[53] Insights from consumer science indicate that the disclosure of more information may increase search costs due to information overload, making it more difficult for consumers to process the information to make an informed choice of sufficient quality.[54] In the case of the tuna cans, the mandatory information may lead consumers to purchase a tuna product that is not in line with their preferences of increased sustainable development.[55]

A fourth example, relevant to mention in the context of this dissertation, is that scholars point out that the WTO itself is based on the neoclassical understanding that law is a price that shapes the incentives to which its subjects would respond.[56] This assumption resembles what elsewhere is known as the "old governance model" that is based on the idea that negotiating a comprehensive, universal and legally binding treaty that prescribes, in a top-down fashion, generally applicable policies based on previously agreed principles would be effective in achieving policy objectives,[57] such as free and fair trade in accordance with sustainable development.[58] This hierarchical old governance model has, however, limited utility in dealing with many of today's most significant global challenges,[59] such as climate change and human rights violations. These global challenges can often not be

[51] WTO Appellate Body, *US-Tuna II*, n 13, footnote 815 at 7.575.

[52] Ibid, at 7.575.

[53] Howse (2013), n 19.

[54] See e.g. Wim Verbeke, 'Agriculture and the food industry in the information age' (2005) 32 European Review of Agricultural Economics 347.

[55] See further on how the WTO panel judgment was based on misconceptions of how consumers process information: Howse (2013).

[56] Craigh Calhoun and Georgi M. Derluguian (eds), *The Deepening Crisis: Governance Challenges after Neoliberalism* (NYU Press 2011) at 9. See on this neoclassical assumption: Nourse and Shaffer (2009), n 34, 66.

[57] Robert Falkner, Hannes Stephan and John Vogler, 'International Climate Policy After Copenhagen: Towards a 'Building Blocks' Approach' (2010) 3 Global Policy 252 at 253.

[58] Preamble Marrakech Agreement; 2001 Doha Ministerial Declaration, n 17.

[59]Abbott and Snidal (2009), n 20; Cafaggi (2013), n 2; Purnhagen (2015), n 2; Marx and others (2012), n 5; Pauwelyn (2014), n 20; Wijkström and McDaniels (2013), n 20.

regulated by the WTO Members *individually*, who either lack the capacity, regulatory reach, or legitimacy to direct transnational actions into more sustainable ones.[60] As the WTO Agreements apply to *individual* WTO Members, other governmental models may be needed to ensure that VSSs regulate international trade in accordance with sustainable development.

These examples illustrate that the interpretation and application of international and EU economic law based on the noncritical application of neoclassical assumptions may have an inhibiting effect on the potential of VSSs to promote sustainable development. Consumer science can provide insights into the "real" effect of an interpretation and application of international and EU economic law on consumers and trade instead of an assumed effect based on normative assumptions derived from the rational actor model. Moreover, consumer science and moral philosophy may provide insights into the effect of an interpretation and application of international and EU economics law on sustainable development that goes beyond material welfare.[61] Furthermore, insights from new governance theory, which aims to get a broad range of stakeholders involved to utilize their collective energy in achieving effective and context-specific solutions,[62] could be helpful in addressing the regulatory challenges of sustainable development in international trade.[63] Such insights may remedy the inhibiting effect of international and EU economic law on the potential of VSSs to promote sustainable development due to a noncritical application of neoclassical law and economics. Allowing insights from consumer science, moral philosophy, and new governance theory in the interpretation and application of international and EU economic law would contribute to the alignment of the objective of sustainable development with international and EU economic law. This corresponds to the emphasized importance of sustainable development as an objective in international and EU economic law. I will elaborate on this objective in the next section.

[60] Abbott and Snidal (2009), n 20.

[61] Matthew Adler and Eric Posner, 'Happiness Research and Cost-Benefit Analysis' (2008) 37 The Journal of Legal Studies 253; Martha Nussbaum, *Woman and Human Development: The Capabilities Approach* (Cambridge University Press 2000), 70; Amartya Sen, 'Equality of What?' in Sterling McMurrin (ed), *Tanner Lectures on Human Values 1* (Cambridge University Press 1980).

[62] Michael Waterstone, 'A New Vision of Public Enforcement' (2007) 92 Minnesota Law Review 434at 482

[63] See scholars using new governance approaches to regulation Orly Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics' (2007) 120 Harvard Law Review 937; David M. Trubek and Louise G. Trubek, 'New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) 13 Columbia Journal of European Law 539. For new governance in international law and global governance, see Abbott and Snidal (2009), n 20. See generally Charles F. Sabel and William H. Simon, 'Epilogue: Accountability Without Sovereignty' in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Bloomsburry 2006), 395.

1.1.3. The Concept of Sustainable Development in International and EU Economic Law

Although the idea that the development of human society and peoples should be sustainable can be traced back to ancient cultures, practices and legal traditions,[64] the concept of sustainable development gained prominence on the international scene[65] with the Brundtland Report 'Our Common Future' by the World Commission on Environment and Development in 1987.[66] This Report provided the now most common definition of sustainable development: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[67] The report clarified that sustainable development requires the integration of 'economic and ecological considerations in decision-making'.[68] Almost two decades later, at the Johannesburg Summit, participating states stressed the importance of also including social issues. The Declaration, which was agreed upon at the Summit, stipulated that sustainable development is 'a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development, and environmental protection – at the local, national, regional and global levels'.[69]

The concept of sustainable development in international law has also been stipulated in decisions of international courts and tribunals. The International Court of Justice (ICJ) held that the 'need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'[70] A few years later, the ICJ held that 'the essence of sustainable development' is the balance between 'economic development and environmental protection'[71] The WTO Appellate Body emphasised in *US-Shrimp* that the sustainable development objective in the Preamble to the WTO Agreement 'must add colour, texture and shading to our interpretation of the

[64] Separate Opinion of Vice President Weeramantry, ICJ, *Case concerning the Gabcikovo – Nagymaros Project (Hungary/Slovakia)* [25 September 1997] ICJ Reports 1997.

[65] See for an explanation that the concept of sustainable development is a recent development in international relations and international law, Christina Voigt, *Sustainable Development as a Principle of International Law* (Martinus Nijhoff Publishers 2009), 12-3.

[66] World Commission on Environment and Development, *Our Common Future* (1987). See Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press 2004) at 19 with further references on the importance of the Brundtland report for sustainable development in international law. See also Jonathan Verschuuren, *Principles of Environmental Law: the Ideal of Sustainable Development and the Role of Principles in International, European and National Law* (Baden-Baden: Nomos 2003) at 21.

[67] WCED (1987) n 66, Chapter 2, Para. 1.

[68] Ibid, at 72.

[69] See Johannesburg Declaration on Sustainable Development, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002, A/CONF.199/20, New York, UN, 2002.

[70] ICJ, *Case concerning the Gabcikovo – Nagymaros Project (Hungary/Slovakia)*, n 64, at 140.

[71] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [20 April 2010] ICJ Report 2010, at 177

Agreements annexed to the WTO Agreement'.[72] Moreover, the WTO Appellate Body held that the concept of sustainable development 'has been generally accepted as integrating economic and social development and environmental protection'.[73]

The importance of sustainable development is also emphasized in several international treaties as sustainable development is included as their overarching object and purpose. For example, the Treaty on the European Union (TEU) expresses the determination of Member States to 'promote economic and social progress for their peoples, taking into account the principle of sustainable development' in its Preamble; and lists as its objective, amongst others, to 'work for the sustainable development of Europe' internally and to contribute to 'the sustainable development of the Earth' in its external relations (Article 3 TEU). The TFEU makes further references to the importance of sustainable development (Article 11 TFEU). The EU Charter on Fundamental Rights (CFR) that states in its preamble that the EU "seeks to promote balanced and sustainable development". Furthermore, the 1994 Marrakesh Agreement Establishing the WTO recognises the objective of sustainable development in its Preamble. The importance of this objective was confirmed by the WTO Members in the 2001 Doha Declaration reinstating their 'commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement'.[74]

Sustainable development is thus an important objective in international and EU economic law. When international and EU economic law is interpreted and applied to VSSs sustainable development should, therefore, be taken into account.

To summarize, four observations have been made in this introduction up to this point. First, VSSs are increasingly regulating sustainable consumption and production, thereby operating as a regulatory authority to promote sustainable development. Second, the interaction between international and EU economic law and VSSs in the regulatory space to promote sustainable development remains unclear. Third, practice shows that this lack of clarity may inhibit the potential of VSSs to promote sustainable development. Fourth, this inhibitive effect of international and EU economic law is problematic as sustainable development is an important objective of international and EU economic law. These observations lead to the conclusion that the inhibiting effect of the application and interpretation of international and EU economic law on the potential of VSSs to promote sustainable development may conflict with the overarching objective of sustainable development. To remedy this conflict, more clarity is needed regarding the boundaries set by international and EU economic law to VSSs. When investigating these boundaries the underlying assumptions must be critically examined.

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[72] WTO Appellate Body *US-Shrimp*, n 17, at 153.

[73] Ibid, at 129.

[74] 2001 Doha Ministerial Declaration, n 17.

1.2. Aims and research questions

The theoretical aim of this dissertation is to provide a firm understanding of the interaction between international and EU economic law and VSSs within the regulatory space to promote sustainable development. The societal aim is to align the interpretation and application of international and EU economic with its main objective of sustainable development. To achieve these aims this dissertation answered the following main research question:

To what extent does the interpretation and application of international and EU economic law interact with the regulatory space of VSSs to promote sustainable development?

To answer this main research question, an overview of the regulatory structure underlying VSSs was first provided by answering the first sub-question:

1. What is the regulatory structure of VSSs?

An overview of the regulatory structure of VSSs gives further insight into the extent to which VSSs may fall within the scope of international and EU economic law. Such an overview was needed to assess when VSSs fall within the scope of international and EU economic law. As such, the second question was:

2. When do VSSs fall within the scope of international and EU economic law?

Once it was clear when VSSs fall within the scope of international and EU economic law, the regulatory space left by the applicable legal framework to VSSs was assessed. Whether international and EU economic law leaves regulatory space to VSSs depends on the interpretation and application of the legal provisions at national, EU, and WTO level. The third question was, therefore:

3. To what extent does international and EU economic law leave room for interpreting and applying legal provisions to VSSs at national, EU, and WTO level?

Once the extent to which international and EU economic law leaves room for interpreting and applying legal provisions to VSSs was clear, clarity was needed as to how to ensure that legal interpretation and application do not inhibit the potential of VSSs to promote sustainable development without a legal justification. To provide such clarity, a critical examination was conducted as to whether and to what extent findings from other scientific disciplines could inform the doctrinal analysis of the interpretation and application of international and EU economic law to VSSs. The fourth question was, therefore:

4. Whether and to what extent could findings from other scientific disciplines inform the doctrinal analysis of the interpretation and application of international and EU economic law to VSSs?

The answer to these questions give more clarity as to the interaction between the interpretation and application of international and EU economic law and VSSs within the regulatory space to promote sustainable development. A clearer understanding of this interaction contributes to the alignment of the objective of sustainable development with the application and interpretation of international and EU economic law to VSSs.

1.3. Methodology

This dissertation is essentially a doctrinal analysis to reveal the extent to which the interpretation and application of international and EU economic law interacts with the regulatory space of VSSs to promote sustainable development.[75] To conduct this doctrinal analysis, it is necessary to first identify the applicable legal rules. To identify the applicable rules within international and EU economic law primary and secondary sources were used. The primary sources include authoritative sources such as existing rules, principles, and precedents. The secondary sources included government documents, EU and international guidelines, newspapers, and scholarly publications. Based on these primary and secondary sources it was examined to what extent international and EU economic law interacts with the regulation space of VSSs to promote sustainable development. Critical legal analysis provides the theoretical framework for this dissertation. Critical legal analysis is geared towards unfolding the policy choices behind the law.[76] In doing so, the dissertation employs a variety of methods.

Legal frameworks are framed in specific terms or concepts.[77] To analyse the extent to which international and EU economic law could be interpreted and applied to VSSs to promote sustainable development, it is necessary to interpret the terms and concepts contained within the legal frameworks analysed. In this dissertation, the methods of textual interpretation, contextual interpretation, effective interpretation and evolutionary interpretation were used. These methods of interpretation are recognized by national legal orders[78] and public international law, most notably by the 1969 Vienna Convention on the

[75] See on doctrinal research as a legal method at Terry Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106 Law Library Journal 579 at 584.

[76] Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6 Oxford Journal of Legal Studies 1, 5; Nourse and Shaffer (2009), n 34.

[77] Ralf Michaels, 'Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2012) at 110.

[78] Joxerramon Bengoetxea, Leonor Moral Soriano and Neil McCormick, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gráinne de Búrca and Joseph H.H. Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) at 48.

Law of Treaties (VCLT).[79] As much has already been written on these methods and their use in legal interpretation,[80] the next few paragraphs will provide a brief overview of how these interpretation methods were used for the purpose of this dissertation. When necessary, resource was had to the travaux préparatoires as a supplementary means of interpretation.[81]

The first method of interpretation that was used was that of textual interpretation.[82] Textual interpretation may be defined as the action of explaining what a normative text conveys by looking at the usual meaning of the words contained therein.[83] To conduct this textual interpretation general, specialized and/or technical dictionaries were examined.[84] However, as emphasized by the WTO Appellate Body, 'dictionaries alone are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words – be those meanings common or rare, universal or specialized'.[85] The ordinary meaning comprises dictionary definitions and their possible uses.[86] Therefore, the meaning of a term in relation to the circumstances in which the treaty was made, and in which the language was used, was examined.[87] When treaties were officially translated in Dutch, English, French, German, and/or Spanish, these translations were examined to

[79] See Articles 31-2 Vienna Convention on the Law of Treaties. The VCLT states that, in accordance with the general rule of interpretation, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty (i.e. textual interpretation) in their context (i.e. contextual interpretation) and in the light of its object and purpose (i.e. effective and evolutionary interpretation). When interpretation according to the general rule of interpretation leaves the meaning ambiguous the VCLT states that, in accordance with supplementary means of interpretation, resource may be had to the preparatory work of the treaty.

[80] See e.g. Isabella Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 The European Journal of International Law; Koen Lenaerts and José A. Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice'' (2013) 20 Columbia Journal of European Law.

[81] See for the increasing importance of the travaux préparatoires in EU law: Lenaerts and Gutiérrez-Fons (2013-4), n 80; and Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756. See for a discussion of the use of the negotiating history by the WTO Appellate Body. Damme (2010), n 80.

[82] This is in line with Article 31(1) VCLT where the actual terms of the text must be the starting point of analysis. See Damme (2010), n 80. Furthermore, in accordance with settled ECJ case law, where the wording of an EU law provision is clear and precise, its contextual or teleological interpretation may not call into question the literal meaning of the provision, as this would run counter to the principle of legal certainty and the principle of inter-institutional balance enshrined in Article 13(3) TEU. See, e.g. Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECLI:EU:C:2008:758; Case C-263/06 *Carboni e Derivati* [2008] ECLI:EU:C:2008:128; Case C-220/03 *ECB v Germany* [2005] ECLI:EU:C:2005:748.

[83] Lenaerts and Gutiérrez-Fons (2013-4), n 80.

[84] Generally relied upon by the WTO Appellate Body. See Damme (2010), n 80, at 623.

[85] WTO Appellate Body, *United States-Measures Affecting Cross-Border Supply of Gambling and Betting Services (US-Gambling)* [7 April 2005] WT/DS285/AB/R, at. 164.

[86] Damme (2010), n 80, 625.

[87] See also Arnold McNair, *The Law of Treaties* (2nd edn, Oxford University Press 1961), 366., where he makes a distinction between the absolute and relative meaning of a term. See also WTO Appellate Body, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts (EC-Chicken Cuts)* [12 September 2005] WT/DS269/AB/R, WT/DS286/AB/R , at 175, were the WTO Appellate Body held that dictionaries were not always dispositive in finding the ordinary meaning and that 'the ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case', and that the ordinary meaning 'must be seen in the light of the intention of the parties as expressed in the words used by them against the light of the surrounding circumstances'.

assess whether the translations further clarified the ordinary meaning of the assessed term.[88]

When the term was not clear and precise, or in the case of the EU, when linguistic divergences exist, textual interpretation did not suffice as a method of interpretation.[89] When this was the case, the method of contextual interpretation was used. The method of contextual interpretation is based on the idea that terms must be interpreted in a way that guarantees consistency between the term and the treaty of which it is part.[90] To ensure such consistency cross-referencing was used as an interpretive technique.[91] This technique is an application of Fitzmaurice's principle of integration that states that treaties, particular parts, chapters or sections are to be interpreted as a whole with reference to their declared or apparent objects, purposes and principles.[92]

When contextual interpretation did not suffice to interpret a term, an effective interpretation method or an evolutionary interpretation method was used. The effective

[88] This is especially important in assessing EU law due to the principle of linguistic equality. See Article 55 TEU in conjunction with Article 342 TFEU, and Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac and Others* [1998] ECLI:EU:C:1998:152 at 36; Case C-257/00 *Givane and others* [2003] ECLI:EU:C:2003:8 at 36; Case C-152/01 *Kyocera* [2003] ECLI:EU:C:2003:623 at 32. The WTO Appellate Body also sometimes resorted to assessing the treaty terms in different languages. See e.g. WTO Appellate Body, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)* [5 April 2001] T/DS135/AB/R, at 89, 91-2 attempting to define 'like products' assessing the French and Spanish versions of the treaty language.

[89] Lenaerts and Gutiérrez-Fons (2013-4), n 80; Case C-341/01 *Plato Plastik Robert Frank* [2004] ECLI:EU:C:2004:254 at 64; Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikringsselskabet Codan* [1998] ECLI:EU:C:1998:617 at 28; Case C-449/93 *Rockfon A/S tegen Specialarbejderforbundet i Danmark* [1995] ECLI:EU:C:1995:420 at 28; Case C-30/77 *Regina v Bouchereau* [1977] ECLI:EU:C:1977:172 at 64.

[90] See e.g. Article 7 TFEU("The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."); Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 Common Market Law Review.

[91] This technique has been used by the WTO Appellate Body as well as by the ECJ on several occasions. See for the WTO e.g. WTO Appellate Body, *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US-Wheat Gluten)* [22 December 2000] WT/DS166/AB/R, at 72–79; see also WTO Appellate Body, *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand (US-Lamb)* [1 May 2001] WT/DS177/AB/R, WT/DS178/AB/R at 162–181; WTO Appellate Body, *United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US-Line Pipe)* [15 February 2002] WT/DS202/AB/R, at 209–211. Compare with Case Concerning the Auditing of Account between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention of 3 December 1976 on the Protection of the Rhine against Pollution by Chlorides, PCA Award Series (2008) 107, at. 91. For the use of cross-referencing by the ECJ see e.g. Case C-465/07 *Elgafaji* [2009] ECLI:EU:C:2009:94; see also Koen Lenaerts, 'The Contribution of the European Court ofJustice to the Area of Freedom, Security and Justice' (2010) 59 International and Comparative Law Quarterly 255 who provides a commentary on the merits of that case.

[92] Gerald Fritzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 Briitish Yearbook of International Law at 9 and 211. See also, e.g., ICJ, *International Status of South-West Africa, Dissenting Opinion of Judge de Visscher* [1950] ICJ Reports 1950 at 187; ICJ, *Case Concerning Right of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] ICJ Reports 1952, at 209; ICJ, *Ambatielos Case (Greece v. United Kingdom) (Merits: Obligation to Arbitrate), Joint Dissenting Opinion of Judges McNair, Basdevant, Klaestad, and Read* [1953] ICJ Reports 1953 at 30; Emer De Vattel, *The Law of Nations, or, Principles of Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (4th edn, 1811), at 255–256.

interpretation method is based on the principle of effectiveness.[93] After examining the normative context in with the treaty term is placed by using contextual interpretation, effective interpretation can be used to ensure that the term is interpreted as to best preserve the effectiveness of the treaty in light of its object and purpose.[94] Effective interpretation follows after contextual interpretation where the normative context in which the term is placed is examined. The principle of effectiveness can also be instrumental in justifying an evolutionary interpretation of the treaty. Evolutionary interpretation was used where the societal context required an interpretation adaptive to changes over time.[95] In the context of this dissertation, when a term pursued more than one objective that was mutually contradictory, it was examined whether there existed a hierarchy between the different objectives in the respective legal order.

The doctrinal analysis of this dissertation went beyond a mere interpretation of the current law.[96] A critical reflection of the current laws was conducted, suggesting ways the philosophy and processes underlying the laws could be improved to promote sustainable development. To provide context for such a critical reflection, the assessed legal frameworks were, if relevant, compared with the USA legal system. To compare the EU legal system and the USA legal system a functional method was used.[97] By using a functional comparative method the purpose and function of the specific rules were identified, so as to interpret and evaluate how well the rule serves its purpose or function. As such, the comparison provided more clarity as to the purposes of the legal rules and other ways that these purposes could be accomplished.

To provide further context for critical reflection, the legal analysis was placed within the larger framework of the social sciences. Such an interdisciplinary analysis enabled a more scientifically grounded analysis of the effect of the interpretation of legal terms and concepts on sustainable development. For example, when a court mandates disclaimers on food labels to clarify otherwise misleading sustainability claims, insights from consumer science may clarify whether such disclaimers would have a positive or negative effect on consumers to purchase sustainably. Another example is that when rules aim to promote

[93] See for the principle of effectiveness in international law: Damme (2010), n 80, 625. See on effective interpretation in ECJ case-law Case C-439/08 *VEBIC* [2010] ECLI:EU:C:2010:739 at 64; Case C-188/10 *Melki and Abdeli* [2010] ECLI:EU:C:2010:363 at 145; Case C-409/06 *Winner Wetten* [2010] ECLI:EU:C:2010:503 at 56.

[94] Lenaerts and Gutiérrez-Fons (2013-4), n 80.

[95] See on evolutionary interpretation Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 German Yearbook of International Law 11, 16-17; Sondre Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6 European Journal of Legal Studies 127.

[96] See Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) Erasmus Law Review 130, 132. who clarifies that 'good' quality doctrinal research should go "well beyond description, analysis, and critique, and invariably suggests ways the law could be amended or the philosophy, processes or administration of the law could be improved".

[97] See on the functional method, e.g. Michaels (2012), n 77; and James Gordley, 'The Functional Method' in Pier Giuseppe Monateri (ed), *Methods of Comparative Law* (Edward Elgar Publishing 2012) at 113.

consumer welfare, without clarifying how such consumer welfare could be estimated, insights from economics, psychology, and philosophy may be helpful to estimate consumer welfare in a way that ensures, or at least not deters, sustainable development.

As VSSs are international it is important to see beyond a single legal system and consider international and EU economic law. To conduct the doctrinal analysis of the international and EU economic legal provisions that apply to VSSs, a case study analysis was selected which provided an extensive examination of how international and EU economic law and VSSs interact within the regulatory space to promote sustainable development. To provide context for critical reflection within the case study analysis, insights from comparative legal methods and methods from the social sciences were used. As such, the case study analysis serves as a showcase of how insights from the social sciences could be integrated in doctrinal analysis to align the objective of sustainable development with the interpretation and application of international and EU economic law to VSSs.

The case study analysis provides a description and examination of four legal frameworks, examining the regulatory space legal frameworks leave to VSSs to promote sustainable development. The selected case studies were the legal frameworks that may be of particular relevance to VSSs and sustainable development: EU consumer law, EU fundamental rights law, WTO law, and EU competition law. These legal frameworks were selected as their current interpretation and application illustrate the inhibitive effect of international and EU economic law on VSSs to promote sustainable development. Second, the legal frameworks were selected to allow for different forms of doctrinal analysis, namely a pure doctrinal analysis, an interdisciplinary analysis combining doctrinal and empirical research methods, a doctrinal analysis applying insights from different theoretical social sciences, and a doctrinal analysis applying insights from new governance theory. The research concentrates on VSSs regulating food production because food production bears the largest environmental costs compared to other sectors,[98] and food consumption may affect most categories often associated with sustainable development (e.g. organic, fair trade, human health, animal welfare).

1.4. Structure of the Dissertation

This dissertation starts with an overview of the regulatory structure of VSSs in Chapter 2. To provide such an overview the regulatory structure of 65 VSSs underlying sustainability food labels in the Dutch market were examined. To identify the presence of a regulatory structure of VSSs three classes of criteria were used to benchmark VSSs on the Dutch

[98] KPMG, *Expect the Unexpected: Building Business Value in a Changing World* (Report: KPMG International, 2012).

market: (1) the aim the standard is trying to achieve; (2) the actors involved in standard-setting; and (3) the type of certification scheme used.

In Chapter 3, the extent to which the interpretation and application of EU consumer law interacts with the regulatory space of VSSs to promote sustainable development was investigated. It was examined whether and how insights from behavioural sciences could inform the legal interpretation and application of the normative EU "average consumer" benchmark under the Food Information Regulation (FIR)[99] when confronted with purely visual information as used by green pictograms. To conduct such an analysis the relevant legal norms were, first, located by using primary and secondary sources. To interpret the legal norms as to analyse whether they prohibit "misleading impressions of sustainability", the legal analysis relied on the leading cases of the ECJ on misleading information, as well as the relevant EU legal texts, policy documents and scholarly papers. To analyze whether consumers in a real-life setting could be considered misled by a sustainability label, an experiment was conducted. This empirical analysis relied on questionnaires. These questionnaires were used to collect information from consumers as to whether a specific food label, that is present on the Dutch market, can be considered to give a misleading impression of sustainability.

In Chapter 4, the extent to which the interpretation and application of EU fundamental rights law interacts with the regulatory space of VSSs to promote sustainable development was explored. It was examined whether the freedom of expression as enshrined in Article 11 CFR could be interpreted to limit the EU's freedom to regulate food labels used by VSSs. It was explored to what extent the freedom of expression protects food businesses against government intervention with communications on food labels. Practice in the USA shows that governmental regulations of commercial communication could be considered inconsistent with the freedom of expression of businesses.[100] Although such practice is not yet apparent in the EU, recent trends show that governmental regulations of commercial communications could be considered inconsistent with the freedom of expression of businesses.[101] To assess whether government interventions with communications on food labels protect food businesses against government intervention a functional comparison

[99] Regulation (EU) 1169/2011 on the provision of food information to consumers (EU Food Information Regulation) [2011] OJ L 304.
[100] See for example, *Amestoy* 92 F.3d 67 (2nd Cir. 1996); *Pearson I* 164 F.3d 650 (D.C. Cir. 1999), rehearing den., 172 F.3d 72 (D.C. Cir. 1999); *Whitaker v Thompson* 48 F. Supp. 2d 1 (D.D.C. 2002); *Boggs* 622 F.3d 628 (6th Cir. 2010).
[101] In Recital 44 of Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control it is stated that "[t]his Regulation does not affect the obligation to respect fundamental rights and fundamental legal principles, including the freedom of expression, as enshrined
in Art. 11, in conjunction with Art. 52, of the Charter of Fundamental Rights of the European Union, and in other relevant provisions." Furthermore, Case C-544/10 *Weintor* [2012] ECLI:EU:C:2012:526 was the first, and so far only, ECJ-case concerning a fundamental rights challenge against a food labelling law.

between the two legal systems was conducted.[102] The analysis was placed in the larger framework of social sciences by using insights from economic and social psychology as to how consumers process information on food products.

In Chapter 5, the extent to which the interpretation and application of WTO law interacts with the regulatory space of VSSs to promote sustainable development was investigated. It was examined whether the SPS and TBT Agreement are effective in disciplining private VSSs or whether other kind of mechanisms should be developed to incentivize private VSSs to promote sustainable development. This analysis requires the assessment of primary sources, i.e. WTO legal texts, principles, and case-law by the Panels and the Appellate Body, and secondary sources, i.e. policy documents, committee reports and scholarly papers. The legal analysis was placed within the larger framework of political science, more specifically new governance theory, to conduct a critical reflection of the current laws and their effectiveness to discipline private VSSs.

In Chapter 6, the extent to which the interpretation and application of EU competition law, more specifically Article 101 TFEU, interacts with the regulatory space of VSSs to promote sustainable development was examined. This analysis required, first, an assessment of how Article 101 TFEU is currently applied to private agreements based on primary sources, such as EU legal texts, case-law by the ECJ, and notices by the European Commission, and secondary sources, such as scholarly papers. Secondly, this analysis required an assessment as to the underlying assumptions in the interpretation and application of Article 101 TFEU to private agreements. These assumptions should first be determined based on primary sources and secondary sources. To conduct a critical reflection of the current legal practice and to provide effective tools to align sustainable development with the interpretation and application of Article 101 TFEU to VSSs, the legal analysis was placed in the larger framework of the social sciences by including insights from welfare economics, economic and social psychology, and moral philosophy.

Chapter 7 contains the conclusions and general discussions of this dissertation. It was concluded that, when properly applied, the approaches proposed in this dissertation are better equipped to align the objective of sustainable development with the interpretation and application of international and EU economic law to VSSs, than solely using approaches derived from neoclassical law and economics. The contributions this dissertation makes to legal and policy practice, and legal research and methodology in the application and interpretation of international and EU economic law were briefly discussed.

[102] See on the functional method, e.g. Michaels (2012), n 77; and Gordley (2012), n 97, 113.

The overall structure of the dissertation can be found in Table 1.1.

Table 1.1. Structure of the dissertation

Chapter	Title	Answer to research question
1	General introduction	
2	Regulatory Structure of Voluntary Sustainability Standards. Foundations for Intervention Strategies to Increase Consumer Confidence	1
3	Green Pictograms on EU Foods. A Legal Study Informed by Behavioural Science	2, 3, 4
4	Legal Limits on Food Labelling Law: Comparative Analysis of the EU and the USA	2, 3, 4
5	Disciplining Private Standards under the SPS and TBT Agreement. A Plea for Market-State Procedural Guidelines	2, 3, 4
6	Overcoming false choices and distorted decisions. Estimating human well-being under Article 101 TFEU	2, 3, 4
7	Conclusion and general discussion	

2

Regulatory Structure of Voluntary Sustainability Standards. Foundations for Intervention Strategies to Increase Consumer Confidence

Forthcoming as a book chapter as:

Eva van der Zee, 'Regulatory Structure of Voluntary Sustainability Standards. Foundations for Intervention Strategies to Increase Consumer Confidence', in: Harry Bremmers and Kai Purnhagen (eds.), *Regulating Food Safety Law in the EU – A Management and Economics Perspective*, New York, Springer 2018, forthcoming.

Abstract Regulation of voluntary sustainability standards (VSSs) may increase their capacity to promote sustainable consumption. To determine if, when and where public or private institutions should intervene, an overview of the current regulatory structure of VSSs is needed. To provide such an overview the regulatory structure of 65 VSSs underlying sustainability food labels in the Dutch market was examined. This study shows a plurality of VSSs with different types of certification schemes, i.e. first-, second- or third-party certification, and with multiple actors involved. The majority of these VSSs resemble a structure where NGOs are highly involved in standard-setting and certification is mainly conducted through private, third-party certification. While these structural characteristics may be considered reliable and credible by consumers, several VSSs do not reflect this structure. The present coexistence of VSSs with different regulatory structures may negatively affect consumer confidence. Future research should aim to examine if, how and where private and public actors could intervene in the regulatory structures of VSSs to increase consumer confidence effectively.

2.1. Introduction

Western governments seem to consider voluntary business-to-consumer sustainability standards as instrumental to the objective of promoting sustainable consumption.[103] This fits within a shift in governance that has taken place from traditional command and control regulatory instruments used by classical government institutions to market-based regulatory instruments used by e.g. NGOs, industry associations, and public-private partnerships.[104]

Sustainability labels have proven very popular to provide sustainability-related information to consumers. These labels often are vested on specific voluntary sustainability standards (VSSs) which a product, organisation, or product process must meet. VSSs are voluntary regulatory schemes designed and enforced by private or public bodies with the purpose of promoting sustainable development. Since the 1980s there has been a rise of

[103] WSSD (2002), n 1.

[104] See e.g. Tietenberg (1998), n 2; Giovannucci and Ponte (2005), n 2; Cafaggi (2013), n 2; Purnhagen (2015), n 2.

VSSs on the consumer market.[105] For example, in 2014 there were around 170 different VSSs being used in The Netherlands.[106]
Despite the rise of VSSs since the 1980s the market share of sustainable food remains low.[107] Different reasons for this slow increase in market share for sustainable food may include the wide diversity of VSSs as shown by research on the credibility of eco-labels,[108] limited consumer understanding of specific VSSs,[109] and/or failure of such VSSs to trigger consumer motivation to purchase sustainably.[110]

Furthermore, VSSs may not or only hardly improve the sustainability issues they are aiming at, or the VSS may negatively impact other sustainability issues.[111] VSSs may also negatively impact trade, especially with developing countries,[112] inducing a decrease in social sustainability. As such, VSSs may fail to contribute to the effective realization of sustainable consumption.

Intervention in the regulatory structure of VSSs may be necessary to increase their capacity to promote sustainable consumption. To determine if, when and where public or private institutions should intervene an overview of the current regulatory structure of VSSs is needed. The objective of this study was to provide such an overview and to identify knowledge gaps which can induce further research.

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[105] Klaus Grunert, Sophie Hieke and Josephine Wills, 'Sustainability labels on food products: Consumer motivation, understanding and use' (2014) 44 Food Policy 177; Carsten Gandenberger, Heiko Garrelts and Diana Wehlau, 'Assessing the Effects of Certification Networks on Sustainable Production and Consumption: The Cases of FLO and FSC.' (2011) 34 Journal of Consumer Policy 107; Sebastian Koos, 'Varieties of Environmental Labelling, Market Structures, and Sustainable Consumption Across Europe: A Comparative Analysis of Organizational and Market Supply Determinants of Environmental-Labelled Goods' (2011) 34 Journal of Consumer Policy 127; Laura T. Raynolds, Douglas Murray and Andrew Heller, 'Regulating Sustainability in the Coffee Sector: A Comparative Analysis of Third-Party Environmental and Social Certification Initiatives' (2007) 24 Agriculture and Human Values 147; John Wilkinson, 'Fair Trade: Dynamic and Dilemmas of a Market Oriented Global Social Movement.' (2007) 30 Journal of Consumer Policy 219.

[106] ANP. 2014, April 3. Ploumen wil 'orde' in aantal keurmerken (English translation: Ploumen wants 'order' in the amount of certification marks). Volkskrant. Retrieved from www.volkskrant.nl/binnenland/ploumen-wil-orde-in-aantal-keurmerken~a3627943/ (visited 20 May 2015).

[107] See e.g. Dutch Ministry of Economic Affairs 2014. Consumentenbestedingen aan Duurzaam Gelabelde Producten. Monitor Duurzaam Voedsel 2013, www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/06/04/monitor-duurzaam-voedsel-2013/14094896-bijlage.pdf.

[108] Carolyn Fischer and others, 'Forest certification: Toward common standards? Resources for the Future ' (2005) Discussion Paper dp-05-10 Washington, DC; Mario Teisl and others, 'Consumer reactions to environmental labels for forest products: a preliminary look' (2002) 52 Forest Products Journal 44.

[109] Ralph Horne, 'Limits to Labels: the role of eco-labels in the assessment of product sustainability and routes to sustainable consumption' (2009) 33 International Journal of Consumer Studies 175; Grunert, Hieke and Wills (2014), n 105.

[110] Ynte Van Dam and Janneke De Jonge, 'The Positive Side of Negative Labelling. 38(1): 19-38.' (2015) 38 Journal of Consumer Policy 19.

[111] See e.g. Justus Von Geibler, 'Market-based Governance for Sustainability in Value Chains: Conditions for Successful Standard Setting in the Palm Oil Sector' (2013) 56 Journal of Cleaner Production 39.

[112] Giovannucci and Ponte (2005), n 104.

2.2. Theoretical Framework

Business-to-consumer information labelling provides an increasingly important regulatory tool, promoting informed consumer choice by communicating sustainability attributes of products or production processes through logos, symbols, labels, and texts. A lack of consumer information labelling may lead to information asymmetry between consumers and producers. Producers of food products often have more or better information about specific sustainability attributes of their products compared to consumers. Information asymmetry between consumers and producers can impede the smooth functioning of markets, which in the worst case may lead to market failure. Market failure implies that consumers are unwilling to pay more for better quality, leading to a lack of motivation by producers to offer higher quality[113] Information asymmetry is especially apparent for sustainability attributes of products, as these can be considered credence attributes[114] and Potemkin attributes.[115] This is less so for search attributes which are known before purchase and experience attributes which are known costlessly only after purchase.[116] Credence attributes are expensive to determine even after purchase,[117] while Potemkin attributes, such as fair trade and animal welfare, cannot be verified by neither the consumer nor external institutions at the end-product level.[118]

The extent a labelling scheme provides relevant sustainability-related information depends on how sustainability is conceived. Numerous definitions of sustainability, or sustainable development, have appeared in international declarations, conventions, court judgments, and scholarly writings.[119] Although definitions differ, many definitions emphasise that the needs of the present must be met, while the ability of future generations to meet their own needs may not be compromised.[120] This is also known as inter- and intra-generational equity. Many definitions further specify economic, social, environmental and sometimes cultural aspects as important dimensions of sustainable development.[121] From

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[113]George Arthur Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 The Quarterly Journal of Economics 488.

[114] Grunert, Hieke and Wills (2014), n 105; Ynte

Van Trijp Van Dam, Hans, 'Cognitive and motivational structure of sustainability' (2011) 32 Journal of Economic Psychology 726.

[115] Roberta Spadoni, Pamela Lombardi and Maurizio Canavari, 'Private Food Standard Certification: Analysis of the BRC Standard in Italian Agri-Food. ' (2014) 116 British Food Journal 142.

[116] Philip Nelson, 'Information and Consumer Behavior.' (1970) 78 Journal of Political Economy 311.

[117] Michael Darby and Edi Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 Journal of Law and Economics 67.

[118] Spadoni, Lombardi and Canavari (2014), n 115.

[119] Paul Johnston and others, 'Reclaiming the Definition of Sustainability' (2007) 14 Environmental Science and Pollution Research 60;Philip Lawn, *Toward Sustainable Development: An Ecological Economics Approach* (Florida: CRC Press 2010).

[120] WCED (1987), n 66.

[121] Magnus Boström, 'A missing pillar? Challenges in theorizing and practicing social sustainability: introduction to the special issue' (2012) 8 Sustainable Scientific Practice Policy 3; Steve Connelly, 'Mapping Sustainable Development as a Contested Concept' (12) 3 Local Environment 259; Joop De Boer and others, 'The conceptual framework' in Mar Campins Eritja (ed), *Sustainability Labelling and Certification* (Marcial Pons 2004) ;Richard B. Norgaard, 'Sustainable Development: A Co-Evolutionary View' (1988) Futures (Dec) 606; Michael Redclift, 'The Meaning of Sustainable Development' (1992) 25 Geoforum 395; Organisation for Economic Co-operation and Development (OECD) 2008. *Promoting Sustainable Consumption*. Good Practices in OECD countries; International

these more abstract aspects of sustainability, more concrete sub-categories of sustainability can be determined that are potentially relevant in the context of VSSs, e.g. biodiversity, human rights and labour conditions. These categories may address several issues that could be relevant in the context of VSSs, e.g. climate change, child labour and wage levels (see also Table 2.1).

Institute for Environment and Development (IIED) 1997. Changing Consumption and Production Patterns: Unlocking Trade Opportunities. *UN Department of Policy Coordination and Sustainable Development*, http://pubs.iied.org/pdfs/8851IIED.pdf; WSSD (2002), n 103; United Nations Conference on Trade and Development (UNCTAD) 2013. *Sustainability Claims Portal.* http://www.unctad.info/en/Sustainability-Claims-Portal/ (visited 20 May 2015).

Table 2.1. Sustainability ideal, aspects, categories, and issues potentially relevant in the context of VSSs[122]

Sustainable development			
Ideal	**Aspects**	**Categories**	**Issues**
Inter- and intra-generational equity	Environmental aspects	Environmental impacts	Climate change
			Environment and health
			Natural resources and waste
		Biodiversity	Biodiversity in general
			One or more specific ecosystems
			Specific species
	Social aspects	Human health	Food safety
		Human rights	Forced labour
			Rights of indigenous people
			Freedom of association/bargaining
			Child labour
		Labour conditions	Wage levels
			Occupational health and safety standards
			Working hours
		Animal welfare	Free-range
	Economic aspects	Trade relations	Guaranteed price
			Long-term contracts
			Advanced payments and credit facilities
			Technical assistance
			Community support
	Cultural aspects	Geographical indications	Designation of origin
			Geographical indication
			Traditional character
		Traditional specialities	Halal
			Kosher
		Religion	

As many sustainability attributes of products can be expensive or impossible to determine even after purchase, consumers may question the credibility of a VSSs. Certification has as

[122] Based on De Boer and others (2004), n 121; and United Nations Conference on Trade and Development (UNCTAD) 2013. *Sustainability Claims Portal.* http://www.unctad.info/en/Sustainability-Claims-Portal/ (visited 20 May 2015).

a function to provide assurance to consumers that the properties which the VSSs represents exist and so the information is credible. Certification can be defined as the (voluntary) assessment and approval by an (accredited) party of an (accredited) standard.[123]

Certification may involve three possible parties: the certification applicant, the certification body, and the accreditation body. The certification applicant is the manufacturer or distributor that requests certification of its product or production-process. The certification body is the actor that issues the certification. The accreditation body is a formal third party that complies with the general requirements for accreditation bodies specified by the International Standard ISO/IEC 17011:2004 set by the International Standard Organization (ISO).[124] In general, accreditation bodies monitor certification bodies on compliance with the International Social and Environmental Accreditation and Labelling (ISEAL) alliance assurance code and/or the ISO 17065 (former ISO 65 or EN 45011).

Basically, certification schemes include public (state-run) schemes and private certification schemes.[125] Public certification schemes are assessed and approved by public bodies (Figure 2.1). Three EU quality schemes are a prime example of such public certification schemes, i.e. PDO (protected designation of origin), PGI (protected geographical indication) and TSG (traditional specialty guaranteed). The European Commission examines whether a food product can be registered as PDO, PGI, or TSG.[126] Public bodies control products registered as PDO, PGI, or TSG on compliance with EU legislation.[127]

Figure 2.1. Public certification

Private certification schemes can take different forms: first-party certification, second-party certification, and third-party certification.[128] First-party certification is when the manufacturer or distributor of the food product itself sets the standards and certifies compliance of the product with the set standard (Figure 2.2). Many examples of first-party

[123] Miranda Meuwissen and others, 'Technical and Economic Considerations about Traceability and Certification in Livestock Production Chains' in Annet Velthuis and others (eds), *New Approaches to Food Safety Economics,* (Kluwer Academic Publishers 2003).

[124] https://www.iso.org/obp/ui/#iso:std:iso-iec:17011:ed-1:v2:en {visited 20 May 2015).

[125] Gabrielle Jahn, Matthias Schramm and Achim Spiller, 'The Reliability of Certification: Quality Labels as a Consumer Policy Tool' (2005) 28 Journal of Consumer Policy 53.

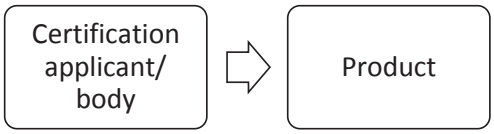
[126] http://ec.europa.eu/agriculture/quality/schemes/index_en.htm (visited 20 May 2015).

[127] In The Netherlands the control bodies are: NVWA (government agency), COKZ and KCB (both government bodies). *See* http://ec.europa.eu/agriculture/quality/schemes/compliance-authorities_en.pdf.

[128] Axel Marx, 'Global Governance and the Certification Revolution Types, Trends and Challenges' in David Levi-Faur (ed), *Handbook of the Politics of Regulation* (Cheltenham: Edward Elgar 2011).

certification can be found with respect to seafood products, e.g. logos like dolphin-friendly tuna and fished by pole & line. In general, these standards are not externally checked. Other examples include standards such as AH Puur & Eerlijk, Fairglobe, or Bio+. These VSSs can be considered umbrella standards as the standards umbrellas for other VSSs: the umbrella standard is first-party certified but requires that the product is certified through specific third-party certification systems.

Figure 2.2. First-party certification



Second-party certification is conducted by an organisation other than the certification applicant (Figure 2.3). These organisations are legally separate from the certification applicant. An example of second-party certification is the V-label. The V-label was launched by the European Vegetarian Union (EVU): an umbrella organisation for most vegetarian groups in Europe. The mark is checked by the different national vegetarian organization per country, i.e. Nederlandse Vegetariërsbond (Dutch Vegetarian Society).[129]

Figure 2.3. Second-party certification

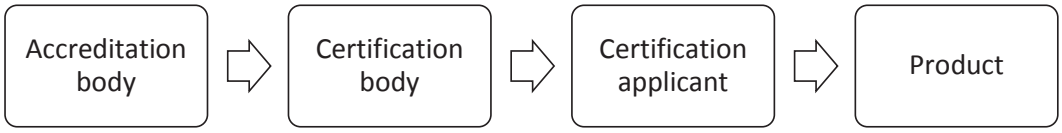
Third-party certification is conducted by a certification body that is legally separate and independent from the organisation that asks for certification (Figure 2.4). The certification body needs to be accredited by an accreditation body to ensure its competence, impartiality and performance capability. An example of third-party certification is the EU organic standard. Every Member State of the EU has at least one private certification body responsible for the certification. This certification body has to be accredited.[130] Due to the independence of the certification body, third-party certification is gaining popularity on all levels of the agri-food chain.[131]

[129] http://www.v-label.info/en/home/international.html (visited 15 December 2014).

[130] Article 5 (2) (c) of Regulation (EC) 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L 165.

[131] Emanuelle Auriol and Steven Schilizzi, 'Quality signaling through certification Theory and an application to agricultural seed markets' (2003) IDEI Working Papers.

Figure 2.4. Third-party certification



Besides the credibility of the certification scheme, the credibility of a standard may also depend on the credibility of the actors involved in setting the standard.[132] The type of actors involved in standard-setting are important as especially lack of clarity over the source of an eco-label is a key factor inducing consumer uncertainty.[133] Thus, to prevent market failure, not only the type of certification but also the types of actors involved need to be considered credible.

Three types of actors can be involved in standard-setting: public actors, NGOs and firms.[134] Public actors encompass developing and developed states, as well as governmental agencies. NGOs include all private actors that are not targeted by the standard, e.g. NGO advocacy groups, labour unions, non-profit organisations student groups, and other civil society organisations, as well as socially responsible investors. Firms include those private actors that *are* targeted by the standard, e.g. multinationals, small firms, agricultural enterprises, and small-scale farmers. Consumer research suggests that consumers may have lower confidence in company-owned standard.[135] They seem to have higher confidence in a standard-setter that is perceived to be independent.[136]

Based on the actors involved in setting standards, seven types of standards can be identified.[137] For illustration purposes examples of type of standards in the food labelling context are presented where possible. The first type of standards that can be distinguished is set by public actors only, which may include national laws and regulations, but also VSSs. Examples of VSSs set by public actors are the EU organic standard and the EU quality schemes for geographical indications and traditional specialities. The second type of standards is set by firms only, which may include self-regulative schemes, such as dolphin-

[132] Friederike Albersmeier, Holger Schulze and Achim Spiller, 'System Dynamics in Food Quality Certifications: Development of an Audit Integrity System' (2010) 1 International Journal on Food Systems Dynamics 69;Mourad Moussa and Salim Touzani, 'The Perceived Credibility of Quality Labels: a Scale Validation with Refinement. International Journal of Consumer Studies' (2008) 32 International Journal of Consumer Studies 526.

[133] Rick Harbaugh, John Maxwell and Beatrice Roussillon, 'Label confusion: The Groucho Effect of Uncertain Standards' (2011) 57 Management Science 1512.

[134] Abbott and Snidal (2009), n 20.

[135] Sally Eden, Christoper Bear and Gordon Walker, 'Understanding and (dis)trusting food assurance schemes: consumer confidence and the 'knowledge fix'.' (2008) 24 Journal of Rural Studies 1; Kim Mannemar Sønderskov and Carsten Daugbjerg, 'The State and Consumer Confidence in Eco-labelling: Organic labelling in Denmark, Sweden, the United Kingdom and the United States' (2011) 28 Agricultural Human Values 507.

[136] Susanne Padel and Carolyn Foster, 'Exploring the gap between attitudes and behavior: understanding why consumers buy or do not buy organic food' (2005) 107 British Food Journal 606; Eden, Bear and Walker (2008), n 135.

[137] Abbott and Snidal (2009), n 20.

safe-tuna or fished by pole and line, and brands, such as AH Puur & Eerlijk and Bio+. The third type of standards is set by NGOs only, which may include standards such as Vegan, V-keurmerk, and the Checkmark (Vinkje in Dutch). The fourth type of standards is set in collaboration with public actors and firms. The UN Global Compact is an example of such a standard, aiming at aligning business operations and strategies with principles in the areas of human rights, labour, environment and anti-corruption.[138] The fifth type of standards is set by a collaboration between public actors and NGOs. Although there are not many examples of such standards, one example is the TCO certification scheme for office equipment.[139] The sixth type of standards is set by a collaboration between firms and NGOs, which may include the more well-known VSSs, such as Max Havelaar, UTZ Certified, and Rainforest Alliance. The seventh type of standards is set by a collaboration between public actors, firms, and NGOs. An example outside the food domain is the Kimberley Process Certification Scheme focusing on conflict diamonds.[140]

2.3. Methodology

To identify the presence of a regulatory structure of VSSs three classes of criteria need to be examined: (1) the aim the standard is trying to achieve; (2) the actors involved in standard-setting; and (3) the type of certification scheme used. These three classes of criteria were used to benchmark VSSs on the Dutch market. These VSSs were selected from the *Keurmerkenwijzer* of Milieucentraal.[141] The *Keurmerkenwijzer* presents over 170 labels, symbols, and logos that seemingly provide information about the sustainability of food, clothes, cosmetics, detergents, appliances, wood, paper, flowers and plants. These labelling schemes could be found on products in The Netherlands in 2014. Of these 170 labelling schemes, 65 are visual representations of sustainability on food labels[142]. For this study these 65 visual representations were selected (Appendix 1),[143] to assess the VSSs underlying these sustainability labels. The focus of this study was on food standards, because food production bears the largest environmental costs compared to other sectors.[144]Furthermore, current food consumption trends may negatively affect all categories of sustainable development (e.g. organic, fair trade, human health, animal welfare).

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[138] https://www.unglobalcompact.org/AboutTheGC/index.html (visited 11 February 2015).

[139] http://tcodevelopment.se/tco_certified_story/ (visited 11 February 2015).

[140] http://www.kimberleyprocess.com/ (visited 11 February 2015).

[141] The Milieu Centraal Foundation is an independent information organisation that offers information to consumers on environmental and energy issues in daily life. www.milieucentraal.nl/over-milieu-centraal/ {visited 13 November 2014).

[142] Beter Leven Kenmerk had three entries in de *keurmerkenwijzer* based on the Beter Leven Kenmerk ranking system: 3 stars, 2 stars, and one star. For the purposes of this study Beter Leven Keurmerk had only one entry.

[143] The author, nor Wageningen University, specifically recommends any of these labelling schemes and/or finds these labelling schemes better or worse that those that were not selected for the study.

[144] KPMG (2012), n 98.

The VSSs underlying the 65 selected visual representations of sustainability on food labels were examined on the basis of three topics: (1) aim; (2) actors involved in standard-setting; and (3) types of certification. The information about these three topics was found through desk research by examining webpages of each visual representation and by consulting other websites such as www.keurmerkenwijzer.nl, www.labelinfo.be,[145] www.label-online.de,[146] and www.standardsmap.org.[147]

2.4. Results

2.4.1. Diversified Aim of VSSs

The aim of the VSSs was diverse (see Table 2.2). Of the four different aspects of sustainability, nine different combinations were observed. VSSs mainly focused on environmental and social aspects (24), social aspects only (11), and environmental, social and economic aspects (7). Frequently, when standards focused on social aspects, the focus was solely on the category animal welfare.

Table 2.2. Sustainability focus of VSSs

Aspects	Total	Of which social is animal welfare only
Environmental + social	24	12
Social	11	7
Environmental + social + economic	7	0
Cultural	5	N/A
No information	5	N/A
Environmental	4	N/A
Environmental + social + cultural	3	3
Social + economic	3	0
Environmental + cultural	2	N/A
Environmental + economic + cultural	1	N/A
Total	65	22

[145] Website of Belgium consumers organisation Netwerk Bewust Verbruiken in cooperation with OIVO en Ecoconso, and support of Cel Sociale Economie, the POD DO, the FOD Leefmilieu and Leefmilieu Brussel. The website contains information about sustainability labels that are also present on Dutch food products.

[146] Website of independent German consumer organisation Verbraucher Initiative.

[147] Website initiated by the International Trade Centre, the joint agency of the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD).

Although some VSSs focused on similar aspects of sustainability, this does not necessarily imply that the requirements are similar. These specific requirements are, however, often difficult to find and, therefore, difficult to compare. The specific requirements that could be found often differed only slightly. For example, Demeter and EU Organic aim at environmental aspects and animal welfare. Demeter sets, however, additional production and processing requirements, e.g. as to mutilations of poultry (like forbidding cutting, trimming, or castration,[148] at least two thirds of the fodder offered to the animals must originate from Demeter production,[149] and milk may not be homogenised.[150] When EU Organic and Demeter are compared on husbandry practices and housing conditions of dairy cows with the husbandry practices and housing condition requirements of two other dairy standards that focus on animal welfare, Duurzame Weidezuivel (Sustainable Pasture Dairy) and Weidemelk (Pasture Milk), differences also occur (see Table 2.3).

Table 2.3. Requirements relating to husbandry practices and housing conditions of dairy cows of EU Organic, Demeter, Duurzame Weidezuivel and Weidemelk

VSS	Type of access	Length of time
EU Organic	Open air, preferably pasture	Permanent
Demeter	Open air, preferably pasture	Permanent
Duurzame Weidezuivel	Pasture	130 days a year, 8 hours a day
Weidemelk	Pasture	120 days a year, 6 hours a day

2.4.2. High NGO Involvement in Standard-Setting

VSSs are mainly set by NGOs (24), and to a lesser extend also by firms (14), public actors (14), or through a partnership between NGOs and firms (10). Partnerships between NGOs and firms generally took the form of NGOs having public consultations with firms before standard-setting. Public-private partnerships, i.e. public actors collaborating in standard-setting with firms, NGOs, or both, were rare in the sample. There were only three public-private partnerships and these were between public actors and NGOs: KRAV, Biogarantie, and Soil Association. These public-private partnerships were, moreover, VSSs regulating organic production processes that were originally founded by NGOs; later these became

[148] Article 5.4.4. Production Standards For the Use of Demeter Biodynamic® and Related Trademarks As of June 2014 (to be implemented by each member country by 1 July 2015).
[149] Ibid, Article 5.5.1.
[150] Ibid. Article 4.1.

official national organic standards that had to meet the requirements of the EU Regulation on Organic Agriculture[151] but upheld their stricter requirements.

2.4.3. Certification of Standards often through Private, Third-Party Certification

Most VSSs were certified through certification schemes. For three VSSs it was unclear what type of certification scheme was used for certification. Only four VSSs, i.e. the Danish organic Ø-mark and the EU schemes PDO, PGI, and TSG, were certified through public certification schemes. The other VSSs were certified through private certification. Most VSSs are certified through third-party certification (33)[152], followed by first-party certification (14), and second-party certification (11).

The 33 VSSs that are certified through third-party certification are often set by NGOs (12), public actors (9), or a partnership between NGOs and firms (8) (see Table 2.4). VSSs that are certified through second-party certification are often set by NGOs only, while VSSs that are certified through first-party certification are often set by firms only.

Table 2.4. Actors Involved in Standard-Setting and Type of Certification

Type of certification	Public actor	Public actor + NGO	NGO	NGO + firm	Firm
Public certification	4	0	0	0	0
Third-party	9	3	12	8	1
Second-party	1	0	10	0	0
First-party	0	0	2	1	11

2.5. General Discussion

This study shows that a regulatory structure is present within VSSs with respect to their aim, actors involved in standard-setting, and their certification scheme used. Most VSSs have two main characteristics, which can be found within each group of VSSs, e.g. animal welfare standards, fair trade standards, or environmental standards. First, VSSs often have high NGO involvement in standard-setting. Second, certification of VSSs is mainly conducted by private certifiers, through third-party certification. Wittingly or unwittingly the majority of VSSs resemble a structure that is trusted by consumers and considered most reliable and credible according to consumer research. First, private, third-party certification is generally

[151] Council Regulation (EC) 834/2007 on organic production and labelling of organic products (EC Regulation on Organic Agriculture) [2007] OJ L 189.

[152] Ecosocial performed two types of certification: third party certification for organic produce, and second-party certification for non-organic produce. Ecosocial is, therefore, counted twice.

perceived as more reliable and credible than first- or second-party certification[153] and thus more effective in ensuring food quality.[154] Second, consumer research suggests that consumers have more confidence in NGOs than in firms or governments in standard-setting.[155] Based on these insights it may seem that the majority of VSSs are on the right track.

Even though the majority of VSSs may be on the right track, several VSSs may not. Current results show that almost half of the VSSs are set without NGO involvement. Furthermore, certification of almost half of the VSSs is not conducted through third-party certification, but through first- or second-party certification. In other words, the majority of VSSs may be considered 'good', i.e. they are more reliable, credible,[156] effective,[157] and trusted,[158] while a minority may be considered 'bad', i.e. they are not considered as reliable, credible, effective, and trusted. The coexistence of a plurality of 'good' and 'bad' VSSs on the market may confuse consumers, as consumers cannot trust that every VSSs is 'good'. As this study also showed the multiplicity and diversity of VSSs on the market, it is very difficult for consumers to know every single VSSs and distinguish 'good' from 'bad' standards. As such, consumer perception towards the reliability and credibility of VSSs, even to those standards that are reliable and credible, may be negatively affected. As a consequence, the effectiveness of VSSs to increase sustainable consumption may be reduced.

To increase the effectiveness of VSSs to increase sustainable consumption, private and/or public intervention may be necessary. An example of private intervention is the merge between Rainforest Alliance and UTZ Certified by creating a single agricultural VSSs, with the aim to simplify the certification process and to increase engagement with consumers.[159] As actors are likely to commit themselves to a system of governance when they grasp that their self-interest is served by such commitment,[160] it is not unlikely that further collaborations will emerge. Governments could induce such collaborations between private standard-setters by drafting international procedural guidelines for standard-setting.

An example of public intervention is governments setting, through command and control regulatory instruments, minimum requirements which a product or production process claiming to be sustainable should meet. For example, in the US, when energy

[153] Elise Golan and others, 'Economics of food labelling' (2001) 24 Journal of Consumer Policy 117.
[154] Hatanaka, Bain and Busch (2005), n 4.
[155] Padel and Foster (2005), n 136; Eden, Bear and Walker (2008), n 135.
[156] Golan and others (2001).
[157] Hatanaka, Bain and Busch (2005), n 4.
[158] Padel and Foster (2005), n 136; Eden, Bear and Walker (2008), n 135.
[159] http://www.rainforest-alliance.org/article/rainforest-alliance-utz-merger (visited 30 June 2017).
[160] Bryan H. Druzin, 'Anarcy, Order, and Trade: A Structuralist Account of Why a Global Commercial Legal Order is Emerging' (2014) 47 Vanderbilt Journal of Transnational Law 1049.

efficiency was becoming popular, a great diversity of claims were made about the value of energy efficiency. The US government stepped in and created a third-party certified energy efficiency standard for products and buildings that meet the highest energy efficiency levels.[161] Consumers could recognise products and buildings that met this standard through the state-controlled, voluntary standard called Energy Star. Another example of governments that stepped in when a great diversity of VSSs appeared on the market with respect to sustainability issues is the EU initiated organic standard. The EU organic standard is a voluntary, third-party certified standard. Producers are legally obliged to place the stamp accompanying the standard on their product labels when they claim their product to be organic. The EU organic standard was set up to increase consumer confidence in products labelled as organic, which would ensure fair competition and a proper functioning of trade in organic produce.[162]

Through Energy Star and the EU organic standard, governments have intervened with the regulatory structure of VSSs by setting minimum quality standards. The VSSs are not checked by the government but by private, third-party certifiers. The Danish organic Ø-mark and the EU quality schemes are examples of VSSs in which the government intervened by setting minimum quality standards that are checked by *public* bodies. As such, the government is more involved in the regulatory structure of these standards compared to Energy Star and the EU organic standard.

It remains unclear, however, whether and to what extent such public or private interventions with VSSs are effective in increasing consumer confidence. Previous research concerning the Energy Star label[163] and the EU quality labels[164] have focused mainly on consumer willingness to pay, concluding that consumers are willing to pay a price premium for Energy Star or EU quality-labelled products. Whether a VSSs will be effective in motivating consumers to purchase the product may not only depend on willingness to pay, but also on consumer recognition of the label,[165] basic consumer knowledge of the production standards covered,[166] and consumer confidence in the VSSs.[167] Previous research concerning the Danish eco-label Ø-mark has been very elaborate on these three factors: the Ø-mark is recognised by almost all Danish consumers, Danish consumers seem

[161] Energy Policy Act. Section 131 of the Act amends Section 324 (42 USC 6294) of the Energy Policy and Conservation Act.

[162] EC Regulation on Organic Agriculture, n 151, preamble para 3.

[163] David Ward and others, 'Factors Influencing Willingness-to-pay for the ENERGY STAR Label' (2011) 39 Energy Policy 1450; Richard Newell and Juha Siikamäki, 'Nudging Energy Efficiency Behavior' (2013) 13 Resources for the Future RFF Discussion Paper.

[164] Luisa Menapace and others, 'Consumers Preferences for Geographical Origin Labels: Evidence from the Canadian Olive Oil Market' (2011) 38 European Review of Agricultural Economics 193; Aprile *et al*. 2012.

[165] John Thøgersen, 'Psychological Determinants of Paying Attention to Eco-labels in Purchase Decisions: Model Development and Multinational Validation' (2000) 23 Journal of Consumer Policy 285.

[166] Carolien Hoogland, Joop de Boer and Jan Boersema, 'Food and sustainability: Do consumers recognize, understand and value on-package information on production standards? ' (2007) 49 Appetite 47.

[167] Thøgersen (2000), n 165; Dorothée Brécard and others, 'Determinants of demand for green products: An application to eco-label demand for fish in Europe.' (2009) 69 Ecological Economics 115.

to have a basic knowledge of the production standards,[168] and Danish consumers seem to have high confidence in their national eco-label Ø-mark compared to consumer confidence of UK, Swedish and US consumers in their national eco-label.[169] Previous research concerning the EU organic standard shows low recognition of the EU organic label by EU consumers[170] and EU consumer confidence in the underlying EU organic standards and the certification systems seems not very pronounced.[171] The effectiveness of these VSSs in increasing consumer confidence in VSSs thus seems to differ. Furthermore, the Energy Star standard, the EU organic standard, and the Danish Ø-mark standard focus on environmental issues, so question remains whether a similar approach would be effective and legally possible for other categories of VSSs (e.g. fair trade, animal welfare, health) or sustainability in general.

Further research is necessary whether and to what extent public or private actors should intervene in the regulatory structure of VSSs to effectively increase consumer confidence. Consumer confidence in VSSs may depend on the number of standards in one market and to what extent these standards address similar or different issues. To assess whether and to what extent public or private actors should intervene in the plurality of VSSs, future research should focus on whether and how much consumer confidence in VSSs is reduced with different levels of plurality of sustainability claims in one market. This can be examined in an experimental study where differences in consumer confidence caused by differences in the number of standards and issues addressed are studied. This can be done by systematically varying the extent to which consumers are confronted with a single standard for each sustainability issue, or a range of standards addressing each same issue. In addition a variation can be made whether a consumer is confronted with a single sustainability issue or a range of sustainability issues. It is expected that if multiple issues are addressed by multiple labels at the same time, consumer confidence would be lowest. Furthermore, it is expected that if multiple issues are each addressed with a single standard this would lead to the highest confidence, as it gives most information with least complexity.

In addition, consumer confidence in VSSs may also depend on the actors in which consumers have confidence. Previous research has shown that consumers have higher confidence in VSSs set by NGOs[172] and that consumers do not identify or prioritise third-party certification as more independent than other types of certification.[173] Sønderskov and

[168] Carsten Daugbjerg and others, 'Improving eco-labelling as an environmental policy instrument : knowledge, trust and organic consumption' (2014) 16 Journal of Environmental Policy and Planning 559.

[169] Sønderskov and Daugbjerg (2011), n 135.

[170] Meike Janssen and Ulrich Hamm, 'Governmental and private certification labels for organic food: Consumer attitudes and preferences in Germany' (2014) [49] Food Policy 437.

[171] Meike Janssen and Ulrich Hamm, 'The mandatory EU logo for organic food: consumer perceptions' (2012) 114 British Food Journal 335.

[172] Padel and Foster (2005), n 136; Eden, Bear and Walker (2008), n 135.

[173] Eden, Bear and Walker (2008), n 135.

Daugbjerg conclude, however, that visible and substantial state involvement in standard-setting and certification increases consumer confidence in organic standards.[174] From both studies it can be derived that consumers have low confidence in organic standards set and confirmed by firms. Both studies contradict each other whether NGOs or governments should set and confirm standards. However, they focus only on organic standards, while results may differ for other categories of sustainability. To assess whether and to what extent actors involved in standard-setting affect consumer confidence, future research should focus on whether firms, NGOs and/or governments should set and/or certify standards to increase consumer confidence and whether this may differ per dimension of sustainability (e.g. fair trade, organic, animal welfare). This could be examined with a survey where consumers are asked to compare VSSs on trustworthiness and willingness to pay. In this survey different VSSs (e.g. fair trade, organic, animal welfare) with different regulatory structures should be tested with different roles for different actors (i.e. set and/or confirmed by NGOs, governments or firms). The outcome of the experiment and the survey could be used to determine the most effective intervention strategy in VSSs.

This study provided an overview of the current regulatory structure of VSSs underlying sustainability labels in The Netherlands. The Netherlands was used as a case study as, similar to other Western countries, it struggles with the proliferation of VSSs.[175] The data collection consists of publically available information as this information is also available to consumers. A limitation was that NGO-firm partnership was assumed when NGOs had public consultations with firms before standard-setting. Such a broad interpretation of NGO-firm partnership was used to not exclude NGO-firm partnership of which publically available information was ambiguous.

Private or public intervention may be necessary to effectively reduce the impact of 'bad' standards on the trustworthiness of 'good' standards. Governments may especially have a role to play as they can induce collaborations between private standard-setters and set minimum requirements which a product or production process claiming to be sustainable should meet. As Western governments have repeatedly stated that they wish to promote sustainable consumption,[176] time has come for action rather than words.

[174] Sønderskov and Daugbjerg (2011), n 135.
[175] See e.g. Koos (2011), n 105.
[176] WSSD (2002), n 103.

3

Green Pictograms on EU Foods. A Legal Study Informed by Behavioural Science

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Abstract The objective of this study is to examine whether and how the application of the normative EU "average consumer" benchmark could be informed by behavioural sciences, in the doctrinal assessment under the FIR of possibly misleading, purely visual information, as used by green pictograms. To achieve the objective two pictograms that are used on food products in the Dutch market were studied. Both pictograms use visual properties that consumers may associate with organic production, with only one pictogram actually guaranteeing organic production. It was, first, examined in a doctrinal manner whether and to what extent the FIR could be interpreted and applied to the pictogram that does not guarantee organic production.[177] Second, as the analysis under the FIR is based on the normative benchmark of the "average consumer", the expectations of the ECJ of the normative "average consumer" were examined. Third, it was analysed whether judicial decisions under the FIR could be informed by insights from behavioural science. Subsequently, two experiments were conducted to assess the potential benefits of including behavioural research under the normative test of the "average consumer". Finally, the results from the legal and experimental study were compared to assess the usefulness of the inclusion of insights from behavioural research in the legal analysis of the normative benchmark of the "average consumer" under the FIR. The doctrinal study showed that insights from behavioural science may provide further guidance to national courts in the doctrinal assessment of the normative EU "average consumer". The experiments indicated that green pictograms could be considered misleading under the FIR.

3.1. Introduction

Green sells. Organic food is gaining popularity and businesses are taking note. A short trip to the supermarket may be overwhelming as many food products are labelled with green pictograms.[178] Green pictograms are pictorial symbols, using visual information commonly associated with organic production, e.g. the colour green and images of leaves.[179] By using this visual information, green pictograms may give consumers the impression that the product it is attached to is produced in an organic manner.

Not all green pictograms guarantee such production, however. Organic production and independent checks to guarantee organic production may warrant a price premium to consumers.[180] To gain the price premium without the higher production and certification

[177] Cf Hutchinson (2015), n 96.

[178] Ulf Hahnel and others, 'The Power of Putting a Label on It: Green Labels Weigh Heavier than Contradicting Product Information for Consumers' Purchase Decisions and Post-Purchase Behavior' (2015) 6 Frontiers in Psychology 1392; Eva Van der Zee, 'Regulatory Structure of Standards underlying Sustainability Labels. Laying the Foundations for Effective Intervention Strategies to Increase Consumer Confidence in Sustainability Labels.' in Harry Bremmers and Kai Purnhagen (eds), *Regulating Food Safety Law in the EU – A Management and Economics Perspective* (Springer 2018).

[179] Hahnel and others (2015), n 178.

[180] Fabrizio Cafaggi and Paola Iamiceli, 'Supply Chains, Contractual Governance and Certification Regimes' (2013) 37 European Journal of Law and Economics 131, 136.

costs, food businesses may be incentivized to free-ride on those pictograms that guarantee organic production. Such practice may give consumers the impression that the food product is produced in an organic manner; which may be considered misleading in the European Union (EU) under the Food Information Regulation (FIR).[181]

In the EU, the FIR aims at forming a framework for EU and national measures to ensure that consumers are not misled when buying food products. To assess whether commercial practices, such as green pictograms, are misleading *in concreto*, they have to be assessed by national courts against the normative benchmark of the "average consumer", who is "reasonably well-informed and reasonably observant and circumspect".[182] The "average consumer" benchmark is a normative test developed by the European Court of Justice (ECJ). The ECJ has clarified what can be expected from this normative "average consumer" when confronted with visual information on consumer products, but only when the visual information was corrected by textual information.[183] It is not obvious from ECJ case-law what can be expected from the normative "average consumer" when confronted with visual information that is not corrected by textual information, such as pictograms. Behavioural research may provide insights as to how the "real consumer", confined by the methodology, processes visual information. As such, behavioural research may be helpful to inform judicial decision making as to what can be expected from the normative "average consumer". Clarity is required as to whether and how behavioural insights could provide guidance to national courts in the doctrinal assessment of misleading visual information by national courts.

The objective of this study is to examine whether and how the application of the normative EU "average consumer" benchmark could be informed by behavioural sciences, in the doctrinal assessment under the FIR of possibly misleading, purely visual information, as used by green pictograms. To achieve the objective two pictograms that are used on food products in the Dutch market were studied. Both pictograms use visual properties that consumers may associate with organic production, with only one pictogram actually guaranteeing organic production. It was, first, examined in a doctrinal manner whether and to what extent the FIR could be interpreted and applied to the pictogram that does not guarantee organic production.[184] Second, as the analysis under the FIR is based on the normative benchmark of the "average consumer", the expectations of the ECJ of the normative "average consumer" were examined. Third, it was analysed whether judicial decisions under the FIR could be informed by insights from behavioural science.

[181] EU Food Information Regulation, n 99.

[182] See e.g., *Clinique*, n 47 and *Gut Springheide*, n 47.

[183] Case C-470/93 *Mars* [1995] ECLI:EU:C:1995:224; Case C-195/14 *Teekanne* [2015] ECLI:EU:C:2015:361.

[184] Cf Hutchinson (2015), n 96.

Subsequently, two experiments were conducted to assess the potential benefits of including behavioural research under the normative test of the "average consumer". Finally, the results from the legal and experimental study were compared to assess the usefulness of the inclusion of insights from behavioural research in the legal analysis of the normative benchmark of the "average consumer" under the FIR.

3.2. Green Pictograms and EU law

The EU Regulation on Organic Agriculture defines the objectives, principles and rules applicable to organic production to contribute, amongst others, to consumer confidence.[185] This Regulation seeks to solve the regulatory dilemma of organic production by combining best environmental practices, a high level of biodiversity, the preservation of natural resources, the application of high animal welfare standards and a production method using natural substances and process.[186] When producers comply with this Regulation, they may use textual information such as "organic", "eco", and "bio",[187] and/or the EU pictogram (Figure 3.1) on their food packaging.[188] When producers do not comply with the EU Regulation on Organic Agriculture, they are not allowed to use textual information such as "organic", "eco" and "bio".[189] The use of green pictograms holding similar visual properties as the EU pictogram is, however, not covered by the EU Regulation on Organic Agriculture.[190]

Similar to the terms "organic", "eco", and "bio", green pictograms may give consumers the impression that a food product is produced using organic production methods. An example of a green pictogram that may give consumers such an impression is the shop pictogram used in practice by a Dutch retail chain (Figure 3.1). Similar to the EU pictogram (Figure 3.2), the shop pictogram uses visual properties that consumers may associate with organic production: the colour green, an image of a leaf, and the form of a quality stamp. In the consumer's mind, both pictograms may create the impression that a product carrying any of these stamps is produced in an organic manner, while this impression is only factually correct for the EU pictogram. Food products carrying the EU pictogram are certified by an independent organization to comply with the EU Regulation on Organic Agriculture.[191] The criteria underlying issuing of the shop pictogram to certain food products, as well as the certification procedures, remain unclear. The shop pictogram can be found on products the retail chain considers to be "100% natural" or when the

[185] Preamble 5, EC Regulation on Organic Agriculture, n 151.
[186] Ibid Preamble 1.
[187] Ibid art 23.
[188] Ibid art 25.
[189] Ibid art 23.
[190] Preamble 5, EC Regulation on Organic Agriculture, n 151.
[191] Ibid.

product contains only “natural flavourings and colourings”, while the retail chain does not explain what “natural” would entail. Consequently, as the shop pictogram uses visual properties that consumers may associate with organic production, the shop pictogram does not necessarily support such associations. Therefore, the shop pictogram may give consumers a misleading impression that the product is produced in an organic manner.

Figure 3.1. Shop pictogram[192]

Figure 3.2. EU pictogram

To assess whether the shop pictogram could be considered misleading, the FIR would be applicable. In the EU, the FIR aims at forming a legal framework for EU and national measures to ensure that consumers are not misled when buying food products. The FIR complements the Unfair Commercial Practices Directive (UCPD)[193] which covers certain aspects of the provision of information to consumers specifically to prevent misleading actions and omissions of information.[194] Both the UCPD and the FIR take the normative “average consumer” as clarified by the ECJ as a normative benchmark to examine whether consumers are misled.[195]

The FIR states that food law shall provide a basis for consumers to make informed choices in relation to food they consume and to prevent any practice that may mislead the consumer (recital 4 FIR). The FIR requires that food information must be fair, meaning that it may not be misleading (Article 7 FIR). More specifically for our case at issue, food information must not be unfair “as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production” (Article 7(1)(a) FIR) or “by attributing to the food effects or properties which it does not possess” (Article 7(1)(b) FIR). Furthermore, the FIR gives some weight to how consumers process information by emphasising that food information shall be accurate, clear and easy to understand for the consumer (Article 7(2) FIR), i.e. the normative “average consumer” as clarified by the ECJ.

When a pictogram gives the normative “average consumer”, as clarified by the ECJ, the misleading impression that the food product it is attached to is produced in an organic

[192] By using this shop label it is in no way implied that the Dutch retail chain using this quality stamp is doing anything illegal.
[193] Council Directive (EC) 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149 (Unfair Commercial Practices Directive)
[194] Preamble 5 FIR.
[195] Unfair Commercial Practices Directive, n 193, preamble 18, arts 6-8. See also *Teekanne*, n 183, at 36, where the ECJ applied the “average consumer” benchmark to assess the misleading effect of food information under the under the Directive preceding the FIR (Council Directive (EC) 2000/13 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [2000] OJ L 109).

manner, the pictogram could be considered misleading under the FIR. Unlike other rules of EU consumer protection legislation,[196] Article 7 FIR does not explicitly require a causal link between the misleading effect of the food information and the transactional decision of the normative "average consumer". Some scholars argue that general legal requirements and good scientific practice of consumer decision theory require that a study examining whether product labels could be misleading needs to include an examination of whether the misleading effect affects the transactional decision made by the normative "average consumer".[197]

3.3. The Normative Benchmark of the "Average Consumer" Based on ECJ Case Law

To assess whether visual information as used by green pictograms is misleading under the FIR should be based on what can be expected from the normative "average consumer" benchmark when confronted with such visual information. This normative benchmark as developed by the ECJ gives guidance to national courts and the national legislator. It is not for the ECJ to rule on the question whether the labelling of certain products is likely to mislead the consumer; this is a task for the national courts.[198] The normative benchmark of the "average consumer" was first introduced by the ECJ in 1998 in *Gut Springheide*.[199] *Gut Springheide* concerned a company that marketed eggs ready-packed under the description '6-Korn – 10 frische Eier' (six-grain – 10 fresh eggs). The company asserted that the six varieties of cereals in question account for 60% of the feed mix used to feed the hens. A slip of paper enclosed in each pack of eggs praised the beneficial effect of this feed on the quality of the eggs. According to the German Courts, the information provided on and in pack would be prohibited under the German Foodstuffs and Consumer Goods Law. *Gut Springheide* asserted that the German appeal court did not produce expert opinion to prove that they misled the consumer. The case moved its way up to the Bundesverwaltungsgericht (the Federal Administrative Court) who asked the ECJ for a preliminary ruling. The Bundesverwaltungsgericht asked the ECJ whether the misleading effects should be determined based on the actual expectations of consumers to whom the information is addressed or based on an objectified concept of a consumer open only to legal interpretation.

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[196] Unfair Commercial Practices Directive, n 193, art 6(1).

[197] Kai Purnhagen and Erica Van Herpen, 'Can Bonus Packs Deceive Consumers? A Demonstration of how Behavioural Consumer Research can Inform Unfair Commercial Practices Law on the Example of the ECJ's Mars Judgment' (2017) 40 Journal of Consumer Policy 217, 229.

[198] See, in particular, Case C 366/98 *Geffroy* [2000] EU:C:2000:430 at 18-20, and Case C-446/07 *Severi* [2009] EU:C:2009:530 at 60.

[199] Case *Gut Springheide*, n 47.

The ECJ referred to its judgments in the interpretation of the application of the free movement of goods[200] and held that to determine whether a description, trade mark or promotional description or statement could be considered misleading should be assessed against the "average consumer" who is "reasonably well-informed and reasonably observant and circumspect".[201] The ECJ expected that national courts should, in general, be able to assess a misleading effect of a description or statement designed to promote sales, based on this normative "average consumer" benchmark, without ordering an expert's report or commissioning a consumer research poll.[202] In certain circumstances, however, e.g. when the necessary information is not at the disposal of the court or where the solution was not clear from the information before it, the ECJ held that a national court "may have recourse to a consumer research poll or an expert's report as guidance for its judgment".[203]

For national courts to apply the normative benchmark of the "average consumer" to green pictograms, then depends on the question how well-informed and observant the normative "average consumer" can reasonably be considered to be. Whilst there are many cases that had an influence on the interpretation of the normative benchmark of the EU "average consumer",[204] this paper focuses on the three leading cases that shaped the legal expectations towards the "average consumer" in EU law regulating food labelling.

In earlier case-law, most notably the *Mars*-case, the ECJ explained what a reasonably circumspect consumer would be considered to know when confronted with potentially misleading visual information front of pack accompanied by correcting textual information positioned next to the visual information. The *Mars*-case concerned a publicity campaign by Mars inc. in which the wrapping of ice-cream bars depicted a coloured band bearing the textual information "+ 10%". The visual information, the coloured band, was much larger than indicated by the textual information. The plaintiffs to the case at the German Court contended that a significant number of consumers "will be induced into believing [...] that the increase is larger than represented" and that, therefore, the marketing should be prohibited.[205] In providing an answer to the *Landgericht Köln* as to whether such a prohibition is compatible with the internal market, the ECJ referred to the normative benchmark of the "average consumer". The ECJ held that "[r]easonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of

[200] In particular Case C-362/88 *GB-INNO-BM* [1990] ECLI:EU:C:1990:102; Case C-238/89 *Pall* [1990] ECLI:EU:C:1990:473; Case C-126/91 *Yves Rocher* [1993] ECLI:EU:C:1993:191; *Clinique*, n 47; Case C-456/93 *Langguth* [1995] ECLI:EU:C:1995:78 and *Mars*, n .183.
[201] Case *Gut Springheide*, n 47, at 30-32.
[202] Ibid at 31.
[203] Ibid at 37.
[204] Cf Bram Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer Science 2015), 29-52; Vanessa Mak, 'Standards of Protection: in Search of the 'Average Consumer' of EU law in the Proposal for the Consumer Rights Directive' (2011) 15 European Review of Private Law 25, 27-29.
[205] *Mars*, n 183, at 22.

that increase".[206] Without explicitly stating this, it seems that the ECJ considered the textual information to be sufficiently determinate to consider that a "reasonably circumspect consumer" would not misinterpret the visual information on the food packaging.

Whether under the normative benchmark of the "average consumer", the "average consumer" can be considered "reasonably well-informed and reasonably observant and circumspect" with relation to textual information on food packaging was further elaborated by the ECJ in the case *Darbo*.[207] The case concerned a jam manufacturer under the name "Darbo Naturrein" (naturally pure) and under the description "Garten Erdbeer" (garden strawberry). A German consumer organization argued that because the jam contained the additive pectin and traces or residues of lead, cadmium, and pesticides, the term "Naturrein" (naturally pure) and "Garten Erdbeer" (garden strawberry) was likely to "create in the consumer's mind the impression that Darbo jam is a pure and natural product, free of any impurity or extraneous substance".[208] In reality, this jam contained the additive pectin and traces or residues of lead, cadmium, and pesticides. The *Oberlandesgericht Köln* sought advice of the ECJ, whether the name "Naturrein" was allowed by Directive 79/112/EEC (on the labelling, presentation and advertising of foodstuffs)[209]. The ECJ held that the normative "average consumer" would not be misled by the term "Naturrein" on the label, because the additive pectin was listed in the list of ingredients.[210] Furthermore, the ECJ held that it is common knowledge that garden fruit is inevitably exposed to pollutants.[211] This judgment by the ECJ could be understood as that the normative "average consumer" is expected to read the list of ingredients before purchasing a product and to have a general knowledge that environmental pollution may have an effect on food production. Whilst the *Darbo* case did not address an issue of visual information conflicting with textual information, the judgment is important for our research, as it clarifies that the ECJ expects the "average consumer" to read the list of ingredients prior to making a purchase decision. However, generally, the production method is not communicated on food labels in the list of ingredients. Our question is whether an "average consumer" could be expected to correctly interpret green pictograms and their link to organic production methods, when there is a lack of textual information on the production process.

More recently, the ECJ has clarified what can be expected from the normative "average consumer" when potentially misleading visual and textual information front of pack is corrected by textual information that is positioned back of pack. In the case

[206] Ibid at 24.

[207] Case C-465/98 *Darbo* [2000] ECLI:EU:C:2000:184..

[208] Ibid at 26.

[209] Council Directive (EEC) 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L 33.

[210] *Darbo*, n 207, at 22.

[211] Ibid at 27.

Teekanne, a tea producer marketed its fruit tea under the name "Felix Himbeer-Vanille Abenteuer" (Felix raspberry and vanilla adventure). The packaging contained depictions of raspberries and vanilla flowers, the indication "Früchtetee mit natürlichen aromen" [sic] (fruit tea with natural flavourings) and "Früchtetee mit natürlichen aromen – Himbeer-Vanille-Geschmack" (fruit tea with natural flavourings – raspberry-vanilla taste), and a seal with the indication "nur natürliche Zutaten" (only natural ingredients). The ingredient list on the side of the packaging indicated, however, that the fruit tea did, in fact, not contain any vanilla or raspberry constituents or flavourings. The *Bundesgerichtshof* referred to the ECJ whether it is permissible under the Directive preceding the FIR[212] for the labelling, presentation and advertising of foodstuffs to give the impression, by means of their appearance, description or pictorial representation, that a particular ingredient is present, even though that ingredient is not in fact present and this is apparent solely from the list of ingredients. The ECJ held that textual information on the back of a food package, such as an ingredient list, does not sufficiently counter a "consumer's erroneous or misleading impression" caused by visual and textual information on the front of that food package.[213] Therefore, the ECJ concluded that the food label "taken as a whole" should be taken into account by national courts to assess whether the normative "average consumer" is misled as to the characteristics of the food.[214]

Taken together the views by the ECJ on how national courts could assess the misleading effect of information on food packaging mainly gives guidance to national courts as to how to examine the misleading effect of either solely textual information, or visual information accompanied by textual information. Most assumptions of the normative "average consumer" test are based on assumptions of the normative "average consumer" when confronted solely with textual information.[215] In the two cases presented above, where the normative "average consumer" test was applied to visual information, this visual information was always accompanied by correcting texts.[216] In the *Mars* case the visual information was accompanied by correcting texts front of pack. In the *Teekanne* case the visual and textual information front of pack were corrected by textual information back of pack. None of these cases involved visual information in the complete absence of correcting texts.

When national courts want to examine whether pictograms that are not accompanied by textual information, such as the shop pictogram, are misleading, the so far

[212] Council Directive (EC) 2000/13, n 195.

[213] *Teekanne*, n 183, at 40.

[214] Ibid at 41-2.

[215] This is also the case for commercial information that does not appear on food packaging. See *GB-INNO-BM* , n 200; *Yves Rocher*, n 200; *Gut Springheide*, n 47; Case C-220/98 *Lifting* [1999] ECLI:EU:C:2000:8; Case C-239/02 *Douwe Egberts v Westrom Pharma* [2004] ECLI:EU:C:2004:445; Case C-26/13 *Kásler* [2014] ECLI:EU:C:2014:282.

[216] *Mars*, n .183; *Teekanne*, n 183.

used normative benchmark of the "average consumer" may not provide sufficient guidance. To get a better understanding what can be expected from the normative "average consumer" when confronted with green pictograms, insights from behavioural research may be helpful to inform judicial decision making.

3.4. The Normative Benchmark of the "Average Consumer" and Behavioural Research

It remains unclear whether behavioural research could inform judicial decision making in EU consumer law as Recital 18 UCPD emphasizes that the normative benchmark of the "average consumer" is not a statistical test.[217]. A very strict interpretation of Recital 18 may be that because the UCPD aims at ensuring the proper functioning of the internal market and to protect consumers' economic interests (Article 1 UCDP), a normative decision should be taken that is not based on any statistical data. This interpretation leaves open whether Recital 18 UCPD has an impact on the normative benchmark of the "average consumer" assessed in the FIR. The FIR is a *lex specialis* to Article 8 General Food Law (GFL)[218] and therefore not necessarily subjected to the UCPD.[219] While the UCPD is more market oriented, the GFL is more consumer-oriented, as it aims to provide a high level of protection of human health and consumers' interest in relation to food (Article 1 GFL). Following this argument, to ensure such high consumer protection, statistical research may provide useful insights within the framework of the FIR regardless of Recital 18.[220]

Another interpretation of Recital 18 may be that national courts do not have to use empirical research to come to a normative conclusion. In our view, such interpretation would be the most accurate. Although the ECJ held that national courts should be able to assess on their own whether the normative "average consumer" can be considered misled,[221] the ECJ explicitly stated that a national court may nonetheless decide to order an expert's opinion or commission a consumer research poll.[222] To extrapolate a poll to more general insights that are useful in the assessment of whether the normative "average

[217] Geraint Howells, Hans W. Micklitz and Thomas Wilhelmsson, *European Fair Trading Law – The Unfair Commercial Practices Directive* (Ashgate Publishing 2006) at 116; Jan Trzaskowski, 'Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive' (2016) 27 European Business Law Review 25 at 33.

[218] Regulation (EC) 178/2002 laying down the general principles and requirements of food law [2002] OJ L 31 (General Food Law)[219] Unfair Commercial Practices Directive, n 193, recital 5 and art 3(4).

[219] Unfair Commercial Practices Directive, n 193, recital 5 and art 3(4).

[220] It should be noted, however, that such interpretation fails to understand that statistical research could add to the information base of the judge to come to a more well-founded normative decision. See e.g. Trzaskowski (2016), n 217. Moreover, it should be noted that the UCPD recognizes three groups of consumers that can be used to decide on what can be expected of the average consumer within that group: the "average consumer", the "targeted average consumer" and the "vulnerable average consumer" (art 5(3) UCPD). These types are implicitly referred to in the FIR in relation to alcoholic beverages (see recital 40 FIR). As argued in this article, to ensure high consumer protection warranted by the FIR, the different groups recognized within the UCPD may also be relevant in the FIR

[221] Case *Gut Springheide*, n 47, at 33-35.

[222] Ibid at 31.

consumer" could be considered misled, statistics are essential. As such, the judgment by the ECJ suggests that at least some type of statistical evidence is allowed. This is also in line with the general trend in the case law of the ECJ to leave open the possibility for Member States to use statistical evidence or any other suitable type of evidence to justify measures infringing the free movement of goods, where the "average consumer" benchmark is part of.[223] This could be considered an opening towards including empirical studies into the actual behaviour of consumers. In the case at hand, empirical research may provide insights as to whether the shop pictogram gives the normative "average consumer" the impression of sustainability of the food product it is attached to, influencing the legal analysis of the potentially misleading character of such a pictogram.

3.5. Experiments

To examine whether and how insights from behavioural science could inform the doctrinal assessment under the FIR of the normative "average consumer" benchmark, as clarified by the ECJ, two experiments were conducted. These experiments serve as an exploratory showcase to examine how insights from behavioural research could inform judicial decision-making under the FIR on the misleading character of purely visual information provided through the use of pictograms. The following experiments could be used by national courts to examine the misleading effect of shop pictograms that closely resemble official pictograms. We investigated consumer interpretation of the shop pictogram and the EU pictogram (study 1) applied to product packaging (study 2). To analyse this we, first, investigated whether a shop pictogram using similar visual properties as the official EU pictogram, such as: the colour green, an image of a leaf, and the form of a quality stamp, gives consumers the impression of a higher level of organic production compared to a similar food product bearing no logo. Second, we examined whether the raised consumer expectations are similar to the impression consumers receive when faced with a food product bearing the official EU logo. Third, we examined whether simultaneous exposure to both pictograms would draw the consumer's attention to the fact that the shop pictogram may not guarantee the organic production of the food product it is attached to. We investigated the pictograms in isolation (i.e., isolated and not attached to a food label) in order to study associations with the pictogram in a controlled way. We also investigated the pictograms attached to a food label to study the effect of the pictogram in a more realistic situation.

In the first study, it was specifically assessed whether participants were likely to infer organic properties from both pictograms analysed or whether they were likely to (also) infer other properties, i.e., fair trade, animal welfare, free of (artificial) colourings and flavourings, or positive impact on health. In the second study, it was studied whether

[223] Case C-333/14 *Scotch Whiskey* [2015] ECLI:EU:C:2015:845, at 64-5 in conjunction with Case C-148/15 *Deutsche Parkinson Vereinigung* [2016] ECLI:EUC:2016:776, at 35-6.

participants also infer these properties when the pictograms where attached to a food product, and whether an addition of either pictogram would lead study participants to be willing to make a larger monetary sacrifice to obtain such a product.

3.5.1. Study 1

3.5.1.1. Design and Procedure

A convenience sample of 70 Dutch participants consisting of students in an undergraduate course and people living close to the home address of the first author volunteered for the experiment. Age ranged between 18 and 35 (*M*=22, *SD* 4.15). Of the participants, 43 were female, 26 male and 1 participant did not report gender. The experiment had a two group design (shop pictogram and EU pictogram – see figures 1 and 2 respectively). The shop pictogram was not recognised by 98% of the participants, the EU pictogram was not recognised by 46% of the participants.

Participants were invited to follow a link to fill in the survey in their own time, on their own computer or smartphone. After clicking the link, participants were randomly assigned to one of the conditions. Depending on the condition, participants were shown a picture of either the EU pictogram or the Dutch retail chain's shop pictogram. Participants were asked to rate to what extent they agreed that a product with that specific label was (1) Fair Trade (2) Animal Friendly (3) Organic (4) Free from artificial flavours and colorants (5) Healthy, on a visual analogue scale coded from 0 to 100 (0= completely disagree; 100= completely agree). All participants were then shown both pictograms together and scored for each pictogram to what extent participants perceived the product to be organically produced on the same visual analogue scale as before. Completing the experiment took about 3 minutes.

3.5.1.2. Results

An independent t-test showed no differences between the pictograms for participants rating their link to the organic production $t(68)=0.71$; $p=.48$ (Table 3.1). Participants scored the pictograms highest on, that is believed in their representation of, an indication of organic production. Although in the case of the EU pictogram the difference with fair trade ($p=.15$) and positive impact on health ($p=.07$) was not significant. Participants considered the EU pictogram to be indicative of a higher level of fair trade $t(68)=-2.06$; $p=.04$, and animal friendliness $t(68)=-2.06$; $p=.04$; neither of which production characteristics are actually regulated by the EU pictogram. No differences in rating for free of artificial additives $t(68)=1.45$; $p=.15$ or positive impact on health $t(68)=-23$; $p=.82$ were found. When participants were shown both pictograms, a paired sample t-test showed no differences for a perceived level of organic properties $t(69)=-1.27$; $p=.21$. Hence, this study suggests that participants perceived both pictograms as an indication or a guarantee of organic

production of food products these pictograms would be placed on. In addition, the study shows no difference in the extent to which participants perceive the labels to indicate organic production.

Table 3.1. Means and standard deviations for the statements

	EU pictogram			Shop pictogram			Cohen's d
	n	Mean	SD	*n*	Mean	SD	
On its own							
Organic	35	69.57[a]	26.27	35	73.94[a]	25.41	0.17
Fair Trade	35	60.03[ab]	29.86	35	44.37[c]	33.67	0.49
Animal Friendly	35	57.17[b]	27.73	35	42.74[c]	30.76	0.49
Free of artificial additives	35	50.86[b]	26.11	35	60.60[b]	29.92	0.34
Healthy	35	59.71[ab]	23.72	35	61.20[b]	30.41	0.05
In comparison							
Organic	70	67.74	26.06		60.91	27.53	0.23

Notes: Cohen's d measure for effect size. Around 0.20 small effects, about 0.50 medium effects.[224] Means in columns that share a superscript character are not significantly different at p=.05 (pairwise comparisons repeated measures least significant difference (LSD))

3.5.2. Study 2

3.5.2.1. Design and Procedure

Participants were 122 students from Wageningen university between 17 and 26 years (M=21, SD=2.0), of whom 80 (66%) were female. Students were approached midterm during the fall semester of 2016 in an education building and were asked to participate in a series of experiments. After completing the first, unrelated study they participated in the current study which took about 5 minutes. As reward for the combined study which lasted about 20 minutes they received a snack representing a monetary value of about €1.00.

Three different images of Dutch syrup waffles (*stroopwafels*) were prepared. Images either showed no pictogram (Figure 3.3A), the Dutch retail chain's shop pictogram (Figure 3.3B), or the EU pictogram (Figure 3.3C). Participant were shown only two of the packages, which were presented next to each other. This allowed direct comparison. Participants were asked to make one of the three comparisons: (1) no pictogram – vs – shop pictogram, (2) no pictogram – vs – EU pictogram, and (3) shop pictogram – vs – EU

[224] Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* (2nd edn, Hillsdale: Lawrence Erlbaum Associates 1988).

pictogram. The shop pictogram was not recognised by 87% of the participants, the EU pictogram was not recognised by 24% of the participants.

Figure 3.3A. No pictogram **Figure 3.3B.** Shop pictogram **Figure 3.3C.** EU pictogram

Figure 3.3. The three syrup waffles packages presented to participants. Each participant saw only 2 out of these 3 packages.

The same questions about perceived level of organic, fair trade, animal friendliness, free of artificial additives and healthiness as in study 1 were asked. In addition, willingness to pay (WTP) for each packages was assessed. After giving them the information that similar packages of syrup waffles are sold in retail for €1.50, participants were asked to give a price indication of what they would be willing to pay for these packages in Euros up to two decimals.

3.5.2.2. Results

Overall scores on perceptions of organic properties, fair trade, animal friendliness, freedom of artificial additives and positive impact on health for the packages are given in table 3.2. In contrast to study 1, no differences between the shop pictogram-labelled product and EU pictogram-labelled product for fair trade and animal friendliness were found. Similarly to study 1, it was found that participants mainly inferred organic properties from the labels. Both the shop pictogram-labelled product and the EU pictogram-labelled product were rated higher on organic properties, and the other sustainability properties such as fair trade, animal friendliness, and free of acritical additives than the package without a pictogram. This gave support to the interpretation from study 1 that both pictograms created

expectations with consumers that the food product, which was labelled with them, was more organic than conventional products. No differences were found between the perception of the positive impact on health across the labelled and unlabelled products, with all cases of this sweet pastry scoring low on the healthy scale.[225]

Table 3.2. Means (SE) of aggregated scores for the three products on perceived product property

	No label	Shop pictogram	EU pictogram
Organic	20.83 (1.97)^{aII,III}	58.64 (3.21)^{bI}	64.45 (2.93)^{bI}
Fair Trade	23.46 (2.28)^{aII}	43.83 (3.28)^{bII}	49.74 (3.30)^{bII}
Animal friendly	29.75 (2.56)^{aI}	42.81 (2.94)^{bII}	45.53 (3.35)^{bII}
Free of Artificial Additives	24.06 (2.11)^{aII}	46.55 (2.84)^{bII}	50.48 (2.60)^{bII}
Healthy	15.46 (1.88)^{aIII}	18.54 (2.05)^{aIII}	17.58 (2.13)^{aIII}

Values within a row that share a superscript character or within a column that share a roman numeral are not significantly different at p=.05 (pairwise comparisons LSD).

Overall scores on perceptions of organic properties for the three food products when they were being compared in pairs are given in table 3.3. Paired sample t-tests on both products rated by the same participant showed no significant difference between the shop-labelled product and the EU-labelled product $t(40)=-0.81$, $p=.42$. Differences between the shop-labelled product and the non-labelled product $t(39)=8.82$, $p<.01$, and the EU-labelled product and the non-labelled product $t(40)=-8.76$, $p<.01$ were found. This provides additional support for the findings from study 1 that either pictogram suggested that the product was more organic than the product without a pictogram, and that no differences between the two pictograms were identified by the study participants.

[225] It should be noted that as the pictograms were attached to a sweet pastry (stroopwafels) product, consumers may associate the pictograms less with health, than if they were applied to a healthier product (e.g. pasta sauce).

Table 3.3. Perceived level of organic (Mean, (SD)) of a product with a label presented next to another product

Condition	N	No label	Shop pictogram	EU pictogram	Paired t, p, Cohen's d
No label – shop label	40	20.25 (17.04)	61.88 (28.55)		t=8.82, p<.01, d=1.46
No label – EU pictogram	41	21.39 (18.55)		68.66 (25.59)	t=-8.76, p<.01, d=1.38
Shop pictogram – EU pictogram	41		55.49 (29.20)	60.24 (27.10)	t=-0.81, p=.42, d=0.13

Notes: Cohen's d around 0.20 small effects, about 0.50 medium effects, around 0.80 and above large to very large.[226]

Next it was explored whether organic perception of the labels influenced economic decision making of participants. It was found that participants are willing to pay approximately 28 Eurocents (25%) more for the shop pictogram-labelled product compared to the product without pictogram $t(39)=3.48$, $p<.01$, about 20 Eurocents (14%) for the EU-labelled compared to the product without pictogram $t(40)=3.66$, $p<.01$. The difference of 8 Eurocents (5%) between the shop pictogram and the EU pictogram did not reach significance $t(40)=-1.92$, $p=.06$ (table 3.4). Hence, these results suggest participants were willing to sacrifice substantially more money for either pictogram-labelled products than for the product without pictogram.[227]

[226] Ibidn 224.

[227] It was also found that willingness to pay is moderately (0.37) to strongly (0.95) positively correlated between the rated products. This implies that participants willing to pay more for one of the packages is also willing to pay more for the other, which, unsurprisingly implies that willingness to pay depends on liking of syrup waffles in general.

Table 3.4. WTP in € (mean, (*SD*)) of a product with a label presented next to another product

Condition	*n*	No label	Shop pictogram	EU pictogram	Paired *t*, *p*, Cohen's *d*
No label – shop label	40	1.14 (0.41)	1.42 (0.47)		*t*=3.48, *p*<.01, *d*=0.57
No label – EU pictogram	41	1.42 (1.11)		1.62 (1.10)	*t*=-3.66, *p*<.01, *d*=0.57
Shop pictogram – EU pictogram	41		1.34 (0.61)	1.42 (0.61)	*t*=-1.92, *p*=.06, *d*=0.38

Notes: Cohen's *d* around 0.20 small effects, about 0.50 medium effects, around 0.80 and above large to very large.[228]

3.5.3. Discussion

Study 1 showed that participants associated the shop pictogram and the EU pictogram mainly with organic production of the food product these pictograms would be attached to; which suggests consumers perceive either pictogram as an indication of organic production. Study 2 confirmed that both the shop and the EU pictogram gave participants the impression that the product is more organic than a product without a pictogram, as both pictogram-labelled products scored substantially higher on organic properties than the non-labelled product. Hence, it can be concluded that consumers infer organic properties from either pictogram, whilst only the EU pictogram guarantees organic production.

In both studies participants rated the level of organic properties guaranteed by the EU pictogram similar to that represented by the shop pictogram. This was the case when the pictograms were presented in isolation from any food product as well as each other and when they were brought in direct comparison (study 1), but also when they were presented on a package of a specific food product, either in isolation from each other or shown in direct comparison (study 2). Caution is needed here so as not to over-interpret a non-significant difference as an indication of no difference. Alternative explanations can be the lack of power of the study, i.e., that there are too few observations to make a definitive claim, or other methodological shortcomings. In the current case, studies 1 and 2 showed that differences as to the perceived level of organic properties between labelled products are at best small,[229] whilst the differences as to these levels between the labelled and the non-labelled products were much more substantial. This suggests that both pictograms

[228] Cohen (1988)n 224.

[229] When interpreting Cohen's d, a measure for effect sizes independent of the number of observations.

convey a similar message about how organically the food product is produced, and that the presence of the EU pictogram on similar food products on the market may not sufficiently correct consumer's misleading impression of the shop pictogram. This is especially relevant as participants reported a higher willingness to pay a price premium for the products labelled with either pictogram when compared to the non-labelled product. Considering that the shop pictogram does not need to guarantee the organic production of the food product to the same extent as the EU pictogram does, this may mislead consumers in their transactional decision-making.

Both studies showed that health scores were substantially higher for the labelled products in study 1, but not different from non-labelled products in study 2. This is probably because a health inference is unlikely for the sweet pastry the pictograms were applied to in study 2. Moreover, both studies showed that besides the organic properties, also other sustainability properties were positively influenced by both pictograms. In both studies fair trade, animal friendly, and free of artificial additives were rated relatively high, albeit slightly lower than the organic properties.

From a legal point of view such associations with other sustainability properties are interesting as evidently consumers infer sustainability properties from the EU pictogram that are not supported by this pictogram. Consumer studies show that consumers tend to see sustainability as a unified construct that indicates comparable levels of organic, fair trade and other sustainable properties.[230] Any sustainability claim is, therefore, likely to create in the consumer's mind associations with sustainability properties that are not supported by the specific sustainability claim at issue. For that reason, a legal assessment informed by behavioural science of what could be expected from the "average consumer" when confronted with sustainability claims can only reasonably focus on whether the main associations with the pictogram are supported by the claim. Our results show that participants associate both the EU and the shop pictogram mainly with organic production, but where this main association is supported by the EU pictogram, it may not be by the shop pictogram.

Before discussing the usefulness of these insights for the application of the normative benchmark of an "average consumer" in the assessment of green pictograms on food products under the FIR, the limitations of the current approach should first be considered, i.e., mainly to what extent it is possible to generalize consumer studies to the "real world".[231] First, participants in the reported studies were not a representative sample of the Dutch population. In study 1 half of the participants were students of Wageningen

[230] Van Dam (2011), n 114.

[231] Cf Robert Hillman, 'The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages' (2000) 85 Cornell Law Review 717; Jeffrely Rachlinski, 'New Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters' (2007) 85 Cornell Law Review 739.

University, the other half were graduates from Utrecht University. In study 2, all participants were students of Wageningen University. Students and university graduates can be expected to have a higher level of education and to be more interested in organic production than the general population. Thus, the sample has likely more knowledge about green pictograms due to a higher motivation to choose products produced in an organic manner. More critical distinction between the shop pictogram and the EU pictogram would be expected from such a knowledgeable and highly educated sample. Nevertheless the perception and valuation of the shop pictogram and the EU pictogram was very similar, which makes it likely that the difference in perception and valuation of the shop pictogram compared to the EU pictogram will be even smaller in the general population.

Secondly, the surveys were conducted in front of a computer screen which is different from a shop-setting where consumers would normally be confronted with such pictograms. While in a supermarket consumer awareness of pictograms is limited, when asked to participate in a survey participants are probably more aware of the pictograms.[232] This increased awareness of participants would be expected to result in a more critical evaluation of the shop pictogram compared to the EU pictogram than in a supermarket. Therefore, it is likely that the distinction between the shop pictogram and the EU pictogram in a real shopping environment is even smaller than in the current study.

The reported studies were conducted with only Dutch participants and it may well be that consumers in other countries differently appreciate the EU pictogram. For example, English consumers have previously been shown to be more sceptical than other European consumers to trusting commercial or EU information.[233] The ECJ already held that "social, cultural and linguistic factors"[234] should be taken into account to determine whether the normative "average consumer" could be considered misled. To take such "social, cultural and linguistic factors" into account, the use of national samples to determine whether the normative "average consumer" will be misled *in concreto*, may be appropriate to provide insights to the doctrinal assessment. Using a national sample may especially be appropriate in our case at issue, where both products and one of the pictograms are typically Dutch. Although the specific outcomes are limited to the Netherlands, the current study may suggest ways how other national courts with the broader EU framework may contract behavioural research on a case by case basis.

Concluding, the conducted experiments provide support for the argument (at least when applied to a Dutch setting) that under the FIR the normative "average consumer" should be considered a consumer who predominantly interprets green pictograms to

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[232] Cf Klaus Grunert and Josephine Wills, 'A Review of European Research on Consumer Response to Nutrition Information at Food Labels' (2007) 15 Journal of Public Health 385 at 396.

[233] Susan Miles, Odis Ueland and Lynn Frewer, 'Public Attitudes towards Genetically-modified Food' (2005) 107 British Food Journal 246 at 253.

[234] See e.g., *Clinique*, n 47 and *Gut Springheide*, n 47.

indicate organic production, and as a result could be misled when confronted with a green pictogram that does not necessarily guarantee such production (such as the shop pictogram).

3.6. Conclusion and General Discussion: The "Average Consumer" Test and the Experiments

Whether pictograms on food packaging could be considered misleading under the FIR revolves around the question what can be expected from the normative "average consumer". Drawing on Article 7 FIR, the experiments provide guidance to the application of the normative benchmark of the "average consumer" by indicating that the shop pictogram likely leads the normative "average consumer" to incorrectly infer characteristics of the food product it is placed on, and to attribute properties to this food product it may not possess, which is prohibited under Article 7(1)(a) and Article 7(1)(b) FIR. Furthermore, as participants predominantly inferred organic properties of the food product that were not necessarily guaranteed by the use of the shop pictogram, our results indicate that the shop pictogram may be interpreted as not being accurate, clear and easy to understand by the normative "average consumer", while this is required under Article 7(2) FIR. Moreover, participants were willing to pay more for the shop pictogram-labelled product than for a non-labelled product and valued a shop pictogram-labelled product and the EU pictogram-labelled product at a comparable price. It would be unlikely that the normative "average consumer" would have taken such a transactional decision if he or she was aware that the shop pictogram does not guarantee any level of sustainable production, although, of course, some products it is placed on may possess such properties. These results are, therefore, an indication that there is a causal link between the potentially misleading effect of the shop label and the transactional decision of the consumer,[235] which further strengthens the conclusion that the shop pictogram is potentially misleading under the FIR.

Legal interpretation may not be conclusive in the doctrinal assessment of whether green pictograms could be considered misleading under the FIR for two reasons. First, it is not obvious from ECJ case-law what can be expected from the normative "average consumer" when confronted with potentially misleading visual information. Second, considering the complexity of how consumers process information, empirical data may be needed for national courts to decide on what can be expected from the normative "average consumer". This paper showed that insights from consumer research as to how real consumers process information may provide further guidance on what can be expected from the normative "average consumer". The use of behavioural insights in the application of the normative benchmark of the "average consumer" may especially be fitting when assessing the

[235] Cf Purnhagen and Herpen (2017), n 197, 217-234.

misleading character of green pictograms on food products under the FIR, as the FIR aims at ensuring a high level of consumer protection. It, therefore, seems reasonable to expect that the FIR would allow for behavioural insights to inform legal decision-making when applying the normative "average consumer" benchmark to assess the impact of visual information, as used by green pictograms, on consumer decision-making. As such, behavioural research may provide the needed clarity as to whether the normative "average consumer" could be considered misled. This paper shows that national courts could use these insights to come to a normative decision that is better suited to ensure a high level of consumer protection under the FIR.

4

Legal Limits on Food Labelling Law: Comparative Analysis of the EU and the USA

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Abstract The objective of this study was to explore to what extent freedom of expression should protect food businesses against government intervention with corporate communications on food labels. A functional comparative method was used to analyse the objective. It was found that expression on food labels should be considered primarily commercial in nature. In the USA some food labelling regulations are considered inconsistent with the freedom of commercial expression. EU courts seem to uphold government restrictions to commercial expression in all cases, especially when restrictions are based on protection of human health. It was concluded that food businesses should only be able to claim free speech rights on food labels when it is of importance to the public or consumers.

4.1. Introduction

Practice in the USA shows that some food labelling regulations could be considered inconsistent with the freedom of expression of food businesses.[236] Recent trends in the EU[237] require investigation whether the right to freedom of expression of food businesses could limit the government need to regulate food information.

The objective of this study was to explore to what extent freedom of expression[238] should protect food businesses against government intervention with communications on food labels. A functional comparative method was used to analyse this objective.[239] To achieve this objective, first (1) the different approaches used by the examined legal systems to ensure free speech protection were considered. In order to do this, it was first considered whether fundamental rights in general and free speech in particular, are protected in the legal system at issue. If this was the case, it was then considered whether and why this protection includes food businesses. It was furthermore considered whether this protection is extended to food labels. When freedom of expression applies to communications on food labels it was considered which limitations can be set to such free speech protection. Second (2), the different approaches to free speech protection on food labels in the USA and the EU were compared. Finally (3), it was discussed to what extent the functions of free speech allow free speech protection of communications on food labels.

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[236] See for example, *Amestoy*, n 100; *Pearson I*, n 100; *Boggs*, n 100.

[237] In Recital 44 of Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control it is stated that "[t]his Regulation does not affect the obligation to respect fundamental rights and fundamental legal principles, including the freedom of expression, as enshrined in Article 11, in conjunction with Article 52, of the Charter of Fundamental Rights of the European Union, and in other relevant provisions." Furthermore, Weintor, n 100 was the first, and so far only, ECJ-case concerning a fundamental rights challenge against a food labelling law.

[238] There seems to be no difference between the term 'freedom of expression' used by civil law systems and 'freedom of speech' used by common law systems. The two terms will, therefore, be used interchangeably throughout this chapter. *See* Eric Barendt, 'Freedom of Expression' in Michel Rosenfeld and Adrás Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2011) at 893.

[239] Gordley (2012), n 97, 113.

The analysis is centred on five situations in which government regulation could potentially be considered inconsistent with the freedom of expression:

Cooked-up is a food business producing canned dinners, such as *Mac'n'Cheese* (a canned macaroni and cheese dinner). *Cooked-up* wants to label *Mac'n'Cheese* with the statement that it 'contains all the nutrients needed for a long and healthy life'. The government bans this information as it is considered to be false.

Corn Rebel is a food businesses producing GM-free sweet corn. According to *Corn Rebel* genetically engineered crops and food products are unsafe for human consumption and hazardous for the environment. *Corn Rebel* wants to disclose on its food label that its sweet corn is 'GM-free' to strengthen the political debate against GM foods. The government prohibits the claim, because it finds that the claim confuses consumers, as there is no sufficient scientific evidence that GM products differ compositionally from non-GM products.

True-blue is a food business producing *Blueberrylicious* (blueberry flavoured jelly beans with added Vitamin C). They want to disclose on the food label of *Blueberrylicious* that it contains 'added Vitamin C'. Although the government considers it truthful information, it is nonetheless prohibited because the government found that the statement will contribute to the problem of obesity as it will encourage consumers to eat unhealthy food products.

My Goodness is a food business producing dairy products containing bifidus. Based on minority scientific opinion *My Goodness* wants to disclose on the food label that 'the consumption of bifidus eases the digestive system'. The government prohibits the claim because there is no significant scientific evidence supporting the claim.

Humble Honey is a food business producing honey. Their honey might be inadvertently contaminated with genetically modified pollen. The government compels *Humble Honey* to label its honey as being 'contaminated with genetically modified pollen' to enable consumers to make an informed choice. *Humble Honey* does not want to disclose such information as they worry it may negatively affect their sales.

The legal systems of the EU and the USA were subject to the comparison. These cases encompass legal systems from (common and civil) legal cultures at comparable stages of

cultural, political and economic development,[240] but have fundamentally different labelling requirements for food products.

The challenges involved with conducting comparative legal research were controlled by extensively consulting experts in constitutional law and food law in each of the two legal systems. This will prevent systematic differences in interpretation and missing out on certain rules and considerations in the foreign system.

The study was restricted to freedom of expression on the physical label on the food product. All other types of expression concerned with the food product, such as online information, were excluded. Future research may aim at more comprehensive study concerning how online food information is, could, and should be regulated in accordance with freedom of expression.

Government regulations comparable to food labelling regulations were included when these regulations touch upon similar legal dilemmas. Examples of such government regulation include case law concerning regulation prohibiting or limiting advertisement, sponsorship and/or labelling of tobacco products, case law considering labelling of diet supplements, and case law concerning labelling of alcoholic beverages.[241]

4.2. Free Speech Protection in the European Union

The right to freedom of expression in the EU is enshrined in Article 11 of the Charter of Fundamental Rights of the European Union (hereinafter: CFR). The CFR was proclaimed in December 2000, but did not acquire legally binding status[242] until an amendment of Article 6 TEU in 2009.[243]

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[240] I have selected the cases based on the "most similar cases" logic, described in Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 Amerian Journal of Comparative Law 125.

[241] In the EU, alcoholic beverages are considered to be food products. In the US, however, alcoholic beverages are regulated primarily by the Bureau of Alcohol Tobacco and Firearms, and not by the Food and Drug Authority.

[242] Although the ECJ already cited the CFR before, see e.g. Case C-540/03 *Parliament v Council* [2006] ECLI:EU:C:2006:429. Also advocates general already discussed the CFR (See e.g. *TNTTraco*, Case 340/99, Advocate General Alber's opinion 2001, ECR I-4109; *BECTU*, Case 173/99, Advocate General Tizzano's opinion 2001, ECR I-4881; *D and Sweden* v *Council*, Case C-122 & 125/99 P, Advocate General Mischo's opinion 2001, ECR I-4319; *Z* v *Parliament,* Case C-270/99 P, Advocate General Jacobs' opinion 2001, ECR I-9197; *Commission* v *Italy*, Case C-49/00, Advocate General Stix-Hackl's opinion 2001, ECR I-8575; *The Netherlands* v *Council* , Case C-377/98, Advocate General Jacobs' opinion 2001, ECR I-7079; *Council* v *Hautala*, Case C-353/99 P, Advocate General Léger's opinion 2001, ECR I-9565; *Booker Aquaculture Ltd* v *Scottish Ministers*, Case C-20&64/00, Advocate General Mischo's opinion 2003, ECR I-7411; *Überseering*, Case C-208/00, Advocate General Ruiz-Jarabo's opinion 2002, ECR I-9919; *Arben Kaba* v *Secretary of State for the Home Department*, Case C-466/00, Advocate General Ruiz-Jarabo's opinion 2003, ECR I-2219; *Evans,* Case C-63/01, Advocate General Alber's opinion 2003, ECR I-14447; *Omega*, Case C-36/02, Advocate General Stix-Hackl's opinion 2004, ECR I-9609; *Nardone*, Case C-181/03 P, Case C-181/03 P, Advocate General Poiares Maduro's opinion 2005, ECR I-199; *Berlusconi and Others,* Case C-387/02, Advocate General Kokott's opinion 2005, ECR I-3565; *Regione autonoma Friuli-Venezia Giulia and ERSA*, Case C-347/03, Advocate General Jacobs's opinion 2005, ECR I-3785); Furthermore, the CFR gained momentum in secondary law (E.g. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251, recital 2; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373, recital 4).

[243] The amended Article 6(1) TEU states that the EU 'recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (...) which shall have the same legal value as the Treaties'.

Article 11 CFR stipulates that:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

The meaning and scope of the CFR rights are determined by case law of the European Court of Justice (ECJ), and may also be determined by case law of the European Court of Human Rights (ECtHR)[244] without thereby adversely affecting the autonomy of Union law and of that of the ECJ.[245] Furthermore, in so far as the CFR contains rights which correspond[246] to rights guaranteed by the European Convention on Human Rights (ECHR), the meaning and scope of those rights shall be the same as those laid down by the ECHR.[247] Whether a right has the same meaning and scope to those guaranteed by the ECHR is elaborated upon in the explanations relating to the CFR.[248] According to the explanations Article 11 CFR has the same meaning and scope as Article 10 ECHR.[249] Although the explanations do not have the status of law, "they are a valuable tool of interpretation intended to clarify the provisions of the Charter".[250] Furthermore, three references in EU primary law can be found that confirm that the CFR has to be interpreted with due regard to the explanations (Article 52(7)

[244] The ECtHR is a supranational or international court established by the European Convention on Human Rights (ECHR). The ECHR is an international treaty, drafted within the Council of Europe, now including 47 members that was formed after the Second World War in an attempt to unify Europe. Ten countries founded the Council of Europe on 5 May 1949: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, Sweden, the United Kingdom and The Netherlands. Today, the Council of Europe covers almost the entire European continent, with its 47 member countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Macedonia, Turkey, Ukraine and the United Kingdom. The Council of Europe remains entirely independent and separate from the EU, and has no powers in prescribing law to its members. The EU is not a member to the ECHR.

[245] 5th recital of the CFR Preamble; Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17; concerning explanation to Article 52(3), In Opinion Pursuant to Article 218(11) TFEU - Draft International Agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the Draft Agreement with the EU and FEU Treaties, Opinion 2/13 (Opinion of the Full Court, Dec. 18, 2014) restated the autonomy of Union law and the ECJ.

[246] Explanations relating to the Charter of Fundamental Rights, n 245.

[247] Article 52(3) CFR. The reference to the ECHR also includes the Protocols to the ECHR. See, Explanations relating to the Charter of Fundamental Rights, n 245. The CFR also includes a large number of social and economic rights derived from the European Social Charter (ESC). The ESC is a treaty drafted by the Council of Europe in 1961 and it was revised in 1996. The ESC only asks from the State Parties to submit reports indicating how they implement the provisions of the ESC to the European Committee of Social Rights (Article 21 and 22 ECR as amended by the 1991 Turin Protocol). Any decision the ESC takes based on these reports are not binding on the State Parties (Article 28 ECR as amended by the 1991 Turin Protocol; Article 8 and 9 Additional Protocol to the European Social Charter (1995)). The ECtHR has had, due to the binding nature of its judgments, a much greater impact on the rights enshrined in the ECHR, than the ESC has had on the rights enshrined in the ESC. The rights enshrined in the ECHR are, therefore, more developed than the rights enshrined in the ESC.

[248] Articles 2, 4, 5(1)+(2), 6, 7, 9, 10(1), 11, 12(1), 14(1)+(3), 17, 19(1)+(2), 47(2)+(3), 48, 49(1) and 50 all correspond to the ECHR or its protocols. See Explanations relating to the Charter of Fundamental Rights, n 245, 17-18.

[249] Ibid, 18.

[250] Ibid.

CFR; fifth recital to the preamble of the CFR; Article 6(1) TEU).[251] The ECJ indeed also appears to follow the explanations.[252]

According to the explanations the level of protection afforded by the CFR to rights that have the same meaning and scope to those guaranteed by the ECHR may not be lower than guaranteed by the ECHR.[253] EU law may, however, provide "more extensive protection".[254] This suggests that the CFR interprets the ECHR as a minimum standard of protection, but not necessarily as a maximum.[255]

4.2.1. Scope of Free Speech Protection of Food Businesses in the EU

There is no dispute that companies and corporate entities enjoy fundamental rights protection in the EU.[256] It is not clear, however, whether companies are excluded from fundamental right protection of strictly personal fundamental rights, such as the right to life (Article 2 CFR) or personal integrity (Article 3 CFR) might be excluded, and arguably freedom of expression.[257] It would be practical if for strictly personal fundamental rights only natural persons could be beneficiaries. The ECJ, however, does not rely on this test.[258]

The proceedings of the legitimacy of the Tobacco Advertising Directive[259] in 2000 provided an opportunity for the ECJ to comment on the scope of free speech protection for companies. In this case, Germany sought annulment of the Tobacco Advertisement Directive. The legal challenge raised seven different possible grounds for the annulment of the Directive.[260] One of the grounds was the violation of the right to freedom of commercial expression. The judgment did not address the issue of compatibility with the right to freedom of expression, because the ECJ accepted the lack of a proper legal basis as ground for annulment of the Directive. Advocate General Fennelly, however, assessed the

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[251] Wolfgang Weiβ, 'EU Human Rights Protection After Lisbon' in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law Policy* (Edward Elgar Publishing 2012), 224.

[252] Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811, at 32, 35-6; Case C-283/11 *Sky Österreich* [2013] ECLI:EU:C:2013:28, at 42; Case C-334/12 *Réexamen Arango Jaramillo* [2012] ECLI:EU:C:2013:134, at 42; Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105 at 20.

[253] Explanations relating to the Charter of Fundamental Rights, n 245, 17.

[254] Article 52(3) CFR. This was reconfirmed by CONV 354/02, Final Report of Working Group II, 22 October 2002, p. 7.

[255] Adrea Biondi, Piet Eeckhout and Stefanie Ripley, *EU Law after Lisbon* (Oxford University Press 2012), 163.

[256] Advocate General Geelhoed's opinion,Case C-301/04 P *Commission v SGL Carbon AG* [2006] ECLI:EU:C:2006:53, at 64; Advocate General Jääskinen's opinion,Case C-249/09 *Novo Nordisk* [2011] ECLI:EU:C:2010:616, at. 44; Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114, at 4 ff; Case C-136/79 *National Panasonic* [1980] ECLI:EU:C:1980:169 at 17 ff; Case C-265/87 *Schrader* [1989] ECLI:EU:C:1989:303 at 15.

[257] See also Hans Rengeling and Peter Szczekalla, *Grundrechte in der Europäischen Union: Charta der Grundrechte und allgemeine Rechtsgrundsätze* (Heymanns 2004), at 344-390; Dirk Ehlers, *European Fundamental Rights and Freedoms* (De Gruyter Recht 2007), 385.

[258] See Ehlers (2007)n 257, 385-6.

[259] Directive 98/43/EC of the European Parliament and of the Council, issued on 6 July 1998, on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.

[260] See for more information Stephen Weatherill, 'The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court's Case Law has Become a "Drafting Guide"' (2011) 12 German Law Journal 827.

compatibility of the Directive limiting advertising and sponsorship of tobacco products[261] with the right to freedom of expression. He argues that:

> "Personal rights are recognized as being fundamental in character, not merely because of their instrumental, social functions, but also because they are necessary for the autonomy, dignity and personal development of individuals. Thus, individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the merits of the goods or services which they market or purchase."[262]

Although he does not directly address whether companies as such should be beneficiaries of free speech protection, it follows from his submissions that he finds that in this case the companies which manufacture tobacco products are subject to free speech protection, even though he considers it to be a personal right.

The ECtHR elaborated extensively on free speech protection. Whether corporate persons are beneficiaries to the right to freedom of expression as enshrined in Article 10 ECHR was discussed for the first time by the ECtHR in Autronic AG v Switzerland in 1990. This interpretation has become settled case law of the ECtHR.[263] The ECtHR held that:

> "In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (…) The Article (…) applies to 'everyone', whether natural or legal persons."[264]

Food businesses would, thus, probably be considered beneficiaries to Article 11 CFR.

4.2.2. Scope of Free Speech Protection of Communications on Food Labels in the EU

Although food businesses most likely will be considered beneficiaries to the right to freedom of expression enshrined in Article 11 CFR, it should still be examined whether communications on the food label could also be considered 'expression' under these

[261] Directive 98/43/EC of the European Parliament and of the Council, issued on 6 July 1998, on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.
[262] Advocate General Fennelly's opinion,Case C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:324, at 154.
[263] *Casado Coca v Spain*, app no 15450/89, ECtHR 24 February 1994, 18 EHRR 1, at 35; See Marius Emberland, *The Human Rights of Companies. Exploring the Structure of ECHR Protection* (Oxford University Press 2006), 130.
[264] *Autronic AG v Switzerland,* app no 12726/87, ECtHR 22 May 1990, A/178, 12 EHRR 485, at. 47.

articles, especially since in 2013 the EU included freedom of expression in a food labelling regulation.[265]

There is not yet a clear ECJ judgment that would be relevant for expressions on the food label. Resource could be had to the case law of the ECtHR. 'Expression' in the context of the ECHR is, at least, an expressive statement represented in written or spoken words, pictures, images and expressive conduct, which has an element of public outreach.[266] Besides the expression itself, also the means for its production and for its communication, such as print,[267] radio[268] and television broadcasting,[269] artistic creations,[270] film[271] and electronic information systems, is protected.[272] Furthermore, the ECtHR stated in Markt Intern Verlag v Germany that "Article 10(1) (…) does not apply solely to certain types of information or ideas or forms of expression".[273] All[274] forms of expression are, thus, protected by Article 10(1) ECHR.

From this it could be concluded that corporate communications on the food label, i.e. the statements by *Cooked-up*, *Corn Rebel*, *True-blue*, and *My Goodness* on their food labels should thus also be protected by Article 10(1) ECHR, and may, therefore, also be protected by Article 11 CFR.

Whether *Humble Honey*, who is compelled to label its honey as being 'contaminated with genetically modified pollen' to enable consumers to make an informed choice, would enjoy free speech protection in the EU is less clear. The ECJ never discussed such a negative right to freedom of expression. Also the ECtHR have not explicitly taken a position on whether or not the negative right to freedom of expression is protected by Article 10 ECHR. However, the European Commission on Human Rights (ECmHR)[275] asserted in Goodwin v. United Kingdom that:

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[265] In Recital 44 of Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control it is stated that "[t]his Regulation does not affect the obligation to respect fundamental rights and fundamental legal principles, including the freedom of expression, as enshrined in Article 11, in conjunction with Article 52, of the Charter of Fundamental Rights of the European Union, and in other relevant provisions."

[266] Emberland (2006)n 263, 117.

[267] *Handyside v UK*, app no 5493/72, ECtHR 7 December 1976, 1 EHRR 737.

[268] *Groppera Radio AG v Switzerland*, app no 10890/84, ECtHR 28 March 1990, 12 EHRR 321.

[269] *Autronic AG v Switzerland*, app no 12726/87, ECtHR 22 May 1990, A/178, 12 EHRR 485.

[270] *Müller and ors v Switzerland*, app no 10737/84, ECtHR 24 May 1988, 13 EHRR 212.

[271] *Otto-Preminger-Institut v Austria*, app no 13470/87, ECtHR 20 September 1994, 17 EHRR.

[272] David Harris, Michael O'Boyle, Colin Warbick, *Law of the European Convention on Human Rights* (Butterworths 1995), 378-9.

[273] *Markt Intern Verlag GmbH and Beermann v Germany*, app no 10572/83, ECtHR 20 November 1989, 12 EHRR 161 at 26.

[274] Hate speech might, however, be excluded from protection. *See* David Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25 Netherlands Quarterly of Human Rights 641 for arguments in favour of excluding hate speech from free speech protection; Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection' (2011) 29 Netherlands Quarterly of Human Rights 54 for arguments against excluding hate speech from free speech protection.

[275] Initially the ECtHR and the ECmHR where part of the international judicial mechanism with jurisdiction to find against States that breach the rights enshrined in the ECHR. The task of the ECmHR was to screen the incoming cases for admissibility (see former Article 28 ECHR) until it was made defunct in 1998 and its tasks were taken over by the ECtHR. *See* Emberland (2006)n 263, 9.

> "There are circumstances in which a "negative right" is to be implied in Article 10 (Art. 10) not to be compelled to give information or to state an opinion."[276]

Goodwin v. United Kingdom, however, concerned the compulsion of a journalist to disclose its sources. The ECtHR has frequently stressed the importance of the press as 'public watchdog' to impart information and ideas of public interest.[277] It is, therefore, not self-evident that disclosure requirements on food labels would also enjoy negative free speech protection.

4.2.3. Limitations to the Free Speech Rights of Food Businesses on Food Labels in the EU

Article 52(1) CFR is the overarching limitation clause of the CFR, and closely follows the case-law of the ECJ. When applying Article 52(1) CFR to Article 11 CFR, the explanations relating to the CFR indicate that due regard should be given to the limitation clause of the freedom of expression of the ECHR, Article 10(2) ECHR[278] and that government limitations imposed on the right to freedom of expression of Article 11 CFR may "not exceed those provided for in Article 10(2) [ECHR]".[279] Article 10(2) ECHR could, therefore, be taken into account when assessing the limits to free speech protection in the EU. A side-by-side comparison of key phrases from Article 52(1) CFR and Article 10(2) ECHR shows that the articles are very similar. The CFR, however, seems to provide a little more protection than the ECHR (Table 4.1).

[276] *Goodwin v United Kingdom,* app no 17488/90, ECtHR 1 March 1994, 22 EHRR 123, at 48.

[277] Barendt (2011), n 238, 66, refers to *Observer and Guardian v UK* (1992), app no 13585/88, ECtHR 26 November 1991, 14 EHRR 153 at 59; *Jersild v Denmark*, app no 15890/89, ECtHR 23 September 1994, 19 EHRR 1.

[278] The rights and freedoms enshrined in the ECHR each have their own limitation clause, instead of one overarching limitation clause as in the CFR.

[279] Explanations relating to the Charter of Fundamental Rights, n 245, at 1.

Table 4.1. Limitation Clauses in the EU

	Article 52(1) CFR	Article 10(2) ECHR

Content	• provided for by law
	• respect the essence of those rights and freedoms.
	• subject to the principle of proportionality
	  • necessary
	  • genuinely meet objectives of general interest OR need to protect the rights and freedoms of others
		• prescribed by law
		• necessary
		• legitimate public aim (exhaustively listed)

So far companies have not challenged a government regulation limiting content on product labels based on the right to freedom of expression before the ECtHR or the ECJ. Nonetheless, the limiting clauses for protection following ECJ case-law and Article 52(1) CFR could play out as follows.

(1) Limitation must be provided for by law

In cases where it involves food labelling law this condition is met by definition. Within the European Union many legally binding rules, mainly Regulations but also Directives,[280] relate to the food label.[281] This requirement is similarly stipulated in Article 10(2) ECHR which specifies that the government interference must be prescribed by law, meaning that, at a minimum, the interference should be authorized by a specific national, European or international legal rule or regime.[282]

(2) Limitation must respect the essence of the rights and freedoms at issue

Case-law of the ECJ indicates that interferences with the fundamental rights of the EU may

[280] Regulations are defined in the Treaty on the Functioning of the European Union as having general application and 'binding in its entirety and directly applicable in Member States' (Article 288 TEU).

[281] Examples are EU Food Information Regulation, n 99; EC Regulation on Organic Agriculture, n 151; Regulation (EC) 1829/2003 on genetically modified food and feed, OJ L 268; Regulation (EC) 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms [2003] OJ L 268; Regulation (EC) 1924/2006 on the nutrition and health claims made on foods; Regulation (EC) 1760/2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products [2000] OJ L 204.

[282] Harris, O'Boyle and Warbick (1995)n 272, 345; *Silver v UK*, app no 5947/72, ECtHR 25 March 1983, at 86.

not impair the very essence of those rights.[283] The wording of Article 52(1) CFR is based on the case-law of the ECJ, which holds that "restrictions may be imposed on the exercise of fundamental rights (...) provided that those restrictions (...) do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very *substance* of those rights".[284] Adherence to the essence of a fundamental right, however, "does not require more than the preservation of all basic guarantees which emanate from the right in question".[285] It could be argued, therefore, that some food labelling regulations affects the essence of the right to freedom of expression (Article 11 CFR) by prohibiting a form of expression. The exact essence of free speech according to the ECJ is, however, yet unclear.

(3) Subject to the principle of proportionality

The principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. As such the limitation should be necessary (see 3.1. below), and genuinely meet objectives of general interests or the need to protect the rights and freedom of others (see 3.2. below).

(3.1) The limitation must be necessary

According to the ECJ the necessity-requirement implies that the limitation should be the least onerous option of the available options. [286] The ECJ had not yet elaborated on this requirement, although Advocate General Fennelly argues that when an EU measure restricts freedom of commercial expression the EU legislator should:

> "be obliged to satisfy the Court that it had reasonable grounds for adopting the measure in question in the public interest. In concrete terms, it should supply coherent evidence that the measure will be effective in achieving the public interest objective invoked (...) and that less restrictive measures would not have been equally effective".[287]

Advocate General Jääskinen argued that in commercial matters the EU legislator has a wide discretion in assessing the level of public health protection and is not required to restrict itself to a minimum necessity to protect freedom of expression.[288] Fennelly adds nuance by

[283] Case C-5/88 *Wachauf* [1989] ECLI:EU:C:1989:321, at 18.

[284] Case C-292/97 *Karlsson and Others* [2000] ECLI:EU:C:2000:202, at 53.

[285] Ehlers (2007) n 257, 393.

[286] See *Sky Österreich* , n 252, at 50.

[287] Advocate General Fennelly's opinion, *Germany v Parliament and Council*, n 262, at 159.

[288] Advocate General Jääskinen's opinion, *Novo Nordisk*, n 256, at.50. He refers to Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 Ratio Juris 433, 440.

stating that "[t]he more restrictive the effects, the greater is the onus on the legislator to show that a less burdensome measure would not have sufficed". Fennelly suggests that the "evidence required to justify a restriction will depend on the nature of the claim made,"[289] because "[e]videntiary requirements may be less strict where public health is at stake"[290], implying that public health by definition gives strong support for any type of restriction. This is in line with the ECtHR which held in two cases concerning tobacco advertising that "overriding considerations of public health, on which the State and the European Union have, moreover, legislated, may take precedence over economic concerns, and even over certain fundamental rights such as freedom of expression".[291]

Limiting false commercial speech, such as *Cooked-up*'s false claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life', will most likely be considered necessary. It may be different for *Corn Rebel*'s claim that its sweet corn is being 'GM-free', *True-blue*'s claim that Vitamin C is added to its *Blueberrylicious* treats, or *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system'. It could well be that adding disclaimers (for example for *Corn Rebel*: 'No significant difference has been shown GM corn and non-GM corn'; for *True-blue*: 'Although the treats contain Vitamin C they should still be eaten in moderation'; and for *My Goodness*: 'This claim is based on minority scientific evidence') would be preferred, being the least onerous option of the available options, as long as it is equally effective as banning the information altogether.

The ECJ did already prefer disclaimers over a prohibition with respect to the free movement of goods. In the Cassis de Dijon ruling[292] and the Beer Purity-case[293] the governments invoked consumer protection to restrict trade of certain products.[294] The ECJ found that disclaimers to the product in question were preferred, because they were less restrictive to trade and had the same effectiveness as prohibiting trade of the product altogether.[295] It is likely that the ECJ would adopt a similar approach when the fundamental right to freedom of expression is limited.

The necessity requirement can also be found in Article 10(2) ECHR which holds that any interference to freedom of expression must be 'necessary in a democratic society'.

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[289] Advocate General Fennelly's opinion, *Germany v Parliament and Council*, n 262, at 160.

[290] Ibid, at 161.

[291] Translation from Advocate General Jääskinen's opinion, *Novo Nordisk*, n 256, at 46. The cases are only accessible in French. See *Société de Conception de Presse et d'Edition et Ponson v France*, no 26935/05, ECtHR 6 March 2009; and *Hachette Filipacchi Presse Automobile and Dupuy v France*, app no 13353/05, ECtHR 5 March 2009: "Ainsi, des considérations primordiales de santé publique, sur lesquelles l'Etat et l'Union européenne ont d'ailleurs légiféré, peuvent primer sur des impératifs économiques, et même certains droits fondamentaux comme la liberté d'expression."

[292] Case C-120/78 *Cassis de Dijon* [1979] ECLI:EU:C:1979:42.

[293] Case C-178/84 *Beer Purity* [1987] ECLI:EU:C:1987:126.

[294] Ibid.

[295] See further on this information paradigm Kai Purnhagen, 'The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny' in Kai Purnhagen and Paul Rott (eds), *Varieties of European Economic Law and Regulation* (Springer 2014), 329-332.

According to the ECtHR interference would be 'necessary in a democratic society' when the interference corresponds to a pressing social need and that the interference is proportionate to the legitimate aim pursued.[296] Furthermore, the reasons for the interference must be relevant and sufficient. In assessing whether and to what extent government interference is necessary the governmental authorities have the 'margin of appreciation'.[297] The margin of appreciation is not unlimited and could even be reduced to zero. The ECtHR can give a final ruling on whether government interference is reconcilable with freedom of expression.[298] Relevant for the purpose of this study is that the width of the margin of appreciation is wider when the expression is considered to be commercial in nature rather than political. Thus, when the statements by *Corn Rebel* are considered political in nature, the width of the margin of appreciation is wider than the overtly commercial statements by *Cooked-up*, *True-blue*, and *My Goodness.*

The ECtHR defines commercial expression as "inciting the public to purchase a particular product".[299] Commercial expression is aimed at enhancing economic interests of individuals and businesses.[300] According to the ECtHR political expression concerns the speaker's "participation in a debate affecting the general interest"[301] or reflects "controversial opinions pertaining to modern society in general".[302] For example, expression that is considered to contribute to public debate, even when it boosts the businesses of the speaker, should not be classified as commercial expression.[303] The ECtHR, furthermore, made a distinction between 'pure' commercial expression and commercial expression with 'political overtones'[304] 'Purely' commercial expression has no political overtones and is subject to the lenient *Markt Intern* standard.[305] The *Markt Intern* standard implies that the ECtHR must "confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate".[306] To establish whether such interference would be proportionate the ECtHR must "weigh the requirements of the protection of the reputation and the rights of others against the publication of the information".[307] When commercial expression concerns an ongoing political debate commercial expression may be considered to have 'political overtones'.[308] Such was the case in Hertel V Switzerland where the appropriateness under Article 10(2) ECHR of court

[296] *Olsson and Olsson v Sweden*, app no 10465/83, ECtHR 24 March 1988, 11 EHRR 259 at 67 PC.
[297] *Handyside v UK*, app no 5493/72, ECtHR 7 December 1976, 1 EHRR 737, at 48-9 PC.
[298] *Handyside v UK*, app no 5493/72, ECtHR 7 December 1976, 1 EHRR 737, at. 49.
[299] *Verein gegen Tierfabrieken v Switzerland*, app no 24699/94, ECtHR 28 September 2001.
[300] Harris, O'Boyle and Warbick (1995) n 272, 461.
[301] *Hertel v Switzerland Reports,* app no 25181/94, ECtHR 25 August 1999, 28 EHRR 534, at 47
[302] *Verein gegen Tierfabrieken v Switzerland*, app no 24699/94, ECtHR 28 September 2001 at 70.
[303] *Barthold v Germany,* app no 8734/79, ECtHR 25 March 1985, 7 EHRR 383.
[304] See also Emberland (2006)n 263, 165 and 171.
[305] Ibid 164-171.
[306] *Markt Intern Verlag GmbH and Beermann v Germany*, app no 10572/83, ECtHR 20 November 1989, 12 EHRR 161 at 33.
[307] Ibid at 34.
[308] *Hertel v Switzerland Reports,* app no 25181/94, ECtHR 25 August 1999, 28 EHRR 534 at 47.

sanctioned injunctions sought by an association of manufactures against the applicant, who had violated domestic competition laws by publishing statements of the alleged hazards involved in the use of microwave ovens, was considered by the ECtHR. Since the statements concerned an ongoing debate of the effects of microwaves on human health, the Hertel claim was "substantially different from... markt intern" and it was therefore "necessary to reduce the extent of the margin of application" implied in that judgment. Commercial expression with 'political overtones' will be subject to a more rigorous scrutiny:[309] the ECtHR could also review whether the interference corresponds to a pressing social need and whether the interference is proportionate to the legitimate aim pursued.[310]

Thus, the claims put forward by *Cooked-up*, *True-blue*, and *My Goodness* may be considered purely commercial. Also *Corn Rebel*'s claim that its sweet corn is being 'GM-free' should be considered purely commercial, because *Corn Rebel* does not participate in a political debate by labelling their corn as 'GM-free' as such label does not make a statement about the hazards of GM-food for human health or the environment.

(3.2a) The limitation must genuinely meet either objectives of general interest recognized by the EU

In settled case-law of the ECJ fundamental rights of the EU may only be restricted for reasons that correspond to "objectives of general interest pursued by the Community".[311] Arguably these general interests are similar to the general interests in the field of free movement of goods, people, services and capital, which include the written grounds of Article 36, 45(4), 52, 62, and 65 TFEU (public morality, policy, or security; protection of health and life of humans, animals, or plants; protection of national treasures possessing artistic, historic or archaeological value; protection of industrial and commercial property) and unwritten grounds in the public interest which are determined in the case law of the ECJ, including, amongst others, protection of public health,[312] the defence of the consumer,[313] and protection of the environment.[314] Furthermore, according to settled ECJ case law purely economic objectives cannot constitute an overriding reason in the public interest.[315] The ECJ has held that the protection of health is an objective of general interest

[309] Emberland (2006), n 263, 170.

[310] *Olsson and Olsson v Sweden*, app no 10465/83, ECtHR 24 March 1988, 11 EHRR 259 at 67 PC.

[311] *Wachauf*, n 283, at 18; *Karlsson and Others*, n 284, at 45.

[312] *Weintor*, n 100.

[313] *Cassis de Dijon*, n 292, at 8.

[314] Case C-142/05 *Aklagaren v Mickelsson and Roos* [2009] ECLI:EU:C:2009:336.

[315] See e.g. Case C-436/00 *X and Y* [2002] ECLI:EU:C:2002:704 at 50; Case C-35/98 *Verkooijen* [2000] ECLI:EU:C:2000:294. See Verica Trstenjak and Erwin Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the ECJ' (2013) 38 European Law Review 293, footnote 40.

that follows from Article 9 TFEU.[316] Other objectives of general interest may include Article 7 to 12 TFEU (consistency between policies; eliminate inequalities/promote equality between men and women; promotion of high level of employment; guaranteeing adequate social protection; fight against social exclusion; promotion of high level of education and training' protection of human health; combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; promoting sustainable development; protecting consumers).

(3.2b) Or the limitation protects the rights and freedoms of others

A food labelling regulation could also limit free speech to protect the rights of others, which could potentially include the right to health protection or the right to receive information. The ECJ seems to recognize a fundamental right to health protection from the second sentence of Article 35 CFR, which requires that "a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities".[317] Advocate General Jääskinen, who assessed for the first time so far commercial expression in the context of Article 11 CFR, also derived a fundamental right to health protection from Article 35 CFR.[318] He further argued that this fundamental right to health protection must be safeguarded to guarantee the fundamental rights, human dignity, the right to life and the right to physical and mental integrity.[319] He argued that the right to life, and as such the protection of health, must take precedence over the fundamental right to freedom of action, such as the freedom of expression.[320]

Another fundamental right that may justify a limitation to free speech is the right to receive information as stipulated in Article 11 CFR. This right is especially important when free speech protection would also include the right not to speak. However, negative expression on food labels (such as *Humble Honey*'s refusal to disclose that its honey is 'contaminated with genetically modified pollen') will most likely not enjoy free speech protection in the EU (see paragraph 2.2). However, if free speech right would include the right not to speak, it is not clear whether this right to receive information could confer rights on consumers to demand disclosure of information on the food label. Article 169 TFEU recognizes that consumers have a *right* to information.[321] This treaty provision does, however, not confer rights on consumers as such but it imposes an obligation on EU bodies

[316] Article 9 TFEU: "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the (...) protection of human health."

[317] *Weintor*, n 100, at 47.

[318] Advocate General Jääskinen's opinion, *Novo Nordisk*, n 256, footnote 21.

[319] Ibid, at 49.

[320] Ibid, at 50. He refers to Alexy (2003), n 288, 440.

[321] Article 169 TFEU: "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their *right to information*, education and to organise themselves in order to safeguard their interests."

to ensure a high level of consumer protection.[322] Consumer protection, however, does seem to be acknowledged as a fundamental right of consumers in the EU, because Article 38 CFR stipulates that 'Union policies must ensure a high level of consumer protection'.[323] However, Ehlers argues that besides the right of access to data "within the field of the Union's fundamental rights, no room should be given to further increase the subjectivity of the idea of transparency."[324]

As a whole, the principle of proportionality seems similar to the requirement of Article 10(2) ECHR that the interference to freedom of expression must serve a legitimate aim. Unlike Article 52(1) CFR, that does not exhaustively lists the applicable general interests, Article 10(2) ECHR indicates what constitutes a legitimate aim, i.e. the interference must be in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[325]

According to the explanations limitations to the right to freedom of expression allowed by Article 52(1) CFR may not exceed those provided for in Article 10(2) ECHR.[326] Government regulations that interfere with the freedom of expression must, therefore, at least meet one of the legitimate aims stipulated in Article 10(2) ECHR.[327] Most government interferences could probably be placed under one of the legitimate aims mentioned in Article 10(2) ECHR as the grounds for interference are broad.[328] It is, therefore, likely that when a food labelling regulation aims at protecting health it could be considered to be a legitimate aim under the ECHR.

4.2.4. Conclusion

In theory, the fundamental right to freedom of expression seems open to food businesses and applies to all types of expression, arguably including expression on food labels. In practice, the fundamental rights protection of food businesses for communications on the food label to be limited.

Government limitations to *Cooked-up* utterly false claim, that its canned macaroni and cheese dinners are healthy, will likely be considered necessary. It will be more difficult for the government to justify limitations to *Corn Rebel*'s, *True-blue*'s or *My Goodness*'s claim.

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[322] James Devenney and Mel Kenny, *European Consumer Protection: Theory and Practice* (CUP 2012), 349-50.

[323] Ibid n 322, 350.

[324] Frank Schorkopf, 'Human Dignity, Fundamental Rights of Personality and Communication' in Dirk Ehlers (ed), *European Fundamental Rights and Freedoms* (De Gruyter Recht 2007), 425.

[325] Article 10(2) ECHR.

[326] Explanations relating to the Charter of Fundamental Rights, n 245, at 1.

[327] Ibid.

[328] Harris, O'Boyle and Warbick (1995), n 272, 348.

In these cases, disclaimers may be preferred as long as the disclaimer has the same effectiveness as a complete ban of the information. Limitations should, however, be placed under one of the legitimate aims stipulated in Article 10(2) ECHR. Limitations based on health protection could probably easily be placed under Article 10(2) ECHR. This will, however, be more difficult when the limitation is based on protecting the consumer right to information. However, it seems that such a right will not be relevant in the context of free speech in the EU, as it is most likely that businesses that refuses to disclose government mandated information on its label, such as *Humble Honey*'s refusal to label its honey as 'contaminated with genetically modified pollen', will not enjoy free speech protection.

4.3. Free Speech Protection in the United States of America

The First Amendment states that "Congress shall make no law (...) abridging the freedom of speech (...)."[329] Corporate entities are afforded, subject to the limits discussed below, First Amendment protection.[330]

4.3.1. Scope of Free Speech of Communications on Food Labels in the USA

The degree to which content on food labels may enjoy First Amendment protection depends on whether the speech can be categorized as commercial speech, because commercial speech receives limited protection.[331]

Commercial speech was carved out by the Supreme Court in 1976 in *Virginia State Pharmacy Board v.* Virginia *Citizens Consumer Council*,[332] and in 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[333] The Court defined commercial speech as "speech with does no more than propose a commercial transaction"[334] or is "related solely to the economic interest of the speaker and its audience."[335] This implies that both parties should have an economic interest in the speech,[336] which excludes books, newspapers, and magazines, read for its political, literary, or other public interest content, from the scope of commercial expression.[337]

The First Amendment also restricts the ability of the government to compel individuals to engage in certain expressive activities, as such free speech protection also

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[329] U.S. Const., Amend. 1 (1791).

[330] *First Nat'l Bank of Boston v Bellotti*, 435 U.S. 765, 778 (1978).

[331] *Central Hudson Gas & Electric v Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980).

[332] *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976).

[333] *Central Hudson Gas & Electric v Public Service Comm'n of New York*, 447 U.S. 557 (1980). It is interesting to note that in 1942, the *Court in Valentine v Chrestenen*, 316 U.S. 52 (1942), held that commercial speech was not protected by the First Amendment. "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine*, 316 U.S. at 54.

[334] *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council*, Inc., 425 U.S. 748, 762 (1976).

[335] *Central Hudson Gas & Electric v Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980).

[336] Barendt (2011), n 238, 396.

[337] Ibid.

includes the right not to speak.[338] With respect to disclosure requirements in the realm of commercial speech, such as *Humble Honey*'s compelled claim that its honey 'contaminated with genetically modified pollen', the Supreme Court made clear that such negative commercial speech does also enjoy First Amendment protection.[339]

Most importantly, the commercial expression relates *solely* to the economic interests. As such, *Cooked-up*'s false claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life', *True-blue*'s claim that Vitamin C is added to its *Blueberrylicious* treats, *My Goodness* claim that 'the consumption of bifidus eases the digestive system', and *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen' will thus likely be considered commercial speech.

This may be different for *Corn Rebel*'s political claim that its sweet corn is being 'GM-free'[340] as such information may not be provided solely for economic reasons, but takes a line on political questions or makes a contribution to the formation of public opinion.[341] It seems, however, that the courts may not want to take it that far. A Circuit Court of Appeals held that press releases by the National Commission on Egg Nutrition, a producers' consortium, on a matter of current controversy, that there was no scientific evidence that egg consumption increased heart diseases, were considered commercial speech,[342] even though it was not clear whether these press releases related solely to the economic interest. [343] Furthermore, in *Nike, Inc. v. Kasky*[344] the question was whether Nike's response, in the form of press releases and letters to newspapers, university presidents, and athletics directors regarding allegations that the company was mistreating and underpaying workers outside the USA could be classified commercial speech. The Supreme Court of California did categorize the speech as commercial and, therefore, the response would not enjoy First Amendment protection if found false or misleading. The majority of the Supreme Court, however, held that the case was not yet ripe for full consideration. In his dissent, Judge Breyer argued that the responses were in form and content public, rather than commercial speech, because the responses by Nike were not made in an advertising format, did not propose sales, and concerned an important matter of public controversy—the criticism of its employment practices.[345] He added that the form and content

[338] *West Virginia Bd. of Education v Barnette*, 319 U.S. 624, 642 (1943); Wooley v Maynard, 430 U.S. 795 (1977).

[339] *Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

[340] Another issue with 'GM-free' claims on corn is that it is difficult to guarantee that there would be no contamination with GM corns. If there is contamination the claim of GM-free would be false and thus not protected unless political speech.

[341] Barendt (2011), n 238, 396-7. Barendt refers to the *German Supreme Constitutional Court,* 102 BverfGE 347, 359-60 (2001) who held that the civil courts were wrong to interpret Benetton pictorial advertisements protesting against environmental damage, the employment of children, and the spread of AIDS as solely intended to promote the company's economic interest.

[342] *FTC v National Commission on Egg Nutrition,* 517 F 2d 485.

[343] See also Barendt (2011), n 238, 397.

[344] *Nike Inc. v Marc Kasky*, 123 S Ct 2554 (2003).

[345] *Ibid. See also Barendt (2011)*, n 238, 398.

distinguishes the speech at issue from purely commercial speech such as “speech—say, the words "dolphin-safe tuna"—that commonly appears in more traditional advertising or labelling contexts.” In a Petitioners’ brief it was also argued that

> “If the asserted tie-in between a state’s regulatory power and the moral conclusions of consumers ever suffices to convert discussion of public issues into lesser protected “commercial speech,” that can only be in the context of direct product advertising and product labels, which are least likely to generate reasoned discussion and which are targeted at consumers and affect purchasing decisions in the first instance and shape broader moral judgments only secondarily.”[346]

Although, the Supreme Court has not yet decided on the issue whether commercial expression needs to relate *solely* to the economic interest, it is likely that *Corn Rebel’s* claim that their sweet corn is being ‘GM-free’, will be categorized as commercial speech.

4.3.2. Limitations to the Free Speech Rights of Food Businesses on Food Labels in the USA

To determine whether commercial speech would enjoy First Amendment protection, the Supreme Court articulated in *Central Hudson*, a four-part test. First (1), the speech must concern lawful activity and not be misleading.[347] The Court has long held that expression likely to deceive[348] or related to illegal activity[349] is not protected speech. Second (2), the Court will inquire whether the government has asserted a substantial interest in regulating the commercial speech at issue.[350] Common examples of a substantial government interest include preventing consumer confusion,[351] protecting national security,[352] life, health and safety.[353] The government bears the burden to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree”.[354] However, the Supreme Court held that when the government restricts truthful, non-misleading commercial speech for reasons “unrelated to the preservation of a fair bargaining process” strict scrutiny should apply.[355] Although strict scrutiny is almost always fatal to the

[346] Brief for the petitioners, No. 02-575, at 36.

[347] Ibid, at 566.

[348] *Friedman v Rogers*, 440 U.S. 1, 15-16 (1979).

[349] *Pittsburgh Press Co. v Human Relations Comm’n*, 413 U.S. 376, 388 (1973).

[350] *Central Hudson Gas & Electric v Public Service Comm’n of New York*, 447 U.S. 557, 566 (1980).

[351] Ibid.

[352] *Haig v Agee*, 453 U.S. 280 (1981).

[353] *See* U.S. Const. preamble & amend *V See also*, Stephen Gottlieb, ‘Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication’ (1988) 58 Boston University Law Review 917, 948 (discussing compelling government interest in life, health and safety).

[354] *Edenfield v Fane*, 507 U.S. 761 (1993).

[355] *44 Liquormart, Inc. v Rhode Island*, 17 U.S. 484 (1996).

challenged government restriction, a Court will uphold the constraint on speech if it is "necessary, and narrowly drawn, to serve a compelling state interest."[356]

If the answer to the first two questions is yes, the Court will then (3) determine "whether the regulation directly advances the governmental interest asserted" [357] and (4) "whether it is not more extensive than necessary to serve that interest."[358] The government needs to establish that the regulation on speech is "narrowly tailored to achieve the desired objective."[359] The government may prohibit inherently misleading advertising, but cannot place an absolute prohibition on *potentially* misleading information, if the information may be presented in a way, such as the use of a disclaimer, that is not deceptive.[360]

Whether information may be considered potentially misleading and, therefore, require a disclaimer was discussed by Court of Appeals with respect to health claims[361] that have some scientific support, such as *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system', but do not satisfy the Food and Drug Administration's (FDA) "significant scientific agreement" standard.[362] In *Pearson I*, a Court of Appeals noted that in cases of incomplete advertising, the message is not inherently misleading (and thus properly restricted) but rather potentially misleading, and that the preferred remedy is more disclosure rather than an outright prohibition.[363] The Court of Appeals held, however, that a disclaimer would not have been necessary when (1) evidence in support of the claim is qualitatively weaker than evidence against the claim; or (2) evidence in support of the claim is outweighed by evidence against the claim.[364] In *Pearson II*, a Court of Appeals added that although there was an absence of significant evidence in support of the claim, this does not mean that it is negative evidence against the claim.[365] The Court of Appeals added in *Pearson II* that disclaimers are not necessary when the government demonstrates "with empirical evidence that disclaimers would bewilder consumers and fail to correct for deceptiveness".[366] In *Whitaker*, the Court of Appeals found that health claims on dietary

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[356] *Capitol Square Review and Advisory Bd. v Pinette,* 515 U.S. 753, 761 (1995); *Perry Ed. Ass'n v Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey v Brown*, 447 U.S. 455, 461 (1980).

[357] *Central Hudson Gas & Electric v Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

[358] Ibid.

[359] *Board of Trustees v Fox*, 492 U.S. 469, 480 (1989).

[360] *In re R.M.J.,* 455 U.S. 191, 203 (1982).

[361] Health claims describe a relationship between a nutrient, such as calcium, and a disease or health-related condition, such as osteoporosis. 21 U.S.C. § 343(r)(1)(B).

[362] The FDA implemented a rule that required "significant scientific agreement" regarding the link between the claimed nutrient and health impact before allowing use of the claim on a food or supplement label. *See* 21 C.F.R. § 101.14; 21 C.F.R. § 101.70.

[363] *Pearson v Shalala*, 164 F.3d 650, 657 (D.C. Cir. 1999).

[364] Ibid.

[365] *Pearson v Shalala*, 130 F. Supp. 2d 105 (D.D.C. 2001).

[366] *Pearson v Thompson*, 141 F. Supp. 2d 105 (D.D.C. 2001).

supplements considering *treating* of a disease instead of *reducing* disease *risk* is unlawful, and therefore fail the first part of the *Central Hudson* test.[367]

Thus, when food businesses want to put content on their food label, such as *Cooked-up*, *Corn Rebel*, *True-blue*, and *My Goodness*, the *Central Hudson* test most likely would apply. This may be different for *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen'. Although the government may require food businesses to place labels on their products to regulate commerce[368] or protect the liberty interests of other members of society[369] some examples of challenges to government compelled speech through disclaimers exist mainly in the biotechnology context (*Amestoy* case and *Boggs* case) and tobacco warning labels (*Discount Tobacco* case and *R.J. Reynolds* case).

In the *Amestoy* case a Court of Appeals invalidated Vermont's mandatory disclosure requirements for dairy products derived from cows treated with a genetically engineered version of bovine somatotropin,[370] commonly referred to as rBST.[371] The Court of Appeals applied the *Central Hudson* test and held that Vermont has failed to establish that its interests are substantial.[372] The Court held that the dairy producers and retailers had a First Amendment right not to speak unless the state could establish a substantial interest for labelling rBST derived products.[373] Vermont argued that its statute supported a "strong consumer interest and the public's 'right to know'."[374] The Court, however, held that a "substantial state interest" cannot be established based merely on consumer curiosity.[375]

In *Boggs*, the Court of Appeals did not invalidate Ohio's mandatory disclosure requirements; albeit that this time the mandatory disclosure requirements considered dairy products derived from cows *not* treated with rBST. In Ohio such products should be

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[367] *Whitaker*, 239 F. Supp. 2d (D.C. 2003) at 54.

[368] *See e.g.,* U.S. *v* 40 Cases, More or Less, Pinocchio Brand 75% Corn, Peanut Oil and Soya Bean Oil Blended with 25% Pure Olive Oil, 289 F.2d 343, 345 (2d Cir. 1961) ("The interest of the federal government in ensuring that such food meets minimum standards of purity and is not misbranded arises out of its supervisory function over interstate commerce.").

[369] *Jacobson v Massachusetts,* 197 U.S. 11, 26 (1905).

[370] Recombinant Bovine Somatotropin, also known as recombinant Bovine Growth Hormone (rGBH), is a synthetic growth hormone that increases milk production by cows.

[371] Vt. Stat. Ann. tit. 6, § 2754 (terminated by 1993, Adj. Sess., No. 127, § 4, as amended by 1997, No. 61 § 272i, eff. Mar. 30, 1998).

[372] *Amestoy*, n 100; at 73.

[373] Ibid, at 71.

[374] Ibid, at 73.

[375] Ibid. The *Amestoy* opinion included a vigorous dissent asserting that the state interest was not limited to consumer curiosity, but also substantive concerns regarding rBST's impact on the heath of humans and cows, the financial sustainability of small farms, and general concerns regarding the manipulation of nature using biotechnology. *Id*. at 74. The proper question, in the dissent's view, is whether the Constitution prohibits government from mandating disclosure of truthful, relevant information to promote informed consumer choice. *Id*. Although the Second Circuit opinion certainly leaves open the possibility that mandatory labelling could pass constitutional muster if the state advanced a more substantive interest, a generalized interest in satisfying consumer curiosity appears to be a losing argument for states attempting to mandate labelling of otherwise scientifically indistinguishable products. Rather, the court relegated process-based labelling decisions to market forces.

accompanied by a disclaimer stating that "The FDA had determined that no significant difference has been shown between milk derived from rBST-supplemented and non-rBST-supplemented cows".[376] The Court of Appeals used the *Zauderer* test to assess whether the rule was in conflict with the First Amendment.[377] In *Zauderer*, the Supreme Court expressed a lighter standard than the Central Hudson test, applying only to disclosure requirements. In *Zauderer* the Supreme Court held that the government may compel disclosure requirements associated with product marketing, so long as the disclosure is (1) purely factual and uncontroversial; (2) reasonably related to the State's interest in preventing deception of consumers; and (3) not unjustified or unduly burdensome.[378] Accordingly, in *Boggs* the Court concluded that the use of a disclaimer accompanying the production claim could eliminate any consumer confusion and was, therefore, considered not to violate the First Amendment even though it compelled food businesses to speak.[379]

Cases in the context of tobacco warning labels illustrate the difficulty in determining whether the compelled commercial speech at issue is purely factual and uncontroversial. The *Discount Tobacco* case concerned labelling restrictions on tobacco products —specifically the use of colour graphics depicting the negative health consequences of smoking along with textual warning labels.[380] The Court of Appeals for the Sixth Circuit also based its decision on *Zauderer* and upheld the graphic-warning requirement because the factual information (i.e., colour graphics) regarding the health risks of using tobacco are reasonably related to the alleviation of potential consumer confusion.[381] In contrast, the Second Circuit Court of Appeals in *R.J. Reynolds*, held that the graphic warnings required under the Act went beyond a full disclosure requirement as in *Zauderer*, to prevent consumer deception, but rather required a general disclosure about the negative health effects of smoking—thus amounting to a warning and discouragement to consumers to purchase products rather than rectify specific deceptive statements.[382] Accordingly, the Court applied the more restrictive *Central Hudson* test—finding that the government failed to present any evidence that the proposed graphics would accomplish the stated goal of reducing smoking rates.

Whether the rational basis test outlined in *Zauderer* and applied in *Discount Tobacco* and *Boggs*, would apply to *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen', or whether the intermediate scrutiny test established in *Central Hudson* and applied in *R.J. Reynolds* and *Amestoy* would apply may

[376] 60 Ohio Admin. Code § 901:11-8 (2008).

[377] *Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

[378] Ibid.

[379] *Boggs*, n 100.

[380] *See Discount Tobacco City & Lottery, Inc. v United States*, 674 F.3d 509 (6th Cir. 2012); R*.J. Reynolds Tobacco Co. v Food and Drug Administration*, 696 F.3d 1205 (D.C. Cir. 2012).

[381] *Discount Tobacco*, 674 F. 3d at 569.

[382] *R.J. Reynolds,* 696 F.3d at 1216.

depend on whether the compelled commercial speech solely aims at informing consumers (and is thus purely factual and uncontroversial) or whether the compelled commercial speech aims at altering consumer choice (and is, therefore, not purely factual and uncontroversial).[383]

4.3.3. Conclusion

The Supreme Court had not yet clarified the meaning of commercial speech, but it is likely that corporate communications on food labels will be categorized as commercial speech. This opens the way for food businesses to challenge government regulations limiting corporate communications on food labels.

Cooked-up, *Corn Rebel*, *True-blue*, *My Goodness* and *Humble Honey* will likely be considered commercial speech. *Cooked-up* will probably not enjoy First Amendment protection as its claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life' is likely inherently misleading. The claims made by *Corn Rebel, True-blue, My Goodness*, and *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen' may be considered potentially misleading, provided the government can demonstrate a substantial interest, and may, therefore, require a disclaimer.

4.4. Comparing the Different Approaches to Free Speech Protection on Food Labels in the USA and the EU

I will compare the different approaches towards free speech protection on food labels in the EU and the US. First (1) I will compare the different approaches to whether corporate entities enjoy free speech protection. Second (2), I will compare whether food labels fall within the scope of free speech protection. Third (3), I will compare whether compelled expression enjoys free speech protection. Although food labels may enjoy free speech protection, this right may still be limited. I will, therefore, (4) assess the different approach towards which limits can be set to free speech.

4.4.1. To Speak or Not to Speak: the Freedom of Companies to Express Themselves

Initially, in the USA the Amendments to the Constitution were seen as human rights, understood to apply to natural persons only. Over time, case law expanded the scope of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to include corporate entities.[384]

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[383] See for a more detailed analysis Jennifer Keighley, 'Can You Handle the Truth? Compelled Commercial Speech and the First Amendment' (2012) 15 University of Pennsylvania Journal of Constitutional Law 539.

[384] See Anne Tucker, 'Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporative Personhood in Citizens United' (2001) 61 Case Western Reserve Law Review 495 (and sources quoted there).

Within the EU certain fundamental rights, arguably including the freedom of expression, also extend to corporate entities.

4.4.2. Expression on the Food Label. Does the Food Label Have What it Takes?

In the EU and the USA expressions on food labels seem to enjoy free speech protection.

4.4.3. Can *Humble Honey* Stay Humble? Whether Free Speech Includes the Right Not to Speak

The extent to which free speech includes the right not to speak, such as *Humble Honey*'s refusal to label its honey as being 'contaminated with genetically modified pollen', differed per jurisdiction. In the USA compelled expression on food labels does enjoy free speech protection. However, purely factual and uncontroversial compelled expression on food labels aimed at informing consumers may be subject to a lighter review than compelled expression on food labels aiming at altering consumer choice. In the EU it is less clear whether free speech includes the right not to disclose information on food labels. Although the ECtHR found that journalists have a right not to speak, it is not self-evident that the same would apply to information on food labels as that type of information serves a fundamentally different purpose. Furthermore, the approach of the ECJ towards whether free speech includes a right not to speak is yet unclear.

4.4.4. Put the Lid On: How Free Speech on Food Labels Can Be Limited

To determine whether expressions can be limited, USA courts differentiate between types of expression: commercial speech has a limited First Amendment protection than political speech. The claims made by *Cooked-up*, *Corn Rebel*, *True-blue*, *Blueberrylicious, My Goodness,* and *Humble Honey*'s refusal to add a disclaimer will most likely be considered commercial speech. Which test will most likely will be applied may depend on the type of commercial speech, mainly whether it concerns voluntary speech or compelled speech through disclaimers. *Central Hudson* test will likely be applied to *Cooked-up*, *Corn Rebel*, *True-blue*, *Blueberrylicious,* and *My Goodness.* This implies that commercial speech that is not misleading or unlawful may be limited when the government has a substantial interest to regulate the speech; when the limitation is necessary; and when the limitation is narrowly tailored to achieve the desired objective.[385] A lighter *Zauderer* test may be applied to disclosure requirements, such as that the government compels *Humble Honey's* to label its honey as being 'contaminated with genetically modified pollen'. The *Zauderer* test implies that he government may compel disclosure requirements associated with product

[385] Although this latest step seems to be eroding.

marketing, so long as the disclosure is (1) purely factual and uncontroversial; (2) reasonably related to the State's interest in preventing deception of consumers; and (3) not unjustified or unduly burdensome.[386]

In the EU an overarching limitations clause applies to all types of expression. From the CFR, ECJ case-law, and ECtHR case-law it can be derived that limitations to free speech in the EU have to be provided for by law, must respect the essence of the fundamental right at issue, must serve a legitimate aim, and must be necessary.[387] The case law of the ECtHR, which may be taken into account by the ECJ when assessing freedom of expression, differentiated commercial expression from other types of expression when it assessed the necessity of the limitation. Basically the ECtHR granted the governmental authorities a wider margin of appreciation when assessing the necessity of a limitation to commercial expression compared to political expression. This margin may become narrower when the commercial expression has 'political overtones'. It seems reasonable to expect that a similar approach as to the ECtHR will be used by the ECJ. Theoretically, it would also be conceivable that the ECJ as court of a union rooted in economic considerations, would value commercial expression higher than the ECtHR does. At present, however, there is no evidence pointing in this direction.

Food labelling regulations limiting free speech with a view to protect public health seems to be generally regarded as legitimate to limit food labels in the analysed legal systems. Disclosure requirements seem to be always preferred in the USA and the EU over an outright prohibition as long as such a disclaimer has the same effectiveness as a prohibition.

4.5. Food Businesses as Guardians of Food Information? To What Extent Do Functions of Free Speech Allow Free Speech Protection of Communications on Food Labels

The degree to which free speech may be protected may differ depending on (1) whether the corporate nature of the speaker justifies free speech protection on food labels, or (2) whether it is the interest of the consumer, or (3) a public interest.[388] Practice in the EU and the USA shows that commercial statements enjoy limited protection compared to political statements. It is, therefore, important to consider (4) to what extent the nature of corporate communications on food labels may be considered political or commercial. Finally, I will

[386] *Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

[387] So-called principle of proportionality.

[388] See for a more general discussion on free speech protection Thomas Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 Yale Law Journal 877 and Barendt (2011), n 238; For a more detailed discussion on corporate commercial free speech protection see Roger Shiner, *Freedom of Commercial Expression,* (Oxford University Press 2003); Tamara Piety, 'Against Freedom of Commercial Expression' (2007) 29 Cardozo Law Review 2583.

consider (5) whether corporate free speech protection on food labels should include the right not to speak.

4.5.1. I Think, Therefore I Am: the Corporate Nature of the Speaker as Justification for Corporate Free Speech.

Most of the purposes and interests of free speech protection do not justify the protection of corporate speech on food labels based on the corporate nature of the speaker.[389] Freedom of expression as a function of self-fulfilment and citizen participation in democracy seems to be a personal right that should only be applicable to human beings, as companies have no human dignity nor are capable of self-fulfilment. When corporate speech is political in nature, however, it can be argued that the tendency of governments to suppress radical or subversive ideas might justify corporate free speech protection on food labels.

4.5.2. Give Me More: Consumer Interest to Receive Information as Justification for Corporate Free Speech

The corporate right to free speech could also be justified based on the consumer interest to receive the information. [390] If the food business is not allowed to give the information the consumer interest to receive the information is not met. It could be argued that the consumer interest to receive information demands that governments should not restrict corporate communication on food labels to protect the consumer right to make fundamental choices concerning their life, an important aspect of self-fulfilment.[391] This argument would only apply when consumers demand information, which the food business is not legally allowed to provide. Especially *Corn Rebel*'s claim that its sweet corn is being 'GM-free' enables consumers to only consume food products that fit within their lifestyle, i.e. foods that are not genetically modified. A similar argument would be more difficult to make for *True-blue*'s claim that Vitamin C has been added to its *Blueberrylicious* or *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system'. Furthermore, consumer interests to receive the information cannot justify a corporate right not to speak, such as *Humble Honey*'s honey compelled disclosure that its honey is 'contaminated with genetically modified pollen'.

[389] Ibid.

[390] Barendt (2011), n 238, 25.

[391] Ibid, 401-2 referring to the Canadian Supreme Court decision *Ford v A-G of Quebec* [1988] 2 SCR 712, 767.

4.5.3. The Truth, the Whole Truth, and Nothing But the Truth: Public Interest in the Free Flow of Information as Justification for Corporate Free Speech

The value of truth can be supported "by utilitarian considerations concerning progress and the development of society".[392] From this it follows that the government should not regulate expression as this constitutes an interruption of the free flow of information. Interruption of the free flow of information has the potential that false information cannot be rebutted, which is harmful to society as a whole.

The free flow of false information, such as *Cooked-up*'s false claim that its canned macaroni and cheese dinner 'contains all the nutrients needed for a long and healthy life', is harmful to society: (1) false information increases the search costs for consumers to find good-quality goods; (2) the public might be incentivized to consume more canned macaroni and cheese dinners which is harmful to public health; and (3) food businesses will not be incentivized to innovate or improve their products in order to make truthful, non-misleading claims that appeal to consumers, because every competitor can make similar claims without it even being true.

This is different for claims that are in itself not false, such as *Corn Rebel*'s claim that its sweet corn is being 'GM-free', *True-blue*'s claim that Vitamin C has been added to its treats, and *My Goodness*'s claim that 'the consumption of bifidus eases the digestive system'. All seem to serve the public interest in the free flow of information i.e. lowering consumer search costs to make an optimal decision and promoting competition by stimulating the innovation and improvement of food products. In such a way both should also fall within the scope of free speech. Whether corporate information lowers consumer search costs to make an optimal decision can, however, be questioned as the amount of information consumers are exposed to is increased. This may result in information overload. Information overload actually increases search costs and could make it more difficult for consumers to process the information on the food label to make an informed choice of sufficient quality.[393] Consumer search costs to make an optimal decision might, therefore, be lowered with the limitation of the amount of information on food labels. If the government is not able to prove that consumers will be better enabled to make an optimal decision by withholding the information from the food label, the corporate information should fall within the scope of free speech protection.

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[392] Ibid, 7.

[393] Verbeke (2005), n 54.

4.5.4. Commercial or Political? The Nature of Corporate Communication on Food Labels

Some food businesses, such as *Corn Rebel*, might address topics through their food labels that are part of public debate, e.g. GMO/child labour/animal cruelty is bad, by informing the consumer that their food product is free from these qualities (e.g. *Corn Rebel*'s claim that its sweet corn is being 'GM-free'). It can be argued that the single statement that a product is free from qualities that might be considered bad by part of the public contributes as such to the public debate. There are much more obvious and more effective ways, however, to communicate political standpoints that certain qualities are bad than stating on food labels that the product does not contain that quality. This makes it difficult to argue that the main purpose of the corporate communication on the food label is political. Most food labels are, therefore, mainly commercial in nature as they are primarily targeted at affecting consumer purchasing decisions.

4.5.5. Does *Humble Honey* have a Free Speech Right Not to Speak?

The right not to speak is "closely linked with freedom of belief and conscience and with underlying rights to human dignity, which would be seriously compromised by a legal requirement to enunciate opinions which are not in truth held by the individual."[394] As food businesses have no 'human dignity' it is hard to justify that food businesses have a free speech right not to disclose information. Furthermore, the consumer interest to receive information does not justify a corporate right not to disclose information on food labels. The public interest in the free flow of commercial information could, however, justify a corporate right not to disclose information when the food business can prove that the compelled information will increase consumer search cost to make an informed choice of sufficient quality. If the food business can prove this, the compelled claim should fall within the scope of free speech.

4.6. Conclusion

The communications made by *Cooked-up*, *Corn Rebel*, *True-Blue*, and *My Goodness* on their food labels will most likely enjoy, subject to limitations, free speech protection in the EU and the US. Such right can only be justified from the perspective of consumer or public interest. *Humble Honey* will most likely not enjoy a right to free speech in the EU, while this seems to be different in the US. Withholding information from consumers should, however, in general not fall within the scope of commercial speech protection because it generally does not serve the consumer or public interest in receiving information. This implies that *Humble Honey* has to speak up; at least as far as its free speech rights are concerned, except

[394] Barendt (2011), n 238, 94.

when *Humble Honey* can prove that the compelled information will increase consumer search costs to make an optimal decision.

Despite the right of free speech, the communications of *Cooked-up* can be banned in the USA and the EU because the government has a substantial interest in doing so. A complete ban of information may be necessary for utterly false claims, however, the claims made by *Corn Rebel*, *True-blue*, and *My Goodness* are not utterly false. Subject to substantial government interest, e.g. protecting public health, such claims can be prohibited, although it is most likely that a disclaimer will be required in the USA and the EU for these types of expressions as long as such a disclaimer will not increase consumer search costs to make an optimal decision.

In sum, food businesses should not be the guardians of information on food labels; their free speech rights on food labels should only be based on public and consumer interests. Only when the information serves the public or consumer interests, free speech protection should step in.

5

Disciplining Private Standards under the SPS and TBT Agreement. A Plea for Market-State Procedural Guidelines

Forthcoming as:

Eva van der Zee, 'Disciplining Private Standards under the SPS and TBT Agreement. A Plea for Market-State Procedural Guidelines', *Journal of World Trade* (2018) 52(3).

Abstract This chapter shows that, although private standards could fall within the scope of the SPS or TBT Agreement, the responsibility of WTO Members to *effectively* ensure that private standard-setters are not more trade-restrictive than necessary is limited under the respective frameworks. Other mechanisms, rooted in a commercial disguise, would be more effective as they could incentivize private standard-setters to comply with the WTO legal system. It is argued that WTO Members worried about the trade-restrictive nature of private standards should draft procedural guidelines in collaboration with IGOs and private multi-stakeholder standard-setting bodies. Such procedural guidelines should be aimed at simplifying the certification process and making it easier for farmers and producers to comply with the private standard.

5.1. Introduction

Private standards are increasingly regulating international trade.[395] These standards, considered private due the predominant private nature of the issuing body,[396] set prerequisites for markets in a large number of developed and increasingly also developing countries, often to achieve a sustainability objective in food production such as food safety, environmental protection or fair labour conditions.[397] On the one hand this may lead to economic growth and better protection levels.[398] On the other hand it may set barriers to trade to farmers and producers who cannot comply with the private standards.[399]

To ensure that private standards are not more trade-restrictive than necessary, it has been topic of hot debate whether private standards could be disciplined by the SPS or TBT Agreement.[400] This chapter first shows that, although private standards could fall within the

[395] Abbott and Snidal (2009) n 20; Cafaggi (2013), n 2; Purnhagen (2015), n 2; Marx and others (2012), n 5; Pauwelyn (2014), n 20; Wijkström and McDaniels (2013), n 20.

[396] This is in line with the majority of scholars and some WTO Members: Abbott and Snidal (2009), n 20; WTO Appellate Body, *US-Tuna II*, n 13; Committee on Sanitary and Phytosanitary Measures, 'Second Report of the Co-stewards of the Private Standards E-working group on Action 1 (G/SPS/55)', G/SPS/55, circulated 29 September 2014.

[397] Reardon, Timmer and Berdegue (2004), n 3, 15.

[398] Laurian Unnevehr, 'Food safety in developing countries: Moving beyond exports' (2009) 24 Global Food Security.

[399] Vera Thorstensen, Reinhard Weissinger and 'Private Standards—Implications for Trade Xinhua Sun, Development, and Governance, 'Private Standards—Implications for Trade, Development, and Governance' (2015) WEF/ICTSD, E15 Task Force on Regulatory Systems Coherence August; Gabriela Alvarez and Oliver von Hagen, 'The Impacts of Private Standards on Producers in Developing Countries,' (2011) International Trade Centre (ITC), Literature Review Series on the Impacts of Private Standards; Part II; Sven Anders and Julie Caswell, 'Standards as Barriers Versus Standards as Catalysts: Assessing the Impact of HACCP Implementation on U.S. Seafood Imports' (2009) 91 American Journal of Agricultural Economists 310.

[400] The SPS Committee heavily debated how private standards could be defined. Committee on Sanitary and Phytosanitary Measures, 'Private Industry Standards. Communication from Saint Vincent and the Grenadines', G/SPS/GEN/766, circulated 28 February 2007; Committee on Sanitary and Phytosanitary Measures, 'Summary of the Meeting Held on 29-30 June 2005', G/SPS/R/37/Rev.1, circulated 18 August 2005, at 17-20; Committee on Sanitary and Phytosanitary Measures, 'Report of the Co-stewards of the Private Standards E-working group on Action 1 (G/SPS/55)', G/SPS/W/276, circulated 18 March 2014; Committee on Sanitary and Phytosanitary Measures, 'Report of the Co-stewards of the private standards e-working group to the March 2015 meeting of the SPS committee on Action 1 (G/SPS/55), G/SPS/W/283, circulated 17 March 2015, at 22; WTO 2015 News Items, 'Sanitary and phytosanitary measures: formal meeting', htts://www.wto.org/english/news_e/news15_e/sps_26mar15_e.htm (visited 21 December 2016); Committee on Sanitary and Phytosanitary Measures, 'Summary of the meeting of 27 - 28 October 2016 - Note by the Secretariat', G/SPS/R/84, circulated 22 December 2016; For the discussions at the TBT Committee: Committee

scope of the SPS or TBT Agreement, the responsibility of WTO Members to *effectively* ensure that private standard-setters are not more trade-restrictive than necessary is limited under the respective frameworks. Other mechanisms, rooted in a commercial disguise, would be more effective as they could incentivize private standard-setters to comply with the WTO legal system. I, therefore, argue that WTO Members worried about the trade-restrictive nature of private standards should draft procedural guidelines in collaboration with IGOs and private multi-stakeholder standard-setting bodies. Such procedural guidelines should be aimed at simplifying the certification process and making it easier for farmers and producers to comply with the private standard.

5.2. The SPS Agreement and Private Standards

The role of the SPS Agreement in addressing private standards was first raised at an SPS Committee meeting in 2005 by St. Vincent and the Grenadines. Supported by Jamaica, Peru, Ecuador and Argentina they raised concern that their exports have been subject to a range of private standards (GLOBALG.A.P.[401] in particular) into the then European Communities (EC), which would negatively affect small-scale farmers.[402] The discussion raised three issues: attribution of actions by private bodies to WTO Members,[403] the applicability of Article 13 to private standards,[404] and the necessity of a forum which deals with trade concerns of private standards.[405] Ever since, private standards have been extensively discussed.[406] These discussions did not successfully address the three issues.

The first two issues raised will be examined below. It will be shown that although private SPS measures fall within the scope of the SPS Agreement, WTO Members bear a limited

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on Technical Barriers to Trade, 'Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4,' G/TBT/26, circulated 13 November 2009; Committee on Technical Barriers to Trade, 'Seventh Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4,' G/TBT/37, circulated 3 December 2015; Committee on Technical Barriers to Trade, 'Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, G/TBT/1/Rev.13, circulated 8 March 2017; Denise Prévost and Tracey Epps assessed whether private food safety standards could be disciplined under the SPS Agreement. Denise Prévost, 'Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities' (2008) 33 South African Yearbook of International Law 1; Tracey Epps, 'Demanding perfection: private food standards and the SPS Agreement' in Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press 2008); Arcuri and Wouters and Geraets, focused on how environmental and social standards could be disciplined by the WTO Agreements; Alessandra Arcuri, 'The TBT Agreement and private standards' in Tracey Epps and Michael Trebilcock (eds), *Research Handbook on WTO and Technical Barriers to Trade* (Edward Elgar Publishing 2014), 519; Jan Wouters and Dylan Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations' (2012) 11 World Trade Review, 479-89.

[401] At that time Eurep/GAP. In September 2007 Eurep/GAP changed its name to GLOBALG.A.P.

[402] Committee on Sanitary and Phytosanitary Measures (2005), n 400, at 17-20.

[403] Ibid, at 18.

[404] Ibid, at 19.

[405] Ibid, at 20.

[406] For an overview, n 400.

responsibility to *effectively* ensure that these private SPS measures comply with the SPS Agreement. The latter issue will be discussed in Section 5.4.

5.2.1. Private SPS Measures

For WTO Members to bear responsibility under the SPS Agreement for private standards, the private standards should be an SPS measure. Annex A.1. of the SPS Agreement defines an SPS measure to "include all relevant laws, decrees, regulations, requirements and procedures" applied for the purpose to protect human, animal, or plant life or health (HAP-LH) within the territory of the Member. The WTO judiciary has not yet considered whether private standards could be SPS measures. Several scholars have argued that only governmental measures fit the definition of Annex A.1. Herwig argues that the terms 'law, decrees and regulation' refer explicitly to governmental measures and that, therefore, 'requirements' and 'procedures' should also be considered governmental.[407] Epps emphasizes that as all Panel reports agree that the meaning of 'all relevant laws, regulation and requirements' in Article III.4 of the GATT entail government involvement, the same should apply to SPS measures.[408] Prévost and Epps, furthermore, emphasize that as in *EC - Biotech* the Panel required an SPS measure to take the *legal form* of a law, decree or regulation, SPS measures can only be government measures.[409] These interpretations leaves aside the meaning of the term 'includes', 'all', and 'relevant'. Arcuri argues that the meaning of 'include' implies that the list is non-exhaustive, including private measures.[410] This is in line with the Appellate Body in *Australia-Apples* arguing that the words 'include' and 'all' suggest an illustrative and expansive list.[411] Furthermore, the Appellate Body considered the word "relevant" as a key element within the sentence which refers back to the list of specific purposes (HAP-LH). As such, the Appellate Body concluded that measures that cannot be considered laws, decrees, regulations, requirements or procedures may nevertheless constitute SPS measures when they are "relevant", that is, when they are "applied" for a purpose to protect HAP-LH.[412] Furthermore, the Appellate Body clearly stated that laws, decrees, regulations, requirements or procedures are "not, in itself, sufficient to bring such an instrument within the ambit of the SPS Agreement."[413] Arguably, as the purpose of the instrument is the required yardstick, private standards that are

[407] Alexia Herwig, 'he Application of the SPS Agreement to Transnational, Private Food Standards' (2016) 7 European Journal of Risk Regulation, 613-5.

[408] Epps (2008); n 400, 83.

[409] Prévost (2008), n 400; Epps (2008); n 400, 28.

[410] Arcuri (2014), n 400; 519.

[411] WTO Appellate Body, *Australia-Measures Affecting the Importation of Apples from New Zealand (Australia–Apples)* [29 November 2010] WT/DS367/AB/R, at 175.

[412] Ibid.

[413] Ibid.

applied to protect HAP-LH should also constitute an SPS measure when they are applied to protect HAP-LH *within the territory of the Member*.

As SPS measure are applied to protect HAP-LH *within the territory of the Member,* the Member responsible for the private standard is the territory of the Member where the private standard aims to protect HAP-LH. For example, the private standard Demeter for biodynamic agriculture requires that farmers use a large crop rotation to decrease the risk of pests and diseases,[414] aims at protecting plant life and health in the territory of the Member where the farmer operates. The private standard GLOBALG.A.P., which requires that producers comply with, amongst others, criteria for food safety,[415] can be considered to aim at reducing risks to human health in the territory of the Member where the food is consumed. This line of reasoning, that *the territory of the Member* depends on the territory where the measure protects HAP-LH, is in line with the decision by the WTO Appellate Body in *Australia-Apples* where the purpose of the measure, i.e. to protect HAP-LH, was considered the required yardstick.

Despite this more contextual approach, some scholars argue that Annex A.1. does not include private standards because the negotiators did not intend to include private actions into the SPS Agreement.[416] This argument is based on the fact that private standards were extensively in use before and during the negotiating of the SPS Agreement in the Uruguay Rounds between 1986 and 1994, while the inclusion of private actions into the SPS Agreement was never mentioned either in formal negotiating meetings or in informal discussions leading up to the SPS Agreement.[417] This argument fails to take into account that the SPS Agreement was negotiated during a time were food standards were typically government measures.[418] The taking up of private food standards largely post-dates the negotiating of the SPS Agreement.[419] The negotiators may not have considered the trade-restrictive nature of private actions and therefore did not include private SPS measures into the negotiations.

Besides the textual or historical interpretation, one could also take recourse to an effective interpretation.[420] Such an approach would also lead to the conclusion that Annex

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[414] Stichting De Meter, 'Biodynamische Landbouw', (visited 30 August 2016).

[415] Global GAP, 'Who we are', http://www.globalgap.org/uk_en/who-we-are/about-us/history/ (visited 30 August 2016).

[416] Epps (2008); n 400; Prévost (2008), n 400; Arcuri (2014), n 400.

[417] According to the recollection of two individuals who were centrally involved in the negotiations that produced the SPS Agreement, i.e. Gretchen Stanton and Digby Gascoigne, Committee on Sanitary and Phytosanitary Measures, 'Private voluntary standards within the WTO multilateral Framework. Submission by the United Kingdom.', G/SPS/GEN/802, circulated 9 October 2007, at 25.

[418] Committee on Sanitary and Phytosanitary Measures (2007), n 400, at 25.

[419] Ibid.

[420] Damme (2010), n 80, 637; Hersch Lauterpacht, *The Development of International Law by the International Court* (revised edn, Cambridge University Press 1982), 228; *Arbitral Award, Eureko B.V. v. Republic of Poland,* [2005] 12 ICSID Rep 335, at 248; WTO Panel, *Mexico-Measures Affecting Telecommunications Services (Mexico-Telecoms)* [2 April 2004] WT/DS204/R, at. 7.2.

A.1. includes private standards. The SPS Agreement was established to guide the development, adoption and enforcement of SPS measures to minimize their negative effects on trade.[421] Furthermore, the SPS Agreement recognizes the importance to assist developing country Members as they may encounter special difficulties in complying with SPS measures.[422] Private standards may especially have an effect on the cost structure of small businesses when standards are too rigid, raise costs, or when they conflict with standards set by governments or international organizations.[423] Paralleled to a shift in governance from public to private in the domain of food production, these private forms of regulation resulted in a shift of government's rulemaking function to private actors.[424] As private and public standards may be similar in effect, excluding state responsibility for private SPS measures as a whole from the SPS Agreement could make the SPS Agreement less effective in minimizing the negative effects on international trade of SPS measures.

In sum, private standards that aim at protecting HAP-LH in the territory of the WTO Member fall within the scope of Annex A.1. As will be discussed below, the extent of the responsibility of WTO Members for these private SPS measures is severely limited.

5.2.2. State Responsibility under the SPS Agreement

A literal interpretation of Article 2.2. SPS Agreement would imply that WTO Members are obliged to ensure that private SPS measures ('any SPS measure') are applied only to the extent necessary to protect HAP-LH, are based on scientific principles and are not maintained without sufficient scientific evidence. Such an "obligation to ensure" would mean an obligation towards a specific result, i.e. WTO Members have to guarantee a WTO-consistent outcome in every single instance.[425] Such a reading of Article 2.2. SPS Agreement seems to be too far-fetched for two reasons. First, Article 2.1. SPS Agreement stipulates that WTO Members have the right to take SPS measures provided that they are not inconsistent with the provisions of the Agreement. This suggests that Article 2 concerns only SPS measures taken by the WTO Member, not by private parties. Second, such a reading would make Article 13 SPS Agreement redundant.

The previous section showed that private SPS measures fall within the scope of the SPS Agreement. This section will show that WTO Members bear only a limited responsibility to *effectively* ensure that private SPS measures comply with the SPS Agreement. The

[421] SPS Agreement, preamble para 4.

[422] Ibid, para 7.

[423] Committee on Sanitary and Phytosanitary Measures, 'Private standards and the SPS Agreement, G/SPS/GEN/746, circulated 24 January 2007a.

[424] Tietenberg (1998), n 2; Giovannucci and Ponte (2005), n 2; Cafaggi (2013), n 2; Purnhagen (2015), n 2.

[425] Samir Gandhi, 'Regulating the Use of Voluntary Environmental Standards within the World Trade Organization Legal System: Making a Case for Developing Countries' (2005) 39 Journal of World Trade 855, 874; Jan Bohanes and Iain Sandford, 'The (untapped) potential of WTO rules to discipline private trade-restrictive conduct. Paper presented at the Society of International Economic Law Inaugural Conference. Geneva, 15-17 July 2008' (2008) Online Proceedings Working Paper No 56/08, 186-7.

argument will be twofold. First, it will be shown that WTO Members only have an obligation to effectively ensure that private standards comply with the SPS Agreement when the private conduct can be attributed to the WTO Member. In this context it will be clarified that standards set by private standard-setters can only be attributed to the WTO Member where they gain legal effect by means of public law. Second, it will be shown that when private conduct cannot be attributed, WTO Members do not have an obligation to effectively ensure private compliance.

5.2.2.1. The Rare Case: Effective State Responsibility for Private SPS Measures

WTO Members have an obligation to effectively ensure that private SPS measures comply with the SPS Agreement, when the actions by the private standard-setter can be attributed to the WTO Member.[426] In *Japan-Film*, the Panel held that in relation to the General Agreement on Tariffs and Trade (GATT) actions taken by a private body could be attributed to the WTO Member if there is sufficient governmental involvement,[427] i.e. there is some governmental connection to or endorsement of actions taken by private bodies.[428] The rationale behind attributing private actions to the WTO Member is to prevent the risk that WTO obligations would be evaded through a WTO Member's delegation of quasi-governmental authority to private bodies.[429]

It is clear that when the WTO Member bases its national standards on private standards it could be attributed to the WTO Member. To attribute this situation to the WTO Member is in line with general principles of state responsibility, which acknowledges that private conduct that has been endorsed and adopted by a state at its own can be attributed to the state.[430] In this case it is, however, not the action by the private standard-setter that is attributed to the WTO Member, but the action by the WTO Member itself, namely the drafting of the national standard.

Private conduct should also be attributed to the WTO Member when the private standard gains legal effect by means of public law. Arguing otherwise would run the risk that WTO Members would evade WTO obligations.[431] Such a conclusion is also in line with general principles of state responsibility, which acknowledges that private conduct over which the

[426] GATT Dispute Settlement, *Japan-Semiconductors* [4 May 1988] L/6309 - 35S/116.

[427] WTO Panel, *Japan-Measures Affecting Consumer Photographic Film and Paper (Japan-Film)* [19 March 1998] WT/DS44/R, at 10.56; WTO Panel, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Argentina-Hides and Leather)* [19 December 2000] WT/DS155/R, at 11.18.

[428] WTO Panel, *Japan-Measures Affecting Consumer Photographic Film and Paper (Japan-Film)*, n 427, at 10.52.

[429] Ibid, at 10.328.

[430] Article 11 ARSIWA.

[431] Enrico Partiti, 'Public Play Upon Private Standards. How European and International Economic Law Enter into Voluntary Regimes for Sustainability' (PhD, University of Amsterdam 2016), 96.

state has 'effective control' acts on the instruction of, or under the direction of control of, that state,[432] and private actors empowered by the law of that Sate to exercise elements of governmental authority,[433] can be attributed to the state. In this respect the judgments by the ECJ in *James Elliott Construction* and *Fra.bo* illustrate when private standards could be considered to gain legal effect by means of public law. In *James Elliott Construction* a private standard developed by a private body was considered an act by the EU because the standard was governed by requirements defined by an EU Directive, initiated, managed and monitored by the European Commission, and its legal effects were subject to prior public publication by the European Commission in the Official Journal of the European Union.[434] In *Fra.bo* the ECJ held that the free movement of goods "applies to standardization and certification activities of private-law bodies, when the national legislation considers the products certified by that body to be compliant with national law and has the effect of restricting the marketing of products which are not certified by that private law-body."[435]

The situation becomes more complex when a WTO Member intentionally fails to intervene with the trade-restrictive nature of the private standard-setter.[436] Such a situation is similar to the ECJ case in *Commission v France*, where the ECJ held that France impliedly authorized private parties to exercise private regulation by failing to apply national legislation.[437] In the context of private standards, the WTO judiciary would have to decide whether the WTO Member has competition laws in place, has a competent competition authority, and that enforcement must be necessary to achieve the objectives of competition. It is unlikely that the WTO judiciary would engage in such a complex and factual analysis. This would risk to seriously endanger the regulatory autonomy of WTO Members to an extent not envisaged by the drafters of the WTO treaties.[438]

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[432] Article 8 ARSIWA in conjunction with ICJ, *Military and Paramilitary Activities in against Nicaragua (Nicaragua v. United States* [27 June 1986] , at 86, 109, and 115.

[433] Article 5 ARSIWA. The scope of governmental authority under the ARSIWA remains unclear. Eva Van der Zee, 'In between two societal actors. The responsibilities of sovereign wealth funds towards human rights and climate change' (2016) 12 International and Comparative Corporate Law Journal.

[434] Case C-613/14 *James Elliott Construction* [2016] ECLI:EU:C:2016:821, at 43.

[435] Case C-171/11 *Fra.bo* [2012] ECLI:EU:C:2012:453 at 32.

[436] This is for example the case for the Dutch Competition Agency, ACM, Letter, 18 February 2016, https://www.rijksoverheid.nl/documenten/brieven/2016/02/18/brief-acm (visited 27 April 2017); Petros Mavroidis and Robert Wolfe, 'Private Standards and the WTO: Reclusive No More' (2017) 16 World Trade Review, 8.

[437] Case C-265/95 *Commission v France* [1997] ECLI:EU:C:1997:595.

[438] On the concept of inaction in WTO jurisprudence under GATT and GATS: Joost Pauwelyn, 'Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS' (2005) 4 World Trade Review 131, 142–145; Panagiotis Delimatsis, 'Don't gamble with GATS-the interaction between Articles VI, XVI, XVII and XVIII GATS in the light of the US-Gambling case' (2006) 40 Journal of World Trade 1059, 1076; Jukka Snell, 'The Notion of Market access: A Concept or a Slogan? Common Market Law Review' (2010) 47 Common Market Law Review 437; Bohanes and Sandford , n 425, at 186-7.

In sum, WTO Members are only responsible to effectively ensure, i.e. they have an obligation of result, that a private SPS measure complies with the SPS Agreement where the private SPS measure gains legal effect by means of public law.

5.2.2.2. The General Case: Ineffective State Responsibility for Private SPS Measures

Where actions by private standard-setters cannot be attributed to the WTO Member, Article 13 SPS Agreement may be applicable. Article 13 obliges WTO Members to take "reasonable measures as may be available to them to ensure that non-governmental entities within their territories" comply with the SPS Agreement. In addition, WTO Members may not "take measures which have the effect of, directly or indirectly, requiring or encouraging (...) non-governmental entities, to act in a manner inconsistent" with the SPS Agreement.

The extent of the responsibility of WTO Members for private SPS measures under Article 13 depends on two issues. First, WTO Members can only be responsible for private SPS measures under Article 13 when the private standard-setter can be considered a 'non-governmental entity' under the SPS Agreement. Second, the degree of responsibility the WTO Members has under Article 13 depends on whether Article 13 can be considered an obligation of conduct or an obligation of result.

Regarding the first issue, neither the SPS Agreement nor SPS case law clarifies the term 'non-governmental entities' within the meaning of Article 13.[439] A narrow interpretation of the term 'non-governmental entity',[440] which would exclude private entities, is often based on the understanding that non-governmental entities must have a degree of government involvement.[441] Such a narrow interpretation of non-governmental entity would make the provision of Article 13 redundant as actions by non-governmental entities that have a degree of government involvement are attributable to the WTO Member and could hence be disciplined under Article 2.[442]

Regarding the second issue, Article 13 does not oblige WTO Members to effectively ensure private compliance, but to take reasonable measures that are available to them. The SPS Agreement nor the WTO judiciary clarify what such reasonable measures entail. The WTO Appellate Body did clarify that the term 'reasonable' implies "a degree of flexibility that involved consideration of all circumstances of a particular case",[443] suggesting that reasonableness should be decided on a case by case basis. The WTO Appellate Body also clarified when a measure may not be "reasonably available" in the context of Article XIV(a)

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[439] Prévost (2008), n 400, 19.

[440] Ibid; Wouters and Geraets (2012), n 400; Mavroidis and Wolfe (2017), n 436; Epps (2008); n 400; Herwig (2016), n 407, 613-5.

[441] Herwig (2016), n 407, 614; Committee on Sanitary and Phytosanitary Measures (2005), n 400, 19.

[442] Epps (2008), n 400, 86.

[443] WTO Appellate Body, *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US-Hot-Rolled Steel)* [24 July 2001] WT/DS184/AB/R, at 84.

GATS i.e. where it is "merely theoretical in nature, for instance, where the responding WTO Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".[444]

As the tone in Article 13 SPS Agreement is much softer than in Article 2(2), Article 13 should be considered an obligation of conduct, only requiring a level of effort by the government. As a consequence WTO Members do not have to ensure that the private standard complies with SPS Agreement in every single instance. Such an obligation of result would only follow when the private conduct can be attributed to the WTO Member, in which case the WTO Member would be responsible under Article 2(2).[445] To make a distinction between the obligation of WTO Members under Article 2(2) and Article 13 also follows from an effective interpretation. The SPS Agreement was established to guide the development, adoption and enforcement of SPS measures to minimize their negative effects on trade.[446] Imposing an obligation of result on WTO Members for private conduct over which they do not have effective control would not minimize these effects as developing countries lack the capacity, developed states lack the regulatory reach to direct transnational actions, and individual states are globally unrepresentative reducing their legitimacy.[447]

As such, reasonable measures will most likely not extent to the drafting of laws to ensure that private parties comply with the SPS Agreement.[448] Reasonable measures most likely include softer instruments, such as disseminating information about the SPS Agreement and its provisions applicable to private standard-setting; developing and circulating a national policy, whether hortatory or for mandatory application, in relation to compliance with these provisions; dialogue with the responsible private organizations to encourage behaviour consistent with the SPS provisions; entering into memoranda of understanding with the private organizations; providing financial incentives to encourage compliance by private organizations;[449] and increasing transparency.[450]

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[444] WTO Appellate Body, *US-Gambling*, n 85, at 308.

[445] In this respect, it should be noted that the Panel in *Australia-Salmon (Article 21.5-Canada)* has erred in finding that Article 13 SPS Agreement contains and obligation of result. This case concerned SPS measures taken by the Regional Government of Tasmania for which Australia was fully responsible. The actions by the Regional Government of Tasmania could be attributed to Australia in which case Australia has an obligation of result under Article 2(2) TBT Agreement, not under Article 13. WTO Panel, *Australia - Measures Affecting Importation of Salmon. Article 21.5 DSU Recourse (Canada)* [18 February 2000] WT/DS18/RW, at. VII.592.

[446] SPS Agreement, preamble para 4.

[447] Abbott and Snidal (2009), n 20, 569.

[448] Prévost (2008), n 400; 24.

[449] Committee on Sanitary and Phytosanitary Measures (2007), n 400, para 11.

[450] Abbott and Snidal (2009), n 20, 561 and 567; Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press 1992).

5.3. The TBT Agreement and Private Standards

Many private standards are not applied to protect HAP-LH, but aim at protecting issues such as animal welfare, human rights, or reducing CO2 levels.[451] As such, they may fall within the scope of the TBT Agreement.[452] The TBT Committee has not explicitly addressed private standards in the same way as the SPS Committee has. WTO Members have expressed concern about the emergence of private standards.[453] Others held that the term 'private standards' lacked clarity and that its relevance to the implementation of the TBT Agreement has not been established.[454] So far, WTO Members did not find consensus as to how the TBT Agreement should respond to the trade-restrictive effect of private standards.

This section will show that although private TBT measures fall within the scope of the TBT Agreement, the WTO Members bear a limited responsibility to *effectively* ensure that these measures comply with the TBT Agreement.

5.3.1. Private Technical Regulations and Standards

Two tests determine whether WTO Members have a responsibility for private standards under the TBT Agreement. The first comprises of two alternative questions, which are relevant for both technical regulations and standards, i.e. (1) does the private standard lay down product characteristics or (their) related process and production methods (PPMs)? Or (2) does the private standard include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product or PPM? When one of these questions is answered in the affirmative it is necessary to conduct the second test which also comprises of two alternative questions, i.e. (3) is the private standard mandatory? Or (4) is the private standard approved by a recognized body?

5.3.1.1. Does the private standard lay down product characteristics or (their) related PPMs within the scope of the TBT Agreement?

The first question that should be answered to assess whether WTO Members bear responsibility for private standards under the TBT Agreement is whether the private standard lays down product characteristics or (their)[455] related PPMs. Many private

[451] Van der Zee (2018), n 178.

[452] Article 1(5) TBT Agreement.

[453] Committee on Technical Barriers to Trade (2009), n 400, at 26.

[454] Ibid.

[455] I have put the term 'their' in brackets as the word is mentioned in the definition of technical regulation but not in the definition of standard. The negotiating history shows that the drafters did not intend a difference. Seung Wha Chang, 'GATTing a Green Trade Barrier. Eco-Labelling and the WTO Agreement on TBT' (1997) 31 Journal of World Trade 137, referring to Committee on Trade and Environment and Committee on Technical Barriers to Trade, 'Negotiating history of the coverage of the agreement on technical barriers to trade with regard to labelling requirements, voluntary standards, and processes and production methods unrelated to product characteristics, WT/CTE/W/10, G/TBT/W/11, circulated 29 August 1995, at 150.

standards set requirements to the production process, such as fair trade, animal welfare, and geographical location, which may not necessarily have an effect on the physical characteristics of the product. Such private standards could be considered a technical regulation or standard when 'related PPMs' would include non-physical characteristics.

The meaning of 'related PPMs' under the TBT Agreement has been widely debated.[456] It was not until *EC-Seal Products* that the meaning of the phrase 'related PPMs' was examined in a WTO dispute.[457] In *EC-Seal Products* the Appellate Body interpreted 'related PPMs' to indicate that the subject matter of a technical regulation may consist of a PPM that is related to product characteristics.[458] To determine whether a measure lays down 'related' PPMs, the PPMs at issue need to have a sufficient nexus to the characteristic of a product.[459]

The width of this 'sufficient nexus' remains unclear. Some scholars argue that prescriptions of specific production methods which do not leave physical traces have a sufficient nexus, while general policy considerations that are not specifically related to the production of specific products would not.[460] In other words, it is necessary to assess whether the characteristic is specifically related to the production of specific products.[461] The rationale for this distinction is that the TBT is a *lex specialis* relative to the GATT concerning trade in goods. When the trade issues are unrelated to a specific product, the TBT Agreement does not apply.[462] Following this line of reasoning, most private standards would fall within the scope of the TBT Agreement as they prescribe specific production methods. For example, private standards that require that tuna is harvested using a specific fishing technique to avoid bycatch of dolphins has sufficient nexus to the tuna product.[463] In the same vain, private standards that require that coffee beans are not harvested by children to avoid child exploitation should also be considered to have such a sufficient nexus.[464]

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[456] Manoj Joshi, 'Are Eco-Labels Consistent with World Trade Organization Agreements?' (2004) 38 Journal of World Trade 69, 69-92; Chang (1997), n 455; Meredith Crowley and Rob Howse, 'Tuna-Dolphin II: a legal and economic analysis of the Appellate Body Report' (2014) 13 World Trade Review 321, 321-355.

[457] WTO Appellate Body, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products (EC-Seal Products)* [18 June 2014] WT/DS400/AB/R, at 5.67; Rob Howse, 'A Comment and Epilogue' (2015) 6 European Journal of Risk Regulation 418.

[458] WTO Appellate Body, *EC-Seal Products*, n 457, at 5.12.

[459] Ibid.

[460] Ming Du, 'What is a "Technical Regulation" in the TBT Agreement?' (2015) 6 European Journal of Risk Regulation 396; Howse (2015), n 457.

[461] Ibid.

[462] Howse (2015), n 457.

[463] WTO Appellate Body, *US-Tuna II*, n 13.

[464] Cf. Howse (2015), n 457.

5.3.1.2. Does the private standards include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product or PPM?

When the private standard does not lay down product characteristics or (their) related PPMs within the scope of the TBT Agreement, it needs to be assessed whether the private standard includes or deals exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product or PPM. Such assessment is mainly relevant for packaging requirements stipulated by private standards, e.g. compostable plastics. Such standards do not relate to the characteristics of the product itself, as it solely relates to the packaging of the product. Such standards do relate to the competitive opportunities of the product in the market, e.g. consumers may be more inclined to buy products wrapped in compostable plastics. The second sentence of the definition of technical regulations and standards states that standards may *also* include measures that are concerned with 'terminology, symbols, packaging, marking or labelling requirements *as they apply to product, process or production methods*'[emphasis added]. As there is no reference to 'their related' PPMs, non-product related PPM packaging or labelling requirements, such as requirements concerning recyclable packaging, would be covered by the TBT Agreement.[465]

5.3.1.3. Is the private standard mandatory?

When one of the two questions above is answered in the affirmative it is necessary to examine whether the private standard can be considered mandatory, in which case it would be a technical regulation. The TBT Agreement imposes a slightly higher burden on WTO Members with respect to technical regulations opposed to technical standards, i.e. a technical regulation may not be maintained if its objectives can be addressed in a less trade-restrictive manner.[466]

This section will show that sufficient government involvement is not a required yardstick to establish whether a measure is a technical regulation. That governments do not necessarily need to be involved in the mandatory nature of a technical regulation does not mean that WTO Members have the same responsibility for private technical regulations as for public technical regulations. In light of the objective of the TBT Agreement, i.e. to ensure that technical regulations and standards do not create unnecessary obstacles to international trade,[467] excluding private technical regulations from the scope of the TBT

[465] WTO Panel, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II)* [15 September 2011] WT/DS381/R, 7.79; Gabrielle Marceau and Joel Trachtman, 'TBT, SPS, and GATT: A Map of the WTO Law of Domestic Regulation' (2002) 48 Journal of World Trade 351, 860-2.

[466] TBT Agreement, Article 2(3).

[467] TBT Agreement, preamble, para 5.

Agreement would make the TBT Agreement less effective in achieving that objective, because WTO Members could then evade responsibility under the TBT Agreement by delegating elements of quasi-governmental authority to private actors. As the latter is an issue of state responsibility it will be further dealt with in Section 5.3.2. below.

The negotiating history of the TBT Agreement shows that WTO Members did not want to limit the term 'mandatory' to *de jure* mandatory, i.e. market access will be denied in a way that is legally enforceable and binding under national law when the product is not in compliance with the standard. The negotiating history initially shows that standards were considered voluntary when they cannot be considered *de jure* mandatory. Voluntary standards could either be (1) standards to which there is no legal obligation to comply[468] or (2) a technical specification approved by a recognized body for continued application and with which compliance has not been made mandatory by a regulation.[469] These references to a more *de jure* interpretation of 'mandatory' were deleted in the final definition of a technical standard.

The WTO judiciary has not clarified when technical regulations can be considered *de facto* mandatory, all actors in the supply-chain require compliance.[470] The Panel in the *US-Tuna II* case has provided some guidance on the mandatory nature of a measure. The Panel first established that the dictionary definitions do not provide much assistance in finding the ordinary meaning of 'mandatory' as it does not limit 'mandatory' to *de jure* mandatory.[471] Referring to the Appellate Body's decision in *EC-Asbestos* the Panel argues that the notion of "mandatory" may encompass the legally binding and enforceable character of the instrument as well as to the effect of the standards, i.e. prescribing/imposing a certain behaviour.[472] The Panel defines a mandatory measure as having 'the effect of regulating in a legally binding or compulsory fashion' and '*[prescribing]* or *[imposing]* in a *binding* or *compulsory* fashion that certain products *must* or *must not* possess certain characteristics, terminology, symbols, packaging, marking or labels or that it *must* or *must not* be produced by using certain processes and production methods'.[473] The Panel argued that because the US measure prescribed and imposed the conditions under which a product may be labelled dolphin-safe, it imposed a "mandatory" prohibition on the offering for sale in the US of tuna products bearing a labelling referring to dolphins and not meeting the requirements that were set out in the US measure.[474] As such, the

[468] GATT docs, 'Standards; packaging and labelling; marks of origin; background note by the Secretariat, MTN/NTM/W/5, circulated 21 April 1975; Committee on Trade and Environment (1995), n 455, at 28.

[469] Committee on Trade and Environment (1995), n 455, at 35.

[470] This problem is clearly illustrated at the Committee on Sanitary and Phytosanitary Measures (2007a), n 423, at 9.

[471] WTO Panel, *US-Tuna II*, n 465, at 7.103.

[472] Ibid, at. 7.103-106

[473] Ibid, at. 7.111.

[474] Ibid, at. 7.131.

Panel argued that the US measure was a technical regulation. The Appellate Body later confirmed the Panel's approach.[475]

The definition provided for by the Panel is so broad that it may arguably include *de jure* and *de facto* mandatory standards.[476] The dissenting Panellist argued that *de facto* mandatory measures can only be a technical regulation when (1) the marketing of the product is impossible without compliance with the measure; and (2) the impossibility must arise from facts sufficiently connected to the government. Regarding the first criteria, the WTO Appellate Body clarified that this impossibility to market a product refers to the impossibility to market the product bearing a specific claim, e.g. "dolphin-safe".[477] In other words, the WTO Appellate Body specified the term "market" in market access, e.g. there is a tuna market but also a "dolphin-safe" tuna market where the marketing of the product may be impossible. The second criteria as stipulated by the dissenting Panellist, i.e. that *de facto* mandatory private standards are not technical regulations under the TBT Agreement when there is no sufficient connection to an act of government,[478] fails to take into account that sufficient connection to an act of government is a question of state responsibility for the measure. As discussed in the beginning of this section, the legal assessment of mandatory does not include an assessment of government involvement.[479]

5.3.1.4. Is the private standard approved by a recognized body?

Most private standards cannot be considered *de facto* mandatory and as such a technical regulation under the TBT Agreement. For example, fair trade chocolate can be marketed in The Netherlands under several private standards, e.g. UTZ, Max Havelaar, and Fair Trade Original. Unless WTO Members impose laws or regulations turning these labels into *de jure* mandatory public measures,[480] these fair trade labels cannot be considered technical regulations under the TBT Agreement, but they may be considered technical standards. Whether private standards can be considered standards under the TBT Agreement depends on whether they can be considered 'approved by a recognized body'.[481]

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[475] WTO Appellate Body, *US-Tuna II*, n 13.

[476] Although the dissenting panellist did not agree and argued that there should also be some form of government involvement. WTO Panel, *US-Tuna II*, n 465, at 7.175; Alessandra Arcuri, 'Back to the Future: US-Tuna II and the New Environment-Trade Debate' (2012) 3 European Journal of Risk Regulation 177.

[477] WTO Appellate Body, *US-Tuna II*, n 13, at 198.

[478] Dissenting opinion WTO Panel, *US-Tuna II*, n 465, at 7.175; Tomasz Wlostowski, 'Selected Observations on the Regulation of Private Standards by the WTO' (2010) 30 Polish Yearbook of International Law 204, 205-33.

[479] WTO Appellate Body, *EC-Asbestos*, n 88, at 66–70, and WTO Appellate Body, *European Communities-Trade Description of Sardines (EC-Sardines)* [26 September 2002] WT/DS231/AB/R, at 176.

[480] The Dutch government intends to establish laws turning private sustainability agreements into public regulation. Government of The Netherlands, 'Competition and Sustainability', *Parliamentary Papers* (2016), https://www.rijksoverheid.nl/documenten/kamerstukken/2016/06/23/mededinging-en-duurzaamheid (visited 27 April 2017).

[481] TBT Agreement, Annex 1.2

The term 'body' should be interpreted broadly, including companies and NGOs. The introductory clause of Annex 1 to the TBT Agreement provides that terms used in the TBT Agreement that are also presented in the ISO/IEC Guide 2: 1991 (hereinafter ISO/IEC Guide) shall have the same meaning as given in the definition in the said Guide.[482] The ISO/IEC Guide defines 'body' as a 'legal or administrative entity that has specific tasks and composition'.[483] Examples of a 'body' are organizations, authorities, companies and foundations. Such a cross-reference to the TBT Agreement would then lead to the conclusion that 'non-governmental entity' should be interpreted broadly, including companies and NGOs.

The Appellate Body in *US-Tuna II* provided further guidance as to whether a body could be considered recognized.[484] A body could be considered recognized when, at a minimum, the WTO Member is aware, or has reason to expect, that the body in question is engaged in standardization activities.[485] Arguably a WTO Member can be considered aware that private standard-setters are engaged in standardization activities through what they communicate to the outside world. This may be the case when WTO Members mention the private standard that is prepared, adopted or applied by the private standard-setter in SPS and TBT Committee documents,[486] or perhaps even on their government websites. A WTO Member could also be considered aware through their public procurement practices. For example, products that are certified by private standards approved by the Dutch government, such as Max Havelaar, Rainforest Alliance, and UTZ, automatically comply with the social requirements for public procurement as set by the Dutch government.[487] Furthermore, a WTO Member could be considered aware when a national accreditation organization accredits the private standard-setter. For example, the Dutch accreditation body (DAC), accredits certification organizations such as SKAL (organic produce certifier) and ProduCert (free-range meat certifier).

5.3.2. State Responsibility under the TBT Agreement

The assessment of the responsibilities of the WTO Member under the TBT Agreement is similar to those under the SPS Agreement. As discussed in Section 5.2.2.2. the difference in language of "to ensure" and "reasonable measures" entails that "to ensure" is an obligation of result, while "reasonable measures" is an obligation of conduct. As such, Article 2 and 4

[482] WTO Appellate Body, *EC-Sardines*, n 479, at 224.

[483] ISO/ICE Guide 2, Article 4(1).

[484] WTO Appellate Body, *US-Tuna II*, n 13, at 362.

[485] Ibid.

[486] Examples of private standards mentioned in SPS and TBT Committee documents are Tesco Nature's Choice, Label Rouge, and GLOBALG.A.P. See Committee on Sanitary and Phytosanitary Measures (2007), n 400, at 5**.** Wlostowski (2010), n 478, 221.

[487] Rijksoverheid, 'Inkopen door het Rijk', https://www.rijksoverheid.nl/onderwerpen/inkopen-door-het-rijk/inhoud/maatschappelijk-verantwoord-inkopen-door-het-rijk/voldoen-aan-sociale-voorwaarden, (visited 21 December 2016).

of the TBT Agreement stipulate an obligation of result[488] imposed on WTO Members when the private actions can be attributed to the WTO Member. In such a case, the WTO Member must ensure that the private TBT measure does not discriminate and,[489] when the attributed private TBT measure is *de facto* mandatory, the WTO Member must ensure that the private standard is not more trade-restrictive than necessary.[490] As discussed in Section 5.2.2.1. above, private technical regulation and standards can only be attributed to the WTO Member where they gain legal effect by means of public law.

When private standards cannot be attributed to the WTO Member, the WTO Member has under Article 3 and 4 TBT Agreement, like under Article 13 SPS Agreement, an obligation of conduct to undertake effort to ensure compliance by non-governmental (standardizing) bodies with the obligations arising from the TBT Agreement.[491] Furthermore, WTO Members may not take measures which require or encourage non-governmental (standardizing) bodies to act inconsistent with the obligations arising from the TBT Agreement.[492] Whether WTO Members have any responsibility under Article 3 and 4 TBT Agreement depends on whether private standard-setters setting technical regulations can be considered non-governmental bodies and whether private standard-setters setting technical standards can be considered non-governmental standardizing bodies.

The term 'non-governmental body' is defined in Annex 1.8 to the TBT Agreement as a '[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation'. Excluding private standard-setters from the definition of 'non-governmental body' is unwarranted as WTO Members intended to leave the concept of non-governmental body more open ended.[493] Under the definition of a standard in the final text of the Tokyo Round, the Explanatory Note specified that standards do not cover 'technical specifications prepared by an individual company for its own production or consumption requirements'.[494] This exclusion is not mentioned in the final text of the TBT Agreement. WTO Members, thus, have an obligation of conduct for private technical regulations.

For private technical standards, it is required that the standard is set by a non-governmental *standardizing* body. The addition of the term "standardizing" ensure that WTO Members need to be aware of the non-governmental body to justify state responsibility. This follows from the fact that although the TBT Agreement does not define the term 'standardizing body', the ISO/IEC Guide defines 'standardizing body' as a body that

[488] Gandhi (2005), n 425, 874.
[489] TBT Agreement, Article 2 and 4.
[490] Ibid.
[491] TBT Agreement, Article 3 and 4.
[492] Ibid.
[493] Arcuri (2014), n 400; 505.
[494] Committee on Sanitary and Phytosanitary Measures (2007), n 400, at 74.

has recognized activities in standardization.[495] 'Standardization' is defined as the 'activity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context'.[496] Neither Annex 1 to the TBT Agreement nor the ISO/IEC Guide define what activities can be considered 'recognized'. According to the Appellate Body in *US-Tuna II*, the minimum requirement of 'recognition' would only require evidence that WTO Members are aware that a standardizing body is engaged in standardization activities.[497] In Section 5.3.1.4. I have provided examples of three situations in which WTO Members could be considered aware that private standard-setters are engaged in standardization activities, i.e. government communications on the private standard, use of private standards in public procurement practices, and national accreditation of the private standard-setter. It seems fair that for technical standards, this 'awareness' requirement, while such awareness may already be assumed for *de facto* mandatory technical standards.

However, "reasonable measures" only refer to an obligation of conduct. The responsibility WTO Members have for private TBT measures that cannot be attributed to them is limited to soft instruments that do not have to *effectively* ensure compliance by the private standard-setter with the TBT Agreements. Furthermore, unlike the SPS Agreement, this state responsibility under Article 3 and 4 is further limited by Article 14(4) TBT Agreement as dispute settlement can only be invoked when a WTO Member considers that another Member has not achieved satisfactory results under Article 3 and 4 *and* that its trade interest are significantly affected. This may especially set constraints on the degree of responsibility WTO Members have for private technical standards as such standards are not *de facto* mandatory and as such may only have a limited effect on the trade interest of the disputing Member.

5.4. Conclusion: The Limited Effectiveness of the SPS and TBT Agreement to Ensure Private Compliance

This chapter shows that the effectiveness of the SPS and TBT Agreement to ensure compliance by private standard-setters with the respective Agreements is limited for two reasons. First, not all private standards would fall within the scope of either the SPS or TBT Agreement. Private standards may only fall within the scope of the SPS Agreement when they aim to protect HAP-LH. Private standards that aim at protecting the environment other than to protect HAP-LH, protecting consumer interest, improving labour conditions, or improving animal welfare are not covered by the SPS Agreement. Those private standards that fall outside the scope of the SPS Agreement could only fall within the scope of the TBT

[495] ISO/IEC Guide, Article 4(3).

[496] Ibid, Article 1.

[497] WTO Appellate Body, *US-Tuna II*, n 13, at 362.

Agreement when the private standard is *de facto* mandatory or when the WTO Member is aware of the private standard-setter.

Second, for those private standards that fall within the scope of the SPS or TBT Agreement, the effectiveness of the Agreements to ensure compliance by private standard-setters is limited due to the limited responsibility of WTO Members under the respective frameworks. Only when private standards can be attributed to the WTO Member, would the WTO Member have a responsibility to effectively ensure compliance of the private standard with the SPS or TBT Agreement. This chapter shows that this may only be the case when the WTO Member would evade WTO obligations by expressly delegating elements of quasi-governmental authority to private actors. Private conduct should not be attributed to WTO Members for failure to act against the trade-restrictive nature of private standards, even when this failure is intentionally. Attribution in this case would require an assessment by the WTO judiciary that could seriously endanger the regulatory autonomy of WTO Members to an extent not envisaged by the drafters of the WTO treaties.

When private standards cannot be attributed to the WTO Member, WTO Members would only be responsible for compliance of the private standard with either the SPS Agreement or the TBT Agreement to the extent to which they should take *reasonable* measures that are *available* to them. This reasonable/availability-criterion severely limits the effectiveness of the provisions of the Agreements to ensure compliance by private standard-setters with the respective frameworks as this chapter shows that the criterion only imposes an obligation of conduct.

5.5. General Discussion. Mechanisms to Regulate Private Standards by the WTO Legal System

This chapter shows that the extent to which the SPS and TBT Agreement offer an effective legal framework to ensure that private standards are not more trade-restrictive than necessary is limited due to the limited responsibility the Agreements impose on WTO Members. This is not surprising as private standards are new forms of international regulatory systems that arose out of the failure of treaties and intergovernmental organizations (IGOs) to regulate international businesses through state responsibility.[498] Using treaties and IGOs, such as the WTO, to discipline these new regulatory systems through state responsibility may, therefore, be ill-suited.

Private standards are part of a new commercial legal order that has emerged surpassing national legal systems and hence also largely independent from WTO law.[499] Within this new commercial legal order, other mechanisms, rooted in a commercial

[498] Abbott and Snidal (2009), n 20; Mark Pollack and Gregory C Shaffer, 'The Interaction of Formal and Informal International Lawmaking' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012), 241-270.

[499] Druzin (2014), n 160.

disguise, are built-in to regulate private standards more effectively,[500] calling into question the state-centred role of the WTO to deal with these problems. I argue that to take effective action against the trade-restrictive nature of private standards WTO Members should act as orchestrators,[501] collaborating with IGOs and private multi-stakeholder standard-setting bodies. This draws from insights of what elsewhere has been phrased as the Trade Council governing a market-state governance system.[502]

Mavroidis and Wolfe already suggest that WTO Members willing to participate should draft a reference paper for private standards modelled after the Telecoms Reference Paper[503] by creating minimum standards to which private standard-setters should adhere.[504] Such a reference paper would then guide WTO Members to better regulate private standards, imposing a due diligence obligation on WTO Members to make private standard-setters in their jurisdiction to apply WTO principles.[505] Although the idea of a reference paper is promising, Mavroidis and Wolfe might not have taken into account that many WTO Members, especially those particularly affected by private standards, lack the capacity to take effective action.[506] Furthermore, it is highly unlikely that WTO Members not affected by private standards, but who may have the regulatory capacity, would be willing to participate in a reference paper that would impose a due diligence obligation on them. This can be illustrated by the initiative by China to start drafting a paper on best practice guidelines regarding private standards and invited WTO Members to participate in the exercise. While some WTO Members supported the initiative,[507] a few developed country members signalled discomfort with the idea.[508] Most notably, the European Union concluded that private standards are outside the scope of the TBT Agreement and, hence, of the TBT Committee's work.[509]

Therefore, I argue that WTO Members willing to incentivize private standard-setters to apply WTO principles draft procedural guidelines in collaboration with IGOs and private multi-stakeholder standard-setting bodies to simplify the certification process and to make it easier for farmers and producers to comply with the private standard. Such

[500] Ibid.

[501] Abbott and Snidal (2009), n 20.

[502] Patterson and Afilalo (2008), n 30.

[503] Negotiating group on basic telecommunications, 'Telecommunications services: reference paper', https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm, 24 april 1996 (visited 26 April 2017).

[504] Mavroidis and Wolfe (2017), n 436.

[505] Ibid.

[506] Abbott and Snidal (2009), n 20, 569.

[507] Committee on Technical Barriers to Trade, 'Minutes of the meeting of 15-16 June 2016, G/TBT/M/69, circulated 22 September 2016, at 3.373-3.378.

[508] Ibid, at 3.379-3.382.

[509] Ibid, at 3.380.

guidelines ensure 'thick stakeholder consent', which may be normatively superior to 'thin State consent', as it may be considered more legitimate and effective.[510]

It is not unlikely that private multi-stakeholder standard-setting bodies would be willing to collaborate as collaboration would serve their self-interest.[511] A major drawback for private standard-setters is that farmers and producers have difficulty to comply with the standards. Private standard-setters are already increasingly trying to make it easier for farmers and producers to comply with their standards. For example, localg.a.p. helps emerging producers who are not able to achieve GLOBALG.A.P. certification by providing an entry level.[512] Another example is the collaboration between Marine Stewardship Council (MSC) and Aquaculture Stewardship Council (ASC) to ensure that supply chain partners will be able to get certified for ASC's and MSC's chain of custody with one audit.[513] A third example is the merge between Rainforest Alliance and UTZ Certified to simplify the certification process.[514] Collaboration with WTO Members and IGOs would provide multi-stakeholder standard-setters with a coordination mechanism better equipped to simplify the certification process for a large number of private standards.[515] This may further incite other private standard-setters, not involved in the collaboration, to voluntary comply as the agreement would facilitate them to do business with a greater number of farmers and producers.[516] In turn, WTO Members affected by private standards would benefit from this simplified certification process that would result from the guidelines, reducing the difficulty for the farmers and producers in their territory to comply with the private standards. Such guidelines would be a more effective means to ensure that private standards are not more trade-restrictive than necessary than focusing on state responsibility for private conduct.

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[510] Pollack and Shaffer (2012), 519. 'Thick stakeholder consent' is slowly emerging as a 'code of good practice' in the standard-setting world and beyond: ISEAL Code of Good Practice for Setting Standards http://www.isealalliance.org/code accessed 21 April 2017. Forest Stewardship Council, Rainforest Alliance, the Marine Stewardship Council, the Fair Trade Labelling Organization, are members of ISEAL and have to comply with this code of good practice.

[511] Druzin (2014), n 160, 1056.

[512] GLOBALG.A.P., 'localg.a.p. - The Stepping Stone to Safe and Sustainable Agriculture', http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/localg.a.p./ (visited 26 April 2017).

[513] MSC, 'Chain of Custody Partnerships', http://www.msc.org/get-certified/supply-chain/asc-and-msc-chain-of-custody (visited 26 April 2017).

[514] UTZ, 'The Rainforest Alliance and UTZ to Merge, Forming a New, Stronger Organization', https://utz.org/merger/ (visited 28 September 2017).

[515] For an elaboration on the coordination problem by private standard-setters, Patrick Mallet, 'UNCTAD Trade and Environment Review' (2006), 54.

[516] This is also known as the network effect. Druzin (2014), n 160.; Joseph Farrell and Paul Klemperer, 'Coordination and Lock-In: Competition With Switching Costs and Network Effects', in: M. Armstrong and R. Porter (eds), *Handbook of Industrial Organization, 3rd edition* (Elsevier 2007); Michael L. Katz and Carl Shapiro, 'Network Externalities, Competition, and Compatibility', *American Economic Review* 75 (1985); Bryan H. Druzin, 'Buying Commercial Law: Choice of law, Choice of Forum, and Network Effect,' 18 *Tulane Journal of International and Comparative Law* 18 (2009).

6

Overcoming False Choices and Distorted Decisions. Estimating Human Well-Being under Article 101 TFEU

Submitted for review as:

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Abstract This chapter shows how science-based estimations could be an addition to the information base of the legal authority and a guidance to undertakings in their self-assessments under the competition rules. The objective of this study was to show that in the assessment of the proportionality of a private sustainability agreement the outcome of the *Wouters* doctrine and art. 101(3) TFEU would be similar when the costs and benefits of an agreement are appropriately estimated in terms of human well-being. To show this, the proportionality test conducted under the *Wouters* doctrine and art. 101(3) TFEU were first compared. Subsequently, methods were provided as to how costs and benefits can be appropriately estimated in terms of human well-being. It was concluded that in the right hands, with the proper understanding of their strengths and weaknesses, the methods discussed, can provide important insights in to what extent a private sustainability agreement ensures human well-being.

6.1. Introduction

Producing in a more sustainable manner often incurs additional costs that are passed on to consumers. To avoid the loss of customers due to increased prices, a business may opt for a private sustainability agreement with competitors to operate in a more sustainable manner. A private sustainability agreement is an agreement between undertakings aimed at promoting sustainable development, e.g. by ensuring animal welfare, fair labour practices or environmentally-friendly production practices, by agreeing to only sell or produce the more sustainable alternative. For example, in 2014 Dutch supermarkets agreed to stop the sale of conventional chicken meat.[517] Likewise, in the 1990s virtually all European producers and importers of washing machines agreed to ban washing machines in the EU that did not meet a certain level of energy efficiency.[518]

Such private agreements may be considered anti-competitive under Article 101 TFEU as producers of less sustainable alternatives may have difficulties to enter the market. Conventionally, private sustainability agreements, depending on where one stands, can be subject to competition law scrutiny either via non-application of Article 101(1) TFEU (the *Wouters* doctrine)[519] or through justification under Article 101(3) TFEU.[520] Seemingly, the main difference between the two alternatives is that the *Wouters* doctrine allows public policy justifications without fulfilling the additional requirement under Article 101(3) TFEU that consumers received a fair share of the benefits. As a consequence, Article 101(3) TFEU

[517] So-called Kip van Morgen. Autoriteit Consument en Markt (2015), n 11.

[518] So-called CECED Agreement. *CECED*, OJ 2000 L 187/47.

[519] See e.g. T-23/09 *CNOP and CCG v Commission* [2010] ECLI:EU:T:2010:452; Case C-519/04 P *Meca-Medina* [2006] ECLI:EU:C:2006:492; Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECLI:EU:C:2013:127; Case C-136/12 *Consiglio nazionale dei geologi v Autorita Garante della Concorrenza e del Mercato* [2013] ECLI:EU:C:2013:489; Case C-309/99 *Wouters* [2002] ECLI:EU:C:2002:98.

[520] Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishers 2009); Donal Casey, 'Disintegration: Environmental Protection and Article 81 EC' (2009) 15 European Law Journal 362; Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012).

is often interpreted as warranting that benefits are quantified economically, while under the *Wouters* doctrine such a quantification is not considered necessary.[521]

The *Wouters* doctrine and Article 101(3) TFEU have in common that they require the exercise of a test towards the proportionality of the measure.[522] A cost-benefit analysis could provide important insights in assessing the proportionality of a private sustainability agreement when the costs and benefits of the sustainability agreements are appropriately estimated. To appropriately estimate sustainability benefits not only insights from economics are required, but also insights from psychology and philosophy. When using these insights, the *Wouters* doctrine and Article 101(3) TFEU would likely lead to similar outcomes in the case of private sustainability agreements, i.e. ensuring human well-being.

This chapter aims to show that in the assessment of the proportionality of a private sustainability agreement the outcome of the *Wouters* doctrine and Article 101(3) TFEU would be similar when the costs and benefits of an agreement are appropriately estimated in terms of human well-being. To show this, the proportionality test conducted under the *Wouters* doctrine and Article 101(3) TFEU were first compared. Subsequently, tools were provided as to how costs and benefits can be appropriately estimated in terms of human well-being.

This research is timely for three reasons. First, it remains unclear for companies and national competition agencies (NCAs) how to assess private sustainability agreements under Article 101 TFEU.[523] Second, EU policy increasingly includes the privatisation of, especially environmental, policy-making by the enrolment of private actors in situations where state action has proven to be inefficient.[524] Therefore, private actors are more likely to set up private agreements that aim at improving sustainable development than they were in the past. Assessing the costs and benefits of public policy is very common in the EU to ensure that these policies achieve their objectives in the most efficient and effective way.[525] As

[521] See e.g. Kamiel Mortelmans, 'Towards Covenrgence in the Application of the Rules on Free Movement and Competition?' (2001) 38 Common Market Law Review 613; Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 Common Market Law Review 1057; Townley (2009), n 520; Casey (2009), n 520; Kingston (2012) n 520; Laurens Jan Ankersmit, *Green Trade and Fair Trade in and with the EU. Process-based Measures within the EU Legal Order* (Cambridge University Press 2017), 194; Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016); Monti and Mulder (2017), n 9.

[522] On the proportionality test under art. 101(3) TFEU see: Townley (2009), n 520; 130-1; Jacques Steenbergen, 'Proportionality in competition law and policy' (2008) 35 Legal Issues of Economic Integration, 259, 259; On the proportionality test under the *Wouters* doctrine see: Monti and Mulder (2017), n 9, 646.

[523] See for example the Dutch Competition Authority report: Mulder, Zomer, Benning, Leenheer, "Economische effecten van "Kip van Morgen". Kosten en baten voor consumenten van een collectieve afspraak in de pluimveehouder" 2014; See also Anna Gerbrandy, 'Addressing the Legitimacy Problem for Competition Authorities taking into account Non-economic Values: the Position of the Dutch Competition Authority' (2015) 40 European law Review 769.

[524] Kingston (2012), n 520, Chapter 2.

[525] European Commission, "Better Regulation Guidelines", Strasbourg, 19.5.2015.

private actors are increasingly encouraged by the EU and Member States to promote sustainable development,[526] assessing such private policy may also be helpful to ensure that their objectives are achieved in the most efficient and effective way. As such, EU competition policy may play a role in ensuring that private sustainability agreements that achieve their objectives efficiently and effectively in terms of human well-being escape competition law scrutiny. Third, the EU[527] and several Member States[528] have already showed increasing interest in combining statistical indicators derived from economics, psychology and philosophy to assess the costs and benefits of public policy in terms of human well-being.[529] As access to statistical data has become much easier in the information society, the potential of using statistical data in competition analysis in the assessment of impact of a private sustainability agreement on human well-being is now bigger than ever.

6.2. Assessing Private Agreements under Article 101 TFEU: Practice ECJ and European Commission

Article 101(1) TFEU prohibits agreements between undertakings which may affect trade between Member States and which have as their objective or effect the prevention, restriction or distortion of competition within the internal market. Whether a private sustainability agreement may be caught by Article 101(1) TFEU, thus, depends on whether the agreement is between undertakings. According to the ECJ 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[530] The main controversial criterion when determining whether the actors involved in the agreement are undertakings

[526] Commission Communication. A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM/2011/0681 final; Monti and Mulder (2017), n 9.

[527] Eurostat, http://ec.europa.eu/eurostat/statistics-explained/index.php/Quality_of_life_indicators (visited 31 March 2017).

[528] Stiglitz, Sen and Fitoussi (2009), n 17; UK office for national statistics http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/guide-method/user-guidance/well-being/index.html (visited 31 March 2017) BES, *Equitable and Sustainable Wellbeing in Italy*, 2013, http://www.misuredelbenessere.it/fileadmin/upload/Report_on_Equitable_and_Sustainable_Well-being_-_11_Mar_2013_-_Summary.pdf (visited 31 March 2017); Statistics Netherlands, *Measuring Sustainable Development and Societal Progress: Overview and Conceptual Approach,* 2011, https://www.cbs.nl/NR/rdonlyres/C32647F1-1EBB-4CDF-861C-F80A8BD99CF3/0/measuringsustainabledevelopment.pdf (visited 31 March 2017); Instituto Nacional de Estadística (statistical bureau Spain) http://www.ine.es/ss/Satellite?c=INEDocTrabajo_C&p=1254735116586&pagename=ProductosYServicios%2FPYSLayout&cid=1259941788238&L=1 (visited 31 March 2017).

[529] See on how to combine these statistical indicators: Stiglitz, Sen and Fitoussi (2009), n 17. See also: Jeroen Van den Bergh, 'The GDP Paradox' (2009) 30 Journal of Economic Psychology 117; OECD, "A framework for measuring the progress of societies", 2009; Daniel Moran and others, 'Measuring Sustainable Development – Nation by Nation' (2008) 64 Ecological Economics 470; Joachim Spangenberg, 'Environmental Space and the Prism of Sustainability: Frameworks for Indicators measuring Sustainable Development' (2002) 2 Ecological Indicators 295.

[530] Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECLI:EU:C:1991:161, at 21; Case C-280/06 ETI and Others *ETI and Others* [2007] ECLI:EU:C:2007:775, at 38; Case C-350/07 *Kattner Stahlbau* [2009] ECLI:EU:C:2009:127, at 34; see also Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006), 26 and 214; Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015), 88-9

is that an undertaking needs to carry out the activity in order to make profits.[531] This criterion would in any case exclude private sustainability agreements that carry out activities as a task in the public interest typical of public authority.[532] For purpose of this chapter, private sustainability agreements are considered to be between undertakings that ultimately aim to make profits by the agreement, e.g. by preventing that consumers would switch to the competitor for cheaper, less sustainable, products.[533]

Private sustainability agreements that are caught by Article 101(1) TFEU may be justified from Article 101(1) TFEU when they comply with the four conditions set forth in Article 101(3) TFEU, i.e. the agreement should (1) contribute to the improvement of the production or distribution of goods, or to promote technical or economic progress, (2) while allowing consumers a fair share of the resulting benefits and (3) which does not impose non-indispensable restrictions on the undertakings concerned and (4) which does not afford these undertakings the possibility of eliminating competition. A fifth condition, added by the ECJ, requires that the benefits that the agreement yields must be greater than its costs.[534] In other words, private sustainability agreements can be justified under Article 101(3) TFEU when consumer fair share of the benefits of the agreement cannot be achieved in a less restrictive way. This "consumer" includes all customers of the parties to the agreement and subsequent purchasers.[535] Scholars debate whether only the effects of the restriction that can be subsumed within the notion of economic efficiency may be included under the Article 101(3) TFEU or whether this may also include wider societal impacts.[536]

To allow wider societal impacts in the assessment under Article 101 TFEU, some scholars argue that the *Wouters* doctrine[537] would apply to private sustainability agreements.[538] In

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[531] Case C-343/95 *Diego Cali & Figli* [1997] ECLI:EU:C:1997:160.

[532] Case C-107/84 *Commission v Germany* [1985] ECLI:EU:C:1985:332, at 14-15; *Höfner and Elser v Macrotron*, n 530, at 22; Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECLI:EU:C:1994:7, at 27-30; *Diego Cali & Figli*, n 531, at 22-23; Advocate General Jacobs's opinion,C-67/96, Joined Cases C-115/97 to C-117/97, and Case C-219/97 *Albany, Brentjens, Maatschappij* [1999] ECLI:EU:C:1999:28, at 314; Advocate General Tesauro's opinion,Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1992] ECLI:EU:C:1992:358 at 12.

[533] It should be noted that supermarkets do not always embark on horizontal co-operation agreements to stop the sale of unsustainable alternatives. For example, Dutch supermarkets individually agreed to stop the sale of battery eggs. "Supermarkten weren eieren uit legbatterij", De Volkskrant, June 6, 2003, p. 15. Arguably, the reason why in this case a horizontal co-operation agreement was not deemed to be necessary was because consumers do not select a supermarket based on the price of eggs, but they do select a supermarket based on the price of meat. As such, supermarkets may be more affected when increasing the price of meat. See e.g. DeGraba (2006), n 10, 613-28.

[534] Monti and Mulder (2017), n 9, 647 referring to Case C- 56/64 *Etablissements Consten Sàrl v Commission* [1966] ECLI:EU:C:1966:41 at 348–9.

[535] European Commission, "Notice: Guidelines on the application of Article 81(3) of the Treaty" [2004] OJ C 101/97, 2004, at 84.

[536] See for example Kingston (2012), n 520; Odudu (2006), n 530; Townley (2009), n 520.

[537] *Wouters*, n 519.

[538] Whish and Bailey (2015), n 530, 140; Monti and Mulder (2017), n 9; Article 81(3) Guidelines, n 535; European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" [2011] OJ C11/1; Odudu (2006), n 530; Okeoghene Odudu, 'The Wider Concerns of Competition Law' (2010) 30 Oxford

Wouters the ECJ drew upon its jurisprudence on internal market law, arguing that the decision of an association of undertakings (the Dutch Bar Association) which restricted competition (banning multi-disciplinary practices[539]) was necessary to achieve a public interest objective (the proper practice of the legal profession). In effect, the ECJ conducted a proportionality test. For a proportionality test to be satisfied the restriction must (1) be a useful, suitable, or effective means of achieving a legitimate aim; (2) not be more restrictive than necessary to achieve that legitimate objective; (3) not have an excessive or disproportionate effect on the other interests.[540] In *Wouters*, the ECJ held that the restriction of competition was suitable (the restriction could reasonably be considered necessary to achieve its public interest objective[541]), necessary (the Netherlands was entitled to consider that the objectives pursued by the restriction cannot be attained in less restrictive means[542]), and did not have a disproportionate effect on other interests (the effects of the restriction does not go beyond what is necessary to ensure the public interest objective[543]).

The interpretation of *Wouters* and its relation to Article 101(3) TFEU has been source of debate. Some argue that the *Wouters* doctrine offers the possibility to exempt private agreements from competition scrutiny when the agreement serves a legitimate purpose,[544] while others limit this legitimate purpose to public policy objectives only.[545] Both seem to agree that the *Wouters* doctrine incorporates objectives that may be considered irrelevant under the application of Article 101(3) TFEU, because they cannot be subsumed within the notion of economic efficiency.[546] Others argue that public policy objectives can be included under the application of Article 101(3) TFEU either by estimating the public interest benefits in monetary terms or by going beyond an economic understanding of the text.[547]

The lack of clarity as to how Article 101 TFEU could be applied to private sustainability agreements is problematic as it reduces the workability of Article 101 TFEU in two ways. First, the degree of the margin of discretion left to the Member States or the European Commission to allow private sustainability agreements that serve a legitimate

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Journal of Legal Studies, 599 599; Monti and Mulder (2017), n 9; Kingston (2012), n 520; Townley (2009), n 520; Casey (2009), n 520; Anna Gerbrandy, 'Competition Law and Private-Sector Sustainability Initiatives' in Aurelia Colombi Ciacchi and others (eds), *Law & Governance - Beyond the Public-Private Divide?* (Eleven International Publishing 2013); Nowag (2016), n 520.

[539] *Wouters*, n 519, at 100.

[540] Gráine De Burcá, 'The Principles of Proportionality and its Application in EC law' (1993) 13 Yearbook of European Law 105.

[541] *Wouters*, n 519, at 107.

[542] Ibid, at 108.

[543] Ibid, at 109.

[544] Whish and Bailey (2015), n 530, 140

[545] Monti and Mulder (2017), n 9.

[546] Article 81(3) Guidelines, n 535; European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" [2011] OJ C11/1; Odudu (2006), n 530; Odudu (2010); Monti and Mulder (2017), n 9.

[547] Kingston (2012), n 520; Townley (2009), n 520; Casey (2009), n 520; Gerbrandy (2013); Nowag (2016), n 520.

purpose remains unclear. Furthermore, there is no appropriate guidance to undertakings in their self-assessment under the competition rules.[548]

These problems could be solved when costs and benefits are appropriately estimated in terms of human well-being. In fact, there are two important reasons to assume that human well-being should be placed at the core of EU competition law.

First, the overall aim of the European Union is "to promote (...) the well-being of its peoples." The term 'well-being' in Article 3(1) TEU should be understood in a broader sense than the economic and formerly used term 'standard of living' (Article 2 ECSC Treaty, later Article 2 EEC Treaty) for two reasons. First, Recital 9 of the Preamble of the TEU clearly states that the EU is determined to promote economic and social progress for their peoples. Second, Article 3 TEU is based on the former Article 2 EC which states that the aim is not only to raise the 'standard of living' but also to raise the 'quality of life'. As such, the term 'well-being' should be understood in a broader sense including quality of life. Eurostat, the directorate-general of the European Commission responsible for providing statistical information to the institutions of the European Union, has provided an extensive document as to how quality of life could be measured. According to Eurostat quality of life is a broad concept and it encompasses both objective factors (such as living conditions, income, health) and the subjective perception one has of them.[549] I will now refer to the notion of 'standard of living' and 'quality of life' as human well-being.

Second, case-law by the ECJ shows that competition rules should ensure human well-being. In its 2011 judgment in *Telia Sonera*, the ECJ held that the function of competition rules is "to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union."[550] The ECJ thereby referred to earlier case-law in *Roquette Frères* from 2002 in which it stipulated that the function of competition rules is to ensure the "economic well-being in the Community".[551] The judgment of the ECJ in *Telia Sonera* should be read as not referring solely to "economic well-being", but also including quality of life. *Roquette* Frères concerned a referral for a preliminary ruling concerning EEC Treaty. At the time of the EEC treaty, the aim of the Community was limited to promoting the standard of living.[552] *Telia Sonera* concerned a preliminary ruling concerning the Treaty of Lisbon, in which the overall aim of the European Union was expanded to promote not only the

[548] Article 5, Council Regulation (EC) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002]OJ L 1, 4.1.2003.

[549] Eurostat, Quality of Life Indicators – Measuring quality of life, http://ec.europa.eu/eurostat/statistics-explained/index.php/Quality_of_life_indicators_-_measuring_quality_of_life (visited 27 February 2017)

[550] Case C-52/09 *TeliaSonera Sverige* [2011] ECLI:EU:C:2011:83, at 22

[551] Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603, at 42.

[552] Art. 2 EEC Treaty

standard of living but also quality of life.[553] The case-law of the ECJ is not out of line with the European Commission Guidelines to Article 101(3) TFEU. In its Guidelines to Article 101(3) TFEU the European Commission has considered that the promotion of consumer welfare is the objective of Article 101 TFEU.[554] While consumer welfare is often understood as a classic economic notion,[555] this has never been clarified as such by the Commission.[556] The Commission even acknowledged the weakness of resorting solely to classical economic methods to assess consumer welfare in its Better Regulation Guidelines (2015) by emphasizing the importance of using psychological insights in the assessment of consumer welfare.[557]

Insights from economics, psychology, and philosophy are necessary to assess the impact of private sustainability agreements on human well-being. Such statistical evidence may add to the information base of the legal authority to conduct a proper proportionality test. I argue, that the proportionality test required by *Wouters* shares essential features with the proportionality test required by Article 101(3) TFEU. As a consequence, when using these insights, the *Wouters* doctrine and Article 101(3) TFEU would likely lead to similar outcomes in the case of private sustainability agreements, i.e. ensuring human well-being. In this section, I will elaborate on the proportionality test under the *Wouters* doctrine and Article 101 (3) TFEU. In Section 6.3, I will elaborate on how to estimate human well-being within this proportionality test.

Table 6.1 shows an overview of the comparable requirements of the proportionality test applied in the *Wouters* doctrine and the requirements of Article 101(3). Although different wording is used, upon closer examination the *Wouters* doctrine and Article 101(3) TFEU are not that different when applied to private sustainability agreements. To show the similarities between the two approaches, I will elaborate on the three stages of the proportionality test and how these are conducted under both the *Wouters* doctrine and Article 101(3) TFEU.

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[553] Art. 3(1) TEU emphasizes that the overall aim of the European Union is "to promote (...) the well-being of its peoples." It should be noted that the term 'well-being' in Art.3(1) TEU should be understood in a broader sense than the economic and formerly used term 'standard of living' (Art. 2 ECSC Treaty, later Art. 2 EEC Treaty) for two reasons. First, Recital 9 of the Preamble of the TEU clearly states that the EU is determined to promote economic and social progress for their peoples. Second, Art. 3 TEU is based on the former Art. 2 EC which states that the aim is not only to raise the 'standard of living' but also to raise the 'quality of life'. As such, the term 'well-being' should be understood in a broader sense including quality of life.

[554] Article 81(3) Guidelines, n 535, at 88.

[555] See for example: Christopher Townley, 'Which goals count in Article 101 TFEU? Public policy and its discontents: the OFT's roundtable discussion on article 101(3) of the TFEU' (2011) 32 European Competition Law Review 441; Kingston (2012), n 520.

[556] See e.g. Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 The Competition Law Review 131, 131-60.

[557] Better Regulation (2015), n 525.

Table 6.1. The requirements under the *Wouters* doctrine and Article 101(3) TFEU

Condition	*Wouters* doctrine	Article 101(3) TFEU
Suitability	Useful, suitable, or effective means of achieving a legitimate aim	Agreement provides technical or economic benefits of which consumers are allowed a fair share
Necessity	Not more restrictive than necessary to achieve legitimate aim;	Agreement does not impose non-indispensable restrictions on the undertakings concerned; Agreement does not afford the undertakings involved to eliminate competition
Balancing of interests	No disproportionate effect on other interests;	Consumers are allowed a fair share of the benefits; The benefits of the agreement must be greater than its costs

6.2.1. Suitability

The first part of the proportionality test (suitability) requires that the restriction is a useful, suitable, or effective means of achieving the legitimate aim. Some scholars argue that the *Wouters* doctrine only applies when the legitimate aim is a public policy objective articulated by the legislator that extends beyond the protection of private interests by the undertaking concerned.[558] Under Article 101(3) TFEU the legitimate aim does not have to be a public policy objective per se, but it must arguably also extend beyond the protection of private interests by the undertaking concerned as it requires that ultimately the individual consumer must benefit. The main difference between the *Wouters* doctrine and Article 101(3) TFEU is then that (1) the *Wouters* doctrine requires that the legitimate aim is a public policy objective articulated by the legislator, while this is not required under Article 101(3) TFEU, and (2) under the *Wouters* doctrine the agreement does not have to benefit the individual consumer, while this is a requirement under Article 101(3) TFEU.

Upon closer examination these differences are negligible when the *Wouters* doctrine or Article 101(3) TFEU is applied to private sustainability agreements. First, most sustainability-related objectives are articulated by the EU legislature.[559] These objectives include the

[558] Monti and Mulder (2017), n 9; Advocate General Mazak's opinion,Case C-439/09 *Pierre Fabre* ECLI:EU:C:2011:113 at 35; Charlotte Jansen and Erik Kloosterhuis, 'The Wouters Case Law, Special for a Different Reason' (2016) 37 European Competition Law Review 335.

[559] See Townley (2009), n 520, 65-7, referring to these objectives as public-linking clauses.

promotion worldwide[560] of inter- and intra-generational equity,[561] human well-being,[562] fair trade,[563] the quality of the environment,[564] and animal welfare.[565] Most objectives pursued by private sustainability agreements would hence be considered articulated by the legislature.

Second, in the pursuit of sustainable development, individual consumer and societal interests are often aligned.[566] For example, an individual consumer may immediately benefit from cheaper product prices, but these cheaper product prices may undermine broader social welfare (relocation of production to less expensive labour markets, increasing environmental pollution due to longer distance these goods must travel), and ultimately circles back to the detriment of the consumer (unemployment; environmental pollution).[567] In other words, a private sustainability agreement that may be exempted following the *Wouters* doctrine when it pursues societal goals, would often also come to benefit the consumer in the long term, especially as, as held by the European Commission in CECED, these benefits to the consumer may be rather small.[568] I will further elaborate on the European Commission decision in CECED in Section 6.2.3.1. below.

6.2.2. Necessity

The second part of the proportionality test (necessity) requires that the agreement is not more restrictive than necessary to achieve the legitimate aim. Some scholars argue that the necessity-test of the *Wouters* doctrine is different from Article 101(3) TFEU. Basically, the argument runs as follows: the analysis under Article 101(3) TFEU is a cost-benefit analysis, while the analysis under the *Wouters* doctrine is a reasonableness test as to whether the measure was an acceptable use of the private regulator's margin of discretion as the ECJ required only that the measure was reasonably necessary to achieve its aim.[569]

Such an argument fails to take two important consideration into account. First, although in *Wouters* the ECJ applied the necessity test by requiring that the measure should

[560] Article 3(5) TEU.
[561] Article 3(3) TEU.
[562] Article 3(1) TEU.
[563] Article 3(5) TEU.
[564] Article 3(3) TEU, Article 11 TFEU, Article 37 CFR.
[565] Article 13 TFEU.
[566] David Glen and others (eds), *Transformative Consumer Research for Personal and Horizontal Collective Well-being* (Routledge 2012), 257.
[567] Garrett Hardin, 'The Tragedy of the Commons Science' (1968) 162 Science 1243; John Platt, 'Social traps' (1973) 28 American Psychologist 641; Thomas Schelling, 'Self-command in Practice, in Policy, and in a Theory of Rational Choice' (1984) 74 American Economic Review 1; Ulrick Beck, *Risk Society. Towards a New Modernity* (Sage Publications 1992); Ulrich Beck, *The Brave New World of Work* (John Wiley & Sons 2014 2014).
[568] *CECED*, OJ 2000 L 187/47, at 53.
[569] Mislav Mataija, *Private Regulation andthe Internal Market. Sports, Legal Services, and Standard Setting in EU Economic Law* (Oxford University Press 2016), 93.

be reasonably considered necessary to achieve its aim,[570] in other ECJ cases in which the *Wouters* doctrine was applied, most notably *CNG*,[571] *API*,[572] and *Meca-Medina*,[573] the ECJ did not include such a reasonableness requirement in its judgement.

Second, Article 101(3) TFEU is also not only limited to a cost-benefit analysis as it clearly includes a necessity test. This necessity test follows from the wording in Article 101(3) TFEU in which it is held that an agreement may not impose non-indispensable restrictions on the undertakings concerned.[574] According to the Guidelines on Article 81(3) EC (now Article 101(3) TFEU) there are two aspects to the indispensability requirement. First, the agreement itself must be "reasonably necessary in order to achieve the efficiencies".[575] Secondly, the restrictions on competition that flow from the agreement must also be "reasonably necessary for the attainment of the efficiencies".[576] Thus, when these efficiencies would be appropriately estimated in terms of human well-being, the difference between the *Wouters* doctrine and art. 101(3) TFEU will evaporate. I will further elaborate on how to appropriately estimate human well-being in Section 6.3.

An additional requirement under Article 101(3) TFEU, on basis of which it could be argued that Article 101(3) TFEU differs from the *Wouters* doctrine, is that the agreement may not afford the undertakings involved to eliminate competition. Private sustainability agreements are generally likely to satisfy this later condition as competition on sustainability factors normally only forms one of many potential parameters of competition.[577] Furthermore, it is questionable whether a private agreement that eliminated competition completely would be considered necessary within the *Wouters* doctrine.

6.2.3. Balancing of interests

The third part of the proportionality test requires an assessment of the effect of the restriction on other interests. A balancing of interest is required both under Article 101(3) TFEU and under the *Wouters* doctrine.

6.2.3.1. Balancing of Interest in Article 101(3) TFEU

A balancing of interest follows from Article 101(3) TFEU, where consumers must be allowed a fair share of the benefits of the agreement, and these benefits must be greater than its

[570] *Wouters*, n 519, at 105-108.
[571] *Consiglio nazionale dei geologi v Autorita Garante della Concorrenza e del Mercato*, n 519.
[572] Case C-184/13 *Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti* [2014] ECLI:EU:C:2014:2147.
[573] *Meca-Medina*, n .519.
[574] Steenbergen (2008), n 522, 259;
[575] Article 81(3) Guidelines, n 535, at 73.
[576] Ibid, at 74.
[577] Kingston (2012), n 520, 287-288.

costs.[578] Under Article 101(3) TFEU the European Commission seemingly wants to make the balancing of interest explicit by preferring an approach based on neoclassical economics placing (allocative) efficiency and consumer welfare at the core of competition law.[579] Allocative efficiency is the main tool of welfare economists to measure the impact of markets and public policy on well-being. As such, welfare economists often use classical cost-benefit analysis (CBA) to survey the impact of markets or a policy measure on well-being.[580] Well-being is used by welfare economists in the narrowest sense, meaning material well-being only.[581] Such an assessment may fail to accurately estimate the benefits of a private sustainability agreement as some societal benefits may only benefit future consumers and/or are qualitative efficiencies that do not have a clear market price. Welfare economist have provided solutions to estimate future benefits and qualitative efficiencies that do not have a clear market price, i.e. the use of a discount rate and the rational actor model.

The solution provided for by welfare economist to estimate future benefits is to use a discount rate. Discounting means that lower weight is put on future benefits than on present benefits. In its Guidelines to Article 101(3) TFEU, the European Commission held that future benefits to consumers must be subject to a discount rate.[582] This in line with ECJ case-law. In *Asnef-Equifar v Ausbanc* the ECJ held that persons who are unable to obtain a service (getting loans) as a result of an anti-competitive agreement (disclosing credit history of potential customers of banks) obtained a benefit (avoid over-indebtedness).[583] As such, "the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers."[584] This could be interpreted as that the beneficial nature of consumers in current and future markets must be taken into account. Such an interpretation is strengthened by the ECJ in GlaxoSmithKline where the ECJ held that a restriction on competition today could be exempted when it would provide benefits in the future.[585] As such, it could be argued that the current and future benefits of an agreement must be taken into account under Article 101 TFEU.

Although the ECJ never ruled as to whether such future benefits need to be discounted, it argued in *MasterCard* that when restriction of competition is found on one side of the market, some of the advantages must also fall on that side of the market.[586]

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[578] Monti and Mulder (2017), n 9, 647 referring to *Etablissements Consten Sàrl v Commission*, n 534, at 348–9.

[579] Article 81(3) Guidelines, n 535.

[580] Jonathan Wiener, 'Better Regulation in Europe' (2006) 59 Current Legal Problems 447, 447-518.

[581] James Buchanan, 'Opportunity Cost' in *The New Palgrave: A Dictionary of Economics* (3rd edn, 1987), 718–21.

[582] Article 81(3) Guidelines, n 535, at 88.

[583] Case C-238/05 *ASNEF-EQUIFAX* [2006] ECLI:EU:C:2006:734.

[584] Ibid, at 70.

[585] Case-501/06P *GlaxoSmithKline* [2009] ECLI:EU:C:2009:610.

[586] Case C-382/12 P *MasterCard* [2014] ECLI:EU:C:2014:2201, at 242; Monti and Mulder (2017), n 9, 650.

Applying this rationale to an agreement that affects present and future markets, restrictions on competition in the present market providing advantages to the future market can only be exempted when the present market has some advantages by the agreement. As such, the application of a discount rate to future benefits may be warranted: not applying a discount rate to future benefits would imply the impoverishment of current generations.[587]

When applying a discount rate a choice needs to be made which discount rate to apply, and whether you would apply either a constant discount rate (i.e. all future costs and benefits are discounted at the same rate) or a time declining discount rate (i.e. the discount rate for future costs and benefits declines by time). The rationale for the time declining discount rate is that the further we try to predict into the future, the less certain we are of the accuracy of such a prediction. A time declining discount rate may be more appropriate to assess the benefits of sustainability agreements. In its Guidelines to Article 101(3) TFEU the European Commission does not provide further guidance as to which discount rate to apply in the context of Article 101(3) TFEU, but only states that a discount rate should be applied to future costs and benefits.[588] In its Better Regulation guidelines, the European Commission recommends the use of a constant discount rate of 4% for short time frames.[589] The Commission finds it appropriate to have a time declining discount rate for longer time frames.[590] In its toolbox to better regulation, the Commission gives the UK government as an example, who uses a 3.5% discount rate for periods up to 50 years which declines to 1.0% share the time horizon exceeds 300 years.[591] It is clear that the choice of a discount rate is a highly political matter as it reflects society's preferences between present and future consumption.

The solution provided for by welfare economist for qualitative efficiencies that do not have a clear market price is to monetize societal benefits based on the idea that how much money a person is willing to pay or accept for an amenity shows how much that amenity increases their welfare. This idea assumes that human beings are rational decision makers, while human beings are often not rational but subject to several biases.[592] As such, not all societal benefits may be appropriately subsumed within the notion of (allocative) efficiency.

[587] Mancur Olson and Martin Bailey, 'Positive Time Preference' (1981) 89 Journal of Political Economy 1.

[588] Article 81(3) Guidelines, n 535, at 87-8.

[589] Better Regulation (2015), n 525, Toolbox, Chapter 3.

[590] Ibid.

[591] Jon Hall and others, 'A Framework to Measure the Progress of Societies' (2010) 5 ECD Statistics Working Papers, OECD Publishing.

[592] The revolution in psychology that has changes perceptions of how people act in economic circumstances may have started with Herbert Simon's paper in 1955 for which he won the 1978 Nobel Prize in economics that introduced the concept of bounded rationality. Simon (1955), n 41.

Practice shows that this could have an inhibiting effect on undertakings to launch new private sustainability initiatives.[593]

These two problems associated with an approach based on neoclassical law and economics in subsuming societal benefits in allocative efficiency (the choice of a discount rate and the assumption of a rational actor) may not be problematic once we realize that the notion of efficiency under Article 101(3) TFEU does not have to be assessed solely in monetary terms. In fact, the decisional practice by the Commission indicates that benefits do not have to be quantifiable in monetary terms. In some cases the Commission did not monetize the benefits, but simply held that consumers benefit from the agreement. For example, in DSD, the Commission held that consumers will benefit from the agreement "as a result of the improvement of environmental quality sought, essentially the reduction in the volume of packaging."[594] In Exxon/Shell the Commission held that consumers could be considered to benefit when they perceive the agreement as beneficial: "[t]he reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks involved in the transport of ethylene will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing concern."[595]

Furthermore, the European Commission has held that the benefits to the individual can be very small. In the CECED-case the Commission estimated that consumer benefits of the agreement would include (1) savings on electricity bills after nine to 40 months after the purchase of a new more energy-efficient washing machine;[596] (2) increased competition and lower prices in more energy-efficient washing machines;[597] and (3) the enjoyment of environmental benefits due to reduced carbon dioxide, sulphur dioxide, and nitrous oxide. To assess the environmental benefits the Commission monetized environmental benefits by estimating the savings in marginal damage from avoiding emissions. This approach was later reapplied in cases concerning dishwashers[598] and water heaters.[599]

The problem with these cases is that they not provide clarity as to how societal benefits could be subsumed within the notion of efficiency when they cannot be easily

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[593] Besluit van de Minister van Economische Zaken van 6 mei 2014, nr. WJZ/14052830, houdende beleidsregel 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, https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/besluiten/2014/05/08/beleidsregel-mededinging-en-duurzaamheid/beleidsregel-mededinging-en-duurzaamheid.pdf (visited 31 March 2017).

[594] *DSD*, OJ 2001 L 319/1, confirmed by Case T-289/01 *DSD* [2007] ECLI:EU:T:2007:155.

[595] *Exxon/Shell*, OJ 1994 L 144/20.

[596] *CECED*, OJ 2000 L 187/47, at 52.

[597] Ibid, at 53.

[598] *CECED Dishwashers* (COMP.F.1/37.894) Notice published pursuant to Article 19(3) of Council Regulation No 17 [2001] OJ C250/2.

[599] *CECED Water-Heaters* (COMP.F.1/37.893) Notice published pursuant to Article 19(3) of Council Regulation No 17 [200 l] OJ C250/4. With regard to these two cases see also the Commission's press release, European Commission, *Commission Press Release* (IP/01/1659) and López, "Commission Confirms its Policy Line in respect of Horizontal Agreements on Energy Efficiency of Domestic Appliances" (2002) CPN 50.

monetized. Some guidance could be found in the 2001 Horizontal Cooperation Guidelines in which the Commission held that:

> "Environmental agreements caught by Article 81(1) [now Article 101(1)] may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs.
>
> Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions."[600]

The 2001 Horizontal Guidelines provide some guidance, namely that a cost-benefit analysis is warranted, although it does not clarify how these costs and benefits must be estimated. The 2001 Horizontal Guidelines have been replaced by the 2010 Horizontal Guidelines that do not longer include a similar reference to environmental agreements and cost-benefit analysis.[601] The Guidelines on Article 81(3) EC (now Article 101(3) TFEU) also do not devise clear standards.[602] As such, these guidelines do not clarify how societal benefits could be appropriately estimated under Article 101(3) TFEU. As explained in Section 6.2 above human well-being should be placed at the core of EU competition law. For that reason, societal benefits should be estimated in terms of human well-being. In Section 6.3 I will clarify how societal benefits could be appropriately estimated in terms of human well-being.

6.2.3.2. Balancing of Interest in the Wouters Doctrine

In the *Wouters* doctrine the balancing of interest is generally conducted rather implicitly.[603] However, there is a general trend in the internal market case law of the ECJ to leave open the possibility for Member States to use statistical evidence or any other suitable type of evidence when conducting the proportionality test.[604] Such an approach would make the

[600] Article 81(3) Guidelines, n 546, at 179.

[601] Guidelines on horizontal co-operation agreements, n 546.

[602] Article 81(3) Guidelines, n 546, at 88; Michele Piergiovanni and Pierantonio D'Elia, 'Self-Assessment of Agreements Under Article 81 EC: Is There a Need for More Commission Guidance?' (2008) Global Competition Policy.

[603] Mataija (2016), n 569, at 93-95.

[604] *Scotch Whiskey*, n 223, at 64-5 in conjunction with *Deutsche Parkinson Vereinigung*, n 223, at 35-6.

balancing of interests more explicit. As the *Wouters* doctrine is based on the ECJ's jurisprudence on internal market law,[605] a similar approach may be warranted. Such statistical evidence may include impact assessments of the costs and benefits of a sustainability agreement.

In the context of private sustainability agreements, it is worth mentioning that the European Commission has developed Better Regulation guidelines which increasingly require the Commission to pay close attention to impact assessments when preparing and evaluating public policy.[606] These impact assessment analyses must assess all the relevant benefits and costs of the policy, including economic, social and environmental impacts, to support policy decisions that deliver the "best balance" between benefits and costs.[607] When the European Commission wants to exempt a private sustainability agreement from competition law scrutiny because the agreement pursues a public policy objective, such as sustainable development, a similar impact assessment should be warranted.

6.2.3.3. Balancing of Interest: Interim Conclusion

Section 6.2. indicates that human well-being should be placed at the core of EU competition law.[608] As such, benefits under Article 101(3) TFEU should not be limited to benefits examined in monetary terms, but should include societal benefits which can be examined in terms of human well-being. Furthermore, best practices demands that the European Commission and its Member States conduct impact assessments balancing costs and benefits in terms of human well-being when they want to exempt a private sustainability agreement from competition scrutiny following the *Wouters* doctrine. The next section will show how the costs and benefits of an agreement could be appropriately estimated in terms of human well-being.

6.3. The Assessment of Private Sustainability Agreements under Article 101 TFEU: Using Scientific Approaches from Economics, Psychology and Philosophy

So far, this chapter concluded that the differences between the *Wouters* doctrine and Article 101(3) TFEU are negligible when benefits can be appropriately estimated in terms of human well-being. In this section I will provide tools how to estimate the costs and benefits of private sustainability agreements in terms of human well-being.

The most recent approach by the European Commission and the Dutch Competition Authority seems limited to a neoclassical approach, engaging in classical economic analysis derived from welfare economics, to assess whether anti-competitive sustainability

[605] Monti and Mulder (2017), n 9, 645.
[606] Better Regulation (2015), n 525.
[607] Better Regulation (2015), n 525, Chapter III.
[608] Article 3(1) TEU; *TeliaSonera Sverige*, n 550, at 22.

agreements could be considered beneficial in terms of well-being.[609] As discussed in Section 6.2.3.1 above, methods derived from welfare economics to estimate the costs and benefits of sustainability agreements only estimate material welfare. Material welfare is only one aspect of human well-being. Happiness or what is necessary to live a human life are also part of human well-being and should be included in the assessment of the costs and benefits of a private sustainability agreement. Happiness can be estimated by methods derived from economic and social psychology, while what is necessary to live a human life can be estimated by methods derived from moral philosophy. Combined, these methods encompass the more objective factors of human well-being by using welfare economics and moral philosophy, and the more subjective aspects of human well-being by using methods from economic and social psychology. The next section will focus on these approaches, by assessing the strengths and weaknesses of using these approaches as tools in the assessment of the costs and benefits of a private sustainability agreement under Article 101 TFEU.

6.3.1. Economic and Social Psychology – Subjective Well-Being

To measure the subjective perceptions of a person's well-being (i.e. happiness), subjective well-being (SWB) methods could be used. SWB is used to measure the extent to which people value the outcomes of their consumption, such as life satisfaction or happiness. SWB encompasses different aspects, such as cognitive evaluations of one's life, positive emotions such as joy and pride, and negative emotions such as pain and worry.[610] When a sustainability agreement would result in less pollution but a higher price of a product, SWB methods could compare how much more people enjoy their lives with less pollution with how much less they enjoy their lives with decreased buying power.

The main strength of SWB is that SWB is less subject to the cognitive biases that may occur in classic CBA, such as people's difficulty to predict the impact of their choices or live events on the future.[611] Another strength of SWB is that instead of monetizing sustainability benefits by asking people what they would be willing to pay or accept, SWB relies on individual self-assessments to analyze the effects of different factors on people's life satisfaction or happiness.[612] The effects of different factors on people's life satisfaction

[609] Autoriteit Consument en Markt (2015), n 11; Autoriteit Consument en Markt, "Economische effecten van 'Kip van Morgen'. Kosten en baten voor consumenten van een collectieve afspraak in de pluimveehouderij", 2014 https://www.acm.nl/nl/publicaties/publicatie/13759/Onderzoek-ACM-naar-de-economische-effecten-van-de-Kip-van-Morgen/ (visited 31 March 2017); Autoriteit Consument en Markt, "Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er jaren kolencentrales in het kader van het SER Energieakkoord", 2013, https://www.acm.nl/nl/download/publicatie/?id=12033> (visited 31 March2017); Article 81(3) Guidelines, n 535.

[610] Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, 'The Measurement of Economic Performance and Social Progress Revisited' (2009) 33 OFCE.

[611] Adler and Posner (2008), n 61.

[611] Daniel Gilbert and Timothy Wilson, 'Prospection: Experiencing the Future' (2007) 317 Science 1351; Timothy Wilson and Daniel Gilbert, 'Affective Forecasting: Knowing What To Want' (2005) 14 Current Directions in Psychology Science 131.

[612] Daniel Kahneman, Ed Diener and Norbert Schwarz, *Well-being: The Foundations of Hedonic Psychology* (1999), ix and xii.

or happiness are then not converted in monetary values but into subjective, hedonic, cardinal, and interpersonally comparable units.[613] These comparable units allow for a comparison between increased material welfare and increased SWB, ensuring a more accurate estimation of human well-being.

An important pitfall of SWB is that SWB methods use evaluative judgments of a person's life satisfaction and presence of positive and negative feelings in real time (i.e. hedonic experiences). Therefore, preferences of future consumers are not included or will be, similarly as in methods derived from welfare economics, be discounted. As discussed in Section 6.2.3.1. the choice of a discount rate is a highly political matter as it reflects society's preferences between present and future consumption.

Another important pitfall of SWB is that it fails to take into account what is necessary to live a human life as people may adapt to their life-circumstances.[614] To allow for a more accurate estimation of the costs and benefits of a private sustainability agreement, what is necessary to live a human life should also be taken into account. The capabilities approach derived from moral philosophy can provide important insights as to what is necessary to live a human life.

6.3.2. Moral philosophy - Capabilities Approach

Although material welfare and subjective well-being are important factors of human well-being, they should not be treated as "general-purpose guides to all aspects of well-being".[615] The capabilities approach may provide further insights to conduct a more thorough analysis of the costs and benefits of private sustainability agreements.[616] The strength of including the capabilities approach for an assessment of the costs and benefits of private sustainability agreements is that it includes values that are important to human well-being besides that what people desire or that what they consider to make them happy.

The central issue of the capabilities approach is not on willingness to pay or happiness, but whether a person is capable of doing things that are considered important in human life.[617] The capabilities approach compares a person's quality of life to that of others based on those capabilities that are considered important in human life. Action needs to be taken when people are systematically falling below the threshold of any of those central capabilities.

To use the capabilities approach in the assessment of human well-being, we need projections or prior responses to normative questions as to what capabilities are considered

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[613] John Bronsteen, Christopher Buccafusco and Jonathan Masur, 'Well-being analysis vs. Cost-benefit analysis' (2013) 62 Duke Law Journal 1603, 1618.

[614] See e.g. Maike Luhmann and others, 'Subjective Well-being and Adaptation to Life Events: A Meta-analysis' (2012) 102 Journal of Personality and Social Psychology 592.

[615] Amartya Sen, *The Idea of Justice* (Harvard University Press 2009), 286.

[616] See on the capabilities approach: Nussbaum (2000), n 61, 70; Sen (1980), n 61.

[617] Nussbaum (2000), n 61, 71.

important in human life. The selection of relevant capabilities to estimate human well-being is a value judgment of which capabilities we consider important. Different ideas as to how such capabilities should be determined include a pre-existing list of central capabilities[618] and leaving the selection of capabilities to democratic processes.[619] Often, statisticians use the list of central capabilities provided for by Nussbaum to develop statistical indicators.[620] These central capabilities include the capability to live to the end of human life of normal length, have good health, and live with and concern for and in relation to animals, plants, and the world of nature.[621] These central capabilities seem in line with the sustainability-related objectives stipulated by the EU legislature.[622] To use these central capabilities in the assessment of human well-being, the capabilities must be quantifiable in some way.[623] Academics have developed statistical indicators for moral behaviour drawing on objective and subjective data.[624] Together with statistical indicators on material welfare and subjective well-being, statistical indicators on capabilities would provide the most accurate estimation of the costs and benefits of a private sustainability agreement.

6.3.3. Combining the Approaches

The assessment of the costs and benefits of private sustainability agreements requires a combination of methods derived from welfare economics, social and economic psychology, and moral philosophy to come to the most accurate estimation of human well-being. To combine these methods statistical indicators have been developed drawing from available statistical data.[625] As access to statistical data has become much easier in the information society, the potential of using statistical data in the assessment of the costs and benefits of a private sustainability agreement is now bigger than ever. Competition authorities could also draw from this statistical data to assess whether the benefits of private sustainability agreements exceeds its costs. As such, there would be a gain in transparency by forcing decisions to be based on rigorous analysis made available to the public.[626]

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[618] Ibid.

[619] Sen (2009), n 615, 286.

[620] Paul Anand and Martin van Hees, 'Capabilities and Achievements: An Empirical Study' (2006) 35 Journal of Socio-Economics 268; Paul Anand and others, 'The Development of Capability Indicators' (2009) 10 Journal of Human Development and Capabilities 125.

[621] Nussbaum (2000), n 61, 78-80.

[622] E.g. Article 3 TEU (well-being of EU peoples); Article 2 Charter of Fundamental Rights (CFR) (right to life), Article 4 CFR (prohibition of torture); Article 35 CFR (health care); Article 37 CFR (environmental protection); Article 13 TFEU (animals are sentient beings); Article 11 TFEU (high level of environmental protection).

[623] Rutger Claassen and Anna Gerbrandy, 'European Competition Law: From a Consumer Welfare to a Capability Approach' 12 Utrecht Law Review 1.

[624]Anand and Hees (2006), n 620; Anand and others (2009), n 620.

[625] Stiglitz, Sen and Fitoussi (2009), n 17; See also: Van den Bergh (2009), n 529; Hall and others (2010), n 591; Moran and others (2008), n 529; Spangenberg (2002), n 529.

[626]Wiener (2006), n 580, 447-518.

To analyse the costs and benefits of a private sustainability agreement statistical data can be collected on material welfare, subjective well-being, and capabilities. How such analysis would play out can be illustrated by a prime example that has triggered intense scholarly debate: the Chicken of Tomorrow Agreement.[627] The Chicken of Tomorrow Agreement is an agreement of 2014 between Dutch supermarkets to collectively stop the sale of conventional chicken.[628] To assess the costs and benefits of the Agreement, statistical date derived from economics on what people are willing to pay for increased animal welfare would provide information as to the extent to which the Chicken Agreement increases material welfare. Statistical data derived from psychology on whether animal friendly chicken production would make people in the EU happier (e.g. whether chicken farmers would be happier) and statistical data derived from philosophy whether animal friendly chicken production would enable people to live a human life (e.g. the extent to which the agreement enables people to live with and concern for and in relation to animals) would fill in the remaining blanks as to whether the agreement promotes human well-being.

If it is, then, established that overall the benefits of the Chicken Agreement exceeds its costs in terms of human well-being, the Agreement may be exempted from competition law scrutiny. The Chicken Agreement may be justified under Article 101(3) when the individual consumer of the product also benefits from the Agreement. As discussed this benefit to the consumer may be rather small.[629] Moreover, as discussed, consumers would generally benefit from sustainability agreements that benefits human well-being as a whole as in the pursuit of sustainable development individual and societal interests are often aligned.[630] In other words, a private sustainability agreement that achieves its societal goals effectively, would most likely also come to benefit the individual consumer in the long term.

6.4. Conclusion and General Discussion

In this chapter I argued that the assessment of private sustainability agreements under the *Wouters* doctrine and Article 101(3) TFEU requires that a proportionality test is conducted. Under this proportionality test the costs and benefits of an agreement should be examined in terms of human well-being, either because it is demanded as a best practice under the *Wouters* doctrine or because it would provide guidance to economic regulators and undertakings in their self-assessment under the competition rules. In this way, societal benefits can be more appropriately included in the assessment under Article 101 TFEU.

This chapter shows that when a public authority (either EU or national authorities) would want to exempt a private sustainability agreement under Article 101(1) TFEU from

[627] Monti and Mulder (2017), n 9; Claassen and Gerbrandy (2016), n 623.
[628] So-called Kip van Morgen.
[629] *CECED*, OJ 2000 L 187/47, at 53.
[630] Glen and others (2012), n 566, 257.

competition law scrutiny, best practices demands that the public authority combines insights from economics, psychology, and philosophy to come to an accurate estimation of the costs and benefits of the private agreement.[631] A justification under Article 101(3) TFEU of a private sustainability agreement would require a similar assessment with the added requirement that consumers also receive some benefit from the agreement (which would likely be the case when the agreement effectively promotes sustainable development).[632]

To most accurately estimate the costs and benefits of a private sustainability agreement in terms of human well-being, this chapter shows that several statistical indicators need to be combined. While, indicators derived from economics are helpful in estimating increased material welfare of an agreement, indicators derived from psychology are helpful in estimating increased happiness of an agreement and indicators derived from philosophy are helpful in estimating whether the agreement enables to live a human life. Combined, these indicators provide greater insights as to whether an agreement benefits human well-being.

This chapter also showed that the use of any scientific method to estimate costs and benefits of an agreement requires answers to highly normative and political questions. A cost-benefit analysis, either based on material well-being or subjective well-being, requires a choice of a discount rate which reflects normative preferences between present and future consumption. The capabilities approach requires normative answers to what capabilities are considered important in human life. These normative and political questions may reflect the difference between the *Wouters* doctrine and Article 101(3) TFEU. While the *Wouters* doctrine could leave some margin of discretion to Member States to decide on the proportionality of an agreement by determining these two highly political issues, when an undertaking pursues a legitimate aim solely articulated by the Member State. While, when an undertaking pursues other legitimate aims over which the EU has competence, the European Commission would have such a margin of discretion.

In sum, this chapter shows how science-based estimations could be an addition to the information base of the legal authority and a guidance to undertakings in their self-assessments under the competition rules. The outcome of such a balancing exercise would result in a more accurate and well-augmented analysis of whether a private sustainability agreement could be exempted or justified under Article 101 TFEU. In the right hands, with the proper understanding of their strengths and weaknesses, the methods discussed, can provide important insights in to what extent a private sustainability agreement ensures human well-being. If the European Commission or its Member States want to use scientific methods to assess private sustainability agreements under Article 101(3) TFEU they should

[631] Article 2 Council Regulation (EC) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002]OJ L 1, 4.1.2003.
[632] Ibid.

be aware of these strengths and weaknesses and clarify which method would be most appropriate and when. As such, statistical data on material welfare, subjective well-being, and capabilities can provide otherwise unattainable insights on the impact of a private sustainability agreement and provide appropriate guidance to undertakings in their self-assessment under the EU competition rules. Misused or misunderstood, they can be misleading and result in unjustified outcomes.

7

Conclusion and General Discussion

7.1. Introduction

This dissertation contributes to a firm understanding of the regulatory space available to VSS-setters to promote sustainable development based on the interaction between international and EU economic law and VSSs. To provide such a firm understanding, this dissertation, first, examined the regulatory structure of VSSs and, second, investigated the interaction between international and EU economic law and the regulatory space of VSSs to promote sustainable development. It was found that the regulatory space available to VSS-setters partly depends on the assumptions underlying legal interpretation. As such, when investigating the limits set by international and EU economic law this dissertation critically examined the normative assumptions underlying legal interpretation by using insights from social sciences and conducting experiments.

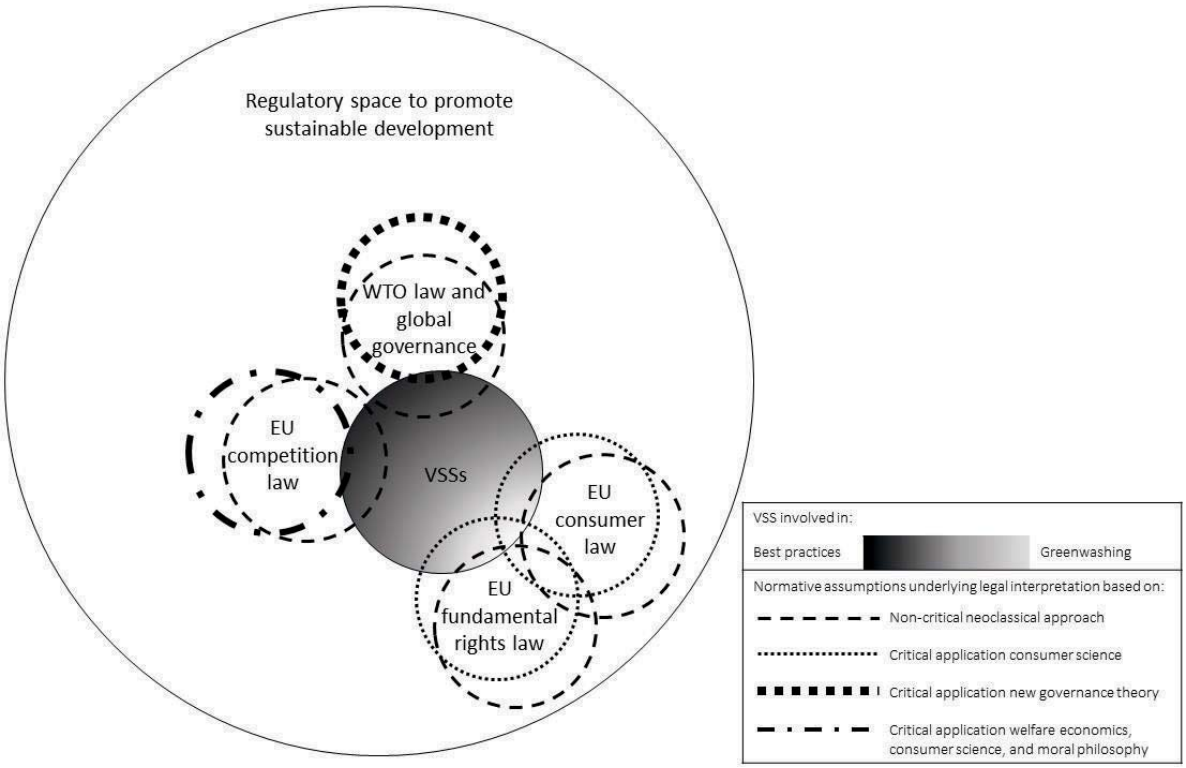
This chapter will first provide an answer to the main research question by showing that the extent to which the interpretation and application of international and EU economic law interacts with the regulatory space of VSSs depends on the specific normative assumptions underlying legal interpretation (Section 7.2). The answer to the main research question is underpinned by a discussion of sub-questions 1 to 4 in Section 7.3 and Section 7.4. In Section 7.5 the limitations and contributions of this dissertation is discussed.

7.2. The Extent to which the Interpretation and Application of International and EU Economic Law Interacts with the Regulatory Space of VSSs

The presented chapters taken together provide the answer to the main research question of this dissertation, by showing that the extent to which the interpretation and application of international and EU economic law interacts with the regulatory space of VSSs depends on the specific normative assumptions underlying legal interpretation. Using critical legal analysis as a theoretical framework, it was found that most commonly, the interpretation and application of international and EU economic law uses normative assumptions derived from a noncritical application of neoclassical law and economics. In this dissertation I went through four legal frameworks and showed that when these normative assumptions in each of these frameworks changed, the regulatory space of VSSs to promote sustainable development changed as well. Results show that the use of normative assumptions based on a noncritical application of neoclassical law and economics has an inhibiting effect on the regulatory space of VSSs that promote best practices in sustainable development (e.g. VSSs that promote human well-being are prohibited as benefits are solely assessed in monetary terms), while it leaves more regulatory space to VSSs that do not promote such best practices (e.g. VSSs that greenwash products are not prohibited because the consumer is considered to easily distinguish greenwashed products from sustainable products).

This dissertation shows that within the examined legal frameworks, the critical application of normative assumptions, such as those derived from welfare economics, consumer science, moral philosophy, and new governance theory, result in either more regulatory space for VSSs that promote best practices in sustainable development without relaxing constraints on VSSs that do not, or less regulatory space for greenwashing VSSs without prohibiting VSSs that promote best practice. Figure 7.1 illustrates the increase and decrease of the regulatory space of VSSs to promote sustainable development depending on the normative assumptions underlying legal interpretation. Which insights from the social sciences are helpful to critically assess the normative assumptions underlying legal interpretation and application, depends on the legal framework at issue. This dissertation examined four cases to illustrate which insights would be most appropriate for which legal framework.

Figure 7.1. The increase and decrease of the regulatory space of VSSs to promote sustainable development depending on the normative assumptions underlying legal interpretation per legal framework



It was found that when in the interpretation and application of EU consumer law to VSSs the underlying normative assumptions are based on a non-critical neoclassical approach, only a fraction of the VSSs that are involved in greenwashing practices would be prohibited (such as VSSs that use the textual term “organic” while they do not comply with the EC

Regulation of Organic Agriculture[633]) while most greenwashing VSSs (such as those using visual information that consumers may associate with increased sustainable production) would not. It was found that when these normative assumptions are based on a critical application of consumer science, more greenwashing VSSs would be prohibited (most notably those VSSs that use visual information that consumers may associate with increased sustainable production).

This dissertation shows that when in the interpretation and application of EU fundamental rights law the underlying normative assumptions are based on a noncritical application of neoclassical law and economics, public authorities have less leeway to reduce the regulatory space of VSSs by banning potentially misleading information on food products as disclaimers are assumed to have the same effectiveness as a complete ban[634] to achieve a public policy objective (such as consumer or environmental protection). Insights from consumer science show that information overload makes it more difficult for consumers to process information to make an informed choice of sufficient quality.[635] When information overload is apparent, a complete ban may be more effective. As such, using insights from consumer science in the interpretation and application of EU fundamental rights law may reduce the regulatory space of greenwashing VSSs as in some cases a complete ban may be considered more effective to achieve public policy objectives.

In the context of WTO law, this dissertation shows that most VSSs are private in nature and only a small fraction of these VSSs would be effectively disciplined by WTO law through state responsibility. Thus, only a small fraction of best practice VSSs would gain by a critical application of consumer science in the interpretation of WTO law. Most best practice VSSs would gain by adopting insights from new governance theory in the global governance of VSSs. Such insights would incentivize VSSs to adopt best practices. This would be more likely to increase the regulatory space of best practice VSSs than relying on state responsibility that follows from the more hierarchical neoclassical models of “old governance”.

It was found that, when critically applied, science-based estimations could be an addition to the information base of the legal authority and a guidance to undertakings in their self-assessment under the EU competition rules. As such, critically applying insights from welfare economics, consumer science, and moral philosophy in the interpretation and application of EU competition law would stimulate private actors to initiate agreements based on best practice VSSs as these would not be prohibited by EU competition law. In the

[633] EC Regulation on Organic Agriculture, n 151, Articles 23 and 25.
[634] This was the case in *Cassis de Dijon*; *Beer Purity*. See on this information paradigm: Purnhagen (2014).
[635] Verbeke (2005), n 54.

same vein, critically applying these insights provides guidance to the legal authority to more accurately assess whether VSSs promote best practices in sustainable development.

In the next section (Section 7.3) the answer to sub-question 1 is discussed, which provides clarity as to which VSSs are susceptible to greenwashing and which VSSs are more likely to promote best practices in sustainable development. In Section 7.4, the answer to sub-questions 2 to 4 is discussed, which provides clarity as to how different normative assumptions underlying legal interpretation and application of EU consumer law, EU fundamental rights law, WTO law, and EU competition law changes the boundaries of the regulatory space of VSSs to promote sustainable development. In Section 7.5 the limitations of this dissertation and the contributions of this dissertation are discussed.

7.3. The Regulatory Structure of VSSs

This section answers and discusses the first sub-question of this dissertation: what is the regulatory structure of VSSs? It was shown in Chapter 2 that mainly private standard-setters are involved in VSS-setting. Three structural patterns of VSS were identified on a spectrum ranging from multi-stakeholder regulatory instruments to self-regulatory instruments.

VSSs taking the form of multi-stakeholder regulatory instruments appear most frequently.[636] The regulatory structure of these VSSs include high NGO involvement in collaboration with firms in standard-setting, and certification conducted by private third-parties. Multi-stakeholder regulatory instruments bring stakeholders together to participate in standard-setting making it easier for the producers involved to voice concerns with specific standards, giving them some influence in standard-setting. Furthermore, multi-stakeholder regulatory instruments VSSs resemble a structure that is trusted most by consumers and considered most reliable and credible.[637]

It seems that these multi-stakeholder regulatory instruments illustrate best practices for any regulatory instrument to promote sustainable development.[638] However, an important pitfall of multi-stakeholder regulatory instruments is that they are susceptible to asymmetry in stakeholder involvement which may lead to knowledge gaps[639] and a lack

[636] These are also the standards that are frequently discussed by legal and governance scholars. See e.g. Steven Bernstein and Erin Hannah, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space ' (2008) 11 Journal of International Economic Law 575; Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 Journal of Law and Society 20.

[637] Golan and others (2001); Hatanaka, Bain and Busch (2005), n 4; Padel and Foster (2005), n 136; Eden, Bear and Walker (2008), n 135.

[638] Some multi-stakeholder regulatory instruments have even been used by public authorities to procure fair trade products that bear the private label awarded when product complies with such a multi-stakeholder regulatory instrument. In the case of Max Havelaar, the ECJ considered such practice to violate the EU public procurement directive (directive 2004/18/EC). See Case C-368/10 *Commission v the Netherlands* [2012] ECLI:EU:C:2012:284 .

[639] Lasse Gerrits and Jurian Edelenbos, 'Management of Sediments Through Stakeholder Involvement' (2004) 4 Journal of Soils and Sediments 239.

of representativeness.[640] Furthermore, as many VSSs operate internationally they may encounter cultural and institutional differences that may make stakeholder involvement difficult.[641] Moreover, as stakeholders may be involved in different ways (by having voting rights, or as consultants, advisors or co-regulators), there is a risk that stakeholders may be neglected in the decision-making phase.[642]

The second structural pattern of VSSs that was found is characterized by self-regulatory instruments. Within these type of VSSs standard-setting is conducted solely by firms, and certification is conducted through private first-party certification, meaning that the firm certifies its own standards. In some cases these self-regulatory instruments require that the product complies with multi-stakeholder regulatory instruments, in other cases these instruments focus on adopting unilateral policies that apply to their operations or purchases. These unilateral policies are generally not publicly available.[643] As these claims are not verified by external auditors, nor are the policies underlying these claims publicly available, consumers and investors have to rely on the company's reputation in evaluating the sustainability impact of production.[644] For that reason, such VSSs are more susceptible to greenwashing than multi-stakeholder regulatory instruments, meaning that the firm may not implementing policies to promote sustainable development.[645]

In between these market-based regulatory instruments and the self-regulatory instruments, a third structural pattern was identified. These types of standards are characterized by sector-specific regulatory instruments. Within these type of VSSs standard-setting is conducted by NGOs within a specific sector without collaboration with firms and require second-party certification. These VSSs establish guidelines that their corporate members have to comply with to make specific claims. Similar as to the self-regulatory instruments, the guidelines are generally not publicly available. As these claims are verified by the standard-setting body itself and not by a third party, and because the guidelines underlying these claims are generally not publicly available, consumers and investors have

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[640] Axel Marx, Miet Maertens and Johan Swinnen (eds), *Private Standards and Global Governance: Economics, Legal and Political Perspectives* (Edward Elgar 2012), 90; Emanuelle Cheyns, 'Multi-stakeholder Initiatives for Sustainable Agriculture: Limits of the 'Inclusiveness' Paradigm' in Stefano Ponte, Peter Gibbon and Jakob Vestergaard (eds), *Governing through Standards: Origins, Drivers and Limitations* (Palgrave MacMillan 2011).

[641] Dan Sperber, *Explaining Culture: A Naturalistic Approach* (Wiley-Blackwell 1996); Ronald Mitchell, 'International Environmental Politics' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (Sage Publications 2002).

[642] Gerrits and Edelenbos (2004), n 639.

[643] See also Michael Vandenbergh, 'The New Wal-Mart effect: The Role of Private Contracting in Global Governance' (2007) 54 UCLA Law Review 913.

[644] Ronnie Lipschutz and Cathleen Fogel, 'The Emergence of Private Authority in Global Governance' in Rodney Hall and Thomas Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2002), 134.

[645] See e.g. Catherine Ramus and Ivan Montiel, 'When are Corporate Environmental Policies a Form of Greenwashing?' (2004) 44 Business & Society 377; Monika Winn and Linda Angell, 'Towards a Process Model of Corporate Greening' (2000) 21 Organization Studies, 1119.

to rely on the standard-setter's reputation in evaluating the sustainability impact of production. As such, these sector-specific regulatory instruments are also more susceptible to greenwashing.[646]

The existence of a multiplicity and diversity of VSS with different degrees of reliability, credibility and effectiveness on the consumer market may reduce the potential of all VSSs to promote sustainable development. Consumer research shows that when specific cues, which may include pictograms on food packaging used by VSSs, are valued highly by consumers, the behaviour of consumers seems largely controlled by the associations that come to mind most easily.[647] Such associations may be overridden by a more deliberate mode of operation,[648] but such a mode of operation may not appear in a supermarket-setting where shopping is often a hurried affair where different information cues compete for attention.[649] The multiplicity and diversity of pictograms on the market that consumers may associate with sustainable production makes it very difficult for consumers to know every single underlying VSS. As a result when consumers have positive associations with a pictogram used by a VSS, due to the credibility and reliability of the VSS, these associations may positively affect consumer perception towards pictograms that are mere examples of greenwashing. As sustainable production and independent checks to guarantee sustainable production may warrant a price premium to consumers,[650] food businesses may be incentivized to free-ride on those pictograms with which consumers have positive associations. This may potentially lead to a loss of customers for the reliable and credible VSSs, reducing their potential to promote sustainable development.

The potential of VSS to promote sustainable development depends, thus, not only on the extent to which the VSS is effective in promoting sustainable production processes due the manipulation of global markets,[651] but depends also on how the information used by the VSS is processed by consumers. These two effects were taken into account within this dissertation to investigate the interaction between the interpretation and application of

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[646] See e.g. Ramus and Montiel (2004), n 645; Winn and Angell (2000), n 645.

[647] This process is known as peripheral processing, heuristic processing, system 1 processing or impulsive system. See e.g. Daniel Kahneman, 'A Perspective on Judgment and Choice—Mapping Bounded Rationality' (2003) 58 American Psychologist 697; Hoogland, Boer and Boersema (2007), n 166, 47; Fritz Strack and Roland Deutsch, 'Reflective and impulsive determinants of social behavior" , 8, 220-247; ' (2004) 8 Personality and Social Psychology Review 220; Alexander Chernev and Gregory Carpenter, 'The Role of Market Efficiency Intuitions in Consumer Choice: A Case of Compensatory Inferences' (2001) 38 Journal of Marketing Research 349; Kai Purnhagen, Erica van Herpen and Ellen van Kleef, 'The Potential Use of Visual Packaging Elements as Nudges' in Klaus Mathis and Avishalom Tor (eds), *Nudging Possibilities, Limitations and Applications in European Law and Economics* (Springer Science 2016).

[648] This process is known as central processing, systematic processing, system 2 processing or reflective system. See ibid.

[649] Horne (2009), n 109.

[650] Cafaggi and Iamiceli (2013), n 180.

[651] Cashore (2002), n 7.

international and EU economic law and the regulatory space of VSSs to promote sustainable development.

7.4. Interaction between the Interpretation and Application of International and EU Economic Law and VSSs

In this section, sub-question 2, 3, and 4 are discussed. The discussion is based upon comparison of findings across the four different case-studies as presented in Chapter 3, 4, 5 and 6. This discussion provides more clarity as to how different normative assumptions underlying legal interpretation and application of international and EU economic law changes the boundaries of the regulatory space of VSSs to promote sustainable development. Through analyzing the four cases, this dissertation examined the various ways in which international and EU economic law interacts with VSSs in more detail. Within the case study analysis the interaction between four sets of legal frameworks (EU consumer law, EU fundamental rights law, WTO law, and EU competition law) and VSSs were examined. These legal frameworks were selected to examine when VSSs fall within the scope of international and EU economic law (sub-question 2); to what extent international and EU economic law leave room to interpret and apply legal provisions to VSSs at national, EU, and WTO level (sub-question 3); and whether and to what extent findings from other scientific disciplines could inform the doctrinal analysis of the interpretation and application of international and EU economic law to VSSs (sub-question 4). Table 7.1 provides a brief overview of the findings of this dissertation, which will be further elaborated upon in Section 7.4.1, Section 7.4.2 and Section 7.4.3.

Table 7.1. Findings of dissertation

Case study		**EU consumer law (Chapter 3)**	**EU fundamental rights law (Chapter 4)**	**WTO law (Chapter 5)**		**EU competition law (Chapter 6)**
Legal provision		**Article 7 FIR**	**Article 11 CFR**	**SPS Agreement**	**TBT Agreement**	**Article 101 TFEU**
VSS in scope of legal framework (sub-question 2)		VSS provides food information to final consumer	Expression used by VSS is limited	VSS applied to protect human, animal, plant life or health	VSS is de jure or de facto mandatory; WTO Member is aware of VSS	VSS is an agreement between undertakings engaged in economic activity aimed to make profit
Interpretation and application of legal provisions (sub-question 3)	**National level**	Decide whether VSS gives misleading impression *in concreto;* VSS using textual information indicating "organic" while product is not in compliance with EU Regulation on Organic Agriculture should always be prohibited	Decide whether limitation is proportional: ▪ Necessity test (least onerous option of the available options) - Disclaimers preferred when same effectiveness as complete ban - Public health trumps free speech as a default ▪ And regulation must meet objectives of general interest recognized by the EU or regulation protects rights and freedoms of others	N/A	N/A	When VSS affects trade between Members, conduct proportionality test in which it should be assessed whether the VSS ensures human well-being NB: if NCAs find that the VSS does not ensure HWB they can only state there are no grounds for action on their part
	EU level	Provides guidance of what can be expected of average consumer when confronted with textual information; Provides regulation which commercial practices are considered unfair in all circumstances	Ibid.	N/A	N/A	When VSS affects trade between Members, conduct proportionality test in which it should be assessed whether the VSS ensures human well-being NB: When Commission acts on own initiative it can bring infringement to an end; exempt VSS from competition scrutiny; justify VSS

	WTO level	N/A	N/A	WTO Member has obligation of result to ensure compliance with SPS rules by private SPS measures that gain legal effect by means of public law; WTO Member has to undertake some effort to ensure compliance by other private SPS measures with SPS rules (obligation of conduct, mainly limited to soft instruments)	WTO Member has obligation of result to ensure compliance with TBT rules by private TBT measures that gain legal effect by means of public law; WTO Member has to undertake some effort to ensure compliance by other private TBT measures with TBT rules (obligation of conduct limited to soft instruments) *only* when trade interests complaining WTO Member are significantly affected	N/A
Additional evidence of relevance (sub-question 4)		Consumer studies into what is misleading to consumers	Consumer studies into the effectiveness of EU Regulation limiting commercial expression to protect public interest objective	As SPS Agreement is not effective in disciplining private standards as a whole, insights from new governance theory is needed	As TBT Agreement is not effective in disciplining private standards as a whole, insights from new governance theory is needed	Social and ethical considerations on estimating human well-being

7.4.1. VSSs within the Scope of International and EU Economic Law

This section answers and discusses sub-question 2: when do VSSs fall within the scope of international and EU economic law? This dissertation shows that whether VSSs fall within the scope of the examined legal framework depends on the specific legal framework at issue. Under the Food Information Regulation (FIR),[652] VSSs fall within its scope when it provides information concerning a food to the final consumer by any means, e.g. on the label or on the company website.[653] Under Article 11 EU Charter of Fundamental Rights (CFR), VSSs fall within its scope when public authorities limit information concerning a food to the final consumer. Furthermore, this dissertation shows that VSSs fall within the scope of the SPS Agreement when they aim at protecting human, animal, plant life or health (HAP-LH) in the territory of the WTO Member. VSSs that do not aim at protecting HAP-LH may fall within the scope of the TBT Agreement when (1) the VSS is *de jure* mandatory, *de facto* mandatory, or when the WTO Member is aware of the private standard-setter (based on what the WTO Member communicates to the outside world, e.g. government communications on the private standard, use of private standards in public procurement practices, or national accreditation of the private standard-setter); and (2) the VSS sets requirements regarding physical characteristics (e.g. the use of animal products), non-physical characteristics that have 'sufficient nexus' to the product characteristics (e.g. use of fishing techniques), or labelling (e.g. recyclable packaging).[654] VSSs fall within the scope of EU competition law when the VSS is an agreement between undertakings engaged in economic activity aimed to make profit that has at its object or effect to prevent, restrict or distort competition within the internal market.

7.4.2. Interpretation and Application of Legal Provisions Relevant to VSS that Fall Within its Scope at National, EU, and WTO level

This section answers and discusses sub-question 3: to what extent does international and EU economic law leave room for interpreting and applying legal provisions to VSSs at national, EU, and WTO level? This dissertation shows that the extent to which international and EU economic law leaves room to interpret and apply legal provisions to VSSs depends on legal interpretation of the proportionality of the trade restriction by the VSSs to achieve a sustainability objective. The exercise of this proportionality test varies from case to case, from jurisdiction to jurisdiction and according to which goal it is applied.[655] In this

[652] EU Food Information Regulation, n 99.

[653] Article 2(2)(a) FIR.

[654] Du (2015), n 460; Howse (2015), n 457.

[655] See e g for EU Law: Tor Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal; also Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999).

dissertation, the proportionality test was discussed in the context of EU consumer law, EU fundamental rights law, WTO law, and EU competition law.

In the context of EU consumer law, the room for interpretation and application lies within the margin of discretion left by the ECJ to national authorities in the legal assessment of whether commercial information is misleading *in concreto*. This margin of discretion follows from the proportionality principle which requires that actions by the EU and its Member States is proportionate, e.g. the action must (1) be a useful, suitable, or effective means of achieving a legitimate aim; (2) not be more restrictive than necessary to achieve that legitimate objective; (3) not have an excessive or disproportionate effect on the other interests.[656] Secondary legislation provides further regulation as to how national authorities should assess commercial information. Most relevant to this dissertation is that when companies use textual information such as "organic", "eco", and "bio" or the EU pictogram for organic agriculture on their food packaging while the food product does not comply with the EU Regulation on Organic Agriculture the margin of discretion left to the national authorities to assess whether such information is misleading is zero: these types of labels must be prohibited in all EU Member States.[657] Such would also be the case when a company claims to be a signatory to a code of conduct while this is not the case, displays other sustainability pictograms without having obtained the necessary authorisation, claims that a code of conduct has an endorsement from a public or other body which it does not have, or claims that its product has been approved, endorsed or authorised by a public or private body while this is not the case.[658]

In other circumstances that are relevant to this dissertation, the margin of discretion left to national courts to decide whether commercial information is misleading *in concreto* depends on the legal interpretation and application of the normative "average consumer" benchmark by the ECJ.[659] To guide national courts in the legal assessment of misleading information, the ECJ developed the normative "average consumer" benchmark as an expression of the proportionality test with regard to the interpretation of the free movement of goods,[660] which has later been taken up by secondary legislation.[661] Under this benchmark, the "average consumer" is considered "reasonably well informed and reasonably observant and circumspect", "taking into account social, cultural and linguistic

[656] De Burcá (1993), n 540.

[657] EC Regulation on Organic Agriculture, n 151, Articles 23 and 25.

[658] Annex 1(1)-(4) UCPD.

[659] See further on the margin of discretion left to national courts under the UCPD by the ECJ, Jules Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive' (2015) 52 Common Market Law Review.

[660] The ECJ has consistently used this wording since its judgment of 16 July 1998, *Gut Springheide*, n 47, at 37. Prior to this decision the Court had already referred to the "[r]easonably circumspect consumer" as yardstick, *Mars*, n .183, at 13: Franck and Purnhagen (2014) at 336.

[661] Such as EU Food Information Regulation, n 99.

factors".[662] Hence, for national courts to conduct a legal assessment of misleading information under the FIR, they have to interpret and apply the "average consumer" benchmark. This dissertation shows that when interpreting and applying the "average consumer" benchmark, national courts could use insights from consumer science. Such an understanding is in line with the general trend in the case law of the ECJ to leave open the possibility for Member States to use statistical evidence or any other suitable type of evidence to justify measures infringing the free movement of goods, where the "average consumer" benchmark is part of.[663] Furthermore, as the Lisbon Treaty has reinforced the consumer dimension of EU internal market law,[664] such insights from consumer science provide a better understanding of how consumers process information.

In the context of EU fundamental rights law, the room for interpretation and application lies within the margin of discretion left by the ECJ to EU and national courts in the legal assessment of whether a limitation to the fundamental right to freedom of expression on food labels, which is often the result of the application of EU secondary legislation,[665] is proportional. This requires a judicial review as to whether the EU secondary legislation hinders the exercise of the freedom of expression only to the extent necessary to achieve the public policy objective. This dissertation shows that the width of the margin of discretion in the legal assessment of limitations set by the EU is broader for commercial expression than political expression. Textual and visual information used by VSSs can only be considered commercial in nature under Article 11 CFR and not political. Therefore, the EU legislator has a wide margin of discretion with regard to the limits set to commercial expression (such as those used by VSSs), especially when the public policy objective the EU secondary legislation pursues is the protection of public health.[666]

In the context of WTO law, this dissertation shows that the room for interpretation and application of the SPS and TBT Agreement to private VSSs by the WTO judiciary lies within

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[662] See e.g., *Clinique*, n 47 and *Gut Springheide*, n 47.

[663] *Scotch Whiskey*, n 223, at 64-5 in conjunction with *Deutsche Parkinson Vereinigung*, n 223, at 35-6.

[664] See e.g. Article 12 TFEU and Article 38 CFR. See also Sybe De Vries, 'Consumer Protection and the EU Single Market Rules – The Search for the 'Paradigm Consumer' (2012) 4 Journal of European Consumer and Market Law 228, 236-8.

[665] Within the European Union many legally binding rules, mainly Regulations but also Directives, relate to information provided for on food packaging. Examples are EU Food Information Regulation, n 99; EC Regulation on Organic Agriculture, n 151;
EC Regulation on genetically modified food and feed, n 281; EC Regulation traceability and labelling of genetically modified organisms, n 281; EC Regulation on the nutrition and health claims made on foods, n 281; Regulation regarding the labelling of beef and beef products, n 281.

[666] Advocate General Jääskinen's opinion, *Novo Nordisk*, n 256, at 50. He refers to Alexy (2003), n 288, 440. Translation from Advocate General Jääskinen's opinion, *Novo Nordisk*, n 256, at 46. The cases are only accessible in French. See *Société de Conception de Presse et d'Edition et Ponson v France*, no 26935/05, ECtHR 6 March 2009; and *Hachette Filipacchi Presse Automobile and Dupuy v France*, app no 13353/05, ECtHR 5 March 2009: "Ainsi, des considérations primordiales de santé publique, sur lesquelles l'Etat et l'Union européenne ont d'ailleurs légiféré, peuvent primer sur des impératifs économiques, et même certains droits fondamentaux comme la liberté d'expression."; Advocate General Fennelly's opinion, *Germany v Parliament and Council*, n 262, at 160-1.

the interpretation and application of what constitutes "sufficient government involvement"[667] and what constitutes a "reasonable measure". These terms can be considered elements of the proportionality principle in WTO law.[668] When WTO Members are considered sufficiently involved with the VSS, the WTO Member would have an obligation of result, i.e. they have to ensure that private VSSs comply with the SPS or TBT Agreement in every single instance.[669] It is argued that WTO Members would only have such an obligation of result for private VSSs when the private VSS gains legal effect by means of public law.[670] In other instances, WTO Members only have an obligation to take reasonable measures as may be available to them to ensure that VSS-setters comply with the SPS or TBT Agreement. It is argued that this only puts an obligation of conduct on the WTO Member, meaning that only a level of effort by the Member is required. The responsibility WTO Members have for VSSs in which they are not sufficiently involved, is limited to soft instruments that do not have to *effectively* ensure compliance by the private standard-setter with the Agreements. Furthermore, specifically for TBT measures, the responsibility of the WTO Member for VSSs in which they are not sufficiently involved is limited as dispute settlement can only be invoked when a WTO Member considers that another Member has not achieved satisfactory results for such VSSs *and* that its trade interest are significantly affected.[671] This may especially set constraints on the degree of responsibility WTO Members have for private technical standards as such standards are not *de facto* mandatory and may only have a limited effect on the trade interest of the disputing Member.

In the context of EU competition law, the room for interpretation and application lies within the margin of discretion left by the ECJ and national courts to economic regulators in the legal assessment of the proportionality of a private sustainability agreement under Article 101 TFEU. When public authorities (either at EU or national level) would want to exempt a private sustainability agreement from competition scrutiny following the *Wouters* doctrine, a proportionality test needs to be conducted. To justify an anti-competitive private sustainability agreement under Article 101(3) TFEU, a proportionality test should also be conducted. This dissertation argues that to conduct the proportionality test under the *Wouters* doctrine and 101(3) TFEU, insights on the impact of the private sustainability agreement on EU human well-being should be taken into account for two reasons. First, the

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[667] WTO Panel, *Japan-Measures Affecting Consumer Photographic Film and Paper (Japan-Film)*, n 427, at 10.56; WTO Panel, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Argentina-Hides and Leather)*, n 427, at 11.18.

[668] Article 13 SPS Agreement, Articles 3 and 4 TBT Agreement. See on the proportionality principle in WTO law: Axel Desmedt, 'Proportionality in WTO Law' (2001) 4 Journal of International Economic Law 441.

[669] Gandhi , n 425, 874; Bohanes and Sandford , n 425, 186-7.

[670] Such a conclusion was similar in the ECJ *James Elliott* and *Fra.bo*. See *James Elliott Construction*, n 434 at 43; *Fra.bo*., n 435, at 32.

[671] Article 14(4) TBT Agreement.

overall aim of the European Union is to promote the well-being of its peoples (Article 3(1) TEU). Second, the ECJ rejects an overly economic notion of consumer welfare as the objective of competition rules, instead favouring that competition rules should improve a wider notion of well-being in the EU.[672] In both instances the type of "well-being" referred to includes the two components of human well-being: standard of living and quality of life. As such, human well-being includes objective factors (such as living conditions, income, health) and the subjective perception one has of them.[673] Human well-being, thus, does not only take into account economic values, but includes socio-technical, cultural and environmental values that will help humans to meet their fundamental needs.[674] Best practices demands that the EU and its Member States willing to exempt private sustainability agreements from competition scrutiny should combine insights from welfare economics, social and economic psychology, and moral philosophy to come to a more accurate estimation of the costs and benefits in terms of human well-being of the private agreement. A similar assessment is warranted under Article 101(3) TFEU. The use of any scientific method to estimate costs and benefits of an agreement requires answers to highly normative and political questions. It is argued that these normative and political questions reflect the difference between the *Wouters* doctrine and Article 101(3) TFEU. The *Wouters* doctrine leaves some margin of discretion to Member States to decide on the proportionality of a private agreement that pursues a legitimate aim solely articulated by the Member State by determining highly normative and political issues (e.g. the choice of a discount rate and/or capabilities). In other cases, i.e. when an undertakings pursues other legitimate aims, the European Commission would have such a margin of discretion.

7.4.3. Findings from Scientific Disciplines Informing the Doctrinal Analysis

This section answers and discusses sub-question 4: whether and to what extent could findings from other scientific disciplines inform the doctrinal analysis of the interpretation and application of international and EU economic law to VSSs? This dissertation shows that within the margin of discretion to assess the proportionality of the trade restriction of a VSS to achieve a sustainability objective there is much room for manoeuvre to include findings from other scientific disciplines to inform the doctrinal analysis of the interpretation and application of international and EU economic law to VSSs. In EU consumer law, EU fundamental rights law, and EU competition law, Member States are allowed to take the latest scientific insights into account in the legal assessment of the proportionality of the

[672] *GlaxoSmithKline*, n 585, at 64; *TeliaSonera Sverige*, n 550, 22.

[673] Eurostat, Quality of Life Indicators – Measuring quality of life, http://ec.europa.eu/eurostat/statistics-explained/index.php/Quality_of_life_indicators_-_measuring_quality_of_life (visited 27 February 2017).

[674] See Philip Smith and Manfred Max-Neef, *Economics Unmasked: From Power and Greed to Compassion and the Common Good* (Green Books 2011).

measure.[675] For EU consumer law and EU fundamental rights law insights from consumer science could inform the doctrinal analysis as to how consumers process information. Such insights provide further understanding of how the "real" consumer would perceive food information as opposed to how a *homo economicus* would perceive such information. By using insights from consumer science, the interpretation and application of the FIR and Article 11 CFR may further the potential of best practice VSSs to promote sustainable development by preventing that information on food products used by greenwashing VSSs negatively affects consumer perception towards the reliability and credibility of best practice VSSs.

In EU competition law, the EU commission and the national competition authorities have a wide margin of discretion to conduct an economic analysis.[676] When a public authority (either EU or national authorities) would exempt private sustainability agreements from competition scrutiny or justify such agreements, best practices demands that the public authority combines insights from welfare economics, social and economic psychology, and moral philosophy to come to a more accurate estimation of the impact of the VSSs on human well-being. These tools could also be used by undertakings in their self-assessment under EU competition rules. When using these insights awareness of the strengths and weaknesses is important, requiring a clarification of which approach and method would be most appropriate and when. Critically applying insights derived from welfare economics, economic and social psychology, and moral philosophy in the interpretation and application of EU competition law may further the potential of VSSs to promote sustainable development. Such insights prevent that private sustainability initiatives that effectively promote best practices are prohibited. As such, private sustainability agreements based on best practice VSSs are stimulated, while those based on greenwashing VSSs are discouraged.

In WTO law, although private VSSs, which are the most dominant type of VSSs, could in some cases be disciplined by WTO law through state responsibility, the effectiveness to discipline the trade-restrictive effects of private VSSs in such a way is limited. Insights from political science, more specifically insights from new governance theory,[677] would be more helpful to assess which role WTO Members could play to effectively incentivize private VSS-setters to comply with the WTO Agreements. Based on the insights from new governance

[675] See in this respect *Gut Springheide*, n 47, at 31; and *Scotch Whiskey*, n 223, at 64-5 in conjunction with *Deutsche Parkinson Vereinigung*, n 223, at 35-6.

[676] Marco Botta and Alexandr Svetlicinii, 'The Standard of Judicial Review in EU Competition Law Enforcement and Its Compatibility with the Right to a Fair Trial Under the EU Charter of Fundamental Rights' in Tanel Kerikmäe (ed), *Protecting Human Rights in the EU Controversies and Challenges of the Charter of Fundamental Rights* (Springer 2013).

[677] See scholars using new governance approaches to regulation Lobel , n 63; Trubek and Trubek (2007), n 63. For new governance in international law and global governance, see Abbott and Snidal (2009), n 20. See generally Sabel and Simon (2006), n 63, 395.

theory I propose that WTO Members willing to incentivize private standard-setters to apply WTO principles, draft procedural best practice guidelines in collaboration with IGOs and private multi-stakeholder standard-setting bodies to simplify the certification process and to make it easier for farmers and producers to comply with the private standard. Such guidelines ensure 'thick stakeholder consent', which may be normatively superior to 'thin State consent', which follows from the WTO Agreements, as it may be considered more legitimate and effective.[678] Such procedural guidelines may incentivize and guide VSSs to incorporate best practices, preventing the pitfalls associated with multi-stakeholder VSSs and avoiding greenwashing practices.

7.5. Limitations and Contributions

As it was found that mostly private actors are involved in VSS-setting, this analysis is part of an overarching question analyzing the regulatory space of private actors to regulate sustainable development through decentered regulation. In practice, mainly EU competition law, EU consumer law, EU fundamental rights law, and WTO law are inhibiting the potential of VSSs to promote sustainable development due to the noncritical application of normative assumptions derived from neo-classical law and economics. For that reason, these legal frameworks were examined. Theoretically, private actors operating in the EU may not only be subject to VSSs or the legislative provisions analyzed. They may also be subject to many other legislative provisions such as EU company law, tax systems, product requirements for state aid or public procurement, manufacturing rules, and EU internal market legislation as stipulated by the fundamental freedoms. Further research may be necessary to examine whether these legislative provisions can be interpreted and applied to private actors, such as private standard-setters and producers, with a view to promote sustainable development.[679] Furthermore, international investment agreements (IIAs)[680] and international trade agreements (ITAs)[681] are also increasingly including sustainable development as an overarching objective. Further research could provide clarification as to

[678] Pollack and Shaffer (2012), n 510, 519. 'Thick stakeholder consent' is slowly emerging as a 'code of good practice' in the standard-setting world and beyond: ISEAL Code of Good Practice for Setting Standards http://www.isealalliance.org/code accessed 21 April 2017. Forest Stewardship Council, Rainforest Alliance, the Marine Stewardship Council, the Fair Trade Labelling Organization, are members of ISEAL and have to comply with this code of good practice.

[679] Such research has already partly been taken up by Ankersmit (2017), n 521 and Partiti (2016), n 431.

[680] See for the role of IIAs in fostering sustainable development, Wolfgang Alschner and Elisabeth Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development ' in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013).

[681] For example the EU concluded an Economic Partnership Agreement (EPA) with the Cariforum group of States, which provides in Article 1 that its first objective is "to eradicate poverty and establish a trade partnership consistent with the objective of sustainable development". In Article 3, the Parties reaffirm 'that the objective of sustainable development is to be applied and integrated at every level of their economic partnership". See Economic Partnership Agreement between the Cariforum States and the European Community and Its Member States, signed on 15 October 2008, *Official Journal of the European Union* (30 October 2008), L 289/I/5, Article 1(a) and Article 3(1). See further on the objective of sustainable development in EPAs: Henning Grosse Ruse-Khan, ' A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond' (2010) 13 Journal of International Economic Law 139.

how the objective of sustainable development could be aligned with the interpretation and application of these legislative provisions to private actors.

Although further research may be required to get a broader understanding of how the objective of sustainable development could be aligned with the legal interpretation and application of legislative provisions to private actors, this dissertation made important contributions to legal research and methodology, and legal and policy practice in the application and interpretation of international and EU economic law to VSSs. I will briefly discuss these contributions below.

7.5.1. Contributions to Legal Research and Methodology

This dissertation started from the premise that the coexistence of international and EU economic law and VSSs results in an interaction and competition for regulatory space.[682] Applying the analytical concept of "regulatory space" in the context of sustainable development is important as practice shows that the interpretation and application of international and EU economic law may inhibit the regulatory space of VSSs to promote sustainable development when legal reasoning is based on the noncritical application of normative assumptions derived from neoclassical theory. This is problematic as sustainable development is an overarching objective in international and EU economic law.[683]

To prevent international and EU economic law to inhibit the potential of VSSs to promote sustainable development due to the noncritical application of the normative assumptions associated with neoclassical theory, legal scholars need to get a firm grasp on how to apply relevant research from the social sciences to legal research, and be aware of the assumptions built into the social sciences models used.[684] The case study analysis conducted within this dissertation serves as a showcase as to how insights from the social sciences

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[682] Karl Ladeur, 'The State in International Law' in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart Publishing 2011).

[683] WCED (1987), n 66; Johannesburg Declaration on Sustainable Development (2002), n 69; ICJ, *Case concerning the Gabcikovo – Nagymaros Project (Hungary/Slovakia)*, n 70, at 140; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, n 71, at 177; Preamble to Treaty on European Union (TEU); Article 3 TEU; Article 11 TFEU; Preamble to the Marrakech Agreement; WTO Appellate Body *US-Shrimp*, n 17, at 129 and 153; 2001 Doha Ministerial Declaration, n 17.

[683] The preamble to the Treaty on European Union (TEU) states the determination "to promote economic and social progress for their peoples, taking into account the principle of sustainable development"; Article 3 TEU states that the Union's "aim is to promote (...) well-being of its peoples, which can arguably be equated with sustainable development or at least is an important component of it (see e.g. Stiglitz, Sen and Fitoussi (2009)); the preamble to the Charter on Fundamental Rights (CFR) states that the EU "seeks to promote balanced and sustainable development; preamble to the 1994 Marrakesh Agreement Establishing the WTO recognising sustainable development as an overarching objective. The importance of this objective was confirmed by the WTO Members in the 2001 Doha Declaration (2001 Doha Ministerial Declaration, n 17); See also WTO Appellate Body *US-Shrimp*, n 17.

[683] Article 2(2) SPS Agreement.

[684] Joel Handler and others, 'A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences' (2005) Wisconsin Law Review 479, 489.

could be integrated in doctrinal analysis to align the objective of sustainable development with the interpretation and application of international and EU economic law to VSSs.

Integrating scientific insights from social sciences into legal analysis has the potential to improve legal interpretation and application by increasing the information base. In such a way legal decisions will be better informed, provided that the insights are used with the proper understanding of their strengths and weaknesses. A proper understanding and integration of different scientific insights from the social sciences are especially needed in a time where sustainable development has become an overarching aim of WTO and EU law,[685] while it is unclear how this aim can be operationalized.[686]

7.5.2. Contributions to Legal and Policy Practice

This dissertation uses findings from social sciences to inform the doctrinal analysis in the interpretation and application of international and EU economic law to VSSs. When properly applied, these findings are better equipped to inform the doctrinal analysis of misleading expression on food packaging, to examine the anti-competitive effect of private sustainability initiatives, and to incentivize VSSs not to set barriers to trade unnecessary to achieve a sustainability objective, than relying on a noncritical application of neoclassical law and economics.

More specifically, for the doctrinal analysis of misleading expressions on food packaging, this dissertation shows how insights from consumer science could inform national authorities to improve labelling as used by private VSS-setters to reduce consumer confusion. When national authorities only prohibit commercial information on food labels that gives a misleading impression to the *homo economicus*, companies may free-ride on sustainability labels that mislead the "real" consumer. This may have a negative effect on the potential of best practice VSSs to promote sustainable development. National authorities are, therefore, advised to take insights from consumer science into account in

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[685] WCED (1987), n 66; Johannesburg Declaration on Sustainable Development (2002), n 69; ICJ, *Case concerning the Gabcikovo – Nagymaros Project (Hungary/Slovakia)*, n 70, at 140; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, n 71, at 177; Preamble to Treaty on European Union (TEU); Article 3 TEU; Article 11 TFEU; Preamble to the Marrakech Agreement; WTO Appellate Body *US-Shrimp*, n 17, at 129 and 153; 2001 Doha Ministerial Declaration, n 17.

[685] *See* the preamble to the Treaty on European Union (TEU) stating the determination "to promote economic and social progress for their peoples, taking into account the principle of sustainable development"; Article 3 TEU states that the Union's "aim is to promote (...) well-being of its peoples, which can arguably be equated with sustainable development or at least is an important component of it (see e.g. Stiglitz, Sen and Fitoussi (2009)); the preamble to the Charter on Fundamental Rights (CFR) states that the EU "seeks to promote balanced and sustainable development; preamble to the 1994 Marrakesh Agreement Establishing the WTO recognising sustainable development as an overarching objective. The importance of this objective was confirmed by the WTO Members in the 2001 Doha Declaration (2001 Doha Ministerial Declaration, n 17.). See also WTO Appellate Body *US-Shrimp*, n 17.

[685] Article 2(2) SPS Agreement.

[686] Ruse-Khan (2010), n 681.

the legal assessment of whether a food packaging gives a misleading impression to the "average consumer" as developed by the ECJ.

For assessing the anti-competitive effect of private sustainability initiatives, this dissertation provides tools to economic regulators in the legal assessment of the proportionality of private sustainability agreements under EU competition law. Solely relying on doctrinal analysis or on approaches derived from neoclassical law and economics may fail to accurately estimate the impact of such agreements on human well-being. This is problematic as human well-being is at the core of EU competition law. Additional insights from social and economic psychology as well as moral philosophy should be included in the legal assessment. In doing so, Member States are advised to clarify their stance on the normative assumptions and political questions underlying these social sciences approaches. Such a stance is necessary in order to use insights from social sciences as an addition to the information base in the legal assessment of the proportionality of private sustainability agreements.

As for incentivizing VSSs not to set barriers to trade unnecessary to achieve a sustainability objective, this dissertation provides an alternative approach to WTO Members to more effectively ensure that private VSSs comply with the SPS or TBT rules. WTO Members worried about the trade-restrictive nature of private VSSs are advised to use WTO law scrutiny only when the private VSSs gains legal effect by means of public law. In other circumstances, WTO law scrutiny would most likely not be effective due to the limited responsibilities of WTO Members for such VSSs. In these instances, WTO Members are advised to draft procedural best practice guidelines in collaboration with IGOs and private multi-stakeholder standard-setting bodies to more effectively incentivize private VSSs to ensure best practices by complying with WTO provisions.

The approaches proposed will enable public authorities to reduce the inhibitive effect of the application and interpretation of international and EU economic law to VSSs that emerged due to the noncritical application of neoclassical law and economics. When lawyers, judges, and economic regulators are willing to take the sustainable development objective of EU and WTO law seriously, they should integrate the relevant insights from social sciences into the interpretation and application of international and EU economic law when making normative assumptions.

Appendix

Appendix 1. 65 visual representations of sustainability on food labels on the Dutch market.

References

Table of Cases

EU Courts

Case C- 56/64 *Etablissements Consten Sàrl v Commission* [1966] ECLI:EU:C:1966:41

Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114

Case C-30/77 *Regina v Bouchereau* [1977] ECLI:EU:C:1977:172

Case C-120/78 *Cassis de Dijon* [1979] ECLI:EU:C:1979:42

Case C-136/79 *National Panasonic* [1980] ECLI:EU:C:1980:169

Case C-107/84 *Commission v Germany* [1985] ECLI:EU:C:1985:332

Case C-178/84 *Commission v Germany* [1987] ECLI:EU:C:1987:126

Case C-265/87 *Schrader* [1989] ECLI:EU:C:1989:303

Case C-5/88 *Wachauf* [1989] ECLI:EU:C:1989:321

Case C-362/88 *GB-INNO-BM* [1990] ECLI:EU:C:1990:102

Case C-238/89 *Pall* [1990] ECLI:EU:C:1990:473

Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECLI:EU:C:1991:161

Advocate General Tesauro's opinion, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1992] ECLI:EU:C:1992:358

Case C-126/91 *Yves Rocher* [1993] ECLI:EU:C:1993:191

Case C-315/92 *Clinique* [1994] ECLI:EU:C:1994:34

Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1994] ECLI:EU:C:1994:7

Case C-449/93 *Rockfon A/S tegen Specialarbejderforbundet i Danmark* [1995] ECLI:EU:C:1995:420

Case C-456/93 *Langguth* [1995] ECLI:EU:C:1995:78

Case C-470/93 *Mars* [1995] ECLI:EU:C:1995:224

Case C-265/95 *Commission v France* [1997] ECLI:EU:C:1997:595

Case C-343/95 *Diego Cali & Figli* [1997] ECLI:EU:C:1997:160

Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac and Others* [1998] ECLI:EU:C:1998:152

Case C-210/96 *Gut Springheide* [1998] ECLI:EU:C:1998:369

Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikringsselskabet Codan* [1998] ECLI:EU:C:1998:617

Advocate General Jacobs's opinion,C-67/96, Joined Cases C-115/97 to C-117/97, and Case C-219/97 *Albany, Brentjens, Maatschappij* [1999] ECLI:EU:C:1999:28

Case C-220/98 *Lifting* [1999] ECLI:EU:C:2000:8

Case C-465/98 *Darbo* [2000] ECLI:EU:C:2000:184.

Case C-292/97 *Karlsson and Others* [2000] ECLI:EU:C:2000:202

Case C-35/98 *Verkooijen* [2000] ECLI:EU:C:2000:294

Advocate General Fennelly's opinion, Case C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:324

Case C 366/98 *Geffroy* [2000] EU:C:2000:430

Case C-309/99 *Wouters* [2002] ECLI:EU:C:2002:98

Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603

Case C-436/00 *X and Y* [2002] ECLI:EU:C:2002:704

Case C-257/00 *Givane and others* [2003] ECLI:EU:C:2003:8

Case C-152/01 *Kyocera* [2003] ECLI:EU:C:2003:623

Case C-341/01 *Plato Plastik Robert Frank* [2004] ECLI:EU:C:2004:254

Case C-239/02 *Douwe Egberts v Westrom Pharma* [2004] ECLI:EU:C:2004:445

Case C-220/03 *ECB v Germany* [2005] ECLI:EU:C:2005:748

Advocate General Geelhoed's opinion,Case C-301/04 P *Commission v SGL Carbon AG* [2006] ECLI:EU:C:2006:53

Case C-519/04 P *Meca-Medina* [2006] ECLI:EU:C:2006:492

Case C-238/05 *ASNEF-EQUIFAX* [2006] ECLI:EU:C:2006:734

Case T-289/01 *DSD* [2007] ECLI:EU:T:2007:155

Case C-280/06 ETI and Others *ETI and Others* [2007] ECLI:EU:C:2007:775

Case C-263/06 *Carboni e Derivati* [2008] ECLI:EU:C:2008:128

Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECLI:EU:C:2008:758

Case C-465/07 *Elgafaji* [2009] ECLI:EU:C:2009:94

Case C-350/07 *Kattner Stahlbau* [2009] ECLI:EU:C:2009:127

Case C-446/07 *Severi* [2009] EU:C:2009:530

Case-501/06P *GlaxoSmithKline* [2009] ECLI:EU:C:2009:610

Case C-188/10 *Melki and Abdeli* [2010] ECLI:EU:C:2010:363

Case C-409/06 *Winner Wetten* [2010] ECLI:EU:C:2010:503

T-23/09 *CNOP and CCG v Commission* [2010] ECLI:EU:T:2010:452

Case C-439/08 *VEBIC* [2010] ECLI:EU:C:2010:739

Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811

Advocate General Jääskinen's opinion, Case C-249/09 *Novo Nordisk* [2011] ECLI:EU:C:2010:616

Case C-52/09 *TeliaSonera Sverige* [2011] ECLI:EU:C:2011:83

Advocate General Mazak's opinion, Case C-439/09 [2011] EU:C:2011:113

Case C-368/10 *Commission v the Netherlands* [2012] ECLI:EU:C:2012:284

Case C-171/11 *Fra.bo* [2012] ECLI:EU:C:2012:453

Case C-544/10 *Weintor* [2012] ECLI:EU:C:2012:526

Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756

Case C-283/11 *Sky Österreich* [2013] ECLI:EU:C:2013:28

Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105

Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECLI:EU:C:2013:127

Case C-334/12 *Réexamen Arango Jaramillo* [2012] ECLI:EU:C:2013:134

Case C-136/12 *Consiglio nazionale dei geologi v Autorita Garante della Concorrenza e del Mercato* [2013] ECLI:EU:C:2013:489

Case C-184/13 *Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti* [2014] ECLI:EU:C:2014:2147;

Case C-26/13 *Kásler* [2014] ECLI:EU:C:2014:282

Case C-195/14 *Teekanne* [2015] ECLI:EU:C:2015:361

Case C-333/14 *Scotch Whiskey* [2015] ECLI:EU:C:2015:845

Case C-148/15 *Deutsche Parkinson Vereinigung* [2016] ECLI:EUC:2016:776

Case C-613/14 *James Elliott Construction* [2016] ECLI:EU:C:2016:821

GATT/WTO

GATT Dispute Settlement, *Japan-Semiconductors* [4 May 1988] L/6309 - 35S/116

WTO Panel, *Japan-Measures Affecting Consumer Photographic Film and Paper* (*Japan-Film)* [19 March 1998] WT/DS44/R

WTO Appellate Body *United States-Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)* [12 October 1998] WT/DS58/AB/R

WTO Panel, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Argentina-Hides and Leather)* [19 December 2000] WT/DS155/R,

WTO Appellate Body, *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US-Wheat Gluten)* [22 December 2000] WT/DS166/AB/R

WTO Appellate Body, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)* [5 April 2001] T/DS135/AB/R

WTO Appellate Body, United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US-Hot-Rolled Steel) [24 July 2001] WT/DS184/AB/R

WTO Appellate Body, *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand (US-Lamb)* [1 May 2001] WT/DS177/AB/R, WT/DS178/AB/R

WTO Appellate Body, *United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US-Line Pipe)* [15 February 2002] WT/DS202/AB/R

WTO Appellate Body, *European Communities-Trade Description of Sardines (EC-Sardines)* [26 September 2002] WT/DS231/AB/R

WTO Panel, Mexico-Measures Affecting Telecommunications Services (Mexico-Telecoms) [2 April 2004] WT/DS204/R

WTO Appellate Body, *United States-Measures Affecting Cross-Border Supply of Gambling and Betting Services (US-Gambling)* [7 April 2005] WT/DS285/AB/R

WTO Appellate Body, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts (EC-Chicken Cuts)* [12 September 2005] WT/DS269/AB/R, WT/DS286/AB/R

WTO Appellate Body, Australia-Measures Affecting the Importation of Apples from New Zealand (Australia–Apples) [29 November 2010] WT/DS367/AB/R,

WTO Panel, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II)* [15 September 2011] WT/DS381/R

WTO Appellate Body, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II)* [16 May 2012] WT/DS381/AB/R

WTO Appellate Body, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products (EC-Seal Products)* [18 June 2014] WT/DS400/AB/R

ECHR

Handyside v UK, app no 5493/72, ECtHR 7 December 1976, 1 EHRR 737

Silver v UK, app no 5947/72, ECtHR 25 March 1983

Barthold v Germany, app no 8734/79, ECtHR 25 March 1985, 7 EHRR 383

Olsson and Olsson v Sweden, app no 10465/83, ECtHR 24 March 1988, 11 EHRR 259

Müller and ors v Switzerland, app no 10737/84, ECtHR 24 May 1988, 13 EHRR 212

Markt Intern Verlag GmbH and Beermann v Germany, app no 10572/83, ECtHR 20 November 1989, 12 EHRR 161

Groppera Radio AG v Switzerland, app no 10890/84, ECtHR 28 March 1990, 12 EHRR 321

Autronic AG v Switzerland, app no 12726/87, ECtHR 22 May 1990, A/178, 12 EHRR 485

Observer and Guardian v UK (1992), app no 13585/88, ECtHR 26 November 1991, 14 EHRR 153

Casado Coca v Spain, app no 15450/89, ECtHR 24 February 1994, 18 EHRR 1

Goodwin v United Kingdom, app no 17488/90, ECtHR 1 March 1994, 22 EHRR 123

Otto-Preminger-Institut v Austria, app no 13470/87, ECtHR 20 September 1994, 17 EHRR

Jersild v Denmark, app no 15890/89, ECtHR 23 September 1994, 19 EHRR 1

Hertel v Switzerland Reports, app no 25181/94, ECtHR 25 August 1999, 28 EHRR 534

Verein gegen Tierfabrieken v Switzerland, app no 24699/94, ECtHR 28 September 2001

Société de Conception de Presse et d'Edition et Ponson v France, app no 26935/05, ECtHR 6 March 2009

Hachette Filipacchi Presse Automobile and Dupuy v France, app no 13353/05, ECtHR 5 March 2009

ICJ

ICJ, *International Status of South-West Africa, Dissenting Opinion of Judge de Visscher* [1950] ICJ Reports 1950

ICJ, *Case Concerning Right of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] ICJ Reports 1952

ICJ, *Ambatielos Case (Greece v. United Kingdom) (Merits: Obligation to Arbitrate), Joint Dissenting Opinion of Judges McNair, Basdevant, Klaestad, and Read* [1953] ICJ Reports 1953

ICJ, *Military and Paramilitary Activities in against Nicaragua (Nicaragua v. United States* [27 June 1986]

ICJ, *Case concerning the Gabcikovo – Nagymaros Project (Hungary/Slovakia)* [25 September 1997] ICJ Reports 1997

ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [20 April 2010] ICJ Report 2010

USA courts

Jacobson v Massachusetts, 197 U.S. 11, 26 (1905).

Court in Valentine v Chrestenen, 316 U.S. 52 (1942)

U.S. *v* 40 Cases, More or Less, Pinocchio Brand 75% Corn, Peanut Oil and Soya Bean Oil Blended with 25% Pure Olive Oil, 289 F.2d 343, 345 (2d Cir. 1961)

Pittsburgh Press Co. v Human Relations Comm'n, 413 U.S. 376, 388 (1973)

Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)

West Virginia Bd. of Education v Barnette, 319 U.S. 624, 642 (1943); Wooley v Maynard, 430 U.S. 795 (1977)

First Nat'l Bank of Boston v Bellotti, 435 U.S. 765, 778 (1978)

Friedman v Rogers, 440 U.S. 1, 15-16 (1979)

Carey v Brown, 447 U.S. 455, 461 (1980)

Central Hudson Gas & Electric v Public Service Comm'n of New York, 447 U.S. 557, 561 (1980)

Haig v Agee, 453 U.S. 280 (1981)

In re R.M.J., 455 U.S. 191, 203 (1982)

Perry Ed. Ass'n v Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)

Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985)

Board of Trustees v Fox, 492 U.S. 469, 480 (1989)

Edenfield v Fane, 507 U.S. 761 (1993)

Capitol Square Review and Advisory Bd. v Pinette, 515 U.S. 753, 761 (1995)

44 Liquormart, Inc. v Rhode Island, 17 U.S. 484 (1996)

Amestoy [92 F.3d 67 (2nd Cir. 1996)

Pearson v Shalala, 164 F.3d 650, 657 (D.C. Cir. 1999)

Pearson I [164 F.3d 650 (D.C. Cir. 1999), rehearing den., 172 F.3d 72 (D.C. Cir. 1999)

Pearson v Shalala, 130 F. Supp. 2d 105 (D.D.C. 2001)

Pearson v Thompson, 141 F. Supp. 2d 105 (D.D.C. 2001)

German Supreme Constitutional Court, 102 BverfGE 347, 359-60 (2001)

Whitaker v Thompson [48 F. Supp. 2d 1 (D.D.C. 2002)

Nike Inc. v Marc Kasky, 123 S Ct 2554 (2003)

Boggs [622 F.3d 628 (6th Cir. 2010)

Discount Tobacco City & Lottery, Inc. v United States, 674 F.3d 509 (6th Cir. 2012)
R*.J. Reynolds Tobacco Co. v Food and Drug Administration*, 696 F.3d 1205 (D.C. Cir. 2012)

EU Commission decisions

DSD, OJ 2001 L 319/1

Exxon/Shell, OJ 1994 L 144/20;

CECED, OJ 2000 L 187/47

CECED Dishwashers (COMP.F.1/37.894) Notice published pursuant to Article 19(3) of Council Regulation No 17 [2001] OJ C250/2

CECED Water-Heaters (COMP.F.1/37.893) Notice published pursuant to Article 19(3) of Council Regulation No 17 [200 l] OJ C250/4

Other cases

Canadian Supreme Court, *Ford v A-G of Quebec* [1988] 2 SCR 712

Arbitral Award, Eureko B.V. v. Republic of Poland, [2005] 12 ICSID Rep 335

Case Concerning the Auditing of Account between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention of 3 December 1976 on the Protection of the Rhine against Pollution by Chlorides, PCA Award Series (2008)

Beslissing van de Reclame Code Commissie, *Greenpeace v DUPAN* [2011] Dossier 2011/00590

<u>Table of Legislation</u>

EU Regulations

Regulation (EC) 1760/2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products [2000] OJ L 204.

Council Regulation (EC) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002]OJ L 1, 4.1.2003

Regulation (EC) 178/2002 laying down the general principles and requirements of food law [2002] OJ L 31

Regulation (EC) 1829/2003 on genetically modified food and feed, OJ L 268

Regulation (EC) 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms [2003] OJ L 268

Regulation (EC) 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L 165.

Regulation (EC) 1924/2006 on the nutrition and health claims made on foods

Council Regulation (EC) 834/2007 on organic production and labelling of organic products (EC Regulation on Organic Agriculture) [2007] OJ L 189

Regulation (EU) 1169/2011 on the provision of food information to consumers (EU Food Information Regulation) [2011] OJ L 304

Regulation (EU) 609/2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control [2013] OJ L 181

EU Directives

Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consume [1978] OJ L 33

Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [2000] OJ L 109)

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373

Directive 2005/29/EC of11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149

EU documents

European Commission, “Notice: Guidelines on the application of Article 81(3) of the Treaty” [2004] OJ C 101/97, 2004

Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303

Commission Communication, EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuff [2010] OJC 341

European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" [2011] OJ C11/1

Commission Communication. A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM/2011/0681 final;

European Commission, “Better Regulation Guidelines”, Strasbourg, 19.5.2015.

GATT/WTO Documents

GATT docs, ‘Standards; packaging and labelling; marks of origin; background note by the Secretariat, MTN/NTM/W/5, circulated 21 April 1975

Committee on Trade and Environment and Committee on Technical Barriers to Trade, ‘Negotiating history of the coverage of the agreement on technical barriers to trade with regard to labelling requirements, voluntary standards, and processes and production methods unrelated to product characteristics, WT/CTE/W/10, G/TBT/W/11, circulated 29 August 1995.

2001 Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, Adopted 14 November 2001.

Committee on Sanitary and Phytosanitary Measures, ‘Summary of the Meeting Held on 29-30 June 2005’, G/SPS/R/37/Rev.1, circulated 18 August 2005

Committee on Sanitary and Phytosanitary Measures, ‘Private standards and the SPS Agreement, G/SPS/GEN/746, circulated 24 January 2007a.

Committee on Sanitary and Phytosanitary Measures, ‘Private Industry Standards. Communication from Saint Vincent and the Grenadines’, G/SPS/GEN/766, circulated 28 February 2007

Gretchen Stanton and Digby Gascoigne, Committee on Sanitary and Phytosanitary Measures, ‘Private voluntary standards within the WTO multilateral Framework. Submission by the United Kingdom.’, G/SPS/GEN/802, circulated 9 October 2007

Committee on Technical Barriers to Trade, 'Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4,' G/TBT/26, circulated 13 November 2009

Committee on Sanitary and Phytosanitary Measures, ‘Report of the Co-stewards of the Private Standards E-working group on Action 1 (G/SPS/55)’, G/SPS/W/276, circulated 18 March 2014

Committee on Sanitary and Phytosanitary Measures, ‘Second Report of the Co-stewards of the Private Standards E-working group on Action 1 (G/SPS/55)’, G/SPS/55, circulated 29 September 2014.

Committee on Sanitary and Phytosanitary Measures, ‘Report of the Co-stewards of the private standards e-working group to the March 2015 meeting of the SPS committee on Action 1 (G/SPS/55), G/SPS/W/283, circulated 17 March 2015

Committee on Technical Barriers to Trade, 'Seventh Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4,’ G/TBT/37, circulated 3 December 2015

Committee on Technical Barriers to Trade, ‘Minutes of the meeting of 15-16 June 2016, G/TBT/M/69, circulated 22 September 2016
WTO 2015 News Items, ‘Sanitary and phytosanitary measures: formal meeting’

Committee on Sanitary and Phytosanitary Measures, 'Summary of the meeting of 27 - 28 October 2016 - Note by the Secretariat', G/SPS/R/84, circulated 22 December 2016;

Committee on Technical Barriers to Trade, 'Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, G/TBT/1/Rev.13, circulated 8 March 2017

Other legislation

Economic Partnership Agreement between the Cariforum States and the European Community and Its Member States, signed on 15 October 2008, *Official Journal of the European Union* (30 October 2008), L 289/I/5

Johannesburg Declaration on Sustainable Development, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002, A/CONF.199/20, New York, UN, 2002;

World Summit on Sustainable Development (WSSD) 2002. Plan of Implementation. Johannesburg: United Nations.

Bibliography

Abbott K and Snidal D, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) [42] VanderBilt Journal of Transnational Law 501

Adler M and Posner E, 'Happiness Research and Cost-Benefit Analysis' (2008) 37 The Journal of Legal Studies 253

Akerlof GA, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 The Quarterly Journal of Economics 488

Albersmeier F, Schulze H and Spiller A, 'System Dynamics in Food Quality Certifications: Development of an Audit Integrity System' (2010) 1 International Journal on Food Systems Dynamics 69

Alexy R, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 Ratio Juris 433

Alschner W and Tuerk E, 'The Role of International Investment Agreements in Fostering Sustainable Development' in Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013)

Alvarez G and Hagen Ov, 'The Impacts of Private Standards on Producers in Developing Countries,' (2011) International Trade Centre (ITC), Literature Review Series on the Impacts of Private Standards; Part II

Anand P and Hees Mv, 'Capabilities and Achievements: An Empirical Study' (2006) 35 Journal of Socio-Economics 268

Anand P and others, 'The Development of Capability Indicators' (2009) 10 Journal of Human Development and Capabilities 125

Anders S and Caswell J, 'Standards as Barriers Versus Standards as Catalysts: Assessing the Impact of HACCP Implementation on U.S. Seafood Imports' (2009) 91 American Journal of Agricultural Economists 310

Ankersmit LJ, *Green Trade and Fair Trade in and with the EU. Process-based Measures within the EU Legal Order* (Cambridge University Press 2017)

Appleby MC, Weary DM and Sandoe P (eds), *Dilemmas in Animal Welfare* (CABI Publishing 2014)

Arcuri A, 'Back to the Future: US-Tuna II and the New Environment-Trade Debate' (2012) 3 European Journal of Risk Regulation 177

Arcuri A, 'The TBT Agreement and private standards' in Epps and Trebilcock (eds), *Research Handbook on WTO and Technical Barriers to Trade* (Edward Elgar Publishing 2014)

Auriol E and Schilizzi S, 'Quality signaling through certification Theory and an application to agricultural seed markets' (2003) IDEI Working Papers

Ayres I and Braithwaite J, *Responsive Regulation* (Oxford University Press 1992)

Baldwin R and Fernandez A, *Is Regulation Right?* (CARR Discussion Paper 0 (Launch Paper), 2000)

Barendt E, 'Freedom of Expression' in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2011)

Beck U, *Risk Society. Towards a New Modernity* (Sage Publications 1992)

Beck U, *The Brave New World of Work* (John Wiley & Sons 2014 2014)

Bengoetxea J, Soriano LM and McCormick N, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Búrca and Weiler (eds), *The European Court of Justice* (Oxford University Press 2001)

Bernhardt R, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 German Yearbook of International Law 11

Bernstein S and Hannah E, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space ' (2008) 11 Journal of International Economic Law 575

Biondi A, Eeckhout P and Ripley S, *EU Law after Lisbon* (Oxford University Press 2012)

Black J, 'Talking about Regulation' (1998) 77 Public Law

Black J, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy

Bohanes J and Sandford I, 'The (untapped) potential of WTO rules to discipline private trade-restrictive conduct. Paper presented at the Society of International Economic Law Inaugural Conference. Geneva, 15-17 July 2008' (2008) Online Proceedings Working Paper No 56/08

Boström M, 'A missing pillar? Challenges in theorizing and practicing social sustainability: introduction to the special issue' (2012) 8 Sustainable Scientific Practice Policy 3

Botta M and Svetlicinii A, 'The Standard of Judicial Review in EU Competition Law Enforcement and Its Compatibility with the Right to a Fair Trial Under the EU Charter of Fundamental Rights' in Kerikmäe (ed), *Protecting Human Rights in the EU Controversies and Challenges of the Charter of Fundamental Rights* (Springer 2013)

Brécard D and others, 'Determinants of demand for green products: An application to eco-label demand for fish in Europe.' (2009) 69 Ecological Economics 115

Bronsteen J, Buccafusco C and Masur J, 'Well-being analysis vs. Cost-benefit analysis' (2013) 62 Duke Law Journal 1603

Buchanan J, 'Opportunity Cost' in *The New Palgrave: A Dictionary of Economics* (3rd edn, 1987)

Cafaggi F, 'New Foundations of Transnational Private Regulation' (2011) 38 Journal of Law and Society 20

Cafaggi F, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 Fordham International Law Journal 1557

Cafaggi F and Iamiceli P, 'Supply Chains, Contractual Governance and Certification Regimes' (2013) 37 European Journal of Law and Economics 131

Calhoun C and Derluguian GM (eds), *The Deepening Crisis: Governance Challenges after Neoliberalism* (NYU Press 2011)

Cannie H and Voorhoof D, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection' (2011) 29 Netherlands Quarterly of Human Rights 54

Casey D, 'Disintegration: Environmental Protection and Article 81 EC' (2009) 15 European Law Journal 362

Cashore B, 'Legitimacy and the Privatisation of Governmental Governance: How NSMD Governance Systems Gain Rule-Making Authority' (2002) 15 Governance: An International Journal of Policy, Administration and Institution

Cave J, Marsden C and Co-Regulation SSOfaEoIS-a, *Options for and Effectiveness of Internet Self- and Co-Regulation* (RAND Europe 2008)

Chang SW, 'GATTing a Green Trade Barrier. Eco-Labelling and the WTO Agreement on TBT' (1997) 31 Journal of World Trade 137

Chernev A and Carpenter G, 'The Role of Market Efficiency Intuitions in Consumer Choice: A Case of Compensatory Inferences' (2001) 38 Journal of Marketing Research 349

Cheyns E, 'Multi-stakeholder Initiatives for Sustainable Agriculture: Limits of the 'Inclusiveness' Paradigm' in Ponte, Gibbon and Vestergaard (eds), *Governing through Standards: Origins, Drivers and Limitations* (Palgrave MacMillan 2011)

Claassen R and Gerbrandy A, 'European Competition Law: From a Consumer Welfare to a Capability Approach' 12 Utrecht Law Review 1

Cohen J, *Statistical Power Analysis for the Behavioral Sciences* (2nd edn, Hillsdale: Lawrence Erlbaum Associates 1988)

Connelly S, 'Mapping Sustainable Development as a Contested Concept' (12) 3 Local Environment 259

Crowley M and Howse R, 'Tuna-Dolphin II: a legal and economic analysis of the Appellate Body Report' (2014) 13 World Trade Review 321

Dam YV and Jonge JD, 'The Positive Side of Negative Labelling. 38(1): 19-38.' (2015) 38 Journal of Consumer Policy 19

Damme IV, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 The European Journal of International Law

Darby M and Karni E, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 Journal of Law and Economics 67

Daskalova V, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 The Competition Law Review 131

Daugbjerg C and others, 'Improving eco-labelling as an environmental policy instrument : knowledge, trust and organic consumption' (2014) 16 Journal of Environmental Policy and Planning 559

De Boer J and others, 'The conceptual framework' in Eritja (ed), *Sustainability Labelling and Certification* (Marcial Pons 2004)

De Burcá G, 'The Principles of Proportionality and its Application in EC law' (1993) 13 Yearbook of European Law 105

DeGraba P, 'The Loss Leader is a Turkey: Targeted Discounts from Multi-product Competitors' (2006) 24 International Journal of Industrial Organization 613

Delimatsis P, 'Don't gamble with GATS-the interaction between Articles VI, XVI, XVII and XVIII GATS in the light of the US-Gambling case' (2006) 40 Journal of World Trade 1059

Desmedt A, 'Proportionality in WTO Law' (2001) 4 Journal of International Economic Law 441

De Vattel E, *The Law of Nations, or, Principles of Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (4th edn, 1811)

Devenney J and Kenny M, *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012)

De Vries S, 'Consumer Protection and the EU Single Market Rules – The Search for the 'Paradigm Consumer' (2012) 4 Journal of European Consumer and Market Law 228

Downie D, 'Global Environmental Policy: Governance Through Regimes' in Axelrod, Downie and Vig (eds), *The Global Environment: Institutions, Law and Policy* (2nd edn, CQ Press 2005)

Druzin BH, 'Anarcy, Order, and Trade: A Structuralist Account of Why a Global Commercial Legal Order is Emerging' (2014) 47 Vanderbilt Journal of Transnational Law 1049

Du M, 'What is a "Technical Regulation" in the TBT Agreement?' (2015) 6 European Journal of Risk Regulation 396

Duivenvoorde B, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer Science 2015)

Eden S, Bear C and Walker G, 'Understanding and (dis)trusting food assurance schemes: consumer confidence and the 'knowledge fix'.' (2008) 24 Journal of Rural Studies 1

Ehlers D, *European Fundamental Rights and Freedoms* (De Gruyter Recht 2007)

Emberland M, *The Human Rights of Companies. Exploring the Structure of ECHR Protection* (Oxford University Press 2006)

Emerson T, 'Toward a General Theory of the First Amendment' (1963) 72 Yale Law Journal 877

Epps T, 'Demanding perfection: private food standards and the SPS Agreement' in Lewis and Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press 2008)

Evans J, *Environmental Governance* (Routledge London 2011)

Falkner R, Stephan H and Vogler J, 'International Climate Policy After Copenhagen: Towards a 'Building Blocks' Approach' (2010) 3 Global Policy 252

Faure M and Luth H, 'Behavioural Economics in Unfair Contract Terms – Cautions and Considerations' (2011) 34 Journal of Consumer Policy

Fischer C and others, 'Forest certification: Toward common standards? Resources for the Future ' (2005) Discussion Paper dp-05-10 Washington, DC

Foucault M, 'Govemmentality' in Burchell, Gordon and Miller (eds), *The Foucault Effect: Studies in Govemmentality* (Harvester Wheatsheaf, London 1991)

Franck J-U and Purnhagen K, 'Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis' in Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer Netherlands 2014)

Fritzmaurice G, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 Briitish Yearbook of International Law

Gandenberger C, Garrelts H and Wehlau D, 'Assessing the Effects of Certification Networks on Sustainable Production and Consumption: The Cases of FLO and FSC.' (2011) 34 Journal of Consumer Policy 107

Gandhi S, 'Regulating the Use of Voluntary Environmental Standards within the World Trade Organization Legal System: Making a Case for Developing Countries' (2005) 39 Journal of World Trade 855

Geibler JV, 'Market-based Governance for Sustainability in Value Chains: Conditions for Successful Standard Setting in the Palm Oil Sector' (2013) 56 Journal of Cleaner Production 39

Gerbrandy A, 'Competition Law and Private-Sector Sustainability Initiatives' in Colombi Ciacchi and others (eds), *Law & Governance - Beyond the Public-Private Divide?* (Eleven International Publishing 2013)

Gerbrandy A, 'Addressing the Legitimacy Problem for Competition Authorities taking into account Non-economic Values: the Position of the Dutch Competition Authority' (2015) 40 European law Review 769

Gerrits L and Edelenbos J, 'Management of Sediments Through Stakeholder Involvement' (2004) 4 Journal of Soils and Sediments 239

Gilbert D and Wilson T, 'Prospection: Experiencing the Future' (2007) 317 Science 1351

Giovannucci D and Ponte S, 'Standards as a New Form of Social Contract? Sustainability Initatives in the Coffee Industry.' (2005) 30 Food Policy 284

Glen D and others (eds), *Transformative Consumer Research for Personal and Horizontal Collective Well-being* (Routledge 2012)

Golan E and others, 'Economics of food labelling' (2001) 24 Journal of Consumer Policy 117

Gordley J, 'The Functional Method' in Monateri (ed), *Methods of Comparative Law* (Edward Elgar Publishing 2012)

Gottlieb S, 'Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication' (1988) 58 Boston University Law Review 917

Grunert K, Hieke S and Wills J, 'Sustainability labels on food products: Consumer motivation, understanding and use' (2014) 44 Food Policy 177

Grunert K and Wills J, 'A Review of European Research on Consumer Response to Nutrition Information at Food Labels' (2007) 15 Journal of Public Health 385

Hahnel U and others, 'The Power of Putting a Label on It: Green Labels Weigh Heavier than Contradicting Product Information for Consumers' Purchase Decisions and Post-Purchase Behavior' (2015) 6 Frontiers in Psychology 1392

Hancher L and Moran M, 'Organizing Regulatory Space' in Hancher and Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press, Oxford 1989)

Hancher L and Moran M (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press Oxford 1989)

Handler J and others, 'A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences' (2005) Wisconsin Law Review 479

Harbaugh R, Maxwell J and Roussillon B, 'Label confusion: The Groucho Effect of Uncertain Standards' (2011) 57 Management Science 1512

Harbo T, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal

Hardin G, 'The Tragedy of the Commons Science' (1968) 162 Science 1243

Harris D, O'Boyle M and Warbick C, *Law of the European Convention on Human Rights* (Butterworths 1995)

Hatanaka M, Bain C and Busch L, 'Third-party certification in the global agrifood system' (2005) 30 Food Policy 354

Heinemann A, 'A "More Realistic Approach" to Competition Law' in Mathis (ed), (Springer 2015)

Helmersen ST, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6 European Journal of Legal Studies 127

Herwig A, 'he Application of the SPS Agreement to Transnational, Private Food Standards' (2016) 7 European Journal of Risk Regulation

Hillman R, 'The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages' (2000) 85 Cornell Law Review 717

Hirschl R, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 Amerian Journal of Comparative Law 125

Hoogland C, Boer, J de, and Boersema J, 'Food and sustainability: Do consumers recognize, understand and value on-package information on production standards? ' (2007) 49 Appetite 47

Horne R, 'Limits to Labels: the role of eco-labels in the assessment of product sustainability and routes to sustainable consumption' (2009) 33 International Journal of Consumer Studies 175

Howells G, Micklitz HW and Wilhelmsson T, *European Fair Trading Law – The Unfair Commercial Practices Directive* (Ashgate Publishing 2006)

Howells G and Weatherill S, *Consumer Protection Law* (Aldershot: Ashgate Publishing Group. 2005)

Howse R, 'Consumer Labelling on Trial at the WTO: Misunderstanding the Behavioural Law and Economics of Consumer Information' in Cremona and others (eds), *On the Constitutionalism of International Economic Law Liber Amicorum for Ernst-Ulrich Petersmann* (Brill 2013)

Howse R, 'A Comment and Epilogue' (2015) 6 European Journal of Risk Regulation 418

Hunt A, 'The Theory of Critical Legal Studies' (1986) 6 Oxford Journal of Legal Studies 1
Hutchinson T, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106 Law Library Journal 579

Hutchinson T, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) Erasmus Law Review 130

Incardona R and Poncibò C, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution,' (2007) 30 Journal of Consumer Policy; 21

In 't Veld R and others (eds), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Kluwer Academic Publishers Dordrecht 1991)

Jahn G, Schramm M and Spiller A, 'The Reliability of Certification: Quality Labels as a Consumer Policy Tool' (2005) 28 Journal of Consumer Policy 53

Jansen C and Kloosterhuis E, 'The Wouters Case Law, Special for a Different Reason' (2016) 37 European Competition Law Review 335

Janssen M and Hamm U, 'The mandatory EU logo for organic food: consumer perceptions' (2012) 114 British Food Journal 335

Janssen M and Hamm U, 'Governmental and private certification labels for organic food: Consumer attitudes and preferences in Germany' (2014) [49] Food Policy 437

Johnston P and others, 'Reclaiming the Definition of Sustainability' (2007) 14 Environmental Science and Pollution Research 60

Joshi M, 'Are Eco-Labels Consistent with World Trade Organization Agreements?' (2004) 38 Journal of World Trade 69

Kahneman D, 'A Perspective on Judgment and Choice—Mapping Bounded Rationality' (2003) 58 American Psychologist 697

Kahneman D, Diener E and Schwarz N, *Well-being: The Foundations of Hedonic Psychology* (1999)

Keane D, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25 Netherlands Quarterly of Human Rights 641

Keighley J, 'Can You Handle the Truth? Compelled Commercial Speech and the First Amendment' (2012) 15 University of Pennsylvania Journal of Constitutional Law 539

Kingston S, *Greening EU Competition Law and Policy* (Cambridge University Press 2012)

Kooiman J, 'Findings, Speculations and Recommendations ' in Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage London 1993)

Koos S, 'Varieties of Environmental Labelling, Market Structures, and Sustainable Consumption Across Europe: A Comparative Analysis of Organizational and Market Supply Determinants of Environmental-Labelled Goods' (2011) 34 Journal of Consumer Policy 127

KPMG, *Expect the Unexpected: Building Business Value in a Changing World* (Report: KPMG International, 2012)

Ladeur K, 'The State in International Law' in Joerges and Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart Publishing 2011)

Lange B, 'Regulatory Spaces and Interactions: An Introduction' (2003) 12 Social and Legal Studies

Lauterpacht H, *The Development of International Law by the International Court* (revised edn, Cambridge University Press 1982)

Lawn P, *Toward Sustainable Development: An Ecological Economics Approach* (Florida: CRC Press 2010)

Lenaerts K, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 Common Market Law Review

Lenaerts K, 'The Contribution of the European Court ofJustice to the Area ofFreedom, Security and Justice' (2010) 59 International and Comparative Law Quarterly 255

Lenaerts K and Gutiérrez-Fons JA, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice'' (2013) 20 Columbia Journal of European Law

Lipschutz R and Fogel C, 'The Emergence of Private Authority in Global Governance' in Hall and Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2002)

Lobel O, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics' (2007) 120 Harvard Law Review 937

Luhmann M and others, 'Subjective Well-being and Adaptation to Life Events: A Meta-analysis' (2012) 102 Journal of Personality and Social Psychology 592

Mak V, 'Standards of Protection: in Search of the 'Average Consumer' of EU law in the Proposal for the Consumer Rights Directive' (2011) 15 European Review of Private Law 25

Makkai T and Braithwaite J, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' in Baldwin, Scott and Hood (eds), *A Reader on Regulation* (Oxford University Press 1998)

Mallet P, 'UNCTAD Trade and Environment Review' (2006)

Marceau G and Trachtman J, 'TBT, SPS, and GATT: A Map of the WTO Law of Domestic Regulation' (2002) 48 Journal of World Trade 351

Marx A, 'Global Governance and the Certification Revolution Types, Trends and Challenges' in Levi-Faur (ed), *Handbook of the Politics of Regulation* (Cheltenham: Edward Elgar 2011)

Marx A, Maertens M and Swinnen J (eds), *Private Standards and Global Governance: Economics, Legal and Political Perspectives* (Edward Elgar 2012)

Marx A and others, *Private Standards and Global Governance Economic, Legal and Political Perspectives* (Publishing ed, 2012)

Mataija M, *Private Regulation and the Internal Market. Sports, Legal Services, and Standard Setting in EU Economic Law* (Oxford University Press 2016)

Mavroidis P and Wolfe R, 'Private Standards and the WTO: Reclusive No More' (2017) 16 World Trade Review

McNair A, *The Law of Treaties* (2nd edn, Oxford University Press 1961)

Menapace L and others, 'Consumers Preferences for Geographical Origin Labels: Evidence from the Canadian Olive Oil Market' (2011) 38 European Review of Agricultural Economics 193

Meuwissen M and others, 'Technical and Economic Considerations about Traceability and Certification in Livestock Production Chains' in Velthuis and others (eds), *New Approaches to Food Safety Economics,* (Kluwer Academic Publishers 2003)

Michaels R, 'Method of Comparative Law' in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2012)

Micklitz HW, 'Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' in Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law,* (Kluwer Law International 2008)

Miles S, Ueland O and Frewer L, 'Public Attitudes towards Genetically-modified Food' (2005) 107 British Food Journal 246

Mitchell R, 'International Environmental Politics' in Carlsnaes, Risse and Simmons (eds), *Handbook of International Relations* (Sage Publications 2002)

Monti G, 'Article 81 EC and Public Policy' (2002) 39 Common Market Law Review 1057

Monti G and Mulder J, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' (2017) 42 European Law Review

Moran D and others, 'Measuring Sustainable Development – Nation by Nation' (2008) 64 Ecological Economics 470

Mortelmans K, 'Towards Covenrgence in the Application of the Rules on Free Movement and Competition?' (2001) 38 Common Market Law Review 613

Moussa M and Touzani S, 'The Perceived Credibility of Quality Labels: a Scale Validation with Refinement. International Journal of Consumer Studies' (2008) 32 International Journal of Consumer Studies 526

Nelson P, 'Information and Consumer Behavior.' (1970) 78 Journal of Political Economy 311

Newell R and Siikamäki J, 'Nudging Energy Efficiency Behavior' (2013) 13 Resources for the Future RFF Discussion Paper

Norgaard RB, 'Sustainable Development: A Co-Evolutionary View' (1988) Futures (Dec) 606

Nourse V and Shaffer G, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2009) 95 Cornell Law Review 61

Nowag J, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016)

Nussbaum M, *Woman and Human Development: The Capabilities Approach* (Cambridge University Press 2000)

Odudu O, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006)

Odudu O, 'The Wider Concerns of Competition Law' (2010) 30 Oxford Journal of Legal Studies, 599 599

Oesch M, *Standards of Review in Dispute Resolution* (Oxford University Press 2003)

Offe C, *Contradictions of the Welfare State* (Press ed, 1984)

Olson M and Bailey M, 'Positive Time Preference' (1981) 89 Journal of Political Economy 1

Padel S and Foster C, 'Exploring the gap between attitudes and behavior: understanding why consumers buy or do not buy organic food' (2005) 107 British Food Journal 606

Partiti E, 'Public Play Upon Private Standards. How European and International Economic Law Enter into Voluntary Regimes for Sustainability' (PhD, University of Amsterdam 2016)

Patterson D and Afilalo A, *The New Global Trading Order* (Cambridge University Press 2008)

Pauwelyn J, 'Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS' (2005) 4 World Trade Review 131

Pauwelyn J, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties' (2014) 17 Journal of International Economic Law 739

Piergiovanni M and D'Elia P, 'Self-Assessment of Agreements Under Article 81 EC: Is There a Need for More Commission Guidance?' (2008) Global Competition Policy

Piety T, 'Against Freedom of Commercial Expression' (2007) 29 Cardozo Law Review 2583

Platt J, 'Social traps' (1973) 28 American Psychologist 641

Pollack M and Shaffer GC, 'The Interaction of Formal and Informal International Lawmaking' in Pauwelyn and Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012)

Prévost D, 'Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities' (2008) 33 South African Yearbook of International Law 1

Purnhagen K, 'The Virtue of Cassis de Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny' in Purnhagen and Rott (eds), *Varieties of European Economic Law and Regulation* (Springer 2014)

Purnhagen K, 'Mapping Private Regulation – Classification, Market Access and Market Closure Policy and Law's Response' (2015) 49 Journal of World Trade 309

Purnhagen K, 'More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?' (2017) 8 European Journal of Risk Regulation 437

Purnhagen K and Herpen EV, 'Can Bonus Packs Deceive Consumers? A Demonstration of how Behavioural Consumer Research can Inform Unfair Commercial Practices Law on the Example of the ECJ's Mars Judgment' (2017) 40 Journal of Consumer Policy 217

Purnhagen K, Herpen Ev and Kleef Ev, 'The Potential Use of Visual Packaging Elements as Nudges' in Mathis and Tor (eds), *Nudging Possibilities, Limitations and Applications in European Law and Economics* (Springer Science 2016)

Rachlinski J, 'New Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters' (2007) 85 Cornell Law Review 739

Ramus C and Montiel I, 'When are Corporate Environmental Policies a Form of Greenwashing?' (2004) 44 Business & Society 377

Raynolds LT, Murray D and Heller A, 'Regulating Sustainability in the Coffee Sector: A Comparative Analysis of Third-Party Environmental and Social Certification Initiatives' (2007) 24 Agriculture and Human Values 147

Raynolds LT, Murray D and Wilkinson J (eds), *Fair Trade: The Challenges of Transforming Globalization* (Routledge 2007)

Reardon T, Timmer P and Berdegue J, 'The rapid rise of supermarkets in developing countries: Induced organisational, institutional and technological change in agri-food systems' (2004) 1 Journal of Agricultural and Development Economics 525

Redclift M, 'The Meaning of Sustainable Development' (1992) 25 Geoforum 395

Rengeling H and Szczekalla P, *Grundrechte in der Europäischen Union: Charta der Grundrechte und allgemeine Rechtsgrundsätze* (Heymanns 2004)

Rhodes RAW, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Open University Press, Buckingham, Philadelphia 1997)

Rose N, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press 1999)

Rose N and Miller P, 'Political Power Beyond the State: Problematics of Government' (1992) 43 British Journal of Sociology 173

Ruse-Khan HG, ' A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond' (2010) 13 Journal of International Economic Law 139

Sabel C and Simon W, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015

Sabel CF and Simon WH, 'Epilogue: Accountability Without Sovereignty' in Búrca and Scott (eds), *Law and New Governance in the EU and the US* (Bloomsburry 2006)

Schebesta H and Purnhagen K, 'The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne' (2016) 4 European Law Review 590

Schelling T, 'Self-command in Practice, in Policy, and in a Theory of Rational Choice' (1984) 74 American Economic Review 1

Schorkopf F, 'Human Dignity, Fundamental Rights of Personality and Communication' in Ehlers (ed), *European Fundamental Rights and Freedoms* (De Gruyter Recht 2007)

Scott C, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) Public Law 329

Segger M-CC and Khalfan A, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press 2004)

Sen A, 'Equality of What?' in McMurrin (ed), *Tanner Lectures on Human Values 1* (Cambridge University Press 1980)

Sen A, *The Idea of Justice* (Harvard University Press 2009)

Shiner R, *Freedom of Commercial Expression,* (Oxford University Press 2003)

Sibony A-L, 'Can EU Consumer Law Benefit From Behavioural Insights? An Analysis of the Unfair Practices Directive' in Mathis (ed), *Behavioural Law and Economics: AMerican and European Perspectives* (Springer 2015)

Sibony A-L and Helleringer G, 'EU Consumer Protection and Behavioural Sciences: Revolution or Reform? ' in Alemanno and Sibony (eds), *About Nudge and the Law* (Hart 2015)

Simon H, 'Behavioural Model of Rational Choice' (1955) 69 Quartely Journal of Economics 99

Simon W, 'Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes' in Búrca and Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006)

Sinclar D, 'Self-regulation versus Command and Control? Beyond False Dichotomies' (1997) 19 Law and Policy

Smith P and Max-Neef M, *Economics Unmasked: From Power and Greed to Compassion and the Common Good* (Green Books 2011)

Snell J, 'The Notion of Market access: A Concept or a Slogan? Common Market Law Review' (2010) 47 Common Market Law Review 437

Sønderskov KM and Daugbjerg C, 'The State and Consumer Confidence in Eco-labelling: Organic labelling in Denmark, Sweden, the United Kingdom and the United States' (2011) 28 Agricultural Human Values 507

Spadoni R, Lombardi P and Canavari M, 'Private Food Standard Certification: Analysis of the BRC Standard in Italian Agri-Food. ' (2014) 116 British Food Journal 142

Spangenberg J, 'Environmental Space and the Prism of Sustainability: Frameworks for Indicators measuring Sustainable Development' (2002) 2 Ecological Indicators 295

Sperber D, *Explaining Culture: A Naturalistic Approach* (Wiley-Blackwell 1996)

Steenbergen J, 'Proportionality in competition law and policy' (2008) 35 Legal Issues of Economic Integration, 259

Stiglitz J, Sen A and Fitoussi J-P, 'The Measurement of Economic Performance and Social Progress Revisited' (2009) 33 OFCE

Stiglitz J, Sen A and Fitoussi J-P, *Report by the Commission on the Measurement of Economic Performance and Social Progress* (Paris, 2009)

Strack F and Deutsch R, 'Reflective and impulsive determinants of social behavior" , 8, 220-247; ' (2004) 8 Personality and Social Psychology Review 220

Stuyck J, 'The Court of Justice and the Unfair Commercial Practices Directive' (2015) 52 Common Market Law Review

Teisl M and others, 'Consumer reactions to environmental labels for forest products: a preliminary look' (2002) 52 Forest Products Journal 44

Teubner G (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter Inc, Berlin 1986)

Teubner G (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Anti-Trust, and Social Welfare Law* (Walter de Gruyter Inc, Berlin 1987)

Teubner G, Farmer L and Murphy D (eds), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-organization* (Wiley, New York 1994)

Teubner G and Febbrajo A (eds), *State, Law, Economy as Autopoietic System:s Regulation and Autonomy in a New Perspective* (Giufre Milan 1992)

Thøgersen J, 'Psychological Determinants of Paying Attention to Eco-labels in Purchase Decisions: Model Development and Multinational Validation' (2000) 23 Journal of Consumer Policy 285

Thorstensen V, Weissinger R and Xinhua Sun PSIfT, Development, and Governance, 'Private Standards—Implications for Trade, Development, and Governance' (2015) WEF/ICTSD, E15 Task Force on Regulatory Systems Coherence August

Tietenberg T, 'Disclosure Strategies for Pollution Control' (1998) 11 Environmental and Resource Economics 587

Townley C, *Article 81 EC and Public Policy* (Hart Publishers 2009)

Townley C, 'Which goals count in Article 101 TFEU? Public policy and its discontents: the OFT's roundtable discussion on article 101(3) of the TFEU' (2011) 32 European Competition Law Review 441

Tridimas T, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999)

Trstenjak V and Beysen E, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the ECJ' (2013) 38 European Law Review 293

Trubek DM and Trubek LG, 'New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) 13 Columbia Journal of European Law 539

Trzaskowski J, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practises Directive' (2011) 34 Journal of Consumer Policy 377

Trzaskowski J, 'Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive' (2016) 27 European Business Law Review 25

Tucker A, 'Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporative Personhood in Citizens United' (2001) 61 Case Western Reserve Law Review 495

Unnevehr L, 'Food safety in developing countries: Moving beyond exports' (2009) 24 Global Food Security

Van Dam Y and Van Trijp, H, 'Cognitive and motivational structure of sustainability' (2011) 32 Journal of Economic Psychology 726

Van den Bergh J, 'The GDP Paradox' (2009) 30 Journal of Economic Psychology 117

Van der Zee E, 'In between two societal actors. The responsibilities of sovereign wealth funds towards human rights and climate change' (2016) 12 International and Comparative Corporate Law Journal

Van der Zee E, 'Regulatory Structure of Standards underlying Sustainability Labels. Laying the Foundations for Effective Intervention Strategies to Increase Consumer Confidence in Sustainability Labels.' in Bremmers and Purnhagen (eds), *Regulating Food Safety Law in the EU – A Management and Economics Perspective* (Springer 2018)

Vandenbergh M, 'The New Wal-Mart effect: The Role of Private Contracting in Global Governance' (2007) 54 UCLA Law Review 913

Verbeke W, 'Agriculture and the food industry in the information age' (2005) 32 European Review of Agricultural Economics 347

Verschuuren J, *Principles of Environmental Law: the Ideal of Sustainable Development and the Role of Principles in International, European and National Law* (Baden-Baden: Nomos 2003)

Voigt C, *Sustainable Development as a Principle of International Law* (Martinus Nijhoff Publishers 2009)

Ward D and others, 'Factors Influencing Willingness-to-pay for the ENERGY STAR Label' (2011) 39 Energy Policy 1450

Waterstone M, 'A New Vision of Public Enforcement' (2007) 92 Minnesota Law Review 434

Weatherill S, 'The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court's Case Law has Become a "Drafting Guide"' (2011) 12 German Law Journal 827

Weiβ W, 'EU Human Rights Protection After Lisbon' in Trybus and Rubini (eds), *The Treaty of Lisbon and the Future of European Law Policy* (Edward Elgar Publishing 2012)

Whish R and Bailey D, *Competition Law* (8th edn, Oxford University Press 2015)

Wiener J, 'Better Regulation in Europe' (2006) 59 Current Legal Problems 447

Wijkström E and McDaniels D, 'Improving Regulatory Governance: International Standards and the WTO TBT Agreement' (2013) 47 Journal of World Trade 1013

Wilkinson J, 'Fair Trade: Dynamic and Dilemmas of a Market Oriented Global Social Movement.' (2007) 30 Journal of Consumer Policy 219

Wilson T and Gilbert D, 'Affective Forecasting: Knowing What To Want' (2005) 14 Current Directions in Psychology Science 131

Windholz E, *Governing through Regulation Public Policy, Regulation and the Law* (Routledge 2017)

Winn M and Angell L, 'Towards a Process Model of Corporate Greening' (2000) 21 Organization Studies, 1119

Wlostowski T, 'Selected Observations on the Regulation of Private Standards by the WTO' (2010) 30 Polish Yearbook of International Law 204

Wouters J and Geraets D, 'Private Food Standards and the World Trade Organization: Some Legal Considerations' (2012) 11 World Trade Review

Other

ANP. 2014, April 3. Ploumen wil 'orde' in aantal keurmerken (English translation: Ploumen wants 'order' in the amount of certification marks). Volkskrant. Retrieved from www.volkskrant.nl/binnenland/ploumen-wil-orde-in-aantal-keurmerken~a3627943/ (visited 20 May 2015).

Autoriteit Consument en Markt, Letter, 18 February 2016, https://www.rijksoverheid.nl/documenten/brieven/2016/02/18/brief-acm (visited 27 April 2017)

Autoriteit Consument en Markt, "Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er jaren kolencentrales in het kader van het SER Energieakkoord", 2013, https://www.acm.nl/nl/download/publicatie/?id=12033> (visited 31 March 2017).

Autoriteit Consument en Markt, “Economische effecten van ‘Kip van Morgen’. Kosten en baten voor consumenten van een collectieve afspraak in de pluimveehouderij”, 2014 https://www.acm.nl/nl/publicaties/publicatie/13759/Onderzoek-ACM-naar-de-economische-effecten-van-de-Kip-van-Morgen/ (visited 31 March 2017)

BES, *Equitable and Sustainable Wellbeing in Italy*, 2013, http://www.misuredelbenessere.it/fileadmin/upload/Report_on_Equitable_and_Sustainable_Well-being_-_11_Mar_2013_-_Summary.pdf (visited 31 March 2017)

Besluit van de Minister van Economische Zaken van 6 mei 2014, nr. WJZ/14052830, houdende beleidsregel 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, https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/besluiten/2014/05/08/beleidsregel-mededinging-en-duurzaamheid/beleidsregel-mededinging-en-duurzaamheid.pdf (visited 31-March 2017)

CONV 354/02, Final Report of Working Group II, 22 October 2002, p. 7.

Dutch Ministry of Economic Affairs 2014. Consumentenbestedingen aan Duurzaam Gelabelde Producten. Monitor Duurzaam Voedsel 2013, www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/06/04/monitor-duurzaam-voedsel-2013/14094896-bijlage.pdf.

Eurostat, Quality of Life Indicators – Measuring quality of life, http://ec.europa.eu/eurostat/statistics-explained/index.php/Quality_of_life_indicators_-_measuring_quality_of_life (visited 27 February 2017)

Government of The Netherlands, ‘Competition and Sustainability’, *Parliamentary Papers* (2016), https://www.rijksoverheid.nl/documenten/kamerstukken/2016/06/23/mededinging-en-duurzaamheid (visited 27 April 2017).

Instituto Nacional de Estadística (statistical bureau Spain) http://www.ine.es/ss/Satellite?c=INEDocTrabajo_C&p=1254735116586&pagename=ProductosYServicios%2FPYSLayout&cid=1259941788238&L=1 (visited 31 March 2017)

Intergovernmental Panel on Climate Change, “Climate Change 2014 Mitigation of Climate Change. Working Group III Contribution to the Fifth Assessment Report”

International Institute for Environment and Development (IIED) 1997. Changing Consumption and Production Patterns: Unlocking Trade Opportunities. *UN Department of Policy Coordination and Sustainable Development*

ISEAL Code of Good Practice for Setting Standards http://www.isealalliance.org/code accessed 21 April 2017. Forest Stewardship Council, Rainforest Alliance, the Marine Stewardship Council, the Fair Trade Labelling Organization, are members of ISEAL and have to comply with this code of good practice.

Mulder, Zomer, Benning, Leenheer, "Economische effecten van "Kip van Morgen". Kosten en baten voor consumenten van een collectieve afspraak in de pluimveehouder" 2014

Negotiating group on basic telecommunications, 'Telecommunications services: reference paper', https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm, 24 april 1996 (visited 26 April 2017).

Organisation for Economic Co-operation and Development (OECD) 2008. *Promoting Sustainable Consumption*. Good Practices in OECD countries

Rijksoverheid, 'Inkopen door het Rijk', https://www.rijksoverheid.nl/onderwerpen/inkopen-door-het-rijk/inhoud/maatschappelijk-verantwoord-inkopen-door-het-rijk/voldoen-aan-sociale-voorwaarden, (visited 21 December 2016).

Statistics Netherlands, *Measuring Sustainable Development and Societal Progress: Overview and Conceptual Approach,* 2011, https://www.cbs.nl/NR/rdonlyres/C32647F1-1EBB-4CDF-861C-F80A8BD99CF3/0/measuringsustainabledevelopment.pdf

Trouw, "Alleen maar eerlijke eieren", 1 April 2010

Volkskrant, "Supermarkten weren eieren uit legbatterij" June 6, 2003

Summary

VSSs are increasingly regulating sustainable consumption and production, thereby operating as a regulatory authority to promote sustainable development. As VSSs regulate economic activities they may be subject to legal provisions framed by international and EU economic law. The extent to which VSSs are subject to these legal provisions depends on the interpretation and application of international and EU economic law to VSSs. This interpretation and application determines the regulatory space within which VSSs can promote sustainable development. The regulatory space for VSS-setters to promote sustainable development that follows from the interaction between the application and interpretation of international and EU economic law and VSSs remains unclear. From the perspective of promoting sustainable development, this is problematic as this lack of clarity may allow for an interpretation and application of international and EU economic law that inhibits the potential of VSSs to promote sustainable development. As such, this inhibitive effect may conflict with the overarching objective of international and EU economic law to promote sustainable development. To remedy this conflict, more clarity is provided in this dissertation regarding the interaction between the interpretation and application of international and EU economic law and the regulatory space of VSSs. When investigating this interaction the normative assumptions underlying legal interpretation and application were examined by using critical legal analysis as a theoretical framework. This dissertation, first elaborated upon the regulatory structure of VSSs in Chapter 2. Subsequently, this dissertations used a case study analysis of EU consumer law (Chapter 3), EU fundamental rights law (Chapter 4), WTO law (Chapter 5) and EU competition law (Chapter 6), to describe and examine how the interpretation and application of international and EU economic law interacts with the regulatory space of VSSs to promote sustainable development.

In Chapter 2 it was found that mainly private standard-setters are involved in VSS-setting. These market-based regulatory instruments have different structural patterns on a spectrum ranging from multi-stakeholder regulatory instruments to self-regulatory instruments. Multi-stakeholder regulatory instruments have high NGO involvement in collaboration with firms in standard-setting, and certification is conducted by private third-parties. Self-regulatory instruments are set and certified by firms through private first-party certification, meaning that the firm certifies its own standards. Sector-specific regulatory instruments are set by NGOs within a specific sector without collaboration with firms and require second-party certification. It was concluded that the present coexistence of VSSs with different regulatory structures may negatively affect consumer confidence.

In Chapter 3 it was shown how the application of the normative EU “average consumer” benchmark could be informed by behavioural sciences, in the doctrinal assessment under the FIR of possibly misleading, purely visual information, as used by green pictograms. As the analysis under the FIR is based on the normative benchmark of the “average consumer”,

the expectations of the ECJ of the normative "average consumer" were examined. It was argued that insights from consumer science can inform the legal assessment of what can be expected from the "average consumer" under the FIR. In two experiments the potential benefits of including consumer research under the normative "average consumer" test were illustrated by showing that consumers may infer incorrect conclusions from a pictogram. Finally, the results from the legal and experimental study were compared to assess the usefulness of consumer research in the legal analysis of the normative benchmark of the "average consumer" under the FIR. The doctrinal study showed that insights from consumer science may provide further guidance to national courts in the doctrinal assessment of the normative EU "average consumer". The consumer decision study indicated that green pictograms could be considered misleading under the FIR.

In Chapter 4 it was found that food businesses could only claim free speech rights on food labels when such information is important to the public or consumers. To assess whether free speech rights protect food businesses against government interventions with communications on food labels a functional comparison between the two legal systems was conducted. It was found that expression on food labels should be considered primarily commercial in nature. In the USA some food labelling regulations are considered inconsistent with the freedom of commercial expression. EU courts seem to uphold government restrictions to commercial expression in all cases, especially when restrictions are based on protection of human health. It was concluded that to inform public authorities how to best regulate commercial information, insights from consumer science are necessary to get a firm grasp on how consumers process information on food products.

In Chapter 5 it was found that although private standards could fall within the scope of the SPS or TBT Agreement, the responsibility of WTO Members to *effectively* ensure that private standard-setters are not more trade-restrictive than necessary, is limited under the respective frameworks. It was found that only VSSs that gain legal effect by means of public law may be effectively prohibited by the application of WTO law. As most VSSs do not gain legal effect by means of public law, it was argued that other mechanisms, derived from new governance theory, would be more effective as they could incentivize private standard-setters to comply with the WTO legal system. It was concluded that WTO Members worried about the trade-restrictive nature of private standards should draft procedural guidelines in collaboration with IGOs and private multi-stakeholder standard-setting bodies. Such procedural guidelines should be aimed at simplifying the certification process and making it easier for farmers and producers to comply with the private standard.

Chapter 6 shows how science-based estimations could be an addition to the information base of the legal authority and a guidance to undertakings in their self-assessments under

the competition rules. It was found that the proportionality test required under the *Wouters* doctrine and Article 101(3) TFEU would lead to similar outcomes in the case of private sustainability agreements when costs and benefits are appropriately estimated in terms of human well-being using insights from welfare economics, social and economic psychology, and moral philosophy. These insights are (1) demanded as a best practice under the *Wouters* doctrine and (2) provide guidance to economic regulators and undertakings to most accurately assess the costs and benefits of the agreement. It was concluded that when the European Commission or its Member States use scientific methods to assess private sustainability agreements under Article 101 TFEU, they should be aware of the strengths and weaknesses and clarify which method would be most appropriate and when. As such, these scientific insights can provide otherwise unattainable insights on the impact of a private sustainability agreement and provide appropriate guidance to undertakings in their self-assessment under the EU competition rules.

Finally, Chapter 7 discusses the outcomes, the limitations and the contributions of this dissertation. The main outcome of this dissertation is that the extent to which the interpretation and application of international and EU economic law interacts with the regulatory space of VSSs depends on the normative assumptions underlying legal interpretation and application. It was concluded that integrating the relevant scientific insights from social sciences into legal analysis has the potential to align the objective of sustainable development with the interpretation and application of international and EU economic law by increasing the information base. In such a way legal decisions will be better informed, provided that the insights are used with the proper understanding of their strengths and weaknesses. When lawyers, judges, and economic regulators are willing to take the sustainable development objective of EU and WTO law seriously, they are advised to integrate the relevant insights from social sciences into their legal interpretation and application when making normative assumptions.

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About the Author

Personal profile

Eva van der Zee was born in Maarssen, the Netherlands, on 26 March 1987. She studied law, economics and French at Utrecht University and University College Dublin. She completed two LL.M. degrees: International Trade and Investment Law at the University of Amsterdam and Fundamentals of Law at Utrecht University (cum laude). Both her LL.M. theses were published in high quality journals. During her second LL.M. she was a research intern at VBDO and published a report in collaboration with several NGOs on the current practices of Dutch businesses on human rights.

After finishing her second LL.M., Eva started a PhD project at the Law and Governance group and Marketing and Behaviour group of Wageningen University, which resulted in the current thesis. Her research focused on how public and private measures to promote sustainable development fit within the EU and WTO legal framework using both doctrinal and empirical methods. During the PhD project, Eva was a visiting researcher at the New York University and the European University Institute and participated in the national Ius Commune research school. Moreover, during the PhD project Eva presented her research at several international conferences, and published three papers and a chapter.

Eva has demonstrated a broad interest in sustainability issues and cultural integration. She has followed several masterclasses and specialized courses concerning sustainable development. Furthermore, she has been active in several international organizations to promote sustainable development (Enactus and Slow Food Youth Network) and cultural integration (Erasmus Student Network and AEGEE).

Publications

Eva van der Zee and Arnout RH Fischer, 'Green Pictograms on EU Foods. A Legal Study Informed by Behavioural Science', *Journal of European Consumer and Market Law,* forthcoming.

Eva van der Zee, 'Disciplining private standards under the SPS and TBT Agreement. A plea for market-state procedural guidelines', *Journal of World trade* (52)2018-3.

Eva van der Zee, 'Regulatory structure of standards underlying sustainability labels. Foundations for intervention strategies to increase consumer confidence', in: Harry Bremmers and Kai Purnhagen (eds.), *Regulating Food Safety Law in the EU – A Management and Economics Perspective*, New York et al, Springer 2017, forthcoming.

Eva van der Zee, 'Legal Limits on Food Labelling Law: Comparative Analysis of the EU and the USA', *European Business Law Review* (27)2016-3.

Eva van der Zee, ‘In between two societal actors. The responsibilities of sovereign wealth funds towards human rights and climate change’, *International and Comparative Corporate Law Journal*, (12)2016-1.

Eva van der Zee, ‘Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?’ *Legal Issues of Economic Integration* (40)2013-1.

Bernd van der Meulen and Eva van der Zee, ‘Through the Wine Gate. First Steps towards Human Rights Awareness in EU Food (Labelling) Law, *European Food and Feed Law* 2013-1.

Eva van der Zee, ‘Sovereign wealth funds and socially responsible investment: do’s and don’ts’, *European Company Law* (9)2012-2.

Eva van der Zee, Carla Neefs, Liesbeth Unger and Saskia Verbunt, ‘Take a closer look. Current practices of Dutch business on human rights’, *VBDO report*, June 2012.

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Training and supervision

Completed project, research and career-related competences

Abbreviations stand for: EUI = European University Institute; LAW = Law and Governance group; MCB = Marketing and Consumer Behaviour group; NL = The Netherlands; NYU = New York University; RM = Research Methodology; USA = United States of America; WASS = Wageningen School of Social Sciences; WGS = Wageningen Graduate School; WUR = Wageningen University and Research; YSFN = Youth Slow Food Network.

Name of the learning activity	Institute (department), place, country	Year	ECTS*
Project related competences			
1. Food Law	WUR (LAW), Wageningen, NL	2012	6
2. Writing PhD proposal	WUR (LAW), Wageningen, NL	2012-2013	3
3. Postgraduate training course law	Ius Commune, The Netherlands	2016	1
4. NYU research stay	NYU, New York, USA	2016	1
5. EUI Summer school European Law	EUI, Florence, Italy	2016	3
6. Law and Economics seminar	EUI, Florence, Italy	2017	1.3
7. Doctoral workshop in European law	EUI, Florence, Italy	2017	1.3
8. Economic law workshop	EUI, Florence, Italy	2017	1.3
9. Theories of Choice and the Law	EUI, Florence, Italy	2017	0.6
General research related competences			
1. Research Methodology	WUR (WASS), Wageningen, NL	2012	4

2. Introduction Course	WUR (WASS), Wageningen, NL	2013	1
3. Techniques for Writing and Presenting	WUR (WGS), Wageningen, NL	2013	1.2
4. Project and Time Management	WUR (WGS), Wageningen, NL	2013	1.5
5. Voice and Presentation Skills Training	WUR (WGS), Wageningen, NL	2013	0.3
6. PhD Discussion Group	WUR (MCB), Wageningen, NL	2012-2015	1
7. Qualitative Data Analysis	WUR (RM), Wageningen, NL	2013	2
8. Methodological Problems in IEL and Adjudication	EUI, Florence, Italy	2017	0.6
9. Presenting “Green Pictograms on EU foods. A legal study informed by behavioural science”	Doctoral workshop in EU law, EUI, Florence, Italy	2017	1
10. Presenting: Overcoming false choices and distorted decisions: the potential of insights in welfare economics, behavioural science and moral philosophy to measure benefits of sustainability agreements under Article 101 TFEU	WASS PhD Day, WUR, Wageningen, NL	2017	1
11. Presenting: “Sustainability standard-setting in the shadow of the law”	Next generation governance arrangements, WUR, Utrecht, NL	2017	1

12. Presenting “Promoting effective sustainability food labelling initiatives through legal frameworks. Insights from legal and behavioural science’.”	Ius Commune, Leuven, Belgium	2017	1
13. Presenting “Estimating human well-being under Article 101 TFEU”	Ius Commune Conference, Utrecht, NL	2017	1
13. Writing retreat	WUR, Huissen, NL	2017	0.5

Career related competences/personal development

1. Slow Food Youth Network academy	SFYN, NL	2015	4
2. Lecturing General Food Law	WUR (LAW), Wageningen, NL	2016	0.5
3. Lecturing International and European Food Law	WUR (Law, Wageningen, NL)	2013	0.5
Total			**40.6**

*One credit according to ECTS is on average equivalent to 28 hours of study load

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