

Biodiversity Standards in Supply Chain Laws

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Introduction

- Drivers of standardisation: **technological development** and **transnationalisation**
- Long national and European tradition of legal inclusion of (**institutional**) private standards
 - i.p. national and European **product safety**, ship classification etc.
- **New supply chain due diligence laws**
 - Addressing **sustainable production** in **transnational** supply chains
 - French loi de vigilance, German Lieferkettengesetz, EUDR, EUCSDDD
- Until recently **only (less institutionalised) private standardisation** systems
 - Industry schemes
 - Multi-stakeholder schemes: Fair Trade labels, FSC certificate etc.
- Relation between law and private standardisation needs to be reconfigured
- Challenge: Make **use** of the **advantages** of private standards –
while **safeguarding the legitimacy and effectiveness of law**



Advantages: Theory

- Unburdens the State
- Use of expertise of private actors
- Ideally plural, inclusion of those concerned and of stakeholders
- Adequate problem oriented standards, higher acceptance and less implementation and enforcement problems
- Flexibility, easier to amend
- **Enhances legitimacy and effectiveness (of the law)**

Transnational level:

- Bridges jurisdictional borders
- (Inter-) or transnational bottom-up approach with framework standards and decentralised concretisation by those concerned
- Transparent harmonised requirements (which often go beyond the law)
- **Legitimate and effective transnational standards (which could be taken up by the law)**

Options

- **Mandatory use**
 - E.g. ship classification, RED: 'voluntary systems'

- **'Safe harbour': presumption of compliance** (public law)
 - E.g. EU product safety: voluntary, but non-rebuttable presumption of safety, option to establish equal safety

- **Consideration by authorities**
 - Rebuttable presumption, listing of systems
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 - Consideration by criteria

 - Open consideration

Options

- **Mandatory use**
 - E.g. ship classification, RED: 'voluntary systems'
 - **Accreditation of systems, approval of standards** (monitoring and control)
 - **No remaining responsibility (or liability) for companies**
- **'Safe harbour': presumption of compliance** (public law)
 - E.g. EU product safety: voluntary, but non-rebuttable presumption of safety, option to establish equal safety
 - **Accreditation of systems, approval of standards** (monitoring and control)
 - **High incentive** to use the system, **no remaining responsibility for companies**
- **Consideration by authorities**
 - Rebuttable presumption, listing of systems
 - Administration: listed systems, **potential underperformance**
 - Companies, **indicators of underperformance have to be taken into account, additional action required**
 - **Incentive** to use the system
 - Consideration by criteria
 - Authorities: development of criteria, **assessment of systems and of remaining due diligence duties**
 - **Respective duty for companies to select and monitor the system, remaining due diligence duties**
 - Open consideration
 - **Low unburdening effect** for authorities
 - **Duty for companies to select and monitor the system, remaining due diligence duties**
 - **Weak incentive for enterprises to use a system**
 - **Weak incentive for systems to improve and adapt to the law**

Challenges: Legitimacy and Effectiveness

e.g. RED, e.g. FSC

- Broad legal requirements due to different conditions abroad
 - Concerning sustainability, e.g. biodiversity: grasslands of 'high biological diversity' (RED)
 - Leave room for ambiguity, **different interpretation, competition, race to the bottom**
 - Huge differences between systems concerning:
 - **Substantive standards**
 - Procedures: transparency, public participation, inclusion of stakeholders, and expertise, fees, required verification procedures
- Even plural systems with elaborate governance structures and high, state of the art safeguards for procedural justice
- **Unsustainable standards**
 - **Unequal power of stakeholders**
 - **Competition** for market share, race to the bottom



Challenges: Legitimacy and Effectiveness

e.g. RED, e.g. FSC

Substantive requirements:

Tension between

→ **Concrete legal requirements, without ambiguity**

→ **Concretisation by practice and those concerned**

(transnational bottom-up approaches which are fair, inclusive, leaving no one behind, sensitive for socio-economic conditions abroad)



Challenges: Legitimacy and Effectiveness

Legal Safeguards

- Exact reach of (inclusion) of standard
- Accreditation of standards system
 - Seat, jurisdiction, applicable law
 - Detailed requirements for organisation, structure, procedures
 - E.g. ISO or ISEAL standards with additional requirements for specific problems or sectors and to cope with transnational multi-level system
 - Thorough ex ante control
 - Transparent and accessible accreditation procedure, e.g. for NGOs
- Monitoring and control
 - Time limits and renewal
- Approval and monitoring of concrete standards
 - Output control
 - Otherwise only rebuttable presumption possible (German constitutional law)
- Accessible complaints or whistle-blower systems

Additional Legal Safeguards

Transparency requirements for standard systems:

- Substantive standards
- Development procedure
- Monitoring and control mechanism
- Remediation of shortcomings
- Enforcement
- Requirements for certifiers
- List of participants, etc.

Empowerment of stakeholders:

- Effective complaints procedure
 - Accessible, protection of whistle-blowers
 - Effective sanctions
 - (Accreditation) authorities and/or within the system (P: competition, less effective)
- Access to justice for victims and NGOs
- Liability of companies
- Liability of certification bodies

Pros and Cons

- The more legal authority standards gain, the less (remaining) duties for enterprises and authorities and vice versa
- In order to make use of the (sustainability and efficiency) advantages of private systems, the law should provide for incentives for enterprises to use a system and for incentives for the systems to improve and adapt to the law –
- While at the same time ensure control by authorities and by enterprises

In addition

- The more transparent the system, the more efficiency benefits for enterprises and authorities
- Empowerment of stakeholders

Declining legal importance in supply chain laws (and increased focus on enterprise due diligence)

- RED:
 - Mandatory use of recognised schemes; compliance with the law
- Timber Regulation:
 - Possibility to use established due diligence systems recognised by the Commission, such as the FSC; no automatic compliance with the law (but in practice presumption)
- Deforestation Regulation:
 - Commission recognised schemes (RED) as provider of 'complementary information'
- Corporate Sustainability Due Diligence Directive:
 - Industry and multi-stakeholder initiatives help to identify, mitigate, and prevent adverse impacts; possibility for companies to participate in initiatives to support implementation of obligations;
 - Mentioned in various regards: develop due diligence and action plans in cooperation with industry or multi-stakeholder initiatives, compliance control, stakeholder engagement, transparency requirements, ...
 - As means or as additional means to fulfil requirements
 - However assessment of appropriateness, control effectiveness, additional due diligence
 - Commission should set out fitness criteria and methodology for assessment;
 - Third party verification *dito*

Standards in Supply Chain Laws: State of the Art

- No legal safe harbor, no automatic presumption of compliance with the law
- Instead: selection and control based on criteria (by Commission), additional due diligence required
- Consideration by authorities
- May be strengthened to (rebuttable) presumption in the middle run

Advantages:

- Companies stay responsible
- Control of private systems by authorities and by companies

Remaining challenges:

- Sufficient incentives for enterprises to participate in a standard system and make use of their additional sustainability and harmonising advantages?
- Sufficient incentives for the systems to improve and adapt to the law?
- Legal uncertainty (both for companies and for systems)!
 - More detailed and gradual due diligence requirements for companies; interplay with system
 - Transparency requirements for systems
- Legal empowerment of stakeholders, e.g. liability rules

Tort liability (fault): Principles: Prevention and Compensation

Relation to public law

- Mutual compensation: adherence to public law requirements no automatic safe harbour concerning tort liability
- Public law: general, abstract; tort law: concrete, individual
- Required duty of care depends on risk in the individual case
- Enterprises closest to risk creation, shall not be exempted from their duty of care
- Exception: mandatory standards

Relation to (institutionalised) private standards:

- Only guidance (permanent case law)
- Could be outdated, not adequate in the individual case, limited coverage, ..
- Enterprises closest to risk creation, shall not be exempted from their duty of care
- Adherence necessary but not sufficient for exclusion of liability

Tort liability: EU CSDDD

- Strong lobby in favour of standards systems as tort law safe harbour

Problems:

- Input and output legitimacy of standards:
 - Substantive accuracy and procedural integrity has to be ensured by accreditation and regular control
- Risk of liability gap:
 - Privately defined 'special sacrifice' for victims
 - Liability of standardisation organisations for compensation instead?

Tort liability: EU CSDDD

Commission draft: limited 'safe-harbour'-regulation

Companies **shall not be liable** for damages caused by the activities of an ***indirect partner*** (with whom they have an established business relationship) in case the company has

- sought contractual assurances from a *direct* partner (with whom it has an established business relationship) that it will ensure compliance with the code of conduct and, as necessary, a corrective action plan (according to Articles 7(2)(b) and 8(3)(c) SDDD),
- **accompanied by appropriate measures to verify compliance, such as suitable industry initiatives or independent third-party verification** (according to Articles 7(4) and 8(5)SDDD), and
- **unless it was unreasonable to expect that the actions would be adequate** to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.

Tort liability: EU CSDDD

Final version: explicit exclusion of 'safe harbor'

Companies that have participated in industry or multi-stakeholder initiatives, or used third-party verification or contractual clauses to support the implementation of due diligence obligations **can still be held liable** in accordance with this Article.

.. which is in line with the tort principles laid out ..