E. GOVERNANCE PERSPECTIVE

LEGAL DESIGN
OF A META-REGULATORY REGIME
FOR RESPONSIBLE CERTIFICATION

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Objective
Mapping a regulatory governance perspective. Is responsible certification a regulatory concern? And if so, how so?

Main subjects
1. Threats & Opportunities of Certification
2. Some Basic Concepts
3. Responsible Certification in Markets
4. Responsible Certification in Public Hierarchies
5. A Closer Look at Competition Law Aspects
6. Some conclusions / statements
1a. THREATS TO RESPONSIBLE CERTIFICATION

A Pakistani police officer guarded a factory in Karachi that was destroyed this month by a fire that killed nearly 300 people, many trapped behind locked exits. (September 2012)

A USA TODAY examination shows that thousands of "green" builders win tax breaks, exceed local restrictions and get expedited permitting under a system that often rewards minor, low-cost steps. (October 2012)

USGBC: U.S. Green Building Council (501(c)(3) IRC NGO)
1b. OPPORTUNITIES FOR RESPONSIBLE CERTIFICATION

Increase of Global Trade/Welfare interdependencies / Rise in Global Governance

Demise of Welfare state: Privatization

Rise of ‘Regulatory Capitalism’…

Nationalization of International Law & ‘Governance by Technical Necessity

Governments and NGOs, often push or pull for certification

Esp. standards for social values (environment, labour, health, safety)

Certification is platform for mobilization (force of change)

Answer both to market failure & to government failure!

But with strong markets & strong civil societies (iNGO’s)…. also strong (instead of ‘hollowed-out’) states to match?
2. SOME BASIC CONCEPTS OF RESPONSIBLE CERTIFICATION

Approach to pros & cons of certification
Concern over *responsible* certification..

a. Certification?

b. Legal design
c. of meta-regulation
d. for responsible certification

A brief clarification
2a. SOME BASIC CONCEPTS OF RESPONSIBLE CERTIFICATION

Certification is a declaratory statement upon a conformity assessment* against some (general or specific/abstract or concrete) standard to the effect that the object** of assessment is in conformity with the standard.

* the process of determining the above conformity, by means of (laboratory) tests, inspections, exams, audits etc., of …

** e.g. persons, organizations, constructions, products, services, processes etc.

Certification: a public or a private law affair (erga omnes/inter partes) with authoritative or indicative legal effects (or none?) about 1st, 2nd or 3rd party conformity assessments,… executed by the same or another organization
2b. LEGAL DESIGN OF RESPONSIBLE CERTIFICATION

The conceptualization, enabling multiple prescriptive (varied) instantiations, either explanatory, advisory or by authority, of legal rules, regimes or institutions (including legal forms or procedures, or sets thereof).

Not legal fact finding (upon legal claims or propositions about legal states of affairs).

Prescriptive legal studies, not descriptive legal studies – how legally secure responsible certification
2c. META-REGULATION IN RESPONSIBLE CERTIFICATION

Insp. by Ayres & Braithwaite

Parker & Scott

Gov’t regulation

Co-regulation

Meta-regulation

Mandated self regulation

Self-regulation

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2d. RESPONSIBLE CERTIFICATION?

Backdrop of Regulatory Capitalism & Decentring of States

Various issues of ‘constitutionalism’ or legitimacy...
- input: when impacts – ‘consent’; stakeholder voice/exit/loyalty
- rights: respect for human rights (also externalities) and legal principles
- output: effectiveness on (long-term, key) societal interests (e.g. safety, security, health, environment)

issue of fragmentation on all counts..

‘Broad challenge’ of limits to (de facto) Public Power & Checks & Balances
- Global Administrative Law; Re-Instating States; Regulating Markets
- Adopting ‘real human rights’ (horizontal application)
2d. RESPONSIBLE CERTIFICATION?

Responsible Certification seen as fit with institutional (legal) rules about workings of basic modes of governance…

... representing different views on input & output legitimacy…

in Competitive markets (Cm)
B2B/B2C ‘exit’ / efficient exchange
Contract, Consumer protection & Competition law

in Public hierarchies (Ph)
G2C/G2G ‘voice’ / servient government
Constitutional & Administrative law
3. RESPONSIBLE CERTIFICATION IN COMPETITIVE MARKETS

Fit of Certification with Institutional Rules of Competitive markets
possible private law responses – to avoid market failure

1. Issue of fair competition (input: level playing field)
   address by ‘inclusive’ / ‘competitive’ certification (& standards)

2. Issue of consumer protection (input: e.g. info.-symmetry)
   address by private accreditation? ISO/IEC audits & certification

3. Issue of externalities (rights: 3rd party)
   address by broad stakeholder involvement (also in underlying standards)? Liability for (purposive) ‘protective effect’?

4. social welfare (output: societal responsibility)
   address social values through CSR or comp. advantage?
3. RESPONSIBLE CERTIFICATION IN COMPETITIVE MARKETS

Fit of Certification with Institutional Rules of Competitive markets possible **public law** responses – to remedy market failure

1. Issue of fair competition (level playing field)
   address by public competition law WTO/EU(MS)!
   both regarding public and private ‘obligations’ of certification

2. Issue of consumer protection (transparency/info-symmetry)
   address by public accreditation (EU-directive)!
   public authority; ISO-IEC standards; standards for certification

3. Issue of externalities (rights legitimacy)
   Legislated protection of third (NGO) parties?

4. Issue of rights & social welfare (output legitimacy)
   public hierarchy measures (see 4. e.g. publicisation)
4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

Fit of Certification with Institutional Rules of Public hierarchy
possible public law use of private certification

1. Certification as public permission/admission
   - as binding or interchangeable / challengeable standard
   - as presumed evidence of compliance/conformity

2. Certification as conditional to public permission (subs./procurem.)

3. Certification as indicative of public law compliance

4. Certification as mere market positioning

Variations: monopoly (public?); oligopoly (licensed/notified bodies); regulated competition (accepted standard); open competition (self regulated standards)

public ↔ private / competition law?
4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

Types 1-3 significant: 4 ways to secure fit with public interest
Starting from private certification at a...

a. Public accreditation / Market surveillance
   non-public interest specific (see 3.)

b. Meta-regulation (Notified bodies/certification bodies)
   – ‘new approach model’; Decision 767/2008 criteria conf.
   assessm. (also used by NAA’s): est., exp.compet., indept.,
   impart., proper proc. criteria (Outsourcing public regulation)
   MS – (non) EU driven; regulated markets; regulating sectors e.g.
   Bio-fuels; Commodities Act; Construction Law

c. Co-regulation

d. Public regulation or publicisation

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4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

c. Co-regulation

Particularly relevant in private certification type 1-2 – or type 3, when involving key public interests (safety, security, environment, health) Certification & standardisation as co-production

Assuming private certificating body, public involvement by (co-) selecting or acknowledging used standards, or public observers in certification activities.

Liability of government/states?

d. Public regulation or publicisation
4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

d. Public regulation or publicisation

Particularly in certification type 1- or 2 with serious concern over key public interests (safety, security, environment, health).

Public regulation ... certification by public law legal acts, but execution by private body/bodies and/or conformity assessor(s) as monopolists (Fra.bo Spa) / as licensed competitors. as free competitors but upon a public (acknowledged) standard.

-- competition law issues? (Also beyond type 1a) State respons’ty?

Publicisation ... assumes certification as public law act executed by a public law body.

In both subtypes: public law compliance Liability of government/states?
4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

Possible public law use of private certification

Analyse certification-type x regulatory type

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<td>1. Public permission</td>
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<td>2. Condition to permission</td>
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<td>3. Indicative of publ.compliance</td>
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<td>4. Mere market making</td>
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Self regulation – making a system that is as weak as possible and then gaming it? Responsible certification?

Public law role to remedy private/market failure…
- when possible through meta-rules (e.g. competition law ++)
- if not then (co-)regulate/publicize
- especially on key human rights issues: safety, security, environment, health, privacy… ‘positive obligations’ under ECHR
- without neglect of possible horizontal effect of such rights (3rd parties)
What does the optimal standardization/certification landscape look like?
- Too much competition?
- Too much choice?
- Or too much concentration of power; conflicts of interest

Article 101 TFEU: “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition…”

FIXING RULES UNDER ARTICLE 101 TFEU

- Main issues:
  - Exclusion (of competitors, of innovative technologies)
  - Exploitation
  - Collusion
- Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreement
- What is caught by the scope?
  - Standardization which qualifies as an economic activity (Case C-113/07 Selex sistemi)
- Governance rules for SSOs in order to ensure access of third parties
CERTIFICATION AND ABUSE OF DOMINANT POSITION

- Article 102 TFEU certification cases:
  - General Motors
  - British Leyland
- Concerns: exploitation of customers, exclusion of rivals, internal market considerations
FRAND FAILURE: PUBLIC LAW SOLUTIONS TO “PRIVATE” QUARRELS

- Disputes involving FRAND terms for SEPs – public and private aspects (Rambus, Qualcomm, Huawei)

- Private interest aspects
  - Access to market
  - Consumer access

- Public interest aspects
  - The whole standardization system might fail...
  - Eroding trust

- Contract law and soft governance mechanisms – not enough to allow the parties themselves to achieve their objectives
- Competition law – not enough to shape the standardization system
ONGOING DISCUSSION
‘IN RESERVE SLIDES’
A Pakistani police officer guarded a factory in Karachi that was destroyed this month by a fire that killed nearly 300 people, many trapped behind locked exits.

By DECLAN WALSH and STEVEN GREENHOUSE

Published: September 19, 2012

ISLAMABAD, Pakistan — A prominent factory monitoring group heavily financed by industry gave a clean bill of health to a Pakistani apparel plant last month, just weeks before a fire engulfed the premises and killed nearly 300 workers, many of them trapped behind locked exit doors.
RESPONSIBLE CERTIFICATION?

THREATS

Public (law)  Ali Enterprises  Private (law)

2nd – 3rd party regulation  1st – 2nd – 3rd party regulation

Government Failure?  Market failure?

“Monitoring ceased in 2003”
1a. THREATS TO RESPONSIBLE CERTIFICATION

5:46PM EDT October 24, 2012 - LAS VEGAS

A USA TODAY examination shows that thousands of "green" builders win tax breaks, exceed local restrictions and get expedited permitting under a system that often rewards minor, low-cost steps.

USGBC: U.S. Green Building Council (501(c)(3) IRC NGO)

Buildings get points for features that aim to minimize emissions, water use, waste and indoor pollutants. (Also outside USA…….)

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RESPONSIBLE CERTIFICATION?

THREATS

“Across the United States, the Green Building Council has helped thousands of developers win tax breaks and grants, charge higher rents, exceed local building restrictions and get expedited permitting by certifying them as "green" under a system that often rewards minor, low-cost steps that have little or no proven environmental benefit, a USA TODAY analysis has found."

E.g. $27 million tax break over 10 years upon certification by the ‘U.S. Green Building Council’ (NGO) (Nevada law)… Palazzo hotel Las V.
RESPONSIBLE CERTIFICATION?
OPPORTUNITY & NECESSITY

Increase of Global Trade/Welfare interdependencies / Rise in Global Governance

Demise of Welfare state: Privatization
Rise of ‘Regulatory Capitalism’…

Increase in transnational private &/or public standards & certification (as law?)*

* Trans Governmental Agencies: ‘nationalization of international law’
* Trans Administrative Agencies: ‘governance by technical necessity’

Strong Markets – Strong iNGO’s – Strong States (or a Hollowing-out of States?)

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RESPONSIBLE CERTIFICATION?
OPPORTUNITY & NECESSITY

Certification is more than indication of quality….. E.g. in Supply-Chain
Also standards for social values (environment, labour, health, safety)

Governments \lor/ \lor NGos, often push or pull for certification
Certification is platform for mobilization (force of change)

Cause 1: Market failure - self-regulation as fix for information asymmetry and
collective action problems. Create trust – esp. 3rd party systems

Cause 2: Government failure – fix by social responsibility of companies
fit with neo-liberalism: constrain government regulation; ‘post-regulatory state’
outsource regulation: standard setting - certification

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RESPONSIBLE CERTIFICATION?

LEGAL DESIGN

1. DESIGN (PROTO)

2. LEGAL ACT X (REPETITIVE)

3. DESIGN (PRESCRIBED) OF L. ACT

4. LEGAL ACT Y (REPETITIVE)

5. DESIGN (PRESCRIBED) OF FACTUAL BEHAVIOUR

6. FACTUAL BEHAVIOUR

PERFORMANCE (MAKING/DOING) REPEITIVELY

POST - LEGAL

(REALIZATION)

IDEO

1. DESIGN (PROTO)

PROTO- LEGAL

DESIGN (MODEL/ OUTLINE) UNIQUELY

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## ORCHESTRATING MULTIPLICITY

Abbott & Snidal (2006) Governance Schemes For Int. (..) Standards

<table>
<thead>
<tr>
<th>General Properties</th>
<th>Nesting</th>
<th>Overlap</th>
<th>Parallelism</th>
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<tbody>
<tr>
<td></td>
<td>Hierarchical</td>
<td>Nonhierarchical</td>
<td>Nonhierarchical</td>
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<td></td>
<td>Single Issue Area</td>
<td>Multiple Issue Areas</td>
<td>Single Issue Area</td>
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<tr>
<td></td>
<td>Rules resolve conflicts</td>
<td>Conflicts addressed through implementation, codification</td>
<td>Competition both creates and resolves conflicts</td>
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<td>Forum Shopping and Regime Competition</td>
<td>Hierarchy limits forum shopping and competition among schemes.</td>
<td>Forum shopping and competition among schemes to achieve different ends</td>
<td>Forum shopping and competition among schemes to achieve “same” end</td>
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Table 1: Different Forms of Relations among Government Schemes