

Private Standards and Competition Law: Why Should “Competition” Be Protected?

Kazumochi Kometani

Nishimura & Asahi

12 December 2016

@76th GSDM Platform Seminar

Private standards are hardly subject to the WTO disciplines

- WTO Agreement is applicable to governmental actions, and only some of them require certain governmental actions on activities by private entities, such as GATS Articles VIII and IX.
 - Article VIII:1: “Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member’s obligations under Article II and specific commitments.”
 - GATT Article XVII:1(b) and (c):
 - “(c) No Member shall prevent any enterprise ... under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.”
 - “(b) ... subparagraph (a) ... shall be understood to require that such enterprises shall ... make any such purchases or sales [involving either imports or exports] solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale”

Private standards are normally subject to competition law

- Private standards are, by definition, activities by private entities, and thus, subject to national competition law.
- The exception is the “act of state” doctrine - This means that private standards are generally subject to national competition law, unless set by private entities that have legal authority to do so.

What are the “private standards”? – By entities

Table 1: Examples of Private Standards

Individual firm schemes	Collective national schemes	Collective international schemes
Tesco Nature's Choice	Assured Food Standards	EurepGAP
Carrefour Filière Qualité	British Retail Consortium Global Standard - Food	International Food Standard
	QS Qualität Sicherheit	Global Food Safety Initiative
	Label Rouge	ISO 22000: Food safety management systems
	Food and Drink Federation/British Retail Consortium Technical Standard for the Supply of Identity Preserved Non-Genetically Modified Food Ingredients and Product	Safe Quality Food (SQF) 1000 and 2000
		ISO 22005: Traceability in the feed and food chain

Private Regulations and Labelling requirements – Informational basis

	Regulations	Labelling Requirements
Product-related (Product quality)	(1)	(2)
Non-product-related (Production process and method)	(3)	(4)

Measures (1)&(3) are “regulations”, by which a business enterprise or NGO choose products it procures (for production or resale).

Measures (2)&(4) are “labelling requirements”, which regulate access to certain labelling in order to convey certain information to consumers.

Questions

- Question 1
 - If a private standard is agreed by two or more business enterprises or by a business association, it may be significantly limiting competition between competitors thus being inconsistent with competition law, for example, as cartels or joint boycott.
 - Is no justification available to such a private standard if it intends to promote certain non-economic objective?
- Question 2
 - If a private standard is adopted by a single private enterprise merely representing its preference with respect to products or services it procures or sells, it appears not inconsistent with competition law.
 - However, is it still permissible even if it relates to the production process or method of certain products or services?

Q1 - Common or Shared Private Standards

- Jurisprudence in Japan
 - Osaka Bus
 - Air Soft Gun
 - May a business association permissibly adopt a product standard commonly applied to its relevant enterprises?
 - Is competition substantially limited?
 - Justifiable?
- Tests
 - Legitimacy of objectives
 - Rationality of choice of measures
 - Reasonableness in enforcement

Is the jurisprudence acceptable?

- The objective of the Japanese competition law is:
 - To protect competition:
 - Not justifiable based on non-competitive consideration
 - To achieve “the healthy and democratic development of the national economy”
 - May be justifiable, but not clear how competitive consideration and non-competitive consideration can be reconciled

Discussion

- Why should the “competition” be protected?
 - One explanation is that the “competition” or the market mechanism can produce the optimal economic outcome.
- In this line, the objective at issue should be legitimate.
 - However, the existing market mechanism is not perfect, i.e., there would be “market failures”.
 - It is justifiable to correct any “market failure”, e.g., environmental protection, safety protection, in order to produce the optimal economic outcome.
- Also, corrective measures should be reasonably designed.
 - The optimal measure should be chosen to correct the subject “market failure”, while minimizing negative side effects.

Q2 PPM – Private Standards

- Two points may be raised regarding private standards on the production process or method of products:
 - Are private entities capable of assessing more properly the market situation and needed actions for a foreign market, than the foreign government?
 - For labelling, are consumers capable of understanding properly how the relevant market situation is operated and what the standards work, concerning the foreign markets?
- This concern regarding the informational basis for measures is common to the governmental PPM measures (see e.g., mandatory labeling requirements on organic food).

Discussion

- Given that competition is to be protected in order to produce the optimal economic outcome, the PPM private standards may be harmful, because it is doubtful that they are optimally designed.
- However, even if a private enterprise's choice of products is not based on the proper consideration of the market situation, it may be corrected through market interactions under the competitive circumstances.
- Thus, unless the enterprise has a dominant position in the market, the government may leave that choice to the market competition.
- On the contrary, if the enterprise has a dominant position, a proper governmental intervention may be necessary to ensure that the true market situation will be properly considered. See also EC's action against Google under the EC competition law?
- Even international private standards may be challenged under competition law if they are adopted for a legitimate objective (e.g., standardization to ensure interoperability) or if they have no mechanism to adjust themselves to the particular situation of each national market, even if they are accepted by relevant business enterprises.

Conclusions

- Private standards are not subject to WTO Agreement, but can be subject to competition law.
- It may be useful to make a distinction between product related private standards and PPM private standards, if competition is to be protected to seek optimal economic outcome, rather than the freedom of competitors.
- Competition between private standards may matter.

More thoughts

- Are these conclusions consistent with GATT Article XVII:1(c)? It prohibits Members from preventing any enterprise acting “solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale”.
- If commercial consideration is equal to profit maximization, it might be inconsistent to restrict the discretion of private enterprises on product choice.
- It can be considered, however, that commercial consideration is not equal to profit maximization; it should mean a well-balanced business decision, properly reflecting the true market situation. This will support the legal interpretations presented here, and may ensure the coordination between the WTO Agreement and competition law.

End