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Food Safety Meta-Controls in the Netherlands

Paul Verbruggen and Tetty Havinga*

Public food safety authorities in Europe and elsewhere have recently developed forms of coordination and collaboration with private compliance systems in the monitoring and enforcement of public food safety laws. Such policies bring with them the risk of regulatory capture, loss of transparency and fuzzy accountability relationships. In this paper we analyse how the Netherlands Food and Consumer Product Safety Authority (NVWA) assesses and monitors the functioning of private food safety control systems so it can use these private systems in its own enforcement activities. We do so by discussing two national private systems that have been formally accepted by the NVWA and are as such subject to its meta-control. The article examines the safeguards that the public enforcement agency uses while coordinating its own activities with private food safety controls, the advantages and risks involved in this strategy, and the extent to which this policy can be improved. From this we draw lessons for public agencies elsewhere willing to engage with private compliance mechanisms. The study is based on the analysis of policy documents, public and private regulation and open-ended interviews with representatives of the public and private sector in the Netherlands.

I. Introduction

Public and private actors play a crucial role in ensuring that food is safe to consume. While government and industry have each developed sophisticated regimes to regulate, manage and control food safety risks, an important recent development is the rise of arrangements in which public and private actors organize their respective regulatory activities to attain the common goal of ensuring safe food. For government the coordination of private regulatory capacity appears attractive in times of global food chains, the internationalisation of public food safety controls, and national budget deficits.¹ However, it is not clear how much such 'hybridisation' of food safety controls contributes to higher levels of food safety. Moreover, certain risks seem manifest, including regulatory capture, transparency and accountability.²

Where states engage in such hybrid (or co-regulatory) arrangements, the key policy question is how these risks can be controlled and managed. A public enforcer is not likely to rely on private food safety controls without ensuring that public legal norms are complied with and the level of compliance is the same as in case of public enforcement, if not better. In the Netherlands, the Netherlands Food and Consumer Product Safety Authority (NVWA) has recently developed a policy of assessing private systems of food

safety controls so as to use these private systems in its own enforcement activities. This paper enquires how the NVWA has designed this policy of 'meta-control' (controlling the controllers) and asks which safeguards the public enforcement agency deploys while coordinating its own activities with private food safety controls, and the extent to which this policy can be improved.

These are pressing questions, given the fact that the NVWA is currently being challenged to more efficiently allocate enforcement resources, after successive rounds of budget cuts have seriously limited those resources. Elsewhere, too, public enforcement agencies in the food sector are developing collaborative regulatory arrangements with private actors to deploy their resources in more efficient and innovative ways. Since the mid-2000s, the Food Standards Agency in the United Kingdom has promoted better

* Paul Verbruggen is Assistant Professor of Private Law and Tetty Havinga is Associate Professor of Sociology of Law, both at Radboud University, Nijmegen.

1 Tetty Havinga and Frans Van Waarden, *Veilig voedsel: Toezicht toevertrouwen? Sectorschets toezicht in de voedselsector*, Webpublicatie nr. 70 (Den Haag: Wetenschappelijke Raad voor het Regeringsbeleid 2013).

2 Marian Garcia Martinez, Paul Verbruggen and Andrew Fearn "Risk-based Approaches to Food Safety Regulation: What Role for Co-regulation?", 16 *Journal of Risk Research* (2013), pp. 1101-1121.

coordination between the monitoring and enforcement activities of the local food authorities and the activities undertaken by the private sector, mainly focusing on so-called ‘farm assurance schemes’.³ The Canadian Food Inspection Agency is developing guidelines for the recognition of ‘third-party service delivery providers’.⁴ Also the U.S. Food & Drug Administration has indicated that, in the context of the Food Safety Modernization Act, it will deploy private certification from recognised ‘third-party auditors’ to verify the food safety compliance of imported goods.⁵ Our investigation into the Dutch experience of meta-control allows us to draw broader lessons for public enforcement agencies elsewhere that consider to engage with private compliance mechanisms.

The questions framed above are central to the explorative research set out in this paper, in which we conducted a comparative analysis of two private food safety control systems – known as *Bureau de Wit* and *RiskPlaza* – which the NVWA has accepted as ‘systems of self-control’ for food produce. The methodological choices that underlie this analysis are explained in Section 4. In what follows, we first define what we mean by ‘meta-control’ (2) and discuss the factors that have driven the emergence of such a policy in the Netherlands (3). The analysis of *Bureau de*

Wit (5) and *RiskPlaza* (6) focuses on the design of these systems of private control and how the NVWA coordinates its own enforcement activities with them. The results of this analysis are compared and discussed to highlight the approach the NVWA has taken to the respective private systems, and discuss the risks involved in those approaches (7). Finally, we present our conclusions and broader lessons for other public enforcement agencies (8).

II. Meta-Control of Food Governance

What do we mean by ‘meta-control’? In essence, meta-control concerns the assessment and control of (other) control systems. In an arrangement of meta-controls, the actor that performs monitoring and enforcement activities (the first tier) is itself subject to systems of control and oversight. The actor that carries out this meta-control function (the second or third tier) does not itself monitor or enforce regulation vis-à-vis the regulated. Instead, its role is limited to managing, verifying and designing first-tier control mechanisms and, more broadly, the framework for meta-control. Meta-control thus implies a two- (or three-) stage process of monitoring and enforcement, in which the role of the meta-controller changes from what Osborne and Gaebler have famously called *rowing to steering*.⁶

Meta-control is distinct from strategies that have been described as ‘enforced self-regulation’ and ‘management-based regulation’. These forms of regulation are characterised by the public approval of private, *internal* management systems at the firm-level, which enable individual firms to self-assess and ensure regulatory compliance.⁷ Meta-control, as we define the concept, concerns the approval of monitoring and enforcement activities carried out by *external* actors (such as third-party auditors and certification bodies) who use their own food safety management systems to assess and ensure regulatory compliance by the firm. Nonetheless, meta-control can involve enforced self-regulation or management-based regulation. This is the case if the first tier controller (e.g. a third-party auditor) verifies whether a firm’s internal risk management system complies with a set of regulatory norms by using a verification scheme, while being subject to control and inspection by another body (e.g. a certification scheme owner, accreditation body or public enforcement agency). In our view, meta-con-

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- 3 Ruth Kirk-Wilson “Review of Food Assurance Schemes for the Food Standards Agency”, 2002 available on the internet at <<http://collections.europarchive.org/tna/20101209122142/http://www.food.gov.uk/multimedia/pdfs/foodassureguidance.pdf>> last consulted 31-10-2014 and Ruth Kirk-Wilson, “Review of Uptake of FSA Food Assurance Scheme Guidance by UK Scheme Operators”, 2008 available on the internet at <<http://collections.europarchive.org/tna/20101209122142/http://www.food.gov.uk/multimedia/pdfs/foodassurancereview.pdf>> last consulted 31-10-2014.
 - 4 Canadian Food Inspection Agency “Improved Food Inspection Model. Proposed Draft”, 2012, available on the internet at <<http://www.inspection.gc.ca/about-the-cfia/accountability/inspection-modernization/proposed-draft/eng/1342549427433/1342549854104>> last consulted 31-10-2014.
 - 5 U.S. Food & Drug Administration “FSMA Facts. Proposed Rule on Accreditation of Third-Party Auditors”, 2013, available on the internet at <<http://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM362561.pdf>> last consulted 31-10-2014. See more specifically the contribution in this Special Issue by Oldfield.
 - 6 D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, MA: Addison-Wesley, 1992).
 - 7 Cary Coglianese and David Lazer, (2003) “Management-based Regulation: Prescribing Private Management to Achieve Public Goals”, 37 *Law & Society Review* (2003), pp. 691 et seq.; Robyn Fairman and Charlotte Yapp, (2005) “Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement”, 27 *Law & Policy* (2005), p. 491 et seq.

trol then concerns the relationship between the first and second tier of control, and not – in contrast to enforced self-regulation or management-based regulation – risk management systems at firm-level.

Accordingly, meta-control involves those activities that seek to regulate and steer the mechanisms, procedures and instruments for the monitoring and enforcement of regulatory compliance, but are managed by others. In that sense, meta-control closely aligns with the broader concept of ‘meta-regulation’. While Coglianesse and Mendelson have correctly observed that there is no agreement on the definition of meta-regulation,⁸ Parker aptly captures the common core of studies of meta-regulation by holding that the concept principally concerns the activity of ‘(...) regulating the regulators, whether they be public agencies, private corporate self-regulators or third party gatekeepers’.⁹ Instead of independently setting regulatory standards and monitoring and enforcing them, the meta-regulator – just like the meta-controller – operates at a distance by focusing on other actors’ mechanisms. However, if these mechanisms are no longer deemed adequate, the meta-regulator intervenes and sets new standards with which the first-tier regulator must comply.

Both public and private actors may act as meta-regulators by exerting influence on or setting conditions for regulatory activities, whether such activities be standard-setting, monitoring or enforcement.¹⁰ In this sense, meta-control is a form of meta-regulation that focuses on the activities of monitoring and enforcement in a regulatory regime. Although here we focus merely on meta-controls exercised by the Dutch public enforcement agency NVWA on two national private food safety control systems, the concepts of meta-regulation and meta-control – in our view – not only involve the regulation of private systems by public actors, but also the regulation of public regimes by private actors,¹¹ as well as the regulation of public and private actors among themselves.¹²

IV. Drivers for Meta-control

Which factors have driven the development of NVWA oversight on private food safety control systems in the Netherlands? One relevant factor is that the capacity of public agencies to regulate food safety is increasingly under pressure due to the globalisation of food supply chains, and the recurrent insti-

tutional reforms and budget cuts. Today, supply chains in the food sector are often international in scope, which means that the various stages of food production may not occur within the territory of a single public enforcement agency, whose jurisdiction is territorially defined. This makes it difficult for such agencies to warrant the safety and quality of the entire production process. Moreover, the NVWA has been confronted with a number of institutional reforms and budget restrictions that have seriously limited its capacity to perform periodic inspections to assess compliance levels.¹³ Within this context, coordination with private food safety systems seems attractive, since these systems may – it is contended – compensate for the gaps that the NVWA has been forced to leave unfulfilled. We therefore observe that the NVWA is aligning its activities with other bodies, both public and private, at national and international levels.

A second factor that has played a decisive role in the development of the NVWA policy of meta-control is the changes that have occurred in the legal framework applying to food safety controls. In response to the BSE crisis in 1996, this framework was significantly reformed both at the national and European level.¹⁴ Regulation 178/2002/EC currently

8 Cary Coglianesse and Evan Mendelson, “Meta-regulation and Self-regulation”, in: Martin Cave, Robert Baldwin, Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford: Oxford University Press, 2010), p. 147. See also: Sharon Gilad, “It Runs in the Family: Meta-regulation and Its Siblings” 4 *Regulation & Governance* (2010) 485.

9 Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge: Cambridge University Press, 2002), at p. 15.

10 Colin Scott, “Regulating Everything: From Mega- to Meta-regulation”, 60 *Administration* (2012), pp. 61-89. Paul Verbruggen and Tetty Havinga, “The Rise of Transnational Private Meta-Regulators”, *Osgoode Legal Studies Research Paper* No. 71/2014, available on the internet at <<http://ssrn.com/abstract=2512843>> last consulted 31-10-2014.

11 Colin Scott, “Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance”, 29 *Journal of Law & Society* (2002), pp. 56-76.

12 Verbruggen and Havinga, The rise of transnational private meta-regulators, supra note 10.

13 Havinga and Van Waarden, *Veilig voedsel 2013*, p. 81ff. After several food safety (the salmonella Thomson and EHEC outbreaks) and non-food safety related incidents (horsemeat), an increase in the number of food safety inspectors was announced in December 2013. See: Brief van de staatssecretaris van Economische Zaken en de minister van Volksgezondheid, Welzijn en Sport aan de Tweede Kamer d.d. 19 december 2013, Plan van aanpak NVWA).

14 Ellen Vos, “EU Food Safety Regulation in the Aftermath of the BSE Crisis”, 23 *Journal of Consumer Policy* (2000), pp. 227-255.

provides the general public legal framework for food safety controls in the European Union (EU) and requires food and feed producers to meet the applicable regulatory standards in all stages of the production, processing and distribution of food and feed. The EU Member States must maintain an effective legal system to see to it that food safety is ensured.¹⁵ By making the private sector primarily responsible for food safety, it became possible for public authorities in the EU such as the NVWA to review and reallocate tasks and resources. The NVWA has focused on 'system controls' (*stysteemtoezicht*), which implies a shift from monitoring substantive food safety norms to oversight of production processes and HACCP-based systems adopted by individual companies.¹⁶

Other pieces of European legislation that concern the exercise of inspections and controls further promote this reorientation. Regulation 882/2004/EC requires that public authorities shall conduct frequent food safety inspections, without prior notice, on a risk basis, taking into account the identified risks, past compliance records, the reliability of the authority's own checks and any other information that might signal non-compliance.¹⁷ The regulation's preamble specifies the latter point, noting that the fre-

quency of the controls should be proportionate to the risk, 'taking into account the results of the checks carried out by feed and food business operators under HACCP based control programmes or quality assurance programmes, where such programmes are designed to meet requirements of feed and food law, animal health and animal welfare rules'.¹⁸ This enables agencies like the NVWA to ascribe an explicit role to private food safety control systems in their institutional frameworks to ensure food safety. The result is that food safety controls in the Netherlands are hybridised to a considerable degree.

A third important factor is the motivation of the private sector to collaborate with the NVWA. Owners of private food safety control systems have a manifest, commercial interest in having their system accepted by the public agency. After all, such public approval will serve as a sign of expertise, competence and diligence, which is likely to attract more (paying) customers. This is a significant incentive for owners to collaborate with the NVWA and subject themselves to its (meta-) control.¹⁹ This 'buy in' offers the NVWA a possibility to collaborate with the private sector since meta-control presupposes a certain level of cooperation and is, in that sense, no one-way street. However, the presence of the commercial motivation for collaboration implies the risk that private interests (attracting new customers, making a profit) will undermine public ones (astute enforcement, food safety). To maintain the proper balance between these interests, the NVWA is challenged to set down adequate safeguards and conditions under which the collaboration can take place.

IV. Methodology

To explore how the NVWA assesses and monitors private food safety control systems and deploys its meta-control strategy, we have investigated two such systems, namely Bureau de Wit (BDW) and RiskPlaza. These are two of the twelve so-called 'self-control systems' which the NVWA accepted in the food production, catering, and retail industries.²⁰ The agency committed itself to taking these systems (and their inspection and audit results) into account when determining its inspection frequency, the depth and length of its inspections, and the interventions at participating firms. The private systems that have been accepted so far are voluntary and principally nation-

15 Article 17(1) and (2) of Regulation 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1.

16 Jan-Kees Helderma and Marlies Honingh, (2009) *Systeemtoezicht. Een onderzoek naar de condities en werking van systeemtoezicht in zes sectoren* (Den Haag: Boom Juridische uitgeverij 2009). Martin De Bree, "Hoe landelijke inspectiediensten omgaan met systeemtoezicht", 2 *Tijdschrift voor Toezicht* (2010), pp. 51-70.

17 Article 3(1) Regulation 882/2004/EC of the European Parliament and of the Council of 29 April 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 191/1.

18 Recital 13 Regulation 882/2004/EC.

19 Not only the owners, but also food business operators have noted that they would like to see the NVWA take (greater) consideration of private systems and certifications in determining its enforcement action. Almost half the firms certified by ISACert (a major certification body in the Netherlands) suggested in a survey conducted by ISACert among its customers that the NVWA does not take sufficient consideration of their audit results to base its inspections on. Available on the internet at <<http://netherlands.isacert.com/artikelen/Resultaten%20enquête%20betrouwbaarheid%20certificaten-94.html>> last consulted 31-10-2014.

20 <<https://www.nvwa.nl/onderwerpen/toezicht-nvwa-eten-en-drinken/dossier/kwaliteitssystemen-zelfcontrolesystemen-levensmiddelen>> last consulted 31-10-2014.

al in scope. Certification for transnational standards, such as those recognized within the Global Food Safety Initiative (GFSI), have not been accepted by the NVWA, although the agency was investigating that option at the time of writing.

The cases were not selected according to any theoretically driven principles. Very little was known about the operation of accepted self-control systems when we initiated our research, and that still remains the case for now. The cases we selected were sought to ensure a high level of variation. The system operated by BDW is one of seven accepted systems that monitor compliance with guides to good hygienic practice by artisan, non-industrial food business operators. These guides are developed on a sectoral basis by the respective representative industry bodies and submitted to government for formal approval, after which they form the basis for NVWA inspections in the sector concerned.²¹ Preliminary research indicated that the meta-control approach taken by the NVWA vis-à-vis BDW was not different from the other accepted self-control systems for guides to good hygienic practice. Accordingly, our selection of BDW as a case study was random. RiskPlaza is one of the five other systems accepted by the NVWA.²² The choice to include RiskPlaza in our analysis is related to the fact that many consider this system an example of how the NVWA should collaborate with private sector initiatives.²³ The other four accepted quality systems are each very different in nature and concern an accredited food standard (Dutch HACCP), a quality system of a large single meat company, a quality assurance system for eggs, and the Dutch Quality Control System for raw material assurance for the production of fruit juices.

The selected private food safety control systems differ as regards a number of elements that are likely to influence how the NVWA designs and implements its meta-control approach. First, BDW is a medium-sized, for-profit company with some 50 years of experience in verification and certification services. All but one of the other accepted similar control systems are for-profit companies. By contrast, RiskPlaza was launched in 2008 as a multi-stakeholder initiative and was administered by the not-for-profit Product Board. Second, firms participating in the BDW system are no longer subject to official inspections by the NVWA. RiskPlaza audited firms will still be subject to NVWA inspections, but they will only look at the parts not covered by the RiskPlaza audit.

Third, BDW only verifies compliance with recognised guides to good hygienic practice. In the case of RiskPlaza, the database that is part of the system concretises the norms upon which RiskPlaza audits are based. The norms are adopted in collaboration with the NVWA, experts and certification bodies performing the audits. The co-regulatory arrangement with RiskPlaza thus not only concerns the verification of compliance with regulatory norms, but also the crystallisation of those norms. These differences might lead the NVWA to set different requirements for the acceptance of the systems as the two cases demonstrate differences with regard to the commercial interests involved, the extent to which they replace NVWA inspections and the scope of their regulatory activities.

In describing the cases we identify the organisations that are concerned with the system, what their respective responsibilities and obligations are, the legal format into which those obligations have been cast, and the methodology for compliance verification (nature, purpose and frequency of visits). Subsequently, we describe the meta-control approach of the NVWA: what requirements does the NVWA set for acceptance of the private system and how does the NVWA monitor the system's functioning after acceptance? Our focus here is on the ways in which the public agency seeks to manage and control the risks that are concerned with this collaboration. The case descriptions are based on publicly available documents (e.g. NVWA policy documents, legislation, private regulation and audit protocols) and four open-ended interviews with representatives of BDW, RiskPlaza, and the NVWA.²⁴

21 Tetty Havinga, "National variations in the implementation and enforcement of European food hygiene regulations. Comparing the structure of food controls and regulations between Scotland and the Netherlands", *35 Recht der Werkelijkheid* (2014), pp. 32-53.

22 See in general: <<https://www.riskplaza.nl/index.php>> last consulted 31-10-2014.

23 Havinga and Van Waarden, *Veilig voedsel*, 2013, p. 61.

24 We conducted four interviews, namely with the 'system expert' of RiskPlaza, the technical director of BDW (who is responsible for the development of the verification system), an auditor working for one of the RiskPlaza recognized certification bodies that perform RiskPlaza Audit+ visits, and a NVWA staff member responsible for developing of the policy of accepted self-control systems in the catering, retail and health care sector. In addition, we used data obtained from two interviews conducted by one of the authors with a staff member of the Product Board involved in the development of RiskPlaza and a staff member of the NVWA responsible for the development of the policy of accepted self-control systems for food and feed production.

V. Bureau de Wit

1. System

BDW is a for-profit company offering verification and consultation services concerning food safety, water safety, air safety and rodent extermination. The company was established some 50 years ago as a laboratory, which today is accredited according to ISO standards. BDW has its own labelling scheme. Its services include inspections, training, sample taking and analysis, consultancy, and the development of internal quality assurance systems. Customers operate in the catering, hotel, restaurant, café, retail and health care sector. Many of the BDW customers are part of branded chains or franchises, in which case, the head office requires its subsidiaries or franchise takers to apply for the BDW label to ensure a certain level of quality and to prevent potential brand damage by safety incidents.

The BDW food safety control system involves a minimum of two annual inspections, during which compliance with the applicable guide to good hygienic practice and public regulation is verified. The inspection results are documented and (if needed) an action plan is drafted to improve compliance. BDW provides support and follow-up concerning the implementation of such a plan. Firms that have been rated 80% compliance in a minimum of two consecutive inspections are awarded the BDW label, including the notification of that award on the BDW website, and will benefit from a lower NVWA inspection rate. A service contract between BDW and its customers provides the legal basis for BDW inspections. The contract entitles BDW to pass on to the NVWA the audit results of customers in the context of a system audit conducted by the agency on the BDW system. BDW only informs the NVWA about firms that meet the 80% threshold and qualify, to benefit from a laxer official inspection regime. These firms are no longer visited by the NVWA; the agency considers the BDW audit sufficient.²⁵

The normative framework applying to the BDW inspections is the same as those that apply to official NVWA inspections, namely public legal norms as operationalised by the applicable guide to good hygienic

ic practice. There are, however, some important differences between the inspections carried out by BDW and the agency. BDW inspectors must check all requirements set out by the guide during an inspection, whereas NVWA inspectors are permitted to focus on particular aspects (e.g. cleaning, sell-by dates, cooling facilities, etc) as part of the prioritised goals in the agency's enforcement policy. Moreover, the level of required regulatory compliance is higher in case of the BDW: while the NVWA will not take enforcement measures if 60% of the requirements are met, BDW should maintain a compliance standard of 80%. The BDW inspection frequency is also higher than that of the NVWA. BDW claims that it visits its customers four times a year, of which at least two visits are unannounced. The NVWA requires a minimum of one unannounced annual visit for accepted self-control systems that monitor compliance with guides to good hygienic practice.

2. Meta-Control

What instruments and procedures does the NVWA use to assess and monitor BDW performance? Before accepting the BDW system (and other self-control systems that monitor compliance with guides to good hygienic practice), the NVWA carries out an extensive initial assessment. This *ex ante* check starts off with talks and discussions with BDW to map and test the methodology of the private system. Aspects that feature prominently in these meetings are the norms that are assessed upon inspection, the research methodology used (e.g. auditing, sample taking, witness audits), the way questions are asked, the training of inspectors, and the ways in which the system is reviewed and updated.

If the NVWA is convinced of the robustness of the private system, a so-called 'address test' is organised: the system owner gives the NVWA a minimum of 40 addresses of customers that have been successfully audited. The agency then verifies whether it sees these firms as low-risk, based on the results of its own inspection data. Subsequently, the NVWA will conduct a system audit at the system owner's premises. Two NVWA auditors who have not previously been involved in the approval process assess the system and inspection reports. The next step is that the system owner solicits firms to participate in the system. If some 100 firms participate, the NVWA performs a

²⁵ BDW, Inspectieprotocol Zelfcontrolesysteem BDW, 1 March 2012, Version 7 (on file with authors).

'reality check' to verify whether the system ensures a sufficiently high level of compliance. Should irregularities emerge, the NVWA can organise verification audits, in which case a private assessor will conduct an inspection, after which an NVWA inspector will directly visit the same premise to assess the situation. Once all these steps are completed, the NVWA accepts the private system and announces it on its website.

Several system owners were interested in having their system assessed and accepted by the NVWA. However, the NVWA did not offer a clear set of criteria that system owners should meet to attain acceptance, nor was the procedure for acceptance formalized. By its own admission, the NVWA did not want to use a straightjacket to apply to all systems. This standpoint can be explained by the experience the authority gained from its involvement in the earlier policy framework called 'Oversight of Inspection', which was applied to egg quality controls in the Dutch poultry sector. As the contribution in this Special Issue by Van der Voort highlights, the strictness and inflexibility of the criteria imposed on the owners of the private control system led to its eventual demise. Yet, the meta-regulatory approach now taken by the NVWA led to other issues, namely uncertainty among system owners who wanted to apply for NVWA acceptance and a certain level of resentment among those owners who saw their competitors gain acceptance.

Our interviews suggest that the NVWA uses the following set of criteria before accepting BDW and other six private systems verifying compliance with guides to good hygienic practice as 'self-control systems':

- i. Participating firms should be artisan, non-industrial food business operators.
- ii. System owners ensure food safety by verifying compliance with recognised guides to good hygienic practice.
- iii. Inspections should cover all elements of the guide.
- iv. Compliance levels of 80%.
- v. If non-compliance is observed, incidents must be re-inspected in a follow-up visit.
- vi. A minimum of one inspection per annum.
- vii. Inspections must be unannounced.
- viii. Participating firms should formally approve the exchange of audit results between the system owner and the NVWA.

Accreditation is not required, nor does the NVWA set specific requirements for the training and experience of inspectors (although this is part of the system audit conducted by the NVWA upon acceptance of the system). Moreover, although the institutional separation of consultancy and inspection is not required, if it is absent then this does raise concerns at the NVWA. In common with the other six accepted self-control systems, BDW reports monthly to the NVWA on the firms participating in the system. The NVWA assumes that these firms are compliant with applicable regulations and does not inspect them.

Finally, it is not clear how the NVWA will continue to assess and monitor the performance of private systems like that of BDW after acceptance. The NVWA anticipates that this *ex post* control will include annual meetings complemented by an office audit one year and random spot checks at participating firms in the alternate year. The NVWA organises a semi-annual plenary meeting to which all accepted self-control systems are invited to discuss new developments and the general functioning of the systems and their collaboration with the NVWA in practice (e.g. in case of an outbreak of a food-borne disease).

VI. RiskPlaza

1. System

RiskPlaza is a private HACCP-based audit scheme to control food safety hazards in raw materials and ingredients for food production. The scheme was launched in 2008 by the semi-public trade association Agricultural Product Board (Productschap Akkerbouw). It initially applied only to the bakery sector, which had initiated the development of the scheme in 2005, but its application was soon extended to other sectors (vegetables, fruits, nuts, poultry, meat, oils and fats, convenience food). RiskPlaza consists of two elements: a database that identifies potential food safety hazards and the 'RiskPlaza Audit+' system. The database concretises EU and national food safety regulations and is adopted and revised by the Product Board in collaboration with experts from various branches of industry and the certification bodies that are recognised as qualified auditors for the RiskPlaza Audit+ system. Participating firms in the food chain can consult the database to ensure that

the products they source are safe. A covenant between the Product Board and NVWA defines the reciprocal responsibilities.²⁶ It determines, amongst others, that the NVWA will use the database for inspections, such that 'a common truth' exists about the potential hazards in raw materials and food ingredients.²⁷

The RiskPlaza Audit+ system supports suppliers in the food processing industry to comply with Article 5 Regulation 2004/852/EC, which requires that food business operators have in place, implement and maintain permanent procedures based on the HACCP principles to verify whether the raw materials and ingredients they source are safe. The Product Board does not consider the audit system a certification scheme, despite the fact that certification bodies recognised by RiskPlaza perform the audits. No actual certificate is awarded after a successful audit: a firm merely receives the status of 'RiskPlaza Audit+'.²⁸ Suppliers of raw materials and food ingredients can apply for a RiskPlaza Audit+ provided they already have a certificate from a HACCP-based food safety scheme, such as the BRC Global Standard or FSSC 22000, or from an NVWA-approved guide to good hygienic practice. Whereas such HACCP certification concerns the assessment of food production processes, the RiskPlaza Audit+ is an additional test – hence the 'plus' – specifically focused on controlling hazards in raw materials and food ingredients.²⁹

The compliance assessment during the RiskPlaza Audit+ is an administrative audit of formalized risk management procedures, registration requirements

and the documentation of product analyses. Sample taking and analysis are not involved. These audits take place on the basis of announced visits, although unannounced visits are possible.³⁰ Four accredited third party certification bodies carry out the RiskPlaza audits,³¹ which are usually conducted together with or after a regular HACCP food safety audit. An audit is performed annually and is thus broadly similar to the auditing frequency of regular HACCP-based private standards. The 'system expert' of RiskPlaza assesses the requirements that are set for the audits.³² This expert is an external consultant who evaluates the performance of the certification bodies as regards aspects of an audit's comprehensiveness, consistency and quality, and reports to the Board annually. For that purpose, the expert collects all audit reports filed by the certification bodies and also participates in audits conducted by these bodies (witness audits).³³

If a producer sources its raw materials or ingredients from a supplier that has been awarded the status of RiskPlaza Audit+, the NVWA considers it to meet the obligations under Article 5 Regulation 2004/852/EC on sales verification. Separate verification of the product sourced from that supplier is no longer necessary and the agency will not inspect this issue.³⁴ Furthermore, NVWA inspections at the RiskPlaza Audit+ supplier will cease.³⁵ The public agency remains competent, however, to perform inspections as regards other aspects of food safety regulation.

Some 70 firms have been audited following the RiskPlaza Audit+ scheme.³⁶ The vast majority of these firms are located in the Netherlands, but a small number are based in Belgium and Germany. As of January 2014, product boards have been dissolved as part of a wider administrative reform in the Netherlands. To ensure the continuity of RiskPlaza its administration and operations have been transferred to the legal entities called RiskPlaza Foundation (RiskPlaza Stichting) and RiskPlaza BV. Soon after we concluded our interviews and document analysis early 2014, RiskPlaza was sold to a commercial party. At the time of writing, it was clear that the NVWA, for the time being, would continue to accept RiskPlaza as a private self-control system following the same criteria and procedures it had designed previously.³⁷ We have not received any indication that the initial meta-controls strategy designed by the NVWA has changed.

26 Convenant horizontaal toezicht tussen het Productschap Akkerbouw (systeemeigenaar RiskPlaza) en de Nederlandse Voedsel- en Warenautoriteit, *Staatscourant* 2012, 13450.

27 Ibid, at 'Doelen en uitgangspunten', no. 7.

28 Product Board, 'Auditreglement RiskPlaza-audit+ systeem (versie 2.0, maart 2013, Den Haag), p. 23, available on the internet at <http://www.productschapakkerbouw.nl/files/PA_28032013_B14.pdf> last consulted 31-10-2014.

29 Product Board, Auditreglement 2013, supra note 28, p. 20

30 Product Board, Auditreglement 2013, supra note 28, p. 24.

31 Product Board, 'Certificerende instellingen', <<https://www.riskplaza.nl/index.php/home/index/3/2>> accessed May 2014.

32 Product Board, Auditreglement 2013, supra note 28, p. 33.

33 Product Board, Auditreglement 2013, supra note 28, p. 39-40.

34 Convenant RiskPlaza – NVWA 2012, supra note 26, at 'Verplichtingen NVWA', no. 4.

35 Ibid, at 'Verplichtingen NVWA', no. 5.

36 The list is available on the internet at <<https://www.riskplaza.nl/index.php/home/index/3/1>> last consulted 31-10-2014.

37 Personal communication NVWA.

2. Meta-Control

How does the NVWA assess and monitor the RiskPlaza scheme? Several instruments and procedures apply. First, the NVWA has been closely involved in setting up the scheme. When the first discussions between the Product Board and the bakery sector took place in 2005, the NVWA was asked to be involved. Now, the NVWA has a formal role in the governance of the regime as the agency participates in the so-called 'expert meetings'.³⁸ In these hearings the content of the hazard database is adopted, determining the specific ingredient groups and factsheets of related hazards. The hearings also discuss recent developments and changes in food safety regulation.³⁹ Participation in the expert hearings, which take place at most four times a year, enables the NVWA to survey the substantive standards upon which RiskPlaza audits are based. Accordingly, it can see to it that the level of protection warranted by RiskPlaza is adequate, and that changes in legislation are correctly and swiftly implemented.

Second, the NVWA also participates in so-called 'harmonisation meetings' that take place annually between the auditors of the recognised certification bodies and the RiskPlaza system expert.⁴⁰ During these hearings the system expert presents the analysis of the audit reports submitted by certification bodies and the witness audits. Cases are also discussed, although not so much at the level of individual certification bodies, but rather as examples to illustrate good (or bad) practices. Whereas participation in the expert hearings enables the NVWA to remain informed about the substantive standards upon which RiskPlaza audits are based, participation in the harmonisation hearings offers the NVWA up-to-date information about the way audits are performed. In conclusion, it must thus be considered that the NVWA is closely involved in the governance and implementation of the RiskPlaza scheme.

The exchange of information between the Product Board and the NVWA also enables the latter to monitor and assess performance. The covenant requires the Product Board to notify the NVWA in case of significant changes in the system, to grant the agency access to the database and to offer insights into the audit system's functioning.⁴¹ From a public interest perspective it is worth observing that there is no obligation on the side of the Product Board to advise and alert the NVWA in cases of major non-

compliance and serious risks to public health and safety.⁴² The audit reports are not automatically shared with the NVWA and the agency did not require the Product Board to oblige the recognised certification bodies to share them either. Nonetheless, there are several ways in which the NVWA can access information about regulatory compliance by firms possessing the RiskPlaza Audit+ status. First of all, the NVWA can monitor the RiskPlaza website for changes in the status of firms. Second, it may request the audit report from the firm upon inspection. Third, the NVWA receives general information on the performance of audited firms and certification bodies when participating in the harmonisation hearings. Finally, the NVWA may organise a system audit to evaluate the entire scheme.⁴³ As the covenant notes, audit reports and random spot checks at participating firms may be part of this audit. The NVWA performed its first system audit on the RiskPlaza scheme late in 2013. It consisted of an office audit, reviewing the system's robustness, client records, training programmes and other relevant documentation. The audit concluded that RiskPlaza is a private system that 'operates properly and offers a substantive contribution to the assurance of the safety of food ingredients'⁴⁴ and offers a number of recommendations for improvement of the system.

VII. Comparison and Discussion

1. Meta-Control

There are several similarities between the ways in which the NVWA organises its meta-controls as regards the two accepted self-control systems. In both cases, BDW and RiskPlaza, a clear set of conditions

38 Covenant RiskPlaza – NVWA 2012, *supra* note 26, at 'Verplichtingen NVWA', no. 1.

39 Product Board, *Auditreglement 2013*, *supra* note 28, p. 37.

40 Product Board, *Auditreglement 2013*, *supra* note 28, p. 40.

41 Covenant RiskPlaza – NVWA 2012, *supra* note 26, at 'Verplichtingen Productschap Akkerbouw', no. 2, 5 and 7.

42 The covenant concerns only the situation that the NVWA provides information to the Product Board about food safety incidents at participating firms. See Covenant RiskPlaza – NVWA 2012, *supra* note 26, at 'Verplichtingen Productschap Akkerbouw', no. 8.

43 *Ibid.*, at 'Verplichtingen NVWA', no. 2-3.

44 NVWA (Internal Audit division), 'RiskPlaza Audit', November 2013 (not published, on file with authors), p. 5.

for acceptance was absent from the start; these conditions have been set along the way as experience with the policy grew. In the case of private control systems such as BDW a number of clear-cut criteria that apply to similar private control systems are now used. RiskPlaza, however, remains a unique system, in which the NVWA has been closely involved from its inception.

In both cases the NVWA conducted an audit on the systems before accepting them. They also performed random checks at participating firms to assess the reliability of the systems, that is, to verify whether the private inspection results did not differ significantly from the findings of the NVWA when visiting the premises. It is too soon to draw any conclusions about the effectiveness of the NVWA meta-controls after the systems of BDW and RiskPlaza were accepted.⁴⁵ The goal is to monitor system performance by organising intermittent meetings, system audits and random verification checks.

There are also some significant differences. The NVWA has not required RiskPlaza to employ unannounced audits, whereas this is an undisputed condition for the acceptance of private control systems such as BDW. Another example is that the NVWA has the possibility to request at any moment an audit report of a firm audited by BDW. The NVWA has that option since it obliges BDW to require from its customers the possibility to forward audit results to the NVWA. In the case of RiskPlaza, audit reports can only be shared with the NVWA in the context of a system audit. The certification bodies recognised by RiskPlaza do not demand from their customers the ability to share any audit results with the NVWA, nor does RiskPlaza require these certification bodies to do so upon recognition. Instead, the contracts between the certification bodies and their customers typically include confidentiality clauses that bar them from sharing any information on audit results with third parties. The NVWA will be able to access the audit results, when inspecting the firm if it asks

for the audit reports. RiskPlaza is obliged to maintain a public record (website) of the RiskPlaza Audit+ firms. That obligation is absent in the case of BDW. The difference is smaller than it seems, however. BDW maintains on its website a list of customers with a BDW certificate, provided the customer agrees to that notification.

2. Benefits and Risks

Generally speaking, a key benefit for public authorities such as the NVWA of collaborating with private control systems such as BDW and RiskPlaza appears to lie in the efficiencies that can be achieved in monitoring and enforcement. In times of budgetary constraints, engaging with pre-existing private assurance schemes can indeed be a cost-effective alternative to reduce inspection costs, while maintaining inspection coverage. Furthermore, the private schemes that have been recognized may contribute to better compliance by firms as they tend to visit them more often, and they may combine inspection and advice in their services, arguably leading to a better understanding among firms of their responsibilities under food safety laws.⁴⁶

Owners of the accepted schemes are likely to attract more customers, as a successful audit process will offer such customers a favourable inspection regime. One way or the other, the acceptance by the NVWA of the private control system will function as a sign of quality and will help the owners to gain (a bigger) market share. The fact that commercial interests are at stake also makes it more important for the NVWA to ensure that its acceptance procedure is transparent, consistent and fair such that other (rival) private schemes are not unduly excluded.

Firms that participate in the accepted schemes benefit from fewer official inspections and may therefore experience less red tape and lower administrative burdens in relation to the NVWA. This perception may constitute an important driver for food business operators to comply with the scheme's requirements. We do not contend that the overall burden of rule compliance will decrease, however. The opposite might be true. Given that the private control systems bring their own set of food safety rules and inspection protocols, that burden is likely to increase. Considering also that the firm must make substantial investments to comply with these rules and

45 This conclusion was also drawn in the NVWA audit for RiskPlaza (supra note 44, p 5-6).

46 See also: M. Wright, G. Palmer, A Shahriyer, R Williams and R. Smith (2013) 'Assessment and Comparison of Third Part Assurance Schemes in the Food Sector: Towards a Common Framework', Final Report for the Food Standards Agency, Project Code FS245006, available on the internet at <http://www.foodbase.org.uk/results.php?f_category_id=&f_report_id=835> last consulted 31-10-2014, p. 45.

pay for the accompanying compliance audits, signing up to these private schemes may be less economically efficient when compared to official public inspections.

From the perspective of the public enforcement agency, there are also considerable risks involved in the current meta-control strategy. For one, an accepted scheme does not provide an absolute warranty of rule compliance. Certificate holders have been found to violate food safety laws.⁴⁷ Private auditors are paid for by the auditees which constitutes a structural conflict of interest between the financial interests of the auditor and protecting the public from food safety risks.⁴⁸ Also the fact that the functions of third party audits do not overlap with those of official inspections and that certain methodologies (sample testing) are not used limits the purpose for which the private schemes can be used by public authorities. Public authorities are thus challenged to create an operational framework by which relevant changes in the status of certified firms are instantly communicated to it.

In this sense it is disturbing to see that the information sharing arrangements designed by the NVWA and the accepted private control systems do not require auditors to advise and alert public authorities in case of major incidents of non-compliance and serious risks to public health and safety. The arrangement currently used relies on the authority to actively check certification data, which generates the risk that non-compliant firms can slip through the meta-control system. Unless the agency can allocate sufficient manpower to the checking of these data and can rely on the accuracy of these data, there is a serious concern of transparency here in terms of the information flowing from the private schemes to the public agency. The reason for this asymmetry in compliance information relates to the incorporation of professional secrecy obligations on the part of private auditors in the contracts they sign with food business operators. Such contractual obligations are a major obstacle for the NVWA to acquire information from private schemes as regards non-compliance.

Another concern is that the inspection frequency of the public authorities may be too low to incentivize firms to participate in the accepted private schemes. Participating firms make considerable investments to comply with the scheme's requirements. The premise that these firms will benefit from a more favourable inspection regime can only be true

if the public authority has the capacity to inspect the non-participating firms. It appears that, at least in the Netherlands, the NVWA does not have that capacity.⁴⁹ This leads to *free rider* problems: non-participating firms enjoy lower costs and may be subject to the same inspection rate as firms that do participate. This potentially undermines the effectiveness of the entire collaboration.

There are also concerns as regards the process of accepting private schemes. In both cases of BDW and RiskPlaza, recognition revolved around general criteria of independence, transparency, inclusiveness and legal compliance. However, formalised procedures that guide the process of acceptance had not been established. As a consequence, the procedure for applying for recognition, the criteria that must be met, and the period for which recognition is granted remained unclear for the systems involved. Furthermore, there is no formal procedure to monitor the performance of recognized schemes, nor to assess whether they are eligible for an extension of (the term of) recognition. While it can be argued that an increased level of formalisation and proceduralisation of scheme recognition may hamper the development of co-regulatory arrangements, the absence of any official guidance on how and when to gain recognition challenges principles like transparency, consistency and fairness in decision-making, which clearly apply to government bodies such as the NVWA.

VIII. Conclusions and Broader Lessons

Our analysis shows that the NVWA has carefully tried to design its meta-control strategy and establish the conditions for collaboration with the private food safety control systems of BDW and RiskPlaza. Its approach is characterised by pragmatism and it has managed to lay down some fundamental safeguards for its meta-control to be successful. The difference between the meta-control exercised in the case of

47 H Beuger (2012) 'Overheidstoezicht en certificatie: Verhogen betrouwbaarheid vergt inspanning van alle betrokkenen' 45 *Voedingsmiddelentechnologie*, p. 21.

48 Timothy D. Lytton and Lesley K. McAllister (2014) 'Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest', *Wisconsin Law Review*, p. 289-335.

49 Havinga and Van Waarden, *Veilig voedsel* 2013, p 80.

BDW and RiskPlaza is primarily related to the consequences of NVWA's acceptance of these systems for the NVWA's monitoring and enforcement activities. In case of BDW a more comprehensive (and stricter) set of conditions apply than in the case of RiskPlaza, since a positive BDW inspection leads to the termination of NVWA inspections. In the case of RiskPlaza a successful audit only leads to a partial replacement of NVWA inspections. Another significant point is that the NVWA was closely involved in establishing the RiskPlaza system and continues to have a formal position in the adoption of the norms on which controls are based. As regards the other circumstance that we supposed to exert an influence on the design of the meta-control strategy, namely the commercial nature of the system owners, we found no evidence.

The analysis also reveals a number of weak points in the meta-control strategy. A significant shortcoming in the current design of the strategy is that the agency does not have the capacity to submit non-participating firms to a closer inspection regime than firms that participate in accepted self-control systems. Accordingly, non-participant firms enjoy lower costs than participating firms. The free rider problem that thus emerges makes the accepted self-control systems rather unattractive. Furthermore, the information exchange between the NVWA and accepted systems relies on the agency actively to check compliance data. The systems, their auditors and inspectors are not required to advise and alert the agency in case of major non-compliance and serious risks to public health and safety. This generates the risk that instances of non-compliance will go unnoticed and slip through the meta-control system. Moreover, the meta-control strategy would benefit in terms of its uniformity, fairness and transparency from a degree of formalisation of the procedure of accepting private food safety control systems. In this regard, we view the recent publication by the NVWA of a policy document on 'criteria for the acceptance of quality control systems' as a very welcome development.⁵⁰

A principle question remains of what will be left of the meta-control strategy when a food safety crisis is traced back to a food business operator that participated in an accepted private control system. Will the agency then be able to explain to the public at large that it was acceptable to leave the actual monitoring of food safety compliance of that firm to a commercial entity without exercising public oversight itself? It is to be expected that the media and politics will be fiercely critical, questioning the accountability of the agency. The way in which the NVWA will handle such a crisis will constitute the litmus test for its meta-control strategy.

At this moment, it is also too early to tell whether the NVWA's meta-control strategy will attain its objectives. The oversight strategy has so far been primarily limited to *ex ante* checks and audits upon acceptance of the private systems. It is largely unclear how and with which frequency the NVWA will continue to assess performance after acceptance and which terms and conditions will apply for re-acceptance (or the revocation of acceptance for that matter).⁵¹ As noted, the agency is currently considering the option of extending its meta-control strategy to transnational certification schemes benchmarked by the GFSI. The possible acceptance of such schemes in the near future will raise the same questions that have been addressed here: what criteria apply for acceptance and how will scheme performance after acceptance be monitored? In considering the GFSI benchmarked schemes the NVWA can build on its experience with national private food control systems, eventually to develop a clear and consistent methodology of meta-controls.

The lessons we draw from the Dutch experience for public (food safety) agencies elsewhere willing to engage with private compliance schemes are the following. First, it is recommended that agencies organise a thorough pre-assessment of the private schemes they want to involve in their monitoring and enforcement policies. Such an *ex ante* assessment should at least include a review of the degree to which the schemes ensure legal compliance, the means and methods of standard-setting and conformity assessment used, and the ways in which the scheme owner ensures the expertise, training, and integrity of its inspection staff. Upon recognition of the scheme, information management and exchange arrangements must be set that allow the agency to verify the status of participant firms (and thus their degree of compli-

50 NVWA "Criteria voor acceptatie van kwaliteitssystemen door de NVWA" (July 2014) available on the internet at <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/07/07/criteria-voor-acceptatie-van-kwaliteitssystemen-door-de-nvwa/criteria-voor-acceptatie-van-kwaliteitssystemen-door-de-nvwa.pdf>> last consulted 31-10-2014.

51 The 2014 policy document remains very general in this regard. See NVWA 2014, supra note 50, p. 5.

ance) under the scheme. Regular reporting duties and warning obligations in case of eminent (food) safety risks should also be part of those arrangements. To reduce the agency's dependence of information provided by the recognised schemes, it should also perform spot checks at participant firms and conduct office audits and on-site shadow or witness audits to verify overall scheme performance. If recognition of the scheme leads to a reduced official inspection regime for participating firms, the agency should en-

sure that non-participating firms are subject to a stricter inspection rate so to prevent free rider problems. Finally, the agency should seek to progressively formalise its meta-control strategy. While working from a set of predefined criteria curbs the flexibility needed in policy development, the complete absence of official documentation once the policy has crystallised will challenge principles of good governance like transparency, consistency and fairness in decision-making.