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Private Food Safety Standards in the EU

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PRIVATE FOOD SAFETY STANDARDS IN THE EU

Tetty Havinga*

Abstract

The global system of food regulation has grown into a complex arrangement of various laws and standards on different governmental levels. These laws and standards are increasingly of a transnational nature. Currently most food laws within the Member States of the European Union are based on EU law. Next to governments private actors also increasingly engage in food regulation. In particular, corporate retailers and multinational food manufacturers have initiated and promoted private food safety standards. The structure of private standards and the complex relationship of these private standards with governmental legislation in the EU is the subject of this paper.

Key words

Private food standard; EU; food law; food regulation; food safety

1. Introduction

In the first section of this paper I describe the proliferation of private standards with a focus on the dominant transnational standards recognized by the Global Food Safety Initiative. In the next sections I analyse what the relationships between the private and the public regulations look like. I do so with regard to four regulatory functions: rule-making, adoption, monitoring and review. Section 2.1 deals with rule-making and analyses how public actors participate in the setting of private rules and how private actors participate in decision-making on public rules. Section 2.2 analyses whether public and private regulators adopted each other's standards and provides some examples of incorporation of private rules in EU law and incorporation of EU law in private standards. Section 2.3 deals with monitoring compliance. Do governmental inspectors take private certificates into account? And to what extent do private auditors check compliance with public rules? And what are the subjects of discussion here? Section 2.4 deals with an evaluation and review of the food regulations. Do private standards incorporate criticism from public authorities in reviewing the standards? Are EU institutions open to criticism and proposals from private standard organizations? Section 3 concludes.

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1.1 Characteristics of private food standards

Development of private standards

It is well documented that private standards have become increasingly important in food safety governance (as well as in other domains) over the last 25 years (e.g. Bain, Ransom & Higgins 2013; Busch & Bingen 2006; Henson & Humphrey 2009; Van der Meulen 2011a). The use of private standards has become very common in many branches of the food industry in many European countries. Moreover, private standards did pioneering work in the modernisation of food regulation. For these reasons an analysis of food safety regulation in the EU cannot be limited to public laws and should include private standards as well.

Several circumstances made up a fertile ground for the rise of private food standards. The increasing globalization of food supply chains makes it more difficult for both food industry and national governments to safeguard the safety of food products. Food supply chains encompass places of production and trading around the globe, some sites and processes may disappear from sight. Retailers and manufacturers sourcing globally sought ways to keep in control (Hatanaka et al. 2005; Henson & Humphry 2010; Oosterveer 2005). National governments also face a problem here because their jurisdiction is locked inside their national territory. Secondly, the increased economic power of supermarket chains also contributed to the rise of private food standards (Burch & Lawrence 2005; Marsden 2010). Concentration in the food retail sector was the result of expansion and mergers. Several corporate food retailers operate in many countries and have a powerful market position (Fuchs et al. 2009; Ten Kate & Van der Wal 2017; Marden 2010, 156ff). A third development that contributed to the rise of private food standards is the growing public concern about food safety as a result of several food scandals (BSE, dioxin, E-coli, salmonella) (Ansell & Vogel 2006; Fulponi 2006; Henson & Humphry 2010; Van der Kloet 2011). The food industry undertook all kinds of initiatives in order to restore and keep consumer trust in food. The fourth factor that has contributed to the rise of private food regulation is the perception of insufficient governmental regulation. The governmental response to food incidents such as the BSE crisis has been perceived as inadequate by both consumers' organizations and food industry (Bernauer & Caduff 2006; Henson 2011; Vos 2000). Criticism of the regulatory capacity of governments is not limited to the domain of food regulation. The capacity of governments to regulate markets has been criticized for being ineffective, inadequate and outdated (Baldwin, Cave & Lodge 2012, 68ff; Majone 1994). These factors constitute the context in which private food standards developed and flourish.

The rise of private food safety standards started in the 1990s. However, private standards are not entirely new in the food industry (Busch

& Bingen 2016). The food sector has a long history of quality controls by manufacturers, trade associations, and corporatist organizations, particularly in the production and trading of perishable food (milk, meat) (Van Waarden 1985). Systems of certification of producers, manufacturers, traders, controlling laboratories and products are common. Classic examples include kosher supervision and the French wine appellations (Lytton 2013; Moran 1993). The new generation of private food standards differs from historical examples in several ways. The typical current food standard operates with a written normative document specifying the substantive and procedural norms and the modes of verification of compliance with these norms, is international in scope, requires third party certification, covers a wide range of issues and is managed by a special organisation with formalized procedures for reviewing the standard, auditing, certification, and handling of complaints. Older private food standards were often less formalised, focussing on a single issue and a local market, and often verification and enforcement procedures were absent or less elaborated (Fouilleux & Loconto 2017, 5-6).¹

Characteristics of private standards

What is a private standard? A private standard is a set of rules or norms developed by private actors, such as food manufacturers, non-governmental organisations (NGOs), industry associations, farmers, retailers and food service providers. These norms set minimum requirements for products, processes or producers. Some examples may clarify this. Several animal welfare organisations set up an animal welfare scheme to encourage firms to improve animal welfare and to enable consumers to vote with their feet by choosing products with an animal welfare label. Examples include 'Freedom Food', a British farm assurance and food labelling scheme set up by the Royal Society for the Prevention of Cruelty to Animals, 'Neuland', a German animal welfare labelling scheme founded in 1988 by a farmer union and two animal welfare organisations, and 'Bioland', a private food quality scheme open for participation of agricultural and livestock producers and food processors (Food Chain Evaluation Consortium 2009). The 'Bioland' label illustrates that private standards are not always clearly separated from public standards. The Bioland guidelines are developed by organic producer groups in compliance with Council Regulation (EEC) 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (later replaced

1 See for example Fouilleux & Loconto (2017, 5-6) who discuss the shift from community-shared value-oriented principles of organic farming to globalized auditable standards.

by Regulation (EC) 834/2007). The Bioland guidelines for production exceed the EU minimum requirements for organic produce.

The concept of private scheme usually refers to a private standard and its internal governance structure and procedures for conformity assessment and enforcement. Thus a scheme consists of not just the substantial norms and requirements (standard) but includes also a management structure and auditing protocol.

Public and private responsibilities for food governance often are not neatly delineated (Havinga 2006; Henson & Humphrey 2010). 'Private food standards [...] are better understood as part of a governance structure rather than as governmental strategies outside the state' (Lockie et al. 2013, 289) The decisive factor for characterizing a standard as a private, public or hybrid standard is who decides on the rules. Animal welfare standards developed by NGOs, by farmer organisations, by fast food chains and combinations between those types of organisations are private standards. Animal welfare provisions in EU or national state laws or guidelines are public standards.

Private food standards cover a wide range of issues (see for multiple examples of private food standards Hammoudi et al. 2015, Henson & Humphrey 2009, Van der Meulen 2011a, Wright et al. 2013). Major transnational standards such as the British Retail Consortium Global Standard for Food Safety (BRC), the International Featured Standards Food Standard (IFS), Food Safety System Certification 22000 (FSSC) and GlobalG.A.P. Integrated Farm Assurance Standard have a strong focus on food safety (Havinga 2015a). Other standards include quality requirements and credence attributes related to environmental and social interests. Certification may entail compliance with standards related to sustainability (e.g. Marine Stewardship Council, Rainforest Alliance), fair trading (e.g. Max Havelaar, UTZ), biodynamic agriculture (e.g. Demeter), organic production (e.g. KRAV, Bioland), religious food laws (e.g. Kashrut Division of the London Beth Din for Kosher Certification, the Halal Authority Board Standard), vegetarian food (e.g. Vegan) and requirements for a healthy diet (e.g. the Heart-Check mark from the American Heart Association). Some standards cover a broad range of issues while others just concentrate on one single issue.

Standards also differ in their geographical reach, some standards are applied globally (BRC, GlobalG.A.P.) while others are limited to a small local area. Another distinction is that between company food standards and industry-wide standards (Henson & Humphrey 2011, 153-154). Some food companies established their own company food standard that has to be applied by all companies in their supply chain. The origin of several food standards is an individual downstream company imposing demands on their upstream suppliers in order to prevent risks and damages (e.g. incidents, recalls, liability claims, reputation

damage). There is a thin line between product requirements specified in a supply contract and arranging these requirements in a company standard. An example of a company standard is the 'Albert Heijn Quality Assurance', which has been abolished and replaced by industry-wide standards (first BRC and later all GFSI-recognized standards) (Havinga 2006). Another example of a company standard is Tesco Nurture, an exclusive independently accredited scheme to ensure that fruit and vegetables are grown according to environmental and responsible standards.²

Private standards fulfil two basic functions in the market (Henson & Humphrey 2010, 1639). The first main function is risk management. In this case private standards are used to set a minimum level of quality, safety or whatever it is that is regulated by the standard. This is a form of ex ante regulation (in contrast to ex post forms of regulation such as liability law, recall, breach of contract litigation). Setting a minimum level is the main objective of food safety standards such as BRC or GlobalG.A.P. Compliance with this type of standards is often not communicated to the public, these are so-called business-to-business (B2B) standards. Certification is a condition for entering the market, usually no price premium is included.

On the other hand, a second category of standards is expressly meant to differentiate products or producers meeting the standard from other products available on the market. These standards want to signify added value, premium high quality or some special attributes. Compliance with this type of standards is usually signalled to consumers by a label or trade mark. These are business-to-consumer standards (B2C). Certification may enable the access to higher values markets and/or higher prices. Examples include certification against the Marine Stewardship Council standard for sustainable fish, kosher food standards, animal welfare and fair trade standards. These standards offer buyers a choice and try to seduce buyers to show a preference for products or producers in compliance with the B2C standard.

In course of time the character of a standard may change. Starting as a distinguishing standard it may develop into a minimum standard at the moment that almost all products or producers are in compliance with the standard. This development may be strived for, as is often the case for programs aiming to promote sustainability, fair trade or animal welfare. In other cases, it seems to be the result of the diffusion process of a new standard: starting small in the start-up phase and growing thereafter. GlobalG.A.P. is an example in case. In the early years farmers who were certified against this standard (called EurepGap at the time) were particularly proud of this distinguishing performance,

2 <http://www.tesco.com/nurture/?page=nurturescheme>.

whereas today almost all farmers in Western European countries such as the Netherlands and Germany need to be GlobalG.A.P. certified (as the market for non-GlobalG.A.P. certified vegetables and fruits is very limited) and GlobalG.A.P. certification has lost its distinguishing value in these markets. From the very start the EurepGap/GlobalG.A.P. has been a business-to-business standard; in the early years it was not allowed to communicate certification to consumers, currently consumers can verify whether the products they buy are GlobalG.A.P. certified by entering a number on the website.³ The retailers that initiated the Eurep-Gap standard did aim at a minimum standard from the very start in order to realize consumer confidence in the safety of all vegetables and fruits in their supermarket stores and an extensive supply of vegetables and fruits fulfilling their requirements creating many buyer options.

Both in the literature and in public debates private standards are occasionally referred to as self-regulation. But are private standards a form of self-regulation? Most private food standards are not to be considered pure self-regulation. In self-regulation the regulator is also the regulatee (Levi-Faur 2011, 8). Most of the private food standards are not initiated nor developed by the same people to whom the rules apply, in other words the regulator is not identical to the regulatee: retailers developed standards for farmers and food manufacturers (GlobalG.A.P., BRC), an environmental organisation together with a food manufacturer developed a standard for fisheries (MSC), and a food outlet developed a standard for farmers (Starbucks Shared Planet).

Most private standards are voluntary standards: compliance with the standard is not laid down by law. However, quite often the regulatee (food business) is under contract to comply with the standard. So without being legally mandatory, adoption of these 'voluntary' standards often is a contractual obligation and economically bound (Caffaggi & Iamiceli 2015; Clapp 2016, 125; Havinga 2015a). Regulatees might be forced by the market to adhere to the voluntary standard. In particular the large corporate retailers and multinational food manufacturers use their economic power to require certification against private food standards from their suppliers. Thus, 96% of the suppliers of own brand food products in Ahold supermarkets across Europe is certified against GFSI recognized standards (Ahold 2016, 8).

Although most private food standards are voluntary and most public standards are mandatory, this is not by definition the case. Henson & Humphrey (2010, 1630) distinguish between four possible combinations of public/private and mandatory/voluntary food standards:

3 http://www.globalgap.org/uk_en/for-consumers/, accessed 1-4-2016.

- public mandatory standards (regulations and laws such as the EU General Food Law and the German Lebensmittel- und Futtermittelgesetzbuch),
- public voluntary standards created by public bodies but whose adoption is voluntary (examples include Label Rouge in France, organic food labels, Codex Alimentarius standards, national HACCP (Hazard Analysis and Critical Control Point) standards such as DS 3027 and ELOT 1416) (see with regard to organic food: Arcuri 2015; Schmidt 2011, 290, 293; Henson & Humphrey 2010, 1630, refer to Label Rouge; Canadian FSEP is a voluntary HACCP program: Herath & Henson 2006),
- legally mandated private standards that have been developed by private organisations and made mandatory by public bodies, and finally,
- voluntary private standards developed and adopted by private bodies, not legal mandatory (e.g. BRC, IFS and GlobalG.A.P.).

I am not acquainted with a clear-cut example of a legally mandated private food standard. However, examples that come close include laws on organically produced food in the European Union and the United States, inclusion of HACCP provisions in Codex and EU law, a definition of fair trade in French law, and Swiss Federal law on Good agricultural practices (see for organic food: Arcuri 2015; Boström & Klintman 2006; Schmidt 2011; for HACCP: Bernauer & Caduff 2006; Demortain 2007; for fair trade in French law and GAP in Switzerland: FAO 2014). In all these cases standards that had been developed by private organisations were included in national or federal laws. Adoption of the standard remained voluntary (organic, fair trade) or became mandatory (HACCP). This chapter deals with the private standards (the last two categories) and in particular with major transnational food safety standards. As already stated, some of the not legally mandated private standards are de facto obligatory for access to important markets.

The status of a standard may change as the following two examples will show. Since 2003, the Safe Quality Food standard (SQF) is a US private retail-driven standard. However, SQF started as a public voluntary standard and was transformed into a private voluntary standard when the ownership of the standard changed: the Food Marketing Institute acquired the standard in 2003 from the West-Australian Department of Agriculture. The opposite happened with private standards for organic agriculture that had been developed by farmers' and consumers' organisations in many European countries. From completely private standards they have been transformed into public minimum standards. European Union regulations allow for additional requirements from private organic standards, whereas this is excluded in US regulations. As

Arcuri concludes this shows 'the analytical difficulties of studying the interaction between public and private regulation in terms of binary thinking' (Arcuri 2015, 15). The influence of governmental intervention on private regulatory schemes is not always either supportive or limiting but can also be both supportive and constraining.

1.2 Major transnational private food standards and third party certification

The remainder of this chapter is focussed on transnational food safety standards that dominate the European market. In particular retail-driven standards are very important because many suppliers of the large multinational supermarkets are required to be certified against one of these standards. Mergers and concentration in the retail market resulted in a relatively small number of multinational supermarket chains with large economic power in global and domestic food supply chains (Fuchs et al. 2009; Ten Kate & Van der Wal 2017). Moreover, retail economic power is increased through cooperation in international buying groups. In Western European countries these multinational supermarkets have a large majority share of the food consumers' market. Important retail-driven private standards in Europe include the BRC Global Standard for Food Safety, the IFS Food Standard and the GlobalG.A.P.. These standards have been adopted by retailers associations from the UK, Germany, France, Italy and the Netherlands and are a supplier requirement of many supermarkets and food businesses around the world. A transnational food safety standard supported by multinational food manufacturers is the Food Safety System Certification 22000 (FSSC).⁴ Together these four transnational standards issued more than 200,000 certificates.⁵ These standards are benchmarked by the Global Food Safety Initiative (GFSI). The GFSI is an industry-driven initiative providing guidance on food safety management systems and a global platform for communication to improve food safety (see on GFSI Fagotto 2017; Havinga & Verbruggen 2017; Verbruggen & Havinga 2016). GFSI is set up and run by representatives of some of the powerful global retailers and food manufacturers.

The process of globalization of retail-driven food safety standards for suppliers follows the pattern of bottom-up globalization of regulation. In the 1990s some retail companies changed their practice and developed a company food standard in response to food safety incidents and diminishing consumer trust. Others model this new practice and in the end this results in globalization of the new standard of practice. As

4 See for a more detailed description of these standards, their development and dissemination Havinga 2015a.

5 Figures on the website of the standards at 23-11-2016: BRC 23,000; FSSC 13,685; GlobalG.A.P. 140.000; IFS 16,800.

Braithwaite & Drahos point out 'rather than business practice following from norms and rules, often mechanisms of modelling delivers globalization of practice which is subsequently codified in rules' (Braithwaite & Drahos 2000, 554). Initially the collective food standards were national standards (BRC in UK, IFS in Germany). Since they have expanded four-fold (Havinga 2015a, 61-63). 1) Geographically, the standard was adopted by supermarkets' chains in other countries. 2) Scope of the standard is no longer limited to own brand food products. 3) Scope beyond food, the organisations also developed standards for non-food, for packaging and for storage and distribution. 4) In due time other groups than the initial members gained access to technical committees and meetings and in some cases to the board of the standard organisation. This includes retailers from other countries, but also food manufacturers and certification bodies. Despite the growing openness, consumer groups and other NGOs are hardly participating in the decision-making process of any of these standards organisations. GlobalG.A.P. is the most open, BRC the most closed club.

These private standards are generally organized along the following lines. There is a standard-owner, that is a retailers' organisation or a new for-profit or not-for-profit organisation established to manage the standard. The standard-owner decides on the general regulations and management structure of the standard organisation. The standard-owner is also responsible for appointing the Board. The Board is responsible for major decisions on the standard such as provisions in the normative document, regular procedures for revising the standard document and appointing members of technical committees and working groups. Usually a technical committee or working group is responsible for the content of the standard, the review process and training programs for auditors. Often consultation rounds for all stakeholders are organized and some standards run special programs to assist small food businesses in particularly in developing countries.

Food businesses that are found in compliance with the standard are certified. Verification of compliance is delegated to certification bodies, organisations specialized in auditing and verifying compliance. Most standards only accept certification bodies that are accredited by a national accreditation body. Some standards accept certification by all accredited certification bodies whereas other standards only accept particular selected certification bodies.

A food business that wants to get a food safety certificate has to decide for a standard and then hire a certification body that will audit to verify that the firm is working in compliance with the regulations in the standard. Some standards have grades (such as one, two or three stars; level A or B), others only differentiate between compliant or not. After a successful auditing process the firm gets a certificate. After some

months (often 6 or 12) a new audit visit is required to verify continued compliance. Many standards do not require unannounced inspections. However this is changing. Several standards have recently introduced (optional) unannounced audit visits to refute criticism of inadequate controls.⁶ Food businesses have to pay for the auditing and certification services. This situation constitutes a conflict of interest between the auditor's financial interest in keeping the customer satisfied and its professional obligation to protect the public against food safety risks (Lytton & McAllister 2014).

Next to the major transnational food safety standards discussed above, several standards exist in local markets or with a focus on special commodities, particularly for primary produce. Examples include the Global Red Meat Standard and the Global Aquaculture Alliance Seafood; these standards are owned by industry associations and GFSI benchmarked. Other standards developed by industry associations include the German 'Qualität und Sicherheit', the Dutch 'IKB' and the British 'Little Red Tractor'. National standardization organizations in for example Denmark, France, Spain have developed national standards; in these countries the national standardization organizations are private not for profit associations mandated by the government (Canivet 2006, 16-17).⁷ A 2010 inventory of certification schemes for agricultural products and foodstuffs marketed in the EU Member States found 441 (sub-) schemes.⁸ Particularly in Germany, Italy, Spain and the United Kingdom many schemes were developed (Aréte 2010, 3).

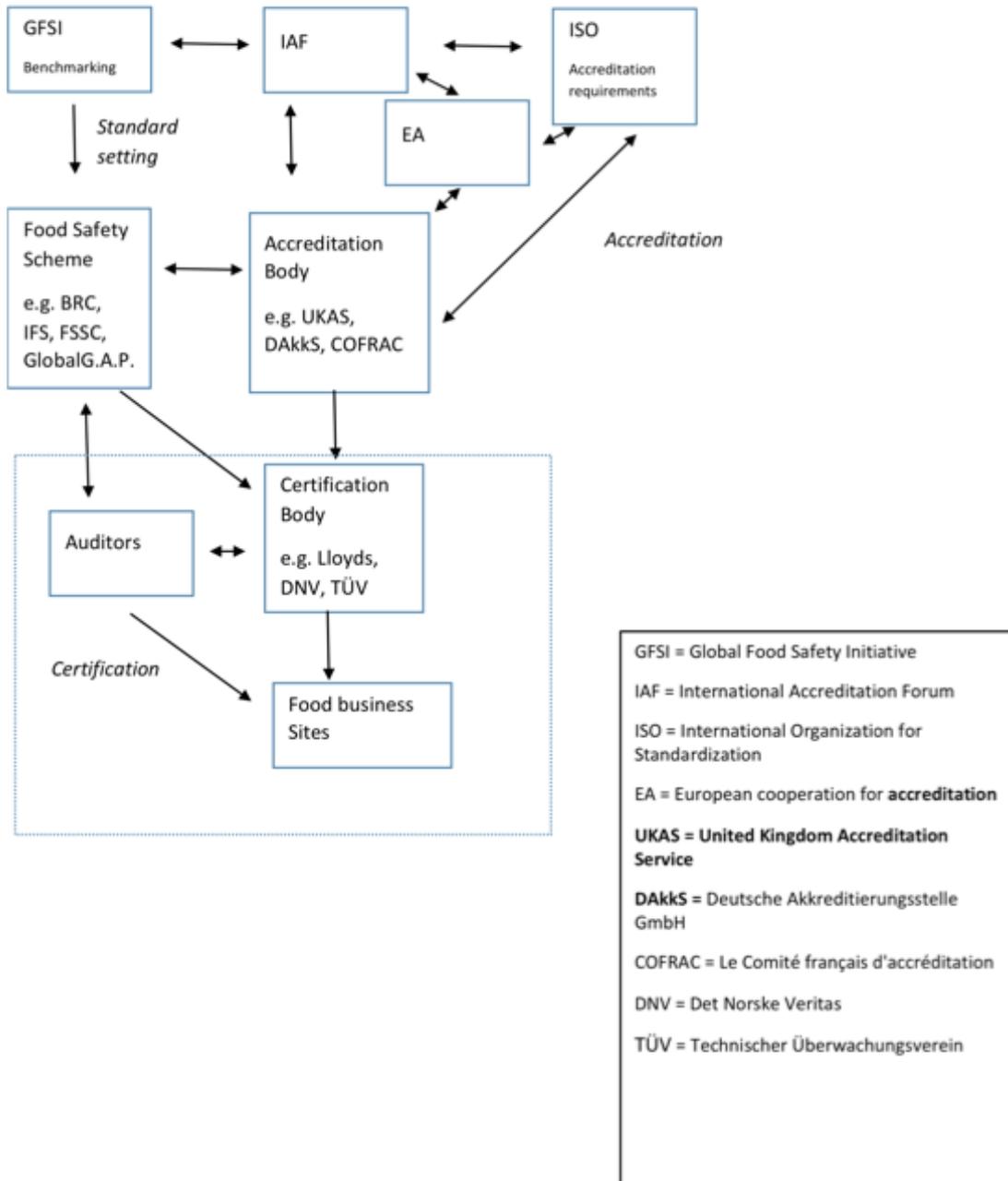
Private food safety standards cover different products and processes in the food supply chain, from farming (animals, plants, fish, grains), processing, storage and distribution, packaging to catering and retail. Private food safety standards generally include requirements related to a HACCP food safety management system, resource management, training and education of personnel, responsibilities of senior management, process control, inspection and testing, labelling, packaging, traceability, protective clothing and personnel hygiene, buildings and pest control. Recently some standards also included requirements on food fraud prevention and authenticity control.

6 The 2017 edition of the GFSI Guidelines requires food safety schemes to ensure that unannounced audits are available as a preferred option (art. 2.5.5, GFSI Benchmarking requirements, GFSI Guidance document version7).

7 E.g. Standards DS 3027, Agriconfiance, UNE 155000. Food safety standards are also developed by the national standardization organizations in Greece, Ireland and Italy (e.g. ELOT 1416, IS 343, UNI 10854); these organizations are mandated by the government or part of the government, so this are public voluntary standards.

8 http://ec.europa.eu/agriculture/quality/certification/index_en.htm.

Figure: System of accredited third party certification of GFSI recognised food safety schemes



2. Relations between public and private actors

After the introduction of some of the widely used private food standards, we will now turn to our main question: how do private standards work: what do they do, who is involved and why. We will also investigate the relationships between the private and the public governance arrangements. Subsequently we discuss the questions for four phases in the regulatory process: rule-making, adopting, monitoring and enforcement, and review. This section deals with rule-making.

Setting of private standards usually involves three parties: a technical committee preparing the draft standard, a board deciding on the standard and in most cases stakeholders. Members of technical committees are experts from the membership of the standard-owner's organisation or from different stakeholders and academics. Standards differ in the openness and transparency of the standard setting process. Currently many standards have public consultation rounds or stakeholders' meetings to get input for the standard and to create sufficient support. The owner of a private standard appoints the members of the board. The board has the final say in the content of the standard. Several major transnational food safety standards are owned by retailers' associations (the management may be either by the retail association or – more common – by an organisation specially established by the retailers' association to manage the standard).

Many standards started with just a few founding members and gradually included more people in the process of standard setting, either by increased membership or by including participants from various stakeholders in a non-membership organisation. Major food safety standards such as IFS and BRC show this development. Participants include retailers, manufacturers, primary producers, certification bodies, and academics. Consumer representatives and other non-governmental organisations are hardly participating in the standard setting process of major food safety standards (Fuchs et al. 2011). The active participation of NGOs is one of the important differences with B2C food standards focussing on social and moral issues. Some of these B2C standards are initiated and managed by NGOs pursuing interests such as animal welfare, ethical trading, or sustainability. The first edition of these standards often is drafted by the NGOs.

What is the relation between private standards and public regulation? There are two sides to this question:

- 1) How do public actors participate in the setting of private standards and schemes?
- 2) What is the relation between the requirements set in the private standard and legal requirements?

Julia Black (1998, 124) distinguishes four forms of self-regulation with a different role of the state that can also be applied to private food standards:

1. mandated private regulation: an industry or profession is formally or informally required by the government to formulate and enforce norms within a broad framework defined by the government;
2. sanctioned private regulation: an industry formulates a regulation and subjects it to government approval;
3. coerced private regulation: the industry formulates and enforces the regulation in response to threats of statutory regulation;
4. voluntary private regulation without any state involvement in promoting or mandating the regulation.

The development of retail-driven private food safety standards such as BRC and IFS is a clear example of the last, voluntary private regulation. Large supermarket companies initiated this without state involvement and without the threat of statutory regulation. On the contrary, one of the drivers is the perception that governmental food regulation was inadequate and consumer confidence in food had to be reinstated after several food safety incidents. However, the introduction of new liability legislation has contributed to the rise of private standards. Although these retail standards are developed without any state interference, they are nevertheless connected to (failing and new) statutory provisions. The government may be involved in some voluntary standards, creating a more mixed form. Consider the participation of governmental technical experts in private standard setting. The Dutch food safety authority (*Nederlandse Voedsel- en Warenautoriteit* – NVWA), for example, participated in the development of Dutch HACCP and Riskplaza (Verbruggen 2014, 239ff).

Private standards always operate within a legal framework. This legal framework consists of general provisions from contract law, tax law, corporate law and liability law and more specific legal provisions that both enable and constrain the development and management of private standards. Marsden, Flynn & Harrison concluded from their analysis of the British food regulatory system, that 'it is the corporate retailers who have led the way (...) also in how to regulate food quality under increasingly complex and competitive food supply conditions' (Marsden, Flynn & Harrison 2000, 193) From the mid-1980s till 2000 this dominance of large retailers leaves 'the State mainly as auditors rather than standard-setters and enforcers of the mainstream process' (Marsden et al. 2010, 284). Moreover, most private food safety standards are built upon public standards such as Codex and ISO standards, and EU law (see for example Casey 2017 on GlobalG.A.P., and Henson & Humphrey 2011 on the relation between private standards and Codex). A key element

of private food safety standards is the practical translation of statutory requirements. Private standards lay down more specific and detailed instructions as to how to comply with legal requirements. Henson & Humphrey argue this is the most important function of private standards in the area of food safety (Henson & Humphrey 2011, 160). Private standards not only add detailed specifications to public regulation, many standards also set stricter requirements. They can do so by adding requirements on issues not covered by governmental regulation, by setting lower thresholds or by extending existing requirements.⁹ It is particularly this characteristic of private food standards that has been contested by developing countries, international organizations such as the FAO and SME representatives for causing trade barriers (see Henson & Humphrey 2010, 2011; Havinga & Verbruggen 2017, 196-197).

The EU General Food Law stipulates that food business operators carry primary responsibility for the safety of the food they produce or sell. Each business is responsible for taking the measures necessary to ensure compliance with food law requirements within the context of its own specific activities by applying verification procedures and quality assurance systems. Food business operators, except primary producers, are required to put in place and implement procedures based on HACCP principles.¹⁰ This legal requirement reinforced the growth of private food certification schemes as compliance with a private standard helps a food business to comply with the legal requirements because the private standards require a food safety management system based on HACCP principles. In fact, the legal requirement to maintain a HACCP food safety plan in place is an example of governmental rule-making using the experience of private companies, private standards and certification. National, European and US governments draw upon the experience of private food standard organizations and auditors with HACCP and included a mandatory HACCP plan in new food laws (Marsden 2010, 255; Oldfield 2015). This tended to empower the retailer-led forms of food regulation (Marsden 2010, 103). The moment national or transnational governments (such as the EU, US and Canadian government) made a HACCP food safety management system legally mandatory for (part of) the food industry, they incorporated the norms in the law (Marsden 2010, 255).¹¹

9 See for example Wright et al. 2013, who assessed many private food assurance schemes operating in the UK and give an overview of correspondence of scheme requirements with legislative requirements regarding food hygiene and safety.

10 Art. 5 of Regulation (EC) No 853/2004 on food hygiene.

11 During the 1990s leading multinational food industries voluntarily adopted food safety management plans based on the principles of HACCP. Food quality systems of major retailers required HACCP from their suppliers. The large retailers

Another example of complex interactions between private and public actors in setting food safety standards is the development of industry guides to good practice for hygiene and for the application of HACCP principles. One of the major obligations on food business operators in EU law is that they have to 'put in place, implement and maintain a permanent procedure based on Hazard Analysis and Critical Control Point (HACCP) principles'.¹² This requirement is a form of enforced self-regulation (Braithwaite 1982) or mandated private regulation (Black 1998): food business operators are legally obliged to develop a risk management system. The option to develop industry guides to good hygienic practice was included in the law particularly to help small and medium (SME) sized food business operators to comply with this legal requirement. The guide has to be developed by a sector of the food industry or a national standards institute and approved by the government (Havinga 2014; Van der Meulen 2017). These hygiene guides are a form of what Black has called sanctioned private regulation.

The General Food Law of the European Union is committed to the involvement of stakeholder organizations in the regulatory process. Representatives of consumers, industry, retailers and farmers are consulted and informed by the Commission and EFSA (Vos & Wendler 2006, 90, 124-126). Formal consultations take place in the context of the Advisory Group on the Food Chain and Animal Health. The Advisory Group has 45 members representing European associations of consumers, farmers, food industry and retailers.¹³ EFSA established a Consultative Stakeholder Platform and organizes public hearings. The participation of industry, retail and farmers in rule-making and risk assessment is not undisputed as it may harm independent decision-making.

The European Commission developed guidelines for certification scheme developers and operators to help improve 'the transparency, credibility and effectiveness of voluntary certification schemes and ensuring that they do not conflict with regulatory requirements.'¹⁴ The guidelines include recommendations regarding scheme participation and development, scheme requirements and claims, certification and inspections and mutual recognition and overlap with other schemes.

were lobbying for making the operation of a HACCP food management system mandatory by law.

12 Article 5 of Regulation (EC) No 853/2004 of the European Parliament and of the Council on the hygiene of foodstuffs. HACCP stands for Hazard Analysis and Critical Control Point.

13 http://ec.europa.eu/dgs/health_food-safety/dgs_consultations/advisory_group_en.htm.

14 Commission Communication 'EU best practice guidelines for voluntary certification schemes for Agricultural products and foodstuffs', 2010/C 341/04, 1.2.

The recommendations aim at the participation of all possible stakeholders, transparency and free availability of information (including disclosure of fees and providing translations), independent and effective inspections and appropriate sanctions and the avoidance of high costs for food operators. Adherence to these guidelines is voluntary. The development of these guidelines is an attempt of the European Commission to stay in control and to influence developments in the domain of private food governance.

2.2 Adoption

After a standard is set, the standard has to be adopted by food business operators and other stakeholders. Whereas many statutory regulations are mandatory, private standards are not as a matter of course implemented or adopted. A private standard first has to be adopted by organizations or persons: a food business or organization has to decide to strive for compliance with a particular standard or to make compliance with the standard mandatory for its trade partners (Havinga 2015b, 29-33; Henson & Humphrey 2011, 155-156). A private standard that is not adopted will not be implemented and therefore remains a dead letter. Private food safety standards have been widely adopted in food supply chains. The retail-driven standards (BRC, IFS, GlobalG.A.P.) have been adopted from the start by the very retailers that initiated the standard. Currently major supermarket chains in Western European countries require from their private brands suppliers certification against one of these private standards (Havinga 2015a, 67).¹⁵ FSSC22000 has been developed with the support of multinational food manufacturers. Major food corporations such as Cargill, Coca Cola, Danone, Domino Pizza's, Heineken, PepsiCo and Unilever have adopted the FSSC standard.¹⁶ A survey revealed that more than half of SME food businesses in the EU stated they are often or sometimes asked by customers or suppliers to comply with private standards.¹⁷ At a rough estimate, 50% of all farms and 25% of all food manufacturers in the UK belong to a third party assurance scheme; as larger firms are more often certified the proportion of the market covered is higher (Wright et al. 2013, 52). The purchasing power of major supermarkets, food manufacturers and caterers made private food safety standards almost mandatory in some markets. The result is a quick and broad uptake of private food safety standards in the market.

The adoption of private standards for sustainability or social interests reveals a more complicated picture. Some transnational standards

15 Ahold, Aldi, Carrefour, COOP, Metro, Tesco.

16 <http://www.fssc22000.com/documents/certified-organizations.xml?lang=en>.

17 Evaluation of the General Food law: SME panel results, p. 10 (http://ec.europa.eu/food/safety/general_food_law/fitness_check/index_en.htm).

have succeeded in securing considerable uptake and support. An example in case is the Marine Stewardship Council standard for sustainable fishery. Currently more than 250 fisheries are MSC certified in 36 countries and over 17,000 MSC labelled products are available. Several retailers and manufacturers have made commitments to 100% sustainable seafood sourcing including MSC certification. Examples include Ikea, Iglo, Dutch retailers, Sainsbury and Waitrose (MSC 2015, 2, 32-35).

Many standards operate on a national or local market only. This applies to standards for animal welfare. The British RSPCA claims that its animal

‘welfare standards have had a significant influence on the animal production standards set by many major retailers for their suppliers, and on various assurance schemes in the UK and overseas. In some instances, the standards have also been used by UK and overseas governments and governmental bodies to inform legislation and associated guidance/recommendations.’¹⁸

Supermarkets’ sales in the Netherlands of products certified against the ‘Beter Leven’ standard of the Netherlands SPCA had a value of more than 500 million Euros in 2014.¹⁹ The total sales with a sustainable certificate in Dutch supermarkets amounts to almost two thousand million Euro.²⁰ These B2C standards often have to face heated debate about the content of the standard and their strategy. The dilemma is which strategy to choose: 1) striving for improvement by developing a realistic standard and cooperating with commercial parties such as producers and retailers and risking the critique that they throw their very principles overboard; 2) no compromising for reasons of principle. In the latter case there probably will be no private standard or a private standard with only a limited number of certificates. An organisation that aims at wide diffusion of its standard in most cases will need to compromise.

The market for kosher products in Europe is small. The market for halal products is in some regions more substantial, but so far there are many competing private standards for halal food (Kurth & Glasbergen 2017; Van Waarden & Van Dalen 2015).

Not only can food business operators adopt a standard, but governmental organizations can as well. In some cases, public agencies

18 <http://science.rspca.org.uk/sciencegroup/farmanimals/standards>.

19 <https://beterleven.dierenbescherming.nl/beter-leven>; https://beterleven.dierenbescherming.nl/fileupload/Rapportage_Raad_van_Advies_BLK__2014_en_2015.pdf.

20 https://beterleven.dierenbescherming.nl/fileupload/Rapportage_Raad_van_Advies_BLK_2014_en_2015.pdf. This is approximately 25% of total sales of meat, fish and dairy in supermarkets. Estimation based on figures at <http://detailhandel.info/index.cfm/branches/levensmiddelenzaken/supermarkten/>.

adopt private standards. The Belgian Food Safety Agency adopted and implemented a quality system certified ISO 9001 and ISO 17020 (Raone 2013, 14). However, these ISO standards are not food standards. Governments can also adopt a private food standard in their procurement policy, among others. International, national and local governments can make compliance with particular private standards a precondition for contracting with the government (see e.g. Ten Kate 2014; Scottish Fair Trade Forum 2013). Many departments and municipalities have done so, such as in the area of fair trade coffee.

Governments sometimes facilitate or promote the dissemination of private food standards within the food industry. They may do so because governmental legislation is not feasible. First of all, the government may lack the authority to prescribe rules. This may be the case in regulation that exceeds the legislative jurisdiction (because it seeks to govern conduct outside the national borders or is not included in the EU legislative mandate). Secondly, governments may facilitate private standards because mandatory governmental legislation is not politically feasible or desirable. Governments may take various measures in order to support the adoption of private standards in the market: funding training programs or promotion campaigns, assisting food businesses in achieving compliance, publicly voicing support, and administrative or expert assistance. For example, the Dutch government has funded a promotion campaign for EurepGap, and several other national governments supported and funded MSC certification of national fisheries (see also Lockie et al. 2013, 284; Kalfagianni & Andrade Roche 2017).

Do governments in their role as public regulator adopt private standards? Although public legislators do draw upon or refer to private standards, they seldom simply adopt a private standard. A related but slightly different form is incorporation of private standards in public regulation by reference. Public regulators do refer to for example the ISO/IEC 17021 standard on Conformity assessment (requirements for bodies providing audit and certification of management systems) and incorporate them in their regulatory frame. EU Regulations also refer to private standards related to analytical reference methods for microbiological food safety (Van der Meulen 2011, 85-86).²¹ However, in most cases in which a government is incorporating private food rules in legislation, the state tends to take over completely. Except for the technical testing norms, the government does not oblige food industry to comply with substantial private standards without transforming the private established rules into public legislation. Examples of this do exist outside

21 See Mendelson 2014 for a critical evaluation of the incorporation of private standards in US federal regulations by reference, focussing on transparency, accountability and potential harms.

the food sector such as in labour relations. In the Netherlands it is quite common that collective labour agreements (the result of negotiations between employers and trade unions' collective bargaining) are declared 'generally binding', that is the provisions of the agreement are made mandatory for all employers and employees in the industry including those that were not represented in the negotiations. The negotiated rules are not changed by the government. However, in food regulation governmental organizations tend to take over the lead. Examples are the EU regulation of organic food, the inclusion of HACCP requirements and third party certification in EU law.

Private standards often do adopt public regulation by including general provisions requiring compliance with all applicable legal requirements. For example, the BRC Global Food Standard refers to legal (and legality of) products and processes in almost every chapter, 'in compliance with the law in the place of production and in the countries where the product(s) is/are intended to be sold.' (BRC Global Standard Food Safety issue 7, 112). Similar provisions are included in other standards such as GlobalG.A.P. and IFS. However, Lockie concluded that compliance with relevant national legislation is expected but not part of the audit (Lockie et al. 2013, 279-280).

2.3 Monitoring and enforcement

This section deals with monitoring and controls. Do governmental inspectors take private certificates into account? And to what extent do private auditors check compliance with public rules? And what are the subjects of discussion here?

The current European Union legal framework creates several opportunities for private food standards and private auditing of food operators and has contributed to the proliferation of these standards. EU law makes food and feed producers primarily responsible for food safety and compliance with all requirements (Van der Meulen 2017). This legal framework stimulates food businesses to employ internal audits and to engage external auditing or consulting firms. Another provision that reinforces the use of private food standards is the requirement that every food business should have an operational food safety management system based on the principles of HACCP. Choosing for third party certification against a major private food safety standard might help a firm to comply with these legal requirements. To be sure, adhering to a private food standard is not legally mandatory.

EU Member States must maintain an effective legal system that requires responsible parties to take affirmative steps to ensure food safety. These include conducting food safety inspections with appropriate frequency, without prior notice and on a risk basis, which take into ac-

count the identified risks, past compliance records, and any other information that might signal non-compliance.²² The frequency of these official 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 programs or quality assurance programs, where such programs are designed to meet requirements of feed and food law, animal health and animal welfare rules'.²³ This enables public authorities responsible for official controls to ascribe an explicit role to private food safety control systems. 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 and integrating them in its own enforcement activities. So far, it has accepted several national private systems, and, after revision of the criteria (in the aftermath of the horsemeat fraud), the NVWA is in the process of assessing and reassigning private food quality systems (Verbruggen & Havinga 2015, 2017; McAllister 2012, p. 10-15; Oldfield 2015).²⁴ In February 2017, the NVWA has found three transnational food safety schemes that fulfil these criteria: BRC, IFS and FSSC22000.²⁵ The UK Food Standards Agency has listed five assurance schemes to be applied when planning inspections of primary produce and is also considering other schemes on the transnational level, including BRC, IFS, FSSC22000 and GlobalG.A.P. (Wright et al. 2013). The FSA is reviewing its enforcement system and the use of private sector audit data and a change of the frequency of audits is being considered.²⁶

The proliferation of private standards goes hand in hand with the establishment and growth of third party certification bodies and of accreditation bodies. Galland distinguishes between two Tripartite Standard Regimes (standardization, certification, accreditation). The European Union did foster the development of a certification industry by obliging some producers to employ third party certification in the context of the 'New Approach to Technical Harmonisation and Standardisation' (Galland 2017; Verbruggen & Van Leeuwen 2015). The EU constructed a notification system and a list of competent certification bodies. To harmonize practices between the Member States the European Commission recommended that notified certification bodies should be

22 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.

23 Recital 13 Regulation 882/2004/EC.

24 Comparable developments are observed in Canada and the United States.

25 <http://ketenborging.nl/kwaliteitsschemas-en-status/> (1-3-2017).

26 Regulating our Future program <https://www.food.gov.uk/search?keyword=regulating%20our%20future> (12-4-2017).

accredited by an independent accreditation body and each Member State should have one single accreditation body.²⁷ This EU accreditation policy is framed in the context of the free market for non-foods but also had an effect on private food standards relying on third party certification. Because certification bodies tend to be not sector-specific, the EU regulations also regulate the certification bodies that verify compliance with food standards. The EU frame means that in the end a public organisation (a national accreditation body) checks the quality of the organisations that are responsible for assessing conformity with private food standards. Accreditation bodies act as carriers and enforcers of state rules (Casey 2017). Thus private food standards that rely on the process of third party certification for monitoring and enforcing conformity with the standard operate within this EU framework.

Nevertheless, public organisations still do criticize the reliability of third party certification. The Netherlands Food and Consumer Product Safety Authority concluded in 2004 and 2011 that certification of a food operator did not guarantee compliance with legal requirements (Havinga & Verbruggen 2017, 202). The Netherlands authority started consultations with food standards organizations, certification bodies, and the Dutch Accreditation Council aiming at improvement of the quality of the certification process. One of the issues of discussion is that audit visits are usually announced. Critics such as the Netherlands Food and Consumer Product Safety Authority argue that most audit visits need to be unannounced to prevent the food operator to clear up before the audit. Pleas in favour of unannounced visits seem to be successful.²⁸ Recently several food safety schemes included unannounced visits, though mostly optional and the 2017 edition of GFSI Guidelines requires schemes to include the availability of unannounced audits as a preferred option.²⁹

Another issue that has come up in the context of public-private co-operation is the need for adequate exchange of information between private certification bodies and scheme owners on the one hand and public food authorities on the other. Public agencies responsible for food safety inspections should be notified about non-conformities (and other situations) that pose a risk to public health. Moreover, public

27 Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products.

28 'A new development has been unannounced audits, arriving at the factory at 8am and entering for the inspection. In the event that access is denied for these assessments, the supplier is delisted.' Jan Kranghand, Regional Director QA MCCI Asia, Metro China at the GFSI meeting 2015: www.mygfsi.com/files/Executive_Summary/GFSC_2015_Executive_Summary_HD.pdf.

29 GFSI Benchmarking Requirements Guidance document version 7, Part 2: Requirements for the management of schemes, 2.5.5 (www.mygfsi.com).

agencies should have access to actual and reliable information about the certification status of food business operators, the accreditation of certification bodies, accumulated information on audit results, and changes in the food safety scheme requirements (Verbruggen 2014, 251). Public agencies should inform private scheme owners and certification bodies about actual food safety risks, recalls, new legislative requirements and new scientific knowledge that might be relevant for their activities in securing the safety of food. The sharing of information is hampered by legal obstacles. Private schemes and auditors operate under the contractual condition of professional confidentiality of audit information (and the whole system is paid for by the contributions of the regulated firms). Public agencies are often not free to share information about particular firms either.

It should be noted that private auditors auditing food business operators that voluntarily join a food safety scheme do have other obligations and responsibilities than public inspectors. A public agency that tries to get complete control over private auditors risks a failing regulatory collaboration. An example in case is the Dutch attempt to have private inspectors of egg producers control legal requirements related to eggs within a strict legal framework. The failure of this hybrid governance structure has been partly contributed to the government that regarded the co-regulatory regime as its own instrument (Van der Voort 2015, 511). More general 'a bald display of coercive power by the state can undermine more normatively based motivations to self-regulate' (Short & Toffel 2010, 386). This would jeopardize one of the key conditions for effective food safety governance (Beuger 2012; Van Wijk & Six 2014). The value of a strong food safety culture in a company is also acknowledged by the GFSI as they started a Technical Working Group focused on Food Safety Culture in 2015.³⁰ The ultimate goal of GFSI is that governments recognize or adopt GFSI third party certification as accepted tools to assist in the prioritization of food safety compliance resources and inspection (Havinga & Verbruggen 2017).

2.4 Evaluation and review

This section deals with the final regulatory function: evaluation and review of the food standards and schemes. Do private schemes incorporate criticism from public authorities in reviewing the standard? Are EU institutions open to criticism and proposals from private standard organizations?

Private food safety standards that are recognized by the GFSI all have procedures in place for regular revision of the scheme. Schemes

30 <http://www.mygfsi.com/news-resources/news/444-call-for-participation-in-new-gfsi-technical-working-group-food-safety-culture.html>, accessed 28-4-2016.

should be subject to formal internal review annually, the normative documents should be reissued at least every four years and direct stakeholders should be involved.³¹ So far GFSI has shown to be responsive to criticism from international and national governmental organisations (Havinga & Verbruggen 2017). They have strengthened auditor competence requirements, requirements related to independency of scheme owners and certification bodies, requirements for stakeholder participation, public availability of relevant documents, the inclusion of unannounced inspection visits and food fraud vulnerability assessment procedures. GFSI also developed a program to assist food business operators in developing markets and SME to work their way up to certification against a GFSI recognized standard. GFSI has announced to work on the development of tools to better understand and strengthen food safety cultures within companies.³²

The question whether EU institutions seriously consider criticism and proposals from private standard organizations requires further investigation.

3. Conclusion

Private food safety standards and other food standards have gained an important position in the European regulatory space. This proliferation raised concerns with public authorities about the legitimacy, accountability and transparency of these private regulations. Public authorities published guidance documents and formulated criteria for private food standards and schemes. In course of time private schemes are strengthened: they have adapted to some of the main points of criticism and are tightening the requirements and adding new ones. This ratcheting up makes it harder for new food business operators to join the club.

The modern food safety laws in the EU (and the US and Canada) focus on prevention and are partly built on the experience of private food schemes and food industry. Private governance structures inevitably carry the risk of capture and conflict of interest. Powerful transnational food safety schemes might push domestic public regulators to the second row in case they lack financial resources, practical experience and the best scientific expertise. For this reason or because of slow-moving wheels of political decision-making, private food schemes may be frontrunners with the risk that some public interests are neglected or that

31 GFSI Guidance document, Sixth Edition/Version 6.3/October 2013, p. 63 (2.3.7, 2.3.8).

32 GFSI's Technical Working Group are making headway, 2016-10-26, www.mygfsi.com/news-resources/latest-news/575-gfsi-s-technical-working-group-are-making-headway.html.

the interests of some stakeholders are not sufficiently taken into account.

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