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Private Food Regulation from a
Regulatee's Perspective

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PRIVATE FOOD REGULATION FROM A REGULATEE'S PERSPECTIVE

Jaap van der Kloet

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Abstract

Regulatory regimes may be conceptualised as consisting of three elements: rule-making (standard setting), monitoring compliance, and enforcement (administration of sanctions) (Picciotto 2002, Scott 2002). Many different forms of private regulation exist, examples are: corporate social responsibility initiatives, codes of conduct, and private standards. In the paper we focus on private food standards and aim to explore the meaning of private standards for those who are regulated by them (regulatees). We therefore looked at the position of regulatees in private regulatory regimes. Three factors seem to affect that position: 1) the level of exactingness of the regulation for the regulatee, 2) the level of voluntariness to stay out of the regulatory regime, 3) the level of the regulatee's control over the regulatory regimes. From these factors, five research questions were developed: 1) how easy is it for regulatees to comply with the standard, 2) is joining the standard voluntary, 3) who sets the rules, 4) who monitors compliance, and 5) who enforces compliance with these rules? These questions are answered for four private food standards: BRC, GlobalGAP, MSC, and EKO. We conclude that the internal organisation and governance structure of private food standards varies highly. The position of regulatees in regulatory regimes has developed in course of time.

Key words

Private food standards, GlobalGap, MSC, BRC, EKO

EXPANSION OF PRIVATE FOOD REGULATION

This paper is about food regulation in international food chains. The way food is regulated has changed in recent decades. Governmental bodies used to take the lead in rule-making and enforcing compliance. However, over the past years several developments have transformed food regulation from traditional state regulation into private or mixed forms of regulation.

During the 1990s a number of global food safety incidents¹ contributed to a decline in consumers' confidence in the safety and quality of food (FAO 2006) and in the capacity of regulators to guarantee food safety (Jaffee & Masakure 2005). These food safety incidents have made consumers more critical of the safety, quality and origin of food. In industrial countries, consumers

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1 Food safety incidents in Europe included the identification of hormones in beef, salmonella in eggs, dioxin in animal feed, E. Coli bacterium in boiled meat, and pesticide residues in fruit and vegetables.

demand a broad assortment of food products of high and consistent quality available throughout the year and for competitive prices (Trienekes & Zuurbier 2008). Governments reacted to the alleged decline in consumer confidence with stricter regulations concerning food safety. Producers and suppliers became primarily responsible for food safety while national governments became responsible for controlling the adequacy of risk controlling mechanisms of companies in a food chain. Due to their legal responsibility and because of fear for potential reputation damage in case of unsafe food products, private actors developed initiatives for decreasing food safety risks and increasing consumer confidence in safe food.

Simultaneously with worldwide food scandals and stricter public and private regulations, food chains rapidly internationalised (Oosterveer 2005, Trienekes & Zuurbier 2008). In order to be able to deliver a continuous and diverse supply of safe food throughout the year, European food traders felt forced to obtain their products from other than national or local markets. This development was stimulated by a process of increasing globalisation in which borders became less visible or disappeared entirely and new techniques for storage enabled food products to remain fresh after transport. Furthermore, economic growth and the related increase of household incomes have stimulated the internationalisation of food chains. As a result, the current food industry has been transformed towards an interconnected system with a large variety of complex relationships (Oosterveer 2005; Piciotto 2002; Trienekes & Zuurbier 2008).

In the context of these developments new forms of food regulation emerged, including private standards, corporate social responsibility initiatives, and codes of conduct. The transformation from traditional state regulation towards less state centred forms of regulation, involved a new relationship and a renewed allocation of responsibilities between government bodies on the one side and private actors on the other. These new forms are characterised by a less dominant role for the government and more responsibilities for private actors (Havinga 2003, Oosterveer 2005). Regulation is conceptualised as consisting of three elements: rule-making, monitoring compliance, and enforcement (Picciotto 2002, Scott 2002). In the traditional model of regulation rule-making was reserved for the legislative body, monitoring compliance for inspectorates, and enforcement for courts. New forms of food regulation include not only public actors, but also private actors who are involved in rule making, monitoring compliance, and enforcement. Private actors include firms, NGOs and other organisations both inside and outside the production chain. An example of an actor inside the production chain is a retailer; an example of an actor outside the production chain is a private audit or certification organisation. Recent trends are the dominant role of retailers, the emergence of global coalitions for setting standards and an increased use of global business to business standards and of third party certification (Fulponi 2006, Harrison 1997, Hat-

anaki & Busch 2008), and a move from a prescriptive towards an enforced self-regulating approach (Martinez et. al. 2007).

The renewed regulation of food has implications for all actors in international food chains, from food industries to primary producers and from food importers to food exporters. Many private food regulations have been developed in Western Europe and other OECD² countries. However, the consequences of these regulations did not stop at national borders. Actors in international food chains are required to comply with private norms that were originally set in Western countries. Private food regulations from European retailers are declared applicable to producers, processors and traders all over the world, including developing countries. A few years ago, most major OECD retailers required certification of products from developing countries against a private food standard such as GlobalGAP or BRC, whereas this is not always required from domestic producers (Fulponi 2006: 7, 9). This rises the question what impact these rules have on actors in developing countries who are regulated by them (regulatees). They find themselves governed by private regulations initially developed in and for a Western context. However, things are different in developing countries. An adequate infrastructure to enforce food quality and safety norms is not available everywhere (Henson & Reardon 2005, Trienekes & Zuurbier 2008) and developing country markets are not all (sufficiently) equipped for competition based on food quality and safety norms (Jaffee & Masakure 2005). Furthermore, capital for investments may not be accessible for everybody. This forms the starting point of the PhD research of one of the authors of this paper.³ That research aims at comparing the effect of private food safety regulation for primary producers in the Netherlands and Kenya. This paper links up with that research and can be considered as a first elaboration of the research theme.

In literature, private food regulation has been examined from the perspective of the state (e.g. George 2005), of private regulators (e.g. Gereffi 1999, Kaplinsky 2000, Reardon et al. 2001), or of retailers (e.g. Havinga 2003, Balsevich et al 2003, Fulponi 2006, Henson 2006), taking an economic perspective (e.g. Baldwin 2001, Gereffi et al 2001, Jostling et al 2004, Reynolds 2004, OECD 2006), or focussing on effectiveness (e.g. Henson & Loader 2001,

2 OECD is the Organisation for Economic Co-operation and Development. The mission of the OECD is to help its member countries to achieve sustainable economic growth and employment and to raise the standard of living in member countries while maintaining financial stability – all this in order to contribute to the development of the world economy. OECD has 30 member states, all developed and rich countries. http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html (29-10-2008).

3 Since May 2008, Jaap van der Kloet has been working as a PhD for the Institute for Sociology of Law of Radboud University Nijmegen, the Netherlands. The (preliminary) title of the research is Private regulation of food safety: concern or benefit for fresh produce growers in the Netherlands and Kenya. The research is funded by NWO, the Dutch organisation for scientific research.

Reardon et. al. 2001, Dolan & Humphrey 2004, Garcia Martinez & Poole 2004). The perspective of regulatees has received less attention. This is remarkable because the expected advantages of private regulation partly rely on the supposition that in private regulation the regulatee and the regulator are the same. Private regulation is expected to be more effective than traditional governmental regulation because requirements are based on inside knowledge preventing practical obstacles in implementation and application. Moreover, private regulation is thought to be accepted more easily and to have a higher level of compliance because it concerns 'own' rules. Traditionally, private regulations are thought to originate from industry (industry association). Many new food regulations, however, are initiated by other private actors such as retailers or environmental organisations. Therefore, many private food regulations cannot be regarded as pure 'self-regulation'. Moreover, private regulations develop through time: extension of requirements, changes in the organisation and governance structure and expansion of issues covered. What does it mean to be governed by private forms of regulation? In this paper we take a regulatee's perspective and aim to explore the meaning of private food regulation for those who are regulated by them. We do this by looking at the position of regulatees in private regulatory regimes. Three factors seem to affect that position: 1) the level of exactingness of the regulation for the regulatee, 2) the level of voluntariness to stay out of the regulatory regime, 3) the level of the regulatee's control over the regulatory regime.

The level of exactingness deals with the changes that regulatees have to implement in order to comply with the regulations. We argue that the exactingness of those changes is different for regulatees who apply for certification for the first time and regulatees who are already certified and maintain to be so. Theoretically, compliance with a food regulatory regime can be either quite simple (because the regulatee already is in compliance with most of the norms from the outset) or very demanding (because the regulation requires fundamental adaptations). The more exacting these changes are for regulatees, the weaker their position.

The level of voluntariness to stay out of the regulatory regime, concerns the existence of legal, moral or economic forces on regulatees to comply with private regulations. Does a potential regulatee have a choice not to join? Is joining the regulatory regime a decision under compulsion of external powers? Regulatees who are free to choose to stay out of the regulatory regime may be less dependent on other actors, such as the regulators or auditing organisations.

The level of the regulatee's control over the regulatory regime is about the influence regulatees have in rule-making, monitoring compliance and enforcement. To what extent are regulated firms involved in rule-making and monitoring? Is a regulatee able to correct decisions that insufficiently take their own interests insufficiently into account? The more control regulatees have, the stronger their position. The downside of a situation in which regulatees have

captured the regulatory process is that it can be a motivator for more governmental regulation (Henson & Caswell 1999). This issue, however, falls outside the scope of this paper. In addition to regulatees, three other private actors may be involved in private regulation: private actors who are part of the production chain, but are not regulated themselves by the regulation at hand, such as suppliers and retailers; private actors providing services to the regulated industry, such as certification and auditing bureaus; and private actors outside the production chain, such as NGOs and consumers (Havinga 2008).

These three factors have led to the following five research questions:

- 1) How easy is it for regulatees to comply with private regulations?
- 2) Is joining the regulatory regime voluntary?
- 3) Who sets the rules and to what extent do regulatees have control over the rules?
- 4) Who monitors compliance and to what extent do regulatees have control over monitoring rules and decisions?
- 5) Who enforces compliance with these rules and to what extent do regulatees have control over enforcing rules and decisions?

In answering these questions we focus on one form of private regulation that, compared with other forms, involves most implications for regulatees: private standards. In general, private food standards contain norms that are more concrete and include sanctions in case of non-compliance. Other forms of private regulation, such as corporate social responsibility initiatives and codes of conduct, tend to allow a more non-committal attitude from regulatees (non-obligatory general principles without monitoring and sanctioning).

We applied the five research questions to four private food standards: the British Retail Consortium Global standard for food safety (BRC), GlobalGAP, the Marine Stewardship Council (MSC) label, and EKO. In selecting private standards we aimed at broad variation. Two standards are business to business standards initiated by retailers driven by self-interest (BRC and GlobalGAP). The other two standards are developed with idealistic intentions (sustainable production) and involve a consumer-label (MSC and EKO). BRC, GlobalGAP, MSC and EKO are selected because they are dominant standards in their field (retail branded manufactured food products, primary food produce, fisheries and Dutch organic food). For this paper we studied the governance structure of the regulation and the standards documents. In our description we rely heavily on information the owners of the standards provide on their websites.

PRIVATE FOOD STANDARDS

British Retail Consortium Global standard for food safety

The British Retail Consortium Global Standard for Food Safety is initially a standard for producers supplying Own Brand food products into UK supermarkets. It is currently used throughout the food industry.

Twenty years ago, food safety was not an important issue for most supermarket organisations. This has changed dramatically since. In the 1990s some major retailers generated their own comprehensive quality assurance scheme including unexpected inspections at farms, gardens and plants (e.g. Tesco and Sainsbury in the United Kingdom, Albert Heijn in the Netherlands).⁴ In 1996 the association of UK retailers (BRC) started to develop a common food safety standard to meet legal requirements.⁵

The aims of the BRC Global Standards are to improve supplier standards and consistency and avoid product failure, to eliminate multiple audit of food manufacturers, to support retailer objectives at all levels of the supply chain and to provide concise information to assist with a due diligence defence.⁶ The standard is regularly reviewed. The most recent version was published in January 2008. The name of the standard has been changed to 'BRC Global Standard for Food Safety'. The standard applies particularly to manufacturers of retailer branded food products, but is also used for the manufacture of other processed food products.

How easy is it for regulatees to comply with private regulations?

The BRC standard contains comprehensive norms with regard to food safety and quality systems, product and process management, and personal hygiene of personnel. The requirements of the standard are very extensive and cover a wide range of activities and include the management of incidents, a food safety plan based on a thorough HACCP study, handling for allergens, chemical and physical contamination control, medical screening of personnel, complaint handling, senior management commitment, traceability and site security. Many procedures must be documented.

Certification may be a demanding process, particularly at the first attempt, because of the wide range of subjects covered. However, the standard also might help to comply with legal regulations and to improve product quality. Food producers could use the standard as a detailed checklist and management tool for ensuring safe products that are in compliance with legal regulations.

4 See Havinga & Jettinghoff 1999 for a description of the quality system of the Dutch leading supermarket Albert Heijn in 1994.

5 www.brc.org.uk/standards/about_background.htm (2005-02-18).

6 www.brc.org.uk/standards/background.htm (2004-06-21).

Is joining the regulatory regime voluntary?

Compliance with the 'BRC Global Standard for Food Safety' is not legally required. However, market forces do force many food manufacturers to comply with this or another retail food safety standard (such as the International Food Standard or Safe Quality Food). In the UK, The Netherlands, Germany and France all major retailers require manufacturers of own brand products to be certified (Havinga 2006, Fulponi 2006). A food producer or grower that lacks certification will be economically sanctioned. Major parties will not buy its products anymore. The purchasing power of supermarkets makes retail food safety standards in fact obligatory for many manufacturers.

Who sets the rules and to what extent do regulatees have control over the rules?

The first issues of the BRC Food standard seem to be developed by retailers only. Over the years other stakeholders became involved in setting the BRC standard (perhaps due to requirements of the Accreditation council). The British Retail Consortium states that representatives from major retailers, manufacturers, certification bodies, United Kingdom Accreditation Service (UKAS) and trade associations contributed to the standard that was developed 'under the leadership of the BRC and its members'.⁷ The website of BRC does not provide information on the members of the Technical Advisory Committee and the Standards Governance and Strategy Committee. It is clear however that the BRC still has a decisive voice. The standard is owned by the British Retail Consortium.

Who monitors compliance and to what extent do regulatees have control over monitoring rules and decisions?

In a private food safety certification scheme like BRC, a company that wants to be certified appoints an accredited certification body to audit the company. October 2008 worldwide 266 accredited certification bodies are recognised by the BRC to audit against the 'BRC Global Standard for Food Safety'.⁸ All Certification Bodies who issue certificates are accredited by Independent Accreditation Bodies, not by the British Retail Consortium. Product certification depends on continued compliance with the fundamental requirements of the Standard. Companies can be awarded with different grades (A, B, C, D). Grade D means that no certificate is issued and a full re-audit should be carried out to gain certification. A grade D will be awarded in case one critical or major non-conformity against the 'Statement of intent' of a 'fundamental' requirement is found, or one critical non-conformity, or three major non-conformities, or two major non-conformities together with 21 minor non-conformities

7 www.brc.org.uk/standards/default.asp?mainsection_i=1&subsection_id=1 (28-3-2008); similar but not mentioning UKAS and major retailers: www.brc.org.uk/standards/about_background.htm (2005-02-18).

8 <http://membersarea.brc.org.uk/directory/search.asp?dir=3> (1-10-2008).

or one major and 31 minor non-conformities.⁹ Audits against the standards are scheduled. A company certified on grade A or B can opt for unannounced audits.

Who enforces compliance with these rules and to what extent do regulatees have control over enforcing rules and decisions?

An audit report has to be technically reviewed prior to the certification decision by the Certification Body. The person deciding to grant, suspend, revoke or renew certification should be independent to the auditor. Critical or major non-conformity against fundamental requirements of the standard should result in suspending or withholding the certification, and a new audit. Other non-conformities are followed by corrective action and revisit.

Conclusion

The BRC Global Standard for Food Safety started as a UK standard owned and dominated by British retailers. In the initial phase, the regulated industry was not involved. Later, British food manufacturers (part of the regulatees) were consulted but still the decisive power is with the British retailers. NGO's, foreign retailers and food industry are not represented in the governance structure. The standard has expanded outside the UK and is not limited to own branded products of retailers anymore.

GlobalGAP

GlobalGAP (Global Partnership for Good Agricultural Practices) is a private sector body that sets standards for the certification of agricultural products around the globe.¹⁰ GlobalGAP started in 1997 as EurepGAP, which was an initiative by European retailers belonging to the Euro-Retailer Produce Working Group (EUREP). British retailers in conjunction with supermarkets in continental Europe were the driving forces. They reacted to growing concerns of consumers regarding product safety, environmental and labour standards and decided to harmonise their own often very different standards.¹¹ In the following years a growing number of producers and retailers around the world joined in with the idea of harmonising standards and procedures for the development of Good Agricultural Practices (GAP). To align EurepGAP's name with the geographical reach of its standards and to prevent confusion with its growing range of public sector and civil society stakeholders, the Board decided to re-brand EurepGAP into GlobalGAP in September 2007. Since 1 January 2008, GlobalGAP has come into effect.

9 BRC Global standard for Food safety Issue 5, Guide to re-audit timescale following awarding of a Grade D issue 1, 11.07.2008 (www.brc.org.uk/standards 3-10-2008).

10 http://www.globalgap.org/cms/front_content.php?idcat=19 (10-10-2008).

11 http://www.globalgap.org/cms/front_content.php?idcat=19 (10-10-2008).

GlobalGAP is a standard for the production of primary agricultural products that covers the process of the certified product from farm inputs like feed or seedlings and all farming activities until the product leaves the farm.¹² The standard addresses norms pertaining to plant and livestock production, plant propagation materials and compound feed manufacturing.¹³ The importance of these norms differs from, what GlobalGAP calls, major musts to minor musts to recommendations. The focus of the standard, however, has been put more strongly on food safety and hygiene at the expense of environment and worker welfare (Van der Grijp et. al. 2005).

Certification programmes commonly use the incentives of increased market access and premium prices to convince producers to meet certification standards and to become certified. In the case of GlobalGAP, a crucial incentive for regulatees is to obtain (and maintain) their license-to-supply to the European supermarkets (Van der Grijp et. al. 2005).

How easy is it for regulatees to comply with private regulations?

Compliance with GlobalGAP can be both simple and demanding. Compliance may be simple for those who are already in compliance with most of the norms set by GlobalGAP, as they follow a standard that is benchmarked against GlobalGAP. For other regulatees, compliance may be rather demanding. GlobalGAP involves a great number of (detailed) norms that cover all aspects of primary production and aspects of animal welfare, environmental protection and worker welfare. Examples are traceability, propagation material, site history and site management, soil management, fertiliser use, irrigation, fertigation, integrated pest management, plant protection products, hygiene policy and procedures, protective clothing, and farm waste management. Compliance with these norms may require adaptations in production methods. For major norms 100% compliance is compulsory, whereas for minor norms this is 95%. Recommendations are inspected but are not a prerequisite for the granting of a GlobalGAP certificate (Van der Grijp et. al. 2005).

For small-scale producers, compliance seems more demanding than large-scale producers, because of the considerable investments in capital and human resources (Van der Grijp et. al. 2005). In Kenya, for example, smallholder farms and contracted large-scale farms face higher investment costs per acre to meet the requirements of GlobalGAP standard than the exporter-owned farm, because they have not applied for other certificates. Exporter-owned farms, on the contrary, already hold other certificates that were implemented in the same period as GlobalGAP or EurepGAP. These producers had to invest less at lower costs in order to become GlobalGAP certified (Mausch et. al. 2006).

12 http://www.globalgap.org/cms/front_content.php?idcat=19 (10-10-2008).

13 http://www.globalgap.org/cms/front_content.php?idcat=3 (10-10-2008).

Is joining the regulatory regime voluntary?

Producers are free to decide whether or not to apply for GlobalGAP certification. However, not all primary producers have another option than applying for certification. Increasingly, buyers of their products, especially Western retailers and supermarkets, demand GlobalGAP certification in order to guarantee their customers safe and qualitative food. As a result GlobalGAP and other private standards become one of the few keys left to gaining and maintaining access to (profitable) markets.

Who sets the rules and to what extent do regulatees have control over the rules?

GlobalGAP has three types of members: retailers and foodservice organisations, suppliers, and associate members such as certification bodies, consulting companies, universities, etc. GlobalGAP is governed by a Board that decides upon the vision and short- and long-term activity plan of the organisation.¹⁴ The Board consists of an equal number of elected producer and retailer representatives and is chaired by an independent chairperson. The day-to-day management of the organisation and implementation of policies and standards is ensured by a Secretariat, a German non-for-profit company, FoodPLUS GmbH.¹⁵ The GlobalGAP standard is developed, revised and maintained by Sector Committees that deal with technical decision-making on specific sector and product issues. Sector Committees are elected by producer and retailer members.

Who monitors compliance and to what extent do regulatees have control over monitoring rules and decisions?

Compliance is monitored by producers themselves through self-assessments and through inspections and audits by independent certification organisations. Producers that apply for certification must register with a Certification Body approved by GlobalGAP. The Certification Body and the applying producer sign a contract in which the producer commits himself to GlobalGAP rules and declares to communicate all relevant and updated data related to the production to the Certification Body. The Certification Body confirms the registration and, if all applicable compliance criteria are met, also certification. The contract between the Certification Body and producer may have an initial duration of up to three years, with subsequent renewal or extension for periods up to three years.¹⁶

Each approved Certification Body can have its own fee structure and must have a penalty procedure that addresses non-conformance with the GlobalGAP standard. A producer may change from one Certification Body to another.

14 GlobalGAP (EurepGAP), General Regulations. Integrated Farm Assurance, Version 3.0-2_Sep07, Valid from 30 September 2007.

15 http://www.globalgap.org/cms/front_content.php?idcat=15.

16 GlobalGAP, General Regulations, p. 11.

er, unless he is sanctioned by the Certification Body. The Certification Body Committee consists of certification bodies that are members of GlobalGAP. Each Certification Body is specialised in certifying one or more specific agricultural products that fall within the scope of GlobalGAP. The main function of the Certification Body Committee is to harmonise the interpretation of the compliance criteria set by Sector Committees.¹⁷

Who enforces compliance with these rules and to what extent do regulatees have control over enforcing rules and decisions?

Compliance with the GlobalGAP standard is enforced by GlobalGAP-approved Certification Bodies. In case a producer does not comply with the applicable major and/or minor norms or violates agreements in the contract with the Certification Body, GlobalGAP provides three types of sanctions. Sanctions are applied to the producer as well as to the product. In case of non-compliance, the producer first receives a warning and agrees with the Certification Body about the time period (maximum 28 calendar days) in which the non-conformance will be corrected. In case a major control point is not complied with, the Certification Body can decide to shorten this period in case the non-compliance is critical in terms of safety for people, environment and consumers.¹⁸ Secondly, when a producer cannot show sufficient corrective action after a warning, a suspension is issued. The Certification Body decides what period (maximum six months) is allowed for correcting the non-compliance. During that time, the producer is not allowed to use the GlobalGAP trademark or logo, certificate or any other document that is related to GlobalGAP. A suspension can be partial or complete. In case of a partial suspension, only certain parts of the certified production are suspended. For example, if apples and cherries are certified, a partial suspension can be issued for the cherry production. In case of a complete suspension, all certified products are suspended. If the cause of the suspension has not resolved within the given time period, the Certification Body will cancel the contract.¹⁹ A cancellation of the contract can also be issued when non-compliance leads to doubts about the integrity of the producer or when major contractual agreements are not complied with. Then, a producer is not allowed to use the GlobalGAP trademark or logo, certificate or any other document that is related to GlobalGAP at all. A producer whose contract has been cancelled may not re-submit for GlobalGAP certification within one year after the date of cancellation.

17 GlobalGAP (EurepGAP), General Regulations. Integrated Farm Assurance, Version 3.0-2_Sep07, Valid from 30 September 2007.

18 GlobalGAP, General Regulations, p. 28.

19 GlobalGAP, General Regulations, p. 29.

Conclusion

Initially, GlobalGAP started as a private standard for food safety which was dominated by European retailers. Later, also producers and more retailers and supermarkets from around the world became members of GlobalGAP. Now, producers and retailers are equally represented in decision-making bodies. Monitoring and enforcing compliance are responsibilities of the GlobalGAP Certification Bodies.

Marine Stewardship Council

The Marine Stewardship Council (MSC) is a label for sustainable fishery and was established in 1997 by the World Wide Fund for Nature (WWF) and Unilever. The multinational food company Unilever found over-fishing a threat to its future fishing activities. The non-governmental environmental organisation WWF considered a specific label an interesting option for promoting sustainable development (Oosterveer 2005: 161, Tully 2004: 3).

The MSC standard, called 'Principles and Criteria of Sustainable Fishing', is based on the FAO Code of Conduct for Responsible Fisheries and the Code of Good Practice for Setting Social and Environmental Standards (ISEAL). The standard is based on 3 principles (maintenance of the target fish stock, minimal environmental impact and effective management) and 31 performance indicators. The standard is science-based and applies to wild-capture fisheries (whatever their size, type or location) and does not apply to aquaculture. The client asking for assessment can either be a fishing company, a fishermen's association or a governmental organization. A 'certified fishery' can involve one of the vessels of a fishing company or hundreds of trawlers from different owners. Currently over 120 fisheries are engaged in the MSC programme (35 certified, 78 under assessment and 20 to 30 in pre-assessment).²⁰ Use of the MSC eco label is only permitted on seafood from a fishery certified to the MSC standard for sustainable fishing handled by members of the supply chain (processors, retailers, restaurants) certified against the MSC 'Chain of custody standard' for seafood traceability.²¹

How easy is it for regulatees to comply with private regulations?

For a fishery meeting all the requirements for full assessment against the MSC standard is very demanding. Assessing the sustainability of a fishery is a complex, timely and public process. It involves financial costs,²² time input from staff and implementing actions to improve sustainability and performance if re-

20 http://www.msc.org/newsroom/press_releases/archive-2008/antarctic-krill-fishery-enters-marine-stewardship (10-10-2008).

21 www.msc.org/get-certified/supply-chain (10-10-2008).

22 Cost of certification can vary between \$25,000 (USD) and \$500,000 (USD) <http://www.msc.org/get-certified/fisheries/know-the-basics> 14-10-2008.

quired. Actors such as regulators, agencies and environmental groups are invited to participate in the assessment process.

For members of the supply chain certification often is quite easy because they already operate product identification and tracking systems for other purposes (e.g. to comply with European regulation or other food standards). The certifier only has to verify that products from certified fisheries are not mixed with products from uncertified fisheries.

Is joining the regulatory regime voluntary?

The MSC standard is voluntary. In course of time several supermarkets, fish restaurants and seafood retailers prefer to sell MSC labelled seafood (Roheim 2003). As a consequence, the pressure for fisheries to engage in MSC is increasing.

Who sets the rules and to what extent do regulatees have control over the rules?

The initial governance structure of MSC (partnership between Unilever en WWF) was criticised by NGOs as lacking due credibility, democratic representativeness and effectiveness (Tully 2004:3). Since 2000, the MSC is governed by the Board of Trustees advised by the Technical Advisory Board and the Stakeholder Council (established in 2002).²³ Trustees are chosen for their knowledge and support for the MSC. The Board should represent different sectors and geographical regions. New Board members are recommended by existing trustees and there must be consensus among all Board members on the appointment. Representative from the fishing industry and scientists seem to dominate the Board.²⁴ The Technical Advisory Board (TAB) advises the Board on the MSC Standards, develops methodologies for certification and accreditation and reviews the progress of fisheries certifications. Existing TAB members propose new TAB members and recommend them to the MSC Board. The Board appoints new members, with the aim of bringing a range of experience, skills and geographical representation to the TAB.²⁵ MSC certified fisheries are not members of MSC, they do not have any formal influence on the rules and their interpretation. In the assessment process and in re-assessment, industry and environmental stakeholders do have the formal opportunity to give their view and to object to decisions taken.

23 www.msc.org/about-us/governance/structure (10-10-2008).

24 Based on information provided on the trustees on www.msc.org/about-us/governance/structure/board-of-trustees/whos-on-the-msc-board (10-10-2008).

25 <http://www.msc.org/about-us/governance/structure/technical-advisory-board/whos-on-the-msc-tab> (14-10-2008).

Who monitors compliance and to what extent do regulatees have control over monitoring rules and decisions?

The fishery appoints an independent certifier that must be accredited by Accreditation Services International to certify fisheries against the MSC environmental standard for sustainable fishing. The certifier issues fishery certificates and conducts the audits during the lifetime of a fishery certificate. The certifier appoints a *fishery assessment team* to assess fisheries against the MSC standard. The team uses information provided by the client fishery and stakeholders to score a fishery on set criteria in order to reach a judgment about whether the fishery meets the MSC standard.²⁶

When a fishery meets the MSC standard for sustainable fishing, its certificate is valid for 5 years. During this period the fishery will be visited at least once a year to check that it continues to meet the MSC standard. The certifier does have the right however, to conduct an unannounced audit at any time or schedule more frequent audits if circumstances indicate the need. Each audit will examine any significant changes that might have occurred either in the physical environment or in the management of the fishery. Each audit will also examine whether the client is satisfactorily addressing all certification conditions. After 5 years, the fishery must be reassessed if it wants to remain in the program.

Who enforces compliance with these rules and to what extent do regulatees have control over enforcing rules and decisions?

The certifier can suspend or withdraw the certificate. Failure to make adequate progress can be enough justification for the certifier to suspend or withdraw the certificate.²⁷

Conclusion

From a partnership between a major food company (Unilever) and an environmental NGO (WWF), the Marine Stewardship Council was transformed in an independent organization. The Board of Trustees and the Technical Advisory Board are composed of scientists and representatives from the fishing industry, chosen for their expertise by cooptation. Regulated fisheries are not formally represented but almost half of the board members have a background in fishing. In this standard also private and public actors outside the food chain are involved, such as environmental NGOs and governmental organizations.

26 <http://www.msc.org/get-certified/fisheries/know-the-basics> (14-10-2008).

27 <http://www.msc.org/get-certified/fisheries/after-certification#post-certification-requirements> (14-10-2008).

EKO

EKO is a Dutch product label for organically produced agricultural products. Products that are EKO certified for more than 95% of organic ingredients. EKO is different from the other three standards presented above in three ways. Firstly, EKO is owned by a private foundation, Skal, but based on governmental regulation. The other standards are based on private regulation. Secondly, Skal is a certification organisation and owner of the EKO label. The owners of the other three standards do not certify themselves, but leave this to independent certification bodies. Thirdly, Skal has a formal monopoly on the certification of organic products in the Netherlands. As for the other three standards certification is performed by several different certification bodies. The term 'organic' is legally protected by EU regulation defining under what circumstances agricultural products are organically produced. The main EU regulation in this respect is Regulation Nr. 2092/91 for organic production methods.²⁸ In the Netherlands, the requirements set in this regulation have been implemented by the Ministry of Agriculture, Nature and Food Quality (LNV) through the agricultural quality regulation (Landbouwkwaliteitswet). In this regulation, the private organisation Skal was assigned responsibility for controlling compliance with organic production methods in the Netherlands.

Skal was founded as Stichting Ekomeerk Controle (Foundation for controlling EKO label) in 1985 and operates as Skal (Foundation for controlling alternative agriculture) since 1992. According to its website (www.skal.nl), Skal is the independent control organisation for the organic agriculture, trade and food industry. Skal aims to promote the correct indication of organically produced agricultural products by means of control, inspections, and certification.²⁹ This means that a product that claims to be organic, is indeed organically produced. Skal describes organic agriculture as sustainable production that can be achieved by measures such as care for vivid and fertile soil, application of preventive crop protection, and manuring with organic manure and natural minerals.³⁰ 1,480 organic farmers and more than 1,200 organic processors, importers, and trade companies are controlled by Skal.³¹

EKO addresses actors in the production chain who produce, process, store, import and sell products. EKO defines each of these different actors as suppliers. In case a certified supplier has not produced, processed, stored, imported the certified product himself, the supplier is responsible for guaranteeing the original producer has met the EKO norms.

28 As from 1 January 2009, EU Regulation Nr. 834/2007 and Nr. 889/2008 will become applicable.

29 Skal, Statuten, 20 August 2003.

30 Skal, Skal-normen, 29 May 2008.

31 <http://www.skal.nl/Portals/0/Nederlands/PDF/InfoSkal.pdf>.

How easy is it for regulatees to comply with private regulations?

Organic farming is a way of living, it demands conviction to choose for organic production methods. Those who are regulated by EKO must have knowledge about nature and what instruments nature provides for making profit with organic agriculture. EKO norms touch upon the entire operational management of a farm, fishery or other agricultural production unit. EKO norms set requirements for the production process, the (design of the) product, a quality plan, and for a complaint procedure. Organic farmers, processors and traders are obliged to pay a fee when applying for certification and pay an annual contribution depending on the number of activities that are certified. Regulatees may be stimulated in complying with EKO by the several different subsidies that are available for organic agriculture.

Is joining the regulatory regime voluntary?

Choosing for organic agriculture is voluntary. Organic agriculture is not dominating the market. So market dominance does not cause pressure to opt for organic production. In the Netherlands, only 2% of the agricultural produced foods is organic.³² Organic farmers in the Netherlands earn an income comparable with that of conventional farmers (Melita 2000:202). However, an organic farmer who wants to sell his products as 'organic' has the legal obligation to be EKO certified, because EKO is based on public regulation.

Who sets the rules and to what extent do regulatees have control over the rules?

The EKO standard is based on regulation of organic production that has been formulated by the European Commission in 1991. Skal has formulated some additional rules on issues not covered by European Regulation Nr. 2092/91. These so-called Skal-norms are only applicable in some specific situations and can be seen as elucidations of the norms set in the European Regulation. Skal applies its Skal-norms only in conjunction with the European Regulation.

Since 2002 the OBR (Overlegorgaan Biologische Regelgeving – Consultative Body Organic Regulation) is a platform for all stakeholders (association of organic farmers, association of organic trading and processing, agricultural organisations, retailers association, environmental NGO, Commodity Boards for Meat, Poultry and Eggs and for Agriculture) to discuss organic regulations.³³ The OBR advises Skal, the Netherlands Department of Agriculture and indirectly the European Commission. Skal and the Ministry of Agriculture are associate members (observer) of OBR.

32 Voedsel en Waren Autoriteit, Biologische landbouw in Nederland: ketenstructuur en voedselveiligheid van dierlijke producten. 2004: 4. (http://www.vwa.nl/portal/page?_pageid=119,1639827&_dad=portal&_schema=PORTAL&p_file_id=10566, 24-10-2008).

33 www.biologica.nl/detail_page.=Beleid_en_regels_OBR_TW (24-10-2008).

Who monitors compliance and to what extent do regulatees have control over monitoring rules and decisions?

In the Netherlands, Skal is the only certification and inspection organisation that is responsible for monitoring compliance with rules for organic production. In other European Union countries, other organisations are responsible. Rules for certification (content and method) are decided by the Board of Skal. The Board consists of a chairperson, general management and executive committee. The chairperson is recommended by the Board and assigned by the Minister of Agriculture, Nature and Food Quality. The general management consists of four members who claim to represent main parts of organic production in the Netherlands. These organisations are the association of organic production and trading, the association of Dutch retailers, the organisation of Dutch agriculture and horticulture, and the federation of organic farmers. The executive committee consists of two persons who were elected because of their relevant knowledge and skills.

Inspections are carried out by Skal or by organisations that inspect on behalf of Skal. Inspections can be both announced and unannounced. Certified suppliers are inspected at least once a year. In addition, extra inspections can take place that are aimed at specific elements in a production process, for example a financial inspection. Suppliers are obliged to allow the inspector access to all company units and relevant documents such as the quality plan, financial administration and complaint record.

Who enforces compliance with these rules and to what extent do regulatees have control over enforcing rules and decisions?

Skal is responsible for enforcing compliance with EKO. If suppliers violate EKO norms, Skal is allowed to impose sanctions, depending on the type of violation. Skal distinguishes three types of violations: small, serious, and fatal. In case of a small violation, when the violation has no direct influence on the product, suppliers are reprimanded and a period is agreed for correction. This sanction is also applicable for applicants of certification. A serious violation concerns a violation of norms that directly influences the product or involves a situation that a small violation is not corrected within the agreed time period. In these cases Skal is allowed to suspend the certificate or cancel the application for certification. Other sanctions may be imposing fines or putting suppliers, on their own costs, under close control. Fatal violations relate to situations in which inspections result in serious doubts about the activities of the supplier or when serious violations are not corrected within the given time period. Fatal violations are sanctioned by cancellation of the certificate. This sanction can also be imposed when financial obligations are not met.

Severe violation of EKO norms may result in criminal prosecution. In case a violation falls within the jurisdiction of criminal law, Skal is obliged to inform the inspection department of the Ministry of Agriculture, Nature and Food Quality.

This only happened once. In July 2006, Skal informed the inspection department of the ministry suspecting a large mushroom farmer having sold 400,000 'normal' mushrooms as organic mushrooms. On 16 October 2008 this case was brought to court.

Conclusion

Initially, in the Netherlands organic production was regulated by the private organisation Stichting Eko-merk Controle (predecessor of Skal). This situation changed with the entering into force of European Regulation Nr. 2092/91 in the Netherlands. In 1992 the Dutch ministry of LNV assigned Skal responsibility for monitoring and enforcing compliance with the, publicly set, rules for organic production. The division of tasks in regulating organic production between the ministry and Skal has maintained in the Netherlands.

CONCLUSION

The four cases above show that the internal organisation and governance structure of private food standards varies highly. From the perspective of regulatees, three aspects of a food standard seem particularly important: 1) the level of exactingness of the standard for the regulatee, 2) the level of voluntariness to stay out of the standard, and 3) the level of the regulatee's control over the regulatory regime.

The first aspect tries to distinguish between standards that are easy to comply with (e.g. because the existing practice is already to a high extent in compliance with the standard) and standards that are very hard to comply with. Based on the number and character of the norms of the standards we expect all four standards to be moderate to very demanding for regulatees applying for certification against the standard for the first time. How much effort it takes to continue compliance after the first certification against the standard remains unclear. For an accurate assessment of the exactingness of a standard a more in-depth study is needed; a desk study is not sufficient.

As to the level of voluntariness of the standard, we examined to what extent a regulatee is legally or morally obliged, or forced by the market to join the standard. In a private food certification scheme a potential regulatee has to take action to become a regulatee: a company should register for certification. This differs from public regulation: no action is required to be governed by the law, the status of regulatee is gained automatically.

Regulatees are free to apply for certification against one of the four food standards. A legal obligation to apply for certification is totally absent in BRC, GlobalGAP and MSC. In the Netherlands, all products with the indication 'organic' or the EKO Quality symbol are legally required to be certified by Skal.

Not legal obligations, but market forces seem to be the most important driver that makes private food standards less voluntary in course of time. The

more a food standard succeeds in achieving a dominant position in the market, the more obligatory joining the standard for regulatees will be. A food standard can achieve a dominant position either because major retailers require certification from suppliers or because consumers prefer products with a particular label.

All together, currently the Marine Stewardship Council label is the most voluntary standard. The BRC food standard is the most obligatory, at least in the United Kingdom, because all major UK retailers require all suppliers of 'own label' food products to be certified against the BRC food standard. BRC did not succeed in becoming the world's only retail food standard. For manufacturers supplying retailers outside the UK, the BRC standard is less obligatory. However, all major retailers in Western Europe do require from suppliers of own branded foods to be certified against BRC or another retail food standard such as IFS or SQF. A manufacturer might be able to opt for an alternative retail food standard; however it is the retailer who decides which standard(s) are required (and whether the supplier is left a choice). We estimate GlobalGAP to be a little more voluntary, particularly because the standard is not required from all suppliers by all major retailers yet; we expect this coverage within a few years. Compared to BRC, GlobalGAP is a more monopolist standard dominating the market of agricultural produce almost completely without serious competing alternative standards.

As to the level of control, none of the four standards is self-regulatory, in the sense that the regulatees are the regulators at the same time. The only standard that has a membership for regulatees, allowing regulatees to vote for representatives in the governing structure, is GlobalGAP. Regulatees have to share their control mutually with the retailers in GlobalGAP. Both Marine Stewardship Council and the EKO standard have some procedures for representing regulatees in the governance structure and for individual regulatees to express their opinion or object to decisions. MSC does not have a membership structure. Members of the Board of Trustees and the Technical Advisory Board are chosen by cooptation; however half of the members have a background in fishery. MSC offers some opportunities for an individual regulatee to participate in decision-making: a fishery is consulted over the assessment structure and performance indicators that will be applied and can make an objection against an unfair decision of the certification body. The EKO standard is based on European and Dutch legislation, and Skal only decides on interpretation and on additional norms. Farmers' organisations are represented in the Board of Skal. As for the BRC Global Food standard, regulatees are not included at all in the governance structure. Control over this standard is restricted to members of the BRC, the owner of the standard. BRC is the only standard from the four that is owned by an old-established organisation not specially created to own and develop the standard. Through the years some opportunities were created for regulatees and other stakeholders to give their opinion on the BRC standard.

We can characterize private food standards by the level of voluntariness and the level of control by regulatees. This is visualised in the following figure.

Figure 1: Estimated position of regulatees in private food standards at the start and today

Source: Authors

Two main developments or trends can be concluded from figure 1. With respect to the level of voluntariness, all four standards have developed from an initially voluntary standard to a more obligatory standard. This has to do with our selection of standards; we selected standards that are the most important in their field. A food standard that does not have a strong position in the market will probably not show this development towards a more obligatory one for regulatees.

The trend in the other factor, the level of control of regulatees over the standard, is less obvious. Two standards (GlobalGAP and MSC) clearly show a development towards more control for regulatees. In both standards this change was introduced rather quickly, in the initial phase some years after the

start. More control for regulatees over the years is not a general trend however, as the other standards show. The EKO standard developed in the opposite direction: initially a private initiative by organic farmers and other stakeholders to promote ecological farming, transformed into a standard based on EU and Dutch regulations leaving only a consultative role for representatives of the regulatees (and other stakeholders). The BRC standard, by contrast, only incorporated a very marginal role for regulatees (and other stakeholders) in the governance structure. These differences in development may be explained by the need for regulators to share control with and be considerate of the interests of regulatees (and other stakeholders) in order to become or maintain a dominant position in food markets.

This paper clearly shows that the time dimension is important in characterizing and comparing food safety standards.

Our study of the governance structure and standards documents provides some preliminary insights in the importance a private food standard might have for regulatees. To gain a more complete and reliable answer our next step should be to turn to the regulatees to learn about their perspective. We intend to interview regulatees, particularly growers of vegetables, in the Netherlands and Kenya on their experiences with and views on private food standards such as GlobalGAP.

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