

Economic Analysis of Law in European Legal Scholarship 6

Harry Bremmers  
Kai Purnhagen *Editors*

# Regulating and Managing Food Safety in the EU

A Legal-Economic Perspective

 Springer

# **Economic Analysis of Law in European Legal Scholarship**

Volume 6

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Harry Bremmers • Kai Purnhagen  
Editors

# Regulating and Managing Food Safety in the EU

A Legal-Economic Perspective

 Springer

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Economic Analysis of Law in European Legal Scholarship  
ISBN 978-3-319-77043-7      ISBN 978-3-319-77045-1 (eBook)  
<https://doi.org/10.1007/978-3-319-77045-1>

Library of Congress Control Number: 2018948256

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Cover Design: eStudio Calamar, Berlin/Figueres

Printed on acid-free paper

This Springer imprint is published by the registered company Springer International Publishing AG part of Springer Nature.

The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

# Contents

<b>Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective . . . . .</b>	<b>1</b>
Harry Bremmers and Kai Purnhagen	
<b>Private Food Safety Standards in the EU . . . . .</b>	<b>11</b>
Tetty Havinga	
<b>Investigating the Regulatory Structure of Voluntary Sustainability Standards: Foundations for Intervention Strategies to Increase Consumer Confidence . . . . .</b>	<b>39</b>
Eva van der Zee	
<b>Environmental Sustainability and the Food System . . . . .</b>	<b>57</b>
Alessandro Banterle, Elena Claire Ricci, and Alessia Cavaliere	
<b>EU Health Claims: A Consumer Perspective . . . . .</b>	<b>89</b>
Erica van Herpen and Hans C. M. van Trijp	
<b>Regulatory Compliance and Company Strategies: The Case of the Nutrition and Health Claims Regulation (EC) No. 1924/2006 . . . . .</b>	<b>105</b>
Stefanie Bröring and Sukhada Khedkar	
<b>Foods for Specific Consumer Groups . . . . .</b>	<b>129</b>
Silvia L. Schmidt	
<b>Commanding to “Nudge” via the Proportionality Principle? . . . . .</b>	<b>151</b>
Kai Purnhagen and Ellen van Kleef	
<b>Obesity, Fat Taxes and Their Effects on Consumers . . . . .</b>	<b>169</b>
Silke Thiele and Jutta Roosen	
<b>Substance Over Form: A Principle for European Food Information Regulation? . . . . .</b>	<b>195</b>
Harry Bremmers	

<b>European Food Law and the Precautionary Principle: Paradoxical Effects of the EU's Precautionary Food Policies . . . . .</b>	<b>217</b>
Lucas Bergkamp and Jaap C. Hanekamp	
<b>Enforcement of European Food Laws . . . . .</b>	<b>245</b>
Franziska Weber	
<b>The Economics of Harmonization of Food Law in the EU . . . . .</b>	<b>263</b>
Michael Faure	
<b>Pre-Market Approval and Its Impact on Food Innovation: The Novel Foods Example . . . . .</b>	<b>291</b>
Martin Holle	
<b>Agricultural Biotechnology: Regulation in the United States and the European Union . . . . .</b>	<b>331</b>
Margaret Rosso Grossman	

# Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective



Harry Bremmers and Kai Purnhagen

**Abstract** This chapter provides a general overview of the contents of this book. The chapter-contributions' order follows different dimensions that can be discerned for describing regulatory content and effect: public-private, mandatory-voluntary, prescription-persuasion, rules-principles, ex-ante-ex-post and centralisation-decentralisation. The book shows that the regulatory toolbox to provide food safety has become more diverse in course of time and that the insight in the social effects of the application of such tools has increased.

## 1 Introduction

When we consume food, we presume that it is safe. When Europeans travel in Europe, consumers can be quite certain that foods they buy and consume will not affect their health. Checking safety via smells, appeal, the seller's reputation or processing of raw eatable foods is regularly not necessary. The European Union (EU) has one of the most sophisticated food laws in the world, and many believe that it is thanks to these laws that food on the EU market is, despite some hick-ups once in a while, relatively safe.<sup>1</sup> This safety-orientation of EU food law is not only geared towards the provision of consumers' rights to health and safety, in the form of this 'presumption-of-safety' it is also one of the main factors determining the competitiveness of the food industry.<sup>2</sup> This 'presumption-of-safety' is not obvious. It is not only propagated by private businesses, but also by the institutional setting in which they operate. A key element of the institutional surroundings of our food supply

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<sup>1</sup>Researchers have determined the EU's traceability requirements as world-leading, see Charlebois et al. (2014), p. 1104.

<sup>2</sup>Wijnands et al. (2008).

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chains is food law. A country with very good laws on food and a likewise rich cuisine and history of food culture is Turkey. However, Turkey is a regular number one candidate in the ranking of countries of origin of counterfeit food and beverages seized at EU borders.<sup>3</sup> Why does the provision of food safety work in some areas of the world better than in other parts? When travelling in the United States of America, one can likewise be quite certain that the food one consumes will not have a major health effect on the body. The provision of safe food is quite successful in the United States. Nevertheless, US consumers are among those most concerned about safety in the world, increasingly calling for stricter regulatory activity. Content-wise the norms that are accepted in a region may differ, due to among others differences in institutional and natural variables (like social habits, culture, climate etc.) and the function they perform.<sup>4</sup>

In the EU, next to guaranteeing the safety of foods, norms which aim at the provision of healthy and sustainable food are of key importance for the free movement of foods across national borders inside of the EU. In other words, food law is of predominant importance for the functioning of the European internal market. On the one hand, within the boundaries of social provisions such as environmental protection and fundamental rights, but also ethical considerations such as animal welfare, the rationale of the internal market (based on economic foundations as harvested from neoclassical economic theorising) determines the operation of food markets and supply chains. On the other hand, food procurement is especially vulnerable due to food safety issues involved, the credence character of foodstuffs and the tendency towards vertical and horizontal cooperation to address such issues. Without regulatory interference, the efficient and effective functioning of supply of safe food may be threatened. This induces a constant dynamics of regulation in which different considerations seem to conquest for predominance: economic allocative and distributional concerns of regulation, informational equity, cultural differences as well as fundamental rights and freedoms. Exercising economic freedoms within the ambit of the EU therefore has to be balanced with deeper concerns about long-term guarantees of food security. As a result an increasing and partly contradictory regulatory food safety framework has been put in place, and it still broadens its scope and content. Starting from the idea that economic considerations are basic to the design and functioning of the European food supply arena, and that economic effects consolidate or induce modification of the present legal structures and principles, we ask ourselves how economic, marketing and managerial theory and practice can explain and enhance the shaping and modification of the regulatory framework that fosters safe and sustainable food supply chains. In the book, generic theorising and measurement of regulatory effects (e.g. of ex-ante vs ex-post regulation, content-versus information-related regulation) is supplemented by in-depth analysis of key topics in food law (like health claims, enforcement strategies and induced risk management at the level of the food business).

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<sup>3</sup>See Dennis and Kelly (2013), p. 26.

<sup>4</sup>See Bremmers et al. (2009).

## 2 Outline

This book addresses the effects of food law on the policies and management of actors in and around food supply chains along different dimensions: public-private, mandatory-voluntary, ex ante-ex post regulation, and regulation with rules (objective standards) or principles, prescription versus persuasion, centralisation versus decentralisation, or hybrids thereof.

### 2.1 *Public-Private*

Regulating markets via public law is a traditional way of interference in food supply chain activities. Due to loss of regulatory power of nation-state regulation<sup>5</sup> and likewise an increase of globalisation of food-related trade private regulation through standards is taking central stage in the regulation of supply chains.<sup>6</sup> This increasingly important form of regulation is addressed by *Tetty Havinga*, *Eva van der Zee* and *Alessandro Banterle*, *Elena Claire Ricci* and *Alessia Cavaliere*.

*Tetty Havinga* ('Private Food Safety Standards in the EU') addresses the structure of private standards and their relationship with governmental regulation. This relationship is analysed for the rulemaking, adoption, monitoring and review of private standards. The relationship is not unidirectional it seems. Private standards influence public regulation, and vice versa. The involvement of public authorities may improve the legitimacy, accountability and transparency of private standards, but carries risks also (like the risk of capture).

*Eva van der Zee* ('Investigating the Regulatory Structure of Voluntary Sustainability Standards') investigates the regulatory structure of standards which underlie sustainability labels. The structural regulatory characteristics of these standards are categorized in order to facilitate governments to eventually intervene in it, should consumer confidence make such intervention necessary. The assessment of such structural impediments and intervention based thereon may be necessary due to the ongoing tendency towards market-based instruments. More and more, sustainability standards are set by private parties. Accreditation could take place by private institutions also, as well as certification and the assessment of compliance. The study shows plurality in the available sustainability labels as to their structural characteristics. The present sustainability labels, using the Netherlands as case study, show that especially non-governmental organisations are involved in the setting of standards, while dominantly certification takes place by private institutions (i.e., third-party certification). This is in line with consumers' expectations, and is, in line with present consumer research, trusted and credible.

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<sup>5</sup>Patterson and Afilalo (2008), pp. 35–37.

<sup>6</sup>Purnhagen (2015).

*Alessandro Banterle, Elena Claire Ricci and Alessia Cavaliere* ('Environmental Sustainability and the Food System') provide us with an overview of environmental sustainability, its connection with the food sector and the way it can be promoted. They investigate public regulation and next address private initiatives in the form of self-regulatory activities. 'Sustainable development' was among others defined in the Brundtland report 'Our Common Future' (1984) and is strongly connected to the structure of the food provision system (water and land usage, disposition of waste etc.). The authors not only go into public regulation on behalf of sustainable development (as for instance indirectly referred to in the General Food Law), but also review private initiatives in this respect (like eco-labelling and fair trade). Last, they assess the effects of measures and information on consumer choices and the preservation of human health.

## 2.2 *Mandatory-Voluntary*

Classical tools of mandatory regulation are enforced by mechanisms of public law, voluntary solutions need to persuade by appeal. In this book, the regulatory choices between the two are illustrated by three contributions that address the use and effects (for the consumer, but also for the strategies of businesses) of commercial practices on foodstuffs.

*Erica van Herpen and Hans van Trijp* ('EU Health Claims: A Consumer Perspective') stress the positive effects of health claims on consumer behaviour and on the effectiveness of businesses. Such effects will only occur if these claims are reliable, which was a major reason to install the nutrition and health claims regulation (NHCR) in 2006. The contribution reviews the effects of health claims from three angles: the representation of the claim in terms of text versus picture, the inferences consumers make of the representation and the consumers' motivation to choose healthy products. Legislators, as well as food businesses for their own purposes, should be aware of the mechanisms behind the differences in consumer responses to textual and visual claims.

While van Herpen and van Trijp investigate the consumer impact of health claims, *Stefanie Bröring and Sukhada Khedkar* ('Regulatory Compliance and Company Strategies: The Case of the Nutrition and Health Claims Regulation (EC) No. 1924/2006') analyse the challenges food businesses face and their strategies to deal with the NHCR. Compliance is not as self-evident as it seems. Companies can comply by submitting for a claim to be authorised if needed for an innovation (for instance a new 'functional food'). But they can also circumvent the NHCR, due to the heavy burdens connected to pre-market approval in terms of necessary scientific evidence, administrative time and resources and postponed access to the market. As to the authors, a dialogue involving all actors would be necessary to reduce the barriers to innovation due to the NHCR.

The contribution of *Silvia Schmidt* ('Foods for Specific Consumer Groups') describes the increased use of standards for vulnerable groups of consumers. From a mere market organisation the EU has developed towards balancing the freedoms in

the market towards the protection of a consumer which is not ‘average’ but makes part of different groups with different safety and personal needs and may be vulnerable as to safety and misleading by information. This consumer is specifically protected by means of product (recipe) and process standards and mandatory food information. Regulation 609/2013, which provides protection to specific groups, is used to analyse the need for and structure of content- and information based regulation, and the trade-off between these two.

### 2.3 *Prescription-Persuasion*

Behavioural steering these days goes beyond the classical dichotomy of mandatory versus voluntary or content-related versus information-related regulation. It is increasingly supplemented by new forms of regulation, which promise to be more effective. These approaches make use of classical monetary incentivizing mechanisms such as taxing, but also increasingly use psychological findings to “nudge”.<sup>7</sup>

*Kai Purnhagen and Ellen van Kleef* (‘Commanding to Nudge via the Proportionality Principle?’) focus in their chapter on the interplay of EU food law and nudging. Starting from the proportionality principle they look into whether nudges are less onerous but equally effective to traditional content-related and information-related regulation. If so, they hypothesize, the proportionality principle may be imperative for regulators, lawmakers and law interpreters to use nudging techniques. Contrasting recent studies on the effectiveness of nudging techniques in the food sectors they conclude that under certain circumstances, nudging techniques indeed show both, a freedom preserving and manipulative character. They argue that the proportionality principle may indeed require regulators, lawmakers and law interpreters to prefer nudging techniques over more traditional forms of regulation if certain conditions are met.

Taking tax rules as instrument to fight over-consumption, *Silke Thiele and Jutta Roosen* (‘Obesity, Fat Taxes and their Effects on Consumers’) focus on the effects of fat taxes. Nowadays, obesity and overweight are serious problems which have the attention of European and national authorities. Taxing unhealthy products is one instrument to change the consumers’ consumption patterns. The authors describe the causes of obesity, their effects in terms of non-communicable diseases and the costs connected to them. Information deficiencies and/or externalities draw the attention of authorities at different levels of regulation. The authors review where fat taxes have been implemented (like in Mexico, or Denmark and other countries of the EU) and what the (expected) effects are on consumers and manufacturers. Next to positive effects, they also go into negative consequences (for instance budgetary impacts for low-income households). They review observation and experimental studies on the effect of fat taxes. All in all they present a comprehensive overview of the scientific work on the fight against obesity.

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<sup>7</sup>See inter alia Jolls et al. (1998) and Purnhagen and Reisch (2016).

## 2.4 *Rules-Principles*

Regulating via rules or principles is a classic of regulatory science ever since the UK financial system started to experiment with principles-based regulation.<sup>8</sup> While often unspoken, EU food law relies largely on a principles-based approach. The authors in this volume will elaborate on such a principles-based approach in food law, each one from a different perspective.

*Harry Bremmers* contributes a chapter (“Substance over Form’ – A Principle for European Food Information Regulation?”) on the use of principles as a replacement of or supplement to substantive rules, to better oppose fraudulent and/or misleading practices in the food industry. He argues that the present legislative structure is not equipped to rule out such practices and a need exists to supplement the present rules with a principle like ‘substance over form’. Under this principle, the created impression towards the user of a food is guiding for assessing whether he has been misled. However, notorious intentional fraudsters may not be encapsulated using this principle, since its application is based on trust in the self-governing capabilities and intentions of food businesses. Yet it may obstruct ‘fraud-by-effect’: the formal adherence to legislation, while materially putting the consumer on the wrong foot.

*Lucas Bergkamp and Jaap Hanekamp* (‘European Food Law and the Precautionary Principle – Paradoxical Effects of the EU’s Precautionary Food Policies’) go into the adverse effects of the application of the precautionary principle to protect consumers against unidentified food risks. The principle has migrated from environmental regulation into food law and is included in Article 7 of the General Food Law (178/2002). As to the authors, precautionary policies like zero-tolerance, MRL’s, or the authorisation of claims before use carry a price tag. Not only do they cost money, but they also may negatively influence the achievement of other policy goals, like innovation or food security. Then the question is whether a precautionary policy is an adequate instrument to provide safe food and if it is, at what price: not only for actors in the EU but also in other countries. The authors argue that other factors than protecting human health and costs thereof may affect the implementation of precautionary measures.

## 2.5 *Ex-Ante–Ex-Post*

While determining the effectiveness of regulation via principles-based vs rules-based regulation is a classic in regulation theory, measuring the effectiveness of regulation by determining ex-ante vs. ex-post liability is a classic in law and economics.

In this sense *Franziska Weber* (‘Enforcement of European Food Laws’) focuses on the preference for public ex-ante regulation versus private ex-post liability for

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<sup>8</sup>Black (2008), p. 425.

enforcing food law. She uses the four criteria Steven Shavell has developed in 1984 to investigate the positive and negative aspects of both (i.e., information availability, insolvency risk, the possibilities to sue responsible actors and the level of administrative costs). In food law, a strong public enforcement system has been installed, which is supplemented by the possibility of private litigation. The latter is dependent on the structure of civil law per Member State. The author views the combination as strong, but notes that further studies have to be carried out to get insight in the synergies and preferences with respect to the public-private divide.

## 2.6 Centralisation-Decentralisation

In a multi-level structure such as the EU the question who regulates at what level is of prime importance.<sup>9</sup> Answering this question is difficult and requires a sound underlying method against which normative solutions can be presented.

*Michael Faure* ('The Economics of Harmonization of Food Law in the EU') asks himself to what extent and under what circumstances food law in the EU needs to be harmonized. He applies the theory of federalism to assess whether centralisation is needed and when and where a decentralised system works better. Different variables influence whether a centralized or a decentralised system of regulation is preferred on economic grounds. Can, using such theorizing, a foundation be provided for explaining the ongoing process of harmonization of EU food law? The theory of comparative federalism implicates that citizens will choose and migrate to the legal order that suits best their needs. It may be that the local level is preferred, since there the needs of citizens is understood best. However, a whole set of factors affect the level of centralisation/decentralisation, like cross-border externalities, the design of optimal jurisdictions, race-to-the bottom or top, the creation of a level playing field and transaction costs. These factors are subsequently applied to the regulation of food, with mixed results as to the preference of a centralized (harmonized) versus a decentralised (Member State) system.

A centralised approach is applied in the new novel foods regulation. *Martin Holle* ('Pre-Market Approval and its Impact on Food Innovation – The Novel Foods Example') asks himself if this piece of legislation (i.e., 2015/2283) brings alleviation to businesses that apply for access to the European market with newly developed products. The former novel foods regulation (258/97), that expired in 2018, forms with its strict and lengthy application procedure and the uncertainties in the outcome of the authorisation process a barrier to innovation. Food businesses thus are reluctant to invest in new products, which is negative for the competitiveness of the European food industry. The author systematically addresses the changes in definition, classification of products as novel, the centralisation of the application and authorisation procedure, and the imposed deadlines for the authorities and

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<sup>9</sup>See for instance Smits (2014).

effects on administrative burdens. The evaluation results in the author's opinion that the new novel foods regulation brings about some alleviation, but still shows shortcomings that only via the implementing measures of the Commission can be dealt with.

Comparing the different regulatory approaches on genetically modified organisms and their application, *Margaret Rosso Grossman* conducts a classical comparative legal analysis of the different laws, regulations and their effect in the supranational system of the EU and the federal system of the USA ('Agricultural Biotechnology: Regulation in the United States and the European Union'). She focuses on regulatory mechanisms that govern authorization and labelling of genetically modified crops and addresses some recent legislative developments. She describes the US and EU regulations that govern genetically engineered animals and clones. Her chapter identifies some similar regulatory priorities as well as some regulatory barriers caused by significant differences in risk management in the US and the EU. Margaret Grossman suggests that innovative biotechnologies will challenge current regulatory systems, which may require new approaches both to protect human health and the environment and to encourage continued innovation and enhanced agricultural productivity.

### 3 Epilogue

After this endeavour, we still owe the reader an elaboration on the positive effects of the regulatory changes with respect to food safety assurance. Although the regulatory changes are still in flux, we can point at two positive influences that enhance EU food safety regulation, and ultimately food safety. One development that has been illustrated in a number of chapters, is the growth of the content of the regulatory toolbox. As there is no one-size-fits-all solution for an effective regulatory system, the number of tools that are available has increased, and probably will further be expanded. A second development that has been demonstrated is that we are permanently improving our knowledge of the social effects the tools have, as a spin-off of the bonds closed with technical and social sciences. Some tools, such as nudging, have been buried a long time underneath the known ones, mainly mandatory and voluntary interventions. Of other tools, such as pre-market approval, due to better methods to generate data on the effects, we increasingly are able to provide solid advice to policy makers. We close with a plea for a continuous and steady growth in research on the social and managerial effects of tools of regulation. Next to this, we should strive for better communication of the available tools and their effects to policy makers, so that the institutional setting for food production and procurement improves.

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# Private Food Safety Standards in the EU



Tetty Havinga

**Abstract** Food safety regulation in the EU is a complex arrangement of public laws and private food standards. This chapter discusses the structure of private food safety standards and the complex relationship of these private standards with public regulation in the EU. Private standards are very common in the food industry in many European countries. Food safety standards such as BRC, IFC and FSSC22000 are initiated and supported by powerful retailers and food manufacturers. Although compliance with these standards is not obliged by law, food business operators in particular markets are in fact forced to join a private certification scheme. Private standards are managed by a standard-owner. Verification of compliance of the major standards is delegated to accredited third-party certification bodies. The norms of private standards are built upon public standards (Codex, EU, ISO). The EU legal framework reinforced the proliferation of private food standards. Private standards did pioneering work in modernizing food regulation. Current EU food law benefitted from the experience of standard-owners, certification bodies and food industry with private standards. The EU legal framework allows public authorities in the Member States to take account of private food safety assurance schemes in their official controls. In several countries, authorities responsible for official food safety controls are investigating ways to collaborate with private food safety assurance systems as part of their monitoring and enforcement tasks. This development raises questions about the reliability of third party certification, the exchange of information between private and public actors, and the risks of regulatory capture and conflicts of interest.

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# 1 Introduction

The global system of food regulation has grown into a complex arrangement of various laws and standards on different regulatory 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. An analysis of food safety regulation in the EU cannot be limited to public laws and should include private standards as well. This chapter discusses the structure of private food safety standards and the complex relationship of these private standards with public regulation in the EU.

In the first section 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 compliance, 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 and enforcement. Do public authorities take private certificates into account? And to what extent do private auditors check compliance with public rules? What are the subjects of discussion in this respect? Section 2.4 deals with the evaluation and review of the food regulations. Do private standards incorporate criticism from public authorities in revising the standards? Are EU institutions open to criticism and proposals from private standard organizations? Section 3 concludes.

## 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.<sup>1</sup> 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

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<sup>1</sup>E.g. Bain et al. (2013), Busch and Bingen (2006), Henson and Humphrey (2009) and van der Meulen (2011a).

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. A first circumstance is the increasing globalization of food supply chains which 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.<sup>2</sup> National governments also face a problem here because their jurisdiction is locked inside their national territory. Secondly, the increased economic power of supermarket chains contributed to the rise of private food standards.<sup>3</sup> 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.<sup>4</sup> 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).<sup>5</sup> 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 public response to food incidents such as the BSE crisis has been perceived as inadequate by both consumers' organizations and food industry.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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).<sup>9</sup> Systems of certification of producers, manufacturers, traders, controlling laboratories and products are common. Classic examples include kosher supervision and the French wine appellations.<sup>10</sup>

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

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<sup>2</sup>Hatanaka et al. (2005), Henson and Humphrey (2010), Oosterveer (2005) and van Waarden (2011).

<sup>3</sup>Burch and Lawrence (2005) and Marsden et al. (2010).

<sup>4</sup>Fuchs et al. (2009), ten Kate and van der Wal (2017) and Marsden et al. (2010), p. 156 ff.

<sup>5</sup>Ansell and Vogel (2006), Fulponi (2006), Henson and Humphrey (2010) and van der Kloet (2011).

<sup>6</sup>Bernauer and Caduff (2006), Henson (2011) and Vos (2000).

<sup>7</sup>Baldwin et al. (2012), p. 68 ff.; Majone (1994).

<sup>8</sup>Busch and Bingen (2006).

<sup>9</sup>van Waarden (1985).

<sup>10</sup>Lytton (2013) and Moran (1993).

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. Often verification and enforcement procedures were absent or less elaborated.<sup>11</sup>

### **Characteristics of Private Food Standards**

A standard is a set of rules or norms about minimum requirements for products, processes or producers. A private standard is developed by private actors, such as food manufacturers, non-governmental organisations (NGOs), industry associations, farmers, retailers and food service providers. 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 exercise influence by buying only 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.<sup>12</sup> 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 European Regulations on organic production of agricultural products. The Bioland guidelines 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.<sup>13</sup> ‘Private food standards [...] are better understood as part of a governance structure rather than as governmental strategies outside the state.’<sup>14</sup> The decisive factor for characterizing a standard as a private, public or hybrid 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.

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<sup>11</sup>See for example Fouilleux and Loconto (2017), pp. 5–6 who discuss the shift from community-shared value-oriented principles of organic farming to globalized auditable standards.

<sup>12</sup>Food Chain Evaluation Consortium (2009).

<sup>13</sup>Havinga (2006) and Henson and Humphrey (2010).

<sup>14</sup>Lockie et al. (2013), p. 289.

Private food standards cover a wide range of issues.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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).<sup>18</sup> 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.<sup>19</sup>

Private standards fulfil two basic functions in the market.<sup>20</sup> 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

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<sup>15</sup>See for multiple examples of private food standards Canivet (2006), Hammoudi et al. (2015), Henson and Humphrey (2009), van der Meulen (2011a) and Wright et al. (2013).

<sup>16</sup>Havinga (2015a).

<sup>17</sup>Henson and Humphrey (2011), pp. 153–154.

<sup>18</sup>Havinga (2006).

<sup>19</sup>See <http://www.tesco.com/nurture/?page=nurtureScheme>, accessed 1 August 2017.

<sup>20</sup>Henson and Humphrey (2010), p. 1639.

market, usually no price premium is included. The second function of standards is expressly differentiate products or producers meeting the standard from other products available on the market. These standards intend 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 trademark. These are business-to-consumer standards (B2C). Certification may enable the access to high value markets and/or higher prices. Examples include certification to 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. 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. Today almost all farmers in Western European countries including 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). 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.<sup>21</sup> The retailers that initiated the EurepGap 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. They aimed also at an extensive supply of vegetables and fruits fulfilling their requirements, thus creating extensive 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 considered pure self-regulation. In self-regulation the regulator is also the regulatee.<sup>22</sup> 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: compliance with the standard is not made mandatory in public regulation. However, quite often the regulatee (food business) is

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<sup>21</sup>See [http://www.globalgap.org/uk\\_en/for-consumers/](http://www.globalgap.org/uk_en/for-consumers/), accessed 1 April 2016.

<sup>22</sup>Levi-Faur (2011), p. 8.

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.<sup>23</sup> 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.<sup>24</sup>

Although most private food standards are voluntary and most public standards are mandatory, this is not by definition the case. Henson and Humphrey<sup>25</sup> distinguish between four possible combinations of public/private and mandatory/voluntary food standards:

- 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),<sup>26</sup>
- 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 compulsory 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.<sup>27</sup> 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.

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<sup>23</sup>Cafaggi and Iamiceli (2015), Clapp (2016), p. 125; Havinga (2015a).

<sup>24</sup>Ahold (2016), p. 8.

<sup>25</sup>Henson and Humphrey (2010), p. 1630.

<sup>26</sup>See with regard to organic food: Arcuri (2015), Schmidt (2011), pp. 290 and 293. Henson and Humphrey (2010), p. 1630, refer to Label Rouge. Canadian FSEP is a voluntary HACCP program, Herath and Henson (2006).

<sup>27</sup>See for organic food Arcuri (2015), Boström and Klintman (2006), Schmidt (2011); for HACCP Bernauer and Caduff (2006), Demortain (2007); for fair trade in French law and GAP in Switzerland FAO (2014).

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.'<sup>28</sup> The influence of governmental intervention on private regulatory schemes is not always either supportive or constraining 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.<sup>29</sup> In Western European countries these 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 retailer 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).<sup>30</sup> Together these four transnational standards issued more than 200,000 certificates.<sup>31</sup> These standards are benchmarked by the Global Food Safety

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<sup>28</sup>Arcuri (2015), p. 15.

<sup>29</sup>Fuchs et al. (2009); Retail economic power is increased through cooperation in international buying groups ten Kate and van der Wal (2017).

<sup>30</sup>See for a more detailed description of these standards, their development and dissemination Havinga (2015a).

<sup>31</sup>Figures on the website of the standards at 23 November 2016: BRC 23,000; FSSC 13,685; GlobalG.A.P. 140,000; IFS 16,800.



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.<sup>32</sup> 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 Braithwaite and 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’.<sup>33</sup> Initially the collective food standards were national standards (BRC in UK, IFS in Germany). Since they have expanded fourfold.<sup>34</sup> (1) Geographically, the standard was adopted by supermarkets’ chains in other countries. (2) Scope of the standard is no longer limited to own branded 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 (see Fig. 1). 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, particularly in developing countries.

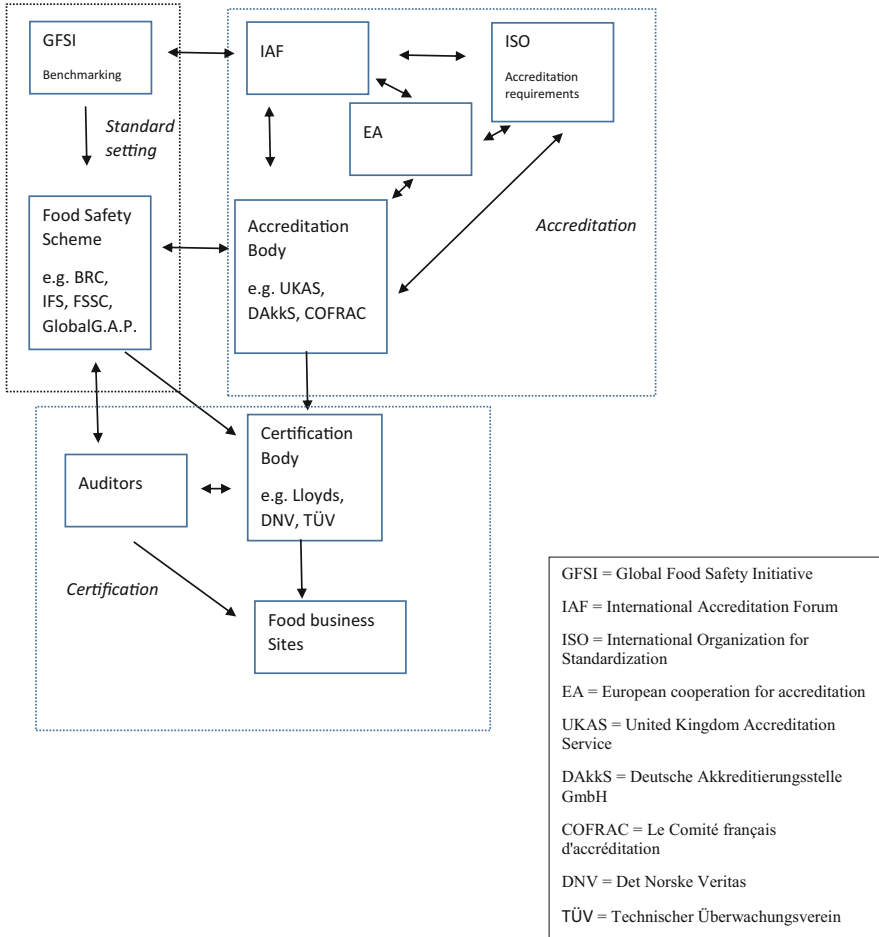
Food businesses that are found in compliance with the standard are certified. Verification of compliance is delegated to certification bodies, organisations specialized in auditing and verifying compliance. Most standards only accept certifica-

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<sup>32</sup>See on GFSI Fagotto (2017), Havinga and Verbruggen (2017) and Verbruggen and Havinga (2016).

<sup>33</sup>Braithwaite and Drahos (2000), p. 554.

<sup>34</sup>Havinga (2015a), pp. 61–63.



**Fig. 1** System of accredited third party certification of GFSI recognised food safety schemes

tion 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 wishes to acquire 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.<sup>35</sup> 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.<sup>36</sup>

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 are 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, Italy and Spain have developed national standards. In these countries the national standardization organizations are private not for profit associations mandated by the government.<sup>37</sup> A 2010 inventory of certification schemes for agricultural products and foodstuffs marketed in the EU Member States found 441 (sub)schemes.<sup>38</sup> Particularly in Germany, Italy, Spain and the United Kingdom many schemes were developed.<sup>39</sup>

Private food safety standards cover different products and processes in the food supply chain, from farming (animals, plants, fish, grains), processing, storage, distribution and 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.

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<sup>35</sup>The 2017 edition of the GFSI Guidelines requires food safety schemes to ensure that unannounced audits are available as a preferred option (Article 2.5.5, GFSI Benchmarking requirements, GFSI Guidance document version 7).

<sup>36</sup>Lytton and McAllister (2014).

<sup>37</sup>E.g. Standards DS 3027, Agri confiance, UNI 10854, UNE 155000. Food safety standards are also developed by the national standardization organizations in Greece and Ireland (e.g. ELOT 1416, IS 343); these are public voluntary standards as the Greek standardization organization is state-owned and the Irish is a governmental institution. Canivet (2006), pp. 16–17).

<sup>38</sup>See [http://ec.europa.eu/agriculture/quality/certification/index\\_en.htm](http://ec.europa.eu/agriculture/quality/certification/index_en.htm), accessed 1 August 2017.

<sup>39</sup>Arête (2010), p. 3.

## 2 Relations Between Public and Private Actors

### 2.1 Rule-Making

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.<sup>40</sup> 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 as well as 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 persons 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.<sup>41</sup> 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?

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<sup>40</sup>See on regulatory phases Henson and Humphrey (2011), Havinga (2015b), pp. 31–33; Verbruggen and Havinga (2017), pp. 11–14.

<sup>41</sup>Fuchs et al. (2011).

Julia Black distinguishes four forms of self-regulation with a different role of the state,<sup>42</sup> 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 which is then subjected 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 the regulation or making its adoption legally mandatory.

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 reinstalled after several food safety incidents. However, the introduction of new liability legislation has contributed to the rise of private standards. 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.<sup>43</sup>

Although these retail standards are developed without any state interference, they are nevertheless connected to statutory provisions. 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 and 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.’<sup>44</sup> 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.’<sup>45</sup> Moreover, most private food safety standards are built upon public standards such as Codex and ISO standards, and EU law.<sup>46</sup> A key element of private food safety standards is the practical translation of statutory requirements. Private standards lay down more specific and detailed

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<sup>42</sup>Black (1998), p. 124.

<sup>43</sup>Verbruggen (2014), p. 239 ff.

<sup>44</sup>Marsden et al. (2000), p. 193.

<sup>45</sup>Marsden et al. (2010), p. 284.

<sup>46</sup>See for example Casey (2017) on GlobalG.A.P.; and Henson and Humphrey (2011) on the relation between private standards and Codex.

instructions as to how to comply with legal requirements. Henson and Humphrey argue this is the most important function of private standards in the area of food safety.<sup>47</sup> 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 public regulation, by setting more stringent critical limits or by extending existing requirements.<sup>48</sup> 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.<sup>49</sup>

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. 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 the HACCP principles’.<sup>50</sup> This legal requirement reinforced the growth of private food certification schemes as implementation of a private standard helps a food business to comply with this legal requirement. A food safety management system based on HACCP principles is a core element of the private food safety standards. 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 and private standards. National, European and US governments included a mandatory HACCP plan in their food laws drawing upon the experiences of private food standard organizations and auditors.<sup>51</sup> This tended to empower the retailer-led forms of food regulation.<sup>52</sup> 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.<sup>53</sup>

Another example of complex interactions between private and public actors in setting food safety standards is the development of industry guides to good practice

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<sup>47</sup>Henson and Humphrey (2011), p. 160.

<sup>48</sup>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.

<sup>49</sup>See Henson and Humphrey (2010, 2011) and Havinga and Verbruggen (2017), pp. 196–197.

<sup>50</sup>Article 5 of Regulation (EC) No 853/2004 of the European Parliament and of the Council on the hygiene of foodstuffs [2004] OJ L139/1. HACCP stands for Hazard Analysis and Critical Control Point.

<sup>51</sup>Chatzopoulou (2015), pp. 2618–2619; Marsden et al. (2010), p. 255; Oldfield (2015).

<sup>52</sup>Marsden et al. (2010), p. 103.

<sup>53</sup>Marsden et al. (2010), p. 255. 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 were lobbying for making the operation of a HACCP food management system mandatory by law.