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# Private food safety standards, private law, and the EU: Exploring the linkages in constitutionalization

Paul Verbruggen\*

## Abstract

Private food safety standards regulate significant parts of the global trade in food. The highly effective implementation of those standards in global supply chains by private law means has challenged their legitimacy, however. This Chapter discusses whether and to what extent the European Union and its Member States have sought to engage with private food safety standards, and ‘constitutionalize’ them by encouraging and requiring adherence to good governance norms. The Chapter reveals that the EU plays at least two constitutionalizing roles; first, it provides a basis and structure for private food safety standards around which their procedural and substantive requirements are organized. Second, the EU mediates the development of these standards as a means to ensure compliance with its food safety laws. In fulfilling these roles, the EU is part of an ongoing transnational dynamic that both shapes and contests the legitimacy and constitutional standing of private food safety standards.

**Keywords:** Transnational private regulation; food safety; legitimacy; EU food law; certification

## Introduction: The contested legitimacy of private food safety standards

Food safety regulation has changed dramatically since the 1990s. The outbreak of recurrent major food safety crises, including Bovine Spongiform Encephalopathy (BSE), the globalization of food supply chains and the growing concentration of economic power amongst food retailers have each provided strong impetus for changes in the institutions and practices of food regulation and governance. At the same time, a general perception of failing public institutions and novel concerns amongst consumers about animal welfare, dietary habits, the environment and fair trade have created public demands for regulatory change.<sup>1</sup> These developments have been considered key elements that explain the rise of private food safety standards.<sup>2</sup> Private, non-state actors (that is, firms, trade associations and NGOs) develop, monitor and enforce these standards, and do so across the globe. In fact, private food safety standards now regulate significant parts of the global trade in food.<sup>3</sup>

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<sup>1</sup> Tetty Havinga, Donal Casey and Frans Van Waarden ‘Changing Regulatory Arrangements in Food Governance’ in Tetty Havinga, Frans Van Waarden, Donal Casey (eds), *The Changing Landscape of Food Governance* (Edward Elgar, 2015) 3–23; Alexia Brunet Marks, ‘A New Governance Recipe for Food Safety Regulation’ (2016) 47 *Loyola University Chicago Law Journal* 907; Terry Marsden, Robert Lee, Andrew Flynn and Samarthia Thankappan, *The New Regulation and Governance of Food. Beyond the Food Crisis?* (Routledge, 2010), 3–23.

<sup>2</sup> Linda Fulponi, ‘Private voluntary standards in the food system: The perspective of major food retailers in OECD countries’ (2006) 31 *Food Policy* 1; Spencer Henson and John Humphrey, ‘The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes’ (2009) Paper Prepared for FAO/WHO, 9-11, <<http://www.fao.org/docrep/012/i1132e/i1132e00.pdf>> accessed 1 June 2018.

<sup>3</sup> WTO, ‘Private Standards and the SPS Agreement’ Committee on Sanitary and Phytosanitary Measures, World Trade Organization, G/SPS/GEN/746, 24 January 2007, 3.

The regulatory role these standards play is contested, however. At the heart of the unease is the design, integrity and quality of private food safety standards and related certification schemes. These standards are not directly tied to traditional institutions of democratic accountability at national level (for example, electoral politics, judicial review, ombudsman schemes). Instead, dominant firms in the food chain (typically multinational supermarket chains) impose them on producers and suppliers as part of their commercial contracts.<sup>4</sup> The standards involved are premised on food safety laws, but frequently go beyond: they either comprise more stringent or detailed standards, or extend the scope of controls set in legislation.<sup>5</sup> Whether they indeed deliver safe(r) food is not supported by scientific evidence or cost-benefit analysis.<sup>6</sup> What is more, the standards are developed only by a select number of industry stakeholders (major food retailers and processors), with limited possibilities for participation by those firms regulated by the standards (producers and suppliers down the chain), those implementing the standards (certification bodies) and NGOs representing consumer and community interests.<sup>7</sup>

Another source for contestation relates to the design and effect of the certification schemes that accompany private food safety standards. It is common practice that the private certification bodies that perform compliance audits and inspections are also paid by the food business operators they contract with. This practice is said to create a systematic conflict of interest between the certification body's professional duty to be unbiased, vigilant and protect the public from food safety incidents, and its commercial interest in keeping its business accounts and attracting new ones. Whenever a certification body denies certification to the operator, it risks losing a paying customer to a competitor because food business operators frequently view certifications as externally imposed costs. As audits are therefore not often incentivized by intrinsic motives to ensure food safety, operators may not be interested in achieving the highest standards for inspection.<sup>8</sup> Instead, the goal is to obtain a certificate at the lowest cost; and, without a competitive market for certification quality, operators are likely to select certifiers that employ lower audit standards.<sup>9</sup> Accordingly, conflict of interest may lead some certifiers to reduce the rigor of audits by 'cutting corners and skewing results'.<sup>10</sup>

The fact that the costs of certification are borne by food business operators raises an additional concern, namely that of barriers to trade. As dominant firms in global food supply chains require producers and suppliers to obtain certification for private standards, the costs of ensuring safe food are effectively shifted to actors down the chain.<sup>11</sup> These compliance costs are significant and impede market access for firms, and in particular for small and medium-sized enterprises (SMEs) and producers in developing

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<sup>4</sup> Fabrizio Cafaggi, 'Transnational governance by contract: Private regulation and contractual networks in food safety' in Alex Marx, Miet Maertens, Johan Swinnen and Jan Wouters (eds), *Private Standards And Global Governance. Economic, Legal and Political Perspectives* (Edward Elgar, 2012).

<sup>5</sup> Henson and Humphrey (n 2) 12.

<sup>6</sup> WTO (n 3) 3–4.

<sup>7</sup> Henson and Humphrey (n 2) 25 and Codex Alimentarius Commission, 'Consideration of the Impact of Private Standards, Joint FAO/WTO Food Standards Programme' (2010) Report presented at 33rd Session Geneva, 5–9 July 2010 (CX/CAC 10/33/13), 23–25 <[ftp://ftp.fao.org/codex/Meetings/CAC/cac33/cac33\\_13e.pdf](ftp://ftp.fao.org/codex/Meetings/CAC/cac33/cac33_13e.pdf)> accessed 1 June 2018.

<sup>8</sup> Gabriele Jahn and others, 'The Reliability of Certification: Quality Labels as a Consumer Policy Tool' (2005) 28 *Journal of Consumer Policy* 53, 60–61.

<sup>9</sup> Certificates have for that reason been compared to 'mail-order diplomas'. Douglas Powell and others, 'Audits and Inspections are Never Enough: A critique to Enhance Food Safety' (2013) 30 *Food Control* 686, 689.

<sup>10</sup> Timothy Lytton and Lesley McAllister, 'Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest' (2014) *Wisconsin Law Review* 289, 301.

<sup>11</sup> Maki Hatanaka, Carmen Bain and Lawrence Busch, 'Third Party Certification in the Global Agrifood System' (2005) 30 *Food Policy* 354, 360.

countries.<sup>12</sup> International trade law has so far failed to effectively address these restrictive effects on trade.<sup>13</sup>

These concerns have jointly created persistent distress amongst business, governments and civil society actors over the legitimacy of private food safety standards in global food supply chains in terms of participation, transparency, accountability and independence.<sup>14</sup> One lens through which regulatory scholarship has approached these concerns, which are common to forms of transnational private regulation, is the lens of ‘constitutionalization’. Scott, Cafaggi and Senden have argued the need to comprehend the standing and legitimacy of transnational private regulation through a pluralist conception of constitutionalism.<sup>15</sup> Accordingly, its legitimacy should not be assessed exclusively in terms of democratic governance tied to electoral politics at national level, but also in terms of alternative sources that may bolster legitimacy.<sup>16</sup> This draws in the potential of private law arrangements as legitimating sources, as well as government oversight over the degree to which private regulation respects good governance norms.<sup>17</sup> Other influential commentators in the field have equally stressed the significance of state actors, both at national and transnational level, in strengthening the legitimacy of transnational private regulatory regimes by imposing procedural and substantive principles of good governance.<sup>18</sup>

Mindful of the theme this volume sets out to map and discuss, this contribution traces whether and to what extent the European Union (EU) and its Member States have sought to engage with private food safety standards, and ‘constitutionalize’ them by encouraging and requiring adherence to norms of good governance. The EU regulatory framework has been said to create ‘a wider range of opportunities for closer collaboration between regulatory agencies and the private sector in the management of food safety’.<sup>19</sup> Indeed, a great deal of such collaboration is now going on in Europe.<sup>20</sup> While the EU may thus aid the development of private standards, it might also be a source of legitimacy to them. Therefore, the question is whether the EU and, by extension, its Member States have also set governance criteria for private standards to strengthen the legitimacy of those standards as a complementary form of global market regulation. The Chapter will discuss these efforts along with the steps that the food industry itself has taken to build and manage the legitimacy of its standards regimes, either in parallel or in response to state-mandated criteria. The contribution will first of all provide further insights into the

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<sup>12</sup> Joonkoo Lee, Gary Gereffi and Janet Beauvais, ‘Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries’ (2012) 109 *Proceedings of the National Academy of Sciences*, 12326–12331.

<sup>13</sup> Petros Mavroidis and Robert Wolfe, ‘Private Standards and the WTO: Reclusive No More’ (2017) 16 *World Trade Review* 1.

<sup>14</sup> See eg Codex Alimentarius Commission (n 7) 23 and Doris Fuchs, Agni Kalfagianni and Tetty Havinga, ‘Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation’ (2011) 28 *Agriculture and Human Values* 353.

<sup>15</sup> Colin Scott, Fabrizio Cafaggi, Linda Senden ‘Introduction: The Conceptual and Constitutional Challenge of Transnational Private Regulation’ (2011) *Journal of Law and Society* 38(1).

<sup>16</sup> *ibid*, 2 (applying ideas of Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) *Modern Law Review* 65, 317–359).

<sup>17</sup> *ibid*, 11, 15.

<sup>18</sup> See eg Kenneth Abbott and Duncan Snidal, ‘Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit’ (2009) 42 *Vanderbilt Journal of Transnational Law* 501, 558.

<sup>19</sup> Marian Garcia Martinez and others, ‘Co-regulation as a Possible Model for Food Safety Governance: Opportunities for Public–Private Partnerships’ (2007) 32 *Food Policy* 299, 312.

<sup>20</sup> See the various contributions in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of food governance: Trends, types and results* (Edward Elgar 2017).

private law foundations of contemporary private food safety standards as a form of transnational private regulation.

### Private law foundations of contemporary private food safety standards

While private food safety standards are typically premised on public law,<sup>21</sup> their governance is based on private law arrangements, including company statutes, association bylaws, and commercial and franchise contracts. It is through these arrangements that private standards have binding and normative effects. Private law thus provides a first (but not the only) layer of constitutional standing and legitimacy of private food safety standards.<sup>22</sup> Contracts play a particularly important role in extending the normative effects of private standards beyond the standards owner and its membership towards other supply chain actors. Contracts are used as vehicles to implement private standards and associated certification schemes along the supply chain. Figure 1 illustrates the network of contractual relationships that is typically involved in the governance of transnational standards along the supply chain.<sup>23</sup>

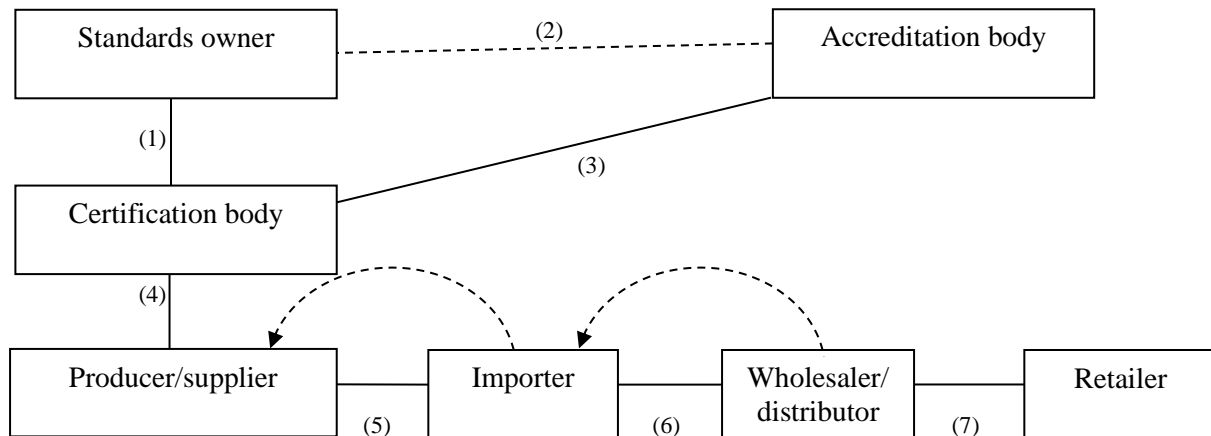


Figure 1. Network of contractual relationships implementing private food safety standards

A first contractual relationship concerns the agreement between the standards developer or ‘owner’ and the certification body (1). Owners of transnational standards separate the regulatory function of standard-setting from that of monitoring and enforcing compliance, which is performed predominantly by third-party certification bodies. Such third-party certification has emerged as the central institutional mechanism in the food industry for the promotion, assessment and enforcement of compliance with private standards.<sup>24</sup> The contract with the certification body is typically a license contract. It grants the body the right to (sub)license food business operators that successfully apply for certification to use the logos or trademarks associated with the certificate, the intellectual property rights of which are held by

<sup>21</sup> See n 5 above.

<sup>22</sup> Cf Scott, Cafaggi and Senden 2012 (n 15) 3.

<sup>23</sup> This analysis builds on Paul Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety* (Edward Elgar 2014) 168–171.

<sup>24</sup> Hatanaka, Bain and Busch (n 11) 355.

the standards owner. The contract usually also specifies the conditions for the award, suspension or revocation of the certificate, the audit protocol and procedures for evaluating and sanctioning performance by the certification body.<sup>25</sup>

Owners' standards typically require, as part of the license agreement, that certification bodies are accredited.<sup>26</sup> Certification bodies ordinarily apply for this attestation from an accreditation body recognized by the standards owner (2). The accreditation and certification bodies enter into a contract (3) that specifies the conditions for accreditation and the monitoring procedures that apply for the period in which accreditation is valid. Certification bodies engage in another contractual relationship with food business operators that seek certification (4). These parties register with the certification body and upon registration they are required to sign a service contract with it. This contract typically details the procedures and conditions for certification, determines the scope, frequency and protocol of audits, and lays down rules for the use of trademarks and logos associated with the certificate.<sup>27</sup>

Commercial contracts concerning the supply, distribution or import of food and ingredients (5-6-7) ensure the binding application of the particular private standards throughout the supply chain. In retailer-driven chains, the economic incentives for producers and suppliers are reported to be highly significant and lead them to assume binding contractual obligations (for example by express warranties) to comply with these standards.<sup>28</sup> Commercial contracts may even require these firms to ensure that their own suppliers meet the standards and certification requirements. Accordingly, compliance with the standards becomes binding upon multiple tiers within the supply chain.<sup>29</sup> Certification then operates as a key proxy for lead-firms in the supply chain to monitor and achieve regulatory compliance, without the need to rely on formal contract law and legal procedures. The integration of third-party certification in commercial contracts may thus lead to efficiency gains in terms of monitoring and sanctioning breach of contract.<sup>30</sup>

## EU food safety law and private standards

EU food safety law has been considered both a stimulus and a baseline for the development of private standards in the field, in particular in the agri-food sector. The legal framework currently governing food safety in the EU was largely developed after a succession of high-profile incidents in the 1990s relating to potentially lethal contaminations of food, such as BSE in beef, salmonella in eggs and dioxins in various foodstuffs. The aim of the framework has been to create a more coherent, comprehensive, dynamic and transparent regulatory framework for food safety that would apply to the entire food

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<sup>25</sup> See eg GLOBALGAP (2014) 'GLOBALGAP Licence and Certification Agreement' Version 4.1 <[http://www.globalgap.org/export/sites/default/.content/.galleries/Documents\\_for\\_Mailings/150408\\_GG\\_Licence-and-Certification-Agreement\\_V4.1\\_en.pdf](http://www.globalgap.org/export/sites/default/.content/.galleries/Documents_for_Mailings/150408_GG_Licence-and-Certification-Agreement_V4.1_en.pdf)> accessed 1 June 2018.

<sup>26</sup> See in general Lytton and McAllister (n 10) 313–317.

<sup>27</sup> See eg GLOBALGAP (2014) 'GLOBALGAP Sublicence and Certification Agreement' Version 4.0 <[https://www.globalgap.org/export/sites/default/.content/.galleries/documents/150227\\_GG\\_Sublicense-and-Certification-Agreement\\_V4\\_en.pdf](https://www.globalgap.org/export/sites/default/.content/.galleries/documents/150227_GG_Sublicense-and-Certification-Agreement_V4_en.pdf)> accessed 1 June 2018.

<sup>28</sup> M'hand Fares and Elodie Rouvière, 'The Implementation of Voluntary Food Safety Systems' (2010) 35 Food Policy 412, 417.

<sup>29</sup> See for a general analysis of supply chain governance by contract Paul Verbruggen 'Private Regulatory Standards in Commercial Contracts: Questions of Compliance' in Roger Brownsword, Rob van Gestel and Hans-W Micklitz, *Contract and Regulation. A Handbook on New Methods of Law Making in Private Law* (Edward Elgar 2017) (with further references).

<sup>30</sup> Cf Fabrizio Cafaggi 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 Fordham International Law Journal 1557, 1604.

chain, that is, from ‘farm to table’.<sup>31</sup> To implement this approach, the EU devolved food safety responsibilities from national governments to the food industry. It has been contended that the new legal framework was an important driver for the food industry, in particular large food retailers in Europe, to develop private standards and implement them along global supply chains.<sup>32</sup> This section discusses the most relevant changes in the EU legal landscape further bolstering the development and use of such standards.<sup>33</sup>

### *Product liability*

The first step in developing a new legal framework governing food safety was to revise the Product Liability Directive.<sup>34</sup> This Directive was adopted in 1985 and had introduced an EU-wide strict liability regime enabling consumers to recover compensation from producers for physical harm and property damage caused by defective products. However, the Directive only applied to industrially manufactured foods, so that ‘primary agricultural products’ that had not undergone any processing of an industrial nature were excluded from the scope of the Directive. Accordingly, no strict liability applied to products of the soil (such as seeds, fruit and vegetables), of stock-farming (such as beef, pigs and poultry) and of fisheries (for example, aquaculture).<sup>35</sup> While the Directive allowed Member States to derogate from the exclusion of primary agricultural products, only Finland, Greece, Luxembourg and Sweden had made use of the derogation.<sup>36</sup>

The BSE crisis created significant political traction for extending the Directive’s strict liability regime to primary agricultural products. An influential report revealing the flaws of the EU (Community) system of food safety controls during the BSE crisis (‘The Medina Report’), called for abolition of the exclusion of primary agricultural products from the scope of the Directive.<sup>37</sup> This report, together with the incorporation of the policy goals of consumer and health protection in the 1992 Maastricht Treaty, created momentum for adoption of Directive 1999/34/EC, amending the Product Liability Directive

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<sup>31</sup> European Commission, White Paper on Food Safety COM (1999) 719 final.

<sup>32</sup> Garcia Martinez et al (n 19), 306; Henson and Humphrey (n 2), 11; Havinga, Van Waarden and Casey (n 1), 12.

<sup>33</sup> The conventional understanding in the literature is that legislative changes in the UK triggered the advent of private standards, rather than new EU food laws. The UK Food Safety Act was adopted in 1990 and introduced a strict liability regime under criminal law for food producers and sellers. This implied that in the event of a food safety incident food business operators could be held criminally liable for breach of food safety requirements without the necessity to prove fault (Sections 7(1) and 8(1)). Liability could be avoided by showing that all reasonable precautions were taken and all due diligence was exercised to avoid the breach (Sec 21). This new regime led dominant British retailers to create safety and quality standards of their own. This development was soon followed by retailers elsewhere in Europe. See Colin Scott, ‘Continuity and Change in British Food Law’ (1990) 56 MLR 785; Spencer Henson and James Northen ‘Economic Determinants of Food Safety Controls in the Supply of Retailer Own-branded Products in the UK’ (1998) 14 Agribusiness 113; Fulponi (n 2) 9.

<sup>34</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29.

<sup>35</sup> Art 2 Product Liability Directive (old).

<sup>36</sup> Commission of the European Communities, First Report on the Application of Council Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (85/374/EEC), COM(95) 617 Final .

<sup>37</sup> Temporary Committee of Inquiry into BSE, ‘Report on the Alleged Contraventions or Maladministration in the Implementation of Community Law in Relation to BSE, Without Prejudice to the Jurisdiction of the Community and the National Courts’, Rapporteur: Manuel Medina Ortega, 7 February 1997, A4-0020/97/A, PE 220.544/fin/A., Recommendation A.II, at para 6.3.b).

accordingly.<sup>38</sup> The recitals of the Directive note that abolition of the exclusion of primary agricultural products from the Directive would ‘help to restore consumer confidence in the safety of agricultural products’, ensure ‘a high level of consumer protection’, and contribute to ‘the proper functioning of the internal market’.<sup>39</sup> Accordingly, the European legislature considered that expanding the scope of the strict product liability regime to agri-food products would create incentives for farmers and growers to better ensure the safety of their products.

The revised remit of the Product Liability Directive had important implications, not only for producers of primary agricultural products, but also for food retailers. Retailers selling primary produce (such as fruits and vegetables) under private labels now also came within the scope of application. The revised Directive not only considers the manufacturer of a finished product a ‘producer’ (for example, a grower or farmer), but also ‘any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer.’<sup>40</sup> Accordingly, retailers attaching private labels to their products (such as Tesco’s *Nurture*, Carrefour’s *Filières Qualité* or Ahold’s *Excellent*) can be held liable under the strict regime of the revised Directive. Privately labelled products have been reported as accounting for an increasing proportion of supermarket sales.<sup>41</sup> Moreover, where retailers import food into the EU, they are also considered a producer.<sup>42</sup> Given the growing practice of global sourcing of food products, EU-based food retailers thus increasingly carry the risk of liability for harm.

Finally, if retailers sell a food product that cannot be traced back to a producer, such as for unpacked fruits and vegetables, the retailer is itself considered the producer of that food product under the revised Directive, ‘unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product’.<sup>43</sup> The threat of being exposed to strict liability for harm caused by defective food products sourced from unidentifiable producers created incentives amongst food retailers to have in place procedures for traceability, allowing them to identify the suppliers and producers of the foods they sell.<sup>44</sup> These procedures are now commonplace in the world’s leading private food safety standards.

### *General Food Law*

Revision of the Product Liability Directive was complemented in 2002 by adoption of Regulation 178/2002/EC – commonly known as the ‘General Food Law’.<sup>45</sup> Since then, this law has provided the general public law framework for food safety controls in the EU. The General Food Law takes as one of its central principles that not government, but firms operating in the food chain are responsible for food safety. More specifically, Article 17(1) requires that food and feed business operators ensure and verify

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<sup>38</sup> Dir 1999/34/EC of the European Parliament and of the Council [1999] OJ L 141/20.

<sup>39</sup> Rec 5 and 9 Dir 1999/34/EC.

<sup>40</sup> Art 3(1) Dir 85/374/EEC.

<sup>41</sup> In Western Europe private labels are reported to have grown from some 20% to 30% of retail food sales between 2004 and 2012. European Commission, ‘The economic impact of modern retail on choice and innovation in the EU food sector’ (2014), 165, <<http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>> accessed 1 June 2018.

<sup>42</sup> Art 3(1) Dir 85/374/EEC.

<sup>43</sup> Art 3(2) Dir 85/374/EEC.

<sup>44</sup> Garry Smith, ‘Interaction of Public and Private Standards in the Food Chain’ (2009) OECD Food, Agriculture and Fisheries Working Papers, No 15 (Paris: OECD Publishing) <doi: 10.1787/221282527214, 22-23>.

<sup>45</sup> Art 1(1) Reg 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2000] OJ L 31/1.



at every stage of the supply chain that the food products they produce, process or distribute meet the requirements set out in more detailed secondary EU legislation. As a complement to this so-called 'food chain approach',<sup>46</sup> Article 18 sets out several registration and traceability obligations, requiring food and feed business operators to identify the suppliers and buyers of their food, feed, food-producing animals, or any substance intended to be, or expected to be, incorporated into a food or feed.<sup>47</sup> The General Food Law thus demands an integrated and comprehensive approach to control of food safety risks by food business operators throughout the entire food supply chain. By developing private standards, lead firms in the chain have responded to that demand.

The principles set out in the General Food Law provide a legal framework for more specific rules on food safety, including rules on hygiene, animal health, food additives, flavoring, contaminants, pesticides, veterinary drug residues and materials coming into contact with food.<sup>48</sup> Scholars have noted that rules regarding food hygiene and pesticides motivated the development of private standards in particular.

### *Food hygiene*

Regulation 852/2004/EC sets out rules on hygienic food production.<sup>49</sup> These rules relate, for example, to the cleanliness of premises, facilities or equipment, temperature control, handling of waste, record-keeping, personal hygiene and training.<sup>50</sup> Regulation 852/2004/EC confirms the food chain approach of the General Food Law: food business operators must ensure that the relevant hygiene rules are met during all stages of production, processing and distribution of food under their control.<sup>51</sup> Meeting these rules must be ensured primarily by the use of so-called 'Hazard Analysis Critical Control Point' (HACCP) principles. HACCP can be best described as a principled system through which food operators themselves identify, assess and control food safety hazards.

Implementation of a HACCP system requires the introduction of rules and compliance procedures internal to the food business operator. Its introduction created demands for industry guidance amongst operators in the EU on how to implement HACCP systems. Demands were particularly strong amongst SMEs, which make up the larger part of the EU food industry.<sup>52</sup> Empirical studies reveal that implementation of HACCP systems is troublesome for SMEs because they frequently lack the necessary

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<sup>46</sup> See for a comparative analysis: Jessica Vapnek, 'Legislative Implementation of the Food Chain Approach' (2007) 40 *Vanderbilt Journal of Transnational Law* 987.

<sup>47</sup> Art 18(1)-(3) General Food Law.

<sup>48</sup> See for a discussion of this framework: Caoimhín MacMaoláin, *Food Law. European, Domestic and International Frameworks* (Hart Publishing 2015).

<sup>49</sup> Reg 852/2004/EC of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs [2004] OJ L 226/3. These rules are specified for food of animal origin in Reg 853/2004/EC of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin [2004] OJ L 226/22.

<sup>50</sup> Art 4(1)-(3) Reg 852/2004/EC.

<sup>51</sup> Arts 1(1) and 3 Reg 852/2004/EC. Specific hygiene requirements are laid down in Annex I for primary production and in Annex II for any stage of production, processing and distribution of food after primary production. Specific rules on food of animal origin are set in Reg 853/2004/EC of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin [2004] OJ L 226/22.

<sup>52</sup> Approximately 14.5 million farmers and 310,000 food and drink producing companies exist in the EU. 99% of these food and drink companies are SMEs, which collectively represent about 42% of the revenues of the European food production market. European Commission, 'European Industry in a Changing World. Updated Sectoral Review 2009', SEC (2009) 1111 final, 69–70.

expertise, experienced staff and financial resources.<sup>53</sup> Private standards operationalize HACCP principles for specific sectors or product groups. In fact, all major private food safety standards take such principles as a central notion in designing their certification schemes.<sup>54</sup> These standards and schemes therefore fulfil an important function in assisting food business operators, including SMEs, to achieve compliance and build capacity to assure and maintain food safety in the future.

### *Pesticides*

The use of pesticides also affects food safety. Pesticides are chemical compounds that are used to prevent, control or destroy harmful organisms ('pests') or diseases on plants and animals. While pesticides may thus help to ensure food safety, the use of substances that are dangerous for animal and human health may also pose food safety risks. Pesticides are heavily regulated by EU law.<sup>55</sup> First, pesticides can only be used if approved by the European Commission and authorized for use by the Member State of the food business operator concerned.<sup>56</sup> Second, use of pesticides must not lead to residues in food and feed that cause harm to humans and animals. Regulation 396/2005/EC defines the maximum levels of pesticide residues that are legally permissible in or on food or animal feed. These so-called Maximum Residue Levels (MRLs) are based on safe-use guidelines regarding plant protection products in primary agricultural production ('Good Agricultural Practice' – GAP) and the lowest consumer exposure necessary to protect vulnerable consumers (for example, infants and elders).

In June 2018 Regulation 396/2005/EC established MRLs for some 1100 pesticides in 315 categories of agricultural products.<sup>57</sup> Its consolidated version counts a staggering 2600 pages of MRLs.<sup>58</sup> Each year new pesticides and product categories are added to the list. Others are deleted or the MRLs amended. The European Commission maintains a database on EU-harmonized MRLs to facilitate compliance by food business operators with applicable norms.<sup>59</sup>

Retailers have developed standards, in particular on primary agricultural production, in response to the EU's MRLs for pesticides.<sup>60</sup> In line with the basic principles of food safety responsibility set out in the General Food Law, all the food and feed sold in the EU must comply with the EU-harmonized MRLs at any stage in the food supply chain. These norms may differ from norms in non-EU countries from which

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<sup>53</sup> Robin Fairman and Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27 *Law and Policy* 491; Ladina Caduff and Thomas Bernauer, 'Managing Risk and Regulation in European Food Safety Governance' (2006) 23 *Review of Policy Research* 153.

<sup>54</sup> Global Food Safety Initiative, 'GFSI Benchmarking Requirements, GFSI Guidance Document' (Version 7) <<https://www.mygfsi.com/certification/benchmarking/gfsi-guidance-document.html>> accessed 1 June 2018.

<sup>55</sup> MacMaoláin (n 48) 150–153.

<sup>56</sup> Approval of plant protection products, which are used to protect crops in the agricultural sector, is regulated by Reg 1107/2009/EC of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L 309/1. The approval of biocides, which are intended for non-plant uses to control pests and disease carriers such as insects, lice and rats, is regulated by Reg 528/2012/EU of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products [2012] OJ L 167/1.

<sup>57</sup> <[https://ec.europa.eu/food/plant/pesticides/max\\_residue\\_levels/eu\\_rules\\_en](https://ec.europa.eu/food/plant/pesticides/max_residue_levels/eu_rules_en)> accessed 1 June 2018.

<sup>58</sup> <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005R0396-20160513>> accessed 1 June 2018.

<sup>59</sup> European Commission, EU Pesticides Database <<http://ec.europa.eu/food/plant/pesticides/eu-pesticides-database/public/?event=homepage&language=EN>> accessed 1 June 2018.

<sup>60</sup> Henson and Humphrey (n 2) 39.

products are sourced. In tandem with the growing practice of global sourcing, retailers might thus face an increased risk of liability exposure if they did not control MRLs throughout the entire food chain.

The GLOBALGAP standard, now the most widely implemented private food safety standard in the world,<sup>61</sup> was developed to assist primary producers and suppliers ensure compliance with EU-harmonized MRLs and put in place procedures on how to manage and avoid exceeding MRLs. GLOBALGAP largely follows the EU-harmonized MRLs, but also requires producers to meet additional requirements (such as self-testing for pesticide residues in all products covered by the standard).<sup>62</sup> Some individual retailers have developed additional private standards that impose on their suppliers residue levels more stringent than the MRLs in force in the EU.<sup>63</sup> As these private standards go beyond what is legally required, concerns over market access emerge.

### *Official controls*

The development of private standards was further motivated by changes regarding inspection and enforcement of EU food safety law. Regulation 882/2004/EC laid down various obligations for the organization of national food safety authorities, financing of official controls and performance by these authorities while carrying out official controls.<sup>64</sup> The Regulation required authorities to carry out official controls regularly, on a risk basis and with appropriate frequency, taking into account the identified risks of the product and sector concerned, past compliance records, the reliability of own checks, and any other information that might signal non-compliance.<sup>65</sup> The preamble of the Regulation added that the frequency of controls should be proportionate to the risk, ‘taking into account the results of the checks carried out by feed and food business operators under HACCP based control programmes or quality assurance programmes, where such programmes are designed to meet requirements of feed and food law, animal health and animal welfare rules’.<sup>66</sup> In addition, authorities had to examine any private control systems that feed and food business operators put in place, check the hygiene conditions in feed and food businesses, and assess procedures for good manufacturing practices, good hygiene practices, and good farming practices and HACCP.<sup>67</sup>

Regulation 882/2004/EC thus enabled national authorities to enroll –and collaborate with – private standards and related certification schemes in their institutional frameworks to control food safety.<sup>68</sup> Currently, a substantial number of authorities do so. A survey carried out in 2015 by a working group of the Heads of European Food Safety Agencies called the ‘Value of Private Assurance Schemes’ reveals that ten national authorities take food business operators’ membership of private assurance schemes

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<sup>61</sup> Codex Alimentarius Commission (n 7) 6–7.

<sup>62</sup> Vanessa Constant Laforce, ‘Between public and private requirements: Challenges and opportunities for the export of tropical fruits from developing countries to the EU’ in Havinga, Van Waarden and Casey (n 1), 229–230.

<sup>63</sup> Eg, the leading retailer in the Netherlands, Ahold, requires from its fresh produce suppliers that they supply products having only 50% of the EU-MRLs. Ahold, ‘Albert Heijn Protocol for Residue Control’, (2012) Version 2.0 <<https://tandgtech.global/assets/Files/AH-Protocol-information-book-EN-360.pdf>> accessed 1 June 2018.

<sup>64</sup> Reg 882/2004/EC of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L 191/1.

<sup>65</sup> Art 3(1) Reg 882/2004/EC.

<sup>66</sup> Rec 13 Reg 882/2004/EC.

<sup>67</sup> Art 10(2)(a), (c) and (d) Reg 882/2004/EC.

<sup>68</sup> Garcia Martinez and others (n 19) and Smith (n 44), 22.

into account when planning official controls.<sup>69</sup> The reliability of the schemes involved is most often mentioned as a challenge to integrating these schemes in official food safety controls. As will be discussed below, some authorities have therefore developed quality assessment criteria around acceptance and recognition of private standards that are included in official controls policies. Once the standards are incorporated in these policies, the firms complying with them typically benefit from a favorable inspection regime (for example, lower inspection frequencies, or inspections on different domains of food law), which increases the appeal of these standards amongst food business operators.<sup>70</sup> Accordingly, these policies again strengthen the development of private standards.

The authorities' practice in terms of incorporating private standards and certification schemes in public enforcement policies is supported by the recently adopted Regulation 2017/625/EU.<sup>71</sup> The Regulation, which will apply from 14 December 2019, amends a host of secondary EU law rules on official controls that previously applied in the broad field of food and feed safety, hygiene, animal health and welfare, plant health, pesticides, organic labelling and genetically modified organisms.<sup>72</sup> The new Regulation also repeals the rules that Regulation 882/2004/EC and Regulation 396/2005/EC had set for official controls.<sup>73</sup> Similar to Regulation 882/2004/EC, however, the new Regulation requires national authorities to carry out official controls regularly, on a risk basis and with appropriate frequency, taking into account, *inter alia*, the reliability of self-controls or those performed by third parties, including private assurance schemes.<sup>74</sup> Amongst the appropriate methods and techniques that authorities may use to perform official controls is also assessment of procedures based on good manufacturing practices, good hygiene practices, good farming practices, and those based on HACCP.<sup>75</sup>

### **Managing legitimacy concerns of private food safety standards**

Thus several linkages interconnect contemporary private food safety standards, the private law arrangements through which these standards gain normative effects in global food supply chains, and EU food safety law. Concerns over the design, integrity and effects of the standards and accompanying certification schemes persist, however. Standards owners have not been agnostic toward such legitimacy concerns. As their standards have developed, they have sought to actively address them and thereby manage their own legitimacy in the face of demands that different actors, including the EU, place on them. Legitimacy is understood here as an empirical phenomenon; as a capacity that standards owners can gain, maintain or repair *vis-à-vis* stakeholders in the system of food governance. This sociological conception is one that has been prominently supported by Suchman, who holds that legitimacy is a 'perception or assumption that the actions of an entity are desirable, proper, or

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<sup>69</sup> These authorities are based in Belgium, Czech Republic, Denmark, Finland, Latvia, Malta, Netherlands, Poland, Slovenia and the UK. See Heads of Food Safety Agencies (Working Group on the Value of Private Assurance Schemes), 'Quickscan' (2015) (on file with author).

<sup>70</sup> Tetty Havinga and Paul Verbruggen, 'The Global Food Safety Initiative and state actors: Paving the way for hybrid food safety governance', in Verbruggen and Havinga (n 20).

<sup>71</sup> Reg (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [2017] OJ L 95/1.

<sup>72</sup> Art 1(2) Reg 2017/625/EU.

<sup>73</sup> However, on the basis of Art 155 of the Regulation the rules on official controls on pesticides as laid down in Reg 396/2005/EC continue to apply until 14 December 2022.

<sup>74</sup> Art 9(1)(d) Reg 882/2004/EC.

<sup>75</sup> Art 14(d) Reg 2017/625/EU. See Art 18(2)(d)(ii) specifically on products of animal origin.

appropriate within some socially constructed system of norms, values, beliefs, and definitions'.<sup>76</sup> For this Chapter's analysis it implies that the legitimacy of owners of private food safety standards is not a normative abstraction that is conferred on it (or not) by some outside authority, but a dynamic characteristic that can be build and managed as a way to ensure a degree of constitutional standing of the standards they develop.

### *Accreditation*

One way in which standards owners have sought to address the legitimacy concerns of their private standards is by requiring the certification bodies that audit and inspect food business operators to be accredited by recognized accreditation bodies. Accreditation is an attestation from an authoritative body that suggests that auditors, certifiers and other so-called conformity assessment bodies are competent to perform compliance verification tasks. The rationale for this layer of meta-controls is to warrant that certification bodies possess the necessary capacities (such as knowledge, experience and independence) to perform the function of certification with full integrity, objectivity and transparency. Accreditation thus addresses the potential conflict of interest caused by the practice of certification bodies being paid by the firms they audit and inspect.<sup>77</sup> For standards owners, accreditation may strengthen claims as to the legitimacy of their standards. For certification bodies, in turn, accreditation is a means of meeting clients' needs, strengthening their position in the market for certification, and bolstering their own credibility.<sup>78</sup>

Accreditation is carried out on the basis of meta-standards developed by the International Organization for Standardization (ISO). ISO/IEC Guide 65:2005 on 'General requirements for bodies operating product certification systems' (ISO Guide 65),<sup>79</sup> together with its European equivalent (EN 45011), emerged in the late 1990s and early 2000s as the 'golden standard' for standards owners to base their own approval and licensing processes for product certification bodies on.<sup>80</sup> Casey's empirical study on the legitimating role of accreditation bodies in relation to GLOBALGAP reveals that the management of GLOBALGAP recognized the importance of accreditation bodies' acceptance of its standard. As he notes, GLOBALGAP '[r]epresentatives clearly thought that accredited third-party certification was necessary for a robust system of implementation, the integrity of which stakeholders would more readily accept.'<sup>81</sup> Therefore GLOBALGAP considered it vital to receive endorsement of its standard from accreditation bodies in Europe. In 2001 GLOBALGAP announced that the European Co-operation for Accreditation (EA), the

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<sup>76</sup> Mark Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571, 574. See for this approach also Donal Casey, 'Interactions, iterations and early institutionalization: Competing lessons of GLOBALGAP's legitimation', in Stepan Wood et al (eds), *Transnational business governance interactions: Enhancing regulatory capacity, ratcheting up standards and empowering marginalized Actors* (Edward Elgar, forthcoming).

<sup>77</sup> Lytton and McAllister (n 10) 316.

<sup>78</sup> Hatanaka, Bain and Busch (n 11) 358 and Bob Tanner, 'Independent Assessment by Third-party Certification Bodies' (2000) 11 *Food Control* 415.

<sup>79</sup> ISO, 'ISO/IEC Guide 65:1996'

<[http://www.iso.org/iso/iso\\_catalogue/catalogue\\_tc/catalogue\\_detail.htm?csnumber=26796](http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=26796)> accessed 1 June 2018. ISO Guide 65 has been replaced by ISO/IEC 17065:2012 'Conformity assessment – Requirements for bodies certifying products, processes and services' <<https://www.iso.org/standard/46568.html>> accessed 1 June 2018.

<sup>80</sup> Lawrence Busch and others, 'The Relationship of Third-Party Certification (TPC) to Sanitary/Phytosanitary (SPS) Measures and the International Agri-Food Trade: Final Report' (2005) RAISE SPS Global Analytical Report #9, 11.

<sup>81</sup> Donal Casey 'Structuring private food safety governance: GLOBALGAP and the legitimating role of the state and rule intermediaries' in Verbruggen and Havinga (n 20) 47.

representative organization of accreditation bodies in Europe, had accepted the GLOBALGAP standard for accreditation, implying that EA members were able to accredit certification bodies to the ISO Guide 65/EN45011 and the GLOBALGAP standard.

Importantly, EA members that accredit certification bodies for private food safety standards in the EU are also the bodies addressed by Regulation 765/2008/EC.<sup>82</sup> This Regulation lays down general principles for the organization and operation of these bodies, including conditions of independence, impartiality, objectivity and competency.<sup>83</sup> A key principle is that Member States appoint a single national accreditation body.<sup>84</sup> Where a public authority does not directly provide accreditation, Member States must formally recognize the accreditation activities of its national accreditation body as a public authority activity.<sup>85</sup> This implies that if a legal person governed by private law (for example a not-for-profit association) is the national accreditation body, it is granted public law status upon formal recognition. Accordingly, EU law awards public law status to accreditation activities. This status also extends to accreditation of certification bodies for private food safety standards.<sup>86</sup> Given that accreditation bodies operate as state actors when performing accreditation activities, their activities in relation to certification bodies lend an important degree of legitimacy to standards owners. It is one of the 'building blocks upon which non-state regulatory organizations seek to construct legitimate regulatory systems.'<sup>87</sup>

The EU further promotes the use of accreditation as a means to bolster the legitimacy and constitutional standing of private food safety standards. In 2010, the European Commission published a Communication on 'EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs'.<sup>88</sup> The communication includes recommendations regarding participation by stakeholders in standards development, certification and accreditation. On the latter point it suggests that 'Certification of compliance with the scheme requirements should be carried out by an independent body accredited by the national accreditation body appointed by Member States according to Regulation 765/2008/EC, in accordance with EN45011/ISO/IEC Guide 65. Alternatively, the accreditation bodies must be a signatory of the multilateral recognition arrangement for product certification of the International Accreditation Forum (IAF)'.<sup>89</sup> The major private food safety standards have also considered accredited third-party certification as being best industry practice.<sup>90</sup>

### *Participation in standard setting*

Another challenge to the legitimacy of private food safety standards is the critique that the possibilities for stakeholder participation in standard setting are limited. Given the importance these standards have in the marketplace, many considered that food producers and suppliers down the chain (in particular

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<sup>82</sup> Reg 765/2008/EC of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Reg (EEC) No 339/93 [2008] OJ L 218/30.

<sup>83</sup> See Arts 8 to 12 Reg 765/2008/EC.

<sup>84</sup> Art 4(1) Reg 765/2008/EC.

<sup>85</sup> Art 4(5) Reg 765/2008/EC.

<sup>86</sup> Art 3 Reg 765/2008/EC.

<sup>87</sup> Casey (n 81) 52.

<sup>88</sup> European Commission Communication of 16 December 2010 [2010] OJ C 341/04.

<sup>89</sup> *ibid*, para 6.1.

<sup>90</sup> Global Food Safety Initiative, 'Enhancing Food Safety Through Third Party Certification' (2011), 22–23 <[http://www.mygfsi.com/gfsifiles/GFSI\\_White\\_Paper\\_-\\_Enhancing\\_Food\\_Safety\\_Through\\_Third\\_Party\\_Certification.pdf](http://www.mygfsi.com/gfsifiles/GFSI_White_Paper_-_Enhancing_Food_Safety_Through_Third_Party_Certification.pdf)> accessed 1 June 2018.

SMEs and producers from developing countries) and those implementing the standards (certification bodies) should also have a say in standards development. Amongst those voicing this critique was the EU. A 2002 report from the European Commission in relation to the GLOBALGAP standard concluded that GLOBALGAP 'failed to meet the participation requirements found in ISO standard setting guidelines' since an open, public and documented consultation process was not in place and there were limited mechanisms for participation by interested parties.<sup>91</sup> The Commission expressed the need for GLOBALGAP to institute broader stakeholder involvement in its governance with a view to ensuring representation of all stakeholders' views and interests in the organization.<sup>92</sup>

The 2010 Commission Communication noted above similarly urges standards owners to ensure wide stakeholder participation. Standard setting 'should be open under transparent and non-discriminatory criteria to all participants willing and able to comply with the specifications'.<sup>93</sup> Moreover, standards owners should have in place a governance structure that allows for participation by all actors in the supply chain in decision-making in a representative and balanced way.<sup>94</sup> They should also promote and facilitate participation by stakeholders from all regions in which the standards apply and by certification bodies.<sup>95</sup> Finally, standards owners should notify stakeholders of any changes in the standards, ensure participation in the periodic review of standards, and justify changes made to standards so to avoid unnecessary adaptation costs for those applying the standard.<sup>96</sup>

All major standards owners have addressed good governance demands such as these by changing the structures, practices and processes of standard setting in several ways. These changes involved altering the composition of existing technical committees and working groups for standards development, setting up new internal forums for stakeholder participation, and public consultation procedures.<sup>97</sup> Similarly, the owners of major private food safety standards are challenged to ensure that their standards are 'developed and maintained with the participation of technically competent representatives of direct stakeholders, or have been subjected to formal review by such parties' and that they are 'subjected to extensive stakeholder consultation and due consideration shall have been given to comments received from stakeholders during the consultation'.<sup>98</sup>

Clearly, standards owners have sought to accommodate increased demands for more open and inclusive standard setting procedures. There are limits to stakeholder participation, however. For one thing, it challenges the ownership, control and internal cohesion of standard setters as organizations established and dominated by lead firms in global food supply chains.<sup>99</sup> As Casey observed in relation to GLOBALGAP, 'any discussions relating to broader multi-stakeholder participation within GLOBALGAP's governance was a no-go area, and highlighted GLOBALGAP resistance to such demands.'<sup>100</sup> This position,

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<sup>91</sup> As cited in Casey (n 76).

<sup>92</sup> *ibid.*

<sup>93</sup> European Commission (n 88) para 4.1.

<sup>94</sup> *ibid.*, para 4.2.

<sup>95</sup> *ibid.*, paras 4.3 and 4.5

<sup>96</sup> *ibid.*, paras 4.6 and 4.7.

<sup>97</sup> GLOBALGAP has been widely commended for its approach. See for an empirical assessment Casey (n 76).

<sup>98</sup> Global Food Safety Initiative, 'GFSI Benchmarking Requirements, GFSI Guidance document version 7 – Part II Requirements for the Management of Schemes' (2017), paras 1.1.2 and 1.1.3.

<https://www.mygfsi.com/certification/benchmarking/gfsi-guidance-document.html> accessed 1 June 2018.

<sup>99</sup> See for a discussion on demands for broader stakeholder participation placed on global standard setters in the areas of fair trade, organic agriculture, fisheries, and forest management Auld, Graeme, Stefan Renckens, and Benjamin Cashore. 2015. Transnational Private Governance between the Logics of Empowerment and Control. *Regulation & Governance* 9 (2):108–124, 119.

<sup>100</sup> Casey (n 76).

which is likely to be common amongst the owners of major private food safety standards, is entirely logical from the perspective of private self-governance: those who establish, finance and own a system of private standards will not likely give up their position to others who do not equally carry the financial and administrative burden of maintaining the system, and the reputational and liability risks if things go wrong. However logical this position may be, it will continue to generate concerns amongst business, governments and civil society over the legitimacy of private standards.

### *Benchmarking*

In 2000, the Global Food Safety Initiative (GFSI) was established by the world's leading food retailers to develop benchmarks that would set minimum standards for private standards and related certification schemes.<sup>101</sup> By developing such meta-standards GFSI seeks to contribute to the strengthening of private food safety standards and encourage buyers to accept certification under different standards as equivalent.<sup>102</sup> In 2018, GFSI had recognized 14 private standards as meeting its benchmarks.<sup>103</sup> According to its own statistics, GFSI-recognized standards find application in 77,000 factories and 150,000 farms in over 160 countries.<sup>104</sup> Scholars confirm the influential role of GFSI on food safety practices on the ground. As early as 2006, a survey conducted among the management of the world's leading supermarkets found that an estimated 75-99% of food supplies sold by supermarket chains were certified against GFSI-recognized standards.<sup>105</sup> Most of the leading Western corporate food retailers and manufacturers currently require certification against GFSI-recognized standards.<sup>106</sup>

GFSI benchmarking has sought to strengthen acceptance of private standards by requiring standards owners to meet criteria for accreditation and stakeholder participation.<sup>107</sup> Other ways in which GFSI addresses legitimacy concerns around private standards involve setting requirements for auditor competence and the management of costs of certification. As regards auditor competence, it must be recognized that the reliability of a private standard and certification scheme crucially depend on the quality and skills of the auditor. Empirical studies on the performance of auditors in global supply chains show that auditor performance is lower where they possess general knowledge about the methodology of auditing, but lack expertise in the field in which the audit is performed.<sup>108</sup> Other research suggests that where auditors receive training specific for the standards they audit, they report more cases of non-compliance.<sup>109</sup> Inconsistencies between certification bodies in awarding certificates under the same standards, possibly caused by lack of sufficient training and expertise, will also harm the reliability of food safety certification.<sup>110</sup>

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<sup>101</sup> See in detail Paul Verbruggen and Tetty Havinga, 'The Rise of Transnational Private Meta-Regulators' (2016) 21 *Tilburg Law Review* 116.

<sup>102</sup> GFSI, 'What is GFSI' <<https://www.mygfsi.com/about-us/about-gfsi/what-is-gfsi.html>> accessed 1 June 2018.

<sup>103</sup> <<http://www.mygfsi.com/schemes-certification/recognised-schemes.html>> accessed 1 June 2018.

<sup>104</sup> GFSI, 'Information Kit' <<https://www.mygfsi.com/news-resources/resources/information-kit.html>> accessed 1 June 2018.

<sup>105</sup> Fulponi (n 2) 6.

<sup>106</sup> Tetty Havinga, 'Retail Driven Food Safety Regulation', in Abdelhakim Hammoudi and others (eds), *Food Safety, Market Organization, Trade and Development* (Springer 2015) 67.

<sup>107</sup> See at n 90 and 98 above.

<sup>108</sup> Lesley McAllister, 'Regulation by Third-Party Verification' (2012) 53 *Boston College Law Review* 1, 42–43.

<sup>109</sup> Jody Short, Michael Toffel and Andrea Hugill, 'Monitoring Global Supply Chains' (2015) 37 *Strategic Management Journal* 1878, 1888.

<sup>110</sup> Friederike Albersmeier and others, 'The Reliability of Third-party Certification in the Food Chain: From Checklists to Risk-oriented Auditing' (2009) 20 *Food Control* 927, 931–933.



Auditor competence has remained an issue of concern, in particular among state actors enrolling private food safety standards in their enforcement policies. The 2010 Commission Communication noted above challenges standards owners to warrant that auditors performing certifications ‘have the relevant knowledge in the specific sector’.<sup>111</sup> National governments have similarly challenged the industry to come with more stringent demands for standards owners as regards auditor competence.<sup>112</sup> GFSI has responded to these concerns by including detailed criteria on auditor competence in its benchmarking requirements.<sup>113</sup> Adopted in 2017, its most recent requirements oblige standards owners applying for GFSI recognition to ensure that associated auditors have both sector-specific food education (including a HACCP training course) and sector-specific work experience.<sup>114</sup> These criteria are specified for all domains the private standards may apply to (such as livestock, fresh produce, food processing or aquaculture).<sup>115</sup> In terms of work experience, GFSI requires that auditors ‘have experience in the food or associated industry including at least 2 years full time work in quality assurance or food safety functions in food production or manufacturing, retailing, inspection or enforcement or the equivalent’.<sup>116</sup> GFSI further lays down rules for auditor training programs, minimum audit frequency and surveillance audits by the certification body involved.<sup>117</sup>

While GFSI has thus sought, through its benchmarking activities, to enhance confidence among relevant stakeholders in private standards, a second important goal of its activities has been to reduce the costs of certification for food business operators. Recognizing that these operators incur substantial costs if lead firms in the chain demand certification against multiple standards, GFSI adopted the motto of ‘once certified, accepted everywhere’ to encourage buyers to accept certification under different standards as equivalent.<sup>118</sup> The European Commission has reinforced this ambition in its Communication on best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs. In areas where such schemes have been identified as overlapping with the requirements of others, the Commission suggests that these schemes ‘should include recognition or acceptance partially or totally of inspections and audits already carried out under those schemes’ and that they ‘should as much as practically and legally possible also harmonise their auditing protocols and documentation requirements’.<sup>119</sup>

Despite its ambition, GFSI has so far not been able to ensure that food retailers widely accept certification based on any GFSI-recognized standard. Many European major retailers only accept certification against the private standard specified in its commercial contracts or procurement policies. For example, most British retailers only accept the BRC Global Standards, while German retailers

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<sup>111</sup> European Commission (n 88), para 6.4.

<sup>112</sup> Havinga and Verbruggen (n 70), 212–213.

<sup>113</sup> A first attempt to develop detailed standards for auditor competences for food processing standards was published in 2013, as an addition to Version 6 (2012) of the GFSI benchmarking requirements. GFSI, ‘Food Safety Auditor Competences’ (2013) <[http://www.mygfsi.com/gfsifiles/information-kit/GFSI\\_Food\\_Safety\\_Auditor\\_Competencies\\_-\\_Edition\\_1\\_October\\_2013.pdf](http://www.mygfsi.com/gfsifiles/information-kit/GFSI_Food_Safety_Auditor_Competencies_-_Edition_1_October_2013.pdf)> accessed 1 June 2018.

<sup>114</sup> GFSI (n 98), para 2.3.2.2.

<sup>115</sup> *ibid*, 6–10.

<sup>116</sup> *ibid*, para 2.3.2.4.

<sup>117</sup> *ibid*, paras 2.3.3 to 2.3.6.

<sup>118</sup> GFSI, ‘What is GFSI’ <<https://www.mygfsi.com/about-us/about-gfsi/what-is-gfsi.html>> accessed 1 June 2018.

<sup>119</sup> European Commission (n 88), paras 7.2 and 7.4.

frequently require IFS certification.<sup>120</sup> Certification costs thus remain a concern for the acceptance and legitimacy of GFSI-recognized standards.

### *Government recognition*

A final strategy discussed here by standards owners to address the legitimacy concerns raised by their private standards is to gain recognition from national governments. Recognition by a national authority of a private standard as being equivalent to public law standards lends a degree of authority and legitimacy to that standard. It may also help to ensure further market uptake. National authorities have for their part been interested in recognizing and enrolling private standards and certification schemes in public enforcement policies.<sup>121</sup> While such co-regulatory arrangements may be encouraged by legal frameworks,<sup>122</sup> the authorities' interests in recognizing private standards must also in part be explained by the opportunities it creates to more effectively allocate scarce enforcement resources.<sup>123</sup>

Government recognition does not come for free, however. It must be earned and national authorities have made it dependent on meeting criteria regarding standards development and governance, audit design, auditor competence and information sharing duties concerning compliance results. A prominent example in the EU is the policy developed by the Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit – NVWA*).<sup>124</sup> Building on a long tradition of neo-corporatism in food safety governance in the Netherlands, NVWA developed a policy document in 2014 that laid down criteria for acceptance of private standards.<sup>125</sup> These criteria were revised in 2017 and now require standard owners, amongst others, to ensure that their standards are developed and reviewed in line with current legislation and applicable ISO standards, that certification is carried out by accredited third-party auditors that employ risk-based audits (both announced and unannounced), and that programs are in place to ensure auditor competence, monitor auditor performance and deploy sanctions if necessary.<sup>126</sup> Additionally, arrangements are made to ensure NVWA oversight and verification of auditor performance, as well as procedures for information exchange between NVWA and standards owners as regards the functioning of the scheme, changes in its governance or operation, and audit results.<sup>127</sup> By 2017, 22 schemes had applied to NVWA for recognition.<sup>128</sup> In 2018, five schemes had been recognized, three of which are GFSI-recognized standards.<sup>129</sup>

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<sup>120</sup> Havinga and Verbruggen (n 70) 192 and Maureen Olewnik, 'Global Food Safety Initiative Overview' <<http://www.grains.k-state.edu/spirel/docs/conferences/mb-alternatives/presentation/m%20olewnik.pdf>> slide 7 accessed 1 June 2018.

<sup>121</sup> See for an analysis of Canada, China, the Netherlands and the United States, Havinga and Verbruggen (n 70).

<sup>122</sup> See at n 68 above.

<sup>123</sup> Garcia Martinez and others (n 19) 312–313.

<sup>124</sup> See in detail Paul Verbruggen and Tetty Havinga, 'Food Safety Meta-Controls in the Netherlands', (2015) 6 *European Journal of Risk Regulation* 512, 514.

<sup>125</sup> NVWA, 'Requirements for the acceptance of quality systems by the Netherlands Food and Consumer Product Safety Authority' (2014) (on file with author).

<sup>126</sup> NVWA 'Criteria for supervision support through private quality systems' (2017) <<http://ketenborging.nl/wp-content/uploads/EN-version-Criteria-for-supervision-support-through-private-quality-systems-25-9-17.pdf>> accessed 1 June 2018, criteria 1 to 4. These criteria overlap with the recommendations offered by the European Commission (n 88), paras 6.1 and 6.2.

<sup>127</sup> *ibid*, criteria 5 and 6.

<sup>128</sup> NVWA, 'Zesde voortgangsrapportage Plan van aanpak NVWA' (2017) <<https://www.rijksoverheid.nl/ministeries/ministerie-van-economische-zaken/documenten/brieven/2017/05/16/zesde-voortgangsrapportage-plan-van-aanpak-nvwa>> accessed 1 June 2018.

<sup>129</sup> <<http://ketenborging.nl/kwaliteitsschemas-en-status/>> accessed 1 June 2018.

NVWA has been a frontrunner in establishing a policy for recognizing national and transnational private food safety standards. It initiated and chaired the working group of the Heads of European Food Safety Agencies called the 'Value of Private Assurance Schemes', in which representatives of nine national authorities in Europe discuss strategies for how to engage with standards owners. NVWA, the working group, EU officials and representatives from authorities outside the EU have also engaged with GFSI and challenged it to further ratchet up its benchmarking requirements as a necessary condition for GFSI-recognized standards to also gain government recognition.<sup>130</sup> NVWA's approach is now being followed by the Food Standards Agency (FSA) in the United Kingdom. In 2018, FSA launched its 'Earning Recognition' program, which sets out criteria for approval of private assurance schemes in animal feed and food hygiene at the level of primary production.<sup>131</sup> Unsurprisingly, these criteria strongly overlap with those developed by NVWA. The schemes currently recognized under the Earned Recognition policy concern national schemes only, but transnational standards may qualify in the future.<sup>132</sup>

Jointly, the policies for government recognition as developed by NVWA and FSA, and potentially also by other national authorities in the near future, seek to further strengthen the integrity and quality of private standards. They add another layer of external rules and controls to the system, which may again further harness the acceptance and legitimacy of these standards amongst interested stakeholders.

## Conclusion

The food industry has developed standards that have proven highly effective in shaping retailer-driven global food supply chains and allocating responsibilities along that chain in the delivery of safe products. Private law arrangements, in particular commercial contracts, provide the legal infrastructure for these standards to have normative effects across jurisdictional borders. The effectiveness of this approach has come at the price of legitimacy, however. Compliance with private standards has become a proxy for market access, while the costs of compliance are typically borne by those down the chain. Together with concerns over participation by interested stakeholders in standards development and the integrity, competence and quality of certification bodies, private food safety standards remain a contested form of transnational regulation.

This Chapter reveals that the EU plays at least two supporting roles in legitimizing and constitutionalizing private food safety standards. First, it provides a basis and structure for private standards around which their procedural and substantive requirements are organized. The principal examples in this respect are the HACCP and traceability requirements which private standards impose on food business operators, together with the MRLs for pesticide control in primary agricultural products. Second, and more generally, the EU encourages the development of private standards as a means to ensure compliance with food safety law. The General Food Law and the EU Regulations on food hygiene and on official controls, in combination with the revised Product Liability Directive, have provided an influential push for the development of private standards to help food business operators to comply with EU law and reduce their liability exposure *vis-à-vis* national authorities or individuals. The tolerance shown by this

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<sup>130</sup> See in detail Havinga and Verbruggen (n 70).

<sup>131</sup> FSA, 'Guidance on Food Standards Agency approved assurance schemes in the animal feed and food hygiene at the level of primary production sectors' (2018) <<https://www.food.gov.uk/sites/default/files/media/document/FINAL%20FSA%20Guidance%20on%20Approved%20Assurance%20Schemes%20April%202018.pdf>> accessed 1 June 2018.

<sup>132</sup> FSA, 'Earned Recognition – approved assurance schemes' <<https://www.food.gov.uk/business-guidance/earned-recognition-approved-assurance-schemes>> accessed 1 June 2018.

body of legislation towards industry self-regulation as a means of ensuring regulatory compliance, explains in part the strong market uptake of private standards based on HACCP, GMP and GAP in the EU.

The Chapter also demonstrated that the EU and its Member States employ direct and indirect, formal and informal ways to control and exert influence over the governance of these standards as a way to strengthen their legitimacy and constitutional standing. Demands regarding meaningful participation by supply chain actors affected by the standards, the integrity, competence and independence of auditors and certifiers, the periodic review of standards based on evidence of their application in the chain, and the need to justify adoption of new requirements based on cost-benefit analyses challenge standards owners to bring their standards and certification schemes in line with established principles of good governance. The industry has strategically responded to these demands, as well as to those voiced by civil society and state actors outside the EU. Through the forum of GFSI it is developing its own accepted international practices of standard setting. The EU is thus part of an ongoing transnational dynamic of influencing and controlling industry practice. It is in this dynamic that the legitimacy and constitutional standing of private food safety standards is both shaped and contested.