Public-Private Regulatory Partnerships:

What Lessons Can We Learn from the Co-Regulation of Food Safety?

Marian Garcia Martinez[1], Paul Verbruggen[2] and Andrew Fearne[1]

[1] Centre for Value Chain Research, Kent Business School, University of Kent, Canterbury, Kent CT2 7NZ, UK

[2] European University Institute, Florence, Italy

Abstract

Co-regulation implies a partnership between public and private actors in the attainment of certain public policy objectives. The paper enquires into the nature of this hybrid regulatory approach by assessing the recent experiences with co-regulatory arrangements in the policy field of food safety where recent developments in the EU regulatory environment are providing greater opportunities for closer collaboration between regulatory agencies and the private sector. The paper argues that for co-regulation to be able to meet its public policy objectives the regulatory arrangement should be responsive to the risks of regulatory capture and free riding, provide for legal backstops, and align related public and private objectives and interests. How co-regulation evolves as an approach to food safety controls will reflect local political and legal norms and market contexts as much as the associated economic costs and benefits.

Key words: co-regulation, food safety, hybrid regulatory instruments, regulatory partnerships

Introduction

The combination of public and private regulatory activities has enjoyed a degree of popularity in national and international regulatory strategies (OECD, 2002). Regulation adopted, monitored, and enforced by private bodies supplements public regulatory activities in a wide range of fields, including consumer and environmental protection, financial markets, labour standards, media, and food safety. The commitment by policy makers to engage private actors in the regulation of these policy areas in the pursuit of public benefits springs from the belief that the inclusion of private actors in public regulatory process generates win-win situations: whilst it creates a wider ownership of the policies in question and increases flexibility for those businesses regulated, it enhances rule compliance and saves costs for the public purse.[i]

However, to attain these potential benefits in practice public and private objectives and motives to submit to such a hybrid or 'co-regulatory' arrangement need to be aligned and co-ordinated (Gunningham et al., 1998, Garcia Martinez et al., 2007). This process may prove difficult as public and private regulatory interests do not necessarily overlap. In fact, self-regulation by business has been said to be necessarily self-interested (Baggott, 1989, p 445). Regulatory capture thus presents itself as a clear risk to the use of private standards as a regulatory tool employed by public authorities to meet public interest objectives (Ogus, 1995).

This paper enquires into the nature of co-regulation and attempts to improve the understanding of co-regulatory arrangements in a number of ways: by clarifying the concept of co-regulation, suggesting a typology of this particular regulatory

partnership, and by assessing the emergence and operation of co-regulatory arrangements in a specific policy field, namely food safety regulation. Here, recent developments in the European Union (EU) regulatory environment are providing greater opportunities for closer collaboration between regulatory agencies and the private sector in the management of food safety. Drawing on arguments provided by the disciplines of law and welfare economics, the paper first defines co-regulation and stresses the conceptual complexity related to co-regulation, thereby providing an account of how the possible relationships of public and private regulatory action can be combined in these particular regulatory arrangements (Section I). Next, the paper discusses the factors which have contributed to the emergence of co-regulation as a policy option to be used by public authorities in the area of food safety (Section II). Subsequently, the paper identifies the opportunities and risks associated with co-regulation (Section III) and deepens the basic preconditions for this hybrid regulatory undertaking to be able to attain the public policy objectives it seeks to ensure (Section IV). The paper concludes by identifying what lessons can be drawn from current co-regulatory partnerships in food safety regulation for governments to engage with businesses in regulatory practices in other policy areas (Section V).

I. Conceptualising Co-regulation: What Kind of Partnership between the Public and Private?

Co-regulation can loosely be termed a regulatory strategy which is optional to policy-makers and that includes the participation of both public and private actors in the regulation of specific public policy interests and objectives. As such, it brings together public and private actors in the different activities of the regulation process. Conceptually, co-regulation thus seems to hold the middle ground between self-

regulation and 'command and control' (CAC) - legal rules that are set and controlled by state authorities and backed by criminal sanctions. Policy-makers and academics have argued that, in certain policy fields, this regulatory approach constitutes the best of both worlds: it addresses the weaknesses of self-regulation whilst retaining the relative strengths that self-regulation has vis-à-vis CAC regulation, such as expertise, flexibility, and cost-effectiveness.

The emergence of co-regulation as a regulatory approach has indeed given rise to a rich discourse by academics and policy makers on definitions and terminology.[ii] Certainly, the different classifications used to distinguish co-regulation form government rules and self-regulation have led to confusion at the terminological level, but what about the conceptual level? In this respect, Bartle and Vass (2007) have identified two important and apparently opposing narratives in the British academic literature concerning the interpretation of private regulatory activities, commonly captured by the term 'self-regulation', and their relationship with the modern state. In the first interpretation, self-regulation is increasingly submitted to control by government, the central regulator of society. As such, self-regulation functions as a regulatory instrument at the disposal of the state to regulate the public. According to the second narrative, however, the state does not act as the central regulator of the public sphere, but has to share its regulatory function with private actors, such as industry associations, groups of individual companies, consumer or trade organizations, self-regulatory bodies, or non-governmental organizations (NGOs).

The first interpretation is put forward, most notably, by Moran, who stresses the 'transformation' of self-regulation along more state controlled lines (Moran, 2003). In

the view of Moran, the self-regulatory system in Britain used to be characterized by a high degree of informality in which the law itself historically played no significant role. In fact, it was initially marked by low levels of 'institutionalization, codification, and juridification' (Moran, 2003, 86). However, in the twentieth century Britain's self-regulatory system changed and became more strictly organized, codified, and legally bound and state-controlled (Bartle and Vass, 2007, 887, Moran, 2003, 69). Moran submits that this transformation exemplifies the emergence of a new regulatory state in Britain, one which follows the ambitions of high modernism in an epoch of hyper-innovation (Moran, 2003, 92-94).

A second, opposing interpretation is voiced by scholars who have conceptualized regulation in their writings as 'decentring' (Black, 2001, Scott, 2004). Regulation is understood as essentially not state-centred: government does not hold an exclusive prerogative over regulation. Public actors share their regulatory role with private actors, either with or without their involvement or formal approval. The decentred narrative of regulation thus represents a shift away from the traditional bipolar image of an empowered public authority regulating those private actors it seeks to regulate. It is in fact based on a 'changed understanding of the nature of society, of government, and of the relationship between them' (Black, 2001, 106). Power and knowledge are thus considered to be fundamentally dispersed amongst public and private actors and therefore the focal point of the study of regulation is, and should be, the nature and dynamics of and interactions and interdependencies between the actors (Bartle and Vass, 2007, 887)

The two dominant ways in which the relationship between public and private regulatory activities is viewed in the literature can be used to suggest two models of co-regulation that are conceptually different: top-down and bottom-up. In the first model, the public actor – often the government – assigns to the private actor a specific regulatory task, often that of standard-setting. Here, the private actor acts under a mandate providing a general legal framework in order to secure objectives identified by that framework. It is the public actor that has the upper hand in this scheme: it sets the mandate, objectives to achieve and means to achieve them. Hence, the self-regulatory activities of the private actors are regulated by the conditions set out in the legal framework.

In the bottom-up model, the private actors' regulatory initiative is acknowledged by the public authority – directly through the creation of a legislative framework or indirectly through soft law measures, references in policy documents, or financial support – without imposing specific conditions on the private regime. Here, private regulatory activities are pursued independently from public activities, but assume such an important regulatory function in practice that they are nonetheless considered to be an inherent part of the regulatory regime. While in both models public authorities retain the right to adopt new rules on the matter or may undertake monitoring and enforcement action, the distinguishing factor concerns the extent to which the private actor is acting under a legislative mandate or not.[iii] This factor is also critical for the question to what extent the rules established under the hybrid regime can be submitted to judicial review (Black, 1998).

In the context of food safety, governments are increasingly engaging private actors in their regulatory activities. The drivers for such public-private partnerships, the forms these cooperative arrangements have assumed, the opportunities and risks the arrangements imply, and the conditions under which they can successfully attain the public policy goals they seek to ensure are discussed in the remainder of the paper.

II. Co-Regulation as a Regulatory Strategy for Food Safety

The protection of public health and the cost-effective delivery of food safety controls have risen to the top of the political and economic agenda in industrialised countries. This follows a recent history of high-profile outbreaks of food-borne diseases that caused a sharp decline in consumer confidence both in policy making and industry practices (Cantley, 2004, Caduff and Bernauer, 2006, Halkier and Holm, 2006). Consequently, government oversight of food safety has undergone profound reform in many countries with the establishment of independent food safety agencies. These reforms have responded to increasing demands for a more transparent and inclusive process of food safety governance (Vos, 2000, Flynn et al., 2004, Ansell and Vogel, 2006) and are designed to remove the inherent conflict of interest in dual responsibilities of a single government department, traditionally the department of agricultural ministries, for both the regulation of food safety and the (economic) development of the agri-food sector (Ansell and Vogel, 2006, Borraz et al., 2006, Steiner, 2006).

The outbreak of the BSE crisis in 1996 in the United Kingdom and later in the EU clearly revealed significant dysfunctions both in industry practices and their supervision by governments, undermining general public trust in food safety

governance (Borraz, 2007, Vos, 2000). The institutional failures put pressure on the European Commission to expand its scope of influence in regulating food safety across the EU (Caduff and Bernauer, 2006). It also forced the Commission to present a more coherent approach to food safety based on principles of separation of the responsibility for legislation and scientific advice, separation of responsibility for legislation and inspection, and greater transparency and information throughout the decision-making process and inspection (Vos, 2000).

The private sector, for its part, has responded to consumer demand for effective food safety controls with the development of a technologically sophisticated and organisationally complex range of approaches to improving product safety and quality standards. These are becoming a prominent driving force for agri-food systems in many countries (Henson and Hooker, 2001, Henson and Reardon, 2005, Fulponi, 2006, Havinga, 2006) As supply chains become more global, so do private standards. For global retailers with a multitude of suppliers scattered globally, private schemes like GlobalGAP have become a key means to manage procurement costs and to ensure the integrity of their supply chains.

At the same time, there is a move to outsource public management functions in a situation of increasing budgetary constraints and in search of alternative modes of social regulation that are less resource intensive (Osborne and Gaebler, 1992, Scott, 2001, Hutter, 2006). The result is an intricate and complex network of public and private incentives to implement enhanced food safety controls (Fearne et al., 2004, Garcia Martinez and Poole, 2004). There is growing recognition in the economics and political economy literature that the existence of market failure per se does not justify

government intervention and that direct (CAC) intervention does not necessarily improve markets, especially when one considers the role that product liability and market mechanisms, such as reputation, play in the provision of safe foods (Antle, 1999, Caswell., 2005, Unnevehr and Jensen, 2005). Coercion can breed minimalist approaches to compliance resulting in sub-optimal improvements to public health alongside significant expenditure of resources on enforcement and monitoring (Garcia Martinez et al., 2007).

Governments are thus exploring how the private food safety controls of producers and processors can be better aligned with regulatory standards and related enforcement systems. Thus, a shift in the focus of regulation is occurring from a predominantly prescriptive CAC approach towards alternative, flexible, less state-centered forms of regulation, such as co-regulation (Braithwaite, 1982, Black, 2001, Coglianese and Lazer, 2003).

While the concept of co-regulation of food safety is new and remains controversial, models for government-business interactions in regulatory practices in search of more cost-effective solutions to a given food safety problem are receiving increasing attention. In practice, the scope and exact shape of co-regulation of food safety, the way in which legal and non-legal instruments are combined, and who launches the initiative vary depending on the policy objectives and the contextual framework in which it operates (Table 1). The recent evolution of EU food hygiene legislation (Regulation 178/2002) responds to a co-regulatory approach under a top-down model where private actors implement public objectives identified in government regulation or legislation (Verbruggen, 2009). Under this new regulatory setting, responsibility

for the production of safe food lies more explicitly with food business operators, all of whom are required to have controls that demonstrate they are managing food safety within their business. The regulator is then responsible for approving these internalised rules and monitoring compliance. Arguably, the more risk-based and flexible nature of these procedures is better matched to the needs of individual businesses and to enforcement. For example, they may allow rapid adoption of new monitoring technologies by industry. They may also provide better opportunities for businesses to demonstrate that they have effective risk management systems in place and that their products present lower risk to consumers. This shift in approach in EU food hygiene policy by focusing on the objectives to be reached by food business operators rather than maintaining very detailed requirements is having a positive effect in compliance rates as the regulations provide ample possibilities to adapt the technical requirements of the food hygiene package in function of the nature of the food business concerned (Commission of the European Communities, 2009).

There are also increasing opportunities for bottom-up co-regulatory approaches in monitoring and evaluation of business food safety performance whereby private actors' regulatory initiative is acknowledged by the public authority without imposing specific conditions on the private regime. For instance, agreement to recognise or cross-reference private food safety controls and take them into account in allocating enforcement resources. Compliance with such norms may enable enforcement officials to distinguish between high and low risk establishments and focus inspection efforts accordingly. The UK Food Standards Agency (FSA) has recently embraced a co-regulatory approach to enforcement and monitoring by introducing a new inspection scheme[iv] for farms in which membership in farm assurance schemes

determines inspection frequency (Food Standards Agency, 2007). Farm assurance schemes are voluntary schemes which verify, through regular independent inspections, that farmers and growers are meeting stated safety and welfare standards in the production of primary products. In the UK, they cover over 85% of production in the milk, eggs, chicken, pork and combinable crop sectors and over 65% for beef and lamb and horticultural produce (AFS data). The use of farm assurance schemes to determine the frequency of inspection is part of the simplification programme aimed at reducing the administrative burden on business. Farms in recognised farm assurance schemes are subject to an average 2% inspection rating compared to an average 25% inspection for farms not in farm assurance schemes. A more targeted enforcement action reduces the regulatory burdens on farmers and local authorities while improving consumer protection and increasing compliance levels[v] (Food Standards Agency, 2008).

Table 1. Typology of Co-regulatory Approaches in Food Safety Controls

Top-down model:	**Implementation mechanism**
private actors implement public objectives identified in government regulation or legislation	Management-based regulation ('enforced self-regulation') with the regulator imposing a requirement on businesses to determine and implement their own internal rules and procedures in order to fulfil defined policy objectives; the regulator is then responsible for approving these internalised rules and monitoring compliance. *Benefits:* it gives firms flexibility in developing their own plans for achieving goals, resulting in a relatively cost-effective instrument because firms will have the incentive to incorporate into their internal management plans the lowest-cost solutions available. It allows for flexible, speedy, well-informed, and adjusted adaptation to technological options and market conditions
Bottom-up model:	**Enforcement mechanism**
the private actors' regulatory initiative is acknowledged by the public authority without imposing specific conditions on the private regime	Agreements to recognise or cross-reference private food safety controls and take them into account in allocating enforcement resources (e.g., use of farm assurance schemes to determine the frequency of inspection) *Benefits*: a more targeted enforcement action, reducing the regulatory burden for public and private sectors

Source: Own elaboration

III. Opportunities and Risks of Co-Regulation of Food Safety

Arguments for co-regulation seem to lie with the potential synergies the combination of public and private regulatory activities implies. The partnership between public and private regulators could, for example, boost the effectiveness of the regulatory tools they design. Where public law uses self-regulatory rules set by businesses or private associations to regulate corporate conduct, the co-regulatory regime would benefit from a number of advantages commonly associated with privately established norms.

(i) Compliance performance

Businesses and organisations feel more committed to those rules that they consider to be of their own. In addition, self-made rules are easy to comprehend and are viewed as realistically attainable by the industry (Baldwin and Cave, 1999, p. 40). As seen with the EU food hygiene policy, the more risk-based and flexible nature of the regulation is having a positive impact on compliance rates (Commission of the European Communities, 2009). It requires, however, full commitment from management and workforce (Jones et al., 2008) which could be a problem among smaller businesses due to the lack of (financial or technical) resources to understand what the law requires of them (Fairman and Yapp, 2005, Fielding et al., 2005). The regulatory capacity of businesses is thus a condition for realisation of co-regulation.

(ii) Responsiveness

Self-regulation is flexible and can rapidly respond to the demands of a dynamic environment in which technologies, food supply chains, actors, institutions, and normative frameworks are in constant development. In the face of theses changes, regulatory law, as traditionally created and enforced by the nation state, has been

accused of being ineffective, simplistic, paternalistic, and over-generalizing (Ayres and Braithwaite, 1992, Streeck and Schmitter, 1985, Teubner, 1986, Zumbansen, 2009). Law, understood as an instrument for social order, struggles to keep up with the business conduct of private companies. While these private actors can deploy their business activities on a worldwide scale, the state remains bound to its jurisdictional territory. Understanding that the state cannot regulate all and its rules lack flexibility, application, and enforcement, modern government has sought to limit its regulatory role by replacing direct and centred state regulation by more indirect and decentred forms of regulation, including 'responsive' and 'reflexive' regulation (Ayres and Braithwaite, 1992, Teubner, 1986). In this so-called post-regulatory world, the state also endows private, self-interested actors with governmental powers to develop and implement public policy objectives. Regulatory regimes combining the public and private regulatory activities such as co-regulation could be employed by government as an alternative approach to help attain public policy interests without it having to control the entire regulatory process, or as Baggott has put it, to 'enable the government both to have its cake and eat it' (Baggott, 1989, p. 449).

An example of how government is trying to increase its responsiveness in the food safety sector concerns the operation of food quality meta-systems. While many of these systems (i.e., HACCP, GMP, GAP, ISO 9000, etc) started out as voluntary codes of good practice, they are increasingly pervading public regulations; for instance the inclusion of HACCP among the regulatory requirements for meat and meat products in the United States and the EU (Henson, 2006). The EU requires all producers to operate under HACCP systems, including foreign producers. Foreign suppliers do not have to prove to the government that there are complying with

HACCP. Instead the EU holds the domestic firm accountable for assuring that the food it imports is produced in compliance with EU law. This is supported by imposing strict liability on the importer in the event of an outbreak[vi].

(iii) Expertise

In-depth (technical) knowledge of the private actors ensures well-informed rule-making. Engagement with stakeholders can enhance the results of regulatory measures by adapting requirements to industry and/or sector-specific requirements and circumstances. This can potentially reduce compliance costs, facilitate process implementation, and enhance enforcement and monitoring, such that regulatory goals (e.g., cost effectiveness) are met. Consultation with industry stakeholders at an early stage in the regulatory decision-making process can be important for evaluating compliance costs and potential impacts on business competitiveness. Similarly, formal public consultations to seek stakeholders' views on different regulatory options before a final decision is taken can lead to more effective legislation.

(iv) Efficiency

Self-regulators experience low costs in acquiring relevant information to set normative standards, and to monitor and enforce them. Relieving the legislator of the duty to govern these regulatory activities reduces regulation costs for the government. This model sub-contracts regulatory functions to private actors. An example is referencing compliance to private codes of practice and/or implementation such as the ISO 22000 series. Compliance with such norms may enable enforcement officials to distinguish between high and low risk establishments and focus inspection efforts accordingly.

To date, however, the potential application of co-regulation to food safety control is limited. The perceived risks associated with allowing market forces to play a role in the regulation of food safety could seriously undermine the potential benefits from greater collaboration between government and private sector in regulatory activities.

(i) Regulatory capture

The potential for capture of the regulatory process by dominant economic interests is a major risk. For example, the UK FSA was established to champion the interests of consumers and has often found it difficult to work in full co-operation with the commercial stakeholders it regulates. Indeed, there is a widespread perception in the food industry that the economic impact on food businesses of new regulations has taken second stage (Fearne et al., 2004, Garcia Martinez et al., 2007). As a result, the response to requests for industry feedback on compliance costs, as part of the process of regulatory impact assessment (RIA), is often poor. In contrast, in the US regulators are often presented with fully-researched cost impact assessments by the food industry. As a result, final regulations may be better designed, complement industry incentives more effectively, and have better benefit-cost profiles. However, in this context there is a risk that proposed regulations become watered down as dominant industry stakeholder voices are heard more strongly than those of other stakeholders, leaving affordable public health benefits unachieved. Achieving an appropriate balance of interests is a formidable challenge for policy decision-makers, especially where there is a drive towards co-regulatory approaches that more actively engage commercial stakeholders.

The recent model the EU has stipulated for co-regulation offers a possible approach to mitigate the risk of regulatory capture. Under EU co-regulation private actors implement public objectives identified in government regulation or legislation. While the regulatory role is thus shared between public and private parties, an evident hierarchical relationship continues to exist. Government *a priori* specifies the objectives and private actors ensure the attainment of these objectives. How private actors achieve these objectives is in principle left to the industry. This conception of co-regulation as an 'implementation mechanism' (Verbruggen, 2009) limits the regulatory role private stakeholders to implementation and is subject to public supervision. Should the commercial stakeholders use the regulatory scheme to promote their private interest at the expense of the public, government can still autonomously undertake legislative action. Arguably, this approach could take away some of the concerns for capture, as a non-dependent hierarchical relationship continues to exist between the public and the private. It should be stressed, however, that it does not erase the concerns completely as the success of the EU approach to co-regulation still chiefly depends of the cooperation between public and private actors, thus offering commercial stakeholders a position to boost their own interests, rather than the public, via the regulatory scheme designed.

(ii) Free-rider behaviour

Not all businesses in an industry sector in which a co-regulatory scheme is introduced may apply or adhere to the specific norms featuring that scheme. There might, for example, be companies that do not fall under the membership of the interest group (i.e. industry associations) that is involved in the co-regulatory arrangement, or the norms as such might be of a voluntary nature to which the individual businesses are

not legally bound. By not applying these norms, businesses can obtain important competitive advantages (i.e. cost saving) over companies that do follow the co-regulatory scheme.

There are potential stumbling blocks with attempts to use private assurance schemes as indirect mechanisms to demonstrate compliance with legal food safety standards. Participation in assurance schemes is voluntary and non-participation cannot be used per se as an indicator of low food safety standards relative to legal requirements. Producers or processors could be penalised by regulatory authorities because of their decision to not implement a voluntary standard. There is also a potential danger of reverse capture with the co-option of voluntary food safety standards and assurance schemes by regulatory authorities, distorting the related costs and benefits for buyers and sellers and, perhaps, raising the spectre of their demise.

Moreover, the promulgation of multiple and competing private standards raises critical questions about comparability, the degree to which they provide reliable systems of oversight that can be trusted by regulatory authorities, and the associated costs of compliance. One solution is the development of industry standards, with which all buyers comply. For example, in the UK the major supermarkets have harmonized their individual food safety audit processes through the British Retail Consortium's (BRC) Global Standard. This has reduced food safety monitoring costs in supermarket supply chains whilst maintaining the required food safety standards (Arfini and Mancini, 2003). Similarly, the formation of the Global Food Safety Initiative (GFSI) though the Food Business Forum (CIES) and the development of a common private protocol on good agricultural practices by the Euro-Retailer Produce

Working Group (GlobalGAP) are further steps towards greater harmonisation and mutual recognition of national and/or regional business practices that are subsequently codified in rules (Braithwaite and Drahos, 2000).

(iii) Accountability and Legitimacy

Co-regulatory arrangements share the burden of regulation between public and private actors. In the case of regulatory failure this raises the question of who is accountable, how this actor can be held to account, and to whom. Rendering participating actors – both public and private – accountable is critical for warranting the legitimacy of the regulatory joint venture that co-regulation is. In fact, accountability mechanisms are a route through which the regulators can satisfy their legitimacy claims (Black, 2008, Bovens, 2007). While accountability mechanisms can find easy application to government, private actors are a difficult case, especially where their regulatory activities are not based on a legal mandate. The legitimacy claims private actors might have when engaging in the co-regulatory scheme might be unsatisfactory, for example because they fail to fully or accurately represent the industry's interest or might adopt poor quality standards. When legal mandates are missing it will prove difficult to render private actors accountable for this behaviour through existing state structures such as parliament, legislative committees, or courts. Therefore, Black (2008) has suggested to look at how private actors operating a regulatory regime respond to meet the legitimacy and accountability claims made by others, for example civil society and government. In this respect, conditions of openness and transparency, communication, and participatory engagement of industry and non-industry stakeholders seem crucial.

Indeed, the challenge for co-regulatory approaches to food safety controls is the economic and political fall-out when wide-scale food safety failures occur. The real test will thus be how they withstand the inevitable public scrutiny when a major outbreak of food-borne illness occurs. Following the precedent of the 2008-2009 financial crisis, accusations of government being 'too soft' on industry may be inevitable. But also the specific regulatory role of private actors will be assessed. To hold them formally accountable, legal mandates, like the contracting-out of statutory powers to the private actor to enforce a legal rule, would facilitate the process.

IV. What Conditions for Co-Regulation of Food Safety to Succeed

The key to effective co-regulation lies with the complementarities between direct and prescriptive regulation (i.e., specification or performance standards), market incentives and self-regulation. In constructing this mix of regulatory instruments the crucial question is how to exactly combine the various tools in order to ensure optimal rule compliance. The approach would be highly context specific; however the effectiveness of co-regulation to pursue public objectives is conditional upon a number of factors that could either foster or hinder closer collaboration between government and private sector in regulatory activities.

- *National regulatory culture.* While the emergence of the post-regulatory state and the process of globalization constitute important pillars in the development of co-regulation as a regulatory strategy, it must be stressed that co-regulation is a phenomenon that enjoys different degrees of popularity in different jurisdictions. Recent developments in the EU regulatory environment towards an 'enforced self-regulatory' approach (Braithwaite, 1982) are providing greater opportunities for

closer collaboration between regulatory agencies and the private sector in the management of food safety. However, we are yet to see clear signs of how co-regulatory approaches will evolve within particular product sectors and across countries. While jurisdictions like the United Kingdom and the Netherlands are spearheading co-regulatory approaches, other (European) jurisdictions have different conceptions of the regulatory role private actors can assume in relation to public policy goals (Vogel, 1986, Garcia Martinez et al., 2007). Increasing budgetary constraints could however favour co-regulatory approaches as governments search for alternative modes of social regulation that are less resource intensive. Moreover, changes in EU regulatory environment towards an enforced self-regulatory approach would put further pressure on national governments less receptive to the idea of private sectors assuming a regulatory role in the attainment of public policy goals.

– *The design of legal norms*. The choice how to design legal norms is relevant in terms of the costs it entails for their adoption, compliance, and enforcement (Diver, 1983, Erhlich and Posner, 1974, Kaplow, 1992), but also affects the possibility for co-regulatory arrangements to be adopted. Less prescriptive regulations are more likely to be consistent with co-regulatory approaches, because these legal norms allow regulators – whether they are public or private or both – to specify these standards via a co-regulatory arrangement. The scope for co-regulation is supported by EU legislation (Regulation (EC) No. 852/2004) that is moving towards an enforced self-regulation approach, including wholesale HACCP adoption. In the UK, this has served to refocus the attention of food safety officials from prescriptive rules to auditing of self-prescribed HACCP

procedures. Changes in the culture of enforcement are clearly required under this approach, with a shift to an outcome rather than a process focus (Griffith, 2005). At least in the short to medium term, it is not evident that such an approach will diminish demands for enforcement resources as officials will be required to assess the efficacy of self-implemented HACCP-based controls rather than a simple compliance exercise as has been historically employed (Garcia Martinez et al., 2007). The demands of the regime however can posse particular difficulties to meat premises (Worsfold, 2001) and small businesses (Fielding et al., 2005, Worsfold, 2005). Training could improve hygiene practices but the limited (economic and otherwise) resources available to smaller enterprises could prove a major constraint (Worsfold, 2005).

- *Institutional design.* Fragmented and/or less flexible regulatory administrative structures can severely constraint regulator's ability to effectively respond changing risk profiles (Merrill, 2005, Dyckman, 2005). On the other hand, civil servants in the regulatory agencies may develop biases toward certain public policies perceived to carry certain professional and/or political risk, and thus hamper government's ability to effectively respond to public demand (see Leaver, 2007, Bardach and Kagan, 1982, Garcia Martinez et al., 2007). In the context of co-regulation, such desire may entail, for instance, an extreme aversion to regulatory options involving possible professional/political risk from negative public health outcome in the event (however unlikely it may be) of a major food safety incident. In this case, policymakers may generally perceive co-regulation as a riskier intervention option and thus prefer more CAC interventions, particularly where co-regulation requires transferring significant responsibilities on controls to food business operators.

Moreover, the position of the public regulatory regime in the infrastructure of a broader regulatory regime (i.e., EU) would shape the regulator's actions and decisions (Baldwin and Black, 2008), which could potentially reduce the regulator's ability to respond to a public demand more effective regulation (Merrill, 2005). The recent review of the delivery of meat hygiene controls in the UK highlighted a significant scope for extending the co-regulatory delivery model in the poultry sector (Tierney, 2007). However, under the EU regulatory legislation such delivery model is not permitted for hygiene controls in the red meat sector, preventing the FSA from delivering more effective, risk based, proportionate controls. Achieving these changes will require changes to European legislation which the European Commission will undertake only if there is significant support amongst the majority of Member States, a process that the FSA estimates could take at least five year to achieve (Food Standards Agency, 2009a).

- *Participatory engagement:* Current risk management efforts try to restore public confidence by involvement of relevant stakeholders at an early stage in the regulatory decision making process (Rowe and Frewer, 2005). However, the effects of proactive participatory processes on public trust are presently unclear (Rowe and Frewer, 2000). For stakeholders to engage positively in the standard setting process requires mutual trust and understanding on the part of government, industry, and other stakeholders in order that quality information is collected and assimilated into the regulatory process, and confidence is built in the value of consultation. In the UK, while the Meat Hygiene Service (MHS) is seen to be performing an important role in relation to food safety, stakeholders feel that there is a lack of trust in the relationship due to a culture of prosecution rather than of

partnership (Food Standards Agency, 2009b). The likely success of co-regulation also depends upon the regulatory process being transparent and open with good communication and its focus being relevant and worthwhile. At the same time, this can mitigate the legitimacy and accountability challenges addressed to the hybrid scheme. The clarity of food hygiene regulation has been found to be important with businesses often being ignorant of the risks associated with their activities (Worsfold, 2001) as well as the effects of non-compliance in enforcement terms.

- *Alignment of public and private regulatory objectives*: Key to the co-regulation debate is the distinction between private and public motives for the use of co-regulation and the possible relationships between private and social benefits and costs emerging under a co-regulatory framework. In the field of food safety economics, social welfare analysis of policies focuses on the regulation of markets to increase social welfare (i.e., improvements in public health) in situations where markets fail, while the political economy (private) approach focuses on the position of interest groups in the process of regulation.

A co-regulatory approach aiming to deliver food safety controls through industry self-regulation re-enforced by governmental would better align the interests of the stakeholders of the regulatory process. In effect, the approach brings closer together two fundamental interests: (i) the firm's desire to minimise its compliance cost, and (ii) the regulator's desire to minimise administrative costs of interventions, through a flexible industry self-regulation and governmental oversight that tapping into the firm's intrinsic and extrinsic incentives for ensuring food safety without crowing out

trust and co-operation of industry. The resulting enhanced food safety controls would potentially lead to improved public health, industry profits and consumer confidence in the long run. For this to work, public oversight and legal backstops need to be present. Compliance information is crucial for public actors to know when or how the system risks failure and, accordingly, when and how to follow-up on cases of non-compliance. Thus, to foster the complementarities between the two regimes information exchange and coordinative channels need to be in place.

- *Regulatory capacity of the business.* Co-regulation is most suited to large, well-informed and well-resourced companies and crucially it is also reliant on the readiness of companies to self-regulate (Hutter and Amodu, 2008). Strong channel leadership would create market incentives for enhanced food safety by rewarding suppliers who meet private standards through price premiums or guaranteed sales, while punishing those that do not by excluding them from markets. However, the food producing and retailing sectors includes a large proportion of SMEs, many exhibiting a low regulatory capacity which in turn limits their ability to self-regulate. Thus, access to reliable information and advice is a vital component of co-regulation in order to enhance compliance among SMEs that may lack expertise and/or resources. Recent studies by Yapp and Fairman (2004, 2006) on enforcement approaches for food safety in SMEs shows that education activities by local authority had significant effects on inspection rating scores and compliance levels. This might however require a fundamental change in the culture of enforcement, away from a 'policing' function in response to non-compliance and/or acute food safety problems (Yapp and Fairman, 2006) toward facilitation and education.

- *Private governance systems:* Well self-regulated private sectors however may pre-empt co-regulatory approaches. Industry self-regulation might lose their much valued characteristics – flexibility, cost-efficiency, and adaptability – in the event that government engages in the scheme. For example, the success of the Lion Quality scheme in the UK egg industry has rendered input from the UK FSA largely redundant. This scheme was developed before the FSA was established and at a time when the survival of the UK egg industry was under threat due to a distinct lack of consumer confidence in public food safety controls. Hence, private initiatives to improve food safety were considered necessary in order to restore consumer confidence. The success achieved by the Lion code of practice in effectively eliminating Salmonella from Lion eggs has modified and reduced government intervention in the sector.

V. Conclusion

Food safety regulation is a key policy area that has witnessed the increasing alignment of risk and regulation. Risk based approaches to food safety regulation seek to ensure that that greater emphasis is placed upon food business operators managing their risks allowing as a result a more targeted enforcement action reducing the regulatory burden for public and private sectors. Co-regulation is certainly not the solution for all regulation problems and indeed entails risks of its own. The key for co-regulatory arrangements, in whatever form they may appear, to be able to attain the public policy objective they seek to ensure, and thus be effective, lies with the complementarities between the public and private regulatory activities constituting the regime. Therefore, the key question is how to exactly combine the various regulatory tools and actors in order to ensure optimal rules compliance.

The analysis of the policy area of food safety conducted in this paper offers a number of lessons for governments to engage with businesses in regulatory partnership in other policy areas. It highlights that the success of the co-regulatory models very much pivots around the commitment and capacity of businesses to self-regulate and the ability of the regulator to find and maintain an optimal monitoring and oversight role (Hutter and Amodu, 2008). Indeed there has to be also a business incentive (e.g. financial or reputational motives) for private actors to want to engage in a co-regulatory scheme. Co-regulation is thus most likely to appear where related public and private objectives and interests are aligned and compatible with each other. Government pressure or the design of legal norms might trigger further cooperation. Government involvement in pre-existing private regulatory schemes can strengthen the scheme's scope of application, transparency and participatory engagement, thus mitigating possible concerns of free riding, legitimacy, and accountability. However, caution should be exercised here, as government engagement could as well undermine much-valued characteristics of well-functioning private schemes.

Co-regulation will also reflect local political and legal norms and market contexts, as much as the associated economic costs and benefits. In this regard, there is greater scope for co-regulation in enforcement and monitoring where greater reliance on private controls would lead to significant cost-savings to regulatory agencies. For co-regulation to ensure compliance with its rules, however, would require rigorous, well-established private regulation with strong self-enforcement powers complemented by government oversight and legal backstops.

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[i] The European Commission, for example, uses these arguments when it presented its new approach to European governance. See Commission (EC), 'European Governance' (White Paper) COM (2001) 428, 25 July 2001, 21.

[ii] See for a comprehensive overview: Black (2001).

[iii] Compare the classification of self-regulatory regimes in terms of mandated and non-mandated schemes by Bartle & Vass (2007, p. 891-896).

[iv] The new scheme applies to those farms where food hygiene rules apply for the first time under Regulation EC 852/2004 on their hygiene of foodstuffs.

[v] The FSA estimates annual savings to be in the region of £571,000 for farmers and £2 million for local authorities across the UK.

[vi] 1985 O.J. (L210) 19