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Verbruggen, P.W.J.; Havinga, T.

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# The Rise of Transnational Private Meta-Regulators

*Paul Verbruggen*

Assistant Professor of Private Law at the Business and Law  
Research Centre of Radboud University, Nijmegen  
*paul.verbruggen@jur.ru.nl*

*Tetty Havinga*

Associate Professor at the Institute for the Sociology of Law  
of the Radboud University, Nijmegen  
*T.Havinga@jur.ru.nl*

## Abstract

The emergence of transnational private regulation has also triggered the rise of private meta-regulation. Meta-regulation refers to the process through which a regulatory body oversees another regulatory body and sets standards for its activities, governance structure or performance. This article explains the emergence and functions of private meta-regulation by drawing on a comparative study of two transnational private meta-regulators: the Global Food Safety Initiative and the European Advertising Standards Alliance. By assessing the governance design of both meta-regulators, as well as the instruments and scope of meta-regulation, we argue that meta-regulation in this context is most prominently concerned with the bolstering of capacity, credibility and legitimacy of private regulatory regimes and convergence between such regimes.

## Keywords

transnational private regulation – meta-regulation – Food Safety – Advertising Standards – GFSI – EASA

## Introduction

In recent years, scholars from various disciplines have turned their attention to transnational regimes of regulation that are chiefly developed outside

state-driven frameworks. This ‘transnational private regulation’ is complementing, competing and at times serving as an alternative to national and international public law frameworks for the regulation of (global) business across a wide range of industries and sectors.<sup>1</sup> The development has spurred scholars to revisit concepts such as legitimacy and accountability,<sup>2</sup> and challenges public actors to rethink regulatory policies.<sup>3</sup>

The emergence of transnational private regulation has also led to the rise of private meta-regulation. With the term ‘meta-regulation’ we refer to processes through which a regulatory body oversees another and sets standards for its activities or performance. In the public domain, meta-regulation may involve the devolution of regulatory activities by a statutory body to private actors with the view to enhance voluntary rule compliance, awareness of responsibilities among the regulated and reduce public enforcement costs.<sup>4</sup> However, in the private domain the rationale for meta-regulation appears to be a different one. We contend that meta-regulation in the private domain is less concerned with the goal of enhancing rule compliance and reducing administrative burdens – as is usually discussed in the literature in relation to government-led meta-regulation – but instead is prominently concerned with the bolstering of the capacity, credibility and legitimacy of private regulatory regimes, and the coordination and convergence between such regimes.

Similar functions of meta-regulation were recently highlighted by several authors. Loconto and Fouilleux have focused on the rise of the ISEAL Alliance as the global association for social and environmental standards.<sup>5</sup> They argue

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

2 Ibid 14–15. See also Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ (2008) 2(2) *Regulation & Governance* 137.

3 The OECD released a study on ‘International Regulatory Co-operation’ (April 2013) in which it flags transnational private regulation as a relevant trend to be taken into account by government in developing policies on international cooperation between regulatory actors. The OECD report is available at <<http://www.oecd.org/gov/regulatory-policy/international-regulatory-co-operation-9789264200463-en.htm>> accessed 30 May 2016.

4 This is also how Ayres and Braithwaite present their model of ‘enforced self-regulation’, which is considered by many to be the most salient form of meta-regulation. See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 110–116.

5 Alison Loconto and Eve Fouilleux, ‘Politics of Private Regulation: ISEAL and the shaping of transnational sustainability governance’ (2014) 8(2) *Regulation & Governance* 166.

that ISEAL facilitates the shaping of an organizational field for sustainability by institutionalizing and legitimating specified actors, tools and practices. More specifically, they contend that:

ISEAL actively builds institutions to shape, provide cohesiveness to, and discipline the sustainability field through the development of a series of meta-codes which fulfil two main purposes: harmonizing procedures among ISEAL members, and establishing the borders between insiders (credible standard schemes) and outsiders (non-credible standards schemes).<sup>6</sup>

Derkx and Glasbergen compare ISEAL with other transnational private meta-regulators in the field of fair labor (JO-IN), sustainable tourism (GSTC), and organic agriculture (ITF).<sup>7</sup> They note that all four organizations use two 'pathways' to enhance the effectiveness of sustainability standards: one concerns the procedural harmonization of the standard setting and certification processes to negotiate 'consensus standards' and the other concerns the activities 'to enhance the capacity of individual standards initiatives to bring about, verify, and reward compliance with these standards'.<sup>8</sup> Accordingly, they also highlight the capacity-building and coordination functions of private meta-regulation at the transnational level.

We contribute to the current debate on the meta-regulation of transnational private standards by engaging in a comparative analysis of two sector-specific transnational private meta-regulators not addressed by the studies noted above, namely, the Global Food Safety Initiative (GFSI) in the food industry, and the European Advertising Standards Alliance (EASA) in the advertising industry. Both organizations develop guidelines, benchmarks and performance indicators for other private bodies involved in the transnational regulation of business activities by processes of standard setting, compliance monitoring and enforcement. Both meta-regulators are industry-driven and have proven to be influential in shaping both industry practices and public policy making. The comparative analysis is focused around four principled and interlinked questions: (i) What has driven the emergence of meta-regulation in the private

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6 Ibid 14.

7 Boudewijn Derkx and Pieter Glasbergen, 'Elaborating Global Private Meta-Governance: An Inventory in the Realm of Voluntary Sustainability Standards' (2014) 27 *Global Environmental Change* 41.

8 Ibid 49.

regulatory domain?; (ii) What are the functions of private meta-regulation?; (iii) What is its relationship with public regulation and regulators?; and (iv) How and to what extent does private meta-regulation contribute to the legitimization of transnational private regulation? These questions contribute to answering the central question of this article: How can we explain the emergence of meta-regulation in transnational private regulation?

The article is structured as follows. We first define the concept of meta-regulation (1). Next, we examine the ways in which meta-regulation has emerged in transnational private regulatory regimes in the issue areas of food safety (2) and advertising (3). The findings of this analysis are discussed and compared afterwards (4). Concluding observations follow (5).

## 1 Debating Meta-Regulation

What do we mean by ‘meta-regulation’? As Coglianese and Mendelson have noted, there is no agreement on the definition of meta-regulation.<sup>9</sup> While for some scholars the concept is linked to the ‘state’s oversight on self-regulatory arrangements’,<sup>10</sup> for others the concept is wider and involves the use of control and steering mechanisms between different regulatory actors and levels of regulation. Parker appears to capture the common core of the study of meta-regulation by holding that it principally concerns the activity of ‘regulating the regulators, whether they be public agencies, private corporate self-regulators or third party gatekeepers’.<sup>11</sup> As such, a meta-regulatory approach changes the function of the regulatory body: rather than carrying out regulatory tasks itself, the body is primarily concerned with the oversight and control of regulatory activities undertaken by other actors, possibly also at other levels of regulation. The regulator (the meta-regulator) may respond if the other (the first-tier regulator) does not meet the conditions the former set as part of the framework for meta-regulation. Accordingly, the role of the meta-regulator

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9 Cary Coglianese and Evan Mendelson, ‘Meta-Regulation and Self-Regulation’ in Martin Cave, Robert Baldwin and Martin Lodge (eds.), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 147.

10 Bridget Hutter, ‘Risk, Regulation and Management’, in Peter Taylor-Gooby and Jess Zinn (eds.), *Risk in Social Science* (Oxford University Press 2006) 215.

11 Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press 2002) 15.

changes – what Osborne and Gaebler have famously called – from *rowing* to *steering*.<sup>12</sup>

There are many different forms of meta-regulation. Most discussed in the literature is the public control and oversight of private regulatory activities. In this context, government control over *individual* and *collective* initiatives of private regulation have been analyzed through the lens of meta-regulation. In the individual form, the thrust of meta-regulation is concerned with the regulation of company-specific risk management systems. Then, meta-regulation overlaps with the concepts of ‘enforced self-regulation’,<sup>13</sup> ‘management-based regulation’<sup>14</sup> and ‘process-oriented regulation’.<sup>15</sup> In all of these forms of meta-regulation attention is drawn to the importance of law and legal institutions in building up the commitment and capacity among firms to self-regulate and resolve non-compliance internally and without the help of public actors.<sup>16</sup> In the collective form, industry-wide regulatory activities are submitted to public control and oversight. This principally concerns the regulation of self-regulatory bodies through law or executive action. Bomhoff and Meuwese have argued that even the disciplines of Better Regulation and Private International Law may constitute examples of meta-regulation for regimes of transnational private regulation, because these disciplines include rules that regulate the activities and performance of these regimes.<sup>17</sup>

Meta-regulation, in our view, is not limited to the control and oversight by public actors of private regulatory activities. If regulation is broadly conceived as being concerned with the attempt to influence the behavior of others that is non-exclusionary to the state and that involves processes of standard-setting,

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12 David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, Reading, MA: Addison-Wesley 1992 as cited in Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press 2011) 147.

13 John Braithwaite, ‘Enforced Self-Regulation: A New Strategy for Corporate Crime Control’ (1982) 80(7) *Michigan Law Review* 80(7), 1466–1507; Robyn Fairman and Charlotte Yapp, ‘Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement’ (2005) 27(4) *Law and Policy* 491.

14 Cary Coglianese and David Lazer, ‘Management-Based Regulation: Prescribing Private Management to Achieve Public Goals’ (2003) 37(4) *Law and Society Review* 691.

15 Sharon Gilad, ‘It runs in the family: Meta-regulation and its siblings’ (2010) 4(4) *Regulation & Governance* 485.

16 Baldwin, Cave and Lodge 2011 (n 12) 149.

17 Jacco Bomhoff and Anne Meuwese, ‘The Meta-regulation of Transnational Private Regulation’ (2011) 38(1) *Journal of Law and Society* 138.

monitoring and enforcement,<sup>18</sup> meta-regulation is not a strategy the use of which is restricted to public actors, but may be applied by private actors vis-à-vis both public and private regulators.<sup>19</sup> Importantly, the activity that is subject to meta-regulation also may not be limited to one specific phase of the regulatory process, and may address standard-setting, monitoring and enforcement activities, or a combination thereof. A meta-regulator may thus set criteria only for the standard-setting activities of another regulator, while not addressing the latter's monitoring and enforcement activities. A regulator may also engage with another regulator for the specific purpose of monitoring and enforcement, while retaining full control over its own standard-setting.<sup>20</sup> This also implies that the rules being monitored and enforced through a meta-regulatory approach need not necessarily be meta-regulatory in nature, although that can be the case.

We observe that, in much of the literature on meta-regulation, there is a focus on (A) the oversight and control activities of public actors over private regulatory activities; (B) with the objective to enhance voluntary rule compliance, awareness of responsibilities among the regulated and reduce public enforcement costs.<sup>21</sup> Developments in the field of transnational private regulation do not match the configuration and objectives of the meta-regulation previously described in much of the literature. In the absence of competent public actors, meta-regulation in this field is pursued by the industry and civil society. We argue that their activities do not merely concern

18 Black has coined such understanding of regulation as 'decentred' or 'polycentric'. See Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103. See also Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in Jacint Jordana and David Levi-Faur (eds.), *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar 2004).

19 See also Scott, who holds that the core of meta-regulation is the idea that 'all social and economic spheres in which governments or others might have an interest in controlling already have within them mechanism of steering – whether through hierarchy, competition, community, design or some combination thereof.' Then, it is a matter of tuning into that mechanism of steering for the meta-regulation to manifest itself. See Colin Scott, 'Regulating Everything: From Mega- to Meta-regulation' (2012) 60(1) *Administration* 61, 82.

20 For an analysis of how the public authority responsible for the monitoring and enforcement of food safety regulations in the Netherlands seeks to engage with private actors to devolve a share of this monitoring and enforcement tasks, see Paul Verbruggen and Tetty Havinga, 'Food Safety Meta-Controls in the Netherlands' (2015) 6(4) *European Journal of Risk Regulation* 512.

21 For example, see Ayres and Braithwaite (n 4) and Parker (n 11).

the monitoring and enforcement of transnational private standards, but also include standard-setting procedures and impact assessment.<sup>22</sup> Also, the objectives of this meta-regulation differ. As we contend, the goal is not primarily related to increasing rule compliance and administrative burden relief, but rather to enhancing the capacity, credibility and legitimacy of private regulatory regimes, as well as the coordination and convergence between such regimes. We will support our argument by developing a comparative analysis of the Global Food Safety Initiative and the European Advertising Standards Alliance in the following sections.

## 2 Global Food Safety Initiative

### 2.1 *Transnational Private Food Safety Standards*

Transnational private food safety standards play a significant role in the regulation of global food supply chains. In the aftermath of the BSE (Bovine spongiform encephalopathy) crisis and other food safety incidents, the food processing industry and major food retailers developed initiatives for decreasing food safety risks and increasing consumer confidence in food. In the 1990s, these industry actors started to develop their own food quality control schemes to evaluate to what extent their suppliers complied with food safety standards.<sup>23</sup> Since then these private schemes have evolved from individual company standards into national, transnational and even global schemes adopted collectively by industry actors.<sup>24</sup>

Today, the leading transnational private food safety standards are the schemes of the BRC (British Retail Consortium Global Standard for Food Safety), IFS (International Featured Standards Food standard), SQF (Safe Quality Food standard), Global G.A.P. (Global Partnership for Good Agricultural

22 For ISEAL see Loconto and Fouilleux (n 5) and Fabrizio Cafaggi and Andrea Renda, 'Public and Private Regulation. Mapping the Labyrinth' (CEPS Working Document No 370/2012) 20–23 <<https://www.ceps.eu/publications/public-and-private-regulation-mapping-labyrinth>> accessed 27 May 2016.

23 For an early account, see also Tetty Havinga and Alex Jettinghoff, 'Self-Regulation in Business: Beyond Associational Self-Regulation' in Francis van Loon and Koen van Aeken (eds.), *60 maal recht en 1 maal wijn: Rechtssociologie, Sociale problemen en justitieel beleid* (Liber Amicorum Prof. Dr. Jean Van Houtte, Acco 1999) 609.

24 For an overview, see Spencer Henson and John Humphrey, 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (Paper Prepared for FAO/WHO, 2009) <<http://www.fao.org/docrep/012/i1132e/i1132e00.pdf>> accessed 15 January 2016.



Practices Standards)<sup>25</sup> and FSSC 22000 (Food Safety System Certification). These organizations are governed by multinational retailers, representatives from national retail associations and/or large multinational food manufacturers. They have developed detailed food safety standards complemented by sophisticated certification schemes to ensure compliance with these standards. Food manufacturers and retailers impose the private standards on their suppliers to ensure that the products they source from them meet high quality and safety standards. This practice is very attractive, in particular as products are sourced from around the world, because it helps to reassure retailers and branded manufacturers of the capability and competence of the supplier, and reduces the need for retailers and manufacturers to carry out their own audits. Moreover, the main costs of the standards are borne by the suppliers since they pay for the certification audits verifying compliance with the standards. Food manufacturers and retailers are therefore the main actors driving the emergence and global dissemination of transnational food safety standards.

## 2.2 *The Development of the GFSI*

Food manufacturers and retailers not only cooperated in developing collective food safety standards, they also engaged in another process to ensure a degree of coordination and harmonize between these standards. In 2000, a number of major retailers already involved in the adoption and implementation of private food safety standards established the Global Food Safety Initiative (GFSI) in order to promote globally accepted food safety standards.<sup>26</sup> The mission of GFSI is 'continuous improvement in food safety management systems to ensure confidence in the delivery of safe food to consumers.'<sup>27</sup> In short, GFSI seeks to ensure a baseline set of private food standards across the globe and reduce suppliers' costs incurred from repetitive certification audits.<sup>28</sup> It encourages industry, government and civil society to share knowledge and strategy for

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25 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.

26 See in greater detail Tetty Havinga and Paul Verbruggen, 'The Global Food Safety Initiative and state actors: Paving the way for hybrid food safety governance', in Paul Verbruggen and Tetty Havinga (eds), *Hybridisation of Food Governance: Trends, Types and Results* (Edward Elgar forthcoming).

27 'GFSI White Paper – Enhancing Food Safety Through Third Party Certification' (GFSI 2011) <[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 April 2016.

28 Global Food Safety Initiative, Year Book 2004.

food safety and to develop best practices by organizing meetings, conferences, focus days and training for food safety managers.

GFSI is a case of private meta-regulation; it does not adopt a food safety standard but rather standards for food safety schemes. In the early years the option of developing one global food safety scheme was the subject of debate among the GFSI members. Eventually, it was decided that a uniform global standard would not be developed and instead the core regulatory activity of GFSI would concern the benchmarking of pre-existing or new schemes against a common denominator, a meta-standard called the GFSI Guidance Document. GFSI thus sets baseline requirements for food safety standards and intends to improve efficiency and reduce costs of auditing and certification throughout the food chain. GFSI's aim is to ensure that all the food products sold meet this standard.

By now, thirteen food safety schemes owned by 9 different organizations have been benchmarked against the GFSI Guidance Document (sixth edition) and thus recognized by GFSI.<sup>29</sup> This includes all major transnational food safety standards. Many transnational food retailers and manufacturers require from their suppliers certification against a GFSI-recognized scheme.<sup>30</sup> Already in 2006, a survey of the world's leading supermarkets found that 75-99% of food supplies sold by them are certified against a GFSI benchmarked scheme.<sup>31</sup> This means that in practice suppliers often do not have a choice to refrain from obtaining certification against a GFSI-recognized scheme, because this would prevent them from accessing the most profitable markets (Europe, North America and Australia).

The importance GFSI thus has within the domain of food safety governance begs the question of how this body is organized, who holds voting power, and indeed how this body legitimizes its activities towards relevant stakeholders in the area? As noted above, GFSI was initiated by a group of international retailers in order to agree on globally accepted food safety standards. The taskforce

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29 These involve standards of BRC, CanadaG.A.P, FSSC 22000, GLOBALG.A.P. and IFS. For a full overview, see <<http://www.mygfsi.com/schemes-certification/recognised-schemes.html>> accessed 1 April 2016. Also China HACCP has applied for GFSI recognition, but as a government-owned standard it could not meet all requirements in the Guidance Document. It is now found equivalent with the GFSI technical requirements in the Guidance Document only.

30 In 2013, 24 retailers, 10 food processing firms and 4 catering companies accepted GFSI-recognized standards <<http://www.mygfsi.com/schemes-certification/benchmarking/benchmarking-overview.html>> accessed 1 April 2016.

31 Linda Fulponi, 'Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries' (2006) 31(1) Food Policy 1, 6.

heading its creation was open to all retailers worldwide. In January 2003, GFSI Taskforce consisted of 52 members, all retailers, mainly from Europe. GFSI's organizational structure has changed, however. GFSI is no longer a membership organization, but a nonprofit foundation under Belgian law. It is managed by the Consumer Goods Forum, a membership organization of over 400 retailers, manufacturers, service providers and other stakeholders across 70 countries. GFSI's Board is an industry-driven organization made up of representatives from retail, distribution, food service, manufacturing and primary produce companies. The majority of the Board are Consumer Goods Forum members. Board seats are not open for representatives of associations, scheme owners, certification or accreditation bodies and consumer organizations. The composition of the Board in March 2016 shows that retailers still have a majority vote but share decision-making powers with other stakeholders (mainly branded food manufacturers).<sup>32</sup> The Technical Working Groups, which provide technical input for the development of the GFSI Guidance Document, consist of experts from retailers, manufacturers, food service operators, standard owners, certification bodies, accreditation bodies, and industry associations. The Governance model 2015 introduced a more balanced stakeholder and geographical representation in the Board and working groups.<sup>33</sup> Local groups and a Stakeholder Forum complement the governance structure. Participation in the annual meetings of the Stakeholder Forum is open to anybody with an interest in GFSI, including non-industry stakeholders such as accreditation bodies, academia, and consultants. Consumer organizations and other civil society groups are not mentioned in the governance model. The relationship between GFSI and the scheme owners that apply for GFSI recognition is governed by a contract the content of which is not publicly available.

Over time, stakeholder participation in GFSI has broadened in several respects. Not only have representatives of food service providers and food manufacturers now become GFSI Board members along with food retailers, also, the participation of stakeholders from outside the food industry in GFSI's regulatory activities is encouraged in consultation rounds, focus days and stakeholder meetings. Moreover, not only retailer-led food schemes are recognized, but also schemes from food manufacturers and farmers' organizations. Another dimension of a wider stakeholder involvement in the regulatory activities of GFSI is its strategy to reach out to the food industry in countries outside

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32 On 8 March 2016, the GFSI website lists 19 members of the Board, 10 retailers, 7 manufacturers, 2 food service <[www.gfsi.com](http://www.gfsi.com)> accessed 8 March 2016.

33 GFSI, 'GFSI Governance Model and Rules of Procedure' (February 2015) <[http://www.mygfsi.com/files/GFSI\\_Governance\\_Model.pdf](http://www.mygfsi.com/files/GFSI_Governance_Model.pdf)> accessed 22 February 2016.

Europe and the non-OECD countries. More specifically, in 2008 it launched the Global Markets Programme to build capacity among small and less-developed manufacturers and primary producers to achieve certification against one of the GFSI-recognized schemes.<sup>34</sup>

Broadening the scope of participants and engaging with those actors influenced by GFSI's regulatory activities contributes to the legitimacy and credibility of GFSI as it supports its claim to be the global platform for all relevant stakeholders. To pursue that aim, GFSI has also erected the Global Regulatory Affairs Working Group, through which it has started to engage with international governmental organizations such as Codex Alimentarius and the World Trade Organization, as well as with national public food safety agencies such as the Canadian Food Inspection Agency, the US Food and Drug Administration, and *Nederlandse Voedsel- en Warenautoriteit* in the Netherlands.<sup>35</sup> Its aim is to further align public and private efforts in food safety by getting governments to recognize and accept GFSI-benchmarked schemes. GFSI is also collaborating with the Chinese government on food safety.<sup>36</sup> Thus, having gained a recognized position as a promoter of globally accepted standard for food safety standards, GFSI now seeks recognition from public authorities as well. Where GFSI succeeds in this new strategy, it will further harness both its legitimacy and significance in the global market place.

### 2.3 *Meta-Regulation*

GFSI is a benchmarking organization. Food safety schemes that apply for recognition are compared to the GFSI Guidance Document. The first version of the Guidance Document was published in 2001, the current version (Version 6) was published in January 2011.<sup>37</sup> The document specifies the requirements

34 GFSI, 'Global Markets Programme Overview' <<http://www.mygfsi.com/market-access/global-markets-programme/overview.html>> accessed 1 April 2016.

35 Havinga and Verbruggen 2017 (n 26).

36 GFSI has signed several Memoranda of Understanding with Chinese governmental organizations and found China HACCP equivalent to the technical requirements in the GFSI guidelines. See GFSI, 'GFSI embarks on public-private partnership with China's CNCA to accelerate food safety development' (2015) <<http://www.mygfsi.com/news-resources/news/432-gfsi-embarks-on-public-private-partnership-with-china-s-cnca-to-accelerate-food-safety-development.html>> accessed 1 April 2016.

37 GFSI, 'GFSI Guidance Document' (2013) <[http://www.mygfsi.com/gfsifiles/GFSI\\_Guidance\\_Document\\_Sixth\\_Edition\\_Version\\_6.3.pdf](http://www.mygfsi.com/gfsifiles/GFSI_Guidance_Document_Sixth_Edition_Version_6.3.pdf)> accessed 30 September 2015. For an extensive analysis of the GFSI Guidance Document, see Elena Fagotto, 'Industry Food Safety Standards: Public and Private Interest in Global Food Safety' (DPhil thesis, Erasmus School of Law, Rotterdam 2015). The seventh version is expected in mid-2016

that a food safety scheme must implement, the key elements for the production of safe food that must be included in the standard, and lays down rules for the benchmarking process. The GFSI requirements 'are firmly based on the food safety principles laid down by the Codex Alimentarius Commission (Codex), the National Advisory Committee on Microbiological Criteria for Foods (NACMCF), relevant ISO standards, and International Codes of Practice where appropriate'.<sup>38</sup> By referring to such authoritative sources GFSI seeks to further strengthen its legitimacy as the global institution setting the leading benchmark for all food safety management systems.

The GFSI Guidance Document provides criteria for the content and procedures of food safety management systems the food safety standard needs to cover. Furthermore, it comprises requirements for the organization and governance structure of standards, including those related to: ownership and accessibility of the standard; involvement of stakeholders in standard-setting; standard review and revision; conflicts of interest. Likewise, criteria are stipulated for auditing and certification. These involve: audit frequency and duration; accreditation requirements; performance monitoring of certification bodies; notification and product recall procedures in case of regulatory non-compliance; complaints and appeals procedures; as well as requirements to the competence and impartiality of certification body staff. All these requirements, it could be held, contribute in important ways to the legitimacy of private food standards as they seek to establish higher levels of stakeholder involvement, transparency, accountability and auditor independence. Criteria for auditing and certification aim at increasing the credibility of compliance assessments through accredited third party certification. Public accessibility of standard documentation, regular reviews and complaints procedures add to the accountability of the schemes.

A food safety scheme applies for recognition by GFSI by submitting the Application Form and after paying a fee.<sup>39</sup> The GFSI Benchmark Committee assesses the scheme's standards, auditor competence requirements, certification audit program and management system based on the requirements set out in the GFSI Guidance Document. For each application a separate Benchmark Committee is formed. Its members are chosen from a list of 'suitably

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38 GFSI, 'What is the GFSI Guidance Document Sixth Edition' <[http://www.mygfsi.com/gfsifiles/What\\_is\\_the\\_GFSI\\_Guidance\\_Document\\_Sixth\\_Edition.pdf](http://www.mygfsi.com/gfsifiles/What_is_the_GFSI_Guidance_Document_Sixth_Edition.pdf)> accessed May 2014.

39 GFSI, 'Benchmarking Application Completion Guidelines' <[http://www.mygfsi.com/gfsifiles/For\\_Website\\_-\\_Benchmarking\\_Application\\_Completion\\_Guidelines.pdf](http://www.mygfsi.com/gfsifiles/For_Website_-_Benchmarking_Application_Completion_Guidelines.pdf)> accessed 1 April 2016. Information on the applicable fees and the contract between scheme owner and GFSI is not publicly available.

qualified persons that are independent, impartial and technically competent from organizations such as retailers and manufacturers and other appropriate experts', but cannot be 'committed users of the scheme being considered for recognition'.<sup>40</sup> The Benchmark committee shall include a representative from an Accreditation Body.<sup>41</sup>

Recognized schemes need to perform a self-assessment annually. This assessment includes an internal audit.<sup>42</sup> For each new version of the GFSI Guidance Document, recognized schemes need to reapply for recognition. In any event, a re-benchmarking process is required every four years.<sup>43</sup> Re-benchmarking may be a demanding and lengthy exercise. Not all GFSI-recognized schemes reapply to be benchmarked against a new version of the GFSI Guidance Document.<sup>44</sup>

Since the inception of GFSI in 2000, its meta-regulatory standards have expanded globally and evolved in substance, giving attention to a broader set of topics including auditor competence and stakeholder consultations, adding new scopes (agriculture, aquaculture, feed, storage, catering) and focusing on capacity-building for small food firms. GFSI has thus developed into a global private meta-regulator establishing requirements for private food safety standards for the certification of food safety management systems for all sectors of the food supply chain. Multiple stakeholders are involved in the formulation of the Guidance Document. The final decision on the Guidance Document and on recognition of food schemes is taken by large food retailers and manufacturers that staff the Board. GFSI relies on globally accepted norms from the Codex and ISO, and promotes accredited third party certification. GFSI has succeeded in its mission to establish global food safety requirements that are widely accepted. However, in reality, multiple food safety audits continue to exist as some retailers and manufacturers add additional requirements to certification against a GFSI-recognized standard.

The legitimacy of GFSI is essentially based on inclusion of accepted global public and private norms (Codex and ISO), multi-stakeholder participation and

40 GFSI, 'General Benchmark Committee'; GFSI, 'Part I Annex II GFSI Guidance Document Sixth Edition Version 6.1' <[http://www.mygfsi.com/gfsifiles/Part\\_I\\_Annex\\_II\\_GFSI\\_Guidance\\_Document\\_Sixth\\_Edition\\_Version\\_6.1.pdf](http://www.mygfsi.com/gfsifiles/Part_I_Annex_II_GFSI_Guidance_Document_Sixth_Edition_Version_6.1.pdf)> accessed 1 April 2016.

41 GFSI Governance Model 2015 p 26 (n 33).

42 GFSI Guidance (n 65), 2.6.5.

43 GFSI Guidance (n 65), 2.6.5 and GFSI, 2011 (n 27), 10.

44 Examples include EFSIS and Dutch HACCP. See: Lucien Joppen, 'GFSI increases its reach' (2005) 30(2) Food Engineering and Ingredients 46 and <[http://www.foodsafetymanagement.info/net-book.php?op=cms&pageid=53&pageid\\_up=0&nnl=english](http://www.foodsafetymanagement.info/net-book.php?op=cms&pageid=53&pageid_up=0&nnl=english)> accessed 1 April 2016.

widespread acceptance in the market. GFSI has contributed to the growth and development of private food safety schemes with third party certification and has created a forum for discussion, sharing best practices and exchange of knowledge for the improvement of food safety management. The GFSI benchmarking requirements to secure serious, impartial and credible certification procedures also strengthen the legitimacy and reliability of private standards. GFSI is flexible in that it responded to criticism by establishing more opportunities for other stakeholders than retailers to be involved, by including more specific requirements (e.g. frequency and duration of audits), by stricter benchmarking and offering more transparency as regards its regulatory activities. This now translates into the situation where scheme owners refer to GFSI to bolster their own legitimacy and credibility of the scheme. GFSI has thus turned into a sign of global excellence that scheme owners are keen to use to attract new clientele.

### 3 European Advertising Standards Alliance<sup>45</sup>

#### 3.1 *Advertising Self-Regulation*

The European advertising industry has since long developed systems of advertising self-regulation to control the behavior of its members and contribute to public policy objectives such as fair competition, consumer protection and human rights protection. These systems generally operate on the basis of two elements: a code of conduct that lays down the basic rules with which advertising practices and marketing communications must comply, and a mechanism for the adoption, review and enforcement of that code.<sup>46</sup> Trade associations representing the segments of the advertising industry (i.e. advertisers, advertising agencies and the media) set these codes, but often also establish separate self-regulatory organizations (SROs) to oversee the application of such codes at the national level. According to data provided by the industry, the SROs in

45 The following analysis builds on Paul Verbruggen, 'Transnational Private Regulation. Case Study Report on Private Regulation in the Advertising Industry' (for the Hiil project report on 'Constitutional Foundations of Transnational Private Regulation: Emergence and Governance Design', Florence 2011) <[www.hiil.org/privateregulation](http://www.hiil.org/privateregulation)> accessed 1 April 2016.

46 Jean Boddewyn, *Global Perspectives on Advertising Self-Regulation. Principles and Practices in Thirty-eight Countries* (Quorum Books 1992) 9; EASA, *Advertising Self-Regulation in Europe and Beyond: A Reference Guide to Self-Regulatory Systems and Codes of Advertising Practice* (6th edn, Poot Printers 2010) 19.

Europe jointly process between 60,000 and 70,000 complaints on advertising annually.<sup>47</sup>

The codes of conduct applied by the SROs at national level may have their origins in codes of international trade organizations or business consortia that intend to create a level playing field for transnational advertising. The principal institutional actor in this respect is the International Chamber of Commerce (ICC), an association for businesses based in Paris. ICC has promulgated codes of advertising practice since the mid-1930s. In addition, the most recent version of the ICC code continues to serve as a general reference point for local SROs to adopt, review and enforce codes of conduct, in particular in continental Europe.<sup>48</sup> The SROs in France, Belgium, Sweden, Finland and Turkey, for example, still apply the ICC code in full. However, in other countries, such as Germany, Italy and the United Kingdom, the ICC code has been less influential and national advertising laws and politics have shaped the development of the local codes for the most part. Then again, advertising self-regulation did not gain firm ground in all countries in Europe. In Eastern and Central Europe, in particular, few to none robust systems of self-regulation had developed since the early 1990s.<sup>49</sup> Different legal frameworks and national legacies that affect the people's perception of the role of the state and public trust in private entities and their regulation have played a major role in holding back the development of self-regulation in these countries.

### 3.2 *Development of EASA*

It is against this background that the European advertising industry established the European Advertising Standards Alliance (EASA) in 1992. The patchwork of national codes and systems regulating advertising and marketing communications in Europe, each with their own particularities and levels of sophistication, resulted in higher costs for companies wanting to engage in advertising activities in other countries. The European Commission even held that the fragmented structure of private regulation in Europe challenged the creation of the European Internal Market. It threatened to take legislative action if the

47 EASA, '2014: European Trends in Advertising Complaints, Copy Advice and Pre-clearance' (2015) <[http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=2f2qcmwatccq3a24ejjfolzf/2014\\_European\\_Trends\\_in\\_Advertising\\_Complaints\\_Copy\\_Advice\\_and\\_Pre-clearance.pdf](http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=2f2qcmwatccq3a24ejjfolzf/2014_European_Trends_in_Advertising_Complaints_Copy_Advice_and_Pre-clearance.pdf)> accessed 1 April 2016.

48 ICC, 'Consolidated ICC Code of Advertising and Marketing Communication Practice' (2011) <[http://codescentre.com/media/2083/660%20consolidated%20icc%20code\\_2011\\_final%20with%20covers.pdf](http://codescentre.com/media/2083/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf)> accessed 1 April 2016.

49 In the study on 'Global Perspectives on Advertising Self-Regulation' commissioned by the ICC, Boddewyn did not discuss any systems from the Eastern and Central European countries. See Boddewyn (n 46), 45.



industry would not set in place structures that could regulate advertising at the European level.<sup>50</sup>

In response, the European advertising industry established EASA, an international not-for-profit association under Belgian law and based in Brussels. EASA formalized a hitherto ad hoc grouping of SROs from a number of West-European countries that had for some years discussed the coordination of their efforts to regulate transnational industry conduct.<sup>51</sup> This network was given the specific task of overseeing the coordination of advertising self-regulation throughout the European Single Market.<sup>52</sup> Following its mandate, EASA first set up a system for the handling of cross-border complaints about ads. EASA would not resolve these cross-border complaints itself, but was to enable the quick transfer of complaints lodged before an SRO in one country to the SRO in the country where the editorial decision to publicise the advertising was made. The latter regime would then bear responsibility for resolving the complaint on the basis of its own code of conduct and system. Accordingly, EASA assumed a role of coordinating transnational compliance and enforcement activities between its SRO members, without actually engaging in regulatory activities itself and defining the standard of what is fair and decent advertising. This latter task was left to the industry.

Until 2002, EASA's main task was concerned with the operation of the cross-border complaint handling system. This changed in view of two major developments in the early 2000s, namely the adoption of important new European legislation on advertising<sup>53</sup> and the imminent accession of 10 new Member States to the European Union in 2004. Given that existing trade associations had previously done a poor job at adequately lobbying for the interests of the European advertising industry in the legislative process,<sup>54</sup> the industry was

50 Anne Cunningham, 'Advertising Self-regulation in a Broader Context: An Examination of the European Union's Regulatory Environment' (2000) 5(2) *Journal of Promotion Management* 61, 64.

51 EASA, *Advertising Self-Regulation in Europe: An Analysis of Self-Regulatory Systems and Codes of Advertising Practice* (5th edn, Poot Printers 2007) 31.

52 EASA, *EASA Guide* (2nd edn, EASA 1996) 5.

53 In the early 2000s, the revision of two principal Directives regulating advertising was discussed: Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising [1997] OJ 2 290/18, and the so-called 'Television Without Frontiers Directive' – Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ 2 298/23.

54 Armand Mattelart and Michael Palmer, 'shaping the European Advertising Scene - Commercial Speech in Search of Legitimacy' (1993) 1(1) *Réseaux. Communication - Technologie - Société* 9, 13.

determined to create an institution through which it could speak with one single voice in the context of these two developments. In 2002, EASA was restructured to become that institution. No longer was it a network between national SROs, but its membership was extended to include also trade associations representing the industry at the European level. Currently, 27 national SROs from 25 European countries and 16 European industry associations are members of EASA.<sup>55</sup> EASA's Board of Directors is comprised of representatives of its member organizations.<sup>56</sup>

With its membership including both the national SROs and the representative bodies of the European advertising industry, EASA's mandate has also changed. In addition to the handling of cross-border advertising complaints, the organization was also to encourage 'high ethical standards in commercial communications by means of effective self-regulation, while being mindful of national differences of culture, legal and commercial practice.'<sup>57</sup> Accordingly, its mission became to 'promote responsible advertising throughout the Single Market, through best self-regulatory practice, in the interests of both consumers and business.'<sup>58</sup>

### 3.3 *Meta-Regulation*

EASA has principally sought to fulfil its renewed mission by sharing best practice guidance and supporting the creation and development of national private regimes, in particular in Central and Eastern-European countries. In 2002, it first adopted the Common Principles and Operating Standards of Best Practice,<sup>59</sup> which were reaffirmed in the 2004 by the so-called EASA Best Practice Self-Regulation Model. This model:

[D]escribes the various component parts of the model self-regulatory systems which EASA wishes to see in place in all existing EU member states and in Accession countries. It is designed to help EASA and its

55 EASA, 'EASA's members' <<http://www.easa-alliance.org/About-EASA/EASA-Members/page.aspx/155>> accessed 1 April 2016.

56 Both the SROs and European industry members are represented in EASA's Board. For the organisational structure of EASA, see <<http://www.easa-alliance.org/About-EASA/Decision-making-structure/page.aspx/112>> accessed 1 April 2016.

57 EASA, 'What is EASA?' <<http://www.easa-alliance.org/page.aspx/110>> accessed 1 April 2016.

58 EASA, *Advertising Self-Regulation in Europe and Beyond: A Reference Guide* (n 45), 45.

59 Available at <[http://www.easa-alliance.org/binarydata.aspx?type=doc/EN\\_commonprinciples.pdf/download](http://www.easa-alliance.org/binarydata.aspx?type=doc/EN_commonprinciples.pdf/download)> accessed 1 April 2016.

members to evaluate, initiate and develop effective and efficient systems across Europe. It will also help identify areas where investment is needed to develop existing national arrangements in order to improve the provision and operation of self-regulation.<sup>60</sup>

The Best Practice Self-Regulation Model lays down several operational benchmarks for SROs. They concern: (i) industry support; (ii) funding; (iii) governance and administration; (iv) code adoption and review; (v) advice and information on code compliance; (vi) efficient complaint handling; (vii) independent and impartial complaint resolution; (viii) effective sanctioning; (ix) compliance monitoring; and (x) publicity and awareness of self-regulatory activities among industry and the consumers. EASA members made a public commitment to abide by these elements by signing the EASA Advertising Self-Regulation Charter in June 2004.<sup>61</sup> To operationalize the meta-standards set out by the Best Practice Self-Regulation Model and the Charter, EASA developed separate documents called Best Practice Recommendations. These Best Practice Recommendations are developed by the Self-Regulatory Committee, where a number of representatives of EASA's SRO members discuss the technical details for guidelines for SROs. The proposals of the Committee require approval by EASA's Board. The Best Practice Self-Regulation Model, the Advertising Self-Regulation Charter and the Best Practice Recommendations were developed through the Self-Regulatory Committee. The best practice standards set out in these documents provide a common roadmap to the organization and functioning of advertising self-regulation in Europe.

EASA has sought to expand its meta-regulatory role for advertising self-regulation outside Europe. In 2008, it established the EASA International Council on Ad Self-Regulation' which has as its current members the regimes from Australia, Brazil, Canada, Chile, Colombia, El Salvador, India, Mexico, New Zealand, Peru and South Africa.<sup>62</sup> Furthermore, these countries now participate in EASA's cross-border complaint handling system. In addition, in 2009 EASA drafted the so-called International Guide to Developing a Self-Regulatory Organisation for the members of the International Council on

60 EASA, 'EASA Best Practice Self-Regulatory Model' (EASA, 2004) <[http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=ayufse45uivrinab2lt1bh45/EN\\_BestPracticeModel.pdf](http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=ayufse45uivrinab2lt1bh45/EN_BestPracticeModel.pdf)> accessed 1 April 2016.

61 European Advertising Standards Alliance, 'Advertising Self-Regulation Charter' (EASA, 2004) <[http://www.easa-alliance.org/01/MyDocuments/SR\\_CHARTER\\_ENG.pdf/download](http://www.easa-alliance.org/01/MyDocuments/SR_CHARTER_ENG.pdf/download)> accessed 1 April 2016.

62 EASA, 'International Council on Advertising Self-Regulation' <<http://www.easa-alliance.org/page.aspx/245>> accessed 1 April 2016.

Ad Self-Regulation, and indeed also for other non-European countries that want to establish a system of advertising self-regulation. This guide, now in its second version, essentially outlines the same operational standards as the 2004 Best Practice Self-Regulation Model.<sup>63</sup>

In Europe, EASA's meta-standards have been quite influential in driving institutional change and organisational learning among the SROs, slowly harmonising national traditions and institutions, and enhancing the overall performance of local SROs. The SROs that were established since 2002 have based their governance design and operational procedures on EASA's standards, whereas the SROs that already existed have also sought to bring their practices in line with these standards. EASA's annual meetings serve to report on progress on the implementation of the Best Practice Self-Regulation Model, Advertising Self-Regulation Charter and Best Practice Recommendations, and discuss the obstacles SROs encounter in that process. Through guided discussions and examples from fellow SRO members, SROs learn how to improve their operations and performance. EASA uses scoreboards to monitor progress among its SRO members.<sup>64</sup> As SROs have publicly committed to adjust their systems to EASA's meta-standards and simply do not want to be the proverbial black sheep, these scoreboards offer a strong additional incentive to live up to these standards.

It should be stressed, however, that the implementation of EASA's meta-standards also benefited strongly from the backing EASA has received from the European Commission, more specifically the Directorate General for Health and Consumers (formerly SANCO). To push the entire European advertising industry toward a single model of self-regulation, EASA turned to the Commission for support. The Commission, which had some concerns of its own as regards advertising self-regulation,<sup>65</sup> recognized the opportunity this meant

63 EASA, 'International Guide to Developing a Self-regulatory Organisation: Practical Advice on Setting up and Consolidating an Advertising Self-regulatory System' (EASA 2009, 2nd edn. 2014) <[http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=raoblezobxitradfeoonqoko/EASA\\_International\\_Guide\\_Self-Regulatory\\_Organisation\\_2014.pdf](http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=raoblezobxitradfeoonqoko/EASA_International_Guide_Self-Regulatory_Organisation_2014.pdf)> accessed 1 April 2016.

64 EASA, 'Best Practice Implementation by European Advertising Watchdogs. EASA Charter Validation Progress Report 2005–2011' (EASA 2011) <[http://www.easa-alliance.org/binarydata.aspx?type=doc/Best\\_practice\\_implementation\\_in\\_European\\_advertising\\_watchdogs270911.pdf/download](http://www.easa-alliance.org/binarydata.aspx?type=doc/Best_practice_implementation_in_European_advertising_watchdogs270911.pdf/download)> accessed 1 April 2016, 24–27.

65 The concerns emerged in the light of the preparatory work for the Unfair Commercial Practices Directive (No 2005/29/EC). See European Commission, 'Green Paper on European Union Consumer Protection' COM (2002) 531 final of 022.10.2001, 5–7, 14.

to develop self-regulation for advertising across the whole of the EU (including the new accession states in Central and Eastern Europe) and saw to it that EASA's Best Practice Model and Charter commitments were discussed in a wider forum.

In 2005, the Commission held a Roundtable on Advertising Self-Regulation that included staff of the Commission, interested NGOs and representatives from the industry. The concluding report of the Roundtable identified a number of factors that should be used to strengthen the impact of self-regulatory activity and increase the overall effectiveness of SROs.<sup>66</sup> These factors largely overlapped with the elements highlighted by the Best Practice Self-Regulation Model and Advertising Self-Regulation Charter. Accordingly, the Roundtable report has, to a large extent, validated EASA's approach and confirms it as the European standard for advertising self-regulation. This confirmation was a much-desired result for EASA, as it had encountered some resistance within its membership to develop advertising self-regulation along the lines of one particular model.<sup>67</sup> The backing of its efforts by the Commission gave EASA the implicit mandate – and, indeed, a fair degree of legitimacy – to drive further integration of the different national approaches to self-regulation in the domain of advertising.

#### 4 Discussion

The description of the cases of GFSI and EASA highlights various aspects of meta-regulation of transnational private regulation. In discussing and

66 European Commission (DG SANCO), 'Self-Regulation and the Advertising Sector: A Report of Some Discussion among Interested Parties' (2006) <[http://www.easa-alliance.org/binarydata.aspx?type=doc/DGSANCO\\_advertisingRT\\_report.pdf](http://www.easa-alliance.org/binarydata.aspx?type=doc/DGSANCO_advertisingRT_report.pdf)> accessed 1 April 2016, 12–13.

67 This wish by EASA to push on is recognized in the Roundtable report, which holds: [T]here is a clear commitment on the part of some, if not all, [self-regulation]-practising sectors of industry to deliver increasingly high quality self-regulation, and to deliver it more evenly across the enlarged EU. This is certainly the case for EASA, which has made a public commitment to improve coverage and performance and has reached out to EU Authorities and others for help. The message heard from EASA is that they cannot deliver their vision alone. If business is to commit the willpower and resources needed to improve self-regulation across the EU 25, there seems to be a need for clear public leadership to the effect that business should be doing this.

European Commission 2006 (n 66), 8.

comparing the two meta-regulators and their activities, we draw attention to: (i) the governance design of the organizations; (ii) the form and scope of meta-regulation they produce; (iii) the function of that meta-regulation; (iv) compliance with meta-regulation; and (v) the role public actors have in meta-regulation.

#### 4.1 *Governance Design of Meta-Regulators*

Both GFSI and EASA are international non-profit organizations under Belgian law, set up specifically to promote the international cooperation and convergence of existing standards. However, the governance structures of EASA and GFSI show significant differences. The most important is that EASA is an association setting meta-regulatory standards for its own members, which are in part organized at the national level. GFSI, by contrast, is a foundation setting guidelines for food safety standards that are not directly represented in its Board, which consists of multinational corporations in the food retail, food processing and food service sectors. Accordingly, the meta-regulatory activities undertaken by EASA take the form of what has traditionally been described in the literature as 'self-regulation'; the regulatory standards are adopted by those addressed by the standards. In other words, the regulator coincides with the regulatees and this essentially comes down to 'the disciplining of one's own conduct by oneself'.<sup>68</sup> The meta-regulatory standards of GFSI move beyond the traditional concept of self-regulation because the regulators are not (representatives of) the regulatees.

Nevertheless, it should be stressed that close ties exist between GFSI and addressees of its meta-standards as the membership of GFSI's Board in part overlaps with that of the addressees. The large retailers and manufacturers that have a seat in the GFSI Board may themselves be members of trade associations that have benchmarked their standards against the GFSI Guidance Documents. Retailers like Metro, Royal Ahold and Coles, for example, are represented in both the board of GFSI and the board of GFSI recognized food safety schemes such as IFS, Global G.A.P., SQF and BRC. Retailers and manufacturers participating in GFSI committees are also member of the trade associations of food retailers or food manufacturers that own the food safety schemes that are regulated by GFSI.

Both the case of GFSI and of EASA show that new stakeholders have been included in the governance structure of the meta-regulatory bodies. These changes have enhanced the legitimacy of the meta-regulators and increased their capacity to coordinate between conflicting interests in the industry. At its

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68 Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *Modern Law Review* 24, 26.

start, GFSI used to be a purely retailer-driven initiative, with large food manufacturers and food services subsequently also gaining representation in the Board. The GFSI Technical Committees that provide input to the GFSI Guidance Documents include representatives of other stakeholders such as scheme owners (the direct addressees of the regulations), certification and accreditation bodies (indirect addressees) and industry associations (representing firms that undergo certification or ask their suppliers to be certified). The Stakeholders Forum broadens the participation of stakeholders in discussing guidelines and developments to organizations outside the food industry. However, the formal decisions on guidelines and recognitions are taken by the Board, which includes representatives of large corporations that buy certified food products. Suppliers and certification industry are only represented at the level of the Technical Committees and have no vote at the Board. The GFSI governance model does not mention consumer organizations at all.

EASA has developed from a network of national SROs into an association including both SROs and industry associations as its constituent members. It does not formally involve non-industry representatives (such as consumer organizations or other stakeholders) in the development, monitoring and enforcement of its meta-regulatory standards. Consistent with the traditional conception of self-regulation, it only includes those parties most directly addressed by the meta-standards, namely the SRO's and industry associations. Recently, EASA has also held a public consultation on its Best Practice Recommendation on Online Behavioral Advertising. While it has thus involved outsiders in the development of its meta-standards, their role remains limited to advice and they do not have any say on the adoption of these standards. Compared to GFSI, it thus appears that EASA is a more 'closed' organization. In reality, it involves all industry parties directly affected by private regulation in its governance design, whereas GFSI does not. Accordingly, industry representation is more carefully balanced in the governance structure of EASA than in GFSI. This strengthens EASA's legitimacy claim as being the 'single voice' of the European advertising industry.

#### 4.2 *Scope and Instruments of Meta-Regulation*

How do GFSI and EASA regulate and what is the scope of the meta-regulatory standards these bodies adopt? We find strong similarities in the way in which GFSI and EASA pursue their meta-regulatory activities. Both organizations do not define the substantive standards on the basis of which compliance by the regulated firms is assessed. Here, they refer to authoritative standards developed by other international institutions (e.g. ISO or the Codex Alimentarius Commission in the case of GFSI or the ICC or the European legislature in the

case of EASA). Instead, the organizations focus on procedural aspects of regulation. In both cases documented best practice guidance (GFSI's Guidance Document and EASA's Best Practice Recommendations) constitute the main instruments of meta-regulation. In these documents, we find three levels of meta-regulation. The first level concerns guidance on the governance design of private regulatory regimes. For example, the GFSI Guidance Document stipulates that schemes must have a clearly defined governance policy and organizational structure and they should ensure there is no conflict of interest that could call into question the impartiality and integrity of certification bodies. Furthermore, schemes developed, managed or owned by a certification body will not be accepted. EASA also adopts guidelines that concern governance issues. It has, for example, set Best Practice Recommendations on complaint handling that require the establishment of a complaints board ('jury') that could independently and impartially assess complaints brought before it. An appeals procedure in the form of an independent review is also required. To accommodate these elements in their systems, several SRO members have had to revise their governance structure.<sup>69</sup> Furthermore, EASA's guidelines on the funding of SROs and their standards of service have also challenged SROs to reconsider some of their governance design.

A second level of meta-regulation included in the guidelines adopted by GFSI and EASA relates to the standard-setting activities of regulatory regimes. For example, GFSI requires from applicant standard owners that direct stakeholders are included in standard-setting processes. In addition, the GFSI Guidance Document also prescribes certain norms, such as those developed by the Codex, which the standards of the benchmarked schemes have to meet, depending on the scope for which the scheme is benchmarked. EASA also employs standards that prescribe the way in which SROs should adopt codes of practice and the normative documents upon which these standards should be based. The Best Practice Recommendation of EASA on code drafting and public consultation clearly define how SRO should draft and revise their normative documents. More generally, EASA promotes the use of the Consolidated ICC Code of Advertising and Marketing Communication Practice as the common substantive baseline for codes of practice in Europe and around the world.

A third layer of meta-regulation concerns monitoring and enforcement activities employed by private food safety certification schemes and SROs. A major part of the GFSI Guidance Document is concerned with the way in which the schemes have designed their certification processes. Following the norms produced by ISO, GFSI requires, among other things, that the certification

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69 Verbruggen (n 45), 83–84.



procedures meet specific criteria for the frequency and duration of audits, and are performed by accredited third party certification bodies. This emphasis on the design of certification procedures can be explained by the importance that GFSI attributes to raising the level of integrity and credibility of private standards. Since these standards involve paid-for verification audits that are performed by commercial bodies, their integrity and independence is always at risk. A careful governance design such as the separation of advice and auditing services in certification bodies contributes to their credibility. EASA's meta-standards are adopted for both monitoring and enforcement activities by SROs. However, unlike GFSI EASA draws specific attention to the complaint handling and enforcement of codes of conduct. This can be explained by the nature of the enforcement activities of SROs. These are complaint-based and involve very little proactive monitoring. In fact, EASA has adopted only one guidance document on compliance monitoring against and at least six documents dealing explicitly with enforcement.<sup>70</sup>

The form and scope of the meta-regulation pursued by GFSI and EASA should also be seen as similar because they both leave ample space for participating regulatory regimes to 'go beyond' their meta-standards. Furthermore, both bodies do not specifically prescribe how these lower level regimes should implement the meta-standards. In this sense, the guidance of GFSI and EASA can be qualified as a sort of minimum harmonization that is akin to that of the European Union in harmonizing the laws of Member States through the adoption of European Directives. By following this approach, GFSI and EASA enable the construction of an international level-playing field for private food safety certification schemes and SROs respectively. An important difference with EU Directives, of course, is the degree of legal enforceability of compliance of the rules. However, as we will discuss now, GFSI and EASA have several non-legal mechanisms in place to ensure compliance with their meta-standards.

#### 4.3 *Compliance with Meta-Regulation*

How is compliance with meta-regulatory standards of GFSI and EASA assessed and enforced? In short, GFSI has a formalized assessment procedure laid down in its Guidance Document. Assessment with the meta-standards by EASA is more fluid: the timing, scope and result of assessment are less clear and these are addressed to the SROs in an informal way. The final decision in GFSI is

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70 These are the Best Practice Recommendations on complaint handling, confidentiality and identity of the complainant, claims substantiation, jury independence, publication of decisions, and online behavioral advertising.

binary (recognition or not), while EASA's assessment does not end in a final decision, but rather in performance scores (green, orange or red) across a variety of elements included in the meta-standards. Orange or red scores will translate into peer pressure from EASA's Board of Directors and fellow SROs, but is not formally sanctioned.

In the case of GFSI, the assessment of compliance with the Guidance Document essentially coincides with the benchmarking exercise. Compliance with the standards of the Guidance Document leads to recognition of the scheme by the GFSI. After recognition, the GFSI does not actively enforce compliance with these standards. The benchmarking process is carried out again after the Guidance Document has been revised. Such a re-benchmarking process is required every four years.<sup>71</sup> If the scheme owner then no longer complies with the Guidance Document it simply loses its status of GFSI-recognized scheme. In the period between the recognition of the private food safety scheme and the adoption of a new version of the Guidance Document, the GFSI shall annually audit recognized schemes based on self-assessment that comprises an internal audit.<sup>72</sup>

In the case of EASA, compliance with the meta-regulatory standards is not assessed through a formal benchmarking process. Instead, the assessment of the level of compliance of the SROs with the standards set out in the Best Practice Self-Regulation Model, the Advertising Self-Regulation Charter and the Best Practice Recommendations is based on self-reporting and monitoring by the Board of Directors. Compliance with the Best Practice Self-Regulation Model and Best Practice Recommendation is not enforced formally, since both are intended as guidelines for best practice for the individual SRO members. Both remain non-binding and their implementation is subject to the context of national public laws and regulations, as well as negotiations with national industry representatives.<sup>73</sup> The Advertising Self-Regulation Charter, on the other hand, can be considered binding for EASA members as they are required to sign the Charter as a legal obligation under EASA's rules of association. Enforcement of the Charter has only been pursued informally, however, mainly through peer pressure from fellow SRO members at EASA's annual meetings and consultations with the Board of Directors or EASA's Secretariat.

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71 GFSI, Guidance (n 38) 2.6.5 and GFSI White Paper 2011 (n 27) 10.

72 GFSI Guidance (n 38) 2.6.5.

73 See EASA, 'Digital Marketing Communications Best Practice' (Brussels 2008) <[http://www.easa-alliance.org/binarydata.aspx?type=doc/Full\\_DMC\\_report\\_PRINT\\_wofEDMA\\_annex\\_new.pdf/download](http://www.easa-alliance.org/binarydata.aspx?type=doc/Full_DMC_report_PRINT_wofEDMA_annex_new.pdf/download)> accessed 1 April 2016, 6.

#### 4.4 *Functions of Meta-Regulation*

The meta-regulatory standards adopted by GFSI and EASA fulfill in part the same functions. In general, it can be held that both meta-regulators seek to contribute to enhancing the regulatory capacity of private food safety certification schemes and SROs. It might even be held that GFSI and EASA have been quite successful in achieving that goal. In the case of GFSI, the consecutive versions of the Guidance Document have each raised the bar for private food safety schemes requiring ever-stricter conditions for audit independence, quality and scope. As for EASA, its guidance documents have been influential in triggering institutional changes in code development and independent complaint-handling that have strengthened advertising self-regulation in Europe. These achievements, ultimately, also contribute to enhancing the credibility and legitimacy of the transnational private regulatory regimes in the field of food safety and advertising. In fact, compliance with the GFSI and EASA procedural meta-standards is now considered the industry standard that scheme owners and SROs should adhere to. When they do, they are generally keen to stress that as a sign of excellence, increasing their credibility and legitimacy in the regulatory arena.

Another major function of meta-regulation as pursued by GFSI and EASA is that it plays a significant role in coordinating and harmonizing different private standards and regimes. Both the GFSI benchmarking process and EASA best practice guidance steer private standards and regimes toward convergence on a single (but minimum) standard for private regulation. GFSI and EASA both constitute a forum for discussion on how to achieve that convergence, for example, by disseminating best practices and new developments. The background of the convergence differs, however. In the case of GFSI, private certification schemes that apply for GFSI recognition compete for suppliers that obtain certification and for retailers and manufacturers to accept certification against their standard. This competition and the diverging standards were costly and inefficient for both buyers and suppliers because of the high costs triggered by multiple audits and certification. Efficiency concerns were therefore a principle driver for the establishment of GFSI. In the case of EASA, competition between SROs is absent because the regulatory activities and influence is defined by the national territory of the SROs. While different national models of advertising self-regulation raise costs for advertisers that engage in transnational advertising activities, the convergence set in place by EASA is less cost-driven than by GFSI. The major drivers for EASA's activities were instead the pressures coming from the European Commission to better coordinate self-regulation at the European level and the advent of new EU legislation on advertising.

This background in part explains why the meta-regulation of GFSI has also developed a function that is different from the meta-regulation of EASA. GFSI's benchmarking exercise plays a prominent role in achieving market access. Recognition by the GFSI enhances the credibility and therefore also the marketability of the scheme among suppliers and buyers. The suppliers possessing a certificate of a GFSI-recognized scheme can also benefit from that recognition as this implies that a host of international retailers and manufacturers will accept their products. In many markets it is fast impossible to trade without certification against a GFSI recognized food safety scheme. For retailers, a higher uptake of GFSI-recognized scheme by suppliers may in turn lead to easier sourcing of products worldwide without carrying out audits or the need to work with preferred suppliers. In the case of EASA, by contrast, market access is not a function of meta-regulation. Instead, EASA's activities focus on coordination and bringing together of different territorially limited self-regulatory systems.

#### 4.5 *Role of Public Actors*

Finally, attention must be drawn to the role that public institutions play in the development of meta-regulation. Whereas this role is strong in the case of EASA, meta-regulation of GFSI was until recently developed autonomously by the food industry without much collaboration with public actors. GFSI bases its meta-standards in part on norms adopted by the Codex, an expert body established by the Food and Agricultural Organization (FAO) and the World Health Organization (WHO) of the United Nations. The participation of representatives of public organizations in the GFSI is limited to a few members in the former Advisory council and a FAO representative in the Global Regulatory Affairs Working Group. The latter group has to develop a work plan to 'actively engage governments in recognizing and accepting GFSI benchmarked schemes as an effective and efficient tool for global food safety management' and 'actively engage and build relationships with CODEX Alimentarius and WTO [...] to further align industry and government efforts in food safety.'<sup>74</sup> Now, having somewhat matured, GFSI seeks formal recognition by national and international governments and aims at integrating its meta-standards with the Codex and WTO (SPS) requirements.<sup>75</sup> GFSI is a pivotal global actor

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74 GFSI, 'Global Regulatory Affairs' <<http://www.mygfsi.com/structure-and-governance/gfsi-technical-committee/global-regulatory-affairs.html>> accessed May 2014. International Forum on Food Safety, 'The GFSI Global Regulatory Affairs Working Group: What is it and what is it doing?' <<http://www.ifofs.org/WhatsNew/2013-04-04/58.html>> accessed 1 April 2016.

75 See in detail Havinga and Verbruggen 2017 (n 26).

whom public actors can no longer disregard. The rise of GFSI has significantly strengthened the capacity of the industry to lobby in this field and it would not surprise us if GFSI would be successful in doing so.

In the case of EASA, by contrast, the role of public actors, in particular the European Commission, is key to understanding the impact and function of EASA's meta-regulatory standards. As noted above, the concluding report of the 2005 Roundtable on Advertising Self-Regulation constituted a firm confirmation by the Commission of EASA's approach to enhance the operation of advertising self-regulation in Europe. It effectively put EASA in the driver's seat to lead the further coordination and harmonization of the different national approaches to self-regulation in the European advertising industry. The informal delegation of the regulation of advertising practices implied by this move shows an important recognition of EASA's regulatory activities and genuinely offers it a degree of legitimacy.

## 5 Conclusion

This article discussed the emergence of private meta-regulation in transnational private regulation. Several factors drive the rise of meta-regulators in this field. By analyzing the meta-regulatory activities of GFSI in the field of food safety and EASA in the field of advertising we argued that meta-regulation in the private domain is principally concerned with the bolstering of the capacity, credibility and legitimacy of transnational private regulatory regimes and the convergence between such regimes. While both GFSI and EASA do adopt meta-standards to enhance rule compliance and enforcement activities of private regulatory regimes, their principal goal is to establish common standards that boost the operation and performance of these regimes. In this sense, private meta-regulation offers a level-playing field for private regulation and brings about coordination (and even to some degree harmonization) of private regulatory activities in specific issue areas. Private meta-regulation may thus be said to facilitate the building of a transnational community of private regulatory regimes that fosters common goals, offers a forum for discussion and reduces rivalry between different regimes.<sup>76</sup> This also offers opportunities for public actors, such as states and intergovernmental organizations, to engage with and tap into the capacity of private meta-regulators as these institutions constitute a nexus of industry interests and other stakeholders involved in private regulation, often across multiple layers of governance.

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76 Compare with Loconto and Fouilleux (n 5), who observe the same dynamics in relation to ISEAL.