

INTRODUCTION: CONTEMPORARY FOOD REGULATORY REGIMES AND THE CHALLENGES AHEAD

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And soon, mechanically, weary after a dull day with the prospect of a depressing morrow, I raised to my lips a spoonful of the tea in which I had soaked a morsel of the cake. No sooner had the warm liquid, and the crumbs with it, touched my palate than a shudder ran through my whole body, and I stopped, intent upon the extraordinary changes that were taking place. An exquisite pleasure had invaded my senses, but individual, detached, with no suggestion of its origin. And at once the vicissitudes of life had become indifferent to me, its disasters innocuous, its brevity illusory – this new sensation having had on me the effect which love has of filling me with a precious essence; or rather this essence was not in me, it was myself. I had ceased now to feel mediocre, accidental, mortal. Whence could it have come to me, this all-powerful joy?

À la recherche du temps perdu, Marcel Proust

Food is one of the fundamental elements of human life: it guarantees survival, it can dispense death and, above all, as Marcel Proust reminds us, it is deeply connected to our own ‘essence’, having the power of blessing men with ‘exquisite pleasure’ and ‘all-powerful joy’. Given the exceptional nature of the regulated matter, regulating food transcends its own domain, mirroring some of the most crucial challenges of regulating contemporary societies.

This short introduction to the issue of *Erasmus Law Review* on ‘food regulatory regimes and the challenges ahead’ identifies two interlinked challenges for contemporary ‘food regulators’: the first is how national and regional regulators can best deal with the increasingly globalised nature of food production and the second is how to create consistency and harmony in a highly fragmented regulatory space. The four contributions to this issue all deal with these two challenges, albeit in different ways.

Challenge # 1: Bridging the Gap between the Global Market and the Local Regulator

Today, Italian pasta can be found almost everywhere in the world, and the same applies to Chinese noodles and rice. Western capitals are invariably melting pots where residents and tourists alike can choose what to eat, from the American hamburger to Japanese sushi, from an Indian curry to an Italian pizza. Many food items sold in supermarkets are manufactured in different parts of the world, while the variety of ingredients available to consumers is far greater than what local regions could possibly offer. According to historians, the globalisation of food has existed for about ten millennia,¹ but the degree to which today’s food production is globalised is arguably unprecedented. An original illustration of this phenomenon is the ‘Global Tacoshed project’, in which a group of architects and art students investigated the origins of the different ingredients used to assemble a cheap taco sold at a taco truck in San Francisco.² The project found that these ingredients originated from almost all continents and that they had travelled more than

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¹ Kenneth F. Kiple, *A Movable Feast: Ten Millennia of Food Globalization* (2007).

² See the Tacoshed project, a collaboration between David Fletcher and Rebar, with the students of the Brave New Ecologies Course taught in the Fall of 2009 as part of URBANlab, the California College of the Arts Architecture Program, available at: <<http://www.rebargroup.org/projects/tacoshed>> (last visited 1 February 2011).

100,000 kilometres, more than double the earth's entire circumference. Interestingly enough, mapping these movements was cumbersome for the students working on the projects, '... "because of the intense obfuscation by the corporations that produce them"'.³

Together with variety and choice, the globalisation of food production also spread risks, making these risks less controllable. It should therefore be evident why regulating food safety has become a central issue for the 'world risk society'.⁴ Regulating risks is a divisive issue, because it involves decisions about scientific facts that are often intertwined with ethical values and different visions of what constitutes a good society.⁵ If a domestic regulator is already faced with difficult regulatory problems in the area of food safety within the domestic context, the global nature of food production imposes an additional challenge: an 'import' regulatory challenge.⁶ In fact, domestic regulators are usually not empowered to implement and enforce regulation beyond the boundaries of their jurisdictions. Much like the people in the Global Tacoshed project, regulators may not even be able to trace the facilities where certain products are originally produced, let alone impose a certain regulatory framework on these producers. As reported by Coglianesse et. al.,

[j]ust identifying who manufactured an ingredient can sometimes be difficult when records are kept in another country and in another language. For example, in 2001 a pair of FDA inspectors were reportedly unable to conduct an inspection of a Chinese facility producing acetaminophen imported into the United States because they simply could not find where the facility was located.⁷

Clearly, if food sold in one jurisdiction is often (co-)produced in another, domestic food safety policy may easily be hindered by the transboundary nature of the production chain.

One way to cope with the regulatory challenges posed by the global nature of food production is for the regulators to strictly apply and enforce domestic regulation abroad and ban the import of goods that do not satisfy the domestic regulatory requirements. However, such a draconian approach would probably fail on a legal, economic and political basis. From a legal perspective, many countries are members of the World Trade Organisation (WTO) and thus bound by the multilateral obligations established by this organisation.⁸ This means that barriers to trade should be justified and that a draconian ban on foreign food products would probably fail the WTO test. Even without considering this international legal boundary, it would be extremely costly to implement and enforce safety regulations extraterritorially. For instance, inspections that are conducted abroad are more costly and difficult because of language and cultural/geographical differences. As the above example shows, it may even be difficult to locate a specific production facility.⁹ Countries may also perceive the strict imposition

³ These are the words of one of the students involved in the project, as reported by Twilight Greenaway, 'Your Taco Deconstructed', in *Good Business*, 2 March 2010, available at: <<http://www.good.is/post/your-taco-deconstructed>> (last visited 1 February 2011).

⁴ Ulrich Beck, *World Risk Society* (1999).

⁵ For an overview of these issues, see Ortwin Renn and Bernd Rohrmann (eds.), *Cross-Cultural Risk Perception – A Survey of Empirical Studies* (2000); Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (1982). For an overview of theories, see Dan M. Kahan, Paul Slovic, Donald Braman and John Gastil, 'Fear of Democracy: A Cultural Evaluation of Sunstein on Risk' (2006) 119 *Harvard Law Review*.

⁶ For a general discussion of the import safety problem, see Cary Coglianesse, Adam M. Finkel, and David Zaring, 'Consumer Protection in an Era of Globalization' in Cary Coglianesse, Adam M. Finkel and David Zaring (eds.), *Import Safety* (2009) 6-13.

⁷ Id., at 8. Internal reference omitted.

⁸ The Agreements most relevant in this area are the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barrier to Trade (TBT Agreement).

⁹ Another example of the difficulties of enforcing regulation abroad is given by Kenneth A. Bamberger and Andrew T. Guzman in the context of the inspection of drug products. Discussing the heparin case, the authors note: 'There is ... reason to believe that American inspectors and officials operating in China would be less effective than those operating domestically, simply because they would lack the language and cultural skills to navigate the Chinese society.... This phenomenon is evidenced in the case of the 2008 heparin deaths, in which FDA inspectors thought they had inspected the Chinese plant that manufactured

of foreign regulatory cultures as a breach of their regulatory autonomy. Moreover, traditional forms of public regulation are increasingly competing with or complemented by private regulation mechanisms that are faster at adjusting to the rapid changes in the food production industry and better able to govern transboundary production processes.¹⁰ Finally, and perhaps most crucially, if all countries would unilaterally try to impose their food (safety) standards on others, producers might end up having to comply with an endless number of potentially conflicting standards.

Challenge # 2: Interconnecting the Fragmented Regulatory Space

A system governed by isolated national regulatory islands trying to impose standards on each other leads us to the second regulatory challenge: how to move from a fragmented regulatory space to a post-national, harmonious and possibly integrated regulatory universe. In describing the post-national regulatory order in the field of global risk regulation, Nico Krisch has juxtaposed two structural paradigms: the constitutionalist paradigm and the pluralist paradigm.¹¹ ‘Constitutionalism ... has typically come with the hope for creating a principled, unified framework for global governance on the model of domestic order.’ In a pluralist order, on the other hand, ‘the different parts, of domestic, regional, and global origin are not linked by overarching legal rules, but interact in a largely political fashion.’¹²

The first paradigm promises to solve the fragmentation problem through the establishment of a hierarchical, well-ordered legal framework. The problems with this paradigm are particularly acute in the domain of risk regulation, which includes food regulation. In fact, regulating the risks related to food means dealing with different approaches to risks: it is not just a matter of science but of how to use the science and of how much weight to give to uncertainty, culture, equitable distribution of risks and so forth. An international hierarchical system of rules may not be sufficiently apt to cope with the different regulatory approaches to risks as well as with different levels of development among countries that unavoidably influence preferences towards risk. Equally, such a governance system may be too slow in adjusting to the continuous evolution of food production processes. A pure constitutionalist paradigm may thus in theory be the perfect solution to the fragmentation problem, but in practice it seems doomed to collide with the real world, where issues of food safety are highly contested and dynamic. Pushing the constitutional agenda at the international level is likely to result in perverse effects causing more, rather than less fragmentation. Nations, in fact, may become reluctant to reach consensus on divisive issues and commit to common strategies, as they would be afraid of the legal consequences of these commitments under a rigid constitutional paradigm. Eventually, they may remain divided on these issues and indeed promote more aggressive unilateral policies, endangering the construction of a harmonious order.

In Krisch’s view, ‘[l]eaving hierarchies and issues of principle undecided may allow space for pragmatic solutions on issues that are less fraught and might provide a safety valve when one or the other side of governance overreaches.’¹³ While agreeing with this view, a third scenario is also imaginable: one where the constitutionalist and pluralist paradigms coexist. In practice, such coexistence may mean that the set of existing international rules not only serves the purpose of establishing minimum rules but also, most crucially, of supporting the construction of an institutional platform that could

the fatal contaminant, but later learned that they had been taken to a different pharmaceutical plant with a similar name.’ Kenneth A. Bamberger and Andrew T. Guzman, ‘Importers as Regulators’ in Cary Coglianese, Adam M. Finkel, and David Zaring (eds.), *Import Safety* (2009) at 201.

¹⁰ Errol Meidinger, ‘Private Import Safety Regulation and Transnational New Governance’ in Cary Coglianese, Adam M. Finkel and David Zaring (eds.), *Import Safety* (Philadelphia: University of Pennsylvania Press 2009).

¹¹ Nico Krisch, ‘Pluralism in Global Risk Regulation: The Dispute over GMOs and Trade’ (20 October 2009), LSE Legal Studies Working Paper No. 17/2009, available at SSRN: <<http://ssrn.com/abstract=1491608>>.

¹² *Id.*, at 2.

¹³ *Id.*, at 27.

promote dialogue between different regulatory units and gradually enhance cooperation in relation to the different values and approaches to food law. Such a system should also include other actors in the institutional dialogue, such as private regulatory entities and non-state actors, which appear to be gaining importance in the development of post-national food law. This would help an already polycentric form of governance to strive for coherence and adhere to basic principles, while maintaining the dynamism and flexibility of a pluralist system. Would this third scenario really constitute a solution to the identified challenges?

The four contributions in this issue of the *Erasmus Law Review* provide partial answers to this question and, more generally, shed light on how the two identified challenges are addressed in practice and could be better addressed in the future.

The articles by Alemanno and Fagotto discuss how Europe and the United States are currently dealing with the import safety challenge. Alberto Alemanno offers a lucid analysis of the regulation of food import safety in the European Community, by choosing as a case study the (in)famous melamine dairy scandal. One important institution created at European level is the Rapid Alert System for Food and Feed (RASFF). Alemanno shows that, while this system is reactive rather than proactive, it still has proved effective in managing various risk crises. A crucial feature established by the system is the prompt exchange of information by different authorities when a risk is detected. While this system operates predominantly within Europe, there are plans to include China in the system. Extending RASFF to China seems to be a step towards bridging fragmentation via cooperation and arguably goes in the direction of the third scenario outline above.

The article by Elena Fagotto is one of the first comments on the new act passed by the US Congress in December 2010 and signed into law by President Barack Obama on 4 January 2011: the *FDA Food Safety Modernization Act*. Among the most salient ways in which the reform addresses the issue of import safety is the emphasis it places on private regulation and increased cooperation with foreign food authorities. For instance, the Act has rendered mandatory the Hazard Analysis and Critical Control Points (HACCP) for all domestic and international food facilities, thus institutionalising a private form of regulation in the sphere of public governance. Moreover, the Act includes several provisions to strengthen cooperation with other countries, for instance, by promoting capacity building for inspection. While Fagotto warns that some features of the reform 'may impose a certain regulatory model (in this case the US model) on foreign countries, especially smaller trading partners, with consequences in terms of equity and legitimacy', the US reform seems to opt for a more collaborative and polycentric form of governance that may address the risks inherent in global food production more effectively than the previous system.

While both the European Union and the United States are searching for models to deal with the import safety challenge, they operate in the shadow of international norms. According to Bernd van der Meulen, the current international legal system dealing directly or indirectly with food law provides a meta-framework, establishing objectives and methodologies for the national regulator. Van der Meulen provides an overview of how different international organisations, from the United Nations to the Codex Alimentarius Commission and the WTO, contribute to the creation of this meta-framework. He concludes that '[e]ven though this system is created by different, more-or-less independent players, it shows a certain coherence in that the elements mutually reinforce rather than contradict each other.' While this conclusion may be considered controversial if we look at the substantive nature of the rules established by these organisations, the institutional framework described by van der Meulen is arguably cooperative and to some extent displays a certain level of coherence. A clear example of this is provided by the relationship between the WTO and the Codex Alimentarius Commission. The recently created International Food Safety Authorities Network (INFOSAN), a forum for the exchange of food safety information between national and international food safety institutions is another example of the shift towards collaborative forms of governance to tackle the identified challenges.

Although all these forms of collaborative governance may help to achieve a more harmonious system of food regulation, the tensions underlying this area of law are

not likely to disappear soon. This is because the issues underpinning food law remain divisive, given all the values attached to food. The article by Tetty Havinga helps us to visualise some of these values. Havinga compares the regulatory regimes for halal and kosher food in the Netherlands and the United States. Interestingly enough, this type of religious labelling is approached differently in these two countries: while these issues have been regulated mainly by means of public regulatory schemes in the United States, in the Netherlands halal and kosher certification schemes rest mainly in the hands of private actors. Havinga explains these differences by referring to the fact that kosher and halal labelling are framed 'as a consumer rights issue in the United States and as a religious issue in the Netherlands' and to the different levels of trust in industry and self-regulation vis-à-vis state regulation in the two countries. Such different approaches seem to be yet another facet of the plurality of political cultures that influence food regulatory regimes across the globe. Given that halal and kosher food also travel across borders and that Jewish and Muslim communities are settled in many countries, the same challenges identified with regard to the regulation of food safety in a post-national order are also likely to arise in this field.

Whether the issue is risks, ethics or religion, the overarching challenge for the future therefore seems to concern the building of a regulatory universe that is able to mediate between the many values and constituencies transcending national borders. This issue of the *Erasmus Law Review* has no ambition to provide a clear solution, yet it hopefully sheds new light on some of the key governance structures that could contribute to the creation of a better food regulatory paradigm for contemporary societies.