

Food Safety Regulatory Styles: The EU and Beyond

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Trends in Regulation: EU and Beyond

1. *The rise of the “regulatory state” and “agencification”*
2. *EU as regulatory leader*
3. *Convergence on American-style adversarial legalism*
4. *Flexible regulation as alternative to command-and-control*
5. *Expansion of auditing and risk-based regulation*
6. *The rise of private regulation via certification regimes*
7. *The greater use of “soft law”*
8. *Risk regulation via deliberation and public consultation*
9. *The development of “reflexive regulation”*

1. The Rise of the Regulatory State and Agencification

General

- The EU has become a “regulatory state” like the U.S. (Majone)
- Agencification is the development of independent regulatory agencies that can make “credible commitments”
- Global diffusion of this model, creating “regulatory capitalism” (Levi-Faur and Jordana)
- EU agencies are “networked” (hub of network of national regulators)

Food Safety

- Creation of the European Food Safety Authority (EFSA)
- EFSA limited to “risk assessment” (Abels and Kobusch)
- EFSA is “networked” via a comitology process (Alemanno; Skogstad)

2. EU as Regulatory Leader

General

- The EU replaces the US as most stringent regulator, partly due to more precautionary stance (Vogel; but Weiner argues that pattern more variable by sector)
- Trading up dynamics in EU push it to level playing field internationally

Food Safety

- EU is global standard setter in food safety (Weimer and Vos)
- Limited by WTO SPS, but EU highly active in Codex Alimentarius (Poli)

3. Convergence on American-style Adversarial Legalism

General

- Conventional contrast: U.S. regulatory system is “adversarial” and “legalistic” while European regulation is more “cooperative” (Kagan).
- Adversarial legalism refers to reliance on liability and tort law, formal command and control style, highly legalistic and politically conflictual processes of rule-making, and punitive enforcement
- Some argue that federal dynamics push EU toward American-style adversarial legalism (Kelemen); however, others argue for hybrid called “cooperative legalism” (Bignami)

Food Safety

- Greater use of liability as a regulatory mechanism (Loader and Hobbs, Wendler); GMO regulation reverts to command and control style that is politically conflictual (Pollack and Schaffer; Weimer).

4. Flexible Regulation as Alternative to Command-and-Control

General

- Backlash against command-and-control leads to experimentation with more flexible forms of regulation (e.g., greater discretion over creation and/or implementation of rules; Coglianese, Gunningham)
- Many different forms: principles-based, performance-based, management-based, market-based and information-based regulation; responsive regulation, co- or self-regulation).

Food Safety

- Use of labeling (information-based) in GMO regime; plus pre-authorization as “co-regulation” (Weimer)
- Emphasis on flexibility in Hygiene Package (Lawless); General Food Law establishes broad “principles”
- Adoption of HACCP (management-based), though using more centralized style (Hyde et al).

5. Expansion of Auditing and Risk-based Regulation

General

- Greater reliance on auditing as a general mechanism of control and accountability (Power)
- Variable uptake of “risk-based” regulatory strategies for efficiency and/or accountability (Rothstein and Borraz).
- Greater focus on risk itself reflects “risk society” (Beck) or “neoliberal governmentality” (Foucault)

Food Safety

- Food and Veterinary Organization (FVO) adopts an auditing and risk-based approach

6. The Rise of Private Regulation via Certification Regimes

General

- The “regulatory gaps” in transnational regulation filled by new private forms of regulation, particularly for the regulation of supply chains. Typically take the form of “certification regimes,” enforced by “third-party auditors” (Cashore)
- Private regulation may form in “shadow of hierarchy” to preempt public regulation or may be a “club” that goes “beyond compliance” to produce branding benefits (Prakash and Potoski).

Food Safety

- Global GAP created by European food retailers (building on initial EUREP GAP). Indirectly prompted by EU liability rules; goes “beyond compliance” (Humphreys)

7. The Greater Use of “Soft Law”

General

- Both European and transnational regulation have tended to rely on “soft law” (greater use of non-binding guidance) (Abbot and Snidal; Eberlein and Grande).
- Some argue that European regulation “hardens” transnational soft law (or private regulation) by incorporating it into EU law and policy (Newman and Bach).

Food Safety

- General Food Law allows EFSA to act as source of “soft law,” especially in GMO regulation (Wendler)
- Commission has issued “soft law” guidance on “co-existence” of GM and traditional crops (Weimer)

8. Risk Regulation via Deliberation and Public Consultation

General

- The EU faces legitimacy challenges because of limited democratization. Concerned about achieving legitimacy through alternative means, such as increased transparency, due process, public consultation, and deliberation (Scharpf, Schmidt).
- Literature on risk governance argues for greater stakeholder and public input via more open, transparent, and deliberative decisionmaking (Renn)

Food Safety

- EFSA has public consultation, but prioritizes science-based risk assessments (Finardi et al).
- Deliberative nature of “networked” agency model limited in GMO domain
- Separation of assessment/management privileges political decisions (Fischer); but Commission largely follows EFSA’s science

9. The Rise of “Reflexive Regulation”

General

- Risk regulation is becoming more “reflexive” (Beck and Giddens)—more transparent, precautionary, self-critical, and self-correcting
- “Democratic experimentalism” is reflexive approach that emphasizes deliberation, mutual learning, and benchmarking. EU has utilized democratic experimental techniques extensively across many sectors (Sabel and Zeitlin).

Food Safety

- EU food safety has democratic experimentalist elements—especially RASFF and FVO (Weimer and Vos).
- EU GMO regime has experimentalist elements, but limited in practice (Dabrowska; Weimer)

Adversarial Legalism

(EU GMO Regime)

- Command-and-control decision style with lack of deliberation (but appeals for greater flexibility)
- Accentuates concerns about agency independence (conflicts of interest and lack of transparency)
- Narrowed emphasis on scientific basis of decisions and disputed regulatory science
- Powerful role of Interest groups in lobbying mode with fears of capture
- Importance of formal legal mechanisms (including adjudication of courts)
- Formal public consultation, but limited deliberation



Democratic Experimentalism

(EU Non-GMO Food Safety)

- Networked, deliberative basis of decisionmaking
- Importance placed on transparent information flows and on information pooling (e.g., RASFF)
- Focus on upgrading performance (e.g., via FVO audits)
- More corporatist involvement of interest groups
- Emphasis on regulation that grants flexibility in implementation
- Greater actual use of “soft law”

