

## Regulatory Capitalism & the Reassertion of the Public Interest

Neo-liberalism was supposed to lead to deregulation, privatization, commercialization and consequently also to the retreat of the state and the shrinking of the public sphere. Paradoxically, in many spheres and across many countries it seems to result in more regulation and even in regulatory explosion (Ayres & Braithwaite, 1992; Kagan, 1995; Braithwaite & Drahos, 2000; Ruhl & Salzman, 2003; Levi-Faur, 2005; Braithwaite, 2008; Ahdieh, 2006). This development may reflect the reassertion of the public sphere, albeit through new means involving regulation and regulatory governance rather than centralized service provision. The expectation (and fear on the part of some) of an ossification of regulation did not materialize, even in countries such as the United States and Britain, where neo-liberalism was most powerful (McGarity, 1992; Yackee & Yackee, 2007; Page, 2001). A new global order of regulatory capitalism is emerging, where the state is restructuring itself as a regulator of social, economic and political life. This new order opens new avenues for social and political control over the economy (Cutler, Porter and Haufler, 1999; Buthe, 2004; Porter and Ronit, 2006).

At the same time as the contours of a new order are coming into view, the limits of policies of privatization and commercialization are becoming clearer. The promise of better economic performance was only partly fulfilled. While inflation has been defeated since the late 1980s, global economic growth is slower than in the heyday of the interventionist state and of Keynesian economic policies. Indeed, the economic policies of successful newly industrialized countries such as Taiwan, South Korea and most recently China hardly conform to the free-market, laissez-faire model (Weiss, 1999; 2003). Climate change and other environmental risks suggest that current commercial practices and the economic rationale of the free market lead to unsustainable development. This chapter is concerned with both the limits of privatization as a program for economic prosperity and the unintended consequences of the regulatory explosion amidst neo-liberalism.

Not all regulations enhance the public interest or are even intended to do so, but all regulation enhances and extends the public sphere by making the private public and

Updated 29 august 08

by making the implicit and the normative formal. To regulate is also to define what is acceptable and legitimate for public action. That regulation can take different forms and serve many masters is already reflected in the debate between opponents and proponents of private-interest and public-interest theories of regulation (for an updated comprehensive overview, see Morgan & Yeung, 2007). From a private-interest perspective, regulation may legitimize public programs that serve the few at the expense of the many; it can serve as a mask for policy actors and institutions that in effect rob or marginalize the weakest sections of society. Yet at the same time, as public-interest theories emphasize, regulation can serve as an effective governance tool that enhances public welfare, corrects market failures and reduces social risks.

The debate about the origins and consequences of regulation is still a central focus of social scientists, and no conclusive answer to the question of whom it serves is yet available. Regulatory regimes are not only ever-evolving political constructions; they also vary in design and purpose across the many issues and sectors they govern. This chapter therefore offer some insights into them rather than to offer conclusive answers. Can regulation stop, restrain or accommodate the tide of materialization and individualization in social and political life? Can states reassert themselves through the design and supply of regulatory frameworks? Can regulation serve as a critical component of the policies, strategies and institutions that check and balance the risks of global capitalism? If so, would and should regulation be grounded in state authority or civil arrangements or a hybrid of the two? Finally, are we experiencing a shift of regulation from one arena (e.g., the local) to another (e.g. the global)?

In dealing with these issues, this chapter suggests that states are reasserting themselves in the delivery of regulatory frameworks that reduce global risks and processes of materialization in the social and legal spheres. However, this reassertion does not necessarily or primarily involve *renationalization* or direct delivery by public monopoly. Instead, it involves regulatory reform and regulatory expansion. Regulation is one important manifestation of the reassertion of the state. This view is often expressed in the literature with reference to the rise of the regulatory state (Majone, 1994; Loughlin & Scott, 1997; McGowan & Wallace 1996; Moran, 2002). Yet, as suggested here, the notion of the regulatory state hardly reflects the public

Updated 29 august 08

potential of regulation. What I call for, therefore, is a reassertion of the regulatory state and the regulatory society alike in order to nurture, strengthen and expand the public sphere. This expansion cannot be understood, and indeed cannot be completed, without attention to the creation of new arenas of regulation beyond the state. This expansion may result in the creation of hybrid and multi-level governance networks of both state and civil society actors. These regulatory networks often expand in tandem and create positive-sum effects of more regulation and a race to the top rather than deregulation and a race to the bottom (D. Vogel, 1995; Ahdieh, 2006). Thus, from a regulation perspective, any reassertion of the state is manifested through three channels: first, and mainly, the deployment of regulatory instruments rather than the direct delivery of public services; second, civil regulation, where society and state collaborate and compete at the same time; and third, global and regional regulation that extends the reach of the nation state rather than replaces it.

The questions raised here are discussed with reference to forms of regulatory governance in the telecoms and food sectors. We discuss the extent to which regulation can indeed offer an acceptable solution to the problems associated with economic globalization, privatization and commercialization. The discussion proceeds as follows. The first section compares the transformation of governance in the telecoms and food industries. These industries provide the empirical cases in light of which we assess the reassertion of the public sphere. The second section focuses on the reassertion of the regulatory state in the telecoms and food industries. The third section focuses on the same process from the point of view of the reassertion of public interests through civil regulation. The fourth section brings civil regulation and state regulation together to demonstrate that a new global order of regulatory capitalism is emerging and is creating the conditions for a reassertion of the public interest in the face of privatization, commercialism and economic materialism in national and global arenas. The chapter concludes with a summary of the arguments and the findings of the chapter.

## **I. The Governance of Food and Telecoms**

To study the governance structures of the telecoms and food sectors is to study governance structures that deal with (a) distinctly different regulatory challenges – mainly economic in the case of telecoms and mainly safety issues in the case of food – which (b) have conflicting dynamics in terms of the globalization of their governance structure – telecoms were mostly under government ownership and subject to a strong intergovernmental international regime for most of the 20th century, while the food supply was mostly privately produced and was not subject to a strong international regime for the governance of safety until very recently; and (c) the extent to which they have experienced processes of privatization and deregulation since the 1980s (as we will see, privatization and deregulation are applicable mainly to telecoms, and much less so to food safety).

The governance of the telecoms industry focuses mainly on the technical compatibility of networks and equipment, on economic rules for interconnection, and on the degree, scope and form of market openness. While telecoms governance is one of the earliest examples of international institutionalization, the industry hardly featured in the public or international arena before the mid-1980s (Jacobson, 1973; Noam, 1992).<sup>1</sup> Since then, however, there has been growing recognition of the importance of telecommunications as the backbone of all other national and global infrastructures. At the national level, telecoms investment is perceived a key component in the development of the modern economy and in the creation of the so-called “information society” and “information economy”. Telecoms has thus moved to the center of attention of economic policymakers. The framing of telecoms in this process of agenda expansion occurred mostly in economic terms. Only since the 1990s have issues of health risks (e.g. radiation from cellular equipment and antennas), equity (universal access to the information highway) and social risks (gambling, terror, pornography and child safety) become dominant issues shaping the governance structure of the telecoms industry.

Unlike with telecommunications, the governance of food safety issues is focused largely on the quality attributes of food and the health effects of the production, processing, distribution and consumption of food. The hazards of food are

Updated 29 august 08

qualitatively different from those of telecoms, even without the recent food scandals and controversies concerning the consumption of genetically modified (GM) food and the applications of nanotechnology in the production of food. According to the World Health Organization, up to one third of the population of developed countries is affected by food-borne illnesses each year. The poor are the most vulnerable, and food and waterborne diarrhoeal diseases, for example, are leading causes of illness in less developed countries, killing an estimated 2.2 million people annually, most of them children.<sup>2</sup>

Given the data on food-borne illnesses and deaths, one would expect food safety to be a major cause for concern at the global, national and regional levels. This is, however, hardly the case. National, regional and global governance structures are more developed and institutionalized in telecoms than in food. Food governance was slow to develop administrative institutions; and when such institutions were established they were entrusted to agriculture administration rather than health administration (and therefore producer rather than consumers interests). This was the case from the mid-19th century until very recently. The focus of regulation at the national level was largely on issues of food adulteration rather than attempts to promote best practice in processing and marketing food. Thus, for example, in the United Kingdom a select parliamentary commission was set up in the mid-19th century to consider the problem of adulterated food. The committee's recommendation led to the Adulteration of Food and Drink Act 1860, which prohibited mixing injurious ingredients with food. The food safety acts that followed in 1928 and 1938 extended the prohibitions so as to include minimum compositional standards in essential food. A notable event in the history of food safety regulation in Britain is the obligation, since 1939, to report cases of food poisoning (Hardy, 1999). In Continental Europe leadership in food-standard setting was in the hands of Austro-Hungarian policymakers, who initiated in 1891 the *Codex Alimentarius Austriacus* to regulate the food trade in the empire. The Austrian Code is considered as one of the strictest; it had an informal status until it was incorporated into Austrian law, which happened as recently as 1975. An important turning point in France was the establishment of the *Société Scientifique d'Hygiène Alimentaire* in 1904 and the passage of the Food Adulteration Act 1905 (Zylberman, 2004, p. 1). Denmark made meat inspection mandatory only in 1903–6, after the family of a member of the Danish parliament was infected with trichinae.

Updated 29 august 08

Development was not always linear and toward stricter regulation. Germany repealed the stricter regulations drawn up by Prussia in 1900, and veterinarians had come to doubt the cost-effectiveness of inspections based on microscopes (Zylberman, 2004, p. 9). Modern systems of food regulation originated in the United States in the late 19th century, when state and local governments began to enact food regulation. In 1879 the first general food-safety legislation was introduced in Congress but failed to pass. Repeated attempts over the next 25 years eventually succeeded in the form of the Pure Food and Drug Act 1906 (Law, 2003; Scheuplein, 1999). As in Europe, the law emphasized adulteration and the obligation to inform the consumer, but it also upgraded the administrative capacities and status of the Bureau of Chemistry in the Department of Agriculture, creating the predecessor of the current regulatory agency, namely, the Food and Drug Administration, which for a long period was the only autonomous food-safety regulatory agency in the world.

While governments were only gradually and hesitantly moving into the domain of food safety, they adopted a much more proactive approach in telecoms. Most European countries nationalized their telegraph industries and, later, also their telephone industries. Germany nationalized telephony in 1878, followed by France (1889), Switzerland (1880), Austria (1895), Belgium (1896) and Britain (1911). State ownership of the telecoms industry was widespread, with only very few exceptions (Schneider, 1997; Levi-Faur, 2003b). The rise of neo-liberalism in the late 1970s had a major impact on telecoms but hardly any on food safety. The divestiture of AT&T in 1984 pushed the old monopolistic (yet private-ownership) domestic regime in the United States into a state of flux, and the implications of those changes were gradually felt across the world. A similar development in Britain led to the privatization of the old colonial telecoms provider, Cable and Wireless, in 1981, and to the partial privatization of British Telecom and the establishment of an autonomous regulator in 1984. The British move seems to prove the feasibility of competition for Europeans and for countries well beyond Europe that were tuned to British developments. The incentives for regulatory emulation were created as soon as it became evident that competition was possible and would bring significant benefits for consumers in terms of both the cost and the quality of service. Other governments increasingly followed the American path and the British example, and acted to privatize telecoms operators and to regulate monopoly power using sector-specific

Updated 29 august 08

agencies. Privatization became intertwined with the establishment of regulatory authorities. Yet regulatory agencies proved to be even more popular than privatization. Worldwide, only 90 countries have privatized some of their telecoms operators, but 120 countries have established regulatory agencies (Levi-Faur, 2003a).

This radical regime change in telecoms was not matched in food safety. While the US Federal Drug and Food Administration faced strong criticism (especially on drug issues), changes at the domestic level were hardly radical. Certain controversies about risk assessment that affected food additives were resolved in the 1970s and 1980s in the courts, but changes in the food-safety regime were hardly felt. More changes were evident in the United Kingdom, especially after the 1980s. Yet these changes were basically the results of the failure of the domestic food regime rather than of neo-liberal or even European challenges. In October 1984 a lengthy series of food safety scares and crises to do with food additives started in Britain, to be rapidly followed by, for example, botulism, pesticides, veterinary medicines, salmonella, BSE and GM foods (Ansell & Vogel, 2006). The responses, although for a long period slow and hesitant, were in the direction of stricter and more extensive regulation (Millstone & van Zwanenberg, 2002).

The development of governance structures and problem definition thus differs considerably as between telecoms and food. While telecoms governance was framed as an investment and competitiveness issue, food governance in the 20th century was about the management of safety risks. While governments are said to have privatized and deregulated the telecoms industry, it is clear that they are reasserting greater control than ever over food-safety issues. The historical context and the regulatory problems of *reassertion* are discussed from a state-centered perspective in the next section.

## **II. The Regulatory State and the Reassertion of the Public Interest**

In order to understand the reassertion of the public interest in the telecoms and food industries through the machinery of the state, we need first to clarify the notion of the rise of the regulatory state (Majone, 1994; Moran, 2002; Loughlin and Scott 1997; McGowan and Wallace, 1996). The term “regulatory state”, which has proved

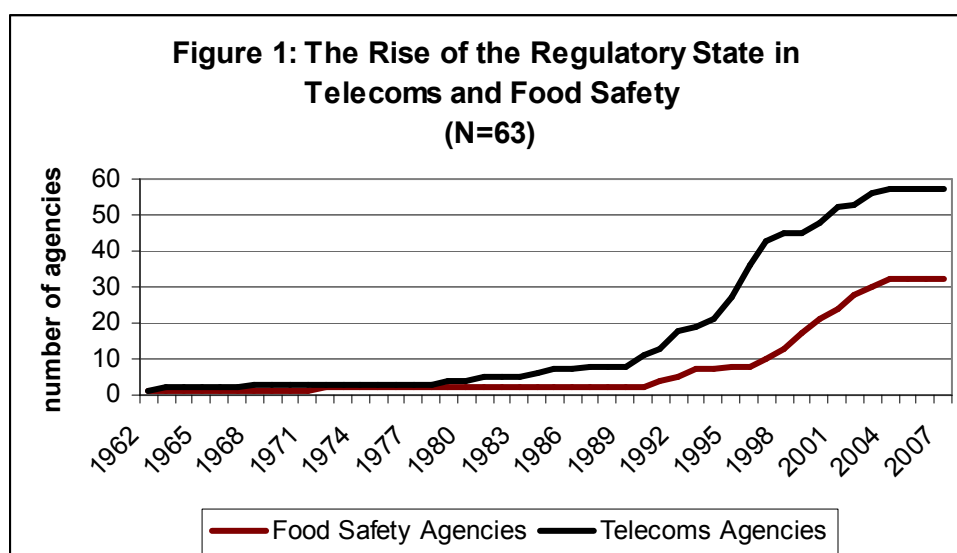
Updated 29 august 08

especially popular since the 1990s, “suggests [that] modern states are placing more emphasis on the use of authority, rules and standard-setting, partially displacing an earlier emphasis on public ownership, public subsidies, and directly provided services. The expanding part of modern government, the argument goes, is *regulation...*” (Hood et al., 1999, p. 3). The regulatory state invests in rule making, monitoring and enforcement at the expense of other types of policy including service provision, subsidies and, more generally, redistribution. Students of political economy and public administration have found the notion of the regulatory state useful in conveying important aspects of political and economic reform worldwide (Jordana, Levi-Faur & Fernandez, 2008). At the same time study, research and consultancy concerning regulatory reform have become a growth industry.

To what extent does the concept of the regulatory state capture the changes in the governance of telecoms and food industries? One way to answer this question is to examine the development and diffusion of regulatory agencies as an indicator of the spread of the regulatory state as an institutional order. While the number of regulatory agencies in the United States has not grown since the mid-1970s, such agencies have become popular elsewhere in the world. A recent survey of the establishment of regulatory agencies across 16 different sectors in 63 countries from the 1920s through to 2007 reveals that it is possible to find an autonomous regulatory agency in about 73 percent of the possible sector-country units that were surveyed (Jordana, Levi-Faur & Fernandez i Marin, 2008). The number of regulatory agencies rose sharply in the 1990s. The rate of establishment increased extremely dramatically: from fewer than five new autonomous agencies per year from the 1960s to the 1980s, to more than 20 agencies per year from the 1990s to 2002 (rising to almost 40 agencies per year between 1994 and 1996). Probably more than anything else, it is the establishment of these agencies that makes the regulatory state an attractive concept for social scientists.

The general pattern of commonalities and variations that is evident from the aggregate data on economic and social regulation is also evident from a more detailed study of regulatory agencies in the telecoms and food sectors. Let us first examine more closely the telecoms sector. The data here reveal that 57 out of the 63 countries surveyed established regulatory authorities to govern the sector (China, Cuba, Israel,

Iran, Bangladesh and Vietnam did not established agencies). The first countries to establish a telecoms regulatory authority were the United States (1934), Costa Rica (1963) and Canada (1968). The turning point in the diffusion of regulatory agencies was, however, the establishment of Ofcom in 1984 by the British government in conjunction with the privatization of British Telecom. In that decade two more countries established regulatory authorities – Chile in 1985 and Finland in 1987. Most of the countries, however, established regulatory authorities in the 1990s, including five in 1995, seven in 1996 and six in 1997. In food safety, only 32 countries out of the 63 surveyed have established a regulatory authority. The first to establish an agency in this field was the United States in 1927, followed by Sweden in 1972. Two decades later, in 1991 Australia and New Zealand established food safety agencies, followed by Argentina (1992) and Columbia (1993). Denmark decided to establish a regulatory authority in 1997, followed by Brazil, France and Ireland in 1998, and Greece and Britain in 1999. Six additional European countries have established regulatory agencies since 2000: Belgium and Portugal in 2000, Finland and Spain in 2001, and the Netherlands and Germany in 2002; and Japan established one in 2003. While the regulatory agency model was adopted by 90 percent of the 63 countries surveyed in telecoms, it was adopted by only 51 percent of the countries surveyed in food safety (see Figure 1).



Updated 29 august 08

Beyond the expansion of the agency model, it is also notable that the regulations that govern the telecoms and food-safety industries are more explicit, more detailed and more demanding than ever before. The privatization of telecoms allowed or necessitated the expansion of regulations, which promises to generate extensive academic, legal and policy discussions in the years to come. Thus, for example, the new Telecom Act in the United States brought the number of pages of primary legislation for telecoms to more than 300. The number of pages in the official compendium of Federal Communications Commission (FCC) decisions and proceedings has nearly tripled since the passage of the new act in 1996. Membership of the Federal Communications Bar Association increased by 73 percent between 1995 and 1998 (Sidak, 2003, p. 213). Developments in other countries have followed the same trajectory of “freer markets, more rules” (S. Vogel, 1996).

A similar expansion is observable in the number of food safety laws and regulatory controls as well. More important, if until the mid-1990s the development of food safety legislation was mainly reactive, as part of governments’ crisis management agenda (Jouve, 1998), the current approach is more holistic and proactive. Thus, ad hoc interventions that are focused on specific contaminants posing immediate hazards are being replaced in many countries with general regulatory frameworks that are usually more demanding than ever before. General legislative frameworks have therefore been updated in countries all over the world, probably starting with the Food Safety Act 1990 in Britain but now including most if not all European Union countries (The General Food Law Regulation 178/2002). Outside Europe similar moves can be noted in Japan (Food Safety Basic Law 2003), India (Food Safety and Standards Act 2006), Australia and New Zealand (Food Standards Australia New Zealand Act 1991), and Nigeria (Decree 19 of 1993 as amended by Food, Drugs and Related Products (Registration) Decree No. 20 of 1999). It is very likely that these regulatory frameworks have many regulatory gaps and that many have shortcomings in terms of both excessive regulation and enforcement deficits. Compliance may also be an important issue, but the literature on the political economy of food safety is increasingly concerned not with deregulation but with by how much the control of and investment in food safety should be increased.

Updated 29 august 08

Our analysis so far suggests that there are some grounds for optimism with regard to the reassertion of the state in the fields of telecoms and food safety. This reassertion does not involve public ownership but stronger and more careful design of regulatory structures. But states are embedded in their societies; we therefore move to civil regulation and its role in telecoms and food safety.

### **III. Civil Regulation and the Reassertion of the Public Interest**

When we discuss the public interest we should also consider the role of civil society because there is no public sphere without civil actors and there is no reassertion of the state without the reassertion of civil society. Civil actors, business included, are often associated with advocacy (e.g. lobbying) and service provision (e.g. replacing the state in the provision of welfare), but in our areas of study they also produce, monitor and enforce regulation. The concept of civil regulation aims to capture this evolving feature of civil politics. But what is civil regulation? It is a relatively new concept in the field of regulation. It refers to the institutionalization of voluntary global and national forms of regulation through the creation of private (non-state) forms of regulation intended to govern markets and firms (D. Vogel, 2005; 2006). Civil regulations attempt to embed international markets and firms in a normative order that prescribes responsible business conduct. “What distinguishes the legitimacy, governance and implementation of civil regulation”, Vogel tells us, “is that it is not rooted in public [i.e., state] authority. Operating beside or around the state rather than through it, civil regulations are based on ‘soft law’ rather than legally binding standards: violators are subject often to market rather than legal penalties” (D. Vogel, 2006, pp. 2–3). Market penalties should be understood here not only as direct and immediate economic outcomes, but also as penalties that are related to the standing and reputation of the corporation and its managers and employees. Because penalties can be high, even if they are not based on legal norms and state enforcement, it might be useful to distinguish between “voluntary regulation” and “civil regulation”. While the two notions retain a close affinity, civil regulation, unlike voluntary regulation, may, at least in principle, possess coercive aspects. Civil regulation includes old and traditional forms of self-regulation but goes beyond it to include third-party regulation

Updated 29 august 08

where various gatekeepers act as regulators (rule setters, rule monitors and rule enforcers) of public standards (Kraakman, 1986; Grabosky, 1995).

How relevant and important are civil forms of regulation in the governance of the telecoms and food industries? Our empirical observations reveal that they are relevant and important at least as legitimacy and reputational mechanisms, but that they are more vibrant and more visible in food safety than in telecoms. Unfortunately the literature on civil regulation in the telecoms industry is case- and country-specific, and there is little effort to conceptualize its scope and assess its development, not to mention measuring it (but see Doyle, 1997; Stuhmcke, 2002). Every empirical assessment of the development of civil regulation in this sphere is therefore arbitrary and provisional. Yet it seems that Anglo-Saxon democracies tend to use it more extensively than Continental European democracies, and that in telecoms the tendency to set up civil regulatory bodies is most often related to consumers' information and consumer complaints. This is the case with the Telecoms Industry Ombudsman in Australia and Britain (TIO and OTELO respectively), the Premium Rate Services Regulator in Britain and Ireland (PhonepayPlus, REGTEL). Another self-regulatory arrangement covers the direct mail industry. In this case associational bodies (TPS and FPS) require direct marketing companies to avoid telephone and fax solicitations. Standards and systems architecture are also an area where self-regulation is widespread (Brunsson & Jacobsson, 2000; Lessig, 1999). Civil regulatory bodies are widespread in the advertisement field and in effect exist in all countries (e.g. the Irish Advertising Standards Authority, the Italian Istituto dell'Autodisciplina Pubblicitaria and the Dutch Stichting Reclame Code). Finally, self-regulatory arrangements cover internet governance, mainly concerning issues of harmful and illegal content (Price & Verhulst, 2005). Beyond these telecom-specific bodies, self-regulation also operates through more general mechanisms that are not industry- or sector-specific, such as corporate social responsibility programs.

Civil regulation is an important component also of the governance of the food industry. While the dominant form of civil regulation in the telecoms industry is self-regulation, the dominant civil regulation in food-safety issues takes the form of

Updated 29 august 08

private food-standard and third-party certification. These private regulatory instruments tend to cover both food safety and food quality. Reardon and Farina (2002) report that during the 1990s businesses rapidly built up an array of private food standards in the context of fiercely competitive markets. These private standards, they argue, have sometimes filled gaps in public standards, especially for safety, but at the same time have been used to differentiate products and to build reputations for both quality and safety. The authors explain the emergence of private agrifood standards by reference to, among others, the market incentive to create such standards on the one hand and the capacity of large marketers of food to formulate and implement them on the other (Reardon & Farina, 2002, p. 415).

Civil standards and third-party certification are also very common at the global level, that is, in the international food market. One notable example is GLOBALGAP (known as EurepGap before September 2007). GLOBALGAP is a private-sector body that sets voluntary standards for the certification of agricultural products. It brings together agricultural producers and retailers who want to establish certification standards and procedures for Good Agricultural Practices (GAP). Certification covers the production process of the certified product from before the seed is planted until it leaves the farm. It covers crops, livestock and aquaculture, and involves more than 80,000 certified producers in no fewer than 80 countries. Interesting enough is the role of third-party regulators as the “gatekeepers“ of quality and safety (Kraakman, 1986; Ribstein, 2005, pp. 5–6). In the context of the GLOBALGAP regime, the accreditation of the 80,000 or so producers is delegated to independent certifiers. In this process these certifiers are the third parties that provide the accreditation for producers after going through the GLOBALGAP accreditation process themselves.

It is tempting to characterize GLOBALGAP as a voluntary organization, but this would be to turn a blind eye to apolitical, non-state forms of power. GLOBALGAP was established by retailers in an increasingly concentrated retail market which allows retailers to exert significant control over producers. These retailers are generally located in the North and are organized as giant corporations, while the producers often come from the South and are organized in family farms. Better food safety in the North may come at a high price to the South. Civil regulation does not necessarily mean voluntarism. In the food sector retailers exercise significant power over other

Updated 29 august 08

parts of the food industry, and their power explains much of the convergence of producers on stricter standards. Indeed, GLOBALGAP is not directly visible to consumers, nor does it attract the direct scrutiny of governments. While its advocates suggest that it leads to an upgrade of food-safety standards and reduces both red-tape and compliance costs, its opponents point out that GLOBALGAP is taking over state functions, and is a form of private government that is neither accountable to the public nor transparent to important stakeholders (Campbell, 2005; 2006; Freidberg, 2007; Guthman, 2007).

While we find that civil regulation is relevant in both the telecoms and the food industries, it is in food safety that it captures the imagination of the policy community and scholars alike. This is not to suggest that civil regulation is an ineffective form of governance either in telecoms or in food safety. We should also be careful not to suggest that civil regulation is more effective in one sector than another. Instead, it is suggested that there are supply and demand pressures for civil regulation in both industries and that these pressures extend the public sphere. Beyond the extension of the public sphere to non-étatist forms of governance, we should explore not the effectiveness of civil regulation as such but more generally the ways it affects the legitimacy of the regulatory regime, the mutual trust of the actors and the trust between them and the public.

#### **IV. The Regulatory Hybrids of Regulatory Capitalism**

While analytically it is tempting to think of state and civil regulation as conflicting and alternative forms of regulation and as two distinct and independent types of public sphere, this is not necessarily either an accurate or the most insightful way to think about them. More often than not, state regulation and civil regulation appear in tandem within hybrids of private–public action as well as within national and global systems of governance. The mutual consolidation and mutual enforcement of the regulatory state and regulatory society characterize and signify the new order of regulatory capitalism. This order is defined, sustained and legitimized by the expansion in the number and the scope of rules and the expansion of various activities that are connected with rule expansion, such as rule making, rule monitoring and rule enforcement. The dynamics and content of such rule activity are shaped by the

Updated 29 august 08

interaction of varying types of civil and state regulation and by the multiple forms and degrees in which the national is embedded in the global. By focusing on this two-dimensional interaction in telecoms and food safety, we are able to demonstrate the extent to which various hybrids constitute current forms of regulatory governance.

We have found so far that regulatory governance in telecoms is manifested in relatively strong forms of state-centered regulation and weak forms of civil regulation. But how do the national and the global interact in telecoms governance? The findings suggest that global governance and national governance have co-expanded. Governance structures at the global level are also very elaborate if we consider the early 19th-century origins of the International Telecommunication Union. Recent changes include an expansion of this framework through the World Trade Organization and a bigger voice and role for business in the global regime than in the past. Yet this is not necessarily reflected in a hollowing out of the state. National regulatory structures in telecoms are more developed, elaborate and effective than ever before. The distinction between the national and the global, like that between civil regulation and state-centered regulation, is relatively clear when compared with the situation in food safety.

Under *étatist* regulatory capitalism, civil regulation is weak and state regulation is strong, and the distinctions between the global and the national are relatively clear. This represents the adaptation of the Westphalian order to the regulatory arena, and in particular its adaptation to the realities of multi-level governance. In the literature on regulation, *étatist* forms of regulation are often described as systems of command and control with prescriptive types of rule. Prescriptive rules tell regulated entities and individuals what to do and how to do it, and tend to be highly particularistic in specifying required actions and the standards to be adhered to (May, 2007, p. 9). This variant of regulatory capitalism usually enjoys a strong capacity to impose sanctions, as well as clear-cut lines of responsibility and thus accountability. Yet these advantages come at a price: strict authoritarianism, unreasonable rule and capricious enforcement practices impose needless costs and generate adversarial relations between regulators and regulatees.

Updated 29 august 08

Moving from telecoms to food safety, we again find expansion and relevance of both state and civil forms of regulation. While state-centered institutions are expanding more slowly than in telecoms, civil forms are expanding faster and more strongly in food safety. Yet we do not recognize a zero-sum game between these forms of regulation. Instead the process is one of the co-expansion of both state and civil forms of regulation, and this co-expansion is more visible in food safety than in telecoms, where civil regulation is comparatively marginal. The interaction between the global and the national in food-safety issues is a product of the relatively fast expansion of supranational governance institutions in food safety, especially when compared with the past. Nothing comparable to the International Telecommunication Union (ITU) in magnitude and importance exists in the field of food safety. The regulatory structure is visibly expanding at the national level, however, and thus we can suggest that the regulatory structures are co-expanding. The emerging structure of governance might best be called a “corporatist” form of regulatory capitalism.

Corporatist regulatory capitalism emerges from the interaction of strong forms of both civil regulation and state regulation. Various forms of the corporatist regulatory order can be envisaged, including co-regulation, where responsibility for regulatory design or regulatory enforcement is shared by state and civil actors. The particular scope of cooperation may vary as long as the regulatory arrangements are grounded in cooperative techniques and the legitimacy of the regime rests at least partly on public-private cooperation. A second form is that of enforced self-regulation, where “the government would compel each company to write a set of rules tailored to the unique set of contingencies facing that firm. A regulatory agency would either approve these rules or send them back for revision if they were insufficiently stringent” (Ayres & Braithwaite, 1992, p. 106). Rather than the government enforcing the rules, most enforcement duties and costs would be internalized by the *regulatee*, which would be required to establish its own independent compliance administration. The primary function of government inspectors would be to ensure the integrity and transparency of the work of the compliance group of the regulatees. State involvement would not stop at monitoring, however. Violations of the privately written and publicly ratified rules would be punishable by law (Ayres & Braithwaite, 1992).

Updated 29 august 08

A third form of corporatist regulatory capitalism involves systems of meta-regulation. The notion of meta-regulation is closely related to the notion of enforced self-regulation as formulated above; however, unlike enforced self-regulation, it allows the *regulatee* to determine its own rules. The regulatory role of the state is confined to the institutionalization and monitoring of the integrity of the work of the compliance group of the regulatees (Grabosky, 1995; Parker, 2002; Morgan, 2003, p. 2). Finally, a form of regulatory corporatism emerges from “multi-level regulation”. Here regulatory authority is allocated to different levels of territorial tiers – supranational (global and regional), national, regional (domestic) and local (Marks & Hooghe, 2001). There are various forms of multi-level regulation depending on the number of tiers that are involved and the particular form of allocation. Regulatory authority can be allocated on a functional basis (whereby it is allocated to different tiers according to their capacity to deal with the problem) or on a hierarchical basis (where supreme authority is allocated to one of the regulatory tiers); alternatively, it may simply be a product of incremental, path-trajectory processes (where the regime is the result of the amalgamation of patches, each designed to solve a particular aspect as it appeared on the regulatory agenda). While much of the discussion on multi-level governance (which is a broader term than multi-level regulation) focuses on the transfer of authority between one tier and another, one should note that the overall impact of multi-level regulation can be that of accretion. Indeed, the possibility that multi-level regulation may involve the co-development of regulatory capacities in different tiers is rarely recognized.

All in all, the perspective of regulatory capitalism suggests that there are various ways in which it is possible to reassert the public interest in an era of regulation. These ways might best be captured through the many forms and types of interaction of civil and state regulation at both the national and the global level and by better appreciation of the fact that regulation and rule making is expanding, indeed exploding.

## **V. Conclusions: Regulation and the Reassertion of the Public Sphere**

This chapter suggests that neo-liberalism has *not* led to the retreat of the state in the telecoms and food industries. A new order of regulation is mediating and enforcing

Updated 29 august 08

socially and politically acceptable forms of capitalism. In this new order, best described as regulatory capitalism, new forms of governance open new opportunities for the reassertion of the state, and more generally also for the reassertion of the public interest. Regulation and capitalism are increasingly intertwined, and new forms of capitalism are associated with new forms of regulation (Braithwaite & Drahos, 2000; Lessig, 1999; Eisner, 2007). Regulation – not privatization and deregulation – best captures the political aspects of the new emerging order. Regulatory expansion is creating a thick institutional design that might shape the governance of capitalism in ways that cannot be anticipated or controlled in advance. While some regulations, advertently or inadvertently, work against the public interest, all regulations extend and strengthen the public sphere, simply by shrinking the private, the normative and the informal, and by extending the public and the formal aspects of policy and politics.

In order to understand the dynamics of global governance and make the most of these new options, we need to take into account three major developments. First, we need to understand the emergence and expansion of the regulatory state as a major feature and facet of the new system of governance. This is well expressed in the telecoms sector, where the institutional innovation of the regulatory agency was highly popularized across countries and regions (Levi-Faur, 2003b; 2005). Indeed, regulatory agencies are now common in telecoms worldwide. They are less evident, however, in food safety. Here, convergence on independent agencies is still in its early days, and the agencies that have been established seem to be less autonomous than those in telecoms. The trend, however, is clearly toward the reassertion of the state and the revision rather than the demise of the regulatory structure. Privatization and deregulation miserably fail to capture even some of the aspects of the dynamics of governance in food safety. While it may well be the case that the regulatory challenges are bigger than in the past and that the current regulatory structures of many states require reform, the general trend since the late 1980s and especially in the 1990s reflects regulatory expansion rather than contraction.

A second development in the governance of present-day capitalism is manifested in the emergence of civil regulation as an alternative, complementary and innovative

Updated 29 august 08

form of regulatory governance. The phenomenon is clearly evident in food-safety issues and to a lesser extent in telecoms. While new forms of private rule setting and third-party regulation are expanding in food safety, in telecoms civil regulation is mostly manifested in the traditional form of self-regulation. Similarly, whereas civil regulation is dealing with issues of consumer complaints about the terms of service in food-safety regulation, civil regulation is being extended over major elements of the production, processing and marketing of food. In both cases, however, the dynamics is not of deregulation or a shift of responsibility from state to civil society but rather of the expansion of both.

Third, the interaction between state regulation and civil regulation promises to create hybrids of regulatory governance and varieties of regulatory capitalism. Both civil and statist forms of regulation grow very fast, and they grow at both the national and the global level. It is only through the interaction of the different dimensions and arenas of regulation that we can hope to capture the essence of regulatory capitalism. It is also should be clear by now that the strength, effectiveness and legitimacy of regulation depend not only on national and state-centered structures but also on civil, global and regional structures. Indeed, the growth of these additional layers of regulation is one of the most important aspects of the governance of both the telecoms and the food industries. These observations echo and confirm earlier and more sweeping suggestions that the way capitalism is organized and governed is changing and that this change involves the creation of new regulatory structures (Rosenau & Czempiel, 1992; Braithwaite & Drahos, 2000; Slaughter, 2004). Thus, in a study of environmental regulation the political scientist Marc Eisner suggests that future gains in environmental quality may be impossible without fundamentally reconsidering regulatory design, that is, one that incorporates self-regulation, association regulation, and standards into the regulatory system, and without thinking creatively about how public policies can be used to reinforce incentives or compensate for their absence (Eisner, 2007, p. 282). Robert Ahdieh (2006) asserts from a legal perspective that cross-jurisdictional regulation creates overlaps that lead to dialogic cooperation that may create the same hybrids that are observed in telecoms and food as well as in Eisner's study of environmental regulation. The challenge we face is to design hybrid

Updated 29 august 08

institutions and mechanisms of regulation and to understand their functions, strengths and weaknesses in both theoretical and practical terms.

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<sup>1</sup> The International Telegraph Union, the predecessor of the International Telecommunications Union, was established in 1865.

<sup>2</sup> WHO Global Strategy for Food Safety, 2002; Available at [www.who.int/entity/foodsafety/publications/general/global\\_strategy](http://www.who.int/entity/foodsafety/publications/general/global_strategy).