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FUTURE OF THE CONSUMER SOCIETY

Proceedings of the Conference “Future of the Consumer Society”
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ETHICS VS. LAW IN THE FOOD BUSINESS

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ABSTRACT – Food business involves many ethical questions. Legislators should not leave all these questions for markets to decide. Legislators should take their role in guiding the food business, having sustainability as goal. This includes environmental and social issues. Legislators need to look ahead and focus on where the food business should go in the future. The simplest way is to guide production and consumption through taxation, making certain production, products, and diets cheaper.

INTRODUCTION

Business ethics, responsible business, and sustainability are popular words these days. Also the food business is using various ethical guidelines to make itself act in a sustainable manner, or at least to look sustainable to consumers. Besides legal entities, businesses are also seen as moral actors.¹

A recent Finnish study by Forsman-Hugg et al.² has provided us with seven different measurable dimensions of responsible food business. These are: product safety, nutrition, environment, occupational welfare, animal welfare, local market presence, and economic responsibility. The report sets measurable goals for companies for the next five years. Many of the seven dimensions are simultaneously areas of law: food law, consumer law, environmental law, employment law, and also company law. Legislation affects every stage and every stakeholder of food business.

Another recent Finnish study by the Ministry of Agriculture³ has identified problems with food law experienced by small and medium-sized companies. We will use this information as evidence on how food companies see the role of legislators.

RESEARCH QUESTIONS

The aim of this paper is to discuss responsible food consumption from a legal point of view: What is the relationship between business ethics and food law? What does the food business expect from legislators? What role should legislators take in making the food business more responsible in the future? We try to answer the questions by looking at current concepts of responsible food business and comparing them to existing laws.

ETHICS VS. LAW

Here we aim to discuss the seven dimensions of responsible food business as described by Forsman-Hugg et al. 2009 from a legal point of view. The starting point of their research was that responsibility is something more than following legislation. Criteria and measures for responsibility were drafted for companies. These criteria and measures could also be used by legislators when developing new legislation.

'Food safety' is the most obvious target of food business responsibility, and also of food law. There are plenty of regulations on both biological and chemical safety of foods. Hygiene rules and rules on additives, pesticide residues, etc. have been in place for decades. The HACCP (Hazard Analysis and Critical Control Points) system is included in European law. It is also stated in the General Food Regulation⁴, that operators themselves carry the primary responsibility for food safety. In-house control and operator responsibility are legal principles. This means that responsibility of the food business on food safety is not merely about competition, benchmarking and branding: it is actually required by the law. In connection to allergies, the responsibility report states that following legislation simply is not enough. We could see this as an advice to legislators: more stringent labelling rules are needed.

'Nutrition' is the second one of the seven elements discussed in the responsibility report. It means that besides being safe, food should also be healthy, or at least the consumer should be able to build a healthy diet based on adequate information. On the information issue, legislation is more abundant than on the nutritional qualities of the products as such. The regulation on fortification⁵ sets the limits for vitamins and minerals added to foods, whereas the regulation on nutrition and health claims⁶ merely states the requirements for claims and does not regulated the attributes of the products themselves. According to the novel food regulation⁷, the nutritional quality of novel foods is assessed before allowing them to enter the market. The novel food is compared to the equivalent novel foods already in the market, and the nutritional quality as such is not evaluated.

Here we need to discuss who is responsible for unhealthy eating habits causing for example the metabolic syndrome. We have to say that primarily the consumers themselves. There is no way of stopping free people from eating too much. However, legislators and companies can offer healthier foods, smaller portions, information and guidance, etc.

The most important issues in the 'Environment' dimension of the study by Forsman-Hugg et al. are the climate effects of food production, and the effects on eutrophication. The former is mainly measured by the amount of green house gases emitted in the food chain. Environmental laws and international agreements exist on these issues. In the responsibility report, it was noted that mere legislation is not enough, if it is not implemented in practice. Interestingly, responsibility is thus seen not necessarily as exceeding the norms, but also as following the existing laws. Following the laws is not here seen as a self-evident starting point. This might also be interpreted to mean that governments should impose stronger control on the implementation of environmental laws.

The fourth element, 'occupational well-being', is a more general issue than just a question food business. However, there are some features to food production such as working in cold temperatures that are not common to all other lines of business. Employment laws are general in the meaning that they apply to all employees equally. There are precise regulations for example on occupational safety, equality of workers, and holidays. These issues are controlled by authorities through check-ups on location. However, the laws do not and cannot guarantee that employees like their work or feel appreciated. This leaves plenty of room for business ethics. If raw materials are imported from third-world countries, Finnish or European employment law does not apply where raw material is produced. If local legislation is non-existent, the lack of business law leaves the whole stage for business ethics.

'Animal well-being' is the fifth element of responsibility. Of course, this does not affect foodstuffs such as bread or vegetables. We are of the view that both business law and business ethics need to develop in this area. According to Eurogroup for Animals, the Common Agricultural Policy needs to be changed radically to make it animal welfare friendly.⁸ Although regulations are not considered very strict, they are still not followed scrupulously. Requirements on animal well-being needs to be based on scientific information on animal behaviour. The issue of how much meat we can eat is another question. It has more to do with the environment than with animal rights.

'Local market presence' is the next element. It includes questions such as where food is produced, cultural connections of food, and the continuance of food production. Agriculture and food production are wider issues than just eating: they are a part of our culture. As regards locality, EU legislation exists on Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Speciality Guaranteed (TSG). These protected geographical statuses add value to local specialties and traditional products. Of course, subsidies to agriculture also affect local market presence. The goals of the EU common agricultural policy (CAP) are to provide farmers with a reasonable standard of living, consumers with quality food at fair prices, and to preserve rural heritage. CAP has received lots of criticism and is under constant reform.

What still remains is the seventh element, which is the 'economic responsibility'. Business ethics has limited space here, because there are detailed laws on taxes, accounting, auditing, financial instruments (both equity and loan), insolvency, etc. Good auditing practice is also a legal concept, and stock market laws stipulate the provision of information to investors. In our opinion, the most important busi-

ness ethics issue here is the question of profit. Who takes the consumer's money: the farmers, the food industry, or the retail chains?

Now we turn to the Finnish Ministry of Agriculture report 2009, which identified problems with food law from entrepreneur's point of view. Many of the entrepreneurial expectations do not relate to the substance of food law: many suggestions are procedural and relate to how requirements are implemented in practice. Typical demands of 'better regulation' are listed: laws should be understandable and authorities should inform regulation targets better. The substance of food law as such is rarely contested. This is probably due to the fact that Finland cannot change laws as such. EU member states can only decide on food control, and EU controls even this control. Discussion on the relationship between law and ethics thus belongs to the European level. Still, some interesting notions can be found in the Finnish report.

The first demand in the report is that food law and its execution should be more flexible and clear. Requirements set by legislation are considered problematic and difficult to comprehend. The main suggestion is that legislation and control should be related to the risk posed by an activity to human health. Laws are plainly seen as too strict and complicated for small businesses that only sell to small groups of customers or only seasonally. For example, hygiene requirements are said not to take into account locally produced and marketed food that is not transported or stored.

As regards food safety, more particularly hygiene and its relationship to law, we seem to have a difference between large and small food companies. Large companies that took part in the study by Forsman-Hugg et al., were seemingly willing to build responsibility schemes above the law, whereas small companies struggle with fulfilling the legal requirements, and consider them overly demanding. It is already stated in EU regulations that food control should be risk-based. Still, European food law might not adequately distinguish between large and small companies, which is one of the challenges for the European Commission in the future.

As mentioned above, large part of the Finnish Ministry report discusses the quality of food control. The entrepreneurs as regulation targets see themselves as customers, deserving a high-quality product (the law). There are European laws and national laws for example on animal feed, animal medicine, animal welfare, and organic production, where subject matters of laws sometimes overlap. It is noted that control systems set by food system actors themselves overlap and complement the legal requirements. The first conclusion is that food law and control should be seen as a whole. Secondly, it should take into account the requirements and control systems that food chain actors set on themselves. Different control schemes should work together in order to avoid duplication of work.

DISCUSSION

When discussing law, we must remember that legislation is void without implementation and control. For example in China, legislation on foodstuffs is modern and plentiful, but control of this legislation is inadequate⁹. Also in Europe, the authorities are putting further effort on both in-house control and administrative control. Also self-regulation needs to be implemented in practice, not just on paper.

The spaces for business law and business ethics complement each other. Where business law is abundant, business ethics has more limited space. Business ethics as science developed in the US, where freedom and liberalism are core values and markets are not regulated as intensively as in Europe.^{10,11} The relationship between business law and business ethics differs in every country due to history and culture. In Europe, the scope for business ethics is smaller than in the US. Because of the economic crisis and the reasons behind it, the trend is towards stricter control. When operating in developing countries, business ethics is just as important for European as for American companies. This is because the legal systems in many third world countries are under-developed as regards for example employment law and environmental law.

The food industry sees legislation as a starting point, on which to build responsibility. It is stated that responsible food business is something more than just doing what is legal. What should legislators derive from this? Legislation is unnecessary because the companies would do everything anyway? Or: legislation is insufficient as even the regulation targets themselves think it is not enough? This would be

to admit that business ethics has developed because legislation has been too slow and ineffective in reacting to real problems in the society. Or maybe legislators should think that legislation is at the right level when setting the minimum standard and leaving room for improvements for more responsible companies? Smaller food companies seem to be in trouble with laws as they are now¹².

We think governments as legislators and parties of international agreements should consider what they want the food business to look like in the future, and strive towards that goal. In our opinion, the goal should be responsible food business. If food business is not considered ethical in every respect by the legislator, various alternatives should be considered. One cannot regulate something that cannot be measured. The CSR (corporate social responsibility) measures developed by the food industry can also be used by legislators when setting targets for food business. Businesses use measures for their reasons, and legislators for their reasons.

Instead of binding legislation, the food industry favours reliance to business ethics and self-regulation. They want to build responsibility themselves and not be forced by governments. The reasons for this are obvious: law is coercive, whereas ethics is based on freedom. Ethics is seen as a strategic asset, whereas law is seen as a hindrance. Recognising that food law will probably not be abolished, entrepreneurs want law to be understandable and expect authorities to give advice as regards law. In addition, the industry would like to see more flexible (put straight: less strict) norms, particularly as regards smaller entrepreneurs.

It is, however, for legislators to consider and decide what kind of instrument is necessary and in right proportion to the problem addressed. If self-regulation is considered adequate, it should be a conscious decision made by law-makers, not a result of industry persuasion, or lack of resources for high-quality law-making. Legislation has its benefits: Legislation is made in a democratic procedure, it is clearly binding on its targets, and it is enforceable by courts. Legislation as a product of democracy also has its downside: it represents the view of the majority, not always the perfect compromise. A judge will have to make an either-or decision and can not make a perfect compromise, either. For example, if 55% of *voters* think certain animal treatment is ethical, it is the law. On the other hand, if 45% of *consumers* think certain animal treatment is unethical, this forces businesses to treat animals better. And from another point of view, if five meat company directors are of the view that certain animal treatment is unethical, it might stop this kind of treatment altogether. Here we see that people have different roles where they take stand to ethical questions. In the law-and-community perspective, also law forms in communities, where a person can be a part of several communities¹³.

As there are problems with legislation (hard law), there are also problems with soft law such as administrative guidelines or self-regulation. Makers of soft law can merely state the fact that soft law is not binding, and thus avoid legal questions such as legal competence, legal coherence, legal interpretation, quality control of regulations, or the legal rights of regulation targets^{14,15}.

In Europe, legislation is given both at the EU level and at member state level. Although EU law covers more and more areas and space, a Member State can still regulate food business in creative ways. Comprehensive approaches to shaping the food industry could also be used in Finland. The main instruments at use are normative guidance, tax guidance, and information guidance.¹⁶ This means that for example, a government can pass a law forbidding the sale of soda and sweet in schools, or forbidding the advertising of soda and sweets. Or it can make soda and sweets more expensive by putting new taxes on them (Denmark is currently planning to do exactly this). Or the government can merely persuade consumers by means of information campaigns saying that soda and sweets make you fat and your teeth disgusting.

The relationship between business ethics (food company self-regulation) and business law (EU regulation or national laws) can consist of many different strategies for the legislator, depending on the situation of business ethics in the field. Business ethics could be seen as a constant negotiation and dispute settlement procedure between a company and its stakeholders, and business law as a tool for settling conflicts that have not been or cannot be adequately settled through this discourse.

Firstly, and perhaps the most commonly, reverting to law could be seen as a last option in cases where the civil society has not resolved a certain problem due to lack of motivation. This means that law

is needed where the food industry lacks incentives to address a certain ethical problem. This is often the case where consumers are not interested of the issue. For example, obesity is largely a nutrition problem that has not been resolved by the food industry and the consumers. The food industry has created healthy products, and gives nutrition declarations. However, the food industry will never abolish certain unhealthy product types altogether, if consumers want them. It will sell as much food as possible. The legislator could force certain nutritional criteria for foods, which would be the strongest alternative. Healthy foods could also carry lighter taxes than fatty, salty foods. This has been suggested in many countries.

Another example of a situation where markets have not resolved an ethical problem is the meat-eating, which places a huge burden to the environment. The meat industry will not stop selling meat, if consumers want to eat meat. The legislator could affect meat consumption for example by forcing public establishments such as schools and hospitals to offer vegetable meals for example once a week. This has already been suggested in Finland. The legislator could also raise the taxes on meat. In the future, meat may become a luxury item that only rich people can afford, as scarcity of water and soil will show in the prices. However, the legislators could act to restraint meat consumption even before this happens.

Third example of a situation where legislation could be used as a last option is the animal-wellbeing issue. Laws on animal well-being are not at a particularly high level. European law could be used as an example for the world.

So far, we have discussed business law as a tool for correcting the wrongs that have been dismissed by business ethics. Secondly, in cases where business ethics has done a great job, legislation could merely decide not to act, or follow the self-regulation guidelines and set the agreed voluntary standards as a legal minimum for all the companies. Where a good business ethics practice has developed, this could be turned into law. Examples of these are the GDA (guideline daily amount) declaration, allergen lists in labelling, etc. The benefits of turning soft law requirements into hard law include legal certainty and clarity from the viewpoints of regulation targets, implementing authorities, and courts.

Thirdly, legislation could strive to be ahead of business ethics, either by setting the minimum standard or by harmonising the issue altogether. This means legislators could try to detect new issues even before the civil society starts to react. Business ethics tends to depend on consumer attitudes on certain periods of time. Legislators could think ahead and force the businesses to act ethical before the consumer movement forces them to do so. This sounds optimistic taking into account that preparation of legislation is inadequately resourced as it is, and has been accused of producing low quality laws.

The possible attitudes of the law-maker towards business law as described above differ in timing: options one and two mean that legislators follow the development of business ethics at a certain question, and either to pass more stringent legislation, not to act, or turn soft law into hard law. Option three would mean that legislators created (forced) responsibility independently of the market trends.

We have to notice that food crisis can happen even if operators follow legislation plus their own good practices, because they leave room for human error. Therefore, a food crisis does not necessarily mean that legislation or self-regulation is inadequate.

It is important to continue discussion on who should shape food consumption in the future: consumers, companies, or legislators. We are of the view that all stakeholders in the food system should work together to benefit the whole society and environment. Business law and business ethics are both needed. They are not competing against each other, but instead they have the same goal: responsible food business also in the future.

A recent Finnish study by Kirveenummi et al.¹⁷ has looked into the future and provided us with four different scenarios of food consumption in 2030. The role of regulation and law is an important part of each scenario. The future of food consumption will partly depend on the role that law-makers will take. Food business will probably not be responsible without regulation.

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