Italian antitrust case law on unfair and misleading nutritional claims

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1.- Preamble

The Regulation (CE) No 1924/2006 (the “Claim Regulation” or “Reg. 1924/2006”) represents the first piece of specific legislation, at a European level to deal with nutritional and health claims, and seeks in much more specific terms to protect consumers from misleading or false claims made in food advertisements.

In Italy there is not only one specific national law that regulates the promotional claims made in food advertising, but many different acts enforceable by different public authorities. In particular: (i) the Italian Advertising Self-regulatory Code, enforced by a private arbiter called “Giurì”. This Code is a set of private rules voluntarily adhered to by companies operating in the Italian market. It aims at ensuring that marketing communication, while performing an extremely useful role in the economy, is carried out as a service to the public, with special consideration given to its influence on consumers. The Code is binding on advertisers, agencies, advertising and marketing consultants, media of any kind, and on anyone who has accepted the Code directly or through membership in an association, or by underwriting a contract pertaining to the execution of marketing communications; (iii) Legislative Decree 109/92 on the labelling of food, that focuses its attention specifically on the label’s formal and substantial features. The general provisions of this Decree apply horizontally to all foodstuffs that are pre-packaged and sold in Italy, and are enforced by different public authorities (Ministry of Health, Guardia di Finanza (Italian Tax Police), local health authorities); (i) Legislative Decree No. 146/2007, that modified Legislative Decree No. 206/2005, known as the “Italian Consumer Code” and Legislative Decree 145/07 on misleading advertising, both enforced by the Italian Competition Authority (the “ICA” or “the Authority”). These Decrees represent, within the Italian experience, the most effective legal instrument to regulate claims relating to food and health. For this reason, after having illustrated the main contents of Decrees No. 145/2007 and No. 146/2007, we

will focus our attention on the juridical relationship between these Decrees and the Claim Regulation. Finally, we will concentrate on the role played by the Reg. 1924/2006 within the consumer protection activity carried out by the ICA.

2.- Italian regulation on unfair commercial practices and misleading advertising


These Decrees modified the legal framework in relation to unlawful comparative advertising and introduced a new set of rules on improper or unfair commercial practices, entrusting its implementation to the ICA.

In particular, the provisions set up by Decree No. 145/2007 on misleading and unlawful comparative advertising are dedicated to the exclusive protection of businesses, whereas the Decree No 146/2007 is dedicated to the protection of consumers, who are defined as "any natural person who [...] is acting for purposes which are outside their trade, business, craft or profession" (Art. 18(a) of the Consumer Code).

2.1.- Unfair Commercial Practices and Decree No. 146/2007

As mentioned previously, Legislative Decree No. 146/2007 transposed the unfair practice regulation to the consumer commercial practice regulations set out by Directive 2005/29/EC in Italy and it made the ICA responsible for its enforcement. This Decree only addresses acts, including misleading advertising, which are likely to directly harm consumers’ economic interests by preventing them from making informed and efficient commercial choices. This is why these rules have been integrated into the Consumer Code, which re-organises the entire legislative source, so as to guarantee adequate consumer protection in a systematic manner.

(2) See Legislative Decree No. 146/2007 - Art. 1 modifying Art. 27 of the Consumer Code.

(3) The previous rules governing misleading advertising that harm consumers have been therefore merged into the new regulation on unfair commercial practices.


(5) Unfair commercial practices that harm only competitors’ economic interests or which relate to transactions between traders do not fall under the scope of consumer protection legislation. These
More particularly, according to Article 1 of Legislative Decree No. 146/2007, the ICA may open proceedings to prohibit any commercial practice (defined as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers”)\(^6\) if it: (i) is contrary to the requirements of professional diligence, which occurs when a trader acts in breach of the standard of special skill and care which is reasonably expected to be exercised towards consumers “commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity”; (ii) is able to materially distort, or is likely to materially distort consumers’ ability to make informed choices causing them to take transactional decisions which they would not have otherwise taken; (iii) affects the economic choice of the “average consumer,” or of the average member of the group when a commercial practice is directed towards a particularly vulnerable group of consumers (in this case the trader is required to act in an extremely careful manner). In this regard it has to be pointed out that the Italian regulation, unlike the EC Directive, does not define the concept of “average consumer”, which according to the Commission, is to be considered as “[…]reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.”\(^9\)

Any practice which cumulatively meets the abovementioned criteria shall be, therefore, prohibited under the general rule laid down in Article 20, which however identifies two specific subcategories of unfair commercial practices: (i) “misleading practices”, which may consist of misleading actions or misleading omissions; and (ii) “aggressive practices”.

\(^6\) See Legislative Decree No. 146/2007 - Art. 1, modifying Art. 28.1 d) of the Consumer Code.

\(^7\) See Legislative Decree No. 146/2007 - Art. 1, modifying Art. 28.1 h) of the Consumer Code.

\(^8\) See Legislative Decree No. 146/2007, Art. 1, modifying Art. 28.1 e) of the Consumer Code: “to materially distort the economic behaviour of consumer’s means by using a commercial practice to appreciably impair a consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that they would not have taken otherwise”.

More specifically, a commercial practice is deemed to be a misleading action if it contains false information, or is, in any way, likely to deceive the average consumer in relation to one or more of the essential elements of the commercial offer. In contrast, a misleading omission occurs when an undertaking knowingly does not provide the material information necessary to enable the average consumer to make an informed transactional decision. This is equally the case if the average consumer is hindered or provided material information in an unclear, unintelligible, ambiguous or untimely manner so as to cause, or be likely to cause, the average consumer to take a commercial decision which they would not have otherwise taken.

Consumers are subjected to aggressive commercial practices when, through harassment or coercion (including the use of physical force or undue influence), their freedom of choice is significantly limited, and they are consequently forced to take decisions of a commercial nature which they would have not otherwise taken.

To provide greater legal certainty both to consumers and traders, in line with what has been stated at an EU level, Legislative Decree No. 146/2007 specifically identifies a list of misleading and aggressive practices, which are considered to be “per se” unfair without the need for a case-by-case assessment of the effects of the specific conduct. (so-called “blacklisted” practices). Misleading practices that have been blacklisted
include: (i) use of a trademark without the necessary authorisation; (ii) falsely declaring to adhere to an ethical code; (iii) falsely declaring that a certain product will be available for a limited period of time; and (iv) falsely asserting that the sale of a product is lawful.

Aggressive practices blacklisted by the Consumer Code include: (i) giving the impression that the consumer may leave the commercial premises only after entering into an agreement; (ii) repeatedly visiting consumers at their homes in violation of their express wishes; and (iii) addressing advertising campaigns to children in an effort to coerce their parents into buying the products.

2.2.- The misleading and comparative advertising and Decree No. 145/2007

The rules on misleading and comparative advertising previously provided in the Consumer Code are now included in a separate piece of legislation which focuses on the protection of traders in their commercial relations. In short, following the general provisions of Decree No 146/2007, in determining whether advertising is misleading, the Decree No 145/2007 states that all its features have to be considered and, in particular, any information it contains concerning: (i) the characteristics of the goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services; (ii) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided; (iii) the nature, attributes and rights of the advertiser, such as its identity and assets, its qualifications and ownership of industrial, commercial or intellectual property rights or its awards and distinctions. Decree No. 145/2007 expressly specifies that the advertisements must be clearly recognisable as such and, in addition to ensure that “...all forms of subliminal advertising are prohibited”\(^\text{14}\), it provides that “...press advertisements must be distinguishable from other forms of public notices, and use graphical forms that are easily perceptible”.

Special attention is paid by Decree No. 145/2007 in relation to advertisements addressed to children and adolescents\(^\text{15}\), and to advertisements regarding products

\(^{14}\) See Art. 5, par. 3.

\(^{15}\) See Art. 7: “Any advertisement is deemed to be misleading when, being likely to be seen by children and adolescents, it exploits their natural credulity or lack of experience or which, by using children and adolescents in the advertisements, without prejudice to the provisions of Section 10 of Law No 112 of 3
that could be dangerous for health and safety reasons\textsuperscript{16}. These cases are considered as aggravating circumstances in the quantification of the amount of the sanction\textsuperscript{17}.

Finally, the Decree provides the conditions needed to permit a comparative advertisement. In particular, Art. 4 specifies that the comparison is allowed if: (a) it is not misleading within the meaning of Artt. 21, 22 and 23 of the Consumers’ Code; (b) it compares goods or services meeting the same needs or intended for the same purpose; (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price; (d) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser’s trade marks, trade names, other distinguishing marks, goods or services and those of a competitor; (e) it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor; (f) for products with designation of origin, it relates in each case to products with the same designation; (g) it does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products; (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name.

3.- The role played by Regulation No 1924/2006 in the ICA’s activity

3.1.- Overview of the ICA’s powers in the application of the rules on unfair commercial practices and misleading advertising

For unfair commercial practices, misleading and unlawful comparative advertising, the Italian rules empower the ICA to launch proceedings, following external complaints or...
ex-officio (i.e., even when no complaints have been received from external sources). It has investigatory powers, including the ability to gain access to any relevant document and to request relevant documents or information from anyone, the capacity to sanction refusals to cooperate or the transmission of untruthful documentation or information, to conduct inspections, to receive assistance from the Italian Tax Police and to conduct surveys and economic analyses. Written commitments may be submitted before the ICA by the Parties under investigation to remove the unlawful aspects of the commercial practice or the advertisement under review. The ICA will appraise the commitments and: a) if it deems them adequate, it issues a decision accepting them and making them binding on the party concerned, and close the case without investigating the offence; b) if it deems them to be partially adequate, it will set a deadline by which the professional will be required to supplement the undertakings; c) if it deems that the commitments are not adequate to remove the unfair element, the ICA continues the proceeding until, if a violation is ascertained, the application of a sanction. Moreover, the ICA may, in particularly urgent cases, in the discretionary exercise of its authority, issue a reasoned decision, ordering the suspension of the commercial practice and the advertisement deemed to be misleading or unlawful. Once a violation has been established, the ICA may prohibit its continuation and subject the business to pecuniary fines ranging from EUR 5,000 to EUR 500,000. If the practice involves harmful products or products that could even indirectly threaten the well-being of young children or adolescents, the minimum fine is EUR 50,000. Fines for non-compliance with ICA measures can range from EUR 10,000 to EUR 150,000. The ICA may also prescribe the publication of corrective declarations at the expense of the business responsible.

3.2.- The ICA’s activity in the food and health products sector and the application of Claim Regulation: recent case law

The ICA recently intervened in the food claim and advertising sector in seven relevant proceedings closed with sanctions: (i) PS 195 Alixir, closed with Decision No. 18721 of 7 August 2008, by imposing a sanction on the company Barilla EUR 200,000; (ii) PS 917 Benessere Attivo, closed with Decision No. 18783, of 21 August 2008 by imposing a sanction of EUR 100,000; (i) PS 20 Danacol, closed with Decision No. 19816, of 29 April 2009, by imposing a sanction on the company Danone of EUR 250,000, (ii) PS 5595 Pastariso, closed with Decision No. 19816, of 29 April 2009, by imposing a

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sanction on the company Riso Scotti EUR 120,000; (iii) PS 649 ProActiv, closed with Decision No. 19820, of 29 April 2009, by imposing a sanction of EUR 100,000; and, most recently, (vi) PS6691 Galbusera-0,001% di colesterolo, closed with Decision No. 22462 of 24 May 2011, by imposing a sanction of EUR 190,000, (vii) PS5851 Colussi-Biscotti Misura senza colesterolo, closed with Decision No. 22453 of 24 May 2011, by imposing a sanction of EUR 100,000.

In particular, we want to focus our attention on the Decisions PS 20 Danacol; PS 5595 Pastariso; PS 195 Alixir, and PS6691 Galbusera-0,001% di colesterolo, because they contain more specific indications about the unfair nature and the characteristics of the claims involved.

With reference to case PS 5595 Pastariso the ICA applied to Riso Scotti S.p.A a sanction of EUR 120,000. The ICA focused its attention on the products Pasta Riso Scotti and Risette Active (pasta and snacks made with rice), that were presented to consumers with the claim "barley beta-glucans can help to reduce cholesterol". This indication was judged misleading by the ICA, because was considered able to ascribe to the product at issue the capacity to reduce cholesterol while, on a scientific basis "health enhancing characteristic cannot be attributed to the food advertised." In particular, ICA underlined that the claim was unfair under Art. 5 lett d) Reg. 1924/06. The latter provides that “The use of nutrition and health claims shall only be permitted if the nutrient or other substance for which the claim is made is contained in the final product in a significant quantity as defined in Community legislation or, where such rules do not exist, in a quantity that will produce the nutritional or physiological effect claimed as established by generally accepted scientific evidence”. The ICA, indeed, found that a portion of Pasta Riso possesses 0.75 g of beta-glucans instead of the 3 g required, according to scientific evidence, to obtain a reduction in cholesterol level.

In addition to the inappropriate information about the specific quantity of beta-glucans in the product and the daily amount necessary to obtain a beneficial effect on your health, the ICA found that the information related to the components of the product was written with characters smaller than the principal claim that emphasised the salutary properties of the product.

With reference to case PS 20 Danacol, the ICA retained unfair and misleading the use by Danone of the claim “reduces cholesterol in three weeks”, in commercialising its product “Danacol”, a yogurt drink containing plant sterols. In particular, the ICA underlined that (i) in the Danone advertisements, the problem of cholesterol had been presented in very simplistic terms: “…eaten too much at Christmas? Take Danacol!”; (ii) the lack of any indication to enable consumers to understand in what situations Danacol may be taken; what kind of people can benefit from it and to what extent; its limited and complementary role with diet and a change in lifestyle; the incomplete reference to tests and studies mentioned in the advertisements. Moreover, the ICA underlined the unfair endorsement, under the provision set out by Art. 12 of the Claims
Regulation, of a medical association in the commercial messages in order to increase credibility that also generates confusion about the “pharmacological” nature of the products. Indeed, the abovementioned article of Reg. 1924/2006 forbids “claims which make reference to recommendations of individual doctors or health professionals and other associations” distorting the real nature of the product advertised.

With a decision related to the case PS 195 Alixir, ICA ruled that the well known Italian food company Barilla was responsible for the violation of Artt. 20 and 21 of the Consumer Code, stating that a list of claims, and nutritional and health claims used by Barilla in its commercial practice, advertising and packaging, all of them concerning Alixir, a functional food line consisting of 10 different products, were unfair as they were contrary to the requirements of professional diligence and likely to distort the economic behaviour of the consumer. In particular, the ICA found unfair comparison under Art. 3, lett. b) of the Reg. 1924/2006. As is well known, this rule provides that “[…] the use of nutrition and health claims shall not: […] (b) give rise to doubt about the safety and/or the nutritional benefit of other foods”. The advertising of Alixir compares the product with ordinary foods in order to underline their limited efficacy (e.g., for the nutritional element provided by a portion of Alixir it is necessary 600 g of garlic, 200 g of onions, 4 cups of green tea). Furthermore, the sentence “…a secret to a longer life” associated with Alixir attributes a greater and general efficacy to the product.

With the decision related to case PS6691 Galbusera - 0.001% di colesterolo, the ICA imposed on Galbusera S.p.A., an Italian company operating in the biscuits and snacks sector, a sanction of EUR 190,000 for two unfair commercial practices represented by the use of the claims (i) “0.001% cholesterol” and (ii) “Helps reduce cholesterol”, within the commercial communication for the biscuits “Più Leggeri” and “Col cuore”. The ICA points out that the claims were misleading because they suggested the consumption of products to consumers who have a specific concern or sensitivity for cholesterol, creating the impression that, through the regular assumption of the products advertised, they would have avoid an increase in their cholesterol level. In other words, the unfair elements underlined in the claims censured by the ICA was represented by the misleading representation of a direct causal link between the food product’s nutritional properties and its salutary effects.

Moreover, the ICA pointed out that the Galbusera’s claims were unfair also taking into account the incorrect use of the slogan “fat free”. Indeed, the Authority underlined that such expression may be used within the commercial communication, according to Claim Regulation[^19], only if the product contains no more than 0.5 g per 100g of product, while the claim “low fat” or similar may be used only if the product contains no

[^19]: Regulation No. 1924/2006, Annex “Nutrition claims and conditions applying to them”.

more than 3 grams of fat per 100 g of product, and the expression "saturated fat" is allowed only if the sum of fatty saturated acids and trans fatty acids does not exceed 0.1 g per 100 g of product and the "low saturated fat" if it does not exceed the amount of 1.5 g per 100 g.

The abovementioned ICA case law allows us to understand what juridical relation exists between the Claim Regulation and the unfair commercial practices and misleading advertising rules, and, therefore, how the ICA applies these two different rules in the general context of consumer protection.

First of all, it is worth noting that, as already mentioned in the preamble, in Italy, the Claim Regulation did not result in the creation of a unified, organic and systematic regulation in the field of nutritional claims. Following the Claim Regulation, indeed, no juridical revision process started to homogenise the rules governing the claims relating to food and health. At the present, therefore, the claim regulation is alongside existing legal sources in the sector of health and alimentation.

The abovementioned Italian Decrees on commercial practices and misleading advertising, and the Claim Regulation, from a juridical point of view, do not represent an alternative legal source. More specifically, between them there is a relation of “genus-species”, according to which the Claim Regulation application does not replace the Decrees No. 145/2007 and No. 146/2007, but represents a tool to specify their juridical content.

We observe, indeed, that the obligations and the prohibitions set out by the national decrees are very broad and their actual application to concrete cases has been mainly entrusted, until now, to the discretionary power of the ICA. This has made the legal framework more uncertain, less rigorous and less consistent.

The Italian Decrees, indeed, provided an open juridical definition of unfair and misleading practice, that could cover a wide number of cases, and, depending on the interpretation provided case by case by the ICA, it could extend or reduce its application field. This definition, according to Decree No 146/2007, applies if an advertisement "deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to […] (a) the existence or nature of the product; (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, aftersale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product".\(^{20}\)

\(^{20}\) See Legislative Decree No. 146/2007, Art. 1 modifying Art. 21 of the Consumer Code.
As we can see, the abovementioned definition lacks specific and fixed parameters to correctly verify, on an objective basis, if the information provided throughout a commercial claim is complete and able to present to the consumer all the essential characteristics related to the composition of the product and, particularly, to the casual link between the product advertised and its effects (benefits or risks). This lack of a juridical definition of what is an unfair and misleading practice is even more problematical in the case of food products, whose characteristics are strictly connected to scientific parameters and the related claim directly impacts, not only on the economic choice of the consumer, but also on its primary interest to health. The Claim Regulation has concretely codified the main scientific parameters to orient the juridical assessment of the ICA, whose intervention within the consumer protection activity in the fields of nutritional claims, consequently, passed from a “case to case” approach, to an analysis based on specifically preconceived field of intervention. As a consequence, the discretionary power of the ICA has been significantly reduced. In addition to the limitation of the discretionary power of the ICA, the introduction of the Regulation has undoubtedly raised the level of cogency in the rules on unfair commercial practices and misleading advertising. Indeed, the stricter legal provision and the objective scientific references conditioning the Authority’s assessment, forces the ICA to increase its intervention in the food sector and to make a more rigorous application of the sanctions provided by the Italian Decrees. As a matter of fact, following the coming into force of the Claim Regulation, the decisions ascertaining unfair and misleading nutritional claims have noticeably increased, from 2.8% of the total of ICA decisions delivered during the 2007, to 18.5% in 2010. The ICA also started to impose sanctions higher than before, passing from sanctions that, until 2007, never exceeded EUR 50,000, to sanctions amounting to EUR 250,000 in 2009 (see the abovementioned case PS 20 Danacol). The application of the conditions set out by the Claims Regulation has not only meant a stricter intervention of the ICA, but also gave the possibility to strengthened its ability to prevent violations of consumer protection rules. Indeed, the enforcement of detailed criteria helps the economic operators in the food sector, in a very specific way, how to make commercial claims fully complaint with the law. This can help the companies to better orient their behaviour and, therefore, to prevent the spread of unfair and misleading practices. The Claim Regulation therefore represents an instrument to better identify the juridical contents of the Italian regulation on unfair commercial practices and misleading

(22) See ICA Annual Report 2010.
advertising, which falls within the general analysis process carried out by the ICA. This regulation, as abovementioned, does not replace the Italian regulation, and does not absorb the ICA’s evaluation of the unfair or misleading nature of a commercial practice. In other words, after having checked the compliance of a nutritional claim with the conditions provided by the Claim Regulation, the ICA does not stop its juridical control and its discretionary evaluation; indeed, even if the information represented on food products labels formally respect the parameters provided by the European rules, this does not mean that these labels can be considered fully complaint with the Decrees No. 145/2007 and No. 146/2007. Indeed, depending on the wording and the communication strategy used in the presentation of that information, the label, even if contains true scientific indications, could emphasised the properties of the advertised product, ascribing to the latter nonexistent salutary characteristics and therefore can represent to the consumer a misleading commercial message.

The Claim Regulation, therefore, only represents a part of the evaluation process carried out by the ICA that, in short, in case of a nutritional claim:
(i) checks if the claim is approved by the Commission or if it is provisionally accepted (according to the general list made by the Commission and transmitted to EFSA);
(ii) checks if the commercial practices or the advertising that could be unfair and misleading meet the specific conditions provided by Regulation 1924/2006;
(iii) checks the advertising under the general criteria of the unfair commercial practices rules, evaluating every omission or misleading information, and controlling if the presentation, the wording and the communicative way used could be able to transmit misleading messages to the consumers.

The importance of considering the Claim Regulation as a juridical tool to specify and strengthen the general provision of the Consumer Code on unfair and misleading commercial practices, has been also expressed by the ICA in a letter sent to the European Commission. Through this letter, the ICA recommended the codification of specific guidelines to better implement the conditions of the Claim Regulation and to assure its uniform application. At the same time, pending the adoption of the “guidelines”, it recommended “extreme caution” in the authorisation of an advertising claim on individual products. The ICA underlines, indeed, that claims on the health effects of foods, even if authorised by the European Commission, can often be used inappropriately by companies.

The ICA retains, in particular, that “the emphasis that some advertising campaigns devoted to the illustration of health problems (e.g., high cholesterol and cardiovascular disease), both in the images, either through the scenes and texts, tend to convey to consumers potentially misleading messages, engender unfounded or excessive expectations on the contribution attributable to legitimise the taking of that particular
food product. These are messages that omit such a need to recommend a proper diet and a healthy lifestyle”.

The ICA, in other words, complains of the general trend of other Member States that carry out a “weak” implementation of the rules on nutritional and health claims, and suggests a more rigorous approach in order to increase the level of attention to be paid to consumer protection in Europe. Such an approach, as we have seen above, consists of qualifying the Claim Regulation’s parameters as a tool to specify the general contents of the Consumer Code rules, and to go beyond the formal control of the scientific contents of the claim.

Depending on the reaction of the Commission to the ICA’s letter, and on the possible political measures that could be adopted at a European level, we will know what to expect, i.e., if the Italian approach will condition also the other Member States or, on the contrary, if it will be destined to remain a singular juridical experience within the EU.

The Italian trend to strengthen the control on the nutritional and health claims under the Consumer Code provisions, is expected to further grow, even after the entry into force of Law No. 4/2011. The latter codified an additional and specific case of unfair commercial practice, under the control of the ICA, represented by the non-disclosure, in the claims of food products, of indications referring to the country of origin of raw materials. This information, following Art. 5, is necessary in order not to mislead the average consumer and, therefore, their omission constitutes a case of commercial unfair practice under Art. 22 of the Consumer Code.

In other words, the Italian Legislator intends to expressly assure the double juridical check provided by the ICA on nutritional claims, i.e., on one hand, the formal control of the completeness of the technical information of the claim, and on the other, the evaluation under the general principal of the Consumer Code to ensure that, even if a claim, formally contains all the information required by the Law No. 4/2011, it could nevertheless be considered unfair because of its misleading and ambiguous presentation (e.g., through the placement or the dimension of the graphics used to indicate the information on the packaging of the product).

6. Conclusion

Recent experience has shown that the ICA pays great attention to the enforcement of the regulations on unfair commercial practices regarding health and nutritional claims on labels and in advertising. Indeed the Authority, in its evaluations, frequently refers to Reg. 1924/2006, using it as an index in its evaluation of the veracity of a nutritional or health claim, or if it is false, ambiguous or misleading, or if it gives rise to doubts about the nutritional safety and fairness of a product, or encourages an excessive
consumption of a particular food, or asserts that a balanced and varied diet would not supply an adequate quantity of all nutritive substances, represents a clear infringement of the Consumer Code.

Even if the ICA refers to the Reg. 1924/2006 and maintains that a nutritional claim, in order to be fair and true, must be based on generally accepted scientific data, referring directly to the product and not just to one of the nutritional substances contained in the product, it does not mean that it will become a “technical food safety authority”. The case law, indeed, shows us that the ICA continues to check advertisements using the general criteria of the unfair commercial practices regulation, evaluating each omission or misleading information without carrying out a personal and independent scientific evaluation of the claim, which is still entrusted to the Ministry of the Health and its specialised agencies.

This means that the ICA uses the Claim Regulation as a juridical and technical tool to specify the contents of the broad provision set up by the Italian rules which gives, as a grounds for their concrete application, fixed and unequivocal references. As a consequence, the ICA’s intervention in the enforcement of consumer protection within the food and health products sector has become more cogent and rigorous.