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Sommario

Editoriale

L'origine conta: nell'alimentare e in agricoltura

Il diritto dell'UE continua il suo cammino di progressiva precisazione attorno ai metodi di comunicazione, da parte dei produttori e dei distributori, di notizie sempre più particolareggiate rivolte ai consumatori, in particolare attraverso le etichette. Questi sviluppi fanno ritenere, da taluni, che le corrispondenti norme siano adottate solo per la protezione dei consumatori, ma le cose non stanno così.

Questi sviluppi comportano, infatti, anche non trascurabili vantaggi alle produzioni primarie nazionali, poiché la possibilità di indicare l'origine della materia prima agricola ha dato la stura a molteplici iniziative dei trasformatori che, in molti casi, dichiarando l'italianità del prodotto di base riescono ad ottenere un vantaggio competitivo sui loro concorrenti, pur italiani, che tale dichiarazione non possono fare perché, forse, temono di non riuscire a garantire la disponibilità di materie prime coltivate in Italia o perché, ed è questa l'ipotesi più frequente, preferiscono evitare questa complicazione ed acquistano indifferentemente sul mercato mondiale e su quello nazionale.

In effetti, attraverso la tracciabilità, che originariamente aveva ragioni prettamente sanitarie, si può seguire il percorso compiuto dalla materia prima agricola in tutti i suoi passaggi e assicurare che la dichiarazione di italianità della materia prima sia fondata su un meccanismo efficiente.

La trasformazione delle finalità delle regole di provenienza della materia prima agricola è, in effetti, rilevante e cambia il senso stesso della tracciabilità; essa, pur mantenendo le sue finalità sanitarie (va sempre ricordato che è figlia delle vicende della c. d. mucca pazza), è diventata un potenziale strumento promozionale a favore dell'agricoltura.

Le regole sull'etichettatura sono, dunque, caratterizzate dall'essere "alimentari" in generale, ma anche "agrarie", come si evidenzia, tra le altre, nella norma che esenta dall'indicazione dei componenti dell'alimento, che interessa in gran parte prodotti agricoli, oltre che in quella che prevede l'obbligo di indicare l'origine del principale ingrediente, abbandonando la vecchia regola, di natura doganale, che privilegiava il Paese di lavorazione finale del prodotto, omettendo il legame con l'origine della materia prima.

Quest'ultima norma costituisce, da sola, il vero punto di svolta a favore dell'agricoltura storicamente più affermata, e cioè di quella italiana.

Si è a lungo disputato, in sede dell'Unione europea, sulla ragionevolezza di una tale prescrizione, sostenendo che, in definitiva, la pasta non ci dice chiaramente l'origine territoriale del grano, ad esempio. Ha prevalso la tesi opposta che ha preferito fornire informazioni più dettagliate al consumatore.

Va detto che la scelta di valorizzare l'origine agricola degli ingredienti, fatta propria dal Parlamento Europeo con il Reg. (UE) n. 1169/2011, è stata largamente depotenziata dalla Commissione Europea, sia con il

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Sede legale
Via Ricchieri 21 – 45100 Rovigo

Periodico iscritto il 18/9/2007 al n. 393/2007 del Registro della Stampa presso il Tribunale di Roma (online)
ISSN 1973-3593 [online]

Periodico iscritto il 26/5/2011 al n. 172/2011 del Registro della Stampa presso il Tribunale di Roma (su carta)
ISSN 2240-7588 [stampato]
stampato in proprio

dir. resp.: Ferdinando Albisinni

HANNO COLLABORATO A QUESTO FASCICOLO

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I testi pubblicati sulla Rivista di diritto alimentare, ad eccezione delle rubriche informative, sono sottoposti alla valutazione aggiuntiva di due "referees" anonimi. La direzione della rivista esclude dalla valutazione i contributi redatti da autori di chiara fama. Ai revisori non è comunicato il nome dell'autore del testo da valutare. I revisori formulano un giudizio sul testo ai fini della pubblicazione, ed indicano eventuali integrazioni e modifiche che ritengono opportune.

Nel rispetto della pluralità di voci e di opinioni accolte nella *Rivista*, gli articoli ed i commenti pubblicati impegnano esclusivamente la responsabilità degli autori.

Il presente fascicolo è stato chiuso in Redazione il 30 Maggio 2020, a causa del blocco delle attività cagionato dall'emergenza COVID.

Reg. esec. n. 1337/2013 sull'origine delle carni delle specie suina, ovina, caprina e di volatili, sia con il Reg. esec. n. 2018/775 sull'indicazione di origine degli ingredienti, che ammette quale possibile indicazione di origine "UE" o "non-UE" o anche "UE e non UE", riprendendo l'operazione compiuta dalla Commissione già nel 2002 con il Reg. n. 2019/2002 sulle norme di commercializzazione dell'olio di oliva. Queste scelte della Commissione Europea sono singolarmente passate sotto silenzio in sede nazionale, ed in sede UE il Parlamento, pur censurando il Reg. esec. n. 1337/2013 sulle carni, nulla ha poi osservato quanto al Reg. esec. n. 2018/775 nonostante questo appaia disegnato secondo principi diversi da quelli affermati nel Reg. n. 1169/2011 costituente l'atto legislativo di delega alla Commissione.

Pur con queste incertezze e contraddizioni, tuttavia, cresce l'attenzione del regolatore europeo verso l'origine agricola dei prodotti alimentari, in coerenza con la finalità essenziale tuttora assegnata all'attività agricola. Com'è noto, l'agricoltura, scoperta che ha consentito all'uomo di arrivare a questo stadio di sviluppo - con vantaggi e vantaggi che non è in questa sede che si devono elencare e, se del caso, lamentare - produce sia alimenti, sia materie prime di alimenti, sia prodotti non alimentari; ma questi ultimi hanno progressivamente perso d'importanza, poiché, ad esempio, ci vestiamo per lo più con derivati del petrolio piuttosto che con fibre vegetali o animali, mentre usiamo le pelli bovine per scarpe e borse, ma ciò soprattutto perché questi animali li alleviamo per ottenere carne e latte, e sono i grandi mammiferi più numerosi sulla terra (circa 10 miliardi di capi). Invece cibo ed agricoltura sono, ad oggi, legati a doppio filo e non sembrano alle viste scoperte che ci affranchino dall'utilizzo della terra per poter mangiare; infatti, le coltivazioni verticali su cartone e simili sono interessanti e possono permetterci di ottenere qualche prodotto in contro stagione, ma non di alimentare 7 miliardi di umani, mentre è ancora lontano, sembra, il momento in cui si produrrà su scala industriale la carne bovina in laboratorio, che sarà comunque un'attività che avrà bisogno di prodotti agricoli per essere realizzata.

Territori da molti secoli occupati dall'uomo, e l'Italia è un esempio peculiare, sono caratterizzati da monumenti di pietra o di marmo, da pitture e sculture, da opere letterarie eterogenee - filosofiche, poetiche, scientifiche ecc. - frutto dell'ingegno dei nostri antenati, ma anche da cibi da secoli inventati, come certi formaggi e certi vini, e non solo, che anch'essi sono elementi monumentali di un passato ricco d'ingegno e di passione che mantiene il suo fascino e la sua presa sul consumatore, estendendola, anzi, ben oltre i nostri confini.

La nostra agricoltura, di dimensioni quantitative contenute, dato che la penisola ha ben poche pianure, essendo invece molto dotata di colline e di montagne, ha però saputo produrre una grande quantità di ricette di prodotti alimentari nobili, oggetto di imitazione da parte di tanti e di una grande richiesta dall'estero. Queste prelibatezze, ottenute comunque da trasformatori italiani, eccedono le potenzialità produttive del nostro

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settore primario. Ma l'abilità dei componenti del sistema alimentare italiano, nel suo complesso, riesce a valorizzare il *made in Italy*, specie se sa contenere le produzioni, cosa che talvolta sfugge al controllo di alcuni *vignerons*, i quali non comprendono che l'equilibrio fra domanda ed offerta deve essere mantenuto, se non si vuole che lo squilibrio comporti un precipitare dei prezzi.

Luigi Costato

L'editoriale che apre il fascicolo sottolinea, già dal titolo, l'importanza crescente della dichiarazione di origine dei prodotti alimentari, non solo nell'ambito della produzione e commercializzazione di prodotti finali destinati al consumo, ma anche a monte, all'interno della fase produttiva agricola.
A lungo si è insistito "*sulla necessità d'informare e tutelare i consumatori*" quale finalità perseguita da una disciplina europea che da oltre 40 anni vieta modalità di etichettatura "*tali da indurre in errore l'acquirente, specialmente: … i) per quanto riguarda le caratteristiche del prodotto alimentare e in particolare … l'origine o la provenienza"*, secondo quanto disposto sin dal 1978 dalla prima direttiva europea in tema di etichettatura dei prodotti alimentari, la Direttiva 79/112/CEE del 18 dicembre 1978.
In questi decenni di applicazione della normativa di fonte europea, è tuttavia emersa, con crescente rilievo, un'ulteriore finalità, accanto a quella intesa a tutelare il consumatore offrendogli informazioni veritiere e non ingannevoli: quella intesa a valorizzare l'attività produttiva agricola all'interno della distribuzione del valore lungo la filiera.
In questa prospettiva l'editoriale pone in rilievo come la crescente attenzione verso l'indicazione dell'origine della materia prima agricola utilizzata possa comportare anche non trascurabili vantaggi alle produzioni primarie nazionali. Da ciò la considerazione che le regole sull'etichettatura sono caratterizzate dall'essere insieme alimentari ed agrarie, siccome finalizzate a tutelare sia i consumatori che i produttori agricoli, oltre che i trasformatori, i quali attraverso la dichiarazione di origine dei componenti valorizzano sul mercato anche i prodotti trasformati. L'origine dei prodotti alimentari e dei loro ingredienti si connota così come strumento rilevante di competizione sul mercato.
In questo ambito un ruolo centrale è stato giocato nell'ultimo decennio dal Regolamento (UE) n. 1169/2011, con l'introduzione di specifici criteri per l'indicazione in etichetta del paese di origine e del *luogo di provenienza*.
Le innovative scelte espresse in tale regolamento sono state in parte depotenziate dai successivi regolamenti di esecuzione della Commissione Europea n. 1337/2013 sull'origine delle carni delle specie suina, ovina, caprina e di volatili, e n. 2018/775 sull'indicazione di origine degli ingredienti. Restano però rilevanti le novità introdotte dal Regolamento (UE) n. 1169/2011 su questo e su altri temi, nella prospettiva di una codificazione sistematica della disciplina dell'etichettatura dei prodotti alimentari.
Preso atto delle novità che stavano per essere introdotte dal progetto di nuovo regolamento sulla comunicazione al consumatore di prodotti alimentari, all'epoca in corso di adozione e pubblicazione, nel 2011 l'AIDA ha organizzato un incontro a Milano, il 6 giugno 2011, in collaborazione con l'EFLA – European Food Law Association, per una prima analisi su contenuti ed effetti di tali novità disciplinari. Le relazioni discusse in tale occasione sono state pubblicate nel fascicolo n. 2-2011 di questa *Rivista*.
Otto anni dopo l'AIDA, in collaborazione con l'EFLA – European Food Law Association e con l'Università degli Studi di Milano, ha organizzato un secondo incontro, svoltosi anch'esso a Milano, il 10 dicembre 2019, e ospitato dal Dipartimento di Studi Internazionali, Giuridici e Storico-Politici, sul tema "*The implementation of Regulation 1169/2011/EU in the EU Member States and the sanction model adopted*", individuando nei profili attuativi e sanzionatori in sede nazionale di questo regolamento elementi cruciali nella regolazione. All'incontro, svoltosi in lingua inglese, hanno partecipato relatori di diversi Paesi europei, oltre che italiani, proponendo un approccio comparativo nella lettura delle diverse esperienze di applicazione del regolamento, per sua natura inteso ad assicurare maggiore uniformità disciplinare rispetto alle precedenti direttive, e che tuttavia lascia ampi spazi alle scelte attuative e sanzionatorie in sede nazionale.

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Relazioni ed interventi discussi nel corso dell'incontro sono pubblicati in questo fascicolo della *Rivista*.
Alessandro Artom introduce i lavori, dando conto delle ragioni della scelta del tema.
Ferdinando Albisinni discute gli elementi di novità introdotti dal Regolamento (UE) n. 1169/2011 sotto il profilo del generale quadro giuridico (nella misura in cui questo regolamento ha sostituito ed accorpato in un unico testo sistematicamente orientato una serie di precedenti distinti atti, regolamenti e direttive), del merito della regolazione (con l'introduzione di nuove cruciali definizioni, quali quelle di paese di origine o luogo di provenienza, e l'adozione di un nuovo approccio quanto alle possibili misure nazionali), nell'area di applicazione (ben più estesa che in passato); e sottolinea l'impatto di queste novità quanto alla declinazione nazionale delle sanzioni, richiamando alcuni recenti casi decisi dalla Corte di giustizia.
Valeria Paganizza propone un'ampia e dettagliata analisi dei documenti europei in tema di etichettatura, ivi inclusi i documenti adottati nel corso degli anni dalla Commissione Europea, con riferimento ad alcuni dei temi che hanno maggiormente suscitato confronti e dibattiti in questi anni, a cominciare dal tema cruciale dell'indicazione di origine in etichetta dei prodotti alimentari e dei loro ingredienti.
Alice Artom riferisce sull'attuazione in Italia del Regolamento (UE) n. 1169/2011 e sui modelli sanzionatori introdotti con il Decreto Legislativo n. 231 del 2017 e con gli altri provvedimenti adottati in Italia in sede legislativa e regolamentare.
Vicente Rodríguez Fuentes illustra la disciplina applicabile in Spagna, sottolineando come l'articolazione della Spagna in Comunità autonome e Regioni assegni soprattutto alla dimensione locale le scelte sulle misure sanzionatorie applicate; riferisce di una serie di casi e questioni rilevanti sin qui emersi, e richiama il ruolo giocato da organismi di autocontrollo volontario su base privatistica.
Didier Le Goff esamina l'attuazione in Francia del Regolamento UE all'interno del quadro disciplinare generale fissato dal Codice del Consumo francese, tenendo conto degli orientamenti espressi dalla Corte di Cassazione.
Luigi Cortellessa analizza le competenze e le attività del Comando Carabinieri per la tutela agroalimentare, riferendo in un ampio prospetto i risultati operativi conseguiti nel 2019.
Laura Ammannati pone l'attenzione sul ruolo che la digitalizzazione sta giocando (e potrà giocare in un prossimo futuro) all'interno della comunicazione nella filiera agroalimentare, migliorando l'efficienza ed aumentando la fiducia di produttori, attori della filiera, e consumatori; e conclude sottolineando come questi nuovi ed originali strumenti pongano problemi disciplinari non ancora affrontati con adeguata consapevolezza da legislatori ed amministratori.
Sabrina Lanni pone l'attenzione sulle diverse prospettive adottate nei vari paesi europei quanto ai contenuti obbligatori e facoltativi delle etichette dei prodotti alimentari, ed all'interazione dei differenti modelli con il diritto dei consumatori a poter operare scelte consapevoli ed informate, e con la disciplina di fonte europea di cui alla Direttiva 2005/29/CE sul divieto di pratiche commerciali sleali nel mercato interno. La relazione estende l'analisi comparativa alle innovative scelte di regolazione operate da alcuni paesi sudamericani, e conclude rilevando che la disciplina dell'etichettatura investe non soltanto le scelte dei consumatori a tutela della loro salute, ma una pluralità di diritti, tutti in vario modo riferibili al diritto di poter effettuare scelte consapevoli ed informate.
Chiude il fascicolo, nella sezione dedicata alle ***Ricerche***, l'indagine di Gelsomina Salito su una questione di grande rilievo ed attualità, anch'essa interna ai temi propri della comunicazione rivolta al consumatore di prodotti alimentari ed all'applicazione del Regolamento (UE) n. 1169/2011: quella relativa alle finalità di tutela attiva della salute assegnate alla comunicazione, al fine di consentire al consumatore scelte consapevoli, che possano tenere in debito conto eventuali allergie del consumatore medesimo. L'ampia analisi richiama la distinzione fra principio di prevenzione e principio di precauzione, esamina gli strumenti pubblicistici e privatistici, nazionali e comunitari, che nel corso degli anni hanno operato al fine di garantire efficace tutela al consumatore di alimenti, concludendo che l'attuale disciplina, pur complessa ed articolata, e più efficace delle precedenti, presenta tuttora rilevanti criticità non compiutamente risolte.

la redazione

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Workshop AIDA-EFLA
Milano, 10 December 2019
The Implementation of Regulation (EU) No 1169/2011 in some Member States and the sanctions models adopted

An introduction

Alessandro Artom

Just few words to introduce the workshop and to explain you the reasons why we have chosen the topic of the workshop.

As it is well known, the Treaty on the Functioning of the European Union (TFEU) leaves to the competence of the legislation by each Member State to establish penalties in case of infringement to the EU Regulations and to appoint the competent bodies in charge to impose those penalties[1].

Some time has elapsed from the entry into application of the EU Regulation No 1169/2011; we intend therefore to analyse, through a comparative law examination, the sanction models adopted by some Member States, to offer tools for professional and research activity. In particular we would like to verify, through the reports by the speakers and the debate with the public, whether the sanctions adopted by each Member State reaches or not the goals established in the "*Recitals*" to the Regulation on food information to consumers.

It appears useful for lawyers working in the area of food law, to assess whether the national sanctions systems can, on the one hand, ensure the free movement of goods[2] and, on the other hand, whether the sanctions adopted can be effective, dissuasive, proportionate to the seriousness of the breach of the provisions foreseen by the EU Regulation on food information to consumers[3].

([1]) Article 169 (1), and point (a) of Article 169 (2), of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union ("the Charter") provides that Union policies are to ensure a high level of consumer protection.

([2]) See Recital 49 Reg. 1169/2011: "… *However, such national measures should not prohibit, impede or restrict the free movement of goods that are in conformity with this Regulation*".

([3]) Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. See Recital 3 of Directive EU 2019/2161: "*The Union has already taken a number of measures to improve awareness among consumers, traders and legal practitioners about consumer rights and to improve enforcement of consumer rights and consumer redress. However, there are remaining gaps in national law regarding truly effective and proportionate penalties to deter and sanction intra-Union infringements, insufficient individual remedies for consumers harmed by breaches of national legislation transposing Directive 2005/29/EC of the European Parliament and of the Council and shortcomings with regard to the injunction procedure under Directive 2009/22/EC of the European Parliament and of the Council. Revision of the injunction procedure should be addressed by a separate instrument amending and replacing Directive 2009/22/EC*".

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National enforcement of food communication rules

Ferdinando Albisinni

1.- An innovative EU Regulation on food information

8 years ago, in June 2011, AIDA and EFLA members met in Milano, to share ideas and comments on the proposal for the new EU Regulation on the provision of food information to consumers[1].
Some months later, Regulation (EU) No 1169/2011 was approved and published[2].
At that time a long term was assigned to the MS to adapt national legislation to the new regulation (the general date of application of Reg. No 1169/2011 was 13 December 2014, while nutrition labelling was postponed until 13 December 2016)[3].
But, even with the benefit of such long terms of application, MS had to deal with difficult tasks to effectively implement the new regulation within their domestic legal order.
In December 2019, AIDA and EFLA members met again, always in Milano, to share ideas and comments on the national implementation and enforcement of this innovative EU Regulation.
In fact, Regulation 1169/2011 introduced relevant innovations:
- *in the legal framework*, as much as the regulation repealed a number of previous directives, in some cases based on models more than 30 years old; unified in a single text provisions previously dispersed in a number of legal acts, and substituted the unification model of regulation to the previous harmonisation model of directives;
- *in the merit of regulation*, e.g. with the new definitions of "food information", "place of provenance", "country of origin"[4], with the adoption of new rules on responsibilities[5], with a new approach to national measures[6], with detailed provisions on the dimensions of letters within the label[7];
- *in the area of application*, including all "food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers"[8].

2.- The impact on national rules

Those innovations have been appreciated in their content only some years later. During those years, MS had to adapt both their substantive legislation and the tools traditionally adopted in this area (from prescriptions to sanctions).
The sanctioning model was (and still is) not uniform among the single MS of EU, with reference to procedures and institutions involved, to the kind of sanctions (criminal or administrative), to the monetary level of sanctions, and to the need to coordinate.
Moreover, national rules have been subject to relevant processes of modification and integration, taking into account the new areas of national measures opened by Reg. No 1169/2011, and the sensitive topic of the identification and communication of country of origin and place of provenance.

(1) Contributions and comments discussed during that workshop have been published in this *Riv.* www.rivistadirittoalimentare.it, n. 2-2011.
(2) Regulation (EU) No 1169/2011 of the European Parliament and of the Council, of 25 October 2011, on the provision of food information to consumers, OJ L 304, 22.11.2011, p. 18–63.
(3) Art. 55 of Reg. No 1169/2011.
(4) Artt. 3 and 26 of Reg. No 1169/2011.
(5) Art. 8 of Reg. No 1169/2011.
(6) Chapter VI of Reg. No 1169/2011.
(7) Art. 13 of Reg. No 1169/2011.
(8) Art. 1 of Reg. No 1169/2011

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The emerging framework resulted even more complex, due to some implementing regulations, adopted by the Commission on the basis of the delegation introduced by Reg. No 1169/2011[9], but in some case expressly criticised by EU Parliament[10].

With reference to Italy many new rules have been introduced:

- in *February 2017*, three Leg.ve Decrees, on sanctions regarding nutritional and health claims, on materials in contact with food, and on feed[11];
- in *September 2017*, a Leg.ve Decree on the specification on label of the factory of production or of conditioning of food, with related sanctions[12];
- in *December 2017*, a Leg.ve Decree on sanctions in case of violation of Reg. 1169/2011[13];
- between *2016* and *2017*, a number of Ministerial Decrees on the indication of origin of some products, all adopted mentioning Reg. No 1169/2011 as legal basis, and located within the general sanctioning framework applicable to EU and national rules on labelling[14].

In the same years, relevant rules have been introduced in all the MS, as discussed by speakers and participants to the Milano workshop[15].

3.- A "flexible droit"

As a result of the simultaneous application of rules of various origin and structure, EU food lawyers must now deal with a dimension of communication and contamination, leading to the conclusion that within the present dimension many sources of law play a decisive role in establishing common rules regulating day to day life of food producers and consumers, building new models of European Governance in this sensitive area of experience.

We are facing a *growing tendency to share models and answers on the basis of shared experiences*, in the two aspects of including external

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([9]) See Commission Implementing Regulation (EU) No 1337/2013, of 13 December 2013, laying down rules for the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry; and Commission Implementing Regulation (EU) 2018/775 of 28 May 2018, laying down rules for the application of Article 26(3) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, as regards the rules for indicating the country of origin or place of provenance of the primary ingredient of a food.

([10]) See European Parliament, 29 January 2014, "Resolution on the Commission implementing regulation of 13 December 2013 laying down rules for the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry", (2014/2530(RSP)); European Parliament, 11 February 2015, "Resolution on country of origin labelling for meat in processed food", (2014/2875(RSP)); European Parliament, 12 May 2016, "Resolution on mandatory indication of the country of origin or place of provenance for certain foods", (2016/2583(RSP)).

([11]) D.Lgs. 7 febbraio 2017, n. 27, Disciplina sanzionatoria per la violazione delle disposizioni di cui al regolamento (CE) n. 1924/2006 relativo alle indicazioni nutrizionali e sulla salute fornite sui prodotti alimentari; D.Lgs. 10 febbraio 2017 n. 29, Disciplina sanzionatoria per la violazione di disposizioni di cui ai regolamenti (CE) n. 1935/2004, n. 1895/2005, n. 2023/2006, n. 282/2008, n. 450/2009 e n. 10/2011, in materia di materiali e oggetti destinati a venire a contatto con prodotti alimentari e alimenti; D.Lgs. 3 febbraio 2017, n. 26, Disciplina sanzionatoria per le violazioni delle disposizioni di cui al regolamento (CE) n. 767/2009 del 13 luglio 2009 sull'immissione sul mercato e sull'uso dei mangimi. See F. Aversano, *Materiali e oggetti a contatto con gli alimenti: regole e responsabilità*, in this *Riv*. www.rivistadirittoalimentare.it, n. 3-2019, p.82.

([12]) D.Lgs. 15 September 2017 n. 145, Disciplina dell'indicazione obbligatoria nell'etichetta della sede e dell'indirizzo dello stabilimento di produzione o, se diverso, di confezionamento, ai sensi dell'articolo 5 della legge 12 agosto 2016, n. 170 - Legge di delegazione europea 2015. See L. Costato – F. Albisinni – V. Rubino – S. Rizzioli – M. Minelli, *L'indicazione dello stabilimento di produzione o di confezionamento nell'etichetta dei prodotti alimentari (d. legis. n. 145 del 2017)*, in *Studium Iuris*, 2018, n. 6, p. 704 ss., e n. 7-8, p. 830 ss.

([13]) D.Lgs. 15 December 2017, n. 231, Disciplina sanzionatoria per la violazione delle disposizioni del regolamento (UE) n. 1169/2011, relativo alla fornitura di informazioni sugli alimenti ai consumatori e l'adeguamento della normativa nazionale alle disposizioni del medesimo regolamento (UE) n. 1169/2011 e della direttiva 2011/91/UE, ai sensi dell'articolo 5 della legge 12 agosto 2016, n. 170 «Legge di delegazione europea 2015». See this *Riv*. www.rivistadirittoalimentare.it, 2017 e 2018.

([14]) D.M. 9 December 2016, on milk and milk-based products; D.M. 26 July 2017, on durum wheat pasta; D.M. 26 July 2017, on rice; D.M. 16 November 2017, on tomato and tomato sauce.

([15]) See V. Paganizza, Alice Artom, V. Rodriguez Fuentes, D. Le Goff in this *Riv*. www.rivistadirittoalimentare.it, n. 1-2020.

sources within the internal legal system and of acting as sources (or at least as models qualified and complied with) of rules that have effect well beyond geography.

On the other hand, in a number of cases, EU or international rules, which have not been introduced to deal with food labelling but to protect other interests, produce relevant effects in this area of regulation.

As a consequence, the sanctioning tools intended to enforce food communication rules are increasingly called to deal with unusual topics and questions.

Two recent decisions of the Court of Justice illustrate this trend.

The first one[16] solved a dispute on the criteria to be followed to declare on the label the country of origin of fresh vegetables, when the country of cultivation and that of harvesting are not the same.

Regulation (EU) No 1169/2011, adopts the definition of "*country of origin*"[17] of Regulation (EEC) No 2913/92[18], i.e. of the Community Customs Code introduced in the '90s for tax goals and not for labelling goals.

The case discussed in 2019 before the Court concerned some mushrooms grown in other countries, exported in boxes with a base of peat and limestone, and harvested just three days after entering the country of import and sale (in this case: Germany).

On the basis of art. 23.2. of Reg. (EC) No 2913/92, that mentions harvesting to define the origin of a vegetable products, the Court stated that the origin of mushrooms to be declared on labels is that of the country of harvesting (in this case Germany), although the mushrooms had actually been grown in other countries.

The decision, called to a difficult integration between set of rules having well different goals and objects:

- gave relevance only to the word "*harvested*" and not to the word "*products*", without considering that the formula of the Community Custom Code uses both words, speaking of "*vegetable products harvested therein*"[19];
- did not consider that the Custom legislator of 1992 was presumably assuming as a matter of common experience that an agricultural product is harvested were it is cultivated (i.e.: produced), as confirmed by the text of the CCC where this definition is located within the general category of "*goods wholly obtained in a country*" as specified in art. 23.2.[20]

The result of the decision is that substantive rules on origin labelling, and consequently rules on sanctions, are shaped in a way that devaluates the agricultural phase of production, in a direction which seems to be contrary to the general framework of Reg. (EU) No 1169/2011[21].

A second interesting recent decision of the Court of Justice[22] had to deal with the topic of the origin to be declared on the label of food coming from territories occupied by the State of Israel since 1967. Confirming the legitimacy of national French measures, the Court stated: "Under the rules of international humanitarian law, these territories are subject to a limited jurisdiction of the State of Israel, as an occupying power, while each has its own international status distinct from that of that State[23]. … Consumers cannot be expected to guess, in the absence of any information capa-

(16) Court of Justice, 4 September 2019, C-686/17, *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v. Prime Champ Deutschland Pilzkulturen GmbH*.
(17) See art. 2.3. of Reg. 1169/2011.
(18) Council Regulation (EEC) No 2913/92, of 12 October 1992, establishing the Community Customs Code.
(19) Art. 23.2.b) of Community Custom Code.
(20) See the heading and full text of art. 23 of Community Custom Code.
(21) See L. Costato, *L'origine conta: nell'alimentare e in agricoltura*, in this *Riv*. www.rivistadirittoalimentare.it, n. 1-2020.
(22) Court of Justice, 12 November 2019, C-363/18, *Organisation juive européenne, Vignoble Psagot Ltd v. Ministere de l'Économie et des Finances*.
(23) Point 34 of the decision.

ble of enlightening them in that respect, that that foodstuff comes from a locality or a set of localities constituting a settlement established in one of those territories in breach of the rules of international humanitarian law[24]. To that extent, the omission of the indication that a foodstuff comes from an 'Israeli settlement' located in one of the territories referred to in paragraph 33 above is likely to mislead consumers, by suggesting that that food has a place of provenance other than its true place of provenance[25]. That conclusion is supported by the objective of Regulation No 1169/2011, which is, as stated in Article 1(1) thereof, to ensure a high level of consumer protection in relation to food information, taking into account the differences in perception of consumers[26]. … *It follows from Article 3(1) of Regulation No 1169/2011, and from recitals 3 and 4 of that regulation, in the light of which that provision must be read, that the provision of information to consumers must enable them to make informed choices, with particular regard to health, economic, environmental, social and ethical considerations*[27]."

Within this perspective, labelling provisions result subject to a multiplicity of rules, even of international origin, not aimed as such to deal with food labelling, but which may be taken to a broad and general dimension, taking into account even "*ethical considerations*".

In other words, we are facing a trend toward *complexity*. And recent EU Regulations, like Reg. (EU) 2017/625 on the globalisation of the official controls on food and more generally on agricultural activity[28]; the present proposals for the CAP Reform including the extension of this globalised control system even to wine CMO; the UE and domestic rules and judicial decisions on global market regulation; expressly confirm this trend.

Finally, with specific reference to the sanction tools, we must consider that anti-trust and competition provisions play a central role in the area of food labelling.

In Italy the AGCM, the national Authority of Guarantee of Competition, adopted many relevant decisions declaring illegal and sanctioning food labels deceiving the consumers[29].

In EU the European Commission is increasingly giving attention to food labelling within enforcement of competition rules in the agri-food markets, applying sanctions which are really heavy and much more effective than the limited sanctions usually applied at national level within the specific rules of labelling.

A significant case is that of 2019, when the EU Commission fined AB InBev for more than 200 million euro[30] for restricting cross-border sales of beer trough the adoption of different packaging in the different MS, notably by removing the French version of mandatory information from the label of the beer sold in Belgium.

Application of food labelling rules may therefore have a very broad reference area, and implementing tools are much more flexible and various than we imagine.

A French scholar, Jean Carbonnier, more than 50 years ago, wrote on the *flexible droit*, looking to legal rules not as a sort of "cudgel" but as "*the flexible bow that throws the arrow away*"[31].

Rules on food labelling and on related sanctions are a clear example of such *flexible bow*, as the

(24) Point 50.
(25) Point 51.
(26) Point 52.
(27) Point 33; italics added.
(28) On this regulation see this *Riv*. www.rivistadirittoalimentare.it, n. 2-2018, with contributions of F. Albisinni, G. Pisciotta, S. Carmignani, F. Aversano, A. Germanò, A. Lupo.
(29) For cases and decisions of the Italian AGCM in this area, see F. Albisinni, *Strumentario di diritto alimentare Europeo*, 4^ ed., 2020, Cedam – Wolters Kluwer, cap. IX.
(30) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2488.
(31) J. Carbonnier, *Flexible droit. Textes pour une sociologie du droit sans rigueur*, L.G.D.J., Paris, 1969; trad. it. *Flessibile diritto*, a cura di A. De Vita sulla 7^ ed. francese del 1992, Milano, 1997.

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contributions in this workshop remark in their analysis under different national and shared perspectives.

ABSTRACT

8 years after the adoption, in 2011, of Regulation (EU) No 1169/2011 on the provision of food information to consumers, AIDA and EFLA members met in Milano, to share ideas and comments on national implementation of this new and innovative regulation.
In fact, Regulation 1169/2011 introduced relevant innovations: in the legal framework, in the merit of regulation, and in the area of application.
As a consequence, MS had to deal with difficult tasks to effectively implement the new regulation within their domestic legal order.
The paper mentions some of the relevant Italian implementation acts, examines some recent decisions of the European Court of Justice and concludes that even in the area of administrative sanctions for violation of EU rules on communication to consumers of food products, EU food lawyers must now deal with a dimension of communication and contamination, as much as many sources of law play a decisive role in establishing common rules regulating day to day life of food producers and consumers, building new models of European Governance in this sensitive area of experience.

A 8 anni dall'adozione, nel 2011, del Regolamento (UE) n. 1169/2011 sulla fornitura di informazioni ai consumatori di prodotti alimentari, i membri di AIDA ed EFLA si sono incontrati a Milano, per condividere idee e commenti sull'attuazione nazionale di questo nuovo e innovativo regolamento.
Il Regolamento n. 1169/2011 ha introdotto rilevanti novità: nel quadro normativo, nel merito della regolamentazione, e nel campo di applicazione.
Di conseguenza, gli Stati membri hanno dovuto affrontare rilevanti difficoltà per attuare efficacemente il nuovo regolamento all'interno degli ordinamenti nazionali.
Il documento cita alcuni degli atti di attuazione italiani, esamina alcune recenti decisioni della Corte di giustizia europea e conclude che anche in materia di sanzioni amministrative per violazione delle norme UE sulla comunicazione ai consumatori di prodotti alimentari, gli operatori del settore alimentare ed i consulenti che operano in tale settore devono ora confrontarsi con una dimensione di comunicazione e contaminazione, al cui interno operano diverse fonti di diritto, che svolgono un ruolo decisivo nello stabilire regole comuni per le scelte quotidiane dei produttori e dei consumatori di cibo, costruendo nuovi modelli di governance europea in questo delicato settore di esperienza.

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A European overview on Regulation (EU) No 1169/2011 after the entry into force

Valeria Paganizza

1.- Introduction

More than five years have passed since the date of application of the EU Regulation on food information to consumers (except for the provisions on the nutrition declaration). The discussion that the act has been generating since the beginning has not yet come to an end and seems actually to freshen day after day, at different levels and topics, for at least two orders or reasons.
The first one is that only the concrete application of the provisions is able to let some of the weaknesses of the Regulation emerge. Actually, the first questions on applicative issues were raised immediately after the adoption of the act and answered in the Commission Notice on Questions and Answers of January 2013. The main elements of concern related, at the time, to the meaning of the provisions on mandatory particulars and the way in which information should be transmitted to consumers.
The second order of reasons for the current debate on the Regulation is that the EU act might be considered somehow incomplete: on the one hand, it does not cover all the aspects of food labelling (non prepacked food and food not intended for final consumers are not covered by the provisions on mandatory particulars of the Regulation) and this implies a non harmonised area where Member States have the opportunity to adopt national provisions and where operators can intervene with voluntary information; on the other hand, the Regulation conferred on the EU Commission the task to adopt implementing and delegated acts in order to put in effect or supplement some of its provisions. However, some of these acts have not been approved yet such as those on information on the possible and unintentional presence in food of substances or products causing allergies or intolerances and on products suitable for vegans or vegetarians (and so, even in this case, there might be place for voluntary information) and some others, such as the regulation on the mandatory indication of the origin of the primary ingredient, despite having been adopted, added further doubts to the application issues.
The paper is therefore intended to offer an overview of what is at stake in the area of the Regulation on food information to consumers.

2.- Voluntary particulars under Article 36 of Regulation (EU) No 1169/2011

As mentioned above, some of the most discussed issues on food information relate to voluntary information[1]. Under Article 36 of Regulation (EU) No 1169/2011 most of the general requirements set for mandatory particulars apply when information listed in Articles 9 and 10 of the Regulation are provided on a voluntary basis.
Operators can however decide to make available further details (other than those listed in articles 9 and 10) that, despite being offered for mere marketing purposes, are however useful to consumers to make more informed choices, according to the general aim of the EU act. In doing that, however, operators must comply with some general requirements that, likely for mandatory particulars, the Regulation sets also for voluntary information, preventing, for instance, misleading, ambiguous or confusing details. Moreover, where appropriate, such information must be based on the relevant scientific data.

([1]) On voluntary food information, please refer also to V. Paganizza, *Informazioni volontarie sugli alimenti, in V. Rubino (ed.), Le informazioni sugli alimenti ai consumatori. Il Regolamento (UE) n. 1169/2011*, Roma, 2015, pp. 219-229.

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For four specific categories of particulars, that is to say information on the possible and unintentional presence in food of substances or products causing allergies or intolerances, information related to suitability of a food for vegetarians or vegans, the additional indication of reference intakes for specific population groups and information on the absence or reduced presence of gluten in food, however, Article 36 empowered the Commission to adopt implementing acts on the application of the mentioned requirements. Of these, the EU Institution adopted only the Implementing Regulation (EU) No 828/2014[2] which sets the exact statements and conditions that an operator respectively must use and comply with when providing information on the absence or reduced presence of gluten. The act allows the use of the 'gluten-free' statement only for food, sold to the final consumer, that contains no more than 20 mg/kg of gluten and of the phrase 'very low gluten' for «food, consisting of or containing one or more ingredients made from wheat, rye, barley, oats or their crossbred varieties which have been specially processed to reduce the gluten content» and which «contains no more than 100 mg/kg of gluten in the food as sold to the final consumer».

A doubt could arise with reference to those products that naturally contain less than 20mg/Kg of gluten, such as, for instance, maize, rice, etc. and the compliance of a statement as 'gluten free' with the provisions of Regulation (EU) No 1169/2011 on fair information practices and in particular with the prohibition to provide food information that are misleading in that they suggest that the food possesses special characteristics when in fact all similar foods possess such characteristics. Recital No 10 of Regulation No 828/2014 takes into account also this event, and reconciles the possibility for a food containing ingredients naturally free of gluten to bear terms indicating the absence of gluten with the compliance with the general provisions on fair information practices. The recital includes several hypotheses.

a. The product is constituted of several ingredients that are naturally gluten free (for instance rice crackers) but on the market there are several other similar products with recipes that include sometimes also ingredients containing gluten: in this case, the general provisions of Regulation (EU) No 828/2014 apply, so the product can bear the "gluten free" statement without further details.

b. The product is constituted of several ingredients that are naturally gluten free and on the market it is impossible to find similar products containing gluten or

c. The product is itself a (mono-ingredient) naturally gluten free food (rice, cornmeal mush).

For b and c, there are two possible readings of the reconciling statement of Regulation (EU) No 828/2014.

The first interpretation suggests that when an operator labels a naturally gluten free food with the 'gluten-free' statement, he or she ensures the absolute absence of gluten[3]. Such reading however seems not to comply with the wording of Regulation (EU) No 828/2014 which, without distinction, authorises the use of the claim for any product with gluten content lower than 20 mg/kg. Requiring an operator to adopt further precautions to avoid any possible contamination (below 20 mg/Kg), in order to use the claims, adds burdens that are not justified under the Regulation and that would thus hinder competition, creating undue discrimination among food business operators.

The second interpretation (that is the reading of the author of this paper) considers the 'gluten free' statement, for those products that are naturally gluten free, to be lawfully used only for foods

(2) Commission Implementing Regulation (EU) No 828/2014 of 30 July 2014 on the requirements for the provision of information to consumers on the absence or reduced presence of gluten in food.

(3) P. Borghi, *Gli alimenti "senza glutine"*, in Costato L., Borghi P., Rizzioli S., Paganizza V., Salvi L., *Compendio di diritto alimentare*, Milano, 2019, p. 255.

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that also bear further details that inform consumers that the characteristic belongs to the whole category of food, such as 'all rice is gluten free' or 'cornmeal is gluten free' or '«Trademark» rice/cornmeal is gluten free as any rice/cornmeal'. In this way, the rationale of Regulation (EU) No 828/2014 will perfectly match Regulation (EU) No 1169/2011: the claim is used in compliance with the first Regulation and with particulars that help consumers knowing that the characteristic is not specific of that product, thus avoiding misleading them. Could in such statement the word "naturally" be used? There is not specific provision on this issue, but the use seems to be allowed, as far as it does not mislead consumers. Indeed, the same Regulation, in its whereas, refers to food that are 'naturally' gluten-free.

2.1. -Unintentional presence in food of substances or products causing allergies or intolerances

Article 9 (1) let. c) of Regulation (EU) No 1169/2011 requires the indication (and the emphasising) of any ingredient or processing aid causing (or derived from products or substances that cause) allergies or intolerances if they are voluntary used in the manufacture or preparation of a food and if they are still present in the finished product, even if in an altered form. The list of allergens is however a concluding catalogue, based on EFSA Scientific Opinion[4]. This means that only substances or products used as ingredients or processing aids, constituted of or derived from those listed in Annex II to the Regulation must be emphasised in labelling. There are thus no legal obligations on the indication of possible unintentional presence of food allergens (so called cross contamination) or any specific requirements for their display. Up till now, despite having been empowered by the Regulation (EU) No 1169/2011, the EU Commission has not adopted yet an implementing act on the unintentional presence of cross contamination. As a consequence, more and more frequently, food business operators have adopted, on a voluntary basis, the praxis of using expressions such as "may contain" to inform consumers that they cannot exclude that during the production process, food came in contact with some traces of substances that can cause allergies of intolerance. Over the legitimacy of this practice, a couple of doubts may arise.

First, as we told above, any information made available on a voluntary basis must not be misleading, ambiguous or confused but in this case the particular is surely unclear and vague: does the product contain allergens or not? The consumer cannot get an answer to such question and will not be able to make a truly informed choice, so, in the uncertainty of the cross contamination, he or she, if affected by allergy or intolerance to those substances, should avoid to buy that product. Since most of food, nowadays, has similar information, the particular is going to lose its significance for consumers.

Second, the use of the warning cannot be considered as an opportunity, for food business operators, to elude the responsibility[5] of adopting the

([4]) EFSA, *Opinion of the Scientific Panel on Dietetic products, nutrition and allergies [NDA] on a request from the Commission relating to the evaluation of allergenic foods for labelling purposes, The EFSA Journal* (2004) 32, 1-197, https://doi.org/10.2903/j.efsa.2004.32. EFSA updated its original scientific opinion in 2014, EFSA NDA Panel (EFSA Panel on Dietetic Products, Nutrition and Allergies), *Scientific Opinion on the evaluation of allergenic foods and food ingredients for labelling purposes*, EFSA Journal 2014;12(11):3894, 286 pp. doi:10.2903/j.efsa.2014.3894. Please refer also to Commission Notice of 13 July 2017 relating to the provision of information on substances or products causing allergies or intolerances as listed in Annex II to Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, OJ *C 428,* 13.12.2017, p. 1-5, in particular point 5.

([5]) On the responsibility of the food business operator, see M.P. Genesin, *La responsabilità primaria dell'operatore del settore alimentare in relazione alla Food Safety*, in *Res. Civ. e prev.*, 2018, 3, pp. 809-826; E. Rook Basile, *Sicurezza e responsabilità nella filiera alimentare*, in *Contratto e impresa*, 2017, 2, pp. 432-450; N. Lucifero, *La responsabilità per le informazioni al consumatore di alimenti tra regole di validità, regole di comportamento e doveri informativi*, in *Contratto e impresa*, 2017, 2, pp. 467-502; S. Masini, *Vizi, difetti e rischi nel consumo di alimenti: profili di responsabilità*, in *Diritto agroalimentare*, 2016, 3, pp. 473-523.

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due diligence in carrying on their activity (such as performing a plant cleaning after having processed food containing ingredients that could cause allergies of intolerances).
Where praxis is steering towards a direction that seems to fail to comply with the general scope of allowing consumers to make informed choices, an implementing act able to harmonize the area is undelayable. However, as stated in the last meeting of the working group on food information to consumers of 9 October 2019, the discussion on the topic has been deferred to the next summit[6]. In the meanwhile, the European Commission is participating with the Member States in the Codex Alimentarius work on the precautionary allergen labelling launched in 2019 and is developing reference measurement procedures, within the European Network of Food Allergen Detection Laboratories, for the future development and implementation of rules on this theme[7].

3.- Products suitable for vegans or vegetarians

Among the implementing acts that the EU Commission had to adopt under article 36 of Regulation (EU) No 1169/2011 there is that on information related to suitability of a food for vegetarians or vegans. The activities of the working group on food information to consumers on this topic, according to the priority set within the REFIT Platform in 2017[8], have already started in 2019 and focused first on the possible definition of vegan and vegetarian[9], which are essential to identify the products to which the future implementing regulation could apply. In everyday life, a clear cut distinction between vegetarian/non vegetarian and vegan/non vegan food is complex since it relies on different 'philosophies' or 'attitudes' toward food and life. Is for instance honey a vegetarian product or not? And is it vegan? And what about food obtained with processing aids of animal origin that are not present in the final product? And how could it be possible to define as vegan or vegetarian a wine or fruit juice or jam obtained with an industrial production, without having the certainty that no insects were blended? As for now, food business operators have chosen to use vegan or vegetarian statements in compliance with private standards that have their own specifications and which offer their own answers to the above mentioned questions. But there are several other issues that are currently involving stakeholders, and on which the working group on food information to consumers is currently focusing, such as the possibility to use the statement 'vegetarian' or 'vegan' for food that should naturally have such characteristics, such as olive oil. As the report of 09 October states, some criticism has been raised[10] by some Member States (such as France) on the misleading nature of such 'claims', according to article 7, par. 1 (c) of Regulation (EU) No 1169/2011, since any vegetable oil is vegetarian and thus this characteristic

(6) The Author found some details on the meeting on a report from the delegated staff of the Dutch Ministry of Health, Welfare and Sport who took part to the meeting of the EU Commission Working Group on Food Information to Consumers on 09 October 2019, https://www.row-minvws.nl/binaries/row-minvws/documenten/verslag/2019/10/9/verslag-cwg-voedselinformatie-voor-consumenten-van-9-oktober-2019/Verslag%20CWG%20Voedselinformatie%20voor%20consumenten%20van%209%20oktober%202019.pdf
(7) Please refer to the Commission's answer of the 12 May 2020 to the Parliament's question no E-001276/2020. https://www.europarl.europa.eu/doceo/document/E-9-2020-001276-ASW_EN.pdf
(8) Regulatory fitness and performance programme – REFIT Scoreboard Summary, 24 October 2017, https://ec.europa.eu/info/sites/info/files/regulatory-fitness-and-performance-programme-refit-scoreboard-summary_en_3.pdf, p. 18.
(9) Please refer to footnote 5. Also scholars started wondering how vegan and vegetarian products can be defined, like F. Domke, *Vegetarian and vegan products labelling and definitions*, in *EFFL*, 2018, 13, 2 pp. 102-107; N. Sochirca, *The European legal framework on vegan and vegetarian claims*, in *EFFL*, 13, 6, pp. 514-521. Both the Authors, as well as I. Carreno and T. Dolle, *Tofu Steaks? Developments on the Naming and Marketing of Plant-based Foods in the Aftermath of the TofuTown Judgement,* in EJRR, 2018, 9, 3, pp. 575-584, DOI: https://doi.org/10.1017/err.2018.43, remind that, lacking a harmonised definition or vegetarian and vegan food at a EU level, Germany adopted national guidelines on the topic.
(10) See footnote No 7.

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cannot be presented as specific of a product. Once again, one could wonder if the possibility that minute insects naturally present in vegetables are milled with the raw material can rule out the vegetarian and vegan nature of the product because, despite the cleaning and filtration phases, some infinitely small parts of insects (such as vitamins or proteins) can become an unintentional compound. In the affirmative, a business operator which could ensure, through adequate technologies, that no insects at all were milled with the vegetable raw material, could lawfully use the claims 'vegan' or 'vegetarian'. To this reading, good practices could be opposed: any operator should adopt any possible strategy to avoid the presence of unintentional bodies (such as insects) not only in the final product, but also at any stage of the production chain. The solution to the doubt if an olive oil (but the same reasoning covers also wine, juice of fruit, jams, etc.) can be sold as vegetarian or vegan is therefore a technological one: if the ordinary production processes carried out with due diligence by food business operators can always exclude the possible unintentional presence of animal substances, thus the adjectives 'vegetarian' or 'vegan' cannot be used. Otherwise, should the good manufacturing practices be unable to prevent the presence of insects, a food business operator who adopts a special technology that can reach such result could lawfully use the claim.

Another issue that pertains to vegan and vegetarian food is the use of "meaty terms", that is to say words that in everyday life are commonly used for meat products but that can be useful to describe alternatives based on non-meat ingredients: some examples could be tofu/soybean or, most simply, 'veggie' burger, hamburger, sausages, etc., where the legislation has not yet provided a definition for them. The issue does not affect for instance milk or cheese or yogurt, which are clearly defined by the EU Legislation and on which also the EU Court of Justice gave its judgment in case C-422/16[11]. Within the European Union a harmonised approach on the theme is still lacking but some stakeholders raised concerns on the possible misleading nature of the use of the 'meaty-words' for vegetarian or vegan products. Such doubts seem actually to be ungrounded, unless national provisions exist. On the one hand, food business operators who offer alternatives for vegetarian or vegan consumers make of this characteristic the commercial strength of their products, so they have every interest in informing consumers of the food composition, through labelling. Also the position in retail food stores usually helps to emphasize their presence and their differences from meat food. Even the most inexperienced and uncultured consumer could recognize their peculiarity: their being "veggie".

On the other hand, consumers who are used to purchase vegetarian or vegan food have a greater sensitivity towards information on the suitability of a product for their diets so they are more than aware that the food they are buying is thought as an alternative to meat products and they choose the product for that specific characteristic: they would not certainly buy a meat product.

The European Commission, in recent years, replied several times to the European Parliament's questions on this issue[12], emphasising that the general principles of Regulation (EU)

([11]) Judgment of the Court (Seventh Chamber) of 14 June 2017, *Verband Sozialer Wettbewerb eV v TofuTown.com GmbH*, Case C-422/16. On the Judgment, please refer to L. Costantino, *Formaggio di tofu e latte di soia al vaglio dell'interpretazione della Corte di Giustizia*, in *Giustizia civile.com (Online)*, 2017, available at http://giustiziacivile.com/unione-europea/note/formaggio-di-tofu-e-latte-di-soia-al-vaglio-dellinterpretazione-della-corte-di [last access 11 March 2020].

([12]) See, for instance, questions No E-003755-17 (https://www.europarl.europa.eu/doceo/document/E-8-2017-003755_EN.html), No P-004181-17 (https://www.europarl.europa.eu/doceo/document/P-8-2017-004181_EN.html), No E-004044-17 (https://www.europarl.europa.eu/doceo/document/E-8-2017-004044_EN.html). Sometimes the EP's questions put forward the idea that the use of meaty-words for vegan and vegetarian products was unfair competition aimed at exploiting «*the reputation of the geographical indications of meat-based products in order to attract consumers*» (E-004310-18, https://www.europarl.europa.eu/doceo/document/E-8-2018-004310_EN.html) without considering, as we mentioned above, that if those products aim to attract vegans or vegetarians, competition does not relief since the target consumers are different (almost opposite, indeed).

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No 1169/2011 «*provide sufficient legal basis to protect consumers from being misled*». In particular, it reminds that, under Annex VI, part A, point 4 of the Regulation «*where a substitution ingredient(s) is used in a product, the name of the product should be followed in close proximity by the* name of the substitution ingredient(s)»[13].

4.- Mandatory indication of the origin of the primary ingredient

One of the hottest topics concerning the implementation of Regulation on food information to consumers is the mandatory indication of the origin of the primary ingredient, but this is a long story. Let's start from the beginning. Article 9, par. 1, (c), includes among mandatory particulars the country of origin or place of provenance only where its presence is required under Article 26, that is to say «*where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food*» and for meat under implementing regulation (EU) No 1337/2013[14]. Moreover, where the country of origin or the place of provenance of a food is given (in any form) but it is not the same as that of its primary ingredient, Regulation (EU) No 1169/2011 requires that, under adoption of an implementing act, the country of origin or place of provenance of the primary ingredient is declared or is indicated as being different from that of the food. The Commission adopted the required implementing act laying down the modalities for the application of Article 26(3) of Regulation (EU) No 1169/2011 just in 2018, with Regulation (EU) 2018/775[15], applicable since the first day of April 2020. The act entails that the indication of the origin or provenance of the primary ingredient different from that of the food is given either with reference to a geographical area among those listed in the Regulation[16] or by means of a statement that informs consumers that the primary ingredient does not originate from the country of origin or the place of provenance of the food. Being mandatory, these particulars must be in compliance with the size requirements of Regulation (EU) No 1169/2011 and the two indications on the origin (food and primary ingredient) must be in the same field of vision.

At the beginning of 2020, the EU Commission published a Notice[17] explaining how the implementing Regulation (EU) 2018/775 should apply. As for the scope, the document recalls that the regulation does not apply to geographical indications that are protected by EU provisions[18] and international agreements, as well as to organic products which are subject to specific provisions that constitute *lex specialis*. Also registered trademarks which constitute an indication of origin do not fall into the scope of the act since, according to its seventh recital, they need further examina-

(13) Answer given by Commissioner Andriukaitis on behalf of the Commission, on 27 June 2016, question reference: E-003771/2016, https://www.europarl.europa.eu/doceo/document/E-8-2016-003771-ASW_EN.html .

(14) Commission Implementing Regulation (EU) No 1337/2013 of 13 December 2013 laying down rules for the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry.

(15) Commission Implementing Regulation (EU) 2018/775 of 28 May 2018 laying down rules for the application of Article 26(3) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, as regards the rules for indicating the country of origin or place of provenance of the primary ingredient of a food.

(16) These are the geographical areas which can be alternatively used: 'EU', 'non-EU' or 'EU and non-EU'; Region, or any other geographical area either within several Member States or within third countries, if defined as such under public international law or well understood by normally informed average consumers; FAO Fishing area, or sea or freshwater body if defined as such under international law or well understood by normally informed average consumers; Member States or third countries ; Region, or any other geographical area within a Member State or within a third country, which is well understood by normally informed average consumers; the country of origin or place of provenance in accordance with specific Union provisions applicable for the primary ingredient as such.

(17) Commission Notice on the application of the provisions of Article 26(3) of Regulation (EU) No 1169/2011, C/2020/428, OJ C 32, 31.1.2020, p. 1-8.

(18) Regulation (EU) No 1151/2012, Regulation (EU) No 1308/2013, Regulation (EC) No 110/2008 or Regulation (EU) No 251/2014.

tion, due to their specific purpose, that is allowing consumers to identify, through the sign, definite characteristics and quality of the product or of a service. Unlikely, trademarks that have not undergone registration are not included in the exemption so, where they contain an indication of origin, they are subject to the implementing regulation. An interpretative doubt that does not find a solution in the Commission notice relates to the inclusion of collective marks and certification marks into the scope of the implementing regulation. On the one hand, if the rationale which justifies the exclusion of trademarks from the provisions of the regulation, according to the seventh recital, is the fact that they are signs that identify a company and its products (a particular commercial source or trade origin, using the word of the Regulation) and which could be transferred from a subject to another, collective marks and certification marks seem to be characterised by a different connotation. Collective marks belong to an association[19], can designate the geographical origin of the goods or services (Article 29 (3) of Directive 2015/2436)[20], but they distinguish the goods or services of all the members of that association. Likely, guarantee or certification marks distinguish goods or services «which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from goods and services which are not so certified», including «signs or indications which may serve, in trade, to designate the geographical origin of the goods or services» (Article 27(a) and 28(4) of Directive 2015/2436[21]). So also certification marks are signs that do not identify the products of a single operator (as a commercial source or trade origin) but rather certify that such products (as well as any other bearing the certification mark) have certain characteristics. On the other hand, however, under Directive 2015/2436, both collective marks and certification marks are trademarks so, when registered, they should not fall into the scope of the implementing Regulation.

The Commission Notice on the application of the provisions of Article 26(3) of Regulation (EU) No 1169/2011 excludes from the scope of the Implementing Regulation some cases in which the presence of geographical elements do not constitute an indication of origin, such as the name and address of the food business operator (that are mandatory under Article 9 of Regulation (EU) No 1169/2011). Such particulars could however mislead consumers if they are emphasised along with elements that recall the origin of the product, where the primary ingredient has a different origin. Also customary and generic names, even when they are legal names under Regulation (EU) No 1169/2011, which include geographical terms but which are not understood as indications of origin or place of provenance of the food (such as Frankfurter sausage), do not fall within the scope of the Implementing Regulation.

Conversely, the Commission Notice explains that any phrases that could refer to the origin or place of provenance (made in, product of, produced in, manufactured in)[22] are subject to the provisions of Regulation (EU) 2018/775 as well as flags and maps. Unlikely, other symbols such as monuments, skylines, or other recognisable graphics should be assessed, according to the Notice, on a case-by-case basis. The same approach should

([19]) According to the Italian Legislative Decree 10 February 2005, n. 30, as amended by the Legislative Decree 20 February 2019, n. 15, the owner of a collective mark can be only public legal entities or trade associations, but not companies.

([20]) Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks.

([21]) As implemented, in Italy, by the Legislative Decree 20 February 2019, n. 15 which added Article 11-bis to the Legislative Decree 10 February 2005, n. 30.

([22]) The Commission Notice states that expressions like 'packed in' refers only to the place where the product has been packed so consumers do not associate it to the origin of the product. Expression such as 'produced by/manufactured by/packed by' do not indicate the origin of the product but are rather referred to the name of a business operator which therefore is not considered, in general, as an indication of origin, but the perception depends on the whole presentation of the product so a case-by-case approach should be adopted.

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drive the evaluation of expressions like 'kind', 'type', 'style', 'recipe', 'inspired by' or 'à la' which usually refer to recipes or processing rather than to the origin and that should be assessed taking into account the whole presentation.

The guidelines published by the Commission focus then on the identification of the primary ingredient that, under Regulation (EU) No 1169/2011 is «an ingredient or ingredients of a food that represent more than 50 % of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required». The definition thus identifies two categories of primary ingredients: the quantitative one (ingredient or ingredients that represent more than 50% of the food) and the qualitative one (ingredient or ingredients associated with the name of the food by the consumer). A food can have more than one primary ingredient: it can have for instance a quantitative and one or more qualitative primary ingredients and they are all subject to the indication of origin at the conditions of Regulation (EU) 2018/775. Conversely, it might have no primary ingredients, like in vegetable soups, where there are several ingredients that do not reach the quantitative threshold and which do not individually drive the consumers' choice or are associated with the name of the food.

A product can be made of a single processed ingredient with an origin that is not the same as that of the raw material, having this undergone a substantial transformation. The definition of 'processing' can be found in Article 2(1) let. m) of Regulation (EC) No 852/2004, according to which it «means any action that substantially alters the initial product, including heating, smoking, curing, maturing, drying, marinating, extraction, extrusion or a combination of those processes»[23]. This entails that conversely 'unprocessed products', being «foodstuffs that have not undergone processing», include «products that have been divided, parted, severed, sliced, boned, minced, skinned, ground, cut, cleaned, trimmed, husked, milled, chilled, frozen, deep-frozen or thawed» (Article 2(1) let. (n) of Regulation (EC) No 852/2004). An issue that may arise concerns the origin of flour, above all when used for in pasta or baked products. Flour should not be considered a processed ingredient, since it is made of milled cereals (and milling is not considered 'processing' under Regulation (EC) No 852/2004). The question is therefore if the primary ingredient of pasta or baked products is the flour (and so the origin would be the place of milling) or the cereals (and the origin will be the place of harvesting).

Under Regulation (EU) No 1169/2011, the country of origin is defined through the reference to the Union Customs Code (UCC) that is now Regulation (EU) No 952/2013. If the origin of goods wholly obtained in a single country is easy to be determined, Article 60 UCC identifies several elements to establish the origin of goods the production of which involves more than one country. Namely, the goods originate in the country or territory where

- they underwent their
a. last,
b. substantial,
c. economically-justified
processing or working,
- in an undertaking equipped for that purpose,
- resulting in the manufacture of a new product or
- representing an important stage of manufacture.

In the case of flour, we could conclude that the country of origin is that of milling because, even if the product did not undergo a processing phase, it was for sure the last working operation that was both substantial and economically-justified. As for the substantiality, it might be demonstrated either if the processing or working lead to a different classification under the Combined Nomenclature, or if they result in the «creation of a product with properties and a composition of its own which it

([23]) Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.

did not have before the process»[24]. Wheat flour, groats and meal, and wheat have different codes under the Combined Nomenclature[25]. Moreover, wheat flour has irrefutably properties that grain does not have, such as the possibility to be kneaded in dough and is a new different product if compared with the original cereal. The economic justification of milling and the importance of the manufacturing stage do not seem to require further deepening, as well as the fact that the process is carried out in undertakings equipped for the specific purpose.

It is therefore clear that the place of origin of flour should be considered as the Country where it was milled, being this activity an essential working stage which turns the original grains into a different product (different both with reference to the Combined Nomenclature and to the use).

However, at least in Italy, this conclusion is not shared by some Institutional bodies, such as the Italian Competition Authority (AGCM). In its act No 28059 in case PS11387[26], the Authority stated that according to Regulation (EU) 2018/775 the primary ingredient of food as pasta is the durum wheat and not the flour, since, in its opinion, consumers' are interested in the cereal origin, rather than on the milled product's. To ground its statement the Italian Competition Authority refers to the definition of qualitative primary ingredient, that means the ingredient that consumers associate with the food. What the ACGM forgets to consider is however that the ingredient of products as pasta or baked food is flour (and not grains) and Regulation (EU) 2018/775 must apply to this, not to wheat. The definition of ingredient of Regulation (EU) No 1169/2011 is, in this context, incontrovertible, being the substance or product used in the manufacturing or preparation of the food (and still present in the food). When producing pasta, what do food business operators use? Flour or grains? The answer is plain.

One could argue that actually the interest of consumers is to know the origin of cereals, rather than of flour, since the former may affect the quality and the characteristics of the products. Such consideration has undoubtedly a point, but the reading, though matching the rationale of the Regulation, does not coincide with its actual requirements and would add obligations that the wording of the EU act does not ask for.

The Commission Notice does not offer clear parameters to allow food business operators to know how to determine the primary qualitative ingredient, since they should consider «whether the origin indication of a particular ingredient is likely to substantially affect consumers' purchasing decisions and whether the absence of such an origin indication would mislead consumers». Besides some cases when consumers' interests can be easily identified, understanding their expectations or knowing in advance when information can be perceived as misleading might be extremely discretionary both on the food business operators' and the control Authority's sides. As for the former, they could ground their decisions on the results of previous surveys targeted to consumers, aimed at acquiring the necessary data to understand what their expectations and perceptions are.

One of the last elements considered by the Commission Notice is the geographical level of the information on the origin. In this regards, it states that the same geographical level must be used (for instance, 'EU and non-EU'), with a possible specification as voluntary information of one or both more detailed level (for instance 'EU (Spain) and non-EU (Switzerland)' or 'EU and non-EU (Switzerland)'.

([24]) Judgment of the Court (Third Chamber) of 10 December 2009, *Bundesfinanzdirektion West v HEKO Industrieerzeugnisse GmbH*, C-260/08.

([25]) Commission Implementing Regulation (EU) 2019/1776 of 9 October 2019 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

([26]) https://www.agcm.it/dotcmsCustom/tc/2025/1/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/87333AF77FE66C1CC12584F5005BD4C3/$File/p28059.pdf

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The last element that the Commission Notice considers is the placing and the presentation of information, allowing the use of abbreviations for the indication of the country of origin when they could be easily and correctly understood, such as EU, USA, UK. Since the origin of the primary ingredient should be placed in the same visual field as the origin of the food, where the latter is repeated several times, also the indication of the origin of the primary ingredient should be repeated accordingly, using a font size which has an x-height of at least 75 % of the x-height of the origin indication of the food and which is not in any case smaller than 1,2 mm[27].

5.- Food Labelling Information System Database (FLIS)

One of the most interesting news, on the practitioners' point of view, is the announced creation of a Food Labelling Information System Database (FLIS), with no formal legal status, which should include all the information requirements at an EU and national level, in order to help operators in complying with the labelling legislation in placing on the market their products and to facilitate control authorities in performing their activities. The project for the establishment of a food labelling system database dates back to several years ago. Though the FLIS was scheduled to be operational by the second quarter of 2017[28], at the end of 2019 it had not been implemented yet. During the meeting of the Working Group of the Commission on Food Information to Consumers of October 2019, a pilot example of how the system is going to look like was presented along with a roadmap of the next steps. The first following phase was the public accessibility of the website which had to be launched between the end of 2019 and the beginning of 2020. In April 2020, however, no further details on the system were available. The second phase will be the collection of data from Member States and the constant updating of the system: on this aspect, several Member States compelled that though being of irrefutable help, the activity of keeping the system updated will be extremely time absorbing. With regards to this, in 2016 the Commission stated that the collection of data would be done by an external contractor[29] and that for the first year the Commission itself would be responsible for updating the system.

6.- Dual Quality and labelling

In the internal market the sale of products with different characteristics is not prohibited and is actually one of the elements that ensure competition among business operators. This applies also to food. In principle, also the sale of products of the same brand that are not perfectly identical is allowed, provided that it is justified by legitimate factors, such as the place of manufacturing, the consumers' preferences, dietary habits, different sources of raw materials, etc. Since 2011, some Member States had however brought to attention that some food business operators adopted practices of dual quality that were misleading[30].
The EU Commission tackled the issue with a strategy based on a dialogue among consumers, industries and national authorities, the definition of a common testing methodology and some further activities like the agreement on a Code of Conduct for producers, identifying standards

([27]) The exceptions of Regulation (EU) No 1169/2011 for small packages apply also to the mandatory indication of the origin of the primary ingredient.
([28]) REFIT Platform, Stakeholder suggestions, p. 32 https://ec.europa.eu/info/sites/info/files/health_and_food_safety_1.pdf [last access 18.04.2020].
([29]) https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp_wg_20160418_sum.pdf [18.04.2020].
([30]) EU Parliament's question E-001866-17, https://www.europarl.europa.eu/doceo/document/E-8-2017-001866_EN.html.

aimed at avoiding the unlawful dual quality of products. Within this framework strategy, on 26 September 2017, the EU Commission issued a Guidance Notice on the application of EU food and consumer protection law to issues of Dual Quality with a specific focus on food products[31]. According to the Commission's Notice, food products with the same packaging and branding must be assessed on a case-by-case basis and they can be considered in contrast with the EU provisions of the Unfair Commercial Practices Directives if the product does not match the legitimate specific expectations that consumers have on that products; if consumers are not made aware of such differences with regards to their expectations, due also to a failure of the food business operators to convey adequate information and such lack of information is able to distort the economic behaviour of the consumers who would have otherwise chosen a different product[32].

The Commission offers also some criteria to characterise the product of reference. The first one is that the product is presented with the same packaging and under the same brand in several Member States. The second one is that the product is sold in the majority of Member States with the same composition while the third one requires that consumers' perception corresponds to the composition such as advertised in the majority of Member States[33].

In 2018, the Joint Research Centre (JRC) of the European Commission developed a common testing protocol[34] aimed at assessing, in a pan European campaign, the characteristics of food related to quality. The method is led by six general principles: transparency in procedures; identification of four components which must be considered in the assessment procedure (selection of products; sampling plan; examination and/or analysis of the samples to produce test results; criteria useful to base a decision upon the results); attention to comparability of the products, in selecting, sampling and testing them; adoption of adequate procedures for such activities (that should be science based, appropriate to the products, 'fit for intended purpose and applied consistently', practical, cost-effective, based on accredited or validated methods and accredited laboratories); involvement of concerned parties who should be treated fairly and equally; fairness in the selection of brands for testing programmes with respect of market shares of brands in different Member States, 'without disadvantaging brand owners active in several food category sectors' and respecting confidentiality requirements[35]. The JRC testing protocol seems to be a useful tool for Member States' Authorities to assess, on a case-by-case basis, whether the EU provisions of the Unfair Commercial Practices Directive or of relevant food law have been infringed[36].

In June 2019, the JRC published the results of a study on a comparison of quality related characteristics of food products[37] carried out following the results of previous studies performed in some Member States between 2016 and 2018, which

(31) Commission Notice C(2017) 6532 final of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food, http://ec.europa.eu/newsroom/document.cfm?doc_id=47227 [19.04.2020].
(32) Ibidem, p. 5.
(33) Ibidem, p. 6.
(34) JRC, Framework for selecting and testing of food products to assess quality related characteristics: EU harmonised testing methodology, 2018, available at https://ec.europa.eu/knowledge4policy/sites/know4pol/files/eu_harmonised_testing_methodology_-_framework_for_selecting_and_testing_of_food_products_to_assess_quality_related_characteristics_0.pdf [19.04.2020].
(35) JRC, cit., p. 11.
(36) JRC, cit., p. 2.
(37) JRC, Results of an EU wide comparison of quality related characteristics of food products, EUR 29778 EN, Publications Office of the European Union, Luxembourg, 2019, https://publications.jrc.ec.europa.eu/repository/bitstream/JRC117088/_eur29778en_results_of_an_eu_wide_comparison_of_quality_related_characteristics_of_food_products.pdf [19.04.2020].

showed some differences in quality between the same food products sold in different countries. Also the findings of the JRC's Report show some differences among products, for instance for what concerns their composition but according to the JRC this does not necessarily imply that two levels of food quality are detected[38]. Moreover, the report recalls that competent national authorities should perform any assessment of misleading practices and violation of EU law, being these activities out of the scope of the JRC's study.

Despite the work carried out by the EU Commission, several doubts are still present, as shown by the number of questions that the Members of the Parliaments ask the Commission on dual quality. The answer is however the same and emphasises the tasks of the national competent authorities to assess the differences in composition and characteristics and the possible justifications by legitimate and objective factors[39], on a case-by-case basis, according to the Unfair Commercial Practices Directive.

7.- Alcohol labelling

Since the adoption of Regulation (EU) No 1169/2011, alcoholic beverages have been subject to some important exemptions as for labelling, such as the possibility to omit the indication of the list of ingredients (provided that they do not have an allergenic effect) and of the nutritional declaration for beverages containing more than 1,2 % by volume of alcohol (Article 16, par.4). With regards to these opportunities, the Regulation required the Commission to adopt a report on such exemptions, tackling whether such products should in future be covered by additional mandatory particulars such as the information on the energy value. The Commission was given the possibility to present, along with the report, a legislative proposal setting the provisions for a list of ingredients or a mandatory nutrition declaration on alcoholic beverages. In the meanwhile, the Regulation encouraged food business operators to provide voluntary information on nutrition declaration by allowing them to indicate only the energy value (Article 30, par. 4).

In March 2017, the EU Commission published its report on the exemptions from the mandatory list of ingredients and the nutrition declaration for alcoholic beverages[40], in which the EU Institution, taking into account the number of voluntary initiatives of the food business operators in this sector addressed at meeting consumers' expectations on information, invited the industry to adopt a self-regulatory proposal to cover the entire sector of alcoholic beverages, both for nutritional declaration and the list of ingredients, and only where the Commission would have considered the proposal as unsatisfactory, it would have performed further assessment. The report was presented to stakeholders on April 2017[41].

The European associations representing the alcoholic beverages sector presented their self-regulatory proposal on 12 March 2018[42], explaining the commitments that each association took on products labelling as for the list of ingredients

([38]) JRC, Results of an EU wide comparison of quality related characteristics of food products, p. 4.

([39]) Please refer to the Commission's answers of 23.04.2020 to question no P-000231/2020, of 23 March 2020 to question no E-004131/2019.

([40]) Report from the Commission to the European Parliament and the Council regarding the mandatory labelling of the list of ingredients and the nutrition declaration of alcoholic beverages European Commission, 13 March 2017, COM(2017) 58 final, https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-report_en.pdf.

([41]) Summary record of the Ad-hoc Working Group of the Advisory Group on the Food Chain and Animal and Plant Health on the Commission's report regarding the mandatory labelling of the list of ingredients and the nutrition declaration of alcoholic beverages, https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp_working-groups_20170404_sum.pdf.

([42]) Minutes from the meeting of 12 March 2018 between Commissioner Andriukaitis and the European associations of alcoholic beverages - Presentation of the industry self-regulatory proposal on the labelling of alcoholic beverages, https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-self-regulatory-proposal_minutes_en.pdf.

and the nutritional declaration. The Brewers of Europe[43] opted for the «development and dissemination of guidance tools on regulatory requirements», already adopted in 2015 as for ingredient listing, and the supply of a toolkit on calculation methods for nutritional values, addressed to help smaller brewers in providing nutritional information. Moreover, the association announced that it would have used monitoring templates to «report annually on the percentages of pre-pack beer volumes carrying the information, with complementary online information also tracked, including as a means to inform consumers regarding beers served on-tap».

The association for spirits (Spirits Europe), in the Annex to the self-regulatory proposal[44], explained that its commitment was to ensure the availability of information on ingredients and on nutritional aspects by the end of 2022, and emphasised the need for a nutritional declaration per serving size, rather than for 100 ml. In particular, Spirits Europe declared the willing to provide online full information on the nutritional declaration, while grasping the opportunity given by Regulation (EU) No 1169/2011 to offer only the energy value on the label. As for the list of ingredients, according to Spirits Europe's document, the commitments of spirit producers go beyond the requirements of the EU Regulation on food information to consumers since, besides the list of all ingredients, labelling will display also information on raw materials and on the production process. The association announced that guidelines helping members and in particular small and medium enterprises would be developed, in order to ensure that information on nutritional aspects and on ingredients will be offered to consumers through online communication platform in a comparable way.

Both the guidelines and the online platform are common elements also to the sector of wine and aromatised wine products[45], whose operators committed to providing consumers with the relevant nutrition declaration taking into account the opportunity offered by Regulation (EU) No 1169/2011 to limit the declaration to the energy value, while adding the information per portion, identified as the average 'drinking unit' (defined as the volume of wine or aromatised wine products which contains the equivalent of 10 grams of ethanol), when relevant. Values could be provided on the basis of data included in the database developed by the sector. The association promoted also the use of symbols, such as E for energy value, in order to (allegedly) simplify consumers' understanding of information. As for the list of ingredients, wine and aromatised wine producers considered that only a limited number of oenological practices were allowed and thus suggested that some specific principles should apply to the sector. In particular, according to the relevant association, some substances should be excluded from the list of ingredients: processing aids (and this is actually similar to the provisions for food in general) and natural substances used to adjust grape composition. The annex to the self-regulatory proposal suggested also a practice that does not seem to comply with the general principles on food information to consumers. Namely, since production may require to add 'last-minute' additives, the association supports the possibility to include in the list of ingredients additives «they are likely to use or use most frequently for the production of a given product, based on their historical wine-making process» provided that information states that «the additive shown may not be present or may be substituted, for instance by using the terms 'and/or'». Such a solution does not actually provide consumers with detailed information on the real nature and composition of the product they are buying but on the possible (and not certain) compositional charac-

(43) https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-self-regulatory-proposal_brewers_en.pdf.
(44) https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-self-regulatory-proposal_annex-spirits-en.pdf.
(45) https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-self-regulatory-proposal_annex-wine-en.pdf.

teristics.
According to the association, wine that is used as basic ingredient for aromatised wine products does not require to be accompanied with the list of its ingredients.
The European Cider and Fruit Wine Association's commitments listed in Annex to the self regulatory proposal[46] are similar to those of the other associations and focus on the promotion of the on-label or online transmission to consumers of the nutrition declaration and the list of ingredients, provided that the link to online information is given on the label; on providing information on the production processes; on the development of guidelines for operators; on subsequent monitoring and evaluation of the industry commitments.
Following the presentation of the self-regulatory proposal, in 2019, both spiritsEurope[47] and the Brewers of Europe[48] associations signed memoranda of Understanding on the labelling of products, as for the energy value and the list of ingredients, recalling the commitments they undertook on the relevant Annexes to the self-regulatory proposal. In particular, the former includes, in individual commitments, providing the energy value both for 100 ml and for serving size, accompanied, by a period of six months after the signature of the Memorandum, by energy information in visual form. According to the document, the list of ingredients will be provided online, through a 'easily and directly accessible' way, like bar code or QR-code; it will be moreover complemented by information on the EU legal definitions of spirit drinks and on the authorised raw materials used.
The Brewers of Europe's Memorandum requires the provision of the energy value per 100 ml while considers as supplementary options the possibilities to add off-label nutritional information or information per serving size. Ingredients will be listed according to Regulation (EU) 1169/2011 «in descending order of weight as recorded at the time of their use in the manufacture of the beverage».

8.- EU guidance on date marking and related food information

Regulation (EU) No 1169/2011 requires, for prepacked food, the indication of the minimum durability date (best before date), which is a simple quality indicator of the characteristics of the food (which remains safe after that date), replaced by the 'use by' date for products that are highly perishable and that must be instead considered unsafe after the expiring date.
Some food are exempted from the indication, such as fresh fruit and vegetables, which have not been peeled, cut or similarly treated, wines, alcoholic beverages containing 10 % or more by volume of alcohol, etc. (Annex X to the Regulation contains the exhaustive list).
In January 2018 the European Commission published the final report of a market study on date marking and other information provided on food labels and food waste prevention[49], which had been carried out in order to shape the actions of the European Union according to the 2015 Circular Economy Plan[50]. According to the report, up to 10% of food waste (which amounts to 88 million tonnes) could be linked to the date marking.
Several issues emerged from the study. The first one was a differentiation on date marking on the

(46) https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-self-regulatory-proposal_cider_en.pdf.
(47) https://spirits.eu/upload/files/publications/CP.MI-098-2019-MoU-Final%20Version%20on%20website%20without%20signature-%204%20June%202019.pdf.
(48) https://beerwisdom.eu/wp-content/uploads/2019/09/mou-beer-label-web-001.pdf.
(49) https://op.europa.eu/en/publication-detail/-/publication/e7be006f-0d55-11e8-966a-01aa75ed71a1/language-en.
(50) COM2015 (614) final, https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-614-EN-F1-1.PDF. In 2020, the European Commission adopted a new Circular Economy Action Plan https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf .

same products among the Member States subject to the investigation, due to a low understanding of their meaning on the consumers' side and the consequent decision of producers to apply a use-by date with a precautionary approach considering the uncertainty of a safe handling of purchased food. In other words, in some countries the same food had a best before date while in other States a use-by date even if there were no safety concerns. These differences actually depend also on some guidance of national consumer and trade associations which influence also retailers' policies.

The second aspect was a possible dissimilarity in the length of shelf-life for the same products. Despite the general recognition that the use-by date is determined by safety consideration, while the best before date relates to quality reasons, some operators take into account more specific elements to determine the shelf life of a products, such as the storage temperature that might be higher in certain countries than in others.

The third aspect that was considered in the report was the availability of storage advice and open-life instructions. As for the former, the market survey showed some differences among markets that could result in contradictory information with possible consumer confusion. Differences among product types were found on open-life instructions.

A fourth element that emerges from the report is the poor legibility of date marking on 11% of the sampled products, due to font size, layout or print quality.

According to the report, Member States adopted several measures to reduce food waste linked to date marking. On the one hand, national control authorities and stakeholders (such as trade associations) supported some practices, intended to harmonise storage conditions across the chilled food chain; supporting the latter and the cross-industry dialogue; developing guidelines to clarify the interpretation of the date expressions; carrying out studies on consumers expectations and understanding; supporting initiatives to propose additional date wording to clarify to consumers that 'best before' is a quality mark and not a safety mark, investing in smart packaging able to provide a more accurate indication of durability; removing legal obstacles to food donation[51].

With regard to this last measure, the report observes that although the European Union allows such practice, there is not a consistent approach in all Member States: while some of them discourage or prohibit food donation with a passed best-before date, others support the practice.

Taken all these considerations into account, the report draws some conclusions on how reducing food waste from date marking through six points: using a clear and legible date marking; ensuring consumers' understanding; indicating 'use by' dates only for safety concerns; avoiding the unnecessary shortening of dates; making storage and open life guidance consistent with the findings of safety and quality tests; ensuring consistency in storage of food at retail and guidance for consumers regarding the home storage temperatures[52].

Following such findings, the report provides a list of five recommendations.

The first is the adoption of guidelines covering several aspects identified as critical in the study: the determination of the product shelf life and open life taking into account safety and other factors; the appropriate choice between 'use by' and 'best before' date and a coherent management of temperatures of chilled food in the retail supply chain, among Member States.

The second is the need to encourage food business operators to overcome the issue of illegible date marking (due, as we mentioned above, to printing, layout, materials…), mainly identifying best practices for packaging and strengthening consultations among involved parties, including the packaging and trade sectors.

([51]) Report, pp. 85-86.
([52]) Report, p. 86.

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The third recommendation is to improve the possibility for consumers to make informed choices, ensuring coherent and consistent information on food, supporting consumers' education campaigns and research on consumers' behaviour and approach to date labels to shape future policies.
The fourth recommendation emphasises the need to support efforts to extend product life, while the fifth suggests that the legal and policy frameworks for the sale and redistribution of food should be made more consistent and clear.
In order to draft its guidance aimed at making date marking more consistent with the support of the sub-group on date marking and food waste prevention of the EU Platform on Food Losses and Food Waste, on May 2019, the European Commission sent a request for a scientific opinion to the European Food Safety Authority. The EU Institution asked in particular a scientific opinion on date marking and related food information 'in view of the application by food business operators of Regulation (EU) No 1169/2011 on food information to consumers as an integrated part of their food safety management system'[53]. EFSA should identify the microbiological factors affecting food shelf-life, while graduating them according to the risk to human health, the storage conditions and time limits after opening the package of food and the good practices for safely defrosting products. In its acceptance letter of 12 July 2019, EFSA fixed the deadline for the opinions on 30 September 2020 and on 31 March 2021.
During the meeting of the Working Group on food information to consumers of 09 October 2019, some Member States presented some practices in use on date marking, such as accompanying the "best before date" with the phrase 'often good after', sometimes followed by terms or emoticons on appearance, smell and taste of that food. In some case, a discount of 50% of the original price is applied to products with a passed "best before date". While the price reduction was positively evaluated by several Member States, the expression 'often good after' was considered confusing. The Commission announced therefore the launch of a survey in order to understand the consumers' perception of the phrase.
While Regulation (EU) No 1169/2011 requires the mandatory date marking on all prepacked foods, with a few exceptions, the possibility to consider the date marking for non-prepacked food as compulsory particular is left to national provisions. In Italy, for instance, the Legislative Decree 231/2017[54] requires only the 'use by' date for non prepacked fresh pasta and fresh filled pasta. The solution does not seem to perfectly match the consumers' interest in being adequately informed of all the characteristics that the product they are buying has and which are not immediately perceivable. With regards to this, it should be noticed that Article 4, par. 2 of Regulation (EU) No 1169/2011, when listing the principles governing mandatory food information, both on prepacked and non prepacked food, states that the 'widespread need on the part of the majority of consumers for certain information to which they attach significant value' should be taken into account in determining mandatory particulars. And it is undeniable that date marking is one of the most important elements of food information, able to lead consumers' choice of buying that product or not.
The fact that the Italian decree does not require date marking as compulsory does not mean that the consumer does not have the possibility to acquire the necessary details: he or she could ask the food business operator selling those products what the use-by or the best before date are. One could wonder if the seller is obliged to provide the

([53]) Mandate M-2019-0143, accepted by EFSA on 12 July 2019, available at the following URL http://registerofquestions.efsa.europa.eu/roqFrontend/wicket/page?2-1.ILinkListener-mandateForm-documents-1-fileNameLnk
([54]) Legislative decree 15 December 2017, n. 231, laying down sanctions for breach of Regulation (EU) No 1169/2011 on food information to consumers and the adjustment of national law to the provisions of the same regulation and to Directive (EU) 2011/91, according to Article 5 of Law 12 August 2016, n. 170, '2015 European delegation law'.

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answer, even if the particular is not required as compulsory by any provision and the solution cannot be other than in the affirmative, at least for the use-by date. Both the general objectives of Regulation (EC) No 178/2002 and of Regulation (EU) No 1169/2011 (which cover both prepacked and non-prepacked food) aim to ensure a high level of protection of consumers' health and interests, the latter in particular through the provision of food information. When referring to the use-by date, the need to protect consumers' health would require informing them about the time after which the product will be considered unsafe. So, even if neither the EU Regulation or the national decree require, for non-prepacked food, date labelling as a mandatory particular, consumer must receive, at request, that detail that would ensure the safe consumption of the product. This is the principle. Actually, at least in the Italian system, there is no sanction for the refuse of providing such information, neither under the sanction scheme adopted for breach of Regulation (EC) No 178/2002 nor under the punitive framework for breach of Regulation (EU) No 1169/2011.

As for the best before date, one of the interests of consumers is to know until when the food maintains its characteristics (we could extend the concept to quality): consumers could thus decide if purchasing the product and when consuming it. Actually, this is something more than a simple interest: it is a right that does not derive from the contract that the food business operator and the consumer stipulate, but that rather anticipates the contract itself. Only when knowing such information, the latter could make a truly informed choice of purchasing and, in the event that, though having asked, he or she does not get the details on the durability, the consumer could decide not to buy that food.

9.- Front-of-pack labelling

The last theme on the implementation of the Regulation on food information to consumers is the so called 'front-of-pack labelling' (FOP). The expression identifies the display of information of nutrition content on the front of the pack, as additional information with respect to the nutrition declaration that is mandatory for almost all foods (with a very few exceptions, as we mentioned in paragraph seven).

Under Article 35 of Regulation (EU) No 1169/2011, the energy value and the amount of nutrients could be provided in other forms of expression or by means of symbols or graphics, as long as such forms meet the following requirements: they are based on sound and scientifically valid consumer research and do not mislead the consumer; their development is the result of consultation with a wide range of stakeholder groups; they aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet; they are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer; in the case of other forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII of the Regulation, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; they are objective and non-discriminatory; and their application does not create obstacles to the free movement of goods (Article 35, par. 1). While Member States could recommend one or more of these forms of expression, they should inform of the details of the adopted solutions the Commission which, according to the Regulation, had to facilitate and organise the exchange of information between Member States, itself and stakeholders on this topic.

After the adoption of the Regulation on food information to consumers, several Member States had approved different forms of expressions of the nutrition declaration, under article 35, thus using a different weight parameter (such as for 200 g of products) or a different form of presentation (such as graphics). Some Countries had instead adopted systems that do not repeat the elements of the nutrition declaration but which aim at providing at a glance an idea of the overall nutritional

quality of the food[55]. On 27 January 2020, Italy, for instance, notified the 'Draft Ministerial Decree laying down the form of presentation and the conditions of use of the optional nutrition logo complementary to the nutrition declaration in accordance with Article 35 of Regulation (EU) No 1169/2011', called 'NutrInform Battery'[56]. The different approaches among Member States raised concerns on the compliance of such FOP systems with the Regulation on food information to consumers, on the fragmentation of the regulatory framework and on the effects of such schemes on the good functioning of the internal market. With regards to this, the European Parliament submitted several questions to the Commission[57], to which the latter replied announcing a report on the subject and reminding that it had already assessed the compliance of the Nutri-Score scheme in the context of national measures that had been notified by France and Belgium.

On 20 May 2020 the EU Institution published the announced report on the front-of-pack labelling (that had actually been originally scheduled by the Regulation by 13 December 2017), concluding that a harmonised mandatory front-of-pack nutrition labelling should be adopted and revealed the intention to work on a legislative proposal on this theme[58]. Several elements drove such determination: first, the potential of FOP schemes, above all if coloured based, to help consumers to make informed healthier choices; second, the possible confusion and lack of trust of consumers on the various schemes of FOP on nutrition labelling, adopted by Member States or NGOs, with a corresponding possible effect on the costs that food business operators have to bear, on the free movement of goods and consequently on the internal market. Finally, the Commission emphasises the possible synergies between the FOP nutrition labelling and the nutrient profiling under Regulation (EC) No 1924/2006, which has not been agreed upon yet, due to strong opposition by some Member States[59].

10.- Concluding remarks

The work of the Commission on FOP nutrition labelling as well as on what concerns date labelling seems to match the path drawn in the mission letter to Commissioner designated S. Kyriakides, which states: «*Part of your work will be to focus on improving consumer information, notably by looking at ways to address demands for more visible and complete information, especially on the health and sustainability of food products*»[60]. The so called 'From farm to fork strategy'[61] transposes these objectives suggesting that a clear information could make 'it easier for consumers to choose healthy and sustainable diets' and revealing that a harmonised mandatory front-of-pack

([55]) S. Storcksdieck genannt Bonsmann, G. Marandola, E. Ciriolo, R. van Bavel, J. Wollgast, *Front-of-pack nu-trition labelling schemes: a comprehensive review*, Luxembourg, Publications Office of the European Union, 2020, https://publications.jrc.ec.europa.eu/repository/bitstream/JRC113586/kjna29811enn.pdf, p. 17.
([56]) TRIS Notification number 2020/31/I.
([57]) See, for instance, questions No E-004590/2019, E-004454/2019, E-000570/2020, P-003026-19, E-002795-19.
([58]) EU Commission, COM(2020) 207 final, Report from the Commission to the European Parliament and the Council regarding the use of additional forms of expression and presentation of the nutrition declaration, p.20, https://ec.europa.eu/food/sites/food/files/safety/docs/labelling-nutrition_fop-report-2020-207_en.pdf.
([59]) Brussels, 20.5.2020 SWD(2020) 96 final, Commission Staff Working Document – Executive Summary of the Evaluation of the Regulation (EC) No 1924/2006 on nutrition and health claims made on foods with regard to nutrient profiles and health claims made on plants and their preparations and of the general regulatory framework for their use in foods, p. 1, https://ec.europa.eu/food/sites/food/files/safety/docs/labelling_nutrition-claims_swd_2020-96_sum_en.pdf.
([60]) https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-stella-kyriakides_en.pdf.
([61]) COM(2020) 381 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system'.

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nutrition labelling will be proposed (paragraph 2.4 of the Communication). Likely, the outcomes of the research on consumers' understanding of date marking will result in the amendment of the existing provisions on 'use by' and 'best before' dates (paragraph 2.5 of the communication).
The 'Farm to fork strategy' discloses also the Commission's intention to propose the extension of mandatory origin or provenance indications to certain products (paragraph 2.4), thus addressing one of the area where the regulatory fragmentation among Member States is increasing.
Despite the proposed paths could probably solve such divisions on FOP labelling as well as on date marking and indication of origin, information to consumers risks to lose the necessary clearness and immediateness that should characterise it. FOP nutrition labelling will not replace the nutrition declaration and also particulars on the origin of products will add to the already required information. Provided that consumers are able to understand the true meaning of the new data, this proliferating of mandatory particulars could bear new costs for food business operators: contractual needs to have the origin of raw materials or ingredients certificated, implementation of systems that could allow to change labelling printing according to the origin of the ingredients used in a specific batch (that may be different from other batches), studies to design a correct FOP nutrition label. An increasing of 'mandatory' responsibilities will obviously accompany the request provision of these data.
Some doubts arise on the usefulness of the proposed solutions since their implementation assumes the average consumer's capability to understand the new requirements and the willingness or interest to obtain the additional information. But much of the meaningfulness of the future development on food labelling grounds on the consideration that many consumers do not fully understand (and probably are not interested in) the already existing particulars (above all, date marking and nutrition declaration). As for the indication of origin, voluntary information could have been an adequate solution: consumers interested in these details would have chosen only products bearing clear information and possible misleading particulars were already sanctioned under article 7 of Regulation (EU) No 1169/2011. The same principles could by the way apply also to the voluntary indication of FOP nutritional labelling and date marking, provided that the mandatory particulars were present.
The feeling is therefore that the increasing in food information regulatory provisions will turn into new burdens for business operators, without being balanced by a significant value for consumers.
A final concern pertains to the lack of updating on the activities that the working group on food information to consumers is carrying on: besides the reports of the Dutch Authority, some interested parties that are not parts to the working group are not in the condition to know the results of the meetings and thus cannot express their views on activities that will turn into proposal and acts that could affect their work. Certainly, this opportunity is delayed once that those drafts have been prepared, through the feedbacks that the Commission's 'Have your say' consultation process system collects.
Transparency and the ongoing working on food information to consumers could however benefit from the timely publication of official reports of the meetings (and not only of the agenda).
Anyway, in the most optimistic of the views, we shall wait a couple of years before seeing the adoption of the acts for the achievement of the goals of Regulation (EU) No 1169/2011 and of the 'Farm to Fork Strategy' and some more time to assess their effective accomplishment.

ABSTRACT

More than five years have passed since the date of application of the EU Regulation on food information to consumers (FIC), but the discussion that it has been generating since the beginning has not yet come to an end and seems actually to

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freshen day after day. If the first elements of concern were on the provisions on mandatory particulars already fully regulated by the EU act, in the last years the debate moved on those areas that have not yet been totally defined, either because of the lack of the implementing acts of the European Commission (information on the possible and unintentional presence in food of substances or products causing allergies or intolerances; products suitable for vegans or vegetarians) or because the adopted regulations did not help in clarifying them, while adding further doubts, such as in the regulation on the mandatory indication of the origin of the primary ingredient.
Starting mainly from the recent activities of the working group on Regulation (EU) No 1169/2011 (food origin; Food Labelling Information System Database; dual quality and labelling; alcohol labelling; EU guidance on date marking and related food information; Vegan/vegetarian), the paper will provide an overview of the strong and weak points of the FIC Regulation, while trying to envisage the possible future perspectives on its application, above all in the light of the mission letter to Commissioner designated S. Kyriakides, which states: «Part of your work will be to focus on improving consumer information, notably by looking at ways to address demands for more visible and complete information, especially on the health and sustainability of food products».

Sono passati più di cinque anni dalla data di applicazione del Regolamento UE sull'informazione alimentare ai consumatori (FIC), ma il dibattito che si è generato sin dall'inizio non è ancora giunto al termine e sembra anzi riaprirsi giorno dopo giorno. Se i primi elementi di preoccupazione sono stati le disposizioni sulle indicazioni obbligatorie già integralmente regolamentate dall'atto UE, negli ultimi anni il dibattito si è spostato sugli ambiti non ancora del tutto definiti, sia per la mancanza degli atti attuativi del Commissione Europea (informazione sulla possibile e involontaria presenza negli alimenti di sostanze o prodotti che provocano allergie o intolleranze; prodotti adatti a vegani o vegetariani), o perché i regolamenti adottati non hanno aiutato a chiarirli, aggiungendo ulteriori dubbi, come nel regolamento sull'indicazione obbligatoria dell'origine dell'ingrediente primario.
A partire principalmente dalle recenti attività del gruppo di lavoro sul Regolamento (UE) n. 1169/2011 (origine degli alimenti; Database del sistema informativo sull'etichettatura degli alimenti; doppia qualità ed etichettatura; etichettatura degli alcol; Linee guida dell'UE sulla marcatura della data e relative informazioni sugli alimenti; Vegano / vegetariano), il presente lavoro propone una panoramica dei punti di forza e di debolezza del Regolamento FIC, cercando di prevedere le possibili prospettive future sulla sua applicazione, soprattutto alla luce della lettera di missione al Commissario designato S. Kyriakides, che afferma: «Parte del Suo lavoro consisterà nel migliorare l'informazione dei consumatori, in particolare cercando modi per rispondere alle richieste di informazioni più visibili e complete, in particolare sulla salute e la sostenibilità dei prodotti alimentari».

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An overview on the implementation of Regulation 1169/2011/EU in Italy: sanction models and check rules adopted

Alice Artom

1.- Introduction

This reports examines the provisions of Legislative Decree No 231 of 15 December 2017 and, in particular, the part regarding the national authorities responsible for controls and for imposing administrative monetary sanctions for violations of EU Regulation No 1169/2011 on the provision of food information to consumers. This legislative decree was issued by the Italian Government on the basis of the 2015 European delegation law (art. 5, paragraph 3, letter b). Pursuant to this delegation law, various delegated decrees have been issued and will be discussed below.

2.- Delegation Law No 170/2016

Art. 5 of Law No 170/2016 – the 2015 European delegation law – states in paragraph 3, letter b): "*Without prejudice to the types of offence in force, adapt the national sanctioning system for administrative violations of the provisions of (EU) Regulation no. 1169/2011 to the relevant implementing acts and national provisions, by identifying effective, dissuasive and proportionate sanctions for the seriousness of the violation, while delegating the competence to impose administrative sanctions to the State, in order to have a single reference framework of sanctions to allow uniform application at national level, with the identification, as the competent administrative authority, of the Department of Central Inspectorate for Fraud Repression and Quality Protection of Agri-Food Products (ICQRF) of the Ministry of Agricultural, Food and Forestry Policies (MIPAAF), while avoiding overlapping with other authorities, without prejudice to the competences due under the current regulations to the Italian Anti-trust Authority (AGCM), as well as those of the bodies responsible for checking for violations*"[1].

From an analysis of the delegating legislative provision, the legislator's intention to delegate the responsibility for imposing administrative sanctions to the State emerges, as does the intention to identify a single central and competent administrative authority (ICQRF) to impose administrative monetary sanctions, while, however, leaving checking for violations to the responsibility of local bodies.

Firstly, with regard to this point, the delegating legislator assumed that with reference to foodstuff legislation, it should be applied the constitutional rule assigning competence to the State.

Art. 117 of the Italian Constitution, in the text amended by art. 3 of the Constitutional Law of 18 October 2001, No 3, provides that food is one of the subjects of concurrent legislation between State and Regions, and thus reserves only the definition of the basic principles to the legislation of the State. The most important innovation of art. 117 of the Constitution, is the reversal of the traditional criterion adopted when attributing this power: the institution to which the Constitution ordinarily assigns legislative power is now the Region, without prejudice to the matters attributed to the exclusive legislative power of the State and those falling under concurrent legislation[2].

Secondly, it can be seen that the will of the delegating legislator to avoid overlapping with other

(1) Law 12 August 2016, n. 170 "Delegation to the Government for the transposition of European directives and the implementation of other acts of the European Union – European delegation law 2015".

(2) See O. Forlenza and G. Terracciano, *L'attribuzione della potestà legislativa*, in "Regioni ed enti locali dopo la riforma costituzionale - un federalismo imperfetto", Chapter III, Il Sole/24 Ore, 2002.

authorities is contradicted by the reserve in favour of the competence of the AGCM (the Italian Anti-trust Authority) and, above all, by maintaining the competence of those local bodies responsible for checking for violations. Therefore, the reserve in favour of the AGCM anti-trust authority, which safeguards competition and the market, based on Law No 287/1990[3] which created that Authority, is understandable. The AGCM, by virtue of the powers conferred by the aforementioned law, intervenes with regard to the conduct of professionals[4] who integrate unfair business practice[5], to protect the damaged consumer (e.g.: misleading food labelling and misleading advertising) and establishes specific measures pursuant to art. 27, paragraph 1-bis of Legislative Decree No 206/2005, amongst which, the temporary suspension of unfair business practices and a ban on spreading unfair commercial practice or continuing, if such practice has already begun[6]. With the provision that bans unfair business practice the AGCM also provides for the application of an administrative monetary sanction, from € 5,000 up to € 5,000,000, considering the gravity and duration of the violation[7]. In the case of deceptive business practices, concerning products that could endanger the health and safety of consumers or deceptive business practices that could directly, or even indirectly, threaten the safety of children and young people[8], the sanction cannot be less than € 50,000.

On the other hand, maintaining the reserve in favour of those local bodies that are responsible for checking for violations, such as Municipalities, is difficult to apply in practice, when taking into account the regulations on administrative monetary sanctions established by Law No 689/1981 concerning "amendments to the penal system", with particular reference to Section II - articles 13 to 18 on procedures for application. This law foresees administrative monetary sanctions instead of penal fines[9].

Moving on to examine articles 13 to 18 of Law No 689/1981, the most innovative provision is represented by art. 13[10]. The powers of those responsible for carrying out checks are identified, for the first time, in this article. The first paragraph refers to the bodies responsible for monitoring compliance with the provisions for which the administrative sanction is foreseen, so having a specific competence; whereas the fourth paragraph provides for checking for administrative offenses, a general competence of qualified subjects: judiciary police officers and agents"[11].

([3]) Law No 287 of 10 October 1990, "Rules for the protection of competition and the market".

([4]) The definition of professional is specified at art.3, letter c) of Legislative Decree No 206/2005 "Consumer code, pursuant to article 7 of Law 29 July 2003, n. 229", as: *"the natural or legal person acting in the course of his business, handicraft or professional activity or through an intermediary*". The Legislative Decree n. 206/2005 has been modified and integrated with the Legislative Decree n. 221 of 23 October 2007, laying down corrective and supplementary provisions of the Legislative Decree of 6 September 2005 n. 206, pursuant to art. 7, of Law 29 July 2003, No 229.

([5]) Article 20, paragraph 2, of Legislative Decree No 206/2005 defines unfair business practice: "a practice contrary to professional diligence which is false or liable to distort the economic behaviour in appreciable extent, concerning the product of the average consumer to which it reaches or it is addressed or of the average member of a group where the unfair business practice is directed to a particular group of consumers. Based on the article 20, paragraph 4, of Legislative Decree No 206/2005 the following business practices are unfair: misleading practices as set out in the articles 21, 22 and 23; aggressive practices as set out in the articles 24, 25 and 26. The articles from 18 to 27 of the Legislative Decree 206/2005 have been modified by the Legislative Decree n. 146 of 2 August 2007 "Implementation of the Directive 2005/29/CE on the unfair business practices between business and consumers in the internal market".

([6]) Art. 27, paragraph 8 of Legislative Decree No 206/2005.

([7]) Art. 27, paragraph 9 of Legislative Decree No 206/2005.

([8]) Art. 21, paragraphs 3 and 4 of Legislative Decree No 206/2005.

([9]) Law n. 689/1981 of 24 November 1981 No 689, "Amendments to the penal system".

([10]) See Laws of decriminalization No 317 of 1967 and No 705 of 1976.

([11]) On the articles 13 "Acts of assessment"; 14 "Opposition and notification"; 15 "Checks through the analysis of samples" and 16 "Reduced payment", 17 "Compulsory reporting" and 18 "Order-injunction" of Law 689/81, see the comment of Elena Riva Crugnola in *Commentario delle "modifiche al sistema penale" (Legge 24 novembre 1981 n. 689)* of Emilio Dolcini, Angelo Giarda, Francesco Mucciarelli, Carlo Enrico Paliero, Elena Riva Crugnola, Ipsoa, 1982.

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3.- Delegated legislative decrees and ministerial decrees

Implementing the delegation law No 170/2016, the Government and the Ministries competent in matters of nutrition have established a series of decrees, in execution of EU Reg. No 1169/2011.
First of all the *Legislative decree n. 231 of 15 December 2017 which establishes the discipline for sanctions for violating the provisions of (EU) Regulation No 1169/2011, concerning the supply of food information to consumers and the adequacy of national legislation to meet the requirements of (EU) Regulation No 1169/2011 and Directive 2011/91/EU, pursuant to art. 5 of law 12 August 2016 No 170 "the 2015 European delegation law*".
Secondly the following delegated legislative decrees and ministerial decrees listed below:
a) Inter-ministerial Decree MIPAAF/MISE of 9 December 2016 "Indication of the origin of the raw material for milk and dairy products on the label, in implementation of (EU) Regulation No 1169/2011, concerning the supply of information on food to consumers";
b) Inter-ministerial Decree MIPAAF/MISE of 26 July 2017 "Labelling indicating the origin of durum wheat for durum wheat semolina pastas";
c) Inter-ministerial Decree MIPAAF/MISE of 26 July 2017 "Labelling indicating the origin of rice";
d) Legislative Decree No 27 of 7 February 2017 "Discipline on sanctions for violating the provisions of (EC) Regulation No 1924/2006 concerning nutritional and health information provided on food products";
e) Legislative Decree No 145 of 15 September 2017 "Discipline on compulsory indication on labelling of the legal office and the address of the production unit or, if different, packaging plant, pursuant to article 5 of Law 12 August 2016, No 170 - the 2015 European delegation law";
f) Ministerial decree of 16 November 2017 "Labelling indicating the origin of tomato".
The above mentioned Legislative Decree No 231/2017, which came into force on 9 May 2018, in the Final Provisions under Title IV provides for a complex system of controls aimed at imposing administrative monetary sanctions, since these are violations relating to information requirements.
This Legislative Decree, adopted by the Presidency of the Council in conjunction with the Ministry of Economic Development (MISE), the Ministry of Agricultural, Food and Forestry Policies (MIPAAF) and the Ministry of Health, provides a single reference framework for sanctioning violation of food supply information to consumers and allows uniform application of sanctions on a national level. For this purpose, and in compliance with the aforementioned legislative delegation, the Department of Central Inspectorate for Fraud Repression and Quality Protection of Agri-Food Products and Foodstuffs (ICQRF) of the Ministry of Agricultural, Food and Forestry Policies (MIPAAF) is designated as the administrative authority responsible for imposing the administrative monetary sanctions provided for therein. These sanctions, concerning in particular the mandatory informations, are proportionate to the seriousness of the breach of the provisions foreseen by the EU Regulation on food information to consumers.

4.- The administrative monetary sanctions adopted in our national law system

The principal violations and the respective administrative monetary sanctions adopted in our national law system are regulated in title II "Penalty provisions referred to in the Regulation" of Legislative Decree No 231/2017.
The most relevant penalty provisions for violations of the EU Regulation No 1169/2011 are the following:

i) art. 3 of Legislative Decree No 231/2017 "Violation of loyal information practices pursuant to art. 7 of the EU Reg. No 1169/2011".
Art. 7 of the EU Reg. No 1169/2011 provides that: food information shall not be misleading:
a) as to the characteristics of the food and, in par-

ticular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;
b) by attributing to the food effects or properties which it does not possess;
c) by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients;
d) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient.
In this case the administrative monetary sanction ranging from a minimum of € 3.000,00 up to a maximum of € 24.000,00.

ii) art. 4 of Legislative Decree n. 231/2017 – "Violation of the disclosure obligations by the FBOs - *Food Business Operators* of the distribution chains (the FBOs of the chains) different from the FBO subject responsible for food information[12], that is the name indicated on the label of those who distribute food in the EU or the importer in the EU for extra-EU products.
Art. 4 n. 1 refers to article 8, paragraph 3 of the EU Reg. No 1169/2011, which foresees: the FBOs of the chain must not supply foodstuffs of which they know or presume to know the non-conformity with the articles 7 and 9 of the Regulation.
In this case the administrative monetary sanction ranging from a minimum of € 500,00 up to a maximum of € 4.000,00.
Art. 4 n. 2 concerns art. 8 paragraph 4 of the EU Reg. No 1169/2011 on the FBOs of the chain (also organized in groups) which modify the mandatory indications referred to in art. 9 paragraph 1 of the Regulation.
In this case the administrative monetary sanction ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00.
Art. 4 n. 3 refers to art. 8 paragraph 6 of the EU Reg. No 1169/2011 on the FBOs of the chain that do not transfer information on non-prepacked food to the FBO of the chain that receives these foods.
In this case the administrative monetary sanction ranging from a minimum of € 1.000,00 up to a maximum of € 8.000,00.
Art. 4 n. 4 refers to art. 8, paragraph 7 of the EU Reg. No 1169/2011 on the FBOs of the chain that do not ensure the correctness of the compulsory indications pursuant to Articles 9 and 10 in relation to pre-packaged foods for the final consumer, but marketed at a stage prior to sale to the final consumer, as well as on prepacked foods intended to be supplied to the community to be prepared, processed, fractionated or cut.
In this case the administrative monetary sanction ranging from a minimum of € 1.000,00 up to a maximum of € 8.000,00.

iii) Art. 5 of Legislative Decree n. 231/2017- "Breach of the obligations relating to the affixing of the mandatory food information".
Art. 5 n. 1 refers to the art. 9 paragraph 1, letter c) concerning the omission of the indications of the ingredients that contain substances that cause allergies listed in Annex II of the EU Reg. 1169/2011.
In this case the administrative monetary sanction ranging from a minimum of € 5.000,00 up to a maximum of € 40.000,00
The sanction does not apply to all the FBOs that have proceeded with the withdrawal and to inform the competent authorities before ascertaining the violation by the competent authority.
Art. 5 nn. 2 and 3 of Legislative Decree No

([12]) See article 8, paragraph 1 "Responsibilities" of EU Reg. No 1169/2011 and art. 9 "List of mandatory particulars", paragraph 1 letter h) of EU Reg. No 1169/2011.

231/2017 refer to the art. 9, paragraph 1 excluding letter c), to the art. 10, paragraph 1[13] and to the Annex III[14]: omission of the mandatory indications on the label and omission of the supplementary mandatory indications for specific types or categories of food referred to in Annex III.
The administrative monetary sanction foreseen ranging from a minimum of € 3.000,00 up to a maximum of € 24.000,00

iv) Art. 7 of Legislative Decree n. 231/2017 – "Distance selling (e-commerce)", refers to art. 14 of EU Regulation No 1169/2011[15] concerning the violation of the supply of mandatory food information[16] in e-commerce.
The administrative monetary sanction foreseen ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00.

v) The art. 10 of Legislative Decree n. 231/2017 – "Violations concerning the requirements in the indication of allergens", refers to the art. 2117 and to the Annex II "Substances or products that cause allergies or intolerances": violations of the correctness of the modalities used to indicate the ingredients that contain substances that cause allergy.
The administrative monetary sanction foreseen ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00

vi) Art. 12.3 of Legislative Decree n. 231/2017 refers to art. 24 and Annex X of the EU Reg. 1169/2011 provides for the application of a very high monetary level of administrative sanction when the food is sold for any reason or sold to the final consumer beyond its expiry date.
In fact the administrative monetary sanction foreseen, ranging from a minimum of € 5.000,00 up to a maximum of € 40.000,00.

vi) Art. 15 of Legislative Decree n. 231/2017 – "Violations concerning nutrition declaration" refers to the articles 30-35 and annexes XIII, XIV and XV. The articles 30-35 and annexes XIII[21], XIV[22] and XV[23] concern violations of the provisions relating to forms of expression and presentation of the nutritional declaration, with the exclusion of the following exceptions:
a) art. 30 "Content", paragraph 5;
b) art. 33 "Expression by portion or unit of consumption", paragraphs 2 and 3.
The administrative monetary sanction foreseen ranging from a minimum of € 2.000,00 up to a maximum of € 16.000,00

5.- Mutual recognition

It's useful a mention of the mutual recognition clause foreseen by the article 25, title IV "Final dispositions" of the aforementioned Legislative Decree, in order to ensure the free circulation of packaged foods in EU, EEA.
Art. 25 provides that:
"Without prejudice to the application of the applicable European Union legislation, the provisions of Title III of this decree do not apply to food products legally manufactured or marketed in another EU Member State or in Turkey or to legal-

(13) Art. 10 "Additional mandatory particulars for specific types or categories of foods" of EU Reg. No 1169/2011.
(14) Annex III "Foods for which the labelling must include one or more additional particulars" of EU Reg. No 1169/2011.
(15) Article 14 "Distance selling" of EU Reg. No 1169/2011.
(16) See art. 9, par. 1 of EU Reg. No 1169/2011, with exclusion of letter f) TMC (Minimum Term of Durability).
(17) Art. 21 "Labelling of certain substances or products causing allergies or intolerances" of EU Reg. No 1169/2011.
(18) Art. 12 "Violations concerning the minimum conservation term, expiry date and freezing" of Legislative Decree n. 231/2017.
(19) Art. 24 "Minimum durability date "use by" date and date of freezing" of EU Reg. No 1169/2011.
(20) Annex X "Date of minimum durability, "use by" date and date of freezing of EU Reg. No 1169/2011.
(21) Annex XIII "Reference intakes" of EU Reg. No 1169/2011.
(22) Annex XIV "Conversion factors for the calculation of energy" of EU Reg. No 1169/2011.
(23) Annex XV "Expression and presentation of nutritional declaration" of EU Reg. No 1169/2011.

ly manufactured products in a Member State of the European Free Trade Association (EFTA), a contracting party to the Agreement on the European Economic Area (EEA), in accordance with the provisions of the regulation".
The mutual recognition clause above mentioned allows free importation into Italy, based on the principle expressed by art. 38[24] of the Regulation, of packaged, non-prepacked food products and food products for final consumption, even if they do not comply with the national provisions of Title III of the aforementioned decree, but legally manufactured or marketed in another Member State or in Turkey or in a Member State belonging to the EEA.

6.- Procedures for ascertain the infringements and for imposing sanctions

In implementation of the legislative delegation, the AGCM and the local bodies (Regions, Municipalities, etc.), as far as their respective competences are concerned, check for violations and, therefore, could also carry out checks on Food Industry Operators, in obvious contrast, with the single activity of the ICQRF.
With regard to controls aimed at imposing administrative monetary sanctions, the art. 26 of the Legislative Decree n. 231/2017 – "Authorities responsible for imposing sanctions" provides that:
1. The Department of Central Inspectorate for the Protection of Quality and Fraud Repression of Agri-Food Products of the Ministry of Agricultural, Food and Forestry Policies is designated as the competent authority for the imposition of administrative pecuniary sanctions provided for in this decree.
2. Remain fixed the competences of the Antitrust Authority in accordance with Legislative Decree 2 August 2007, n. 145, and of the legislative decree 6 September 2005, n. 206, and those due, pursuant to current legislation, to the bodies responsible for ascertaining the violations.
3. The parties that carry out control activities are required to maintain the confidentiality of information acquired in compliance with current legislation".
In compliance with the legislative delegation pursuant to art. 5, paragraph 3, letter b) of Law 170/2016, the Department of Central Inspectorate for the Protection of Quality and Fraud Repression of Agri-Food Products (ICQRF) of the Ministry of Agricultural, Food and Forestry Policies (MIPAAF) is designated as the competent authority for the imposition of administrative monetary sanctions provided for by the aforementioned Legislative Decree.
The ICQRF is one of the major European agri-food control bodies. Its own skills at national level are the following:
i) prevention and repression of fraud in the trade of food products and technical means of production for agriculture;
ii) supervision of productions of registered quality (PDO, PGI and BIO);
iii) contrasting the irregular commercialization of agri-food products introduced by Member States or Third Countries and the fraudulent phenomena that generate unfair competition between operators and sanctions for the proper functioning of inter-professional agreements.
iv) At European and world level, the ICQRF is an ex officio authority and a coordinating authority on wine, defending quality Made in Italy in all European countries, fighting counterfeiting outside the EU borders also with cooperation agreements.
v) Finally, the ICQRF carries out checks on the WEB for the protection of Italian quality productions by making agreements with the main global e-commerce players.
Analysis of art. 26 of Legislative Decree 231/2017 shows the presence of multiple Authorities with competences regarding monitoring and imposing sanctions: the ICQRF, the AGCM and the local

([24]) Art. 38 "National measures" of EU Reg. No 1169/2011.

bodies, and the delegation law makes no specification about the criteria for sharing competence when checking for violations.
The interpretative difficulties are often tightened by the will of the delegating legislator to maintain the role of pre-eminence of the Italian Anti-trust Authority (AGCM) as the subject that exercise broad powers: a checking, monitoring and where necessary, inhibiting and sanctioning body, to safeguard the consumer against infringements committed by Food Sector Operators.
Actually, the function of the AGCM is to be the responsible body for safeguarding the loyalty of information supplied to consumers, especially with reference to violations of art. 3 of Legislative Decree No 231/2017 "Violation of fair information practices pursuant to art. 7 of EU Reg. No 1169/2011".
Finally, art. 27 of the Legislative Decree n. 231/2017 governs the procedures for imposing sanctions foreseeing that:
1. for the assessment of violations and the imposition of administrative sanctions provided for by this decree are applicable, the provisions contained in Chapter I, Sections I and II of the Law of 24 November 1981, n. 689.
2. The provisions of article 1, paragraphs 3 and 4 of the decree-law of 24 June 2014, n. 91, converted, with modifications, by the law 11 August 2014, n. 116 apply to the violations envisaged by the present decree.
3. When the violation is committed by companies with micro-company parameters, as per recommendation 2003/361/CE of 6 May 6, 2003, the administrative sanction is reduced to a third.
4. The sanctioning provisions of this decree do not apply to supplies to non-profit organizations, for the subsequent free transfer to poor people, of foods that present labelling irregularities not attributable to information on the expiry date or relating to substances or products that can cause allergies or intolerances.
5. The sanctioning provisions of this decree do not apply to the placing on the market of a food that is accompanied by an adequate written correction of the information that does not comply with the provisions of this decree ".
Examination of art. 27 reveals the following:
- the difficult practical application of Law 689/1981, considering the legal reserve in favour of the local bodies responsible for checking for violations;
- a measure is introduced to reduce the edictal sanction by up to one third in the event that the responsible party has the parameters of a micro-company. According to the Commission Recommendation of 6 May 2003 on the definition of micro, small and medium-sized enterprises and in particular to art. 2 of the Annex to the Recommendation "*The category of micro, small and medium-sized enterprise (SMEs) is made up of companies that employ less than 250 people and whose annual turnover does not exceed 43 million Euro"*;
- The non-sanctionable nature of products supplied to non-profit organisation that distribute free food to the needy people is established, without prejudice to violations related to the expiration date and allergens.

7.- Summary Brainstorming

Based on the considerations above, in Italy we have different competent bodies responsible for checking for violations and imposing sanctions, with a negative impact for the controlled subjects (i.e. food industries) as well as a lack of coordination between the competent public bodies, especially the competence, foreseen by the aforementioned Legislative Decree of the Municipalities to ascertain the infringements of EU Reg. No 1169/2011.
I hope that the authority and the well-known professional experience of ICQRF could avoid this discrepancy.

ABSTRACT

The principal aim of the article is to show the con-

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trast between the National Law (Legislative Decree No 231 of 15 December 2017) on sanction rules for the infringements to the disposals of (EU) Regulation No 1169/2011, on the provision of food information to consumers, and the compliance of National Law to disposals of the same (EU) Regulation No 1169/2011.
The article examines, in particular, the contradictions concerning matter of controls, assessment and imposition of administrative monetary sanctions coming from the European Delegation Law n. 170/2016 – art. 5, paragraph 3, letter b), by virtue of which the Delegate Decree No 231/2017, other Delegated Decrees and Ministerial Decrees have been issued.

Scopo principale dell'articolo è quello di evidenziare contrasti e conformità tra la disciplina nazionale sulle norme sanzionatorie per le violazioni alle disposizioni del Regolamento (UE) n. 1169/2011 (Decreto Legislativo n. 231 del 15 dicembre 2017), e le disposizioni di tale Regolamento.
L'articolo esamina, in particolare, le contraddizioni in materia di controlli, valutazione e irrogazione delle sanzioni amministrative pecuniarie derivanti dalla Legge di Delegazione Europea n. 170/2016 - art. 5, comma 3, lettera b), in virtù del quale sono stati emanati il Decreto Legislativo n. 231/2017, altri Decreti Legislativi e Decreti Ministeriali.

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The implementation in Spain of Regulation EU 1169/2011 and the sanction models adopted: a brief overview

Vicente Rodríguez Fuentes

1.- Introduction

Spain is a decentralised State. Regulation and control of food presentation is mainly a competence of the Autonomous Communities, of which there are seventeen in Spain plus two Autonomous Cities. Central Government remains competent to coordinate, to issue basic legislation and to control imported products. Furthermore, the regulation and control of food information aims to protect different legal interests, affecting consumer protection, fair competition, food safety and agricultural quality. These are matters which are not always under the control of one sole authority or whose infringements are not always governed by the same piece of legislation. Therefore there is neither one single authority nor one single piece of legislation governing the control of the application of Regulation (EU) 1169/2011 on the provision of food information to consumers (FIC Regulation) in Spain. Moreover, because of different territorial and material competences, these sometimes overlap.

The following pieces of legislation complement and develop FIC Regulation in Spain:

i) *RD 126/2015 de 27 de Febrero*, on non pre-packed foods, foods packed on the sales premises at the consumer's request or pre-packed for direct sale, which regulates how to provide information on allergens in these cases and what information has to be provided in the case of distant sale and other matters.

ii) *RD 1334/1999* on food labelling, which is the implementation in Spain of repealed Directives on food labelling, and which is still in force as regards batch number which is a mandatory particular of food labelling in Spain

iii) Furthermore, there are several quality standards ruling mandatory particulars and legal names for some products, such as Meat products and Iberian meat products; *RD 474/2014* and *RD 4/2014*, Table Olives; *RD 679/2016*, Edible oils *RD 308/1983*, etc..

2.- Infringements and Penalties

Infringements of the FIC Regulation are normally prosecuted under administrative law, including several pieces of legislation protecting consumer interests, food safety and food quality. Infringements can also be the subject of private law since they can be considered unfair competition. More rarely these infringements could be the subject of criminal law if the infringement consists of a fraud with relevant economic impact.

The following administrative sanctions and pieces of legislation are applicable to FIC Regulation infringements in Spain:

At *National level*, infringements of FIC Law could fall under the scope of:

a) Consumers Protection Act; *RDL 1/2007 Ley General para la Defensa de Consumidores y Usuarios*.

Depending on the nature of the infringement, it could be considered serious, sanctioned with a fine between 3,005.07 to 15,025.30 Euros, or very serious, sanctioned with a fine between 15,025.30 to 601,012 Euros

b) Food Safety and Nutrition Act; *Ley 17/2011 de Seguridad Alimentaria y Nutrición*.

Depending on the impact on public health, the infringement can be sanctioned with a fine of up to 5,000 Euros or up to 20,000 Euros, as per article 50.1.b),

c) Food Quality Act; *Ley 28/2015 de Calidad Alimentaria*.

Depending on the nature of the food fraud, it can be sanctioned with a fine of 4,001 to 150,000 Euros, as per articles 14.9 or 14.13,

d) Agri-food Fraud Regulation; *RD 1945/83; arti-*

cle 3.1.3
Depending on the nature of the infringement, it could be considered serious, sanctioned with a fine between 601.02 to 15,025.30 Euros, or very serious, sanctioned with a fine of between 15,025.31 to 601,012.1
At *Regional level* infringements of FIC Regulation can fall under scope of several pieces of legislation, for example;
a) In Madrid; they are generally sanctioned by *Ley 11/1998 de protección del consumidor en Madrid* (Consumer protection) with a fine from 15,025.31 to 601,012.10 Euros
b) Andalusia; they are generally sanctioned by *Ley 2/2011 de calidad agroalimentaria de Andalucía* (Agri-food quality), with a fine from 3,000 to 50,000 Euros
c) Valencia; they are generally sanctioned by *Ley 1/2011 Estatuto de los Consumidores y Usuarios de la Comunidad de Valencia* (Consumer protection) with a fine from 15,025.31 to 601,012.10 Euros
d) Catalonia; they are generally sanctioned by *Ley 22/2010, Código de Consumo de Cataluña* (Consumer) with a fine of 10,000 to 100,000 Euros
e) Navarra; they are generally sanctioned by *Ley Foral 7/2016 de defensa de Consumidores y Usuarios* (Consumer) with a fine from 3,000 to 15,000 Euros.
Both in national and regional legislations, additional sanctions such as closure, destruction of the product, publication of sanctions, etc. can be imposed.

3.- Some relevant legal issues

3.1. The question of the competent administrative authority to prosecute FIC Regulation infringements in Spain.

Most FBOs distribute their products in more than one region, generally all over Spain, that is to say, the market is Spain as a whole. Furthermore, some FBOs have premises, offices and factories in different parts of Spain and sometimes the legal domicile of the company is also in a different location. This creates a problem of territorial competence, since only one administrative proceeding and sanction is possible for one infringement, due to the principle of *non bis in idem*, applicable to administrative law. In other words, if the infringement is detected in Madrid but the company manufacturing the product is in Catalonia, or if the factory in Catalonia is owned by a company whose legal domicile is in Andalusia, which authority is competent and which legislation is applicable? The one where the product is manufactured? The one where the legal domicile is based? Or the one where the product is sold and where consumers have to be protected?
There is no simple answer to this, and in practical terms it is my experience that criteria are not always clear nor uniform from one regional authority to another. In order to resolve this situation, *Ley 20/2013 de Garantía de Unidad del Mercado* (Act to guarantee a single market within Spain), was enacted. Its Article 21 establishes that the competent authority is the corresponding to the place of the FBO's legal domicile, in cases where the infringement relates to requirements applicable to the product itself. However, this article of the Law does not establish a clear preference of one authority over another and in fact some Courts have adjudicated that competence to control products on the market resides with the regional authority where the product is sold (Judgement of the Andalusian Superior Court of 8 March 2018, rec.1116/2015), while on other occasions the criteria of the Court have been rather to ascertain where the decision to which the infringement can be traced was taken, if the infringement is the result of a decision taken by the headquarters or by a branch (Judgement of the Madrid Superior Court of 23 May 2012). In any case, none of these judgements are case law in Spain and the criteria are not as clear as legal certainty would require.

3.2. When the manufacturer is different from the

owner of the brand, who is to be considered responsible for an infringement?

According to article 8.1 of FIC Regulation, the FBO responsible for the food information shall be the operator under whose name or business name the food is marketed, or its importer in the EU. Furthermore, article 9 of Spanish RD 1945/83 considers the person whose name is on the label is responsible for any infringement related to food presentation and labelling (in pre-packaged foods). The producer can also be blamed if it acted in agreement with the owner of the brand. A similar liability is established by article 17 of Ley 28/2015 on food quality.
However, in practice, authorities prosecute both the owner of the brand and producers indistinctly, when these are different companies, and Courts tend to consider any one of them liable and put the blame of the infringement on the fact itself and not on culpability, which is contrary to the main principles of sanctioning law. An exception to this approach can be found in a Judgement of the Court of Cordoba (number 209/2018 of 3 October). No clear case law has been established and the criteria set by the ECJ in the Lidl Italy ruling of 26 November 206 (C-315/05) appear to support a broad interpretation of the concept of responsibility in the case of infringements of this kind.

4.- Infringements of FIC Regulation under private law

Finally, under private Law, infringements of FIC regulation can also fall under the scope of unfair competition (misleading presentation and advertising is considered unfair competition, as per articles 3.e of Ley 34/1998 and 5.1. b of Ley 3/1991) and cases are sometimes brought before the Jury of AUTOCONTROL (Spanish advertising standards agency) which has taken several decisions on the matter, such as the Resolution of 2 November 2013 "*Vivesoy Vidactiva y Vivesoy Pielvital*", where it was considered misleading to present voluntary information in such a way to limit space for mandatory particulars[1]. Although AUTOCONTROL decisions have very limited legal value (they do not have the status of an arbitration award) their moral value is important and are in general followed by the food and advertising industries.

ABSTRACT

Spain is a decentralised State and the FIC Regulation is enforced, mainly, via regional legislation and penalties, generally fines, vary from one region to another. To determine the territorial legislation applicable in cases where the product is sold in a place different to where it is produced, criteria have been established by Spanish Act Ley 20/2013 de Garantía de Unidad del Mercado. However, conflicting interpretations on territorial competences are not uncommon. Apart from administrative infringements, non-compliance with the FIC Regulation can be considered unfair competition, which is prosecuted under private law and, often, under voluntary schemes similar to (but not with the legal status of) arbitration, such as that of the advertising standards control body AUTOCONTROL.

La Spagna è uno Stato decentralizzato e il Regolamento (UE) n. 1169/2011 viene applicato principalmente attraverso la legislazione regionale. Le sanzioni, generalmente pecuniarie, variano da una regione all'altra. La Ley 20/2013 de Garantía de Unidad del Mercado ha stabilito i criteri da seguire per determinare la legislazione ter-

(1) However a Court in Navarra in a Judgement of 5 April 2017 considered that adding an adjetive to the legal name of a product- a mandatory particular- is covered by commercial freedom of speech.

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ritoriale applicabile nei casi in cui il prodotto è venduto in un luogo diverso da quello in cui è prodotto. Non sono tuttavia rare interpretazioni contrastanti in tema di competenze territoriali. Il mancato rispetto del Regolamento (UE) n. 1169/2011 può inoltre essere considerato come manifestazione di concorrenza sleale, perseguita ai sensi del diritto privato e, spesso, nell'ambito di schemi volontari simili a quelli dell'arbitrato (pur non avendo lo status giuridico di questo), come quello dell'organismo di controllo della pubblicità denominato AUTOCONTROL.

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The implementation of Regulation (EU) No 1169/2011 in France: some remarks

Didier Le Goff

1.- The general framework

Dealing with the question of the implementation of Regulation (EU) No 1169/2011 in France needs, as a pre-requisite, to give a few historical explanations about the development of the consumption law field through the years.
If it is true to say that consumption law has silently become a very important field of law during the 20th century in France, we have to add that this development has not been equal and linear.
During the two first third of said century, the French law dated 1 August 1905 dealing with frauds and falsifications has been the quasi-unique text dealing with consumption law. The scope of this law was very large, from frauds and falsifications to labelling and regulation of many products.
Then, starting from 1970, many new texts came into the field of consumption law, so that in the early 1990's, consumption law had become a very abrupt matter with many texts and case law. That is the reason why, in 1993, the first Consumption Code (*Code de la Consommation*) was enacted.
This code gathered and codified all existing texts, and continues to develop today with new European standards.
Everyone will have understood that the consumption code was the legal framework for the application and implementation of 1169/2011 regulation in France.
Let's deal with the implementation in France (I), then with the sanctions (II).

2.- The implementation in France

Book 4 Title 1 of the French consumption code concerning conformity of products and services is the legal framework of the implementation.
Article L411-1 al 1 states in substance that from their initial market launch, products shall meet the regulations in force relating to the health and safety of the persons, and that the persons responsible for such launching are therefore required to ensure that the product complies with said regulation in force.
As usual in France, this is a framework.
From a French institutional point of view, law, enacted by the legislative power, states for the principles, and decrees, enacted by the government, provide for application measures of the law. This is the case in our topic.
Article L412-1 of French consumption code states the Council of State Decrees shall determine the measures to which the product shall complain, provide for a list of 11 domains that shall give rise to a decree, as, for instance, their importation or exportation, their traceability, labelling, and/or information due to the consumer, …)
And article L412-2 states that "*Where a EU Regulation contains provisions which come under the field of application of Title 1 (i.e.: Conformity), a Council State Decree ascertains whether these provisions, as well as those of EU regulations that may amend them or that may be adopted for their application constitutes the implementation measures provided for in article L412-1*"
Concerning EU Regulation No 1169/2011, said decree was adopted on 11 December 2014.
The reader will wonder why a decree is necessary to implement a EU regulation which is, by itself, directly applicable into Member States Legislation, and it definitely is a good question.
French Criminal Chamber of the Supreme Court (*Cour de Cassation*) ruled on 10. October 2006 that the decree provided for in article L412-2 is not a condition of the implementation in France of an EU Regulation[1].
Thus, as far as conformity obligations provided for

(1) Crim 10 octobre 2006 – n° 06-80170.

in French law may give rise to specific offenses and sanctions, it is necessary to classify the provisions of the EU Regulation info the framework of conformity.

3.- Sanctions

Three (3) questions shall be examined:
- Who may control?
- Who may sentence?
- What are the risks?

Who may control?

The main persons habilitated to investigate and establish the violations of Book 4 of the French consumption Code are the public servants of the Directorate General for Competition, Consumer and Fraud Prevention (Direction Générale de la Concurrence, de la consummation et de la Répression des Fraudes – DGCCRF)
Their field of investigation is very wide and is not limited to frauds and falsifications, and they may investigate throughout the territory.
When they consider that a fraud is effective, they shall first inform the responsible party and ask her, or give injunction to comply with the regulation.
If the compliance is not met, they shall issue a report to the prosecutor who is empowered to decide to sue or not.

Who may sentence?

In 2014, public servants were allowed to inflict administrative fines in certain circumstances, but this empowerment does not concern conformity and security of products rules of Book 4 of the French Consumption Code.
Thus, the only possible penalties will result of a trial, which implies the intervention of a criminal court or judge.

What are the risks?

Book 4 of the French Consumption Code provides for specific penalties.
Article R451-1 states that any breach to a decree adopted in consideration of article L412-1 may be sentenced of a 5th category minor offense, which means a simple fine which amount is at most, 1500 € when it is the first time.
But article L441-1 of the same code states that deceit is a major offence.
Deceit implies that the responsible person mislead the other party to a contract which object is a product.
The risk is a two (2) years imprisonment penalty and/or a 300.000 € fine at most, when it is the first time.
Then comes falsification of article L413-1.
Falsification is the more severe offence of Book 4 with regard to the facts, and implies that the responsible person violated an official process the product shall comply with.
The risk is the same than in the case of deceit, but may reach a 7 years of imprisonment and a 750.000 € fine if the product constitutes a danger for human or animal health, or if the acts were committed as a group.
And despite the three (3) specific offenses of Book 4, the judge may sometime choose another ground for sentence.
For instance, in a case were a product does not comply with the labelling regulation applicable to it, (Art 7 of the Regulation 1169/2011/EU) the prosecution preferred the ground of the 2005/29/CE Directive concerning unfair business to consumer, through the qualification of misleading commercial advertising.
This is an example to evidence that the scope of sentences available may finally be very large, and depends on the acts committed and the legal qualification they receive.

ABSTRACT

The implementation of Regulation EU 1169/2011 in France could not be dissociated from French

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law history.
In 1905, a very large text on frauds and falsifications appeared in France, which will be the backbone of consumer law until the appearance the French consumer code in 1993.
This code was, therefore, the ideal framework for the implementation of the regulation in France, since it sets general obligations, and designates actors and sanctions.

L'attuazione in Francia del Regolamento UE n. 1169/2011 si colloca all'interno della storia del diritto francese.
Nel 1905 è stato introdotto in Francia un testo molto ampio su frodi e falsificazioni, che costituirà la spina dorsale del diritto dei consumatori fino alla comparsa del codice del consumo francese nel 1993.
Questo codice è stato, quindi, il quadro ideale per l'attuazione del regolamento in Francia, poiché stabilisce obblighi generali e designa attori e sanzioni.

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L'attività del Comando Carabinieri per la Tutela Agroalimentare

Luigi Cortellessa

Il *Comando Carabinieri per la Tutela Agroalimentare* (già Comando Carabinieri Politiche Agricole e Agroalimentari), posto alle dipendenze del Comando Unità Forestali, Ambientali e Agroalimentari Carabinieri[1], ai sensi dell'art.7, comma 1 del DPCM n.25 dell'8 febbraio 2019[2], annovera tra i suoi compiti, in particolare, lo svolgimento di:

- *controlli straordinari* sull'erogazione e percezione di aiuti pubblici nel settore agroalimentare e della pesca e dell'acquacoltura, sulle operazioni di ritiro e vendita di prodotti agroalimentari, ivi compresi gli aiuti ai Paesi in via di sviluppo e indigenti;
- *controlli specifici* sulla regolare applicazione dei regolamenti comunitari concorrendo, coordinandosi con l'ICQRF, nell'attività di prevenzione e repressione delle frodi nel settore agroalimentare.

Nello svolgimento di tali compiti, il Reparto può effettuare accessi e ispezioni amministrative avvalendosi dei poteri previsti dalle norme vigenti per l'esercizio delle proprie attività istituzionali.

Reparto Specializzato dell'Arma dei Carabinieri, recentemente riorganizzato sotto l'aspetto ordinativo con l'innesto in organico di personale dell'ex Corpo Forestale dello Stato, il Comando Carabinieri per la Tutela Agroalimentare opera su tutto il territorio nazionale attraverso un Reparto Operativo (con alle dipendenze una Sezione Operativa Centrale ed una Sezione Analisi e BB.DD.) con sede a Roma e 5 Reparti Carabinieri Tutela Agroalimentare con sedi a Torino, Parma, Roma, Salerno e Messina.

In tal senso, il Comando Carabinieri per la Tutela Agroalimentare indirizza la propria azione operativa lungo le seguenti direttrici:

- contrasto alle frodi connesse all'indebita percezione di fondi comunitari e nazionali erogati a sostegno del comparto agricolo dall'Agenzia per le Erogazioni in Agricoltura (AGEA) del MIPAAF e dagli altri 8 Organismi Pagatori regionali allo stato istituiti;
- tutela della sicurezza degli alimenti, prevenzione e contrasto delle frodi in campo agroalimentare, con attività finalizzate ad accertare il rispetto da parte di tutti gli operatori interessati dalla relativa filiera (produzione, trasformazione e commercializzazione) della normativa europea e nazionale di settore.

Con riferimento al *primo ambito operativo*, l'attività è indirizzata quindi all'esecuzione di controlli straordinari sulla regolarità dei finanziamenti della Politica Agricola Comune (P.A.C.)[3] a sostegno del comparto agricolo.

([1]) A seguito dell'entrata in vigore del D.Lgs. n.177 del 16 agosto 2016 che nel sancire l'assorbimento del Corpo Forestale dello Stato nell'Arma dei Carabinieri ha attribuito, quali funzioni dell'Arma, tra le altre, la prevenzione e repressione delle frodi in danno della qualità delle produzioni agroalimentari ed i controlli derivanti dalla normativa comunitaria agroforestale e ambientale e concorso nelle attività volte al rispetto della normativa in materia di sicurezza alimentare del consumatore e di biosicurezza in genere.

([2]) Che ha abrogato il DPCM n. 105 del 27 febbraio 2013, cosi come modificato dal DPCM n.143 del 17 luglio 2017 che ne rinovellava le prerogative.

([3]) La PAC assorbe il 45% del bilancio comunitario, viene riformata ogni 7 anni (attualmente è in vigore quella concernente il periodo 2014-2020), l'Italia beneficia di circa 7 miliardi annui (52 miliardi nel settennato) ed è finalizzata sostanzialmente a:

offrire sussidi e prezzi garantiti agli operatori del comparto agricolo, con l'ottica di creare un regime di sostegno al reddito degli agricoltori, affinché non vi sia un abbandono del settore agricolo;

incentivare una produzione mirata alle necessità della popolazione U.E. e disincentivare le sovrapproduzioni nel comparto agricolo che abbatterebbero i prezzi, a discapito dell'equilibrio di mercato fra la domanda e l'offerta.

Prevede come strumenti di finanziamento principali:

il Fondo Europeo Agricolo di Garanzia (F.E.A.G.A.), alimentato totalmente da fondi comunitari, che ha come principale funzione quella di sostenere il reddito degli agricoltori, che rimangono liberi di produrre in funzione della domanda del mercato;

il Fondo Europeo Agricolo di Sviluppo Rurale e Fondo Europeo Sviluppo Regionale (F.E.A.S.R./F.E.S.R.), alimentato per 50% da fondi

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Tale attività, declinata nella verifica e nel contrasto all'illecito percepimento di finanziamenti a sostegno del comparto agricolo, svolta di iniziativa o su delega dell'Autorità giudiziaria, ma anche a supporto dell'Arma territoriale e degli altri reparti specializzati che si trovino impegnati in indagini nel settore, risulta di precipuo interesse operativo, in quanto i riflessi di tali fatti delittuosi non sono ascrivibili esclusivamente al danno economico nei confronti della P.A., ma altresì al pregiudizio alla funzione sociale perseguita dalla distribuzione dei fondi, con grave nocumento per le già fragili economie locali e la critica situazione in cui versa l'imprenditoria giovanile.

Le attività di controllo sui finanziamenti comunitari a sostegno del reddito agricolo vengono quindi svolte attraverso riscontri documentali e sul "campo" per verificare l'esistenza dei previsti requisiti soggettivi (effettivo esercizio di un'attività agricola - *stricto sensu* o in forma imprenditoriale - ovvero assenza di altri motivi ostativi ex art. 67 D.Lgs. n. 15/2011 per ricevere i finanziamenti) ed oggettivi (disponibilità titolata delle unità produttive dichiarate in conduzione) del richiedente, nonché l'effettiva titolarità delle attività finanziate ed esecuzione di specifici metodi di produzione.

Con riferimento alla seconda direttrice operativa perseguita, l'attività è invece rivolta alla tutela della corretta produzione e commercializzazione degli alimenti nel rispetto delle normative di settore europee e nazionali[4]. L'azione d'intervento è costituita dal contrasto, preventivo e repressivo, delle frodi nel comparto agroalimentare ed è attuata con un duplice obiettivo:

- da un lato, proteggere il patrimonio agroalimentare italiano, quale volano dell'economia pubblica ed esempio emblematico della libera concorrenza del mercato:
- dall'altro tutelare il consumatore, affinché proceda ad acquisti sani, sotto il profilo della salute, e sicuri quanto a correttezza della provenienza e delle informazioni relative al prodotto.

La prerogativa dell'azione operativa è quindi quella di garantire nell'ambito dell'intera *filiera agroalimentare*, dal campo al prodotto finale, la sicurezza per quanto concerne origine, qualità, quantità, tipologia di lavorazione e trasformazione, attraverso la verifica della corrispondenza dei dati in etichetta e/o nella documentazione contabile e di accompagnamento del prodotto con quelli di effettivo stato di quest'ultimo. Tutto ciò allo scopo di evitare che i consumatori si trovino ad acquistare un alimento non rispondente alle aspettative, quindi di qualità inferiore o di altra natura. Partendo da accertamenti di natura amministrativa, che spesso sfociano in violazioni di natura penale, si procede alla verifica sul campo di tutte le fasi: produzione, trasformazione e distribuzione, al fine di garantire che il prodotto sia conforme a quanto previsto dalle specifiche norme del comparto ed accertare che lo stesso sia sicuro.

L'azione è mirata, pertanto, mediante attività ispettive effettuate presso stabilimenti produttivi, strutture della grande distribuzione ed esercizi di vendita sia all'ingrosso sia al dettaglio, integrate anche da campionamenti di matrici alimentari da

UE e per l'altro 50% da fondi nazionali, che sostiene l'agricoltura in quanto fornitrice di beni pubblici nella sua componente ambientale, climatica, territoriale e incentiva lo sviluppo delle zone rurali. La strategia d'intervento è composita e mira all'innovazione e alla competitività del comparto e allo sviluppo dei territori rurali. Il Programma di Sviluppo Rurale (P.S.R.) è il principale strumento operativo di programmazione e finanziamento per gli interventi nel settore agricolo, forestale e rurale sul territorio regionale.

([4]) La complessa e delicata qualificazione dei beni da tutelare postula l'applicazione di plurime fonti normative di riferimento: anzitutto di rango costituzionale (l'art. 32 che tutela la salute come diritto fondamentale dell'individuo ed interesse della collettività, e gli artt. 41 e 43, che disciplinano rispettivamente la libertà di iniziativa economica ed i limiti alla libertà di concorrenza, con il richiamo all'art. 16 della Carta dei diritti fondamentali dell'Unione Europea che fa riferimento al concetto di "libertà d'impresa"). Conferiscono altresì protezione al sistema talune norme di origine sovranazionale (ad es. il Reg. (CE) 178/2002, che afferma i principi ed i requisiti generali della legislazione alimentare, istituisce l'Autorità europea per la sicurezza alimentare e fissa procedure nel campo della sicurezza alimentare; si tratta del testo guida in tema di tracciabilità e rintracciabilità degli alimenti). Il quadro normativo è altresì rinvigorito da un vivace panorama tutorio, a perimetro protettivo di singoli prodotti alimentari (ad es. Legge n. 238/2016, "Disciplina organica della coltivazione della vite e della produzione e del commercio del vino", c.d. "T.U. sul vino").

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sottoporre ad analisi chimiche ufficiali, a verificare la provenienza e corrispondenza delle materie prime impiegate nella trasformazione-lavorazione degli alimenti, accertare casi di contraffazione e falsa evocazione dei Marchi di Qualità (DOP/IGP/STG) tutelati, in aderenza ai rispettivi disciplinari, o dei prodotti certificati *Biologici* e violazioni in materia di "tracciabilità" ed "etichettatura", nonché alla tutela del "*Made in Italy*", anche sul piano internazionale.

Le attività di controllo si concentrano sulle filiere produttive dei diversi settori agroalimentari (lattiero-caseario, oleario, ortofrutta, allevamenti zootecnici e carne, prodotti a denominazione d'origine, vitivinicolo, ittico, apistico, conserviero, biologico, riso, grano, pasta e cereali, avicolo, ecc.).

Nella pianificazione dell'attività operativa, a seguito di attente e specifiche valutazioni ed analisi del rischio, vengono individuati gli "obiettivi sensibili" ovvero quelli che, al momento, sono risultati avere una maggiore vulnerabilità e meritevoli di particolare attenzione, anche attraverso la conduzione di specifiche campagne tematiche (olio, vino, miele, uova, etc.) senza ovviamente trascurare i restanti settori.

In tale quadro, particolare interesse è rivolto quindi anche ai c.d. *marchi di qualità*, che investono una fetta rilevante di imprese del settore agricolo, decise ad affidarsi alla realizzazione di prodotti di alta qualità. Le produzioni di qualità sono state il volano di un processo economico che ha trasformato "il tipico" da settore di nicchia a comparto di innovazione dell'agricoltura. Il Comando rivolge da anni particolare attenzione alle tradizioni regionali attraverso la tutela degli alimenti a marchi di qualità (DOP, IGP, STG, IGT, DOC, DOCG) su tutto il territorio nazionale, ma anche a livello internazionale, ove opera da alcuni nell'ambito della rete di cooperazione internazionale di polizia nota come OPSON (dal greco antico, "cibo") che, nata nel 2011 sotto il coordinamento di Europol ed Interpol, oltre alle agenzie di controllo ed alle forze di polizia internazionali prevede la partecipazione anche di portatori di interesse. (Per l'Italia partecipano alcuni Consorzi di tutela di note produzioni di qualità, quali il Prosecco, il Gorgonzola e l'Olio extravergine toscano).

Precipua attenzione è altresì rivolta al settore del "*biologico*", moderna tendenza alimentare che va largamente diffondendosi per la sua rappresentazione di ritorno al naturale, tant'è che obiettivo dell'agricoltura biologica è quello di garantire la "*Sostenibilità Ambientale*", attraverso l'utilizzo di prodotti e processi presenti in natura, riducendo drasticamente l'impiego di input esterni al processo produttivo, escludendo prodotti e medicinali chimici di sintesi. Anche in questo settore, quindi il Comando svolge controlli serrati allo scopo soprattutto di evitare che prodotti convenzionali siano distribuiti come prodotti biologici.

I controlli effettuati dai Reparti territoriali (RAC) hanno negli ultimi anni ripetutamente permesso di evidenziare anomalie ed illeciti in numerosi e diversificati ambiti produttivi, nonché di scoprire, in diverse zone del territorio nazionale, alcune rilevanti frodi in filiere già notoriamente considerate ad alto rischio, in numerosi studi ed analisi di settore.

Riassumendo, le violazioni della normativa di settore maggiormente riscontrate sono:

- le frodi nell'esercizio del commercio (art.515 c.p.);
- la mancata rintracciabilità e/o tracciabilità dei prodotti agroalimentari (Reg. UE 178/2002);
- difformità nell'etichettatura (Reg. UE 1169/2011);
- la falsa evocazione e/o contraffazione dei Marchi di Qualità (DOP/IGP/STG) (art.517 quater c.p.) o di quelli certificati falsamente "Biologici" (art.516 c.p.);
- falsa indicazione, mediante la stampigliatura "*Made in Italy*", e fallace indicazione, mediante uso del marchio con modalità tali da indurre il consumatore a ritenere che il prodotto sia di origine italiana (art. 517 c.p. in riferimento alla Legge n. 350/2003 - commi 49 e 49 quater - dell'art. 4).

Il Comando Carabinieri per la Tutela Agroalimentare, inoltre, nell'ambito dell'azione di contrasto al fenomeno della contraffazione dei prodotti agroalimentari, gestisce il numero verde 800 020 320 per la segnalazione, da parte del cittadino, di prodotti contraffatti/irregolari.

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COMANDO CARABINIERI PER LA TUTELA AGROALIMENTARE RISULTATI OPERATIVI (anno 2019)

ABSTRACT

The Carabinieri Command for Agri-food Protection (RAC) is a "Specialised Department" of the Carabinieri force which is divided into a Central Investigative Department and 5 Local Departments for Agri-food Protection based in Torino (north-west Italy), Parma (north-east Italy), Roma (Central Italy), Salerno (Central-South Italy) and Messina (South Italy).

The Special Department, according to the dictates of Article 18 of Law No 99 of 23 July 2009, pursuant to Article 8 of Legislative Decree No 177 of 19 August 2016, and the Ministerial Decree No 25 of 8 February 2011, contributes to guaranteeing agri-food safety, and also carries out extraordinary checks, with the help of the public, in the agri-food, fishing and aquaculture sectors, on withdrawal operations and the sale of agri-food products.

The men of the RAC deal with the origin of the food, the authenticity of the food and Italian food production, ensuring what we eat is genuine.

The checks, carried out throughout Italy, concern the labelling and traceability of food products in particular.

In Italy, operators in the sector are obliged to respect the general provisions of Reg. (EU) No 1169/2011 concerning the supply of food information to consumers. The purpose of the regulation is to ensure clear and correct information, so as not to mislead the consumer regarding the characteristics, properties or effects of the products they buy; these are therefore the aspects that the checking is most concerned about.

In this context, the RACs verify the traceability of food products (Article 17 of Reg.(EC) No 178/2002) - defined as a process of making the public aware of the various transformations and manipulations carried out starting from the raw material up to the final marketing of the agri-food product- and re-traceability (Article 18 of Reg. (EC) No 178/2002) defined as a backwards process that starts from the final product and goes back down the production chain until reaching the raw material.

Such activities are carried out throughout Italy and involve the retail and wholesale trade, dairy product producers, factories, wineries, farms, packing centers, fruit, vegetable and fish markets, storage and processing companies and small and large retailers.

The Department is the newest of the specialist departments of Carabinieri force. It has been set up as an agile operational tool, attentive to the multiple requests of citizens and continuously participating in the adaptation and doctrinal modernization of the complex agri-food sector.

Il Comando dei Carabinieri per la Protezione Agroalimentare (CCR) è un "Reparto Specializzato" dell'Arma dei Carabinieri che è suddiviso in un Reparto Centrale Investigativo e 5 Reparti Locali per la Protezione Agroalimentare con sede a Torino (nord-ovest Italia), Parma (Italia nord-orientale), Roma (Italia centrale), Salerno (Italia centro-meridionale) e Messina (Italia meridionale).

Il Reparto Speciale, ai sensi dell'articolo 18 della Legge n. 99 del 23 luglio 2009, ai sensi dell'articolo 8 del decreto legislativo n. 177 del 19 agosto 2016, e il D.P.C.M. n. 25 dell'8 febbraio 2011, contribuisce a garantire la sicurezza agroalimentare, ed effettua anche controlli straordinari, con l'ausilio del pubblico, nei settori dell'agroalimentare, della pesca e dell'acquacoltura, sulle operazioni di ritiro e vendita di prodotti agroalimentari.

Gli uomini del RAC si occupano dell'origine del cibo, della genuinità del cibo e della produzione alimentare italiana, assicurando che ciò che mangiamo sia genuino.

I controlli, effettuati in tutta Italia, riguardano in particolare l'etichettatura e la tracciabilità dei pro-

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dotti alimentari.
In Italia gli operatori del settore sono tenuti al rispetto delle disposizioni generali del Reg. (UE) n. 1169/2011 relativo alla fornitura di informazioni sugli alimenti ai consumatori. Scopo del regolamento è garantire un'informazione chiara e corretta, in modo da non trarre in inganno il consumatore in merito alle caratteristiche, proprietà o effetti dei prodotti che acquistano; questi sono quindi gli aspetti che maggiormente preoccupano il controllo.
In questo contesto, i CCR verificano la tracciabilità dei prodotti alimentari (art. 17 Reg. (CE) n. 178/2002) - definita come processo di sensibilizzazione del pubblico sulle varie trasformazioni e manipolazioni effettuate a partire dalla materia prima fino alla commercializzazione finale del prodotto agroalimentare e alla rintracciabilità (art. 18 Reg. (CE) n. 178/2002) definito come un processo a ritroso che parte dal prodotto finale e risale lungo la filiera fino a raggiungere materiale grezzo.
Tali attività vengono svolte in tutta Italia e coinvolgono il commercio al dettaglio e all'ingrosso, produttori di latticini, stabilimenti, cantine, aziende agricole, centri di confezionamento, mercati ortofrutticoli e ittici, aziende di stoccaggio e trasformazione e piccola e grande distribuzione.
Il Reparto è il più recente dei reparti specialistici dei Carabinieri. Si configura come uno strumento operativo agile, attento alle molteplici richieste dei cittadini e partecipe continuamente all'adeguamento e all'ammodernamento del complesso settore agroalimentare.

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Information in agri-food market: the role of digital technologies

Laura Ammannati

1.- Information and consumer empowerment

Taking the title of the Reg. 1169 of 2011 "on the provision of food information to consumers" seriously, I will try to focus firstly on how information is communicated and on the role of the consumer on the market.
The regulation is placed in a normative framework, where the main task is to empower consumers through instruments addressed to enhancing their ability to become dynamic and aware actors of the market. As stated by the Commission in a document on consumer empowerment: "to make informed decisions, consumers need certain skills, such as the ability to perform simple calculations, to read a label, or to recognise relevant logos"[1].
From this perspective the case of food information to consumers is an example of interest.
The information asymmetry between consumers and producers has been reduced by the legislators of the European Union through a relevant re-organisation of the provisions concerning information to the public. The Reg. 1169 reveals the evolution in shaping modes and instruments following the innovative strategies of the information-based regulation. Therefore, it focuses on food labelling in order to "benefit citizens by requiring clear, comprehensible and legible labelling of foods" as well as "to ensure easier compliance and greater clarity for stakeholders"[2]. Moreover, it highlights not only labelling, but more generally food information made available by any means, including modern technological tools.
The advent of new media has led the European legislator to create a comprehensive and evolutionary approach to food information, which has led to the adoption of rules aimed at "covering information provided also by means other than the label"[3].
Certainly, in 2011 there was a larger number of "conscious consumers" than in past decades. Consequently, on the market a more detailed labelling could, to some extent, be more appreciated. However, as affirmed by Borghi in a comment on the regulation, it's not so certain that currently the consumer is always an "avid reader", demanding a more detailed label that satisfies his/her rationality, together with his/her hunger for knowledge[4].
Therefore, we need to recall some warnings. Firstly, an overload of information can limit the capability of consumers in understanding the essential content. Secondly, shortage of time, lack of technical skills and, thirdly, linguistic and cultural diversity can prevent the consumer from elaborating information into real knowledge.
The Reg. 1169 refers to a new way to point out the nutrition declaration where it seems "appropriate" to add and differentiate additional "forms of expression or presentation of information" in relation to the cultural and behavioural characteristics of the consumers in each country[5]. This provision represents an important step towards a new vision of the consumer (no more as an "average consumer" but a real one), since, as often highlighted, cognitive biases influence thinking and decision making of the real consumer[6].

([1]) Commission Staff W- P, Consumer Empowerment in the EU, (SEC(2011) 469 final.
([2]) Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, recital 9.
([3]) Ivi, recital 14.
([4]) P. Borghi, *Risk-related Communication and Food-related Communication: What Information to Consumers?*, in *q. Riv*. www.rivistadirittoalimentare, n. 2-2011, 3- 4.
([5]) Regulation (EU) No 1169/ 2011 *on the provision of food information to consumers*, cit., recital 43.
([6]) On these matters, see V. J. Trzaskowski, *Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive*, in *J Consum Policy*, 2011 (34), 382-384; A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi. La costruzione di una "responsabilità del consumatore*", in *q. Riv*. www.rivistadirittoalimentare, n. 2-2012, 5; and more in general, L. Ammannati, *Il paradigma del consumatore nell'era digitale. Consumatore digitale o digitalizzazione del consumatore?*, in *Riv. Trim. Dir. Ec*., 1, 2019.

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2.- Digital technologies and agri-food chain

Regarding the relevant role that information plays in the food sector it is worth analysing what the potential new role of technological innovations in the digital economy is and exploring how the new digital mechanisms will enhance access to food information and consumer protection.
Digital technologies are expected to play a relevant role in generating citizens' confidence in public institutions and the manufacturer. All in all citizens/consumers have two fundamental interests: "the interest in food safety aims at health protection and citizens' well-being; and the interest in the veracity of information received during the selection and purchase of products is based on a relationship of trust between consumers and the food supplier"[7].
In this framework it is worth recalling at least two crucial measures adopted by the European institutions at the beginning of the century: firstly, the regulation establishing the European Food Safety Authority and, in the aftermath of the 'mad cow' crisis, aimed at harmonizing procedures to guarantee food safety; secondly, the regulation concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms[8].
A powerful set of new digital technologies can revolutionise some parts of the agri-food chain. Generally digital technologies are seen as an important tool to shorten the supply chain. Obvious examples are the "platformisation" of food supply which reduces the need for intermediaries and helps not only reduce search and delivery costs for consumers but also improve food traceability[9].
The emergence of platform economy, the increasing use of Internet of Things (IoT) and the current and future development of Distributed Ledger Technologies (DLTs) are expected to solve some market failures along the supply chain and, at the same time, to empower consumers in their choices. Consequently, they must be equipped with adequate skills in using digital technologies[10].
In the age of Internet and Big Data an interesting theoretical but also practical problem is to establish the source of information.
Whilst it is true that UPS can accurately track its packages, such granular provenance evaluation has often not been possible with today's items that are produced and transported in complex, inter-organizational, often international supply chains[11]. However new technologies, namely IoT and DLTs, "promise to offer highly secure and immutable access to supply chain data".
Blockchain technologies in the financial area and nowadays increasingly in the energy sector are developing and are documented in literature, media, and political dimensions. Nevertheless, as affirmed by the first observers, the opportunities as well as the challenges posed by blockchain to food safety, traceability, and sustainable development

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([7]) L. Leone, *Towards new "digital insights." The value of Open Data for food information in Europe*, in *q. Riv*. www.rivistadirittoalimentare, n. 3-2017, 2.
([8]) See Regulation (EC) No 178/2002 of 28 January 2002 *laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety*; and Regulation (EC) No 1830/2003 of 22 September 2003 *concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms*. On the topics of the first Reg. see esp. S. Gabbi, *Consulenza scientifica Istituzionale e indipendenza: è possibile la quadratura del cerchio?*, in V. Salvatore (a cura), *Le Agenzie dell'Unione Europea. Profili istituzionali e tendenze evolutive,* Polo Interregionale di Eccellenza Jean Monnet, Pavia, 2011, 129 – 160; and on the topics of the second, see esp. P. Dabrowska-Klosinska, *The regulation of GMOs in the EU: conflicts, problems and reforms*, in L. Ammannati (ed.), *Networks. In Search of a Model for European and Global Regulation*, Giappichelli, 2012, 99 – 126, where the interventions in food sector are investigated in the light of risk regulation.
([9]) CEPS – Centre for European Policy Studies - Barilla Center for Food & Nutrition Foundation, *Digitising Agrifood. Pathways and Challeges*, November 2019, 27.
([10]) On this issue, see A. Renda "*The Age of Foodtech: Optimizing the Agri-Food Chain with Digital Technologies*", in R. Valentini, J. Sievenpiper, M. Antonelli and K. Dembska (eds.), *Achieving SDGs through Sustainable Food Systems*, Springer publishing, 2019.
([11]) H. M. Kim – M. Laskowski, *Towards an Ontology-Driven Blockchain Design for Supply Chain Provenance*, in *Intelligent Systems in Accounting, Finance, and Management*, 2019, 20 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828369) .

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have not been fully examined[12].
In some ways this remark is confirmed by the number of papers published for instance in SSRN on blockchain in agricultural and food sectors: 15 papers in 2019 but in the previous year 1 only.
Generally speaking, the Distributed Ledger Technology (DLT but colloquially known as blockchain) is a technology that maintains a record, or a ledger of transactions in a distributed format across separate nodes. A copy of the blockchain is stored in all computers of the network which periodically synchronize to make sure that all of them share the same database.
Blockchain was developed as a technology intended to disintermediate existing processes and incumbent business models. And it has evolved beyond its initial applications for cryptocurrency to a generic technology that can be used for specific purposes in different industries. Prior to the emergence of the blockchain, there was no opportunity to coordinate activities of different actors over the Internet "without a centralized body ensuring that no one has tampered with the data". Without such a sort of authority unrelated individuals could not verify that transactions are not fraudulent or invalid[13].
Theoretically speaking blockchain technology can be referred to as a system of transactions which progressively acquires the status of a "regulatory technology". Briefly we could say that with the advent of blockchain law is progressively turning into code. Recalling the famous expression of Lessig who already in 1999 affirmed that code, along with market, state and social norms, represents a regulatory tool ("code is law")[14], we can observe that law increasingly assumes the characteristic of code ("law is code") with rules becoming more and more formalized[15].
The specific feature of this kind of regulation is that rules are enforced ex ante since technical rules, unlike legal written in natural language (hence ambiguous and flexible) are completely formalized. So there is no room for interpretation. If DLT technologies become more widely adopted, there will be an increasing need to focus on such decentralized (autonomous) organizations and to regulate their creation and development.
The EU institutions have not yet proposed specific regulation, regarding the potential uses of blockchain technology. However EU Parliament has issued a resolution of 3 October 2018 on *distributed ledger technologies and blockchains: building trust with disintermediation*.
As affirmed in this document, "DLT is a general-purpose technology which can improve transaction cost efficiency by removing intermediaries and intermediation costs, as well as increasing transaction transparency, also reshaping value chains and improving organisational efficiency through trustworthy decentralisation".
Moreover DLT can introduce "an IT-based paradigm that can democratise data and improve trust and transparency". Referring to the topic of supply chain DLT can help in improving supply chains and facilitate "monitoring of origin of goods and their ingredients or components, improving transparency, visibility and compliance checking", "thus reducing the risk of illegal goods entering the supply chain and ensuring consumer protection"[16].

3.- Blockchain and stakeholders' trust

Focusing specifically on the food sector and agricultural industry the blockchain can be used in numerous dimensions such as supply, production proces-

([12]) Ching-Fu Lin, *Blockchainizing Food Law: Implications for Food Safety, Traceability, and Sustainability*, Conference on *Food Law and Policy*: *Food Safety and Technology Governance*, Taipei, May 10-11, 2019 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387467).
([13]) A. Wright & P. de Filippi, *Decentralized blockchain technology and the rise of lex cryptographia*, 2015, 5 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664).
([14]) L. Lessig, *Code: and other Laws of cyberspace*, Bacic Books, 1999.
([15]) On this second expression, see P. De Filippi and S. Hassan, *Blockchain technology as a regulatory technology: from code is law to law is code*, in *First Monday*, 5 December 2016, 4 ss.
([16]) EU Parliament (2017/2772(RSP)), *Distributed ledger technologies and blockchains: building trust with disintermediation*, n. 16.

ses, food quality monitoring and control of transportation steps as well as waste recycling.

As already highlighted, it is increasingly important the source of information as well as the authenticity and "the 'credence qualities' of many goods and services … in guiding consumer choice". The lack of verifiability and clarity of various aspects of goods and services such as, as examples, production in compliance with workers' rights, geographic origin of food, respect of the environmental standards by all players along a supply chain, can lead to problems challenging not only consumers' behaviour but also business strategies. Facing these critical elements it is worth considering that DLTs and blockchain can help operators improve the integrity and the efficiency of complex supply chain[17].

Only to recall some recent examples, in 2017, IBM announced a collaboration with a few major food producers and retailers, including Dole, Nestlé, Tyson Foods, Kroger, Unilever, and Walmart, in order to apply technologies such as DLT to address challenges along the global food supply chain. Walmart has further required its upstream suppliers of leafy greens to use the cloud- and blockchain-based "IBM Food Trust" platform by September 2019.

At a global scale, an impressive example is TradeLens which applies blockchain to the world's global supply chain[18]. Such a platform built on open standards includes more than 20 ports and terminal operators, global container carriers, custom brokers, cargo owners, freight forwarders, transportation and logistics companies and customs authorities in five countries. It enables digital collaboration across the parties involved in international trade. Following this example other platforms have been launched across the world[19].

DLT enables different parties along a supply chain to trust digital data and has the potential to lower transaction costs and improve the efficiency of agricultural supply chains by reducing the need for monitoring and verification of data.

Some experts have estimated that the cost of trust is in the order of 35% of the total value of economic production. Blockchain is an institutional technology for "industrialising the cost of trust"[20]. The economic benefit of blockchain is that it lowers administrative and monitoring costs associated with transactional data.

We can mention other advantages of this technology such as more certain information and consumer trust resulting from the traceability of the food supply chain.

As suggested, blockchain can help reach and implement the tasks of the Reg. 625 of 2017 which entered into force the 14th of December 2019[21], by introducing a single integrated system of "official controls"[22]. Recalling the general framework of this regulation concerning "food safety, integrity and wholesomeness", blockchain could support the introduction of a single integrated control system and make controls easier vi-à-vis the excessive number of normative sources. Therefore the blockchain technology could improve efficient integration of the official control instruments also in terms of the quality of products.

([17]) CEPS, *Digitizing Agrifood*, cit., 44. In addition, see U. Sengupta, S. Singh and H. Kim, *Meeting Changing Customer Requirements,* in *Food and Agriculture Through Application of Blockchain Technology*, which focus on the implementation of blockchain technology in the food and agriculture industry in Ontario, esp. on the value of information for stakeholders in the supply chain (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3429200).

([18]) See https://newsroom.ibm.com/2018-08-09-Maersk-and-IBM-Introduce-TradeLens-Blockchain-Shipping-Solution

([19]) See e.g. GSBN, powered by Oracle in cooperation with Evergreen Marine, CMA CGM, Cosco Shipping, and Yang Ming, representing about a third of total global container ship capacity (https://www.supplychaindive.com/news/ocean-carriers-new-blockchain-cosco-cma-cgm/541630/)

([20]) S. Davidson, M. Novak and J. Potts, The Cost of Trust: A Pilot Study, 2018 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3218761).

([21]) Regulation (UE) 2017/625 of the European Parliament and of the Council of 15 March 2017 *on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products*.

([22]) F. Albisinni, *Il Regolamento (UE) 2017/625: controlli ufficiali, ciclo della vita, impresa, e globalizzazione*, in *q. Riv*. www.rivistadirittoalimentare, n. 1-2018, 11.

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Moreover this kind of technology could be used to contrast phaenomena such as counterfeiting, adulteration and fraud, to guarantee the correct maintenance of goods during the transportation as well as the registration of products to be traded. All in all blockchain enables an efficient monitoring along the whole supply chain giving help in challenging potential risks of manipulation[23].

4.- Regulating blockchain

I often say talking about digital innovation, such technologies always have not only a bright but also a dark side. Here the pros and cons cannot be described in more detail.
I can only observe that there are some criticisms in developing such a techno-regulatory mechanism which may undermine efficiency and accountability of the regulation. The lessons learned from the first cases of DLT/blockchain applications in the supply chain are relevant and focus on the interventions aimed at overcoming the obstacles to the potential development of such a technology.
First, two general remarks. On the one hand, the impact of the technology is still small so far, since only several sectors and industries with complex supply chains are involved. On the other hand, the current mechanisms which we are to deal with is a private/permissioned DLT where the parties agree to share a ledger designed for a specific purpose.
Second, as underlined, technical obstacles resulting from an excessive amount of transactions can limit the correct monitoring of data with regard to the amount of operators involved especially when the nodes are located in different geographic jurisdictions. Only in case of small supply chain when the possibility to register each step of a product is guaranteed the technology is advantageous since it enables all operators of the chain to be informed on the transactions in efficient and transparent way[24].
Third, these technologies raise important new issues in terms of legal responsibility in the case of errors and damages to third parties. Therefore in some sectors, especially in the financial market, a new dimension of responsibility, the so called 'algorithm responsibility', is arising.
Fourth, efficiency and accountability of blockchain technology rely on accuracy and fairness of information/data transferred by operators into the chain at each step. Therefore DLT application for the supply chain cannot completely solve the problem of information asymmetries, lack of trust and opacity.
Fifth, as observed above, given the lack of flexibility of technical rules, combined with the ex ante enforcement of regulation by code, blockchain technologies cannot distinguish between routine situations and cases that need to be treated differently.
As suggested by several scholars who have analysed these technologies thoroughly[25], while supporting autonomous systems blockchain technology creates challenges for governments and regulators. They can lose the ability to regulate the activities through traditional means. From this point of view blockchain undermines existing laws and regulations like many other technologies over time. However the powerful characteristic of the technology is its ability to let people create their own system of rules, a sort of private regulatory framework enforced by the underlying protocol of a blockchain based network.
The crucial question is on how governments and regulators can regulate such a technology. The debate is still ongoing.

ABSTRACT

Regarding the relevant role that information plays in the food the paper analyses how the new digital mechanisms will enhance access to food information and consumer protection. A powerful set of

(23) G. Spoto, *Gli utilizzi della Blockchain dell'Internet of Things nel settore degli alimenti*, in *q. Riv*. www.rivistadirittoalimentare.it , n. 1-2019, 27.
(24) Ivi, 20.
(25) P. De Filippi – A. Wright, *Blockchain and the Law. The Rule of Code*, Harward University Press, 2018.

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new digital technologies can revolutionise the agri-food chain. In particular Distributed Ledger Technology (DLT) enables different parties along a supply chain to trust digital data and has the potential to lower transaction costs and improve the efficiency of agricultural supply chains by reducing the need for monitoring and verification of data. All in all these technologies undermine existing regulations and raise important new issues which must be taken into consideration by regulators and legislators.

In considerazione del ruolo importante che l'informazione ha nel settore degli alimenti questo contributo vuole analizzare come la digitalizzazione può migliorare l'accesso alla informazione alimentare e la tutela dei consumatori. Alcune delle nuove tecnologie digitali possono rivoluzionare la catena agroalimentare. In particolare la tecnologia DLT permette alle diverse parti della catena di aumentare la fiducia riguardo l'informazione, di ridurre i costi di transazione e di migliorare l'efficienza della stessa catena superando in parte la necessità di monitorare e verificare i dati. In sintesi queste tecnologie mettono in discussione le regolazioni attuali e pongono nuovi e rilevanti problemi che dovranno essere considerati da regolatori e legislatori.

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Front-of-package food labels and consumer's autonomous decision-making

Sabrina Lanni

1.- Consumer's rights and new foods label expectations according to EU law

Consumers choose the best food products, among those they can compare through the diversified offers from the market, according to their multiple desires. It's not just a market policy issue: the growing attention to consumer expectations also highlights a conspicuous expansion of European consumer law framework[1]. In line with global perspectives, European consumers appear to be provided with new rights, such as the ethical ones (i.e. the choice of foods, or primary ingredients choice, obtained without damaging others' fundamental rights), as well as the environmental ones (or rather, consideration of the impact connected to one's choices on natural resources and their environmental sustainability)[2]. Of course, these new rights also contribute to pursuing existing rights on a full scale, such as economic ones (i.e. the selection of the lowest prices) or the health ones (giving great attention to the ultimate effects of food products being integrated into human organism).

The physiological need for food is ancestral in individuals, nevertheless the current consumer is more sophisticated and discloses complex expectations, combining the physiological and health needs with cultural and social implications; thus, food products must fully satisfy the consumer being elaborated and well-structured, both in composition and manufacturing processes, as well as through presentation, packaging and labelling[3]. Obviously, these consumer expectations are well known to market studies even before the impact of legal issues: according to the "4Ps" theory, marketing adds up all the tactical tools of the trade that the companies can manipulate in order to produce the desired reaction from a specific consumer target[4]. It is a group of variables under the combined control of the traders as well as and of the manufacturers on the markets, combined in marketing strategies in order to influence consumer behavior and to ensure the maximum efficiency of the product, regardless of its nature. The consumer appears 'vulnerable' and this peculiar analysis, which is well known from a comparative point of view, underlines the relevance of food labeling in order to limit consumers' rights infringement[5]. These answers encouraged European governments to find a frame of reference in EC Reg. 178/2002, which ensures consumer's right to information and contains two statements that influenced the development of national disciplines. Indeed, the mentioned Regulation prevents any behavior of pri-

(1) In evaluating the development of EU consumer law in terms of quantity, scholars define it a successful story: cf. B. Busch, *Harmonization versus Complementation: the Consumer Rights Directive and the Common European Sales Law*, in J.C. de Medeiros Nóbrega et alii (eds.), *Perspectivas atuais do direito do consumidor no Brasil e na Europa. Conceitos, jurisdição e harmonização legislativa*, Natal, 2014, p. 222.

(2) Regarding the influence of consumers religiousness upon food production systems, see G.R.T. White-A. Samuel, *Fairtrade and Halal Food Certifications and Labelling: Commercial Lessons and Religious Limitations*, in *Journal of Macromarketing*, 36, 2015, ps. 1-12. According to the so called double pyramid to show integration between social and environmental sustainability see S. Tommasi, *Food diversity and consumer protection*, in *European Food and Feed Law Review*, 2017, p. 220.

(3) 9 The issue refers to the 'right to food' as legal concept that incorporates the 'right to access adequate food', satisfying both in quantity and in quality, both from a ecological and cultural point of view, capable to fulfill food consumer's expectations (The topic was already mentioned in S. Lanni, *Consumer Rights beyond Regional Harmonization: Planned Obsolescence and Food Sustainability as Long Term Issues for a Cross-Border Enforcement of Consumer Law*, in S. Lanni (ed.), *Harmonization of European and Latin American Consumer Law*, Napoli, 2018, p. 524).

(4) See L. Manea-Gh. Epuran, *The Packaging and Labelling of Food Products in the European Regulatory Requirements*, in *Bulletin of the Transilvania University of Braşov*, 58, 2016, ps. 175 ss.

(5) Having in mind the rights and new rights that widely appear in European consumerism, food labels are seen as an objective to meet consumer rights, see: A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi. La costruzione di una "responsabiltà del consumatore"*, in *q. Riv.* www.rivistadirittoalimentare, n. 2-2012, p. 18.

vate subjects aimed at hindering consumers' conscious choices in relation to food products (Article 8) and reaffirms the importance of information contained on the label, in order to define that food safe and marketable (Article 14, paragraph 3, letter B). EC Reg. 178/2002 represents the guideline for the protection of food products consumers; differently, the EU Reg 1169/2011, consolidating and updating existing European rules on labelling, contains the most relevant answers on the requirements of the informative paradigm, actually the label, must contain to prevent the final consumer from being misled[6]. These normative provisions offer to lawyers an interesting synthesis, between the complex of rules and legal principles (such as, good faith) already in force and the fair practices of consumer's right to an adequate information[7]. Among the latter, stands out the criterion of intelligibility of information (clear and accessible) for the final consumer, which have to inspire front-of-pack food labels, and actually this is the precise objective of my attention here.

2.- Consumer information between 'mandatory' and 'voluntary' labelling contents

The intelligibility and transparency of information contained on the label are one of the deeply felt needs in civil society since they represent the empirical antecedent of individual self-determination. This assessment stems from recitals 4 and 26 of EU Reg. 1169/2011 and especially relates to the informative content provided by the label. From a private-law point of view, the label appears as a tool through which rebalance the position of the weakest part of the contract, also taking into account information asymmetries as well as cognitive deficits that can hinder a conscious and careful choice in the negotiation[8]. Looking from this perspective, front-of-pack food labels help consumer to make food choices that satisfy her/his expectations, improve health and reduce the risk of chronic diseases.
Doing so in a meaningful way would require a comprehensive discussion on the definition of food products consumer. Which is the standard consumer to be taken into consideration? The profane consumer? The smart one? The active one? According to the objective of this essay, I cannot hold back on this point[9]; furthermore, I want to point out that the consumer of food products is usually submitted to an informative overload, suggesting the concept of a weak and profane subject that can easily be at the market's mercy[10]. From a normative point of view, I believe that the consumer's specifications should be outlined according to EC Dir. 29/2005[11] that aims toward a complete harmonization of European rules on unfair commercial practices, raising consumer's protection levels.

([6]) Especially referring to the principal field of vision, as defined by Art. 2 (2) (1) and Art. 34 (3) (a), as well as the label requirements, for which a reference standard can be found in the article 7.
([7]) Key question is the relationship between the information duties stipulated in the Consumer Right Directive (2011/83/EU) and other information requirements, laid down by national laws and other European legislative acts. Regarding the relationship with other EU acts, art. 3(2) of Dir. 2011/83/EU stress that other EU acts governing specific sectors shall prevail over the Directive itself. On this topic B. Busch (*Harmonization versus Complementation: the Consumer Rights Directive and the Common European Sales Law*, in J.C. de Medeiros Nóbrega et alii (eds.), cit., p. 228), underlines how the information requirements set out in the Capital Requirement Directive (2013/36/EU) apply in addition to those laid down in the Services Directives (2006/123/EC) and the E-Commerce Directive (2000/31/EC), and that the first one is unfortunately silent on its relationship to the Unfair Commercial Practices Directive (2005/29/EC), which also contains a lengthy list of information items that traders must not omit in their 'invitation to purchase'.
([8]) Cf. R. Caterina, *Architettura delle scelte e tutela del consumatore*, in *Consumatori, Diritto e Mercato*, 2012, ps. 73 ss.
([9]) On the topic see F. Albisinni, *Strumentario di diritto alimentare europeo*, Torino, 3^ ed., 2017, ps. 130-131 which underlines, with reference to food products, how EC Reg.178/2002 does not place any explicit reference to the 'consumer natural person' as the only possible consumer.
([10]) With reference to the 'threshold' of the prudent consumer see A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi*, cit., p. 22. In a comparative perspective, see also: S. Lanni, *El consumidor en la venta de bienes de consumo en Italia. Notas de derecho comparado*, in *Anuario de derecho civil*, 2018, ps. 389-409.
([11]) According to Recital 18 «consumer is the subject reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors», so that the reference should be anchored to a subject generally informed and attentive to what he buys.

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EC Dir. 29/2005 rules intersect various advertising legal aspects already regulated by CEE Directives 84/450 and 2006/114. The mentioned Directive modifies existing rules on advertising and identifies unfair commercial practices, which may take the form of non-diligent professional behaviours, capable of altering consumers' freedom of choice, especially in order to gain the trust accumulated in them by other companies[12]. Information included in the label falls within the discipline of the EC Dir. 29/2005, as the promotion of the product endangers the rational sphere to which the information itself is addressed; through it the companies manage to attribute to their brand emotional values and social issues going well beyond the simple promotion of the product[13]. From a contractual point of view, scholars must also consider the global impact that food products sold online can have; indeed EU Reg. 1169/2011 covers information requirements not only for food sold directly to the consumer in shops, but also for food sold through business-to-consumer transactions in case of distance selling[14]. In the latter case, the situation appears more complex from the point of view of private law, because in distance selling all the mandatory information must be made available before the purchase is concluded; comparative lawyers know that rules leading to the formation of the contract differ from one national system to another[15].

The incidence and the relevance of different factors require to evaluate whether the label information should be in line with different standards: i.e., how to balance the relationship between 'mandatory' and 'voluntary' information content. The mentioned evaluation seems to be affected by the variety of types of front-of-pack food labels, globally used to stress, for example, nutrients included, nutritional recommendations, scientific basis criteria, commercial targets etc., but not infrequently criticized by many professionals as leading to an increase in consumer confusion; for these reasons, the US Institute of Medicine and the Health Canada Department, for example, strongly call for a single standardized and universal front-of-pack food label.

3.- Comparing front-of-pack food label models and their interaction with EU consumer law

Front-of-pack food labels appears materialized by different formats and implementation schemes[16]. Among the most widespread in the European context, or object of attention by the European doctrine, there are the 'enriched label', the 'q code label', the 'traffic light label', 'nutris-core label' 'the black mark or warning label'. How do these labels work? Is it possible to find common mandatory rules? Despite the aim of far reaching harmonization, Article 35 of the EU Reg 1169/2011 leaves some space for national initiatives on nutrition labelling. It allows for different forms of expression and/or presentation of the mandatory requirements on a voluntary basis. Such additional voluntary nutrition labelling must be in compliance with other more specific requirements[17]; furthermore,

([12]) Article 5 sets out a general definition of unfair practice, that is followed by the prevision of two different types of unfair commercial practices (those that are misleading, pursuant to articles 6 and 7, and the aggressive ones, pursuant to articles 8 and 9), and that it is accompanied by a list of the practices to be considered unfair in any case, regardless of whether they are deceptive or aggressive.
([13]) The reference should be made first of all by hidden marketing as a technique that can influence consumers, precisely because it acts on the decision-making process that is the basis of their consumption choices.
([14]) Cf. Art. 14 EU Reg. 1169/2011.
([15]) Regarding problems and common principles of contract law in European countries cf. H. Kotz, *European Contract Law*, eng. traduction by G. Mertens, Oxford, 2017, cap. 2.
([16]) On the topic, see D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, in *Nutrients*, 11, 2019, ps. 1-16 (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6471039/).
([17]) Proving that: «(a) they are based on sound and scientifically valid consumer research and do not mislead the consumer; (b) their development is the result of consultation with a wide range of stakeholder groups; (c) they aim at facilitating consumer understanding of the contribution or importance of the food to the energetic and nutritional content of a diet; (d) they are supported by scientifically valid evidences of understanding of such forms of expression or presentation by the average consumer; (e) in the case of other forms of expression, they are based either on the harmonized reference intakes set out in Annex XIII, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; (f) they are objective and non-discriminatory; (g) their application does not create obstacles to the free movement of goods» (Art. 35).

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it emerges for scholars the need to evaluate if, according to the point of view of European private law, the front-of-pack food label alters consumer vulnerability and, at the same time, if it is possible to evaluate positive and negative aspects of the various types of labelling, in order to identify the best labelling model or, at least, the type of voluntary label better suited to guarantee European consumer rights.

The mentioned research finds a reference point in the Funnel Model analysis (FM),that has been taken as a point of reflection by van der Bend's research work,[18] in order to deepen functional and visual aspects of front-of-pack labels in Europe, helping scholars to summarize and compare features of different labelling schemes. Globally, taking into account the possible EU trade needs, I will focus briefly only on four of these models. The first one is the Keyhole label, a very simple symbol and the longest-standing front-of-pack label in Europe[19]; it appears as a positive and directive label, that doesn't apply to all product categories and aims to help consumers in choosing healthier food products within a specific merchandise category. It's the most directive scheme, because the decision about the nutritional classification of the product has already been made for the consumer. This does not mean that consumers receptiveness to guidance doesn't depend on multiple other factors such as the context of the shopping visit, time constraints and taste, but it also has a cultural dimension[20]. A different model is that of the Nutri-Score label, based on preset criteria and algorithms to establish an indicator of the overall nutrition profile for all pre-packaged food[21]. It's a mandatory nutritional declaration, whose main purposes are to help consumers in making healthier choices and to stimulate product reformulation towards healthier product compositions. In contrast to the Keyhole label, it conveys a mixed message as it displays five boxes with colors ranging from dark green to dark red, with letters to grade foods according to their overall nutritional quality: from 'A', for products with the best nutritional quality, to 'E' for the products with the worst features. Because Nutris-Core provides a summary of indications for each food spanning from healthy to definitely unhealthy, it is considered neither positive nor negative, rather as a mixed scheme[22].

Another model is the well-known Mixed Multiple Traffic Light[23]. In contrast to all other labels, it is a semi-directive front-of-pack label, that combines green, amber and red color-coding with percentage of daily amounts of energy (or energy plus total fat, saturated fat, total sugar and salt) in foods and drinks. 60% of UK companies have adopted this label: by a comparative point of view, the Mixed Multiple Traffic Light enjoys wide admiration, as it stands across the different models[24]. However, in some contexts, primarily the Italian one, it is strongly criticized as considered simplistic and unable to considerate the ways through which different products are combined in a balanced diet (for example, the Mediterranean one)[25].

([18]) Cf. D. Van der Bend et alii, *A Simple Visual Model to Compare Existing Front-of-pack Nutrient Profiling Schemes*, in *European Journal of Nutrition & Food Safety*, 2014, ps. 429-534. On the topic, see too D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit.

([19]) The mentioned label was introduced in Sweden in 1989, and since then, it has developed as a common Nordic label for healthier foods, when it was introduced subsequently by Nordic Country (Denmark, Norway, Iceland) as well as Lithuania and Macedonia.

([20]) Even if the general panorama appears more and more frequently that of the so called 'one-dimensional logic': see J. Glenn, *Globalization: North-South Perspectives*, London, 2007.

([21]) The scheme was approved in 2017 by the French Government as a voluntary national policy, and it was approved to be used in Belgium, Spain and Portugal too.

([22]) Cf. D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit., p. 6.

([23]) The scheme was launched in 2013 by U.K., primarily aiming at helping consumers make healthier food choices according to Ministers' Recommendation on the use of color coding as well as to EU Reg. 1169/2011. See M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law*, in *European Food and Feed Law Review*, 2014, p. 149.

([24]) On the issue cf. L. Gonzàlez Vaque, *Son los semáforos nutricionales la major manera de informar a los consumidores sobre los nutrients contenidos en los productos alimenticios?*, in *Revista CESCO de Derecho de Consumo*, 11, 2014, p. 249.

([25]) See P. Borghi, *Rosso, giallo o verde? L'ennesima etichetta alimentare "a semaforo". L'ennesimo segno di disgregazione*, in *q. Riv.* www.rivistadirittoalimentare, n.2-2017, p. 2, where the Author highlights the exigence for a unique European evaluation tool for food nutrition, in order to avoid freelance initiatives by single EU Countries.

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Finally, considering the transnational legal model, I would like to draw the attention to Israeli and Chilean models too, that I put together as 'black labels', which are very easy models to help consumers decide, in a shorter period of time, to buy or not something according a sort of warning message. These models reflect the speed imposed by the image society, and take into account the economic research developed in support of front-of-pack color labels for all those (i.e. the vast majority) who want a quick comparison of different food products.

Israeli Warning Labels are a mandatory model that marks food packages with red or green circles to stress whether or not the food is healthy in relation to the presence of a disqualifying nutrients[26]. Israeli model is clearly distinctive in respect to other labels and communicates a negative health message; therefore, it is considered valuable to be included in this European comparison for the paternalistic drift of consumer law that European scholars must critically examine[27], also in consideration of other similar cases that emerge globally. On this regard, it is interesting to point out that Israeli labelling is linked to the so called "cookie monster moderation"[28], as an objective accomplished with a set of new laws regulating the labeling and marketing of certain foods, that has found great success in Chile, for example, especially according to the 20.606 law.

Chilean 20.606 law is broadly sweeping in its protection of children from certain food marketing[29], and by a comparative point of view its example is followed by other Latin American Countries: Ecuador implemented its own traffic light food labelling requirements for high levels of sugars, fat and sodium; Peru, Uruguay and Costa Rica have banned packaged foods in their schools and look with interest at the Chilean model; Mexico has increased taxes on similarly packed foods. While Chilean black logo, so-called PARE labeling (similar to road signs actually in use), is absent from the European food market, it is appreciated in Latin American countries; it has discouraged the purchase and consumption of the items with these labels, and has contributed to the implementation of fundamental personal rights, even before the consumer's ones, namely the right to the health (with a drastic reduction in obesity)[30].

Scholars underlined only very small differences in effectiveness and efficiency among the different label formats as perceived by consumers[31]. One possible explanation for this contradiction in results could be that the choice of the products used for the comparison of the different schemes has a significant influence on the outcome. So while traffic lights may be superior in identifying whether cornflakes or muesli are the healthier breakfast option, they are likely to fail in a category like cakes, where by nature of the production process the vast majority of products will score red on fat and sugar[32].

The comparison of the mentioned labelling types shows a double response according to the profile taken into consideration. First of all, no big differen-

([26]) The scheme was approved by the Israeli parliament's Labor, Welfare and Health Committee in 2017 and its first phase was enforced in January 2020. The Israeli food labelling reform requires red warning labels to appear on all food and beverage products containing high levels of sugar, sodium and satured fat at, at the same time, enables the optional addition of green labels for recommended foodstuffs.

([27]) With reference to the paternalistic approach of Italian and European consumer law, see R. Caterina, *Architettura delle scelte e tutela del consumatore*, cit., p. 73. Regarding the dangers of an asphyxiating consumer regulatory system, see A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi*, cit., p. 24.

([28]) According to current rates of obesity in Chile, that leaves behind only three other countries (New Zeland 26%, Mexico 30% and United States 33%), scholars made reference to "Sesam street gang" of H.E. Schwartz (for example, *Cookie Monster's Foodie Truck: A Sesame Street*, Lerner Publishing Group, 2019), to decrease by storytelling children's exposure to unhealthy foods. See T. Godfrey, *Transitioning to "Sometimes foods": Chile's new Stop-light Food Labelling Laws*, in *Law and Business Review of the Americas*, 2014, ps. 661 ss.

([29]) For the same reasons, the McDonald's Happy Meal is on the out in Chile, also taking account of art. 8, l. 20.606.

([30]) Cf. *Ley de Etiquetado y Publicidad de Alimentos en Chile: ¿Un modelo replicable para Latinóamerica?*, Informe special, Santiago, 2016 (https://ideas.llorenteycuenca.com/wp-content/uploads/sites/5/2016/05/160504_DI_informe_alimentacion_chile_ESP.pdf).

([31]) The issue is deepened by Cf. D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit., p. 9.

([32]) The concept is underlined by M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law*, cit., p. 151.

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ces emerge regarding the information content: some characteristics are found to be similar in positive, mixed and negative front-of-pack labels. They use the same reference unit (100g/100ml) and include disqualifying components related to some ingredient percentage (sodium, sugar and fats) in their product criteria, and all aim at helping consumers to make healthier choices. The most relevant difference between positive and the mixed or negative labels is that in all positive labels a category-specific approach is employed, which means that different criteria are used for different food categories; conversely a single set of criteria for all food categories is used for the mixed and negative front-of-pack labels, although there are exceptions for specific food categories. This is certainly the most critical point, as it favors the homologation of food consumption (unlike what medical research offers based on age, lifestyle, personal needs etc.) as well as consumer's concept (it is not static, but is actually a changing figure, in relation to cultural and social reference factors).

Secondly, differences emerge in relation to the message built. The types of information contained in the different model labels mark a different degree of criticism for the consumer, as these labels balance in a different way the explicit factors (i.e. the quantity and/or percentage for one specific ingredient) with the perceptible factors (i.e. the wholesomeness of a product) as well as with the merely allusive ones (i.e. the ability of a product to be in line with ethical and healthy choices). Israeli and Chilean label models pay specific attention to the so called implied health claims, and they appear susceptible from a comparative point of view to the art. 101.14 a(1) of USA Code of Federal Regulations. It seems obvious that three or four red warns on the product are likely to be decoded as a sort of 'non-beneficial' nutrition claim, so that the consumer is oriented to consider that that food does not meet his nutritional expectations. On the other hand, the same number of green light codes, as well as the absence of Chilean black label, could act as a 'beneficial' claim to enforce consumer choice. Even if these models are increasing consumers' understanding of nutritional information, color coding is inevitably considered at least an implied claim, affecting the so called consumer bounded rationality;[33] thus, it emphasizes the purposes of the front-of-pack nutrition labelling as a marketing strategy rather than a public health defense[34].

4.- Evaluating information ambiguity and consumer misconceptions: some final remarks

There is an ongoing debate on which are the front-of-pack label models most effective in translating complex nutritional information that can be correctly chosen in order to protect consumers' rights[35]. On this issue a few studies have been realized but, according to the different European legal systems, scholars don't agree on the specific formats or methodologies to be used. There are critical issues regarding some gaps in offering to the consumer standard level of information transparency, and therefore of his own interests protection: all these should prevail over the pursuit of economic interests of traders and companies[36]. I believe that the crucial point of this delicate balance must be found in the ambiguity of information, which the entrepreneur often uses in order to emphasize the properties of

([33]) Cf. M. Pantzar, *Rational Choice of Food: on the Domain of the Premises of the Consumer Choice Theory*, in *International Journal of Consume Studies & Home Economics*, 20, 1996, ps. 1-20; L. Bairati - E. Grasso, *Lire ou regarder? Les couleurs dans l'étiquetage alimentaire et l'information du consommateur*, in *Contrats-Concurrence-Consommation*, 10, 2019, ps. 1-6.

([34]) Cf. K.D. Brownell - J.P. Koplan, *Front-of-Pack Nutrition Labelling: an Abuse of Trust by Food Industry?*, in *The New England Journal of Medicine*, 364, 2011, ps. 2373-2375.

([35]) See M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law,* cit., ps. 148 ss, especially regarding the possible breach between UK front-of-pack labelling and art. 3 NHCR; D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit., p. 2.

([36]) It's widely accepted that a gap remains in relation to sanctions for breaching of information duties, inasmuch as Article 24 Consumer Right Directive (2011/83/EU) leaves this issue to the member states, only establishing that sanctions should be «effective, proportionate and dissuasive».

his product and attract the consumer's favor. Specifically, it is possible to distinguish two types of allusiveness that may harm consumer interests: on one hand, the mismatch between the communicated features of the product and those actually present according to a more global feedback; on the other hand, the use for commercial purposes of social preconceptions that fall within the expectations of consumer protection.

For example, one of the reference cases is the mandatory indication, provided by EU Reg. 1830/2003, about the presence of Genetically Modified Organisms in relation to all products in which their percentage exceeds 0.9%[37]. This approach, that is accepted in Europe but is currently subjected to a challenge by the World Trade Organization, supports the message that there are some intrinsic differences between food with genetically modified ingredients and conventional products. It leads consumers to prefer non-GMO products even if scientific data, claimed by different manufacturers, do not admit any difference between standard products and the GMO ones.

Another example of consumer misconception's abuse, totally or partially not founded, is palm oil, which in recent years has been subject of cross-advertising campaigns, aimed to highlight the negative consequences of the massive use of this product by the agri-food industry. This has led to an increasing level of suspicion by the majority of consumers, so that Italian companies, such as Barilla or Friulbaker, have been forced to review their recipes containing palm oil as a consequence of a social alarmism that led to demonizing the product by itself, without any distinction between consequences in terms of consumer health (in comparison with other vegetable fats) and those on environmental sustainability (in terms of global warming effect) or even of human rights (in relation to consultation of indigenous people occupying the lands)[38].

Moreover, it appears obvious that the green color, considered as an implied health claim, would constitute a claim criteria set out at the national level, capable to create a barrier to intra-EU trade, especially regarding producers that cannot comply with the recommended scheme[39]. Similar observation can be made in relation to Chilean black logo, that inevitably recall dangerous effects to consumer's health and could create a barrier intra Mercosur-trade as well as different levels of protection of the citizens of that area[40]. From a legal point of view, these actions don't violate European legal rules: the different voluntary labeling systems derive from the possibility allowed by the EU Regulation 1169/2011, especially by the already mentioned Art. 35 (additional forms of expression and presentations) and the subsequent Art. 36 (voluntary food information), to use «graphic symbols and other forms of expression». However, doubts may arise regarding the respect of the consumer's autonomy in decision-making, in relation to a broad interpretation of the articles 5 and 6 of EC Dir. 29/2005[41].

Comparative analysis of the front-of-pack label model shows how this field of consumer law harmonization appears to be characterized by numerous gray areas, in which different national intentions and different market interests appear really mixed up, and in which the traditional public/private and man-

(37) See L. Bairati - E. Grasso, *Indicazioni in etichetta e messaggi fuorvianti nell'informazione del consumatore di alimenti*, in *Revista Bioética y Derecho*, 42, 2018, p. 40. Other national measures add to EU requirements stressing states efforts to GMOs label issues (cf. M. Rosso Grossmann, *Label for genetically modified foods: a debate in the United States*, in "I diritti della terra e del mercato agroalimentare. Liber amicorum Alberto Germanò", Milano, 2016, ps. 1403 ss.).

(38) On the need to pay attention to consumer's choices, not only using the economic price of a good as a crucial factor, but also giving attention to the current global scenario characterized by different factors of which consumer needs and wants to be aware, see S. Tommasi, *Food Diversity and Consumer Protection*, in *European Food and Feed Law Review*, 12, 2017, 218.

(39) See M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law*, cit., ps. 148, 153.

(40) These are current investigations that draw the attention of the scholars interested to deepen the legal research of that area also in consideration of the 2019 Parlasur pre-project on *'Derecho a la alimentación saludable, accesso a la información fundada y etiquetado de alimentos en el Mercosur'* (cf. https://www.parlamentomercosur.org/innovaportal/file/17360/1/p-a-r-l-a-s-u-r.-iniciativa-derecho-alimentacion-saludable.pdf), on which it is our intention to dwell with great attention in another essay.

(41) Avoidance of such distortions was one of the reasons that led to the adoption of the European Nutrition and Health Regulation (Reg. EC 1924/2006).

datory/voluntary combinations tend to be overcome by the behaviour of business operators and by the interactions with third parties of private or hybrid nature[42]. In particular, this trend highlights shadowed areas of the consumer's right to information, placing purpose of the many label models in a 'fuzzy field'. A meaningful example appears that of nutritional traffic lights, since these can lead to a distortion of the market, also on the basis of preconceived cognitive elements that may affect purchase decisions according to misunderstandings or on the basis of pre-existing cultural elements. Another example is that of process certifications relating to sustainability, referring to environmental, economic and social dimension, that are massively used in the labeling of a growing number of products, but are sometimes harshly contested as misleading for the consumer or being an obstacle to fundamental principles of international trade law[43]. The European Court of Justice underlined in many cases[44] the opportunity to avoid all national measures leading to a discrimination between domestic and foreign products, considering these measures as national barriers to trade, even if they were voluntarily issued[45]. In conclusion, front-of-pack label models affect not only consumer health choices but also a plurality of rights, which recall the operational force of a set of European sources, among which emerges the EU Reg.1169/2011, configured as a fundamental rule that prevails and inspires the general rule formed particularly by CEE Dir. 29/2005. Lacking specific rule by the Regulation, the commercial communication that alters the consumer's decision-making process, through the supply of 'suggestive' and 'promotional' information of health standard, in compliance with the leeway allowed through voluntary labeling within the limits set by Art. 36 EU Reg 1169/2011, falls within the scope of application of the CEE Dir. 29/2005 which still works as «safety net which fills the gaps not regulated by other EU sector specific rules»[46], but currently appears to be overloaded with a further role, in order to balance the voluntary indications of the front-of-pack model labels with the non-paternalistic protection of consumer rights, saving their rights to choose food products knowingly.

ABSTRACT

The essay underlines some different perspectives of front-of-pack food labels, between European and other Countries models. According to EU consumer law developments, which also have to consider the requirements set by global trade of EU food products, the Author highlights links and gaps of EU Reg No 1169/2011.

Il lavoro sottolinea alcune differenze nei modelli disciplinari adottati per le etichette dei prodotti alimentari confezionati nell'Unione Europea ed in altri Paesi. Esaminando gli sviluppi del diritto dei consumatori dell'UE, che devono anche considerare i requisiti stabiliti dal commercio globale di prodotti alimentari, l'autore sottolinea i collegamenti e le lacune del regolamento UE n. 1169/2011.

□

(42) See L. Bairati-E. Grasso, *Indicazioni in etichetta e messaggi fuorvianti nell'informazione del consumatore di alimenti*, cit., p. 40.
(43) Many criteria are also established, as complement of the EU labelling systems referring to sustainability, by Reg. EC 66/2010.
(44) Among the best known cases: "Dassonville" (Case 8-74), "Buy Irish" (Case C-249/81), "Commission v. Germany" (Case C-325/00) underline how the improvement of consumer protection is a mirror image of the improvement of free goods movement.
(45) EU legislation helped to establish a certain degree of consumer protection in the internal market, sometimes realized at the expense of creating a rather fragmented regulatory framework, causing significant compliance cost for business activities wishing to trade cross-border. Cf. B. Busch, *Harmonization versus complementation: the Consumer Rights Directive and the Common European Sales Law*, in J.C. de Medeiros Nóbrega et alii (eds.), cit., p. 223.
(46) Cf. Communication from the Commission on the application of the Unfair Commercial Practices Directive (March 14, 2013).

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Ricerche

Alimentazione (in)consapevole e rischi per il soggetto allergico

Gelsomina Salito

1. - Il c.d. dilemma dell'onnivoro e le sue eccezioni

Era il 1976 quando lo psicologo Paul Rozin elaborò, *rectius* perfezionò il c.d. dilemma dell'onnivoro[1], vale a dire la tesi – già timidamente avanzata da Rousseau e Brillat Savarin – secondo cui gli animali dall'alimentazione completa e non specializzata (e tra questi l'uomo) sono ordinariamente tenuti ad operare una scelta degli alimenti da ingerire, vagliandoli tra un'ampia gamma che ricomprende tutti quelli potenzialmente commestibili. L'idea, nella sua apparente semplicità ed attualità, se, da un lato, conferma l'immagine del mangiare quale "quotidiana riaffermazione di identità culturale"[2] e personale, sconta, dall'altro, più di una eccezione, giustificata da esigenze di tutela della salute in grado di ridefinire, qualitativamente e quantitativamente, la selezione alimentare dell'individuo. Non solo, infatti, l'insorgere o l'esistere di determinate patologie (si pensi a quelle cardiovascolari o al diabete) impone pasti ispirati a regimi rigidi o comunque controllati, ma il delinearsi di una condizione di allergia o di intolleranza verso uno o più alimenti ne comporta l'espunzione più o meno radicale dalla dieta. È noto, al riguardo, come il verificarsi dell'una o, in forme a volte più gradate, dell'altra, determini una reazione avversa ed in taluni casi letale dell'organismo in seguito all'ingestione di sostanze individuate come allergeni o come elementi nocivi per il corpo.

La conseguente necessità di evitarne il consumo o di contenerlo entro limiti ben definiti si traduce, per l'interessato, nell'adozione di uno stile di vita altresì nutrizionale non privo di riflessi sul piano giuridico ogniqualvolta il soddisfacimento dei suoi bisogni alimentari presupponga l'agire di un terzo, nella veste, ad esempio, ora di produttore dell'alimento incriminato, ora di suo rivenditore, ora, ancora, di ristoratore incaricato di provvedere alle richieste culinarie del cliente allergico o intollerante. Il rischio, sullo sfondo, del concreto verificarsi di un danno, più o meno grave, alla salute spiega l'attenzione riservata al tema nel corso del tempo, complice il crescere sia dei casi clinici e della sensibilità verso forme di educazione alimentare[3], sia del progresso scientifico, che ha consentito di evidenziare con maggiore precisione la stretta correlazione tra l'alimentazione e l'insorgere di malattie, fino ad individuare i c.d. danni ritardati che si manifestano come conseguenza a lungo termine dell'ingestione di un determinato cibo.

Accanto ad esigenze di tutela di stampo privatistico da attivare in funzione preventiva o, in alternativa, risarcitoria, si sono così affermate istanze di carattere pubblicistico e politiche di *food safety*[4], volte ad assicurare la sicurezza igienico sanitaria dei prodotti alimentari immessi in commercio attraverso una serie di interventi quali, tra gli altri, l'adozione, a livello interno e internazionale, di normative sempre più specifiche, che hanno completato e arricchito la disciplina di natura civilistica contenuta nel codice del consumo e, in generale, nel codice civile. E se non è mancato chi ha ravvisato in una simile, frenetica, attività legislativa, il "*fumus* della dispersione e dunque il rischio del fallimento"[5], è parimenti innegabile come la stessa attesti la percezione dei peri-

(1) P. Rozin, *The selection of foods by rats, humans and other animals*, Advances in the Study of Behavior, 1976, 6, p. 21 ss.
(2) Secondo la tesi di P. Kittler, K. Sucher, M. Nelms, *Food and culture*, Woodsworth, Belmont, 2012, p. 4.
(3) La stretta correlazione tra il consumo di alimenti e il rischio di contrarre patologie è da tempo percepita con precisione nella prospettiva epidemiologica. Lo rileva, opportunamente, E. Al Mureden, *I danni da consumo di alimenti tra legislazione di settore, principio di precauzione e responsabilità civile*, in *Contratto e impresa*, 2011, p. 1495 ss.
(4) Sul punto F. Albisinni, *Strumentario di diritto alimentare europeo*, Wolters Kluwer, 4^ ed., Torino, 2020, p. 6.
(5) Così M. Girolami, *Etichettatura, informazioni e rimedi privatistici nella vendita di prodotti alimentari ai consumatori*, in *Nuove leggi civ. comm.*, 2014, p. 140.

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coli per la salute connessi al cibo di cui si diceva e la conseguente necessità di monitorare, altresì con la lente del diritto, l'insieme di passaggi che dalla fase della produzione conducono fino a quella del consumo degli alimenti.

Basti sol riflettere, al riguardo, come alla legislazione penalistica, mirante, precipuamente, a tutelare la salute e l'economia pubblica, mediante, ad esempio, la repressione e punizione delle condotte dirette all'avvelenamento di acque o di sostanze alimentari (cfr. artt. 439 e 440 c.p.) o alla contraffazione e all'adulterazione degli alimenti (cfr. artt. 442 e 444 c.p.) o alla vendita di alimenti non genuini (art. 516 c.p.), si sia affiancata dapprima la legislazione speciale (di cui è emblematica manifestazione la legge 30 aprile 1962, n. 283, di *Disciplina igienica della produzione e della vendita delle sostanze alimentari e delle bevande*)[6] e, quindi, quella comunitaria, che, a partire dagli anni ottanta, ha inciso sia a livello orizzontale, dettando regole applicabili a tutti i prodotti alimentari, sia a livello verticale, disciplinando specifiche categorie di alimenti[7]. Significative espressioni ne sono il reg. CE n. 178/2002, che ha enunciato i principi generali per la sicurezza alimentare ed ha istituito la *European Food and Safety Authority* (*EFSA*)[8], e il reg. UE n. 1169/2011, relativo alla fornitura di informazioni sugli alimenti ai consumatori. La finalità di "garantire che i consumatori siano adeguatamente informati sugli alimenti che consumano" (3° considerando, reg. n. 1169/2011) ha, quindi, indotto il legislatore comunitario a prestare particolare attenzione alle prerogative dei soggetti allergici, ai quali si è preoccupato di assicurare una maggiore conoscenza e consapevolezza circa la composizione degli alimenti e la loro provenienza, riducendo notevolmente le possibilità di errore e facilitando, al tempo stesso, l'individuazione del responsabile del mancato rispetto delle regole a presidio della sicurezza alimentare in senso lato intesa.

Il reg. UE n. 1169/2011 in quest'ottica ha guardato al consumatore non già in prospettiva contrattuale[9], con l'obiettivo, vale a dire, di riequilibrarne la posizione di debolezza rispetto alla controparte forte, ma nella sua individualità e nella sua qualità di titolare di una situazione giuridica soggettiva con rilevanti implicazioni pubblicistiche, con l'intento di tutelarne il diritto alla salute e, con (e per mezzo di) esso, l'interesse collettivo al buon funzionamento del mercato (considerato altresì in termini di contenimento della spesa sanitaria). Sull'abbrivio del reg. CE n. 178/2002, così, la richiamata disciplina ha acclarato il definitivo superamento della logica prettamente pubblicistica che animava la precedente normativa in materia alimentare e che relegava il consumatore finale a mero destinatario di una rete di obblighi gravanti eminentemente se non esclusivamente sul produttore e sul distributore dei prodotti, come emergeva, ad esempio, all'interno del nostro ordinamento, dal T.U. del 1962 (l. 30 aprile 1962, n. 283) il cui obiettivo principale era (ed è) quello di garantire che gli alimenti messi in commercio o comunque distribuiti fossero igienicamente sani.

La seconda e più matura fase di costruzione della legislazione alimentare, inaugurata, appunto, con il richiamato reg. n. 178/2002, ha ribaltato, invece, la descritta visuale e ha elevato il consumatore a protagonista della sicurezza alimentare[10] nonché a garante (anche quando non diretto destinatario) del rispetto di ogni disposizione finalizzata ad evitare un danno alla sua salute derivante dal consumo di alimenti, attraverso una serie di azioni, dirette ed indirette, e di rimedi. A fondamento di questo nuovo

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([6]) In argomento, anche per quanto concerne le sanzioni a presidio della l. n. 283/1962, A.M. Palmieri, *La responsabilità dell'impresa alimentare, in Alimenti, danno e responsabilità*, a cura di L. Paoloni, Milano, 2008, p. 94 ss.

([7]) Si pensi alla regolamentazione di prodotti quali il latte (cfr. d.p.r., 14 febbraio 1997, n. 54), la pasta (d.p.r., 6 febbraio 2001, n. 187), i surgelati (d.lgs., 27 gennaio 1997, n. 110), le uova (d.l., 4 febbraio 1993, n. 65). Sul punto S. Masini, *Corso di diritto alimentare*, Milano, 2017, p. 167.

([8]) Il regolamento n. 178/2002 si propone come "pervasiva codificazione sistematica", i cui principi risultano applicabili sia alla legislazione europea sia a quella nazionale ed investono l'intera filiera agroalimentare. Amplius F. Albisinni, *Strumentario di diritto alimentare europeo*, cit., p. 112.

([9]) La nozione non coincide con quella di consumatore *tout court* di cui all'art. 3 cod. cons.

([10]) V. F. Albisinni, *Strumentario di diritto alimentare europeo*, cit., p. 8.

approccio alla materia vi è la constatazione per cui la corretta gestione del prodotto alimentare, in ragione della sua natura e del suo essere, appunto, un prodotto inserito nel ciclo di vita, non può essere svolta in via astratta, ma richiede una consapevole partecipazione di tutti i soggetti coinvolti nel processo alimentare, in ogni tappa del percorso che conduce *from farm to fork*[11]. Di qui il ruolo centrale ascritto all'informazione in quanto unico strumento in grado di restituire consapevolezza alle scelte del soggetto; ma di qui, altresì, la previsione di una serie di norme volte ad imporre a chi commercializza prodotti alimentari il rispetto di precipui obblighi e di specifiche modalità di divulgazione dei dati concernenti i beni di consumo, pena l'incommerciabilità di quelli che ne siano privi o che siano forniti di indicazioni fuorvianti potenzialmente idonee a danneggiare la salute dei fruitori finali. L'informazione diviene anzi a tal punto centrale da incidere sulla struttura delle dinamiche negoziali degli scambi e da esporle, come si dirà, ad una declaratoria di nullità per impossibilità dell'oggetto (o a detta di taluni per illiceità della causa) se svolte o concluse in dispregio delle prescrizioni informative poste dalla legge[12].

2.- Principio di prevenzione e analisi del rischio

Al fine, pertanto, di favorire pratiche leali di comunicazione e divulgazione[13], l'art. 7 del richiamato reg. n. 1169/2011 prescrive che non devono essere attribuiti al "prodotto alimentare effetti o proprietà che non possiede". La previsione è diretta ad impedire o quanto meno ad arginare la tendenza, diffusa, a reclamizzare pregi, vantaggi o addirittura effetti salutari di un cibo, in assenza della fondatezza scientifica della notizia o del beneficio sulla salute, come nel caso di un messaggio pubblicitario di un integratore alimentare del quale sia predicata un'efficacia risolutiva e generalizzata dei disturbi causati dalle intolleranze alimentari, attraverso *claims* perentori che promettono la possibilità di reintrodurre senza problemi alimenti non tollerati (si pensi allo slogan "mai più cibi vietati/torna a mangiare con gusto")[14].

Un ruolo fondamentale gioca, in merito, l'etichetta – vale a dire "qualunque marchio commerciale o di fabbrica, segno, immagine o altra rappresentazione grafica scritto, stampato, stampigliato, marchiato, impresso in rilievo o a impronta sull'imballaggio o sul contenitore di un alimento o che accompagna detto imballaggio o contenitore" (art. 2, par. 2, reg. UE n. 1169/2011) –, essenziale per assicurare la trasparenza informativa e per rendere conoscibili la natura e gli allergeni del prodotto. L'etichetta si presenta, anzitutto, "come una dichiarazione al pubblico di connotati, caratteristiche, pregi, qualità vere o presunte, specifiche identità, e si inserisce in un meccanismo negoziale, per il quale la scelta dell'acquisto muove da un'esplicita promessa del produttore e del venditore e da un correlativo affidamento del consumatore" traducendosi in una obbligazione i cui contenuti sono precisati e dichiarati "con una ricchezza di informazioni ignota sino ad un recente passato"[15].

Del suo contenuto l'aspetto più importante – per quanto qui d'interesse – è rappresentato dalla elencazione obbligatoria degli ingredienti e dalla specifi-

(11) Interessati le riflessioni sul punto di F. Albisinni, *Strumentario di diritto alimentare europeo*, cit., p. 116.

(12) *Amplius* sul tema, per i profili civilistici, M. Girolami, *Etichettatura, informazioni e rimedi privatistici nella vendita di prodotti alimentari ai consumatori,* cit., p. 142. Ma sul punto, altresì, A. Germanò, *Sull'etichetta degli alimenti*, in *Riv. dir. agr.*, 2010, I, p. 86; T. Babuscio, *Alimenti sicuri e diritto: analisi di problemi giuridici nei sistemi amministrativi delle autorità per la sicurezza alimentare europee e statunitense*, Milano, 2005. Sull'importanza del rispetto degli obblighi informativi per evitare, in soggetti ipersensibili, reazioni abnormi G. Nicolini, *Immissione in commercio di prodotti agro-alimentari*, Torino, 2005, p. 238.

(13) Con precipuo riguardo alla tutela che la normativa comunitaria intende riservare alla salute umana e agli interessi del consumatore F. Albisinni, *Sistema agroalimentare*, in *Dig. civ., Agg.*, II, Torino 2009, p. 498.

(14) Cfr. Garante concorr. e mercato, 15 ottobre 2014, n. 25149, in *Rass. dir. farm.*, 2016, 5, p. 1189 ss., il quale, a fronte della complessità del fenomeno delle intolleranze alimentari, ha accertato all'esito dell'istruttoria che l'azione benefica dell'integratore era limitata ai soli disturbi infiammatori del colon causati dall'intolleranza al lattosio, essendo impossibile dimostrare l'efficacia del prodotto per tutte le possibili reazioni allergiche al cibo.

(15) In questi termini F. Albisinni, *Le norme sull'etichettatura dei prodotti alimentari*, in *Trattato breve di diritto agrario italiano e comunitario*, a cura di L. Costato, Padova, 2003, p. 636.

cazione di quelli che sono ordinariamente considerati allergeni[16], che vanno segnalati attraverso una serie di accorgimenti, quali le dimensioni del carattere, l'eventuale spaziatura tra righe e lettere, lo spessore, il tipo di colore[17], in grado di evidenziarne con immediatezza la presenza.

Se, tuttavia, la c.d. etichettatura a semaforo[18] – in cui appunto le informazioni meno salutari sono rese con modalità diverse dalle altre – sia effettivamente in grado di restituire consapevolezza al "consumatore medio", vale a dire normalmente informato e ragionevolmente attento ed avveduto, è interrogativo al quale è difficile sfuggire, vieppiù ove si consideri come nella prassi le notizie in tal modo rese rischiano di rivelarsi fuorvianti tutte le volte in cui, puntando ad accentuare le qualità del prodotto più che le sue caratteristiche nutrizionali e il suo potenziale allergizzante, inducono l'acquirente a prediligere un alimento piuttosto che un altro sulla base di un messaggio pubblicitario non correttamente strutturato o non pienamente veritiero.

Esemplificativo, in tal senso, è il caso dei prodotti *light*, esaltati, anche graficamente, per il ridotto apporto di zuccheri, ma che in realtà non sono poi dietetici come appaiono data la sostituzione degli zuccheri con gli edulcoranti[19]. Ma non meno emblematico è l'uso, assai frequente in ambito commerciale, del c.d. *dolus bonus*, consistente nella millantata esaltazione di un prodotto al fine di favorirne l'acquisto.

Le riflessioni, se attestano l'affermarsi di una visione sempre più personalistica del consumatore, gettano nondimeno un'ombra sulla effettiva idoneità delle etichette semaforo a sortire l'effetto protettivo auspicato, almeno nella misura in cui non si rivelano in grado di evitare errori cognitivi e informazioni false, a causa, come detto, soprattutto di forme di presentazione delle merci volutamente dirette a condizionare il consumatore facendo leva solo su alcune sue esigenze e non necessariamente su quelle più importanti e utili ai fini di una sana e corretta nutrizione.

Il giudizio negativo è destinato a trovare conferma se solo si pone mente ai cc.dd. *bias cognitivi*, vale a dire a quegli automatismi mentali che inevitabilmente rischiano di caratterizzare la condotta del soggetto spingendolo ad assumere decisioni in modo non ponderato in base a percezioni della realtà deformate e che, appunto, lo inducono in errori cognitivi[20].

Per arginare i danni alla salute, le linee guida adottate con Circolare del Ministero della Salute n. 3674-P-06/02/2015 e completate dalla Comunicazione della Commissione Europea del 13 luglio 2017 riguardante la fornitura di informazioni su sostanze o prodotti che provocano allergie o intolleranze figuranti nell'allegato II del regolamento (UE) n. 1169/2011, hanno stabilito che gli allergeni, se contenuti inequivocabilmente in un cibo, devono essere segnalati in grassetto[21] e ciò anche qualora si tratti di alimenti composti da più ingredienti indicati attraverso l'uso di più parole[22]. La disciplina

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([16]) Il contenuto c.d. facoltativo dell'etichetta, che include informazioni di tipo nutrizionale e salutistico, non è libero e discrezionale, sebbene, appunto, facoltativo. Esso, infatti, deve rispettare quanto prescritto dal reg. CE n. 1924/2006 che tutela il consumatore vietando le informazioni false, ingannevoli e non accertate scientificamente.

([17]) Sul tema, tra gli altri, F. Albisinni, *The new EU regulation on the provision of food information to consumers*, in *q. Riv*. www.rivistadirittoalimentare.it, n. 2-2011, p. 32 ss.; L. Costato, *Le etichette alimentari nel nuovo reg. 1169/2011*, in *Riv. dir. agr.*, 2011, I, p. 658 ss.; F. Capelli, *Il regolamento (UE) n. 1169/2001 e le sue guide spirituali*, in *q. Riv*. www.rivistadirittoalimentare.it, n. 2-2014, p. 13 ss.; I. Canfora, *Informazioni e tutela della salute e conformazione del contenuto negoziale tra diritto europeo e diritti nazionali*, in *Riv. dir. agr.*, 2014, I, p. 119 ss.

([18]) Come sottolinea G. Spoto, *Tutela del consumatore, etichette a semaforo e informazioni "negative*", in *q. Riv.*, www.rivistadirittoalimentare.it, n. 2-2018, p. 26. In giurisprudenza Corte giustizia UE, 20 luglio 2017, causa C-93/16.

([19]) L'esempio è tratto da G. Spoto, *Tutela del consumatore, etichette a semaforo e informazioni "negative"*, cit., p. 34. Per uno sguardo comparatistico con particolare riguardo alla situazione francese P. Borghi, *Rosso, giallo o verde? L'ennesima etichetta alimentare a "semaforo", l'ennesimo segno di disgregazione*, in *q. Riv.*, www.rivistadirittoalimentare.it, n. 2-2017, p. 79 ss.

([20]) Sul tema, tra gli altri, AA.VV., *Judgment under Uncertainty: Heuristics and Biases*, in *Science*, 1974, p. 1124 ss.

([21]) Precisazioni ulteriori concernono la frutta a guscio (nocciole, noci, arachidi). Se si tratta di aromi occorre indicare il tipo di frutta a guscio dal quale sono ricavati (come ad esempio la mandorla qualora derivino da essa). Indicazioni particolari sono, altresì, richieste per i cereali contenenti glutine, che vanno precisati per tipologia nella lista degli ingredienti. La parola "glutine", peraltro, è da considerarsi facoltativa e comunque va enfatizzata [es: farina di frumento (contiene glutine)].

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tace, tuttavia, sulla dicitura, ampiamente utilizzata nella pratica, "può contenere tracce di…"; dicitura finalizzata ad allertare il soggetto sul rischio di eventuali contaminazioni con allergeni del prodotto sulla cui etichetta è riportata. Il silenzio normativo induce, invero, a diffidare della correttezza della formula, specie alla luce della impossibilità, come scientificamente dimostrato, di individuare una soglia al di sotto della quale siano scongiurate reazioni allergiche e simil allergiche. La normativa vigente, pertanto, detta un obbligo di segnalazione della presenza di allergeni quando questa è superiore alla soglia dello 0,01%, percentuale che, di fatto, è equiparata all'assenza, di guisa che deve concludersi nel senso che il pericolo di contaminazione va comunicato a prescindere dalla quantità eventualmente contenuta di allergene tutte le volte in cui il produttore o il ristoratore non siano in grado di escluderne con certezza la presenza nell'alimento[23]. E ciò anche qualora si tratti di prodotti alimentari di provenienza estera, rispetto ai quali le descritte indicazioni devono essere rese in lingua italiana[24].

Né in senso contrario vale richiamare la c.d. tossicità tollerata, in relazione alla quale si è non di rado esclusa la risarcibilità dei danni alla stessa conseguenti sul presupposto della insussistenza della violazione delle regole e dell'esistenza di soglie "accettabili" di esposizione a fattori di rischio in grado di giustificare quella che è stata definita una "reazione permanente di avvelenamento collettivo standardizzata"[25], dal momento che l'allergia non è dose dipendente ma si scatena per il fatto stesso della ingestione ancorché minima dell'allergene.

3.- Informazione scorretta ed ingannevole: rimedi e responsabilità

L'intera materia della responsabilità per danni derivanti dal consumo di alimenti da parte di un soggetto allergico risulta, del resto, ispirata, in linea con la disciplina generale che governa la *food safety*, al principio di prevenzione che, come è noto, a differenza di quello di precauzione (teso a limitare rischi incerti), si prefigge di ridurre ed evitare rischi prevedibili[26], riservando particolare attenzione ai possibili effetti a lungo termine sulla salute del consumatore e dei suoi discendenti, nonché ai probabili effetti tossici cumulativi dell'alimento.

La dannosità, in altri termini, è presa in considerazione non solo nella sua dimensione presente e attuale, ma anche in quella futura, con la ricerca di regimi e regole di responsabilità in grado di assicurare, sul piano oggettivo, un ampliamento dei criteri a fondamento dell'azione risarcitoria e della definizione del *quantum* dovuto e, sul piano soggettivo, un allargamento della sfera dei soggetti responsabili e di quelli danneggiati[27].

Ciò implica, ad esempio, che al verificarsi di una condizione di allergia scatenata da cibi in relazione ai quali si era assicurata l'assenza dell'allergene, devono essere risarciti non solo i danni immediati alla salute ma anche quelli collaterali e successivi, conseguenti al trattamento farmacologico necessario e indifferibile, oltre a quelli arrecati al feto nell'eventualità che l'ingestione involontaria dell'alimento – determinata da una carente o errata informazione – sia avvenuta ad opera di una donna allergica in stato di gravidanza.

La legislazione alimentare si basa, infatti, sull'analisi del rischio, valutato alla luce delle conoscenze scientifiche esistenti in un determinato momento storico[28], nonché sul principio di una responsabilità "che rompe la relazione tra danneggiante e danneggiato per dirigersi verso l'ignoto, ossia ad aspettative e interessi in divenire in quanto riferibili alle generazioni future"[29]. L'analisi del rischio diverge,

(22) Se un ingrediente composto contiene sostanze che possono causare allergie o intolleranze, l'etichetta in questione sarà: olio di semi di girasole, latte concentrato zuccherato (latte, zucchero).
(23) Cfr. Giurì cod. aut. pubb.ria, 25 marzo 2014, n.15, in *Rassegna dir. farm.*, 2014, 3, p. 636.
(24) Sul punto, ad esempio, Giud. pace Milano, 4 febbraio 2009, in *Guida al dir.*, 2009, 22, p. 67. E già prima, nel senso di far gravare il detto obbligo di controllo sull'importatore, Cass. pen., 14 maggio 1998, n. 7214, in *Riv. trim. dir. pen. econ.*, 1998, p. 1118.
(25) In questi termini U. Beck, *La società del rischio: verso una seconda modernità*, Roma, 2013, p. 84 ss.
(26) In argomento, tra gli altri, M. Sollini, *Il principio di precauzione nella disciplina comunitaria della sicurezza alimentare*, Milano, 2006, p. 95 ss.
(27) Sul tema E. Rook Basile, *Sicurezza e responsabilità nella filiera alimentare*, in *Contratto e impresa*, 2017, 2, p. 435.
(28) Come ricorda F. Squillaci, *(H)ave cibus, Le nuove frontiere del diritto alimentare*, Padova, 2017, p. 20.

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peraltro, per contenuti e tecniche, a seconda che sia svolta in ambito pubblicistico o privatistico e ciò nonostante la presenza in entrambi di un comune denominatore metodologico rappresentato dall'articolarsi dell'indagine nelle tre fasi della valutazione, della comunicazione e della gestione, appunto, del rischio.

Il profilo più strettamente pubblicistico, per l'esattezza, si sostanzia di regole e procedure (si pensi al metodo HACCP nonché ai controlli ufficiali svolti dall'autorità pubblica *ex* art. 17 reg. CE n. 178/2002[30]) ispirate al fine prioritario della salvaguardia della salute umana e degli interessi diffusi dei consumatori. Il rispetto delle stesse, pertanto, non può prescindere dall'individuazione del soggetto chiamato ad assumere il ruolo di primo garante della loro esatta applicazione; ruolo che, per l'esattezza, la legge assegna all'operatore del settore alimentare, il quale risponde dei danni conseguenti al suo comportamento doloso o colposo secondo il dettato dell'art. 2043 c.c., "integrato" dalle norme pubblicistiche che impongono il sistema di autocontrollo HACPP[31].

Diversamente, il profilo privatistico si connota per un'analisi del rischio da consumo di alimenti condotta sulla base di una logica eminentemente negoziale, che, nell'intento di tutelare le ragioni del singolo, muove dalla considerazione degli strumenti attraverso i quali si crea la relazione tra costui e l'operatore del settore alimentare (ossia "la persona fisica o giuridica responsabile di garantire il rispetto delle disposizioni della legislazione alimentare nell'impresa alimentare posta sotto il suo controllo"[32]). Detta relazione, più esattamente, può originare sia da un negozio traslativo (si pensi alla classica compravendita) sia da un negozio di altra natura (come, ad esempio, un contratto di ristorazione, di albergo, di *catering*, di *banqueting*, di servizio mensa e via enumerando). Si tratta di un numero variegato di fatti-specie, il cui tratto comune è rappresentato dall'elevato grado di diligenza richiesto ad entrambe le parti, tenute a precisi e reciproci doveri di comunicazione e di informazione.

La consapevolezza di un pericolo serio e rilevante per la salute, infatti, eleva la soglia dell'attenzione che è ragionevole attendersi da ognuno dei contraenti, in termini di etero ed autoresponsabilità, intesa quest'ultima come assunzione consapevole delle conseguenze che possono discendere da una condotta non improntata alla collaborazione, alla lealtà e alla verità nello scambio delle notizie rilevanti[33]. Si pensi, così, alla necessità che il soggetto

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([29]) Così E. Rook Basile, *Sicurezza e responsabilità nella filiera alimentare*, cit., p. 435.

([30]) In giur. molto chiara è Cass., 10 luglio 2014, n. 15824, in *Foro it.*, 2015, 5, I, c. 1716, per la quale "nel settore alimentare, dove la circolazione di merce sicura e sana contribuisce in maniera significativa alla salute e al benessere dei consumatori, l'acquirente di un alimento, operatore professionale e produttore (mediante l'utilizzazione del componente comperato) della sostanza finale destinata al consumo umano, ha l'obbligo – riconducibile al dovere di diligenza, previsto dal secondo comma dell'art. 1227 c.c., cui il creditore è tenuto per evitare l'aggravamento del danno indotto dal comportamento inadempiente del debitore – di attenersi al principio di precauzione e di adottare misure proporzionate in funzione delle caratteristiche del prodotto e della sua destinazione, verificando, attraverso controlli di genuinità a campione, prima di ulteriormente impiegarlo quale parte o ingrediente nella preparazione di un alimento poi distribuito su scala industriale, che il componente acquistato risponda ai requisiti di sicurezza previsti e non contenga additivi vietati e pericolosi, senza poter fare esclusivo affidamento sull'osservanza da parte del rivenditore dell'obbligo di fornire un prodotto non adulterato né contraffatto, a meno che non abbia ricevuto, prima dell'impiego su scala industriale dell'alimento acquistato, una precisa e circostanziata garanzia".

([31]) Così E. Al Mureden, *I danni da consumo di alimenti tra legislazione di settore, principio di precauzione e responsabilità civile*, cit., p. 1497.

([32]) Vedi art. 3 reg. (CE) n. 178/2002 (la c.d. General Food Law) che introduce un concetto di impresa alimentare più ampio di quello previsto all'interno dell'ordinamento italiano, in quanto comprensivo, altresì, delle attività di produzione, trasformazione e distribuzione di alimenti non aventi fine di lucro. Come ha chiarito Cass., 9 ottobre 2019, n. 25330, in Giust. civ. Mass., 2019, "in tema di confezionamento e pubblicità degli alimenti, anche il rivenditore è sanzionabile (…) allorché non sia consentita al consumatore una immediata e certa identificazione degli elementi propriamente integranti la corretta etichettatura: ed infatti, nonostante nella sua qualità di mero distributore immetta il prodotto sul mercato come gli viene fornito dal produttore, egli acquista la veste di operatore commerciale appartenente alla filiera dei passaggi del prodotto preconfezionato (dal momento della produzione a quello della vendita finale), qualifica alla quale si riferisce, nello stabilire i principi ed i requisiti della legislazione alimentare, l'art. 17 del Reg. CE n. 178 del 2002, secondo cui spetta agli operatori (e non ai soli produttori) del settore alimentare (e dei mangimi) garantire che nelle imprese da essi controllate gli alimenti (o i mangimi) soddisfino le disposizioni della legislazione alimentare inerenti alle loro attività in tutte le fasi della produzione, della trasformazione e della distribuzione, nonché verificare che tali disposizioni siano soddisfatte". Già in precedenza Cass., 27 novembre 2018, n. 30620, su www.dejure.it, 2018.

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allergico dichiari senza nulla omettere il suo problema alimentare, pena il rispondere dei danni da lui stesso patiti per avere taciuto, colposamente o dolosamente, le allergie dalle quali è affetto al solo fine di non rivelare notizie concernenti la propria condizione. O si pensi, *ex adverso*, all'operatore del settore alimentare, il quale, in un inevitabile bilanciamento tra protezione della salute altrui e logiche di guadagno, prediliga le seconde e fornisca informazioni scorrette, in dispregio delle prescrizioni normative, al solo scopo di aumentare le vendite e i profitti.

Ma mentre il parlare ed il parlar chiaro è un onere per la persona allergica, in tutte le circostanze in cui risulti imprescindibile per evitare un danno da ingestione di alimenti "pericolosi", esso è un dovere per la controparte, alla quale compete la preparazione e la messa in commercio dei cibi.

Il legislatore non è, invero, nuovo ad invocare regole di autoresponsabilità: un esempio si rinviene già in tema di fumo di sigarette, settore rispetto al quale l'informazione rappresenta la sola vera arma per proteggere e al tempo stesso per rendere consapevole dei rischi il fumatore, libero in tal modo di decidere se sottoporvisi o meno[34]. Analoga previsione non era pensabile con riguardo al soggetto allergico, essendo, nella specie, la possibilità di scelta contraddetta *in nuce* dalla presenza di una condizione patologica e divenendo, di conseguenza, fondamentale la corretta indicazione degli allergeni per evitare il danno. L'operatore del settore alimentare, allora, in quanto "alienante" (del bene come del servizio di ristorazione), non deve tacere alcuna notizia che concerna la composizione dell'alimento e la presenza di allergeni, facendo attenzione ad esprimersi in modo chiaro e comprensibile. La dottrina discorre, al riguardo, di "accordo qualificato" tra le parti, basandosi sulla circostanza per cui tanto il codice di consumo quanto il ricordato regolamento n. 1169/2011 fanno riferimento alla necessità di un'informazione fornita dal produttore che permetta un'adesione da parte del consumatore che sia frutto di un "consenso consapevole"[35]. Integra, così, gli estremi della colpa specifica, per violazione degli art. 8 e 9 reg. UE n. 1169/2011, la condotta della cameriera da sala che, tempestivamente informata della allergia alimentare del consumatore, ometta di verificare analiticamente gli ingredienti del pasto servito – contenente la presenza di allergeni – determinando un improvviso *shock* anafilattico con successivo decesso del cliente per arresto cardiorespiratorio[36]. Né va esente da responsabilità il ristoratore, chiamato, anzi, a rispondere in via indiretta per fatto degli ausiliari.

La giurisprudenza, del resto, già da tempo giudica con particolare rigore la posizione dell'operatore del settore alimentare, sol che si ponga mente al c.d. caso Saclà, in cui ha affermato l'esistenza in capo alla società acquirente del dovere di analizzare gli acquisti di peperoncini rossi prima di utilizzarli nelle proprie produzioni e di verificare la possibile cancerosità del colorante rosso utilizzato dall'impresa for-

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([33]) Si tratta di regole che travalicano la sfera interpersonale e contrattuale perché devono improntare la condotta dei soggetti (autorità incluse) che operano nel settore della sicurezza alimentare. Da ultimo, sul punto, A. Germanò, *La trasparenza nella comunicazione del rischio: il Reg. 2019/1381*, in *q. Riv.*, www.rivistadirittoalimentare.it, n. 3-2019, p. 120 ss., il quale ricorda come con il regolamento (UE) 2019/1381 del 30 giugno 2019 relativo alla trasparenza e alla sostenibilità dell'analisi del rischio dell'Unione nella filiera alimentare si è provveduto alla modifica del Reg. n. 178/2002 sulla sicurezza alimentare, con la riformulazione degli obiettivi della comunicazione del rischio (nuovo art. 8 *bis*). Si sono dettati, in particolare, i principi generali della comunicazione del rischio (nuovo art. 8 *ter)*; è stato formulato il Piano generale della comunicazione del rischio (nuovo art. 8 *quater*) e sono state elaborate specifiche disposizioni sulla notifica degli studi da parte dell'Autorità europea per la sicurezza alimentare (nuovo art. 32 *ter*), sulla consultazione dei terzi interessati (nuovo art. 32 *quater*), sugli studi diretti a verificare gli elementi di prova utilizzati nel processo di valutazione del rischio (nuovo art. 32 *quinquies*) e in tema di riservatezza di certi dati scientifici esposti nella domanda di trattamento riservato e di garanzia dei segreti industriali (nuovi art. 39 e ss.). Sull'importanza della trasparenza, vera e propria "parola magica, evocativa ma non descrittiva di contenuti precisamente individuati", F. Albisinni, *Trasparenza e Scienze della vita nella codificazione europea*, in *q. Riv.*, www.rivistadirittoalimentare.it, n. 3-2019, p. 32 ss.

([34]) Cfr. l. n. 428/1990 e d.lgs. n. 184/2003 sugli avvisi circa i danni prodotti dal fumo da apporre sui pacchetti di sigarette.

([35]) In questi termini G. Biscontini, *Regolamento n. 1169 del 2011: tutele civilistiche per violazione del dovere di informazione nel settore alimentare*, in *Pers. e mercato,* 2012, 3, p. 163.

([36]) Trib. Salerno, 15 novembre 2019, in *Ridare.it*, 31 marzo 2020.

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nitrice[37].

4.- La violazione del dovere d'informazione in fase precontrattuale e…

Se risponde ad un concreto e serio interesse del consumatore/cliente non omettere alcuna notizia funzionale ad evitare danni anche gravi alla propria salute, non altrettanto può sempre dirsi per il professionista che, mosso da fini di lucro, potrebbe ricorrere, come accennato, a forme di *dolus bonus* o ad altre pratiche commerciali e pubblicitarie finalizzate ad incrementare le vendite a scapito della trasparenza (al contrario decisiva per consentire acquisti o scelte alimentari in sicurezza per il soggetto allergico). Si profila, così, il rischio di pratiche commerciali scorrette ed ingannevoli, idonee a falsare il comportamento economico del consumatore o ad alterarne, pericolosamente, il processo volitivo, inducendolo a comprare o a consumare un alimento che se correttamente informato non avrebbe voluto e potuto acquistare e ingerire[38]. "La linea di confine tra *scorrettezza* e *ingannevolezza*" – ha chiarito la dottrina – "si deve individuare in quel punto di equilibrio tra l'autonomia (privata) delle imprese in ordine alle più efficaci strategie di comunicazione e la sicurezza (pubblica) del mercato, che garantisce un elevato livello di tutela dei consumatori con riguardo sia al loro diritto di scelta sia alla tutela della loro salute"[39]. Il giudizio circa la scorrettezza o l'ingannevolezza della condotta deve, peraltro, basarsi sulla considerazione delle aspettative del consumatore medio, normalmente informato e ragionevolmente attento e avveduto[40]. Sul piano rimediale, la legge accorda al soggetto leso la possibilità di ricorrere all'Autorità garante della concorrenza e del mercato, che ha il potere discrezionale di inibire il comportamento dannoso, di eliminarne gli effetti e di comminare le relative sanzioni amministrative[41]. Sebbene il carattere della pratica commerciale debba essere valutato *ex ante* e quindi a prescindere dal dato di fatto concreto, la soluzione prospettata, tuttavia, mal sembra prestarsi ad assicurare una tutela effettiva al soggetto allergico, irreparabilmente danneggiato dall'avere confidato senza sua colpa nella veridicità delle informazioni concernenti l'alimento consumato. Occorre allora verificare quali

([37]) Cass., 10 luglio 2014, n. 15824, in *q. Riv*. www.rivistadirittoalimentare.it, n. 4-2015, p.54, con il commento di G. Vaccaro, *Il principio di precauzione e la responsabilità delle imprese nella filiera alimentare*, *ivi*, p. 50, che ha negato il diritto dell'acquirente soc. Saclà al pieno risarcimento nei confronti di chi le aveva venduto spezie difettose, individuando nella mancata completa verifica da parte della società acquirente i presupposti per l'applicazione del principio di riduzione del risarcimento in ragione del concorso di colpa del danneggiato.

([38]) Una pratica è scorretta se è "contraria alla diligenza professionale" ed è falsa o idonea a falsare in misura apprezzabile il comportamento economico, in relazione al prodotto, del consumatore medio che raggiunge o al quale è diretta o del membro medio di un gruppo qualora la pratica commerciale sia diretta a un determinato gruppo di consumatori. Nella trama normativa, tale definizione generale di pratica scorretta si scompone in due diverse categorie: le pratiche ingannevoli (di cui agli artt. 21 e 22) e le pratiche aggressive (di cui agli artt. 24 e 25): cfr. Cons. Stato, 14 aprile 2020, n. 2414, in *Diritto & Giustizia*, 2020, 27 aprile. Gli esempi in merito potrebbero essere numerosi: l'AGCM ha così ritenuto scorretta, ai sensi degli artt. 20, comma 2, 21, comma 1, lett. b), 22, comma 1, cod. cons., la pratica commerciale "posta in essere dalla società Danone s.p.a. - che ha realizzato una campagna pubblicitaria finalizzata a promuovere Danaos, uno yogurt integrato di calcio da assumere come complemento della dieta quotidiana, suggerito per uno specifico target di consumatori, in considerazione dell'insufficiente apporto di calcio assunto, nonché evidenziando l'inadeguatezza di alcuni alimenti comuni (latte e formaggio) a soddisfare il bisogno di calcio". Analogamente ha reputato scorretto il claim relativo alla campagna promozionale del prodotto denominato "PastaRiso Scotti" in quanto "diretto ad esaltare il fatto che l'assunzione di quel tipo di pasta «riduce il colesterolo»" dal momento che "all'alimento reclamizzato non possono essere attribuite le caratteristiche salutistiche vantate, che riguardano appunto gli effetti di riduzione del colesterolo": AGCM, 1 dicembre 2010, n. 21851, in Giust. civ., 2011, 2, p. 544.

([39]) In questi termini N. Lucifero, *La responsabilità per le informazioni al consumatore di alimenti tra regole di validità, regole di comportamento e doveri informativi*, in *Contratto e impr*., 2017, p. 477.

([40]) Cfr. Corte giustizia, 4 giugno 2015, C-195/2014; nonché Corte giustizia, 19 dicembre 2013, C-281/12, in *Dir. comm. e degli scambi int*., 2013, p. 652.

([41]) Come ha chiarito T.A.R. Roma, (Lazio), 9 dicembre 2019, n.14067, in *Foro amm.*, 2019, 12, c. 2106, "in presenza di pratiche scorrette non può essere disconosciuto il diritto dell'A.G.C.M., corrispondente ad un suo ampio spazio di discrezionalità amministrativa, di scegliere di proseguire il procedimento e di concludere con un provvedimento sanzionatorio, che rappresenta il modo più appropriato per enunciare principi e regole di condotta utili a prevenire future pratiche commerciali scorrette, analoghe a quelle già in istruttoria".

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altri rimedi l'ordinamento predispone e se gli stessi possono dirsi maggiormente performanti.
L'indagine non può che muovere, ancora una volta, dalla valutazione dei contenuti e delle forme in cui le informazioni sulla composizione del cibo vengono rese sia nella fase precontrattuale sia in quella propriamente contrattuale. Nella prima delle due l'intera disciplina della materia, posta principalmente dal codice del consumo e dalla normativa comunitaria, assume una valenza per così dire più generale, incentrata com'è sulle dinamiche del mercato e su una informazione rivolta almeno tendenzialmente ed inizialmente *in incertam personam*[42], come si evince dalle numerose offerte al pubblico che caratterizzano il commercio, proposte altresì sotto forma di menù, con indicazione di prezzi e pietanze, collocati spesso al di fuori del locale per indurre la clientela ad entrare. L'applicazione delle regole che sovraintendono alla fase precontrattuale spiega il sorgere della responsabilità *ex* art. 1337 c.c. in caso di informazioni incomplete o decettive, come tali lesive del dovere di correttezza e buona fede nelle trattative. La responsabilità precontrattuale, infatti, può derivare, come è noto, oltre che dalla rottura ingiustificata di queste ultime, anche dal mancato rispetto dell'obbligo di lealtà reciproca, il quale comporta un dovere di completezza informativa circa la reale intenzione di concludere il contratto, senza che alcun mutamento delle circostanze possa risultare idoneo a legittimare la reticenza o la maliziosa omissione di notizie rilevanti nel corso della prosecuzione delle trattative finalizzate alla stipulazione del negozio[43]. Parte della dottrina non esclude che sin da tale fase possa profilarsi altresì una responsabilità derivante dalla violazione degli obblighi di protezione che nascerebbero in capo all'operatore del settore alimentare per effetto del "contatto sociale qualificato" che si crea già durante le trattative[44].
Il legittimo affidamento che l'altrui condotta contraria a buona fede produrrebbe nel consumatore assumerebbe rilievo, in altri termini, come legittima attesa che l'altra parte si comporti conformemente ai principi generali di correttezza e buona fede (oggettiva). Non può, tuttavia, non rilevarsi come (contraddittoriamente e paradossalmente) sia proprio la mancata conclusione del contratto dalla quale conseguirebbe la disponibilità dell'alimento contenente l'allergene o, addirittura (si pensi al contratto di ristorazione), la verosimile ingestione dello stesso, a rappresentare la più efficace tutela per il consumatore allergico.
La fase precontrattuale manca, poi, di fatto, nelle vendite di prodotti alimentari concluse mediante distributori (c.d. *vending machine*) quando contraente sia il soggetto allergico. La modalità automatica di perfezionamento dell'acquisto, per effetto del semplice inserimento di denaro per un importo corrispondente al prezzo del prodotto, non consente, infatti, all'acquirente la previa conoscenza degli ingredienti dell'alimento che intende acquistare. Il d.lgs. 15 dicembre 2017, n. 231, nel fissare la *Disciplina sanzionatoria per la violazione delle disposizioni del regolamento (UE) n. 1169/2011*, ha dettato regole solo per gli alimenti preimballati (quali, ad esempio, le bevande calde) rispetto ai quali ha posto l'obbligo in capo ai gestori dei distributori automatici o dei locali commerciali automatizzati di fornire in lingua italiana le indicazioni concernenti la denominazione, la lista degli ingredienti, gli allergeni presenti, il nome o ragione sociale o marchio depositato e la sede dell'impresa responsabile della gestione dell'impianto, con attenzione tra l'altro alla doverosa evidenza grafica degli allergeni, rispetto agli altri ingredienti citati nelle apposite liste (art. 18)[45].
La commissione Europea, invitata a pronunciarsi sui cibi non preimballati, ha escluso la necessità

([42]) A. Germanò, *Le indicazioni in etichetta (e la loro natura) e i segni*, in *Riv. dir. agr.*, 2012, p. 207 ss.
([43]) In tal senso si è espressa anche da ultimo la giurisprudenza di merito. Tra le ultime, Trib. Bari, 1° marzo 2017, su www.dejure.it, 2017.
([44]) Da ultimo Trib. Brindisi, 30 aprile 2020, su www.dejure.it, 2017.
([45]) L'omessa indicazione degli allergeni sui singoli alimenti non preimballati è punita con la sanzione da € 5.000 a € 40.000, "salvo che il fatto costituisca reato". La violazione degli altri obblighi d'informativa – su denominazione alimento, lista ingredienti, nome o ragione sociale o marchio depositato e sede dell'impresa responsabile della gestione dell'impianto – è soggetta a sanzione amministrativa da € 1.000 a € 8.000. Identica pena è prevista per il mancato utilizzo della lingua italiana (cfr. art. 22).

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che le informazioni ad essi relative siano comunicate prima della conclusione dell'acquisto, ma ha fatto salva la possibilità per gli Stati membri di disporre diversamente. Nel nostro ordinamento, tuttavia, pur sussistendo una norma quale l'art. 15 d.lgs. n. 109/1992, che prevede l'obbligo di indicare gli ingredienti di "sostanze alimentari non preconfezionate poste in involucri protettivi e di bevande a preparazione estemporanea o ad erogazione istantanea", non vi è alcuna specifica previsione che imponga di affiggere, all'esterno del distributore automatico, una lista degli ingredienti, con precisazione degli allergeni, dei prodotti in vendita attraverso la macchina. Il che si traduce in una rilevante limitazione dei diritti del consumatore allergico al quale non resterebbe che contattare il gestore (questo sì obbligatoriamente indicato) ed esigere la detta informazione, con evidente dispendio di tempo e di energie. La gravità dell'omissione si apprezza maggiormente in tutte quelle circostanze in cui il distributore automatico rappresenta il solo mezzo di erogazione di alimenti; eventualità questa non certo remota sol che si consideri come, ad esempio, in molti luoghi di lavoro o su molte tratte ferroviarie o nautiche non sono previste altre modalità di acquisto e di approvvigionamento di cibo[46].
Che peraltro l'esigenza di assicurare il diritto a nutrirsi in modo indistinto a tutti i viaggiatori rischi di essere poco avvertita sembra comprovato dal fatto che la relativa attuazione, nei contratti di viaggio con vettore ferroviario, aereo, marittimo è affidata essenzialmente alla regolamentazione pattizia, con onore, sin dalla fase delle trattative, a carico del soggetto allergico di segnalare le proprie allergie per verificare la disponibilità e la capacità della compagnia di garantirgli una alimentazione sicura a bordo.

5.- … in fase contrattuale. Conclusioni

Il discorso è destinato a complicarsi in relazione alla fase contrattuale. Tanto che si verta in tema di contratti di scambio (aventi ad oggetto alimenti) quanto che si tratti di contratti di ristorazione (nelle varianti del contratto di ristorante, del *catering*, del *banqueting*, del contratto di albergo) ancora una volta l'informazione diventa il perno dell'intera disciplina: l'etichetta e il menù[47] assumono il valore di clausole che identificano l'oggetto del contratto e l'insieme delle sue caratteristiche e, in quanto tali, contengono le concrete indicazioni della proposta dell'offerente, dalla cui "esattezza e corrispondenza al bene, secondo il principio di correttezza, trasparenza ed equità dell'informazione, dipende l'accettazione da parte del consumatore e il conseguente perfezionamento del contratto[48]". Etichetta e menù, in altri termini, costituiscono il contenuto di un regolamento negoziale unilateralmente predisposto da uno solo dei contraenti, il quale, in ossequio al dettato dell'art. 1341 c.c., deve assicurarne alla parte non predisponente la conoscenza (o conoscibilità), nel rispetto delle formalità imposte dalla legge[49]. Essi, infatti, condizionano il contratto anche sotto il

([46]) Le norme cui fare riferimento nel caso di distributori automatici sono quelle che sanciscono la responsabilità del produttore (artt. 114 ss. cod. cons.) integrate da quelle che definiscono gli standards di sicurezza dei prodotti alimentari e dalle regole tecniche alle quali eventualmente esse facciano rinvio. Sul punto E. Al Mureden, *I danni da consumo di alimenti tra legislazione di settore, principio di precauzione e responsabilità civile*, cit., p. 1500.
([47]) L'art. 19 reg. n. 1169/2011, nel disciplinare le categorie di alimenti non preimballati, menziona al n. 4, i prodotti somministrati dalle collettività, intendendosi per tali qualunque struttura (compreso un veicolo o un banco di vendita fisso o mobile), come ristoranti, mense, scuole, ospedali e imprese di ristorazione in cui, nel quadro di un'attività imprenditoriale, sono preparati alimenti destinati al consumo immediato da parte del consumatore finale (cfr. art. 2, comma 2, lett. d) del Reg. UE n. 1169/2011). Dette collettività sono tenute a indicare la presenza nei piatti proposti degli allergeni individuati nell'elenco di cui all'Allegato 2 del Reg. (Ue) n. 1169/2011 (allegato 2), in modo che ogni allergene sia riconducibile a ciascun alimento prima che lo stesso sia servito al consumatore finale (art. 19, comma 8). Tale indicazione deve essere apposta sul menù o registro o apposito cartello o attraverso sistemi digitali (in quest'ultimo caso le informazioni dovranno essere riportate anche su un'apposita documentazione scritta facilmente reperibile dall'autorità di controllo e dal consumatore finale). In alternativa, l'avviso della possibile presenza degli allergeni può essere riportato sul menù o su un registro o su un apposito cartello che rimandi al personale cui chiedere le eventuali necessarie informazioni.
([48]) Così N. Lucifero, *La responsabilità per le informazioni al consumatore di alimenti tra regole di validità, regole di comportamento e doveri informativi*, cit., p. 470 ss.
([49]) A. Germanò, *Il mercato alimentare e la comunicazione nei contratti di cessione dei prodotti*, in *Riv. dir. agr.*, 2009, p. 112 ss.

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profilo della forma e lo rendono, appunto, "formale", in quanto ne subordinano la validità al rispetto di una determinata e predefinita modalità di documentazione della volontà, di là dall'ulteriore formalismo cui potrebbe essere soggetto per la manifestazione della stessa. Parte della dottrina non ha esitato a discorrere al riguardo di neoformalismo negoziale per evidenziare come il corretto scambio di informazioni tra i contraenti venga assicurato altresì attraverso le norme e le procedure stabilite dal legislatore, interno e comunitario, per l'esteriorizzazione degli atti di autonomia privata[50]. Per certo, etichetta e menù assolvono la stessa funzione che l'informazione ha negli altri contratti con i consumatori[51] ed assumono un ruolo rilevante all'interno del procedimento volitivo che conduce alla conclusione del contratto e che rischia di essere inevitabilmente viziato da informazioni scorrette o parziali.

Peraltro, essendo le indicazioni sugli allergeni obbligatorie e necessarie per descrivere l'oggetto del contratto o, più precisamente, la prestazione oggetto del contratto (cfr. in particolare dall'art. 9 reg. n. 1169/2011), la relativa assenza o mendacità determina la nullità del negozio *ex* art. 1418 c.c. per mancanza dei requisiti stabiliti dall'art. 1346 c.c. Si tratta della più grave forma di invalidità prevista dall'ordinamento, alla quale l'operatore del settore alimentare può sottrarsi solo offrendo o servendo alla controparte alimenti conformi a quelli richiesti e garantendone la preparazione e la distribuzione a norma di legge (art. 17 reg. n. 178/2002). Ci si potrebbe, peraltro chiedere se la consegna di un alimento analogo a quello ordinato ma contenente un allergene, a dispetto della indicazione del cliente di non includerlo tra gli ingredienti, integri sul piano civilistico un *aliud pro alio*. Come è noto, ricorre l'*aliud pro alio* nella compravendita "quando viene consegnato un bene completamente diverso da quello pattuito"[52], con conseguente possibilità per l'acquirente di richiedere la risoluzione del contratto o l'esatto adempimento senza incorrere nei termini di prescrizione e decadenza previsti dall'art. 1495 c.c.[53]. La nozione è però tutt'altro che pacifica: se, da un lato, si è scorta la consegna dell'*aliud pro alio* nei casi in cui il bene venduto sia completamente diverso da quello pattuito, in quanto, appartenendo ad un genere differente, si riveli funzionalmente inidoneo ad assolvere la destinazione economico-sociale della *res* venduta[54]; dall'altro, si è affermato che la stessa non ricorre solo quando il bene è completamente difforme da quello pattuito – perché relativo ad un genere del tutto diverso – ma anche quando è assolutamente privo delle caratteristiche funzionali a soddisfare i bisogni dell'acquirente[55]. Ancora più significativamente si è ritenuto sussistere un *aliud pro alio* in caso di vendita di un mangime complementare E (per cavalle fattrici) nel quale era presente un tasso di fumonisine assai superiore a quello consentito, tale da comportare la tossicità del prodotto, sul presupposto per cui "il mangime presenterebbe difetti tali che gli impediscono di assolvere alla sua naturale funzione economico-sociale, che è quella alimentare"[56]. E la regola ben sembra prestarsi a trovare applicazione altresì nell'ipotesi di cibo contenente un allergene di cui sia stata chiesta l'esclusione, stante appunto l'inadeguatezza dello stesso a soddisfare i bisogni e le aspettative del richiedente.

La discussione è destinata, tuttavia, a perdere di interesse laddove si consideri come la disciplina

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([50]) V. A. Jannarelli, *La disciplina dell'atto e dell'attività: i contratti tra imprese e tra imprese e consumatori*, in AA.VV., *Diritto privato europeo*, Padova, 1997, p. 513.

([51]) Sul punto G. Biscontini, *Regolamento n. 1169 del 2011: tutele civilistiche per violazione del dovere di informazione nel settore alimentare*, cit., p. 168.

([52]) F. Gazzoni, *Manuale di diritto privato*, Napoli, 2019, p. 1077.

([53]) La vendita *aliud pro alio* è soggetta alla prescrizione decennale prevista dalla norma generale dell'art. 2946 c.c.

([54]) Tra le tante Cass., 23 marzo 2017, n.7557, in *Giust. civ. Mass.*, 2017.

([55]) Trib. Modena, 5 gennaio 2016, in Giurisprudenza locale – Modena, 2016, ha poi aggiunto che l'*aliud pro aliio* si riscontra anche quando il bene "abbia difetti che la rendano inservibile, ovvero risulti compromessa la destinazione del bene all'uso che abbia costituito elemento determinante per l'offerta di acquisto", come nel caso al suo vaglio di mancata indicazione, nel bene compravenduto, del numero di serie e dell'indirizzo del fabbricante con conseguente violazione delle norme in tema di marcatura Ce, necessaria per la distribuzione del prodotto nel territorio dell'Unione Europea.

([56]) Trib. Lucca, 14 febbraio 2017, su www.dejure.it, 2017.

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specifica dettata per la vendita dei beni di consumo, nata con riferimento ai vizi materiali del bene, ha finito per includere anche i casi in cui si arrivi alla prospettazione di un *aliud pro alio*[57]; essa, in altri termini, si è spinta fino al punto di far rientrare nel "difetto di conformità" le diverse tipologie di vizi materiali dai quali il bene può essere affetto[58]. Ed è innegabile, pertanto, che quando sia consegnato o somministrato un alimento "diverso", in quanto composto con un ingrediente non solo non voluto ma addirittura pericoloso per il soggetto, si realizzi una non conformità all'oggetto del contratto del bene di fatto reso alla controparte. Sono *rectius* si presumono, infatti, conformi al contratto i beni che presentino "la qualità e le prestazioni abituali di un bene dello stesso tipo, che il consumatore può ragionevolmente aspettarsi, tenuto conto della natura del bene e, se del caso, delle dichiarazioni pubbliche sulle caratteristiche specifiche dei beni fatte al riguardo dal venditore, dal produttore o dal suo agente o rappresentante, in particolare nella pubblicità o sulla etichettatura" (art. 129, lett. c, cod. cons.)[59].

Il codice di consumo, espressione di una logica industriale, assume come visuale privilegiata di regolamentazione la legittima aspettativa del consumatore, secondo un criterio di normalità[60], tant'è che l'art. 117 cod. cons., nel definire il prodotto "difettoso", qualifica tale quello che "non offre la sicurezza che ci si può legittimamente attendere"[61]. Ogniqualvolta, allora, che il bene venduto o servito si riveli inidoneo, per la presenza di allergeni, all'uso da parte del consumatore/acquirente, questi ha diritto di avvalersi dei rimedi previsti in merito dal codice di consumo e di pretendere "il ripristino, senza spese, della conformità del bene mediante riparazione o sostituzione" oppure, in subordine, di chiedere "la riduzione adeguata del prezzo o invocare la risoluzione del contratto" (art. 130 cod. cons.). Ma che davvero si tratti di rimedi efficaci per chi, avendo confidato senza sua colpa, nella sicurezza dell'alimento, ha subito un danno anche grave alla salute, è sospetto che difficilmente si fuga, posto che nessuno di essi appare effettivamente in grado di offrire soluzione alla situazione di malore in cui si è venuto a trovare e che, nei casi peggiori, potrebbe averne determinato il decesso a seguito di *shock* anafilattico[62]. Si pensi, così, alla prospettata sostituzione del bene "viziato" con un altro idoneo a soddisfare la pretesa alimentare del consumatore: la stessa, pur qualora possibile[63], potrebbe non incontrare affatto l'interesse del soggetto, essendo venuta meno la fiducia nella controparte sulla quale aveva riposto affidamento per la valida conclusione del contratto di compravendita o di ristorazione. La circostanza che si tratti di un bene fungibile, infatti, non implica, automaticamente, che esso sia anche sostituibile, dal momento che la sostituibilità, a differenza della fungibilità, è strettamente legata al volere concreto delle parti del contratto o, come nella specie, di una di esse[64]. Analogamente la riduzione del prezzo può

([57]) Restano esclusi solo i vizi giuridici del bene.

([58]) Cfr. A. Luminoso, *La compravendita*, Torino, 2011, p. 330 e p. 336 s. in part.; M.P. Mantovani, *La vendita dei beni di consumo*, Napoli, 2009, p. 241 ss.; G. Amadio, *Difetto di conformità e tutele sinallagmatiche*, in *Riv. dir. civ.*, 2001, I, p. 871 ss. Per la riconducibilità del difetto di conformità alla garanzia, S. Mazzamuto, Il contratto di diritto europeo, Torino, 2011, p. 232 ss.; A. Nicolussi, *Diritto europeo della vendita dei beni di consumo e categorie dogmatiche*, in *Europa e dir. priv*., 2003, p. 525 ss.

([59]) La disciplina sulla vendita dei beni di consumo include nel "difetto di conformità" le diverse tipologie di vizi materiali.

([60]) Il codice di consumo si pone sulla stessa lunghezza d'onda della normativa comunitaria e, in particolare, della direttiva 85/374/CEE del 25 luglio 1985, che, all'art. 6, considera difettoso un prodotto "quando non offre la sicurezza che ci si può legittimamente attendere tenuto conto di tutte le circostanze" ivi compreso l'uso al quale esso è ragionevolmente destinato.

([61]) Il concetto di difettosità "ruota intorno a quello di sicurezza, che a sua volta si pone al livello corrispondente alle aspettative legittime del pubblico": così A. Germanò, M.P. Ragionieri, E. Rook Basile, *Diritto agroalimentare. Le regole del mercato degli alimenti e dell'informazione alimentare*, Torino, 2020, p. 56. Il concetto di prodotto alimentare sicuro deve, in ogni caso, essere valutato alla luce dell'art. 14 reg. (CE) n. 178/2002.

([62]) Con conseguente trasmissione agli eredi del diritto di agire in giudizio.

([63]) Chiarisce, peraltro, M. Girolami, *Etichettatura, informazioni e rimedi privatistici nella vendita di prodotti alimentari ai consumatori*, cit. p. 144, che quando il difetto di conformità dell'alimento derivi da deficit informativo nell'etichetta delle informazioni rese al consumatore è difficile immaginare che il bene acquistato sia l'unico esemplare viziato a fronte di una generalità di beni dello stesso tipo che rispondono invece alle aspettative del consumatore.

([64]) V. C. Rinaldo, *La sostituibilità del bene nella vendita di species al consumatore (Italia e Germania: due ordinamenti a confronto)*, in *Riv. dir. civ.*, 2011, II, p. 531 ss.

avere un senso solo in presenza di acquisti di grandi partite di merci o di merci particolarmente costose e pregiate, rivelandosi altrimenti inadeguata a fronte del costo normalmente esiguo degli alimenti, specie se oggetto di un contratto di compravendita. Né il discorso muta con riguardo alla risoluzione, la quale può dirsi concretamente praticabile unicamente nei casi, assai infrequenti, in cui il consumatore si avveda del difetto quando non abbia ancora ingerito l'alimento o nei casi in cui abbia acquistato una partita consistente di prodotti[65].

Non resta, pertanto, che il rimedio risarcitorio in ragione della responsabilità contrattuale (da inadempimento) ed extracontrattuale (conseguente alla lesione del diritto assoluto alla salute) dell'operatore del settore alimentare[66]; rimedio che, tuttavia, non è scevro, a sua volta, da insidie connesse soprattutto all'onere di provare il danno concretamente subito e il nesso eziologico tra il difetto informativo e il danno medesimo, che, specie in un soggetto intollerante, potrebbe manifestarsi anche dopo un certo lasso di tempo dall'ingestione dell'alimento. Si pensi, a voler esemplificare, al caso in cui la persona, non pensando affatto di andare incontro ad un rischio per la sua salute, non conservi lo scontrino che attesta l'avvenuto acquisto del cibo incriminato presso un determinato venditore o produttore, il quale potrebbe, pertanto, disconoscere la relazione contrattuale e respingere la pretesa risarcitoria[67]. Si consideri l'ipotesi in cui, pur verificandosi la reazione allergica contestualmente all'assunzione dell'alimento, il ristoratore neghi di avere impiegato l'allergene tra gli ingredienti e costringa di conseguenza il danneggiato a ricorrere ad articolate e costose indagini mediche per supportare la sua richiesta di risarcimento danni. Si immaginino, ancora, gli scenari che potrebbero aprirsi nella circostanza in cui a scatenare il malore sia un alimento diverso rispetto a quello indicato come allergizzante e del quale il soggetto ignorava di essere allergico. Il rimedio risarcitorio, così, lungi dal rivelarsi "l'antistaminico" di tutti i mali derivanti dall'inconsapevole e involontaria ingestione di un allergene per causa d'altri, non soddisfa e non salva (né potrebbe) da reazioni fisiche più o meno gravi il malcapitato. La strada da percorrere per una compiuta tutela della sua condizione altresì giuridica si presenta ancora accidentata e non priva di criticità, sebbene costellata oggi da soluzioni un tempo inimmaginabili. Al legislatore, interno e comunitario, va comunque ascritto il merito di avere saputo ordire un apparato normativo articolato e attento e di avere perseguito, per tale via, l'obiettivo proprio di ogni legislazione, quello, vale a dire, come insegna autorevole dottrina, "di condurre gli uomini al massimo di felicità o al minimo d'infelicità possibile"[68].

ABSTRACT

Food allergies represent a high risk and in some cases a lethal risk for the subject who is affected by

([65]) Ma sul punto ancora M. Girolami, *Etichettatura, informazioni e rimedi privatistici nella vendita di prodotti alimentari ai consumatori*, cit. p. 144.

([66]) "La responsabilità contrattuale e quella extracontrattuale possono concorrere allorché un unico comportamento risalente al medesimo autore, e quindi un evento dannoso unico nella sua genesi soggettiva, appaia di per sé lesivo non solo di specifici diritti derivanti al contraente dalle clausole contrattuali, ma anche dei diritti assoluti che alla persona offesa spettano di non subire pregiudizi all'onore, alla propria incolumità personale e alla proprietà di cui è titolare": Trib. Padova, 20 aprile 2016, *inedita*, e già in precedenza in questi termini Cass., 7 agosto 1982, n. 4437, in *Resp. civ. e prev.*, 1984, p. 78 ss.

([67]) La giurisprudenza non richiede, in linea generale (e dunque in un discorso non circoscritto alla sola materia "alimentare"), la dimostrazione di un rapporto di consequenzialità necessaria tra la condotta illecita e le lesioni alla sfera personale subite, ritenendo sufficiente la sussistenza di un rapporto di mera probabilità scientifica ed affermando che il nesso causale può essere considerato sussistente non solo quando il danno possa considerarsi conseguenza inevitabile della condotta, ma anche quando ne sia conseguenza altamente probabile e verosimile. Per la giur. di merito Trib. Padova, 20 aprile 2016; parla di nesso di causalità sussistente quando il danno possa reputarsi conseguenza altamente probabile e verosimile della condotta "anche in base ad un serio e ragionevole criterio di probabilità scientifica" Trib. Palermo, 2 agosto 2019, in www.dejure.it, 2020. Vedi, altresì, Cass., 20 aprile 2012, in *Resp. civ. e prev.*, 2012, 4, p. 1132 ss.; Cass., 30 ottobre 2009, n. 23059, in *Guida al dir.*, 2010, 6, p. 62 ss.

([68]) C. Beccaria, *Dei delitti e delle pene*, Milano, ed. 2015, p. 123, al quale si deve la precisazione secondo cui "il fine principale d'ogni buona legislazione è l'arte di condurre gli uomini al massimo di felicità o al minimo d'infelicità possibile".

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them. The occurrence of adverse reactions derives from the involuntary ingestion of the allergen. It is therefore necessary to impose a strict and controlled diet, which does not include "risky" foods. It also implies the need for the consumer to always be able to know the composition of the food. a decisive role in this regard is played by the label and any other tool (for example the menu in restaurants) capable of disclosing information on ingredients and drawing attention to the presence of allergens. the essay aims to analyze the problems concerning the condition of the allergic subject. It illustrates their rights and related duties, both in the physiological phase of food consumption and in the pathological one, in which the search for remedial tools, not just compensatory ones, is a direct consequence of the violation of the rules that internal and community legislation imposes on matter.

Le allergie alimentari rappresentano un rischio elevato ed in alcuni casi letale per il soggetto che ne è affetto. Lo scatenarsi di reazioni avverse, dovute alla involontaria ingestione dell'allergene, se da un lato impone un regime alimentare rigoroso e controllato, che non contempli cibi "a rischio", dall'altro implica la necessità che il consumatore sia sempre in grado di conoscere la composizione degli alimenti. A tal fine un ruolo decisivo assume l'etichetta e, con essa, ogni altro strumento (si pensi al menù nei ristoranti) idoneo a rendere note le informazioni sugli ingredienti e a richiamare l'attenzione sulla presenza di allergeni. In quest'ottica, il saggio si prefigge di analizzare le problematiche connesse alla condizione in cui versi il soggetto allergico, illustrandone i diritti e i correlati doveri, sia nella fase per così dire fisiologica del consumo di alimenti, sia in quella patologica in cui la ricerca di strumenti rimediali, non solo risarcitori, è diretta conseguenza della violazione delle norme che la legislazione interna e comunitaria pone in materia.

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