

National enforcement of food communication rules

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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 consumers¹.

Some months later, Regulation (EU) No 1169/2011 was approved and published².

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- *in the legal framework*, as much as the regulation repealed a number of previous directives, in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 responsibilities⁵, with a new approach to national measures⁶, with detailed provisions on the dimensions of letters within the label⁷;

- *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.

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 1169/2011⁹, but in some case expressly criticised by EU Parliament¹⁰.

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 feed¹¹;
- in September 2017, a Leg.ve Decree on the specification on label of the factory of production or of conditioning of food, with related sanctions¹²;
- in December 2017, a Leg.ve Decree on sanctions in case of violation of Reg. 1169/2011¹³;
- 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 labelling¹⁴.

In the same years, relevant rules have been introduced in all the MS, as discussed by speakers and participants to the Milano workshop¹⁵.

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

(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. Albinini – V. Rubino – S. Rizzoli – 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 one¹⁶ 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 2913/92¹⁸, 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 1169/2011²¹.

A second interesting recent decision of the Court of Justice²² 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 State²³. ... 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. Ministère 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 law²⁴. 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 provenance²⁵. 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 consumers²⁶. ... *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 activity²⁸; 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 consumers²⁹.

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 euro³⁰ for restricting cross-border sales of beer through 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^a 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^a ed. francese del 1992, Milano, 1997.

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.