Volume 26 [2020] C.E.L.B. Issue 2

THE CARDOZO ELECTRONIC LAW BULLETIN

FALL 2020

THE CARDOZO INSTITUTE
ISSN 1128-322X

The Cardozo Law Bulletin is a peer-reviewed, English and Italian language journal concerned to provide an international forum for academic research exploring the thresholds of legal theory, judicial practice and public policy, where the use of a 'comparative law and literature' approach becomes crucial to the understanding of Law as a complex order.

The Cardozo Law Bulletin, established in 1995 as one of the world first Law Journals on the Web, invites the submission of essays, topical article, comments, critical reviews, which will be evaluated by an independent committee of referees on the basis of their quality of scholarship, originality, and contribution to reshaping legal views and perspectives.

http://www.jus.unitn.it/cardozo/

CHIEF EDITOR: Pier Giuseppe Monateri

ALL PAPERS SUBMITTED TO *THE CARDOZO ELECTRONIC LAW BULLETIN* ARE SUBJECT TO DOUBLE BLIND PEER REVIEW AND TO THE APPROVAL OF THE STEERING COMMITTEE.

THE CARDOZO ELECTRONIC LAW BULLETIN

VOLUME XXVI FALL 2020 NUMBER 2

CONTENTS

ARTICLES

AGRI-FOOD LAW AND COMPARATIVE TOOLS IN GLOBAL MARKETS•

Ferdinando Albisinni

ABSTRACT

Agri-Food Law is increasingly characterised by a peculiar way of rule-making, where multilevel sources of law overlap and interact, and where private and public responsibilities are brought to unity through vertical and horizontal cooperation.

Globalisation of production and trade of agriculture and food products *opened the way to* Globalisation of rules*, where European, International, National and Regional level play roles which cannot be reduced into the traditional hierarchical framework.*

In this perspective European Agri-Food Law, *by its nature, must now be appreciated as* European and Global Law, *in the true comparative sense of communication and contamination among legal systems, leading to the conclusion that within the present dimension many global sources of law concur to build new models of European Governance in this sensitive area of experience.*

International agreements certainly have played and are still playing a decisive role. It is sufficient here to mention the WTO agreement, the well known cases discussed before WTO panels (from use of hormones in bovine meat, to GMOs, to GIs), the Treaty signed by EU and Vietnam, the CETA, the negotiations on the TTIP even if not arrived to a final result, and recently Reg. (EU) 2019/1753 on the accession to the Geneva Act of the Lisbon

•) A previous version of this paper has been discussed in the Congress organised by the University of Florence on 21-22 November 2019, "Le regole del mercato alimentare tra sicurezza e concorrenza".

Agreement on Appellations of Origin and Geographical Indications.

Together with those sources a relevant role is played by recommendations of organisations and institutions, like Codex Alimentarius Commission, UNECE, OIV, which as a matter of principle are classified as soft law, but in most cases benefit of a role very near to hard law.

Finally, a decisive and increasing role is played by what legal scholars qualified as legal transplants, and that we could consider as the shared dimension of Global Agri-Food Law.

We must therefore recognize that we are facing to-day a tendency to communication within Global Markets *of legal models of* Agri-Food Law*, with a growing tendency to share models and answers on the basis of shared experiences, in the two aspects of including external sources within the internal legal system and, on the other hand, of acting as source (or at least as model qualified and complied with) of rules that have effect beyond geography and political sovereignty.*

Recent EU Regulations, like Reg. 2017/625 on the globalisation of the official controls on food and more generally on agricultural activity; 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; all expressly confirm this trend.

Even sources of law are largely involved in this process.

The traditional border between public *and* private *law sources is becoming difficult to trace in* Agri-Food Law, *where regulatory authorities, technical rules and standards are typically transnational, and standards of private-law origin have large and relevant impact on the effective governance of the sector, giving place to what has been meaningfully qualified as the "*Hybridization of Food Safety Governance*".*

In this perspective, Comparative method *appears to be a precious tool to better know, implement and in some cases reform this area of legal experience, not only as an academic research tool, but as a necessary tool to operate in the real world.*

SUMMARY: 1. Premise: a dating tradition of comparative studies in agricultural law – 2. Food Law and Agricultural Law: an intimate relationship – 3. Toward European Codes of Agri-Food Law – 4. Life Cycle: a holistic approach from science to legal regulation – 5. The transnational dimension – 6. Legal transplants – 7. Rights and remedies: administration and jurisdiction facing globalization – 8. Comparative tools and Agri-Food Law.

1.- Premise: a dating tradition of comparative studies in agricultural law

The use of comparative method as an essential tool to study and better understand our own law[1] is part of a dating tradition of Italian studies in agricultural law, with the foundation already in 1957 of the IDAIC – Istituto di Diritto Agrario Italiano e Comparato, not casually addressed, already in its name, to study the international and comparative dimension of agricultural law[2]

Italian scholars of agricultural law, approaching topics apparently enclosed within the borders and barriers of domestic territory – e.g. agricultural structures and production, access to land and land uses,

1) As pointed out by GINO GORLA, already in the preface to *Il Contratto. Problemi fondamentali trattati con il metodo comparativo e casistico*, I, Milano, Giuffré ed., 1955, and in a well-known series of researches; see for a synthesis G. GORLA, *Diritto comparato*, voce dell' *Enciclopedia del diritto*, Giuffré ed., Milano, 1963, p.928. In critical perspective P.G. MONATERI, *Methods in Comparative Law: an intellectual overview*, in P.G. MONATERI (ed.), *Methods of Comparative Law*, Edward Elgar, 2013, underlies "how Comparative Law was historically used to define, or better to construct and assert national identities".

2) On the story of IDAIC see A. GERMANÒ, *L'Istituto di diritto agrario internazionale e comparato: la storia*, 2017.

contracts, rights and privileges – in fact always looked with interest at the comparison with foreign experiences.

It is a line of comparative research, which always distinguished researches and publications of Italian legal scholars, working within the lines anticipated by the foundation of IDAIC and expressing great attention to the experiences in the area of Agri-Food Law of U.S.A., South America, Africa, and Far East.[3]

If to-day legal scholars, from different legal systems and different history and culture, share an approach which recognises the *intimate relationship* between *agriculture* and *food*, and between *agricultural law* and *food law*, this is certainly not new for Italian scholars of agricultural law, always well conscious of the relevance of the "*nature of things*"[4] in defining legal models, structures and rules in an area intimately related to *real life*[5].

In the same time, *Agri-Food Law*, by its nature, implies *a comparative approach*, as a necessary tool to know and share models and tools[6].

---

3) See the catalogue of publications of IDAIC, from its foundation until its inclusion in the National Council of Researches, at http://www.idaic.cnr.it/pubblicazioni.php.

4) The *nature of things*, as a relevant tool in agricultural law, has been underlined, already in the '30s of the past century, by T. ASCARELLI, *L'importanza dei criteri tecnici nella sistemazione delle discipline giuridiche e il diritto agrario*, in "Atti del primo congresso nazionale di diritto agrario", 1936, Florence, p.102.

5) This is a central topic of the research of Italian scholars of agricultural law; see E. ROOK BASILE, S. CARMIGNANI, N. LUCIFERO, *Strutture agrarie e metamorfosi del paesaggio. Dalla natura delle cose alla natura dei fatti*, Giuffré ed., 2010; L. COSTATO L. (dir.), *Trattato breve di diritto agrario italiano e comunitario*, 3ª ed., Padova, 2003; S. CARMIGNANI, *Agricoltura e ambiente. Le reciproche implicazioni*, Giappichelli, 2012; A. GERMANÒ, *Manuale di diritto agrario*, 8ª ed., Torino, 2016; S. MASINI, *Tracce di diritto agrario*, Cacucci ed., Bari, 2019; A. JANNARELLI, *Cibo e diritti. Per un'agricoltura sostenibile*, Giappichelli, 2015; ID., *Il diritto dell'agricoltura nell'era della globalizzazione*, Cacucci ed., 2003; L. COSTATO – L. RUSSO, *Corso di diritto agrario italiano e dell'Unione Europea*, Giuffrè Francis Lefebvre, 5^ ed., 2019; M. GOLDONI – E. SIRSI (ed.), *Regole dell'agricoltura, regole del cibo*, Pisa, 2005; I. CANFORA, *La commercializzazione dei prodotti agricoli nel diritto italiano e comunitario*, Cacucci, 2008.

6) The need to use comparative tools in studying food law has been underlined already in the '60s by E. J. BIGWOOD – A. GERARD, *Fundamental principles and Objectives of a Comparative Food Law*, New York, 1967. And not by chance recently, AIDC - Italian Association of Comparative Law had its 2019 Congress in Parma, on *Food Law - A Comparative Perspective,* underlying that "La realtà è che il cibo offre un caleidoscopio di prospettive attraverso le quali osservare il diritto e confrontare le sue articolazioni, prescindendo in larga misura da schemi sistematici, da famiglie giuridiche, da partizioni didattiche. In una prospettiva post-moderna si potrebbe, anzi, guardare non al cibo

2.- Food Law and Agricultural Law: an intimate relationship

During the last 30 years, *European Food Law* and *Agriculture Law* shaped themselves as a sort of *machine shops*, where new legal tools and institutes are created and tested, and from where have been (and are, even at present times) drawn models of general application in the process of unification of European law[7].

The regulatory process in this area is largely due to the plurality of objects involved in the relation between *law* and *science* in the areas of *agriculture* and *food*, influenced by the trends characterising "*law in the knowledge society*"[8], sharing a feature identified as central and common to the entire range of *Agri-Food Law* today, namely that, already mentioned, of the relation between *technological and legal innovation*.[9]

attraverso il diritto, ma al diritto come una sorta di cibo, nel quale i vari elementi costituitivi sono metaforici ingredienti normativi utilizzati con disinvoltura e inconsapevolezza, in versioni "fusion" che mirano a soddisfare i palati del momento o il discount economico. A questa prospettiva consumeristica – il diritto come prodotto da scaffale di supermercato o come prodotto di stagione – si può reagire solo rafforzando la riflessione scientifica, comprendendo meglio qual è la "provincia" del diritto e dunque separandolo da inutili contaminazioni", in *Cibo e Diritto. Una prospettiva comparata*, L. SCAFFARDI – V. ZENO-ZENCOVICH (eds.), RomaTre-Press, 2020, I, 3; in this volume have been published the papers discussed in the Congress, looking to the topics of *agri-food law* under different perspectives.

7) For an analysis of those trends see the contributions in V. RODRIGUEZ FUENTES (ed.), *From agricultural to food law – the new scenario*, Wageningen Academic Publishers, 2014; L. COSTATO – F. ALBISINNI (eds.), *European and Global Food Law*, Cedam, Wolters Kluwer, 2nd ed., 2016; L. A. Bourges (ed.), *UE: Sociología y Derecho Alimentarios. Estudios Jurídicos en Honor de Luis González Vaqué*, Thomson Reuters Aranzadi, 2013.

8) On the special relationship characterising the "model of the relation between science and policy incorporated in the 'modern' conception of science", and more generally on the "knowledge society", see the analysis set in a historical-comparative perspective by M. TALLACCHINI, *Sicurezze e responsabilità in tempi di crisi*, in *Riv.dir.alim.*, www.rivistadirittoalimentare.it, n. 1-2012, p.14.

9) For a historical analysis of the relation between technological innovation and foodstuff availability, in reference to production and conservation techniques, see, with extensive references, M. MONTANARI, *La fame e l'abbondanza. Storia dell'alimentazione in Europa*, Roma-Bari, 1993; for further indications, in legal perspective, see F. ALBISINNI, *Sistema agroalimentare*, in

In the same time, *Law* and *Food* share a relevant symbolic attitude, as much as "Law, as well as food, becomes an expressional code apt to capture the profound correlation between the meaning of taste, and the taste of meaning"[10].

Over the years, debate on *agriculture* and *food law* has focused on a multiplicity of topics[11], from traditional products to brands and labels signs, from GMOs in agriculture and in the food chain to liability and responsibility, from the precautionary principle to the new rules on safety and traceability, from advertising to recognition of the territorial identity of products and production processes within the framework of international trade[12], from the role of the organisation of producers to the special regime of contractual relation within the agri-food market, from producers liability[13] to the peculiar role assigned to consumers of food products[14] as leading actors of food safety.

Within this framework, the relation between *food law, agricultural law* and *innovation*, both *technological* and *legal*[15], has taken on specific and characteristic

---

"Digesto disc. priv.", sez. civ., Aggiornam., Utet, Turin, 2009, p.479; ID., *Transparency, crisis and innovation in EU Food Law*, in *Rivista della Regolazione dei Mercati*, 2015, p. 97.

10) C. Costantini, *Geo-Food and Normative Identities. Power and Privilege across Competing Traditions*, in *The Cardozo Electronic Law Bullettin*, 2015, XXI, 1, at p.8, who underlies how food symbolism played a central role in assessing peculiarites and differences among legal systems in England and in France.

11) See recently, in comparative perspective, L. SCAFFARDI – V. ZENO-ZENCOVICH (eds.), *Cibo e diritto. Una prospettiva comparata*, cit.

12) On the new order in international trade of agri-food products after the Marrakech Treaty, see P. BORGHI, *L' agricoltura nel Trattato di Marrakech. Prodotti agricoli e alimentari nel diritto del commercio internazionale*, Giuffrè, 2004.

13) See M. GIUFFRIDA, *Liability for Defective Food Products,* in L. COSTATO – F. ALBISINNI (eds.), *European and Global Food Law*, Cedam, Wolters Kluwer, 2nd ed., 2016, p.263.

14) See S. CARMIGNANI, *Consumer Protection,* in *European and Global Food Law*, cit., p. 237.

15) On the relation between technological and legal innovation in the area of Agri-Food Law, see F. ALBISINNI, *Agriculture and Food Law as Innovation Engines of European Law: the New Scenario*, in *From agricultural to food law*, 2014, cit.; ID., *Innovazione-azione e innovazione-reazione nel diritto agrario e alimentare europeo: i nuovi scenari (Reactive and proactive innovation in European agriculture and food law: the new scenario)*, in *Agricoltura Istituzioni Mercati*, 2013, p. 225; F. LEONINI - M. TALLACCHINI - M. FERRARI (eds), *Innovating food, innovating the law*, Libellula Edizioni, 2014; L. SALVI, *Diritto alimentare e innovazione tecnologica nella regolazione dell'Unione Europea. Profili di legittimità e accountability*, Jovene ed., 2017; and

content, with the rapid transition from a *food legislation* (taken in the sense of the juxtaposition of detailed precepts, to a large extent based on sanctions and prescriptive rulings) and an *agriculture legislation* (largely identified with economic provisions on incentives and financial support) to an *agri-food law* based on a systemic and clearly laid out approach.

This has led scholars to observe, in comparative perspective:

"Initially just a set of rules – mainly based on national sources – which established prohibitions, mostly assisted by criminal sanctions, today food law is also, or rather first and foremost, aimed at prevention, controls and, in general, at guaranteeing the free and safe movement of foodstuffs and drink not only within the EU but in the whole world"[16];

"The concept of 'food law' is multi-level"; "Even traditional distinctions between different areas of legal studies have been largely overcome, in particular with reference to *Agricultural Law* and *Food Law*."; "Sometimes a distinction is made between 'food law' on the one hand and 'agricultural law' on the other. The distinction is not a watershed however. Food and agricultural law overlap in that food chain (or agri-food chain) fully includes primary production of food. Thus this primary production of food is fully within the scope of food law." [17];

"We can therefore speak of a *Food Law* only assuming it is a *food production chain law*. But, if it is a *food production chain law,* then by its very nature it is an *Agri-Food Law*, which adopts the primary production stage as a necessary and characterizing element"[18].

---

recently the papers published in AIDA-IFLA (ed.), *Innovation in Agri-Food Law between Technology and Comparison*, Wolters Kluwer, 2019.

16) L. COSTATO, *Principles and rules of European and Global Food Law System*, in *European and Global Food Law*, cit., p.3.

17) B. VAN DER MEULEN (ed.), *Private Food Law*, Wageningen Academic Publishers, 2011, 33.

18) F. ALBISINNI, *From legislation to food law: the new actors*, in V. PARISIO (ed.), *Food safety and quality law: a transnational perspective*, Giappichelli, Torino, 2015, 21.

In 2000 the EU Commission White Paper on Food Safety, and then in 2002 Regulation (EC) No 178/2002 of the European Parliament and of the Council[19], expressly adopted this approach[20].

The new Regulation, not by chance known as *EFLS–European Food Law System*, aimed to provide "*the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market*" [21], declared that for those purposes "*This Regulation lays down the general principles governing food and feed in general, and food and feed safety in particular, at Community and national level*"[22], so that "*This Regulation shall apply to all stages of production, processing and distribution of food and feed,*"[23], including "*primary production*"[24].

The preamble of the Regulation indicates as legal bases, in one single context, Articles 37 (CAP), 95 (Approximation of national provisions), 133 (Common commercial policy), 152(4)(b) (Health protection), thereby evidencing – even at formal level – the multiplicity of objects, values, interests and goals affected by food law legislation.

The multiplicity of legal bases confirms the plurality of objects and goals dealing with multiple areas and needs, and the innovative character of Regulation (EC) No 178/2002, adopting new or newly designed legal models

---

19) It is the well-known Regulation (EC) No 178/2002 of the European Parliament and of the Council 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. For an analytic examination of the single rules, see IDAIC (ed.), *La sicurezza alimentare nell'Unione Europea - Commentario al Regolamento (CE) n.178/2002 del 28 gennaio 2002*, in *Le nuove leggi civ. comm.*, 2003, n. 1-2, 114.

20) On trends of European Food Law after the adoption of Regulation (EC) No 178/2002, see C. MACMAOLÁIN, *EU Food Law. Protecting Consumers and Health in a Common Market*, Hart Publishing, Portland, 2007; B. V. DER MEULEN – M. VAN DER VELDE, *European Food Law Handbook*, Wageningen Academic Publishers, 2008.

21) Art. 1.1. of Regulation (EC) No 178/2002.

22) Art. 1.2. of Regulation (EC) No 178/2002.

23) Art. 1.3. of Regulation (EC) No 178/2002.

24) Art. 3, No 16 of Regulation (EC) No 178/2002.

and tools. Traditional borders between production and communication rules are weakened, and the main regulatory criteria is that of *responsibilities*, both public and private, with a functional design of governance[25].

Undertakings and business operators are called to operate within an integrated framework of regulatory competences, which includes innovative rules, operating together with the traditional rules on production and products, and expressing the *proactive innovative approach* of the European legislator.

As well observed by an authoritative scholar, Regulation No 178/2002 operates on different levels: "that of *law sources*, … [where it] introduces general principles … establishes rules directly applicable, which do not need national execution measures; … that of the *institutional design* to be adopted by any Member State; … that of *cooperation* to provide among national organizations and Community organisation"[26].

The structure of such legal framework, characterised by the polycentrism of sources, may not be reduced to the *general-special*, *rule-exception* categories, and sets itself as a sort of peculiar *laboratory of innovation*, in quantitative terms due to the large number of measures and decisions, and at systematic level due to the peculiar plural and multilevel nature of this area of regulation.

On a more general perspective, it is well know that some essential principles of European administrative law have been identified, outlined, and declared by the Court of Justice, through a series of decisions often originated from disputes arising in the area of agri-food regulations.

This is true not only for European law, as an authoritative scholar underlined with reference to U.S. experience: «*Most important principles of United States constitutional law have been developed in the context of food regulation…*

---

[25]) See Art. 17, entitled "*Responsibilities*" of Reg. No 178/2002.
[26]) S. CASSESE (ed.), *Per un'Autorità nazionale della sicurezza alimentare*, Milano, 2002, introd.

The power of both state and federal governments to regulate private business in order to protect not only the public health and safety, but also the economic stability of the industry, and the power of the federal government over intrastate as well as interstate commerce, have all been adjudicated by the Supreme Court in the context of food legislation. In Europe, the authority of the new European Union to override national law in order to achieve a common marketplace was decided by the European High Court of Justice in the context of a sixteenth century German statute regulating beer»[27].

3.- Toward European Codes of Agri-Food Law

Within this process, some new and original lines have been emerging during the last few years:

- *Food Law*, which discovered the Primary Agricultural Sector as a fundamental element of *Food Safety* in the '90s with the "*Mad Cow*" crisis, and from then addressed its attention and its provisions to the entire *Agri-Food Chain*, is now taking a further crucial step, addressing its attention and its rules to *all the agricultural activity*, even if not addressed to produce food products, as recently stated by Regulation (EU) 2017/625 with reference to its area of application, and to objects and activities covered[28];
- *Agri-Food markets*, as a whole, are getting a special attention: art. 43 TFEU on CAP – which after the Lisbon Treaty some EU commentators considered for some time as a sort of "*relict of the past*" – has been rediscovered by EU Commission, Parliament, and Council, as the proper

[27]) P.B. HURT, *Food law and policy: an essay*, in *Journal of Food Law & Policy*, 1, 2005.
[28]) Regulation (EU) 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. For a comment of this new legislation see F. ALBISINNI, *Regulation (EU) 2017/625: Official Controls, Life, Responsibilities, and Globalization*, in *European Food and Feed Law Review*, 2019, p. 118.

legal basis for rules involving competition within the entire *Agri-Food chain*, as stated in the new Directive on UTP in the agri-food chain[29];

- the *Local dimension*, including the agricultural and rural dimension, is getting a growing relevance at law not only in Europe, but even in countries like U.S.A. and in China. In China new models and tools have been recently introduced to face the challenge to guarantee food safety of agri-food products obtained by a multiplicity of small producers and offered in large markets with final destinations really far from the origin[30]. In the same time the growing attention to the peculiar local dimension of food induced USA[31] and some EU Member States to adopt peculiar rules on the origin labelling, with the controversial tendency to what has been called a *renationalisation* or *re-localisation* of rules[32];
- even *Sources of law* are largely involved in this process. The traditional border between *public* and *private law sources* is becoming difficult to trace, and in many areas (not only commercial, but also involving food safety issues) is emerging a sort of *primacy of contract*, over the body of legislation itself, even if this sort of contracts often include contents with regard to which there has not been, nor there can be, any significant negotiation[33].

---

29) Directive (EU) 2019/633 of the European Parliament and of the Council, of 17 April 2019, on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. For a first comment see P. DE CASTRO (ed.), *Direttiva Ue contro le pratiche commerciali sleali, cosa cambia per le imprese e per i consumatori italiani*, Roma, 2019; and *ivi*, p. 24, F. ALBISINNI, *L'art. 62 del D.L. 1/2012 in Italia: una norma innovativa, ma incerta e poco applicata*; L. RUSSO, *Le pratiche commerciali sleali nei contratti della filiera agroalimentare e la direttiva UE 2019/633,* in L. SCAFFARDI – V. ZENO-ZENCOVICH (eds.), *Cibo e diritto*, cit., 2020, I, 377.

30) On those new tendency in Chinese legislation and practice see RUAN ZUALIN – YU YANGYAO, *Small Farmers Big Markets and Agricultural Food Safety*, in *Innovation in Agri-Food Law between Technology and Comparison*, cit, 104.

31) With the US legislation on COOL.

32) On recent legislation of some MS on the origin of food, see M. HOLLE, *Globalisation of Innovation. (Re-) Localisation of Food Law*, in *Innovation in Agri-Food Law between Technology and Comparison*, cit, 125.

33) B. VAN DER MEULEN, *Private Food Law*, Wageningen Academic Publishers, The Netherlands, 2011; P. VERBURGGEN, *Enforcing Transnational Private Regulation – A Comparative Analysis of Advertising and Food Safety*, Edward Elgar, 2014.

The law generated through these pathways becomes *ultra-national* and introduces to what has been called "*Global power*"[34] This is particularly true for *Agri-Food Law*, where regulatory authorities, technical rules and standards are typically transnational, and standards of private-law origin have large and relevant impact on the effective governance of the sector, giving place to what has been meaningfully qualified as the "*Hybridization of Food Governance*"[35].

A relevant element is increasingly present in recent EU legislation: the move towards a unified and systemic perspective, within the *Codification process*, which in the last twenty years characterized large part of the action of the European legislator in the areas of Common Agricultural Policy and of agri-food markets, from the point of view both of *food security* and of *food safety*.

The European reforms of CAP of this century, before and after the Lisbon Treaty, the revision of CAP in December 2013 and the "*omnibus*" regulation of December 2017[36], the new Regulations on Food Information to consumers[37], on Quality Products[38], on Official Controls[39], and recently the new Regulation on transparency in risk assessment in the food chain[40],

---

34) L. CASINI, *Potere globale. Regole e decisioni oltre gli Stati*, Il Mulino, 2016.
35) P. VERBURGGEN – T. HAVINGA (eds), *Hybridization of Food Governance. Trends Types and Results*, Edward Elgar, 2017.
36) With this name is commonly designated – by reason of its wide spectrum of intervention on different crucial junctions of the CAP discipline – Regulation (EU) No 2017/2393 of the European Parliament and of the Council of 13 December 2017, amending the four basic regulations of 2013 on CAP.
37) 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.
38) Regulation (EU) No 1151/2012 of the European Parliament and of the Council, of 21 November 2012, on quality schemes for agricultural products and foodstuffs.
39) Regulation (EU) 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.
40) Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019, on the transparency and sustainability of the EU risk assessment in the food chain. On this regulation see the comments and papers discussed in the annual Congress of AIDA-IFLA, University of Napoli Federico II – Portici, 11-12 October, 2019, published in the *Rivista di diritto alimentare* www.rivistadirittoalimentare.it, No 3-2019, 4-2019.

all marked the progressive emergence of *European agri-food Codes*, which are not single uniform codes, but rather *common codes*, where needs and subjects, national, regional and local, occupy a prominent place alongside the disciplinary choices expressed centrally, insofar as the *Code* is first of all a system of signals, of communication, of decryption, a way of interpreting (and therefore regulating) the experience of reality, which requires the sharing of a common language.

The process of codification of European law (in general, and specifically with reference to agriculture and food) implies, by its very nature, in a European Union that still has 27 Member States, a multilevel legislation, establishing principles, aims, methods, institutions, and integrating them through the cooperative contribution of several subjects:

- the European Commission, through the use of delegated powers and enforcement powers, as provided for by art. 290 of the TFEU;
- the Member States, through the adoption of national provisions in the exercise of the powers and competences recognized by a number of provisions of recent EU legislation[41];
- the international organizations, such as the World Health Organization; the Codex Alimentarius Commission; the World Organization for Animal Health (OIE); the European and Mediterranean Plant Protection Organization and any other regional plant protection organization established under the International Plant Protection Convention (IPPC); the IPPC Secretariat; the Organization for Economic Cooperation and Development; the UNECE - United Nations Economic Commission for Europe; the Secretariat of the Cartagena Protocol on the prevention of biotechnological risks related to the Convention on Biological Diversity; all

41) See, e.g., with reference to different topics, Reg. (EU) No 1169/2011, and Reg. (EU) 625/2017.

expressly referred to by EU agri-food legislation, within the scope of their respective competences.

It is a model of codification, and of codes, different from those of the nineteenth century, codes of nationality and separation, and that in some ways may recall the *Corpus Iuris Civilis Iustinianeum*, of recomposition of the past and at the same time of strong innovation, within a framework where the sources of law are different and plural, and an essential role remains assigned to interpretation, to *ius dicere*, in its judicial, administrative and doctrinal declinations.[42]

4.- Life Cycle: a holistic approach from science to legal regulation

Those lines of progressive integration of objects, goals, and responsibilities, in the EU and Global dimension, have been recently strengthened by Regulation 2017/625 on official controls[43], which locates topics and rules of *food safety* within the more general themes of the *integrity* and *wholesomeness*, lending a peculiar attention to the *authenticity* and *integrity* of the agri-food chain and to the *global dimension* of this chain from production to market, translating in innovative law rules the scientific consciousness on the interrelation of all aspects and forms of life.

The element of progressive systemic and institutional unification of official controls in the agri-food sector is certainly one of the identifying elements of this important reform of 2017, but it is not the only one.

---

42) Reference is made to the lesson of G. GORLA, *Giurisprudenza*, Voce della *Enciclopedia del Diritto*, XIX, Milano, 1970, 489; ID., *Diritto comparato e diritto comune europeo*, 1981, Giuffré.
43) See note 39 *supra*.

A short title of this regulation could be "*The Regulation of Globalization, Complexity, and Life Cycle*".

It is the *Regulation of Globalization*, not only with reference to the geographic dimension immediately and openly connected to markets and to international trade in the global market, but with reference to the *thematic* and *Institutional perimeter*, enhancing "*the global that is in us*"[44] even in terms of the binding legal rules.

At the same time, it is the *Regulation of Complexity* and *Life Cycle*, not only for the dimension[45]and for the many areas involved both in terms of substantive rules and of institutional subjects and procedures, but mainly for the complex and ambitious goals declared.

Art.1 on "Subject matter and scope", jointly mentions "*food safety, integrity and wholesomeness*". Such joint approach is confirmed in the institutional section of the regulation, which provides, inter alia, the "Designation of European Union reference centres for the authenticity and integrity of the agri-food"[46], as well as an "European Union reference laboratory" and "European Union reference Laboratories", aimed at ensuring quality, uniformity and reliability of analysis, testing and diagnosis, and improving and standardizing the activities of national laboratories[47], and introduces "Reference Centers of the European Union for Animal Welfare".[48]

---

44) For further indications on issues related to the growing domestic globalization of European food law, and so to the "*global that is in us*", please refer to the reports discussed during the Conference organized by Italian Food Law Association on 14-15 October 2015, in Milan, in occasion of the Expo, published in *Riv.dir.alim*. www.rivistadirittoalimentare.it, No 1-2016, with the introduction *Bricks and Stones of the GFL Laboratory*; and refer to L.COSTATO - F.ALBISINNI (eds.), *European and Global Food Law*, cit., and there to the introduction *The road to global Food Law*, and to chapter II, *The path to the European and Global Food Law System*.

45) 142 pages, 167 articles, 5 Annexes.

46) See artt. 97, 98, 98.

47) See artt. 92, 93, 94.

48) See artt. 95, 96, 97.

The identification of multiple goals, among them interacting, proposes an original holistic approach to the entire *Life Cycle* (not limited to food production), giving attention within this unified perspective also to the *environment* and to *any form of life*, including any sort of animals and plants, regardless of their destination.

Approach reinforced by the call for the guarantee of *authenticity* and *integrity* of the food supply chain, with the provision of the establishment of appropriate Centers of reference, and the adoptions of new definitions of *hazard*, *risk*, *operator*.[49]

Controls on animals and plants, are intended to guarantee the safety of food and feed products addressed to enter the human food consumption chain, but in the same time:

- assign to animal welfare and to the protection of plants from harmful organisms a proper value *ex se*, regardless of the reference to the safety and quality of food[50]; and

- assign to the green areas, to the forests of the Union, to biodiversity, to the environment, an attention not present in the previous Regulation on controls No 882/2004.[51]

Consistent with this broader thematic perimeter, which ends up investing all forms of life, the definitions of *hazard* and *risk* are rewritten.

In Regulation No 178/2002, *hazard* is defined as "a biological, chemical or physical agent in, or condition of, food or feed with the potential to cause an *adverse health effect*"[52], where the reference to *health* is intended as a reference to *human health* in accordance with Art. 1 of that regulation, which states: "This Regulation provides the basis for the assurance of a high level of

---

[49]) See art. 3.
[50]) See recital (7) of Reg. 2017/625.
[51]) See recital (8) of Reg. 2017/625.
[52]) Art.3.1. No 14 of Reg. No 178/2002.

protection of human health and consumers' interest in relation to food"[53], and *risk* is defined as "a function of the probability of an *adverse health effect* and the severity of that effect, consequential to a hazard" [54].

In the new regulation of 2017, *hazard* is defined as "any agent or condition with the potential to have an adverse effect on *human*, *animal or plant health, animal welfare or the environment*;" [55]; and consequently *risk* is defined as "a function of the probability of an adverse effect on human, animal or *plant health, animal welfare or the environment*, and of the severity of that effect, consequential to a hazard;" [56].

Hazards and *risks*, which must be considered during official controls under the new regulation, are no longer only those that can affect human health, directly or indirectly, but - in a much wider perspective - all those which, in addition to human health, can affect animal or vegetable health, animal welfare or the environment: in a word all those that can have effects on the *Life Cycle* as a whole.

If Regulation No 178/2002 marked, in an express and declared way, the transition to a *supply chain* approach[57], looking however only to the "*food production chain*"[58], the new regulation on controls of 2017 expresses the awareness that attention to the *agri-food chain* (and not just to *food chain*[59]) necessarily implies a more general attention to everything that in various ways is connected to the *Life Cycle*, and to all the phases of use of products of

---

53) Art.1.1. of Reg. No 178/2002.
54) Art.3.1. No 9 of Reg No 178/2002.
55) Art.3(23) of Reg. 2017/625.
56) Art.3(24) of Reg. 2017/625.
57) See art. 1 and 3 of Reg. No 178/2002.
58) See recital (12) of Reg. No 178/2002, which states: "In order to ensure the safety of food, it is necessary to consider all aspects of *the food production chain* as a continuum from and including primary production and the production of animal feed. ".
59) See recital (3) of Reg. 2017/625 and the numerous recitals that follow it in the same perspective, and which stress among other things that the overall dimension of *agri-food chain* involves many aspects and objects untreated by the previous Reg. 882/2004 (thus, among others, recitals 17 and 19).

plant or animal origin, even if not immediately or clearly connected to the cycle of food production and distribution.

Consistent with this new approach, the operators to whom the new system applies are not identified with the "food business operators" referred to in Regulation No 178/2002[60] and in Regulation No 882/2004[61], but with a formula that exceeds the perimeter of the "food sector" and identifies the operator in "any natural or legal person subject to one or more of the obligations provided for in the rules referred to in Article 1 (2)".[62]

The operator thus identified by Regulation 2017/625 does not include only those who work within the agri-food supply chain, "*from farm to table*", but also anyone involved in animal health or welfare[63], protection against harmful organisms for plants[64], plant protection products and pesticides [65], environmental profiles; in a word: anyone who has to do with the biological cycle, regardless of the declared location within or outside the food chain.

This path of EU legislation, expressly related to goals and tools of *food safety*, finds a significant correspondence in the evolution of CAP, which led to a systemic definition of *agricultural activity* with Regulation (EC) No 1782/2003[66] and with subsequent reforms of 2009[67] and 2013[68].

---

60) Pursuant to art. 3, par. 1, n. 3, of Reg. No 178/2002.
61) See art. 2.1. of Reg. No 882/2004, which refers to the definitions introduced by artt. 2 and 3 of Reg. No 178/2002, and art. 3 of Reg. No 882/2004, which provides for the application of the controls envisaged by the regulation to "feed or food business operators" and to "feed and food businesses".
62) Art.3.1. (29) of Reg. 2017/625.
63) Art.1.2. lett. d) and f) of Reg. 2017/625.
64) Art.1.2. lett. g) of Reg. 2017/625.
65) Art.1.2. lett. h) of Reg. 2017/625.
66) Council Regulation (EC) No 1782/2003 of 29 September 2003, establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers.
67) Council Regulation (EC) No 73/2009 of 19 January 2009, establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers.
68) Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013, establishing rules for direct payments to farmers under support schemes within

After the MTR of 2003, the declared objects of the CAP intervention are no longer the products nor the production, but the agricultural activity as such.

The explicit placing of "maintaining the land in good agricultural and environmental conditions" within the definition of "*agricultural activity*"[69], it is not an accidental provision, but emphasizes the absence of any immediate link with production.

The activity is qualified *agricultural* by reason of the relationship with the *land* and with the organisms that populate it, and not by reason of the use of it for production.

The regulation on controls in 2017 builds to some extent a bridge between these two paths, food safety and the CAP, in the direction of a systemic framework, enhancing the responsibility of the any subject which in any way operates within the biological cycle or the environment, regardless of the final goal of such activity, food or otherwise.

Explicit confirmation comes from the new provisions of Regulation 2017/625 dedicated to wood and its possible pathologies[70], as well as to plant diseases[71].

In a regulation which has a multiple legal basis in art. 43(2) (CAP), art. 114 (internal market), art. 168(4)(b) (protection of public health in the veterinary and phytosanitary sectors), specific rules are laid down on the import of wood and wood logs, wood packaging materials, trees, shrubs, forest reproductive material.

---

the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009.

[69]) See art.2(c) of Reg. No 1782/2003.

[70]) See recital (61) of Reg.2017/625.

[71]) See art. 3, par. 1, n. 21 and 22, of Reg.2017/625, on the broad definition of plant products and the possible vectors of plant diseases.

The recent spread of serious plant diseases, although not dangerous for human health, but highly harmful to trees, such as the red palm weevil and the xylella for olive trees, has increased the attention to these diseases.

However, it appears relevant that – within the systemic approach of Regulation 2017/625 – the answer to these pathologies has not been researched only in specific and exceptional measures (such as those adopted a few years ago after the crisis triggered by infected seed sprouts)[72].

The topic of the care of wood and forest products has been brought into a regulation on controls aimed to ensure the joint application of food and feed law (but also of rules on animal health and welfare, plant health and plant protection products)[73], which places attention to human health within a wider perspective of *attention to life in all its aspects*, adopting a scientific systemic consideration of life and environment as foundation canon.

The holistic approach putting the whole *cycle of life* at the center of the legislative attention, and assuming *wholesomeness* and *integrity* as fundamental parameters of any action along the *agri-food chain*, links the new EU Food Law regulation on controls to the current framework of EU Agricultural Law centered on environmental awareness.

In the same time it also rediscovers some paradigms of national Agricultural Law, dating back to the first half of the XX century, for a long time shadowed at EU level by the prevailing attention given in the first decades of CAP to production and products.

Reference is made here to a central figure in the Italian legal system, that of the agricultural entrepreneur, introduced by the Civil Code of 1942, and

---

72) On the four special regulations adopted after the crisis triggered by the seed sprouts, see V. PAGANIZZA, *Les quatre Mousquetaires (ou mousquetons) against E. Coli: the Regulations (EU) 208/2013, 209/2013, 210/2013, 211/2013 and the "excesses" in security*, in *Riv.dir.alim.*, www.rivistadirittoalimentare.it, No 2-2013, p. 36; ID., *Dai cetrioli spagnoli ai semi di fieno greco egiziani: crisi risolta*, in *Riv.dir.alim.*, www.rivistadirittoalimentare.it, No 3-2011, p. 31.

73) As specified already in the title of the Regulation; see *supra* note 20.

specified in 2001 with the decrees reforming national agricultural legislation.[74]

As it is well known, present wording of Art.2135 of the Italian Civil Code specifies that are considered *essentially agricultural* "the activities directed to the care and to the development of a *biological cycle or of a necessary phase of the same cycle*, of vegetal or animal character".

The explicit assumption among the essential agricultural activities of any activity related to the biological cycle, moved from the consideration that the *cycle of life* cannot be reduced to individual moments, but by its nature requires attention to the entire *agri-food activity chain*, considered not only *vertically*, from farm to table as understood by European food law, but also *horizontally*, in reference to *all that pertains to life*, even if apparently not directly placed in the path that leads to final food or feed.

This perspective found in the mentioned recent EU legislation on official controls a significant expression, in a framework which from the protection of human health systematically shifts to the protection of the whole *Life Cycle*.

The European legislator arrived at this result through a plurality of paths, articulated along a number of steps, distinct but to some extent convergent.

The path observed here is the one linked to *food safety*, to the hygiene and health safety of products intended for human consumption, which from products has been extended to the whole *food business*, including in this definition even the *primary production*.[75]

---

74) Leg. Dec. 28 May 2001, No 228. On the innovative perspective opened by the 2001 reform on the identification and regulation of the agricultural business, see L. COSTATO (ed.), *Commentario a I tre «Decreti orientamento» della pesca e acquacoltura, forestale e agricolo*, in *Le nuove leggi civ.comm.*, 2001, p.668 ss., and there the comments by A. GERMANÒ, F. ALBISINNI, S. BOLOGNINI, P. BORGHI, S. CARMIGNANI, E. CASADEI, G. CASAROTTO, L. RUSSO, G. SGARBANTI.

75) See art.2 of Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs, which for the first time introduced a general definition of *food business* to cover the entire chain from processing and manufacturing to distribution and sale, nevertheless excluding the primary production, and art.3 of Reg No 178/2002, which extended the definition to include also the primary production.

Today, with Regulation 2017/625, EU legislation on *food safety* is still expanding to include also what does not directly affect food as such, but nevertheless affects the *life cycle* of plant or animal organisms and the environment, in clear awareness that attention to human health cannot be taken by itself alone, but it is necessarily part of the attention to the health of all that is living.

In this sense, the wide definition of "*operator*" introduced by Regulation 2017/625 appears based on the same considerations which led to the new text of art. 2135 of the Italian Civil Code, although the new Regulation at the same time extends its own area of application well beyond agricultural activity, including even all the following phases of transformation, manipulation, transport, marketing.

In other words, the *life cycle operator* drawn up by the new regulation appears coherent with the Italian definition of agricultural activity based on the attention to the *biological cycle*, and shares with this a logic of *specialty*, not as expression of privileges or exemptions, but by reason of the acknowledged pre-eminent importance of interests, rights, and values to be protected, both in agriculture and in food.

In this perspective, the regulation is part of a line, not just European, which in recent years is receiving growing attention also in the U.S.A.[76] and in China[77]; a line that tends to enhance the *authenticity, wholesomeness* and *integrity* of *agri-food products* as a necessary element of a scientific notion of *food safety* as a whole, necessarily located within the general attention to *life safety* in its *wholesomeness*.

---

76) M.T. ROBERTS – W. TURK, *The Pursuit of Food Authenticity*, UCLA School of Law, 2017.
77) J. LEPEINTRE – J. SUN, (eds.), *Building Food Safety Governance in China*, Luxembourg Publications Office of the European Union, 2018.

5.- The transnational dimension

The innovative trends in European agri-food legislation gave rise to a regulatory system which is *polycentric*, both for the sources (European, national, and international; legislative, administrative, and judicial), and for the goals, the objects and the interests considered.

But EFL is increasingly taking on also a *transnational dimension*, in the two aspects of acting as the source of rules producing effects well beyond the borders of European Union, and of being open to the operation of external sources within the EU legal system.

These measures have been introduced through International Agreements or Association Accords, but also through the adoption of internal rules, projected into an external dimension[78]. Along this path, institutions springing from within the European market acquired a transnational dimension and conveyed their own original models to other legal systems, and reciprocally foreign sources are operating within the EU legal order, in some cases as leading references, and in some cases as elements of binding rules.

A relevant example is that of the extension of rules on PDO and PGI products to non-EC products.

---

[78]) With reference to IGs and to the peculiar different national approaches, see M. A. ECHOLS, *Geographical Indications for Food Products. International Legal and Regulatory Perspectives*, Wolters Kluwer, International 2008, who underlines in the *Introduction*, at p. 3: "The TRIPs Agreement leaves each WTO Member with the flexibility to decide how to apply and enforce its GI commitments. As a consequence, there are two principal regulatory approaches to implementing the TRIPs rules about geographical origins for foods. One approach is to create *sui generis* system, which applies only to the recognition and protection of geographical indications for foods. The European Communities is the paradigm, but India, and the People's Republic of China, among others, also have adopted *sui generis* systems. The second approach is to include the recognition and protection of geographical indications for foods within the trademark law. Here the United States is the paradigm, but many other jurisdictions follow the approach including Canada, Japan, the Russian Federation and South Africa".

It is sufficient here to recall Regulation No 692/2003[79], which, modifying rules originally introduced by Regulation No 2081/92[80], provided for a specific operative procedure for registration and protection, as PDO or PGI, of agri-food products from third countries. This possibility had been already envisaged in Regulation No 2081/92, but in that text it was no more than the statement of a principle, not accompanied by operative rules, as shown by the circumstance that at the time this opportunity had not been used by any third Country.

Regulation No 692/2003 introduced innovative provisions, adopting specific detailed procedures, identifying the subjects admitted to benefit of this protection, and setting the rules for conflict resolution[81].

Under Regulation No 692/2003 this opportunity was subject to a *reciprocity rule*: the interested third countries should grant analogous protection to agri-food products coming from EC; a condition which in fact was a strong barrier against the use of such opportunity by non-EC producers.

Only few years later, Regulation No 510/2006[82] excluded the reciprocity clause, shaping European rules in conformity to a decision of the WTO Panel, which in 2005 declared unlawful such clause, deciding a controversy on geographical indications between USA and EC[83].

The possibility to grant protection to products obtained outside EU, even in absence of any reciprocity, has been later confirmed by Regulation No

---

79) Council Regulation (EC) No 692/2003 of 8 April 2003 amending Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

80) Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

81) See Articles 12a, 12b, 12c, 12d, added to Regulation No 2081/92 by Regulation No 692/2003.

82) Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, which repealed Reg. No 2018/92.

83) WTO Panel Report United States *v. European Communities*, 15 March 2005*, DS174.*

1551/2012[84], which repealed Regulation No 510/2006 and is currently in force.

In a short number of years, many geographical designations of agri-food products obtained in non-EU countries, from Columbia coffee, to tea from certain regions of India, to numerous Chinese products, have obtained effective legal protection within EU.[85]

On the other hand, models springing from European agri-food regulation are increasingly acquiring a transnational dimension, spreading well beyond EU borders.

Within this perspective, European Union is acting as a subject laying down original rules to qualify and protect its own products, but in the same time is providing protection to products obtained beyond its own borders, promoting a model which by itself has *transnational elements* and has been largely borrowed by third countries.

The European model of PDO and PGI has been voluntarily adopted, during the last decade, by many third countries and introduced within national legal systems[86], not only through partnership and association agreements, but also through the adoption of internal rules, projected into an external dimension[87].

---

84) Regulation (EU) No 1151/202 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.

85) Café de Columbia (PGI), entered in the Register of PDO and PGI by Commission Regulation (EC) No 1050/2007 of 12 September 2007. Since then many Chinese products designations have been filed in the Register of PDO and PGI: Jinxiang Da Suan PGI (garlic); Guanxi Mi You PDO (kind of fruits); Lixian Ma Shan Yao PGI (tuber called igname); Longjing cha PDO (thé); Shaanxi ping guo PDO (apple); Longkou Fen Si PGI (vermicelli); Zhenjiang Xiang Cu PGI (vinegar); Yancheng Long Xia PGI (shrimp); Pinggu Da Tao PDO (peach); Dongshan Bai Lu Sun PGI (fruit). The updated list of designations, applied, published, and registered, is published at http://ec.europa.eu/agriculture/quality/door/list.html?locale=en.

86) See M. FERRARI – U. IZZO, *Diritto alimentare comparato*, Il Mulino, Bologna, 2012; and with specific reference to the recent Turkish legislative reforms introducing protection for GIs for agri-food and artisanal products, see A. ŞULE SONGÜL – E. SELIN CILA, *Geographical Indications for Traditional Food Products in Turkey*, in *Riv.dir.alim*. www.rivistadirittoalimentare, n. 1-2014, 15.

87) For further indications on those experiences, see F. ALBISINNI, *Strumentario di Diritto Alimentare Europeo*, Utet, Wolters Kluwer, 4^ ed., 2020, Chap. I, par. 11.

A similar trend may be observed in the crucial area of *food safety*. Anyone who wishes to export to Europe must conform to the European technical rules and health and hygiene requirements, e.g. adopting systems of traceability for bovine meats, thereby putting into effect the model of law that becomes "*another country's national law*"[88]. In the same time, regulatory tools adopted by EU Food Safety Law – like HACCP, or traceability – have been largely adopted during the years by many other legal systems[89].

6.- Legal transplants

As evidenced by the mentioned experiences on IGs and on Food Safety models, we are facing a growing tendency to *Legal Transplants* in the area of *Agri-Food Law*, through communication and contamination among legal systems, with all the uncertain consequences, which may result from *uses and misuses*[90] of such legal technics[91].

Within the present shared dimension of *Global Agri-Food Law* many sources of law (not necessarily binding, but nonetheless relevant) cooperate to establish common rules regulating day to day life of food producers and

88) F. GALGANO, *La globalizzazione nello specchio del diritto*, Il Mulino, Bologna, 2005.
89) See M. T. ROBERTS, *US Food Law: responding to Changing Social Conditions*, in *European and Global Food Law*, cit., 57; SUN JUANJUAN, *Evolution and Recent Update of Food Safety Governance in China*, in *European and Global Food Law*, ibidem, 87; L. GONZÁLEZ VAQUÉ – H. A. MUÑOZ UREÑA, *Trends in Food Legislation in Latin America,* ibidem, 107.
90) Reference is made to O. KAHN-FREUND, *On Uses and Misuses of Comparative Law*, in 37 *Modern Law Review*, 1974, and to A. WATSON, *Legal Transplants: An Approach to Comparative Law*, 1974, Edinburgh; more recently on those topics see M. ZONGLING SHEN, *Legal Transplant and Comparative Law*, in *Revue international de droit comparé*, 1999, vol. 41, n, 4, 853; and J. W. Cairns, *Watson, Walton, and the History of Legal Transplants*, in *Georgia Journal of International and Comparative Law,* vol. 41, No 3,2013, p. 637. In a different perspective, on the share of legal tools and models see G. GORLA, *Il ricorso alla legge di un «luogo vicino» nell'ambito del diritto comune europeo*, in *Foro it.*, 1973, V, 89; R. SACCO, *Legal Formants: a Dynamic Approach to Comparative Law,* in 39 *American Journal of Comparative Law*, 1991, 1-34.
91) Technics not neutral by themselves, as observed by P.G. MONATERI, *Methods in Comparative Law*, cit.

consumers, building new models of *Governance* in this sensitive area of experience.

Globalisation appears to be a relevant engine of legal innovation in the *EAFLS- European Agri-Food Law System*, linked to "*the proliferation, as a functional response to the changing needs of the world community, of global regulatory systems by sector*"[92], and it is bringing radical changes in the traditional *law-making process*, since "the announced change cannot fail to imply a reconsideration of the method applied in drawing up our rules, on the sources of such rules", on the "relation between *production* and *food*, or rather, between *agricultural product* and *foodstuff*[93].

International agreements certainly have played and are still playing a relevant role.

It is sufficient here to mention the WTO agreement, the well known cases discussed before the WTO panels (from use of hormones in bovine meat, to GMOs, to GIs), the Treaty signed by EU and Vietnam, the CETA, the negotiations on the TTIP even if not arrived to a final result, and very recently Regulation (EU) 2019/1753 on international protection of European PDOs and PGIs[94].

But, together with international agreements, a relevant role is played, within the *EAFLS*, by recommendations of international organisations and institutions, such as the Codex Alimentarius Commission, UNECE, OIV, as sources of *soft law* and in some cases of something near to *hard law*.

A number of provisions offer clear evidence of this experience of communication and contamination:

---

92) E. CHITI – B.G. MATTARELLA (eds.), *Global Administrative law and EU Administrative Law*, Berlin, 2011.

93) A. JANNARELLI, *Il diritto dell'agricoltura nell'era della globalizzazione*, 2^ ed., Bari, 2003.

94) Regulation (EU) 2019/1753 of the European Parliament and of the Council, of 23 October 2019, on the action of the Union following its accession to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications.

– Article 2.(3) of Regulation No 178/2002, on definition of "*food*", while for medical products, cosmetics, tobacco and tobacco products, makes reference to EEC directives to establish the difference with food products, for "*narcotic or psychotropic substances*" makes reference to two United Nations conventions , ruling that «"Food" shall not include: … g) narcotic or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971». European Union is not a part of those conventions, but as an effect of Regulation No 178/2002 those international sources operate within the EFLS. It remains open the crucial question: is this a *static reference* to the content of the mentioned conventions in their historical text, or the provision of Article 2.(3)(g) of Regulation No 178/2002 must be interpreted as a *mobile reference*[95] including all the subsequent modifications of the text and annexes of the Conventions, thereby introducing those UN conventions as sources of law directly operating within the EU legal system [96]?

– the Single CMO Regulation of 2007,[97] confirming a guide-line introduced by Regulation (EC) No 1182/2007,[98] established that the marketing standards to be adopted by the EU Commission should be drafted "t*aking into account, in particular … as regards the fruit and vegetables and the processed fruit and vegetables sectors, the Standard recommendations adopted by the UN-Economic*

---

95) On the long standing debate on *material reference* (rinvio materiale) and *formal reference* (rinvio formale), see C. MORTATI, *Istituzioni di dritto pubblico*, Cedam, 1967, I vol., p. 283, and the judicial cases and scholars thereby cited.

96) The European Parliament underlined in its document of 4 February 2003 (DT\488454IT.doc. in www.europarl.europa.eu) the "illogical effects" and the uncertainty arising from the missing coordination between the two UN Conventions and the EU provisions.

97) Reg. No 1234/2007, later repealed by Reg. No 1308/2013, presently in force. See Chapter XVIII.

98) Council Regulation (EC) No 1182/2007 of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector, which extended to processed fruit and vegetables a rule previously introduced by Reg. No 2200/96 only for fresh fruit and vegetables.

Commission for Europe (UN/ECE)"[99]. UN/ECE was created in 1947 as one of the five regional commissions of the United Nations, to promote; it includes 56 member States in Europe, North America and Asia[100]. By its nature, UN/ECE tends to operate in favour of uniformity and standardisation, so that "*taking into account*" UN/ECE recommendations could imply to introduce within EU law making process an external source operating along lines and priorities which may be quite different from those of the representative EU institutions.

– with specific reference to the wine sector, both the Single CMO of 2007[101] and the present Single CMO of 2013[102], expressly underline that "*When authorising oenological practices in accordance with the procedure referred to in Article 195(4), the Commission shall: (a) base itself on the oenological practices recommended and published by the International Organisation of Vine and Wine (OIV)*",[103] referring to OIV recommended practices also to establish methods of analysis for oenological products,[104] and to establish rules to accept oenological practice of imported products.[105] Even in this case, recommendations of an international voluntary organisation, adopted without any clear disclosure of interests involved, may operate directly within the EU law making process.

---

[99]) Art. 113(2)a(v) of Reg. No 1234/2007, as modified by Reg. No 361/2008 of 14 April 2008; and now Art.
[100]) See www.unece.org.
[101]) Reg. No 1234/2007.
[102]) Reg. No 1308/2013.
[103]) Art. 120*f* of Reg. No 1234/2007; see also, with similar wording, Art. 80(3)a of Reg. No 1308/2013.
[104]) Art. 120*g* of Reg. No 1234/2007; see also, with similar wording, Art. 80 of Reg. No 1308/2013.
[105]) Art. 158*a* of Reg. No 1234/2007; see also, with similar wording, Art. 90(2) of Reg. No 1308/2013.

– Commission Regulation No 606/2009[106], laying down detailed rules on oenological practices, expressly assigned direct application within EU legal system to the oenological practice approved by OIV with reference to the purity and identification specification of substances used in oenological practices.[107]

Through mechanisms of direct or indirect referral, within sensitive areas of regulation, soft law originating within institutions of globalisation is therefore progressively influencing EU law acquiring in some cases the proper nature of hard law.

The European dimension results no more sufficient to comprehend the complexity of real world (the nature of things), and it is forced to take into account a Global dimension, which expresses a conscious tendency to share models and answers on the basis of shared experiences.

We are facing a tendency to communication within *Global Markets* of legal models of *Agri-Food Law*, with a growing tendency to share models and answers on the basis of shared experiences.

In this perspective *European Agri-Food Law*, by its nature, must now be appreciated as *European and Global Law*, in the true comparative sense of communication and contamination among legal systems.

It seems reasonable to imagine that in the next few years we will see other relevant innovations, both institutional and on the substance of regulation, and to conclude that *Agri-Food Law*, with its multiplicity of legal bases, of

---

106) Commission Regulation EC) No 606/2009 of 10 July 2009 laying down certain detailed rules for implementing Council Regulation (EC) No 479/2008 as regards the categories of grapevine products, oenological practices and the applicable restrictions; recently repealed by Commission Delegated Regulation (EU) 2019/934, of 12 March 2019, supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards wine-growing areas where the alcoholic strength may be increased, authorised oenological practices and restrictions applicable to the production and conservation of grapevine products, the minimum percentage of alcohol for by-products and their disposal, and publication of OIV files.

107) Art. 9 of Reg. No 606/2009.

goals, of legal tools, pays the price of giving systemic order to a sector full of intertwining tensions, but at the same time expresses a peculiar way of European rule-making, moving toward a complex polycentric governance of interests and activities, where International, Global, European, and National levels intersect, and where private and public responsibilities are brought to unity through vertical and horizontal cooperation and subsidiarity.

7.- Rights and remedies: administration and jurisdiction facing globalization

As it is well known, *No remedy no rights* is a principle dating back to equity, which common law scholars have always considered essential for the protection of individual freedom, identifying its roots in the old principle of Roman Law *Ubi Jus Ibi Remedium*.

Leaving aside any political consideration, it may be considered as generally accepted that in the majority of national States, citizens, consumers, and commercial operators benefit to-day of administrative and judicial *remedies* to effectively protect their *rights*.

But this is true in the national and European dimension, almost in general terms and with reference to the *law in the books*, while the transnational dimension of agri-food trade and regulation puts under stress the traditional categories of *national remedies*

Some measures adopted by the EU Commission, and some cases decided by the Court of Justice, dealing with the sensitive topic of the operation of transnational institution and sources within the *European Agri-Food Law System*, well illustrate peculiarities and critical issues of present *law in action*.

7.a) The EU Commission and the international trade of agri-food products

As noticed above[108], the search for original solutions, intended to guarantee knowledge, participation, accountability in the global agri-food market, led in Regulation (EU) 2017/625, as well as in other legislative acts of these years, to the introduction of new institutions, as well as of new substantive rules, and to the identification of administrative models and decisions appropriate to the global dimension of the market.

Such innovations imply relevant questions on issues of justice and protection.

Regulation 2017/625, in one of its first articles, solemnly states: "The decisions taken by the competent authorities in accordance with Article 55, Article 66(3) and (6), Article 67, point (b) of Article 137(3), and Article 138(1) and (2), concerning natural or legal persons *shall be subject to such persons' right of appeal in accordance with national law*."[109] But this is a provision placed within Title II, dedicated to "Official controls and other official activities in the Member States", which as such does not seem to add significant protection tools compared to what is already guaranteed by the national laws and by the European Treaties.

On the other hand, the operation of the new Data Processing System (IMSOC), and the possible protection of the operator concerned, are not specifically regulated, as much as the new regulation provides only that ratings of individual operators may be communicated to the public subject to the conditions that "(a) the rating criteria are objective, transparent and

108) See *supra* par. 4.
109) Art. 7.1.

publicly available; and (b) appropriate arrangements are in place to ensure the fairness, consistency and transparency of the rating process."[110]

This is a provision, whose scope of operation - beyond the generic wording used - is in any case limited to the possibility of communicating or not to the general public the rating of individual operators.

The question of the use of such data by public authorities is quite different.

In other words: if a certain rating is the condition for sanctions which can be imposed to the operators[111], the point is to identify which *remedies*, judicial or administrative, can be used by the operator concerned to act for the rapid modification of a rating unfavorable to him, resulting by the information provided by authorities different from those responsible for keeping records and from those responsible for adopting sanctions.

It is certainly possible to apply to the Court of Justice against measures taken by the European Commission as the subject responsible for maintaining the Data Processing System (IMSOC), but areas of evident uncertainty remain open as to the *remedies* to challenge not how the Commission processed the data received, but instead the same accountability of the data entered, communicated to the Commission by national administrations, EU and non-EU.

A recent administrative measure of the EU Commission well illustrates this point.

The case concerns the importation in EU of meat products from non-EU countries.

Regulation (CE) No 854/2004[112], provides at Art. 12.1. that products of animal origin may be imported into the Community only if they have been

---

110) Art.11.3.
111) As provided by artt. 9, 44, 54, 79, 138.
112) Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004.

obtained in establishments registered in a list updated by the EU Commission on the basis of the guarantees provided by the authorities of third countries of origin and of the information provided by the authorities of the Member States.

In May 2018 the Commission amended this lists, adopting an implementing regulation[113], which excluded some Brazilian establishments previously included. After this decision products from those Brazilian factories are no more admitted in Europe.

The Commission decision was expressly based on:

- notification from Member Sates of cases of presence of Salmonella in poultry meat and poultry meat preparations, originating from several establishments in Brazil;

- "information provided by the Brazilian competent authorities" on cases of fraud found in Brazil concerning laboratory certification for meat and meat products exported to the Union;

- "ongoing investigations and recent action of the judiciary in Brazil".[114]

The Commission's decision results therefore adopted not only on the basis of the reports by Member States on the controls carried out at the Union's borders, but also on the basis of the information provided by the "Brazilian competent authorities" on "cases of fraud", as well as on "ongoing investigations and recent interventions of the judiciary in Brazil".

It is thus recognized legal relevance, as basis for the adoption of the EU decision of excluding these establishments "from imports into the Union of specified products of animal origin"[115], to acts of authorities of non-EU countries, without specifying whether the interest parties have been admitted

113) Commission Implementing Regulation (EU) 2018/700 of 8 May 2018.
114) See recitals (4), (5), (6) of Reg.2018/700.
115) See art. 1 of Reg. 2018/700.

to participate to the proceedings, which rights (if any) have been guaranteed to them, who performed the tests, what have been the analytical results of microbiological checks.

Any judicial action against the EU exclusion of the establishments should therefore pass through prior judicial or administrative action at national level (in this case: in Brazil with reference to the acts of Brazilian authorities; and in MSs with reference to the notification to the Commission of cases of salmonella) against the acts and the authorities taken into account by the Commission; acts and authorities not specifically mentioned in the EU implementing regulation, with consequent difficulty of any legal action also in this respect.

The dimension of mutual interaction between institutions of sovereign jurisdictions, distinct but all operating in the shared arena of the "*space*" of production and trade[116], is strongly enhanced by Regulation 2017/625 through the establishment of a shared and unitary database and the assignment of a rating to each operator. But the serious problems that such interaction can cause in terms of the effectiveness of the protection of the operators in this global arena – as evidenced by the case of the Brazilian meat – remain unresolved even after the adoption of the new Regulation.

7.b) The EU Commission, the Court of Justice and the "Piadina Romagnola"

This conclusion is confirmed by the second case, which does not involve non-EU countries, taking place entirely in the European dimension, but makes evident the critical issues of proceedings that expressly include, at

116) N. IRTI, *Norma e luoghi. Problemi di geo-diritto*, Laterza, Bari-Roma, 2001.

various levels, authorities and institutions, administrative and jurisdictional, of different political entities, therefore entering in a *transnational dimension*.

The case concerns the litigation, which lasted for several years, on the recognition of the "*Piadina Romagnola*" or "*Piada Romagnola*" PGI.[117]

In December 2012, the Italian Ministry of Agricultural Policies granted provisional protection at national level to the "*Piadina Romagnola/Piada Romagnola*" PGI, limiting the production area to some areas of Romagna but including in the protection both industrial and artisan products. Opposing this decision, a major industrial manufacturer of Piadina, located in Emilia and not in Romagna[118], applied to the competent Administrative Tribunal. This Court, with a decision of 15 May 2014, upheld the claim by declaring that the territorial limitation could be applied only to the artisan production, and not to the industrial one, and therefore annulled the Italian decree.

Some days after, on 21 May 2014, the Commission published the application for registration transmitted by the Italian Ministry and based on the original text of the Italian decree. The company, which had successfully proposed the judicial claim against the Italian decree, reported to the European Commission the judicial decision, asking to revoke the publication of the application for registration. The Commission did not accept such request and some months later (at the request of the Italian government, which in the meantime appealed to the Council of State against the decision of first instance) adopted the implementing regulation of 24 October 2014[119] recognizing the PGI "*Piadina Romagnola/Piada Romagnola*" with the product

---

117) For a comment see V. PAGANIZZA, *Dalla padella alla brace: la Piadina Romagnola IGP, dal "testo" al Consiglio di Stato*, in *Riv.dir.alim.*, www.rivistadirittoalimentare.it, No 3-2014, p. 45.

118) It must be considered that "Emilia" and "Romagna" are two different areas of one single administrative Region, whose name is "Emilia-Romagna".

119) Commission Implementing Regulation (EU) No 1174/2014 of 24 October 2014 entering a name in the register of protected designations of origin and protected geographical indications (*Piadina Romagnola/Piada Romagnola* (PGI)).

specification proposed by the Italian government, despite the circumstance that the appeal to the Council of State was still pending and not decided, and that the ruling of the Administrative Tribunal that partially repealed the national decree was at that time fully enforceable.

With a claim to the EU Tribunal of January 2015, the applicants asked to cancel the implementing regulation, as adopted on the basis of a product specification at that time no longer effective, because repealed by the decision of the Italian Administrative Tribunal.

Sometime later, however, the Italian Council of State, by judgment of 13 May 2015[120], annulled the decision of the Administrative Tribunal, rejecting the claim against the Italian decree.

More than two years after the decision of the Council of State, on 12 September 2017, the case before the EU Tribunal was discussed, and was later decided by judgment of 23 April 2018, which rejected the claim and declared the legitimacy of the registration ordered by the European Commission.[121]

In the reasons of the decision, the EU Court acknowledged that the Commission in October 2014 could not register the PGI, since at that time it was fully effective the decision of the national judge which annulled the product specification approved by the Italian Government. The Court specified that – on the basis of the principle of *good administration*[122] – the Commission had the duty to wait the conclusion of the national judicial procedures before deciding on the registration at EU level. On such basis the

120) Italian Council of State, 13 May 2015, decision No 2405/2015.
121) Judgment of the General Court (Second Chamber) of 23 April 2018, T-43/15 - *CRM v Commission*.
122) Point 75.

Court declared that the Commission irregularly accepted the request of registration[123].

However, the Court dismissed the action, taking into account that a cancellation of the contested registration would be of no practical effect, due to the circumstance that the Commission should be under duty to reopen the file on the basis the subsequent decision of the Consiglio di Stato which validated the Italian decree[124].

The Court also ruled that there had been no violation of the right to effective judicial protection under Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, since the appellant had been able to have recourse to national judges and to the European judge. [125]

The whole affair, and its conclusion, leave many open questions.

Incidentally, it should be underlined that the Court of Justice, while expressly recognizing the violations by the Commission, ordered the applicants to pay two thirds of the costs incurred by the Commission in the proceeding, compensating only the last third, without considering in any way the circumstance that at the time the claim was filed before the EU Court it was well founded, since - as expressly stated in the decision – at that time the Commission could not approve the proposal of the Italian government.

In other words: the EU judge acknowledges that the plaintiffs were right when the claim was filed, dismisses the claim on the ground of new circumstances occurred during the proceeding, but nevertheless condemns the applicants to pay two thirds of the costs!

---

123) Points 91 and 92.
124) Point 93.
125) Point 103.

This recent case within the EU borders seems to confirm with exemplary evidence the unresolved serious difficulties in getting effective protection, within an agri-food *transnational market*, where different administrations remain subject to distinct jurisdictions, in the absence of specific rules aimed to guarantee remedies consistent with the *globalization of administration*.

7.c) The Court of Justice and the Rio de Janeiro convention

A much older case, of 2001[126], may be considered as a leading case on the topic of the effect of international treaties within domestic EU legal system.

The Court of justice was called to decide on the application of the Kingdom of Netherlands for the annulment of the EC Directive of 1998[127] on the legal protection of biotechnological inventions.

The Court rejected all the pleas of the applicant, with a decision relevant for the arguments and the consequences, even if concise[128].

Netherlands, the only MS which voted against the approval of the Directive, applied for the annulment, on the basis of seven different pleas.

All those pleas are interesting, as much as they involve basic principles of EC law[129], but with reference to the transnational and international dimension of sources of law here discussed, the relevant points are those submitted in the fourth plea, which was based on the alleged duty to comply

---

126) Court of Justice, 9 October 2001, C-377/98, *Kingdom of Netherlands v. European Parliament. Council of European Union, Commission of European Communities.*

127) Directive 98/44/EC of the European Parliament and of the Council, of 6 July 1998, on the legal protection of biotechnological inventions.

128) As Gino Gorla pointed out in his lessons on jurisprudence as source of law, it must be noticed that in some cases the brief dimension of the reasons of a judicial decision may reflect the lack of full agreement of the entire judging panel on the conclusions reached; so that persuasiveness is sacrificed to the assertiveness of *decisum*.

129) For a analysis of the entire decision of the Court, see F. ALBISINNI, *Strumentario di diritto alimentare Europeo,* IV ed., cit., p. 391.

with international conventions.

European Community at that time had approved the Agreement on Trade -related aspects of Intellectual Property Rights (TRIPs)[130], and the Convention on Biological Diversity signed in Rio de Janeiro on 5 June 1992 (Cdb)[131].

Art. 1.2. of Directive 98/44/EC, states «*This Directive shall be without prejudice to the obligations of the Member States pursuant to international agreements, and in particular the TRIPs Agreement and the Convention on Biological Diversity*», but omits any specific indication on the criteria to follow in the event of a conflict between the principles proper to the TRIPs agreement and those proper to the Rio Convention.

The Netherlands application pleaded that Directive 98/44/EC violated both those international agreements.

The Court of Justice rejected the arguments of the applicant.

With regard to the TRIPs agreement, the Court recognized that the MS may exclude patents of living matter, but declared that this is simply a faculty, which can be waived. The directive - according to the Court - expresses precisely this waiver and it is binding for all Member States, as adopted by the Council with the majorities prescribed by art. 100/A of the Treaty[132]. The result is a declared compression of the autonomous choices of single MS, compared to what the TRIPs agreement had guaranteed.

Equally relevant are the reasons affirmed by the Court to reject the plea relating to the failure to comply with the Rio Convention.

It was argued by the Netherlands that the directive would run counter to

---

130) Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994; approved on behalf of the European Community by Council decision 94/800/EC of 22 December 1994.
131) Convention on Biological Diversity, United Nations, Rio de Janeiro, 1992, approved on behalf of European Community by Council decision 93/626/EEC of 25 October 1993.
132) Point 58 of the decision.

the principle of equitable sharing of the benefits arising out the utilization of genetic resources[133].

The Court of Justice replied, to reject this argument:

«Moreover, while Article 1 of the CBD states that its objective is the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, it specifies that this must be done taking into account all rights over those resources and technologies. There is no provision of the CBD which requires that the conditions for the grant of a patent for biotechnological inventions should include the consideration of the interests of the country from which the genetic resource originates or the existence of measures for transferring technology.»[134].

Thus arguing, the 2001 judgment introduced an authentic (and binding) interpretation not only of the 1998 directive, but of the same contents of the TRIPs Agreement and of the Convention on the protection of biological diversity, denying to those documents the legal capacity to guarantee protection to the interests of the countries of origin of genetic resources.

The principles stated in the recitals and in Art. 1 of the Directive are reduced to a political emphasis, destined to yield before a different hierarchy of interests privileged by the content of the operative provisions introduced by the Directive.

If in other cases in the past the recitals have played a decisive role in assigning actual contents to EC provisions[135], here the interpretation moved in an opposite direction.

---

133) Point 63 of the decision.
134) Point 66 of the decision.
135) See the decision of the Court of Justice, 4 April 2000, C-269/97, on Regulation (CE) No 820/97 on traceability and origin labelling of bovine meat.

7.d) The Court of Justice, the indication of origin of food, and the International Humanitarian Law

A quite different approach to the relevant topic of the interaction between EU and International rules, came recently by a decision of the Court of Justice, called to judge the case of the indication of origin on foodstuffs originating in Palestinian territories occupied by the State of Israel since June 1967[136].

A notice published by the French Minister for the Economy and Finance of 24 November 2016, specifies:

«under international law the Golan Heights and the West Bank, including East Jerusalem, are not part of Israel. Consequently, in order not to mislead the consumer, the labelling of food products must accurately indicate the exact origin of the products, whether their indication is mandatory under Community rules or voluntarily affixed by the operator.

For products from the West Bank or the Golan Heights which originate in settlements, an indication limited to "product originating in the Golan Heights" or "product originating in the West Bank" is not acceptable. Although these terms do refer to the wider area or territory in which the product originates, the omission of the additional geographical information that the product originates from Israeli settlements is likely to mislead the consumer as to the true origin of the product. In such cases, it is necessary to add, in brackets, the term "Israeli settlement" or equivalent terms. Thus, terms such as "product originating in the Golan Heights (Israeli settlement)" or "product originating in the West Bank (Israeli settlement)" may be

136) Court of Justice, 12 Novembre 2019, C-363/18, *Organisation juive européenne, Vignoble Psagot Ltd v. Ministere de l'Économie et des Finances*.

used.»[137].

In a judicial proceeding of the Organisation juive européenne and Vignoble Psagot Ltd against the French Minister, the legality of this notice was challenged, and the case was sent to the Court of Justice for a preliminary ruling on the legality of this French Notice with reference to provisions of Regulation (EU) No 1169/2011 on food information to consumers[138].

The Court of Justice decided for the legitimacy of the French Notice, on the basis of those reasons:

"In the present case, the referring court states that the foodstuffs at issue in the main proceedings originate in 'territories occupied by the State of Israel since 1967' and, more specifically, as stated in the Ministerial Notice, in the West Bank, including East Jerusalem, and the Golan Heights[139].

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[140].

…

Consumers cannot be expected to guess, in the absence of any information capable 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[141].

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

137) Point 17 of the decision.
138) 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.
139) Point 33.
140) Point 34.
141) Point 50.

place of provenance other than its true place of provenance[142].

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. [143].

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[144]."

On such basis the Court ruled:

"Article 9(1)(i) of 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, … read in conjunction with Article 26(2)(a) of that regulation, must be interpreted as meaning that foodstuffs originating in a territory occupied by the State of Israel must bear not only the indication of that territory but also, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, the indication of that provenance"[145].

International humanitarian law, and an Advisory Opinion of the International Court of Justice on the right to self-determination of the Palestinian people[146], are therefore recognized by the Court of Justice as sources directly operating within the *European Agri-Food Law*, adopting a

142) Point 51.
143) Point 52.
144) Point 33.
145) Final ruling of the decision.
146) International Court of Justice, Advisory Opinion of 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory; point 35 of the decision of the EU Court of Justice.

paradigm quite different from that followed by the Court in the decision of 2001 on Directive 98/44/EC.

8.- Comparative tools and Global Agri-Food Law

An analysis, albeit brief, of experiences and trends of these years in European, domestic and international legislation and jurisdiction, allows us to identify the emergence, with increasing evidence, of a *multilevel framework* of principles and rules, addressed to the *Agri-Food System* taken as a comprehensive whole; a framework suitable to include the entire set of structures, activities and relationships, subject to multi-level regulatory interventions, and moving towards a complex polycentric system, where Global, European and domestic levels are intertwined, and public and private responsibilities operate through vertical and horizontal cooperation and subsidiarity.

Production and trade, making up a single body, set about composing a disciplinary set which is by its very nature *European* and *Global*, equipped with principles, rules and procedures, not reduced to the agricultural and food legislation or to the single hygiene-health regulations of the products considered as such, but understood as identifying, concisely representing and governing, the origin (the farmer), the supply chain (the food industry), and the result (the food product and its placement on the market for consumption), and therefore the whole *agri-food system*, which in the adoption of the *production chain standard* finds essential identity and systematic elements for the affirmation of its own solid disciplinary perspective, and in the systemic formula of *Global Agri-Food Law* finds it consistent expression.

The result is a growing tendency to a common disciplinary area, looking

as a whole to *Agriculture*, *Foodstuff*, *Environment*, and to any *Form of Life*, and therefore addressed to players having different legal status[147], thus posing further questions to law scholars, due to the persistent distinction of legal regime between agricultural and commercial undertakings[148].

This framework is growing through communication and contamination of models, to share answers and possible solutions based on common experiences and needs, in the two aspects of introducing external sources within the internal legal systems, and of spreading internal rules and models far beyond national borders.

On the other hand, in today's experience, we must recognize that there cannot be an *agri-food law*, which is not by its nature open to the winds of globalization[149].

In this perspective, the peculiar structure of *agri-food law*, characterized by the simultaneous action of a multiplicity of sources and models quite different from the traditional ones, requires knowledge tools suitable for this complex multiplicity, and leads to the use of the *comparative method* not as an academic curiosity, but as a valuable tool for all those seeking to "*ask the*

147) As provided by the new Regulation on official controls Regulation (EU) 2017/625 of the European Parliament and of the Council, of 15 March 2017; see *supra* par.4.
148) See A. JANNARELLI, *L'impresa agricola nel sistema agro-industriale*, cit.
149) Not by chance, the first edition of L. COSTATO - F. ALBISINNI (eds), *European Food Law*, Cedam - Wolters Kluwer, 2012, written with the contribution of Italian food law scholars, was entitled, and dealt with, "*European Food Law*", while the second edition, four years later, 2016, saw the contribution also of US, Chinese, and Latin America food lawyers, with chapters on those areas of the world, and was entitled, and dealt with, "*European and Global Food Law*", "To immediately signify to the reader that European Food Law, by its nature, is not limited to European borders, but is influenced by, and influences, Global Law" (p. XI of the premise to the 2nd ed.).

appropriate questions"[150], and to "*move out from ideological mechanism*"[151], searching for consistent answers to critical questions.

[150]) As observed by V. ZENO ZENCOVICH, in the conclusion of *Comparative Legal Systems. A short and illustrated introduction*, Roma-Tre Press, 2019, p. 105: "In this much more complex, but real, context the role of comparative law is not to provide correct answers but, much more engagingly, to ask the appropriate questions.".

[151]) P.G. MONATERI, *Methods in Comparative Law*, cit., underling: "The activity of lawyers is basically an «ideological» activity: their job is to produce meaning to make institutions working. But comparativism is a move out from this ideological mechanism. What a comparative lawyer can do, as a comparativist, is to reveal the unofficial, and to critique those processes of meaning production as social and political realities, peculiarly in a world of «contaminations»".