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Milano, 10 December 2019**
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Editoriale

L'origine conta: nell'alimentare e in agricoltura

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

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

In effetti, attraverso la tracciabilità, che originariamente aveva ragioni prettamente sanitarie, si può seguire il percorso compiuto dalla materia prima agricola in tutti i suoi passaggi e assicurare che la dichiarazione di italianità della materia prima sia fondata su un meccanismo efficiente. La trasformazione delle finalità delle regole di provenienza della materia prima agricola è, in effetti, rilevante e cambia il senso stesso della tracciabilità; essa, pur mantenendo le sue finalità sanitarie (va sempre ricordato che è figlia delle vicende della c. d. mucca pazza), è diventata un potenziale strumento promozionale a favore dell'agricoltura.

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

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

Si è a lungo disputato, in sede dell'Unione europea, sulla ragionevolezza di una tale prescrizione, sostenendo che, in definitiva, la pasta non ci dice chiaramente l'origine territoriale del grano, ad esempio. Ha prevalso la tesi opposta che ha preferito fornire informazioni più dettagliate al consumatore. Va detto che la scelta di valorizzare l'origine agricola degli ingredienti, fatta propria dal Parlamento Europeo con il Reg. (UE) n. 1169/2011, è stata largamente depotenziata dalla Commissione Europea, sia con il

rivista di diritto alimentare

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

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

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

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

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

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

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

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

Valeria Paganizza

1.- Introduction

More than five years have passed since the date of application of the EU Regulation on food information to consumers (except for the provisions on the nutrition declaration). The discussion that the act has been generating since the beginning has not yet come to an end and seems actually to freshen day after day, at different levels and topics, for at least two orders or reasons.

The first one is that only the concrete application of the provisions is able to let some of the weaknesses of the Regulation emerge. Actually, the first questions on applicative issues were raised immediately after the adoption of the act and answered in the Commission Notice on Questions and Answers of January 2013. The main elements of concern related, at the time, to the meaning of the provisions on mandatory particulars and the way in which information should be transmitted to consumers.

The second order of reasons for the current debate on the Regulation is that the EU act might be considered somehow incomplete: on the one hand, it does not cover all the aspects of food labelling (non prepacked food and food not intended for final consumers are not covered by the provisions on mandatory particulars of the Regulation) and this implies a non harmonised area where Member States have the opportunity to adopt national provisions and where operators can intervene with voluntary information; on the other hand, the Regulation conferred on the EU

Commission the task to adopt implementing and delegated acts in order to put in effect or supplement some of its provisions. However, some of these acts have not been approved yet such as those on information on the possible and unintentional presence in food of substances or products causing allergies or intolerances and on products suitable for vegans or vegetarians (and so, even in this case, there might be place for voluntary information) and some others, such as the regulation on the mandatory indication of the origin of the primary ingredient, despite having been adopted, added further doubts to the application issues.

The paper is therefore intended to offer an overview of what is at stake in the area of the Regulation on food information to consumers.

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

As mentioned above, some of the most discussed issues on food information relate to voluntary information¹. Under Article 36 of Regulation (EU) No 1169/2011 most of the general requirements set for mandatory particulars apply when information listed in Articles 9 and 10 of the Regulation are provided on a voluntary basis.

Operators can however decide to make available further details (other than those listed in articles 9 and 10) that, despite being offered for mere marketing purposes, are however useful to consumers to make more informed choices, according to the general aim of the EU act. In doing that, however, operators must comply with some general requirements that, likely for mandatory particulars, the Regulation sets also for voluntary information, preventing, for instance, misleading, ambiguous or confusing details. Moreover, where appropriate, such information must be based on the relevant scientific data.

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

For four specific categories of particulars, that is to say information on the possible and unintentional presence in food of substances or products causing allergies or intolerances, information related to suitability of a food for vegetarians or vegans, the additional indication of reference intakes for specific population groups and information on the absence or reduced presence of gluten in food, however, Article 36 empowered the Commission to adopt implementing acts on the application of the mentioned requirements. Of these, the EU Institution adopted only the Implementing Regulation (EU) No 828/2014² which sets the exact statements and conditions that an operator respectively must use and comply with when providing information on the absence or reduced presence of gluten. The act allows the use of the 'gluten-free' statement only for food, sold to the final consumer, that contains no more than 20 mg/kg of gluten and of the phrase 'very low gluten' for «food, consisting of or containing one or more ingredients made from wheat, rye, barley, oats or their crossbred varieties which have been specially processed to reduce the gluten content» and which «contains no more than 100 mg/kg of gluten in the food as sold to the final consumer».

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

rally free of gluten to bear terms indicating the absence of gluten with the compliance with the general provisions on fair information practices. The recital includes several hypotheses.

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

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

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

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

The first interpretation suggests that when an operator labels a naturally gluten free food with the 'gluten-free' statement, he or she ensures the absolute absence of gluten³. Such reading however seems not to comply with the wording of Regulation (EU) No 828/2014 which, without distinction, authorises the use of the claim for any product with gluten content lower than 20 mg/kg. Requiring an operator to adopt further precautions to avoid any possible contamination (below 20 mg/Kg), in order to use the claims, adds burdens that are not justified under the Regulation and that would thus hinder competition, creating undue discrimination among food business operators.

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

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

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

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

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

Article 9 (1) let. c) of Regulation (EU) No 1169/2011 requires the indication (and the emphasising) of any ingredient or processing aid causing (or derived from products or substances that cause) allergies or intolerances if they are voluntary used in the manufacture or preparation of a food and if they are still present in the finished product, even if in an altered form. The list of allergens is however a concluding catalogue, based on EFSA Scientific Opinion⁴. This means that only substances or products used as ingredients or processing aids, constituted of or deri-

ved from those listed in Annex II to the Regulation must be emphasised in labelling. There are thus no legal obligations on the indication of possible unintentional presence of food allergens (so called cross contamination) or any specific requirements for their display. Up till now, despite having been empowered by the Regulation (EU) No 1169/2011, the EU Commission has not adopted yet an implementing act on the unintentional presence of cross contamination. As a consequence, more and more frequently, food business operators have adopted, on a voluntary basis, the praxis of using expressions such as "may contain" to inform consumers that they cannot exclude that during the production process, food came in contact with some traces of substances that can cause allergies or intolerance. Over the legitimacy of this practice, a couple of doubts may arise.

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

Second, the use of the warning cannot be considered as an opportunity, for food business operators, to elude the responsibility⁵ of adopting the

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

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

due diligence in carrying on their activity (such as performing a plant cleaning after having processed food containing ingredients that could cause allergies of intolerances).

Where praxis is steering towards a direction that seems to fail to comply with the general scope of allowing consumers to make informed choices, an implementing act able to harmonize the area is undelayable. However, as stated in the last meeting of the working group on food information to consumers of 9 October 2019, the discussion on the topic has been deferred to the next summit⁶. In the meanwhile, the European Commission is participating with the Member States in the Codex Alimentarius work on the precautionary allergen labelling launched in 2019 and is developing reference measurement procedures, within the European Network of Food Allergen Detection Laboratories, for the future development and implementation of rules on this theme⁷.

3.- Products suitable for vegans or vegetarians

Among the implementing acts that the EU Commission had to adopt under article 36 of Regulation (EU) No 1169/2011 there is that on information related to suitability of a food for vegetarians or vegans. The activities of the working group on food information to consumers on this topic, according to the priority set within the REFIT Platform in 2017⁸, have already started in

2019 and focused first on the possible definition of vegan and vegetarian⁹, which are essential to identify the products to which the future implementing regulation could apply. In everyday life, a clear cut distinction between vegetarian/non vegetarian and vegan/non vegan food is complex since it relies on different 'philosophies' or 'attitudes' toward food and life. Is for instance honey a vegetarian product or not? And is it vegan? And what about food obtained with processing aids of animal origin that are not present in the final product? And how could it be possible to define as vegan or vegetarian a wine or fruit juice or jam obtained with an industrial production, without having the certainty that no insects were blended? As for now, food business operators have chosen to use vegan or vegetarian statements in compliance with private standards that have their own specifications and which offer their own answers to the above mentioned questions. But there are several other issues that are currently involving stakeholders, and on which the working group on food information to consumers is currently focusing, such as the possibility to use the statement 'vegetarian' or 'vegan' for food that should naturally have such characteristics, such as olive oil. As the report of 09 October states, some criticism has been raised¹⁰ by some Member States (such as France) on the misleading nature of such 'claims', according to article 7, par. 1 (c) of Regulation (EU) No 1169/2011, since any vegetable oil is vegetarian and thus this characteristic

(⁶) The Author found some details on the meeting on a report from the delegated staff of the Dutch Ministry of Health, Welfare and Sport who took part to the meeting of the EU Commission Working Group on Food Information to Consumers on 09 October 2019, <https://www.row-minvws.nl/binaries/row-minvws/documenten/verslag/2019/10/9/verslag-cwg-voedselinformatie-voor-consumenten-van-9-oktober-2019/Verslag%20CWG%20Voedselinformatie%20voor%20consumenten%20van%209%20oktober%202019.pdf>

(⁷) Please refer to the Commission's answer of the 12 May 2020 to the Parliament's question no E-001276/2020, https://www.europarl.europa.eu/doceo/document/E-9-2020-001276-ASW_EN.pdf

(⁸) Regulatory fitness and performance programme – REFIT Scoreboard Summary, 24 October 2017, https://ec.europa.eu/info/sites/info/files/regulatory-fitness-and-performance-programme-refit-scoreboard-summary_en_3.pdf, p. 18.

(⁹) Please refer to footnote 5. Also scholars started wondering how vegan and vegetarian products can be defined, like F. Domke, *Vegetarian and vegan products labelling and definitions*, in *EFFL*, 2018, 13, 2 pp. 102-107; N. Sochirca, *The European legal framework on vegan and vegetarian claims*, in *EFFL*, 13, 6, pp. 514-521. Both the Authors, as well as I. Carreno and T. Dolle, *Tofu Steaks? Developments on the Naming and Marketing of Plant-based Foods in the Aftermath of the TofuTown Judgement*, in *EJRR*, 2018, 9, 3, pp. 575-584, DOI: <https://doi.org/10.1017/err.2018.43>, remind that, lacking a harmonised definition of vegetarian and vegan food at a EU level, Germany adopted national guidelines on the topic.

(¹⁰) See footnote No 7.

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

Another issue that pertains to vegan and vegetarian food is the use of "meaty terms", that is to say words that in everyday life are commonly used for meat products but that can be useful to describe alternatives based on non-meat ingredients: some exam-

ples could be tofu/soybean or, most simply, 'veggie' burger, hamburger, sausages, etc., where the legislation has not yet provided a definition for them. The issue does not affect for instance milk or cheese or yogurt, which are clearly defined by the EU Legislation and on which also the EU Court of Justice gave its judgment in case C-422/16¹¹. Within the European Union a harmonised approach on the theme is still lacking but some stakeholders raised concerns on the possible misleading nature of the use of the 'meaty-words' for vegetarian or vegan products. Such doubts seem actually to be ungrounded, unless national provisions exist. On the one hand, food business operators who offer alternatives for vegetarian or vegan consumers make of this characteristic the commercial strength of their products, so they have every interest in informing consumers of the food composition, through labelling. Also the position in retail food stores usually helps to emphasize their presence and their differences from meat food. Even the most inexperienced and uncultured consumer could recognize their peculiarity: their being "veggie".

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

The European Commission, in recent years, replied several times to the European Parliament's questions on this issue¹², emphasizing that the general principles of Regulation (EU)

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

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

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

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

One of the hottest topics concerning the implementation of Regulation on food information to consumers is the mandatory indication of the origin of the primary ingredient, but this is a long story. Let's start from the beginning. Article 9, par. 1, (c), includes among mandatory particulars the country of origin or place of provenance only where its presence is required under Article 26, that is to say «where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food» and for meat under implementing regulation (EU) No 1337/2013¹⁴. Moreover, where the country of origin or the place of provenance of a food is given (in any form) but it is not the same as that of its primary ingredient, Regulation (EU) No 1169/2011 requires that, under adoption of an implementing act, the country of origin or place of provenance of the primary ingredient is declared

or is indicated as being different from that of the food. The Commission adopted the required implementing act laying down the modalities for the application of Article 26(3) of Regulation (EU) No 1169/2011 just in 2018, with Regulation (EU) 2018/775¹⁵, applicable since the first day of April 2020. The act entails that the indication of the origin or provenance of the primary ingredient different from that of the food is given either with reference to a geographical area among those listed in the Regulation¹⁶ or by means of a statement that informs consumers that the primary ingredient does not originate from the country of origin or the place of provenance of the food. Being mandatory, these particulars must be in compliance with the size requirements of Regulation (EU) No 1169/2011 and the two indications on the origin (food and primary ingredient) must be in the same field of vision.

At the beginning of 2020, the EU Commission published a Notice¹⁷ explaining how the implementing Regulation (EU) 2018/775 should apply. As for the scope, the document recalls that the regulation does not apply to geographical indications that are protected by EU provisions¹⁸ and international agreements, as well as to organic products which are subject to specific provisions that constitute *lex specialis*. Also registered trademarks which constitute an indication of origin do not fall into the scope of the act since, according to its seventh recital, they need further examina-

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

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

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

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

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

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

tion, due to their specific purpose, that is allowing consumers to identify, through the sign, definite characteristics and quality of the product or of a service. Unlikely, trademarks that have not undergone registration are not included in the exemption so, where they contain an indication of origin, they are subject to the implementing regulation. An interpretative doubt that does not find a solution in the Commission notice relates to the inclusion of collective marks and certification marks into the scope of the implementing regulation. On the one hand, if the rationale which justifies the exclusion of trademarks from the provisions of the regulation, according to the seventh recital, is the fact that they are signs that identify a company and its products (a particular commercial source or trade origin, using the word of the Regulation) and which could be transferred from a subject to another, collective marks and certification marks seem to be characterised by a different connotation. Collective marks belong to an association¹⁹, can designate the geographical origin of the goods or services (Article 29 (3) of Directive 2015/2436)²⁰, but they distinguish the goods or services of all the members of that association. Likely, guarantee or certification marks distinguish goods or services «which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from goods and services which are not so certified», including «signs or indications which may serve, in trade, to designate the geographical origin of the goods or services» (Article 27(a) and 28(4) of Directive 2015/2436²¹). So also certification marks are signs that do not identify the products of a sin-

gle operator (as a commercial source or trade origin) but rather certify that such products (as well as any other bearing the certification mark) have certain characteristics. On the other hand, however, under Directive 2015/2436, both collective marks and certification marks are trademarks so, when registered, they should not fall into the scope of the implementing Regulation.

The Commission Notice on the application of the provisions of Article 26(3) of Regulation (EU) No 1169/2011 excludes from the scope of the Implementing Regulation some cases in which the presence of geographical elements do not constitute an indication of origin, such as the name and address of the food business operator (that are mandatory under Article 9 of Regulation (EU) No 1169/2011). Such particulars could however mislead consumers if they are emphasised along with elements that recall the origin of the product, where the primary ingredient has a different origin. Also customary and generic names, even when they are legal names under Regulation (EU) No 1169/2011, which include geographical terms but which are not understood as indications of origin or place of provenance of the food (such as Frankfurter sausage), do not fall within the scope of the Implementing Regulation. Conversely, the Commission Notice explains that any phrases that could refer to the origin or place of provenance (made in, product of, produced in, manufactured in)²² are subject to the provisions of Regulation (EU) 2018/775 as well as flags and maps. Unlikely, other symbols such as monuments, skylines, or other recognisable graphics should be assessed, according to the Notice, on a case-by-case basis. The same approach should

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

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

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

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

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

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

A product can be made of a single processed ingredient with an origin that is not the same as that of the raw material, having this undergone a substantial transformation. The definition of 'processing' can be found in Article 2(1) let. m) of Regulation (EC) No 852/2004, according to which it «means any action that substantially alters the initial product, including heating, smoking, curing, maturing, drying, marinating, extraction, extrusion or a combination of those processes»²³. This entails that conversely 'unprocessed products', being «foodstuffs that have not undergone processing», include «products that have been divi-

ded, parted, severed, sliced, boned, minced, skinned, ground, cut, cleaned, trimmed, husked, milled, chilled, frozen, deep-frozen or thawed» (Article 2(1) let. (n) of Regulation (EC) No 852/2004). An issue that may arise concerns the origin of flour, above all when used for in pasta or baked products. Flour should not be considered a processed ingredient, since it is made of milled cereals (and milling is not considered 'processing' under Regulation (EC) No 852/2004). The question is therefore if the primary ingredient of pasta or baked products is the flour (and so the origin would be the place of milling) or the cereals (and the origin will be the place of harvesting).

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

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

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

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

did not have before the process»²⁴. Wheat flour, groats and meal, and wheat have different codes under the Combined Nomenclature²⁵. Moreover, wheat flour has irrefutably properties that grain does not have, such as the possibility to be kneaded in dough and is a new different product if compared with the original cereal. The economic justification of milling and the importance of the manufacturing stage do not seem to require further deepening, as well as the fact that the process is carried out in undertakings equipped for the specific purpose.

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

However, at least in Italy, this conclusion is not shared by some Institutional bodies, such as the Italian Competition Authority (AGCM). In its act No 28059 in case PS11387²⁶, the Authority stated that according to Regulation (EU) 2018/775 the primary ingredient of food as pasta is the durum wheat and not the flour, since, in its opinion, consumers' are interested in the cereal origin, rather than on the milled product's. To ground its statement the Italian Competition Authority refers to the definition of qualitative primary ingredient, that means the ingredient that consumers associate with the food. What the ACGM forgets to consider is however that the ingredient of products as pasta or baked food is flour (and not grains) and Regulation (EU) 2018/775 must apply to this, not to wheat. The definition of ingredient of Regulation (EU) No 1169/2011 is, in this context, incontrovertible, being the substance or product used in the manufacturing or preparation of the food (and still present in the food). When produ-

cing pasta, what do food business operators use? Flour or grains? The answer is plain.

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

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

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

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

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

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

The last element that the Commission Notice considers is the placing and the presentation of information, allowing the use of abbreviations for the indication of the country of origin when they could be easily and correctly understood, such as EU, USA, UK. Since the origin of the primary ingredient should be placed in the same visual field as the origin of the food, where the latter is repeated several times, also the indication of the origin of the primary ingredient should be repeated accordingly, using a font size which has an x-height of at least 75 % of the x-height of the origin indication of the food and which is not in any case smaller than 1,2 mm²⁷.

5.- Food Labelling Information System Database (FLIS)

One of the most interesting news, on the practitioners' point of view, is the announced creation of a Food Labelling Information System Database (FLIS), with no formal legal status, which should include all the information requirements at an EU and national level, in order to help operators in complying with the labelling legislation in placing on the market their products and to facilitate control authorities in performing their activities. The project for the establishment of a food labelling system database dates back to several years ago. Though the FLIS was scheduled to be operational by the second quarter of 2017²⁸, at the end of 2019 it had not been implemented yet. During the meeting of the Working Group of the Commission on Food Information to Consumers of October 2019, a pilot example of how the system is going to look like was presented along with a roadmap of the next steps. The first fol-

lowing phase was the public accessibility of the website which had to be launched between the end of 2019 and the beginning of 2020. In April 2020, however, no further details on the system were available. The second phase will be the collection of data from Member States and the constant updating of the system: on this aspect, several Member States compelled that though being of irrefutable help, the activity of keeping the system updated will be extremely time absorbing. With regards to this, in 2016 the Commission stated that the collection of data would be done by an external contractor²⁹ and that for the first year the Commission itself would be responsible for updating the system.

6.- Dual Quality and labelling

In the internal market the sale of products with different characteristics is not prohibited and is actually one of the elements that ensure competition among business operators. This applies also to food. In principle, also the sale of products of the same brand that are not perfectly identical is allowed, provided that it is justified by legitimate factors, such as the place of manufacturing, the consumers' preferences, dietary habits, different sources of raw materials, etc. Since 2011, some Member States had however brought to attention that some food business operators adopted practices of dual quality that were misleading³⁰.

The EU Commission tackled the issue with a strategy based on a dialogue among consumers, industries and national authorities, the definition of a common testing methodology and some further activities like the agreement on a Code of Conduct for producers, identifying standards

⁽²⁷⁾ The exceptions of Regulation (EU) No 1169/2011 for small packages apply also to the mandatory indication of the origin of the primary ingredient.

⁽²⁸⁾ REFIT Platform, Stakeholder suggestions, p. 32 https://ec.europa.eu/info/sites/info/files/health_and_food_safety_1.pdf [last access 18.04.2020].

⁽²⁹⁾ https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp_wg_20160418_sum.pdf [18.04.2020].

⁽³⁰⁾ EU Parliament's question E-001866-17, https://www.europarl.europa.eu/doceo/document/E-8-2017-001866_EN.html.

aimed at avoiding the unlawful dual quality of products. Within this framework strategy, on 26 September 2017, the EU Commission issued a Guidance Notice on the application of EU food and consumer protection law to issues of Dual Quality with a specific focus on food products³¹. According to the Commission's Notice, food products with the same packaging and branding must be assessed on a case-by-case basis and they can be considered in contrast with the EU provisions of the Unfair Commercial Practices Directives if the product does not match the legitimate specific expectations that consumers have on that products; if consumers are not made aware of such differences with regards to their expectations, due also to a failure of the food business operators to convey adequate information and such lack of information is able to distort the economic behaviour of the consumers who would have otherwise chosen a different product³².

The Commission offers also some criteria to characterise the product of reference. The first one is that the product is presented with the same packaging and under the same brand in several Member States. The second one is that the product is sold in the majority of Member States with the same composition while the third one requires that consumers' perception corresponds to the composition such as advertised in the majority of Member States³³.

In 2018, the Joint Research Centre (JRC) of the European Commission developed a common

testing protocol³⁴ aimed at assessing, in a pan European campaign, the characteristics of food related to quality. The method is led by six general principles: transparency in procedures; identification of four components which must be considered in the assessment procedure (selection of products; sampling plan; examination and/or analysis of the samples to produce test results; criteria useful to base a decision upon the results); attention to comparability of the products, in selecting, sampling and testing them; adoption of adequate procedures for such activities (that should be science based, appropriate to the products, 'fit for intended purpose and applied consistently', practical, cost-effective, based on accredited or validated methods and accredited laboratories); involvement of concerned parties who should be treated fairly and equally; fairness in the selection of brands for testing programmes with respect of market shares of brands in different Member States, 'without disadvantaging brand owners active in several food category sectors' and respecting confidentiality requirements³⁵. The JRC testing protocol seems to be a useful tool for Member States' Authorities to assess, on a case-by-case basis, whether the EU provisions of the Unfair Commercial Practices Directive or of relevant food law have been infringed³⁶.

In June 2019, the JRC published the results of a study on a comparison of quality related characteristics of food products³⁷ carried out following the results of previous studies performed in some Member States between 2016 and 2018, which

⁽³¹⁾ Commission Notice C(2017) 6532 final of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food, http://ec.europa.eu/newsroom/document.cfm?doc_id=47227 [19.04.2020].

⁽³²⁾ Ibidem, p. 5.

⁽³³⁾ Ibidem, p. 6.

⁽³⁴⁾ JRC, Framework for selecting and testing of food products to assess quality related characteristics: EU harmonised testing methodology, 2018, available at https://ec.europa.eu/knowledge4policy/sites/knowledge4policy/files/eu_harmonised_testing_methodology_-_framework_for_selecting_and_testing_of_food_products_to_assess_quality_related_characteristics_0.pdf [19.04.2020].

⁽³⁵⁾ JRC, cit., p. 11.

⁽³⁶⁾ JRC, cit., p. 2.

⁽³⁷⁾ JRC, Results of an EU wide comparison of quality related characteristics of food products, EUR 29778 EN, Publications Office of the European Union, Luxembourg, 2019, https://publications.jrc.ec.europa.eu/repository/bitstream/JRC117088/eur29778en_results_of_an_eu_wide_comparison_of_quality_related_characteristics_of_food_products.pdf [19.04.2020].

showed some differences in quality between the same food products sold in different countries. Also the findings of the JRC's Report show some differences among products, for instance for what concerns their composition but according to the JRC this does not necessarily imply that two levels of food quality are detected³⁸. Moreover, the report recalls that competent national authorities should perform any assessment of misleading practices and violation of EU law, being these activities out of the scope of the JRC's study. Despite the work carried out by the EU Commission, several doubts are still present, as shown by the number of questions that the Members of the Parliaments ask the Commission on dual quality. The answer is however the same and emphasises the tasks of the national competent authorities to assess the differences in composition and characteristics and the possible justifications by legitimate and objective factors³⁹, on a case-by-case basis, according to the Unfair Commercial Practices Directive.

7.- Alcohol labelling

Since the adoption of Regulation (EU) No 1169/2011, alcoholic beverages have been subject to some important exemptions as for labelling, such as the possibility to omit the indication of the list of ingredients (provided that they do not have an allergenic effect) and of the nutritional declaration for beverages containing more than 1,2 % by volume of alcohol (Article 16, par.4).

With regards to these opportunities, the Regulation required the Commission to adopt a report on such exemptions, tackling whether such products should in future be covered by additional mandatory particulars such as the information on the energy value. The Commission was given the possibility to present, along with the report, a legislative proposal setting the provisions for a list of ingredients or a mandatory nutrition declaration on alcoholic beverages. In the meanwhile, the Regulation encouraged food business operators to provide voluntary information on nutrition declaration by allowing them to indicate only the energy value (Article 30, par. 4).

In March 2017, the EU Commission published its report on the exemptions from the mandatory list of ingredients and the nutrition declaration for alcoholic beverages⁴⁰, in which the EU Institution, taking into account the number of voluntary initiatives of the food business operators in this sector addressed at meeting consumers' expectations on information, invited the industry to adopt a self-regulatory proposal to cover the entire sector of alcoholic beverages, both for nutritional declaration and the list of ingredients, and only where the Commission would have considered the proposal as unsatisfactory, it would have performed further assessment. The report was presented to stakeholders on April 2017⁴¹.

The European associations representing the alcoholic beverages sector presented their self-regulatory proposal on 12 March 2018⁴², explaining the commitments that each association took on products labelling as for the list of ingredients

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

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

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

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

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

and the nutritional declaration. The Brewers of Europe⁴³ opted for the «development and dissemination of guidance tools on regulatory requirements», already adopted in 2015 as for ingredient listing, and the supply of a toolkit on calculation methods for nutritional values, addressed to help smaller brewers in providing nutritional information. Moreover, the association announced that it would have used monitoring templates to «report annually on the percentages of pre-pack beer volumes carrying the information, with complementary online information also tracked, including as a means to inform consumers regarding beers served on-tap».

The association for spirits (Spirits Europe), in the Annex to the self-regulatory proposal⁴⁴, explained that its commitment was to ensure the availability of information on ingredients and on nutritional aspects by the end of 2022, and emphasised the need for a nutritional declaration per serving size, rather than for 100 ml. In particular, Spirits Europe declared the willing to provide online full information on the nutritional declaration, while grasping the opportunity given by Regulation (EU) No 1169/2011 to offer only the energy value on the label. As for the list of ingredients, according to Spirits Europe's document, the commitments of spirit producers go beyond the requirements of the EU Regulation on food information to consumers since, besides the list of all ingredients, labelling will display also information on raw materials and on the production process. The association announced that guidelines helping members and in particular small and medium enterprises would be developed, in order to ensure that information on nutritional aspects and on ingredients will be offered to consumers through online communication platform in a comparable way.

Both the guidelines and the online platform are common elements also to the sector of wine and

aromatised wine products⁴⁵, whose operators committed to providing consumers with the relevant nutrition declaration taking into account the opportunity offered by Regulation (EU) No 1169/2011 to limit the declaration to the energy value, while adding the information per portion, identified as the average 'drinking unit' (defined as the volume of wine or aromatised wine products which contains the equivalent of 10 grams of ethanol), when relevant. Values could be provided on the basis of data included in the database developed by the sector. The association promoted also the use of symbols, such as E for energy value, in order to (allegedly) simplify consumers' understanding of information. As for the list of ingredients, wine and aromatised wine producers considered that only a limited number of oenological practices were allowed and thus suggested that some specific principles should apply to the sector. In particular, according to the relevant association, some substances should be excluded from the list of ingredients: processing aids (and this is actually similar to the provisions for food in general) and natural substances used to adjust grape composition. The annex to the self-regulatory proposal suggested also a practice that does not seem to comply with the general principles on food information to consumers. Namely, since production may require to add 'last-minute' additives, the association supports the possibility to include in the list of ingredients additives «they are likely to use or use most frequently for the production of a given product, based on their historical wine-making process» provided that information states that «the additive shown may not be present or may be substituted, for instance by using the terms 'and/or'». Such a solution does not actually provide consumers with detailed information on the real nature and composition of the product they are buying but on the possible (and not certain) compositional charac-

⁽⁴³⁾ https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-self-regulatory-proposal_brewers_en.pdf.

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

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

teristics.

According to the association, wine that is used as basic ingredient for aromatised wine products does not require to be accompanied with the list of its ingredients.

The European Cider and Fruit Wine Association's commitments listed in Annex to the self regulatory proposal⁴⁶ are similar to those of the other associations and focus on the promotion of the on-label or online transmission to consumers of the nutrition declaration and the list of ingredients, provided that the link to online information is given on the label; on providing information on the production processes; on the development of guidelines for operators; on subsequent monitoring and evaluation of the industry commitments.

Following the presentation of the self-regulatory proposal, in 2019, both spiritsEurope⁴⁷ and the Brewers of Europe⁴⁸ associations signed memoranda of Understanding on the labelling of products, as for the energy value and the list of ingredients, recalling the commitments they undertook on the relevant Annexes to the self-regulatory proposal. In particular, the former includes, in individual commitments, providing the energy value both for 100 ml and for serving size, accompanied, by a period of six months after the signature of the Memorandum, by energy information in visual form. According to the document, the list of ingredients will be provided online, through a 'easily and directly accessible' way, like bar code or QR-code; it will be moreover complemented by information on the EU legal definitions of spirit drinks and on the authorised raw materials used. The Brewers of Europe's Memorandum requires the provision of the energy value per 100 ml while considers as supplementary options the possibili-

ties to add off-label nutritional information or information per serving size. Ingredients will be listed according to Regulation (EU) 1169/2011 «in descending order of weight as recorded at the time of their use in the manufacture of the beverage».

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

Regulation (EU) No 1169/2011 requires, for pre-packed food, the indication of the minimum durability date (best before date), which is a simple quality indicator of the characteristics of the food (which remains safe after that date), replaced by the 'use by' date for products that are highly perishable and that must be instead considered unsafe after the expiring date.

Some food are exempted from the indication, such as fresh fruit and vegetables, which have not been peeled, cut or similarly treated, wines, alcoholic beverages containing 10 % or more by volume of alcohol, etc. (Annex X to the Regulation contains the exhaustive list).

In January 2018 the European Commission published the final report of a market study on date marking and other information provided on food labels and food waste prevention⁴⁹, which had been carried out in order to shape the actions of the European Union according to the 2015 Circular Economy Plan⁵⁰. According to the report, up to 10% of food waste (which amounts to 88 million tonnes) could be linked to the date marking.

Several issues emerged from the study. The first one was a differentiation on date marking on the

⁽⁴⁶⁾ https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_legis_alcohol-self-regulatory-proposal_cider_en.pdf.

⁽⁴⁷⁾ <https://spirits.eu/upload/files/publications/CP.MI-098-2019-MoU-Final%20Version%20on%20website%20without%20signature%204%20June%202019.pdf>.

⁽⁴⁸⁾ <https://beervisdom.eu/wp-content/uploads/2019/09/mou-beer-label-web-001.pdf>.

⁽⁴⁹⁾ <https://op.europa.eu/en/publication-detail/-/publication/e7be006f-0d55-11e8-966a-01aa75ed71a1/language-en>.

⁽⁵⁰⁾ COM2015 (614) final, <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-614-EN-F1-1.PDF>. In 2020, the European Commission adopted a new Circular Economy Action Plan https://ec.europa.eu/environment/circular-economy/pdf/new_circular_economy_action_plan.pdf.

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

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

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

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

According to the report, Member States adopted several measures to reduce food waste linked to date marking. On the one hand, national control authorities and stakeholders (such as trade associations) supported some practices, intended to harmonise storage conditions across the chilled food chain; supporting the latter and the cross-industry dialogue; developing guidelines to clarify

the interpretation of the date expressions; carrying out studies on consumers expectations and understanding; supporting initiatives to propose additional date wording to clarify to consumers that 'best before' is a quality mark and not a safety mark, investing in smart packaging able to provide a more accurate indication of durability; removing legal obstacles to food donation⁵¹.

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

Taken all these considerations into account, the report draws some conclusions on how reducing food waste from date marking through six points: using a clear and legible date marking; ensuring consumers' understanding; indicating 'use by' dates only for safety concerns; avoiding the unnecessary shortening of dates; making storage and open life guidance consistent with the findings of safety and quality tests; ensuring consistency in storage of food at retail and guidance for consumers regarding the home storage temperatures⁵². Following such findings, the report provides a list of five recommendations.

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

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

⁽⁵¹⁾ Report, pp. 85-86.

⁽⁵²⁾ Report, p. 86.

The third recommendation is to improve the possibility for consumers to make informed choices, ensuring coherent and consistent information on food, supporting consumers' education campaigns and research on consumers' behaviour and approach to date labels to shape future policies.

The fourth recommendation emphasises the need to support efforts to extend product life, while the fifth suggests that the legal and policy frameworks for the sale and redistribution of food should be made more consistent and clear.

In order to draft its guidance aimed at making date marking more consistent with the support of the sub-group on date marking and food waste prevention of the EU Platform on Food Losses and Food Waste, on May 2019, the European Commission sent a request for a scientific opinion to the European Food Safety Authority. The EU Institution asked in particular a scientific opinion on date marking and related food information 'in view of the application by food business operators of Regulation (EU) No 1169/2011 on food information to consumers as an integrated part of their food safety management system'⁶³. EFSA should identify the microbiological factors affecting food shelf-life, while graduating them according to the risk to human health, the storage conditions and time limits after opening the package of food and the good practices for safely defrosting products. In its acceptance letter of 12 July 2019, EFSA fixed the deadline for the opinions on 30 September 2020 and on 31 March 2021.

During the meeting of the Working Group on food information to consumers of 09 October 2019, some Member States presented some practices in use on date marking, such as accompanying the "best before date" with the phrase 'often good after', sometimes followed by terms or emoticons on appearance, smell and taste of that food. In

some case, a discount of 50% of the original price is applied to products with a passed "best before date". While the price reduction was positively evaluated by several Member States, the expression 'often good after' was considered confusing. The Commission announced therefore the launch of a survey in order to understand the consumers' perception of the phrase.

While Regulation (EU) No 1169/2011 requires the mandatory date marking on all prepacked foods, with a few exceptions, the possibility to consider the date marking for non-prepacked food as compulsory particular is left to national provisions. In Italy, for instance, the Legislative Decree 231/2017⁶⁴ requires only the 'use by' date for non prepacked fresh pasta and fresh filled pasta. The solution does not seem to perfectly match the consumers' interest in being adequately informed of all the characteristics that the product they are buying has and which are not immediately perceivable. With regards to this, it should be noticed that Article 4, par. 2 of Regulation (EU) No 1169/2011, when listing the principles governing mandatory food information, both on prepacked and non prepacked food, states that the 'widespread need on the part of the majority of consumers for certain information to which they attach significant value' should be taken into account in determining mandatory particulars. And it is undeniable that date marking is one of the most important elements of food information, able to lead consumers' choice of buying that product or not.

The fact that the Italian decree does not require date marking as compulsory does not mean that the consumer does not have the possibility to acquire the necessary details: he or she could ask the food business operator selling those products what the use-by or the best before date are. One could wonder if the seller is obliged to provide the

⁽⁶³⁾ Mandate M-2019-0143, accepted by EFSA on 12 July 2019, available at the following URL http://registerofquestions.efsa.europa.eu/roqFrontend/wicket/page?2-1_ILinkListener-mandateForm-documents-1-fileNameLnk

⁽⁶⁴⁾ Legislative decree 15 December 2017, n. 231, laying down sanctions for breach of Regulation (EU) No 1169/2011 on food information to consumers and the adjustment of national law to the provisions of the same regulation and to Directive (EU) 2011/91, according to Article 5 of Law 12 August 2016, n. 170, '2015 European delegation law'.

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

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

9.- *Front-of-pack labelling*

The last theme on the implementation of the Regulation on food information to consumers is the so called 'front-of-pack labelling' (FOP). The

expression identifies the display of information of nutrition content on the front of the pack, as additional information with respect to the nutrition declaration that is mandatory for almost all foods (with a very few exceptions, as we mentioned in paragraph seven).

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

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

quality of the food⁵⁵. On 27 January 2020, Italy, for instance, notified the 'Draft Ministerial Decree laying down the form of presentation and the conditions of use of the optional nutrition logo complementary to the nutrition declaration in accordance with Article 35 of Regulation (EU) No 1169/2011', called 'NutrInform Battery'⁵⁶. The different approaches among Member States raised concerns on the compliance of such FOP systems with the Regulation on food information to consumers, on the fragmentation of the regulatory framework and on the effects of such schemes on the good functioning of the internal market. With regards to this, the European Parliament submitted several questions to the Commission⁵⁷, to which the latter replied announcing a report on the subject and reminding that it had already assessed the compliance of the Nutri-Score scheme in the context of national measures that had been notified by France and Belgium.

On 20 May 2020 the EU Institution published the announced report on the front-of-pack labelling (that had actually been originally scheduled by the Regulation by 13 December 2017), concluding that a harmonised mandatory front-of-pack nutrition labelling should be adopted and revealed the intention to work on a legislative proposal on this theme⁵⁸. Several elements drove such determination: first, the potential of FOP schemes, above all if coloured based, to help consumers to

make informed healthier choices; second, the possible confusion and lack of trust of consumers on the various schemes of FOP on nutrition labelling, adopted by Member States or NGOs, with a corresponding possible effect on the costs that food business operators have to bear, on the free movement of goods and consequently on the internal market. Finally, the Commission emphasises the possible synergies between the FOP nutrition labelling and the nutrient profiling under Regulation (EC) No 1924/2006, which has not been agreed upon yet, due to strong opposition by some Member States⁵⁹.

10.- Concluding remarks

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

⁽⁵⁵⁾ S. Storcksdieck genannt Bonsmann, G. Marandola, E. Ciriolo, R. van Bavel, J. Wollgast, *Front-of-pack nutrition labelling schemes: a comprehensive review*, Luxembourg, Publications Office of the European Union, 2020, <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC113586/kjna29811enn.pdf>, p. 17.

⁽⁵⁶⁾ TRIS Notification number 2020/31/1.

⁽⁵⁷⁾ See, for instance, questions No E-004590/2019, E-004454/2019, E-000570/2020, P-003026-19, E-002795-19.

⁽⁵⁸⁾ EU Commission, COM(2020) 207 final, Report from the Commission to the European Parliament and the Council regarding the use of additional forms of expression and presentation of the nutrition declaration, p.20, https://ec.europa.eu/food/sites/food/files/safety/docs/labelling-nutrition_fop-report-2020-207_en.pdf.

⁽⁵⁹⁾ Brussels, 20.5.2020 SWD(2020) 96 final, Commission Staff Working Document – Executive Summary of the Evaluation of the Regulation (EC) No 1924/2006 on nutrition and health claims made on foods with regard to nutrient profiles and health claims made on plants and their preparations and of the general regulatory framework for their use in foods, p. 1, https://ec.europa.eu/food/sites/food/files/safety/docs/labelling_nutrition-claims_swd_2020-96_sum_en.pdf.

⁽⁶⁰⁾ https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-stella-kyriakides_en.pdf.

⁽⁶¹⁾ COM(2020) 381 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system'.

nutrition labelling will be proposed (paragraph 2.4 of the Communication). Likely, the outcomes of the research on consumers' understanding of date marking will result in the amendment of the existing provisions on 'use by' and 'best before' dates (paragraph 2.5 of the communication).

The 'Farm to fork strategy' discloses also the Commission's intention to propose the extension of mandatory origin or provenance indications to certain products (paragraph 2.4), thus addressing one of the area where the regulatory fragmentation among Member States is increasing.

Despite the proposed paths could probably solve such divisions on FOP labelling as well as on date marking and indication of origin, information to consumers risks to lose the necessary clearness and immediateness that should characterise it. FOP nutrition labelling will not replace the nutrition declaration and also particulars on the origin of products will add to the already required information. Provided that consumers are able to understand the true meaning of the new data, this proliferating of mandatory particulars could bear new costs for food business operators: contractual needs to have the origin of raw materials or ingredients certificated, implementation of systems that could allow to change labelling printing according to the origin of the ingredients used in a specific batch (that may be different from other batches), studies to design a correct FOP nutrition label. An increasing of 'mandatory' responsibilities will obviously accompany the request provision of these data.

Some doubts arise on the usefulness of the proposed solutions since their implementation assumes the average consumer's capability to understand the new requirements and the willingness or interest to obtain the additional information. But much of the meaningfulness of the future development on food labelling grounds on the consideration that many consumers do not fully understand (and probably are not interested in) the already existing particulars (above all, date marking and nutrition declaration). As for the indication of origin, voluntary information could have been an adequate solution: consumers interested

in these details would have chosen only products bearing clear information and possible misleading particulars were already sanctioned under article 7 of Regulation (EU) No 1169/2011. The same principles could by the way apply also to the voluntary indication of FOP nutritional labelling and date marking, provided that the mandatory particulars were present.

The feeling is therefore that the increasing in food information regulatory provisions will turn into new burdens for business operators, without being balanced by a significant value for consumers.

A final concern pertains to the lack of updating on the activities that the working group on food information to consumers is carrying on: besides the reports of the Dutch Authority, some interested parties that are not parts to the working group are not in the condition to know the results of the meetings and thus cannot express their views on activities that will turn into proposal and acts that could affect their work. Certainly, this opportunity is delayed once that those drafts have been prepared, through the feedbacks that the Commission's 'Have your say' consultation process system collects.

Transparency and the ongoing working on food information to consumers could however benefit from the timely publication of official reports of the meetings (and not only of the agenda).

Anyway, in the most optimistic of the views, we shall wait a couple of years before seeing the adoption of the acts for the achievement of the goals of Regulation (EU) No 1169/2011 and of the 'Farm to Fork Strategy' and some more time to assess their effective accomplishment.

ABSTRACT

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

freshen day after day. If the first elements of concern were on the provisions on mandatory particulars already fully regulated by the EU act, in the last years the debate moved on those areas that have not yet been totally defined, either because of the lack of the implementing acts of the European Commission (information on the possible and unintentional presence in food of substances or products causing allergies or intolerances; products suitable for vegans or vegetarians) or because the adopted regulations did not help in clarifying them, while adding further doubts, such as in the regulation on the mandatory indication of the origin of the primary ingredient.

Starting mainly from the recent activities of the working group on Regulation (EU) No 1169/2011 (food origin; Food Labelling Information System Database; dual quality and labelling; alcohol labelling; EU guidance on date marking and related food information; Vegan/vegetarian), the paper will provide an overview of the strong and weak points of the FIC Regulation, while trying to envisage the possible future perspectives on its application, above all in the light of the mission letter to Commissioner designated S. Kyriakides, which states: «Part of your work will be to focus on improving consumer information, notably by looking at ways to address demands for more visible and complete information, especially on the health and sustainability of food products».

Sono passati più di cinque anni dalla data di applicazione del Regolamento UE sull'informazione alimentare ai consumatori (FIC), ma il dibattito

che si è generato sin dall'inizio non è ancora giunto al termine e sembra anzi riaprirsi giorno dopo giorno. Se i primi elementi di preoccupazione sono stati le disposizioni sulle indicazioni obbligatorie già integralmente regolamentate dall'atto UE, negli ultimi anni il dibattito si è spostato sugli ambiti non ancora del tutto definiti, sia per la mancanza degli atti attuativi del Commissione Europea (informazione sulla possibile e involontaria presenza negli alimenti di sostanze o prodotti che provocano allergie o intolleranze; prodotti adatti a vegani o vegetariani), o perché i regolamenti adottati non hanno aiutato a chiarirli, aggiungendo ulteriori dubbi, come nel regolamento sull'indicazione obbligatoria dell'origine dell'ingrediente primario.

A partire principalmente dalle recenti attività del gruppo di lavoro sul Regolamento (UE) n. 1169/2011 (origine degli alimenti; Database del sistema informativo sull'etichettatura degli alimenti; doppia qualità ed etichettatura; etichettatura degli alcol; Linee guida dell'UE sulla marcatura della data e relative informazioni sugli alimenti; Vegano / vegetariano), il presente lavoro propone una panoramica dei punti di forza e di debolezza del Regolamento FIC, cercando di prevedere le possibili prospettive future sulla sua applicazione, soprattutto alla luce della lettera di missione al Commissario designato S. Kyriakides, che afferma: «Parte del Suo lavoro consisterà nel migliorare l'informazione dei consumatori, in particolare cercando modi per rispondere alle richieste di informazioni più visibili e complete, in particolare sulla salute e la sostenibilità dei prodotti alimentari».

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