CHAPTER I

PRINCIPLES AND RULES OF EUROPEAN AND GLOBAL FOOD LAW

Luigi Costato

1. Food security and Food safety

The survival of plants and animals depends on their ability to feed themselves. Plants and animals need nourishment for their survival; hence, with the creation of the single market and the increasing movement of foodstuffs, the rules that govern the European food system have become increasingly more complex until they have become a proper Food Law.

All living beings need energy to grow and maintain their tissues. This is also true for human beings, who are omnivorous and can feed on meat or plants. This has made the food laws adopted by the EU a very complex issue. A man's diet must contain carbohydrates (glucides), proteins, fats (lipids), mineral salts, organic acids, vitamins, and a relevant amount of water. Under particular circumstances people suffering from specific pathologies may not eat certain foodstuffs and have to find a substitute that has an equivalent nutritional value and is not harmful.

Legislation can consider food from two different viewpoints: the producer or the consumer.

There are relatively few producers, while everybody is a consumer; so special attention is addressed to the latter and consequently to food security and food safety.

Food security means securing food availability and supplies; *food safety* refers to safe hygienic conditions, i.e. the absence of elements that do not belong to food (e.g. residues from pesticides or veterinary treatments, environmental contamination), and the absence of alteration in the production and/or use and/or preservation of the product.

Due to the development of food production and preservation technologies, food safety also means:

– safety from toxins (safety of the actual composition of the food *per se*, without reference to exogenous factors);

– nutritional safety (no nutritional disadvantages for the consumer), an aspect that involves the testing of new foods;

– information on safety (providing the consumer with adequate and full information about the characteristics of the food, the mode of or quantities for use) (Russo 2010; Costato-Rizzioli 2010).

Farmers are first in line as food producers, given that the whole food system depends on agriculture, which provides ready food – fruit, vegetables, meat eggs etc – as well as the raw materials for industrial or agricultural transformation, such as sugar beet, grain, oil seeds and grapes and milk, the last two of which are usually (though not always) transformed into wine and cheese by the farmers themselves.

The market of agricultural products is therefore characterized by a constant expansion of the production and distribution chains, not only on a transnational but also on a transcontinental or, to use a "fashion" word, on a global level.

The supra-national dimension of the food production and distribution chains in Europe, promotes the coexistence and the necessary cooperation between the national and EU authorities. On the one hand, the lengthening of and the complexity of the food chain, increases the risk of obstacles to and unilateral restrictions of free trade, on the other hand those factors also favour the spreading of health risks linked to the consumption of food or the breeding of animals destined for the food chain. This compels the competent authorities to cooperate with each other, horizontally with the various national bodies and vertically with the European institutions (1).

(1) See the opinion of the Advocate-general Geelhoed, delivered on 3 February 2005, Case C-211/03, *Orthica*.

Food law governs this complex issue, by establishing food production and trade rules. It also includes the sanctionary apparatus which at times is included in ordinary law (e.g., commercial fraud and swindle may be perpetrated by food producers or food traders, but may also be perpetrated by other operators, economic or otherwise), and at times is object of specific provisions (e.g., the adulteration of foods or such like). This is, therefore, an interdisciplinary subject in many ways.

2. Food regulation

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, as will become clear when examining international sources.

The legal bases of the EU food legislation are not as "specialized" as those for the adoption of CAP or of the rules governing competition. In the initial phase, the protection of the consumer's health and of his other interests were not necessarily so relevant in food legislation as they are increasingly becoming through the laws that have been adopted and are being proposed.

EU legislator had no clear policy on the tools to be used to achieve the aforementioned aims and – without changing the legal nature of the act – decided to attribute to the provisions in Chapters I and II of Regulation No 178/2002, the role of framework rules, which must be abided even by successive rules adopted by the EU and the Member States.

Chapter II of Regulation No 178/2002 is expressly named as "*General food legislation*" (Articles 4 to 20) (IDAIC 2003). The general range of the rules established by the aforementioned first two chapters goes well beyond Regulation No 178/2002 and helps us to understand how European food legislation is being built.

Articles 1, 2, and 3 of Regulation No 178/2002 are intended as general rules that define food and the operators in the food value chain, as well as the risks it is exposed to in its different moments or forms, the placing on the market, the phases of production and the traceability of foods and their raw materials.

Chapter II, '*General food legislation*', starts with Article 4, which on the one hand establishes that "the principles laid down in Articles 5 to 10 shall form a general framework of a horizontal nature to be followed when measures are taken", and on the other that until the adoption of new rules regulating food, "existing food law principles and procedures shall be adapted [...] in order to comply with Articles 5 to 10".

This wording of Article 4(4) is not surprising, when it makes rules adopted for the interpretation of future provisions applicable even to already existing provisions: in a famous court-case (2) the Court of Justice declared that "when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty" (3) [now Article 288 TFEU]. Therefore, *mutatis mutandis*, it is understandable why Regulation No 178/2002 establishes that the current and future community and national law must be interpreted in the light of the provisions of Article 4(4) of Reg. 178/2002.

It appears clear that the EU legislator intended to attribute to the above mentioned Articles the characteristics of general principles of community food law, not only by the formal statements contained in Article 4, but also through the actual content of the rules referred to. They identify the general objectives of food law (Article 5), with special onus on protecting the interests of consumers seen from the specific perspective of food consumers (Article 8), the fundamental features of risk analysis, subdivided into its evaluation, management and communication (Articles 6, 9, 10) and the precaution principle, whose contents are precisely specified (Article 7).

It has been questioned whether the characteristics of the general principles of the mentioned rules are such as to justify their recognition as foundation of a food law system, as some of them are shared by other branches of law (Sgarbanti 2002; Sgarbanti in IDAIC 2003).

It is true that the principles laid down in Articles 5-10 to a large extent reproduce rules that exist already in primary and secondary law.

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(2) ECJ, 14 July 1994, Case C-91/92, *Faccini Dori.*

(3) Par. 26, Case C-91/92.

However, given the distinctive features of the item "*food*", it is evident that "*food*" in Article 4 of Regulation No 178/2002 is considered in a very specific manner, and that the EU legislation's intention to produce particularly severe rules for food, aimed at reconciling the need for food security and safety with the free movement of food, is at the root of this strongly pervading interventionism.

The proposed systemic model seems therefore perfectly acceptable, taking also into account that the completion of the rules foreseen by the European action was to be achieved quickly, as required by the needs for food safety, and that the reference to the principles in chapter II of the regulation is the interpretative key of present and future food law, not only in the EU but also on a national level.

The content of and the leading position assigned to Articles 5-10 by the regulation itself make them the cornerstones of European Food Law. These rules are also binding for legislators as they too must conform to the proclaimed principles.

Coherently, Regulation No 178/2002 assumes the prevalence of its contents over those of national law and the cooperation of state authorities with the EU, to allow its rules and those that will be adopted in its enforcement to achieve their intended results.

Hence, Article 14, "*Food safety requirements*", obliges all 'food operators', whichever Member State they belong to, not to place on the market '*unsafe food*' as specified by the same provision; and similar provisions are introduced by Article 15 with reference to feed for food-producing animals. Article 16, "*Presentation*", states that labelling, advertising and presentation "must not mislead consumers", taking into account European legislation on labelling and implicitly prefiguring the improvement of the applicable laws.

Article 17, "*Responsibilities*" establishes that Member States "shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution." and must, therefore, set up an official control system, fixing the sanctions applicable to those who violate rules on food law (cf. the "hygiene package", *in primis,* Regs. No 852, 853 and 854/2004 on matters of food controls) (4) and

(4) See Chapter XIV.

on the production of feeds (5), following the criteria of proportionality and guaranteeing their dissuasiveness (terms derived from the judicial doctrine of the Court of Justice).

The operators in the food system and in the feed system (only for feed destined to animals which are food or raw materials for food ingested by human beings), must, in accordance with Article 18 of the Regulation, put in place traceability systems and procedures (6), while the EFSA, the scientific consulting body of the EU, must "establish a system of networks of organisations operating in the fields within its mission and be responsible for their operation" with clear reference to the national authorities (7).

Finally, Article 50 of the Regulation provides for the creation of a rapid alert system, in which "the Member States, the Commission and the authorities" shall participate; Article 53 tackles the problems of emergency situations; and Article 55 those of crisis management.

3. The precautionary principle

In Regulation No 178/2002 Article 7 contains a rule that, rather than introducing a real precautionary principle, attempts to achieve the difficult balance between the two interests at stake (consumer protection and free movement of food). This Article is named "*precautionary principle*", but is worded in such a way that it is substantially compatible with the SPS Agreement and in particular with its Article 5.

Through the use of Article 30 EEC Treaty (today Article 38 TFEU), applicable in the absence of harmonization measures at Community level, the Commission had to prevent the breaking up of the unified market into many isolated markets, and also had to prevent incurring in

(5) See the Commission Recommendation of 14 December 2005, on the coordinated inspection programme in the animal nutrition for the year 2006 in accordance with Council Directive 95/53/EC, (2005/925/EC).

(6) See Chapter XIV.

(7) Art. 23(g), Reg. No 178/2002. See Regulation No 2230/2004 of the Commission of 23 December 2004 bearing application procedure of Regulation No 178/2002 concerning the network of organisms/bodies operating in the sphere of competence of the European Authority for food safety.

violations of the SPS Agreement, and, consequently, in sanctions by the WTO due to the behaviour of one or more Member State.

The attempt to undertake these aims simultaneously become clear when analysing Article 7(1), which states: "1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment." and consequently infers that precaution prevails. In contrast, Article 7(2) states that "Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment", putting forward an interpretation of the principle which is coherent with the provisions of Article 5 of the SPS Agreement. Nor could it be otherwise, as compliance with the Agreement is essential for the EU economy, while it is clear that in the case of certain or highly probable danger to human health, commercial restrictions could be justified even in the light of previous international commitments.

Risk evaluation must be based on available scientific elements. Article 7 of the Regulation, however, while enunciating the mentioned principle, adopts a fragile formula, affirming that "provisional risk management measures [...] may be adopted". Thus the application of the precautionary principle is not obligatory but only contingent. This shows remarkable "caution" on behalf of EU legislator, which does not want to impose on itself *a priori* the precautionary principle as a general binding principle of the European food law system, even if already affirmed by EU legislation on other occasions (Christoforou 2002), and frequently referred to by the Court of Justice precisely on the subject of health protection, and therefore applicable in relation to food (Gradoni in IDAIC 2003). It must be added that precautionary action in general, is by nature not binding and that the decision on the need to adopt it must change in the presence of varying degrees of risk.

4. Basic rules of EU Food Law

The development of the legal basis of European food policy and therefore, EU Food Law needs to be examined in greater detail. Initially European intervention in this sector was closely linked to the legal basis of the agricultural policy, also because the products listed in Annex II of the Treaty are food or raw materials for food production, with few exceptions such as animal feed and some fibres such as hemp.

Legislative interventions were, therefore, based on agricultural procedures, in accordance with Article 37 EEC Treaty (now Article 43 TFEU), or else on the approximation of the laws, first on the basis of Article 100 EEC Treaty (now Article 115 TFUE, but amended), of difficult application as it required the unanimous consent of the Council, and later on the basis of Article 100A EEC Treaty (now Article 114 TFEU), introduced with the Single European Act for the creation of the single market. Article 100A foresees a qualified majority vote of the Council, first within cooperation procedures with the EP and later within the co-decision procedure, today renamed ordinary juridical procedure.

At times the current Article 207 TFEU (previously Article 133 TEC) was used to set up the common trade policy. Later, after food scandals, and especially mad cow disease, Article 152(4)(b) (now Article 168(4)(b), TFEU) was included in the Treaty, to deal with interventions on plants and animals using the co-decision procedure, currently ordinary legislation.

From the above arguments it can be inferred that food is a transversal issue, which horizontally invests different sectors of EU competence. Looking back at EU history, you can make out, right from 1969, a Community programme, Council Resolution of 28 May 1969, that wanted to eliminate technical obstacles to the exchange of foodstuffs, deriving from the disparities among the numerous different legislative, regulatory, administrative regulations of Member States. In the same direction Directive 50/70/EEC of the Commission ([8]), without specifically referring to food, laid down the basis for the distinction between discriminatory measures that are either

([8]) Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Art. 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

generally or separately applicable. The directive has in some ways been overruled by the so called *Cassis de Dijon* judicial decision ([9]).

The Commission, on its behalf, paid special attention to food law in its White Paper of 1985 for the completion of the internal market ([10]). This was followed by the so called White Paper *bis* of 1993, dealing exclusively with measures for the creation of the internal market in the food sector ([11]).

The Communication on the free movement of food products within the EU ([12]) and the Communication on their sales ([13]) must also be mentioned. A special mention must go to the Communication dealing with the management of emergencies in the context of the application of EU rules ([14]), given that it divides alarm networks for food products from those for non food products, which are now subject to the Rapid Alert System established in Regulation No 178/2002.

It is therefore possible to assume that, despite the absence of a specific legal basis for the creation of a Community food policy, the tools provided by the Treaty permit the adoption of such a policy. The absence of a specific "*reserved*" basis cannot be considered an obstacle to the creation of an EU food law with its own principles, even if often shared by others, but shaped in a specific way to accommodate the subject matter to be regulated, or the way they fit together when they make up the basis of a legislation related to food for human beings and, to a certain extent, animals that are destined to be or supply food for human beings.

([9]) ECJ, 20 February 1979, Case 120/78, *Rewe Zentral.*

([10]) Completing the internal market: White paper from the Commission to the European Council. COM (85) 310 final.

([11]) Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the handling of urgent situations in the context of implementation of Community rules – Follow-up to the Sutherland report. COM (93) 430 final.

([12]) Communication from the Commission Mutual recognition in the context of the follow-up of the action plan for the single market. COM (99) 299 final.

([13]) Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition. 2003/C 265/02.

([14]) Completion of the Internal Market: Community Legislation on Foodstuffs. Communication from the Commission to the Council and the European Parliament. COM (85) 603 final.

At least from the viewpoint of food hygiene, the EU seems fully competent, especially, due to the approximation or – one might almost say – quasi-unification process achieved by Regulation No 178/2002.

Food law is a set of national, EU and international legal rules, with the final aim of protecting the food consumer. In general, this protection consists in prohibiting the placing on the market of flawed foodstuffs which are dangerous to health even if consumed in small quantities.

With regard to this initial approach to "food law", which consist in the identification of rules that govern producing, trading and consuming products destined for humans, it seems opportune to go a little further, to identify a better and more suitable set of requirements, that would determine its true specificity.

Finally, considering the new rules on EU competence in Articles 3 and 4 of the TFEU, the absence of a specific mention of food does not mean that it cannot be recognized as an "autonomous subject", within the framework of the internal market and consumer protection, as well as agricultural and fishing policy, considering that, at least until now, competence has in many ways been fully exercised by the EU.

5. EU law and the WTO

There is no doubt that the rapid succession of rules – national, EU, and also dictated by international treaties linked to globalization, such as those contained in the Agreements with the WTO – has progressively accentuated the need to focus on the protection of the consumer faced with the great movement of food products, which means that food produced thousands of kilometres away is eaten by people spread over vast territories such as Europe, the US, Asia etc.

It is also true that EU law and the rules in the Marrakesh Treaty strongly favour the free movement of products and oppose a protectionist use of health rules formally adopted with the scope of protecting the consumer, but which may conceal individual economic goals of the States.

Considering the doctrine of the Court of Justice on the one hand (starting from *Dassonville*) ([15]), and some decisions by the competent

([15]) ECJ, 11 July 1974, Case 8-74.

bodies to solve some controversies within the WTO (*Meat with hormones* case) ([16]) on the other, is sufficient to understand the precarious balance between the right to protection of food safety and the trade interest to the free movement of products within the EU and the Member Countries of the WTO, fully expressed in Article 7 Regulation No 178/2002 and Article 5 of the SPS Agreement.

The interests of world trade today emerge to such an extent that they limit (even if not directly, as repeatedly affirmed by the Court of Justice) the system of food law, not only in individual states, but also in the EU.

The element that really emerges from this great mass of rules, prohibitions, limitations of prohibitions etc. is the distinctive features of the interests involved in the field of food and in the consequent adoption of rules. This phenomenon asserts itself in a strong and substantial shift of the effective power of law-making in the matter of food from the States and the regional supra-state bodies such as the EU, in favour of the WTO.

Food laws regulating the health aspects of products are becoming increasingly universal in nature, as they invest the global movement of food and must, therefore, guarantee the safety standards required at that level. This implies going back to rules of soft law often referred to by the WTO and EU, as confirmed by the references of the Court of Justice to the *Codex Alimentarius*, even before the EU accession to the *Codex Alimentarius* Commission ([17]) (e.g. in the well–know judgement *Smanor* on frozen yoghurt) ([18]) (Sgarbanti 1997).

It cannot be denied that, though the whole set of rules that makes up food law – both from an internal and an international viewpoint – is based on the general principle of protecting the consumer and his health, many rules are conditioned by trade, without prejudicing the formal supremacy of consumer health protection.

With regard to the universality of food law, it must be noted that, to guarantee the reasonable freedom of movement of products, the EU institutions (and not only them) not only probed the principle of the

([16]) World Trade Organization Appellate Body, WT/DS26/AB/R, 16 January 1998.

([17]) See Council Decision of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission.

([18]) ECJ, 14 July 1988, Case 298/87.

Cassis de Dijon to its very limits, but also removed trade obstacles of a hygienic nature through the adoption of directives on aromas and additives, which identify the products that are permissible and their quantities in relation to the individual foodstuff. At WTO level the SPS Agreement adopted Article 4, which appears largely inspired, *mutatis mutandis*, by the European mutual recognition principle, and Article 5, which allows only a temporary suspension of imports in cases of suspected unsafe imported food, suspension to be rapidly removed or made permanent upon scientific evaluation of the risks.

Today, the EU Treaty, in Article 169 TFEU, explicitly establishes consumer protection, but does not limit itself to mere health, although acknowledging health protection as a priority. It also cares about security, economic interests of consumers and the right to information, mainly achieved through adequate labeling and the use of names that will not give rise to misunderstandings, often referring to the aforementioned soft law system contained in the *Codex Alimentarius*.

6. Consumer protection and risk prevention

The protection of consumer health has given rise to the progressive regulation of the producers' responsibility on the one hand, and of the analysis of the dangers and the control of the critical points of the production systems and foodstuff distribution – HACCP ([19]), on the other (Costato 2006).

The former extends the responsibility of the producer, the latter aims at imposing a system of self-control able to prevent, to a maximum degree, the production of flawed food especially from a microbiological point of view.

Finally, a system of rules is being created by which the food producers will be obliged to guarantee *traceability* of the products, to allow the identification of the specific phase in which the flaw occurred, including phases preceding and succeeding production or commercialization of the food.

([19]) Introduced into the EU with Directive 93/43 of the Council, 14 June 1993, the HACCP method is presently enforced by Regulation No 852/2004 of the European Parliament and the Council, 29 April 2004.

These features of food law seem to make it difficult to identify its specific peculiarities, as they seem focused on the protection of the consumer and mitigated by the needs of trade, elements which food law seems to have in common with other sets or systems of rules which increasingly characterize the EU.

But there is a substantial recognizable difference between the general protection of the consumer and of interstate trade and the special protection of the consumer of foodstuff.

In fact, Community Regulation No 2006/2004 "on the cooperation for the protection of consumers" ([20]) highlights the peculiarity of the issue. Article 3(a) identifies the area of application affected by the directives mentioned in this regulation and points out that seller and supplier must be understood to mean the person who "is acting for purposes relating to his trade, business, craft or profession;". Therefore, according to this regulation, the consumer is a subject who deals with a professional and who contacts him in this role. In these cases, the legislators' concern is that of protecting the consumer from being squashed by the prevalent competence of the professional tradesman.

Regulation No 178/2002 considers the relationship between consumer and supplier of food from a different point of view. The fact that the food supplier is undertaking an activity with a view to making money (Article 3, Regulation No 178/2002) is not important. Regulation No 178/2002 is only interested in the safety of the food. The responsibility of the food supplier is not conditioned by his role. The only thing that matters is that the food should be edible without any risks beyond the normal ones provoked by food excesses or intolerance.

The peculiar objective aspect which characterizes this branch of law comes to the foreground. It regulates production and trade – or at any rate the supply – of goods that are not intended to remain external to the consumer, but are "intended to be, or reasonably expected to be ingested by humans" (Article 2, Regulation No 178/2002), giving rise to a specific physical relationship unlike any other product; not even medicine, which like food, also ends up inside the consumer but

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([20]) Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

which, unlike food, is only taken as an exceptional remedy, not by everyone and not every day. This distinction is confirmed yet again in Regulation No 2006/2004, which amongst the directives that involve a sphere outside food, also includes one governing the rules on "medicines for human use" but none related to food.

The specificity of man's relationship with food is also reflected in the idea of the sacredness of meals, which exists in many religions to such a degree that certain peoples maintain that eating your enemy is a way of acquiring his positive qualities. In short, foodstuffs are very particular substances given their 'intimate' destination with the consumer. The objective element, composed of the peculiarity of the destination of these goods, is essential when reconstructing the foundations of food law.

The fact that food law also regulates feeds confirms the point, as only feeds destined to animals that produce food or that will become food are covered by food law, while feed for animals not bred for this purpose are not.

7. Conclusion

The protection of consumers of food, therefore, takes on very specific aspects, that justify a shaping into a unitary system of the multiple food laws introduced by EU legislation.

The particular nature of food, and the functions of consumer protection, give food laws very specific features, which progressively are giving rise to a coherent systemic model, equipped with its own general principles, as established in particular by Regulation No 178/2002, and capable of self-integration.