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*Transparency in the Global Food System: What Information and to What Ends?*

**Panel 1: What We Talk About When We Talk About Transparency:  
The Meaning of "Transparency" In the Modern Food System**

## The Varieties and Limits of Transparency in U.S. Food Law

Lisa Heinzerling\*

Transparency is at once the oldest and the newest idea in the law of food. Roman civil law contained detailed rules against fraud in the sale of food. The Magna Carta required transparency in the weights and measures used by certain food sellers. The American colonies passed laws aimed at preventing deception in specific food markets. Today, dozens of federal statutes both constrain and compel statements about the identity, quality, and composition of our food. Regulations and guidelines issued by at least ten different federal agencies further refine the legal framework for representations about food. One cannot, in fact, look at the information provided on any package of processed food in the United States without seeing a highly refined product of the legal system. Indeed, I do not believe it is an overstatement to say that representations about the nature and quality of our food are among the most highly regulated verbal expressions in the United States today.

Yet we remain dissatisfied, even deeply confused. When the great agrarian and essayist Wendell Berry urges us to remember that "[a] significant part of the pleasure of eating is in one's accurate consciousness of the lives and the world from which food comes," he is also reminding us how little we know about the food we eat: how it was grown, where it was grown, who grew it, how it was harvested or killed, how far it has traveled to reach us. In truth, we often do not even know what is in our food, much less how it has come to our table. The nagging, and growing, concern that we do not know nearly enough about our food has made transparency a core demand of the contemporary movement aimed at changing the industrial food system.

How can our highly refined legal system on food transparency leave us with such a deep sense that we lack crucial information about the food we eat? I offer two explanations for our continuing befuddlement, both grounded in law. The first is an observation internal to the existing regulatory system for representations about our food: in brief, this system is far less powerful and far less committed to transparency than it seems. The second explanation critiques the existing system from the outside, observing that current law does not even aspire to induce an "accurate consciousness of the lives and the world from which food comes," and indeed musters considerable effort to avoid such awareness.

Closer examination of the current regulatory system for food at first only deepens the mystery as to how we can remain perplexed about the food we eat. After all, a central goal of the federal legal system for food is to ensure the integrity of representations made by sellers of food about their products; in all of the major federal statutes on food, "misbranding" stands side by side with "adulteration" as a core concern. To achieve transparency, the law of food deploys three different kinds of regulatory strategies: prohibitions against fraud, compelled disclosures, and constraints on discretionary disclosures. One can only marvel at the apparent comprehensiveness of the system thus created, one in which false or misleading statements about food are forbidden, disclosures about a wide range of food properties are mandatory, and discretionary statements about many specific properties of food are tightly constrained.

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\* Justice William J. Brennan, Jr. Professor of Law, Georgetown University Law Center. Copyright © 2014 by Lisa Heinzerling.

In principle, almost no imaginable food-related utterance, made in the food marketplace, can avoid this legal net. All representations made in food labeling and advertising fall under generic federal prohibitions against false or misleading statements, prohibitions that may be enforced not only by federal agencies but also, in some cases, by competitors harmed by deceptive representations about rival products.

Beyond the generic prohibitions on false or misleading representations about food lies a welter of highly specific affirmative requirements of disclosure. Together, these requirements provide that we must be told the name of the food we are buying, the ingredients in it (in decreasing order by volume), numerous facts about its nutritional content, the major allergens present in it, the name and address of the manufacturer of it, and the net weight of the product (in both English and metric units, no less). For certain foods, we must also be given instructions for cooking and handling and be told the foods' country (or countries) of origin.

Behind each of these compelled disclosures is a phalanx of precisely rendered rules about the exact utterances required (and allowed). Developing rules for food names and identities alone occupied the federal Food and Drug Administration for the middle decades of the last century. The nutrition facts panel on food products has been made instantly recognizable not through some magical process of spontaneous clarity and uniformity but through an intensely deliberate and intricate legal process. The seemingly straightforward requirement of identifying the place of origin of meat products – a requirement present in some form in federal law since the nineteenth century – has recently spawned regulatory and judicial proceedings stretching out over years and across continents. The law of food is thick, in other words, with both negative constraints – forbidding deception – and a highly refined set of positive obligations of disclosure.

The prohibitions on deceptive food-related representations have led naturally to specific constraints on representations likely to be highly enticing to consumers and thus especially susceptible to abuse. Claims about the superior nutrient content of food – its relative lowness in fat or sodium, or relative highness in fiber or calcium – are subject to a detailed legal structure specifying the exact food-content parameters that permit the claims. Statements that aim to connect the contents of particular food products to the salutary functioning of the human body must also abide by a precise set of legal rules. Claims about the disease-preventive properties of specific food products are likewise constrained by an intricate legal framework, one that here even entails mandatory premarket review by the government. Lawful use of the one-word descriptor "organic" requires compliance with a dense code of specifications about the precise methods of food production that warrant this term.

The federal government itself is also at once legally empowered and constrained in its own representations about food. Federal agencies must issue dietary guidelines instructing Americans about the components of a healthy (or unhealthy) diet. These guidelines directly inform consumers about healthy and unhealthy food choices and also indirectly affect consumer behavior by serving as inputs to food programs run or funded by the federal government. Federal agencies also issue periodic advisories on the potential risks or benefits of consuming specific foods, such as the recent federal advisory on mercury-containing fish. The federal government is, in short, a uniquely powerful speaker in the marketplace of ideas about food.

Collectively, these constraints and powers create an enormous legal structure governing representations about the food we eat. It would not be unreasonable to surmise, upon

surveying this structure, that the American food consumer must be the best- informed consumer (of any kind) in the world, perhaps in the history of the world. Every conceivable legal strategy governing information has been deployed in the U.S. food system: prohibitions on fraudulent representations, affirmative obligations of disclosure, constraints on especially alluring claims about the properties of particular foods, officially sanctioned dietary advice. The U.S. food system, one might conclude, is not just transparent; it is crystalline.

Yet the transparency achieved by law is only partial, and indeed sometimes serves only to conceal a lie. Resource limits at federal agencies charged with regulating food hollow out enforcement programs aimed at false or misleading representations about food. Regulatory fragmentation ensures that agencies with very different cultures and missions preside over the transparency of the food system. Lopsided participation by food producers before the agencies works distortions in rules on mandatory disclosures. Technical assumptions embedded within required disclosures hide a welter of political judgments. Entities created by federal law and endowed with coercive power to extract their funding from food producers develop sophisticated marketing regimes for particular food products, sometimes contradicting the messages conveyed by other government entities. Outdated programs remain on the books even while newer programs partially (but not completely) erase them; the law of food thus becomes a nearly illegible palimpsest. In all of these ways, the existing regulatory system for food fails to deliver the transparency it seems to promise.

Even if the existing system were fully functional, however, it would not meet the demands of many of the participants in the contemporary movement to transform our food system. These include demands for transparency of the kind Wendell Berry would counsel: transparency about the way our food is grown, where it is grown, who grows it, how it got to our table, at what environmental and human cost. Here, the truth is, the legal system does not even try to meet these demands. There are no federally compelled disclosures, on our food, about the environmental origins and consequences of our food. Nor are there federally compelled disclosures about the human labor or animal suffering involved in growing and raising our food. The USDA's National Organic Program, of course, aims to provide a shorthand descriptor signifying a superior environmental profile, but use of the "organic" label – and compliance with the conditions the USDA attaches to it – is discretionary, not mandatory, and in any event reflects only a partial accounting of the environmental consequences of food production and processing.

Indeed, in the domains of the environment, labor, and animal welfare, the federal regulatory apparatus has mostly evaded rather than embraced transparency. Federal agencies charged with ensuring the integrity of verbal representations about food have approved the use of terms that might signify environmental superiority – such as "fresh" and "naturally raised" – to describe the highly dubious products of an environmentally degraded agriculture. Agencies have avoided even collecting information – for their own use – about the unwholesome practices of modern agricultural operations. States have piled on by passing laws forbidding speech criticizing or documenting the unsavory practices of these operations. Extravagant allowances for "confidential business information" make many features of our food system not just opaque, but secret.

My chief purpose here has been diagnostic rather than therapeutic. But I will say a tentative word about the way forward. My first set of observations, about the shortcomings of existing rules on transparency about the nature and quality of our food, leads to a conclusion concerning my second set of observations, about the lack of rules on transparency about the

environmental and social consequences of our food: I do not think adding another layer of legal rules, mandating additional disclosures about our food, will achieve the kind of transparency Wendell Berry and others have described. Such rules would suffer from the same resource constraints, regulatory fragmentation, and – above all – industry capture that have undermined the existing regime. One must also be realistic about the amount of social engineering that can be accomplished through labels on products that most people buy in haste, on a limited budget, and for purposes other than social and environmental progress.

For now, one small step toward a more transparent food system would be for consumers to be clear-eyed about the nature of the food label. Consumers should treat the food label like a legal document, offered for their assent. It has been drafted by strangers, mostly for strangers' benefit. Every word, every number, even every font, has been parsed and negotiated and approved by strangers' lawyers. It is not a neutral document; it is not authorless, even if it is anonymous. The ancient impulse of *caveat emptor* should, in other words, activate, not recede, upon seeing a label on the food one is about to buy.

## Transparency for Whom? A Look at Indian Food Supply Chains in the Wake of Supermarket Transformation

Amy J. Cohen

Our charge today is to talk about “the meaning of ‘transparency’ in the modern food system.” I want therefore to begin with some thoughts on the relationship between “transparency” and “modernity.” As several scholars have argued, transparency, as a social and legal value, represents a shift in how we think about modernity. Namely, it represents a shift from trusting expertise and expert systems—for example, the FDA—to our more contemporary presumption that no system, public or private, will function effectively and honestly without mechanisms for monitoring and audit.<sup>1</sup> Thus, our contemporary faith in transparency also suggests a model of governance that is shaped by market norms: that is, a form of governance that rests not only on rules to prevent market failures in public as much as private life, but increasingly also on oversight and monitoring of those rules.<sup>2</sup>

But if our current modernist confidence in transparency reflects what William Mazzerella calls a “market-molded managerial ethos,”<sup>3</sup> it is important to make clear that transparency does not necessarily describe a state of affairs where buyers and sellers in market transactions themselves understand the terms of their agreement with sufficient information and opportunities to negotiate them. Rather, transparency more commonly means being the kind of entity that is subject to *oversight*<sup>4</sup>—in other words, an institution or actor who can claim to make all of its activities visible to external forms of monitoring and authority.

Understood in this way, transparency is also “an intensely moral project.”<sup>5</sup> Surveillance organizations like credit-rating agencies, corruption rankings, and accounting firms do not simply monitor market actors for efficiency; they promise measures and networks of trustworthiness and accountability.<sup>6</sup> As such, making oneself visible and subject to oversight today marks market actors as legitimate, ethical, and indeed as “modern”—and distinguishes them from unethical, opaque, and quite often “traditional” ones. Transparency, however, does not only index moral hierarchies between different kinds of market actors. It also produces disparate effects depending on an agent’s position in structures of political and economic power. For actors at the center, opacity can facilitate tyrannical forms of governance; for actors operating at the margins, however, opacity can become “a potential challenge to official

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<sup>1</sup> Omar Kutty, *Overseeing the Bank: Water, Sanitation and the Development of Liberal Sovereignty* (2104 ms on file with author) (describing Anthony Giddens’ argument that modern societies are characterized by trust in expert systems). See also Haridimos Tsoukas, *The Tyranny of Light: The Temptations and the Paradoxes of the Information Society*, 29(9) FUTURES 827, 835 (2007) (arguing that “the ideal of transparency” that the “information society promises to deliver...is not only illusory...but...undermines the trust that is necessary for an expert system to function effectively”); Marilyn Strathern, *The Tyranny of Transparency*, 26(3) BRITISH EDUCATIONAL RESEARCH JOURNAL 309, 310 (2000) (illustrating how contemporary social practices of audit “point[] to an absence of trust”).

<sup>2</sup> Kutty, *supra* note 1.

<sup>3</sup> William Mazzerella, *Internet X-Ray: E-Governance, Transparency and the Politics of Immediation in India*, 18(3) PUBLIC CULTURE 473, 499 (2006).

<sup>4</sup> Kutty, *supra* note 1.

<sup>5</sup> Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANNUAL REV. SOC. 285, 304 (2007).

<sup>6</sup> See *id.*

panopsis.”<sup>7</sup>

I have been studying food systems in India where transparency, along with discursive distinctions between traditional and modern market actors and institutions, play an important role in current debates about the restructuring of food systems according to the imperatives of large supermarket chains.<sup>8</sup> Supermarkets aim to catalyze fundamental changes not only in retail but throughout the food supply chain. In India, they aim to replace the fragmented networks of traditional agents and traders that currently move agricultural produce from farmers to retailers with highly rationalized, modernized sourcing systems that can be monitored from above, and that drastically limit the number of participants in market exchange. Unlike many existing Indian market intermediaries, supermarkets can claim to create transparent supply chains. Yet whom precisely are they becoming transparent for? As we shall see, as supermarkets institute new mechanisms to oversee and monitor food producers, food supply chains may become less intelligible and navigable, indeed more opaque, precisely for these small-scale users.

In India, policy elites have widely invoked transparency as an ideal to justify the Cabinet’s 2012 decision to reverse its longstanding policy against foreign direct investment in the food retail sector and thus to allow multinational retail chains like (Walmart, Tesco, and Carrefour) to enter India’s 450 billion dollar multi-brand retail market.<sup>9</sup> To that end, policy makers have characterized traditional traders and market intermediaries not only as inefficient but *unethical*, using market power that stems from their closed kinship and patronage-based network in order to pay farmers low prices and charge end consumers high premiums. In describing these intermediaries as unethical, commentators typically portray them as lacking transparency.

Consider, for example, a 2010 discussion paper released by the Department of Industrial Policy and Promotion (DIPP) to invite industry views on foreign direct investment in multi-brand retail. It explained: “Intermediaries dominate the value chain. They often flout *mandi* [wholesale market] norms and their pricing lacks transparency. Wholesale regulated markets...have developed a monopolistic and non-transparent character.”<sup>10</sup> The central Indian government, the paper continued, has “made a strong case for FDI in *modern* retailing as entry of *modern* foreign retailers through joint venture in India would help develop...a domestic supply chain capable of meeting *international* standards.”<sup>11</sup> Policy and media reports echo the government’s disapproval of non-modern, domestic Indian markets. For example, a recent article in *The Economist* on onions, which have been singled out as major cause of food inflation, colorfully describes how Indian *mandis* work:

Onions are sometimes unpacked, sorted and repacked, with wastage rates of up to 20%. By 9am the market is a teeming maze of 300-odd selling agents, who mainly act on

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<sup>7</sup> *Id.*

<sup>8</sup> See generally Amy J. Cohen, *Supermarkets in India: Struggles over the Organization of Agricultural Markets and Food Supply Chains*, 68 UNIVERSITY OF MIAMI LAW REVIEW 20 (2013); Amy J. Cohen & Jason Jackson, *The Moral Technologies of Markets: Foreign Direct Investment in Indian Food Supply Chains*, work in progress; *Market, State, Family: Supermarkets in Middle-Class West Bengal*, in SUPERMARKETS AND THEIR ALTERNATIVES: THE EVERYDAY POLITICS AND PRACTICES OF SUSTAINABLE FOOD (eds. Emma-Jayne Abbots, Benjamin Coles & Michael K. Goodman, Routledge Press, work in progress).

<sup>9</sup> Currently, roughly 95 percent of the food retail market remains in the hands of what policy analysts call the “unorganized” or “informal” retail sector. *Retail Sector in India Growing at Phenomenal Pace*, THE TIMES OF INDIA (June 25, 2012).

<sup>10</sup> Department of Industrial Policy and Promotion, Government of India, *Discussion Paper on Foreign Direct Investment (FDI) in Multi-Brand Retail Trading* 6 (2010).

<sup>11</sup> *Id.* at 9.

behalf of middlemen, and several thousand buyers—who are either retailers or sub-distributors. Everyone stands ankle deep in onions of every size. The bidding process is opaque. The selling agents each drape a towel on their arm. To make a bid you stick your hand under the towel and grip their hand, with secret clenches denoting different prices. Average prices today are about \$0.54 per kilo. If the seller likes your tickles you hail a porter. He carries your newly bought sacks on his head to a dispatch depot where another group of couriers takes them into the city.<sup>12</sup>

This description is not inaccurate, although it is incomplete. As one large orange broker in West Bengal explained—when I asked about why open auctions rarely happen in wholesale markets despite state law that requires them—an “auction system doesn’t work here.” Buyers are mostly united, he explained, and price variation depends mostly on supply and demand. Open bidding, he therefore argued, was unlikely to have much effect. But when supply is low and demand is high, he continued, brokers may nonetheless try to increase prices with a “fingering system”: “we will shake hands and [the buyer] will push on some points so we will know he is saying how much price. So again we will talk to another so whoever is giving more we will sell it to them and nobody will know the price.” “So we can’t call that [an] auction or competition,” he concluded. But in a sellers’ market, he stressed, the non-transparent fingering system is effective at raising prices while simultaneously preventing disputes among buyers and thus maintaining social relations in the market.<sup>13</sup>

Here the ambiguities created (and managed) by the “fingering system” are both endemic and potentially productive in Indian wholesale markets—“fixing” them via more and better transparent market practices could, as the orange broker suggested, create a new set of social problems.<sup>14</sup> William Mazzerella has thus called our contemporary interest in transparency a “politics of immediation – that is to say, a political practice ... that occludes the potentialities and contingencies embedded in the mediations that comprise and enable social life.”<sup>15</sup> But even if Mazzerella is right, a liberal legal/economic perspective would emphasize the costs of opacity—stressing the ways in which opaque market systems are nonetheless likely to produce both inefficiencies and inequities. In the remainder of this comment, I want therefore briefly to explore whether and how transparency in fact advances ideas of market efficiency and market equity in Indian food supply chains—and for whom.

Efficiency first. Frederick Schauer observes how legal scholars often hold the view that “open information is the key to efficient markets...that operate effectively.”<sup>16</sup> There is of course a long and rich literature devoted to studying the effects of information on markets.<sup>17</sup> Here I

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<sup>12</sup> *Lord of the Rings: Journey of an Indian Onion*, THE ECONOMIST, Dec. 14, 2013.

<sup>13</sup> Interview with Sanjay Prasad, Commission Agent, Sankar Prasad & Sons, in Siliguri, West Bengal (Nov. 19, 2010).

<sup>14</sup> See generally JACQUELINE BEST, THE LIMITS OF TRANSPARENCY: AMBIGUITY AND THE HISTORY OF INTERNATIONAL FINANCE (2005).

<sup>15</sup> Mazzerella, *supra* note 3, at 476.

<sup>16</sup> Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. Ill. L. Rev. 1339, 1350.

<sup>17</sup> A classic is George Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84(3) QUARTERLY J. ECONOMICS 488 (1970). Akerlof examines the problems caused by information asymmetries between sellers and buyers in markets including credit markets in India. Writing from a very different disciplinary perspective, Clifford Geertz describes strategies to search for, manage, and block information as “the central experience of life in the bazaar.” Clifford Geertz, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68(2) AM. ECONOMIC REV. 28 (1978).



wish only to address the common Indian policy claim that transparency—again, making one’s market activities visible and subject to oversight—will produce *cost savings* by minimizing waste and rents and thus producing surplus that can be shared among farmers and consumers. Sonia Gandhi, for example, recently summarized this ambition in a political speech: “It is for the benefit of the farmers and *aam aadmi* [common man], the Central government has decided to allow FDI in retail.”<sup>18</sup>

There is important data, however, that questions the correlation between transparency and cost savings in Indian food supply chains, including calculations from my own interviews with agricultural sourcing corporations. For example, consider this interview with Mayank Jalan, the Managing Director of Keventer’s Fresh, a corporation that supplies supermarkets with fresh fruits and vegetables in West Bengal and which is a subsidiary of Keventer Agro Limited, a national food processing corporation with multi-millions dollars of annual sales. He reports that upgrading to a Western supply chain model with sorting, grading, cold chain, platform, processing, storage, and dispatch systems—all organized, controlled, and monitored from above—would indeed enable the firm to salvage about 20% more produce that currently is wasted. But, under existing conditions, he explained, this “upgrade” would cost the firm more money that it would save. When I asked Jalan to speculate on why this was the case, he replied that the traditional supply chain is “*really* efficient” with its proliferation of small intermediaries rapidly moving goods all over the state: “look at the way that they’re doing the transactions. You know, their tenacity to get stuff, and then sell it off, and their knowledge about the pulse of the market, and the consumer.” For the time being, he thus prefers to rely on existing brokers and intermediaries and the “traditional” practices they have put in place.<sup>19</sup>

Economists Marcel Fafchamps, Ruth Vargas-Hill, and Bart Minten report similar findings in wholesale markets in four Indian states where brokers, known as “commission agents,” sell goods on behalf of farmers for a percentage of the sale. To their surprise, they could not conclude that “the somewhat obscure way in which auctions are held [and] the dual role of commission agents [as both broker and wholesaler]” generates rents that “are sufficiently large to reduce farmer prices and increase consumer prices.”<sup>20</sup> In fact, they found that large rather than small capital, such as exporters and processors, were hurt most by the current structure: “For them,” the authors conclude, “liberalization is essential.”<sup>21</sup> This is, in part, because large firms that wish to access global markets must structure market transactions according to uniform legal rules and standards that can travel intelligibly and explicitly across social and geographical contexts. In other words, transparency here reflects a market agent’s capacity to facilitate liberal institutional forms of oversight of standardized economic practices so that it can access new (often transnational) markets. This aim is different from raising prices

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<sup>18</sup> *Sonia Gandhi in Shimla: FDI will Benefit both Farmers and Consumers*, PRESSBRIEF.IN, Oct. 31, 2012. Sonia Gandhi was the Chairperson of the Congress Party led United Progressive Alliance (UPA) that ruled India from 2004-2014.

<sup>19</sup> Interview with Mayank Jalan, Managing Director of Keventer’s Fresh, in Kolkata, West Bengal (Nov. 1, 2010). Presumably this balance sheet could change with a different configuration of infrastructure and conditions on the ground—a transformation, however, that in India hardly seems forthcoming. Indeed, many corporate retail chains have scaled back more ambitious plans as they struggle to outcompete local actors on the ground. For more specific detail and analysis, see Cohen, *supra* note 8.

<sup>20</sup> Marcel Fafchamps, Ruth Vargas-Hill, & Bart Minten, *Quality Control and the Marketing of Non-staple Crops in India*, in GLOBAL SUPPLY CHAINS, STANDARDS AND THE POOR 122, 125 (Johan F.M. Swinnen ed. 2007) (studying Maharashtra, Orissa, Tamil Nadu, and Uttar Pradesh).

<sup>21</sup> *Id.* at 126.

for domestic Indian farmers and lowering them for consumers. Or to put the point bluntly, transparency does not itself necessarily ensure cost savings, especially when analyzed from the perspective of multiple and competing market interests and actors.

Second, on the relation between transparency and equity. One way global retailers in India propose to improve oversight in food supply chains is by introducing formal contract—a legal form that, according to the central Indian government, advances the interests of small farmers by releasing them from the grip of market intermediaries and their opaque, informal, and exploitative market practices. In brief, supermarkets propose to use production contracts where farmers would agree not only to supply a certain quality of produce for a certain price but also to use particular seeds, pesticides, and fertilizers as well as particular management practices and standards—all of which are supplied to them and monitored by the contractor. This is known as contract farming (or by its critics as factories in the field).

Currently, small farmers in India rely on local traders who often facilitate sales for a commission. Sometimes there is competition among agents for the farmer's price. Sometimes, however, these sales are interlinked. Bigger agents will provide credit and farmers will dedicate their fields to them. None of this is in writing or subject to formal state regulation. It is instead based on a combination of sociality, trust, patronage, coercion, and informal control. Indeed, highly flexible small-scale capitalists often defy formal processes of monitoring and self-regulation with their personalized relations to each other and to public officials.

Under contemporary liberalization, informally interlinked arrangements between farmers and intermediary traders stand to become formal contracts between farmers and vastly more dominant actors. Supermarkets, in some sense, want the kind of market power that the most dominant intermediaries already presently command but that supermarkets can't exercise because they lack informal and longstanding relations of patronage with other market and state actors. Nor is it simple for supermarkets to develop them. As corporations, supermarkets require governance practices like standardized accounting and professional management. They thus must exercise control through means that can be made cognizable and legitimate—indeed transparent—to the national and international financial and legal bureaucracies that govern them. Supermarkets thus use written contracts and legal modes of accountability—such as third party accreditation and private audit schemes of these contracts—that the state and consumers can monitor and see.

But do supermarket-governed supply chains produce more transparent and thus more equitable practices for farmers? To begin, we might ask if corporate supply chains in fact represent commercial spaces that are as transparent as they purport to be. Corporate actors know well that there are practical limits to what formal contracts (and their oversight mechanisms including courts) can achieve. In my interviews, corporate managers accordingly did not discuss only how they could liberalize the market via formal contracts but also how they could simultaneously embed *themselves* within informal social networks. For example, Vishal Sehgal, Head of Corporate Relations of Metro Cash and Carry, a German wholesale corporation, noted that “As a large company, my contract cannot be enforced. If I sign a contract and the price is 5 but the market is 10, no one will sell to me, I can't go to court. It is better to build trust.”<sup>22</sup> Here building trust does not involve social practices of audit and monitoring but rather replicating informal patron-client relations. For example, Keventer Group's Jalan explained that, like existing market intermediaries, the Keventer Group too extends credit to farmers without formal

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<sup>22</sup> Telephone Interview with Vishal Sehgal, Head of Corporate Relations, Metro Cash and Carry India (September 11, 2010).

security. He discussed farmers who produced mangoes for Keventer's food processing operations: "[I]n the month of November, December, we would just go and throw away money to all the farmers, you know . . . millions and hundreds of millions of Indian rupees—just goes out to the farmers, because that's when they need it. Now, when the season starts, in the month of May, after six months . . . I don't have any security; I don't have any paper; [I've] just given the money—I hope to collect it back through mangos."<sup>23</sup> This corporate strategy of adapting to local institutional context may reflect shrewd business sense. The point, however, I wish to stress is not simply that corporate actors themselves may selectively engage in practices that defy formal institutional forms of monitoring and oversight. Rather my point instead is that it is "modern" firms, not "traditional" traders, who can potentially shroud themselves with the legitimizing power of transparency and legal form, even if they simultaneously replicate informal business practices.

From a perspective concerned with equity, we might also ask about the lived experiences of small farmers increasingly subject to new liberal forms of monitoring and oversight. I interviewed approximately 100 small horticulture farmers in West Bengal about whether they would enter into supermarket contracts. The vast majority expressed strong reservations; as one put it: "We won't allow it. Contract means you are *under someone's restriction*."<sup>24</sup> But what if, I repeatedly asked, the company offers a good price and a contract for, say, two weeks, many remained adamant: "No farmer will go for a binding contract with any company . . . For fresh products, *we can understand the market*."<sup>25</sup> These farmers argued that in fresh produce markets they preferred to make production decisions and hedge against risk through their more immediate knowledge of the market and informal market relations rather than through formal contracts with large corporate actors. To these farmers, the opaque practices of the traditional market were more intelligible, and more easily managed, than the new potential supply chain.

And what about the relationship between supply chain transparency and market prices? At the same time that farmers worried that their production practices would become subject to onerous standards of monitoring and control, they also anticipated that contract farming would make market prices more opaque for them. As Lawrence Busch and Carmen Bain likewise argue, prices for goods traded in wholesale markets "can be far removed from and uncorrelated with the prices of similar products grown under contract," leaving farmers with insufficient information to bargain.<sup>26</sup> Indeed, from the perspective of the firm, one reason to favor contracts is precisely the non-public, non-transparent pricing that private agreements enable.<sup>27</sup> Moreover, as contract farming becomes more common, spot markets, in turn, become less reliable. Indeed, farmers elsewhere "have voiced concerns that . . . spot market prices become 'more vulnerable to manipulation and volatility as fewer buyers and sellers account for a larger percentage of the

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<sup>23</sup> Interview with Jalan, *supra* note 19.

<sup>24</sup> Interview with farmers in Santoshpur Village (near Kamdevpur) in District North 24 Paraganas, West Bengal (Mitra Routh trans.) (Sept. 21, 2010).

<sup>25</sup> *Id.* (Mitra Routh & Monalisa Saha trans.)

<sup>26</sup> Lawrence Busch & Carmen Bain, *New! Improved? The Transformation of the Global Agrifood System*, 69 RURAL SOC. 321, 331 (2004). See also KEVIN CHEN, ANDREW W. SHEPARD, & CARLOS DA SILVA, CHANGES IN FOOD RETAILING IN ASIA: IMPLICATIONS OF SUPERMARKET PROCUREMENT PRACTICES FOR FARMERS AND TRADITIONAL MARKETING SYSTEMS 24 (2005) (reporting that in their interviews with small farmers "the lack of or limited market information and intelligence on prices and alternative buyers and their limited negotiating or bargaining skills were considered as constraints to initiating [contractual] linkages").

<sup>27</sup> See, e.g., Neil Hamilton, *Agricultural Contracting: A U.S. Perspective And Issues for India to Consider*, in CONTRACT FARMING IN INDIA: A RESOURCE BOOK 1, 5 (Ashok Gulati, PL Joshi, Maurice Landes eds. 2008), available at [http://www.ncap.res.in/contract\\_%20farming](http://www.ncap.res.in/contract_%20farming).

trade.”<sup>28</sup> The farmers I spoke with in West Bengal expressed similar anxieties. As one put it: “If the market is not there, then we cannot verify the actual amount for that particular produce. In that case, it won’t be possible for us to *know* the actual price for my produce.”<sup>29</sup> Under a corporate regime, farmers, in other words, do not trust they could access the kind of market information they need to negotiate a price.

Farmers, I must make clear, did not defend existing markets, which are full of inequalities and contradictions, as much as waver that, for them, these markets presented more intelligible and reliable opportunities to negotiate a price (and manage production decisions) than the integrated supply chains that supermarkets hoped to construct via contract. As one put it, “the middleman will make [a] profit [of] hardly two rupees to three rupees. Not much. And in that case, the market will be controlled by us. But for the rich people, once they capture the market, it will be out of control.”<sup>30</sup> And with different ideas of what makes market transactions understandable, negotiable, and controllable came different ideas of what makes them equitable. For example, one farmer complained that: “Even if I want, I cannot sell it in the market directly. The middlemen have their union. They will stop us.” Contract farming, I suggested, would solve that problem. Here, to my surprise, is how my translator interpreted the rather lively conversation among three farmers that ensued:

In that case, the family of the middleperson, middleman will suffer. It is a “chain-chain” business. Everybody is making money and surviving. So if [the company] is coming directly to us, then the middleman won’t be there, and their family will be starving. So we don’t want that. Everybody is making business; let them do it.<sup>31</sup>

Not all farmers expressed such eloquent ideas of moral economy. But when it came to fresh produce markets, they were more likely to describe market relationships shaped by mutual constraint, trust, and a shared need to survive than brute exploitation.<sup>32</sup> This suggests that for some farmers the idea that “everybody is making business; let them do it” is its own equitable principle that markets (and the rules that regulate them) should accommodate and support.

To conclude: we are increasingly witnessing calls for heightened forms of public and private oversight of food supply chains, especially the high-end “quality” ones of the advanced industrialized economies of the West. It is against this backdrop that I am interested in how transparent market practices—that is, practices that are legible and can travel easily in a transnational economic environment—are not always more equitable or more intelligible to all those who participate in them. In other words, I have argued that transparency, as both a

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<sup>28</sup> Busch & Bain, *supra* note 26, at 331 (quoting S. Martinez and D.E. Davis, *Farm Business Practices Coordinate Production with Consumer Preferences*, 25 FOOD REV. 33, 38 (2002)).

<sup>29</sup> Interview with farmer in Akondoheria Village near Haroa in District North 24 Paraganas, West Bengal (Oct. 3, 2010) (Mitra Routh trans).

<sup>30</sup> Interview with farmers in Amboula Village (near Habra) in District North 24 Paraganas, West Bengal (Sept. 19, 2010) (Mitra Routh trans).

<sup>31</sup> Interview with farmers in Santoshpur Village, *supra* note 24 (Mitra Routh trans).

<sup>32</sup> I should add: Farmers’ assessments of agricultural markets were, in significant ways, commodity specific. They described small-scale trade for highly perishable fresh fruits and vegetables as far more competitive than trade for commodities such as rice, potatoes, and mustard seed oil where powerful actors who owned storage and processing facilities could manipulate both supply and prices. For a breathtakingly detailed analysis of the problems and inequalities in these staple markets, see BARBARA HARRISS-WHITE, *RURAL COMMERCIAL CAPITAL: AGRICULTURAL MARKETS IN WEST BENGAL* (2008).

regulatory and discursive practice, in some respects is situational—generating disparate effects depending on an actor’s position in local, regional, and transnational markets. Indeed, I have argued that for some actors like small farmers, transparency may not produce more market information but paradoxically *less*.

I have also suggested that our contemporary ideal of transparency produces its own market hierarchies and legitimizing effects. Indeed in India, the moral authority that transparency bestows helps to explain how policy elites can describe multinational retail corporations as instruments of “efficient supply chains which can act as *models of development*”—notwithstanding, for example, Walmart’s well-documented practices of bribery, corruption, gender discrimination, and union suppression.<sup>33</sup>

Of course, I do not mean to suggest that we should be against transparency in food supply chains. Transparency, as the title of our panel implies, is a “strategically deployable shifter.”<sup>34</sup> That is, it is a term with meanings that can shift across contexts—usable by policy elites to encourage foreign direct investment in the food supply chains of developing economies as much as by the Coalition of Immokalee Workers’ (as I suspect we will hear tonight) to expose unfair labor practices in those chains. Rather the aim of this comment has been to suggest that as we discuss what transparency means, we consider its distributional effects as it is deployed as a justification for reforming food systems in particular social and economic contexts. And that we do so not only for people in their identities as consumers who are desirous of more and better health and safety information, but also for people in their identity as producers who are desirous of sustainable and equitable livelihoods.

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<sup>33</sup> Department of Industrial Policy and Promotion, *supra* note 10, at 18 (emphasis added).

<sup>34</sup> Bonnie Urciuoli, *Strategically Deployable Shifters in College Marketing, or Just What do They Mean by “Skills” and “Leadership” and “Multiculturalism”?*, Language & Culture: Symposium 6 (2010), available at <http://language-culture.binghamton.edu/symposia/6/index.html>.

# Transparency, crisis and innovation in EU Food Law

Ferdinando Albisinni\*

**Summary:** *I. Premise. – II. Technological innovation. – III. Legal innovation, globalization and new market rules. – IV. In search of transparency. – V. The emerging of some elements of transparency in the '90s. – VI. The BSE crisis and the new transparency approach. – VII. The White Paper on Food Safety – VIII. A golden thread throughout EFLS. – IX. A fil rouge. – X. A winding and still not covered path towards transparency.*

## I. Premise

When we talk about *Transparency* in *European Food Law*, two elements immediately come at stage:

- *crisis*,
- *innovation*.

*Crisis* has been a key element in the experience of the construction of EFL; an element which, in the last two decades – starting from the *BSE crisis* – allowed EU Institutions to overcome in a short period of time traditional models of harmonisation, shifting toward unification of rules and of procedures, and adopting *transparency* as a sort of *pass-partout* tool, which has been devoted to deal with a multiplicity of issues.

Crises of the past “*offer lessons to regulators and policy makers in the aftermath of the current crisis*” - observed recently a prominent legal scholar, discussing new institutional and regulatory models for preventing systemic risk in the financial area<sup>1</sup>.

Such consideration may be certainly shared by scholars discussing present trends in Food Law.

*Innovation* has been both at the origin of the food safety crises and a central element of the answer to them.

In this framework, the relation between *technological* and *legal innovation* has played a peculiar role.

## II. Technological innovation

It is well known that *technological innovation* has played a decisive role in bringing about a radically different relation with food. Change has come about both in the quantity of food provisioning and in the quality of the processing, conservation and logistics of food stuffs.

Developments in this field began to accelerate in the early XIXth century, in the wake of the inventions of the celebrated French chef and confectioner Appert, whose discoveries concerning food conservation in tins enabled the Napoleonic armies to enjoy much greater independence in food supplies, allowing the forces to be deployed and moved with a speed and effectiveness unknown to the armies of the past.

Since that moment, food consumption habits have continued to evolve and have undergone extraordinarily rapid change in recent times. The processing of raw materials of

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<sup>1</sup> Laura Ammannati, *Restructuring global governance of financial system: a framework for preventing systemic risk*, 2014, in print, which I could read due to the courtesy of the A.

agricultural origin, which previously had been carried out predominantly in the home, now began to be increasingly performed by the food industry, with its characteristics of technological and organisational complexity; the development of fast means of transport, which were not only less expensive but also far more capacious than their predecessors, led to the rise of new forms of food distribution, in which foodstuffs were no longer necessarily placed on markets chosen for reasons of proximity, but could instead be distributed on markets situated at enormous distances from the area of production<sup>2</sup>.

This has allowed the emergence of new protagonists, among which the large food retail organisations, which in recent years have assumed a hegemonic position with respect to the foodstuff processing industry itself. In many ways, agricultural activity has found itself in an inferior position, subordinated to choices made elsewhere, both upstream and downstream of the primary activity<sup>3</sup>.

On the other hand, *technological innovation* must be credited with playing a decisive role even in European countries with a specific reputation in the food sector, allowing certain products to achieve and maintain positions of excellence which today are widely recognized and appreciated as exemplary cases of a tradition of food quality, although in actual fact, more than resting on a past history such products are in many cases the outcome of "*the invention of tradition*"<sup>4</sup>, as testified in the motto "*tradition is a successful invention*"<sup>5</sup>.

To cite just one among many cases, the success of Italian wine on world markets is owed above all to technological innovation. If the wine on sale were still "*the wine of old farmer*", all the wine cellars would have had to close down years ago. And if one reflects that Baron Ricasoli introduced only at the end of XIX century in Chianti region new cultivars, innovative planting densities and layouts, novel processing and vinification techniques, and it is these which today lie at the heart of the worldwide success of this wine, then it becomes clear that chance has played only a minor role in the recent innovation-oriented review of the procedural guidelines for Italy's major quality wines. The essence of their success lies in the introduction of new high quality cultivars or trail-blazing processing techniques, and more complex fining and ageing procedures.

### III. Legal innovation, globalization and new market rules

But *legal innovation* matters too.

Consider e.g. new EU rules, ranging from *traceability* to *precaution*, from *mutual recognition* to *origin from large areas*, from *official control* to *private voluntary bodies* entrusted with tasks traditionally pertaining to public law (such as the Consortiums for the Safeguarding of Wines and of PDO and PGI products).

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<sup>2</sup> See Jean Pierre Poulain, *Sociologie de l'alimentation. Les mangeurs et l'espace social alimentaire*, Paris, PUF, 2002.

<sup>3</sup> See, e.g., the detailed analysis on the agri-food distribution published by the Italian anti-trust Authority, Autorità Garante della Concorrenza e del Mercato, *Indagine conoscitiva sulla distribuzione agroalimentare (IC/28)*, Roma, June 2007, and *Indagine conoscitiva sul settore della GDO (IC43)*, Roma, July 2013, at [www.agcm.it](http://www.agcm.it).

<sup>4</sup> According to the brilliant and well-known oxymoron by Eric J. Hobsbawm, in E.J. Hobsbawm- T. Ranger, *The invention of tradition*, Cambridge Un. Press, 1983.

<sup>5</sup> As stated by Corrado Barberis, *L'agricoltura tra gastronomia e alimentazione*, in INSOR, *Gastronomia e società*, Milan, 1984, p. 21.

In all these cases, the predominant element characterising EFL over the last two decades is precisely that of constant innovation, of *Rechtsreform in Permanenz* - as has been written, in reference to a different branch of law, by some German scholars<sup>6</sup>.

It is therefore vital to interact with *innovation*, endeavouring to bring order into the various proposals that spring up in a disorderly fashion and to organise them within the confines of a shared set of options. The keys of this process can be summarised by reference to:

- *innovation*,
- *globalization*,
- *regulation*,
- *market*.

*Market* results as a synthetic formula that blends and sums up the first three categories, a space allowing the action of rules that operate both in the economic and legal sphere.

*Market* calls back to *innovation* when the outcome of innovation affects economic analysis, to *regulatory issues* when the effects of such issues have consequences for the juridical analysis, and to *globalisation* inasmuch as the global perspective has radically changed the economic and legal framework.

Over recent years, it has been widely noted that in present days globalisation cannot be regarded as an element exogenous to the legal order: rather, it is more correctly viewed as internal to it, strongly shaping both processes and contents. Furthermore, a number of arguments have been put forward in support of the suggestion that this goes hand in hand with the "*marketisation*" of the institutions and the distribution of public powers over more than one level, in significant harmony with the growing multilevel dimension of the sources of law.

The role played by *jurisdictional power* within this multilevel dimension, to balance interests and values in the construction of European law in general and of food law in particular, is well known, starting from the decision on the case *Cassis de Dijon* and the introduction of the paradigm of *mutual recognition* on the basis of *equivalence*<sup>7</sup>.

Together with *jurisdictional power*, a relevant regulatory role is played by *contracts*, although in most cases this sort of contracts do not imply any significant negotiation. Food law, at a large extent, also embraces *standards* introduced by certification bodies, of a private-law origin but with no clear-cut position in the public-private, binding-voluntary, dichotomy, which long guided civil law systems, with their crystal-clear and reassuring - though now largely lost - geometry.

The law generated through these pathways is by its proper nature *ultranational*. This is particularly true for food law, where regulatory authorities, technical rules and standards are typically transnational.

It follows - as has been pointed out - that, on a global stage crowded with regulators, we have to observe the "*shift from the hierarchical coordination concentrated in the State towards an independent non hierarchical connection between public and private actors, belonging to all the levels of government*"<sup>8</sup>. Legitimation is sought on the basis of the rules (i.e. on the basis of the given rules as previously constructed, and *transparency* could play a

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<sup>6</sup> As observed, in reference to corporate law, by U. Noack-D.A. Zetzsche, *Corporate Governance Reform in Germany: The Second Decade*, Center for Business & Corporate Law Research Paper Series No. 0010, Düsseldorf, June 2005.

<sup>7</sup> Court of Justice, 20 February 1979, C-120/78, *Rewe-Zentral Ag.*; on the general paradigm of equivalence as a founding principle of European Legal System see Luisa Torchia, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo*, Il Mulino, Bologna, 2006; with specific reference to the role played by such paradigm in EFL see Ferdinando Albisinni, *The path to the European Food Law System*, in L. Costato - F. Albisinni (eds.), *European Food Law*, Cedam, Padua, 2012, p.17.

<sup>8</sup> Sabino Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in "Riv. trim.dir.pubbl.", 2001, 601 ss.



decisive role in this framework), rather than on the basis of the consensus expressed in the traditional democratic forms of participation<sup>9</sup>, but the reference to the *rule of law* in its substantive content<sup>10</sup> is often challenged by a dimension where “*the notion of «legal space» becomes more important and relevant than the traditional one of «legal system»*”.<sup>11</sup>

EFL, in the sense of an institutional set of legislative acts formally adopted by the Council, the Commission and the European Parliament, is itself increasingly taking on an ultra-national dimension, in the two aspects of submitting to external sources and, on the other hand, of acting as the source of rules that have effect beyond the borders of the Member States.

Thus, if the European rules on quality wines that derive from certain specific regions must conform to the indications of the World Trade Organisation<sup>12</sup>, EU, for its part, projects its rules beyond its own borders, with health and hygiene requirements but also with technical rules. Accordingly, anyone who wishes to export to Europe must conform to the prescribed European health and hygiene requirements and technical rules (thereby putting into effect the well known model of law that becomes “*another country's national law*”<sup>13</sup>).

One may also cite the example - in reference to a specific class of products - of the extension of the rules on PDO and PGI products beyond the boundaries of Europe. It is sufficient here to recall Regulation No 692/2003<sup>14</sup>, which, modifying the rules originally introduced in 1992 on PDO and PGI products<sup>15</sup>, provided for a specific operative procedure for the registration, and consequent safeguarding, as PDO or PGI, of agricultural or food products from third countries, external to the Community<sup>16</sup>.

It is hardly necessary to emphasise that globalisation is bringing about radical changes in traditional law-making, with effects that have specific incidence on food law.

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<sup>9</sup> Sabino Cassese, cit.

<sup>10</sup> On the different contents, procedural or substantive, assigned to the *rule of law* notion, and on the challenges that globalization and fragmentation of sources of law are posing to a substantive model of *rule of law* nourished with fundamental cultural and social values, see Francesco Viola, *Rule of Law. Il governo della legge ieri ed oggi*, Giappichelli ed., Torino, 2011.

<sup>11</sup> Francesco Viola, cit., p. 147.

<sup>12</sup> See, e.g., Commission Regulation (EC) No 316/2004 of 20 February 2004, amending Regulation (EC) No 753/2002, laying down certain rules for applying Council Regulation (EC) No 1493/1999 as regards the description, designation, presentation and protection of certain wine sector products, which has been adopted taking into account some claims entered by third parties after the notification of Regulation No 753/2002 to the World Trade Organisation - as expressly stated in whereas (2) and (3) of the Regulation No 316/2004.

<sup>13</sup> As defined by Francesco Galgano, *Lex mercatoria*, Il Mulino, 2010, 5<sup>a</sup> ed., who gives this title to Chap.III of the book; see also Chap. IV and V of the same book.

<sup>14</sup> Council Regulation (EC) No 692/2003 of 8 April 2003 amending Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

<sup>15</sup> Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs; later Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs; now Council Regulation (UE) No 1151/2012 of the European Parliament and of the Council of 21 November 2012, on quality schemes for agricultural products and foodstuffs.

<sup>16</sup> Products obtained in non EU countries (from Columbia coffee to tea from certain regions of India, to numerous Chinese products) can therefore now obtain - and in effect have obtained - recognition within the European Community and legal protection as well, starting with Café de Columbia (PGI), entered in the Register of PDO and PGI by Commission Regulation (EC) No 1050/2007 of 12 September 2007, since to the nine Chinese products filed in the Register of PDO and PGI : Jinxiang Da Suan Igp (garlic); Guanxi Mi You Dop (kind of fruits ); Lixian Ma Shan Yao Igp (tuber called igname); Longjing cha Dop (thé); Shaanxi ping guo Dop (apple); Longkou Fen Si Igp (vermicelli); Zhenjiang Xiang Cu (vinegar); Yancheng Long Xia (shrimp); and then to Commission Implementing Regulation (EU) No 1041/2012 of 26 October 2012 entering a name in the register of protected designations of origin and protected geographical indications (Pinggu Da Tao PDO) (peach), and others.

Such change is not devoid of effects on the legal model envisaged, since "the announced change cannot fail to imply a reconsideration of the method applied in drawing up our rules, on the sources of such rules", on the "relation between *production* and *food*, or rather, between *agricultural product* and *foodstuff*", and this must be considered within the broader context of the interplay between *globalisation* of the rules and *territoriality* as an intrinsic element characterising the "agricultural part" as compared to the "industrial part" of the agri-foodstuff system<sup>17</sup>.

#### IV. In search of transparency

Along those lines, *innovation* (both in production, in organisation, in logistic, and in marketing) and *globalisation* (both in trade and in regulation), played a relevant role in the first decades of EFL, starting from the '60s (just after the Rome Treaty establishing the EEC) and until the first years of the '90s (after the Maastricht Treaty), through the adoption of regulations on agricultural products within the CAP and of directives aimed to establish the internal market.

But all of these legislative European acts, even when including consumer protection among their goals, did not mention *transparency*, and even did not consider it.

Even the well know Directive No. 79/112/CEE of 18 December 1978<sup>18</sup>, which was the first horizontal European legislative act to be applied to the labeling of any sort of food product, did not mention *transparency* and was adopted only on the legal basis of art. 100 TCEE (i.e. to harmonize national rules to implement the common market).

The goal to inform and protect consumers is declared, but more as a tool to guarantee fair competition among European business operators, than as a value by itself<sup>19</sup>.

And the decisions of the Court of Justice and the recommendations and rules adopted by the Commission in the '80s, on the free use of food names by foreign operators even when not corresponding to the traditional domestic names, confirmed an approach which was first of all *market oriented*, with *the free circulation of goods* as the prevailing criteria (it is sufficient here to remember the famous cases of pasta, bier, vinegar, with a radical approach which changed only partly in the '90s with the decisions *Smanor* on frozen yogurt and *Van der Laan* on shoulder ham), even when such use of names could in fact result non corresponding to the expected substance of the products.

But, if European legislation and jurisdiction for more than three decades largely underestimated the relevance of *transparency* in food law, in the same years such issue started to emerge as a central one in the studies of social scholars.

The contribution of French scholars during those years resulted really enriching<sup>20</sup> (not by chance, due to the traditional importance of food and food culture in their history).

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<sup>17</sup> Thus stated by Antonio Jannarelli, *Il diritto dell'agricoltura nell'era della globalizzazione*, 2<sup>a</sup> ed., Bari, 2003, pp. 299-300 and 311, in the closing chapter of the work; the chapter bears the significant title "From the agricultural product to the foodstuff: globalisation of the agri-food system and agricultural law".

<sup>18</sup> Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labeling, presentation and advertising of foodstuffs for sale to the ultimate consumer.

<sup>19</sup> Such characterization of the Directive No 79/112 appears particularly relevant when compared with present prevailing models on labeling.

<sup>20</sup> Starting from the well known researches of Claude Lévi-Strauss in the four volumes *Mythologiques I. Le cru et le cuit*, Paris, Plon, 1964, it. *Mitologica I. Il crudo e il cotto*, trad. di Andrea Bonomi (Il Saggiatore, 1966); *Mythologiques II. Du miel aux cendres*, Paris, Plon, 1967, it. *Mitologica II. Dal miele alle ceneri*, trad. di Andrea Bonomi (Il Saggiatore, 1970); *Mythologiques III. L'origine des manières de table*, Paris, Plon, 1968, it. *Mitologica III. Le origini delle buone maniere a tavola*, trad. di Enzo Lucarelli (il Saggiatore, 1971);

Already in 1979 a paper of Claude Fischler, “*Gastronomie, gastro-anomie*”<sup>21</sup> underlined that in the affluent age, linked to globalization and technical innovation, the consumer of food is missing any solid and established criteria to decide, and is therefore in a condition of *gastro-anomie*<sup>22</sup>. Consumers are in a paradoxical condition, where the “largely increased freedom of choices goes together with the loss of safety which was previously guaranteed by a socially shared regulatory system”<sup>23</sup>: “autonomy advances, but together with it even *anomy* advances”<sup>24</sup>.

Some years later, in the first ‘90s, a French scholar of public law – before any emerging of food safety crises in Europe – observed:

«*Si le slogan de la qualité a gagné tous les secteurs d’activité économique, et notamment les activités industrielles, les enjeux de la qualité prennent volontiers une dimension politique dans le cas des activités agricoles: le consommateur entretient évidemment un rapport plus intime avec sa nourriture qu’avec les produits non alimentaires, alors même que s’allonge sans cesse le processus qui conduit l’aliment de la conception des matières premières à son estomac, et que s’estompe sa connaissance des systèmes de production, transformation et commercialisation*»<sup>25</sup>.

This simple image, the *intimate relation* of the consumer with his *nourishment*, the attention to the circumstance that the journey of food from the agricultural phase of the production of raw materials to the *stomach* is becoming everyday longer (so that *nourishment* and *stomach* appear as essential elements of this area of law) highlights clearly the inadequacy of any legislation which does not focus on this *intimate relation*.

## V. The emerging of some elements of transparency in the ‘90s

Without using the word *transparency*, some first elements of what we today qualify as the *transparency paradigm* appeared in 1993 in the EEC directive which introduced the method HACCP within the food business organisation.

Council Directive 93/43/EEC of 14 June 1993 on HACCP<sup>26</sup>, introducing the principle of analysis and control over critical points, gave legal relevance to the internal control over food undertakings, to the awareness of the firm's responsibility for organisational aspects and not only for liability for damages, enhanced appreciation of the value of the food chain, underlined express and conscious internal and external communication as the object of a guarantee and as a characterisation of the supply.

The regulatory framework thus introduced into the Community's legal system resulted in profound *innovation* as compared to the pre-existing rules of domestic law.

The adoption of risk analysis systems, the emphasis placed on control over one's own undertaking and on the producer's responsibility in the sphere of self-certification, translated into dynamic models matters concerning organisation and safeguards. Such models are far

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*Mythologiques IV. L'homme nu*, Paris, Plon, 1971, it. *Mitologica IV. L'uomo nudo*, trad. di Enzo Lucarelli (Il Saggiatore, 1974).

<sup>21</sup> Claude Fischler, in *La nourriture. Pour une anthropologie bioculturelle de l'alimentation*, in “Communications”, 1979, XXXI.

<sup>22</sup> See Jean Pierre Poulain, cit., for a comprehensive exam of the French social studies on those issues.

<sup>23</sup> Jean Pierre Poulain, cit., p. 53.

<sup>24</sup> Claude Fischler, *L'omnivore*, Paris, 1990, 164.

<sup>25</sup> Daniel Gadbin, *La qualité de la production du produit de base en droit communautaire agricole*, in “Le produit agro-alimentaire et son cadre juridique communautaire”, Rennes, 1996.

<sup>26</sup> Directive 93/43/EEC of 14 June 1993, on the hygiene of foodstuffs; the Directive has been later repealed by Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004, on the hygiene of foodstuffs.

more flexible than the previous static rules typical of domestic legal systems (including the Italian system), which to a large extent followed the model of rigid and abstract prescriptions regarding equipment and premises, together with ex-post checks on the products, while the specific aspects of the production processes were disregarded.

The establishment of guidelines and voluntary handbooks setting out correct hygiene practices<sup>27</sup> made it possible to highlight the differences in production techniques and products; further, it awarded priority to the individual's sense of responsibility, which was made to hinge on behaviour and on an attitude of respect for health as an intrinsic component of the authenticity of a product rather than as an externally imposed prescription.

In one word: food producers were called to be *transparent* in their activity.

*Analyse what you do, declare and document it*: this is the motto which sintetizes the introduction of the HACCP method, and it is something which clearly evokes *transparency in food operators activity*.

It is no more sufficient that the single food product is respecting the single prescription regarding that sort of food: all the food business structure and activity must be transparent, must be a *glass house*, where official control can look through.

These measures represented relevant regulatory innovations in comparison to the earlier models of national legislation, as expressed, e.g., in the Italian Consolidated Text of 1962 on food safety<sup>28</sup>, which provided for authorisation of the premises prior to engaging in productive activity, followed by subsequent checks on the products, but tended to ignore the internal activity of the food business operator.

In short, the generalised adoption of the HACCP method was part of a development path, within which legislation originating from the European framework flows into national law, forging a link between consumer confidence, safeguard of health, and free circulation of foodstuffs; a link which is situated within the proper elements of *transparency*. Rather than relying on static public control systems, this approach hinges on a system of dynamic self-control by business operators, which are called upon to exercise surveillance over their own undertakings.

Equally significant is the extent of the regulatory sphere involved. To achieve its aims, the 1993 Directive stated that *all the phases* of production were to be the object of regulatory control<sup>29</sup>, thus marking the transition from attention to a single food product to attention to *food chain* and to *transparency* of it considered as a whole

The crucial aspect of the European regulatory framework as outlined in the early '90s by Directive 43/93/EEC thus consisted in its *systemic elements*, characterised by overall relations in which the actors are considered in a unitary perspective, and each of the actors involved has to perform an analysis and a thorough check to verify and control its own phases, and must *declare* what he is doing.

In this first legislative experience, *transparency* is not situated within the communication to consumers, but it is rather assumed as a *raison d'être* of the internal self-organisation of food producers. Full and conscious *transparency* within any food business organisation is a condition of *accountability* and therefore of *trust*.

## VI. The BSE crisis and the new transparency approach

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<sup>27</sup> See Art. 5, Directive 93/43/EEC.

<sup>28</sup> Law 30 April 1962, No 283, «Disciplina igienica della produzione e della vendita delle sostanze alimentari e delle bevande».

<sup>29</sup> See art.2 of Directive 93/43. This article still excludes the primary production phase, which would be only incorporated in the food law system by the subsequent Regulation No 178/2002 on GFL.

The innovative elements of *transparency within food business*, introduced in fact even if not expressly mentioned in the Directive on HACCP of 1993, did not receive specific and systemic attention during the following years.

It was only with the *BSE* crisis, at the end of the '90s, that *transparency*, in its different declinations and meanings, made the first official entrance within the EU food law vocabulary.

Regulation No 820/97 of the Council<sup>30</sup>, adopted *in response* to the BSE crisis, effectively came to express a new systemic regulatory approach, which involved both *contents* and the *legal basis* adopted.

As far as *contents* were concerned, the rules introduced by the 1997 Regulation, prompted by worry about the spread of a pathology whose origins were traceable to a specific territorial area and to an identified Member State, required for the first time that (i) *traceability* and (ii) generalised *origin labelling from large area* (institutes both located within *transparency*, in the two different areas of the *food chain* and of the *communication to consumer*) should be introduced in connection with a whole category of products (beef), and that such requirements should not be limited to the case of niche products, as had been stated by Regulation No 2081/92, which had concerned itself only with PDO/PGI products.

*Transparency* was expressly mentioned both as a *goal* to be reached and as *tool* to guarantee the stabilisation of markets.<sup>31</sup>

Even the *legal basis* underlying the 1997 Regulation was new, although this novelty was not clearly perceived at the time, as attention was focused overwhelmingly on the increasing concern among the public on account of the dangers deriving from the BSE epidemic.

The Council invoked Art. 43 of the Treaty as legal basis of the new regulation. In other words, it invoked a rule pertaining to *market organisation*, and not Art. 100/A on the approximation of the provisions laid down by law, regulation or administrative action in Member States, which had up to then been utilised in all cases where food safety rules had been introduced.

The European Commission and the European Parliament challenged the 1997 Regulation, and took the matter to the Court of Justice. What they challenged was not the intrinsic content of the measures adopted or their appropriateness: rather, they objected to the use of Art. 43 TEC (now Art. 43 TFEU) as the legal basis, instead of Art. 100/A (now Art. 114 TFEU).

According to the institutions that had taken the matter to the Court, the aim pursued by Regulation No 820/97 should not have been interpreted as establishing rules for the production and enhanced appreciation of agricultural products (an aim that – in their opinion – would not justify differentiating products by territorial origin, as long as the origin was quite independent of the objective characteristics of the products involved); rather, the real aim of the Regulation was to introduce health and hygiene measures for the safeguarding of health, and such measures were the only ones that could justify rules were capable of inducing fragmentation of the internal market in terms of national origin of the product involved.

Consequently, according to the arguments put forward by the European Commission and the European Parliament, the legal basis should have been identified as residing in Art. 100/A rather than 43 TEC, and therefore it would be necessary to have recourse to the co-decision procedure provided for at the time by Art. 189/B.

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<sup>30</sup> Council Regulation (EC) No 820/97 of 21 April 1997, establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products.

<sup>31</sup> See whereas (1) of the Regulation.

The case was decided by the Court with a sentence issued on 4 April 2000<sup>32</sup>. The date of publication is significant, because the judgment was issued just a few months before the introduction of the new rules on beef, approved by the European Parliament and the Council in July 2000<sup>33</sup>. The new rules superseded Regulation No 820/97 and – modifying the approach followed in 1997 - identified its legal basis as residing not only in Art.37 TEC (previously Art. 43) on the CAP, but also in art.152 TCE (previously art. 129), according to which: « 1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities», thereby following the co-decision procedure established by Art. 251 TCE and overcoming the disagreement between the Council, the Commission and the European Parliament.

At the time of the decision, the conflict between the different institutions of the community was thus gradually being resolved, and the question no longer consisted in how to divide up areas of responsibility: instead, attention had turned to the systematic plane of identification of the founding principles of the area for which rulings were to be set out.

In this context, the Court rejected the distinction between production and marketing, and between rules to be respected by producers and rules addressed to consumers; it thus declared the appeal to be unfounded, with the following exemplary explanatory statement:

«... Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the attainment of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. ... As regards the aim of the contested regulation, it must be observed that, according to the first recital, it is intended to re-establish stability in the beef and beef products market, destabilised by the BSE crisis, by improving the transparency of the conditions for the production and marketing of the products concerned, particularly as regards traceability. ... It must therefore be held that, in regulating the conditions for the production and marketing of beef and beef products with a view to *improving the transparency of those conditions*, the contested regulation is essentially intended to attain the objectives of Article 39 of the Treaty, in particular *the stabilisation of the market*. It was, therefore, rightly adopted on the basis of Article 43 of the Treaty.»<sup>34</sup>

In short, the April 2000 statement by the Court attributed to Regulation No 820/97, perhaps more than to any other previous regulatory provision, the nature of an exemplary act of the European food law system, the latter being viewed as a complex system that brings about the following effects: it unifies in a plurifunctional body of rules the demands of competition and the demands of food safety and of transparent information to consumers; it overcomes the distinctions between different subjects; it brings together in a single regulatory framework – whose leading paradigm is *transparency* – all the subjects of the production chain (including those who operate in the primary production phase) and also the consumers.

This underscored the *impetus* and the *timing* of the rise to prominence of a model that was remarkably innovative as compared to the past. In the new model, the agricultural phase of production, the food processing phase and that of marketing and consumption were combined in an original and avowedly innovative and unified regime.

According to the original model outlined by the Court of Justice, what has been introduced by Regulation No 820/97 is not only *transparency* within the operations of one

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<sup>32</sup> Judgment of the Court 4 April 2000, Case C-269/97, Commission of the European Communities v Council of the European Union.

<sup>33</sup> Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000, establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97.

<sup>34</sup> See para 47, 53, 59, 60 of the Judgement.

single business operator (as provided by Directive No 43/93), but *transparency in the entire food chain*, even if limited only to bovine animals and beef.

The system model of *food chain*, until then contained within the borders of economic science, becomes a legal concept.

And *transparency* qualified itself as the essential tool of guarantee, in a double declination:

- *internal transparency* within the food chain, through *traceability*;
- *external transparency* to consumers and within the market, through mandatory *origin labelling from vast areas*.

## VII. The White Paper on Food Safety

The subsequent, and decisive, turning point came with the adoption of the new food safety model, enshrined in the White Paper on Food Safety of 2000<sup>35</sup> which – even before than Regulation No 178/2002 (commonly known as General Food Law - GFL)<sup>36</sup> – addressed to all the operators in the production chain, and significantly concluded:

“*Greater transparency* at all levels of Food Safety policy is the *golden thread* throughout the whole White Paper and it will contribute fundamentally to enhancing consumer confidence in EU Food Safety policy”.

A quotation from this White Paper has become widely known. The proposed policy is summarised with the formula *from farm to table*: it is not the *fields* that are protagonists in a material sense, but rather the *farm*, the agricultural enterprise, and with it the *farmers*, the producers.

This inspiration, systemic and involving the entire production chain, was translated into an operative body of rules with the introduction of "food business" by Art.3, n. 2 of Regulation No 178/2002. A further novelty introduced by the 2002 Regulation consists in its specific reference to the carrying out of operations connected *to a stage*, and therefore to a possible *food business operation connected to a stage*, that is to say a subject definable as an undertaking whose distinguishing characteristics and regime is not the fact of completing all the actions involved in an entire and homogeneous activity, but simply that of being involved in one of the *stages*, even if the stage in question has an internal structure of its own consisting of activities which in various ways are not homogeneous with one another.

The reference to the *stage* (already present, although not fully developed, in the earlier European provisions on health and hygiene) goes hand in hand with the concepts of *production chain* and *network*, thereby assigning legal significance to categories that had so far been considered only from the economic point of view.

We are thus faced with a rather unusual question involving definitions: that is to say, a subject can be defined as a *food business*, with the resulting obligations and responsibilities, even if this definition does not concern the general activity the subject is engaged in, but simply relates to the fact that the subject takes part in one of the *stages* of production, processing and distribution of the food products. But this can be taken even further: even if the subject merely performs "*any of the activities related to any stage of production, processing and distribution of food*", this is sufficient for the subject to be defined as a food business and thus to be subject to the rules laid down for this category.<sup>37</sup>

<sup>35</sup> Bruxelles, 12.1.2000, COM (1999) 719 fin.

<sup>36</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

<sup>37</sup> Art.3, n.2, Regulation No 178/2002.

In other words, the object of the ruling (the *food product*) and the aim of the ruling (*food safety*) have led European regulators to realise that imposing rules as a scattered series of points, by totally distinct categories of subjects, cannot be effective, and that what is needed is a body of uniform rules, which define the subject not in terms of its abstract characteristics but simply in terms of its very participation (in whatever form) into the sphere of producing and distributing.

The search for innovative regulatory modules was likewise given decisive expression in Regulation No 178/2002. Innovation can already be seen in the multiple legal basis adopted. In particular, the following articles of the Treaty are invoked jointly: Arts. 37 (agriculture), 95 (approximation of laws – public health – protection of the environment), 133 (common commercial policy), 152, para 4, lett. (b) (veterinary and plant-health measures).

As a result, food provisions concern a number of different areas, with consequences affecting various different types of wants and sectors, and implying the creation of new models and regulatory tools.

The traditional boundaries between rules applicable to production, and rules applicable to trading activities, become blurred, and distinctions made on the basis of functions attributed to particular tasks play an increasingly minor role.

Rather, what comes to play the role of a decisive institutional canon is the functionalisation of the exercise of regulatory powers and governance.

New provisions concerning the manner of operating of any agri-food business become established, together with new organisational and relational rules, which complement traditional rules on liability.

The agri-food system appears to be the object of a peculiar and complex regulation, the *Agri-Food Law*, not confined to final food products alone, but intended to deal with the entire agri-food chain, in an integrated systemic set of rules dealing jointly with the primary production and with all the stages of transformation, distribution and marketing, and in the same time dealing both with public authorities and with private entities.

The awareness of the systemic nature of food safety risks lead the European legislator to draw a systemic and unified legal order and governance of the entire agri-food chain, *from farm to table*, as much as in recent years the financial crisis of 2008 lead to the awareness of the need of a new systemic and comprehensive “*global financial governance*”.<sup>38</sup>

In such systemic agri-food legal order, provisions on *responsibilities* of food and feed business operators, of public authorities, and of Member States<sup>39</sup>, are intended firstly to establish *competences* (“who is in charge for what”)<sup>40</sup> subject to scrutiny and therefore bound to be accountable and transparent, in a perspective which ties up “risk society” and “the imperative of responsibility”.<sup>41</sup>

As expressly stated in the conclusions of the White Paper above mentioned, the *golden thread* which inspires such new legal framework in its entirety is *transparency* throughout the whole *European Food Law System*, with a pluralistic declination of this paradigm.

## VIII. A golden thread throughout EFLS

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<sup>38</sup> For an in depth analysis, see Laura Ammannati, *Restructuring global governance of financial system: a framework for preventing systemic risk*, cit.

<sup>39</sup> Art. 17 of Regulation No 178/2002.

<sup>40</sup> Object and goals of art. 17 are clear in the German text of Regulation No 178/2002, which translates “Responsibilities” in “Zuständigkeiten”, i.e. competences.

<sup>41</sup> Thereby importing into binding legal provisions the suggestions of the well known researches on present times of Ulrich Beck, *Risikogesellschaft Auf dem Weg in eine andere Moderne*, Suhrkamp, Germany, 1986; Id., *World Risk Society*, Polity Press, USA, 1999; and of Hans Jonas, *Das Prinzip Verantwortung*, Insel Verlag, Frankfurt am Main, 1979; Id., *The Imperative of Responsibility*, University of Chicago Press, 1984.



Some scholars identified *transparency* as “the literal value of *accountability*, the idea that an accountable bureaucrat and organisation must explain, or account for, its actions. ... a key requirement for all other dimensions of accountability”.<sup>42</sup>

Others underlined “the multiple frames in which we can see *accountability* and *transparency* and the relationship between them – as *Siamese twins*, as *matching parts* and as an «*awkward couple*»”, noting that “*more recent academic literature tends to differentiate different models and types of accountability and the same is just beginning to happen with the idea of transparency*”.<sup>43</sup>

This complex and mobile relationship between *transparency* and *accountability* finds peculiar expression in the area of EFL, due to the “*rapport plus intime que le consommateur entretient avec sa nourriture*”.<sup>44</sup>

Today – roughly two decades after the BSE crisis and more than one decade after the White Paper on Food Safety and the adoption of GFL – when we talk about *transparency* in EFL, we talk of a *polisemic paradigm* used in various declinations, not necessarily uniform, even if having common inspiration and common goals, which on a provisional and tentative basis, taking into account specific provisions adopted in some main areas of food legislation, can be summarised as:

- (1) *transparency* in regulation and in governance;
- (2) *transparency* within food business undertakings;
- (3) *transparency* within market, in market transactions, in relations B2B;
- (4) *transparency* in communication and information to consumers, on safety and on quality, both from public authorities and from business undertakings and private organisations, in relations B2C.

All these declinations are subject to specific and express rules of law, first of all in the GFL, Regulation No 178/2002, where *transparency* is largely mentioned both in the reasons of the act and in detailed articles.

A specific section, Section 2, within Chapter II dealing with the “General Food law”, is entitled to “*Principles of Transparency*” and consists of two articles:

“Article 9 - Public consultation

There shall be open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow it.”;

“Article 10 - Public information

Without prejudice to the applicable provisions of Community and national law on access to documents, where there are reasonable grounds to suspect that a food or feed may present a risk for human or animal health, then, depending on the nature, seriousness and extent of that risk, public authorities shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or feed, or type of food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk.”

These two articles expressly refer to *transparency* in sources of law and in governance, both *before* the adoption of regulatory provisions, and *after* the emerging of risk situations which require decisions affecting the general public.

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<sup>42</sup> Jonathan GS Koppell, *World Rule – Accountability, Legitimacy and the Design of Global Governance*, Univ. Chicago Press, 2010.

<sup>43</sup> Christopher Hood, *Accountability and Transparency. Siamese Twins, Matching Parts, Awkward Couple ?*, in “Accountability and European Governance”, eds. Deirdre Curtin, Peter Mair, Yannis Papadopoulos, Routledge ed., London and New York, 2012, 61, at p. 77.

<sup>44</sup> Daniel Gadbin, cit.

But even apart from this named Section, the *transparency* principle is spread all over the text of Regulation No 178/2002, including:

- art. 13 international standards;
- art. 14 food safety requirements;
- art. 16 presentation;
- art. 17 responsibilities;
- art. 18 traceability;
- art. 19 withdraw and communication after the sale;
- art. 22 transparency in EFSA;
- art. 55 transparency in the management of crises.

A detailed analysis of all these provisions will result in a sort of synopsis of EFLS<sup>45</sup>, but two groups of provisions can be mentioned as capable to highlight *Transparency* as a *polysemic expression*.

Art. 14, establishing “*Food Safety Requirements*”, after mentioning in the first two paragraphs material and substantive elements of food safety, in the third paragraph adds:

“3. In determining whether any food is unsafe, regard shall be had:

(a) to the normal conditions of use of the food by the consumer and at each stage of production, processing and distribution, and

(b) to *the information provided to the consumer*, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods.”

The consumer is not only the passive beneficiary of protection; he is called to an active role in the complex system of food safety.

*Transparency* in the information to be provided about food safety undertakes therefore a twofold nature:

- it is a *duty* for the food business, which are obliged to give fair and exhaustive information,

- but in the same time it is a *source of responsibility* for the consumer, who has to read carefully the information provided to avoid adverse health effects, similarly to what is established by EU directive on financial products, where the operators are under duty to give to the consumers full disclosure of all the conditions applied to the operations, but conversely the consumers must carefully evaluate the operation on the basis of the information provided.

As effectively underlined by Lisa Heinzerling, the result is that: “The ancient impulse of *caveat emptor* should, in other words, activate, not recede, upon seeing a label on the food one is about to buy”.<sup>46</sup>

With reference to production and trade, artt. 16-21 draw the new rules of organisation and responsibility of food business operators.

Substantive requisites of food products and of food production techniques must be respected, but this is no more sufficient.

Food business undertakings are under the duty to respect new rules of organisation, which can be synthesised as:

- *transparency* in internal organisation, with:
  - the adoption of HACCP procedures;
  - the adoption of traceability procedures;
- *transparency* in business relations, by:
  - sharing information with the others operators along the food chain

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<sup>45</sup> For a detailed analysis of Regulation No 178/2002, article by article, see *Commentario al regolamento (CE) n.178/2002 del 28 gennaio 2002*, IDAIC (ed.), in “Le nuove leggi civ.comm.”, 2003, p. 114 ss.

<sup>46</sup> Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, paper prepared for the UCLA-Harvard Law School Food Law and Policy Conference, October 24, 2014.

- *transparency* to consumers:
  - in presentation before the sale;
  - in withdraw and information after the sale.

## IX. A fil rouge

*Transparency paradigm* is not only present in Regulation No 178/2002.

Starting with the GFL, it is now the *fil rouge* of all subsequent European food legislation.

Regulation No 1169/2011 on food information to consumers<sup>47</sup>, which will enter in force next 14 December 2014, insists on:

- art.3.1. providing a basis for final consumers to make informed choices and to make safe use of food;
- art.3.2. protecting the legitimate interests of producers and promoting the production of quality products;
- art.3.4. transparent public consultation;
- art. 4 mandatory information;
- art. 7 fair information;
- art.45 notification procedure aimed to ensure that the process of introducing new food information legislation is transparent for all stakeholders.

In a different area of legislation, Regulation No 1308/2013 on Common Organisation of Agricultural Markets<sup>48</sup>, which has been recently introduced as part of the reform of the Common Agricultural Policy, and which entered in force on 1 January 2014:

- moves from the consideration of the goal of *Market transparency*<sup>49</sup>;
- introduces specific rules to grant *Market transparency* in public aids<sup>50</sup>;
- encourages the recourse to regulatory agreements among producers, interbranch organisations, producers organisations<sup>51</sup>, and to written agreements<sup>52</sup> as tools capable to promote “best practices and market *transparency*”<sup>53</sup> and to help to handle market crises, getting over two strong traditional taboos of EU competition laws: a) the prohibition of previous agreements among producers to regulate the offer of agri-food products; b) the prohibition of previous agreements to regulate prices of agri-food products<sup>54</sup>.

## X. A winding and still not covered path towards transparency

<sup>47</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011, on the provision of food information to consumers.

<sup>48</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013, establishing a common organization of the markets in agricultural products.

<sup>49</sup> Whereas 11, 12, 17, 23, 132, 192.

<sup>50</sup> Artt. 18-19.

<sup>51</sup> Artt. 125, 127, 131, 132, 168, 209.

<sup>52</sup> See, on the controversial relationship between “transparency” and “modernity”, with reference to the experience of introduction of written contracts in the India food market, the persuasive analysis of Amy J. Cohen, paper prepared for the UCLA-Harvard Law School Food Law and Policy Conference, October 24, 2014.

<sup>53</sup> Whereas 132.

<sup>54</sup> For an analysis of the new innovative EU regulation of business contracts in the food market see Ferdinando Albisinni, *La nuova OCM ed i contratti agroalimentari*, in *Riv.dir.alim.* [www.rivistadirittoalimentare.it](http://www.rivistadirittoalimentare.it) no 1-2013, p. 4.

In this complex process driven by *transparency* some questions remain still largely open:

- is *transparency* a passive or an active paradigm ?
- in other words: does *transparency* mean only to be subject to scrutiny in decisions, or is it also an expression to designate *participation* and not mere subsequent *control* ?
- how *transparency* effectively works in EFL, with specific reference to *transparency* in sources of law and in governance, especially after the Lisbon Treaty and the increased amount of delegated and implementing powers assigned to the Commission ?

A recent case of conflict between the EU Parliament and the EU Commission, arising from the new Commission Regulation on the origin of meat different from bovine, induces to consider with caution the effective rate of *transparency* in the exercise of EU regulatory powers, and – by consequence – in the agri-food market.

The EU Regulation No 1169/2011 on food information to consumers<sup>55</sup>, established, inter alia, that the indication of the country of origin or place of provenance shall be mandatory for fresh, chilled and frozen meat of swine, sheep, or goats or poultry<sup>56</sup>, and that the EU Commission should adopt implementing acts introducing such labelling provisions<sup>57</sup>.

On 13 December 2013 the Commission adopted the foreseen implementing regulation<sup>58</sup>, but did not extend to such meat the rigorous origin provisions introduced in 1997 for beef and beef products, and with specific reference to minced meat and trimmings admitted a general (and generic) indication “*Origin: EU*”.<sup>59</sup>

Such provisions have been criticized by some commentators underlying that a generic indication of EU origin appeared not coherent with the *transparency* framework provided and supported by Regulation No 1169/2011. Moreover such generic EU origin indication appeared not capable to prevent new crises like the horse meat crisis<sup>60</sup> caused by minced meat coming from specific EU countries; so that – according to those commentators – it was necessary to specify the country of origin of any meat with reference to each MS to restore trust among consumers.

The EU Parliament adopted a severe resolution, expressly mentioning “the recent food scandals, including the fraudulent substitution of horsemeat for beef”, observed that “1. the Commission implementing regulation exceeds the implementing power conferred on the Commission under Regulation (EU) No 1169/2011”, and concluded: “2. Calls on the Commission to withdraw the implementing regulation; 3. *Calls on the Commission to draw up a revised version of the implementing regulation, which should include a mandatory labelling requirement for the place of birth, as well as those of rearing and slaughter, for unprocessed meat of pigs, poultry, sheep and goats in accordance with the existing beef origin labelling legislation; 4. Calls on the Commission to remove any derogation in the implementing regulation for minced meat and trimmings;*”.<sup>61</sup>

<sup>55</sup> See *supra*.

<sup>56</sup> Art. 26.2. Reg. No 1169/2011. For beef and beef products the mandatory origin labelling had been introduced already by Reg. No 820/1997 – see *supra* par.6.

<sup>57</sup> Art. 26.8. Reg. No 1169/2011.

<sup>58</sup> 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.

<sup>59</sup> Art. 7.1.(a) Reg. No 1337/2013: “where minced meat or trimmings are produced exclusively from meat obtained from animals born, reared and slaughtered in different Member States;”.

<sup>60</sup> On the horse meat crisis see Valeria Paganizza, *The Cucumber and Horsemeat crises*, in *Riv.dir.alim. www.rivistadirittoalimentare.it* No 2-2014, p.53.

<sup>61</sup> The EU Parliament Resolution adopted on January 29, 2014, is published at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2014-0087+0+DOC+XML+V0//EN>.

The Commission totally rejected the EU Parliament resolution, observing: "The option advocated by the Parliament resolution (i.e. the mandatory indication of place of birth) would necessitate strengthening the animal labelling system for swine, sheep, goats and poultry. *This would incur disproportionate costs for animal readers and national administrations. ... The exemption for minced meat provided for in the adopted Implementing Regulation is justified by the nature of the product and the associated production system, which uses meat from a variety of origins much more frequently than other types of meat.*", adding as conclusive and decisive argument: "*The Commission's proposal was adopted by the Standing Committee on the Food Chain and Animal Health by a qualified majority of 23 Member States*".<sup>62</sup>

The Commission Regulation No 1337/2013 remained therefore in force in its original text, even after the express contrary resolution of the EU Parliament.

It must be added, to better evaluate the case, that the identity of the 23 MS which voted in favour of the Commission proposal and of the 5 MS which voted against it was not made public.

As a result, in this relevant and sensitive case *transparency* in EU food regulation appears far from being effectively reached in all its different but related declinations:

- *in regulation and in governance*, as much as the process by which the provisions have been adopted remains opaque, and the single responsibilities of MS remain unknown, contrary to the substance even if not to the wording of art. 9 of Regulation No 178/2002;<sup>63</sup>
- *within food business undertakings and within market*, as much as concealing the single MS origin in the label encourages unfair behaviours in competition;
- *in communication and information to consumers*, which are not in condition to know the effective geographical origin of the food product which they are buying.

In other words, such recent case evidenced that, even in the EFLS and even after the formal statements affirmed in the GFL of 2002, effective *transparency* in food law is far from being fully accomplished.

At the same time, this recent case offered documented evidence that *transparency in food law* is a *polisemic expression* having the plural declinations already mentioned, but it is also a *necessarily coherent paradigm*, which can be effectively realised only as a whole in its *entirety*.

*Transparency* in communication to the consumer cannot be realised by itself alone, but requires *transparency* in regulation and governance and *transparency* in market relations, and implies *responsibility* and *accountability* of all the actors in scene. Vice versa, the *absence of full transparency* in regulation and governance implies, as a sort of natural corollary, a *weaker transparency* in market competition and in communication to consumers.

In this perspective, on the basis of the European experiences (starting from the '90s and up the recent case of meat labelling), and in an increasing globalisation of the sources of law which by itself increases the challenges coming from conflicting values and interests, *transparency* appears to be a powerful tool to deal with innovations, both technological and institutional, only when properly located within the *rule of law*, if we intend it, over the due respect of established procedures (as referred to by the EU Commission in its answer to the EU Parliament), above all as coherence with a set of prominent values.<sup>64</sup>

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<sup>62</sup> The Follow up of the Commission adopted on April 15, 2014, is published at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2014/2530\(RSP\)#tab-0](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2014/2530(RSP)#tab-0)

<sup>63</sup> See *supra* para 8.

<sup>64</sup> On the *rule of law* notion, and on the difficult task of reconciling procedural and substantive issues, flexibility and arbitrariness, values and interests, in present times of globalization and fragmentation of sources of law, see Francesco Viola, *Rule of Law*, cit.

As underlined with reference to «*food democracy*» by a US scholar<sup>65</sup>, and to «*food principles and rules*» by a EU scholar<sup>66</sup>, the peculiarity of “*man’s relationship with food*”<sup>67</sup>, in a global world where “*s’allonge sans cesse le processus qui conduit l’aliment de la conception des matières premières à son estomac*”<sup>68</sup>, poses new and unheard challenges to traditional models and sets of legal regulation.

*Transparency*, in the plural declination above discussed, can be a powerful tool to search possible answers to such challenges, but a relevant part of the long and winding way toward *Effective Transparency in Food Law* is still to be covered.

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<sup>65</sup> Neil D. Hamilton, *Food Democracy II: Revolution or Restoration ?*, in *Journal of Food Law & Policy*, 2005, p.13.

<sup>66</sup> Luigi Costato, *Principles and rules of European Food law*, in L.Costato – F.Albisinni (eds.), “European Food Law”, cit.

<sup>67</sup> Luigi Costato, cit.

<sup>68</sup> Daniel Gadbin, cit.