

ЕВРОПЕЙСКОЕ АГЕНТСТВО ПО БЕЗОПАСНОСТИ ПРОДУКТОВ ПИТАНИЯ: ТЕХНОЛОГИИ, НОРМЫ И КОНФЛИКТЫ.

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В статье дается обзор правовых аспектов обеспечения безопасности продуктов питания в Европейском Союзе и основных институтов в данной области в историческом контексте. Автор утверждает, что современное право не только делает глобализацию возможной, но и управляет ей. Это приводит к возникновению определенных противоречий. Наука оказывается неспособной обеспечить определенности, полезные для общества. С другой стороны, общество само выдвигает альтернативную политическую концепцию, основанную на новых средствах участия в деятельности общества. Далее, современность имеет тенденцию создавать правовую норму, способную мгновенно адаптироваться к изменяющимся условиям в мире. Особое внимание уделено Европейскому агентству по безопасности продуктов питания (EFSA), которое играет ведущую роль в указанной области. Более того, имея гибкую институциональную структуру, EFSA может стать связующим звеном между социальной демократией и либеризмом, чему автор уделяет особое внимание. Социальный эффект успешно достигается тем, что агентство обеспечивает гибкое сочетание (или баланс) коммунитарного и национального уровней. Занимаясь экономическими аспектами, но выходя за пределы имущественных прав, EFSA ускоряет преодоление неэффективных бюрократий. Автор приходит к выводу, что в конечном итоге все юридические неопределенности будут решены путем «упорядоченного плюрализма».

The Origins of Food Safety Law

For immemorial time, «food fear» has represented «an evil of Western civilization» [11], since right from the start, it has been intertwining with commercial competition problems [12], which have been considered a source of division by government leaders. Food fear has also been associated with political and cultural process [12] (repressive) dynamics, and with food habits problems.

Among examples of the past [12], the 24 articles of Mirepoix Charter, approved on July 17th, 1303, represent an inspiring expression of this kaleidoscope.

First of all, besides the taxation on produce, the Charter established even the price, as «the notion of public quiet is incompatible with that of competition; secondly, it guaranteed «public health» – today better referred to as «food safety», contemplating the inspections of markets, the checking of cattle [12] (and not by sample) and the possible sanctions.

But the aforementioned elements were accompanied, with insinuating subtlety, by traits of political, religious, and cultural fight against the Catharist heresy that, being vegetarian, was recognizable, no matter if

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declared or clandestine, by food habits, since they didn't eat meat, dairy or eggs.

The rule was perhaps a means to spot those covered Cathars among those who practiced the same habits, among the inspectors or customers going to the market although not to buy meat; in any event, controlling the meat market, main taboo among Cathars, was already a political signal [12].

Anyhow, it is sure that the occurrences and choices accompanying the development of food safety highlights «the history of human struggle in order to evaluate, possibly reduce, control the risks» related to the assumption of food. Along the time, the sweeping enlargement of markets, the progressive diffusion of mass consumption, a more and more standardized production strengthened the «food fear», inexorably appealing to a more refined regulation capable of disciplining the entire agricultural and food system.

Essentially, as P. Bevilacqua pointed out [6], the most primordial and private practice in ages – surviving through food – has become matter of public concern and protection, unprecedented object of regulation, critical point in ordering the international trade.

These are processes launched along an evolutionary path in which institutions, norms, technical entities are involved, whose main aim – the consumer's protection – finds its own legal tools in the regulation no. 178/2002, defined by attentive economists «general food law» [7], deriving from it a systematic structure and a unifying horizon in the food law.

The European Food Safety Authority in the Institutional Processes

EC Regulation no. 178/2002 (28 January 2002), providing principles and general elements of legislation on food, establishes the European Food Safety Authority and fixes procedures in the field of food safety. The aim of this regulation is to find a legal basis in the food sector fostering the protection of human health and consumers' interests, ensuring on the other side the effective functioning of the market [5].

In particular, through a composite system – domestic and European, direct and indirect [8] – the regulation disciplines the prevention and the risk control by evaluating the risk itself and its managing. The evaluation, technical and scientific only, is given to the European Food Safety Authority which, in this regard, is in charge of providing the Commission with the scientific information necessary to the risk control. In executing this pre-eminent duty,

the Authority should cooperate with agencies and national scientific committees and create a network system in order to realize an incessant information and opinion exchange on the most relevant problems dealing with food safety.

In this way, it follows that scientific and technical matters and the organization of data concerning food and feed acquire a determining relevance in light of the new regulation.

The European Authority, in particular, «represents in the meantime the indispensable joint between each of the single national authorities and the rest of the Union, and the body in charge of the almost entire risk assessment, even though in cooperation with domestic levels and the communitarian laboratory».

And it is indeed this interweaving between technical functions and pre-eminent role to ask for institutional considerations.

Ordinarily, authorities come from a deficit in executing [20] mostly recurring in «complex» [18] political and administrative systems, deeply affected by the rapidity of economic processes, the polyarchy of legal sources, the intersection of interests, the disruption of traditional forms in politics.

At the communitarian level, in particular, Authorities get further reasons of their own existence from the emergence (of the rules) of market and competition as constitutional paradigms, untouchable by the domestic legislator if not in cases and within bounds provided by the communitarian law, whose power does come from a «break» of the Constitution (according to article 11) with the following limitation of sovereignty.

Despite the denomination, Agency and/or Authority, they are not entirely assimilable to analogous bodies already existing in domestic legal orders. «If they share with them the regulatory or executing function they exert on the ground of a high technical qualification in specific fields reserved to the Union, it cannot be said the same of their independence, given that in the European agencies are represented both Member States and – at least in those established by the EC Treaty – the European Commission».

The European Food Safety Authority which, by comparison with the most recurrent typologies, can be defined neither independent, nor regulatory, indicates the breaking point in the balance among different protected interests just through the technical and scientific feature. But it points out also the apparent corroboration of the supranational State at the level of politics of law, with

the expansion of communitarian powers – although precariously balanced with respect to logistics and organizational elements – with the constitutionalized principle of subsidiarity.

The current discipline on biotechnologies, in particular, confirms the dialectics. If the directive 90/220 referred to the emission of genetically modified organisms in the environment traced «a decentralized mechanism, whose key role was attributed to the national authorities in charge with the release of the first authorization» finalized to the commodification of a genetically modified organism [9], on the contrary the regulation no. 1829/2003 starts an articulated and complex procedure in which subsidiarity and centralization are combined leaning towards authority, leaving the Authority the ultimate determination for the dissenting opinion the Commission may give with the definitive motivation.

Metaphorically speaking, food safety gets a two-headed connotation, since the supremacy of technique and the political technocracy in the Commission seemingly coexist, the Commission staying in the Authority the final interlocutor. If I may take the liberty of a historical reference, I would like to notice how, in Paris back to the Colbertian period, «the competent authority in supplying food and food safety still is a more-headed monster which puts together three judicial bodies and an administrative authority» [12].

If the process of multiplying bodies should simplify, concentrating functions in just one structure detached from the traditional Administration, in the European Food Safety Authority case it seems to happen quite the reverse.

The combination (horizontal/vertical, central/suburban) founding the Authority generated a complex system, and not only logistically and organizationally speaking; the double communitarian/national dimension refers to a rather complicated domestic organizational equipment, especially with respect to its functional nature, because of the noteworthy difference of the administrative apparatuses in each of the Member States.

If the protected interests are, in large part, the same (protection of health, of consumers, of agricultural produce...), the domestic structures and national Agencies for food safety (where they exist) work following different models, tools, and functions, but pursuing the same interests.

Food Safety in the Lisbon Treaty

In this regard, it is important to consider that the particular combination of the Authority, providing elements of integration and decentralization, seems to represent the real epiphenomenon of bigger European institutional dynamics, based on a moving balance among different powers, also in the field of food safety (beyond common agricultural politics [1]).

With the enter into force of the Treaty on the Functioning of the European Union (TFEU), differently from the agricultural matter, there is no explicit references to the issue of feeding but, on the contrary, there are specific articles (article 168 on health safety and article 169 on consumer's protection). Despite this absence, it is doubtless that there is a direct relation among feeding, food safety, and health security; furthermore, the eighth paragraph of the regulation no. 178/2002 highlights that «the Community has chosen a high level of health protection as appropriate in the development in the food law». The sixth paragraph is even more significant considering the relation among feeding, food safety and health security, especially when this article affirms that «water is ingested directly or indirectly, like other foods. Thereby contributing, to the overall explosive of a consumer to ingested substances, including chemical and microbiological constraints».

Indeed, also in the field of food safety, a spread institutional juncture and of competences emerges as far as the aforementioned article 168, paragraph 4 provides – differently from article 2, paragraph 5 and article 6, letter a), and accordingly to article 4, paragraph 2, letter k) – that the European Parliament and the European Council contribute to enhance the objectives identified by this article, deliberating in accordance with the ordinary procedure and after consulting the Economic and Social Committee and the Committee of Regions, and adopting measures in the veterinarian and phytosanitarian fields aimed at the protection of public health in order to deal with common safety issues.

Essentially, even in the food safety matter, there is a process similar to the one characterizing the Common Agricultural Policy, in which the exercise of competences is well spread among different levels, powers, and initiatives, inside an institutional complex framework, build on a «mobile balance» among different subjects [1].

As it has been authoritatively observed, «also in the European Union the

relation between the centre and suburban areas, between national legal orders and supranational realities, between national and European institutions presents itself plural and not univocal and not hierarchical» [17]. In this sense, specifically with regard to competences in food issues, the complexity of the institutional apparatus balanced between the Union and Member States seems to reflect the same intricacy of the matter itself.

The European Food Safety Authority enters in this dialectics particularly through its functions and competences.

Functions and Competences of the EFSA

First of all, I ought to underline how the opening clause in the second paragraph of article 22 of the regulation no. 178/2002 gives the Authority very wide tasks, including, along all the food chain from the primary sector to the final consumer, every aspect affecting, also indirectly, the food safety. All in all, as I previously noticed, the new body is invested with large discretionary power when time comes to determine its own competencies, not only with reference to problems directly connected to the product, but even in all cases in which the Authority may single out reasons of danger, also indirect, for the product or the feed.

As a paradox, it may be pointed out that it is the scientific uncertainty itself to widen the boundaries of the field, even though the main task given to the Authority consists of evaluating the likelihood of risk in certain given circumstances and in drafting through reports on the matter [9]. In this sense, the system conceived in the regulation no. 178/2002 finds «its own means of intervention in the risks analysis, whose essential components are the collecting of available data, their scientific and technical evaluation and their circulation» [4].

As far as the Authority lacks any decisional power, its double function (scientific and informative) «enables the Authority to influence the political decisions on the risk control, since the institutions couldn't avoid to take into consideration the public opinion, strongly influenced by the news coming from the Authority» [8].

Talking of scientific opinions, it is revealing noticing that the opinion, which is one of the competences given to the Authority but not exclusively to it, enables the Authority to express its scientific independence and authoritativeness, unleashing it from the «political» control of the Commission or other European or national institutions.

Among other things, the self-appointed competence of releasing scientific opinions gets a remarkable importance, firstly because it is the Authority itself (and not an external body) to detect immediately and directly the risks described in the article 34 of the regulation no. 178 and, secondly, because the Authority enjoys its autonomy from its own administrative environment. What seems surprising, in this situation, is that article 29, first paragraph of the aforementioned regulation doesn't contemplate the possibility on the part of domestic authorities to ask for scientific opinions, profiling a «hierarchical» scientific structure instead of a network, to which the entire meaning of the regulation actually seems to hint.

Furthermore, criticisms moved by the Commission against the EFSA just because of its self-appointment rely on the unsolved dialectics between technique and politics, since it may cause chronological asymmetries when the Commission asks for an opinion, with the consequence of causing «serious delays in the development of European policies because of alleged scientific “curiosities”» [13].

The organs of EFSA: the advisory forum

Communitarian agencies, even with different competencies and functions, present common elements, in light of their articulated structure in terms of management organs (administrative council, executive director or president), and scientific organs (scientific or technical committees).

However, the Authority, even proposing the same organizational scheme, seems to distinguish itself in some aspects, such as the presence of a third organ, the advisory forum, the Board composition, and the process to elect the executive director.

A significant profile in this regard is due to the advisory organ, as far as its functions concern specifically the collaboration with Member States' authorities, whose discipline is identified in article 27 of the regulation no. 178/2002, in its own way put into practice by a domestic decision.

With respect to the multilevel institutional and composite register, defined on food safety, and especially with due consideration for the role played by the EFSA, the advisory forum represents an evident expression of this system as, among the organs of the EFSA, it is the one that «expresses more the will and, in the meantime, the necessity to cooperate and

to integrate scientific knowledge both at communitarian and national level».

Referring to another historical event, it is possible to highlight an anticipatory expression of the EFSA's functions, in the middle between the advisory forum and the scientific committee, in the last decades of XVIIIth century in Paris, but with effects both on public safety and on food safety, that showed the competition between bakers and inn-keepers.

The inn-keepers, accused by bakers of buying bread from peddlers (in this way, undermining their supremacy recognized by corporative statutes) and, aware of the legal impasse, justified this choice putting forward food safety reasons. Indeed, the bread produced by bakers would be unhealthy, as made with yeast, differently from the bread provided by peddlers, made with baking powder and with the best water of the Oise river feeder.

This commercial dispute turned into a health crisis with potential effects on the environmental safety so to provoke the intervention of the head of the police, who started a first informal investigation, convening different doctors without getting an unequivocal opinion in this regard. Therefore, the head of the police asked the medical school that, by majority (45 out of 75), voted against the use of yeast.

The opinion was declared publicly but, in front of the uncontrolled spread of rumors, during the summer 1668, quite ahead in time, before legislating the judges convened the assizes of bread in January 1669 in order to listen to six doctors and six citizens, specifically convened as an «advisory forum».

As it was underlined, «the particular modernity of this conference is that it involves simple consumers at the same level of doctors and, perhaps, for the first time, a food risk was addressed democratically and, then, by judges» [11].

Indeed, the bakers' dean - with the aim to put an end to this issue, after travelling and going into more depth and after having verified that the bread produced with yeast was spread in so many French areas and in surrounding countries - finished his report with the irrefutable observation underlying the fact that he had spent his entire life eating that kind of bread; and, for this reason, the assizes of bread wisely recommended by acclamation «Leave it alone, leave it alone, the consumer will choose» [11].

It is possible to point out that the process we have just described seems to anticipate the relation between the European Food Safety Authority and the civil society interlocutors,

that led finally, lately during the Berlin advisory forum on 8th and 9th October 2004, to the formal proposal to establish a committee representing the interested parts.

Essentially, also through the composition and the operative capabilities of the advisory forum it is possible to reaffirm the multilevel dimension characterizing the Authority, coming from the dialectics between technique and politics and from the dynamics between the national and communitarian level.

The advisory forum represents a turning point along the path of establishing a system between the EFSA and the Member States' Authorities, thanks to the scientific authoritativeness and the role of coordination, and it assumes, in this perspective, a particular relevance also in light of the absence of an agency between the board of directors and Member States and, obviously, the respective domestic authorities.

Conclusions:

«There is no one centre in the universe»

If it is possible to draw a conclusion from the reasoning hereby unfolded, we may start from the first of the seven postulates of Nicholas Copernicus: «There is no one centre in the universe».

We have been living in a transitional epoch, full of uncertainties, conflicts, global challenges, deeply affecting people and communities in their entirety. An age in which «State-nations lose their capacity to determine unilaterally the balance inside systems structuring the current techno-nihilist capitalism - that is, the new relationship developed among gradually more liberated individuals and more and more powerful and organized social worlds» [18].

«Globalization is not entirely unprecedented but, as Guido Rossi pointed out, so far «the birth of a new economic condition was coupled with a new right, whereas now it happens exactly the reverse: the destruction of the pre-existing order seems to be followed by nothing» [20].

Beside this phenomenon and in the meantime, the process of deconstruction of law, whose main source does not rest only on institutional politics, but «it is generated mainly by other social systems much more in advance in the run for globalization than politics. A policentered globalization, in which different spheres of life break their own local boundaries to constitute autonomous global areas, comes hand in hand with a «multicentered governance - that is a multilayered, multidimensional and multiactor» [14]. At the same time, law in itself

seems to have given up its essential function, that is the normative process, and embrace the *techné* which not only makes globalization possible, but which rules it» [20].

If, in particular, we look more into the role of science in the field of food safety, the issue comes to the surface in its full complexity. A first manifestation of it occurs yet at the infracommunitarian level, since in a 28 -Member States European Union «all the technical norms need to be defined, so that the terms be unambiguous and vague; consequently, the meaning of the terms related to food produce is not implicit anymore, silently referred to science, but made explicit by the legislator itself».

Secondly, always talking about complexity, uncertainties and divarication in scientific evaluations may occur to the extent that differences in scientific approaches may turn into market barriers and it is not by chance that the regulation no. 178/2002 provides certain remedies (articles 30 and 60).

On the international arena, the situation is no less complicated. Scientific debates on health and public health topics became non-tariff barriers, despite the Treaties on technical barriers to trade (TBT) and the health and phytosanitary measures (SPS). Indeed, «as several cases prove (like that of harmonized meat), the existence of a system managing trade controversies based on risk assessment and scientific evaluations (apparently objective) didn't blur the motive of trade wars» [12].

There is more than this: the same multiplication of technical committees inside the Codex Alimentarius couldn't significantly homogenize regulations for European consumers, although, more in general, it is the international scientific community to show its own criticalities.

It is enough to say that the World Health Organization is just an observer inside the committees on health and phytosanitary measures and on technical barriers to trade, and observer *ad hoc* in TRIPS (*Trade Related Intellectual Property Rights*) commitments. In this way, the WHO may pay its own contribution to the debate, but not enter the decisional process and draft resolutions. Moreover, it is worth noticing that, on a series of issues such as additives, microbiological risk, pesticides, EFSA and the scientific bodies inside the *Codex Alimentarius* have divulged different opinions and reached different results. Same happened for the evaluation of pesticides between EFSA (applying more stringent tests) and JEFCA, to the extent that, in July 2010, the European

Commission asked EFSA an opinion on the different evaluation on the security of lycopene (a carotid present in tomatoes and other vegetables [12]) between the two bodies.

In this way, we are back to the paradox of a science incapable of assuring certainties useful to society when the society itself proposes a form of politics relying on new participatory means.

Moreover, politically speaking, the same institutional structure of EFSA, with its mobile (flexible) combination between the communitarian and national level, seems a proper example of a wider dialectics between socialdemocracy and liberism, given that «legislation on food safety is a classical example of risk regulation, defined as a governmental encroachment on social or market processes in order to control potentially unhealthy consequences» [15].

This is a form of dialectics supposedly confirmed, at a «constitutional» level, in the Lisbon Treaty through the balance between the general prohibition against quantitative restrictions according to article 36 of TFEU and the derogations recurring in article 114 (paragraphs 4 and 5). And just in this regard we might claim that science doesn't constitute the only parameter of the agricultural and food law, since the actual diversities in evaluating the food risk seem to depend, in greater part, on pre-scientific phenomena having political motivations, «that is tied to profound values embedded in every single society and national community» [12].

Consequently, we should specify that, beyond simple scientific postulates, the controversy may have other grounds – social, ethical, economic. Hence a sort of multidisciplinary ages emerges, so that we will have more likely a knowledge controversy based on diversities about know how, traditional methods and different cultural and religious approaches than a mere scientific dispute. So «it is no one else than the legislator that has to solve the very same scientific uncertainties picking the most suitable and timely definition in a given society».

Let's get back, in this way, to the primary issue, that is the pluralism of legal sources as a feature of our times. «It is unthinkable to force on economic phenomena a unifying legal model, even if by law, because they are subject to intrinsic dynamics leading to overcome the suggested schemes». In the meantime, we can't think of the role of administrative institutions without considering the social complexity, that is the transformation occurred inside the differentiated, specialized, multiplied

society in so many private, collective, political entities.

In conclusion, we may affirm that «modernity is related to “soft” or flexible law – in which written sources and unwritten sources, legitimized through domestic and international practice and corroborated by conventions, alternate. The communitarian law constitutes the least common denominator to manage this highly complex situation: it deals with economic aspects of individual and collective life, but it goes beyond property rights» [2].

The European Food Safety Authority intervenes just in this kaleidoscope of situations and in this progressive complexity but, through its «flexible» structure, enhances the overcome of past inelasticities and unbearable hierarchies, and the affirmation of a new values order and legal dimensions.

Law, just like other social phenomena, has been experiencing the inclemency of a long and difficult transition to be solved with the contribution of an «ordered pluralism» [9], new Atlantis of the liquid modernity [3].

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THE EUROPEAN FOOD SAFETY AUTHORITY AMONG TECHNIQUE, NORMS, AND CONFLICTS

Article reviews the legal aspect of providing food safety in the European Union and main institutions of that process in historical context. Author argues that the modern law not only makes globalization possible, but rules it. Thereupon some kind of discrepancy is coming out. Thus a science turns out incapable to assure certainties useful to society. On the other hand, society itself puts forward an alternative political concept relying on new participatory means. Furthermore modernity tends to create a flexible law which is able to instantly adapt to changeable world. Special attention is paid to the activities of the European Food Safety Authority (EFSA) which takes the leading role in mentioned sphere. Moreover, with its mobile institutional structure, EFSA seems to

be an interlink between socialdemocracy and liberism, so author lays a special emphasis on this case. The social effect is successfully achieved by its flexible combination (or balance) between the communitarian and national level. Dealing with economic aspects, but going beyond property rights the EFSA enhances the overcome of unbearable hierarchies. Author comes to conclusion, that in the long run all legal uncertainties would be solved through the «ordered pluralism».

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Ключевые слова:

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