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# Italian Report – III Commission

Scientific and practical development of rural law at eu national and regional level and in the WT

Développement scientifique et pratique du droit rural dans UE, dans les états, les régions et dans l'OMC

## 1. Soil consumption

In September 2012 the Ministry of agriculture, food and forestry (MIPAAF) formulated a proposal for a bill to regulate a series of activities that, together, can lead to (as actually occurred) a considerable reduction in the lands set aside for agricultural use and the negative consequences of this as regards agriculture and the environment.

As regards agriculture; due to the fact that there is a progressive reduction in the amount of arable land, this implies a probable risk of insufficient production of agricultural and food produce compared to the national requirements. If, to date, the impact on food *security* due to the reduced availability of arable land has been limited, this is due mainly to the fact that the increases in productivity have been able to compensate for the less surface area cultivated. The equilibrium in the ratio between less cultivated surface and an increase in the yield is, nonetheless, extremely precarious, also because for some time the increases in terms of productivity are less evident than in the past, also due to the massive exploitation of the potential of the soil, which is now increasingly less sensitive to stimuli from the use of chemical products.

As regards the environment; as the impermeabilisation of the soil or the abandonment thereof in strategic areas leads inevitably to negative results on more fronts, firstly on the ecosystem and on soil erosion.

Indeed the reduction of lands set aside for agricultural activities is ascribable, generally speaking, to two different factors: on the one hand, a growing urbanisation that has signified the progressive erosion of agricultural areas in favour of living or industrial areas, and on the other

hand the abandonment of the lands, generally mountain areas which are not very productive although they are of particular relevance for the hydro-geological protection of the lands.

The presumed facts on which the bill is based effectively demonstrate the complete lack of interest shown by the legislator for the phenomenon, if we consider that during the period from 1971 to 2010 there was a reduction, within the Territory of Italy, in agricultural land of approximately 28% [1], even though in the past, albeit not in an organised fashion, there have been predictions aimed at appraising the importance of agricultural land for environmental and production purposes[2].

The said Italian bill differs, as regards the objectives, from the Commission's[3] proposed delegated law, which aims at establishing a framework for the protection of land: the legal basis of the proposed directive is exclusively environmental[4], so much so that the (future) directive aims at reducing the phenomena of degradation attributable to erosion, the reduction in organic matter, contamination, salinisation, compacting, the decrease in soil biodiversity, impermeabilisation, flooding and landslides. It must be stated that the proposal dates back to 2006 but it is still far from being close to being approved[5]. While it takes into consideration also the phenomenon of

[1] Interesting data on the matter are found in the *Rapporto sullo stato dell'agricoltura*, (Report on the state of agriculture) by INEA, 2012; v., moreover, FRASCARELLI and MARIANO, *Il consumo di suolo agricolo in Italia: una valutazione delle politiche*, (The use of agricultural land in Italy: An assessment of policies) in *Agriregionieuropa*, June 2013, mention the lack of reliability of Italian data banks relating to the use of land, having no uniformity and being not updated.

[2] See delegated law 5 March 2001, n. 57, which states instructions in the matter of opening and regulation of markets, as per art. 7, contains the delegation for modernising the areas of agriculture, forests, fishing and aquatic farming, provides for the support and economic and social development of agriculture, acquatic farming, fishing and agriculture and food systems that must come about «according to the production vocation of the territory » (as per the 3rd para., lett. a); art. 8 that follows contains the list of executive principles and criteria of the delegated law, at parag. 1°, lett. e), and makes provision for the «promotion and maintenance of effective production structures, favouring the preservation of the company unit and the agricultural use of lands …»: in arg. v. ALBISINNI, *Diritto agrario territoriale*, (Territorial agriculture law) Viterbo, 2004, 91 ss.

[3] 22 September 2006, COM (2006) 232 def., establishing a framework for the protection of soil and amends directive 2004/35/CE.

[4] Art. 175, par. 1 TCE, now become Art. 192 TFUE, falling within the title dedicated to the environment, is mentioned as the legal base for the directive.

[5] Compare the Commission Report to the European Parliament, Council, European Social and Economic Committee and the Committee of the Regions of the 13 February 2012, COM (2012) 46, entitled *Attuazione della strategia tematica per la protezione del suolo e attività in corso* (Implementation of the themed strategy for the protection of the land and activities in progress), which takes into account the fact that the 2006 proposal for a framework directive for the protection of land, after having been approved by the European Parliament in November 2007 at the first reading, by about a two thirds majority, was stranded at the Council due to the opposition of a minority of Member States for reasons linked to subsidiarity, excessive costs and administrative burdens.

impermeabilisation of the soil and therefore one of the phenomena which the bill under consideration considers to be the reason for the loss of agricultural land, the approach of the proposal appears to be rather indecisive: indeed art. 5 states that the Member States must adopt the «measures necessary to limit impermeabilisation» or, if this were to occur, to lessen the effects thereof, making use of products and techniques to protect it and maintain the largest possible functionality of the soil[6].

Over and above the problems that arise from an unsatisfactory preparation of the text of the regulation, the initiative is highlighted because the lawmaker is fully aware of wanting to expressly abandon the approach[7] – which is entrenched in time - whereby agricultural lands were considered, in a town planning point of view, as being "residual" to construction land, rather than being appraised for what they were, due to the positive external motives connected with the presence of agricultural lands, and considered as a value for common assets: the importance therefore is not connected to the ownership aspects, going beyond the purely private aspects[8].

Before briefly examining the contents of the text presented to Parliament, it is necessary to mention once again that this is a bill and as such it is not only open to amendment, even extensively, during parliamentary examination, but even prior to that it could even end up being a dead letter, as there were no certainties that Parliament would effectively implement a law that deals with the so-called consumption of agricultural land. As further proof of the randomness of results, it is useful to mention that the text of the original bill approved by the Ministers' Council was largely amended by the Conference of the Regions and the independent provinces (so-called Unified Conference) at the sitting on 30.10.2012, in order to take into account hereafter the main

[6] The phenomenon of soil impermeabilisation does not only concern Italy but also the whole of the EU. In the Report dated 13 February 2012, the Commission states how in the whole of the EU, from 1990 to 2000 at least 275 hectares a day were lost due to this, and from 1990 to2006, 19 member states lost a potential for agricultural production amounting to an overall 6,1 million tons of wheat; moreover we must consider that according to the same Commission, which echoes the study undertaken by GARDI, PANAGOS, BOSCO and DE BROGNIEZ, *Soil Sealing, Land Take and Food Security: Impact assessment of land take in the production of the agricultural sector in Europe*, *JRC*, 2011, to compensate the loss of a hectare of fertile land in Europe it is necessary to put to use an area ten times this size in another part of the planet.

[7] Also (and above all) law: cfr., among others, TAR Lazio Rome, sez. II, 8 November 2006, n. 12138 (quoted by N. CENTOFANTI-FAVAGROSSA-P. CENTOFANTI, *Diritto urbanistico (Town Planning Law)*, II ed., Padova, 2012, 168) according to which «the destination into agricultural areas, set by the zoning regulations for an area, does not actually assume a real and profitable agricultural use, having the more general aim of trying, by means of the prohibition to build or the possibility of building in extremely limited terms, to direct the urban and production areas in specific directions or to safeguard precise equilibriums in the plan of the territory. ».

[8] In an interesting historical *excursus*, cfr. P. URBANI, *La disciplina urbanistica delle aree agricole (Town Planning Regulations for agricultural areas)* , in *Trattato di dir. agr.* (Agricultural Law) , vol. 2, *Il diritto agroambientale*, (Food and Agriculture Law) Torino, 2011, 597 ss.; on agricultural areas, v. MENGOLI, *Manuale di diritto urbanistico*, (Manual of Town Planning Law) VI ed., Milano, 2009, 189 ss.

outlines of the initial version of the bill (only), together with the amendments subsequently proposed by the Unified Conference.

The original draft of the bill, after having established – in Art. 1 - that for the purposes of the law agricultural land is the one identified as such by town planning instruments in force, provided – in Art. 2 - for the adoption of a ministerial decree by MIPAAF, in agreement with the Ministries of the Environment, Culture and Infrastructures and Transport, to be updated every 10 years, with which to determine the «the maximum extension of buildable agricultural surface on the national territory». Furthermore, provision was made, by means of a subsequent deed by the Conference of the Regions and independent Provinces, for the subsequent division between the various regions of the buildable agricultural surface in the national territory as established in the aforementioned Ministerial Decree. The Regions, in turn, would then have to divide amongst the Municipal areas of the region the volume of buildable agricultural land.

Following the amendments undertaken at the Unified Conference, and differing from the government bill (which, as previously illustrated, made provision for a cascading mechanism of identification of land susceptible to building work, starting from the ministerial decree to be implemented, followed by the provisions adopted by the territorial organisations), a procedure is envisaged that is not only more respectful of relative competences but also takes into account the indispensible role played by the regions in the phase of identification and determination of usable land. The mechanism laid down in the amendments presented by the Unified Conference provides for a procedure that starts from the bottom and reaches - as a synthesis of the decision taken at a regional level - the establishment of a national level of usable agricultural land. These are the concepts stated in the new Art. 3, which, in paragraph 1, still states the adoption of a M.D. in agreement with the other Ministries mentioned above (to be adopted within 1 year and to be updated every 10 years thereafter) to define the national objective in terms of reduction of the agricultural land, but also taking into account the decision as per paragraph 2 (i.e. the decision by the Unified Conference establishing the criteria and methods to define the objective on the part of the M.D.) and the results of paragraph 3 (by means of which the Regions send to the Committee for the Monitoring of the use of agricultural land the data acquired based on the criteria stated in paragraph 2), having obtained the opinions of the Unified Conference and the Committee for the Monitoring of use of land.

In compliance with Art. 3, paragraph 5, a decision by the Unified Conference establishes the contribution of the individual regions in terms of quantity, for the reduction in the use of

agricultural land; in compliance with paragraph 10 that follows, the regions then decide on the reduction in terms of quantity of the agricultural land at a provincial level and will establish the criteria and ways for the definition of limits in consumption of agricultural land in the territorial planning by local organisations.

In the same way, article 7 also provides for the amendment of Art. 2, paragraph 8, law 24 December 2007, n. 244: this arrangement originally indicated the period 2008 – 2010; following amendments undertaken to Art. 2, paragraph 41, Law Decree 29 December 2010, n. 225, the validity was extended to 2012. In compliance with this regulation the revenue from building permits and relative fines could be used, for amounts not exceeding 50 percent, to finance current expenses and for amounts no greater than a further 25 percent only for expenses relating to the ordinary maintenance of green areas, roads and municipal property. The forecast repeal nonetheless seemed essentially useless given the temporary nature of the ordinance and considering that the bill was presented to Parliament in November 2012, and therefore shortly before the regulation was to be repealed. Nonetheless the planned repeal paradoxically led to a renewed interest, *in retrospect,* as, with art. 10, paragraph 4-*ter*, of le l.d. 8 April 2013, n. 35 (converted, with amendments, by law 6 June 2013, n. 64) the text of paragraph 8 of Art. 2, law n. 244 of 2007 was further modified, extending the validity from 2012 to 2014. Needless to say that the extension until 2014 of the provision under examination conflicts openly with the aims of the bill, presented by the Government only a few months before the adoption of the said l.d. n. 35 of 2013.

Always in Art. 7 there is the express introduction of the prohibition of destination of revenue from building permits, establishing that this revenue must be set aside only for the realisation of primary and secondary urban development, the restoration of building complexes located in historic centres and for the promotion of the environment and landscape, with the related prohibition to use the revenue for current expenses and other purposes.

A few months after the presentation of the bill, in June 2013 the new Government presented its own bill that has the same aims as previously, without, however making any reference to the first or to the events that had involved the Unified Conference.

The re-proposal of a bill on this matter once again shows how this is of particular interested at government level even if it would have been advisable to explain that, in fact, the text presented in June 2013 essentially presents once again the one approved by the Unified Conference on 30 October 2012, albeit with some rather essential innovation, this would lead almost inevitably to the

reopening of a discussion between the State and the Regions for the definition of a final text for submission to the Houses.

The greatest innovation concerns the introduction of a new article on the priority of re-use: the new bill expressly makes provision, as a fundamental principle of the "government of the territory", for the priority of re-use and the construction re-generation of the land that has been built on, compared to the further consumption of land not built on (see art. 1, paragraph 2)[9]; this principle implies[10] «at least the obligation of appropriate and documented motivation, in all planning deeds, authorisations, approvals and consents and all else, relating to public and private works for the transformation of the territory, concerning the impossibility or the excessive cost of alternative location in areas already undergoing building development, but unused or nonetheless susceptible to regeneration, recovery, re-qualification and a more effective use ». After having established the principle, the bill introduces a new Art. 4, with the title «priority of re-use », wherein it is established that the Municipalities must, within one year from the coming into effect of the law, proceed with the census of all the communal areas already affected by building work but not in use or susceptible to recovery, and the need to keep a «list of areas susceptible to priority use for building work for urban regeneration and the location of new investments for production and infrastructure » (art. 4, 1° par.). The last paragraph of art. 4 states that the non fulfilment of the Municipality to undertake this census or the obligation of drawing up the said list will lead to the prohibition of building work both public and private and the consumption, even partially, of ground not built on. There can be no doubt that the introduction of the principle of re-use constitutes an effective, if not necessary, complement to the action aiming at containing the use of agricultural land and that motivational obligations of the administrative provisions, over and above forcing a census of areas susceptible for re-use, aided by the prohibition of realising building work in the case of non-fulfilment, can constitute an initial barrier against the indiscriminate covering of non-buildable lands under a layer of concrete.

Nonetheless, it is important that that which, at present is simply a bill, can become law as quickly as possible, in order to prevent that in the wait for the approval thereof there is a further uncontrolled and indiscriminate expansion of buildable areas.

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[9] Moreover, some regional laws had already laid down provisions in this regard: cfr., per riff., URBANI, *op. cit.*, 604.
[10] The forecast greater protection of non buildable land to be introduced by regional laws remaining firm.

**2. La relation difficile entre cultures génétiquement modifiées et le principe de la coexistence.**

En Italie, les débats sur les OGM sont particulièrement virulents, surtout depuis les dernières décisions des tribunaux nationaux et européens. Deux décisions importantes de la Cour de justice doivent notamment être signalées, l'affaire C 36/11du 6 septembre 2012 Pioneer Salut Bred Italie, et, et l'affaire 542/12 du 8 mai 2013.

Les faits sont connus.

Dans la première décision, la Cour de justice a jugé que la mise en culture d'organismes génétiquement modifiés tels que des variétés du maïs MON 810 ne peut pas être soumise à une procédure nationale d'autorisation, lorsque l'utilisation et la commercialisation de ces variétés sont autorisées en vertu de l'article 20 du règlement (CE) n° 1829/2003 du Parlement européen et du Conseil du 22 septembre 2003 concernant les denrées alimentaires et les aliments pour animaux génétiquement modifiés, et que lesdites variétés ont été admises au catalogue commun des variétés des espèces de plantes agricoles prévu par la directive 2002/53/CE du Conseil du 13 juin 2002 concernant le catalogue commun des variétés des espèces de plantes agricoles, telle que modifiée par le règlement n° 1829/2003.

La décision a également confirmé que l'article 26 bis de la directive 2001/18/CE du Parlement européen et du Conseil du 12 mars 2001 relative à la dissémination volontaire d'organismes génétiquement modifiés dans l'environnement et abrogeant la directive 90/220/CEE du Conseil, telle que modifiée par la directive 2008/27/CE du Parlement européen et du Conseil du 11 mars 2008, ne permet pas à un État membre de s'opposer de manière générale à la mise en culture sur son territoire de tels organismes génétiquement modifiés dans l'attente de l'adoption de mesures de coexistence visant à éviter la présence accidentelle d'organismes génétiquement modifiés dans d'autres cultures.

Cette situation s'inscrit dans un contexte national dans lequel la soumission à une autorisation a été analysée à plusieurs reprises par la jurisprudence nationale qui a vérifié le respect de la procédure italienne[11] et, plus rarement, sa légitimité[12] au regard de la législation européenne[13].

[11] Consiglio di Stato , sez. VI, 19 gennaio 2010 n. 183; Consiglio di Stato , sez. VI, 15 novembre 2010 n. 8053

[12] Cassazione penale, sez. III, 5 novembre 2011, n. 11148; Cassazione penale, sez. III, 22 marzo 2012, n. 19251

[13] Voir: E SIRSI, L'impiego in agricoltura di organismi geneticamente modificati, in Trattato di diritto agrario, diretto da L. Costato-A. Germanò, E. Rook Basile, Torino, 2011, vol.2, p. 308; : E SIRSI , GM food and feed, in European Food Law, diretto da L. Costato e F. Albisinni, Padova, 2012, p. 337; S. RIZZIOLI, A proposito di organismi geneticamente modificati: la Corte di Giustizia ritiene compatibile con il diritto dell'Unione europea la disciplina italiana di autorizzazione alla messa in coltura di OGM, in Rivista di diritto agrario, II, 2012, p. 229.

Quand a été examiné la légitimité de la procédure, la jurisprudence nationale a toujours conclu dans le sens de sa légitimité parfois en l'interprétant comme une sorte d'application des mesures de coexistence.

En ce qui concerne la co-existence, il est désormais connu que la loi du 28 Janvier 2005 n°5 de conversion, modifiée par le décret-loi 22 novembre 2004 n°279 relatif aux « mesures urgentes pour assurer la coexistence entre l'agriculture transgénique, conventionnelle et biologique, a été partiellement déclarée inconstitutionnelle par l'arrêt de la Cour constitutionnelle n°116/2006, ce qui a conduit à vider la loi de son contenu et à la rendre inapplicable en l'absence d'intervention des régions.

Dans une circulaire n°269 ultérieure en date du 31 Mars 2006, le MIPAAF a cependant estimé que «la déclaration d'inconstitutionnalité (...) doit être interprété en ce sens que prévaut toujours l'interdiction de planter des OGM.

La circulaire mentionnée précise que de la co-existence découle un principe positif, selon lequelil n'est possible de cultiver des OGM que si ont été remplies les conditions et les modalités pratiques concernant notamment les conséquences économiques (ressortant de la compétence des régions et des provinces autonomes) ou la responsabilité civile (ressortant de la compétence de l'Etat), dès lors que les régions et les provinces autonomes ont adopté leur propres dispositions sur la co-existence ; restera encore à respecter la procédure d'autorisation prévue par le décret législatif 212/2001 (...).

L'inclusion d'une variété spécifique dans le registre national doit être évaluée selon une procédure au cas par cas, en tenant compte des conditions agro-écologiques, environnementales et pédoclimatiques du territoire national. "Quoi qu'il en soit, le MIPAAF a conclu que« le principe de la pureté des semence relève de la compétence de l'Etat ".

C'est dans ce contexte complexe qu'a été prononcée la seconde décision judiciaire européenne. Il s'agit d'une ordonnance de la Cour de justice rendue le 8 mai 2013 dans l'affaire 542/12 prise suite à une demande préjudicielle présentée dans le cadre d'une procédure pénale engagée contre M. Fidenato dans laquelle il lui est reproché d'avoir mis en culture certaines variétés de maïs génétiquement modifiés sans avoir obtenu au préalable l'autorisation prévue par la législation nationale. Le juge national avait notamment relevé un éventuel conflit entre l'arrêt de la « Corte suprema di cassazione » du 15 novembre 2011, confirmé par un arrêt de cette même juridiction en date du 22 mars 2012, et l'arrêt de la Cour européenne de justice du 6 septembre 2012, Pioneer Hi Bred Italia.

Dans ce cas également, la Cour de Justice a répondu aux questions posées en déclarant que le droit de l'Union doit être interprété en ce sens que la mise en culture d'organismes génétiquement modifiés tels que des variétés du maïs MON 810 ne peut pas être soumise à une procédure nationale d'autorisation, lorsque l'utilisation et la commercialisation de ces variétés sont et que lesdites variétés ont été admises au catalogue commun des variétés des espèces de plantes agricoles prévu par la directive 2002/53/CE du Conseil. Par ailleurs, elle a confirmé l'impossibilité de considérer une autorisation nationale équivalente à une mesure de coexistence.

Le débat italien s'est intensifié ces derniers mois et les ministères de l'Environnement, de l'Agriculture, de l'Alimentation et des Forêts et de la Santé ont signé le 12 Juillet 2013 un décret interministériel qui interdit de façon absolue la culture des variétés de maïs génétiquement modifié appartenant à la variété MON810 sur le territoire italien.

L'interdiction de la culture du maïs MON810 est motivée par les préoccupations soulevées par une étude réalisée par le Conseil italien pour la recherche et l'expérimentation en agriculture, renforcée par un étude technique et scientifique de l'Institut superieur pour la protection et la recherche environnementale, qui met en évidence l'impact négatif de la culture du mais MON810 sur la biodiversité et qui n'exclut pas des risques pour les organismes aquatiques, ceux-ci ayant d'ailleurs déjà été mis en évidence à l'occasion d'un avis de l'Autorité européenne de sécurité des aliments rendu en décembre 2011.

### 3. Le domaine agro-alimentaire

Le droit agro-alimentaire est inévitablement affecté par les choix et les évolutions du droit européen et international.

Nous avons choisi de signaler ici, parmi d'autres, deux des interventions legislatives européennes autour desquelles le débat national a été particulièrement riche en idées et réflexions.

Doit être mentionné en premier lieu le réglement UE. 1169/2011 concernant la fourniture d'informations aux consommateurs des aliments qui a été et est toujours un champ fertile d'investigation pour la doctrine italienne.

De nombreuses questions sont au centre des réflexions des juristes: entre autres, le rôle de ce texte très détaillé et complexe, son impact sur le système général d'information et d'éducation du consommateur, la confusion entre les principes et les exigences d'information, le développement de nouvelles responsabilités pour les exploitants du secteur alimentaire, ainsi que la construction d'une

«responsabilité des consommateurs" face aux informations fournies, question très prégnante, par exemple en ce qui concerne l'utilisation des nanomatériaux[14].

La seconde des mesures réglementaires européennes auxquelles je faisais allusion est le reg. U.E. n. 1151/2012 ; les juristes s'interrogent notamment sur sa au regard de ses objectifs et l'articulation entre les nouvelles règles et les règles existantes dans le domaine des appellations d'origine protégées, les indications géographiques protégées, les spécialités traditionnelles garanties, l'utilisation de designations facultatives sur la qualité, l'utilisation des symboles européens et des mots «produit de montagne» et «produits de l'agriculture dans les îles"[15].

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[14] F.ALBISINNI, The new EU Regulation on the provision of food information to consumers, e di P. BORGHI, Risk-related Communication and Food-related Communication: What information to Consumers?, al Workshop EFLA-AIDA, Food products and information to consumers, in www.rivistadirittoalimentare, n. 2-2011, p. 32 e 49. A. DI LAURO, La comunicazione e la disciplina della pubblicità dei prodotti alimentari, in Trattato di diritto agrario, a cura di L. Costato, E. Rook Basile, A. Germanò, Torino, 2011, p.; A. DI LAURO, Labels, names and trade marks, in European Food Law, diretto da L. Costato e F. Albisinni, Padova, 2012, p. 285; i saggi (di JANNARELLI, RUSSO, ALBISINNI, M. GIUFFRIDA, FORTI, CANFORA pubblicati in Rivista di diritto agrario, 2012, I, 37 ss.; L. COSTATO, Le etichette alimentari nel nuovo regolamento (UE) n. 1169/2011, in Rivista di diritto agrario, 2011, I, 658 ss.; S. BOLOGNINI, Linee-guida della nuova normativa europea relativa alla « fornitura di informazioni sugli alimenti ai consumatori **",** Le nuove leggi civili commentate, 2012, 4, p. 613; EAD, La disciplina della comunicazione business to consumer nel mercato agro-alimentare europeo, Torino, 2012.

[15] L. COSTATO, Il regolamento n. 1151/2012 del Parlamento europeo e del Consiglio sui regimi di qualità dei prodotti alimentari, in Rivista di diritto agrario, II, 2012, p. 648.

## 4. Instruments de procédure.

Il convient de noter que, depuis 2007, ont été mis en place deux nouveaux instruments de procédure, d'application générale, mais qui ont été considérés comme très utiles en particulier dans de domaine alimentaire. Compte tenu de ce qui a déjà été développé sur l'article 62 du décret-loi n° 1 du 24 janvier 2012, converti en loi suite à la loi du 24 Mars 2012 n°27, seront résumées ici les nouveautés les plus importantes concernant ces deux types d'actions.

Il s'agit de l'action de classe (ou de groupe ou collective) [16] introduite initialement par l'article 140 bis du Code de la consommation, qui permet à n'importe quel utilisateur (même un seul), composante de la classe de référence, individuellement ou par l'intermédiaire d'associations auxquelles il participe, d'ester en justice. Est prévue l'adhésion ultérieure des personnes qui sont dans la même situation que le requérant. Cette participation implique l'abandon de toute action (de restitution ou d'indemnisation) individuelle basée sur le même motif.

La proposition d'action de groupe produit ses effets sur la prescription à compter de la notification de la demande et, pour ceux qui ont adhéré ultérieurement, à partir du dépôt de l'adhésion à l'action.

Aux situations subjectives qui été déjà prévues comme relevant de l'action de classe, l'article 6 du décret-loi n° 1 du 24 janvier 2012 converti en loi par la loi n°27 du 24 mars 2012, a adjoint d'autres situations qui ont conduit à une étendue significative du champ d'application de l'action de groupe ; ce texte a aussi résolu certaines questions d'interprétation, tout en en créant d'autres.

A notamment été particulièrement mis en évidence[17] le fait que sont désormais couverts non seulement les droits individuels mais aussi les « intérêts collectifs », catégorie dont l'identification n'est pas toujours facile, et comme la protection a été étendue à ces situations qui, même si ne peuvent pas être considérés comme expression de "droits identitaires «formule initialement adopté par le législateur, peuvent être classés comme« homogènes.

Les commentateurs ont relevé que l'utilisation de l'action de groupe est particulièrement intéressante pour le secteur alimentaire où il est possible de parler de contrats de masse, où les

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[16] Decreto legislativo 6 settembre 2005, n. 206. Pour l'action de classe voir l' art. 2 comma 446 legge 24 dicembre 2007, n. 244 et l'art. 49 legge 23 luglio 2009, n. 99.

[17] P. BORGHI, Azioni collettive, responsabilità e contratti delle imprese alimentari, in. www.rivistadirittoalimentare.it,, 2-2008, 55 ss.; ID., Le azioni di classe nel settore alimentare, in , www.rivistadirittoalimentare.it,, 1-2012, 39 ss.

dommages se répètent mais sont souvent sans importance économique, et pour lesquels l'accès au droit peut être difficile en raison des coûts et des difficultés de preuve du dommage[18].De même, a été soulignée l'importance de reconnaître le soi-disant préjudice concurrentiel de masse qui permet d'organiser la protection de la concurrence au-delà des cas prévus par le Code civil qui ne porte que sur les relations entre les entreprises.

L'action collective visée à l'art. 140 Code de la consommation constitue l'autre outil utilisé dans le secteur agricole et alimentaire. C'est un moyen de contrer, par la promotion d'actions supra-individuelles, les comportements d'entreprise contraires à l'un des droits fondamentaux des consommateurs tels que la protection de la santé, la sécurité et la qualité des produits et services, la loyauté dans l'information et la publicité, l'éducation des consommateurs, la loyauté, la transparence et l'équité dans les relations contractuelles… etc.

Les associations de consommateurs et des utilisateurs figurant sur la liste de l'article 137 du Code de la consommation sont habilitées à agir conformément à l'article 140, pour protéger les intérêts collectifs des consommateurs et des utilisateurs. Ils peuvent demander au tribunal: a) d'empêcher les actes et les comportements préjudiciables aux intérêts des consommateurs et aux utilisateurs ; b) de prendre les mesures appropriées pour corriger ou éliminer les effets néfastes des violations ; c) d'ordonner la publication de la mesure dans un ou plusieurs journaux à grand tirage ou localement dans les cas où des mesures de publicité peuvent aider à corriger ou à éliminer les effets des violations commises.

Comme mentionné précédemment, l'alinéa 10 de l'article 62 prévoit que les actions en dommage et intérêt soient portées par des associations de consommateurs et par les groupes d'entreprises impliquées dans le CNEL ou au moins représentatives au niveau national. Cette disposition, dont la formulation n'est pas particulièrement heureuse, a été critiquée en ce qu'elle reprend les modalités déjà offertes par la legislation, notamment celles des articles 140 et 140 bis du code de la consommation ; toutefois, elle s'avère particulièrement utile, car elle donne aux contrats agro-alimentaires des outils de protection plus adaptés aux besoins du secteur [19].

Il convient de noter, par ailleurs, toujours en ce qui concerne le domaine du procès, que en septembre 2011 a été promulgué le décret législatif n° 150 concernant des dispositions complémentaires dans le Code de procédure civile. Les articles 11 et 33 de ce décret concernent les conflits dans le domaine agricole, spécifiquement la question des usages collectifs Ainsi, l'article

[18] Voir art. 140 bis del Codice del Consumo.

[19] P. BORGHI, Le azioni di classe nel settore alimentare, in , www.rivistadirittoalimentare.it,, 1-2013, 39

11 reprend des dispositions précédentes en confirmant la reconduction au rite du procès du travail pour les litiges relevant des contrats agricoles, de la compétence des Sections agraires spécialisées et de l'obligation de tenter une conciliation pour certains domaines attribués à la compétence des Sections agraires spécialisées.

Cependant, il y a des innovations qui ont, par exemple, mis en cause la question de la procédure à suivre pour les litiges concernant le locataire non-agriculteur direct et qui ne résolvent pas les doutes pesant sur la justiciabilité de l'injonction préliminaire émise par les Sections agraires spécialisées[20].

## 5. Taxation aspects

The 2007 budget (law n. 296 of 2006, paragraph 1093 of art. 1), attributed an important benefit to some agricultural companies: agricultural companies owned by persons, limited liability and cooperative companies were allowed to opt for a privileged tax liability (based on land register revenue) already envisaged for farmers as individuals and ordinary partnerships.

In accordance with paragraph 513 of art.1 of the law of stability for 2013[21] the aforementioned paragraph 1093 of art. 1 of law n. 296 of 2006 was repealed, even if it is forecast that, in order to protect the companies concerned, the option already exercised for the application of revenue from land registers will remain firm until the end of 2014, thus the change to the ordinary taxation system will only become operational as from 2015.

## 6. Réflexions sur la Politique agricole commune

La doctrine italienne de ces deux dernières années a longuement réfléchi sur la « saison de la réforme » de la législation agricole européenne et de la législation alimentaire notamment en vue de l'adoption des propositions relatives à la réforme de la PAC. Les commentateurs ont souligné que les règlements européens adoptés ces dernières années semblent suggérer un processus de

[20]Voir: A. GERMANÒ, Controversie agrarie : le modifiche (d.lgs. n. 150 del 2011), in Rivista di diritto agrario, 2011, I, p. 429; G. CASAROTTO, Le controversie agrarie nella disciplina dell'art 11 del decreto legislativo 1 settembre 2011, n. 150, in Rivista di diritto agrario, 2011, I, p. 437; A. GERMANÒ ; Il diritto processuale dell'agricoltura, in Trattato di diritto agrario, diretto da L. Costato-A. Germanò, E. Rook Basile, Torino, 2011, vol.1, p. 815; P. NAPPI, Il processo agrario davanti alle Sezioni specializzate agrarie: la disciplina processuale, in Trattato di diritto agrario, diretto da L. Costato-A. Germanò, E. Rook Basile, Torino, 2011, vol.1, p. 844; E. TOMASELLA, I commissari liquidatori degli usi civici, in Trattato di diritto agrario, diretto da L. Costato-A. Germanò, E. Rook Basile, Torino, 2011, vol.1, p. 877.

[21] Law 24 December 2012, n. 228, stating provisions for the drawing up of the annual and multi-annual State budget, in the O.G. n. 302 of 29 December 2012, s.o. n. 212.

codification de la législation agricole européenne, qui se serait exprimé au travers d'une sorte de code pour les régimes de soutien direct à l'agriculture (Reg. 182/2003 puis reg. 73/2009), d'un code européen de développement rural (Reg 1257-1299 puis Reg. 1698/2005) et d'un code relatif à l'Organisation commune de marché unique (Rég. 1234/2007 et ses modifications ultérieures)[22].

Selon le nouveau modèle de gouvernement européen qui se dessine dans le domaine agro-alimentaire, l'attention de la doctrine italienne a été attirée en particulier par la très grande délégation de pouvoirs à la Commission au moyen d'actes délégués et d'actes d'exécution, l'ouverture du droit à des sources non traditionnelles, les nouvelles tendances en matière de soumission des produits agricoles aux règles de la concurrence et par la « redécouverte de la centralité du contrat »[23].

Sur le premier point, a été particulièrement commenté l'émergence d'une matière spécifique, en particulier dans la proposition de règlement sur l'OCM unique, concernant l'octroi de très larges pouvoirs à la Commission, dont les limites ne sont pas suffisamment fixées.

Sur le second point, il a été souligné que les nouvelles dispositions sur l'OCM unique peuvent introduire des changements importants dans le cadre de la souveraineté alimentaire européenne depuis l'ouverture prévue, dans la proposition de nouveau règlement sur l'OCM unique, à une équivalence substantielle dans le cadre de la commercialisation entre les règles européennes et celles adoptées par le Codex Alimentarius et la UNECE. « En d'autres termes, les organisations internationales, qui ne répondent pas aux critères de légitimité démocratique et de justiciabilité et dont l'*accountability* a été à plusieurs reprises critiquée, pourront adopter des règles, auxquelles les citoyens européens seront directement soumis » .[24]

Sur le troisième point, il a été dit que l'exemption des règles de concurrence prévues pour les agriculteurs (Reg. 26/62 maintenant Reg. 1184/2006) était limitée par l'interdiction d'un prix spécifique.

Comme on le sait, cette limite a été récemment affectés par le règlement 216/2012 qui, dans le secteur du lait et des produits laitiers, reconnaît la possibilité d'accords préalables entre les producteurs pour réguler l'offre et la determination des prix.

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[22] F.ALBISINNI, Le proposte per la riforma della PAC verso il 2020: profili di innovazione istituzionale e di contenuti, in Rivista di diritto agrario, 2011, I, 604; ID., Il diritto agrario europeo dopo Lisbona fra intervento e regolazione: I codici europei dell'agricoltura, in Agricoltura , Istituzioni e Mercati, 2011, 29.
[23] F. ALBISINNI, La nuova OCM e i contratti agroalimentari, in , www.rivistadirittoalimentare.it,, 1-2013
[24] F. ALBISINNI, La nuova OCM e i contratti agroalimentari, cit.

Ces développements ont amené certains commentateurs à parler de l'émergence de nouveaux modèles de gouvernement totalement innovants dans la mesure où ils procéderaient d'une réglementation élaborée par le bas : comme une sorte de programmation autogérée dont la portée pourrait être expansive, qui remplacerait la planification centralisée du Conseil et de la Commission, alors que cette dernière a toujours caractérisée le secteur agricole[25].

**7. Contractual relationships between farmers and buyer enterprises**

Last, adding evidence to the emergency nature of contractual relationships between farmers and buyer enterprises, the legislator issued an interim act, a "*decreto legge*" (decree-law), aimed at standardizing contracts of sale of agrifood products (without providing for the destiny of contracts of crop farming, livestock farming and supply, regulated by D. lgs. 102/2005). Unlike previous acts, the compliance to which was left to modest incentives, Article 62, D.L. No. 1/2012 as amended by L. No. 27/2012, adds new elements of form and content to the type of contract, enforcing its effectiveness by means of administrative sanctions for violation of law. Under the original provision amended by the related converting law, in case of breach of the above mentioned provisions, the contract should be null and void; Article 36-bis, D.L. No. 179, of 18 October 2012, as amended by the related converting law No. 221, of 17 December 2012, deleted from the provision the words "a pena di nullità" (En. tr. "under penalty of invalidity").

Because of the undue haste in drafting the provisions, many problems that had arisen both for the interpretation and the application of the law, moved to the following inter-ministerial decree, passed on 19 October 2012[26], formally aimed at setting out the ways to apply the provision[27] but having, in practice, a very incisive content - though the implementation of the "Consiglio di Stato" (Council of State)'s remarks: rather than applying the provisions of Article 62, it completed them, so that any doubt on its (partial) unlawfulness does seem not ungrounded.

Article 62 was enforced on 24 October 2012, with a six month "*vacatio legis*", to allow involved operators to timely comply with the new rules[28]: yet, as already said, only two months after the

[25] F. ALBISINNI, La nuova OCM e i contratti agroalimentari, cit.; A. JANNARELLI, L'associazionismo dei produttori agricoli ed il "Tabù" dei prezzi agricoli nella disciplina della concorrenza. Considerazioni critiche sul reg. n. 261 del 2012 in materia di latte e prodotti lattiero-caseari, in Rivista di diritto agrario, 2012, I, 179.

[26] D.M. No. 199 of 19 October 2012, in G.U. No. 274 of 23 November 2012. See A. GERMANÒ, *Ancora sul contratto di cessione dei prodotti agricoli e alimentari: il decreto ministeriale applicativo dell'art. 62 del d.l. 1/2012*, in *Dir. giur. agr. alim. amb.*, 2012, pp. 523 ff.

[27] See Article 62, subparagraph 11-bis, inserted by the converting law.

[28] See Article 62, subparagraph 11-bis, added by the converting law. First comments on the provisions can be found in F. ALBISINNI, *Cessione di prodotti agricoli e agroalimentari (o alimentari?): ancora un indefinito movimento*, in *Riv.*

enforcement of the law, the provision was amended[29], under pressure from involved economic operators that were dissatisfied with the new regulatory framework.

It must be said that the provision, as it was drafted, is likely to remain unenforced, so much so that, as expected[30], its poor quality suggests short-term amendments, since it does not solve the problems that affect the weak party of the contract. The inappropriate technique used when drafting the regulatory text resulted in an excessively wide scope[31] (probably broader than originally expected) that is not functional to the protection of the weaker party of the contract, although this seemed to be the main purpose pursued by the Legislator. Also for these reasons, we will only point out the most relevant critical points within the provision, without investigating it in detail (analysis that would otherwise lays outside this paper's aim).

The examination of Article 62, though within the limits we have just set, shall start from blaming the Legislator's ambition in laying down a single regulation not only for the sale of products in general (with the exception - under Article 36, subpar. 6-bis, D.L. No. 179/2012, as amended by the related converting Law No. 221/2012 - of contracts that – though concerning agricultural products – are concluded by farmers) but also for contractual relationships within a completely different area, like the food market. The scope of the provision includes all contracts having as subject matter the sale both of agricultural products and foodstuffs[32], with the sole exception of agreements entered into by a consumer and, now, of contracts concluded by farmers[33].

*dir. alim.*, 2012, 2, pagg. 33 ff.; A. ARTOM, *Disciplina delle relazioni commerciali in materia di cessioni di prodotti agricoli e agroalimentari*, *ibidem*, pp. 42 ff.; A. GERMANÒ, *Sul contratto di cessione di prodotti agricoli e alimentari*, in *Dir. giur. agr. alim. amb.*, 2012, pp. 379 ff.; R. TOMMASINI, *La nuova disciplina dei contratti per i prodotti agricoli e alimentari*, in *Riv. dir. alim.*, 2012, 4, pp. 3 ff.; A. JANNARELLI, *La strutturazione giuridica dei mercati nel sistema agro-alimentare e l'art. 62 della legge 24 marzo 2012, n. 27: un pasticcio italiano in salsa francese*, in *Riv. dir. agr.*, 2012, I, pp. 545 ff.

[29] The legislator has deleted the reference to invalidity and has stated that contracts where both parties are farmers do not fall into within the scope of Article 62.

[30] In his speech held at the IDAIC Conference "*Il divenire del diritto agrario italiano e europeo tra sviluppi tecnologici e sostenibilità*", Bologna, 25-26 October 2012, the Author had foreseen the possibility of such an event.

[31] Despite the explanation offered by Article 36, subparagraph 6-bis of D.L. No. 179/2012, as amended by the converting law No. 221/2012, that excludes from the scope of Article 62 contracts concluded by farmers.

[32] See Article 62, subparagraph 1, the content of which does not fit the heading of the Article that refers to contacts of sale of agricultural and agri-food products. See F. ALBISINNI, *Cessione di prodotti agricoli e agroalimentari (o alimentari?): ancora un indefinito movimento*, *cit.*, pp. 33 ff.

[33] The applying D.M. (Article 1, subparagraph 3) - in a "creative" rather than "enforcing" way - provided for the inapplicability of Article 62 to the sale of agricultural products, for cooperatives or POs of which a farmer was member (as in French law and in Regulation (EU) No. 261/2002 for sale of raw milk: see footnote **Errore. Il segnalibro non è definito.**), holding that in such cases there was not any conflict of interests; by virtue of this provision, the rule remain still applicable for sale to cooperatives of which the farmer was not a member: the case in point is now provided for by Article 36, subparagraph 6-bis, D.L. No. 179/2012.

The provision does not specify what should be meant for agricultural products and foodstuffs: on this point the explanation offered by the subsequent implementing D.M. No. 199/2012, which refers to – as for agricultural products – those listed in Annex I to the TFEU and, for foodstuffs, to the definition of "food" given by Article 2, Regulation (EC) No. 178/2002[34].

In doing so, a new contractual type was set up: it is intended to regulate the sale of products that are very different, and precisely for this reason, characterized by too many facets to include them into a single contractual and regulatory framework. This first remark points out the impossibility to provide the same rules for so diverse cases, since the seller can be a farmer (who sells its goods to the processor or the distributor) or an industrial entrepreneur who produces processed food, then sold to the wholesaler or to the retailer. Though in both cases, within their relevant markets, they have a weak position, if compared to the buyer party, all the involved enterprises and the dynamics of their markets are very different.

We should also doubt about the possibility or usefulness to draft a single regulation for the sale of all agricultural products since, on the contrary, also individual sectors of agricultural production have specific features that require differential treatments – also from a legal point of view – as shown by the EU law approach: though arranging only one Regulation for the Single CMO, it had to develop specific provisions for the different products. To this effect, the regulation on framework contract (and, subsequently, contracts of crop farming, livestock farming and supply) provided for in D.lgs. 102/2005, better meets the needs to be answered. Such contracts – as in Spain and France – do not apply to the universality of agricultural products: they are concluded autonomously for each individual product, taking into account peculiarities and problems of the specific market. In this regard, we shall point out the lack of any coordination between the new contract of sale of agricultural products and foodstuffs, set forth by Article 62, and the above mentioned contract of crop farming, livestock farming and supply, provided for by D.lgs. 102/2005, so that rules laid down by the latter will absorb also the provisions of Article 62, all the times in which conditions for its application are met.

As already said, the implementing D.M, makes clear that the phrase "*agricultural products*" includes all and only the goods listed in Annex I to the TFEU, that is to say the exhaustive list including those products considered by EU law as "*agricultural products*" and subject to the provisions of Articles 39-44 TFEU. As a result, to identify agricultural products regulated by

[34] 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, in OJ L 31, 01.02.2002, pp. 1-24.

Article 62, the definition of “farmer” contained in Article 2135 of the Italian Civil Code has not to be considered. Likewise, all the assimilations carried on by the law to such a definition will not be taken into account[35]. The question is not irrelevant, since Annex I TFEU does not match with products obtained by those subjects defined by the national law as farmers or those equivalent to them[36]. So that goods which, under Italian law, are not the result of agricultural activities (for instance, processed products like sugar or flour[37]) fall within the list of Annex I TFEU and, at the same time, some products that - under Italian law[38] – belong to the category of agricultural products (as wood), do not fall within it: thus, though carried out by a farmer, the sale of such products is not regulated by Article 62. We shall then remind that some non-food products are listed in Annex I, as cut flowers, cork and wool.

Owing to the significant discrepancies between list of Annex I TFEU and the national definition of farm, the question arises why it is made reference to the EU Law to identify agricultural products. It might be the result of the extraterritorial relevance of the provision, having an overriding mandatory nature under Article 9, Reg. (EC) No. 593/2008[39]: it would thus overlap any other law applicable under the Regulation, and, ultimately, try to avoid any censure from the EU Institutions. As a matter of fact, they could complain that, in specifying the scope of a rule applicable to transactions with entrepreneurs of other Member States, national law would refer to an internal provision. Accordingly, the application of provisions contained in Article 62 would refer to all contracts of sale of those products considered “agricultural products” by EU law, regardless of the different definition given by national law[40]. To this effect, the declaration contained in Article 1, subpar. 2 of the implementing D.M. must comply with the binding definition set forth by Article

[35] See Article 4, subparagraph 4, D.lgs. 09 January 2012, No. 4, under which the fish farmer is subject to general provisions for farmers; Article 1, subparagraph 2, D.lgs. No. 228/2001, under which cooperatives of farmers and consortia of cooperatives of farmers are considered farmers as well, when – for activities falling under Article 2135 of the Italian Civil Code - they use mainly their members’ products or supply, to their members, goods and services targeted at running and developing the biological cycle; Article 1, subparagraph 1094, L. 296/2006, put on the same level farmers and “società di persone” (entities similar to “*partnership*”) or limited liability companies of farmers, if they carried on activities aimed at handling, preserving, processing, trading, marketing agricultural products of associated farmers. The provision was repealed by Article 1, subparagraph 513 L. 24 December 2012, No. 228, in GU No. 302 of 29 December 2012, S.O. No. 212.

[36] S. MANSERVISI, *Seta, cotone, sughero e legno e l’Allegato II del Trattato CEE*, in *Riv. dir. agr.*, 1990, I, pp. 136 ff.

[37] Such products fall within the definition of food, so that, even if national law referred to Article 2135 of the Civil Code, the sale of these products would fall within the provision of Article 62, as food.

[38] Where obtained through activities aimed at running and developing the biological cycle or part of it, as provided by Article 2135, subparagraph 2 Civil Code.

[39] See Article 1, subparagraph 2 of the Implementing D.M. under which the provisions of the decree itself are overriding mandatory rules, under Article 9 of Regulation (EC) No. 593/2008. On this topic, G. BIAGIONI, *Commento all’articolo 9 del Regolamento (CE) n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008, sulla legge applicabile alle obbligazioni contrattuali («Roma I»)*, *Commentario*, F. SALERNO – P. FRANZINA, in *Riv. dir. agr.*, 2009, pp. 788 ff.

[40] Taking into consideration the reference to the definition given by the Regulation (EC) No. 178/2002, the same should be said about food.

9, Regulation (EC) No. 593/2008, that describes as "overriding mandatory" those "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization*".

Since Annex I includes also seeds and feedstuffs, under the original wording of the law, it was applicable not only to the downstream but also to the upstream agricultural production: so that, for instance, the contract of sale of feedstuffs was subject to that law, even if the weak party was not the seller but the buyer farmer. Contracts of purchase of feedstuffs or seeds, - as well as other agricultural products like living plants (think to the sale from a plant nursery to a fruit and vegetables farm), straw, forage (think to the plants sold by a crop farm to a livestock farm) do not fall anymore within the scope of the provision, since the new Article 36, subpar. 6-bis, d.l. No. 179/2012, inserted by the converting law No. 221/2012, left them out.

The exclusion of contracts concluded between farmers, under Article 36, subpar. 6-bis[41] had a further significant effect. Contracts concluded between farmers and cooperatives for processing and sale or cooperatives of services do not fall within the application of Article 62, even though they implies the transfer of property of agricultural products (in the above mentioned meaning): these cooperatives (and their consortia), under Article 1, subpar. 2, D.lgs n. 228/2001 are treated as farmers when, in the activities carried out under Article 2135 of the Italian Civil Code, they mainly use their members' products or if they mostly provide them goods and services aimed at running and developing the biological cycle: the exclusion thus refers both to sales from an associate to the cooperative falling within the mentioned provision (this is the most significant case, referred to the sale of the agricultural production from a farmer to the cooperative), and to the opposite sales from the cooperative to its members (for instance, seeds or seedlings)[42].

As above mentioned, under Article 2 of D.M. No. 199/2012 the definition of food includes products of article 2, Reg. (EC) No. 178/2002[43]. The reference is certainly correct and even forced,

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[41] Article 1, subparagraph 3 of the implementing DM excluded from the scope of Article 62, transfers of agricultural products and food from members to their cooperatives (falling under Article 1, subparagraph 2 of D. lgs. 228/2001) or to recognized POs, as well as transfers between fish farmers. The following regulatory intervention has therefore rectified a provision that should have been considered integrating (and not only implementing) the primary rule and, what is more, it has extended its scope, since now, what really matters is the quality of "farmer" of the seller, rather than the status of associate in a cooperative or PO.

[42] General rules on late payments in commercial transactions apply to these relationships, without the mandatory provisions of Article 62, subparagraph 3 and without the possibility of administrative sanctions restricted to the contracts regulated in Article 62, subparagraph1.

[43] See *La sicurezza alimentare nell'Unione europea*, Commentario al Regolamento (CE) 178/2002, (Commentary to Regulation (EC) No. 178/2002), ed. IDAIC (Istituto di diritto agrario internazionale e comparato, in *Le nuove leggi civili commentate*, 2003, pp. 114 ff. See also L. COSTATO, *Principi e requisiti generali della legislazione alimentare*, in *Trattato di diritto agrario*, cit., vol. 3, pp. 19 ff.; S. RIZZIOLI, *I principi generali del diritto alimentare nella legislazione e giurisprudenza comunitarie*, Roma, 2008, pp. 151 ff.

since the definition of food is given by an EC Regulation (being thus directly applicable within the Member States), and in particular in that Regulation laying down the principles of EU Food Law and that, for this reason, has assumed the characteristics of a "super-Regulation", the definitions of which are referred to also by other EU food laws (with the exception of specific exclusions). As a consequence, also contracts of sale of food additives and enzymes are regulated by Article 62: as we have just said for what concerns the agricultural sector, also in this event, food entrepreneurs can be both sellers (of a product) and buyers (of ingredients); the case in point falls within the provisions of Article 62, since under Article 36, subpar. 6-bis, of D.L. No. 179/2012 only contracts concluded by farmers (and not contracts between food entrepreneurs, that are traders, under national law) are excluded.

The wording of the provision, applicable only to contracts of sale of products, leaves out other vertical integration contracts despite the large use made of them in the sector, as the contracts ending up in a mere supply of services (while contracts concerning the transfer of property and implying other positive acts shall fall within the provision), or contracts of "*soccida*" whereby a party transfers farm animals to the other one (in return of profit), to carry out an associated agricultural activity.

The provision shall apply also to the contracts where none of the parties is a farmer, since it can relate to agreements between food enterprises and large-scale distribution companies or to agreements between trade operators, involving catering businesses, coffees, restaurants, and canteens.

Contracts falling within Article 62 shall be concluded in writing and indicate (but not longer under penalty of nullity, as previously stated) the duration, the characteristics of the sold product, the price, the methods of delivery and of payment[44].

As for content requirements (together with the provision for the written form), they issue from the need to ensure more transparency of contractual relationships: the weak party is often forced to enter into the agreement in a situation characterized by lack of clarity about the whole content. This situation could enable abusive behaviour by the stronger party even with regard to possibly occurred contract modifications.

Article 62, subpar. 5 – not amended by the intervention of Autumn 2012 – still provides for an administrative sanction from a minimum of € 516.00, to a maximum of € 20,000.00, to be calculated according to the value of the goods affected by the commercial transaction[45]. Moreover,

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[44] For a detailed analysis of the clauses that must be agreed upon in writing, under the mentioned provision, see A. JANNARELLI, *cit.*, pp. 573 ff.

[45] The Italian Competition Authority (acronym ACGM) is the body responsible of supervising and imposing sanctions (Article 62,8): the procedure for contesting the sanction of Article 62 is laid down by Law 689/1981, so that, depending on the value, the Court of competent jurisdiction will be the "Giudice di Pace" (Justice of Peace, though there is no strict correspondence between the two phrases) or the "Tribunale" (Civil Court); as for sanctions imposed by the Authority for violation of the provisions on competition, the competent jurisdiction is the administrative Court. Article

it is not clear how the individual liable for the lack of written form or for the lack of one or more mandatory elements provided for by Article 62, subpar. 1 can be pinpointed[46], so that the sanction could be addressed to a subject that the law was intended to protect, thus worsening his position[47].

Article 62, besides ensuring greater transparency – at least with regard to main contractual clauses – tries to avoid disproportionate contractual unbalance, between the parties: so, the first subparagraph provides that contracts for the sale of food and agricultural products shall comply to the principles of transparency, fairness, proportionality and mutual contractual performances, for supplied goods. The second subparagraph provides that under commercial relationships between economic operators - included the contracts we are analysing – it is forbidden: a) imposing directly or indirectly conditions of purchase, sale or other unfair contractual conditions, as well as non contractual terms or retroactive conditions; b) applying objectively dissimilar terms for equivalent performances; c) making the conclusion and performance of the contract and the continuity and regularity of trade relationships depend on the performance of obligations that, as for nature and according to trade usage, do not have any connection with the subject of contracts or of the trade relationships themselves; d) obtain undue unilateral performances that are not justified by the nature or content of the trade relationships; e) carrying out a commercial conduct that is unfair even taking into account the whole set of trade relationships concerning supply conditions.

Such a vagueness is even more significant if we think that the breach of prohibitions results in monetary administrative sanctions, under subparagraph 6, to be quantified from a minimum of € 516.00 to a maximum of € 3,000.00, depending on the advantage taken by the party that did not comply with the prohibition.

Thirdly, Article 62 affect a further aspect, related to the regulation of terms of payment for contracts of sale of agricultural products and food. Amending the existing provisions of D. lgs. 231/2002 that implemented Directive 2000/35/EC[48] on combating late payment in commercial

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62, subparagraph 8 provides that, despite its new powers, the Authority shall carry out its activities without additional human or financial resources. By the resolution of 06 february 2013, No. 24220 (in GU No 154 of 09 March 2013), the AGCM passed the new Regulation for procedures on trade relationships concerning the sale of food and agricultural products.

[46] Similarly, A. JANNARELLI, *La strutturazione giuridica dei mercati nel sistema agro-alimentare*, *cit.*, p. 591.

[47] As for the original draft, the choice to provide for an administrative sanction was an effective deterrent from contracts concluded in breach of requirements of form or information set forth in Article 62, subparagraph 1, under pressure from the stronger party that, lacking any system of sanctions, could have asserted its supremacy to force its contractual partner to enter into agreements in violation of Article 62, subparagraph 1 - and so (under the original wording) null and void – just to file an action for the nullity of the contract at its discretion, whenever the judicial declaration of invalidity could have been a useful ploy.

[48] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, in OJ L 200, 08.08.2000, pp. 35-38. This Directive was repealed by Directive 2011/7/EU, with effect starting from March 16, 2013: the recent act was implemented in Italy through D. lgs. 09 November 2012, No. 192, amending D. lgs. No. 231/2002. Article 62, subparagraph 3 seems to be a specific provision, since it applies to a definite category of contracts and thus it is not affected by the new D. lgs. No. 192/2012; at the same time, Article 62, subparagraph 3 does not contrast with the recent EU Directive. It is thus amazing the note No. 5401 of 26 March 2013 (published on the Ministerial website), of the legal office of the Ministry of Economic Development, in response to a question put by Confindustria: with a shearing reply, it reached the conclusion that Article 62, subparagraph 3 (and thus its related system of sanctions) had been tacitly repealed by D. lgs. No. 192/2012, implementing Directive 2011/7/EU, both applying the last-in-time rule and since it was in conflict with the new Directive. Few days after, the legal office of the Ministry of Agricultural, Food and Forestry Policies expressed its disagreement through the note of 02 April 2013, No. 3470 (also published on the official website): it pointed out the specific nature of the provision in question – so that the adoption of the new D. lgs. No. 192/2012 does not repeal the previous specific norm – and its full compliance with Directive 2011/7/EU that does not affect the possibility for Member States to maintain or enact national provisions most favorable to the creditor.

transactions, Article 62, subparagraph 3 provides that the payment shall be peremptorily[49] done within 30 or 60 days, depending on whether the product is perishable or not, starting from the last day of the month in which the invoice is received; the default interest rate - that is also peremptory - is increased by two percentage points[50]. Subsequent subparagraph 4 lists perishable food, taking up the existing "catalogue"[51].

The debtor's failure to comply with the terms of payment is sanctioned with a monetary administrative fine from a minimum of € 500.00, to maximum of € 500,000.00, to be calculated with reference to the creditor's sales, the recurrence and the extent of the delay, according to subparagraph 7[52].

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[49] This is the result of an overall interpretation of subparagraph 3, particularly if related to the previous Article 4, subparagraphs 3 and 4, D. lgs. 231/2002, repealed by Article 62, subparagraphs 11, that already provided for the compulsory nature of terms of payment when referred to the sale of perishable food.

[50] Paradoxically the provision does not specify what the reference parameter for the increasing by two percentage points is. Under the previous rules, as for sales of perishable food, the default interest rate increasing by two percentage points had to be calculated on the rate provided for in Article 5, subparagraph 1, D. lgs. No. 231/2002. The extrapolation of the rules on late payment from the general context of D. lgs. 231/2002, in the event of sale of agricultural products and food, has eliminated the systematic profiles and links that existed before. The "*Council of State*" (*Consiglio di Stato*), in its opinion on the D.M. that implemented Article 62, underlined that the increasing by two percentage points, provided for by Article 62, subparagraph 3, must relate to the reference rate calculated under the law implementing the EU Directives on late payments; the final draft of the D.M. took into account this opinion, so that Article 6 provides that default interests are calculated using the reference rate determined according to Article 5, subparagraph 2, D. lgs. 231/2002.

[51] The list was contained in the D.M. (Ministry of Productive Activities) of 13 May 2008, implementing D. lgs. No. 231/2002. Now the list of products is drawn up in a law, thus resulting into a stiff regulation. Article 62, subparagraph 11, repeals, besides the implementing D.M., Article 4, subparagraphs 3 and 4 of D. lgs. 231/2002 (laying down the previous regulation on late payment for sale of perishable food). For the purposes of the provisions of Article 62 on late payment, perishable food includes: a) agricultural, fish and food pre-packed products the expiration date or the date of mimimum durability of which do not exceed 60 days; b) agricultural, fish and food bulk products, including herbs and aromatic plants, even though protected by packaging or refrigerated, provided that they did not undergo any treatment to preserve them more than sixty days; c) meat products having the physical-chemical characteristics listed in subparagraph 4, c); d) any type of milk.

[52] We have already pinpointed the unreasonable differences in the amount of sanctions: fines for failure to comply with the terms of payment are higher than others (of modest amount), above all if compared to the ones applicable for breach of the antitrust law (art. 15, L. 287/1990): see F. ALBISINNI, *op. cit*., pp. 39 ff.