

Front-of-package food labels and consumer's autonomous decision-making

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1.- Consumer's rights and new foods label expectations according to EU law

Consumers choose the best food products, among those they can compare through the diversified offers from the market, according to their multiple desires. It's not just a market policy issue: the growing attention to consumer expectations also highlights a conspicuous expansion of European consumer law framework¹. In line with global perspectives, European consumers appear to be provided with new rights, such as the ethical ones (i.e. the choice of foods, or primary ingredients choice, obtained without damaging others' fundamental rights), as well as the environmental ones (or rather, consideration of the impact connected to one's choices on natural resources and their environmental sustainability)². Of course, these new rights also contribute to pursuing existing rights on a full scale, such as economic ones (i.e. the selection of the lowest prices) or the health ones (giving great attention to the ultimate effects of food products being

integrated into human organism).

The physiological need for food is ancestral in individuals, nevertheless the current consumer is more sophisticated and discloses complex expectations, combining the physiological and health needs with cultural and social implications; thus, food products must fully satisfy the consumer being elaborated and well-structured, both in composition and manufacturing processes, as well as through presentation, packaging and labelling³. Obviously, these consumer expectations are well known to market studies even before the impact of legal issues: according to the "4Ps" theory, marketing adds up all the tactical tools of the trade that the companies can manipulate in order to produce the desired reaction from a specific consumer target⁴. It is a group of variables under the combined control of the traders as well as and of the manufacturers on the markets, combined in marketing strategies in order to influence consumer behavior and to ensure the maximum efficiency of the product, regardless of its nature. The consumer appears 'vulnerable' and this peculiar analysis, which is well known from a comparative point of view, underlines the relevance of food labelling in order to limit consumers' rights infringement⁵. These answers encouraged European governments to find a frame of reference in EC Reg. 178/2002, which ensures consumer's right to information and contains two statements that influenced the development of national disciplines. Indeed, the mentioned Regulation prevents any behavior of pri-

(¹) In evaluating the development of EU consumer law in terms of quantity, scholars define it a successful story: cf. B. Busch, *Harmonization versus Complementarity: the Consumer Rights Directive and the Common European Sales Law*, in J.C. de Medeiros Nóbrega et alii (eds.), *Perspectivas atuais do direito do consumidor no Brasil e na Europa. Conceitos, jurisdição e harmonização legislativa*, Natal, 2014, p. 222.

(²) Regarding the influence of consumers religiousness upon food production systems, see G.R.T. White-A. Samuel, *Fairtrade and Halal Food Certifications and Labelling: Commercial Lessons and Religious Limitations*, in *Journal of Macromarketing*, 36, 2015, ps. 1-12. According to the so called double pyramid to show integration between social and environmental sustainability see S. Tommasi, *Food diversity and consumer protection*, in *European Food and Feed Law Review*, 2017, p. 220.

(³) The issue refers to the 'right to food' as legal concept that incorporates the 'right to access adequate food', satisfying both in quantity and in quality, both from a ecological and cultural point of view, capable to fulfill food consumer's expectations (The topic was already mentioned in S. Lanni, *Consumer Rights beyond Regional Harmonization: Planned Obsolescence and Food Sustainability as Long Term Issues for a Cross-Border Enforcement of Consumer Law*, in S. Lanni (ed.), *Harmonization of European and Latin American Consumer Law*, Napoli, 2018, p. 524).

(⁴) See L. Manea-Gh. Epuran, *The Packaging and Labelling of Food Products in the European Regulatory Requirements*, in *Bulletin of the Transilvania University of Braşov*, 58, 2016, ps. 175 ss.

(⁵) Having in mind the rights and new rights that widely appear in European consumerism, food labels are seen as an objective to meet consumer rights, see: A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi. La costruzione di una "responsabilità del consumatore"*, in *q. Riv. www.rivistadirittoalimentare.it*, n. 2-2012, p. 18.

vate subjects aimed at hindering consumers' conscious choices in relation to food products (Article 8) and reaffirms the importance of information contained on the label, in order to define that food safe and marketable (Article 14, paragraph 3, letter B). EC Reg. 178/2002 represents the guideline for the protection of food products consumers; differently, the EU Reg 1169/2011, consolidating and updating existing European rules on labelling, contains the most relevant answers on the requirements of the informative paradigm, actually the label, must contain to prevent the final consumer from being misled⁶. These normative provisions offer to lawyers an interesting synthesis, between the complex of rules and legal principles (such as, good faith) already in force and the fair practices of consumer's right to an adequate information⁷. Among the latter, stands out the criterion of intelligibility of information (clear and accessible) for the final consumer, which have to inspire front-of-pack food labels, and actually this is the precise objective of my attention here.

2.- Consumer information between 'mandatory' and 'voluntary' labelling contents

The intelligibility and transparency of information contained on the label are one of the deeply felt needs in civil society since they represent the empiri-

cal antecedent of individual self-determination. This assessment stems from recitals 4 and 26 of EU Reg. 1169/2011 and especially relates to the informative content provided by the label. From a private-law point of view, the label appears as a tool through which rebalance the position of the weakest part of the contract, also taking into account information asymmetries as well as cognitive deficits that can hinder a conscious and careful choice in the negotiation⁸. Looking from this perspective, front-of-pack food labels help consumer to make food choices that satisfy her/his expectations, improve health and reduce the risk of chronic diseases.

Doing so in a meaningful way would require a comprehensive discussion on the definition of food products consumer. Which is the standard consumer to be taken into consideration? The profane consumer? The smart one? The active one? According to the objective of this essay, I cannot hold back on this point⁹; furthermore, I want to point out that the consumer of food products is usually submitted to an informative overload, suggesting the concept of a weak and profane subject that can easily be at the market's mercy¹⁰. From a normative point of view, I believe that the consumer's specifications should be outlined according to EC Dir. 29/2005¹¹ that aims toward a complete harmonization of European rules on unfair commercial practices, raising consumer's protection levels.

⁽⁶⁾ Especially referring to the principal field of vision, as defined by Art. 2 (2) (1) and Art. 34 (3) (a), as well as the label requirements, for which a reference standard can be found in the article 7.

⁽⁷⁾ Key question is the relationship between the information duties stipulated in the Consumer Right Directive (2011/83/EU) and other information requirements, laid down by national laws and other European legislative acts. Regarding the relationship with other EU acts, art. 3(2) of Dir. 2011/83/EU stress that other EU acts governing specific sectors shall prevail over the Directive itself. On this topic B. Busch (*Harmonization versus Complementation: the Consumer Rights Directive and the Common European Sales Law*, in J.C. de Medeiros Nóbrega et alii (eds.), cit., p. 228), underlines how the information requirements set out in the Capital Requirement Directive (2013/36/EU) apply in addition to those laid down in the Services Directives (2006/123/EC) and the E-Commerce Directive (2000/31/EC), and that the first one is unfortunately silent on its relationship to the Unfair Commercial Practices Directive (2005/29/EC), which also contains a lengthy list of information items that traders must not omit in their 'invitation to purchase'.

⁽⁸⁾ Cf. R. Caterina, *Architettura delle scelte e tutela del consumatore*, in *Consumatori, Diritto e Mercato*, 2012, ps. 73 ss.

⁽⁹⁾ On the topic see F. Albinini, *Strumentario di diritto alimentare europeo*, Torino, 3^a ed., 2017, ps. 130-131 which underlines, with reference to food products, how EC Reg. 178/2002 does not place any explicit reference to the 'consumer natural person' as the only possible consumer.

⁽¹⁰⁾ With reference to the 'threshold' of the prudent consumer see A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi*, cit., p. 22. In a comparative perspective, see also: S. Lanni, *El consumidor en la venta de bienes de consumo en Italia. Notas de derecho comparado*, in *Anuario de derecho civil*, 2018, ps. 389-409.

⁽¹¹⁾ According to Recital 18 «consumer is the subject reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors», so that the reference should be anchored to a subject generally informed and attentive to what he buys.

EC Dir. 29/2005 rules intersect various advertising legal aspects already regulated by CEE Directives 84/450 and 2006/114. The mentioned Directive modifies existing rules on advertising and identifies unfair commercial practices, which may take the form of non-diligent professional behaviours, capable of altering consumers' freedom of choice, especially in order to gain the trust accumulated in them by other companies¹². Information included in the label falls within the discipline of the EC Dir. 29/2005, as the promotion of the product endangers the rational sphere to which the information itself is addressed; through it the companies manage to attribute to their brand emotional values and social issues going well beyond the simple promotion of the product¹³. From a contractual point of view, scholars must also consider the global impact that food products sold online can have; indeed EU Reg. 1169/2011 covers information requirements not only for food sold directly to the consumer in shops, but also for food sold through business-to-consumer transactions in case of distance selling¹⁴. In the latter case, the situation appears more complex from the point of view of private law, because in distance selling all the mandatory information must be made available before the purchase is concluded; comparative lawyers know that rules leading to the formation of the contract differ from one national system to another¹⁵.

The incidence and the relevance of different factors require to evaluate whether the label information should be in line with different standards: i.e., how

to balance the relationship between 'mandatory' and 'voluntary' information content. The mentioned evaluation seems to be affected by the variety of types of front-of-pack food labels, globally used to stress, for example, nutrients included, nutritional recommendations, scientific basis criteria, commercial targets etc., but not infrequently criticized by many professionals as leading to an increase in consumer confusion; for these reasons, the US Institute of Medicine and the Health Canada Department, for example, strongly call for a single standardized and universal front-of-pack food label.

3.- Comparing front-of-pack food label models and their interaction with EU consumer law

Front-of-pack food labels appears materialized by different formats and implementation schemes¹⁶. Among the most widespread in the European context, or object of attention by the European doctrine, there are the 'enriched label', the 'q code label', the 'traffic light label', 'nutris-core label' 'the black mark or warning label'. How do these labels work? Is it possible to find common mandatory rules? Despite the aim of far reaching harmonization, Article 35 of the EU Reg 1169/2011 leaves some space for national initiatives on nutrition labelling. It allows for different forms of expression and/or presentation of the mandatory requirements on a voluntary basis. Such additional voluntary nutrition labelling must be in compliance with other more specific requirements¹⁷; furthermore,

(¹²) Article 5 sets out a general definition of unfair practice, that is followed by the prevision of two different types of unfair commercial practices (those that are misleading, pursuant to articles 6 and 7, and the aggressive ones, pursuant to articles 8 and 9), and that it is accompanied by a list of the practices to be considered unfair in any case, regardless of whether they are deceptive or aggressive.

(¹³) The reference should be made first of all by hidden marketing as a technique that can influence consumers, precisely because it acts on the decision-making process that is the basis of their consumption choices.

(¹⁴) Cf. Art. 14 EU Reg. 1169/2011.

(¹⁵) Regarding problems and common principles of contract law in European countries cf. H. Kotz, *European Contract Law*, eng. traduction by G. Mertens, Oxford, 2017, cap. 2.

(¹⁶) On the topic, see D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, in *Nutrients*, 11, 2019, ps. 1-16 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6471039/>).

(¹⁷) Proving that: «(a) they are based on sound and scientifically valid consumer research and do not mislead the consumer; (b) their development is the result of consultation with a wide range of stakeholder groups; (c) they aim at facilitating consumer understanding of the contribution or importance of the food to the energetic and nutritional content of a diet; (d) they are supported by scientifically valid evidences of understanding of such forms of expression or presentation by the average consumer; (e) in the case of other forms of expression, they are based either on the harmonized reference intakes set out in Annex XIII, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; (f) they are objective and non-discriminatory; (g) their application does not create obstacles to the free movement of goods» (Art. 35).

it emerges for scholars the need to evaluate if, according to the point of view of European private law, the front-of-pack food label alters consumer vulnerability and, at the same time, if it is possible to evaluate positive and negative aspects of the various types of labelling, in order to identify the best labelling model or, at least, the type of voluntary label better suited to guarantee European consumer rights.

The mentioned research finds a reference point in the Funnel Model analysis (FM), that has been taken as a point of reflection by van der Bend's research work,¹⁸ in order to deepen functional and visual aspects of front-of-pack labels in Europe, helping scholars to summarize and compare features of different labelling schemes. Globally, taking into account the possible EU trade needs, I will focus briefly only on four of these models. The first one is the Keyhole label, a very simple symbol and the longest-standing front-of-pack label in Europe¹⁹; it appears as a positive and directive label, that doesn't apply to all product categories and aims to help consumers in choosing healthier food products within a specific merchandise category. It's the most directive scheme, because the decision about the nutritional classification of the product has already been made for the consumer. This does not mean that consumers receptiveness to guidance doesn't depend on multiple other factors such as the context of the shopping visit, time constraints and taste, but it also has a cultural dimension²⁰. A different model is that of the

Nutri-Score label, based on preset criteria and algorithms to establish an indicator of the overall nutrition profile for all pre-packaged food²¹. It's a mandatory nutritional declaration, whose main purposes are to help consumers in making healthier choices and to stimulate product reformulation towards healthier product compositions. In contrast to the Keyhole label, it conveys a mixed message as it displays five boxes with colors ranging from dark green to dark red, with letters to grade foods according to their overall nutritional quality: from 'A', for products with the best nutritional quality, to 'E' for the products with the worst features. Because Nutri-Score provides a summary of indications for each food spanning from healthy to definitely unhealthy, it is considered neither positive nor negative, rather as a mixed scheme²².

Another model is the well-known Mixed Multiple Traffic Light²³. In contrast to all other labels, it is a semi-directive front-of-pack label, that combines green, amber and red color-coding with percentage of daily amounts of energy (or energy plus total fat, saturated fat, total sugar and salt) in foods and drinks. 60% of UK companies have adopted this label: by a comparative point of view, the Mixed Multiple Traffic Light enjoys wide admiration, as it stands across the different models²⁴. However, in some contexts, primarily the Italian one, it is strongly criticized as considered simplistic and unable to considerate the ways through which different products are combined in a balanced diet (for example, the Mediterranean one)²⁵.

(18) Cf. D. Van der Bend et alii, *A Simple Visual Model to Compare Existing Front-of-pack Nutrient Profiling Schemes*, in *European Journal of Nutrition & Food Safety*, 2014, ps. 429-534. On the topic, see too D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit.

(19) The mentioned label was introduced in Sweden in 1989, and since then, it has developed as a common Nordic label for healthier foods, when it was introduced subsequently by Nordic Country (Denmark, Norway, Iceland) as well as Lithuania and Macedonia.

(20) Even if the general panorama appears more and more frequently that of the so called 'one-dimensional logic': see J. Glenn, *Globalization: North-South Perspectives*, London, 2007.

(21) The scheme was approved in 2017 by the French Government as a voluntary national policy, and it was approved to be used in Belgium, Spain and Portugal too.

(22) Cf. D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit., p. 6.

(23) The scheme was launched in 2013 by U.K., primarily aiming at helping consumers make healthier food choices according to Ministers' Recommendation on the use of color coding as well as to EU Reg. 1169/2011. See M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law*, in *European Food and Feed Law Review*, 2014, p. 149.

(24) On the issue cf. L. González Vaque, *Son los semáforos nutricionales la mayor manera de informar a los consumidores sobre los nutrientes contenidos en los productos alimenticios?*, in *Revista CESCO de Derecho de Consumo*, 11, 2014, p. 249.

(25) See P. Borghi, *Rosso, giallo o verde? L'ennesima etichetta alimentare "a semaforo". L'ennesimo segno di disgregazione*, in *q. Riv. www.rivistadirittoalimentare*, n.2-2017, p. 2, where the Author highlights the exigence for a unique European evaluation tool for food nutrition, in order to avoid freelance initiatives by single EU Countries.

Finally, considering the transnational legal model, I would like to draw the attention to Israeli and Chilean models too, that I put together as 'black labels', which are very easy models to help consumers decide, in a shorter period of time, to buy or not something according a sort of warning message. These models reflect the speed imposed by the image society, and take into account the economic research developed in support of front-of-pack color labels for all those (i.e. the vast majority) who want a quick comparison of different food products.

Israeli Warning Labels are a mandatory model that marks food packages with red or green circles to stress whether or not the food is healthy in relation to the presence of a disqualifying nutrients²⁶. Israeli model is clearly distinctive in respect to other labels and communicates a negative health message; therefore, it is considered valuable to be included in this European comparison for the paternalistic drift of consumer law that European scholars must critically examine²⁷, also in consideration of other similar cases that emerge globally. On this regard, it is interesting to point out that Israeli labelling is linked to the so called "cookie monster moderation"²⁸, as an objective accomplished with a set of new laws regulating the labeling and marketing of certain foods, that has found great success in Chile, for example, especially according to the 20.606 law.

Chilean 20.606 law is broadly sweeping in its protection of children from certain food marketing²⁹, and by a comparative point of view its example is fol-

lowed by other Latin American Countries: Ecuador implemented its own traffic light food labelling requirements for high levels of sugars, fat and sodium; Peru, Uruguay and Costa Rica have banned packaged foods in their schools and look with interest at the Chilean model; Mexico has increased taxes on similarly packed foods. While Chilean black logo, so-called PARE labeling (similar to road signs actually in use), is absent from the European food market, it is appreciated in Latin American countries; it has discouraged the purchase and consumption of the items with these labels, and has contributed to the implementation of fundamental personal rights, even before the consumer's ones, namely the right to the health (with a drastic reduction in obesity)³⁰.

Scholars underlined only very small differences in effectiveness and efficiency among the different label formats as perceived by consumers³¹. One possible explanation for this contradiction in results could be that the choice of the products used for the comparison of the different schemes has a significant influence on the outcome. So while traffic lights may be superior in identifying whether cornflakes or muesli are the healthier breakfast option, they are likely to fail in a category like cakes, where by nature of the production process the vast majority of products will score red on fat and sugar³².

The comparison of the mentioned labelling types shows a double response according to the profile taken into consideration. First of all, no big differen-

⁽²⁶⁾ The scheme was approved by the Israeli parliament's Labor, Welfare and Health Committee in 2017 and its first phase was enforced in January 2020. The Israeli food labelling reform requires red warning labels to appear on all food and beverage products containing high levels of sugar, sodium and saturated fat at, at the same time, enables the optional addition of green labels for recommended food-stuffs.

⁽²⁷⁾ With reference to the paternalistic approach of Italian and European consumer law, see R. Caterina, *Architettura delle scelte e tutela del consumatore*, cit., p. 73. Regarding the dangers of an asphyxiating consumer regulatory system, see A. Di Lauro, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi*, cit., p. 24.

⁽²⁸⁾ According to current rates of obesity in Chile, that leaves behind only three other countries (New Zeland 26%, Mexico 30% and United States 33%), scholars made reference to "Sesam street gang" of H.E. Schwartz (for example, *Cookie Monster's Foodie Truck: A Sesame Street*, Lerner Publishing Group, 2019), to decrease by storytelling children's exposure to unhealthy foods. See T. Godfrey, *Transitioning to "Sometimes foods": Chile's new Stop-light Food Labelling Laws*, in *Law and Business Review of the Americas*, 2014, ps. 661 ss.

⁽²⁹⁾ For the same reasons, the McDonald's Happy Meal is on the out in Chile, also taking account of art. 8, l. 20.606.

⁽³⁰⁾ Cf. *Ley de Etiquetado y Publicidad de Alimentos en Chile: ¿Un modelo replicable para Latinoamérica?*, Informe special, Santiago, 2016 (https://ideas.llorenteycuencia.com/wp-content/uploads/sites/5/2016/05/160504_DI_informe_alimentacion_chile_ESP.pdf).

⁽³¹⁾ The issue is deepened by Cf. D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit., p. 9.

⁽³²⁾ The concept is underlined by M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law*, cit., p. 151.

ces emerge regarding the information content: some characteristics are found to be similar in positive, mixed and negative front-of-pack labels. They use the same reference unit (100g/100ml) and include disqualifying components related to some ingredient percentage (sodium, sugar and fats) in their product criteria, and all aim at helping consumers to make healthier choices. The most relevant difference between positive and the mixed or negative labels is that in all positive labels a category-specific approach is employed, which means that different criteria are used for different food categories; conversely a single set of criteria for all food categories is used for the mixed and negative front-of-pack labels, although there are exceptions for specific food categories. This is certainly the most critical point, as it favors the homologation of food consumption (unlike what medical research offers based on age, lifestyle, personal needs etc.) as well as consumer's concept (it is not static, but is actually a changing figure, in relation to cultural and social reference factors).

Secondly, differences emerge in relation to the message built. The types of information contained in the different model labels mark a different degree of criticism for the consumer, as these labels balance in a different way the explicit factors (i.e. the quantity and/or percentage for one specific ingredient) with the perceptible factors (i.e. the wholesomeness of a product) as well as with the merely allusive ones (i.e. the ability of a product to be in line with ethical and healthy choices). Israeli and Chilean label models pay specific attention to the so called implied health claims, and they appear susceptible from a comparative point of view to the art. 101.14 a(1) of USA Code of Federal Regulations. It seems

obvious that three or four red warns on the product are likely to be decoded as a sort of 'non-beneficial' nutrition claim, so that the consumer is oriented to consider that that food does not meet his nutritional expectations. On the other hand, the same number of green light codes, as well as the absence of Chilean black label, could act as a 'beneficial' claim to enforce consumer choice. Even if these models are increasing consumers' understanding of nutritional information, color coding is inevitably considered at least an implied claim, affecting the so called consumer bounded rationality;³³ thus, it emphasizes the purposes of the front-of-pack nutrition labelling as a marketing strategy rather than a public health defense³⁴.

4.- Evaluating information ambiguity and consumer misconceptions: some final remarks

There is an ongoing debate on which are the front-of-pack label models most effective in translating complex nutritional information that can be correctly chosen in order to protect consumers' rights³⁵. On this issue a few studies have been realized but, according to the different European legal systems, scholars don't agree on the specific formats or methodologies to be used. There are critical issues regarding some gaps in offering to the consumer standard level of information transparency, and therefore of his own interests protection: all these should prevail over the pursuit of economic interests of traders and companies³⁶. I believe that the crucial point of this delicate balance must be found in the ambiguity of information, which the entrepreneur often uses in order to emphasize the properties of

⁽³³⁾ Cf. M. Pantzar, *Rational Choice of Food: on the Domain of the Premises of the Consumer Choice Theory*, in *International Journal of Consume Studies & Home Economics*, 20, 1996, ps. 1-20; L. Bairati - E. Grasso, *Lire ou regarder? Les couleurs dans l'étiquetage alimentaire et l'information du consommateur*, in *Contrats-Concurrence-Consommation*, 10, 2019, ps. 1-6.

⁽³⁴⁾ Cf. K.D. Brownell - J.P. Koplan, *Front-of-Pack Nutrition Labelling: an Abuse of Trust by Food Industry?*, in *The New England Journal of Medicine*, 364, 2011, ps. 2373-2375.

⁽³⁵⁾ See M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law*, cit., ps. 148 ss, especially regarding the possible breach between UK front-of-pack labelling and art. 3 NHCR; D.L.M. van der Bend - L. Lissner, *Differences and Similarities between Front-of-Pack Nutritional Labels in Europe: A Comparison of Functional and Visual Aspects*, cit., p. 2.

⁽³⁶⁾ It's widely accepted that a gap remains in relation to sanctions for breaching of information duties, inasmuch as Article 24 Consumer Right Directive (2011/83/EU) leaves this issue to the member states, only establishing that sanctions should be «effective, proportionate and dissuasive».

his product and attract the consumer's favor. Specifically, it is possible to distinguish two types of allusiveness that may harm consumer interests: on one hand, the mismatch between the communicated features of the product and those actually present according to a more global feedback; on the other hand, the use for commercial purposes of social preconceptions that fall within the expectations of consumer protection.

For example, one of the reference cases is the mandatory indication, provided by EU Reg. 1830/2003, about the presence of Genetically Modified Organisms in relation to all products in which their percentage exceeds 0.9%³⁷. This approach, that is accepted in Europe but is currently subjected to a challenge by the World Trade Organization, supports the message that there are some intrinsic differences between food with genetically modified ingredients and conventional products. It leads consumers to prefer non-GMO products even if scientific data, claimed by different manufacturers, do not admit any difference between standard products and the GMO ones.

Another example of consumer misconception's abuse, totally or partially not founded, is palm oil, which in recent years has been subject of cross-advertising campaigns, aimed to highlight the negative consequences of the massive use of this product by the agri-food industry. This has led to an increasing level of suspicion by the majority of consumers, so that Italian companies, such as Barilla or Friulbaker, have been forced to review their recipes containing palm oil as a consequence of a social alarmism that led to demonizing the product by

itself, without any distinction between consequences in terms of consumer health (in comparison with other vegetable fats) and those on environmental sustainability (in terms of global warming effect) or even of human rights (in relation to consultation of indigenous people occupying the lands)³⁸.

Moreover, it appears obvious that the green color, considered as an implied health claim, would constitute a claim criteria set out at the national level, capable to create a barrier to intra-EU trade, especially regarding producers that cannot comply with the recommended scheme³⁹. Similar observation can be made in relation to Chilean black logo, that inevitably recall dangerous effects to consumer's health and could create a barrier intra Mercosur-trade as well as different levels of protection of the citizens of that area⁴⁰. From a legal point of view, these actions don't violate European legal rules: the different voluntary labeling systems derive from the possibility allowed by the EU Regulation 1169/2011, especially by the already mentioned Art. 35 (additional forms of expression and presentations) and the subsequent Art. 36 (voluntary food information), to use «graphic symbols and other forms of expression». However, doubts may arise regarding the respect of the consumer's autonomy in decision-making, in relation to a broad interpretation of the articles 5 and 6 of EC Dir. 29/2005⁴¹.

Comparative analysis of the front-of-pack label model shows how this field of consumer law harmonization appears to be characterized by numerous gray areas, in which different national intentions and different market interests appear really mixed up, and in which the traditional public/private and man-

⁽³⁷⁾ See L. Bairati - E. Grasso, *Indicazioni in etichetta e messaggi fuorvianti nell'informazione del consumatore di alimenti*, in *Revista Bioética y Derecho*, 42, 2018, p. 40. Other national measures add to EU requirements stressing states efforts to GMOs label issues (cf. M. Rosso Grossmann, *Label for genetically modified foods: a debate in the United States*, in "I diritti della terra e del mercato agroalimentare. Liber amicorum Alberto Germanò", Milano, 2016, ps. 1403 ss.).

⁽³⁸⁾ On the need to pay attention to consumer's choices, not only using the economic price of a good as a crucial factor, but also giving attention to the current global scenario characterized by different factors of which consumer needs and wants to be aware, see S. Tommasi, *Food Diversity and Consumer Protection*, in *European Food and Feed Law Review*, 12, 2017, 218.

⁽³⁹⁾ See M. Holle - E. Togni - A. Vettorel, *The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law*, cit., ps. 148, 153.

⁽⁴⁰⁾ These are current investigations that draw the attention of the scholars interested to deepen the legal research of that area also in consideration of the 2019 Parlasur pre-project on *'Derecho a la alimentación saludable, acceso a la información fundada y etiquetado de alimentos en el Mercosur'* (cf. <https://www.parlamentomercosur.org/innovaportal/file/17360/1/p-a-r-l-a-s-u-r.-iniciativa-derecho-alimentacion-saludable.pdf>), on which it is our intention to dwell with great attention in another essay.

⁽⁴¹⁾ Avoidance of such distortions was one of the reasons that led to the adoption of the European Nutrition and Health Regulation (Reg. EC 1924/2006).

datory/voluntary combinations tend to be overcome by the behaviour of business operators and by the interactions with third parties of private or hybrid nature⁴². In particular, this trend highlights shadowed areas of the consumer's right to information, placing purpose of the many label models in a 'fuzzy field'. A meaningful example appears that of nutritional traffic lights, since these can lead to a distortion of the market, also on the basis of preconceived cognitive elements that may affect purchase decisions according to misunderstandings or on the basis of pre-existing cultural elements. Another example is that of process certifications relating to sustainability, referring to environmental, economic and social dimension, that are massively used in the labeling of a growing number of products, but are sometimes harshly contested as misleading for the consumer or being an obstacle to fundamental principles of international trade law⁴³. The European Court of Justice underlined in many cases⁴⁴ the opportunity to avoid all national measures leading to a discrimination between domestic and foreign products, considering these measures as national barriers to trade, even if they were voluntarily issued⁴⁵. In conclusion, front-of-pack label models affect not only consumer health choices but also a plurality of rights, which recall the operational force of a set of European sources, among which emerges the EU Reg.1169/2011, configured as a fundamental rule that prevails and inspires the general rule formed particularly by CEE Dir. 29/2005. Lacking specific rule by the Regulation, the commercial communication that alters the consumer's decision-making pro-

cess, through the supply of 'suggestive' and 'promotional' information of health standard, in compliance with the leeway allowed through voluntary labeling within the limits set by Art. 36 EU Reg 1169/2011, falls within the scope of application of the CEE Dir. 29/2005 which still works as «safety net which fills the gaps not regulated by other EU sector specific rules»⁴⁶, but currently appears to be overloaded with a further role, in order to balance the voluntary indications of the front-of-pack model labels with the non-paternalistic protection of consumer rights, saving their rights to choose food products knowingly.

ABSTRACT

The essay underlines some different perspectives of front-of-pack food labels, between European and other Countries models. According to EU consumer law developments, which also have to consider the requirements set by global trade of EU food products, the Author highlights links and gaps of EU Reg No 1169/2011.

Il lavoro sottolinea alcune differenze nei modelli disciplinari adottati per le etichette dei prodotti alimentari confezionati nell'Unione Europea ed in altri Paesi. Esaminando gli sviluppi del diritto dei consumatori dell'UE, che devono anche considerare i requisiti stabiliti dal commercio globale di prodotti alimentari, l'autore sottolinea i collegamenti e le lacune del regolamento UE n. 1169/2011.

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⁽⁴²⁾ See L. Bairati-E. Grasso, *Indicazioni in etichetta e messaggi fuorvianti nell'informazione del consumatore di alimenti*, cit., p. 40.

⁽⁴³⁾ Many criteria are also established, as complement of the EU labelling systems referring to sustainability, by Reg. EC 66/2010.

⁽⁴⁴⁾ Among the best known cases: "Dassonville" (Case 8-74), "Buy Irish" (Case C-249/81), "Commission v. Germany" (Case C-325/00) underline how the improvement of consumer protection is a mirror image of the improvement of free goods movement.

⁽⁴⁵⁾ EU legislation helped to establish a certain degree of consumer protection in the internal market, sometimes realized at the expense of creating a rather fragmented regulatory framework, causing significant compliance cost for business activities wishing to trade cross-border. Cf. B. Busch, *Harmonization versus complementation: the Consumer Rights Directive and the Common European Sales Law*, in J.C. de Medeiros Nóbrega et alii (eds.), cit., p. 223.

⁽⁴⁶⁾ Cf. Communication from the Commission on the application of the Unfair Commercial Practices Directive (March 14, 2013).