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The interplay of public and private actors when developing rules on food origin labelling

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Be COOL: read it!

To the watercourses
that embraced me and guided me along this journey.

What I love most about rivers is
You can't step in the same river twice
The water's always changing, always flowing

But people, I guess, can't live like that
We all must pay a price
To be safe, we lose our chance of ever knowing

What's around the river bend
Waiting just around the river bend

I look once more just around the river bend
Beyond the shore where the gulls fly free
Don't know what for what I dream the day might send
Just around the river bend for me, coming for me

[...]

I look once more just around the river bend
Beyond the shore somewhere past the sea
Don't know what for why do all my dreams extend
Just around the river bend, just around the river bend

Should I choose the smoothest course
Steady as the beating drum?
[...]
Or do you still wait for me, dream giver
Just around the river bend?

(Just around the riverbend, Judy Kuhn
From the motion film *Pocahontas*)

THE INTERPALY OF PUBLIC AND PRIVATE ACTORS WHEN DEVELOPING RULES ON FOOD ORIGIN LABELLING

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INTRODUCTION

This study concerns the issue of country of origin labelling (hereinafter, COOL) in the EU legal order, particularly in the EU internal market and in the context of global trade, in which the EU is in prime position.

One of the main reasons for embarking in this research is that the issue has gained increasing importance within the EU as well as within the Member States. Although the EU Commission has preferred to leave the industry to voluntarily[1] indicate the origin on labels, the European Parliament as well as internal forces of various Member States are standing up for mandatory origin. Prompted by a series of food-safety scares in the 1990s, consumers have become increasingly concerned about the agro-food industry[2]. A growing number of purchasers demands better information, and a clear indication of the country of origin is an essential element of such a claim.
In light of this, a first purpose of this research is to analyse how these pressures can be turned into reality - leading towards the adoption of mandatory country of origin labels - and whether this is in compliance with the relevant European Union Law and International Trade Law.

The interest in COOL, demonstrated by the World Trade Organization (WTO) and the European and national institutions, as well as by consumers and business operators, depends on the range of meanings that the concept of origin is able to cover.
Indeed, such a notion can be interpreted as a protectionist barrier within a free trade area as well as a policy tool to meet consumers' expectations. It can be understood by purchasers as a safety and quality indicator and even be useful to assume how long a

[1] There are some exceptions in which the indication of the country of origin is mandatory, as Chapter 2 will show.
[2] A. Shaw (1999), What are 'They' Doing to Our Food? Public Concerns about Food in the UK, in *Sociological Research Online*, Vol. 4, Issue 3. Available at http://journals.sagepub.com/doi/pdf/10.5153/sro.329 (last access 27th November 2017).

specific product has travelled before landing on some supermarkets' shelf. It might mean increasing costs for producing companies, extra profit for retailers that try to attract consumers and additional burdens for customary administration. It can bring to mind an emotional connection to a place and be enriched by cultural values.

Issues of consumer protection, product advertising and territory promotion characterize the scrutiny of COOL issues. The relationship between food, territory and consumers, that the concept of origin is able to express, is reflected in institutional and social dynamics, meaning relatively public actors and private parties.

At an institutional level, particularly during the last two years, national governments have shown a growing interest for the matter. It is no coincidence that countries such as France and Italy have been the first to introduce additional mandatory indications on the origin of specific type of food. A significant cultural divergence in the approach to the topic exists between the north and the south of Europe. In much of southern Europe "the association between *terroir,* tradition and quality is taken as self-evident"[3]. The territory is seen as a sum of expertise about the production system and its specific environmental features are deemed able to confer unique qualities. At the opposite, in northern Europe, such associations are much weaker[4].
However, behind the banner of meeting consumers' expectations and demand for increased transparency along the food supply chain, a patriotic aim might be hidden. Establishing additional mandatory COOL schemes might be a way for Member States to promote domestic products. From this viewpoint, the concerns expressed by the EU Commission on the consequences that mandatory COOL might have on transnational movement of goods are easily understandable. Such an interaction between Member States and European institutions deserves deep examination, due to its potential impact on the Single Market. The fundamental freedom of movement of goods might be hindered and Article 34 TFUE – which prohibits quantitative restrictions and measures having an equivalent effect - be violated. At a global level as well, the indication of the country of origin on food products might be interpreted as a

[3] W. Moran (1993), The Wine Appellation as Territory in France and California, in *Annals of the Association of American Geographers*, Vol. 82, Issue 3, pp. 27–49.
[4] Nicholas Parrott, Natasha Wilson, Jonathan Murdoch (2002), Spatializing quality: regional protection and the alternative geography of food, in *European Urban and Regional Studies*, Vol. 9, Issue 3, p. 246.

protectionist barrier and, as such, be challenged in front of the WTO dispute mechanism.

On the social level, studies on the country-of-origin effect and on consumer ethnocentrism show that country of origin labelling can act as a tool of reassurance for safety and quality. Purchasers might think that the indication of the origin means improved traceability systems within the food supply chain. Or they might link it to emotions and biases felt about a specific place, as theories of consumer ethnocentrism show and country-of-origin effect show. Business operators, on the contrary, can see COOL as an additional economic burden that forces them to change labels and increase controls on supply flows. At the same time retailer companies might be willing to exploit such a consumers' demand in order to hold them loyal. Whether the consumers' perceptions on COOL are correct and how to what extent business operators exploit such an ambiguity on the meaning of the country of origin deserves some deep reflections.

Whichever chosen perspective reveals the complexity of the topic. At issue there are as many different interests as stakeholders involved. Such a background generates a contrast not only among stakeholders' claims but also among fundamental principles, meaning free movement of goods and right to be informed. From this viewpoint, country of origin labelling represents a privileged case study of the global food governance and its dynamics. However, in the legal realm, despite growing attention, the study of COOL is in a less advanced phase[5]. Till now, the issue of the country of origin has been mainly addressed by disciplines such as history, anthropology, sociology, marketing.

Therefore, this research, aims at moving a step forward towards a deeper comprehension of the issue of the country of origin labelling within legal studies. The analysis of the way in which public actors – WTO, European institutions and Member States –and private parties – consumers and business operators – interact in order to develop and implement rules on country of origin labelling will allow some considerations on the dynamics within the global food governance.

[5] Lorenzo Bairati (2017), The food consumer's right to information on product country of origin: trends and outlook, beyond EU Regulation 1169/2011, in *Journal of European Consumer and Market Law*, Issue 1, p. 9.

The dissertation is organized as follows.

The first part – Chapters 1, 2, 3 - is dedicated to the analysis of the legislation on country-of-origin labelling. Three levels are taken into account, namely the international, the EU and the national one.

A description of the rules on country-of-origin within the WTO system will be provided, with a special focus on the Technical Barriers to Trade Agreement (TBT Agreement).

The core of this first part is constituted by the analysis of Article 26 of Regulation (EU) 1169 of 2011, on the provision of food information to consumers. Under Article 26, the indication of the country of origin on labels remains on a voluntary basis. Indeed, it is mandatory to indicate it only if failure to give such information might mislead the consumer as to the specific origin of the product and in some listed specific cases. As Article 26 leaves space to the EU Commission for further implementations the country-of-origin labelling issue evolves continuously.

The scrutiny of Article 39, concerning additional mandatory particulars with the potential to be set by the Member States, leads the discussion to the national level. Two Member States are object of scrutiny: Italy and France. Reasons behind this choice stem from the fact that both countries adopted additional mandatory COOL schemes for specific products. Indeed, they both enjoy a particularly high reputation in the food sector and their territory can be commercially exploited thanks to its reputation. This provides fruitful ground for a comparative analysis.

In the second part, such a legal framework will constitute the background for the discussion on the effects of COOL on both trade and consumers. In particular, Chapter 4 will analyse the international system of the rules of origin (ROOs) as well as the Union Customs Code (UCC). Both these provisions are crucial for the implementation of Article 26, Reg. (EU) 1169/2011: in order to know which country gives the origin to a certain product, reference has to be made to the UCC, which recalls international ROOs. At the same time, as Member States' regulations have to comply with the European rules, the interconnections among the international, the European and the national levels will be outlined.

Following this focus on trade law, the consumers' perspective on country of origin labelling will be pointed out – Chapter 5. The origin indication will be addressed as a matter of right to be informed – pursuant Article 169 TFUE - questioning the

effectiveness of labels in providing information and influencing consumers' behaviour.

The last part of the thesis is devoted to the analysis of the country of origin labelling system within the current global food governance. The concepts of origin will be discussed in view of the tension between the globalized food supply chain and the growing demand for localization, as more respondent to sustainable goals. It will show how, till now, legal scholars have been mostly concerned about the impact that such an indication might have on trade flows. The notion of Food Sovereignty and the Food Regime Theory will help to build up an opposite perspective, enriched by environmental, ethical and cultural concerns.

The conclusion offers a critical analysis on the current trends of commoditization of food. Hence, it will discuss whether or not it is possible to untie the concept of the country of origin from purely market-driven interests and to what extent this new approach can be applied to food policy-making.

PART I

LEGISLATION ON COUNTRY-OF-ORIGIN LABELLING

Consumers have always shown a certain interest in knowing where their food comes from, since the attribute of the origin has been historically able to give them confidence on the quality of the food they consume[6]. While this kind of knowledge could be easily gained when people used to produce their own food, over the past decades considerable changes, in parallel with the globalisation of the food industry, have increased the gap between production and consumption moments[7]. Indeed, nowadays the growing demand for tighter regulation testifies a generalised sense of discomfort for the information asymmetries along the food supply chain[8]. In this scenario, on the one hand food safety regulation and traceability systems, taking the place of purchasers' personal evaluation of risk and quality, become a crucial public policy tool and, on the other hand, marketing strategies have been developed in order to exploit such consumers' demand.

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[6] P. Brereton (2013), "Verifying the origin of food: an introduction", in P. Brereton (ed.), *New analytical approaches for verifying the origin of food*, Woodhead Publishing, pp. 3-4. The contribution underlines how familiarity with the local food supply chain was able to reassure consumers on the quality of the food they were used to purchased. As a matter of fact, preference for premium goods is nothing new, as the author shows through some examples: ancient Athens had a public inspector of wine and Pliny the Elder was concerned about lead adulteration of Roman wine. For deeper knowledge, please, refer to J. Robinson (ed.) (2006), *The Oxford Companion to Wine*, Third Edition, pp. 4 and 26–27, Oxford University Press, USA and J. Eisinger (1982), Lead and wine. Eberhard Gockel and the colica Pictonum, in *Medical History*, Vol. 26, Issue 3, pp. 279–302.

[7] In this regard, it is worth referring to the studies conducted by the Berkeley Food Institute and in particular to Tim Josling, "Globalization of the Food Industry and its Impact on Agricultural Trade Policy", available on the Internet at http://web.stanford.edu/~josling/berkeley.pdf, then published in Charles B. Moss, Gordon C. Rausser, Andrew Schmitz *et al.* (eds.) (2002), "Agriculture Globalization Trade and the Environment", in David Zilberman, Renan Goetz, Alberto Garrido (series eds.), 20 Natural Resource Management and Policy, London: Springer, pp. 309 *et sqq.*.

[8] Lara Fornabaio and Margherita Poto (2016), Science and Civic Engagement in the Food Sector. How to reshape risk analysis into a more transparent toolbox, in *European Food and Feed Law Review*, Vol. 11, N. 4, p. 315.

As a matter of fact, the growing consumers' demand for the abovementioned information has led some regulators[9] to widen the requirements for mandatory country of origin labelling, which, in general, continues to be on voluntary basis and applied only to specific foods. Reasons behind the choice to make it obligatory might be different: from food safety concerns - for instance, it is the case of beef meat regulation after the bovine spongiform encephalopathy (BSE) disease[10] -, to the willingness of protecting regional food against cheaper imported goods, to, more recently, purchasers' attitude towards local food, animal welfare and hygienic production practices.

This part will first refer to some international horizontal provisions regarding country of origin labelling, particularly, Codex Alimentarius, UNECE and WTO Sanitary and Phytosanitary Agreement (hereinafter, SPS Agreement) and Technical Barriers to Trade Agreement (hereinafter, TBT Agreement). A deeper focus will be on the European Regulation on Food Information to consumers (hereinafter, FIR)[11] and its Article 26. A description of specific products rules will follow, as set both internationally and within the European Union. Finally, the Italian legislation on the country of origin labelling will be analysed as well as a brief description of the French position on this matter will be provided.

[9] For instance, as it will be showed afterwards, in Chapter 3, within the European Union, French and Italian governments have chosen to adopt additional mandatory country of origin labelling for specific products.

[10] Indeed, Regulation (EC) 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97 tried to regain consumers' confidence on beef meat through improved systems of traceability and better transparency.

[11] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004; L 304/18 – 22.11.2011.

CHAPTER 1

INTERNATIONAL RULES ON COUNTRY-OF-ORIGIN-LABELLING

This chapter is dedicated to the scrutiny of international rules on country of origin labelling (hereinafter, COOL). It is organised as follows. First, a brief description of the international standards within the Codex Alimentarius Commission (CAC) and the United Nations Economic Commission for Europe (UNECE) regarding COOL will be provided. Then a description of the WTO rules concerning the indication of origin on products' labels will be object of scrutiny. Special focus will be on the Technical Barriers to Trade Agreement (hereinafter, TBT Agreement).

1.1 International horizontal standards for food origin labelling

Currently, there are several international legislations that, dealing with labelling issues, regard the origin of food products as well. Before analysing the WTO's rules on the country of origin labelling some references to them will be given.

1.1.1 Codex Alimentarius general standards for the labelling of prepackaged foods

The Codex Alimentarius, established by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) in 1963, is a set of international food standards, guidelines and codes of practice that aims to facilitate the international food trade, by promoting fair trade practices as well as by protecting consumers' health. The General Standards for the Labelling of Prepackaged Foods (CODEX STAN 1-1985) require that *the country of origin of the food shall be declared if its omission would mislead or deceive the consumer*[12] and that in case a product, after being processed in a second country, changes its nature, *the country in which the processing is performed shall be considered to be the country of origin for*

[12] Paragraph 1, Point 4.5, CODEX STAN 1-1985.

the purposes of labelling[13].

Although the Codex rules are not binding, the WTO-SPS (Agreement on the Application of Sanitary and Phytosanitary Measures) and TBT (Agreement on Technical Barriers to Trade) Agreements assure that they hold a pivotal role within international trade. Indeed, under the abovementioned agreements countries cannot impose higher health, safety or technical requirements on imports than the ones listed in the international standards, such as the Codex Alimentarius. This has given the Codex standards a much higher profile at international level than they had at the beginning[14].

1.1.2 UNECE agricultural standards

The United Nations Economic Commission for Europe (UNECE) was created in 1947 by the United Nations Economic and Social Council[15] (ECOSOC) as one of five regional commissions of the United Nations[16]. The UNECE Working Party on Agricultural Quality Standards has developed commercial guidelines, under the name of WP.7, aiming at fostering high-quality production, while facilitating international trade. Products covered by such standards are diverse: fresh fruit and vegetables (FFV), dry and dried produce (DDP), seed potatoes, meat, cut flowers, eggs and egg products. As most of the standards refer to the export and control stage, in general, information on origin is mandatory for bulk packaging or documentation rather than for consumer information[17].

1.2 The WTO's definition of origin

This paragraph will be dedicated to the analysis of the WTO's system on country of

[13] Paragraph 2, Point 4.5, CODEX STAN 1-1985.
[14] M. Woolfe, Thames Ditton (2013), Food origin legislation and standards, in P. Brereton (ed.), *New analytical approaches for verifying the origin of food*, Woodhead Publishing, p. 14.
[15] The UN Charter set up ECOSOC in 1945 as one of the six main organs of the United Nations. Focusing on economic, social and environmental sustainable development, it includes regional economic and social commissions, functional commissions facilitating intergovernmental discussions of major global issues, and specialized agencies. For a better understanding of its sustainable development goals, please, refer to https://www.un.org/ecosoc/en/sustainable-development
[16] The others are: Economic Commission for Africa (ECA), Economic and Social Commission for Asia and the Pacific (ESCAP), Economic Commission for Latin America and the Caribbean (ECLAC), Economic and Social Commission for Western Asia (ESCWA).
[17] Standards are published in the following website: http://www.unece.org/trade/agr/aboutus.html (last access 13th March 2017).

origin labelling. The difference between technical regulations and standards within the TBT Agreement will be pointed out. Finally, Articles 2.1 and 2.2 of the TBT Agreement as well as Article III:4 GATT will be examined. This last paragraph will provide the tool to understand the WTO dispute on COOL, object of further scrutiny in Chapter 4.

1.2.1 GATT and "marks of origin"

Within the GATT[18] system, Article IX, titled "Marks of origin", allows countries to require marks of country origin:

Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

This first paragraph explicitly sets that requirements must apply to all like products of third countries. It clarifies, in the following paragraph, that the impact of these measures on *commerce and industry of exporting countries*[19] should be minimum and not beyond what it is deemed necessary in order to protect consumers from *fraudulent and misleading indications*[20]. Particularly, as paragraph 6 specifies, the use of these trade names should not be deceptive about the true origin of a product, *to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation*. Moreover, this kind of regulations should not damage products neither materially reduce their value, nor unreasonably increase their cost[21].

Taking into consideration the private and public costs of implementation, verification and enforcement throughout the food chain, the cost of country-of-origin labelling may outweigh the benefits. This can be true not only for exporters but also for domestic agents, such as shippers, handlers and processors, that have to bear

[18] For an extensive discussion of the WTO legal architecture in a comparative perspective, please, refer to Federico Ortino (2004), *Basic Legal Instruments for the Liberalisation of Trade. A Comparative Analysis of EC and WTO Law*, Oxford: Hart Publishing.
[19] Article IX GATT, paragraph 2.
[20] Art. IX GATT, par. 2.
[21] Article IX GATT, paragraph 4.

administrative and operational costs[22], as already pointed out in previous paragraphs. For these reasons, although policymakers are often interested in the tool of mandatory origin labelling, in order to differentiate domestic products and foreign ones, these costs are likely to be passed back to foreign or domestic producers, or forward to consumers, depending on the price responsiveness of supply and demand.

1.2.2 Labelling requirements under the TBT Agreement

In the realm of the WTO, all food-related technical regulations, voluntary standards and conformity assessment procedures fall under the Technical Barriers to Trade (TBT) Agreement[23]. Indeed, the TBT Agreement fosters transparency and coordination of national regulations and standards thanks to the adoption of international rules and laying down provisions for labelling schemes under a regulatory framework for product standards. Efficiency of production and development of international trade are achieved through international standards and technical regulations that work as a basis for national provisions[24]. Harmonization is at the core of the TBT Agreement, in so far as it minimizes the trade-restricting effects of domestic regulations and allows producers to take advantage of economies of scale, by creating undifferentiated products that can be sold in a wider number of countries[25].

The relevance of such a matter for the purpose of this research is due to a fine linkage among consumers' demands, governmental interventions on foodstuff's technical

[22] Tim Josling, Donna Roberts and David Orden (2004), *Food regulation and trade – Towards a safe and open global system – An overview and synopsis*, Paper for presentation at the American Agricultural Economics Association, Annual Meeting, Denver – Colorado, August 1-4, p. 143. The authors mention the cost for processing meat from cattle with different places of birth on different days of the week or the costs of record keeping in order to maintain verifiable audit trails.

[23] Particularly, labelling requirements, food quality standards and packaging regulations. For extensive understanding of the TBT Agreement, please refer to Tracey Epps and Michael J. Trebilcock (2013), *Research Handbbook on the WTO and Technical Barriers to Trade*, Cheltenham: Edward Elgar Publishing Limited; G. Marceau and J. Trachtman (2002), The Technical Barriers to Trade Agreement, the Sanitary and Phitosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods, in *Journal of World Trade*, N. 36.

[24] E. Wijkström and D. McDaniels (2013), *International standards and the WTO TBT Agreement: improving governance for regulatory alignment*, Staff Working Paper ERSD-2013-06, World Trade Organization Economic Research and Statistics Division, p. 3.

[25] Markus Wagner (2013), "International Standards", in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to trade*, Cheltenham: Edward Elgar Publishing Limited, p. 243.

requirements and the success of the TBT Agreement. Consumers' demand either for products with specific quality attributes or for information about these mentioned attributes keeps on growing. Concomitant with this, national governments promulgate regulations[26], in order to establish what kind of information should be provided and how it should be displayed. As a consequence, the TBT Agreement is becoming increasingly important in global food markets, as "it attempts to balance the aim of standardization for purposes of creating a more efficient trading system, while granting WTO Members the policy space to protect their interests […]"[27].
Within this framework, it might happen that domestic rules enacted to give answers to consumers' demands are in conflict with those set by the WTO, whose main goal is harmonization for economic efficiency. In addition, many food standards are developed by other kinds of public[28], private[29] and public/private organizations[30] that have the potential to affect trade significantly, either by incorporation into national regulations or by voluntary contracts of firms.

The TBT Agreement aims at harmonizing technical regulations, standards and conformity assessments provisions. While these latters do not follow within the scope of this work, the formers need to be briefly defined. The main difference between the two categories of technical regulations and standards, defined respectively in Annex 1.1[31] and Annex 1.2[32] of the TBT Agreement, is that technical regulations are

[26] In the past years governments have been intervening in labelling in order to align individual consumption choices with social objectives.
[27] Markus Wagner (2013), "International Standards", in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to trade*, Cheltenham: Edward Elgar Publishing Limited, p. 239.
[28] Such as the Codex Alimentarius Commission which, operating under the auspices of the United Nations Food and Agriculture Organization and the World Health Organization, represents a perfect example of a public body that develops standards concerning food, food production and food safety. Regarding the Codex Alimentarius and its rules on origin labelling please refer to Chapter 1, Paragraph 1.
[29] Examples of standardizations by a private entity are the International Organization for Standardization (ISO), which is composed only of industry representatives, with national standard-setting bodies, and the Marine Stewardship Council, composed of industry and consumer groups, certifying sustainable seafood.
[30] There are also hybrid bodies, such as the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH), which brings together the regulatory authorities and pharmaceutical industry to discuss scientific and technical aspects of drug registration. For more details, please, refer to Stéphanie Dagron (2012), *Global Harmonization through Public-Private Partnership: The Case of Pharmaceuticals*, IRPA Working Paper 2/2012, 1.
[31] It defines a technical regulation as a "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols,

mandatory whereas standards are not[33]. As a consequence, whenever the requirements of a technical regulation for a product are not met, that product cannot be sold in a WTO Member. Instead, every time a product does not comply with a standard it can be sold but only without the logo or certification that following a certain standard guarantees. For instance, the Fairtrade International standard can be used only if its requirements are met. If there is not compliance with those requirements, the product can nevertheless be sold without such a certification. Technical regulations and standards represent the conditions that have to be met in order to gain access to a particular market. The choice to address them through an international agreement is an attempt to limit their impact on trade: despite appearing to be less disruptive of trade than quantitative restrictions, the effect can actually be very similar. For instance, referring to labels, if the information that has to be specified on a label was different in each country, manufacturers would bear very high costs, such as the cost of producing many different types of labels rather than the cost of "maintaining distinct inventories for each market"[34].

Article 2 of the TBT Agreement applies to technical regulations. It specifies that *members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any*

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packaging, marking or labelling requirements as they apply to a product, process or production method."

[32] A standard is defined as "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method". In other word, a standard is a "technical specification or set of specifications related to characteristics of a product or its manufacturing process". Donna Roberts, Timothy E. Josling, and David Orden (1999), *A Framework for Analyzing Technical Trade Barriers in Agricultural Markets*, Market and Trade Economics Division, Economic Research Service, U.S. Department of Agriculture. Technical Bulletin No. 1876, p. 3. For more details on food standards, please, see also Chapter 6 of this dissertation.

[33] In the Tuna II case – Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R, adopted on the 15th September 20011 -, regarding labelling schemes for the sale of tuna products in the United States, the distinction between a technical regulation and a standard led to a dissenting opinion at the panel stage. Indeed, the majority's opinion was that compliance means that the product cannot be marked as "dolphin-safe" but can still be marked without it. This way all labelling requirements are technical regulations. The dissenting opinion is that mandatory compliance entails that a product cannot be marked at all without meeting certain requirements. For further details, please, refer to https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (last access 6th November 2017).

[34] Timothy Josling, Donna Roberts and David Orden (2004), *Food regulation and trade. Toward a safe and open global food*, Peterson Institute for International Economics, p. 24.

other country[35]. It continues at paragraph 2: *Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products*. And at paragraph 4 it adds that *where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations* […].

Paragraph 4 constitutes an example of harmonization, as deviation from the international standards has to be justified whenever it has an impact on trade among WTO Members[36]. Member States are required to use existing international standards as a basis for their domestic technical regulation, with regards to the regulations that will be adopted in the future as well as the regulations that have been already adopted, working retroactively[37]. Therefore, this provision covers not only measures set after the entry into force of the WTO Agreement[38] but also that have been adopted previously.

1.2.3 TBT Articles 2.1 and 2.2 and GATT III:4

This paragraph will provide an analysis of Articles 2.1 and 2.2 of the TBT Agreement and of Article III:4 GATT, as their interpretation has been crucial within the WTO dispute concerning US country of origin labelling rules. These provisions constitute the legal basis on which the WTO Panel settled the dispute that will be further discussed in Chapter 4. Therefore, it is worth briefly examining them, while

[35] Article 2.1 TBT Agreement.
[36] In light of this, compliance with international standards creates the presumption that the regulation follows WTO law, as Article 2.5 of the TBT Agreement specifies.
[37] Markus Wagner (2013), "International Standards", in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to trade*, Cheltenham: Edward Elgar Publishing Limited, p. 254. For further details on Article 2.4 please refer to Paragraph 6.4 of this thesis.
[38] Meaning 1st January 1995 for original Members or a later date in which the State joined the WTO.

Paragraph 6, in Chapter 4, will specifically regard the US COOL laws in front of the WTO.

Article 2.1 of the TBT Agreement, as pointed out above, imposes to WTO member states to treat domestic products in the same way as the products they import from other member states. This "no less favourable treatment" clause includes both the national treatment obligation and the most favoured nation obligation treatment, regarding, undoubtedly, only "like products"[39]. Indeed, in order to determine a case of discrimination, the standard of the "likeness" or not of the products in question is used. This means that, a different treatment is allowed only if the products concerned are not considered "like"[40]. Article 2.1 forbids both *de jure* and *de facto* discrimination between domestic and like imported products[41]. *De jure* discrimination implies that labelling requirements explicitly distinguish between products with different origins. *De facto* discrimination, instead, is referred to those cases in which a greater burden is imposed on imports or on imports from certain countries[42].

Article 2.2, instead, requires members states of the WTO to *ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create*[43]. Under this rule, consequently, member states cannot impose technical regulations that are more restricted than necessary. This provision has been recently addressed in front of the

[39] As the WTO Appellate Body Report, *US—Clove Cigarettes*, above n.16, para.87, states, in order to verify whether a violation of the national treatment obligation has occurred, three elements must be double checked: (a) the measure at issue must be a technical regulation; (b) the imported and domestic products at issue must be like products; and (c) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.

[40] Problems stem from the fact that word "like" is not defined in the GATT. "Since it is inherently a term of comparison, it cannot be defined in an absolute way. Which products are to be considered "like", depends on the characteristics relevant for the comparison. Christiane R. Conrad (2011), *Processes and Production Methods (PPMs) in WTO Law Interfacing Trade and Social Goals*, Cambridge Books Online, Book DOI: http://dx.doi.org/10.1017/CBO9780511807398, at p. 39.

[41] Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted on the 13th June 2012, US – Tuna II (Mexico), para. 286.

[42] Tania Voon, Andrew Mitchell and Cathrine Gascoigne (2013), "Consumer information, consumer preferences and product labels under the TBT Agreement", pp. 467-468.

[43] The Article than goes on "Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products".

WTO dispute mechanisms, in order to assess whether a technical regulation constitutes an obstacle to international trade, under Article 2.2. of the TBT Agreement. Three elements have to be taken into account: (i) the trade-restrictiveness of the technical regulation, (ii) the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective. (iii) the risk that non-fulfilment would create and, in most cases, (iv) a comparison with alternative measures.

Considering the WTO case law[44], it is possible to state that the Appellate Body is likely to adopt a stringent approach to technical regulations under Article 2.1, while wider leeway is granted to Members under Article 2.2[45].

Finally, Article III:4 GATT 1994 is strictly related to TBT Article 2.1 as it establishes that *the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product*. Indeed, in this case, it is possible to talk about an overlap between the two norms, as they contain the same national treatment obligation rather than they share the same key elements and structure; why? Reasons are likely to be found in the fact that, when drafting the TBT Agreement, parties to the GATT Agreement could select different packages of GATT Agreements to accede to. Hence, the TBT Agreement had to contain a national treatment obligation - in Article 2.1 – for all those cases in which one party to the TBT Agreement chose not to accede to the GATT Agreement. In fact, "as the national treatment obligation is one of the cornerstones of the multi-lateral trading system"[46], it was necessary to make sure that

[44] For the sake of clarity, reference should be made to US – Clove Cigarettes; US – Tuna II (Mexico); US – COOL.

[45] Tania Voon, Andrew Mitchell and Cathrine Gascoigne (2013), "Consumer information, consumer preferences and product labels under the TBT Agreement", in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to trade*, Cheltenham: Edward Elgar Publishing Limited, p. 473.

[46] Henry Hailong Jia (2013), Entangled Relationship between Article 2.1 of the TBT Agreement and Certain Other WTO Provisions, in *Chinese Journal of International Law*, Vol. 12, at p. 724.

such a clause was contained in every major GATT Agreement. However, it is true that, after the establishment of the WTO, the overlap between Article 2.1 TBT Agreement and Article III:4 GATT, with regard to the national treatment obligation, lost its historical justification. Despite concerning the same principles, under the TBT Agreement no general exception provision to the national treatment obligation can be found. The balance between trade liberalization and Members' right to regulate as a counter-balance to trade liberalization objectives remains a crucial issue that implicates the legality of the multi-lateral trading system[47].

Within this framework, the TBT Agreement might be considered *lex specialis*, while the GATT Agreement, overlapping with it, *lex generalis*. It might look like that Article 2 TBT Agreement is a "development" or a "step forward" from the disciplines of the GATT Agreement[48] or even that the TBT Agreement itself expands on the pre-existing GATT disciplines. If the relationship between the two Agreements is defined as the *lex specialis-lex generalis* one, the general rule applicable is that *lex specialis* excludes the application of *lex generalis*. However, not only this is not necessarily true in the WTO, but also it does not seem to be the case for TBT Article 2.1 and GATT Article III:4[49]. On the one hand, no reference in either the TBT or the GATT Agreement indicates that the application of the TBT Agreement excludes the application of the GATT Agreement, within their overlapping scope. On the other hand, in WTO judiciary cases, neither the Panel nor the Appellate Body have interpreted the two measures in the sense that the applicability of TBT Article 2.1 exclude the application of GATT Article III. As the rationale behind TBT Article 2.1 is the same as the one of GATT Article III:4 in terms of domestic measures, any technical regulation has to be double checked under both TBT Article 2.1 and GATT Article III:4, with GATT Article XX providing the "general exceptions".

From this perspective, if a conflict between TBT Article 2.1, on the one hand, and GATT Article III:4 with Article XX, on the other hand, arises, the outcome is likely to be that the GATT Agreement will prevail. Every technical regulation has to be in conformity with the GATT national treatment obligation, even though the disputed regulation is upheld under TBT Article 2.1. Therefore, the general criterion *lex*

[47] John H. Jackson (1969), *World Trade and the Law of GATT*, Indianapolis: The Bobbs-Merrill Company, at p. 788.
[48] WTO Panel Report, US—Clove Cigarettes, above n.11, para.7.112.
[49] Henry Hailong Jia (2013), Entangled Relationship between Article 2.1 of the TBT Agreement and Certain Other WTO Provisions, in *Chinese Journal of International Law*, Vol. 12, at p. 746.

specialis derogat legi generali - requiring that the application of *lex specialis* excludes the application of *lex generalis* in the event that the former modifies or nullifies the latter - in the case of conflict between TBT Article 2.1 and GATT Article III:4 cannot be applied.

This potential conflict between *lex specialis* and *generalis* is not avoidable when it comes to TBT Article 2.1 and GATT Article III:4. It requires that any technical regulation will have to go through the more stringent scrutiny addressed by the GATT national treatment obligation. Within this framework, then, TBT Article 2.1 "seems to be like a vermiform appendix in the face of GATT Articles III:4 and XX, while the TBT Agreement, as a whole, may be a comprehensive and meaningful development of the relevant part of the GATT Agreement, though the direction of development is confusing"[50]. This construction was useful to provide the national treatment obligation when non-GATT Parties would accede to the early version of the TBT Agreement before the establishment of the WTO. However, in the current context, it ends up making its interpretation and application very complicated.

The rules analysed above have been object of judicial review within the WTO's dispute settlement mechanisms, as Chapter 4 will show.

[50] Henry Hailong Jia (2013), Entangled Relationship between Article 2.1 of the TBT Agreement and Certain Other WTO Provisions, at p. 751.

CHAPTER 2

EU REGULATORY FRAMEWORK ON CONTRY OF ORIGIN LABELLING

Globalization of the food market has increased the need to protect consumers, urging the European Union to intervene. Safety and hygienic concerns - especially during the production and the processing phases - as well as aggressive and potentially confusing marketing campaigns led the European legislator to set stricter rules. Indeed, purchasers are perceived as the weakest link of the food chain, thus worthy of enhanced protection.

In this perspective, Regulation (EU) 178 of 2002[51] - usually called General Food Law (GFL) - defines the pillars of the current food safety legislation, establishing, at Article 1, *the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food [...]*. Two targets are outlined, referring, on the one hand, to the protection of health, and, on the other hand, to the protection of economic interests, as Article 5[52] of the same Regulation specifies. Therefore, since the very beginning of the food safety legislation, the European Union seems to paint the concept of consumers' protection different colours, depending on the object that has to be safeguarded[53]. Besides food safety concerns, food law also includes those

[51] 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; L 31/1 - 1.2.2002.

[52] Article 5 establishes that "Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment".

[53] Within the European Union Law system consumers' rights are underpinned on Article 169 TFUE, that identifies three different areas of intervention: protection of health and safety, protection of economic interests and promotion of consumers' rights to information, education and organization. While health and safety have to be referred not exclusively to consumers' rather than to individuals thus they appear as not "negotiable", economic interests can be compressed when different necessities emerge (for instance, enterprises' economic interests). G. Alpa, G. Conte, L. Rossi Carleo (2009), *La costruzione del diritto dei consumatori*, in G. Alpa (ed.), I diritti dei consumatori, Turin, Vol. I, pp. 56-57.

rules that ensure fairness in food trade. Hence, a continuously changing balance exists between the goal of free circulation of goods and the one of protecting consumers' interest[54]. As the GFL is beyond the scope of this work, the above considerations - limited to its Articles 1 and 5 - represent only a food for thought of some of the dynamics that enliven food law. Indeed, tensions between stricter rules able to protect consumers' interest, on the one side, and simpler rules able to favour food production and trade, on the other, are a constant with food law. The area regarding the set of information that has to be provided to purchasers makes no exception. Hence, such a background should be borne in mind when referring to labelling rules as well.

2.1 Food origin labelling in the European Union

A good example of the need to find harmony within the areas of consumers' protection and market needs is Article 26 of the FIR, dealing with *Country of Origin or Place of Provenance*. As first general remark, it is possible to state that Regulation (EU) 1169/2011 focuses not on the instrument of labelling itself but on labelling as a way of information and communication to consumers, so that they are enabled to make aware purchasing decisions. In this perspective, the FIR can be seen as an essential part of the European legislation on market competition as well as a crucial element in the attempt to guarantee both quality and safety of food products[55].

In order to better understand the cited Article 26 FIR, a brief historic excursus will follow.

2.1.1 Council Directive 79/112/EEC and Directive 2000/13/EC of the European Parliament and of the Council

The Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer[56] set up a well-nigh complete

[54] Irene Canfora (2014), Brevi riflessioni sulla tutela dei consumatori di prodotti agroalimentari nel diritto europeo, tra sicurezza degli alimenti e diritto all'informazione, in *Studi in onore di Luigi Costato – Vol. II Diritto Alimentare dell'Unione Europea*, Jovene Editore: Napoli, p. 130.
[55] Ferdinando Albisinni (2012), La comunicazione al consumatore di alimenti, le disposizioni nazionali e l'origine dei prodotti, in *Rivista di Diritto Agrario*, Vol. I, p. 69.
[56] L. 33/1 – 8.2.79.

harmonization, with only few exceptions[57]. Provisions referring to the origin or provenance of food products were Article 2 – stating that labelling should not be misleading when it comes to[58], *inter alia*, origin and provenance – and Article 3, indicating that *particulars of the place of origin or provenance* should be compulsory *in the cases where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff.*

The provisions of the Council Directive 79/112/EEC have been modified several times[59] and finally codified in the Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs[60]. The rules on origin and provenance remained substantially unvaried, hence indication of origin and provenance had to be provided only on a voluntary basis.

2.1.2 The Food Information Regulation's legislative iter

The approval of the Regulation (EU) 1169 of 2011 took three years, beginning on January 30th 2008 when the European Commission presented a proposal for a regulation concerning food information to consumers[61]. Aiming to consolidate and update European labelling legislation, the idea was to merge and to amend the Directive 2000/13/EEC on Food Labelling with Directive 90/496/EEC on Nutrition

[57] Article 14, Council Directive 79/112/EEC, states that "Member States shall refrain from laying down requirements more detailed than those already contained in articles 3 to 11 concerning the manner in which the particulars provided for in Article 3 and Article 4(2) are to be shown" and at paragraph 2 adds that "Member States shall, however, ensure that the sale of foodstuffs within their own territories is prohibited if the particulars provided in Article 3 and Article 4(2) do not appear in a language easily understood by purchasers […]. This provision shall not prevent such particulars from being indicated in various languages".

[58] Article 2 refers to nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production.

[59] For a complete list of amendments, please, see http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31979L0112 (last access 4th February 2017)

[60] L. 109/29 - 6.5.2000.

[61] The European Commission's proposal was actually anticipated by DG SANCO's evaluation of the legislation on food labelling. Indeed, in 2003, DG SANCO, cooperating with the representatives of the Member States, of consumers, of industry and of trade, launched an evaluation with the purpose to "enable the Commission to reassess the needs and expectations of […] consumers for information on food labels, taking into account the technical and logistical constraints for implementation by the industry". Results - published in 2004 – identified the key elements for the Commission's intervention. Afterwards, in March 2006, DG SANCO launched a public consultation process on labelling (text available here: https://ec.europa.eu/food/sites/food/files/safety/docs/labelling-nutrition_better-reg_competitiveness-consumer-info_en.pdf (last access 5th February 2017), formally closed on 16 June 2006.

Labelling. In addition, five more directives plus one regulation[62] were included in such reform plan, prompted by the consideration that food labelling was a "policy problem given that in spite of the existence of many rules" the legislation was "not working as effectively"[63] as it could have.

With regards to the country of origin of food products, as mentioned in the previous paragraph, the Directive 2000/13/EC sets up a voluntary labelling system at Articles 2 and 3. When drafting its proposal[64], the European Commission took into account this sensitive issue, considering on the one hand consumers' expectations to receive such information as well as to be certain that the information provided is not false or misleading and, on the other hand, the industry's interest to exploit the origin as a competitive advantage[65]. Moreover, aware of the absence of a definition of origin or provenance, the Commission observed how similar luck might lead to ambiguity and uncertainty for consumers, industry and Member States as well. Origin labelling has been identified as a "major policy issue", able, once ameliorated, to make the legislation clearer, to facilitate compliance for the operators as well as to improve consumer understanding of origin indications[66].

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[62] Here the complete list: Commission Directive 87/250/EEC of 15 April 1987 on the indication of alcoholic strength by volume in the labelling of alcoholic beverages for sale to the ultimate consumer; Commission Directive 94/54/EC of 18 November 1994 concerning the compulsory indication on the labelling of certain foodstuffs of particulars other than those provided for in Council Directive 79/112/EEC; Commission Directive 1999/10/EC of 8 March 1999 providing for derogations from the provisions of Article 7 of Council Directive 79/112/EEC as regards the labelling of foodstuffs; Commission Directive 2002/67/EC of 18 July 2002 on the labelling of foodstuffs containing quinine and food containing caffeine; Commission Regulation 608/2004 of 11 March 2004 regarding the labelling of food and food ingredients with added phytosterols, phytosterol esters, phytostanols and/or phytostanol esters; Commission Directive 2004/77/EC of 29 April 2004 amending Directive 94/54/EC concerning the labelling of certain foods containing glycyrrhizinic acid and its ammonium salt.

[63] Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and the Council on the provision of food information to consumers, *Impact assessment report on general food labelling issues*, SEC(2008) 92, Brussels, 30.1.2008, p. 6, available at http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2008/sec_2008_0092_en.pdf (last access 5th February 2017).

[64] Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers (presented by the Commission); Brussels, 30.1.2008 COM(2008) 40 final; 2008/0028 (COD).

[65] Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and the Council on the provision of food information to consumers, *Impact assessment report on general food labelling issues*, p. 20.

[66] Besides origin labelling, other measures are identified as main areas of intervention, in order to "contribute towards simplification in terms of easier compliance and greater clarity for stakeholders": improvement of legibility of the labels, information on allergenic ingredients, ingredient listing for alcoholic beverages. Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and the Council on the provision of food information to consumers, *Impact assessment report on general food labelling issues*, p. 31.

Article 9 of the Commission's Draft Regulation, containing the list of mandatory particulars, deals with the country of origin and the place of provenance at Paragraph 1, letter i). It states that it is mandatory to specify the origin of a food product on label *where failure to indicate this might mislead the consumer to a material degree as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance; in such cases the indication shall be in accordance with the rules laid down in Article 35(3)* [67] *and (4)* [68] *and those established in accordance with Article 35(5)*, regarding the implementation of rules about the application of Paragraph 3 of the same Article.

This is not the only provision on origin and provenance. As a matter of fact, Article 38 of the Draft Regulation, refers to foodstuffs' provenance as well, stating that, besides the mandatory information listed in Article 9, Paragraph 1, and 10, Member States may require information for specific types or categories of food, for different reasons[69], among which place of provenance. However, Article 38, Paragraph 2, specifies that the Member States are enabled to add such information only if a proven link between certain quality of the food and its origin exists. Following this provision, fear has risen with regards to the traditional distinction between "simple" and "qualified"[70] indications of provenance, looking like protection of simple indication of provenance was going to be impossible. In other words, the distinction between simple and qualified indications is underpinned on the absence or the presence of a link between a certain quality and the origin. If such a connection is required in both cases, the risk is to make them overlap. What would be the difference between these two categories then? On this issue, doubts still remain and will be addressed in Paragraph 2.6.

[67] Article 35, Paragraph 3, clarifies that, despite being on voluntary basis, in case the country of origin or the place of provenance of the food differs from the one of its primary ingredient(s), "the country of origin or place of provenance of those ingredient(s) shall also be given".

[68] Concerning meat other than beef or veal, it specifies that "the indication on the country of origin or place of provenance may be given as a single place only where animals have been born, reared and slaughtered in the same country or place. In other cases information on each of the different places of birth, rearing and slaughter shall be given".

[69] Reasons that might justify additional mandatory particulars are: (a) the protection of public health; (b) the protection of consumers; (c) the prevention of fraud; (d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition.

[70] This second term, contrary to the first one, refers to those items where a proven link between a certain place and particular properties exists.

The Commission's proposal constituted an attempt to give answers to existing problems, even though, since this Draft Regulation, the goal to uniform food labelling law within the European Union system was uncertain. Surely bringing together all the rules in one place is a positive goal but harmonization was and is "thwarted by various seemingly confusing legal reservations afforded to the Member States"[71].

Later, on 16 June 2010, successive to the European Commission's Draft Regulation[72], the European Parliament adopted its first reading position[73]. It focuses on country of origin labelling at Article 9, dedicated to the list of mandatory particulars. Innovating with comparison to the Commission's proposal, letter k) requires this kind of information to be compulsory for meat; poultry; dairy products; fresh fruit and vegetables; other single-ingredient products and meat, poultry and fish when used as an ingredient in processed foods. After recalling Article 34, Paragraph 4 of the Draft Regulation, dealing with meat and poultry, the European Parliament's text adds that whenever it would be impractical to label the country of origin, the statement "Of unspecified origin" should be provided. For all other foods, the rules for origin and provenance remain unvaried.

[71] Olaf Sosnitza (2011), Challenges of the Food Information Regulation: Revision and Simplification of Food Labelling Legislation?, in *European Food and Feed Law Review*, N. 1, p. 25.

[72] On 10 March 2008, the Council decided to consult the European Economic and Social Committee, whose opinion was adopted on 18 September 2008. What is worth mentioning here is point 3.5, Paragraphs 2 and 3, where the EESC declares that the indication of origin is necessary not only in order to meets the needs of consumers, but also as an effective way of improving market transparency and supporting the future development of the agriculture sector and of rural areas throughout the EU. Indeed, the EECS linked such mandatory indication with the European development model, "based on respect for rules that guarantee food safety, environmental safety, animal welfare and adequate public health standards". Therefore, it goes on, information about the country of origin "[should be] obligatory for all non-processed or primary processing agri-food products", while for secondary processing products "the obligation to indicate the provenance of the main agricultural raw materials used to make the final product should be assessed on a case-by-case basis". Opinion of the European Economic and Social Committee on the "Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers; COM(2008) 40 final — 2008/0028 (COD); (2009/C 77/20); OJEU C 77/81. Complete text available at : http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008AE1519&from=IT (last access 6th February 2017).

[73] Position of the European Parliament adopted at first reading on 16 June 2010 with a view to the adoption of Regulation (EU) No .../2010 of the European Parliament and of the Council on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directives 94/54/EC and 1999/10/EC, Directive 2000/13/EC, Commission Directives 2002/67/EC and 2004/77/EC and Commission Regulation (EC) No 608/2004. Available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0222#title4 (last access 6th February 2017).

The position in the first reading of the European Parliament was not accepted by the Council, that adopted its position in the first reading on 21 February 2011[74]. Already at Point 34 the Council's point of view appears slightly different than the EU Parliament's one. As a matter of fact, while the EU Parliament showed to prefer a general mandatory origin labelling scheme, going further on the way of consumers' protection, the Council - referring to the vertical approach used to establish mandatory origin labelling exclusively for certain products[75] - deemed necessary to better evaluate the impacts of such system. Thus, it called for the intervention of the European Commission, through reports concerning types of meat other than beef, swine, sheep, goat and poultry meat; meat used as an ingredient; milk; milk used as an ingredient in dairy products; unprocessed foods; single-ingredient products and ingredients that represent more than 50% of a food[76]. Moreover, Article 25 is added. It specifically regards country of origin or place of provenance, even though the rules for origin remain on voluntary basis. From this viewpoint, the Council appears reluctant to proceed without further impact assessments.

The announcement of the Council's position marked the beginning of the second reading, with the European Parliament busy discussing more than 400 amendments to the position of the Council in first reading and 134 adopted[77]. The EU Parliament adopted its second position on 6 July 2011, in agreement with the Council, so that the Parliament's position corresponds to final legislative act, Regulation (EU) 1169 of 2011.

The following Table sums up the steps towards the entry into force of Regulation (EU) 1169 of 2011.

[74] Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No. 1925/2006 and repealing Directives 87/250/EEC, 90/496/EEC, 1999/10/EC, 2000/13/EC, 2002/67/EC, 2008/5/EC and Regulation (EC) No. 608/2004. Available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017602%202010%20REV%201 (last access 6th February 2017).

[75] It refers to honey, fruits and vegetables, fish, beef and beef products and olive oil.

[76] Point 34 and Article 25, Paragraphs 4 and 5 of the Position of the Council at first reading.

[77] Pétér Dévényi (2011), The New Regulation on Food Information to Consumers – Is New Always Better?, in *European Food and Feed Law Review*, N. 4, p. 211.

Table 1. Historic excursus

Legal Provision	Year	Articles concerning COOL
Directive 79/112/EEC	1978	2 - 3
Directive 2000/13/EC	2000	2 -3
EU Commission's proposal	2008	9 – 35 - 38
EU Parliament position – 1^ reading	2010	9
Council position – 1^ reading	February 2011	25
EU Parliament + Council – 2^ reading	July 2011	26

2.1.3 The Regulation (EU) No. 1169 of 2011

The Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004[78], has been adopted on 25 October 2011. As it represent the conclusion of almost four years of negotiations, during the development of the text itself things began to change, from consumers' needs and industrial technologies, to the economical and political scenarios in Member States as well as in the EU. At the same time, issues that were considered crucial at the very beginning – e.g. national schemes – lost their importance while new questions, like labelling of ritual slaughter, arose[79]. Furthermore, the Commission is required to publish many reports[80] and impact assessments, not to mention its power to adopt delegated acts under Article 51 as well as executive ones. This choice lead to think

[78] OJEU L 304/18.
[79] Pétér Dévényi (2011), The New Regulation on Food Information to Consumers – Is New Always Better?, in *EFFL*, N. 4, p. 217.
[80] For instance, Article 30, Paragraph 7, requires the EU Commission to submit a report on the "presence of trans fats in foods and in the overall diet of the Union population". Indeed, on 3 December 2015 – although Regulation 1169/2011 had fixed the deadline for 13 December 2014 - the Commission adopted this act, available at https://ec.europa.eu/food/sites/food/files/safety/docs/fs_labelling-nutrition_trans-fats-report_en.pdf (last access 7th February 2017).

that the field of food information to consumers is way far from being codified once and for all. Indeed, the rules might change depending on the mentioned acts.

Among the initial statements, some are of great interest for the purpose of this work. In particular, the "Whereas" 29-33 are dedicated to the issue of country of origin labelling and place of provenance. Even though it is stated again that the origin should be indicated only when its absence might mislead consumers regarding the true country of origin or place of provenance of the product, attention is paid to the urgency of defining criteria clear enough to *ensure a level playing field for industry*[81] as well as improve purchasers' understanding of such information. The BSE crisis is acknowledged as the trigger that created consumers' expectations for origin labelling of beef and beef products. Indeed, the European legislator recognizes that, in general, the origin of meat - such as swine, sheep, goat and poultry - is one of the main concerns among consumers. Therefore, mandatory declarations for this category of products should be set up. The possibility to indicate the origin in different ways depending on the type of meat should be taken into account, without forgetting the principle of proportionality as well as *the administrative burden for food business operators and enforcement authorities*.[82] In addition, the European Commission is requested to draft reports concerning the possibility to extend the origin labelling for certain types of food and, based on their results, the rules outlined might be modified, differently for each sector[83].

The last "Whereas" worth mentioning here is n. 33, which point out that the determination of the country of origin of foods will be based on the non-preferential rules of origin laid down by Council Regulation (EEC) No 2913/92 of 12 October 1992 - establishing the Community Customs Code - and its implementing provisions in Commission Regulation (EEC) No 2454/93 of 2 July 1993. Reasons why this reference can be deemed wrong will be discussed below.

2.1.4 The definition of origin and provenance in the FIR

[81] Whereas 29, Regulation (EU) 1169/2011.
[82] Whereas 31, Regulation (EU) 1169/2011.
[83] Whereas 32, Regulation (EU) 1169/2011.

After some introductory remarks on Regulation (EU) 1169/2011, it is time to ask: what does the expression "origin and provenance" mean?

A definition of the two terms is given in Article 2, Paragraph 2, letter (g). While the "country of origin" is positively defined making reference to Articles 23 to 26 of Regulation (EEC) No 2913/1992 – or Community Customs Code -, the "place of provenance" is negatively described as *any place where a food is indicated to come from and that is not the country of origin*. Actually, both definitions contribute to make the system uncertain, since, on the one hand, the meaning of "place of provenance" remains murky and, on the other hand, reference to Regulation (EEC) 2913/1992 appears incorrect. Indeed, the Community Customs Code has been replaced at first by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code – the so called Modernised Customs Code[84] - and, afterwards, by the Union Customs Code, adopted on 9 October 2013 as Regulation (EU) No 952/2013 of the European Parliament and of the Council. Surely, at the time of drafting Regulation (EU) 1169/2011 the European legislator could not be aware of this last reform, while the Modernised Customs Code was already into force and it should have been acknowledged. Indeed, Article 35 of the Modernised Customs Code - within Chapter 2, titled "Origin of good" and dictating the scope for non-preferential rules of origin - despite preserving the same structure of Article 22[85] of the Community Customs Code, as to letters (a) and (b), in letter (c) specifies that its provisions are applicable to, *inter alia*, *other Community measures relating to the origin of goods*. This means that the rules regarding the origin of goods, stated in the Modernised Customs Code, are of general application within the European Union. Such a provision differs from the past system, in so far as under the previous Customs Code[86] those rules were

[84] OJ L 145, 4.6.2008.

[85] Here the text of the Article: "Articles 23 to 26 define the non-preferential origin of goods for the purposes of: (a) applying the Customs Tariff of the European Communities with the exception of the measures referred to in Article 20 (3) (d) and (e); (b) applying measures other than tariff measures established by Community provisions governing specific fields relating to trade in goods; (c) the preparation and issue of certificates of origin.

[86] As a matter of fact, till 2008, there was no uniform legislation concerning the origin of goods. The Community Customs Code defined the origin exclusively for customs purposes and customs are naturally relevant only for trade relations with third countries and not within the Internal Market. As briefly described, things changed in 2008 when Article 35 of Regulation (EC) 450/2008 sets up that its rules are applicable to (a) the Common Customs Tariff with the exception of the measures referred to in Article 33(2)(d) and (e); (b) measures, other than tariff measures, established by Community provisions governing specific fields relating to trade in goods; (c) other Community measures relating

referred only to trade relations with third countries. Hence, the definition of the country of origin that the FIR contains cannot be considered valid. It has to be replaced by the one of the Union Customs Code, as it will be further explained in the next Chapter.

Two other provisions will be taken into account, although they do not deal exclusively with the issue of the indication of country of origin or place of provenance. Reference should be made to Articles 7 and 9 have to be considered.
The first cited provision is dedicated to fairness in communication practises to consumers, requiring the information provided not to be misleading as to, among others, country of origin or place of provenance[87].
Article 9, instead, presents the list of mandatory particulars that have to be indicated on labels. Two points of this catalogue are worthy of mention here. First of all, letter (h), concerning *the name or business name and address of the food business operator referred to in Article 8(1)*. In this case, what has to be borne in mind is that this kind of declaration only serves the purpose to clearly identify the food business operator responsible for the food information. Surely, it pinpoints a certain area but, as set up in Article 8, Paragraph 1, the operator can also be the importer into the Union market[88] and, consequently, "nobody" relevant for understanding where the marketed food comes from. Letter (i), instead, points out that the country of origin or place of provenance have to be declared, in accordance with the rules established in Article 26, which will be analysed in the following paragraph.

2.1.5 Article 26 FIC Regulation

With regards to the provisions of Regulation (EU) 1169/2011 specifically concerning country of origin labelling, reference has to be made to Article 26, which extends the number of food products whose label has to specify the country of origin. After

to the origin of goods. Ferdinando Albisinni (2012), La comunicazione al consumatore di alimenti, le disposizioni nazionali e l'origine dei prodotti, in *Rivista di Diritto Agrario*, I, p. 72.
[87] The other elements listed in Paragraph (a), Article 7 of FIC Regulation are: characteristics of the food and, in particular, its nature, identity, properties, composition, quantity, durability and method of manufacture or production.
[88] Indeed, the food business operator is the subject responsible for the food information and it is defined as "the operator under whose name the food is marketed or, if that operator is not established in the Union, the importer into the Union market". As stated in Article 8, Paragraph 2, main task is to "ensure the presence and accuracy of the food information in accordance with the applicable food information law and requirements of relevant national provisions".

outlining that this Article must be applied without prejudice to Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed and Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs – now merged into Regulation (EU) 1151 of 2012 on quality schemes for agricultural products and foodstuffs[89] - the second paragraph clarifies that:

2. Indication of the country of origin or place of provenance shall be mandatory:

(a) where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance;

(b) for meat falling within the Combined Nomenclature ('CN') codes listed in Annex XI[90]. The application of this point shall be subject to the adoption of implementing acts referred to in paragraph 8.

Furthermore, with reference to this last provision at letter b), not only implementing acts are required, whereas the European Commission, *within 5 years from the day of application*[91], has to draft an impact assessment and submit it to the European Parliament and the Council, in order to evaluate the mandatory indication of the origin and the provenance for the products listed in the cited Annex XI.

Then, Article 26 goes on:

3. Where the country of origin or the place of provenance of a food is given and where it is not the same as that of its primary ingredient:

[89] Regulation (EU) 1151 of 2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJEU L 343/1, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R1151 (last access 7th February 2017).
[90] Annex XI of FIC Regulation, titled "Types of meat for which the indication of the country of origin or place of provenance is mandatory", deals with meat of swine fresh chilled or frozen; meat of sheep or goats, fresh, chilled or frozen and meat of the poultry of heading 0105, fresh, chilled or frozen.
[91] Paragraph 4, Article 26, Regulation (EU) 1169/2011.

(a) the country of origin or place of provenance of the primary ingredient in question shall also be given; or

(b) the country of origin or place of provenance of the primary ingredient shall be indicated as being different to that of the food.

For the primary ingredient Article 26 establishes a special labelling obligation. The definition of primary ingredient is at Article 2, Paragraph 2, letter (q), which describes it as:

an ingredient or ingredients of a food that represent more than 50 % of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required.

When the origin of provenance of this ingredient differs from the one of the food then this divergence has to be clearly indicated on labels. The circumstances that fall within the scope of Article 26, Paragraph 3, regard food produced in places other than in the country of origin or place of provenance of their ingredients. In this case, two kinds of labels are possible, pursuant letters (a) or (b), Paragraph 3, Article 26. In particular, under letter (b), the place of provenance as well as the country of origin of the primary ingredient do not need to be revealed. The indication of the region in question is deemed sufficient. Thus, a correct label could indicate, for instance, "produced with South American honey" or "made in the United Kingdom", but also "the wheat flour of this baguette does not originate from France"[92]. From an empirical point of view, the definition of primary ingredient is of hard implementation. Firstly, chances are that none of the used ingredients represents more than 50% of a food. For these reasons, the legislator speaks about "ingredient or ingredients": it is possible that only a sum of ingredients reach the threshold of 50%. This is likely to happen with food products that have a long list of ingredients, as it is for most processed food. Then, a sum of which ingredients? When the list of ingredients is long, many

[92] Examples from Moritz Hagenmeyer, (2012), *Food information regulation- commentary on Regulation (EU) No 1169/2011 on the Provision of Food Information to Consumers*, Berlin: The legal publisher lexxion, pp. 282-283.

combinations that represent the 50% of the food could be chosen[93]. However, the criteria to be used in order to select the ingredients for such a sum are not specified. Once the ingredients are picked, they should all be considered "primary" thus the country of origin or the place of provenance of each of them should be provided. The resulting label, indicating the country of origin of a food in addition to the countries of origin of the chosen primary ingredients, would be very long. Further assessments should be carried out in order to determine whether or not purchasers benefit from such detailed information. Although excessive in length, it would be more useful for consumers than the option under Paragraph 3, letter (b), which gives the chance to specify only that the origin of the primary ingredient is different from the one of the product. Indeed, this last type of indication does not seem to have the potential to actually inform consumers[94]. In order to implement these rules it is necessary the adoption of implementing acts. Currently, the EU Commission is working on the proposal of an implementing act of the FIC Regulation[95]. Under Article 3 of such a Regulation, when information on the country of origin or place of provenance of the primary ingredient of a food is provided *it shall be expressed at least at the same level of precision as the country of origin or place of provenance given for the food*[96]. However, *where a primary ingredient originates from more than two countries, or comes from more than two places, the countries of origin or places of provenance of that primary ingredient may be given at the immediate lower level of precision than the one given for the food*[97]. This regulation is expected to entry into force in 2019, aiming at clarifying the provision of information under Article 26, Paragraph 3.

In the following paragraphs of Article 26 several crucial tasks are assigned to the European Commission. Indeed, paragraphs 5 and 6 indicate a list of products whose

[93] Paolo Borghi (2014), *Paese di origine o luogo di provenienza*, Nuove regole per le informazioni sugli alimenti ai consumatori, 5th December, Trento, p. 7. Available at http://www.centroconsumatori.tn.it/download/154dextRKSGLj.pdf (last access 27th November 2017).
[94] Paolo Borghi (2014), *Paese di origine o luogo di provenienza*, Nuove regole per le informazioni sugli alimenti ai consumatori, 5th December, Trento, p.7.
[95] Commission Implementing Regulation laying down rules for the application of Article 26(3) of Regulation (EU) 1169/ 2011 of the European Parliament and of the Council on the provision of food information to consumers, as regards the rules for indicating the country of origin or place of provenance of the primary ingredient of a food where different to that given for that food. Available at https://www.foodagriculturerequirements.com/wp-content/uploads/2016/03/esclusivo-il-documento-su-cui-lavora-bruxelles.pdf (last access 27th November 2017).
[96] Artcle 3, Paragraph 1, Commission Implementing Regulation laying down rules for the application of Article 26(3) of Regulation (EU) 1169/ 2011.
[97] Article 3, Paragraph 2, Commission Implementing Regulation laying down rules for the application of Article 26(3) of Regulation (EU) 1169/ 2011.

indication of origin or provenance should be subject to deeper studying by the European Commission. Similar burden is justified by the need to analyse, on the one hand, the costs and benefits of the introduction of such measures, and, on the other hand, the legal impact both on internal market and international trade. Furthermore, the need for purchasers to be correctly informed has to be investigated, together with the feasibility of providing mandatory indication of origin or provenance[98]. In particular, objects of these reports by the Commission are supposed to be: (a) types of meat other than beef and those referred to in point (b) of paragraph (b) milk and (c) milk used as an ingredient in dairy products, (d) unprocessed foods, (e) single ingredient products, (f) ingredients that represent more than 50 % of a food[99] and meat used as an ingredient[100]. Additional requirements are indicated for those reports regarding meat, as brought up in letter (b), paragraph 2, and letter (a), paragraph 5. Indeed, considered the different steps occurring in the life of the animals, the reports should also take into account the different options available when expressing the country of origin or place of provenance, distinguishing "place of birth", "place of rearing" and "place of slaughtering"[101].

The abovementioned impact assessments to the European Parliament and the Council should be submitted by the Commission. After this, and following the procedure described in Article 48, paragraph 2, the Commission is supposed to adopt implementing acts concerning the application of letter (b), paragraph 2 – meaning meat listed in Annex XI – as well as the application of paragraph 3 - dealing with the primary ingredient -.

As final remark on Article 26, one can notice that it looks at least intricate, with some very precise rules – for instance those that mention the types of meat listed in Annex XI -, some others that simply delegate the Commission to draft reports rather than implementing acts, and, finally some even less clear, whose usefulness for consumers can be doubted[102]. This kind of "construction" leaves the impression that Article 26 is

[98] Moreover, "the Commission may accompany those reports with proposals to modify the relevant Union provisions", Paragraph 7, Article 26 of FIC Regulation.
[99] These products are listed in Paragraph 4, Article 26 of Regulation (EU) 1169/2011, and the deadline for the Commission's report is fixed on 13 December 2014.
[100] Paragraph 6, Article 26 of the FIC Regulation. In this case, instead, the deadline for the Commission's report is 13 December 2013.
[101] Paragraph 9, Article 26 of FIC Regulation.
[102] For instance, Paragraph 3 is of hard interpretation, also considering that the definition of the primary ingredient itself is a bit confused as demonstrated above.

the attempt not to displease anyone, neither those Member States that asked for a timely declaration of origin nor those that were afraid that such mandatory indication was going to splinter the internal market[103]. The consideration that nothing has changed so far gives a clear idea of how challenging it is to find a compromise on such a sensitive subject.

2.2 National measures

While this topic will be further analysed, here it is worth mentioning Articles 38 and 39.

Article 38 specifies that, on the one hand, national measures can be adopted or maintained only if the European Union authorizes them and, on the other hand, when dealing with both matters harmonized and not harmonized by the FIC Regulation, national measures cannot give rise to obstacles to free movements of goods. After dictating these general principles, Article 39 concerns specifically *National measures on additional mandatory particulars*. Indeed, in accordance with the procedure laid down in Article 45 – meaning the notification procedure – Member States can *adopt measures requiring additional mandatory particulars for specific types or categories of foods* for, among others, *the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition*[104]. What actually surprises the most is the second Paragraph of Article 39, which states that *Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods only where there is a proven link between certain qualities of the food and its origin or provenance*. Furthermore, *when notifying such measures to the Commission, Member States shall provide evidence that the majority of consumers attach significant value to the provision of that information*. As a matter of fact, besides the data regarding how consumers evaluate an additional indication of origin or provenance, the former cited part requires that the origin or the provenance, which the member state (hereinafter, MS) is willing to indicate on labels, is able to lend to the products

[103] Luis Gonzàlez Vaqué (2016), L'indicazione dell'origine dei prodotti agroalimentari secondo il recente decreto francese sul latte e sulla carne: quali sviluppi si prevedono nell'Unione Europea?, in *Alimenta*, Vol. XXIV, N. 9/16, p. 191.

[104] This is letter (d), Paragraph 1, Article 39. The other elements that might justify the introduction of national additional mandatory particulars are: (a) the protection of public health, (b) the protection of consumers, (c) the prevention of fraud.

peculiar features. This issue - as it has already been outlined in Paragraph 2.2 - remains in the consolidated version of the text as well, which, by doing so, seems to ignore the distinction between "simple" and "qualified" indication of origin. Thus, a doubt rises: is this the end of the protection of simple designations of origin?

Such a provision sounds like indications of origin cannot be added whenever a link between food quality and the origin does not exist. However, this is hard to believe, as the consolidated case law of the European Court of Justice (hereinafter, CJEU)[105] and the legal doctrine[106] on "simple" designations of origin shows. Indeed, the CJEU admits that geographical indications different from Protected Origin Designations (POD) and Protected Geographical Indication (PGI)[107] can be protected by additional national measures. Then, why is this "proven link" between the product's origin and its features required, under Article 39, Paragraph 2? An explanation might be the need to avoid, at least formally, national measures that are hiding protectionist purposes. In other words, protectionist measures are not allowed within the Internal Market, thus the will to simply protect domestic products cannot be put forward when adding mandatory particulars. At the same time, since the subject is harmonised by Regulation (EU) 1169/2011, any national interventions on such a matter require a justification. How can a MS justify the decision to indicate on certain products' labels the origin or the provenance? The European legislator seems to think that such a justification should be based on a proven connection between places and qualities. However, any strong links between the food and the territory would usually lead producers to protect their products through a POD or PGI quality sign. From this viewpoint, the "made in" information serves other purposes than the ones covered by such quality schemes. Indeed, the need to require a justification for additional national measures should not overlap with the protection of POD and PGI. Then, how can

[105] Please, refer to Judgment of the Court of 10 November 1992, C-3/91, Exportur SA and LOR SA and Confiserie du Tech; Judgment of the Court of 7 November 2000, C-321/98, Schutzverband gegen Unwesen in der Wirtschaft eV and Warsteiner Brauerei Haus Cramer GmbH&Co. KG; Judgment of the Court 18 November 2003, C-216/01, Budéjovický Budvar, národní podnik and Rudolf Ammersin GmbH; Judgement of the Court 8 September 2009, C-478/07, Budějovický Budvar, národní podnik and Rudolf Ammersin GmbH (Bud I and Bud II); Judgement of the Court 8 May 2014, C-35/13, Assica and Kraft Foods c. Associazione fra produttori per la tutela del Salame Felino.

[106] For instance, F. Capelli (2001), La sentenza Wersteiner in materia di denominazioni di origine: un contributo alla soluzione di un equivoco, in *Diritto comunitario e degli scambi internazionali*, Vol. 2, p. 278; M. Valletta (2002), Non solo Dop e Igp: territorialità del prodotto e informazione del consumatore dopo il caso Warsteiner, in *Rivista di Diritto Agrario*, Vol. II, p. 142. For a general overview, please refer to Vadim Mantrov (2014), *EU Law on Indications of Geographical Origin. Theory and Practice*, Springer.

[107] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs; 14.12.2012 – L-343/1.

mandatory particulars be added and justified by MS, without stumbling, on the one hand, on the obstacle of protectionism and, on the other hand, without overlapping with Regulation (EU) 1151/2012's *ratio*?

(do whatever they do). Then in the next sentence finish up the thought about the national measure protectionist targets

A possible answer might be that the attribute of "certain qualities"[108] is generic enough to make it easy to find a suitable justification. From this perspective, as a legal and unique definition of "quality" does not exist, different meanings can be attributed to the term. Moreover, even the "proven link" is hard to demonstrate: who can tell whether it exists? The requirements of paragraph 2, article 39 are too weak and wide to effectively be demonstrated. This leads to think that only a national measure that clearly affirms protectionist targets would not be accepted. This way the Member States have the discretionary power to add mandatory particulars even though the matter is harmonized within the European Union.

In addition, Article 39, Paragraph 2, Regulation (EU) 1169/2011, leads to think about its relationship with Articles 28-29 of Regulation (EU) N. 1151 of 2012 - on quality schemes for agricultural products and foodstuffs -. The European Court of Justice, since the beginning of the '90s, has always stated that national regulations cannot undermine the applications of the rules laid down in the mentioned Regulation (and its previous versions). This, basically, meant that Member States could intervene only concerning "simple geographical indications", meaning those that do not imply a link between the product's origin and its features and, thus, cannot fall within the scope of Regulation (EU) 1151/2012. Actually, certain leanings might be observed.

While at first, a sort of European monopoly on such an issue could be noticed, then, the European Commission left open the chance to use different indications from PDO and PGI, deeming it profitable for producers as well as beneficial for consumers. From this viewpoint, Article 39 is not the only provision within the European union's system to embrace this perspective. It perfectly mirrors Article 28 and 29 of Regulation (EU) 1151/2012. Within this perspective, Article 28 allows Member States to *maintain national rules on optional quality terms which are not covered by this Regulation, provided that such rules comply with Union law*. Article 29, instead,

[108] Required under Article 39, Paragraph 2, Regulation (EU) No 1169/2011.

dictating the criteria that have to be satisfied by optional quality terms, requires, *inter alia*, that *the term relates to a characteristic of one or more categories of products, or to a farming or processing attribute which applies in specific areas* (letter (a) paragraph 1)). The perspective chosen in both Regulations (EU) 1169/2011 and 1151/2012 looks the same. In both cases, the European legislator seems to give to member states the chance to set additional rules to the PDO and PGI's ones, when it comes to food products that have some proven "geographical quality". Even with all the cautions described in Article 45, Reg. (EU) 1169/2011, is this the end of the European monopolistic logic on the protection of "quality marks"?

2.3 Vertical legislation

So far, this contribution has outlined the horizontal legislation regarding country of origin and place of provenance labelling, meaning all those rules and regulations applicable to foodstuff in general. However, next to it, the vertical legislation has to be described as well, taking into account specific products' origin labelling requirements. The following pages will deal with those products – honey; olive oil; fish and fisheries; beef; poultry; eggs; fresh fruit and vegetables - that, due to their features, require mandatory information on origin. At the end of the paragraph, Table 2 displays for each product the applicable legislation.

2.3.1 Honey

Honey is defined by Council Directive 2001/110/EC[109], Annex 1, in line with the Codex Alimentarius standard for honey (Codex Stan 12-1981), as a *natural sweet substance produced by Apis mellifera bees from the nectar of plants or from secretions of living parts of plants or excretions of plant-sucking insects on the living parts of plants, which the bees collect, transform by combining with specific substances of their own, deposit, dehydrate, store and leave in honeycombs to ripen and mature*[110].

[109] Council Directive 2001/110/EC of 20 December 2001 relating to honey (OJ L 10, 12.1.2002, p.47).
[110] The definition given in the Council Directive 74/409/EEC was slightly different but surely less precise, as Article 1, defined it as "the foodstuff which is produced by the honey-bee from the nectar of blossoms or secretions of or on living parts of plants, and which the bees collect, transform, combine with specific substances of their own and store and leave to mature in honey combs".

European Union began dealing with harmonization issues related to honey in 1974, with the Directive 74/409/EEC. The aim was to avoid *unfair conditions of competition*[111], thanks to a precise definition of the requirements that the products should have met and the information that should have appeared on packages and labels. Particularly, Article 7, Paragraph 1, of the mentioned Directive, called for compulsory information on packages, containers or labels of honey[112], while Paragraph 3 of the same article, waiving the first cited paragraph, allowed Member States to maintain *national provisions which require indication of the country of origin*, even though this indication could no longer be required for honey produced in the Community. Finally, Paragraph 4 states that the term "honey" might have been supplemented by a regional, territorial or topographical name, if the product originated entirely in the indicated area. Therefore, within this briefly designed system, the rules about the country of origin labelling were left to Member States provisions: apparently, the European legislator, at that time, did not deem the country of origin as an indication able to distort competition within the internal market, by influencing consumers' purchasing tendencies.

The scenario changed with Directive (EC) 2001/110[113]. As a matter of fact, Whereas No 5, of the mentioned Directive, underlines *the close link between the quality of honey and its origin*, while there was no such clarification under the past rules. As a consequence, it is considered *indispensable* to fully inform consumers, so that they are not misled *regarding the quality of the product*[114]. Moreover, in order to protect purchasers' interests and to assure them of adequate transparency, *the country of origin where the honey has been harvested should be included in the labelling*[115]. Indeed, Letter a), Paragraph 4, Article 2 of the Directive (EC) 2001/110, states that it is mandatory to indicate the country or countries of origin where the honey has been harvested. However, whenever the honey originates in more than one Member States

[111] Whereas No 2, Dir. (EEC) No 74/409, on the harmonization of the laws of the Member States relating to honey.
[112] Mandatory information was: a) the term "honey" or one of the names listed in Article 1 (2); b) the weight expressed in grammes or kilogrammes; c) the name or trade name and the address or registered office of the producer or packer, or of a seller established within the Community.
[113] Council Directive 2001/110/EC of 20 December 2001 relating to honey; 12.01.2002 – L-10/47. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:010:0047:0052:EN:PDF (last visited 27th September 2017).
[114] Whereas No 5, Directive (EC) 2001/110.
[115] Whereas No 5, Directive (EC) 2001/110.

or third country it is sufficient to claim on labels "blend of EC honeys", "blend of non-EC honeys" and "blend of EC and non-EC honeys".

The analysis of the two Directives, on the one hand leads to notice how the Union's perspective has changed in the past decades, apparently getting closer to consumers' needs. On the other hand, despite the greater attention paid to purchasers' interests, the European Union's ultimate target seems to be, once again, the protection of free movement of goods within the Internal Market. Indeed, Whereas No. 1 itself specifies that vertical directives concerning food shall be simplified. Within this perspective, taking into account only the essential requirements that producers are obliged to meet, allows products to move freely within the Union market. Same approach emerges also from Whereas No. 2, where misleading information to purchasers - about the definition of honey, the different types of honey and the characteristics required - are seen as a concern for unfair competition rather than for the right to be correctly informed. Indeed, the EU's major consideration goes to the *direct effect* that such misleading information might *have on the establishment and functioning of the common market*[116].

Finally, the last step is Directive (EU) 63 of 2014 of the European Parliament and of the Council of 15 May 2014 amending Council Directive 2001/110/EC relating to honey[117]. Actually, nothing really innovative can be found in this text, hence considerations moved before remain valid. With regards to the country of origin labelling matter, it simply acknowledges the entry into force of the Treaty of Lisbon. As a consequence, references to the European Community made by the indications contained in Article 2, Paragraph 4, Letter a), are replaced by references to the European Union, meaning "EU" takes the place of "EC".

2.3.2 Fresh fruit and vegetables

Regulation (EU) No 1308 of 2013 of the European Parliament and of the Council[118]

[116] Whereas No. 2, Directive (EC) 2001/110.

[117] 3.6.2014 – L 164/1. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0063&from=EN (last access 27th September 2017).

[118] Regulation (EU) No 1308 of 2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347/671. Available at

establishes a common organisation of the markets in agricultural products and repeals Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007. As Whereas No. 1 states, the Regulation in analysis follows the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled "The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future", which sets out potential challenges, objectives and orientations for the Common Agricultural Policy ("the CAP") after 2013. Indeed, the reform's target is to *harmonize, streamline and simplify the provisions* on the one hand by ensuring that non-essential elements may be adopted by the Commission through delegated acts and, on the other hand, by stressing itself *all the basic elements of the common organization of the markets in agricultural products*[119].

With regards to the country of origin issue, Whereas No. 72 of Regulation (EU) No 1308/2013 links the indication of the country of origin to both producers' and consumers' interests. Indeed, while the formers are interested in communicating the products and farming features, the latters wish to receive transparent information about those mentioned elements. Consequently, the above mentioned Regulation calls for a clear determination of the place of farming and/or the place of origin, *on a case-by-case basis at the appropriate geographical level, while taking into account the specific characteristics of some sectors, in particular concerning processed agricultural products* [120]. Without prejudice of Article 26 Regulation (EU) 1169/2011, the indication of origin is included in the list of marketing standards by Articles 75 and 76, which clearly states that *products of the fruit and vegetables sector which are intended to be sold fresh to the consumer may only be marketed if they are sound, fair and of marketable quality and if the country of origin is indicated*. Moreover, the European legislator, aware of how often market conditions, international standards and consumer demands change, delegates the Commission the power to adopt the necessary acts on marketing standards by sectors or products as well as derogations and exemptions from such standards. However, in order to set these delegated acts, data about purchasers' expectations as well as needs for product

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0671:0854:EN:PDF (last access 27th September 2017).

[119] Whereas No 1, Regulation (EU) No 1308 of 2013.

[120] Whereas No 72, Regulation (EU) No 1308/2013.

innovation and technical progress should be demonstrated. Indeed, the Commission is required to draft a report to the European Parliament and to the Council evaluating, besides the above mentioned elements, also the costs and administrative burdens for operators. This way there should be a clear frame on the impact that these new measures are likely to have on the Common Market as well as on international trade, and on the benefits for both producers and consumers[121].

Finally, when it comes to trade with third countries[122], it is given to the EU Commission the power to approve implementing acts regarding the *procedures for the application of the specific provisions laid down in the agreement or act that regulates the import or export regime* on, *inter alia*, *provenance and origin of the product*[123].

2.3.3 Fish and fisheries

Regulation (EU) 1379 of 2013 of the European Parliament and of the Council[124] deals with the Common Organization of the Markets, which is the European policy for managing the market in fishery and aquaculture products. It represents one of the pillars of the Common Fisheries policy and it mainly covers the areas of producers' organizations, marketing standards, consumers' information and competition rules. Various reasons led the European legislator to draft this new Regulation. On the one hand, recent market developments and changes in fishing activities as well as the drawbacks in the implementation of past rules[125]. On the other hand, the awareness that fishing is a crucial economic activity for the Union's coastal regions[126], which would benefit of greater market stability and correlation between supply and demand[127].

Article 35 establishes that the products listed in Letters (a), (b), (c) and (e) such as,

[121] Article 75, Paragraph 6, Regulation (EU) No 1308/2013.
[122] Part III, Chapter I, Regulation (EU) No 1308/2013.
[123] Article 187, Letter b), Regulation (EU) No 1308/2013.
[124] Regulation (EU) 1379 of 2013 of the European Parliament and of the Council of 11 December 2013 on the common organization of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, OJ L 354/1. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:354:0001:0021:EN:PDF (last access 27th September 2017).
[125] Whereas No. 2, Council regulation (EU) 1379/2013.
[126] Whereas No. 3, Regulation (EU) 1379/2013.
[127] Whereas No. 4, Regulation (EU) 1379/2013.

inter alia, live fish, smoked fish, crustaceans and molluscs, of Annex I, can be sold to the final consumer only if the label indicates the commercial designation of the species and its scientific name; the production method[128]; the catch or farming area and also the category if fishing gear used in capture of fisheries; whether the product has been defrosted and the date of minimum durability when appropriate[129].

Article 38 specifically regards the indication of the catch or production area, which depends on whether the fish was caught at sea or in freshwater or was farmed. In particular, in the former case, the name of the sub-area or the division listed in the FAO fishing areas[130] should be indicated in writing or in terms understandable to the consumer, such as a map or a pictogram. Regarding the case of fishery caught in freshwater, there should be a reference to the body of water of origin in the Member State or third country of provenance of the product; finally, for aquaculture products, *a reference to the Member State or third country in which the product reached more than half of its final weight or stayed for more than half of the rearing period or, in the case of shellfish, underwent a final rearing or cultivation stage of at least six months*[131]. Nonetheless, Paragraph 2 of this same provision clarifies that operators may display more precise information about the catch or production area. In fact, Article 39, Regulation (EU) 1379/2013, allows to give to consumers some additional information concerning, among others, the flag State of the vessel that caught at sea those products[132].

Nonetheless, the abovementioned indication on origin does not seem able to fully meet consumers' expectations. Indeed, as the FAO fishing areas[133] are excessively wide, the related given information does not look really informative. Indeed, no adding value is gained from it, since the origin remains highly ambiguous. This is an element that the EU should take into account, considering that, following the product's appearance (58%) and its cost (55%), the origin is the third aspect that the

[128] Article 35, Paragraph 1, Letter b), specifies how such information should be given: "…caught…" or "…caught in freshwater…" or "…farmed…".
[129] Member States can exempt from these requirements the direct selling from fishing vessels to consumers of a small amount of products by fishermen or aquaculture producers.
[130] By way of derogation for fishery products caught in waters other than the Northeast Atlantic and the Mediterranean and Black Sea, it is possible to indicate the name of the FAO fishing area.
[131] Article 38, Paragraph 1, Letter c).
[132] Article 39, Paragraph 1, Letter d).
[133] For a complete list of FAO fishing areas, please, refer to http://www.fao.org/fishery/area/search/en (last access 3rd March 2017).

European consumers look at when buying fishery (42%)[134]. In particular, the relative majority of EU consumers prefer products from their own countries and region, while only 3% of respondents prefer products from outside of the EU and 23% of them do not have a preference.[135]

2.3.4 Olive oil

European rules on olive oil origin labelling[136] differentiate between virgin and extra-virgin olive oil on the one side, and other categories of olive oil on the other side[137]. While for the first mentioned group, it is stated that taste and quality of the product might depend on its geographical origin, for the second one such connection is not identified. Therefore, the European legislator deems it necessary that mandatory[138] designations of origin *should be restricted to extra virgin and virgin olive oils which satisfy precise conditions*[139]. Indeed, the Union considers that an origin indication also for other categories of edible olive oil is likely to end up in an even greater confusion for consumers, as they might start thinking that quality differences exist for that kind of products as well. At first glance, the aim of not to distort the market of edible olive oil seems fundamental, in so far as geographical origin labelling may interfere on products' price, disturbing the regular functioning of the market.

Origin labelling indications for olive oil are linked not only to the necessity of correctly informing consumers but also to the need of protecting products'

[134] Special Eurobarometer 450, *EU consumer habits regarding fishery and aquaculture products*, Survey requested by the European Commission, Directorate-General for Maritime Affairs and Fisheries and co-ordinated by the Directorate-General for Communication, Fieldwork June 2016 – Publication January 2017, p. 5. This survey was carried out by the TNS Opinion & Social network in the 28 Member States of the European Union between 4 June and 13 June 2016. A total of 27,818 EU citizens from different social and demographic categories were interviewed face-to-face at home and in their native language on behalf of the Directorate-General for Maritime Affairs and Fisheries. http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2106 (last access 27th November 2017).
[135] Special Eurobarometer 450, p. 73.
[136] Reference to the Commission Implementing Regulation (EU) No 29/2012, now in force, and to the Commission Regulation (EC) No 2815/98.
[137] For descriptions and definitions of olive oil and olive pomace oil Article 78, Paragraph 2, Regulation (EU) No 1308/2013, refers to Part VIII, Annex VII.
[138] The European legislator itself admits that "Optional arrangements implemented until 2009 proved not to be sufficient to avoid misleading consumers as to the real characteristics of virgin oils in this regard"; whereas No 5, Regulation (EU) No 29/2012.
[139] Whereas No 5, Regulation (EU) No 29/2012.

reputation[140]. Especially in this sector, displaying the origin can be functional both for consumers' safety and business' competitive advantage. In particular, on the one hand, origin labelling, whenever transparent and complete, can help consumers to avoid being misled; on the other hand, it may represent a competition tool, that can be used, by local food businesses, to value their products. While the first perspective of consumers' protection is adopted by the Union Custom Code as well as by Article 26, Reg. (EU) No 1169 of 2011, the second one is mainly reflected within the European legislation on GIs. Indeed, it insists on the need of guaranteeing products' actual features, through certified controls on the production system.
This last kind of approach clearly appeared in the Regulation (EC) No 2815/98 and again in Article 4, Reg. (EU) No 29/2012.

As it happens for other types of food products[141], when it comes to olive oil purchasing choices as well, the country of origin indication can be read, by the consumers, as a quality marking, leading them to prefer the national product over the foreign one. Indeed, the possible restriction to free circulation of goods within the internal market constitutes a typical issue of the matter here in analysis. From this viewpoint, this might explain why the EU looks at the matter of consumers' information under the scope of avoiding market distortion. A balance has to be found between opposite interests: consumers' and producers' ones. In light of this, it often looks like transparency of information is simply a way to mainly protect competition among producers and, only as a consequence, consumers, even if they actually have been benefitting from it.

It is of great importance to be aware that, when dealing with geographical origin labelling issues, the decision-making process is influenced by different stakeholders, whose interests are involved: on the one hand citizens and their organizations[142] and

[140] As Irene Canfora (2013), L'indicazione di origine sull'etichettatura degli alimenti tra informazione e valorizzazione. Il paradigma dell'olio di oliva, in *Rivista di Diritto Agrario*, Vol. XCII, at p. 653, underlines products' reputation is influenced by two elements: productive process and features variety depending on the geographical origin.
[141] This is especially true for meat products.
[142] I am referring to the debate opened by *Green book on food quality*.

on the other hand producers that cooperate, for instance, on drafting IGs disciplinary[143].

The rules about olive oil origin labelling distinguish between regional origin and Member State/European Union/third Countries origin. Indeed, the regional origin indications are covered by IGs regulation[144], while origins related to the European Union or to the entire territory of a Member State fall down Regulation (EU) No 29/2012. This means that the Member States cannot introduce regional origin indications, outside IGs regulation. It seems that European legislator's main purpose, when drafting the mentioned regulation on marketing standards for olive oils, has been to avoid alterations within the internal market and not to value some particular products through the origin indication. Indeed, the promotion of peculiar qualities is exclusively left to IGs rules. Such a choice might sound not appropriate if it is taken into consideration Whereas No 5, Reg. (EU) No 29/2012. It underlines that *As a result of agricultural traditions and local extraction and blending practices directly marketable virgin olive oils may be quite different of taste and quality depending on their geographical origin*. How a Member State origin indication is supposed to make clear for consumers these different tastes and qualities? Not to mention the reference to EU/extra EU origin: this wide indication does not protect consumers and their right to be informed but it only meets internal market needs.

In conclusion, it has to be considered that, according to the European legislator, *the designation of origin must […] refer to the geographical area in which the oil was obtained, which is, in general, the area in which the oil was extracted from the olives*[145]. However, in certain cases the place where the oil is extracted is not the same as the one where the olives were harvested, making necessary to give to consumers this information[146] as well. Setting as compulsory labelling indication the raw materials origin as well as the processing place, undoubtedly makes the olive oil regulation more articulate, compared to other vertical legislations. At the same time, it

[143] Irene Canfora, L'indicazione di origine sull'etichettatura degli alimenti tra informazione e valorizzazione. Il paradigma dell'olio di oliva, in *Rivista di Diritto Agrario*, Vol. XCII.
[144] Whereas No 7, Reg. (EU) No 29/2012 "Designations indicating a regional origin should be reserved for PDOs or PGIs so as to avoid confusion among consumers potentially leading to market disturbances".
[145] Whereas No 8, Reg. (EU) No 29/2012.
[146] Whereas No 8, Reg. (EU) No 29/2012.

makes it respondent to traceability rules, on the provisions of Regulation (EU) No 178 of 2002. This way, traceability represents a *trait d'union* between different fields, within the food law system[147]: it allows to control on the productive process for both safety and consumers information reasons.

2.3.5 Meat other than beef (Article 26, Paragraph 2, Letter (b))

Article 26, Paragraph 2, Regulation (EU) No 1169 of 2011 establishes the obligation to indicate the country of origin or place of provenance on labels of meat falling under the Combined Nomenclature codes, listed in Annex XI to that Regulation, namely fresh, chilled and frozen meat of swine, sheep or goats and poultry. However, the application of such provision was not immediate, whereas it required the adoption of impact assessments and, on their basis, implementing acts, as Paragraph 8[148] of that same Article specifies. Indeed, a study examining and comparing different options of origin labelling for fresh and frozen meat, minced meat and cuts, of pigs, sheep, goats and poultry has been carried out[149]. The investigation took into consideration three policy options - origin labelling at the level of EU Member State indicating the place of birth, the place of rearing and the place of slaughter of the animal; at the level of EU Member State indicating the place of rearing and the place of slaughter and origin labelling at the level of EU / non EU - aiming to give appropriate origin information to consumers, without causing disproportionate economical and administrative burdens on the meat supply chain. Data showed that, in general, the overall impacts of mandatory origin labelling are low for all the mentioned options, with pig meat being the most affected[150]. Some differences on the possible impact have been noticed[151]

[147] Irene Canfora, L'indicazione di origine sull'etichettatura degli alimenti tra informazione e valorizzazione. Il paradigma dell'olio di oliva.
[148] Paragraph 8, Article 26, Regulation (EU) 1169 of 2011 states that "By 13 December 2013, following impact assessments, the Commission shall adopt implementing acts concerning the application of point (b) of paragraph 2 of this Article […]."
[149] European Commission Directorate-General for agriculture and rural development, Study for mandatory origin labelling for pig, poultry and sheep & goats meat, AGRI-2012-EVAL 01, Final report June 2013. Study undertaken by LEI Agricultural Economics Research Institute, Wageningen UR (NL). Available at http://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2013/origin-labelling/fulltext_en.pdf (last access 6th March 2017).
[150] European Commission Directorate-General for agriculture and rural development, Study for mandatory origin labelling for pig, poultry and sheep & goats meat, AGRI-2012-EVAL 01, Final report June 2013, p. 36.
[151] European Commission Directorate-General for agriculture and rural development, Study for mandatory origin labelling for pig, poultry and sheep & goats meat, AGRI-2012-EVAL 01, Final report June 2013, p. 57 and 79.

also with regards to the size of businesses, with medium size being the most affected. On the one side, large firms are likely to have management and control systems already and, on the other side, small ones usually prefer to buy locally and operate in niche markets.

Pursuant the results of the above mentioned study, the Commission adopted the Commission Implementing Regulation (EU) No 1337/2013 of 13 December 2013 laying down rules for the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry[152].

Setting out mandatory country of origin labelling requires traceability systems at each stage of production and distribution, as Article 3, Paragraph 2, Regulation (EU) 1337/2013, highlights, stating that *each food business operator shall be responsible for the application of the identification and registration system*. Under Article 5, of the abovementioned Regulation, the label of meat should contain the place of rearing, depending on set temporal criteria,[153] and the one where the slaughter took place[154] as well as the *batch code identifying the meat supplied to the consumer or mass caterer*. However, Article 5 continues, whenever it is not possible to identify a Member State

[152] OJ L 335/19.

[153] Such information shall be given specifying 'Reared in: (name of the Member State or third country)', in accordance with the criteria drafted in Article 5, which change depending on the type of meat. Indeed, (i) for swine, the rearing place is, "in case the animal is slaughtered older than 6 months, Member State or third country in which the last rearing period of at least 4 months took place", "in case the animal is slaughtered younger than 6 months and with a live weight of at least 80 kilograms" it is "the Member State or third country in which the rearing period after the animal has reached 30 kilograms took place", while, "in case the animal is slaughtered younger than 6 months and with a live weight of less than 80 kilograms, the Member State or third country in which the whole rearing period took place"; (ii) for sheep and goats, the rearing place is "the Member State or third country in which the last rearing period of at least 6 months took place or, in case the animal is slaughtered younger than 6 months, the Member State or third country in which the whole rearing period took place"; finally, when it comes to (iii) poultry, it is "the Member State or third country in which the last rearing period of at least one month took place or, in case the animal is slaughtered younger than one month, the Member State or third country in which the whole rearing period after the animal was placed for fattening took place". Whenever it is not possible to identify a Member State or third country where the rearing took place, accordingly to the temporal canon established, the information on the label can be "Reared in: several Member States of the EU" or, where the meat or the animals have been imported into the Union, by "Reared in: several non-EU countries" or "Reared in: several EU and non-EU countries". By way of derogation from this provision, Article 6 sets out that the label of meat imported for placing on the Union market, and for which the information described above is not available, shall contain the indication "Reared in: non-EU".

[154] Article 5, Regulation (EU) 1337/2013, sets out that the Member State or third country in which the slaughter took place has to be indicated as 'Slaughtered in: (name of the Member State or third country)'".

or third country where the rearing took place, as the time canon established is not met, the information on the label can be "Reared in: several Member States of the EU" or, where the meat or the animals have been imported into the Union, by "Reared in: several non-EU countries" or "Reared in: several EU and non-EU countries". Another case occurs when the rearing period is not attained in any of the Member States or third countries where the animal was reared. On the label it can be declared "Reared in: (list of the Member States or third countries where the animal was reared)" if the food business operator proves to the satisfaction of the competent authority that the animal was reared in those Member States or third countries[155]. On the contrary, the indication on label can simply be "Origin: (name of Member State or third country)", if the food business operator proves to the satisfaction of the competent authority that the meat has been obtained from animals born, reared and slaughtered in one single Member State or third country.

2.3.6 Beef and beef products

Beef – and related products - has been the first type of meat for which mandatory country of origin labelling has been set out. It does not surprise that the European legislator made this choice, as Regulation (EC) 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97[156], follows the bovine spongiform encephalopathy crisis, that had caused great instability in the

[155] A particular case is considered in Paragraph 3, Article 5, which states that where several pieces of meat, of the same or of different species, correspond to different labelling indications but are presented in the same pack to the consumer or mass caterer, the label shall indicate: "(a) the list of the relevant Member States or third countries in accordance with paragraphs 1 or 2, for each species" as well as "(b) the batch code identifying the meat supplied to the consumer or mass caterer". Special rules are also drafted for minced meat and trimmings in Article 7. Indeed, indications on labels shall be the following: "(a) 'Origin: EU', where minced meat or trimmings are produced exclusively from meat obtained from animals born, reared and slaughtered in different Member States; (b) 'Reared and slaughtered in: EU', where minced meat or trimmings are produced exclusively from meat obtained from animals reared and slaughtered in different Member States; (c) 'Reared and slaughtered in: non-EU', where minced meat or trimmings are produced exclusively from meat imported into the Union; (d) 'Reared in: non-EU' and 'Slaughtered in: EU' where minced meat or trimmings are produced exclusively from meat obtained from animals imported into the Union as animals for slaughter and slaughtered in one or different Member States; (e) 'Reared and slaughtered in: EU and non-EU' where minced meat or trimmings are produced from: (i) meat obtained from animals reared and slaughtered in one or different Member States and from meat imported into the Union or (ii) meat obtained from animals imported into the Union and slaughtered in one or different Member States".

[156] OJ L 204/01.

European beef and beef products market. From this perspective, transparency about production and marketing phases as well as improved traceability systems have been identified as the best instruments to regain consumers' trust. However, *in order to maintain and strengthen the confidence of consumers in beef and to avoid misleading them*[157], also the set of information available on labels has to be clear and complete. Indeed, the European intervention in this sector covered two different areas: on the one hand, at production stage, an efficient system for the identification and registration of bovine animals was needed, while, on the other hand, it was deemed necessary to create a specific Community labelling system in the beef sector based on objective criteria at the marketing stage[158].

With regards to the former area, even though less interesting for the purpose of this work, Article 1 states that each Member States should establish a system for the registration and identification of bovine animals[159]. Indeed, provisions from Article 1 to Article 10 describe the system adopted in order to ensure a more effective and detailed traceability systems, mainly through ear tags and animal passports. Due to its relevance, such system has been implemented through the Commission Regulation (EC) No 911/2004 of 29 April 2004 implementing Regulation (EC) No 1760/2000 of the European Parliament and of the Council as regards eartags, passports and holding registers[160].

Greater attention, here, has to be paid to the labelling of beef and beef products, to which Title II of the above Regulation (EC) 1760/2000 is dedicated. The mandatory labelling system ensures the identification of the link between the meat and the animal/animals thanks to a reference number or reference code relating to single animals or to a group of them. The Member State or third country where the slaughterhouse and the cutting hall are settled, together with the approval number of the place where the animals were slaughtered as well as of the cutting hall which

[157] Whereas 4, Regulation (EC) 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97.
[158] Whereas 5, Regulation (EC) 1760/2000.
[159] As Article 3, Regulation (EC) 1760/2000 sets out, such identification and registration systems are based on ear tags to identify animals individually; computerized databases; animal passports and individual registers kept on each holding.
[160] OJ L 163/65.

performed the cutting operation on the carcass have to be indicated[161]. Actually, this was the labelling system only for the first two years after the entry into force. From 2002, the European legislator decided to widen the set of compulsory information to be provided. Indeed, nowadays, consumers have to be aware of the Member State or third country of birth, of fattening as well as of slaughtering, with the exception of animals born, raised and slaughtered in the same Member State or third country, for which the indication on label is simply "Origin: (name of Member State/third country)"[162].

Table 2. Vertical legislation

PRODUCT	LEGISLATION
Honey	*Directive (EU) 63 of 2014*
Fresh fruits and vegetables	*Regulation (EU) 1308 of 2013*
Fish and fisheries	*Regulation (EU) 1379 of 2013*
Olive oil	*Regulation (EU) 29 of 2012*
Meat other than beef	*Regulation (EU) 1337 of 2013*
Beef and beef products	*Regulation (EC) 1760 of 2000*

2.4 Further steps

The next paragraphs will be dedicated to the study of those food products for which the indication of the country of origin on the label remains on a voluntary basis. Reference is to:

- meat used as an ingredient;
- unprocessed food;
- single ingredients products;

[161] As Article 13, Paragraph 2, Regulation (EC) 1760/2000, requires, this information should be indicated on labels as follows: "Slaughtered in (name of the Member State or third country) (approval number)" and "Cutting in: (name of the Member State or third country) (approval number)".

[162] Article 13, Paragraph 5, letters (a) and (b). It is worth mentioning that there are two main exceptions to these general rules. Indeed, on the one hand, by way of derogation of Article 13, Article 14 establishes that, in case of minced meat, labels should be written as follows: "prepared (name of the Member State or third country)", depending on where the meat was prepared, and "origin" where the State or States involved are not the State of preparation; on the other hand, Article 15 requires the indication "Origin: non-EC' and "Slaughtered in: (name of third country)", whenever all the information described in Article 13 is not available.

- ingredients that represent more than the 50% of a food;
- milk;
- milk used as an ingredient in dairy products;
- types of meat other than beef, swine, sheep, goat and poultry meat.

In these cases, the EU Commission has adopted preliminary reports, which are not legally binding documents. Their purpose is to assess mandatory origin labelling for each listed category of food. These reports by the Commission address the issue of country of origin labelling from the different stakeholders' perspective, namely consumers, food business operators and administrators. Particularly, they take into account consumers' need of being informed on the origin of food; the feasibility of COOL for different products, as well as a cost-benefit analysis on the introduction of mandatory COOL. The reports describe the foreseeable economic impact that such a legal measure would have both on the internal market and on international trade. Whether or not, following these reports, the Union will establish mandatory COOL for the specific products in object it is hard to know. Such a decision is likely to depend on how much in the next future the EU will weight the consumers' interests, in comparison with the business operators' ones.

2.4.1 Meat used as an ingredient (Article 26, Paragraph 6)

Article 26, Paragraph 6, of the FIC Regulation requires the Commission to submit a report to the European Parliament and the Council regarding the possibility to extend mandatory origin labelling for meat used as an ingredient in pre-packed foods. Such a report[163] has been adopted by the EU Commission adopted in 2013 and it will constitute the focus of this paragraph.

As a first consideration, it should be said that it is actually quite hard to talk about meat used as an ingredient as a single category. Products can vary from relatively easy preparations – e.g. fresh meat with spices – to multi-ingredients food with meat in it. Moreover, at least two perspectives have to be considered here, namely the ones of the producers as well as the ones of the consumers.

[163] 52013DC0755 REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL regarding the mandatory indication of the country of origin or place of provenance for meat used as an ingredient/*COM/2013/0755 final*/.

From the producers' point of view, the report drafted by the Commission acknowledges how long the supply chain of meat used as an ingredient is, with several steps in production and marketing of the final products[164]. Such a complexity is mainly due to the fact that EU meat processors are used to turn to multiple sources - within and out the EU[165] - for unprocessed meat and other meat ingredients. This is a common feature also for producers of multi-ingredients foods with meat ingredients, who are used to obtain raw materials from different suppliers along the food chain. In addition, after incorporating meat ingredients in other meat-related products, processors sell them to retailers/catering/butchers, whether or not sliced and/or packed. Therefore, in a similar context, there is a general limited demand for origin information, while it exists for specific preparations, coming from a "single meat piece", ham for instance, or coming from abroad[166].

Giving origin information means relying on advanced traceability systems[167]. However, when the EU Commission drafted its report it concluded that the schemes used along the food chain did not fit the purpose of origin labelling. In particular, the EU Commission underlines that traceability legislation is based primarily on the need to ensure food safety, as Article 18, Regulation (EU) 178/2000 specifies, requiring information "one step back and one step forward". Moreover, these traceability requirements are "worded in terms of their goal and intended result, rather than in terms of prescribing how that result is to be achieved", allowing food business operators to flexibly implement these requirements[168]. Even where more detailed traceability systems exist, there are differences depending on the animal species and, in any case, they do not extend beyond the unprocessed phase. "Overall, because of the structure of the supply chain and the absence of any significant 'business-to-

[164] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or the place of provenance for meat used as an ingredient, {SWD(2013) 437 final}, Brussels, 17.12.2013 COM(2013) 755 final, p. 4.
[165] Multiple sourcing within the EU is preferred when it comes to pig meat-based products, whereas both EU and non-EU countries for beef and poultry based preparations.
[166] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or the place of provenance for meat used as an ingredient, p. 5.
[167] For further details on traceability, please, refer to Chapter 5, Paragraph 5.
[168] Commission Staff Working Document, Origin labelling for meat used as an ingredient: consumers' attitude, feasibility of possible scenarios and impacts. Accompanying the document Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for meat used as an ingredient {COM(2013) 755 final}, Brussels, 17.12.2013 SWD(2013) 437 final, p. 18.

business' interest in this information, the transmission of origin information tends to stop at the earlier stages of the supply chain"[169].

At the opposite, from the consumers' point of view, surely some interests in knowing the origin of meat ingredients exists, as such information is usually associated with a range of positive attributes, including quality. Nonetheless, although purchasers' preferences and understanding of origin information differ among Member States, the overall consumer's interest in origin indication is evaluated as less important than price as well as quality/sensory aspects and it is not reflected in "willingness to pay"[170].

Urging the Commission to follow up its report on meat used as an ingredient, the EU Parliament voted a resolution on 11th February 2015[171], dealing with country of origin labelling for meat in processed food. The rationale, as the EU Parliament underlines, is to ensure improved transparency throughout the food chain. The current voluntary origin system is deemed very often to be misleading, thus European consumers need better information. While taking into account the impact that a mandatory origin labelling provision might have on food business operators, due to excessive costs as well as administrative burdens, the parliamentary resolution refers to the Food Chain Evaluation Consortium (FCEC) survey results, indicating that, when it comes to meat-based food, more than 90% of consumer respondents find it important that origin is labelled[172]. Although the EU Parliament clearly stated its position, it has to borne in mind that such a report is not legally binding.

2.4.2 Unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food

Article 26, Paragraph 6, of Regulation (EU) No 1169/2011 of the European

[169] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or the place of provenance for meat used as an ingredient, p. 7.
[170] Data shows that at price increases of less than 10%, the "willingness to pay" falls by 60-80%. Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or the place of provenance for meat used as an ingredient, p. 13.
[171] European Parliament resolution of 11 February 2015 on country of origin labelling for meat in processed food [2014/2875(RSP)].
[172] Food Chain Evaluation Consortium, *Study on the application of rules on mandatory indication of country of origin or place of provenance of meat used as an ingredient (MCOOL)*, Brussels, 10 July 2013, 10.

Parliament and of the Council on the provision of food information to consumers, requires the Commission to submit a series of reports to the European Parliament and the Council concerning the possibility to extend mandatory origin labelling for certain food categories, namely types of meat other than beef, swine, sheep, goat and poultry; milk; milk used as an ingredient in dairy products; unprocessed foods; single ingredient products; ingredients that represent more than 50 % of a food. The Commission drafted various reports, differentiating the studies depending on the type of products. In particular, on 17 December 2013, the EU Commission adopted one report concerning meat used as an ingredient, while on 20 May 2015 two other reports have been released. The first one regards milk, dairy products and minor meat and the second one unprocessed foods, single ingredient products and ingredients that are more than 50% of a food. As no legislative act has followed these two mentioned studies, this paragraph will focus on the latter report's results[173].

First of all, some definitions have to be outlined. Indeed, while the FIC Regulation, making reference to Regulation (EC) 852 of 2004, defines "unprocessed food"[174], it says nothing about "single ingredient products" nor "ingredients that represent more than 50% of a food". Therefore, it is the Commission report itself to delineate them. "Single ingredient products" are "products that contain only one ingredient or feedstock. Examples are sugar, tomato purée, vegetable oils of a single vegetable origin, frozen potato fries when no additive or salt has been added to these products"[175]. As for "ingredients that represent more than 50% of a food", since it is not clear to what that 50% is referred (volume, weight, etc.), the report only makes some examples, such as tomato of a tomato sauce, fruit in fruit juices and flour in bread. It clearly appears how these food categories include very different products. As a consequence, also the consumers' interest in origin information and the economic

[173] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food, Brussels, 20.5.2015 COM(2015) 204 final.
[174] Article 2, Letter (n), Regulation (EC) No 852 of 2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs defines "unprocessed products" as "foodstuffs that have not undergone processing, and includes products that have been divided, parted, severed, sliced, boned, minced, skinned, ground, cut, cleaned, trimmed, husked, milled, chilled, frozen, deep-frozen or thawed".
[175] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food, p. 5.

impact of imposing a mandatory origin labelling vary greatly. The supply chains as well is quite complex, underpinned on ingredients whose origin changes frequently, aiming to maintain low purchasing prices rather than the quality of the final product[176].

As, so far, the indication of origin could have been given on a voluntary basis, different stakeholders have been consulted in order to understand their behaviour. From business operators' side, results show that voluntary origin scheme was rarely used for the food sector here in analysis. Furthermore, even when such information is given, it is only for a minor part of the total production of a certain product (for instance < 1% of total coffee market) and essentially for the high value segment[177]. With regards to consumers' attitude, although the interest in origin labelling for these products is lower than for other food categories – such as meat or dairy products -, three quarters of the respondent purchasers calls for it. In addition, despite declaring the same interest in knowing the place of farming of raw materials as well as the place of production, when asked for concrete examples they showed to prefer information about the place of production.

All these considerations led the EU Commission to state that implementing mandatory origin schemes in this sector would increase the costs of production, and, consequently, the prices for consumers. Therefore, origin labelling on a voluntary basis - as it was and still is - looks like the most preferable scenario, able to keep products' cost at current levels.

2.4.3 Milk, milk used as an ingredient in dairy products and types of meat other than beef, swine, sheep, goat and poultry meat

As already pointed out in the previous paragraphs, Article 26, Paragraph 6, of the FIC Regulation, requires the Commission to adopt some reports on the possibility to extend mandatory country of origin information. Hence, this part will discuss the results obtained by the study of compulsory origin schemes related to milk, milk used

[176] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food, p. 12.

[177] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food, p. 6.

as an ingredient in dairy products and minor meat[178].

With regards to the definition of the products here in analysis, reference should be made to Regulation (EU) No 1308/2013, Annex VII, Part III, where "milk" means exclusively the normal mammary secretion obtained from one or more milkings without either addition thereto or extraction therefrom, while "milk products" means products derived exclusively from milk, on the understanding that substances necessary for their manufacture may be added provided that those substances are not used for the purpose of replacing, in whole or in part, any milk constituent. As for the types of meat concerned, they are fresh and frozen meat from horses, rabbits, reindeer and deer, from farmed and wild game, as well from birds other than chicken, turkey, ducks, geese and guinea fowls[179].

Data obtained from inventories shows that, when it comes to the milk and meat sectors, voluntary origin schemes are quite frequent. Indeed, consumers can, if they so wish, opt for milk or meat products, where origin information is voluntarily provided for by food business operators[180]. Usually these origin schemes are underpinned on EU quality signs - PDO, PGI or TSG - or on private or public organization, such as groups of operators, retailers, NGOs or public authorities. These kinds of labelling often make reference to a Member State or even a particular region, although there is no uniform criterion in order to voluntarily indicate the link between certain attributes and a geographical provenance[181].

In general, concerning the milk supply chain, it is possible to state that, due to the

[178] The types of meat under the remit on the report accounts only for the 3% of the total European meat consumption, Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for milk, milk used as an ingredient in dairy products and types of meat other than beef, swine, sheep, goat and poultry meat, p. 4.

[179] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for milk, milk used as an ingredient in dairy products and types of meat other than beef, swine, sheep, goat and poultry meat, Brussels, 20.5.2015 COM(2015) 205 final, p. 2.

[180] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for milk, milk used as an ingredient in dairy products and types of meat other than beef, swine, sheep, goat and poultry meat, Brussels, 20.5.2015 COM(2015) 205 final, p. 3.

[181] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for milk, milk used as an ingredient in dairy products and types of meat other than beef, swine, sheep, goat and poultry meat, Brussels, 20.5.2015 COM(2015) 205 final, p. 3.

perishable feature of the product, farmers mainly depend on local processors, who buy raw milk and other milk ingredients from various sources, processing them all together in the same plant. Hence, while the cost of labelling the origin of milk could be generally modest, its impact among operators is likely to be uneven, depending on the need to introduce additional traceability systems that pass on a substantial increase of costs.

Instead, with regards to the types of meat under the scope of this report, it usually involves short supply chains within the same Member State. The only exception is constituted by horsemeat that can have longer supply chains, with more operators involved and more intra-EU and external trade[182]. Actually, Article 5 and Annex II, Section I, Regulation 853/2004, require a mark that indicates the last establishment of production/processing/packaging as well as the Member State in which it is located. However this does not necessarily mean being able to read on labels the origin or provenance of the raw material used.

Consumers are interested in knowing the origin both for milk and minor meats, despite their willingness to pay for this information appears to be modest[183]. Particularly, for milk and dairy products, purchasers' main concern is the country of milking or processing whereas the place where the animal was raised and slaughtered is crucial for meats.

Also on this matter the EU Parliament intervened with a non-binding resolution, voted on 12th May 2016 and regarding the mandatory indication of the country of origin or place of provenance for meat and milk[184]. Again, the rationale is to meet consumers'

[182] Indeed, some provisions about horsemeat are slightly different compared to the ones concerning other types of minor meat. For instance, horses are the only case for which a system of identification and registration of live animal exists. From 1 January 2016 the registration requirements are stricter, in accordance to the Commission Implementing Regulation (EU) 2015/262, of 17 February 2015 laying down rules pursuant to Council Directives 90/427/EEC and 2009/156/EC as regards the methods for the identification of equidae (Equine Passport Regulation).

[183] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for milk, milk used as an ingredient in dairy products and types of meat other than beef, swine, sheep, goat and poultry meat, Brussels, 20.5.2015 COM(2015) 205 final, p. 13.

[184] Text approved by 422 votes to 159, with 68 abstentions. This resolution comes further to Brussels, 20 May 2015 COM(2015) 205 final/REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, regarding the mandatory indication of the country of origin or place of provenance for milk, milk used as an ingredient in dairy products and types of meat other than

expectations, reminding previous survey data and adding that 84% of EU citizens considers it necessary to indicate the origin of milk and 88% consider such labelling necessary also for meat other than beef, swine, sheep, goat and poultry meat, whose origin has to be indicated, according to Regulation (EU) No. 1169/2011, Annex XI, following the modalities described in Regulation (EU) No. 1337/2013[185]. Under the EU Parliament's perspective, a similar measure would be able to help to improve consumers' confidence in food products by making the food supply chain more transparent**.** Nonetheless, the EU Commission has yet to make any proposals on this subject.

beef, swine, sheep, goat and poultry meat. Through this Report, European Commission highlighted the need to provide for harmonized rules of mandatory origin labelling in both milk and meat sectors. At this respect, to support its position, the European Commission stated that existing inventories show that the milk and meat sectors have a relatively higher penetration of food labelling schemes. Milk and meat products sold on the EU market are already labelled voluntarily, either via a EU scheme (PDO, PGI or TSG) or via private or public organizations (such as group of operators, retailers, NGOs or public authorities). Such labelling usually refers to a Member State or a lower geographical level (region). The criteria used in these voluntary schemes to link certain attributes with a geographical provenance can differ considerably from one to another.

[185] Commission Implementing Regulation (EU) No. 1337/2013 of 13 December 2013 laying down rules for the application of Regulation (EU) No. 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry, OJ L 335, 14 December 2013.

CHAPTER 3

NATIONAL PROVINSIONS: OVERVIEW ON ITALY AND FRANCE

After describing the European perspective on country of origin and place of provenance labelling, this Chapter is dedicated to the analysis of the legislation of two EU Member States: Italy and France, two legal systems that can be profitably compared. Although, currently, Italy and France are not the only examples of national additional provisions on COOL, they have been the first two countries to intervene. Table 3 shows recent trends of COOL national initiatives within the EU.

Italy and France share a common viewpoint, when it comes to origin and provenance labelling. Both have come out with a legislation that requires such an indication as mandatory for more food products than those listed in Regulation (EU) 1169/2011. Apparently, the strong food culture that characterizes them both has led national legislators to underline domestic origin or provenance as a quality clue.
First, the Italian legislation on country of origin and place of provenance will be described, giving a historical overview as well. Second, French recent provisions on this matter will be portrayed. Some concluding comparative remarks will follow.

Table 3 on national COOL and their status. Last updated 2/7/2017. Data available at https://gain.fas.usda.gov/Recent%20GAIN%20Publications/EU%20Country%20of%20Origin%20Labeling%20-%20Member%20State%20Initiatives_Brussels%20USEU_EU-28_2-7-2017.pdf (last access 27th November 2017).

Member State	Products	Status
France	Milk, milk used in dairy products, meat used as an ingredient in food	In force since January 1, 2017
Italy	Products derived from tomatoes	Future implementation
Italy	Rice	Future implementation (2018)
Italy	Durum wheat and semolina in pasta	Future implementation (2018)
Italy	Milk and milk used in dairy products	Entered into force on April 19, 2017
Lithuania	Milk and milk used as an ingredient in dairy products	Approved by Commission
Portugal	Milk and milk used in dairy products	Approved by Commission
Romania	Milk and dairy products	Not notified to Commission
Greece	Milk and milk used as an ingredient in dairy products	Notified to Commission
Greece	Rabbit meat	Notified to Commission
Finland	Milk, milk used as an ingredient in dairy products, meat used as an ingredient in food	Notified to Commission
Spain	Milk and dairy products	In progress

3.1 Italy

The Italian culinary tradition is worldwide famous and its regional characterization makes it of particular interest for the purpose of this research. As the territory is more and more a criterion for purchasers' food choices[186], the attempt will be to fathom how national legislation has shaped and interpreted such a connection between consumers and locality. Despite being crucial for purchasers and, consequently, for business operators as well that might exploit such consumers' interest, the Italian

[186] Massimo Montanari (2004), *Il cibo come cultura*, Editori Laterza, p. 114-115. The author underlines how the willing to give value to local food products and, consequently, local cuisine, increased only between the XVIII and XIX century, as the classical cooking book by Pellegrino Artusi, *La scienza in cucina e l'arte di mangiar bene* (translated in *Science in the kitchen and the art of eating well*), published in 1891, shows. Indeed, purpose of the book is to unify Italian culinary traditions right after the political unification of the country, but Artusi chose to pursue this "cooking unification" spreading deeper knowledge and appreciation of local features.

legislator for many years has not provided a definition of "origin" and "provenance". Before the European harmonization, the terms had to be described making reference to the Italian Criminal Code and how it was interpreted. About ten years ago, though, sensibility changed and the Italian legislator began looking at the "made in Italy" indication as a pivotal element for the domestic economy. While similar perspective receives plaudits from producers as well as consumers, the ways chosen to reach the target of protecting "Italian quality" have not worked efficiently and seemed more orientated to gain political consensus than making the subject clearer.

The following two paragraphs will regard on the one hand the national provisions concerning origin and provenance, as they can be found in the Criminal Code as well as in different legal texts set out in the past years. On the other hand, the interpretations that the Italian Supreme Court (Corte di Cassazione) has given of these two terms will be pointed out. Finally, the last part will outline the recent ministerial decree on the origin of milk and dairy products as well as the new decrees about the origin of wheat and pasta and rice. The recent proposal concerning the indication of origin for tomato puree will be delineated. Finally, the recent decree on the indication of the address of the business operator where the food has been produced or packaged will be briefly described as well.

3.1.1 Origin and provenance in Italian legal texts

Article 515 and Article 517 of the Italian Criminal Code - and somehow also Articles 516[187] and 517-bis[188] c.c. – deal with the concepts of origin and provenance. The former establishes that the seller who hands over to the purchaser a good which differs from the item they had agreed upon for *origin*, *provenance*, quality or quantity is punished. The latter, instead, concerning the sale of industrial products under deceptive trademark, punishes whoever sells original work or industrial products under names, trademarks or national or foreign distinctive signs, that might mislead

[187] The reason why Article 516 c.c. is less interesting than the other two mentioned provisions, is that, in spite of being the only one which refers expressively to foodstuffs, it does not refer to the origin or provenance, whereas it speaks about "genuineness" as a feature that food products must possess whenever they are put on the market. Doubts remain whether origin and provenance are included in the term "genuineness".

[188] This provision describes an aggravating factor, meaning that the penalty is higher, if the actions described in Articles 515, 516 and 517 c.c. regard food or beverage, whose designation of origin as well as peculiarities are protected by current legislation.

consumers as for the *origin*, *provenance* or quality of the product[189]. Both provisions consider origin and provenance, as well as quality, as objects worth being protected but the terms are not defined, so that it is not clear what belongs to one concept and what to the other one.

Ambiguity is also increased by, at least, two elements. First of all, the fact that not only there is no definition of origin but very often the diversity between unprocessed agricultural products and processed products is ignored, even though the determination of origin differs in these two cases. It is of great importance, then, to bear in mind that the issue of the country of origin is relevant for agriculture as well as for the food industry. Second, this topic covers several branches of knowledge, from trade and customary law, to consumers' protection and even trademark rules. This makes it hard to understand what kind of rules is applicable and which principles should guide their interpretation.

Besides the provisions included in the Criminal Code, the Italian legislator tried to set out additional rules able to protect the so called "made in Italy". Several attempts can be mentioned:

- L. n. 350 of 24 December 2003;
- L. n. 204 of 3 August 2004;
- D.l. (decree) n. 35 of 14 March 2005, modifying Article 49, Paragraph 4, L. 350/2003;
- L. n. 248 of 2 December 2005;
- L. n. 296 of 27 December 2006;
- L. n. 99 of 23 July 2009;
- L. n. 135 of 25 September 2009;
- L. n. 4 of 3 February 2011.

An analytical description of each of these regulations would lead this research too far from its focal point, nonetheless some words can be said about the most important interventions.

[189] For those who know Italian it might be useful to read the mentioned provision in its original language. Article 517 c.c., titled *Vendita di prodotti industriali con segni mendaci*: "Chiunque pone in vendita o mette altrimenti in circolazione opere dell'ingegno o prodotti industriali, con nomi, marchi o segni distintivi nazionali o esteri, atti a indurre in inganno il compratore sull'*origine, provenienza* o qualità dell'opera o del prodotto, è punito, se il fatto non è preveduto come reato da altra disposizione di legge, con la reclusione fino a un anno o con la multa fino a 1.032 euro"

The L. n. 350 of 24 December 2003 is the Budget Law for the year 2004[190]. It widens the offense described in Article 517 c.c. while it does not face the main issue[191]. Indeed, it avoids to define both the terms origin and provenance. The most interesting provision, for the purpose of the current research, is Article 4, Paragraph 49[192], whose target is to protect as well as to promote products manufactured in Italy – or "made in Italy" – through a better regulation of the indication of origin and provenance as well as through a new trademark able to assure those goods that are entirely manufactured in Italy or that are considered Italian under the European Custom Code[193].

The L. n. 204 of 3 August 2004[194], instead, after establishing as mandatory the indication of origin on labels, represents an attempt to give a definition of it. As a matter of fact, when dealing with unprocessed food, the terms origin or provenance

[190] Legge 24 December 2003 n. 350, "Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004)", pubblicata nella *Gazzetta Ufficiale* n. 299 del 27 Dicembre 2003 - Supplemento ordinario n. 196. Available at http://www.camera.it/parlam/leggi/03350l.htm (last access 28th September 2017).

[191] Ferdinando Albisinni (2011), Il made in Italy dei prodotti alimentari e gli incerti tentativi del legislatore, in *Agriregionieuropa*, N. 25, p. 43, available at http://agriregionieuropa.univpm.it/it/content/article/31/25/il-made-italy-dei-prodotti-alimentari-e-gli-incerti-tentativi-del-legislatore (last access 20th February 2017).

[192] For those who are able to read Italian here the provision in analysis: "L'importazione e l'esportazione a fini di commercializzazione ovvero la commercializzazione di prodotti recanti false o fallaci indicazioni di provenienza costituisce reato ed e' punita ai sensi dell'articolo 517 del codice penale. Costituisce falsa indicazione la stampigliatura "made in Italy" su prodotti e merci non originari dall'Italia ai sensi della normativa europea sull'origine;costituisce fallace indicazione, anche qualora sia indicata l'originee la provenienza estera dei prodotti o delle merci, l'uso di segni, figure, o quant'altro possa indurre il consumatore a ritenere che il prodotto o la merce sia di origine italiana. Le fattispecie sono commesse sin dalla presentazione dei prodotti o delle merci in dogana per l'immissione in consumo o in libera pratica e sino alla vendita al dettaglio. La fallace indicazione delle merci puo' essere sanata sul piano amministrativo con l'asportazione a cura ed a spese del contravventore dei segni o delle figure o di quant'altro induca a ritenere che si tratti di un prodotto di origine italiana. La falsa indicazione sull'origine o sulla provenienza di prodotti o merci può essere sanata sul piano amministrativo attraverso l'esatta indicazione dell'origine o l'asportazione della stampigliatura "made in Italy"".

[193] Reference here is to Article 4, Paragraph 61, l. 350/2003, which states that "[…] è istituito presso il Ministero delle attività produttive un apposito fondo con dotazione di 20 milioni di euro per il 2004, 30 milioni di euro per il 2005 e 20 milioni di euro a decorrere dal2006,per la realizzazione di azioni a sostegno di una campagna promozionale straordinaria a favore del "made in Italy", anche attraverso la regolamentazione dell'indicazione di origine o l'istituzione di un apposito marchio a tutela delle merci integralmente prodotte sul territorio italiano o assimilate ai sensi della normativa europea in materia di origine […]". Actually, there were two other crucial reasons behind Paragraph 49. Indeed, doubts have raised regarding the time when the crime could be considered to have taken place. The legislator solved the uncertainty specifying that the crime takes place with the presentation of the products to the custom authority. Furthermore, thanks to Paragraph 49, protection under Article 517 c.c. - which only talks about creative or industrial products - is expressly recognized also for foodstuffs.

[194] L. n. 204 of 3 August 2004, "Conversione in legge, con modificazioni, del decreto-legge 24 giugno 2004, n. 157, recante disposizioni urgenti per l'etichettatura di alcuni prodotti agroalimentari, nonchè in material di agricoltura e pesca", pubblicata nella *Gazzetta Ufficiale* n. 186 del 10 agosto 2004. Available at http://www.camera.it/parlam/leggi/04204l.htm (last access 28th September 2017).

mean the country or the area of production, while, when it comes to processed food, origin and provenance indicate the area where the raw material mainly used in the final product was harvested rather than bred. The law 204/2004 has never been implemented as the Ministry of Agriculture, who was supposed to intervene did not. Indeed, ministerial decrees for establishing the concrete ways for indicating the origin and provenance on labels are needed in order to make the law effective. Moreover, not only the notification procedure[195] to the EU Commission had not been followed but the European institution reacted contesting violation of Article 28 of the Treaty, about free circulation of goods.

In 2005 a new intervention on the subject has to be recorded. Through Article 2-ter of the law 248 of 2005[196], the Italian legislator modified once again Article 4, Paragraph 49 of L. 350/2003, widening the type of offence. Not only activities of import and export of products traded under false or misleading indication of provenance were punished but also the attempt to act in such a way represented a felony. The same Paragraph has been modified also by law 296/2006[197], which includes in the "false or misleading indication of origin" also deceptive or misleading use of trademarks.

In 2009 the Italian legislator stepped in twice: first with law n. 99 of 2009 and then with law n. 135 of 2009.

In July, with l. n. 99/2009, Article 4, Paragraph 49 of L. 350/2003 has been modified. From that moment on, indicating precisely and clearly the origin of goods not heading from Italy despite being traded under Italian firms' trademarks became mandatory. However, two months later such a provision has been abrogated due to law 135/2009, which specifies the meaning of "100% made in Italy" or "full made in Italy" products and similar indications. As a consequence, goods that have been designed, projected, processed and packaged exclusively in Italy are considered entirely produced in Italy.

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[195] Reference to the procedure described in the Directive 98/34/EC of the European Parliament and the Council of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society service, OJ L 204, 21.07.1998, p.37.

[196] L. n. 248 of 2 December 2005, "Conversione in legge, con modificazioni, del decreto-legge 30 settembre 2005, n. 203, recante misure di contrasto all'evasione fiscale e disposizioni urgenti in materia tributaria e finanziaria", pubblicata nella *Gazzetta Ufficiale* n. 281 del 2 dicembre 2005 - Supplemento Ordinario n. 195. Available at http://www.camera.it/parlam/leggi/052481.htm (last access 28th September 2017).

[197] L. n. 296, of 27 December 2006, "Disposizioni oer la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)", pubblicata nella *Gazzetta Ufficiale* n. 299 del 27 dicembre 2006 - Supplemento ordinario n. 244. Available at http://www.parlamento.it/parlam/leggi/062961.htm (last access 28th September 2017).

Finally, the last step is represented by Articles 4 and 5 of law n. 4 of 2011[198]. In particular, Article 4, while establishing as mandatory the indication of the country of origin or place of provenance on labels, specifies that the target is to respond to the needs of informing consumers as well as of preventing and contrasting food frauds. A definition of origin and provenance is provided, distinguishing between processed and unprocessed food. In this latter case, reference has to be made to the country were those products were produced, whereas for the former ones two elements have to be combined. Indeed, the place of the last substantial transformation as well as the place of harvesting or breeding of the primary raw material employed during the production phases have to be indicated. Interestingly, Article 4 postponed the implementation of its rules to some ministerial decrees, maybe as an *escamotage*[199], in order to avoid EU infractions procedures. As already happened in the past, the implementing decrees have never been set out, therefore this provision as well is just dead letter.
The last steps will be at the European level: the process of harmonization achieved by Regulation (EU) 1169/2011 - which still requires implementing acts -, as described above, and vertical national ministerial decrees that will be further discussed.

3.1.2 Courts' interpretation of origin and provenance

Doubts on how provisions about origin and provenance should be interpreted early raised, so that the first important precedent on this matter dates back to 1984[200]. A first crucial interpretation of Article 517 c.c. states that, whenever a geographical indication is used in a completely detached way from every possible reference to a

[198] L. n. 4 of 3 February 2001, "Disposizioni in materia di etichettatura e di qualità dei prodotti alimentari", pubblicata nella *Gazzetta Ufficiale* n. 41 del 19 febbraio 2011. Available at http://gazzette.comune.jesi.an.it/2011/41/1.htm (last access 28th September 2017).
[199] Sebastiano Rizzioli (2012), "Tracciabilità ed etichettatura degli alimenti: la legge n. 4/2011", in AA.VV., *Tracciabilità ed etichettatura degli alimenti. Partecipazione e sicurezza*, I Georgofili, Quaderni, Firenze, p. 25. Please, refer to this contribution for a deeper description of L. 4/2011.
[200] Reference to the "FIAT sentence", from which it is possible to learn that the case of an Italian enterprise that puts on the Italian market goods (in the matter in question automobiles) with its own trademark and produced abroad, following the exact same technical requirements as the ones manufactured in Italy, does not fall under Article 517 c.c. ("Non integra gli estremi del reato di vendita di prodotti industriali con segni mendaci, di cui all'art. 517 c.p., il fatto dei responsabili di un'azienda italiana che ponga in vendita o metta in circolazione col proprio marchio sul mercato italiano autoveicoli di cui è produttrice, fabbricati materialmente all'estero su sua licenza con gli identici requisiti di quelli omologhi da essa prodotti in Italia." (Tribunal of Torino, 12.10.1984 – Giur. Pen. 1985, II, 230).

particular area, there is no crime (cigarettes "Cortina" are the classical example[201]). This means that if consumers do not link the geographical indication to some product's features, Article 517 c.c. cannot be applied. Indeed, it would be possible to guess that purchaser's choices do not depend on such information. Since the Italian Supreme Court[202] has faced this matter numerous times, it is in the opinion of who writes that it is not useful to mention all the sentences delivered. Therefore, the attempt will be to design a *fil rouge* that connects them all, in order to provide a theoretical framework as clear as possible.

The first interesting judgement decided by the Italian Supreme Court on the topic of origin and provenance is the *Thun*[203] case of 1999. Its concept of "entrepreneurial origin", firstly introduced at this time, has inspired the following jurisprudence, so far. Indeed, the Supreme Court stated that the rules on this matter aim at ensuring consumers on products' origin and provenance not from a specific place – namely geographical origin -, whereas from a specific business operator that is legally, economically and technically responsible for the production process. In this particular case, although the production phases concretely occurred in China, *Thun* provided the raw materials as well as the guidelines containing production methods and techniques, checking time to time whether and how they were followed.

While, at first, the Supreme Court's judgements concerned Article 517 c.c., after the publication of l. 350 of 2003 the crucial point became the interpretation of Article 4, Paragraph 49, of the mentioned legal act. On this regard, the initial judgement that directly deals with Article 4, Paragraph 49, is the n. 3352 of 2005. It makes clear reference to the *Thun* case, thus confirming the interpretation of "origin" as based on the know-how rather than on a peculiar geographical area. Several cases[204] might be cited in line with this jurisprudence, but one is of major interest for the purpose of this

[201] "Cortina" is a famous ski resort in the Ampezzo Valley, on the Dolomites, in Italy. The name "Cortina" on some cigarettes does not lead the consumers to establish a connection between that place and the place of origin of the cigarettes. The geographical indication in this case is completely detached from any references to a specific area and purchasers can easily assess this.
[202] When talking about the Supreme Court reference should be made to the Italian *Corte Suprema di Cassazione*, as no further judicial remedy exists after it in Italy. It is different from the *Corte Costituzionale* (Constitutional Court) that deals exclusively with Constitutional law.
[203] The sentence is acknowledged by the name of the notorious pottery's firm from Bolzano that was involved (Cass. 2500/1999).
[204] For instance, Cass. 34103/2005; Cass. 34105/2005; Cass. 2648/2006.

research. It is Cass. 21797 of 2006, in which the Court distinguished between two groups of products, namely the industrial products and the agro-food ones. Specifically, when referring to the former ones, products' origin and provenance are linked to the business operator, in light of the concept of entrepreneurial origin already designed. On the contrary, agricultural and food products' quality is seen as tightly bound to the environment - natural as well as human - in which they have been harvested and transformed. As a consequence their origin and provenance have a geographical connotation.

Expressly regarding food products, the Supreme Court's judgement n. 27250 of 2007 deals with some packages of fruit salad and plums in syrup. They were labelled as "made in Italy", even though part of the fruit used[205] had a different provenance. In the first part, the Court reminded its interpretation of Article 517 c.c.. It clarifies that "origin" refers to the place or the business operator that handled the manufacturing rather than the harvesting phase, while "provenance" means the place or the business operator that acts like an intermediary between producer and purchasers. Primary scope of the Criminal Code provision is to protect consumers' freedom of choice, on the one side, and manufacturers from unfair competition, on the other side. In light of this, the know-how rather than a geographical area becomes relevant, as constant jurisprudence of the Supreme Court had stated several times. The Court built its reasoning also through the analysis of Article 4, Paragraph 49, l. 350/2003 – as modified by l. 80 of 2005[206] – as well as Articles 23 and 24 of the Custom Code[207].

Following some of its previous declarations,[208] the Court underlines that when it comes to agricultural products, the term "origin" used in Article 517 c.c. has a geographical connotation. The indication of the country of origin on labels - here examined – should not be confused with PDO and PGI quality signs. Indeed, the trademark "made in Italy" does not ensure that the products have peculiar features,

[205] The quantity varied but in any case was not over 30%.
[206] This provision ads "o di origine" (translated "of origin") after the words "misleading indication of provenance". Please, refer to note n. 59 for the complete text.
[207] Reference is to Articles 23 and 24 of Regulation (CE) 2913/1992. In 2013 the Union Customs Code entered into force but the rules for the acquisition of origin - currently under Articles 59-64 - remained unvaried. The criterion is that goods obtained in a single country are considered as originating there. For goods manufactured in more than one country or territory the principle is the one of "the last substantial transformation". Please refer to Paragraphs 3.5 and 3.6 of this dissertation.
[208] In particular, Cass. Sez. 3, 17th February 2005, Acanfora.

whereas it clarifies to consumers that the business operator that has produced that good is located in the specified area[209]. Therefore, on the contrails of the European Court of Justice's jurisprudence, the "made in Italy" trademark is rather assimilated to the, so called, "simple geographical indications" and, in order to identify origin and provenance, reference shall be made to Articles 23 and 24 of the European Custom Code[210]. In light of these two mentioned provisions, in the particular case here analysed, the Supreme Court deemed that the processes employed for making the fruit salad as well as the plums in syrup can be considered as "last substantial transformation". Hence, despite not being fruit entirely produced in Italy, the products can be labelled as "made in Italy", according to the European Custom Code, recalled by Article 4, Paragraph 49, l. 350/2003.

Finally, it has to be underlined that such case law interpretation of Article 517 c.c. and Article 4, Paragraph 49, l. 350/2003, so far remained unvaried, as the last cases on the topic confirm[211].

3.1.3 Ministerial decree on the origin of milk and dairy products

On 19th of January 2017 the Italian decree on mandatory country of origin labelling for milk[212] and dairy products[213] was published on the national Official Journal

[209] Corte Suprema di Cassazione, Sez. 3, Sentence n. 27250 of 2007, p. 8: "[…] il marchio di origine "made in Italy" non presuppone e non assicura in nessun modo la presenza di specifiche caratteristiche dei prodotti, ma si limita ad indicare al consumatore che l'impresa che ha realizzato il prodotto è ubicata in un determinato paese. Si tratta cioè di una situazione assimilabile a quella che la Corte di giustizia europea ha definito come "denominazione di origine geografica semplice", ovvero indicazione che "non implica alcun rapporto tra le caratteristiche del prodotto e la sua origine geografica" (sent. 7.11.2000, C-312/98)".

[210] Corte Suprema di Cassazione, Sez. 3, Sentence n. 27250 of 2007, p. 9.

[211] For instance, Sent. 27063/2008; Sent. 19650/2012; Sent. n. 41684/2014; Sent. 52029/2014; Sent. 54521/2016.

[212] For raw milk reference should be made to another inter-ministerial decree that requires a traceability system for the raw milked used in each batch of product obtained under the same circumstances (Article 4, D.M. 27.05.2004). Decreto ministeriale 27 May 2004 (last modification on 14 January 2005) on "Rintracciabilità e scadenza del latte fresco", Gazzetta Ufficiale n. 152 of 1st July 2004. Available at http://www.reterurale.it/downloads/cd/NORMATIVA/NORMATIVACOLLEGATA/DM.27-05-04_rintracc_latte_fresco.pdf (last access 28th September 2017).

[213] Inter-ministerial decree 9th December 2016, concerning the indication on labels of country of origin of milk and dairy products, under Reg. (EU) 1169/2011, about food information to consumers (original title: Ministero delle Politiche Agricole, Alimentari e Forestali e Ministero dello Sviluppo Economico - Decreto 9 Dicembre 2016 - Indicazione dell'origine in etichetta della materia prima per il latte e i prodotti lattieri caseari, in attuazione del regolamento (UE) n. 1169/2011, relativo alla fornitura di informazioni sugli alimenti ai consumatori. (17A00291) (GU Serie Generale n. 15 del 19.1.2017)

(Gazzetta Ufficiale della Repubblica Italiana). Such an initiative[214] has been justified by the need to improve transparency along the food supply chain as well as to meet consumers' demands and expectations about food products' quality, in general, and raw materials' origin in particular[215].

It constitutes the final step of a procedure started during the summer of 2016, with the notification to the EU Commission of a draft decree on the subject, as Article 45 Regulation (EU) 1169/2011 requires. On October 14th 2016 Italy – and this event did not surprise after the French experience with a decree with similar content - has received the "green light" allowing the entry into force. However, since the topic of the country of origin labelling has been harmonized by the FIC Regulation, one could wonder whether Member States are allowed to establish new mandatory particulars, as the one discussed here. As already specified above, the answer can be found in Article 39, dealing with all the national measures that set new mandatory particulars, in addition to the ones listed in Articles 9[216] and 10[217], Reg. (EU) 1169/2011. Indeed,

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Available at http://www.gazzettaufficiale.it/eli/id/2017/01/19/17A00291/sg (last access on 22nd February 2017).

[214] Actually, this is not the first time Italy tried to add mandatory country of origin information for milk and dairy products. Indeed, on the 22nd of April 2010, the EU Commission rejected the so called "Zaia decree" ("Decreto Zaia", from the name of the Italian Ministry of Agriculture back than) with such content.

[215] According to a public investigation led by the Italian Ministry of Agriculture (online public consultation carried out under Paragraph 4-bis, Article 4, l. 4/2011, as modified by l. 116/2014), 9 consumers to 10 deem of greatest importance that origin is showed on labels of fresh milk (95%) and other dairy products such as yoghurt e cheese (90,84%). More than 26.500 participants have been involved, answering to a survey based on 11 questions concerning the importance of food traceability, the indication of origin on labels as well as the transparency of information on labels. Results available at https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/8531 (last access 21st November 2017).

[216] According to Article 9, Reg. (EU) 1169/2011, indication of the following particulars shall be mandatory: (a) the name of the food; (b) the list of ingredients; (c) any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form; (d) the quantity of certain ingredients or categories of ingredients; (e) the net quantity of the food; (f) the date of minimum durability or the 'use by' date; (g) any special storage conditions and/or conditions of use; (h) the name or business name and address of the food business operator referred to in Article 8(1); (i) the country of origin or place of provenance where provided for in Article 26; (j) instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions; (k) with respect to beverages containing more than 1,2 % by volume of alcohol, the actual alcoholic strength by volume; (l) a nutrition declaration.

[217] Article 10, Reg. (EU) 1169/2011 states that "in addition to the particulars listed in Article 9(1), additional mandatory particulars for specific types or categories of foods are laid down in Annex III". Moreover, the Commission can amend Annex III by means of delegated acts, in accordance with Article 51, in order to ensure consumers' protection, taking into account scientific and technical developments. Finally, "where, in the case of the emergence of a risk to consumers' health, imperative grounds of urgency so require, the procedure provided for in Article 52 shall apply to delegated acts adopted pursuant to this Article".

Article 39 allows the Member States to lay down new mandatory indications for specific types or categories of food only under four circumstances, which are: (a) the protection of public health, (b) the protection of consumers, (c) the prevention of fraud and (d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition. Moreover, Paragraph 2, of Article 39, establishes that the Member States can introduce new origin labelling indications only if there is a proven connection between that origin and the product's features and if they are able to demonstrate that the majority of consumers deems that information to be of crucial importance. Notwithstanding, whenever a Member State wishes to do this, it has to follow a notification procedure, as described in Article 45, Reg. (EU) No. 1169/2011, which states that the *Member State which deems it necessary to adopt new food information legislation shall notify in advance the Commission and the other Member States of the measures envisaged and give the reasons justifying them*[218].

Some introductory remarks to the decree specify that it shall apply to all types of milk and pre-packed[219] dairy products listed in Annex 1[220], this way leaving behind unpackaged cheese and other kinds of dairy products. It is also of great importance to bear in mind that the decree is applicable exclusively to the Italian business operators, when producing for the domestic market[221]. Therefore, goods produced by business

[218] For further explanations on Articles 39 and 45 of the FIC Regulation, please, refer to Chapter 1, Paragraph 2.6.

[219] With regards to the definition of pre-packed products reference has to be made to Article 2 of FIC Regulation, which defines them as "any single item for presentation as such to the final consumer and to mass caterers, consisting of a food and the packaging into which it was put before being offered for sale, whether such packaging encloses the food completely or only partially, but in any event in such a way that the contents cannot be altered without opening or changing the packaging; 'pre-packed food' does not cover foods packed on the sales premises at the consumer's request or pre-packed for direct sale".

[220] The list of pre-packed dairy products includes: milk (cow, buffalo, ovine-goat's, donkey's and other animal origin) and milk creams (concentrated or not, with or without the addition of sugar and/or sweeteners); buttermilk, milk and clotted cream, yoghurt, kefir and other fermented or acidified milk and creams, concentrated as well as containing added sugar or sweeteners or flavoured by adding fruit or cocoa; whey, concentrated or with added sugar or other sweeteners; products consisting of natural milk constituents, whether or not containing added sugar or other sweeteners, not elsewhere specified or included; butter and other fats derived from milk; creams dairy spreads; cheeses, dairy products and curds; long-life sterilized milk; long life UHT milk.

[221] This might constitute an example of "reverse discrimination". The domestic legislation impose to Italian food business more burdens, thus more costs, when it comes to labelling compared to the EU law. This way, they find themselves in a position of disadvantage. The literature on reverse discrimination is quite extensive. Please, see, for instance, Alan H. Goldman (1979), *Justice and reverse discrimination*, Princeton Legacy Library; Robert K. Fullinwider (1980), *The reverse discrimination controversy. A moral and legal analysis*, Totowa, New Jersey: Rowman and Littlefield,

operators settled in different Member States or in Third Countries but exporting in Italy as well as Italian products only for export purposes are excluded from its application. Furthermore, milk and dairy products already protected with a geographical indication (PDO and/or PGI and/or STG) will be exempted from complying with the mandatory origin labelling requirements.

Under a more practical perspective, Articles 2 and 3 of the decree require that milk's and milk products' labels shall display the following indications:

a) "*Country of collection: name of the country where the milking is carried out;*
b) *Country of packaging: name of the country where the product has been packaged;*
c) *Country of process: name of the country where the milk has been processed*".

Whenever the three phases are carried out in the same country, the three indications can be replaced with a single label "*milk origin: name of the country*".
The three indications can also be replaced as follows:

- "*Origin of the milk: EU countries*", when the phases are carried out in EU countries other than Italy;
- "*Origin of the milk: non-EU countries*", when the phases are carried out outside the EU borders:
- "*Origin of the milk: EU and non-EU countries*", when the phases are carried out both in EU countries other than Italy and non-EU countries.

As in cases when the processing phases are numerous and articulated it might be hard to identify a unique place, some guidelines by the Ministry of Economic Development are expected.

The decree will be applied from the 19th of April 2017 and it will be experimentally applied till the 31ft of March 2019. Moreover, products traded and labelled before this "deadline" will have to be traded by the next 180 days rather than re-labelled with additional origin information, complying with the decree here analysed.

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available at http://files.eric.ed.gov/fulltext/ED292213.pdf (last access 21st November 2017); Alina Tryfonidou, (2009), *Reverse discrimination in EC law*, Alphen aan den Rijn: Kluwer law international; Dominik Hanf, (2011), Reverse discrimination in EU Law: constitutional aberration, constitutional necessity, or Judicial Choice, in *Maastricht Journal of European and Comparative Law*, Vol. 18, Issue 1, pp. 29-61.

3.1.4 Ministerial decrees on the origin of wheat and pasta and rice

Following the success of the above mentioned provisions on milk and dairy products, two other decrees have been adopted. They concern the origin of durum wheat for durum wheat semolina pasta and the origin of rice. Both of them are not applicable to products legally manufactured and marketed in other Member States or third countries. Surprisingly, they are the result of a combined initiative by the Ministry of Agriculture and the Ministry of Economic Development, without the involvement of the European Commission. As explained in the previous paragraph, a notification procedure has been followed for the decree on milk and dairy products that entered into force after the EU Commission's green light. This time, however, for pasta and rice, the Commission has not been informed[222].

The decree 26 July 2017 on pasta[223] requires to specify on Italian packages of pasta produced in Italy the harvesting country of wheat as well as the country where the wheat was grinded[224]. Indications will be:

a) *Harvesting country of the wheat: name of the country in which the wheat has been harvested;*

b) *grinding country: name of the country in which the wheat has been grinded.*

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[222] Actually, at the very beginning, the proposals for the introduction of the indication of origin for pasta and rice on labels were sent to the EU Commission, as the notification procedure requires. Then, however, the proposals have been recalled, probably due to the risk to be officially rejected by the EU Commission. After recalling the two texts, the ministers, Maurizio Martina (Ministry of Agriculture) and Carlo Calenda (Ministry of Economic Development) signed two other decrees, without informing the EU Commission. As official information miss the source used has been this one: http://www.ilfattoalimentare.it/origine-grano-pasta-riso-bruxelles.html (last access 28th September 2017).

[223] Decree 26 July 2017, "Indicazione dell'origine, in etichetta, del grano duro per paste di semola di grano duro", GU Serie Generale n. 191 of 17.08.2017. Available at http://www.gazzettaufficiale.it/eli/id/2017/08/17/17A05704/sg (last access 28th September 2017).

[224] Two main reasons are pointed out by the Ministry of Agriculture and the Ministry of Economic Development in order to justify this measure. On the one hand, data obtained from an online public consultation - with 26 thousands of citizens involved - promoted by the Italian Ministry of Agriculture shows that 85% of Italians are interested in knowing the origin of raw materials used in the production of pasta. On the other hand, the wheat and pasta supply chain represents a crucial element for the Italian agribusiness, considering that the economic value of domestic production of pasta overcomes 4,6 billions euros and the export counts for 2 billions euros. See https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/10740 (last access 25 February 2017). Something more might be worth it mentioning here, as the decree looks like a reply to the so called "battaglia del grano" (literally translated "battle for grain"), worsened in July 2016. Indeed, although Italy is the European main producer of durum wheat, imports especially of soft wheat and the quotations' decrease for the Italian product have jeopardized several farming enterprises. See, for instance http://www.lastampa.it/2016/07/27/edizioni/alessandria/trebbiatura-e-pane-gratis-la-battaglia-del-grano-scende-in-piazza-Nd5BTMu2AYsSfsyZ0G4DXM/pagina.html (last access 25th February 2017).

In case two or more countries are involved in these production phases, different indications can be used on labels, meaning EU Countries, extra-EU Countries, EU/extra-EU Countries[225]. In addition, when the durum wheat is harvested in a single country – for instance, Italy - for at least 50%, it is possible to use the indication "Italy and EU/extra-EU Countries"[226].

The same approach has been followed for rice as well[227]. On the rice's label, under Article 2, Paragraph 1, this information has to be included:

a) *Harvesting country of rice: name of the country in which the rice has been harvested;*
b) *Processing country: name of the country in which the processing/transformation of rice took place;*
c) *Packaging country: name of the country in which rice has been packaged.*

When these three phases occurred in one country it is possible to simply write *origin of rice: name of the country*. Instead, when they took place in two or more countries, belonging or not to the European Union, in order to indicate the place where the single step occurred indications such as EU Countries, extra-EU Countries, EU/extra-EU Countries can be used[228].

Article 7 of both decrees specifies that their provisions are experimentally into force till 31st December 2020. Nonetheless, in case the EU Commission sets out executive acts concerning durum wheat semolina pasta as well as rice - under Article 26, Paragraphs 5 and 8, of Regulation 1169 of 2011 - these decrees will not be effective anymore.

[225] Article 3, Paragraph 1, Decree 26 July 2017, "Indicazione dell'origine, in etichetta, del grano duro per paste di semola di grano duro".
[226] Article 3, Paragraph 2, Decree 26 July 2017, "Indicazione dell'origine, in etichetta, del grano duro per paste di semola di grano duro".
[227] Decree 26 July 2017, "Indicazione dell'origine in etichetta del riso", GU Serie Ufficiale n. 190 of 16.08.2017. Available at http://www.gazzettaufficiale.it/eli/id/2017/08/16/17A05698/sg (last access on 28th September 2017).
[228] Article 3, Decree 26 July 2017, "Indicazione dell'origine in etichetta del riso".

3.1.5 Products derived from tomatoes

At the end of October 2017 the Italian Ministry of Agriculture together with the Italian Ministry of Economic Development announced the future implementation of a ministerial decree regarding the origin of tomatoes in all the products derived from them – such as canned-tomato, peeled tomatoes and tomato concentrate -[229]. Actually, already in 2006, a ministerial decree by the two above-mentioned ministries entered into force on a similar matter. For reasons of consumers' protection, the Ministerial decree of 17th February 2006 stated the mandatory indication of the origin of fresh tomatoes on tomato sauce's labels[230].

The recent decree, besides extending the number of categories to which mandatory COOL shall apply, requires labels to indicate the place where tomatoes have been harvested as well as the place where tomatoes have been processed. Information should be given as follows:

a) *Harvesting country of tomatoes: the name of the country in which tomatoes have been harvested;*
b) *Processing country of tomatoes: name of the country in which tomatoes have been processed.*

If this phase takes place in more than one country, different terms can be used: EU Countries, NON EU Countries, EU and NON EU Countries. Whenever all the phases take place in Italy the indication can be *Origin of tomatoes: Italy*.

The decree specifies that its provisions are in force till full implementation of Article 26, Paragraph 3, FIC Regulation, on the primary ingredient.

3.1.6 Indication of the packaging or producing firm's headquarter on labels

[229] Currently, only the press release on this matter is available. Please, refer to https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/11834 (last access 21st November 2017).

[230] In particular, under Article 1, Ministerial Decree 17.02.2006, the place where tomatoes have been harvested shall be indicated on labels. Although only in Italian, the document is available at https://www.diritto.it/ministero-delle-politiche-agricole-e-forestali-decreto-17-febbraio-2006-passata-di-pomodoro-origine-del-pomodoro-fresco/ (last access 21st November 2017).

A related matter to mandatory COOL concerns the indication on the labels of the packaging or producing firm's head office[231]. The provision of such information was already mandatory under the Legislative Decree N. 109 of 1992. However, when Regulation (EU) 1169 of 2011 entered into force, in order to comply with the renovated European rules on labelling, the norm was repealed. In September 2017 a Legislative Decree introduced again the mandatory indication of the packaging or producing firm's head office, in order to better inform consumers as well as to improve traceability systems for safety reasons. Nowadays, such an indication can be omitted only if:

a) when the indication of the area is enough to identify the plant as well;
b) when the packaging or producing firm's head office is either included in the trademark or coincides with the food business operator responsible for the food information;
c) when the package already displays either an identification mark or a health mark.

The *Ispettorato Centrale Repressione Frodi* (ICQRF)[232] has the competence to verify the compliance with the decree.

The indication on labels of the packaging or producing firm's head office differs from the indication of the country of origin on labels. Indeed, such information cannot be used to deduce the origin of food products, for which specific rules apply, whereas it is more connected to traceability issues. Nonetheless, it can be seen as an effort to improve transparency along the food supply chain.

3.2 France

France shares with Italy a great attention to local traditional products and their connection with the territory. Indeed, it does not surprise that French people have

[231] Please, refer to the press release on such a matter: https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/11661 (last access 21st November 2017).
[232] It is the public Office that deals with anti-fraud activities within the food sector.

coined one word to describe such link, i.e. *terroir*[233], whose complexity makes it very hard to even translate it.

Nevertheless, the term "origin" was not legally defined, so that such uncertainty led some authors to talk about the "mystery of origin"[234], underling how the origin of foodstuffs cannot be simply reduced to geographical provenance. The next paragraph is dedicated to the scrutiny of the French decree on the origin of milk and of milk and meat used as ingredients. As it will be shown, when it comes to additional indications on labels regarding the origin of food, the French experience is very similar to the Italian one.

3.2.1 The decree on the origin of milk and milk and meat used as ingredients: preliminary steps

The debate on origin labelling has been particularly popular in France[235], especially after the horsemeat scandal[236] in 2013. Therefore, it does not surprise the fact that a

[233] The term describes the complete natural environment in which a particular wine is produced, including factors such as the soil, topography, and climate. Despite being born within the wine sector, *terroir* can be referred to other kinds of crop, such as coffee, tobacco or chocolate and, in the opinion of who is writing also to food. Indeed, it includes the application of particular methods, techniques as well as habits and customs of a culture. Hence, it is commonly used in the expression "produits de terroir", which refers to products made in a given place and products connected with that place. Laurence Bérard and Philippe Marchenay (2007), Localized products in France: definition, protection and value-adding, in *Anthropology of food* [Online], S2. Available at https://aof.revues.org/415#tocto1n1 (last access 24th February 2017).

[234] Ferdinando Albisinni (2012), La comunicazione al consumatore di alimenti, le disposizioni nazionali e l'origine dei prodotti, in *Rivista di Diritto Agrario*, I, citing J.P. Branlard (1995), La reconnaisance et la protection par le Droit des mentions d'origine géographique comme élément de qualité des produits alimentarires, in *Revue de droit rural*, 409 .

[235] It might be interesting to mention the French consumer association *UFC-que choisir?*'s position, as it is expressed in a recently published report. Considering that the main element addressed against mandatory COOL is the cost for food business operators and, consequently, the increasing price for consumers, the mentioned report discusses the impact of origin labelling, added, on a voluntary basis, on 245 processed foods containing beef, pork and chicken meat, marketed by major French producers and retailers. Results show that in all the categories of foods examined, there are references to the origin of meat, proving that such indication is actually possible, even for the most complex items. Therefore, according to *UFC-que choisir?*, it is likely that the presence or absence of COOL depends essentially on the procurement and transparency policy adopted by each brand. This data would be proven by the fact that, taking into account similar products, some brands has chosen to always include origin on labels (e.g. *Charal*, *Le Gaulois*, *Marie* and *Findus*), whereas others do not give this information to consumers (e.g. *Daunat*, *Sodébo*, *Pere Dodu*). Same for retailers' own brands: for instance, if *Carrefour* displays the country of origin for all of its beef based products, there are no such mentions on chicken-based ones and, similarly, *E. Leclerc*'s pork items are usually labelled with origin but this is not valid for beef. UFC-que choisir? Département des Etudes, *Indication de l'origine des viandes dans les produits transformés à base de bœuf, de porc et de poulet. Trois ans après le scandale de la viande de cheval, l'opacité persiste sur plus de la moitié des produits!*, 8th February 2016. For the purposes of this survey, the *UFC- Que Choisir* has focused on products frequently consumed, that contain the three type of meats the report deals with, namely beef, pork and poultry. The analysis has

French decree on this matter has recently been implemented. Reference is to the decree N. 2016-1137 of 19th of August 2016 *relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient*[237] (hereinafter, Decree).

Already in 2010, the law 27 July 2010[238], on the modernization of agriculture and fisheries, admitted the possibility to add the indication of origin on food products' labels. Such a choice has been confirmed by the consumers' law of 17 March 2014[239], under the conditional approval of the European Commission. Indeed, the consumer law introduced in the Consumers' Code the Article L412-4, that specifies:

Sans préjudice des dispositions spécifiques relatives au mode d'indication de l'origine des denrées alimentaires, l'indication du pays d'origine est obligatoire pour les produits agricoles et alimentaires et les produits de la mer, à l'état brut ou transformé. La liste des produits concernés et les modalités d'application de l'indication de l'origine mentionnée au premier alinéa sont fixées par décret en Conseil d'Etat après que la Commission européenne a déclaré compatible avec le droit de l'Union européenne l'obligation prévue au présent article.

As the FIC Regulation requires, the draft of the Decree has firstly been notified to the European Commission. On 12 April 2016, the Commission consulted the Standing Committee on Plants, Animals, Food and Feed[240] (hereinafter, SCPAFF). During its meetings EU Member State expressed different positions on the matter:

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been conducted from 25 January to 2 February 2016, on 244 meat processed foods, including 81 products containing beef, 69 pork-based and 94 with chicken.

[236] For a report of the events see https://www.theguardian.com/uk/2013/feb/15/horsemeat-scandal-the-essential-guide (last access 23rd September 2016).

[237] Décret n° 2016-1137 du 19 août 2016 relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient of the Ministère de l'agriculture, de l'agroalimentaire et de la forêt, JORF n°0194 du 21 août 2016 - texte n° 18, NOR: AGRT1607764D, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033053008&categorieLien=id (last access 30th November 2016).

[238] Law 27.07.2010: JO 28July, 2010, p. 13925.

[239] L. N. 2014-344, 17.03.2014 relative à la consummation (literally translated, regarding consumption): JO 18 March 2014, p. 5400.

[240] Composed of the representatives from the Commission and the EU Member States. In the last year, the SCPAFF has held exchanges of views not only on French and Italian draft measures on COOL of milk, dairy products, but also on Lithuanian, Portuguese and Greek ones. Please, see the Summary Report of the SCPAFF on 13–14 September 2016 that addresses Italy (A.01); Lithuania (A.02) and Portugal (A.03): https://ec.europa. eu/food/sites/food/files/safety/docs/reg-com_gfl_20160913_sum.pdf (last visited 22nd November 2017).

In February 2017, the Spanish Ministry of Agriculture also announced a decree making the indication

- some highlighted the negative impact that the French measure was likely to have on the access of non-French ingredient suppliers to food production and distribution in France. Particularly, of major concern was the effect on small- and medium-sized enterprises.
- Other delegations did not oppose mandatory COOL itself, but expressed a preference for a harmonised approach at EU level.
- Only a few delegations supported the French draft Decree.

The Commission underlined that the FIC Regulation allows EU Member States to adopt national measures on COOL on food under specific substantial as well as procedural conditions. In addition, it stated that "the topic was intensively debated at the co-decision stage and that the political and legal context has significantly evolved in recent years"[241].

3.2.2 The Decree: content and potential consequences on the market

After the EU Commission's green light the Decree entered into force and France started a two-year trial of mandatory COOL scheme. The Decree requires Country of Origin Labelling for milk, milk used as an ingredient in the dairy products listed in its annex[242] and meat listed in the same annex (*i.e.*, meat of bovine animals, meat of swine, meat of sheep and goats, and meat of poultry) used as an ingredient in

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of the country of origin for milk and dairy products mandatory – please, see Vidal Maté, Agricultura obligará a poner el país de origen en los productos lácteos, 13 February 2017, https://elpais.com/economia/2017/02/12/actualidad/1486909504_261825.html (last access 22nd November 2017).

[241] Summary Report of the Standing Committee on Plants, Animals, Food and Feed held in Brussels on 12 April 2016, DG Sante document sante.ddg2.g.5(2016)2527400, A.01 Exchange of views on the French notification of the draft Decree related to the origin indication of milk and meat used as an ingredient (AGRAP/2016/0339 - projet de décret relatif à l'indication de l'origine du lait et des viandes utilisées en tant qu'ingrédient), p. 1. Available at https://ec.europa.eu/food/sites/food/files/safety/docs/reg-com_gfl_20160412_sum.pdf (last access 22th November 2017).

[242] They are: milk and cream, not concentrated or containing added sugar or other sweetening matter; milk and cream, concentrated or containing added sugar or other sweetening matter; buttermilk, condensed milk and cream, yogurt, kefir and other fermented or acidified milk and cream, concentrated or containing added sugar or other sweetening or flavored or containing added fruit or cocoa; lactosérum, concentrated or containing added sugar or other sweetenin; products consisting of natural milk, added sugar or other sweetening, not elsewhere specified or included; butter and other fats and oils derived from milk; dairy spreads pasta; cheese and curd.

transformed products[243]. Particularly, Article 2 points out that for each category of meat, the label has to display the following information:

- "*Country of birth (name of the country of birth of the animals)*";
- "*Country of fattening: (name of the country where fattening took place)*";
- "*Country of slaughter: (name of the country where took place the slaughter of animals)*".

When a category of meat comes from animals that are born, raised and slaughtered in the same country, the indication of origin may be "*Origin: (name of country)*". When the meat product derives from born, raised and slaughtered animals in one or more Member States of the European Union, the reference to the origin may be "Origin: EU" and even when the animals were born, raised and slaughtered in one or more states outside the European Union the label can says only "*Origin: outside UE*".
With regards to dairy products, similar provisions are outlined[244]. Indeed, for milk, the indication of the *country of collection*, *country of packaging* and *country of processing* of milk are required and, again, when the various steps happened in one or more countries, that are members of the European Union, the mention "*EU*" can be used; equally, when the various phases have been carried out on the territory of several countries located outside the EU, the words "*Outside EU*" can be adopted. Finally, Article 4 allows business operators to indicate the origin as "*EU - outside EU*", whenever it would be necessary to list several EU members and third countries or in any case it was not possible to determine the origin. These indications, described in Articles 2 and 3, have to be written right after the ingredient they refer to or in a specific note and in different size, colour and font[245]. Finally, as a closing provision, and in accordance with the European Court of Justice's position since *Cassis de Dijon*[246], Article 6 states that products legally manufactured or marketed in another Member State of the European Union, or in a third country, are not subject to the

[243] However, if the percentage of these ingredients - calculated on the basis of the total weight of the ingredients used in the pre-packed food product - is below a certain threshold, set by the Ministry of agriculture and consumption and that cannot be higher than 50%, this decree is not applicable, as Article 1, paragraph 1, states.
[244] Article 3, Decree N. 2016-1137.
[245] Article 5, Decree N. 2016-1137.
[246] Commonly known under the name of the French liquor object of the case, this is the Judgement of the Court 20th February 1979, case C-120/78, *Rewe Zentrale*.

provisions of this decree, hence they can freely circulate, despite being labelled in a different manner.

The decree, accordingly to Article 9, came into force on the 1st of January 2017 as a provisional measure, applicable only until 31st of December 2018[247]. Moreover, at the end of this fixed period, the same Article lays out that a report - by the Ministry responsible for agricultural and consumer policy - will have to be submitted to the European Commission, for a thorough evaluation.

The entry into force of the Decree raised many concerns from different voices, namely the European Dairy Association (hereinafter, EDA); the European Association of Dairy Trade (hereinafter, Eucolait); the European Meat and Livestock Trading Union (UECBV) and FoodDrinkEurope (FDE), representing the European food and drink industry

- The UECBV argued that France's COOL scheme trial could contribute to a "fragmentation of the single market"[248].
- FDE claimed that measures like the French ones are likely to lead to higher packaging and production costs as well as increased administrative burden on businesses. Moreover, they encouraged local sourcing without regard to the detrimental impact that it may have on established supply chains, which transcend national, and sometimes even European, borders[249].
- The EDA's position is the most interesting, considering the sequence of events that it caused. First, the EDA expressed to the Commission its viewpoint. It defined the Decree as a way to reintroduce national barriers among EU Member States as well as an obstacle to the harmonised implementation of the FIC Regulation. The Commission replied stressing that the potential negative effects on the internal market will be evaluated by the French authorities in the report due in 2018. Such an answer did not satisfy the EDA that turned to the

[247] The decree itself specifies that in order to give food business operators time to adapt to the set new labelling rules, pre-packed foods, regularly produced or marketed before the decree enters into force and whose labelling does not comply with its provisions, can be sold or distributed at the latest till 31st March 2017.
[248] Oscar Rousseau, *Pressure mounts on French country-of-origin scheme*, 6 January 2017, https://www.globalmeatnews.com/Article/2017/01/06/Criticism-mounts-for-France-s-COOL-scheme (last access 22nd November 2017).
[249] Oscar Rousseau, *Pressure mounts on French country-of-origin scheme*.

EU Ombudsman. This latter launched an inquiry into the matter and concluded that the Commission's implicit approval of the French measure complied, from a procedural point of view, with the relevant legal requirements[250]. The EU Ombudsman's report[251] acknowledges that it was not clear in what way the complainant considered the Commission to have failed to make sure that France had complied with the relevant substantive requirements. Consequently, the EU Ombudsman concluded that the complainant had not yet demonstrated maladministration on the part of the Commission regarding the substantive aspect of its allegation.

- Eucolait underlined the additional burdens that such a legislation creates for a significant number of food operators. Product flows will have to be adjusted accordingly as well as products' labels will have to be changed. Eucolait criticized the choice of a two-year trial. In its viewpoint, the risk is that it will only be useful to assess that prices of products did in fact increase and that the desired effect of increasing consumption was not achieved[252].

Besides these critics, it is true that the introduction of mandatory COOL forces food business operators to reorganize their supply chain. From this perspective, although the Decree does not mention any traceability systems, they need to be improved in order to guarantee the origin[253]. However, some questions remain: how can the origin of an ingredient be checked with sufficient certainty? Is it really possible to control the accuracy of such an indication?

[250] Reference is to Article 45, Paragraph 3 of the FIC Regulation, since the Commission had consulted the SCPAFF on the Decree.
[251] Decision in case 1212/2016/PMC concerning the European Commission's implicit positive decision regarding the French draft decree on mandatory origin labelling for milk and meat. Available at https://www.ombudsman.europa.eu/cases/decision.faces/en/71083/html.bookmark (last access 22nd November 2017).
[252] The European Association of Dairy Trade expressed this position also with reference to the Italian Decree on COOL for milk and milk used as an ingredient. Please, refer to letter of 29 June 2016 to the Commission in relation to the Italian draft decree on the mandatory indication of origin of milk and milk used as an ingredient. Available at http://www.eucolait.eu/userfiles/files/Position%20papers/2016_06_29%20%20Eucolait%20letter%20to%20Commissioner%20Andriukaitis%20-%20Italian%20draft%20decree%20on%20mandatory%20origin%20labelling%20for%20dairy.pdf (last access 22nd November 2017).
[253] Julia Bombardier and Jean-Luc Viruéga (2017), Entrée en vigueur du décret sur les mentiones d'origine: quelles conséquences pur les entreprises?, in *Revue de Droit Rural – Revue Mensuelle LexisNexis JurisClasseur*, February, p. 35.

3.3 Concluding remarks

The new schemes on COOL adopted by France and Italy have to be consistent with EU law and WTO obligations, in order to avoid "potentially costly and destabilising litigation, as well as commercial and legal uncertainty for economic operators"[254].

On the European Union's side, national measures that introduce as mandatory the indication of the country of origin on products' labels cannot serve a protectionist purpose. The European Court of Justice (hereinafter, ECJ) held in several decisions that a national legislation with the only purpose to favour domestic production would constitute an obstacle to the fundamental freedoms that is incompatible with the internal market.

Already in the past[255], public campaigns for the promotion of national products required the intervention of the ECJ in order to solve the conflicts. Within this matter, one of the most famous example is the "Buy Irish" campaign, led by the Irish government. In this case[256], the ECJ highlighted that the Irish initiative to promote the sale of Irish national products had the intent to penalize imports from other Member States. Such a patriotic purpose has been deemed in conflict with the spirit of the European Single Market.

However, the ECJ expressed a different position in the English "Apples and Pears" campaign to support production of specific varieties of English and Welsh apples and pears. This time[257], the campaign was considered legitimate:

The said provisions do not prevent such a body[258] from drawing attention, in its publicity, to the specific qualities of fruit produced within the Member State in

[254] Ignacio Carreño, Tobias Dolle and Yury Rovnov, (2017) , Country of Origin Labelling on the Rise in EU Member States – An Analysis under EU law and the EU's International Trade Obligations, in *European Journal of Risk Regulation*, 8, p. 423.

[255] For instance, the German *Absatzfondsgesetz* (AFG) of 1969 or the "Buy Greek" campaign in 1985. On this issue, please, refer to J. Jojnik, (2012), Free Movement of Goods in a Labyrinth: Can Buy Irish Survive the Crisis?, in *Common Market Law Review*, 49, pp. 291-326.

[256] Case C-249/81 *Commission* v *Ireland* ECLI:EU:C:1982:402. Available at; http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0249&from=EN (last access 23rd November 2017).

[257] Case C-222/82 *Apple and Pear Development Council* ECLI:EU: C:1983:370. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61982CJ0222&from=EN (last access 23rd November 2017).

[258] The first question addressed before the Court regarded the possibility to establish a development council for food production, under the rules on the common organization of the market in fruit and vegetables.

question or from organizing campaigns to promote the sale of certain varieties, mentioning their particular properties, even if those varieties are typical of national production; on the other hand, it would be contrary to Article 30 of the Treaty for such a body to engage in publicity intended to discourage the purchase of products from other Member States or to disparage those products in the eyes of consumers, or to advise consumers to purchase domestic products solely by reason of their national origin.[259]

Therefore, the ECJ stated that it is incompatible with EU law to promote local products merely on the basis of their national origin.
The same position has been held by the European Commission as well, that highlighted the need that "references to national origin should be subsidiary to the main message put over to consumers by the campaign and not constitute the principal reason why consumers are being advised to buy the product"[260].

This brief overview on the ECJ's case law shows the difficulty of balancing the national interests with the EU principles on free movement of goods. With this regard, mandatory country of origin labelling might be connected to public policies aimed at promoting domestic production. For this reason, till now, the European Commission seems to prefer voluntary COOL, thus the introduction of harmonized legislation on the matter looks unlikely.
In addition, compliance with the principle of free movement of goods requires conformity with the principle of mutual recognition (hereinafter, MR) as well. As a consequence, the provisions on COOL set by France and Italy apply only to national producers, while foreign ones are not obliged to do the same[261]. The risk, otherwise, would be to violate the principle of mutual recognition[262]. Under this principle,

[259] Case C-222/82 *Apple and Pear Development Council* ECLI:EU: C:1983:370, p. 4128.
[260] Commission communication concerning State involvement in the promotion of agricultural and fisheries products 86/C 272/03; 28.10.86; OJ C272/ 3; paragraph n. 2.3.1.
[261] For this reason, both the Italian and the French initiatives have been criticized by food business operators and their associations.
[262] The principle of mutual recognition (MR) has been described "as an ingenious innovation by economists, lawyers and political scientists alike" by J. Pelkmans (2007), Mutual recognition in goods. On promises and disillusions, in *Journal of European Public Policy*, Vol. 14, Issue 5, p. 699.
MR is born in the case law of the European Court of Justice (ECJ) and in the decision practice of the European Commission, aiming at removing unnecessary and disproportionate trade barriers. With regards to the case law, some milestones should be mentioned. First of all, the *Dassonville* case, of 1974. The ECJ, dealing with Article 28 EC Treaty, on quantitative import restrictions for goods and

markets, which are constituted by specific regulations for goods and thus are distinct, can be integrated. Indeed, MR can act as an "alternative to harmonization"[263] as it aims at ensuring that, in the context of the internal market, Member States (MS) "recognise and give effect to factual and legal situations of the other MS"[264].

On the WTO's side, during the WTO-TBT informal meeting held on the 26th of January 2017 the United States have strongly criticized the measures set out in Italy and France. Indeed, although the above-discussed texts are applied only to goods produced by business operators settled in Italy and France, the US delegate contested both provisions. It should firstly be verified whether the Italian and French governments have properly followed the notification procedure established in the TBT Agreement, starting bilateral meetings with single states delegate as well as with the EU Commission. In this regards, some diplomatic meetings have been already hold in February 2017. If an agreement will not be reached it is likely that the USA will start the procedure of dispute settlement, hoping that in the meantime the American administration will not hope for retaliatory measures, such as increasing custom duties.

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measures of equivalent effect, explains that this latter notion covers "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" (C-8/74 of 8.07.1974). Secondly, the *Cassis de Dijon* case, in which the ECJ stated that "There is no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, (products) should not be introduced into any other Member State" (C-120/78 of 20.07.1978). Finally, the *Foie Gras* case, in which the ECJ required Member States to include in their technical regulations a mutual recognition clause, according to which Member States must allow the import of products which are in conformity with the legislation of another Member State (C-184/96).
Mutual recognition is usually described as what is needed to remove barriers to trade without depriving the states of their regulatory powers to maintain or enact stricter domestic regulations. However, some scholars have underlined the misunderstanding on which this interpretation of such principle is underpinned. Indeed, under a mutual recognition rule, the Member States lose their power to enact mandatory regulations for domestic markets, as they can only establish mandatory regulations for domestic producers, who still have to comply with national legislation. "Consequently, under mutual recognition the regulatory autonomy of a state over its domestic market is lost". W. Kerber and R. Van den Bergh (2008), Mutual Recognition Revisited: Misunderstandings, Inconsistencies, and a Suggested Reinterpretation, in *Kyklos*, Vol. 61, 2008, N. 3, p. 454.

[263] S. K. Schmidt (2007), Mutual recognition as a new mode of governance, in *Journal of European Public Policy*, Vol. 14, Issue 5, p. 671.

[264] Wouter van Ballegooij (2015), *The nature of mutual recognition in EU Law*, Intersentia, p.56.

PART II

ORIGIN'S EFFECTS ON TRADE AND CONSUMERS

Increasing concerns on safety, health and environments led governments to rely more frequently on the potential of labels to inform consumers on products' features as well as ways of production. The use of labels as a means for providing information is likely to grow as "scientific evidence accumulates and the knowledge of individuals and policymakers become more and more nuanced and expert"[265]. Indeed, the developing interest on labels is due to their capability to respond to consumers' demands and even influence their preferences, with consequences on the competitive relationship among products[266].

Country of origin labelling is a perfect example of how the indications on a product's label have the potential to affect both trade and consumers. For this reason, this part will address the issue of origin labelling from both perspectives.

Particularly, Chapter 4 is dedicated to trade related issues within the international as well as European market. It will answer the question: which is the impact of rules of origin on trade? Chapter 5, instead, analyses how country-of-origin labelling is perceived by consumers and to what extent it can model their consumption choices.

[265] Tania Voon, Andrew Mitchell and Cathrine Gascoigne (2013), "Consumer information, consumer preferences and product labels under the TBT Agreement", in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to trade*, Cheltenham: Edward Elgar Publishing Limited, p. 454.

[266] Tania Voon, Andrew Mitchell and Cathrine Gascoigne (2013), "Consumer information, consumer preferences and product labels under the TBT Agreement", in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to trade*, Cheltenham: Edward Elgar Publishing Limited, p. 465.

CHAPTER 4

INTERNATIONAL AND EUROPEAN RULES OF ORIGIN

International trade has significantly increased over the last half century and because of it, concerns regarding imports from foreign countries have arisen[267]. This chapter provides an overview on the existing rules of origin under international treaties as well as under the Union Customs Code.

In particular, the rode towards the harmonization of international rules of origin will be described. Special focus will be on the interaction between the indication of origin on products' labels and principles of free trade within the WTO system.

The analysis of the Union Customs Code will provide the opportunity to describe preferential and non-preferential rules of origin and a description of product-by-product ones will follow. Some considerations on the functioning of the rules of origin within globalized food supply chains will lead the chapter to a conclusion.

4.1 Briefly describing ROOs: rationale and costs

Rules of origin are a set of procedures used in order to determine the national source of a product. They are a key component of a state's customs and trade policy but, especially in recent times, they have been very controversial. Indeed, the rationale for Rules of Origin (hereinafter, ROOs) has been described as "differentiated restrictions on international trade"[268].

The pre-eminence of internationalized production[269], together with the growth of

[267] Markus Wagner (2013), "International Standards", in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to trade*, Cheltenham: Edward Elgar Publishing Limited, p. 238.

[268] As a matter of fact, in a completely open world economy, there would not be a demand for rules of origin because it would be immaterial where goods and services originated. E. Vermulst (1992), Rules of Origin as Commercial Policy Instruments – Revisited, in *Journal of World Trade*, Vol. 26, p. 61.

[269] K. N. Harilal and P. L. Beena (2005), Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives, in *Economic and Political Weekly*, Vol. 40, p. 5419.

global trade[270], has brought into eminence these rules for the establishment of the "origin" of traded products. There are two main reasons for determining it:

- to distinguish foreign from domestic products, when imports are not to be granted national treatment;
- to define the conditions under which a foreign product will be considered as originating in a preference receiving country[271].

In addition, a tendency of using them as protectionist tools per se has to be pointed out[272].

However, rules of origin might have a wider scope, as they play a role in the application of laws relating to marking[273], labelling, and advertising; duty drawback provisions; government procurement; countervailing duty and safeguard proceedings and quantitative restrictions, including import prohibitions and trade embargoes[274].

ROOs exist in order to make sure that countries that have not signed a free trade area agreement do not take advantage of it. They ensure the parties of a Preferential Trade Agreement (hereinafter, PTA) that tariff benefits are limited to them only and in free trade area (hereinafter, FTA) they are supposed to prevent trade deflection as well. On the one hand, both the mentioned targets are better achieved if rules of origin are more stringent but, on the other hand, the stricter the origin rules, the lower would be

[270] E. Vermulst (1992), *Rules of Origin as Commercial Policy Instruments – Revisited*, in *Journal of World Trade*, Vol. 26, talks about "regionalization of the world economy through creation of trading blocs".
[271] In a trade preference scheme, preference-receiving-countries (or beneficiary countries) are those that benefit from lower tariffs or duty free entry for eligible products from preference giving countries (or donor countries).
[272] Particularly, ROOs might be used in order to protect the producers of the intermediate goods, so that a State that want to protect its intermediate good producing industry will opt for stringent rules of origin for the final good, while in the opposite situation, the State is likely to prefer more liberal rules of origin. Moreover, a protectionist goal based on ROO might depend on the so called "privatization" of trade policy, term that indicates the influencing role that industrial lobbies are likely to have when determining similar rules.
[273] As C. Satapathy (1998), Rules of origin: a necessary evil?, in *Economic and Political Weekly*, Vol. 33, N. 35, p. 2270, suggests, it is of great importance to bear in mind that rules of origin might impact on origin marking requirements, creating a potential barrier to trade.
[274] R. Falvey and G. Reed (2000), *Rules of Origin as commercial policy instruments*, Research Paper 2000/18, p. 1.

the chance of a net trade creation[275]. Generally speaking, FTA should positively impact on trade as they generate the trend to shift from inefficient home sources to efficient member sources but such positive impulses are diminished within higher compliance cost of rules of origin. Nevertheless, ROOs might also bring a trade diversion effect[276], inducing firms to shift suppliers in order to meet the rules of origin[277]. Hence, "the success of a PTA, in terms of net trade creation"[278], also depends on them.

In addition, ROOs are linked to two main types of costs, such as production and administrative costs, both of them with the potential to introduce a protectionist bias[279]. It has been estimated that the costs associated with meeting origin requirements range between 3 and 5 percent of final product prices[280]. About the first above-mentioned cost - namely production costs - a PTA without rules of origin would be highly liberalized. On the opposite, if stringent rules of origin are set, the potential of the PTA to boost trade would be diminished by the increasing costs of input for the intra-PTA final goods producers[281]. Administrative costs, instead, mostly derive from the bookkeeping costs - such as the certification of the origin of the product for the exporter - as well as the verification of that origin for the customs authorities. Not to mention that the ability to prove consistency with the rules may be very hard, especially for small companies in developing and transition economies, as it requires sophisticated and expensive accounting procedures. Indeed, the costs of the proof of origin may be prohibitive in countries where customs mechanisms are not well developed. Hence, even though producers are able to meet rules of origin's

[275] K. N. Harilal and P. L. Beena (2005), *Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives*, in *Economic and Political Weekly*, Vol. 40, p. 5420.
[276] Trade is diverted from a more efficient exporter towards a less efficient one by the formation of a free trade agreement or a customs union.
[277] Firms will usually prefer to switch from third countries suppliers to partner nations ones. P. Augier, M. Gasiorek, C. Lai Tong, P. Martin and A. Prat (2005), The Impact of Rules of Origin on Trade Flows, in *Economic Policy*, Vol. 20, pp. 576-578.
[278] K. N. Harilal and P. L. Beena (2005), *Reining in Rules of Origin-Based Protectionism: A Critique of WTO Initiatives*, p. 5420.
[279] A. Estevadeordal and K. Suominen (2003), *Rules of Origin in FTAs in Europe and in the Americas: issues and implications for the EU-Mercosur Inter-Regional Association Agreement*, INTAL-ITD Working paper 15, p. 8.
[280] O. Cadot and J. de Melo (2008), Why OECD countries should reform rules of origin, in *The World Bank Research Observer*, Vol. 23, N. 1, p. 97.
[281] The argumentation is highly technical. For a deeper understanding of the economic model developed see J. Ju and K. Krishna (1998), *Firm behavior and market access in a Free Trade Area with rules of origin*, NBER Working paper N. 6857.

requirements, they might not receive preferential access to the free trade area. The customs authorities may not accept their certificates proving the origin rather than the costs of such proof are high relative to the duty reduction that is available[282].

Finally, one could wonder what impact ROOs might have on trade over time. Here it is sufficient to say that there are two possible answers. In the first scenario, as ROO's selectivity in the last years has increased, this tendency might go on, leading to obstructiveness of trade. In the second scenario, as some scholars[283] suggested, ROO's effects could diminish over time thanks to the so-called "ROO learning", in so far as exporters will learn to comply with such rules and to consequently adjust their production strategies, taking advantages of the permissive tariff regime.

Is it possible to erase these aforementioned rules of origin's effects? Some principles might be useful[284], in order to, at least, minimize them:

- simplicity, precision and transparency, in order to avoid administrative discretion;
- administrative simplicity, so that such costs can decrease;
- flexibility, in order to be more adaptive to the continuously changing economic context;
- negotiability, so that parties can easily change them.

4.2 International harmonization of rules of origin

[282] Even though the argumentation is developed by the authors referring, specifically, to the European Customs Union, it can generally be extended to ROOs working in PTAs. Please, see P. Brenton and M. Manchin (2002), *Making EU trade agreement work. The Role of Rules of Origin*, Centre for European Policy Studies (CEPS) Working Document N. 183, p. 15, available on the Internet at http://www.ceps.be (last access 13th August 2016).

[283] A. Estevadeordal and K. Suominen (2005), *What are the effect of rules of origin on trade?*, p. 32, available on the Internet at: http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/288464-1119888387789/RulesOfOrigin_TradeEffects.pdf (last access 12th August 2016). In order to prove this statement the authors point out a mathematical model at pp. 25-28.

[284] P. Augier, M. Gasiorek, C. Lai Tong, P. Martin and A. Prat (2005), *The Impact of Rules of Origin on Trade Flows*, p. 603 and P. Brenton (2005), "Preferential rules of origin", in P. Brenton and I. Hiroshi Imagawa, *Rules of Origin, Trade and Customs*, p. 164.

A brief historic overview of the events that led to the current system of rules of origin will be provided in the next two sections and displayed in Table 4, at the end of the paragraph.

4.2.1 First steps

A harmonized preferential set of rules of origin was discussed for the first time during the United Nations Conference on Trade and Development (UNCTAD), concerning the establishment of a Generalized System of Preferences (GSP) that considers origin at a systemic level[285]. However, at the end of the first round of negotiations, preference-giving countries opted to retain their own origin systems and extend them with some adjustments to the GSP. In the absence of multilateral disciplines[286], another international institution, the Customs Cooperation Council, expressed its interest in the harmonization of the rules of origin. Indeed, the Customs Cooperation Council[287], based in Brussels, gathering customs experts from several countries[288], codified a general concept of origin within the Kyoto Convention[289] negotiations in 1973.

Nevertheless, the guidelines contained in Annex D.1 of the Convention were not detailed enough and left member states free to choose alternative methods for the

[285] The Generalized System of Preferences (GSP) was presented by the first Secretary-General of UNCTAD, Raul Prebisch, at the First Session of the United Nations Conference on Trade and Development (UNCTAD I) in 1964. The idea of the GSP was ultimately adopted in New Delhi, in 1968, during UNCTAD II.

[286] As a matter of fact the General Agreement on Tariffs and Trade (GATT, 1947) does not include any specific regulations on origin matters.

[287] Created on the 15th December 1950 by the Brussels Convention. In particular, the Customs Cooperation Council was a predecessor of the World Customs Organization (WCO). In 1947 thirteen European Governments represented in the Committee for European Economic Co-operation set up a Study Group. Its task was to examine the possibility of establishing one or more inter-European Customs Unions based on the principles of the General Agreement on Tariffs and Trade (GATT). In 1948, the Study Group established two committees. The first one was the Economic Committee, predecessor of the Organization for Economic Co-operation and Development (OECD); the secondo ne was the Customs Committee that became the Customs Co-operation Council (CCC). In 1952, the Convention formally establishing the CCC came into force. The Council is the governing body of the CCC and the inaugural Session of the Council was held in Brussels on 26 January 1953, with seventeen European countries attending. In 1994 the Council adopted the working name World Customs Organization, with 180 Customs administrations which operate on all continents and represent all stages of economic development. Today, WCO Members are responsible for processing more than 98% of all international trade. http://www.wcoomd.org/en/about-us/what-is-the-wco/au_history.aspx (last access 19th October 2017).

[288] Such as Austria, Belgium, Denmark (with the Faroe Isles and Greenland), France, Greece, Iceland, Ireland, Italy (with San Marino), Luxembourg, Netherlands, Norway, Portugal (with Madeira and the Azores), Sweden, Switzerland (with Liechtenstein), Turkey, and the United Kingdom.

[289] *International Convention on the Simplification and Harmonization of Custom Procedures*, adopted in Kyoto in 1974 by the Customs Cooperation Council at its 41st and 42nd sessions.

determination of the origin. Annex D.1 distinguishes between the criterion of goods "wholly obtained" and the one of "last substantial transformation", "where two or more countries have taken part in the production of the goods"[290]. Since the Kyoto Convention gave ample discretion to signing countries, leaving unresolved the issue of harmonized and non-discriminatory rules of origin, the contracting parties to the GATT decided to discuss further reforms during the Uruguay Round[291] that started in 1986 and ended in 1994. However, although participating countries recognized the need to provide transparency to regulations and practices regarding rules of origin, one could question the usefulness of such a rule within a free trade agreement[292]. Considering how technical the task of the harmonization of the rules of origin system is, member states agreed to embark on a three-year work programme, starting after the conclusion of the Uruguay Round.

4.2.2 Further development

The Agreement on Rules of Origin (hereinafter, ARO) established a Harmonization Work Programme (HWP), aiming at harmonizing non-preferential rules of origin. It requires WTO members to assure that their origin rules do not have distorting effects on international trade and that they are administered in a uniform and impartial manner. The main goals are to bring further liberalization and expansion of world trade as well as to impose precise disciplines on the application of Rules of Origin both during the transition period and after the harmonization of non-preferential rules of origin. About the former goal, it has to be admitted that rules of origin actually represent a second-best solution[293], as they still are a way for discriminating products depending on the originating status, and, consequently, treat differently similar goods. Due to the highly technical knowledge that this subject requires, Article 4 of the ARO established the Committee on Rules of Origin (CRO) in WTO and the Technical Committee on Rules of Origin (TCRO) at the World Customs Organization (WCO),

[290] Kyoto Convention, Annex D1 concerning rules of origin, Introduction.
[291] E. N. Varona (1994), "Rules of Origin in the GATT", in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin*, Ann Arbor: The University of Michigan Press, p. 365.
[292] As G. N. Horlick and Michael A. Meyer (1994), "Rules of Origin from a policy perspective", in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin*, Ann Arbor: The University of Michigan Press, p. 403, if MFN tariffs were the only regulation, there would be no logical need for it but "rules of origin are usually the stepchildren of other discriminatory devices".
[293] J. A. LaNasa (1996), Rules of origin and the Uruguay Round's effectiveness in harmonizing and regulating them, in *The American Journal of International Law*, Vol. 90, p. 640.

each of them with its own set of responsibilities[294]. On the one hand the TCRO carried out the task of the technical negotiations of the HRO; on the other hand, the CRO was intended as the so-called "political" committee, dealing with policy questions rather than technical ones. Despite this, later in the negotiations a good part of the technical work was also conducted in the CRO to devise technical solutions for the most intractable issues[295]. The CRO and the TCRO set an overall architectural design, based on general rules and three annexes. Particularly, the general rules are established in eight Articles, provisionally entitled (1) Scope of Application; (2) the Harmonized System; (3) Definitions; (4) Determination of Origin; (5) Residual Rules of Origin; (6) Minimal Operations or Processes; (7) Special Provisions; (8) De Minimis. The three Appendixes are (I) Wholly obtained goods; (II) Product rules – substantial transformation; (III) Minimal operations or processes[296].

Moreover, in June 1999, the WCO Council adopted the revised Kyoto Convention, in order to boost trade facilitation. Such a revised version entered into force on 3rd February 2006. The main identified targets regard, *inter alia*, transparency and predictability of Customs actions; standardization and simplification of the goods declaration and supporting documents; maximum use of information technology; minimum necessary Customs control to ensure compliance with regulations. The revised Convention also contains new and obligatory rules for its application which all Contracting Parties must accept without reservation[297].

Within the WTO's Doha Round – started in November 2001 - a "Ministerial Decision on Preferential ROO for Least-Developed Countries (LDC)" has been adopted[298], focusing on the need of ensuring transparent and simple preferential rules for those countries. Finally, in 2011, the WTO boosted its involvement in ROOs issues by launching the "Made in the World Initiative[299] (MiWi)". This initiative aims at

[294] For the CRO they are clearly defined in Article 4, Paragraphs 1 and 2 and Article 6 of the ARO; regarding the TCRO they are contained in Annex 1 of the ARO.
[295] Stefano Inama (2008), *Rules of Origin in International Trade*, Cambridge, p. 22.
[296] Please, refer to https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm and, for the text of the Agreement to https://www.wto.org/english/docs_e/legal_e/22-roo.pdf (last access 9th November 2017).
[297] For the text of the Revised Kyoto Convention, please, refer to http://www.wcoomd.org/en/Topics/Facilitation/Instrument%20and%20Tools/Conventions/pf_revised_kyoto_conv/Kyoto_New (last access 8th November 2017).
[298] WTO, Ministerial Conference, Ninth Session, Bali, 3–6 December 2013, *Preferential Rules of Origin for Least-Developed Countries*, WT/MIN(13)/42, WT/L/917, 11 December 2013.
[299] The term has been first used by former WTO Director-General Pascal Lamy, who said "more and

sharing projects, experiences and practical approaches in measuring and analysing trade in value added[300]. The recent focus on trade in value added reflects the growing awareness among international organizations of the rapid changes in global manufacturing.

Usually PTAs clarify which types of operations are not deemed enough to confer origin, such as, *inter alia*, bottling, placing in boxes, bags and cases; assembly of parts; operations for assuring that the products are well preserved while shipped. Moreover, as non-preferential rules of origin's rationale is to assign origin to all goods imported into a country, there must be an origin determination in all cases. Therefore, secondary rules should be available for those cases in which the primary origin criterion is not met (change of the heading, processing requirements or value-added criteria). Even though the ARO itself is silent on this point, members considered that residual rules should apply. This way, the question is shifted to what should be the sequence of application for residual rules and their implementation.

As a matter of fact, some other methods can be applied for the determination of the origin, namely *cumulation*, *tolerance* (or *de minimis*) and *absorption* (or *roll-up*) principles. In particular, within the *cumulation* criterion, the imported materials from identified countries are considered as domestic products[301]; *tolerance* rules allow to use a certain percentage of non-originating materials without affecting the origin of

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more products are *Made in the World*", 15 October 2010. Available on Internet at http://www.wto.org/english/news_e/sppl_e/sppl174_e.htm (last access 12 August 2016). Particularly, Pascal Lamy said: "[…] the concept of country of origin for manufactured goods has gradually become obsolete as the various operations, from the design of the product to the manufacture of the components, assembly and marketing have spread across the world, creating international production chains. […] What we call "Made in China" is indeed assembled in China, but what makes up the commercial value of the product comes from the numerous countries that preceded its assembly in China in the global value chain, from its design to the manufacture of the different components and the organization of the logistical support to the chain as a whole. In other words, the production of goods and services can no longer be considered "monolocated", but rather, "multilocated". As a result, the notion of "relocation", which made sense in the past when referring to the production of a product or service at a single location, loses much of its meaning."

[300] An example of a project covered by the MiWi is the joint OECD–WTO Trade in Value-Added (TiVA) database, which aims to offer data and statistics that more accurately reflect today's global trade landscape. For a better understanding, please refer to http://www.oecd.org/sti/ind/measuringtradeinvalue-addedanoecd-wtojointinitiative.htm (last access 3rd November 2017).

[301] There are three kinds of cumulation: bilateral, diagonal (or partial) and full. Within the former, originating inputs produced in accordance with the relevant rules of origin and hailing from a partner country are deemed as originating inputs when used in a country's exports to that partner. Diagonal cumulation takes place on a regional basis, since it allows inputs, coming from partner in the specified region, to be further processed in another partner country without undermining the originating status from the country where the processing phase is undertaken. In the latter, which is actually rare, any processing activities occurred in any countries of a regional group can be deemed as qualifying content.

the final product; finally, within the *absorption* principle, inputs that have acquired originating status by satisfying the relevant rules of origin can be treated as being of domestic origin in any further processing activities that will be carried out.

Table 4. International harmonization of ROOs

International Organisation	Treaty	Year
UNCTAD I	GSP presented	1964
UNCTAD II	GSP adopted	1968
Customs Cooperation Council (CCC)	Kyoto Convention	1974
WTO Uruguay Round	Agreement on Rules of Origin	1994
CCC	Revised Kyoto Convention	1999
WTO Doha Round	Ministerial Decision on Preferential ROO for LDC	2001
WTO	Made in the World Initiative	2011

4.3 The Union Customs Code

The Union is based upon a customs union. It is advisable, in the interests both of economic operators and of the customs authorities in the Union, to assemble current customs legislation in a code. Based on the concept of an internal market, that code should contain the general rules and procedures which ensure the implementation of the tariff and other common policy measures introduced at Union level in connection with trade in goods between the Union and countries or territories outside the customs territory of the Union, taking into account the requirements of those common policies. Customs legislation should be better aligned on the provisions relating to the collection of import charges without change to the scope of the tax provisions in force[302].

The establishment of the customs union is at the very core of the system created by the EU Treaties[303] and the free movement of goods[304] represents a *conditio sine qua*

[302] "Whereas" 9, *European Union Customs Code*, Regulation (EU) N. 952/2013.
[303] Article 28, TFUE.
[304] Free movement of goods within the EU and the WTO systems are quite different: while EU law prevents a large category of national obstacles to trade, taking into account a measure's effects, the WTO preclude a smaller number of measures and its focus is primarily on those measures' purpose. Please, see T. Perišin (2008), *Free movement of goods and limits of regulatory autonomy in the EU and WTO*, Asser Press, pp. 12-15.

non for the creation of a common market within the Union[305]. As far as imports from third countries are concerned, the main feature of the customs union is the Common Customs Tariff (CCT), hence it is crucial to identify where goods come from.

The definition of the origin of goods is in the Union Customs Code (hereinafter, UCC), Regulation (EU) N. 952/2013[306], at Chapter 2, Articles 59-63. While the basic provisions are in Council Regulation (EEC) N. 2913/1992 and in the so called Modernised Customs Code[307], after many implementing modifications on 9 October 2013 the European Parliament and the Council adopted the new customs regulation[308], entered into force on 30.10.2013 and applied from 1 May 2016. As Table 5 displays, two other legal provisions have to be taken into account within the UCC architecture, namely the Commission delegated regulation (EU) No 2015/2446[309], supplementing certain non essential elements of the UCC (the UCC Delegated Act) as well as the Commission implementing regulation (EU) No 2015/2447[310], having the purpose to ensure uniform implementation and application of procedures by all Member States (the UCC Implementing Act).

[305] It is of great importance to bear in mind that Article 36 TFEU contains a list of matters that may be the basis for justification of barriers to inter-State trade in goods, since such a barrier is not automatically unlawful. "Finding a trade barrier justified serves as an expression of the limits of the judicial role in market-making. Such persisting obstacles to trade fall to be addressed, if they are to be addressed at all, by the EU legislature—by the harmonization of laws. Harmonization at EU level results in a common set of rules for doing business, and within that common set of rules is found the political choice about exactly what form and intensity the EU's (re-)regulatory scheme should take". Please, refer to S. Weatherill (2012), Free movement of goods, in *International and Comparative Law Quarterly*, Vol. 61, p. 547.

[306] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code; OJEU L 269/1; 10.10.2013. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0952 (last access 8th November 2017).

[307] Regulation (EC) No. 450/2008 of the European Parliament and the Council, of 23 April 2008, laying down the Community Customs Code (Modernised Customs Code).

[308] As stated at "Whereas" 56 "in order to simplify and rationalise customs legislation, a number of provisions contained in autonomous Union acts have, for the sake of transparency, been incorporated into the Code. Council Regulation (EEC) No 3925/91 of 19 December 1991 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra- Community sea crossing, Regulation (EEC) No 2913/92, Council Regulation (EC) No 1207/2001 of 11 June 2001 on procedures to facilitate the issue or the making out in the Community of proofs of origin and the issue of certain approved exporter authorisations under the provisions governing preferential trade between the European Community and certain countries, and Regulation (EC) No 450/2008 should therefore be repealed".

[309] Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code; OJEU L343/1; 29.12.2015. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2446&from=ES (last access 8th November 2017).

[310] Commission Implementing Regulation (EU) No 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European

Table 5. The UCC Architecture

Regulation (EU) N. 952/2013	Laying down the UCC
Commission delegated regulation (EU) No 2015/2446	UCC Delegated Act
Commission implementing regulation (EU) No 2015/2447	UCC Implementing Act

Further details on the concept of the origin of goods within the UCC will be provided in section 4.4.1, concerning non-preferential rules of origin. Here, it is worth mentioning that the definition of the origin of goods plays a pivotal role in order to determine the import and export duties applicable as well as whether the goods are subject to any non-tariff measures[311] established as commercial policy. Moreover, the identification of the origin allows consumers to understand where those goods actually come from.

The indication of the country of origin is crucial for various reasons:

- labelling of goods (*made in*…)
- implementation of anti-dumping rules;
- uniform application of the Common Customs Tariff (CCT);
- determination of export refunds where applicable.

Determination of the origin of goods is based on an "allocation of responsibilities as between the authorities of the exporting country and those of the importing country"[312], where the former establishes the origin of the good in question, while the latter accepts the determinations legally made by the authorities of the exporting country.

Recent debates about the validity of rules of origin led the European Commission to publish, on the 18th December 2003, a Green Paper entitled "On the Future of Rules of Origin in Preferential Trade Agreements"[313]. This contribution is an overview of

Parliament and of the Council laying down the Union Customs Code; OJEU L343/558; 29.12.2015. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2447&from=EN (last access 8th November 2017).

[311] For instance surveillance or safeguard measures, quantitative restrictions or limits and import or export prohibitions.

[312] L. W. Gormeley (2009), *EU law of free movement of goods and customs union*, Oxford: Oxford University Press, p. 48.

[313] European Commission (2003), 'On the Future of Rules of Origin in Preferential Trade Agreements',

the main problems posed by the current ROOs structure and names three key areas where reforms are needed:

a. the criteria for acquiring origin and the legal framework surrounding that process;
b. greater supervision in applying origin assignments;
c. a procedure for ensuring an optimal division of responsibilities between traders and authorities[314].

Therefore, the Green Paper deals more with compliance issues than with proposals for the substantive reform of ROOs. Although the European Commission suggested a value-added percentage requirement as the basis for the determination of a substantial transformation, the basic rules for conferring the origin eventually remained the same[315].

4.4 Preferential and non-preferential ROOs

Section 1 and Section 2, of Chapter 2, Reg. (EU) N. 952/2013, deal with, respectively, non-preferential and preferential origin. The distinction between these two groups stems from the existence of particular agreements or treaties among countries. The rules of preferential origin aim to limit customs preferences - including other equivalent measures -, contained in specific agreements. This means that only the products that originate from those States which benefit from that unilateral measure are granted with special customs treatments. This kind of agreements with specific countries usually reduce import duties or, sometimes, even allows a total exemption for products classes, so that trade is facilitated.

4.4.1 Non-preferential rules of origin

Articles 59-63 of the European Customs Code concern non-preferential rules of origin. Such rules refer to all import transactions of products coming from those countries that do not have a particular agreement with the European Union. Therefore, in these cases, the Common Customs Tariff is applied. Indeed, the product's origin

COM (2003) 787 final.
[314] COM (2003) 787 final, p. 5.
[315] D. Geraets, C. Carroll and A. R. Willems (2015), Reconciling rules of origin and global value chains: the case for reform, in *Journal of International Economic Law*, Vol. 18, p. 298.

does not permit the application of preferential import duties in the country of destination. In addition, rules on non-preferential origin are applied in those situations in which, even though states have reached an agreement, a consignment of goods is not accompanied by the proper documentation that prove the actual origin of a product[316].

Currently, as there are no specific rules about the determination of non-preferential origin of goods, Member states follow the general principles contained in the Kyoto Convention, of 18 May 1973[317] as well as the disciplines established by the WTO Agreement on Rules of Origin. The Kyoto Convention recommends to conform to its general principles both non-preferential and preferential rules of origin. Thus, such a recommendation is referred to all kinds of rules of origin that each country or free trade area might have agreed upon. The purpose is to make the interpretations of trade rules by customs authorities easier.

Principles for the origin acquisition have remained unchanged under the UCC. The general rule is that goods wholly obtained or produced in a single country[318] are considered as originating there. Difficulties stem from the fact that nowadays an increasing number of goods is not produced in a single country. Historically products used to be manufactured with few foreign inputs other than raw materials[319]. In contrast, currently, the production phases occur in different states, in order to maximize the economies of scale. In these cases the question of the origin is complex and requires further analysis. Changes in trading patterns have made the economic

[316] Massimo Fabio (2012), *Customs Law of the European Union*, Wolters Kluwer, §3.02 [A].

[317] The Kyoto Convention was accepted by Council Decision 77/145/EEC of 3 June 1977.

[318] Regulation (CE) 2913/1992, at Article 23, Paragraph 2, explains what this expression means: a) mineral products extracted within that country; b) vegetable products harvested therein; c) live animals born and raised therein; d) products derived from raised animals therein; e) products of hunting or fishing carried on therein; f) products of sea-fishing and other products taken from the sea outside a country's territorial sea by vessels registered or recorded in the country concerned and flying the flag of that country; g)goods obtained or produced on board factory ships from the products referred to in head (f) originating in that country, provided that such factory ships are registered or recorded in that country and fly its flag; h) products taken from the seabed or subsoil beneath the seabed outside the territorial sea provided that that country has exclusive rights to exploit that seabed or subsoil; i) waste and scrap products derived from those manufacturing operations and used articles, if they were collected therein and are fit only for the recovery of raw materials; j) goods which are produced therein exclusively from goods referred to in heads (a)-(i) or from their derivatives, at any stage of production. Finally, as stated at Article 23, Paragraph 3, the term "country" for these purposes covers that country's territorial sea.

[319] J. Waincymer, "Rules of Origin: commentary", in E. Vermulst, P. Waer and J. Bourgeois (eds.), *Rules of Origin*, Ann Arbor: The University of Michigan Press, p. 409.

impact of rules of origin greater. At the same time, the development in transports as well as the inclusion of many developing countries in international trade have accelerated this trend.

In almost all countries, legislation provides the applicable rules, that define which working or processing operation is able to confer the status of product originated in the country where such task was carried out.

The European Union law made the same choice. At Article 60, Paragraph 2, Regulation (EU) 952/2013, it is stated that *Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture*. This way, Article 60 of UCC reflects the distinction between goods wholly obtained in one single country and goods manufactured in more than one country or territory. In order to determine the origin it is necessary to distinguish, among different operations, which one is *sufficient* to confer the origin and which one, oppositely, is *not sufficient* for its determination. Once the sufficient operation is identified, the problem is shifted to understand what is the meaning of:

a. the term *sufficient*;
b. the *last, substantial, economically-justified processing or working*.

Not only the principles of origin acquisitions have remained the same but also the wording of Article 60 of the UCC equals the text of Article 24 of the European Community Customs Code (hereinafter, CCC). This finding makes the interpretation of Article 24 of the CCC by the European Court of Justice still applicable[320]. In light of this, *the processing or working is «substantial» […] if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before the process or operation. Activities altering the presentation of a product for the purpose of its use, but which do not bring about a significant quality change in its properties, are not of such a nature as to determine the origin of the product*[321].

[320] Laura Carola Beretta (2016), Impacts of the European Union Customs Code Non-preferential Rules of Origin on the "Made in ..." Indication, in *Novità Fiscali*, N. 12, p. 33.

[321] Paragraph 13, Case 93/83 Zentrag. Available at http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30d6e3970abe50d246248c4188c655f5ed8e.e34KaxiLc3qMb40Rch0SaxyMc3b0?text=&docid=92459&pageIndex=0&doclang=EN&mode=lst&

Articles 32-34 of the Delegated Act expressively refer to Article 60 of the UCC. In particular, under Article 32, the country or territory in which the rules set out in Annex 22-01 to the UCC Delegated Act are fulfilled are those where the last substantial processing or working occurred. Hence, Annex 22-01 contains the product specific rules for the non-preferential origin determination. Article 34 of the UCC, instead, lists the minimal operations that do not confer the origin[322]. Interestingly, they are applicable to all categories of goods, while under the old provisions they were part of a set of articles referred to textiles and textile articles[323].

In addition to the general rule there are other criteria for determining the origin of a good. Particularly, three methods can be identified:

1. change of tariff heading: when the goods obtained after a working or processing phase has to be classified under a tariff heading different from that applied to each of the products worked or processed. Even though this is the most common criterion, it is seldom the only method applied;
2. technical test, meaning a list of manufacturing or processing operations that confer or not the "origin status" from a certain country;
3. *ad valorem* percentage, which requires that either a maximum import content of non-originating materials is utilized, or that a certain percentage of domestic content is added.

In order to provide a practical guidance and promote the uniform interpretation of non-preferential rules of origin, the European Commission had published on the website of its Directorate General Taxation and Customs Union, the list of rules

dir=&occ=first&part=1&cid=1616497 (last access 8th November 2017). See also paragraph 6 of the previous case Case C-49/76 Gesellschaft für Überseehandel. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0049&from=EN (last access 8th November 2017).

[322] These are the minimal operations listed in Article 34 of the UCC Delegated Act: (a) operations to ensure the preservation of products in good condition during transport and storage; (b) simple operations consisting of the removal of dust, sifting or screening, sorting, classifying, matching, washing, cutting up; (c) changes of packing and the breaking-up and assembly of consignments, the simple placing in bottles, cans, flasks, bags, cases, boxes, fixing on cards or boards, and all other simple packaging operations; (d) putting up of goods in sets or ensembles or putting up for sale; (e) affixing of marks, labels or other similar distinguishing signs on products or their packaging; (f) simple assembly of parts of products to constitute a complete product; (g) disassembly or change of use; (h) a combination of two or more operations specified in points (a) to (g). Compared to Article 38 of the Implementing Provision of the Community Customs Code, the mentioned provision adds letters (a), (c), (g).

[323] Laura Carola Beretta (2016), Impacts of the European Union Customs Code Non-preferential Rules of Origin on the "Made in ..." Indication, in *Novità Fiscali*, N. 12, p. 33.

proposed by the EU in the context of the WTO harmonization of non-preferential rules of origin, foreseen by Article 9 of the WTO Agreement on Rules of Origin (ARO)[324]. However, the number of different opinions on these matters has hindered the negotiation process.

Finally, it should be borne in mind that, when it comes to national legislation concerning the origin indication – or the "Made in…" -, if EU provisions are missed, Member States can decide whether to regulate it. However, any domestic law has to comply with EU law and principles.

4.4.2 Preferential origin

The concept of preferential origin refers to all those situations in which there is a commercial agreement between two or more States. It means that a more favourable customs regime is applied to the products that hailed from those countries[325].

Rules of origin are an integral part of preferential trade agreements, from bilateral and regional free trade agreements to the nonreciprocal preferences that industrial countries offer to developing countries[326]. Indeed, a multilateral or bilateral agreement - or even a unilateral concession - must be in force[327], so that customs duties are excluded or at least have a lower impact on transactions. For these reasons, rules on preferential origin are more stringent than those on non-preferential origin. For instance, they usually specify, in accordance with the direct transport rule, that the preferential treatment is applied to those products that are shipped directly to the country of destination, without passing through other countries.

Since preferential tariff measures are applied only to those products that have the status of "originating products" from specific countries, it is of great importance to

[324] Laura Carola Beretta (2016), Impacts of the European Union Customs Code Non-preferential Rules of Origin on the "Made in ..." Indication, p. 34.

[325] For instance, preferential arrangements have been adopted with the EFTA countries (Switzerland; Iceland; Norway; Liechtenstein) or some Mediterranean countries (*inter alia* Turkey; Algeria; Israel; Morocco; Egypt).

[326] P. Brenton (2005), Preferential rules of origin, in P. Brenton and I. Hiroshi Imagawa, "Rules of Origin, Trade and Customs." In L. De Wulf and J. B. Sokol (eds.) *The Customs Modernization Handbook*, Washington, DC: World Bank. http://sitere sources.worldbank.org/INTEXPCOMNET/Resources/Customs_Mod ernization_Handbook.pdf. , p. 161.

[327] Article 64 EU Customs Code, referring to Article 56, Paragraph 2, clarifies that preferential tariff measures can be inserted in agreements concluded by the Union and other countries or territories (letter d)), or they can be set unilaterally by the Union (letter e)).

define, once again, what this means. Hence, Article 64 clarifies that such rules "shall be based either on the criterion that goods are wholly obtained or on the criterion that goods result from sufficient processing or working."

4.5 Examples of product-by-product rules

Besides preferential and non-preferential ROOs of general application - as the ones addressed before - sectorial/product-specific rules of origin have to be taken into account as well. Indeed, within the European as well as within the NAFTA legislation, the sectorial/product-specific rules of origin are compiled in a separate list, annexed to the origin legislation. Reference is to Annex II to the Origin Protocol in the European origin models and to Annex 401 Specific Rules of Origin in the NAFTA.

The positive element of product specific rules is that they leave very little scope for interpretation. However, at the same time, they can become very complex and restrictive. This has, at least, two main consequences.

a. The more complex and the more technical the rules become, the greater is the scope for the participation of domestic industries in setting those rules[328]. Establishing product-by-product rules of origin is, by nature, a very technical task that will likely be carried out by specialists, meaning "the representatives of concerned industries"[329]. Indeed, for multinational corporations, rules of origin can play a crucial role in deciding whether to invest. As companies often depend on foreign inputs, they have to face the issue of complying with the rules for the determination of the origin as well as with the administrative costs discussed above.
b. Undoubtedly, rules of origin are an essential element for preferential trade agreements but they add considerable complexity to the trading system for traders, customs officials and trade policy officials. From a developing country perspective, very strict rules - such as the product-by-product ones - are difficult to comply with. On the contrary, "less complicated rules of origin

[328] B. Hoekman (1993), Rules of Origin for Goods and Services: Conceptual and Economic Considerations, in *Journal of World Trade*, Vol. 27, pp. 81–99.
[329] D. Palmeter (2003), *The WTO as a Legal System: Essays on International Trade Law and Policy,* London: Cameron May, p. 159.

stimulate trade between regional partners by reducing the transaction costs of undertaking such trade, in comparison with more complex and restrictive rules of origin"[330]. From this viewpoint, less restrictive rules seem to be more appropriate in order to prompt trade and investments in the partner region. They ensure producers the flexibility they need in sourcing their inputs but, at the same time, they do not undermine the ability to prevent trans-shipment of goods from third countries that are not members of the agreement.

Reaching consensus on technical requirements concerning some specific goods has not been easy. Even though in recent years a progress has been recorded, some product specific outstanding issues still remain: some examples, related to the food sector, will follow.

4.5.1 Fishery products

The issues of *drying*, *salting*, *smoking* and *filleting* of fish are unresolved:

- some delegations - mainly Japan and Korea - do not consider filleting operations as origin conferring, hence they suggest that origin should be referred back to the country where the fish has been captured or farmed from egg or fry (including fingerling);
- in the case of drying and smoking fish, a growing consensus towards recognizing them as origin-conferring activities has been recorded;
- thanks to the so called "stock-fish" consensus, heavy salting of fish is considered to be origin conferring.

4.5.2 Slaughtering

For slaughtering operations the debate focused on the SPS Agreement concerns and on consumers information. Meat-producing countries such as the United States, Argentina, Brazil and Australia consider slaughtering as an origin-conferring operation, while a second group of countries – for instance Japan - believe that

[330] P. Brenton (2005), *Preferential rules of origin*, in P. Brenton and I. Hiroshi Imagawa, "Rules of Origin, Trade and Customs.", p. 172.

slaughtering confers origin only after a certain period of fattening[331].

4.5.3 Dairy products

On the one hand, countries like Australia and New Zealand consider operations such as obtaining recombined or reconstituted milk, condensed milk, milk powder, cheese and every other product containing more than 50 percent of milk solids as origin conferring. On the other hand, the EU, that is the most protectionist when it comes to dairy products, does not agree upon this.

Indeed, the Union's position seems to be justified by concerns about the application of internal rules, dealing with payment of export subsidies rather than protectionist intents. For these reasons, the EU position is that origin always goes back to the country that has produced the milk, in order to avoid the misuse of such subsidies.

4.5.4 Coffee products

The issues are related to roasting and decaffeination operations. Countries that are major producers of coffee – *inter alia* Colombia - wish to retain origin and do not consider those activities as origin-conferring[332]. On the contrary, countries that transform coffee by roasting, roasting and blending, decaffeination, or making coffee preparations, wish to acquire origin through these processes.

4.5.5 Refining fats and oil

Some delegations do not consider the operation of refining oils and fats as an origin-conferring one, because they argue that the essential characteristics are not changed by it. However, other delegations – for instance Japan and the EU – state that the process of refining, which is composed by three different operations[333] carried out in a single country, actually is essential, in so far as it makes those oils and fats suitable for consumption or use.

[331] Usually four months.

[332] Scientific research as well deals with this kind of issue. Indeed, trying to find a method able to find out the origin of coffee beans. For one of the most recent method that could be applied, called Nuclear Magnetic Resonance (NMR), A. V. Arana, J. Medina, R. Alarcon, E. Moreno, L. Heintz, H. Schäfer, J. Wist (2015), Coffee's country of origin determined by NMR: the Colombian case, in *Food Chemistry*, Vol. 175, pp. 500-506.

[333] The operations are neutralization, decolorizing and deodorizing.

4.5.6 Refining sugar and sugar products and molasses

For sugar as well, States do not agree upon how the operation of refining should be considered. Particularly, major sugar producers, such as Australia, Cuba and New Zealand, consider it as an origin-conferring operation, while other countries - *inter alia* the EU, the U.S. and some developing countries - hold the view that refining should not be considered as an origin-conferring process.

A similar debate concern also related matters, such as manufacturing inverting sugar, obtaining sugar syrups, and obtaining molasses. On the one hand, countries that are producing and exporting sugar at competitive prices, prefer to lose origin as soon as possible to avoid protective measures applicable to sugar and sugar products. On the other hand, countries traditionally adopting more protectionist trade policies on sugar, wish to have rules retaining origin in order to avoid the circumvention of trade measures or misuse of domestic subsidies.

4.5.7 Cocoa and cocoa products

Countries that produce cocoa beans, which is the raw material, wish to retain origin of the downstream products, like cocoa paste and cocoa butter. Other countries, though, consider making cocoa powder from cocoa paste as origin conferring.

Similarly, debate occurs about finished retail chocolate preparations from chocolate crumbs. Countries producing raw cocoa materials argue for more restrictive rules of origin, while other countries hold the view that preparing retail products from chocolate crumbs is an origin-conferring operation. In particular, among industrialized countries, those that have major confectionery industries believe that such a simple abovementioned operation is enough for acquiring the originating status. Some other industrialized countries, specialized in manufacturing high quality chocolate products, instead, wish to have a restrictive rule. Indeed, this may be the case of Swiss position that does not consider the process of turning chocolate crumbs into retail chocolate an origin-conferring operation.

4.5.8 Juices and wines

Major disputes arise between the group of countries producing the raw material – namely, fruits, vegetables and grapes - and the one of countries that transforms the raw material into the finished products[334]. As a matter of fact, the countries where the fruits were grown and harvested deem that they should retain the originating status. Other countries, instead, consider the preparation of juices from imported products as origin conferring.

When it comes to wines, the debate occurs between the countries that are traditional producers of wines and those that either do not produce wines or are relative newcomers to wine producing, like Australia. The first mentioned group states that wine is a special product and that its distinctive features depend on the origin of the raw material, in combination with certain wine-making techniques. For these reasons, these countries consider that, in the case of wine and grape must, the origin should remain with the country where the grapes grew. On the contrary, the United States and other developing countries are of the view that producing wine from imported grapes, or from wine must, is an origin-conferring operation.
Such a debate stems from the desire to retain the origin of wines, such as those made in Italy or France, versus the desire to acquire origin by developing new wine-making techniques in the case of new wine producers. Hence, in this case, "the link between the HRO and its implication on labelling is the real contentious issue"[335]. The issue is made even more complicated by the fact that it might be quite difficult to distinguish local grapes and grape must from imported ones.

4.5.9 Mixtures/Blends

It is possible to identify two main approaches: product-specific mixtures rules of origin on a sector-by-sector basis or a general rule for mixtures covering all products. The principal disagreement derives from blending of wines and whisky, spices, and mixtures of vegetables or fruits. In general, the mixing of agricultural products is not considered to be an origin-conferring operation. Nonetheless, mixing and blending of such products is a commercial reality that has to be addressed by an appropriate rule

[334] It is worth to mention also a third group of countries that consider the operations of reconstituting juices and adding oils and essences to them is an origin conferring activity.
[335] S. Inama (2008), *Rules of Origin in International Trade*, p. 79.

and cannot be left to residual provisions. Hence, one of the proposals was to confer the originating status to the country of origin of materials that account for more than 50 percent by weight of all materials used. When none of the materials used meets the percentage required, the origin of the goods shall be the country in which mixing was carried out.

4.5.10 Grinding of spices

The division within this context is between those countries that are growing and harvesting spices as part of their natural endowments and those countries that are actually importing and commercializing these spices after crushing and grinding them. The formers do not consider crushing and grinding spices operations as origin-conferring, as they do not add any new property to the spices. The latters, instead, argue that those operations actually have the potential to change the features of the good because they increase their surface area, release essential oils and create a form of seasoning.

4.6 COOL's impact on international trade

This paragraph provides an overview on the WTO's disputes on COOL, in order to examine how legislations on country of origin labelling have been judicially interpreted. This way, the effects that COOL have on international trade will be pointed out. It is connected with the scrutiny of TBT Articles 2.1 and 2.2 as well as GATT III:4, object of Chapter.

4.6.1 WTO dispute on US COOL law

The main reason for dealing with Articles 2.1 and 2.2 of the TBT Agreement and of Article III:4 GATT in Chapter 1 is due to the crucial role they played within the WTO disputes on US legislation on country of origin labelling. Indeed, in 2008, US COOL laws[336] have been challenged by Canada and Mexico in front of the WTO. The two

[336] In the United States, country-of-origin labelling first appeared in the post-Civil War era, when the McKinley Tariff Act of 1890 imposed country-of-origin labelling requirements on all articles of foreign manufacture. With a similar provision, the Congress sought to eliminate misbranded and counterfeit foreign goods and to protect the national market against the price-lowering effect of foreign

countries presented a request for consultations[337] about the application of US COOL laws to meat products. Major problems stem from COOL's implementation in the meat industry, as for the nature of the product itself. Indeed, unlike fruits and vegetables, which are planted, grown, and harvested all in one place, a calf may be born in one country, fed and raised in another, and slaughtered in yet another country. The COOL provision requires that consumers have to be informed at the retail level of the country of origin in respect of covered commodities, including beef and pork. The label "US origin" can only be applied to meat products from animals that were exclusively born, raised and slaughtered in the United States. This would exclude such a designation in respect of beef or pork derived from livestock that is exported to the United States for feed or immediate slaughter. This means that if the animal is imported into the United States for immediate slaughter, the label identifies the

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goods. See Peter Chang (2009), *Country of Origin Labeling: History and Public Choice Theory*, in Food & Drug Law Journal, Vol. 64, at p. 693-695-696. However, as The McKinley Tariff Act contained many ambiguities, the Congress decided to introduce country-of-origin labeling laws in the Tariff Act of 1930. This way, COOL expanded progressively after the enactment of the Tariff Act of 1930, until the passage of today's modern COOL policy in the 2002 and 2008 Farm Bills.
To the substantially transformed or unwrapped products that the Tariff Act of 1930 does not cover, the Secretary of the Treasury may add some exceptions, in so far as even products that fall under the scope of the law do not have to comply with it. Among these products - known as the "J List", because the provision that grants this discretion to the Secretary is in subsection J of the statute – "natural products, such as vegetables, fruits, nuts, berries, eggs and live or dead animals, fish, and birds; all the foregoing which are in their natural state or not advanced in any manner further than is necessary for their safe transportation" are enumerated. Such a provision actually eliminated country-of-origin labelling requirements for a large portion of agricultural products and, consequently, prior to the COOL legislation in the 2002 and 2008 Farm Bills, consumers had very few chances to gain information about food origin. For this reason, the new COOL law aims to ensure that purchasers know where their food comes from, giving them the choice between domestic and foreign-grown products.
Finally, it might be interesting to point out that, in 2003, the U.S. Government Accountability Office (U.S. GAO) surveyed fifty-seven countries that conduct trade with the United States about their country-of-origin labelling practices. See U.S. GAO Report to Congressional Requesters, GAO-03-780, *COUNTRY-OF- ORIGIN LABELING. Opportunities for USDA and Industry to Implement Challenging Aspects of the New Law*, August 2003. The results show that most of the countries require at least some minimal form of country-of-origin labelling at the retail level, for both imported and domestic agricultural products. Furthermore, all of the United States' largest trading partners, including Canada, China, Mexico, and Japan, made country-of-origin labels mandatory for at least some agricultural food products.

[337] On 1st December 2008, Canada requested consultations with the United States, concerning mandatory country of origin labelling provisions contained in the Agricultural Marketing Act of 1946 as amended by the 2008 Farm Bill and as implemented through an Interim Final Rule of 28th July 2008. Then, on 12th December 2008, Mexico and Nicaragua requested to join the consultations. Subsequently, the United States informed the Dispute Settlement Body (hereinafter, DSB) that it had accepted the request of Mexico to join the consultations. On 7th May 2009, Canada requested further consultations concerning related amendments and measures adopted by the United States after Canada's initial request for consultations. On 15th May 2009, Mexico requested to join the further consultations and the same did Peru on 22nd May 2009. Subsequently, the United States informed the DSB that it had accepted the requests of Mexico and Peru to join the consultations. Finally, on 7th October 2009, Canada requested the establishment of a panel and on 10 May 2010, the Director-General composed the panel.

country-of-origin as the country from which the animal was imported and the United States[338]. The US COOL laws, as under the 2002[339] and 2008[340] Farm Bill, does not require that all products contain country-of-origin labels during every part of the importation and selling process. Instead, the product shall inform the "ultimate purchaser" where it originated, where U.S. Customs and Border Protection interprets the term "ultimate purchaser" as the last U.S. person to receive the article in the form in which it was imported[341]. By analysing the way in which Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of GATT 1994 have been interpreted[342] it is possible to understand which consequences the adoption of mandatory country of origin labelling schemes is likely to have in the context of global trade. This way, the

[338] In addition, proposals by Secretary Vilsack issued a letter to agriculture industry representatives encouraging the implementation of voluntary COOL measures to identify which step of production occurred in each country on a mixed origin label.

[339] In 2002, Congress decided to include the first version of COOL in the Farm Security and Rural Investment Act of 2002. The 2002 COOL provision called for mandatory country-of-origin labels for certain raw agricultural products, starting from 2004. Then, the Fiscal Year 2004 Omnibus Appropriations Act postponed the implementation of COOL for all products, except seafood, until 2006; and in Fiscal Year 2006, the agriculture appropriations legislation pushed the implementation of COOL back even farther, to 2008. See *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006*, Pub.L. No. 109-97, § 792, 119 Stat. 2120, 2164.

[340] Within the Food, Conservation, and Energy Act of 2008 full implementation of mandatory COOL for food was established, adding, to the commodities listed in 2002 law provisions - namely beef, veal, lamb, pork, seafood, vegetables, fruits, peanuts - goat meat, chicken, macadamia nuts, pecans and ginseng. Processed foods and food service providers, such as hotels and restaurants are not included in COOL, that applies to products of both domestic and foreign origin that are sold in US supermarkets. It is supermarkets' duty to ensure that the products they sell are labelled as to their country of origin. See Alison L. Sawka William A. Kerr (2011), *Challenging US country of origin labeling at the WTO: the law, the issues and the evidence*, Canadian Agricultural Trade Policy and Competitiveness Research Network (CATPRN); CATPRN Trade Policy Brief 2011-05. These provisions amended by the 2008 Farm Bill have been implemented through an Interim Final Rule of 28 July 2008, at p. 1.

[341] See Ashley Peppler (2013), Where is my food from? Development in the WTO dispute over country-of-origin-labelling for food in the United States, in *Drake Journal of Agricultural Law*, Vol. 18, at p. 3. This means that if a product reaches the consumer in the same form in which it was imported, it will still contain its country-of-origin label, whereas a product that undergoes "substantial transformation" once it reaches the United States will not contain a label with its country-of-origin by the time it reaches the consumer. Furthermore, the law only requires labelling on wrapped products, so that, for instance, fruits and vegetables in loose bins at the grocery store do not have to be labelled.

[342] Actually, this is the third case in which Article 2.1 and 2.2 of the TBT Agreement have been interpreted; nevertheless, due to the issue it addresses is the most interesting for the purpose of this research. For sake's of completeness, though, it is worthy to mention that the first case in which interpretation of this Article have been delivered was *US—Clove Cigarettes*, a dispute dealing with an American ban on the manufacture and sale of cigarettes in the United States with characterizing flavours. Problems stem from the fact that the ban excluded menthol cigarettes, that could to continue to be manufactured and sold in the United States. The second ruling was in *US—Tuna II*. In this dispute, Mexico challenged the technical regulations for the use of the "dolphin-safe" label put into effect by the United States on tuna and tuna products ("tuna products") imported into the United States or marketed or sold in the United States.

so called *US-COOL* dispute[343] within the WTO might constitute a useful example in order to try to forecast the implications that a similar European measure would have.

The dispute started when Canada and Mexico interpreted the 2008 US COOL law as a violation to the US's obligations under the WTO regime. The two countries deemed that the mentioned American regulation actually constituted a disguised barrier to trade[344]. Following challenges by Canada and Mexico, a WTO Panel determined that the COOL measure falls into the definition of technical regulation under the TBT Agreement and it is inconsistent with the United States' WTO obligations. Indeed, the Panel underlined that the COOL law violates Article 2.1 of the TBT Agreement, in so far as it accords less favourable treatment to imported Canadian cattle and hogs than to like domestic products. Moreover, the Panel found that the COOL measure does not fulfil its legitimate objective of providing consumers with information on origin, and, hence, violates Article 2.2 of the TBT Agreement[345] as well. Interestingly, the Panel did not consider it necessary to rule on the claims under Article III:4 of the GATT 1994, dealing with the national treatment clause.
The second phase of the dispute was in front of the Appellate Body (hereinafter, AB), that upheld - although for different reasons[346] - the Panel's finding about violation of

[343] Dispute settlement: DISPUTE DS384; *United States — Certain Country of Origin Labelling (COOL) Requirements*; available on Internet at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm#top (last access 6th October 2016)
[344] Canada and Mexico have separately challenged COOL at the WTO. Particularly, both countries requested that the Panel make recommendations to the United States to bring COOL into compliance with the TBT Agreement and the GATT 1994 provisions. As a matter of fact, under the former, both countries claimed that COOL violated Article 2 – or, in alternative Articles 2, 5 and 7 of the SPS Agreement -; under the GATT 1994, instead, both parties asserted that COOL violates Articles III:4, IX:2, IX:4 and X:3 and Article 2 of the Agreement on Rules of Origin.
[345] Instead, the Panel did not consider it necessary to rule on the claims under Article III:4 of the GATT 1994 (national treatment) or on the non-violation claims under Article XXIII:1(b) of the GATT 1994.
[346] With reference to Article 2.1 of the TBT Agreement, the AB agreed with the Panel that the COOL measure has a detrimental impact on imported livestock, since its recordkeeping and verification requirements create an incentive for processors to use exclusively domestic livestock. Nevertheless, the AB criticized the Panel's findings, in so far as they do not take into account whether this *de facto* detrimental impact stems exclusively from a legitimate regulatory distinction, in which case it would not violate Article 2.1. In its own analysis, the AB stated that the COOL measure lacks even-handedness because its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors of livestock as compared to the information conveyed to consumers through the mandatory labelling requirements for meat sold at the retail level. Indeed, even though a large amount of information must be tracked and transmitted by upstream producers in order to inform consumers on origin, only a small amount of this information is actually communicated to them in an understandable or accurate manner, without considering that a considerable proportion of meat sold in the United States is not subject to the COOL measure's labelling requirements at all. As a consequence, the detrimental impact on imported livestock cannot be said to stem exclusively from a legitimate regulatory distinction, while it reflects a discrimination against Article 2.1.

Article 2.1 TBT Agreement while it reversed[347] the Panel's conclusion regarding Article 2.2 of the TBT Agreement. Again, as for Article III:4 of GATT 1994, no statement was made.

In order to comply with the recommendations and rulings of the WTO Dispute Settlement Body (DSB), in May 2013 the US amended its COOL system. The target of the new measures was to provide consumers with enhanced clarity, by requiring labels to indicate every country where a production stage has taken place.
However, in October 2014, a compliance panel[348] rejected also the amended COOL scheme, as in violation of WTO law, including Article 2.1 of the TBT Agreement. The United States responded on the 28th November 2014, notifying the DSB its decision to appeal to the Appellate Body and, on the 12th December 2014, Canada filed another appeal in the same dispute. On the 18th May 2015, the compliance AB report was circulated to Members. In its report, the AB maintained the panel's position according to which also the amended COOL measure increases the record-keeping burden for imported livestock entailed by the original COOL scheme. In particular, the Appellate Body agreed with the panel that the recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of livestock that cannot be justified by the need to provide origin information to consumers. Indeed, the numerous exemptions under the amended COOL measure lead to think that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions[349].
As for the GATT 1994 Article III:4, so far not taken into consideration, the compliance panel found that the amended COOL measure violates it as well, since the amended COOL measure increases the original COOL provision's detrimental impact

[347] The AB did not agree with the Panel on its interpretation and application of Article 2.2., because the Panel appeared to have considered that a measure could be consistent with Article 2.2 only if it fulfilled its objective completely or exceeded some minimum level of fulfilment. Actually, the AB, while reversing the Panel's finding that the COOL measure is inconsistent with Article 2.2, was unable to determine whether the COOL measure is more trade restrictive than necessary to fulfil a legitimate objective within the meaning of Article 2.2.
[348] Convened under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[349] In this regard, data shows that between 57.7% and 66.7% of beef and between 83.5% and 84.1% of pork muscle cuts consumed in the US does not have an origin indication, despite imposing an upstream recordkeeping burden on producers and processors that has a detrimental impact on competitive opportunities for imported livestock.

on the competitive opportunities of imported livestock in comparison with like US products.

4.6.2 What the European Union can learn from the US experience

Not surprisingly, the *US-COOL* dispute brings into light how controversial the introduction of COOL requirements is. Also within the European Union, such a matter has been subjected to many critics. This is shown also by Regulation 1169/2011's negotiations history, with severe disparities of opinion at the very heart of the European Union Institutions, EU Member States and relevant stakeholders. For sure, when drafting new rules about origin indications on labels the EU has to be aware of its international trade obligations but they cannot represent an impassable obstacle.

Analysing the abovementioned dispute, one might have the feeling that recordkeeping and verification requirements for producers and processors along the food supply chain are the criteria to judge whether a COOL scheme is acceptable within the WTO regime. These requirements look crucial in order to guarantee that business operators compete evenly. Indeed, that kind of burdens seems to be at the core of this matter, in so far as they are used to determine if the COOL requirements afford less favourable treatment to imported goods than to domestic ones. From this viewpoint, it is not the concept of origin itself whereas it is the traceability system that comes to play a pivotal role. Such a perspective is embraced by the EU Commission as well, that acknowledge this in its reports about meat used as an ingredient, milk and dairy products as well as unprocessed foods, single ingredient products and ingredients that represent more than 50% of a product[350].

The key, then, might be to adopt a common traceability system - at least as a minimum common base - able to ensure the passing of information along the food chain. Once traceability requirements are the same for every business operator, member states are free to decide whether to make origin information mandatory or

[350] Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or the place of provenance for meat used as an ingredient, {SWD(2013) 437 final}, Brussels, 17.12.2013 COM(2013) 755 final and Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food, Brussels, 20.5.2015 COM(2015) 204 final.

only voluntary. Producers and processors will be able to give that information if requested and they will not be subjected to additional burdens depending on the country they export their goods.

Within this framework, problems stem from the fact that the current traceability system is not adequate for guaranteeing the information on the origin. The rules on which the traceability system is underpinned are described in the Codex Alimentarius[351] as well as in the Regulation (EU) N. 178 of 2002[352]. The two provisions are not concerned on consumers' right to be informed, whereas their primary scope is to ensure food safety and not to trace origin. As a consequence, new traceability systems will be required, not only in the European Union but as a global standard for all producers and processors. If every business operator is "forced"[353] to follow the same rules, there will not be additional burdens to face: the only decision to make, depending on national rules of importing countries, is whether to include references to the country of origin on the label. In such a system, producers and processors are likely to provide origin information even on a voluntary basis, in order to have a unique model of label for all the countries they export commodities to.

Surely, this construction is overly optimistic. It is hard to imagine that a similar agreement on traceability can be reached, considering the interests involved,

[351] For further details on the Codex Alimentarius, please, refer to Chapter 1, Paragraph 1 of this dissertation.

[352] Usually addressed as the General Food Law, it contains the general principles of food safety legislation within the European Union and establishes the European Food Safety Authority. 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; OJEC L 31/1 – 1.2.2002. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:031:0001:0024:en:PDF (last access 7th November 2017).

[353] An enhanced traceability system inside the Codex Alimentarius technically would not be voluntary but it would practically be compulsory thanks to the mechanism of references to the SPS and the TBT Agreements. In particular, while Codex standards were originally designed in order to facilitate trade, providing a minimum level of food safety and quality, after the adoption of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), in 1994, they changed their status. Indeed, they have become "the presumptive international standards for food safety and labelling". For the purpose of this research reference should be made to the TBT Agreement, as it contains food labelling requirements. Although the TBT Agreement does not specifically refer to Codex standards, whenever a Member State of the WTO establishes a standard that exceeds the requirements set by Codex, this can be challenged as a trade barrier. This way, "Codex standards have new significance for food safety and labelling" within WTO Members. Lucinda Sikes (1998), FDA's Consideration of Codex Alimentarius Standards in Light of International Trade Agreements, in *Food & Drug Law Journal*, N. 53, p. 327. Available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2169&context=facpubs (last access 7th November 2017).

especially those of multinational companies and big retailers. However, it might have the advantage to arouse interest in the way origin information can be obtained, going beyond the typical explanations based on consumers' interest. This latter argument, in fact, despite being valuable and of crucial importance in the view of who is writing, has been continuously challenged and has never been deemed enough to set a COOL mandatory scheme. As a matter of fact, although the right to know where the food actually comes from is at the core of purchasers' demand, so much that it can actually be amounted as a market need, it seems that business operators are the only ones entitled to decide. For these reasons, a change of perspective might remove the morass and offer the field for a renovate debate.

4.6.3 To sum up: COOL and international trade

Trade is affected by technical regulations, which, unlike other trade barriers, have both direct and indirect impacts on markets: on the one hand, a requirement that cannot be met or that can be met at a very high cost can be assimilated to a ban on imports, on the other hand it might happen that requirements are written in ways that favour domestic producers[354]. Indeed, technical regulations, and specifically labelling, can constitute a non-tariff barrier, traditionally defined as "any device or other governmental practice that directly impedes the entry of imports into a country, which discriminates against imports, but does not apply with equal strength to production or distribution"[355]. It is worth mentioning that also the Sanitary and Phitosanitary (SPS) Agreement measures can be enumerated among the non-tariff barriers to trade, in so far as they share with the TBT Agreement standards the ability to considerably impact on agricultural and food products trade.

It is very hard to distinguish between a non-tariff barrier and regulations aiming at protecting consumers' health[356]. Nevertheless, the difference might be found in the potential impact on trade. Indeed, a non-tariff barrier affects trade - directly or

[354] See, for instance, the judgement of the European Court of Justice on chocolate, Case C-47/09, Judgment of the Court (First Chamber) of 25 November 2010; European Commission v Italian Republic.
[355] J.S. Hillman (1991), *Technical barriers to agricultural trade*, Boulder-Colorado (USA): Westview Press.
[356] OECD (2003), *L'impact des réglementations sur le commerce de produits agroalimentaires. Les accords sur les obstacles techniques au commerce (OTC) et l'application des mesures sanitaires at phytosanitaires (SPS)*, at p. 51.

indirectly - despite being adopted for a different purpose, while regulations for consumers' protection share the precise target of impacting on the market, in order to correct its distortions in favour of purchasers. As a matter of fact, the effect of labelling on consumer behaviour can be problematic, as it can facilitate or distort markets by preventing or causing consumer deception. At least theoretically, labelling allows consumers to behave accordingly to their preferences by correcting the asymmetry of information between the producer and the consumer. From this viewpoint, the impact that labelling have on consumer behaviour makes it capable of creating a trade barrier under the general trade liberalisation rules of both European and WTO regimes[357].

This is particularly true when it comes to origin indication on food products, as identifying the country of origin can encourage consumers to act in a manner not conducive to a single market by favouring domestic products. This is the reason why within the WTO system as well as in the European Union, more specialised rules to deal with the complexities of labelling regulation have been adopted.

Within the food sector, the "Made in…" indication is a suitable example to show to what extent regulations are able to affect the domestic market demand, since consumers' confidence in certain features of foodstuffs might lead them to purchase the national product instead of another. Therefore, the WTO plays a pivotal role in achieving international coordination of regulations and standards. In particular, when it comes to food regulations, obstacles to trade might come both from *risk-reducing regulations* and *related-to-product quality* regulations, where the latter case is the most interesting for the purpose of this research. In fact, countries have to figure out how to regulate processing and manufacturing phases, what kind of information shall be provided as well as whether this information should be mandatory. This is a very challenging and tricky task as nowadays, due to global trade and investments, any regulation on food labelling can trigger trade dispute.

4.7 Rethinking ROOs

[357] Ilona Cheyne (2012), Consumer Labelling in EU and WTO Law, in Sanford E. Gaines, Birgitte Egelund Olsen and Karsten Engsig Sørensen (eds.), *Liberalising Trade in the EU and the WTO: a Legal Comparison*, Cambridge: Cambridge University Press, at pp. 309-332.

Both non-preferential and preferential ROOs are currently based on criteria closely related to the actual manufacturing or assembly of the final product. However, these methods fail in considering that the majority of goods nowadays is produced in multiple steps at multiple locations. For these reasons, determining the exact step where a product is 'made' is inherently cumbersome. All steps contribute to the sales price of the final good[358].

New ROOs should take into account not only manufacturing phases but also design, research and development, marketing, transport, as each of them confer value to the good. As a matter of fact, statistics collected by the OECD and the WTO[359], in their TiVA database, show that this kind of operations sometimes confer even more value than the value added by production and assembly activities. Hence, ROOs have to recognize this point, in order to be able to adapt to the process called "servitization"[360], "servicification"[361], or "manuservice economy"[362]. The concept of "servicification" – and similar derivatives - refers to the "increased use of services in manufacturing, both in terms of production processes and sales"[363]. Such a change

[358] D. Geraets, C, Carroll and A. R. Willems (2015), *Reconciling rules of origin and global value chains: the case for reform*, p. 299.

[359] Indeed, data shows that the value added by the services sector was over 50% for G20 countries such as the USA, India, the UK, France, and the EU as a whole. G20 (2014), *Global Value Chains: Challenges, Opportunities, and Implications for Trade Policy*, OECD, WTO and World Bank Group, Report Prepared for Submission to the G20 Trade Ministers Meeting, Sydney, Australia, 19 July, p. 15-16.

[360] The term "servitization" was first used by Sandra Vandermerwe and Juan Rada (1988), Servitization of Business: Adding Value by Adding Services, in *European Management Journal*, Vol. 6, Issue 4, pp. 314-324. In this article the authors specify that "Manufacturers have of course always been in services, but nowhere near the extent to which they are involved in them today. Mainly, industrial companies provided "servicing". Now there is a trend to create specialist services around the products they make, sell their knowhow, and set up special companies and units for these new service", p. 315.

[361] This is the term used by Edward D. Reiskin, Allen L. White, Jill Kauffman Johnson, Thomas J. Votta (2000), Servicizing the Chemical Supply Chain, in *Journal of Industrial Ecology*, Vol. 3, N. 2 & 3, p. 19-31. At p. 30, they explain the concept of "servicification" in this way: "Products in the future will be valued more as service delivery agents and less for their physical attributes per se. And suppliers to industry must be prepared to sharpen their responsiveness to rapidly changing customer needs where such needs are increasingly tied to information, not physical content. Indeed, information is the lubricant of this service transition".

[362] The following words might help to better understand such a concept: "[…] shift that has occurred towards the creation of manuservice production processes and products and perhaps even to the development of a manuservice economy. Production systems are increasingly founded upon complex combina- tions of manufacturing and service knowledge. The production of products and services should be conceptualized as a process that consists of a complex and evolving blending of manufacturing and service processes or perhaps more correctly production processes". J.R Bryson and P. W. Daniels (2010), "Service Worlds: The 'Services Duality' and the Rise of the Manuservice Economy", p. 99, in Maglio, P.P., Kieliszewski, C. A. and Spohrer, J.C. (eds.), *Handbook of Service Science*, New York: Springer.

[363] Patrick Low (2013), The Role of Services in Global Value Chains, *Fung Global Institute Working Paper FGI-2013-1*, p. 5. Available at http://www.asiaglobalinstitute.hku.hk/en/wp-

entails to acknowledge the shift from a product-focus to a service-focus enterprise in a variety of manufacturing sectors[364].

Questions remain: how could be designed a rule conferring origin based on value added at each step in the production process? What steps in the production process would qualify for inclusion, and how would the relative value added be measured? Further research will be necessary on this topic.

Due to the difficulties in identifying which country is the source of the imported good under traditional rules of origin, some scholars[365] have suggested to use a different method. Indeed, when multiple countries have contributed to the cost of production of the traded good and, therefore, to the value added in its production, they recommend a "tariff whose base is not the price of the imported article but rather the proportion of the value added outside the area"[366]. These multi-country rules of origin would bring some administrative advantages over traditional rules of origin for preferential trade and, since the criterion used for valuation is uniform among goods, it could not be manipulated by governments to give more protection to selected goods.

A solution is still far but it should be borne in mind that rules of origin are reflected on products' marks of origin. Particularly, the link between customs origin and mark of origin derives from the U.S. practice, when 1890 American legislation required to mark goods imported into the United States with their country of origin. The rationale behind such a rule was to inform consumers of a product's country of origin. Nonetheless, it did not elude the legislator's mind the idea that it could also have the indirect effect of favouring domestic products over competing foreign goods. Indeed, in many "buy national" campaigns[367] periodically launched by some countries – such

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content/uploads/2015/04/456-The-Role-of-Services-in-Global-Value-Chains.pdf (last access 8th November 2017).

[364] Edward D. Reiskin, Allen L. White, Jill Kauffman Johnson, Thomas J. Votta (2000), Servicizing the Chemical Supply Chain, in *Journal of Industrial Ecology*, Vol. 3, N. 2 & 3, p. 20.

[365] For instance, see P. J. Lloyd (1993), A Tariff Substitute for Rules of Origin in Free Trade Areas, in *The World Economy*, Vol. 16, pp. 699–712 and L. S. Ho (1998), Country of Origin Rules: Its Origin, Nature and Directions for Reform, in *Pacific Economic Review*, Vol. 3, pp. 161–166.

[366] P. J. Lloyd (2002), Country of origin in the global economy, in *World Trade Review*, Vol. 1, p. 176.

[367] It should be underlined that "even though such campaigns may generate a positive feel- good response, the outcomes are unlikely to be positive unless both retail buyers and end consumers can perceive additional value in domestic goods on pragmatic grounds". Andrea Insch, Rebecca S. Prentice and John G. Knight (2011), Retail buyers' decision-making and buy national campaigns, in *Australasian Marketing Journal*, Vol. 19, Issue 4, p. 265. Indeed, many scholars suggest that these campaigns potential to influence consumers' purchasing behaviour is scarce. See, for instance, R.

as USA, Australia, South Africa, Slovakia, New Zealand Malaysia, India, Greece, Italy and Thailand[368] - marks of origin may function as non-tariff barriers.

For these reasons, the question of mark of origin in the United States has been the subject of several dispute decisions. Most cases regarded sensitive sectors, such as foodstuffs, textiles, steel products, and footwear, in which labelling, import sensitivity and consumers' health considerations may have played a role on the final outcome. Some crucial points come to light through these controversies:

a. the difficulty of determining the origin, due to the globalized supply chain[369];
b. the fact that an incorrect labelling of origin has severe consequences for importers;
c. the criteria described in the previous paragraphs look more and more inappropriate for identifying the country that actually gained an economic benefit from that sale;
d. marks of origin might widely impact on consumers' choice, especially when it comes to foodstuffs, where brand names or certain quality goods are commonly identified with certain countries[370]. The same considerations work actually also for environmental and humanitarian concerns. Indeed, consumers might be more attracted by goods that originate from those countries that are recognized as respecting human rights, labour laws, or environmental treaties.

This last point will be further developed in the following chapter, dedicated to the perception that consumers have on country of origin labelling.

Ettenson, J. Wagner and G. Gaeth, (1988), Evaluating the effect of country-of-origin and the 'Made-in the USA' campaign: A conjoint approach, in *Journal of Retailing*, N. 64, pp. 85–100; D. Neven, G. Norman and J.-F. Thisse (1991), Attitudes towards foreign products and international price competition, in *Canadian Journal of Economics*, N. 24, pp. 1–11; G. Fenwick and C. Wright (2000), Effect of a buy-national campaign on member firm performance, in *Journal of Business Research*, N. 47, pp. 135–145.

[368] Andrea Insch, Damien Mather and John Knight, (2017), Buy-national campaigns: congruence determines premiums for domestic products, in *International Marketing Review*, Vol. 34, Issue 2, p. 240.

[369] Nowadays is "possible to produce a product anywhere, using resources from anywhere, by a company located anywhere, to be sold anywhere", Milton Friedman's words cited in Ali Farazmand (1999), *Globalization and Public Administration* , Public Administration Review, Vol. 59, No. 6, at p. 513.

[370] S. Inama (2008), *Rules of Origin in International Trade*, p. 134.

CHAPTER 5

CONSUMER'S PERSPECTIVE ON COUNTRY OF ORIGIN LABELLING

5.1 From ROOs to COOL – Introductory remarks

Many traded goods have a mark of origin that identifies the country of origin depending on the rules described above. While Chapter 3 dealt with the rules for conferring the origin – rules of origin (ROO) -, this part concerns the indication of the origin on traded products – country of origin labelling (COOL) -. The issue is not secondary, in so far as, especially when coping with foodstuffs, consumers' willingness to pay might change depending on the origin itself.

Understanding to what extent country of origin labelling affects consumers' response has become essential to policy makers and food marketers. On the one hand, data shows that regulations establishing mandatory indications of origin are supported by consumers[371]; on the other hand, from a market-driven perspective, COOL might actually hides a protectionist measure. In this latter case, the indication of the origin could result in litigations within the WTO system[372] due to its potential to allow producers "to charge different prices for products that are identical except the country of origin"[373].

Although consumer's perspective changes depending on product category as well

[371] For instance, for the U.S. see Consumer Reports (2007), *Food labeling poll*, available at greenerchoices.org/pdf/Food%20Labeling%20Poll-final_rev.pdf. (last access 15th August 2016), which shows that 92% of U.S. consumers believe that COOL should be required for imported foods. In Europe, close to 70% (on average) of consumers in Austria, France, Poland and Sweden consider the origin as an important factor when buying food. Please, refer to BEUC Report (2013), Where does my food come from? BEUC consumer survey on origin labelling on food, p. 4. Available at http://www.beuc.eu/publications/2013-00043-01-e.pdf (last access 9th November 2017).

[372] Please, refer to Paragraphs 3.3.4 and 3.3.5.

[373] J. M. Bienenfeld, E. R. Botkins, B. E. Roe and M. T. Batte (2016), Country of origin labeling for complex supply chains: the case for labeling the location of different supply chain links, in *Agricultural Economics*, Vol. 47, p. 205.

access to information, products and services that hail from highly developed countries are perceived differently from those that come from newly industrialized countries or developing countries[374].

From a retailer's viewpoint, the current globalized food chain makes it easier to purchase goods[375] from foreign countries at a lower price than the one paid for the domestic ones. However, while reducing costs for business operators, global food trade might have some drawbacks when it comes to food risks[376]. Food crises not only have a negative effect on human health, but they also have an adverse impact on the food industry, considering how products' bad image and reputation are likely to undermine consumers' confidence on them.

In markets characterized by frequent information asymmetries, COOL can play a pivotal role in consumers' buying choices. Indeed, a product originated in a particular country is linked to prior perceptions about that country's production and marketing strengths and weaknesses[377]. This way, country of origin acts as a "surrogate for product quality and other product characteristics that cannot be evaluated directly"[378]. Consumers might establish a connection between the country and the quality of the raw materials as well as the know-how and the experience gained in years of manufacturing. In particular, consumers' evaluation of goods - and food is a highly sensitive category in this sense – depends on both intrinsic[379] and extrinsic[380] cues. Country of origin information can be considered an extrinsic cue that changes depending on the country image. Nonetheless, when country-of-origin works as an external cue consumer perception is not generally biased whereas it is influenced only

[374] R. Wongprawmas, C.A. Padilla Bravo, A. Lazo, M. Canavari and A. Spiller (2015), Practitioners' perceptions of the credibility of food quality assurance schemes: exploring the effect of country of origin, in *Quality Assurance and Safety of Crops & Foods*, Vol. 7, p. 791.
[375] This is particularly true when it comes to agricultural products.
[376] Because of information asymmetries retailers face the risk of being exposed to food safety issues. Hence, they usually use *quality assurance schemes* (QAS), which are theoretically voluntary but *de facto* mandatory standards, able to ensure control over quality and safety of foodstuffs. For a deeper analysis see S. Henson (2008), *The role of public and private standards in regulating international food markets*, in Journal of International Agricultural Trade and Development, Vol. 4, pp. 63-81 and L. Fulponi (2006), *Private voluntary standards in the food system: the perspective of major food retailers in OECD countries*, in Food Policy, Vol. 31, pp. 1-13.
[377] R. Wongprawmas, C.A. Padilla Bravo, A. Lazo, M. Canavari and A. Spiller (2015), Practitioners' perceptions of the credibility of food quality assurance schemes: exploring the effect of country of origin, in *Quality Assurance and Safety of Crops & Foods*, Vol. 7, p. 791.
[378] L. A. Manrai, D.N. Lascu, A. K. Manrai (1998), Interactive effects of country of origin and product category on product evaluations, in *International Business Review*, Vol. 7, p. 594.
[379] For instance, design and shape.
[380] Such as price and brand name.

for some of the products manufactured in that country[381]. Thus, if a country is perceived as having specific expertise, the country-of-origin becomes a factor in the quality measurement of only those specific products.

In fact, the so-called "country-of-origin effect" - to which the next paragraph is dedicated - might be described as the influence that a country image has on consumers' perception. The economic, social and cultural system as well as the level of economic development and stereotypes of that country is likely to be evaluated by consumers during the purchasing moment[382]. For instance, food products from industrial countries are perceived as safer and of higher quality. This might be either because of better access to information and better level of market and economic development or due to more confidence in monitoring and audit system, thanks to lower levels of corruption[383]. Moreover, data shows[384] that a negative country image is likely to impact on consumers' willingness to pay (hereinafter, WTP) especially if that country intervened in the processing and packaging phases. This might mean that purchasers consider more critical for safety and quality concerns the last stages of the supply chain, suggesting that it is the country of processing and packaging rather than the one where the raw materials come from, to play a crucial role in consumers' decision making process[385].

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[381] H. D. Kalicharan (2014), The Effect And Influence Of Country-Of-Origin On Consumers' Perception Of Product Quality And Purchasing Intentions, in *International Business & Economics Research Journal*, Vol. 13, p. 898 and see also J. O'Shaughnessy and J. N. O' Shaughnessy (2002), Treating the nation as a brand: some neglected issues, in *Journal of Macromarketing*, Vol. 20, pp. 56-76; P. Chao (1993), *Partitioning country-of-origin effects; consumer evaluations of a hybrid product*, in Journal of International Business Studies, 24, pp. 291-307 and V. V. Cordell (1991), Competitive context and price as moderators of country-of-original preferences, in *Journal of the Academy of Marketing Science*, Vol. 19, pp. 123-135.

[382] L. A. Manrai, D.N. Lascu, A. K. Manrai (1998), Interactive effects of country of origin and product category on product evaluations, in *International Business Review*, Vol. 7, p. 596. Changing perspective, the authors underline that, from a retailer's point of view, this element means that "marketers developing product strategies should be aware of factors related to the product's country of origin that might influence consumers' evaluations", p. 592.

[383] R. Wongprawmas, C.A. Padilla Bravo, A. Lazo, M. Canavari and A. Spiller (2015), Practitioners' perceptions of the credibility of food quality assurance schemes: exploring the effect of country of origin, *Quality Assurance and Safety of Crops & Foods*, Vol. 7, p. 796.

[384] J. M. Bienenfeld, E. R. Botkins, B. E. Roe and M. T. Batte (2016), Country of origin labeling for complex supply chains: the case for labeling the location of different supply chain links, in *Agricultural Economics*, Vol. 47, pp. 205-213.

[385] J. M. Bienenfeld, E. R. Botkins, B. E. Roe and M. T. Batte (2016), Country of origin labeling for complex supply chains: the case for labeling the location of different supply chain links, p. 211. It has to be underlined, though, that the experiment was carried out analyzing U.S. consumers' willingness-to-pay (WTP) for a packaged cereal product where the key grain ingredient may be grown in one country and processed in a second country (multi-country supply chain) and compare it to equivalent products that have both stages located in a single country. The authors found out not only that WTP in these two cases is different but also that labels that list only the country where the grain was grown or only the country where the grain was processed and packaged into cereal would influence dissimilarly

5.2 The country-of-origin effect

As said in the previous paragraph, country-of-origin of products, and of foodstuff in particular, can influence consumers' purchasing choices. This phenomenon is called "country of origin effect". It shows how and to what extent consumers form different assessments towards products coming from various countries, as they link the origin to quality rather than they combine origin with other attributes. The country of origin effect will be addressed referring to the concepts of cognitive, emotional and normative arguments – as Table 6 shows -, as well as to the notion of animosity.

Indeed, whenever consumers establish a connection between the origin and quality, they feel less risk in making these purchases. They often interpret the country of origin label as an indication with the potential to provide for additional food safety cues[386]. In light of this, some scholars have suggested[387] that if consumers' overall confidence in the safety of food increases, they will be less inclined to want COOL. It looks like their desire for COOL depends on concerns regarding the safety of the food products that originate in specific countries[388]. Nonetheless, this *cognitive*[389] argument, that relates quality and COO, is not the only one that should be taken into account. The origin has also some *emotional* significance, inasmuch as consumers associate it with a set of symbols and meanings. On the one hand, especially when it

consumers. For instance, the authors point out that WTP for cereal where the grain was grown in China and processed and packaged into cereal in England is statistically different from the WTP for a product grown and processed in England, suggesting that "COOL policies that communicate information about countries' participation at different stages of the supply chain can generate additional value for consumers".

[386] As a matter of fact M. L. Loureiro and W. J. Umberger (2007), A choice experiment model for beef: What US consumer responses tell us about relative preferences for food safety, country-of- origin labelling and traceability, in *Food Policy*, Vol. 32, p. 509, referring to beef products, shows that when additional information specifically related to the safety of a given meat product (for instance the mark "food safety inspected") is given to consumers, country-of-origin labels earns much smaller premiums on average. This element indicates that when such information on safety is not provided consumers tend to interpret the origin indication as a safety signal.

[387] K. E. Lewis and Carola Grebitus (2016), Why U.S. Consumers Support Country of Origin Labeling: Examining the Impact of Ethnocentrism and Food Safety, in *Journal of International Food & Agribusiness Marketing*, Vol. 28, p. 258.

[388] In this regard, consumers' confidence in the safety of the food is usually shaped into two dimensions: food safety optimisms and food safety pessimism. For deeper acknowledgement see J. de Jonge, H. van Trijp, R. J. Renes and L. Frewer (2007), Understanding consumer confidence in the safety of food: its two-dimensional structure and determinants, in *Risk Analysis*, Vol. 27, pp. 729-740.

[389] B. Schnettler, M. Sánchez, L. Orellana, J. Sepúlveda (2013), Country of origin and ethnocentrism: a review from the perspective of food consumption, in *Economía Agraria*, Vol. 17, p. 34.

comes to foodstuffs, country of origin can be associated with authenticity and national identity, so that it is likely to lead to strong emotional attachments to certain brands and products[390]. On the other hand, such an emotional attachments might result in the so-called *animosity* feeling, which is "remnants of antipathy related to previous or ongoing military, political or economic events"[391]. From this viewpoint, countries have emotional connotations that may be formed directly through personal experiences - such as holidays or encounters with foreigners - but also indirectly, through art, education and mass media[392]. Finally, so-called *normative* aspects[393] can be referred to the country-of-origin effect, meaning that consumers hold social and personal norms related to country of origin. Particularly, considering that by buying one country's goods consumers are able to support its economy, decisions of boycotting products that hail from certain states or, oppositely, of buying domestic can be interpreted as moral actions[394].

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[390] One of the best example might be the one pointed out by S. Fournier (1998), Consumers and Their Brands: Developing Relationship Theory in Consumer Research, in *Journal of Consumer Research*, Vol. 24, pp. 348-352, where the author talks about a second-generation Italian woman, named Jean, who lives in a small town in the U.S. where over half the people are Italian. The woman shows a powerful brand attachment for some food categories - such as tomato sauce as well as olive oil - in so far as she links them to ethnic heritage and family memories, as her words clearly demonstrate: "My mother always used to make the sauce too. All Italians do. When you make sauce, it's like your trademark. […] I fry up the sausage in a frying pan with the *Bertolli* olive oil. […] I use the *Italian Flavored* bread crumbs, Progresso, […] then I take the *Contadina* tomato paste ", pp. 350-351.

[391] J. G. Klein, R. Ettenson and M. D. Morris (1998), The Animosity Model of Foreign Product Purchase: An Empirical Test in the People's Republic of China, in *Journal of Marketing*, Vol. 62, p. 90. The authors undertook their research in Nanjing (China), where, in 1937, Japanese army killed 300,000 Chinese civilians. Consumers in Nanjing, despite being aware of the high quality of Japanese goods, were not willing to purchase products made in Japan due to their feelings of animosity toward the country. Interestingly, these researchers also discovered that consumer's animosity did not have impact negatively on product judgment. However, as S. A. Ahmed and d'Astous (2008), Antecedents, moderators and dimensions of country-of-origin evaluations, in *International Marketing Review*, Vol. 25, p. 96, state, animosity may play a role "not only in countries like China, where past cruelties committed by Japanese during World War II provoked hatred towards Japan but also in countries like Taiwan where no such cruelties were committed by China".

[392] P. J. Verlegh, J-B. E.M. Steenkamp (1999), A review and meta-analysis of country-of-origin research, in *Journal of Economic Psychology*, Vol. 20, p. 526.

[393] P. J. Verlegh, J-B. E.M. Steenkamp (1999), A review and meta-analysis of country-of-origin research, in *Journal of Economic Psychology*, Vol. 20, p. 527.

[394] Indeed, during the last years, consumption behaviour and motivation have been changing continuously, as eating is influenced by many factors that do not depend only on the single person, but also on environment, social relations, availability and price, as BEUC, *Informed food choices for healthier consumers*, *BEUC position on nutrition*, BEUC–X-2015-008 – 04/02/2015, shows. Actually, even though price remains an essential element when purchasing food, consumers seem to select products more carefully, paying attention to the relation between it and quality and between it and ethics. As a matter of fact, the 2015 Nielsen multi-country survey on the "Corporate Social Responsibility and Sustainability", after 30.000 interviews in 60 countries, identifies an average of 66% respondents willing to pay more for social and environmental features of the products (complete survey at http://www.nielsen.com/ug/en/press-room/2015/consumer-goods-brands-that-demonstrate-commitment-to-sustainability-outperform.html, last access 26th August 2016). In the mentioned cases

Table 6. Dimensions of the concept of origin.

Cognitive argument	Link between quality and COO
Emotional argument	Link between emotional attachment and COO
Normative argument	Link between social and personal norms and COO

As seen, country of origin itself is not a one-dimension concept[395]. Especially in the current global economy, all these mentioned aspects cannot be taken into account separately. They interact continuously, determining consumers' choices and

the choice is a more reasoned process than an answer to irrational impulses and companies must adapt their communication strategies to this new dimension of consumption. Indeed, these kinds of consumers "seek to satisfy complex preferences and their desire to buy goods which match their lifestyles". From this perspective, consumption becomes political in so far as it is a tool for "making statements with the shopping basket". Consumers can exercise their influence through monetary choices, rewarding certain companies by buying their products as well as punishing some others, not purchasing their goods; indeed both buy-cotting and boycotting campaigns are ways of expressing political and ethical identity. Despite being a matter of personal decision-making, strictly related to the individual's private sphere, it is strictly related to the determination of becoming actively engaged in the public activities. However, recently, the economic crisis has been having a strong impact both on enterprises and families. On the one hand, the food marketing system's economic importance related to the rest of the economy has been declined, as consumers all around the world leave to food a smaller and smaller amount of their income. On the other hand, families' budget for food has diminished, causing many changes in people's attitude towards consumption: some of them reduce the quantity, trying to waste a bit less, while others have been forced to reduce quality, finding easier and more affordable to purchase unhealthy food. This is why it is crucial to reshape the environment, so that consumers are not discouraged from buying healthy food by its high price. Nonetheless, making healthier choice the easiest ones requires different policies, able to educate, inform and protect consumers. Public bodies should rely less on private companies initiatives and be in charge of long-term health promotion strategies - starting from the easiest ones, such as making fresh fruits and vegetables more available in nearby shops and better placed in supermarkets or being careful about marketing to kids - within agriculture, trade and environment policies. From this viewpoint, the role of information is essential. See E. Kaynak (2000), Cross-national and cross-cultural issues in food marketing, in *Journal of International Food & Agribusiness Market*, Vol. 10, p. 3; M. Abis (2011), Which communication to consumers?, in *Rivista di Diritto Alimentare*, N. 2, p.1 and L. Becchetti (2011), *Voting with the wallet*, Aiccon working paper, p. 12. As Professor Becchetti says in the mentioned paper "The vote with the wallet is a new, emerging feature of economic participation and democracy in the globally-integrated market economy. This expression identifies the pivotal role that responsible consumption and investment can play in addressing social and environmental emergencies which have been aggravated by the asymmetry of power between domestic institutions and global corporations". The most interesting example here is the "fair trade" one: these kinds of products are bounded with a social and environmental content, that satisfies consumers' needs for ethics. Hence, from this point of view, "the price premium should be perceived not as a distortion, but as a different portioning of value in the value chain between producers and importers".
For a deeper focus on political consumerism and sociological sciences see also S. Wahlen and M. Laamanen (2015), Consumption, lifestyle and social movements, in *International Journal of Consumer Studies*, Vol. 39, Issue 5, p. 399 and L. S. Yates (2011), Critical Consumption, in *European Societies*, Vol. 13, pp. 191-217; D. Stolle, M. Hooghe and M. Micheletti (2005), Politics in the Supermarket: Political Consumerism as a Form of Political Participation, in *International Political Science Review*, Vol. 26, p. 262 and S. Bossy (2014), The utopias of political consumerism: The search of alternatives to mass consumption, in *Journal of Consumer Culture*, Vol. 14, pp. 179-198.

[395] Economists are used to distinguish between country-of-design (COD) and country-of-assembly (COA) as two crucial dimensions in the perception of country of origin. See, for instance, S. A. Ahmed and d'Astous (2008), Antecedents, moderators and dimensions of country-of-origin evaluations, in *International Marketing Review*, Vol. 25, p. 79.

preferences.

The consideration that nowadays production phases very often take place in different countries does not change such an interplay. Although consumers are often unaware of the actual place of manufacturing and processing of goods, the "made in" indication or, when the label lacks this information, the brand's origin, are deemed to be enough for the existence of the country-of-origin effect. Hence, it might become an interesting opportunity for international firms to pragmatically emphasize those "origin countries" that carry favourable connotations[396].

5.3 Consumer ethnocentrism

The concept of consumer ethnocentrism is tightly bound to the notion of animosity, as one possible outcome of the country-of-origin effects discussed above. Indeed, both ethnocentrism and animosity imply that buying foreign products is deemed harmful for national economy, thus unpatriotic[397]. The two terms, though, are slightly different. While ethnocentrism can be described as the "link between social and moral norms and consumer behaviour, […] animosity is a variable that emphasizes a consumer's moral attachment to the geographic origin of a product"[398]. From this viewpoint, animosity is a feeling of antipathy rather than hostility towards another country, whereas an ethnocentric consumer believes in the importance of protecting national economy and employment, without being led by such emotions.

In addition, since ethnocentrism is primarily connected to ethnic group self-centeredness - which is conceptually distinct from out-group negativity[399] - scholars

[396] P. J. Verlegh, J-B. E.M. Steenkamp (1999), *A review and meta-analysis of country-of-origin research*, p. 538.

[397] K. Erdener and Ali Kara (2002), Consumer perceptions of foreign products, in *European Journal of Marketing*, Vol. 36, p. 933.

[398] N. Huitzilin Jiménez and S. San Martín (2010), The role of country-of-origin, ethnocentrism and animosity in promoting consumer trust. The moderating role of familiarity, in *International Business Review*, Vol. 19, p. 38.

[399] B. Bizumic, J. Duckitt, D. Popadic, V. Dru and S. Krauss (2009), A cross-cultural investigation into a reconceptualization of ethnocentrism, in *European Journal of Social Psychology*, Vol. 39, p. 874, where the authors define ethnocentrism as "[…] an attitudinal construct that involves a strong sense of ethnic group self-centeredness and self- importance. This sense has intergroup and intragroup expressions. Intergroup expressions involve the central belief or sentiment that one's own ethnic group is more important than other ethnic groups, whereas intragroup expressions involve the central belief or sentiment that one's own ethnic group is more important than its individual members. Intergroup expressions involve preferring ethnic in-groups over out-groups, a belief in the superiority of one's ethnic group over out-groups, the wish for ethnic purity within the ethnic in-group, and acceptance of exploitation of out-groups when this is in in-group's interests. Intragroup expressions, on the other hand, involve a need for strong group cohesion and a sentiment of strong devotion to one's own ethnic

argued that it is more likely to influence consumers' purchases when choosing between domestic and foreign goods. On the contrary, animosity plays a bigger role when selecting imported goods with different origin[400].

5.3.1 Ethnocentrism in sociology

In sociology, the concept of ethnocentrism has been defined as "this view of things in which one's own group is the centre of everything, and all others are scaled and rated with reference to it"[401]. The dichotomy between one's own group and other groups leads people to develop a positive attitude towards everything that is related to their own group and, oppositely, a negative attitude towards other groups.

In this work, such a notion is used in order to understand whether consumers favour domestic product over foreign ones[402]. Consumers with ethnocentric views are most likely to select locally made products or those manufactured in countries that have cultural, political, and economic similarities to their home country. Hence, consumers' ethnocentricity, described as "the beliefs held by consumers about the appropriateness, indeed morality, of purchasing foreign-made products"[403], has two main features: love and concern for one's own country and, as a consequence, intention of not to purchase imported products[404].

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group. These six different expressions of ethnocentrism should be mutually interacting and reinforcing".

[400] A. Peng Cui, T. A. Wajda and M. Y. Hu (2012), Consumer animosity and product choice: might price make a difference, in *Journal of Consumer Marketing*, Vol. 29, p. 496, where the authors refer to another research: Klein, J.G. (2002), Us versus them, or us versus everyone? Delineating consumer aversion to foreign goods, in *Journal of International Business Studies*, Vol. 32, pp. 345-63.

[401] W. G. Sumner (1906), *Folkways: a study of the sociological importance of usages, manners, customs, mores, and morals*, New York: Ginn & Company, p. 13. The author at the next page continues: "[…] ethnocentrism leads a people to exaggerate and intensify everything in their own folkways which is peculiar and which differentiate them from others".

[402] In this context, it is assumed that next to a foreign product also a domestic one is available, otherwise it would be not possible to study how consumer ethnocentrism affects consumers when choosing among national or imported goods. However, it has to be stressed out that studies on consumer ethnocentrism has focused also on situations in which the domestic product was not available, concluding that an ethnocentric consumer is likely to favor, among different foreign products, those that come from culturally similar countries. See J. J. Watson and K. Wright, (2000), Consumer ethnocentrism and attitudes toward domestic and foreign products, in *European Journal of Marketing*, Vol. 34, p. 1153.

[403] T. A. Shimp and S. Sharma (1987), Consumer ethnocentrism: construction and validation of the CETSCALE, in *Journal of Marketing Research*, Vol. 27, p. 280, where the authors develop a scale of 17 items - so called the Consumer Ethnocentric Tendencies Scale (CETSCALE) - to evaluate ethnocentric tendencies among consumers. The purpose of the CETSCALE is to measure to what extent consumers feel that buying imported products is unpatriotic and immoral because of the potential damages to which the national economy may be subjected.

[404] S. Sharma, T. A. Shimp an J. Shin (1995), Consumer ethnocentrism: a test of antecedents and

As said in the previous paragraph, many studies have underlined the existence of biases against foreign goods[405]. It is worth mentioning that consumers' preference towards a product varies depending on the product's specific origin as well as on the product category[406]. For this reason, when analysing how consumer ethnocentrism interacts with country of origin labelling, it has to be taken into account that consumers' inclination depends both on the product category and on the specific foreign country involved[407]. Particularly, it has been highlighted that consumer ethnocentrism influences purchases of traditional food products. In addition, residents of rural areas are used to opt for local products for a matter of competition with the agricultural production of the region where they live[408].

The importance of such studies lays in their potential to show how and to what extent stereotypes, reputations and emotions play a pivotal role in consumers' purchasing decisions. Such an emotional component has to be balanced with rational elements, gained through experiences and personal knowledge, as the following paragraph will describe.

5.4 The role of information on consumers' decision-making process: is COOL a matter of right to be informed?

Especially when dealing with foodstuffs, the country of origin labelling and its related effects have to be connected with information issues. Generally speaking, products are characterized by both intrinsic and extrinsic cues, where the formers refer, for instance, to taste, design or fitness, while the latters to brand or price. From this viewpoint, country of origin is an extrinsic cue that might be used by consumers as a

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moderators, in *Journal of the Academy of Marketing Science*, Vol. 23, p. 27.

[405] See, for instance, P. J. Verlegh, J-B. E.M. Steenkamp (1999), A review and meta-analysis of country-of-origin research, pp. 521-546.

[406] G. Balabanis (2004), Domestic country bias, country-of-origin effects, and consumer ethnocentrism: a multidimensional unfolding approach, in *Journal of the Academy of Marketing Science*, Vol. 32, p. 80.

[407] For instance, U.S. consumers tend to favoUr domestic beef but American ice cream producers prefer to choose a name as "Häagen-Dazs" for their brands, since the name suggests an association with Europe, hence with European chocolate. S. M. Camgöz and P. S. Ertem (2007), Should Food Manufacturers Care About Country-of-Origin Effect?, in *Journal of Food Products Marketing*, Vol. 14, p. 101.

[408] B. Schnettler, M. Sánchez, L. Orellana, J. Sepúlveda (2013), Country of origin and ethnocentrism: a review from the perspective of food consumption, in *Economía Agraria*, Vol. 17, pp. 36-37.

surrogate for product quality and prestige[409]. Indeed, consumers cannot know features and properties of food products before consuming them. As a consequence, only information allows them to make conscious decisions.

In addition, many food products' elements - such as taste or quality of ingredients - are so-called *experience* attributes[410], in so far as people can find out about them only after consumption. In most of the cases, the product itself is not enough to give a clear and immediate idea of its features, that usually depend on ingredients, place and ways of productions and so on. Not to mention the fact that food safety concerns arose in recent years, especially due to the numerous food scandals occurred. Therefore, it seems quite natural that consumers deduce the intrinsic features they care about - included food safety assurance - from extrinsic cues, that are the only information actually available. As extrinsic cues, information on labels is useful for consumers in order to develop quality expectations, essential in the food purchasing decision-making process. However, since many food items are low involvement products[411], it is likely that consumers read labels as rules of thumb that help them to easily form quality judgments[412]. Considering how difficult it is to evaluate the quality of food

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[409] S. M. Camgöz and P. S. Ertem (2007), Should Food Manufacturers Care About Country-of-Origin Effect?, in *Journal of Food Products Marketing*, Vol. 14, p. 90.

[410] Here the reference is to the distinction between *search* and *experience* goods, introduced by Philip Nelson (1970), Information and Consumer Behavior, in *Journal of Political Economy*, Vol. 78, N. 2 (Mar. – Apr.), pp. 311-329. *Search products* or services have attributes customers can readily evaluate before they purchase, while *experience products* or services can be evaluated only after purchase. In the first case well-informed buyers are aware of the substitutes that exist for these types of products and thus are likely to be more price sensitive than other buyers; in the second one buyers tend to be less price sensitive, especially if it is their first purchase of said product and they will pay attention to product's brand and reputation, due to consistency of quality and loyalty. Nelson makes the example of canned tuna fish: "To evaluate brands of canned tuna fish, for example, the consumer would almost certainly purchase brands of tuna fish for consumption. He could, then, determine from several purchases which brand he preferred. We will call this information process "experience". For tuna fish there is no effective search alternative open." (p. 312).
Michael R. Darby and Edi Karni, in 1973, added a third group of products, the credence goods, that have attributes buyers cannot confidently evaluate, even after one or more purchases. They include health care; legal consulting; advertising and IT services. For this kind of goods price sensitivity tends to be relatively low. See Michael R. Darby and Edi Karni (1973), Free Competition and the Optimal Amount of Fraud, in *Journal of Law and Economics*, Vol. 16, N. 1, (Apr.), pp. 67-88. The example they refer to is the removal of an appendix, "which will be correct or not according to whether the organ is diseased. The purchaser will have no different experience after the operation whether or not the organ was diseased.", p. 69.

[411] The *level of involvement* reflects how personally important or interested consumers are in buying a product as well as how much information they need to make a decision. The level of involvement in purchasing decisions can change from those that are fairly routine, so that consumers are not very involved, to decisions that require extensive thought and a high level of involvement. See J. Tanner and M. A. Raymond (2012), *Marketing principle 2.0*, p. 95, available at http://2012books.lardbucket.org/pdfs/marketing-principles-v2.0.pdf (last access 29th August 2016).

[412] S. Chen and S. Chaiken (1999), "The heuristic-systematic model in its broader context", in S. Chaiken and Y. Trope (eds.), *Dual process theories in social psychology*, New York: Guilford Press,

before eating it, purchasers are likely to rely on these extrinsic cues, meaning on brands and labels. Indeed, labels can facilitate repeat purchases, when satisfaction has occurred, this way becoming the trusted extrinsic cues that may be used as a "search […] attribute in the shop"[413]. Nonetheless, some critical points have to be taken into account. Room limitations on labels remain rather then the risk of information overload persists. Consumers can also decide to be rationally ignorant, "because the opportunity costs of information processing, relating to time and allocation of cognitive capacity, exceed the expected marginal benefit"[414].

The issue addressed in this paragraph is to understand the main purpose behind labelling. Is it to promote a practical policy - for instance helping consumers to look after their own health or promoting market transparency -? Or does labelling have an abstract aim, in the sense of empowering consumers to act on their preferences whatever they may be and however they wish?
In this second case, as labelling is not bound to a substantive policy, this kind of power ensured to consumers might raise concerns with reference to irrational purchasers. Indeed, their choices can cause market distortion, facilitated or even caused by the misguided use of consumer labelling.

5.4.1 The European Union approach to labelling

The FIC regulation, considering how rapidly social, economic and technological environment changes, requires food information law to "provide sufficient flexibility to be able to keep up to date with new information requirements of consumers"[415].

It should be borne in mind that the crucial role of labelling as an instrument for informing purchasers is linked to the way in which the food supply chain is organized. Indeed, the industrial distribution chain, together with its ability to broaden rapidly

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pp. 3–96.
[413] A. Bernués, A. Olaizola and K. Corcoran (2003), Extrinsic attributes of red meat as indicators of quality in Europe: an application for market segmentation, in *Food Quality and Preference*, Vol. 14, p. 274.
[414] W. Verbeke and R. W. Ward (2006), Consumer interest in information cues denoting quality, traceability and origin: an application of ordered probit models to beef labels, in *Food Quality and Preference*, Vol. 17, p. 454.
[415] Whereas No 16, Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, OJ 2011 L 304/18.

and in a widespread way, has replaced the relationship between consumers and local producers. This way, that seller's role of "guidance" which could help purchasers while buying foodstuff has been erased.
In addition, two other elements should be taken into account:

1. Information is a public good that, once produced, generates useful benefits also for those who did not sustain the costs. This way, the advantages that informed consumers are able to get, in terms of better combination of price and quality, are shared with all consumers, even the not informed ones.
2. A growing number of means of information is available to purchasers. They can choose to be informed in the way that fits them the most. For instance, consumers' associations are reliable sources of information and business operators as well can give a positive contribution in this sense. Indeed, they can develop easy tools, such as instructions or free brochures in stores, but they can also publish reports by public or private experts, independent auditors and journalists[416].

Within this framework, providing true information on a package and making labels easy to understand for everyone is a key aspect[417]. Two perspectives should be addressed. The first one considers the moment of purchasing. Article 7, Reg. (EU) No 1169/2011, requires information practices to be fair, meaning that information shall not be misleading but accurate, clear and easy to understand[418]. The second one takes

[416] P. Del Chiappa (2009), "Le associazioni, la rappresentanza e la partecipazione dei consumatori", in G. Alpa (ed.), *I diritti dei consumatori*, tomo II, p. 723.
[417] It might be interesting to briefly mention N. Irti (2009), who, in *L'ordine giuridico del mercato*, Editori Laterza, affirms that information lagal framework is the basis of both firms and consumers' responsibility. Indeed, he compares business risk and consumers' choice risk. As consumers cannot transfer to anyone else the unknown elements inherent in their decision, rules and regulations cannot protect them from that risk but they are only useful to guarantee the flow of information; p. 141.
[418] Actually, most of the rules were already included in Directive 2000/13/EC. In this regard, I would like to mention the case C-195/14 (4th June 2015) concerning the labelling and presentation of foodstuff. It refers to the above-mentioned Directive but it can still be considered valiant. The case deals with a Teekanne fruit tea sold under the name 'Felix Himbeer-Vanille Abenteuer' ('Felix raspberry and vanilla adventure'). The packaging comprises a number of elements of various sizes, colour and font, in particular (i) depictions of raspberries and vanilla flowers, (ii) the indications 'Früchtetee mit natürlichen aromen' ('fruit tea with natural flavourings') and 'Früchtetee mit natürlichen aromen – Himbeer-Vanille-Geschmack' ('fruit tea with natural flavourings – raspberry-vanilla taste') and (iii) a seal with the indication 'nur natürliche Zutaten' ('only natural ingredients') inside a golden circle. However, the referring court found that the fruit tea does not contain any vanilla or raspberry constituents or flavourings, as it was detailed in the ingredients list. The BVV brought an action against Teekanne before the Landgericht Düsseldorf (Regional Court, Düsseldorf), submitting

into account the information's potential to have a "precautionary" function[419]. Indeed, it allows purchasers to evaluate products' safety, in light of their own personal needs, such as allergies or intolerances.

Nonetheless, reading information about ingredients or nutritional properties is not the same as being informed[420].

On the one hand, the increasing number of information available might actually lead to negative consequences, for two main reasons: (a) a long list of product information might lead many consumers to disregard the label, (b) it might make it harder to order each piece of information according to importance[421]. On the other hand, the language used in labels is often a symbolic one, which means that the person who receives information has to decode it. This operation is usually taken for granted but how many times, when going grocery shopping, are people too lazy or in a hurry to read carefully? What about those less educated consumers who find it hard to completely understand terms and acronyms[422]?

There needs to be a balance between purchasers' responsibility and information availability. It is not fair to justify a shallow and distracted purchaser otherwise the risk would be to completely erase her/his responsibility. At the same time, the

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that the items on the fruit tea's packaging misled the consumer with regard to the tea's contents. The BVV argues that because of those items, the consumer expects the tea to contain vanilla and raspberry or at least natural vanilla flavouring and natural raspberry flavouring. The ECJ states that *Articles 2(1)(a)(i) and 3(1)(2) of Directive 2000/13 must be interpreted as precluding the labelling of a foodstuff and methods used for the labelling from giving the impression, by means of the appearance, description or pictorial representation of a particular ingredient, that that ingredient is present, even though it is not in fact present and this is apparent solely from the list of ingredients on the foodstuff's packaging* (paragraph 44). Here consumers are displayed as individuals not even capable of reading and understanding a list of ingredients, otherwise they would not be misled by a simple image placed on a package. But wasn't this same consumer *reasonably well informed and reasonably observant and circumspect*?

[419] S. Bolognini (2012), *La disciplina della comunicazione business to consumer nel mercato agro-alimentare europeo*, Torino: Giappichelli, p. 77.

[420] A. Carretero García (2013), La Información alimentaria que debe ser facilitada al consumidor a partir de 2014 en la Unión Europea**,** in *Revista CESCO de Derecho de Consumo*, Vol. 8, p. 387.

[421] L. Noah (1994), The imperative to warn: disentangling the "right to know" from "the need to know" about consumer product hazards, in *Yale Journal on Regulation*, Vol. 11, mentioned in E. Golan, F. Kuchler, L. Mitchell et al. (2000), *Economics of Food Labeling*, Economic Research Service, U.S. Department of Agriculture, Agricultural Economic Report N. 793, p. 14.

[422] For instance, the recent Flash Eurobarometer 425, *Food waste and date marking*, Fieldwork September 2015, Publication October 2015, carried out by TSN political & social network, involving 26.601 respondents from the 28 Member States, shows that the meaning of date marking on food products is generally misunderstood, as consumers have difficulties in comprehending the terms "best before" and "use by". More precisely, only 47% of Europeans understand the meaning of "best before" and 40% the one of "use by". There are differences on the one hand at country-level, about both awareness and understanding of this kind of labelling, and on the other hand at socio-demographic level.

information provided must be immediate and easily understandable. The judgement regarding the supplied information should be addressed from a subjective perspective, considering how consumers approach foodstuff as well as their actual capacity to understand. From this viewpoint, the growing number of information given to consumers would only lead to better protection for them if they are able to convert the indications on the labels into actual nutritional knowledge.

The process of making informed food purchasing decisions depends not only on the wording of the labels, but also on the consumers' ability to understand what those indications actually mean. The current system does not make the majority of consumers able to play an active role within the food market. Purchasers, who are supposed to be the beneficiaries of labelling, behave more like passive subjects, overwhelmed by tons of information. Despite the difficulties found in approaching labels, they cannot say they have not read, thus they do not know. From this viewpoint, the legal architecture designed by the European legislator is underpinned not only on the food sector operators' responsibility for food information under Article 8, Reg. (EU) No 1169/2011, but also on a sort of consumers' responsibility[423]. The FIC regulation strengthens the precautionary function[424] of business to consumers information within the food market. This means that the European food legislation's goal is to give purchasers all the information they need in order to assess the quality of food before buying it. This is of great importance especially for those subjects that, due to medical conditions as well as ethical choices, want to avoid specific ingredients or attributes. At the same time, the FIC regulation emphasizes purchasers' auto-responsibility, delegating to them the task of choosing whether a product is good for their health. The EU's main concern seems to be to demand food business operators to provide information. Whether or not that information is clear, and,

[423] A. Di Lauro (2012), Nuove regole per le informazioni sui prodotti alimentarie nuovi analfabetismi. La costruzione di una "responsabilità del consumatore", in *Rivista di Diritto Alimentare*, Vol. 2, April-June, p. 23.

[424] Within this context, reference is not only to the so-called "precautionary labels", rather than to a concept of precaution applicable to the general role of information, as the paragraph further explains. For the sake of clarity, precautionary labels are technically intended as the ones with a "may contain…" indication, referred to dangerous ingredients for allergic purchasers. Critiques have been made to this kind of statement. Indeed "Rather than helping the allergic consumer cope with their condition offers, such labelling means they have even more restricted food choices and makes every day activities such as shopping, difficult. In the eyes of many allergy sufferers, precautionary labelling is viewed as cover for suboptimal allergen control practices". E. N. C. Mills, E. Valovirta, C. Madsen, S. L. Taylor et al. (2004), Information provision for allergic consumers – where are we going with food allergen labelling?, in *Allergy*, 59, p. 1266.

consequently, how it will shape the consumer's behaviour depending on it, is not a primary interest of the legislator. Once food business operators have written on labels all the mandatory particulars required by the FIC, there is no more information asymmetry that might mislead the purchaser. Such a consideration could be interpreted two ways.

Within the first and positive interpretation, EU Food Law goes above and beyond the traditional concept of the average consumer. In other words, it defines an aware purchaser, who has the capability to read and understand labels. Legislation on average consumers becomes legislation on individuals, each of whom not only has different preferences on what it is needed to nurture her/his organism[425] but is also able to consciously behave accordingly. Consumers are expected to understand all the mandatory and voluntary indications provided, as well as to make their own decisions. This way, they are treated as active subjects and they are deemed fully responsible for the choices they make.

The second interpretation, instead, does not positively re-evaluate consumers. Surely, going beyond the notion of average consumers is a beneficial goal but this is far from being achieved. Within this framework, the FIC regulation is negatively limited to the provision of information, and it does not take care of actually passing content on purchasers. The EU legislator does not seem interested in effectively informing them but only in giving purchasers what it is likely that they are going to need to avoid damage. The target of the EU policy is exclusively to give information, rather than communicating with consumers[426].

[425] Stefano Masini (2011), Diritto all'informazione ed evoluzione in senso personalista del consumatore (osservazioni a margine del nuovo regolamento sull'etichettatura di alimenti), in *Rivista di Diritto Agrario*, Fasc. 4, pp. 583-584. For those who understand Italian, the author cites the following very intesting quote: "non più cittadini assolutamente uguali sul piano giuridico come se si trattasse di modelli usciti da un medesimo stampo, ma soggetti sorpresi nella specificità della loro forza o debolezza socio-economica, il più delle volte inseriti in formazioni sociali con *status* differenziati perché espressione di interessi differenziati". Please, refer to P. Grossi (2010), "Il diritto civile italiano alle soglie del terzo millennio. Una postfazione", in F. Macario and M. Lo Buono (eds.), *Il diritto civile nel pensiero dei giuristi. Un itinerario storico e metodologico per l'insegnamento*, Padova: Cedam, p. 414.

[426] The difference between information and communication is underlined by F. Capelli (2009), Evoluzione del ruolo dell'etichettatura degli alimenti: dalle proprietà nutritive agli effetti sulla salute, alla luce della proposta di nuovo regolamento sull'informazione al consumatore di prodotti alimentari, in *Diritto Comunitario e degli Scambi Internazionali*, Vol. 4, p. 839.

This latter is the position of the author. Information should come only after education, as a fully implementation of whereas No 10 of Regulation (EU) 1169/2011[427], on the relationship between education and consumers' empowerment, should be a priority within the European agenda on food. Since it is a matter of human behaviours and life-style[428], shaping mindful purchasers cannot be left exclusively to labelling policies. It is crucial to interpret the moment of purchasing food as an activity that starts long before supermarket's aisles. From this viewpoint, only if consumers are provided with education[429] – and not simply information – does it become possible to truly communicate with them[430].

5.4.2 Communicating the origin of food

The need of effectively communicating with consumers is particularly true when it comes to country of origin labelling. As seen in the previous paragraphs, in addition to the difficulties of actually understanding the information provided on labels, the country of origin effect as well as ethnocentric biases play a pivotal role in consumers' decision making process.

On the one hand consumer organizations ask for more detailed labels, under the sign of a general "right to know" what the food contains and how and where it is produced. On the other hand, food business operators have to decide what kind of information is useful to provide, in addition to the mandatory particulars required by the FIC

[427] Reference is to the second part of Whereas No 10 of Regulation (EU) 1169/2011, which states that "Knowledge of the basic principles of nutrition and appropriate nutrition information on foods would contribute significantly towards enabling the consumer to make such an informed choice. Education and information campaigns are an important mechanism for improving consumer understanding of food information."

[428] With the word life-style reference is not limited to strictly dietary choices, whereas it also includes citizens' attitudes towards environmental and sustainability issues as well as individuals' orientation towards sports, alcohol, tobacco and so on.

[429] From-farm-to-school initiatives as well as gardening activities involving kids at school, for instance, proved to be effective to reshape kids' relationship with the moments of production and consumption of food. Just few examples: http://www.nytimes.com/2011/11/20/nyregion/prep-schools-encourage-students-to-learn-to-farm.html; https://www.theguardian.com/teacher-network/teacher-blog/2014/mar/12/school-farms-engaging-students-curriculum-sustainability; https://www.theguardian.com/teacher-network/2016/mar/15/schools-benefit-growing-produce (last access 10th November 2017).

[430] This is particularly true if we think, for instance, of organic food. It is mostly displayed as more advisable but, at the same time, it usually costs more. If the target is to convince a growing number of consumers to purchase it, they should be persuaded that the price corresponds to peculiar qualities that make it healthier and better for the environment. In order to do so, labels are not enough as they are just symbols and do not provide explanations. In light of this

regulation under Article 9. In order to make such a decision, companies have to assess the number of consumers that would be interested in COO as well as the premium that consumers would be willing to pay for that piece of information. If corporations do not believe that consumers will pay a higher price for the indication of the country of origin, it would only represent extra costs. This way, it is likely that business operators will not agree with the mandatory provision of COO information, nor they will be willing to participate in voluntary schemes.

A first risk connected with COOL is consumers' wrong impression that domestic products are safer than the imported ones, even when goods originate in other EU Member States, that are all required to follow the same safety standards. Consumers might interpret the higher price of a domestic product as a clue of safer producing methods instead of increased production costs. For these reasons, adding new indications to the mandatory particulars already set by Article 9 FIC may actually necessitate to invest on some type of promotion campaign, able to help consumers assimilate that information. Indeed, data shows that even the apparently simplest information, such as the date of minimum durability, is often misunderstood[431]. Then, indications related to the country of origin might require some extra explanations in order to be correctly interpreted.

Another risk of a "Made in…" indication might be its potential to build an ideal connection between the origin and the quality, even though this does not fall under the definition of COOL. Origin might be linked to beliefs about the knowledge developed in the specific area as well as it can be used for identifying the product, after many satisfying purchases, when the brand is not strong enough. As a consequence, country of origin labelling is likely to play a crucial role in consumers' purchasing decision-making process only if they have some knowledge about the region indicated and if they have experienced the quality of the product and they find it pleasing[432].

[431] Flash Eurobarometer 425 on Food waste and date marking, September 2015. Eurobarometer findings show that the meaning of date marking on food products is poorly understood. 47% of Europeans understand the meaning of "best before" labelling and somewhat fewer (40%) are aware of the meaning of "use by". Available at http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2095 (last visit 13th November 2017).

[432] K. G. Grunert (2005), Food quality and safety: consumer perception and demand, in *European Review of Agricultural Economics*, Vol. 32, p. 377.

Technically, the purpose of the indication of the country of origin on labels is not in the two mentioned connections between origin and quality as well as between origin and safety. However, such links come pretty natural to consumers and can be understood on the basis of cognitive, emotional and normative perceptions, as described in Paragraph 4.2.

From a legal perspective, the reason for setting a mandatory indication on COO may be found in the right to be informed. The linkage between information and consumers' choices is acknowledged as a crucial element for consumers' protection. Such a right has to be shaped in a way that takes into consideration the peculiar relationship existing between food and human beings. Differently from other purchasable goods, food becomes part of who consumes it. The right to be informed means to have the chance to choose what to eat depending on preferences and values but it does not include the right to choose not to buy food at all, at cost of starving[433]. From this viewpoint, establishing mandatory COOL is a legitimate strategy to inform consumer but it has to be implemented through effective education campaigns. A mandatory indication on the origin of food is a translation of the right to be informed only if consumers are able to fathom the given information. Otherwise the result would be an empty right, that nothing adds to the decision-making process of the majority of consumers.

5.5 COOL and connected matters: some reflections on the side

This conclusive paragraph will deal with traceability as a tool for the identification of the origin of food as well as with COOL as a food-miles indicator. The reason for the legislator to establish mandatory COOL does not reside either in traceability or sustainability issues. Nonetheless, both of these topics are connected with the indication of the origin as it will be described.

5.5.1 Traceability and country of origin labelling

[433] Michiel Korthals (20014), "The food we eat: The right to be informed and the duty to inform", in Ruth Chadwick, Mairi Levitt and Darren Shickle (eds.), *The Right to Know and the Right Not to Know. Genetic Privacy and Responsibility*, Cambridge University Press, p. 197.

According to Article 3, point 15, of Regulation (EC) No. 178 of 2002 *traceability means the ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution*.

Traceability entails the ability to follow the movements of food products throughout the supply chain. It is based on backward and forward follow-ups of goods – which correspond to tracing and tracking –, so that it is possible to know the product flow from farm to fork and gain all the associated information. Major scope is that, by doing so correctly, "the product can be checked for safety and quality control, traced upward, and tracked downward at any time required"[434]. It represents a crucial part of the supply chain, especially within the food sector, due to its implications for animal and human health - although EU regulation lacks detailed internal traceability[435] requirements[436] -. Moreover, in order to ensure that labels are accurate, origin information has to be transferred in each link of the food chain. The supplier that "starts" the country of origin declaration has to maintain the records necessary to prove the origin claim. This means that in a vertical supply chain, there has to be an audit trail that assures the integrity of such traceability system.

The reason for dealing with traceability within this research about country of origin labelling stems from the consideration that, in recent years, significant attention has been paid to product labelling. Labels are interpreted as a means to provide product-specific information to the stakeholders involved in the food chain as well as a tool to reduce the quality uncertainty faced by consumers when purchasing food[437].

Indeed, food safety and food quality issues have become increasingly important[438] in consumer perceptions of food markets. Within the complex array of factors that create the concept of "food quality", purchasers always look for quality cues that may help them to evaluate products. Country of origin labelling is often read under this light, as

[434] T. Bosona and G. Gebresenbet (2012), Food traceability as an integral part of logistics management in food and agricultural supply chain, in *Food Control*, Vol. 33, p. 35.

[435] Internal traceability is referred to traceability systems within a company; oppositely, chain traceability is between companies in the supply chain.

[436] K. A-M. Donnelly, K. Mari-Karlsen and B. Dreyer (2012), A simulated recall study in five major food sectors, in *British Food Journal*, Vol. 114, p. 1017.

[437] W. Verbeke and J. Roosen (2009), Market Differentiation Potential of Country-of-origin, Quality and Traceability Labeling, in *The Estey Centre Journal of International Law and Trade Policy*, Vol. 10, p. 21.

[438] Especially after the Bovine Spongiform Encephalopaty in early 2000.

linked as it is to traceability systems in agro-food supply chains. Indeed, the ability to provide consumers with information on the country of origin, despite not necessarily implying the full traceability throughout the supply chain to the farm, at least requires a basic level of traceability. This way, traceability becomes a system with the potential to facilitate the provision of quality signals to consumers. However, many of the traceability systems for food products, both in the EU and in third countries, are unlikely to grant credible *ex ante* quality signals to consumers[439]. It is true, though, that even simple traceability schemes can pinpoint specific credence attributes[440], used as food safety signals or as marks showing the adoption of certain ethical and environmental practices.

Traceability is implemented thanks to a series of mechanisms, called "traceability systems". Through traceability systems "identification"; "link"; "records of information"; "collection and storage of information" and "verification" are performed. Components of the system are:

- rules and procedures;
- documented procedures;
- organizations/systems;
- process and management resources (personnel, financial resources, machinery equipment, software, technologies and techniques);
- regulations;
- education/training.

Information system technologies are used. Currently, the majority of traceability systems are based on electronic information databases, even though it is possible to create a traceability system also without them[441].

Traceability has the potential to play different roles in the market:

- at the very beginning, traceability arose as a method to react to a specific

[439] Jill E. Hobbs (2003), *Traceability and Country of Origin Labelling*, Presented at the Policy Dispute Information Consortium 9th Agricultural and Food Policy Information Workshop, Montreal, p. 5.
[440] Please, refer to footnote No 179 for the definition of credence goods.
[441] Revision Committee on the Handbook for Introduction of Food Traceability Systems (2007), *Handbook for Introduction of Food Traceability Systems (Guidelines for Food Traceability)*, Food Marketing Research and Information Center – Tokyo, p.13. Available at http://www.maff.go.jp/j/syouan/seisaku/trace/attach/pdf/index-67.pdf (last access 13th November 2017).

problem that affected one of the links of the food supply chain. Indeed, once an issue has been identified, traceability systems allow to operate in a less costly way, becoming an *ex post* reactive information.

- Traceability systems play a pivotal role in enhancing the effectiveness of tort liability law, working as an incentive for firms to produce safe food. Making it easier to establish legal liability, companies are incentivized to adopt spontaneously such initiatives. Within this perspective, traceability can be helpful in preventing financial damages as well as harm to brand name capital, due to civil legal action. However, also within this second framework, traceability remains an instrument able to provide only *ex post* information.
- Finally, traceability system can be used to give consumers information, through labels. As stated above, when buying food products, consumers are not aware of all the food's features. They need labels that indicate unobservable credence attributes, already verified by food business operators in the pre-purchase phase. In this only case, traceability's function is to be an *ex ante* information, as it requires "proactive information provision and quality verification"[442].

Nevertheless, problems stem from the fact that the actual traceability systems - in the EU, as well as in Canada or in the U.S. -, despite playing a crucial economic role maintaining consumers' confidence in the food industry, are not designed in order to give consumers *ex ante* information. This implies that they do not reduce information asymmetries, while, thanks to trace-back mechanisms, they are focused on limiting cost arising in the event of a problem. Built in such a way, the current traceability systems are surely necessary but not enough to provide consumers with detailed and verified information about food's quality attributes.

5.5.2 The role of traceability within the food supply chain

Traceability systems can be implemented by both private sector and governments. Within the former, and in particular for producers and processors, the trigger to adopt such systems might be either an individual initiative for better controlling their own supply chain or a result of pressure from food retailers. Indeed, food retailers are

[442] Jill E. Hobbs (2003), Traceability and Country of Origin Labelling, p. 12.

usually led by a desire to reduce risk exposure rather than to decrease the transaction costs of monitoring product quality or downstream production methods. However, such an interest in traceability systems is seldom translated in available information to consumers on retail packages. The most effective way to ensure that also consumers can benefit from traceability schemes is to adopt mandatory labelling requirements, as the European Union did for specific products[443].

This consideration leads to another question: to what extent traceability and country of origin labelling are a private or public responsibility? The answer depends on "whether there is market failure, and if a market failure is present, on the extent to which the benefits to consumers of mandating traceability and/or labelling outweigh the costs"[444]. Indeed, industry-driven traceability is likely to change depending on how consumers evaluate this kind of information. As a consequence, the main element that companies will take into account is how much purchasers are willing to pay for it.

From a corporation's perspective, if country of origin labelling is only valued as a cue for safety or quality, it would be more efficient to provide this kind of information through direct quality signals. From this viewpoint, instead of implementing traceability schemes, it would be more profitable to use third party certifications of quality, or regulatory process and/or performance standards for food safety.

From a consumer's perspective, reading about each step of the food chain on products' labels might be overwhelming. For this reason, a public intervention that evaluates which information should be provided becomes necessary.

In an effort to link traceability and COOL as well as traceability and safety, it can be stated that traceability is instrumental in identifying the former – the country of origin - and shaping the latter – food safety-. In other words, traceability does not have intrinsic value per se[445], while it presents an *ex ante* and *ex post* utility.

[443] Surely beef is the obvious examle, with compulsory traceability and labelling systems.

[444] Jill E. Hobbs (2003), Traceability and Country of Origin Labelling, p. 11.

[445] Researchers investigated 278 Belgian meat consumers' interest in information cues referring to country of origin, quality and traceability on beef labels and the potential impact of a generic information campaign, aimed at drawing consumers' attention to beef origin, quality and traceability labeling (the campaign in question was implemented during September 2000, under the scope of informing Belgian consumers about the features and guarantees offered by the European beef labeling system). The shows that when it comes to country-of-origin and quality labels, the value that consumers place on such indications on labels might positively change thanks to information

Ex ante utility means that traceability is "needed as the backbone for guarantees related to quality and origin"[446]. On the one hand, for the food sector operator that will label the final product, traceability will be useful to go backwards to the first links of the supply chain. On the other hand, it will ensure consumers about the feasibility of tracing back the origin.

Ex post, instead, traceability is a crucial tool for efficient product recalls as well as for liability issues, whenever a food safety crisis occurs. It might help to minimize production and distribution of unsafe food or, at least, to limit the damage by facilitating product recall activities rather than by establishing the extent of suppliers' liability.

This way, traceability can be described as an *ex ante proactive* and an *ex post reactive* instrument, functioning for providing information about the origin as well as for erasing risks within the food supply chain. In addition, whenever companies not only comply with the legal requirements but also choose to give extra information to consumers - such as country of origin - traceability might be a precious tool to gain consumers' trust.

Data provided by traceability systems are instrumental for transparency of food production and sourcing. As traceability's value is not intrinsic rather than it depends on what it protects, it might end up being functional for the implementation of sustainability initiatives, especially at farm level[447]. Despite being born to effectively respond to risky events, traceability might be useful for sustainability issues as well. To this the following chapter will be dedicated.

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campaigns, while this was not the case for consumer interest in direct indications of traceability. This means that consumers do not value traceability labels per se, even when informed about them in a campaign. See W. Verbeke, R. W. Ward and T. Avermaete (2002), Evaluation of publicity measures relating to the EU beef labeling system in Belgium, in *Food Policy*, Vol. 27, pp. 339-353; and W. Verbeke and R. W. Ward (2006), Consumer interest in information cues denoting quality, traceability and origin: an application of ordered probit models to beef labels, in *Food Quality and Preference*, Vol. 17, pp. 453-467. It has to be said though, that these findings refer to Belgian consumers, while, for instance, another study on Italian meat consumers reports that they are interested in voluntary traceability information, such as the system of cattle breeding and the date of slaughtering, even though the risk of information overload has to be taken into consideration. See A. Banterle and S. Stranieri (2008), Information, Labelling, and Vertical Coordination: An Analysis of the Italian Meat Supply Networks, in *Agribusiness,* Vol. 24, pp. 320–331.

[446] W. Verbeke and J. Roosen (2009), *Market Differentiation Potential of Country-of-origin, Quality and Traceability Labeling*, p. 31.

[447] T. Bosona and G. Gebresenbet (2012), Food traceability as an integral part of logistics management in food and agricultural supply chain, p. 39.

5.5.3 Country of origin labelling as a food-miles indicator

Information on food labels - such as country of origin, geographical indications or other quality marks - are valuable for consumers, if perceived as signals of particular product's features. As seen in the previous paragraphs, labels might be used to recall a certain quality level or to suggest attributes related to authenticity and genuineness. This is the case of region and origin labels, that have been reported to be rather convenient marketing tools, designed in order to stress out certain food product's characteristics[448].

Actually, the country of origin labelling has the potential to highlight an extra characteristic of the product. Even though COOL's rationale does not lie in environmental matters, nonetheless it allows consumers to choose, among the different products available, those that have travelled less, thus are likely to have a lower carbon footprint.

In addition, by reading where food comes from, educated purchasers might be able to understand "whether produce was grown out of season in a greenhouse or came from an unsustainable or depleted fishery"[449]. Here, reference to educated purchasers only is essential. Stretching in such a way the meaning of country of origin labelling, in fact, requires knowledge and many cognitive steps. First of all, it is necessary to identify the country, then to know where that country is on the world map and whether it is above or under the equator in order to assess seasonality and so on. Even when a purchaser has the adequate level of knowledge, s/he might not have time to read or simply s/he might not be willing to put such an effort on food product choices. Therefore, it is noteworthy that such an interpretation of COOL refers exclusively to a niche of consumers. Only those that feel the urgency of making production, distribution and even their own consumption activities more environmentally and economically sustainable are likely to give to the country of origin this kind of meaning. Although local markets are earning increasing success[450], purchasers'

[448] W. Verbeke (2013), Food quality policies and consumer interest in the EU, in Marija Klopčič, Abele Kuipers and Jean-François Hocquette (eds.), "Consumer attitudes to food quality products", Wageningen: Wageningen Academic Publisher, pp. 23-24.

[449] J. Czarnezki, A. Homan and M. Jeans (2015), Creating order amidst food eco-label chaos, in *Duke environmental law and policy forum*, Vol. XXV:281, p. 294.

[450] For a comparison of farmers market in Europe and in the United States, please refer to R. Vecchio (2009), *European and United States farmers' markets: similarities, differences and potential developments*, paper prepared for presentation at the 113th EAAE Seminar A resilient European food

motives for food choices are still driven by price and safety concern. This kind of narrative may appeal more to particular market segments. Consumers with a strong interest in high-quality and high-priced foods, specific socio-demographic groups, or residents of the region of provenance of the considered foods do not represent the majority of consumers. This is the reason why the current market share of sustainable food products remains low[451]. Most consumers seem to prefer 'ego' over 'eco'[452] and the current social and physical environments do not appear to lead purchasers to change their habits.

Not only these mentioned consumers represent a minority but the interested categories of food, as well, are a few. As the discussion is how to take advantage of the indication of the country of origin for sustainability issues, the COOL legal framework has to be borne in mind. This means that the "Made in…" indication will be useful to assess the covered miles only of those specific types of food for which law requires such an indication. Nevertheless, there is a bright side. With environmental and ethical concerns gaining increasing interest among consumers, producers might be willing to obtain their loyalty through voluntary country of origin schemes on food packages. From this viewpoint, re-interpreting COOL in such an environmentally sustainable way might work as a trigger to enhance voluntary origin labelling schemes. Indeed, being aware of the environmental and ethical implications of consumption choices has made the food business operators increasingly focused on sustainable ways of production, by integrating the role of consumers' opinions on sustainability issues into their marketing strategies.

Bending COOL to environmental matters might appear pretentious rather than useless. However, it has the benefit to show how legal instruments, created to respond to certain issues, can be implemented in order to serve different causes. The tool of the country of origin has been established on the one hand under Article 26 FIC in

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industry and food chain in a challenging world, Chania (Greece), 3-6 September. Available at http://ageconsearch.umn.edu/bitstream/58131/2/Vecchio.pdf (last access 13th November 2017).

[451] M. J. Reinders, Jos Bartels and Gé Backus (2013), *Market opportunities for sustainable foods: an investigation of the different roles of consumers and retailers, catering companies and brand manufacturers*, in Marija Klopčič, Abele Kuipers and Jean-François Hocquette (eds.), "Consumer attitudes to food quality products", Wageningen: Wageningen Academic Publisher, pp. 166.

[452] M. J. Reinders, Jos Bartels and Gé Backus (2013), *Market opportunities for sustainable foods: an investigation of the different roles of consumers and retailers, catering companies and brand manufacturers*, p. 171.

order to avoid misleading consumers on the true origin of food. On the other hand, within the context of international trade, its utility is linked to customary needs, as explained in the previous chapter. Although not set by the legislator, COOL can be useful for such an additional environmental purpose. This kind of approach is actually "sustainable" itself. It shows that is not necessary to create more, rather it is a matter of using differently what already exists, changing perspectives.

PART III

THE ORIGIN AND PROVENANCE OF FOOD AS A GOVERNANCE ISSUE

This chapter will add context to the country of origin labelling system within the current global food governance. The concepts of origin and provenance will be discussed in view of the tension between the globalized food supply chain and the growing demand for localization, as more respondent to sustainable goals.

The first part will be dedicated to the description of what it is intended with the term "governance" as well as of the main actors involved, in order to understand in which way they interact when it comes to country of origin labelling rules[453]. Particular focus will be on retailers and their increasing power to shape standards and impose them to the producing and processing industry.

The second part will evaluate the concepts of origin and provenance in light of the "food regimes theory" and the Food Sovereignty Movement's objections. By challenging origin and provenance as notions mainly leant towards market's needs, the aim will be to fathom whether and to what extent they can be embedded in diverse social and ethical concerns.

The first part adopts a market-based perspective, therefore the way in which COOL rules are interpreted will fit this kind of framework. At the opposite, the second part considers country of origin and provenance labelling as an essential element for consumers' right to know. As this latter mirrors the opinion of who writes, these considerations will lead the thesis to a conclusion.

[453] Please, refer to Part I for a description of the legislation on Country of Origin Labelling within the EU as well as within the Italian legislative framework.

CHAPTER 6

A MARKET-BASED PERSPECTIVE

6.1 What is Global? What is Governance?[454]

The concepts of "global" and "governance" will be the pillars of the following scrutiny. Although quite commonly used, it might be beneficial to outline a glossary describing their main features, before referring specifically to the global food governance within the legal realm.

The two terms were born in different fields: while "global" has been used for the first time by Marshall McLuhan[455] in the field of communication and media, "governance" belongs to the domain of economics[456]. With reference to the former one – global -, McLuhan outlined a new reality with major implications for the formation of social structures, namely the so-called "global village"[457], based on newly created interconnections. This theory has been thoroughly studied and discussed[458], in

[454] This paragraph contains some references to a previous article that Prof. Margherita Poto and I have written together. At that time, my contribution mainly regarded other issues than the ones mentioned here. So, please, bear in mind that the words you will read, although referenced to our article, are actually the outcome of Prof. Poto's research activity, for which I am deeply thankful.

[455] "Today, after more than a century of electric technology, we have extended our central nervous system in a *global* embrace, abolishing both space and time as far as our planet is concerned", Marshall McLuhan (1964), *Understanding media: the extensions of man*, MIT Press, p. 3. For a thorough analysis of the global development of the communications see Meenakshi Gigi Durham and Douglas M. Kellner (2012), *Media and Cultural Studies,* 2^ Edition, Oxford: Wiley-Blackwell.

[456] Mariela Maidana-Eletti (2014), *Global Food Governance. Implications of Food Safety and Quality Standards in International Trade Law*, Peter Lang, p. 7.

[457] "The new electronic independence re-creates the world in the image of a global village" Marshall McLuhan (1964), *Understanding media: the extensions of man*, MIT Press, p. 195.

[458] The scholarship on McLuhan's studies is quite extensive. See, among others, Richard Cavell (2003), *McLuhan in Space: a cultural geography*, University of Toronto Press; Harry H. Crosby, George R. Bond (1968), *McLuhan Explosion*, U.S: Van Nostrand Reinhold Inc.; Meenakshi Gigi Durham and Douglas M. Kellner (2012), *Media and Cultural Studies*, Oxford: Wiley-Blackwell; Mark Federman (2006), *The Cultural Paradox of the Global Village*, available at http://individual.utoronto.ca/markfederman/CulturalParadoxOfTheGlobalVillage.pdf (last access 27th November 2017); Sidney Finkelstein (1968), *Sense and nonsense of McLuhan*, U.S: International Publishers Co Inc.; W. Terrence Gordon and Susan Willmarth (1997), *McLuhan for beginners*, Writers and Readers Pub.; Philip Marchand (1989), *Marshall McLuhan: The medium and the messenger*, MIT Press; Janine Marchessault (2005), *Marshall McLuhan*, SAGE Publications; Jonathan Miller (1971), *Marshall McLuhan*, USA: Penguin Group; John Moss, Linda M. Morra (2004), *At the speed of light*,

particular by Mark Federman, who developed further this concept. Mark Federman talked about the phenomenon of "globalism" as the "emergence of trans-national institutions and ad-hoc organizations founded on relationships and reflexivity"[459].

With regards to the second one – i.e. governance -, since it has several different meanings, it may be easier to define it distinguishing it from what it is not. Governance is not government: it rather is a "new process of governing; or a changed condition of ordered rule; or the new method by which society is governed"[460]. This perspective, governance is a broader term than government and it includes "a complex set of organizations drawn from the public and private sectors"[461].

Combining the two concepts of "global" and "governance", it looks like going global implied the creation of an organizational space, in which cross-border needs – such as environmental protection and human rights – are recognized and liberal economic as well as democratic models circulate, with the opportunity to strengthen the engagement of civil society in the decision-making process[462]. On the one hand, territorial and non-territorial borders have been fading away; on the other hand, actors are expected to be multiform and to change aspect with the necessary flexibility[463]. Indeed, global governance entails a shift in the allocation of authority from the top down to the bottom-up and it blurs the boundaries between private and public domains, determining both governmental and non-governmental rules for the provision of public goods and services[464]. Working together with formal institutions, governance is based upon a continuous "interaction between formal and informal networks, partnerships, projects and consensus", as it is pluricentric rather than

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University of Ottawa Pr.; Lance Strate and Edward Wachtel (eds.) (2005), *The legacy of McLuhan*, Hampton Press; Donald F. Theall (2006), *The virtual Marshall McLuhan,* McGill-Queen's University Press.

[459] Mark Federman, "The Cultural Paradox of the Global Village", in http://individual.utoronto.ca/markfederman/CulturalParadoxOfTheGlobalVillage.pdf, 2006, p. 6.

[460] R. A. V. Rhodes (1996), The new governance: governing without government, in *Political Studies*, XLIV, p. 652-653.

[461] James N. Roseneau (1992), "Governance, Order, and Change in World Politics", in J. N. Rosneau and Ernst-Otto Czempoiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge: Cambridge University Press, p. 3-6.

[462] Helmut Anheiner and Nuno Themudo (2002), *Organisational Forms of Global Civil Society: Implications of Going Global, Global Civil Society*, pp. 191-216. Available at http://www.gcsknowledgebase.org/wp-content/uploads/2002chapter81.pdf (last access 14th June 2017).

[463] Margherita Poto and Lara Fornabaio (2017), Participation as the Essence of Good Governance: Some General Reflections and a Case Study on the Arctic Council, in *Arctic Review on Law and Politics*, Vol. 8, p. 148.

[464] Robert Lawrence (2003), "Comment on Gary C. Hufbauer", in Horst Siebert (ed.), *Global Governance: an Architecture for the World Economy*, Springer, p. 271.

unicentric[465]. Not only the actors' roles in the global arena has changed but also new actors emerge. Besides states, it is worth mentioning the Inter-governmental organisations[466] (IGOs), the independent administrative authorities[467] (IAAs), and the non-governmental organizations[468] (NGOs)[469]. The category is not exhaustive, since

[465] Jessica Duncan (2015), *Global Food Security Governance. Civil society engagement in the reformed committee on World Food Security*, New York: Routledge, p. 21.

[466] According to the Union of International Associations (UIA), the term IGOs includes all the organisations formed by at least three States active on a plurality of national territories. The IGOs are generally created through a formal intergovernmental agreement and their aim is to strengthen the cooperation among States. Moreover, some IGOs play a role in settling disputes, establishing special procedures and facilitating the compliance with international rules. Please, see the official website: http://www.uia.org/faq/yb3 and refer to Eşref Ertürk (2015), Intergovernmental Organizations (IGOs) And Their Roles And Activities In Security, Economy, Health, And Environment, in *The Journal of International Social Research*, Volume 8, Issue 37, pp. 333-341.

[467] IAAs are non-state agencies supervising sensitive sectors, whose characteristics are the organisational independence from governments, the subjection to administrative law rules, as well as civil law rules (as in the case of liability), their quasi-judicial powers, having the ability to play an alternative role to the courts. They are created by law and they are subject to it; and they are usually formed by a consistent group of technical experts. They are given powers over regulation but are also subject to controls by elected politicians and judges. Please, refer to Mark Thatcher (2002), Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation, in *West European Politics*, Volume 25, Issue 1, pp. 125-147. Among some of the most relevant studies on IAA see: Frank Vibert (2014), *The new regulatory space*, Cheltenham: Edward Elgar and, by the same author (2015), *Independent agencies No fixed boundaries*, available at http://www.lse.ac.uk/accounting/CARR/pdf/DPs/CARR-DP81-Frank-Vibert.pdf (last access 14 June 2017). See also Edoardo Chiti (2004), Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies, in *European Law Journal*, Vol.10, Issue 4, pp. 402-438. However, doubts emerge relating to their independence, impartiality and detached status and experience has shown some drawbacks in their functioning, as the example of the inability of the financial supervisory bodies to respond to the financial crisis in 2008 shows. Please, refer to Jonathan Turley (2013), *The rise of the fourth branch of the government*, The Washington Post, and to Margherita Poto (2011), The System of Financial Supervision in Europe – Origins, Developments and Risk of Overruling, *European Journal of Risk Regulation*, Vol. 2, p. 491 -. Despite all, the independent administrative authorities have certainly paved a new way to the enlargement of the governance beyond the limits of the government. And the idea of technical bodies with neutral and discretionary power has certainly impacted the global regulatory scenario, by showing new potential cooperative networks between the old system of national governments and new cross-boundaries bodies.

[468] The NGOs are private and voluntary organisations whose members are individuals or associations that come together to achieve a common purpose. Manuel Castells (2008), The New Public Sphere: Global Society, Communication Networks, and Global Governance", in *The Annals of the American Academy*, Vol. 85, p. 616, highlights three main features when referring to NGOs vis-à-vis political parties: their considerable popularity and legitimacy, which translates into substantial funding via donations and volunteerism. The majority of the scholarship agrees to include NGOs as the most active part of the civil society, with their contributions as agenda setters, conscience-keepers, lobbyist and good practices enforcers. Please refer to Farhana Yamin (2001), NGOs and International Environmental Law: a Critical Evaluation of their Roles and Responsibilities, in *Review of European Community and International Environmental Law*, Vol. 10, N. 2, pp. 149-162 as well as to Thomas Bernauer and Robert Gampfer (2013), Effects of civil society involvement on popular legitimacy of global environmental governance, in *Global Environmental Change*, Vol. 23, pp. 439–449. Undoubtedly, the role played by the NGOs and especially by the environmental NGOs (e-NGOs) in the last half century has grown exponentially and has contributed to promote the civic awareness on sustainable development. Despite the consolidate opinions quoted above that refer NGOs as civil society, it seems more advisable to keep the category "civil society" open to any kind of single or grouped actors that strive for the protection of fundamental rights otherwise infringed or neglected by the decision makers. For a deeper understanding of what it is meant here for "civil society" please see M. Poto and L. Fornabaio (2017), Participation as the Essence of Good Governance: Some General

new formations are allowed to enter the global arena. Among the most significant examples of new aggregations of actors are the civic society movements and the minority groups (i.e. indigenous peoples).

To sum up, governance generally refers to the management of society, through state and government institutions as well as civil society and private sector. The concept of global governance emerged as a way to describe the economical and political changes occurred due to the process of globalization. Indeed, such a process has led to a redistribution of "power within the international systems away from the nation-state to new international non-state actors"[470].

6.2 The global dimension and the law

Specifically referring to the legal realm, before the advent of the global dimension, law mainly had national boundaries. On the opposite, nowadays, due to the new cross-border dimension, supranational systems influence the national and the local, while local developments have pervasive repercussions on different parts of the world[471]. Indeed, this kind of structure is often assimilated to a network, where, on the one hand, the emersion of new actors has influenced the rise of the network system itself; on the other hand, the network system has encouraged the participation of a number of actors wider than the mere national states[472].

The result of the expanding global legal realm both intersecting with and being influenced by the local and national levels is a complex cacophony of intertwined, multi-level regulations. "In the same field, there may be trans-national regulators setting soft-law standards, state regulators or departments implementing supra-national legal requirements, national regulatory agencies applying a variety of regulatory instruments, and sub-national non-state regulators such as standard-setting

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Reflections and a Case Study on the Arctic Council, in *Arctic Review on Law and Politics*, Vol. 8, p. 140.

[469] Margaret P. Karns and Karen A. Mingst (2004), *International Organizations. The Politics and Processes of Global Governance*, Second Edition, London: Lynne Rienner Publishers.

[470] J. P. Muldoon, 2004, The Architecture of global governance: an introduction to the study of international organizations, Boulder: Westview Press, p. 4.

[471] William Twining (2009), Globalisation and Legal Scholarship, in *Tilburg Law Lectures Series*, Montesquieu seminars, volume 4, p. 8.

[472] Anne-Marie Slaughter (2004), *A New World Order*, Princeton: Princeton University Press, p. 40.

authorities, professional self-regulators, and industry-based certification bodies. In addition, regulation may encompass a diverse array of voluntary bodies, regulated firms, and other organizations. Many of these regulatory actors may apply the norms of both state-based regulators and trans-national or sub-national non-state regulators, and they may be both advised by an array of consultants and have to conform to conditions imposed by other bodies such as companies"[473]. The internationalization of regulation produces a variety of regulatory regimes, often based on different norms. When authority is shared among diverse actors and levels of government, hierarchies do not work. This lead to the rise of regulatory networks, meaning regimes that involve numbers of regulators having a common impact on a certain issue. These regulators are spread across distinct governmental levels and they might seek to coordinate their activities[474].

Within this perspective, networks have the great peculiarity of transferring information smoothly to the actors, guaranteeing a high level of transparency in the safeguard of both procedural and judicial principles, such as access to information rather than the right to participate, to be heard and to have a fair trial. However, one last question remains: how the actors part of this network will be able to cooperate? On the one side, the need to establish a common core of values that works as a common language of communication cannot be neglected. On the other side, that set of values – that might include, *inter alia*, opposition to market driven forces, acceptance of sustainable development in environmental law, prioritisation of human rights over security issues - shall be participated. This means that, in order to implement the common core, it is necessary to set up good administration principles as a guidance. Transparency and participation are therefore the keys to open up the dialogues among the actors[475].

6.3 Global Food Governance

These brief introductory remarks constitute the basis to tackle the issues related to the

[473] R. Baldwin, M. Cave and M. Lodge (2012), *Understanding Regulation: Theory, Strategy and Practice*, Second edition, Oxford: Oxford University Press, p.159.
[474] R. Baldwin, M. Cave, M. Lodge (2012), *Understanding Regulation: Theory, Strategy and Practice*, Oxford: Oxford University Press, p.373-380.
[475] M. Poto and L. Fornabaio (2017), Participation as the Essence of Good Governance: Some General Reflections and a Case Study on the Arctic Council, p. 143.

global food governance. Indeed, one of the most interesting aspects about food law and food governance is that they constitute a perfect example of all the issues named above. On the one hand food law is a complex subject, at the crossroads with many and various values, that are likely to come into conflict. On the other hand, food governance has the typical structure of a network, where no hierarchy is allowed. As the interests involved are numerous and none prevails on the others, frictions among rules and regulators protecting them are likely to emerge. Not only the areas covered by food law are diversified – ranging from regulations of commerce and consumers' protection, to rules on agriculture, environment protection, animal wellbeing, cultural heritage –, but they are also regulated by different authorities, involved in a constant dialogue[476]. The structure is the one of a regulatory network with multiform and composite nature, underpinned on the coexistence of various bodies, that are in charge of different powers. In such a network structure there should be no centre and each authority should enjoy the same share of power.

What has to be intended with the concept of "global food governance" slightly changes depending on which matter is considered crucial. As said above, environmental, economic, ethical, health concerns are all related to food and can all be objects of food regulations. The fact that these issues regard all the same topic makes the governance fragmented. It is composed of various regulators, belonging to different areas of interests, despite addressing the same object. Next to this "sector-based" fragmentation, it is possible to identify a "geographical" one, assuming that each legal order establishes its own set of rules through specific authorities. As these latters enjoy a certain degree of autonomy from other regulatory systems, on the one hand, they address food from their own point of view and, on the other hand, they cannot be totally isolated. Within such a global network system, they build up connections with other authorities, belonging to different regulatory systems rather than dealing with diverse thematic fields. This way fragmentation is destined to increase, thus the challenge is to reduce it in the attempt to implement coherent policies.

Moreover, to this kind of "substantial" complexity – due to the sector-base and

[476] D. Bevilacqua (2012), *La sicurezza alimentare negli ordinamenti giuridici ultrastatali,* Milano: Giuffrè, p. 88.

geographical fragmentation of the global food governance - a "spatial" one should be added. Although the food governance has a global dimension, many food products remain related to their topographical origin and their traditional way of production. This geographical considerations influence not only the contents of the rules but also the distribution of powers at local, regional and global level[477]. Within this multi-layered framework, some actors play a crucial role, namely, the WTO at global level and the European Union at the regional one. However, besides these regulatory institutions, other players have to be taken into account, as it will be described in the following paragraph. Indeed, along the food supply chain, food business operators – retailers, in particular - have been developing *de facto* binding standards that are worldwide spread. This element is of great importance for the purpose of this work as well as it is crucial for a definition of global food governance that fits the context of this research.

As the rules on COOL have implications on trade, the definition of "global food governance" that is taken into account here responds to trade related concerns. Within this context, "global food governance" is intended as "a cooperative interplay of legal entities (public and private) to design and adopt harmonised rules that enhance international trade in food and so guarantee market access"[478]. Two crucial processes can be identified within the food governance, namely standard development and conformity assessment. While the former provides food operators with rules, addressed as standards and set by standard-setting bodies, the latter is underpinned on audits procedures, that have to assess the technical compliance to the set up standards.

For the purpose of this work, the development of standards will be object of scrutiny. Since standards are designed by both public and private bodies, elements of hard law as well as of soft law[479] can be identified. Hence, the term "standard" can be used in a wide sense, indicating all rules affecting foodstuffs. This topic will be scrutinized in Paragraph 2, which will be dedicated to mandatory, voluntary and *de facto* food standards. Country of origin and provenance labelling rules can be studied in light of

[477] Maria Sole Porpora (2016), *Participation and Transparency in Food Law*, PhD Thesis, University of Parma.
[478] Mariela Maidana-Eletti (2014), *Global Food Governance. Implications of Food Safety and Quality Standards in International Trade Law*, Peter Lang, p. 11.
[479] International bodies perform their activity mainly by issuing soft laws, namely standards, voluntary protocols, guidelines, and adjudicatory measures.

these considerations. In spite of being set up by public institutions, that make them mandatory standards, they are actually voluntary in nature, so that room remains for private bodies' intervention. The major individual firm standards are owned and applied by large retailers. Typically these standards combine food safety requirements along with a number of non-food safety requirements. This is, indeed, what has been happening in recent years[480]. Once taken into consideration consumers' interest for such information, food business operators are exploiting its value to gain market share.

6.4 Set of powers within the Global Food Governance: focus on private food governance

Regulation of food entails a complex interplay of various actors. As previously outlined, the novel and continuously evolving governance structure - generally described as a network – links not only European institutions but also local authorities as well as central institutions of the Member States[481]. This way, several layers of responsibility rather than different sets of enforcement mechanisms become interconnected. In the food sector as well, next to the traditional command-and-control, alternative forms of regulations emerged, such as self-regulation, co-regulation, management-based regulation and other private systems of governance[482].

[480] Renata Clarke (2010), Private *Food Safety Standards: Their Role in Food Safety Regulation and their Impact*, 33rd Session of the Codex Alimentarius Commission, FAO, p. 6. Available at http://www.fao.org/docrep/016/ap236e/ap236e.pdf (last access 20th November 2017). The report adds that in recent years there has been concentration in the retail sector with a small number of retailers controlling a high proportion of the market share. In most European countries the 5 largest retailers account for between 50% to over 70% of retail food sales – please, refer to Linda Fulponi, (2004), *Private standards and the shaping of the agro-food system*, OECD -. Furthermore, private labels reportedly account for an increasing proportion of sales, accounting for 14% at global level in 2000 and roughly 22% of total retail food sales at global scale in 2010 - data by GFSI (2010), *The Global Food safety Initiative: Once certified accepted everywhere*, Position paper -. These two trends combine to create a situation whereby global food retailing increasingly resembles an international oligopoly composed of a limited number of multinationals with minor brand producers and non-branded producers being obliged to comply with the requirements and conditions set by retailers - FAO (2006), Food safety certification; FAO (2006), *Market penetration of selected private standards for imported fruits and vegetables into the EU*. Unpublished report of the Commodities and trade Division, Ref.: project nr. 40365; FAO (2006), *Traceability, supply chains and smallholders: case-studies from India and Indonesia*, Committee on Commodity Problems, 17th Session, Nairobi, Kenya. CCP:TE 06/4 -.

[481] Alberto Alemanno (2014), "Introduction. Foundations of EU Food Law and Policy", in A. Alemanno and S. Gabbi (eds.), *Foundations of EU Food Law and Policy. Ten years of the European Food Safety Authority*, Ashgate, p.5.

[482] Next to command and control (CAC), which "impose detailed, legally enforceable limits, conditions, and affirmative requirements on industrial operations" or activities - Rena I. Steinzor (1998), Reinventing Environmental Regulation: the dangerous journey from command to self-control, in *Harvard Environmental Law Review*, Vol. 22, p.104 -, different regulatory techniques, such as

The new network of authorities, spread all over the world, creates a system of "multilevel" governance, where bodies have sector-based powers rather than State-based ones. Although not all the bodies involved have powers on a global scale, the effect of their rules might overcome borders.

Despite levels are interconnected it might be useful to distinguish between "public food governance" and "private food governance". Within the former, *inter alia*, the World Trade Organization (WTO)[483], the World Health Organization (WHO)[484], the Codex Alimentarius Commission (CAC)[485], the Food and Agriculture Organization (FAO)[486] interact at global level; the EU – and its related bodies, such as European Food Safety Authority (EFSA), when dealing with risk assessment and scientific expertise, and the Commission - at regional level; specialized agencies with regulatory powers within the food sector in each Member State.

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economic incentives for compliance, have emerged. Please, see R. Baldwin, M. Cave and M. Lodge (2012), *Understanding Regulation: Theory, Strategy and Practice*,. At p. 3 the authors describe what can be intended as "regulation": (i) a specific set of command, meaning the promulgation of binding rules to be applied by a body devoted to this purpose; (ii) a deliberate state influence, namely all state actions that are designed to influence business or social behaviour. To this group belongs the command-based regimes; (iii) all forms of social or economic influence, in which every mechanisms that effect behaviours - whether state-based or not – is considered regulatory. Finally, they defines it as "an activity that restricts behaviour and prevents the occurrence of certain undesirable activities […] The broader view is, however, that the influence of regulation may also be enabling or facilitative […]." For a comparison between CAC and self-regulation, see also Darren Sinclair (1997), Self-Regulation Versus Command and Control? Beyond False Dichotomies, in *Law and Policy*, Vol. 19, N. 4, p.529-559.

[483] The WTO promotes free trade at global level, in any sector of commerce, with agriculture and food policies being a major issue in WTO negotiations. Besides, policy-making powers it also enjoys quasi-judicial functions, by means of the Dispute Settlement Body (DSB), whose action ensures compliance with the rules adopted within the WTO system. Please, see Johan Swinnen, Alessandro Olper and Thijs Vandemoortele (2012), Impact of the WTO on Agriculture and Food Policy, in *The World Economy*, p.1089-1101; G. Venturini (2004), *L'organizzazione mondiale del commercio*, Milano: Giuffré; G. Picone, A. Ligustro (2002), *Diritto dell'organizzazione mondiale del commercio*, Padova: Cedam; P.J. Lloyd (2001), The Architecture of the WTO, in *European Journal of Political Economy*, Vol. 17, p.327-353.

[484] WHO Constitution came into force on 7 April 1948. Its primary role is to direct and coordinate international health within the United Nations' system. Although health is not a focal point within this research, when it comes to food governance, it is protected on three areas of regulation: food safety, animal wellbeing and environment preservation. More information available on the website: http://www.who.int/about/en/

[485] The Codex Alimentarius Commission was established in 1962 by the Joint FAO/WHO Food Standards Programme. Aiming at facilitating international trade, it elaborates standards, codes of practice, guidelines to address food safety and quality.

[486] FAO is an intergovernmental organization, with 194 Member Nations, two associate members and one member organization, the European Union. It has three main goals: the eradication of hunger, food insecurity and malnutrition; the elimination of poverty and the driving forward of economic and social progress for all; and the sustainable management and utilization of natural resources, including land, water, air, climate and genetic resources for the benefit of present and future generations. More information available on the website: http://www.fao.org/about/en/

"Private food governance", instead, involves food producing industry, retailer companies – these latter two together might be pointed as transnational corporations (TNCs) -, and consumers - whether considered as individuals or as gathered in consumers' association, NGOs or social movements -.

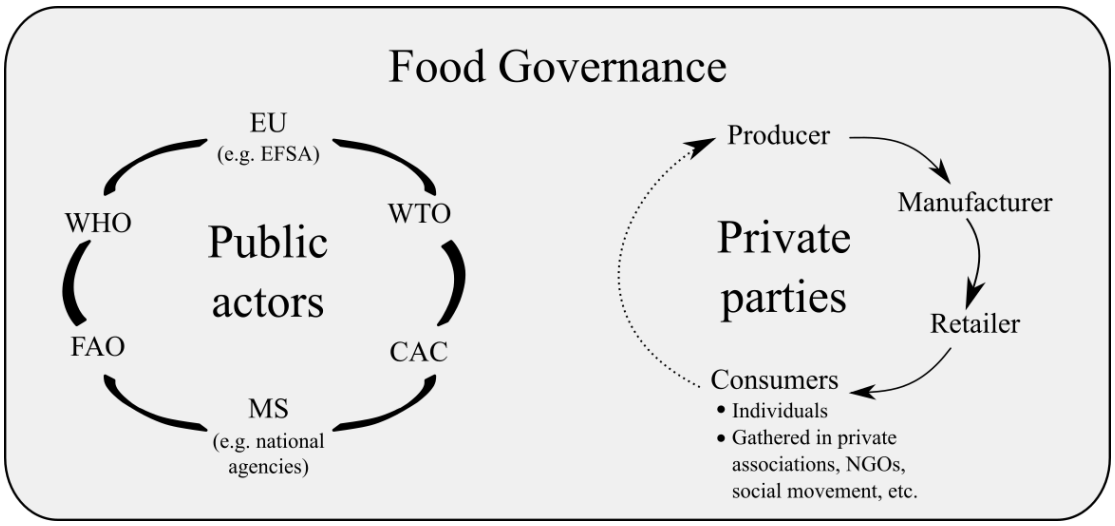

Figure 1: Food governance

When it comes to COOL rules the main public actors that have to be analysed for the purpose of this research are the WTO and the European Union. Indeed, the previous chapters of this thesis have been dedicated to the analysis of the set of rules established by them. This part, instead, will discuss private food governance, mainly focusing on retailers' role within the food supply chain.

The decision to deal with private actors as well stems from the awareness that global food and agricultural norms are increasingly created not only by governmental actors but also by private actors, particularly by the food industry and by the retailers' corporations[487]. Next to this kind of self-regulation interventions, also the non-governmental organizations - especially environmental NGOs - have been trying to regulate the agro-food chain through their own initiatives. Results are that firms frequently align themselves to environmental rather than fair trade NGOs' demands, in order to gain market share. Within this context, NGOs have become "the new super

[487] Doris Fuchs, Agni Kalfagiannia and Tetty Havinga (2011), Actors in private food governance: the legitimacy of retail standards and multistakeholder initiatives with civil society participation, in *Agriculture and Human Values*, Vol. 28, p.353.

brands"[488], able to attract a niche of consumers that is strongly concerned about workers' conditions, health, animal welfare, environmental degradation, sustainability, local sourcing, organic production, or some other ethical and social issue[489]. Although this kind of standards appears to involve different stakeholders, private standards in the food safety realm are mainly driven by large food retailers or processing corporations, with a little or no engagement of other stakeholders[490]. Indeed, rules set by a narrow group of actors are likely to impact on a plethora of other actors spread all over the world[491]. This represents an endemic problem of private food governance: are such private actors legitimated[492] to set rules? When it comes to public regulation, decision-making procedures, implementation and enforcement mechanisms are underpinned on democratic principles, so that no – or minimum - doubts are supposed to rise about their legitimacy[493]. Public policies are felt legitimate for two main reasons: firstly, as citizens are able to participate, whether directly or indirectly, in setting rules. Secondly, as the public can hold decision-makers accountable both through courts and elections[494].

Things work differently within the private food governance, in so far as principles of participation, transparency and accountability are hardly enforced. In particular:

- Participation: there are no equal opportunities for different societal actors, so that their voices are often ignored by major stakeholders;

[488] J. Wootliff and C. Deri (2011), NGOs: The new super brands, in *Corporate Reputation Review*, Vol. 4, Issue 2, pp. 157–164.
[489] L. Busch (2011), The private governance of food: equitable exchange or bizarre bazaar?, in *Agriculture and human values*, Vol. 28, p. 345.
[490] Doris Fuchs, Agni Kalfagianni and Tetty Havinga (2011), Actors in private food governance: the legitimacy of retail standards and multistakeholder initiatives with civil society participation, in *Agriculture and Human Values*, Vol. 28, p. 362.
[491] D. Fuchs, A. Kalfagianni, J. Clapp and L. Busch (2011), Introduction to symposium on private agrifood governance: values, shortcomings and strategies, in *Agriculture and Human Values*, Vol. 28, p. 338.
[492] "Legitimacy" in a normative sense is intended as "the right to rule", where ruling is promulgating rules and attempting to secure compliance with them by attaching costs to noncompliance and/or benefits to compliance. It differs from the same notion in the sociology realm, in which an institution is legitimate "when it is widely believed to have a right to rule". Allen Buchanan and Robert O. Keohane (2006), The legitimacy of global governance institutions, in *Ethics and International Affairs*, Vol. 20, Issue 4, p. 405.
[493] Actually, especially when it comes to technical regulations, it is possible to doubt about the legitimacy of public governance as well. Very often governments nominate experts or bureaucrats to negotiate rules in international context. This makes the legitimacy chains longer, thus less connected with the electoral constituency.
[494] Doris Fuchs and Agni Kalfagianni (2010), The Causes and Consequences of Private Food Governance, in *Business and Politics*, Vol. 12, Issue 3, p.10.

- Transparency: same consideration made above, since private sets of rules are rarely open to civil society's scrutiny[495] rather than they are highly technical, thus hard to understand for other market participants.
- Accountability: actors in private governance institutions are usually accountable only to those people directly affected by their activities, so that accountability is provided in a very limited sense[496].

Despite these legitimacy defects, transnational corporations' market power influences their political power as well, so that they have the capability to set, implement, and enforce rules that may become mandatory[497]. "This type of power is structural in the sense that it affects the input side of the political process"[498], in other words, it allows corporate actors to determine the focus and content of rules.

A final consideration on the relationship between public and private food governance can be made. The two are legally linked through Regulation (EU) 178 of 2002, Whereas 30, stating that "a food business operator […] should have primary legally responsibility for ensuring food safety". In light of this norm, public institutions themselves held considerably responsible the private sector[499], giving a basis for the emergence and development of private regulation. The consequence of this designed system of "shared" responsibility is a somewhat vanishing border between the public and the private realm, where market actors are deemed accountable for any malpractice along the supply chain.[500]

Four main actors can be indicated as part of the private food governance, namely input suppliers, food manufacturers, retailers and consumers[501]. However, since

[495] D. Fuchs, A. Kalfagianni, J. Clapp and L. Busch (2011), Introduction to symposium on private agrifood governance: values, shortcomings and strategies, in *Agriculture and Human Values*, Vol. 28, p. 339.
[496] D. Fuchs, A. Kalfagianni, J. Clapp and L. Busch (2011), *Agriculture and Human Values*, p. 340.
[497] Jennifer Clapp and Doris Fuchs (eds.) (2009), *Corportae Power in Global Agrifood Governance, Cambridge*, Massachusetts: The MIT Press.
[498] Jennifer Clapp and Doris Fuchs (eds.) (2009), *Corportae Power in Global Agrifood Governance, Cambridge*, Massachusetts: The MIT Press, p. 9.
[499] John Humphrey (2006), Policy implications of trends in agribusiness value chain, in *The European Journal of Development Research*, Vol. 18, p.7.
[500] Doris Fuchs and Agni Kalfagianni, The Causes and Consequences of Private Food Governance, in *Business and Politics*, Vol. 12, Issue 3, 2010, p.11.
[501] One of the most interesting metaphor to describe the agri-industrial system is the one of an hourglass, whereby "farm commodities produced by thousands of farmers must pass through the narrow part of the glass that is analogous to the few firms that control the processing of the commodities before the food is distributed to millions of people in this and other countries." William

retailer companies have been identified as the predominant players along the food supply chain[502], the next paragraph will be exclusively dedicated to them. The crucial power that the retail sector enjoys is the capability of setting standards, thus it will be of great importance to begin with an analysis of what it has to be intended with standards as well as their implications for trade. Then, as COOL will be interpreted as voluntary standards, the role of retailer companies in the standards setting will be addressed.

6.5 Food standards and trade

As described in Chapter 1, the European Union leaves business operators free to decide whether or not to add information on country of origin and provenance on products' labels. With some exceptions[503], the indication of origin and provenance remains on a voluntary basis, therefore it is interesting to analyse it as a private food standard, in order to understand how it works within the trade context. The more the food system becomes interlinked across the world, the more there is the need of a better coordinated model of both production and distribution systems, in order to be able to effectively take advantage of economies of scale. Nowadays, international trade is one of the areas in which standards play a pivotal role[504].

This is true also for trade in food, where standards represent a tool to pursue social food safety-quality objectives. On the one hand, from the food business operators' viewpoint, they guarantee the production and identification of product and process features over time. On the other hand, from the consumers' perspective, these standards create the basis for product differentiation, meeting purchasers' demands. Information asymmetries and externalities make it very hard to provide a socially

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Heffernan, Mary Hendrickson and Robert Gronski (1999), *Consolidation in the food and agriculture system*, Report to the National Farmers Union, p. 1. Available at http://www.foodcircles.missouri.edu/whstudy.pdf (last access 26th August 2017).

[502] David Burch and Geoff Lawrence (2005), Supermarkets own brands, Supply chains and the transformation of the agri-food system, in *International Journal of Sociology of Agriculture and Food*, Vol. 13, N. 1, p.1.

[503] For a complete analysis of EU rules as well as Member States' ones on COOL please refer to Chapters 2 and 3.

[504] Walter Mattli and Tim Büthe (2003), Setting international standards: technological rationality or primacy of power?, in *World Politics. A Quarterly Journal of International Relations*, Vol. 56, N. 1, p. 2. Available at https://people.duke.edu/~buthe/downloads/MattliButhe_WPv56n1.pdf (last access 22nd June 2017). Other areas are: environmental management, information security management, social responsibility, health and safety. Please refer to: https://www.iso.org/home.html (last access 20th November 2017).

optimum level of both food safety and/or quality within the food market. Standards, instead, reduce information costs for business operators and work as instruments for the coordination of supply chains[505]. In particular, as markets are increasingly globally integrated, thus have to deal with different regulatory systems, harmonization of standards seems necessary in order to reduce the risks associated with procurement of raw and semi-processed ingredients as well as to assure that food safety and quality attributes are satisfied.

In the past, product and process standards used to be tightly tied to national borders. This kind of standards - that it is possible to define mandatory standards - is part of food safety and quality governmental policies. Indeed, mandatory standards are considered as means to achieve a socially desirable level of protection for human health[506] and their enforcement is guaranteed through official controls. While they are usually set up by public institutions, other types of standards might be established by public as well as private entities – such as trade organizations and standard-setting bodies. Currently, two opposite trends can be noticed. A first developing trend is the emergence of private global coalitions of leading firms, for setting standards for food[507]; a second one depends on international trade agreements, whose development has increased since the establishment of the WTO[508].

With reference to this latter trend, the Technical Barriers to Trade Agreement (TBT Agreement) - and the Sanitary and Phytosanitary Agreement as well - promotes the adoption of international standards imposing them as a foundation for regulation. Indeed, Article 2.4[509] of the TBT Agreement states the mandatory use of international

[505] Steve Charnovitz (2005), International Standards and the WTO, *GW Law Faculty Publications & Other Works*, Paper 394, p.11. Available at http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1431&context=faculty_publications (last access 22nd June 2017).

[506] J.M. Antle (1995), *Choice and Efficiency in Food Safety Policy*, Washington DC: AEI Press.

[507] L. Fulponi (2006), Private voluntary standards in the food system: The perspective of major food retailers in OECD countries, in *Food Policy*, Vol. 31, p. 3.

[508] Mariela Maidana-Eletti (2014), *Global Food Governance. Implications of Food Safety and Quality Standards in International Trade Law*, Peter Lang, p. 27.

[509] TBT Agreement, Article 2.4 states: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems"

standards as a basis for regulatory policies[510]. It leaves a choice only regarding the kind of measure to adopt and the way in which it is going to be applied[511]. As international standards constitute the basis of new regulations, compliance with WTO rules is presumed and trade is supposed to be facilitated. This way, although voluntary in nature, food standards becomes legally binding, since the compliance with the WTO Agreement is presumed. This is true, for instance, for the standards set by the Codex Alimentarius Commission (CAC) as well as for those set by the International Organization for Standardization (ISO), whose standards are a perfect example of voluntary consensus standards. As underlined above, the main feature of voluntary consensus standards is the fact that they are the result of "formal coordinated process involving participants in a market with or without the participation of government"[512].

Regarding the former mentioned trend – meaning food standards set up by global coalitions of companies - the industry-led "harmonization" initiatives show that companies are taking a global approach to managing the food system. Indeed, even though domestic institutional frameworks remain crucial, markets seem to be defined more by areas of activities, rather than by national borders[513], making private voluntary standards schemes global standards. As instruments of "soft law" become

[510] In order to understand whether a standard is "relevant" and has been used as a "basis for a technical regulation" - in accordance with Article 2.4 TBT Agreement - reference should be made to the WTO Appellate Body's findings in, at least, two notorious cases, namely *EC-Sardines* (WTO Appellate Body, 26th September 2002, WT/DS231/AB/R. One-page summary is available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds231sum_e.pdf (last access 23rd June 2017); *US Tuna II (Mexico)* (WTO Appellate Body, 16th May 2012, WT/DS381/44. One-page summary available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds381sum_e.pdf (last access 23rd June 2017). With reference to the attribute of "relevant", in the former cited case a European regulation dealing with labelling and marketing requirements of preserved sardines was challenged by Peru, under Article 2.4 TBT Agreement. The Appellate Body defined relevant a standard that is "bearing upon; relating to the matter in hand; pertinent" (paragraphs 231-232). In the latter case Mexico challenged US regulation about the use of a "dolphin-safe" label on tuna products. This time an international standard is defined relevant depending on the characteristics of the standard-setting body. Particularly, it should have recognized activities in standardization and its membership should be open to WTO members (paragraph 359). Regarding the meaning of "basis for a technical regulation", reference has to be made, once again, to the case *EC-Sardines*, mentioned above. The cited expression means that an international standard is used as a "principal constituent [of anything]" or as a "fundamental principle [or theory]" for a technical regulation. There should also be a "very strong and very close relationship" between the international standard taken into account and the challenged measure. (*EC-Sardines* paragraphs. 240-245).

[511] Erik Wijkstrom and Devin McDaniels (2013), *International Standards and the WTO TBT Agreement: improving governance for regulatory alignment*, Word Trade Organization - Economic Research and Statistics Division, Staff Working Paper ERSD, p. 3.

[512] Spencer Henson (2008), The role of public and private standards in regulating international food markets, in *Journal of International Agricultural Trade and Development*, Vol. 4, Issue 1, p. 65.

[513] L. Fulponi (2006), p. 4.

crucial in the governance of economic national and international systems[514], in the same way the private sector - firms, civil society associations, international organizations – has been taking the lead in shaping global standards, regarding food safety, quality and ethical matters. This means that "private rather than public standards [that] are becoming the predominant drivers of contemporary agri-food systems"[515]. This last kind of standards is called de facto standard suggesting that "they arise from an uncoordinated process of market-based competition between private firms"[516]. Even though not legally binding, they are likely to become mandatory in practice, as firms adopt them in order to either enter or remain within a particular market, in which those specifications have acquired a consistent market share. Such an evolution of private food safety and quality standards is challenging the role of the WTO TBT and SPS Agreements as well as the role of government-to-government diplomacy.

6.6 Retailers' rule-making power within the agri-food market

From general considerations on private actors within the food supply chain, this paragraph will shift towards the analysis of one of its main players, and namely on the retailer companies. Within the market-based perspective here adopted, COOL is likely to obtain more attention depending on how business operators will weight it. With the exceptions of specific products for which Member States have intervened in order to signal the country of origin on labels (see, for instance, milk, meat, rice and wheat), a general mandatory rules will hardly be set by public regulatory bodies. The chance to find this kind of information on food products' labels will rather depend on how business operators will evaluate its capability to attract consumers. If the country of origin indication is deemed a useful tool to entice purchasers it is likely to be added, on a voluntary basis. This way it might become a de facto standard, established due to market-driven considerations instead of consumers' protection one.

[514] U. Morth (2004), "Introduction", in U. Morth (ed.) *Soft Law in Governance and Regulation.* Cheltenham: Edward Elgar.
[515] S.J. Henson and N.H. Hooker (2001), Private Sector Management of Food Safety: Public Regulation and the Role of Private Controls, in *International Food and Agribusiness Management Review,* Vol. 4, p.7-17.
[516] S. Henson (2008), The role of public and private standards in regulating international food markets, in *Journal of International Agricultural Trade and Development*, p.65.

Indeed, in the past years[517], a shift in power along the food supply chain occurred. The growing number of consumers, the fragmented manufacturing sector, as well as the rise of corporate retail, have been the hallmark of the European agri-food sector[518]. In post-war Europe and North America, the increasing demand for high quality products as well as the emerging patterns of mass consumption, changed the manufacturer-dominated supply chain in favour of highly competitive retail companies. The retail sector has been based on sale to a widening crowd of purchasers. As sit as it is between supply side and purchasers, its tasks consist in procurement and trade of food, targeting various groups of consumers. As a result, retailers invest in both "constructing and reflecting" consumers' interest, controlling supply through a new set of intermediaries – for instance, certification bodies and transport firms – and, in so doing, imposing a particular quality of the product[519]. This way, they have increasingly gained the needed legitimacy to behave as political actors, able to establish and implement private rules[520]. What is of great interest is how food retail standards, despite being legally voluntary, are perceived as unavoidable, becoming de facto mandatory. Indeed, actors who refuse to comply with them run up against the risk of being excluded from the global market[521]. Initially they took the form of business-to-business requirements, in order to facilitate regulatory compliance and limit the exposure to product liability[522]. Instead, in the mid-1990s major food retailers, first in the UK and then more widely, started developing joint private standards. The aim was to reduce the costs of governing food safety along the supply chains, "while expanding the population of suppliers from

[517] Usually the 1960s are indicated as the time when a reconfiguration of the food supply chain started. David Burch and Geoff Lawrence (2005), Supermarket own brands, supply chain and the transformation of the agri-food system, in *International Journal of Sociology of Agriculture and Food*, Vol. 13, Issue 1, p.1.

[518] Kevin Morgan, Terry Marsden and Jonathan Murdoch (2009), *Worlds of Food. Place, Power, and Provenance in the Food Chain*, Oxford Geographical and Environmental Studies, p. 63. The authors underline how the corporate retail sector has been the main driving force in reshaping the European agri-food sector, while in the U.S.A., despite increasing internationalization, the development of retail capital has been uneven (p. 64).

[519] Kevin Morgan, Terry Marsden and Jonathan Murdoch (2009), *Worlds of Food. Place, Power, and Provenance in the Food Chain*, p. 67.

[520] Doris Fuchs and Agni Kalfagianni, in *Business and Politics*, Vol. 12, Issue 3, 2010, p.1.

[521] Moreover, as Fabrizio Cafaggi and Janczuk, Agnieszka (2010), Private Regulation and Legal Integration: The European Example, in *Business and Politics*, Vol. 12, Issue 3, p. 23, explain, the more the market structure is based on cross-border transactions the more there will be incentives for the development of private standards, that make the market integration easier. Within this context, the mechanism of exclusion from the market, whenever there is a luck of compliance, gets frequent in response to an increasing degree of integration.

[522] Linda Fulponi (2006), Private voluntary standards in the food system: The perspective of major food retailers in OECD countries, in *Food Policy*, Vol. 31, p. 3-4.

which they could procure"[523]. Throughout global acquisitions and mergers[524], food retailers have created large transnational corporations across the globe. On the one side, in opposition to food manufacturers, retailers do not have to cope with the natural constraints of agriculture and food[525]; on the other side, being closer to consumers, they are able to make purchasers loyal and to influence their preferences. By showing themselves at the intersection of production and consumption, retailers engage directly with consumers[526] and demonstrate their capability to dictate conditions to food manufacturers. Indeed, from the consumers' point of view, supermarkets' ability to deliver fresh, varied and safe products makes them appear as the "gatekeepers of food nutrition and quality"[527], shaping demands through their pricing policies. Considering aspects related to the management of the supply chain, the growing dominance of food retailers, presenting themselves as "supply chain captain" improved vertical coordination, ensuring a constant smooth flow of goods. This has meant that large retailers have been able to specify standards for a wide range of products[528].

Taking into consideration the country of origin and provenance labelling, such an indication - as said - is not required as mandatory, even though an increasing number of consumers started to ask for it. If, on the basis of what has been showed above, retailers enjoy the power to impose their standards on the market, it can be concluded that COOL does not always fit retailer companies' targets. On a general basis, the retailing sector is likely to gain more benefits from a completely implemented free internal market, that country of origin rather than provenance indications might challenge. Labelling requirements that are exactly the same in the entire EU can facilitate the exchange of goods, while "different mandatory labelling requirements can hinder operators from freely sourcing across the EU when looking for a better

[523] Spencer Henson (2008), p. 71.
[524] [524] Doris Fuchs and Agni Kalfagianni (2010), in *Business and Politics*, Vol. 12, Issue 3, p.13.
[525] David Burch and Geoff Lawrence (2005), Supermarket own brands, supply chains, and the transformation of agri-food system, in *International Journal of Sociology of Agriculture and Food*, Vol. 13, 1, p. 1.
[526] Jane Dixon (2003), Authority, power and value in contemporary industrial food system, in *International Journal of Sociology of Agriculture and Food*, Vol. 11, p. 34.
[527] D. Burch and G. Lawrence (2005), *International Journal of Sociology of Agriculture and Food*, p. 9.
[528] Lawrence Busch (2011), "Quasi-states? The unexpected rise of private standards", in Bernd van der Meulen (ed.), *Private Food Law. Governing food chains through contract law, self-regulation, private standards, audits and certification schemes*, The Netherlands: Wageningen Academic Publishers, p. 57-58.

price"[529]. From this perspective, the Food Information to Consumers (FIC) Regulation as well, despite harmonizing food information to consumers, can cause compliance issues whenever it leaves the Member States free to set additional mandatory requirements, as it is the case of country of origin labelling. This kind of country-by-country compliance assessment is likely to hamper cross-border sourcing, making it hard to exploit all the benefits of economies of scale[530]. Within this framework, country of origin labelling is seen as a protectionist measure, that prevents the complete realization of the EU Single Market. Similar measures create "additional costs or burden for retailers to establish on their territories or make it more difficult for them to stay operational in that particular Member State"[531]. Different national labelling rules are perceived as barriers to overcome, therefore harmonised mandatory consumer information should be kept to a strict minimum and all other national labelling requirements (including language requirements) should be optional[532].

However, in certain cases the indication of the origin might serve as a tool to attract consumers. Recent trends show that voluntary indications of the origin are more frequent, especially when it comes to reassure purchasers on the connection between the raw materials and the final product. This is true for specific kinds of food, whose ingredients' origin can be exploited to increase sales. Indeed, for food such as tomato sauce derived from Italian tomatoes rather than dairy products obtained from French milk, the indication of the origin could represent a competitive advantage. Moreover, such additional indications can be provided throughout lists on labels rather than with different methods that do not further complicate labels[533]. Reference is to retailers'

[529] Communication from the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Setting up a European Retail Action, Brussels, 31.1.2013 COM(2013) 36 final, p. 14.
[530] Brussels, 31.1.2013 COM(2013) 36 final, p. 14.
[531] European Retail Round table, *ERRT Position on the EU Single Market*, p. 2. Despite generally referred to any kind of protectionist measures, this statement can include COOL and provenance indication as well. The document is available at http://ec.europa.eu/information_society/newsroom/image/document/2016-5/european_retail_roundtable_errt_13470.pdf (last access 25th July 2017).
About the European Retail Round Table (ERRT), ERRT brings together the CEOs of Europe's leading international retail companies. Among the members, Tesco; Mercadona; Lidl; Royal Ahold; Asda Walmart; Groupe Auchan; Groupe Carrefour, Dansk Supermarked.
[532] European Retail Round table, *ERRT Position on the EU Single Market*, p. 3. In particular, the document states that "different consumer rights, labeling requirements, rules on product standards and composition, health and safety regulations, electronic waste disposal provisions, rules on price promotions (e.g. sales below costs prohibitions) generate costs for legal advice".
[533] Lorenzo Bairati (2017), The food consumer's right to information on product country of origin: trends and outlook, beyond EU Regulation 1169/2011, in *European Common Market Law Review*,

marketing campaigns of house brand products[534] as well as to QR Codes, which through shoppers' smartphone might serve as a database of information. This way, private actors are replacing public regulators in reassuring consumers on features of transparency and quality along the food supply chain[535]. They seem to gain twice from an indication of origin provided only on a voluntary basis. The first time as, whenever it is not convenient to reveal such information, they are not obliged to do so. The second time as, if an extra profit could be obtained from the indication of the country of origin – for instance on house brand products -, they can declare it. Retailers' choice of the one or the other is not underpinned on the willingness to implement consumers' right to be informed - as this is a matter of public policy - rather than on considerations related to economic profits.

EU law aims at protecting both consumers and private initiatives to add information on labels. However, these two aspects of consumer protection and support to private initiative appear to have different goals. "In the former case, the goal is to inform consumers, with the purpose of removing obstacles and inconsistencies that might hinder informed choices. In the latter, the goal is to induce them to make certain choices over others […]. This issue is connected to the broader theme of information transparency, and the tendency for market participants to manipulate the market […]"[536]. Difficulties in interpreting a high number of confusing information, in association with emotional biases, can be exploited by private actors in order to lead consumers to suboptimal choices. Increasing private intervention in such a field is not bad in itself. However, it raises some doubts on the way the right to be informed is implemented and balanced with free trade principles.

Till now, the European Commission does not seem interested in this kind of issue. On

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Issue 1, p. 15.

[534] In Italy, for instance, a similar campaign has been carried out by COOP. Besides the indication of the origin on some products' label, COOP developed also an app for Android systems, that clarifies the producing company's headquarter and the origin of the ingredients that define the peculiarities of a certain product. Please, refer to http://www.e-coop.it/origine and to https://play.google.com/store/apps/details?id=it.softecspa.coop.main&hl=it (last access 27th November 2017).

[535] COOL is not the only field in which private actors are taking leads for meeting consumers' demand for information on transparency rather then on environmental and ethical features. Third-party certification schemes are increasingly spreading as a means to fill the information gaps that occur along the food supply chain. Again, private actors have seen in this gap an economic advantage. Within this scenario, public regulators' role is to verify that the information provided is correct.

[536] Lorenzo Bairati (2017), The food consumer's right to information on product country of origin: trends and outlook, beyond EU Regulation 1169/2011, in *European Common Market Law Review*, Issue 1, p. 16.

the contrary, it showed to take into account retail companies' requests for improved harmonization on labelling legislation. Considering that divergent national labelling requirements might frustrate the market's needs, the EU's goal is to set up, by the end of 2017, a common food labelling information system. In close collaboration with the competent domestic authorities as well as with the stakeholders, such a system can facilitate market access[537]. It will be a dedicated database containing all European and national food labelling requirements, in order to easily identify and understand the rules with which each product should comply[538].

6.7 Conclusive remarks

The impacts that the recently introduced rules on mandatory country of origin labelling have on the internal market remain a hot topic. At the request of the Belgian delegation[539], the Agriculture and Fisheries Council, on 17 and 18th July 2017, discussed the norms on mandatory COOL for milk and foodstuffs containing milk or meat as an ingredient. The Commission has been invited to assess the effects of the different national rules on the internal market one year after the implementation of the first national decree. Three main positions emerged during the debate:

1. Firstly, those that deem mandatory COOL as not only costly and burdensome but also detrimental to the internal market and free movement of goods[540].

[537] Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, *Implementation of the European Retailer Action Plan*, p. 8.

[538] The EU Commission's intention to develop such an instrument is welcomed also by the European Parliament, as stated in the *European Parliament resolution of 11 December 2013 on the European Retail Action Plan for the benefit of all actors (2013/2093(INI))*, P7_TA(2013)0580, p. 4-5. Document available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-0580 (last access 25th July 2017).

[539] As explained in the Council of European Union, Agriculture and Fisheries Council (meeting on 17-18 July 2017), *Consequences of the mandatory labeling of the country of origin on the internal market. Information from the Belgian delegation*, Annex AGRI 384 DENLEG 50, 11135/17, Brussels, 10 July 2017 (OR. en), p. 2, Belgium's request was strictly related to the impact that French legislation on COOL has had on trade flow from Belgium to France. French national measure was announced for the first time in the summer of 2016 and "as many contracts in the retail sector are fixed- term contracts, some were abandoned or not renewed in order to prepare for the national rules. It seems that some major multinational retail companies, with big buying power, have increased the pressure on the other partners of the food chain to adapt for these national rules. Especially fresh milk producing dairy companies felt an impact immediately. The monitoring of the meat and dairy product volumes to France closely checked by the sector and the figures of the Belgian National Bank also show decreasing exports. The first hint of trouble came with the announcement of the sector in the spring of 2016 that there was a decline of 17% for milk compared to the same period in 2015. A further decline came with the actual start of the measure at the end of last year and is still ongoing."

[540] FoodDrink Europe has claimed its discontent for national mandatory COOL rules several times. After the mentioned Agriculture and Fisheries Council a statement has been released in order to press

2. The second intermediate position belongs to those that support the Belgian request to have an impact assessment on such national rules;
3. finally, a third group highlights the needs of transparency and the right of the consumer to be correctly informed as well as taking into consideration the growing societal demand to know the origin of food. They support the idea of an EU-wide mandatory labelling of origin[541].

the EU Commission to tackle such an issue urgently: "We therefore call on the Commission to urgently take action against this unsustainable situation for the EU Single Market for foods and to proceed with a thorough impact assessment of the market situation without further delay." Please, refer to this link: http://www.fooddrinkeurope.eu/news/statement/mandatory-country-of-origin-labelling/ (last access 26th July 2017).

[541] Outcome of the Council Meeting, 3556th Council meeting, Agriculture and Fisheries, 11324/17 (OR. en), Provisional Version, PRESSE 43 PR CO 43, p. 12.

CHAPTER 7

ORIGIN AND PROVENANCE BEYOND THE MARKET

From a market-perspective, the globalization of food and agricultural systems have produced significant benefits, such as increased varieties of foods available to consumers and new markets for producers. However, if different values are taken into account, globalization raises concerns about its socioeconomic and environmental outcomes. Major issues are related to food security; small-farmer livelihoods; environmental quality; food safety and consumer sovereignty. In particular, since corporate actors in the global arena are increasingly playing a role in setting the rules that govern their activities, doubts emerge about the efficacy and legitimacy of these rules[542].

For these reasons, this last chapter will deal with origin and provenance from a diverse perspective, leaving behind the market's needs towards a more inclusive food system. Harriet Friedmann and Philip McMichael's food regimes theory, together with Duncan Kennedy[543]'s map of legal thoughts, will be pointed out. The former will serve as a historical background that might be helpful for fathoming the current food system, while the latter will be useful in order to "trace changes in the legal categories governing food markets over time "[544]. Then, the notion of Food sovereignty will be addressed, as a reaction against the predominant interests along the food supply chain. This conceptual framework will constitute a new perspective on country of origin and place of provenance labelling and will lead the thesis to a conclusion.

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[542] Jennifer Clapp and Doris Fuchs (eds.), 2009, p. 6.

[543] Duncan Kennedy is the Carter Professor of General Jurisprudence at Harvard Law School. Among his many works, the one in reference here is Duncan Kennedy (2006), "Three Globalizations of Law and Legal Thought: 1850-2000", in David M. Trubek & Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press, p. 19-73.

[544] Amy J. Cohen (2015), The law and political economy of contemporary food: some reflections on the local and the small, in *Law and Contemporary Problems*, Vol. 78, p. 101. Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4721&context=lcp (last access 31st August 2017).

7.1 Food regimes, legal thoughts and Food Sovereignty

This first paragraph concerns the two concepts of Food regimes and Food sovereignty. As they are not part of the legal realm, they will be only briefly designed, although literature on both of them is extensive. The reason why they are object of this thesis is that they can "situate the world food system and its crisis within a broader historical understanding of geo-political and ecological conditions[545]". The food regimes' approach can help order the contemporary global food politics, although, of course, it has to cope with a continuously evolving and unknowable future. It entails the study of the ways in which food is produced and distributed. From a legal perspective, understanding the structure of economic exchange means to discuss the rules that govern markets as well. Therefore, the food regime theory will be described in parallel with Duncan Kennedy's analysis of changes in modes of legal thoughts. This way, the rules analysed so far can be investigated from a different viewpoint that might be helpful to reach a wider comprehension of the topic.

7.1.1 Food regime analysis and legal thoughts

The notion of food regime was developed by Harriet Friedman in 1987[546] as a means to frame the global food system within historic processes, from agricultural modernization to food global political-economy and food consumption patterns. A food regime represents a stable set of relations between the establishment and evolution of nation states on the one hand, and the international political economy of food on the other. In this perspective:

"[F]ood regime analysis brings a structured perspective to the understanding of agriculture and food's role in capital accumulation across time and space. In specifying patterns of circulation of food in the world economy it underlines the agrofood dimension of geo-politics, but makes no claim to comprehensive treatment of different agricultures across the world. Its examination of the politics of food within stable and transitional periods of capital accumulation is therefore quite focused, but

[545] Philip McMichael (2009), A food regime genealogy, in *The Journal of Peasant Studies*, Vol. 36, N. 1, p.139.

[546] A more systematic formulation by Friedmann and McMichael appeared two years later. Please, refer to Harriet Friedmann and Philip McMichael (1989), Agriculture and the State system: the rise and decline of national agricultures, 1870 to the present, in *Sociologia Ruralis*, Volume 29, Issue 2, p. 93–117.

nevertheless strategic. It complements a range of accounts of global political economy that focus, conventionally, on industrial and technological power relations as vehicles of development and/or supremacy. […] Ultimately, as a historical construct, the food regime has ethical potential: regarding how we live on the earth, and how we live together"[547].

Two food regimes are identified, even though debates on whether a third one can be recognized are underway[548]. In spite of the differences among them, they are typified by two main features, namely stability and internal contradictions[549]. Particularly, stability means that the key actors within a food regime agreed on "implicit rules tying them into predictable relations of food production, consumption and trade"[550]. While the existence of contradictions is the necessary engine for the demise of the regime itself and the transition to another one.

- The "first food regime"[551] (1870 - 1914) was characterized by free trade flows

[547] Philip McMichael (2009), A food regime genealogy, in *The Journal of Peasant Studies*, Vol. 36, No. 1, p.140 and p.164. Then, by the same author: "In my view, the bottom line is that food regime analysis offers a historical method to examine the political and economic (and now ecological) relationships attending the production and circulation of food on a world scale. And by this I mean food regime analysis provides a particular optic on the periodic transformations in political and social relations in the capitalist world economy over the last one and a half centuries, and in doing so it offers key insights into current transformations. It can at least attempt to situate them, and at most offer intimations of the future. In this sense, 'food regime' is not a theoretical construct; rather, it is a form of analysis. It is a method, in fact a world-historical method. It is a way of organizing our understanding of significant shifts in global power relations through the agri-food lens." P. McMichael (2016), Commentary: Food regime for thought, in *The Journal for Peasant Studies*, Vol. 43, Issue 3, p. 650.

[548] Of course, it has to be bore in mind that the food regime theory is only the way chosen here to interpret the global food system. Critiques have been moved against it from the 1990s to nowadays. Particularly, Goodman and Watts (see, for instance, D. Goodman and M. Watts (1997), "Agrarian Questions: Global Appetite, Local Metabolism. Nature, Culture, and Industry in *Fin-de-siècle* Agro-food Systems", in D. Goodman and M. Watts (eds.), *Globalizing Food: Agrarian Questions and Global Restructuring,* London: Routledge, pp. 1-32.) highlighted how many similarities can be found between the way agriculture is characterized in the food regime theory and the way industry is described in regulation theory, finding this "overdrawn" (D. Goodman and M. Watts (1994), Reconfiguring the Rural or Fording the Divide? Capitalist Restructuring and the Global Agro-food System, in *Journal of Peasant Studies*, Vol. 22, Issue 1, p. 5). Bernstein, instead, emphasized the luck of references to the world population growth: "What part in the growth of food production and availability, then, has been (and is) played by the kinds of (capitalist) agriculture and agricultural trade on which accounts of the three food regimes to date have focused our attention?" (Henry Bernstein (2015), *Food regime and food regime analysis*, Conference paper No. 1, Land grabbing, conflict and agrarian-environmental transformations: perspectives from East and Southeast Asia. An international academic conference, 5-6 June, Chiang Mai University, p. 25. Also available at https://www.iss.nl/fileadmin/ASSETS/iss/Research_and_projects/Research_networks/LDPI/CMCP_1-_Bernstein.pdf, (last access 7th August 2017). He also criticizes how much attention has been paid to peasants as crucial subjects in the struggles for "social justice and ecological sanity".

[549] Ángel Luis Gonzáles-Esteban (2017), Patterns of world wheat trade, 1945-2010: The long hangover from the second food regime, in *Journal of Agrarian Change*, p. 3.

[550] André Magnan, (2012), "Food Regimes", in Jeffrey M. Pilcher (ed.), *The Oxford Handbook of Food History*, New York: Oxford University Press, p. 3.

[551] Also called "the colonial-diasporic food regime" by Harriet Friedmann (2005), "From colonialism to green capitalism: social movements and emergence of food regimes", in Frederick H. Buttel and

from colonies to Europe, under the British hegemony. Production of grains was relocated to the New World settlers states, such as the U.S., Canada, Australia. The regime definitely collapsed under the Great Depression of 1930s and World War II. The crisis lasted about twenty years before a new food regime consolidated.

- The "second food regime"[552] lasted from 1950s to1970s and was developed under the U.S. hegemony. Protection of national markets, throughout domestic price support for farmers, export subsidies and protective tariffs, were instituted in the developed countries[553]. In the U.S. particularly, chronic over-production of wheat was registered. Such a grain surplus was disposed in form of food aid to third countries that could constitute allies in the Cold War, as declared in Public Law 480[554], the Agricultural Trade Development and Assistance Act of 1954.
- The "third food regime" [555] is shaped by the global dimension - that characterizes both financial markets and transnational corporations - as well as by a shift in the agro-food sector from agriculture towards food industry and

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Philip McMichael (eds.), *New Directions in the Sociology of Global Development (Research in Rural Sociology and Development, Volume 11)*, Emerald Group Publishing Limited, pp. 227 – 264.

[552] This one as well has been labelled differently as "post-war food regime" or "the surplus regime", Harriet Friedmann (1993), The political economy of food: a global crisis, in *New Left Review*, Vol. 197, p. 29-57 as well as "mercantile-industrial food regime" by Harriet Friedman (2005), "From colonialism to green capitalism: social movements and emergence of food regimes", in Frederick H. Buttel and Philip McMichael (eds.).

[553] Harriet Friedmann (1990), **"**Family Wheat Farms and Third World Diets: A Paradoxical Relationship between Unwaged and Waged Labour", in Jane L. Collins and Martha E. Gimenez (eds.), *Work Without Wages: Domestic Labour and Self-Employment within Capitalism*, Albany: State University of New York Press, pp. 193-213.

[554] Public Law 480 clearly states: "It is hereby declared to be the policy of Congress to expand international trade among the United States and friendly nations, to facilitate the convertibility of currency, to promote the economic stability of American agriculture and the national welfare, to make maximum efficient use of surplus agricultural commodities in furtherance of the foreign policy of the United States, and to stimulate and facilitate the expansion of foreign trade in agricultural commodities produced in the United States by providing a means whereby surplus agricultural commodities in excess of the usual marketings of such commodities may be sold through private trade channels, and foreign currencies accepted in payment therefor". Available at https://www.gpo.gov/fdsys/pkg/STATUTE-68/pdf/STATUTE-68-Pg454-2.pdf (last access 4th August 2017).

[555] The name third food regime has been used by Philip McMichael (1992), Tensions between national and international control of the world food order: contours of a new food regime, in *Sociological Perspective*, Vol. 35, Issue 2, p. 343-365. It has been called in various ways, such as "corporate environmental food regime" (Friedmann, 2005) and "corporate food regime" by McMichael (2005), "Global development and the corporate regime", in F.H. Buttel and P. McMichael (eds.), *New Directions in the Sociology of Global Development Research in Rural Sociology and Development*, Vol. 11, Oxford: Elsevier Press, p. 269–303.

services[556]. Besides corporations another crucial actor emerges, namely social movements, which challenge the conventional food system and propose alternative ones, based on sustainability and social justice. On the one hand, regulations increasingly move towards corporations[557]; on the other hand an ecological sensitivity begins to spread out. As previously anticipated, there is a debate regarding whether a completely developed third food regime exists, rather than it is only at an embryonic stage or it simply is a hangover[558] from the previous regime. In spite of this, some interesting features can be pointed out herein and will lead to introduce the notion of Food sovereignty.

The food regimes identified by Friedmann and McMichael are almost perfectly reflected in Duncan Kennedy's interpretation of the globalization of law and legal thought. In his analysis, Duncan Kennedy identifies three globalizations:

- The first globalization, dominated by the "classical legal thought" (hereinafter, CLT), occurs from 1850 to 1914 and ruled the first food regime. First globalization was dominated by the so called "will theory", which implies that private law rules established in Western nation states had their main purpose in protecting rights of legal persons, whose wills "were restrained only as

[556] Harriet Friedmann (1993), The political economy of food: a global crisis, in *New Left Review*, 197, p. 52.
[557] Henry Bernstein, *Food regime and food regime analysis*, Conference paper No. 1, p. 13.
[558] The concept of hangover has been developed by Bill Pritchard. Considering that a food regime is supposed to be underpinned upon a stabilized set of relations and that stability in both the first and the second regimes depended on a hegemonic power (respectively, Britain and the U.S.), he underlines the luck of such a power nowadays. As dynamics are now on a global scale, the author emphasizes that not even the WTO is able to "act as an institution that brings into being a new food regime […] This absence of a hegemon leaves the WTO rudderless." In other words, the collapse of the Doha round - the latest round of trade negotiations among the WTO membership, launched in November 2001 at the WTO's Fourth Ministerial Conference in Doha, Qatar - is seen as a sign of the institutional inability of the WTO and multilateralism policy to construct a new, stabilized food regime. And he goes on: "The WTO provided an arena for hegemonic contestation in the world food system, rather than alternately providing the institutional architecture to meld those tensions within a new political–economic food order." Bill Pritchard (2009), The long hangover from the second food regime: a world-historical interpretation of the collapse of the WTO Doha Round, in *Agriculture and Human Values*, Vol. 26, pp. 304 and 306.
More generally, three main factors have undermined the prospects for a successful Doha Round: the "account imbalances and currency misalignments" pushing trade politics towards protectionist directions in both the United States and Europe; the growing anti-globalization sentiments; the absence of a compelling reason for the political leaders to achieve the necessary compromise in order to reach an agreement. Please, refer to C. Fred Bergsten (2005), Rescuing the Doha Round, in *Foreign Affairs*, WTO Special Edition, p. 2.

necessary to permit others to do the same"[559]. International trade started to grow and the dominant economic image was the one of free market as a space of freedom and equality, governed by private law.

- The second globalization is also called the social period, began around 1900 and lasted till 1968. If in CLT the legal core was private law of obligations, and, particularly, contract law, "social law coordinated individual willing subjects of CLT in the public interest"[560]. Starting from 1920s but exploding only later in 1930s, this time was characterised by bilateral trade agreements and the formation of blocs. After the World War II, Keynesian policies of economic recovery were adopted, and this required an economy of mass consumption and production, with "state regulations designed to stabilize mass markets"[561].
- The third globalization is the one of contemporary legal thought. "Human rights play the same role in contemporary legal consciousness that private rights in CLT and social rights in the Social"[562]. In this vision, that Duncan Kennedy call "neoformalism", law has to guarantee human and property rights as well as the intergovernmental order through the extension of the rule of law[563]. Rather than setting out legal rules in order to achieve a single or social desirable purpose, policy analysis aims to find a balance "among competing visions of the good, manage difference and uncertainty, and produce ad hoc compromises. In this mode, legal questions are subject to expert cost-benefit assessments, scientific studies, and public and private standard setting"[564]. Such a subjection of legal questions to costs and benefits analysis can be noticed when it comes to COOL as well. Indeed, in the history of COOL, economic concerns have been the main element in light of which evaluate new food policies, disregarding diverse ethical and social values.

[559] Duncan Kennedy (2006), "Three Globalizations of Law and Legal Thought: 1850-2000", in David M. Trubek & Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press, p. 26.
[560] Duncan Kennedy (2006), "Three Globalizations of Law and Legal Thought: 1850-2000", p. 43.
[561] Amy J. Cohen (2015), in *Law and Contemporary Problems*, p. 109.
[562] Duncan Kennedy (2006), p. 65.
[563] Amy J. Cohen (2015), p. 116.
[564] Amy J. Cohen (2015), p. 117.

7.1.2 Can the third food regime be identified?

For the purpose of this research, only the third food regime will be further examined. Far from being thorough, this investigation will be helpful to include ecological concerns within global economic dynamics and to discuss country of origin labelling from a different perspective, more tied to societal needs and ethical issues. Indeed, the choice itself to deal with food regime analysis in this context depends on the fact that "the food regime concept allows us to refocus from the commodity as object to the commodity as relation, with definite geo-political, social, ecological, and nutritional relations at significant historical moments"[565].

As mentioned above, there are divergent opinions on whether or not a third food regime exists, even though there is large agreement on the end of the second one. Depending on the authors' approach as well as on the interpretation of the concept of food regime itself, conclusions will be different. Indeed, while some scholars[566] consider current times as a transition period, from the second to the third food regime - some others[567] deem it possible to talk about a stable new regime that has in the WTO and in the international trade flows it has contributed to boost a key element.

Besides supporting the former or the latter theoretical framework, some general elements and dynamics can be observed. Indeed, one of the main event that shaped the third food regime – both as something emerging or as something already stable - has been the establishment of the WTO in 1995[568]. This led to strong liberalization and commoditization of corporate supply chains, through, *inter alia*, harmonization of production standards and limits to the extent and power of national food regulation.

[565] Philip McMichael (2009), in *The Journal of Peasant Studies*, Vol. 36, No. 1, p.163.
[566] In particular, Friedmann believes that the foundations of this "emerging" food regime (that she calls "corporate-environmental") are the growing supermarket power and the new private quality standards that create products' differentiation. However, in Friedman's view, we are still in a period of competition among actors and interests. Indeed, on one hand there is, from an economic perspective, a general tendency towards free market and, from a political one, a loss of centrality of the nation-state. On the other hand, social movements emerged as new actors that represent different and contesting values.
[567] It is mainly McMichael that argues that it is possible to talk about a third "corporate food regime", characterized by a corporate driven food supply chain and a "global consumer class". P. McMichael (2005), in F.H. Buttel and P. McMichael (eds.), p. 270.
[568] For a brief reflection on the establishment of the WTO from the GATT system, please, refer to S.R. Sen (1994), From GATT to WTO, in *Economic and Political Weekly*, Vol. 29, N. 43, pp. 2802-2804.

The result of such policies is what has been termed "Food from Nowhere"[569], in opposition with its twin "Food from Somewhere".

Referring to a food from nowhere regime means to describe a set of relations based on invisibility, in so far as who produced that food, where, how and under what labour conditions remain unknown. At the opposite, a food from somewhere regime is underpinned upon a set of socially and ecologically sustainable relations that include flexible mechanisms of management, able to adapt to changes, empowering resilience. While the food from nowhere regime is characterized by food scares and risk management policies; by the rise of retailer power[570] as well as nutrition crises in the Western countries - due to the increase of cheap and fast food's consumption –, in the food from somewhere regime, growing environmental awareness, emergence of social movements and increasing interest in culinary topics on a mass scale are key elements. If cheapness, convenience and long processing steps typify the food from nowhere regime, food from somewhere appears to be ecologically embedded and locally sourced whenever possible. Indeed, many authors refer to the food from somewhere regime as the one born following an "ecological turn" or a "cultural turn"[571].

In the first, second and in the third regime intended as food from nowhere regime, food manufacturing has strong impacts both socially and ecologically at a global scale, even though consumers are generally unaware and appear to be interested in nothing but prices. At the core of such unsustainable relations two elements can be identified, namely "distance, between production and consumption, and durability of key food commodities like wheat"[572].

In the food from somewhere framework, instead, consumers consider their own actions as part of the ecological problem and start criticizing industrial food as potentially dangerous for their long-term health as well as for its environmental effects. Here, the abovementioned dynamics are subverted, in so far as distance is

[569] The term comes from José Bové and François Dufour (2001), *The world is not for sale*, London: Verso, before being used by McMichael.

[570] G. Lawrence and D. Burch (eds.) (2007), *Supermarkets and agri-food supply chains: Transformations in the production and consumption of foods*, London, UK: Edward Elgar.

[571] Hugh Campbell (2009), Breaking new ground in food regime theory: corporate environmentalism, ecological feedbacks and the 'food from somewhere' regime?, in *Agriculture and Human Values*, Vol. 26, p. 313.

[572] Hugh Campbell (2009), Breaking new ground in food regime theory: corporate environmentalism, ecological feedbacks and the 'food from somewhere' regime?, in *Agriculture and Human Values*, 26, p. 310.

replaced with locality and durability with seasonality. For the emergence of this renovated food culture social movements and NGOs played a crucial role. Indeed, as described in paragraphs 5.3 and 5.4, a different form of governance emerged. Thanks to these new mentioned actors entering in the global arena, sustainability claims spread out, marking a border between the unsustainable food policies of the past and the latest ones that try to address ecological sensitivity. From this viewpoint the food from somewhere regime presents some interesting tendencies, stretching environmental knowledge at a global scale and pushing companies and regulators to incorporate, within the production and processing phases, carbon footprint, food miles and other similar certifications[573].

Not only the food from somewhere regime coexists with the food from nowhere regime but behind the formation of the food from somewhere regime lies a dynamic of reaction to the industrial food systems. In other words, the willingness to protest against the mainstream system of cheap and highly environmentally impacting food drove mainly *elite* purchasers to support new form of food provisioning. Food regime theory and D. Kennedy's legal thought map converge on this point, meaning that current moment does not embody a unique and totalizing logic. It rather contains contradictions and opposing forces. Although the existence of the food from nowhere regime might be deemed as crucial for the emergence of its counterpart, the opposite appears not to be true. Indeed, nowadays, it is hard to say that the industrial food system needs its opposite to survive. Hence, despite its increasing importance, the food from somewhere regime has to be studied as a market *niche*.

7.2 The Food sovereignty movement

The analysis dedicated to the juxtaposition between the food from nowhere and the food from somewhere regimes is of great interest in this context, as able as it is to recap into two simple metaphors the opposition between agro-industrialization and agro-ecology. Aiming at a more sustainable food model, it underlines the need of a shift from a food system in which corporate interests are privileged[574], this way

[573] Not only environmental certifications but also social and ethical ones, such as Fair Trade, can be included.

[574] Jan Douwe van der Ploeg (2009), *The new peasantries. Struggles for autonomy and sustainability in an era of empire and globalization*, London and Sterling: Earthscan. The author compares the fully

suggesting a new theoretical and value framework in light of which interpreting food law. Indeed, the rules concerning information to consumers[575] are respondent to the mainstream industrialized system, underpinned on global sourcing of processed ingredients. Rules on origin labeling are no exception.

Therefore, this paragraph will be an attempt to read COOL from a different viewpoint and, in order to do so, the food sovereignty movement will be further examined, in so far as it played a crucial role in the emergence of the food from somewhere regime.

Food sovereignty[576] is defined as "the right of nations and peoples to control their own food systems, including their own markets, production modes, food cultures and environments" and it "has emerged as a critical alternative to the dominant neoliberal model for agriculture and trade"[577]. Its critique is underpinned upon the idea that

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industrialized agriculture with the "peasant mode of farming", based on the "creation and development of a self-controlled and self-managed resource base", p. 23.

[575] As well as the rules about safety, which, however, are not of major concern here.

[576] The genealogy of the term "Food sovereignty" is quite interesting. It is usually taken for granted that it was firstly used by La Vía Campesina at its Second International Conference at Tlaxcala (Mexico), in 1996. However, Latin American governments occasionally used the expression earlier, in the 1960s, and, more often, in the 1980s, referring to "soberanía alimentaria". Particularly, in 1983, the government of Mexico announced a new National Food Program (Programa Nacional de Alimentación, PRONAL), whose goal was to achieve food sovereignty. Doubts remain whether Mexico exported the language of food sovereignty to Central America, via mass media or actual contact between peasant movements or other civil society groups, or whether the emergence of the term in Central America is a case of simultaneity of invention". Marc Edelman (2014), Food sovereignty: forgotten genealogies and future regulatory challenges, in *The Journal of Peasant Studies*, Vol. 41, Issue 6, p. 963-965. It is true, though, that the term owes its success to La Vía Campesina, that used it in opposition with the concept of "food security", in so far as this latter would not pay "particular attention to how, where and by whom food is produced". During the Tlaxcala Conference some principles of food sovereignty were drafted and lately presented at the World Food Summit, held in Rome in November 1996. The notion of food sovereignty was further enriched in other international civil-society events - among others, the World Forum on Food Sovereignty held in Cuba (2001) and the Ngo/Cso Forum on Food Sovereignty (2002) held in Rome in conjunction with the World Food Summit: Five Years Later-. Some national governments have included food sovereignty into their national constitutions and laws, for instance, between 1999 and 2009, Venezuela, Mali, Bolivia, Ecuador, Nepal and Senegal. Surely, it is still uncertain how and to what extent such a principle will be implemented.Please, refer to Hannah Wittman, Annette Desmarais and Nettie Wiebe (2010), "The Origins & Potential of Food Sovereignty", in Hannah Wittman, Annette Desmarais and Nettie Wiebe (eds.), *Food sovereignty: reconnecting Food, Nature and Community*, Halifax: Fernwood Publishing, p. 3 and 8. Available at: http://www.observatorioseguridadalimentaria.org/sites/default/files/Wittman_et_al_Food%20sovereignity-origins_2010.pdf (last access 21st August 2017).

[577] Hannah Wittman, Annette Desmarais & Nettie Wiebe (2010), "The Origins & Potential of Food Sovereignty", p. 2.

As, especially for legal scholars, the movement La Vía Campesina might be unknown, a brief description will be provided. La Vía Campesina is an international movement which gathers peasant organisations of small and medium sized producers, agricultural workers, rural women and indigenous communities from Asia, America and Europe. It is organised in seven regions, namely Europe; Northeast and Southeast Asia; South Asia; North America; the Caribbean; Central America and South America. It was established in April 1992, when several peasant leaders from Central America, North

today's food production is subordinated to profiteering dynamics, "rather than social provisioning and restoring land and waterway nutrient cycles, and biodiversity in general"[578]. Under the sovereignty movement the focus is on small-scale producers as well as on the capability of low-input agriculture to restore ecosystems. Indeed, the current food system is criticized by the advocates of the food sovereignty movement not only for the economic, social and political tensions that it creates, but also for the ecological disruption that it contributes to cause. Phenomena such as climate change, environmental degradation, loss of biodiversity, unsustainable resource exploitation constitute the inescapable background of the mentioned critique to the industrialized food system[579].

Some key elements[580] are usually pointed out when it comes to describe what food sovereignty means. Individuals, people, communities and countries have the right to:

- define their own agricultural, labour, fishing, food, land and water management policies which are ecologically, socially, economically and culturally appropriate to their unique circumstances;
- to produce food, which means that all people have the right to safe, nutritious and culturally appropriate food and to produce enough food to sustain themselves and their societies;
- to choose their own level of self-reliance in food;
- to manage, use and control life-sustaining natural resources;
- to produce and harvest food in an ecologically sustainable manner.

The agricultural model that is suggested is called "agro-ecology", as focused as it is not on "maximizing output for sale on the global market", but on "meeting social need" [581], with its economical, cultural and ecological dimensions. From this

America and Europe got together in Managua (Nicaragua), at the Congress of the National Union of Farmers and Livestock Owners (UNAG). In May 1993, La Vía Campesina's first conference was held in Mons (Belgium) where it was constituted as a world organisation, and its first strategic guidelines and structure were defined.

[578] P. McMichael (2016), in *The Journal for Peasant Studies*, Vol. 43, Issue 3, p. 655.

[579] The ecological deficit is commonly acknowledged and it is getting worse and worse each year: it has been calculated that in 2017 the earth overshoot day was on the 2nd August. Data available at http://www.overshootday.org/ (last access 19th August 2017).

[580] Michel Pimbert (2009), *Towards food sovereignty: Reclaiming autonomous food systems*, CAFS, IIED and RCC, London and Munich. Here the reference is actually to p. 45 of the online version of introduction and first chapters, available at http://pubs.iied.org/pdfs/G02268.pdf (last access 21st August 2017).

[581] Michael Menser (2014), "The Territory of Self-Determination: Social Reproduction, Agro-ecology, and the Role of the State", in Peter Andrée, Jeffrey Ayres, Michael J. Bosia, and Marie-Josée

perspective, food sovereignty implies to be aware of the biological and cultural diversity of food systems that is not reflected in the current mainstream food chain[582]. Nonetheless, sovereignty's claims cannot be reduced to an agricultural reform. More generally, local organisations call for a greater role in the governance of food systems. Citizens are no more passive subjects whose rights and duties are granted by states rather they are active individuals, whose rights are realized through their own actions. In so doing, local organisations, such as the food sovereignty movement, express a new kind of "emergent citizenship in the governance of food systems"[583]. Indeed, "regenerating localized food systems entails shifts from uniformity, concentration, coercion and centralization, to support more diversity, decentralization, dynamic adaptation and democracy. This is what the struggle for food sovereignty is all about"[584].

The attention paid to locality is the reason why the concept of food sovereignty is of particular interest for the purpose of this research. The attempt is to show how a shift from considering food as a commodity to food as an entity spatially and culturally embedded can produce significant changes in the way food policies are addressed. From this viewpoint, the rules of the market, that are usually deemed as preeminent, might lose their priority in favour of principles that boost consumers' awareness, sustainability and cultural preservation.

Although beyond the purpose of this research, a general consideration has to be made. The principles of food sovereignty entail the involvement of small producers and consumers in the decision-making process about food provisioning. This issue is of legal interest as well. Indeed, any legal claims about rights focus on consumers' perspective, rather than on producers' one. Emerging questions of democratization

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Massicotte (eds.), *Globalization and Food Sovereignty. Global and local change in the new politics of food*, University of Toronto Press, p. 62.

[582] Michel Pimbert (2006), *Transforming knowledge and ways of knowing food sovereignty and bio-cultural diversity*, Paper for Conference on Endogenous Development. The interplay of worldviews, globalisation and locality. Geneva: Switzerland, 3-5th October, p. 2-3.

[583] Michel Pimbert (2006), *Reclaiming autonomous food systems: the role of local organizations in farming, environment and people's access to food*, Paper presented at International Conference on Land, Poverty, Social Justice and Development, Institute of Social Studies and the Inter-Church Organization for Development and Cooperation, 12-14th January 2006, The Hague: The Netherlands, p. 16.

[584] Michel Pimbert (2006), *Reclaiming autonomous food systems: the role of local organizations in farming, environment and people's access to food*, Paper presented at International Conference on Land, Poverty, Social Justice and Development, p. 30.

and participation are legally faced through the debate around purchasers' right to be informed and to make aware choices. Producers' rights to participatory self-determination mainly remain ignored by *elite* legal culture. This is understandable when it comes to multinational corporations producing and processing food, as able as they are to impose their perspectives thanks to the economic power they enjoy. However, small producers are in a position of weakness that can be assimilated to the one in which consumers find themselves. Focusing on self-determination and decentralization practices, food sovereignty opens to future challenges and debates.

7.2.1 Food sovereignty and Country of Origin Labelling

The global food system has developed across two decades of deregulation and trade liberalization[585] that, growing the distance between producers and consumers, have decreased public trust in it. As a response, citizens started demanding more regulations on food safety and food information, in order to better understand the features of the food they are used to purchase, from production to distribution phase. In reaction to such a globalized food system, social movements begun proposing and building alternative food systems, at the polar opposite of the industrial prevalent food model. Within these new alternative food systems, attributes of authenticity and traceability became crucial, and labelling issues became a pivotal element in the "competitive battlefield of quality, regulation and consumption"[586]. In light of this, the connection between COOL and food sovereignty can be identified. Struggles over the right to be informed on the origin of food can help building up bridges between producers and food eaters, this way contributing to the creation of alternative regimes to the current food system. From this perspective, food labelling represents a crucial battleground for shaping a different food chain. It might contribute to the emergence of new knowledge about the food system. A higher degree of purchasers' awareness on the mentioned issues might make it easier for citizens to realize how little attention is dedicated to local food within international provisions. Increased understanding of

[585] Elizabeth Smythe (2014), "Food Sovereignty, Trade Rules, and the Struggle to Know the Origins of Food", in Peter Andrée, Jeffrey Ayres, Michael J. Bosia, and Marie-Josèe Massicotte (eds.), *Globalization and Food Sovereignty. Global and local change in the new politics of food*, University of Toronto Press, p. 288.

[586] Terry Mardsen (2004), "Theorising Food Quality: some key issues in understanding its competitive production and regulation", in Harvey, McMeekin and Warde (eds.), *Quality of Food*, Manchester University Press, p. 151.

labelling issues has the potential to act as a trigger for challenging the current rules and shape them differently in response.

7.3 Food and Places: a foodshed model

The reason why provenance and origin of food have become a crucial element of debate, not only in Europe but worldwide as well, is due to the meaning that it is often linked to both of these concepts. Places have multi-layered meanings. They can be, besides geographical spaces, jurisdictional entities rather than "relational construct"[587], where social and political relations are the main forces. The term provenance, then, has even wider meanings than the term "place", since, particularly with regards to food, it has a spatial, social and cultural dimension. Indeed, it identifies the area where the food comes from; the used methods of production and distribution as well as the perceived food's quality and reputation[588].

Food and place are so tightly intertwined that have led some authors to talk about "food-sheds"[589] and "food-shed analysis". The food-shed is intended as "that sphere of land, people, and business that provides a community or region with its food"[590]. This "hybrid social and natural"[591] concept of foodshed connects the cultural – namely food -, with the natural – shed -, serving as a metaphor that "starts from a

[587] Kevin Morgan, Terry Mardsen and Jonathan Murdoch (2009), *Worlds of Food. Place, Power, and Provenance in the Food Chain*, Oxford Geographical and Environmental Studies, p. 3.
[588] Kevin Morgan, Terry Mardsen and Jonathan Murdoch (2009), p. 4.
[589] The original use of the term "foodshed" dates back to Walter P. Hedden (1929), *How great cities are fed*, New York: D.C. Heath and Company, in which the author focuses on New York City's food supply system, after a rail crisis occurred in 1921. Analysing where food is produced and, particularly, how it is distributed to consumers, he underlines how technology has changed the food market, increasing the gap between points of production and points of consumption. Later, Arthur Getz (1991), Urban foodsheds, in *The Permaculture Activist*, Vol. 24, p. 26–27, reintroduced the concept of "foodshed" in order to describe how the food system works and suggesting that the source of food is something that should be protected. Finally, Jack Kloppenburg, John Hendrickson and G. W. Stevenson, Coming in to the Foodshed, in *Agriculture and Human Values*, Vol. 13, N. 3, adopted the concept of "foodshed" to represent a more locally reliant and alternative food system, characterized by less negative social and environmental impacts compared to traditional agricultural practices. For further details please refer to Christian J. Peters, Nelson L. Bills, Jennifer L. Wilkins and Gary W. Fick (2008), Foodshed analysis and its relevance to sustainability, in *Renewable Agriculture and Food Systems*, Vol. 24, Issue 1, p. 2.
[590] Brial Halweil (2002), *Home grown. The case of local food in local market*, Worldwatch Paper 163, State of the World Library, p. 14.
[591] It is so described by Robert Feagan (2007), The place of food: mapping out the "local" in local food systems, in *Progress in Human Geography*, Vol. 3, Issue 1, p. 26.

premise of unity of place and people, of nature and society"[592]. As said, most consumers have only a vague idea of the food origin, of food producers and of food handling methods. For these reasons, it might be useful to refer to a "foodshed model" that, encouraging a greater role for locality, helps to rethink the conventional food system[593]. The idea is not to idealize local production either to state that the conventional food system should be totally dismantled. Instead, the suggestion is to shape the current regulatory regime in such a way that the connection between producers and consumers is re-established.

Within this perspective, revealing information on origin and provenance might serve such a purpose. Indeed, on the one hand, it generally allows purchasers to evaluate how trade – whether local, regional, national or global – plays a role in the current food system. On the other hand, whenever on a local scale, it is likely to make purchasers more concerned with their immediate environment and how food impacts on it[594].

The prevalent model nowadays proposes a sort of homogenization of food. Not only provisions of food do not change depending on the season, but also technology is able to override natural constraints and deliver the same products wherever in this world. Indeed, technological improvements allow longer storage and more distant shipping

[592] Particularly, as the Jack Kloppenburg, John Hendrickson and G. W. Stevenson (1996) explain, it aims to "encompass the physical, biological, social, and intellectual components of the multidimensional space we live and eat." (p. 41). The term "foodshed" is inspired by the one of "watershed", as a way "to grasp the shape and the unity of something as complex as a food system than to geographically imagine the flow of food into a particular place?" (p. 34). Within this perspective, "foodshed analysis" means "the posing of particular kinds of questions and the gathering of particular types of information or data. And foodshed analysis ought in turn to foster change. […] The foodshed can be one vehicle through which we reassemble our fragmented identities, re-establish community, and become native not only to a place but to each other." (p. 34) Thus, foodshed analysis tries to answer to questions such as "Where is food coming from?"; "How is it getting to us?", as it studies the qualitative and quantitative transformations to which food is subject while travelling "through time and space toward consumption" (p. 40). Jack Kloppenburg, John Hendrickson and G. W. Stevenson (1996), Coming in to the Foodshed, in *Agriculture and Human Values*, Vol. 13, N. 3, p. 34; 40; 41. The authors identify five principles for evaluating the current food policies: a) moral economy, in order to understand the consequences of consumption patterns; b) commensal community, which means the "establishment or recovery of social linkages beyond atomistic market relationships through the production, exchange, processing, and consumption of food" (p. 37); c) self-protection, secession and succession, for determining the best role in the food system for each actor involved; d) proximity, as the foodshed is embedded in a specific geographic area; e) nature as measure, meaning that human activities have to respect the natural limitations of the foodshed.

[593] Margaret Sova McCabe (2011), Foodshed Foundations: Law's Role in Shaping our Food System's Future, in *Fordham Environmental Law Review*, Vol. 22, p. 563.

[594] Margaret Sova McCabe (2011), in *Fordham Environmental Law Review*, Vol. 22, p. 570. Here the author is referring to the principle of "proximity", as explained by Jack Kloppenburg *et. alia*, see n. 123.

have encouraged the food system to sprawl[595]. However, on the one side, relying on long-distance travel causes more packaging, refrigeration[596], and fuel, generating waste and greenhouse gasses emissions as well as it requires more preservatives and additives[597], so that products can last longer. On the other side, an entire set of relationships within the foodshed - between neighbours, between farmers and local processors, between farmers and consumers - is lost in the process[598].

Food sovereignty and food-shed analysis suggest an opposite perspective compared to the mainstream one. They take into serious account the link between nature and food, in so far as natural conditions are seen "not as an obstacle to be overcome but as a measure of limits to be respected"[599]. Paying attention to nature and seasonality, leads to shorten the food supply chain, allowing citizens to have more knowledge, thus more control, over the food they eat[600]. Moreover, considering nature as a pivotal element within the food system entails a shift towards quality attributes of authenticity and traceability. Indeed, the willingness to build such an alternative food system is one of the effects of the decline of the public trust in the conventional forms of food provisioning. Consumers' increasing anxiety about both the food supply chain and its regulatory regime make them wonder where their food comes from and how it is produced and distributed. In a food system underpinned on local production getting these answers would be quite easy. At the opposite, in the conventional food system they represent a battleground. The campaigns that in particular social movements have been carried out to achieve increasing knowledge on the provenance of the food have made country of origin labelling a politicized issue. Indeed, this issue reveals contradictions in food regulations. The question such movements rises is about knowledge and power, meaning whose knowledge is considered essential when it

[595] Brial Halweil (2002), *Home grown. The case of local food in local market*, p. 6.
[596] The innovations in refrigeration engineering that occurred in the 1950's, 1960's, and 1970's have had a major impact on commodities traded today. This work led to the creation of the frozen foods industry, allowing a significant extension of food products' shelf life. William Coyle and Nicole Ballenger (eds.) (2000), *Technological Changes in the Transportation Sector: Effects on U.S. Food and Agricultural Trade, A Proceedings*, Washington, D.C.: Economic Research Service, United States Department of Agriculture, p. 33. Available at http://ageconsearch.umn.edu/bitstream/33551/1/mp001566.pdf (last access 25th August 2017).
[597] Scientists developed techniques to control the ripening of fruits, vegetables, and other perishables, so that their shelf life could be further extended. Norman N. Potter and Joseph H. Hotchkiss (1995), *Food Science*, New York: Chapman & Hall, pp. 163-199.
[598] Brial Halweil (2002), p. 15.
[599] Jack Kloppenburg *et. alia*, p. 38.
[600] See supra, p. 63.

comes to set rules on food. Do citizens have an effective and implemented right to know or the view that regulations display is the one of big manufacturing and retail companies?

7.3.1 Looking for a compromise

Within the perspective addressed herein, food chains are necessarily linked to ecology and culture. Indeed, it relatively is a matter of natural resources as well as a matter of consumption practices[601]. There could be no starker contrast.

As showed above, one of the conventional system's key features lies is the distance between the organic world and the supermarkets' shelves, with consumers having minimum knowledge on the provenance of the food. In other words, markets are hidden, while the food sovereignty movement tries to bring them to light. However, reality is complex and cannot be simply reduced into two opposite divisions.

The strategies that retailers adopt are likely to change depending on each national market, thus considering what type of consumers they wish to attract. From this viewpoint, they will advertise the quality attributes consumers are interested in and the provenance itself will be revealed according to the significance that purchasers attach to it[602].

The retail sector will show information on the provenance of food only in case of economic return. As a consequence, this information will be revealed depending on how consumers value it. Despite the reasons behind retailers' decision to indicate the country of origin or place of provenance are merely economic, it might play a positive role in promoting local food. In fact, retailers have the resources necessary to deliver it to a wider audience. This means that the retailers' choice to sell local food has the potential to have a stronger impact on the food supply chain itself. Making local products available for a greater number of purchasers, such a retailers' choice might realize social justice and equity on a local scale[603].

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[601] Kevin Morgan, Terry Mardsen and Jonathan Murdoch (2009), *Worlds of Food. Place, Power, and Provenance in the Food Chain*, Oxford Geographical and Environmental studies, p. 8.

[602] Kevin Morgan, Terry Mardsen and Jonathan Murdoch (2009), *Worlds of Food. Place, Power, and Provenance in the Food Chain*, p. 178.

[603] Jonnie B. Dunne, Kimberlee J. Chambers, Katlyn J. Giombolini, and Sheridan A. Schlegel (2010), What does "local" mean in the grocery store? Multiplicity in food retailers' perspectives on sourcing and marketing local foods, in *Renewable Agriculture and Food Systems*, Vol. 26, Issue 1, p. 47. Authors' surveys, conducted in four major urban centers of Oregon's Willamette Valley, show that meeting the increasing demand for local foods was retailers' primary reason for carrying them, despite

7.4 COOL under food sovereignty principles

Highly integrated and globalized food production makes it very hard – if not impossible – for consumers to identify places and methods of manufacturing, when they are far from the sites of production and processing. This is the case of interchangeable food products[604]. Indeed, these are sourced globally, on the basis of price rather than on different qualities, such as durability, for the food that has to be shipped over long distances[605]. Within this context, whenever consumers are interested in knowing the origin of the food they are going to eat[606], they can only rely on the information displayed on labels. Nonetheless, law's loopholes make the field of labelling and, more generally, of information provision to consumers, one of the most contested in the food policies.

Such a consideration is true for place of provenance and country of origin labelling as well, which, despite being crucial in political debates, remain "confusing aspects of food labelling policy"[607]. As said in the first chapter, within the European Union law, Article 26, Regulation (EU) 1169/2011, states that origin and provenance shall be indicated only if failure to do so is likely to mislead purchasers about the origin of the food. This provision sounds ambiguous.

As COOL is designed as voluntary, it is likely to be used by food retailers as well as governments for marketing or political reasons. On the one hand, retailers will add such an indication only if it will constitute a monetary advantage against competitors. On the other hand, governments might use it in order to gain internal consensus as well as to boost national production. Therefore, the perspective of framing country of

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they all underlines how much problematic product availability has been. Indeed, next to difficulties related to the food sourcing, the majority of consumers were not aware of the limited capacity and land-use patterns of the region. From this perspective, "acting as crucial intermediaries, food retailers are able to communicate demand for local food to producers, and to inform consumers that carrying local food may be considerably more complex than a short drive". Please, see p. 56-57.

[604] Always bear in mind that even though this thesis discusses provenance and origin of food, protected designations of origin are not a matter of concern herein. These latter are the products intimately connected to a place, a *terroir*, and, due to such celebrated and recognized features, producers and distributors are able to gain a price premium from consumers.

[605] Elizabeth Smythe (2014), "Food Sovereignty, Trade Rules, and the Struggle to Know the Origins of Food", in Peter Andrée, Jeffrey Ayres, Michael J. Bosia and Marie-Josée Massicotte (eds.), *Globalization and Food Sovereignty. Global and local change in the new politics of food*, Toronto: University of Toronto Press, p. 304.

[606] The reasons are varied, for instance, from the desire to strengthen the local economy to concerns about production methods in other areas of the world

[607] Kevin Morgan, Terry Mardsen and Jonathan Murdoch (2009), p. 185.

origin labelling as a voluntary information is, in most cases, rooted in market-related considerations. Such a legal regime, however, leave many consumers unsatisfied.

At the opposite, food sovereignty offers a different perspective. Besides privileging local food production and local sources, the principles suggested by food sovereignty can be employed even in the mainstream food system. Indeed, these principles could be applied in order to make the supply chain more traceable as well as to shape labelling rules in a way more respondent to consumers' needs and concerns. It is not only a matter of creating alternative food systems with the potential to shorten the distance between producers and food eaters. It rather is a demand for the implementation of the right to know about the food that is consumed. It is a request to food manufacturers and retailers to make the supply chain more transparent, following the general criterion of traceability.

Within this context, food sovereignty and the foodshed model represent an ethical framework, a set of values to be embedded in future food policies. Although the act of choosing what to eat is private, such principles underline how "the social environment of food choice" is, instead, "a public matter"[608]. As the current food system is highly integrated, based, as it is, on global trade, international organizations have to be engaged as well in such a reform process. Indeed, national rules that try to support the consumers' right to know are likely to be challenged within the WTO. Highlighting the role of places within the food supply chain does not mean to abolish global trade, as "we can never ever be purely local beings, no matter how hard we try"[609]. It rather means to include "non-trade concerns" within global policies and shape the regulatory regime in accordance.

Far from being solved, the struggle for food origin labelling concerns many actors of the global food governance: from local activists to NGOs, from small producers to consumers. Creating the basis for present and future coalitions, so far it has had the positive outcome to generate greater sensitivity and awareness regarding how the food system is organized[610]. Although modifying rules at international level requires more than this, increased knowledge among a wider range of consumers is always

[608] Kevin Morgan, Terry Mardsen and Jonathan Murdoch (2009), p. 197.
[609] David Harvey (1996), *Justice, Nature and the Geography of Difference*, Oxford: Blackwell, p. 353.
[610] Elizabeth Smythe (2014), "Food Sovereignty, Trade Rules, and the Struggle to Know the Origins of Food", p. 313.

significant and beneficial, as able as it is to instil doubts and desires, true triggers of change.

CONCLUSIONS

The study of country of origin labelling always implies a scrutiny of the different positions at play. As the issue comprises three regulatory levels - namely the international, the European and the national one – as well as private stakeholders – consumers, food manufacturers and retailers – the subject is as complex as fascinating. Taking into account divergent stances on the topic meant to organize the dissertation itself on the basis of this continual unbalance among the wavering principles and interests at stake.

Country of origin labelling indicates the country or countries where the food was grown, processed or packaged. In the current context of global governance and free trade, both within the EU Single Market and the WTO legal order, such a concept might seem anachronistic. While regulatory networks make national borders fade and food supply chains become global, tracing back a product to a specific place might sound an almost impossible task. However, increasingly globalized trade has raised concerns on the availability of information to consumers. From this perspective, the idea of introducing mandatory COOL is "grounded in the principle of allowing informed choice" to purchasers, as this would "constitutes a benefit to society as such"[611]. On the one hand the imperative of free trade; on the other hand consumers' right to be informed.

Assuming that consumers would benefit from an indication of origin, how can such a benefit be measured? The criterion used is based on the willingness to pay for products whose labels display the country of origin. Data shows it is unlikely that purchasers would bear extra price for it[612]. Consumers do not value the information

[611] Alberto Alemanno (2010), Country of Origin Labelling: The Last Frontier of the Geographic Perceptions of Food , in *European Journal of Risk Regulation*, Vol. 3, p. 266.
[612] J. M. Bienenfeld, E. R. Botkins, B. E. Roe and M. T. Batte (2016), Country of origin labeling for complex supply chains: the case for labeling the location of different supply chain links, in *Agricultural Economics*, Vol. 47, Issue 2, pp. 205-213.

on the country of origin per se, rather than they use it in order to "infer certain perceived qualities of the food product or make other choices which are related to the country of origin"[613]. Hence, reasons for the introduction of mandatory COOL would be rooted on the guarantee of choice based on the features they are interested in, such as, for instance, product's specific attributes, support to local production, food-miles and associated carbon footprint. On the contrary, those who stand opposite mandatory COOL underline the extra burden it would be. Indeed, for the processing and packaging industry it would translate into changing labels, preparing new ones with additional information as well as increasing controls on suppliers. The cost of all these operations is likely to be passed on consumers.

Within this context, Article 26, Regulation (EU) 1169/2011, "has reached a form of compromise which mediates the push from international law on the one hand, and pressure from stakeholders on the other"[614]. Indeed, the choice to leave COOL on a voluntary basis, while admitting some exceptions only through vertical regulation, reflects the need to avoid fragmentation within the Single Market. Not only mandatory COOL might hide a protectionist barrier in violation of the principle of free movement of goods, and of Article 34 TFUE in particular, but it might also alter competition. Whenever consumers link COOL to unfounded claims of superior quality or improved safety, business operators might exploit such an incorrect belief on the product to attract shoppers. Indeed, the link between the features' of the food and the territory from which it comes might be understood in the wrong way. The indication of the country of origin reveals that a product comes from a specific area only under the principle of the last substantial transformation. It does not imply that the raw materials and the processing phase took place there.

Therefore, from a consumers' protection perspective, two risks can be outlined. The first depends on the fact that an omission of information deprives them of the right to make aware choices. The second risk revolves around the incorrect meaning that purchasers may give to the country of origin displayed on a label. Both the omission and the presence of the indication of origin have the potential to mislead consumers.

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[613] Alberto Alemanno (2010), Country of Origin Labelling: The Last Frontier of the Geographic Perceptions of Food , in *European Journal of Risk Regulation*, Vol. 3, p. 266.

[614] Lorenzo Bairati (2017), The food consumer's right to information on product country of origin: trends and outlook, beyond EU Regulation 1169/2011, in *European Common Market Law Review*, Issue 1, p. 10.

The issue is made even more complex by the recent French and Italian interventions that introduce mandatory COOL for certain categories of food. Similar measures are likely to be established by other Member States as well, endangering the functioning of the Single Market. The national attempts to add value to products throughout the mere indication of their origin prompts forms of national protetionism. What has been called "gastronationalism" assigns to national *food production a symbolic value and is underpinned on the assumptions that domestically-produced food is safer and higher in quality than imports.* "Gastronationalism connects food's social and cultural attributes to politics by making the material, commercial, and institutional processes that shape foods the very objects of investigation"[615]. Such a scenario does not surprise as it fits the revival of nationalism that can be witnessed everywhere across Europe[616].

In the attempt to tackle nationalist ambitions, the EU institutions' decision to keep the indication of the origin on a voluntary basis can be explained. The EU's standpoint is underpinned on the consideration that the country of origin is neither a safety nor a quality cue. Hence, there is no need to display it - if its absence does not mislead consumers. However, exceptions to this general rule are provided. Reference is to vertical legislation, whose justification lies in safety and quality concerns. The two choices of establishing COOL as a voluntary indication and, at the same time, of admitting exceptions in which the indication is mandatory, seem contradictory. Considering the origin as a negligible element gives reasons to voluntary labelling practices. At the opposite, a mandatory indication leads to connect the origin with additional values, such as safety and quality. If the country of origin is deemed an insignificant element there should be no exceptions to the general rule of Article 26, Paragraph 1. In light of this, can COOL really be considered as neutral information? The position of the EU institutions appears shaky and confusing. The EU's lack of a clear stand on this matter baffle consumers and hinders the implementation of their right of informed choices provided by the Regulation (EU) 1169/2011.

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[615] Michaela De Soucey (2010), Food Traditions and Authenticity Politics in the European Union, in *American Sociological Review*, Vol. 75, N. 3, p. 434.

[616] Herman Lelieveldt (2016), Gastronationalism? How Europe's food production is entangled in nationalist politics, in the *London School of Economics and Political Sciences Blog on British politics and policy*. Available at http://blogs.lse.ac.uk/politicsandpolicy/gastronationalism-how-europes-food-production-is-entangled-in-nationalist-politics/ (last access 27th November 2017).

Within this context, the implementation of consumers' right to be informed requires transparent and consistent communication practices. The average consumer might believe that the indication of the country of origin on a processed food means that the whole processing phase took place in that country. At the opposite, it should be clearly stated that a "Made in…" indication does not imply that the product was wholly obtained in that one country. Indeed, the rule of the last substantial transformation is known by technician but ignored by general consumers. If the "Made in…" indication would be replaced by the words "Country of the last substantial transformation…" consumers might not be led to think that the entire production and processing phases took place in one country. As the definition of "last substantial transformation" is highly technical, purchasers would gain no knowledge on its actual meaning. However, even without fully understanding it, they would realize that only the last phase took place in the indicated place. The last phase would remain obscure as well as the meaning of substantial transformation. Hence, this would not be a way to increase knowledge, while it would be a manner at least not to mislead the consumers. Maybe only a stopgap measure but a tiny step towards improved information transparency.

Another solution would be to signal the origin of the raw materials separately to the origin of the entire product, as the rule of the primary ingredient under Article 26, Paragraph 3, Reg. (EU) 1169/2011 would suggest. For the majority of processed food, the raw materials come from a different place than the one that confers the origin to the final product. Then, associating the "Made in…" indication with a statement specifying the origin of the raw materials[617] could be useful, although long and quite complicated. This method could be implemented using Information Communication Technology, that would allow to have additional and even personalized information, depending on the purchaser's needs. Further assessments should be carried out in order to determine whether or not shoppers would benefit from such detailed information.

While the EU institutions have chosen to keep the indication of the origin on a voluntary basis, private initiatives started flourishing with the aim to meet consumers' expectations. Retailer companies in particular, take a competitive advantage from the

[617] For instance for a bar of milk chocolate it could be "Made in Belgium. Cocoa from Costa Rica. Milk from the Netherlands".

indication of the origin. Trends are[618] to specify the origin of the raw materials especially for some types of food, such as tomato sauce with tomatoes from Italy or cheese produced with French milk. Even though not legally obliged to add such information, the increase in sales is worth the effort. This way, private measures fill in the gaps left by public regulations. Information that, publicly provided, would represent an implementation of the right to consciously choose what to eat becomes an empty space to conquer for extra profit. As a consequence, reassuring consumers on transparency and quality would become a matter of business and not a matter of right to be informed. Leaving the floor to private actors means to bend the implementation of consumers' right to be informed to profit calculation and economic assessments. The borders between the public and the private spheres become blurry, with private rather than public standards taking the leads in shaping the current food system[619].

Increasing private intervention in the field of the provision of food information to consumers is not detrimental in itself. However, the consideration that public policies and private initiatives are led by different drivers should be borne in mind. The balance between information transparency and private parties' economic interest cannot be found leaving the latters free to act in the name of free movement of goods. What kind of information should be provided and how it should be displayed in order not to mislead consumers is a matter of public regulation.

Public policy that aims to guarantee transparency in food labelling should be evaluated not only on the basis of quantitative criteria but also qualitatively. Qualitative evaluations implies to take into account elements of adequacy, clarity, comprehensibility and compliance with consumer interests, demands and expectations[620]. Till now, the decisions on COOL have been underpinned on quantitative considerations, in other words on a cost/benefit analysis. On the contrary, quality considerations entail how different consumers perceive and understand

[618] Lorenzo Bairati (2017), The food consumer's right to information on product country of origin: trends and outlook, beyond EU Regulation 1169/2011, in *European Common Market Law Review*, Issue 1, p. 15.

[619] S.J. Henson and N.H. Hooker (2001), Private Sector Management of Food Safety: Public Regulation and the Role of Private Controls, in *International Food and Agribusiness Management Review,* Vol. 4, p.7-17.

[620] Lorenzo Bairati (2017), The food consumer's right to information on product country of origin: trends and outlook, beyond EU Regulation 1169/2011, in *European Common Market Law Review*, Issue 1, p. 16.

COOL; to what extent the surrounding environment influence their behaviours; whether or not the current system assures an adequate level of consumers' protection; as well as what are the reasons behind purchasers' demand for an origin indication. If qualitative considerations are taken into account, the focus would not be kept exclusively on industry's interests. From this perspective, COOL would represent an instrument for empowering consumers, assuring improved transparency along the food supply chain. This would imply a high level of consumers' health protection as well as an implementation of their right to be informed. Moreover, clear information would guarantee fair competition among producers and territories.

Food Sovereignty and Food Regime analyses constitute the theoretical background to build a diverse concept of food, beyond commoditization[621]. Indeed, they suggest to interpret food as an "enduring political relationship that cannot be reduced/fetishized to a question of "how much"; rather it is a political ecological relationship"[622]. While the process of commoditization adds exchange value to products, so that they can be traded for money, culture and people ''singularize'' objects and commodities[623]. If food carries exclusively a market price, food policies will be based on quantitative criteria. At the opposite, if food includes cultural and ethical values, food policies are likely to take into account consumers' subjective dimension.

Public regulators – EU institutions, in particular - can include such a perspective within regulations. They are the only ones able to interpret the many reasons that drive consumers' demand for COOL and, on this basis, develop labelling policies that comprise the above-mentioned qualitative considerations. On the contrary, industry's led initiatives are based on a cost analysis assessment, which does not take into account the cultural and ethical aspects of food, whenever it does not translate into extra profit.

Public actors should acknowledge that the increasing demand for COOL depends on safety and quality concerns which directly derive from the current organization of the

[621] For the concept of commoditization, please, refer to I. Kopytoff (1986), "The cultural biography of things: Commoditization as process", in A. Appadurai (ed.) *The social life of things,* Cambridge, UK: Cambridge University Press, pp. 64–91.
[622] Philip McMichael (2014), Historicizing food sovereignty, in *The Journal of Peasant Studies*, Vol. 41, Issue 6, p. 951.
[623] Ariane Lotti (2010), The commoditization of products and taste: Slow Food and the conservation of agrobiodiversity, in *Agriculture and Human Values*, Vol. 27, p. 73.

agro-food system. From this viewpoint, an indication of the origin, connecting the food with a certain place, has the potential to alleviate the anxiety that many Western cultures experience[624]. The growing physical distance between the production and consumption phases as well as the abstraction of food from nature requires a public response with the potential to reconnect the spatial, social and cultural dimensions of food. From a business operator's viewpoint, used to deal with globalized food supply chains, an indication of origin might seem irrational. Reasons to add it on products' labels depend solely on country of origin's power to attract consumers. At the opposite, a public regulator should not rule for the *hic et nunc*, while it should act according to a wider vision, in which consumers are enabled to play their active role within the market. From this viewpoint, the indication of the origin is, firstly, a step forward towards the implementation of consumers' right to be informed, thus to make aware purchasing choices. Secondly, it has the potential to bridge humans, food and land, by establishing a relationship that goes beyond the mere economic value, in order to embrace the natural[625] and cultural dimensions of food. Highlighting the connections between humans and nature helps to generate environmental and ethical awareness, empowering humans not only as consumers but also as mindful citizens.

[624] John Reid and Matthew Rout, (2016), Getting to know your food: the insights of indigenous thinking in food provenance, in *Agriculture and Human Values*, Vol. 33, p. 427.
[625] This means to take into account elements such as seasonality, soil characteristics, weather conditions, water availability.

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