

PRODUCE PROTECTION

Contents



1. **Foreword – Definition of “Food”**
2. **European Regulations Concerning Produce Protection**
3. **Foods Protection at National Level**
4. **Food Counterfeiting - Criminal liabilities**
5. **Contacts**

1. Foreword - Definition of “Food”

Clause 2 of EC Regulation No. 178/2002 and later modifications gives a general direct definition of food produce, defining this as “...any substance or produce, which is processed, partially processed or not processed, supposed to be swallowed or reasonably supposed it might be swallowed by humans. This includes drinks, chewing gums and any substance willingly added to foods during their production, preparation or processing. It includes water under the specifications establishing the values to be observed as per Clause 6 of EC Directive No. 98/83, keeping in mind the requisites of EC Directives No. 80/778 and No. 98/83...”

This briefing aims at giving a preliminary survey of the main aspects concerning the protection of food produce from the point of view of both civil and criminal law.

Food produce law is characterized, as we are going to see, not only by the relevant number of its sources – national, EC, international – but also by its cross-trend throughout several fields of both national and EC laws.

After what specified above, the first step to establish the borders of food produce laws is the legal definition of “*food*”.

There is not a definition of food having a general significance in this country. Italian lawmakers have used different terms to define in each single instance the scope of their intervention. According to the prevailing theories the large number of terms used by any lawmaker should be referred to only one concept of food, meaning “*whatever substance used by man for his own feeding*”.

Other sources concern the so-called “*hygiene package*” (EC Regulations No. 852, 853, 854 of 2004), about the hygiene of food produce, specific hygiene of the food produce from animals, the organization of official checkups on the food produce from animals for human consumption, and also the so-called FIAP package (Food Improvement Agents Package, as per EC Regulations No. 1331, 1332, 1333, 1334 of 2008), regulating the production, the commercialization and the use of additives, aromas and enzymes in foods.

Further, Clause 2 of the Ministerial Decree of March 21, 1973 about food packaging states that foods are “*all edible*

substances, both solid and liquid, with an animal, vegetal or mineral origin, which can be swallowed by man at a natural state, or after being processed or transformed or mixed, including chewable preparations such as chewing gums” and similar.

At the European Community level, Clause 2 of EC Regulation No. 178/2002 and later modifications gives a general direct definition of food produce, defining this as “...any substance or produce, which is processed, partially processed or not processed, supposed to be swallowed or reasonably supposed it might be swallowed by humans. This includes drinks, chewing gums and any substance willingly added to foods during their production, preparation or processing. It includes water under the specifications establishing the values to be observed as per Clause 6 of EC Directive No. 98/83, keeping in mind the requisites of EC Directives No. 80/778 and No. 98/83...”.

2. European regulations concerning produce protection

The most complete European legislation about food laws consists in EC Regulation No. 178/2002 by the European Parliament and by the European Council which has got the pertinent title “GFL- General Food Law”. This Regulation establishes the principles making up the whole prescriptive complex referring to foods safety, “sets up the European Authority for Foods and fixes the procedures and effective organizational mechanisms aiming at decision-making in the field of foods and feeds”, with the purpose of protecting the food processing chain “from farm to table”.

The most complete European legislation about food laws consists in EC Regulation No. 178/2002 by the European Parliament and by the European Council which has got the pertinent title “GFL- General Food Law”. This Regulation establishes the principles making up the whole prescriptive complex referring to foods safety, “sets up the European Authority for Foods and fixes the procedures and effective organizational mechanisms aiming at decision-making in the field of foods and feeds”, with the purpose of protecting the food processing chain “from farm to table”.

Concisely, keeping in mind the aims of the present Briefing, three main principles/definitions have been focused on, picking them up from the EC Regulation No. 178/2002:

1. definition of “food”;
2. principle of traceability;
3. principle of mutual recognition.

The first principle established in the EC Regulation No. 178/2002 is the definition of food, as mentioned before. According to the Regulation, when “food” is meant, the characteristic of “edibility” is not essential, but it is limited

to the simple destination of the substance in question to be “*reasonably*” the object of food consumption by humans.

Therefore, it is thought that are part of the term “*foods*” not only industrial finished products but also semi-finished products and agricultural produce, the so called primary ones, that is the produce of the land after harvesting them, the produce of rearing, of fishing and of hunting.

Clause 18 of the EC Regulation No. 178/2002 states the principle of traceability. The traceability of foods is an obligation laid upon all the businesses producing, processing and distributing foods.

According to such principle, each company in the agribusiness field must be able to indicate the subject who has supplied the foodstuff and/or other products which have become part of a definite food (this is the so-called “*in-traceability*”) and which subjects the products in question have been supplied to (the so-called “*out-traceability*”).

Traceability has got a double aim:

1. granting food safety at each stage of the food processing chain;
2. identifying the companies involved in production, thanks to the means of labeling, which cannot be deceitful and whose contents must be visible and intelligible.

Furthermore, the label must report the name of the product and the previous processing, the place of origin and the minimum preservation term.

After what has been said above, traceability is for sure a unifying element of the different production stages of a given food, and it operates at the same time as a differentiation element with reference to the liability of individual operators.

The subject of traceability is closely linked to the EC level objective of the free circulation of the foodstuffs and feeds which are produced and/or launched onto the market. The above said objective has made it necessary to ensure the free circulation of some food lawfully produced in a member country but commercialized in another EC

country.

The principle of mutual recognition was stated by law starting from the Cassis de Dijon Judgment (see EC Court of Justice, Judgment No. 20/02/1979, Case 120/78).

According to such principle, “*each product legally made and sold in a member state is entitled to be imported and commercialized even in the other member states without groundless obstacles*”.

However, in case of missing EU legislation, the member states keep their own competence to introduce the so-called technical prescriptives, that is the regulations about the composition, the form, the denomination, the quality, the conditioning, the labeling and more in general the presentation of the food produce.

Following the Judgment called “*Cassis de Dijon*”, the European Commission listed some cases where the national regulations may hamper the circulation of the goods, for instance when they:

1. are necessary to satisfy preemptory needs;
2. aim at general interest purposes;
3. are the essential guarantee to get such purposes.

3. Foods protection at national level

At present, therefore, the bulk of the regulations concerning food legislation appears to be a complex, multidisciplinary system, where regional, national and international sources interact. The result of the above is that there is a remarkable widening of the matter in question compared to the past, shifting the focus of the present food legislation from inflicting sanctions to people who commercialized and/or kept foods unsuitable to human consumption for different reasons to preventing any risk and to regulating activities of planning, authorization and supervision.

The legal protection of typical produce is deeply rooted into national regulations as regards the subject of collective trade marks, exactly at Clause 2570 of Italy’s Civil Code.

Furthermore, differently from other countries, Italy enacted a law about labeling and food produce quality (i.e.: Law 03/02/2011, No. 4, published on the *Gazzetta Ufficiale* (Official Gazette) on 19/02/2011, No. 41).

The above mentioned law contains provisions both on the labeling and on the presentation of all foodstuffs, which must guarantee a major protection from the imitation of Italian produce.

Clause 4 of the above mentioned law states that it is

compulsory detailing on the labeling of “*foodstuff products which are commercialized, processed, partially processed or non-processed the full information about the place of origin or provenance*” of the product itself, that is to say of the place where the product was made or of the place where it left from a given geographical point, as well as “*the possible use of ingredients where there are genetically modified organisms present at any stage of the food chain, from the initial production place to the final consumption*”.

More specifically, for unprocessed food produce, the indication of the place of origin or provenance concerns the country or the state where the produce was made. Instead, for processed foodstuffs the indication concerns the place where the last substantial processing was made, and it is also compulsory to indicate the place of growing or of rearing – in case of animal meat – of the prevailing agricultural raw material used in the preparation or production of processed foodstuffs.

In Italy for a long time in the past food safety regulations were considered only with reference to criminal law.

The process of making reference to EEC legislation concerning food regulations started in the 1970s only. As foodstuffs have got an economical relevance, that is they are goods for free exchange, they are subjected to the regulations on the free circulation of goods according to the Clauses 28-37 of the Treaty on the Functioning of the European Union (hereinafter “TFUE”), and on the coordination of the legal systems of the member countries (Clauses 144-118 TFUE).

At present, therefore, the bulk of the regulations concerning food legislation appears to be a complex, multidisciplinary system, where regional, national and international sources interact. The result of the above is that there is a remarkable widening of the matter in question compared to the past, shifting the focus of the present food legislation from inflicting sanctions to people who commercialized and/or kept foods unsuitable to human consumption for different reasons to preventing any risk and to regulating activities of planning, authorization and supervision.

The common principles at the root of food legislation which have contributed to define its vocabulary, highlighting the application manners and the objectives of the legislation

concerning foodstuffs are: a high level of health protection; the correct working of the foodstuff market; the need of clear definitions in order to agree more easily about the idea of food; top quality and independent scientific control at the basis of the risk analysis about foodstuffs; the observance of the consumer's rights and the guarantee of access to accurate information; the traceability of foodstuffs; the full liability of the market entrepreneurs about the safety of foodstuffs; the improvement of food legislation and free access to information.

4. Food Counterfeiting- Criminal liabilities

The concept of "*food counterfeiting*" refers to the complex of offences aimed at sanctioning - either in the Penal Code or in the Consolidated Act about the hygienic regulations concerning the production and sale of foodstuffs - the contamination behaviors of substances or drinks intended for nourishment, or even of falsification of geographical indications or trade marks of origin of agribusiness produce, to safeguard public safety, property and free trade exchange.

At present, the indictable cases in point in common criminal law to protect public health are regulated by Clauses No. 440, 442, 444 and 452 of the Penal Code, where the legislator meant to prosecute any behavior, either fraudulent or negligent, aimed at the adulteration, counterfeiting or trading of substances intended for nourishment, or, whatever behavior of selling and distributing foodstuffs however harmful to public health.

On the different side of the protection of the assets of the community of consumers or of the individual consumer, the case of food counterfeiting is instead penalized by Clauses No. 515, 516 and 517 of the Penal Code, or by the solely fraudulent indictments of trade fraud, sale of non-genuine substances as genuine and counterfeiting of geographical indications or designations of origin of agribusiness produce.

From this point of view, Clause 25 bis 1 of Legislative Decree No. 231/2001 states as well a specific title of administrative liability resulting from misdeed to be faced by businesses and companies producing or trading in foodstuffs and drinks, in case the behaviors of trade fraud

or counterfeiting of origin trade marks of agribusiness produce are committed by any person having managerial or ancillary positions in the interest and/or to the advantage of food industries.

Finally, the aspect of “*food counterfeiting*” is as well considered by the national legislator through the anticipation of the breach crimes of the so-called “*toxic fraud*”, both regulated by Clauses 5 and 6 of Law 283/1962 (TU reporting the hygienic discipline of the production and sale of foodstuffs).

Such charges – outlining the closure system of the criminal offence of “*food counterfeiting*”- indeed punish only the behaviors of selling, administering or distributing foodstuffs which are badly preserved or manipulated in their natural composition, together with – in preparing foods or drinks – the use of adulterated substances, or containing remains of products which may cause intoxicating effects or which may imperil the single consumer’s health.

5. Contacts

If you would like to know more about some aspects of the topics in the present Briefing, please do not hesitate to get in touch with either one of contacts mentioned below or your usual contact at *CM&P Studio Legale Associato*.



Avv. Andrea Ceschina

Partner

Via Torino, 2
20123 – Milan
+39.0292854104
aceschina@cmplawfirm.com



Avv. Fabrizio Marchisio

Partner

Via Torino, 2
20123 - Milan
+39.0292854104
fmarchisio@cmplawfirm.com



Avv. Andrea Orabona

Of Counsel

Via Torino, 2
20123 - Milan
+39.0292854104
aorabona@cmplawfirm.com