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"They Collected What Was Left of the Scraps": Food Surplus as an Opportunity and Its Legal Incentives

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ABSTRACT

For many years the problem of food security has been addressed only in relation to developing countries, due to the fact that people in developed nations had a relatively abundant supply of food. This is not anymore true both because of the economic crisis and an increasing demand of food at the global level. Therefore, food surplus in the food chain both at the production level and at household consumption could become a resource. In this respect, legal rules (e.g., the Good Samaritan Act in the United States) may provide incentives to economic agents for recovering food surplus. This paper examines in a comparative way legal remedies provided by United States and European Union to address food surplus. Some suggestions are provided to further improve the systems as well.

KEYWORDS

Food surplus, Food waste, Good Samaritan Act, Food security, Food banks

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1. Introduction*: food waste and food security

"We resolve further to halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger […]". This commitment is one of the eight vows adopted by the leaders from 189 nations who joined for the UN Millennium Summit in 2000, commonly known also as "Millennium Goals". Twelve year have passed but this goal is far from being reached as there are still many people who are not able to have access to enough food (United Nations 2000, 5).

The concept of "food security" was defined for the first time in 1996 when the participants in the World Food Summit of Rome reached an agreement on the definition, stating "food security exists when all people, at all time, have physical social and economic access to sufficient, safe, and nutritious food which meets their dietary need and food preferences for an active and healthy life" (FAO 2002).

According to last available data, the share of undernourished populations decreased from 20 per cent in 1990-1992 to 16 percent in 2005-2007. However, there was no progress since 2000-2002, and overall situation even worsened after the initial food crisis of 2008. Higher prices of food commodities and lower level of employment, resulted in an increase number of poor people (United Nations 2010, 11-12).

While for many years food security has a been a main concern for developing country, following the economic crisis nowadays is becoming relevant also in the western countries.

As an examples, according to the last data provided by Eurostat (the Statistical Service of the European Commission), the European Union

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accounts 8% of poor people not able to eating meat or proteins regularly[1] and in some member countries the percentage is even above the European average (Antuofermo and Di Melio 2012, 5)[2].

The situation is not better on the other side of the Atlantic. The United States Department of Agriculture has estimated that 14.5 percent of US citizens were food insecure in 2010. That is to say that more than one of ten had difficulty at some time during the year providing enough food for all members of family[3] (Coleman-Jensen et al. 2011, 4-5).

It is noteworthy that food security does not imply only having sufficient food, but also the ability to fulfill own preferences. This is extremely relevant if one considers the transition in diet habits in many developing countries triggered by recent economic growth (Kearney 2010, 5; Nam, Jo, and Lee 2010, 6)[4]. This change of diet habits has an obvious spill over effect, multiplying country pursuing food commodities and effecting overall global food security. (Nam, Jo, and Lee 2010, 7)

Food security is not an merely agricultural or social problem, it is also a political concern, having a deep impact on international policy and global security. This is demonstrated by the recent Arabian spring that

[1] Poverty is evaluated by Eurostat as "Material deprivation", namely the ability "to afford some items considered by most people to be desirable or even necessary to lead an adequate life". Food rich of protein is one of the nine items considered necessary for an adequate life The other eight are the inability to afford: 1) to pay rent, mortgage or utility bills; 2) to keep their home adequately warm; 3) to face unexpected expenses; 4) to go on holiday; 4) a television set; 6) a washing machine; 7) a car; 8) a telephone. Severe material deprivation rate is defined as the enforced inability to pay for at least four of the above-mentioned items (Eurostat 2012).

[2] As an example, in Italy almost one over five families is barely poor (ISTAT 2012, 7) and 3 million of people face extremely material deprivation (Benvegnù et al. 2011, 9)

[3] According to Colemant et al. about one-half of all food-insecure households participated in one or more of the three largest Federal food assistance programs during the month prior to the survey. After 2008 households who had insufficient money and other resources for food grew of 5 percent and people who faced *very low food insecurity* were 6.4 million

[4] Such an instance, in the last 40 years China has showed dramatic increase in consumption of period, especially in vegetable oils (680%), meat (349%) and sugar (305%). Both Brazil and China have experienced quite marked increases in egg consumption and India has faced a rising demand of eggs and egg products

was caused also by the highly volatile price of commodities in 2008 (World Bank, FAO, and IFAD 2009, 2-7)[5].

In terms of supply, five producers (Argentina, Australia, Canada, the European Union, and the United States) deliver 73% of the world's traded cereals (FAO 2012). Therefore, the most wealthy economy not only hold a strong purchasing power, but also they are able to exercise a strong influence on the commodities prices. It is evident that western countries bear responsible for combating hunger in the world.

Furthermore, in their recent outlook for 2012, FAO and OECD estimate that the agricultural production will have to increase by 60% to meet growing demand of food commodities in the next years. The two international bodies underline how "the need to increase production and productivity would be greatly reduce by reducing food losses and food waste". Recovering post-harvest losses at the farm gate (mainly in developing countries) and food waste further along the food chain (mainly in developed countries) will reduce the need of an intensive agriculture and environmental impact (OECD and FAO 2012, 68).

Therefore, recovering food surplus is of paramount importance to combat hunger and this topic is gaining momentum at international level as more and more countries are considering how to improve sustainability of the food chain.

According to a study presented by the FAO, every year roughly one-third of the edible food, gets lost or wasted globally, which is about 1.3 billion ton per year[6].

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[5] Authors have explained this phenomenon shading light on the heavy dependence on cereal imports of Arab countries which makes them extremely vulnerable. During 2008, following the prizes shock some major agricultural commodities-exporting countries banned exports for fear of not being able to feed their people. This coupled with massive investment in biofuel production in United States and Europe which shifted land away from production of food and pasture. As a consequence Arabian countries relying on imports were not able anymore to victual from the market and this resulted in population distress

[6] The survey was presented during the International Congress "Save the Food" which took place in Düsseldorf (Germany) in 2011. There is considerable heterogeneity in data as food wasted by consumers in Europe and North-America is 95-115 kg/year,

FAO outlined different causes of loses in the most developed countries. Among these the high "appearance quality standards" for fresh products fostered by retailers and the advantage of disposing food instead of using or re-using it are deemed the most relevant (Gustavsson et al. 2011, 4-15).

A more efficient use of food in the food chain is not only an obligation for international agency, but it is receiving a growing public interest thanks to the political awareness raised by media. On the other side of the ocean the problem is gaining space in the public agenda and several NGOs have promoted forums and project to involve public opinion (Bloom 2010).

Private NGOs active in preventing food waste (i.e. WRAP -Working Together for World Without Waste) (WRAP 2012) or collecting it for poor people (i.e. Feeding America, Fondazione Banco Alimentare Italia), play an important role in providing data to understand the extent of this phenomenon (Campiglio and Rovati 2009, 19; America's Second Harvest (Organization) 2006).

Based on these data, one of the most recent study has estimated that in the United Stated food loss amounted to $165.6 billion at retail and consumer level in 2008. That is to say that for each American consumer the retail sector has wasted 124 kg of food per year at an estimated retail price of $390/year (Buzby and Hyman 2012, 569)[7].

In the European Union, the Preparatory Study assigned by the Commission to the *Bio Intelligence Service Consortium*, estimated annual food waste generation at approximately 89Mt, or 179kg per capita. The principal source of food waste in the EU are households (42%) followed by food producers (39%) and restoration (14%). The Consortium forecasted an increase up to 126 Mt by 2020 without

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while this figure in sub-Saharan Africa and South/Southeast Asia is only 6-11 kg/year. Developed and low-income countries differ also due to the fact that in the first ones most of food is wasted at the consumer level, meanwhile in the latter ones is lost during the early and middle stages of the food supply chain

[7] To this it has to be added the householders who did not consume 297kg of food at an estimated price of $936 during the same year.

additional prevention policy or activities (DG ENV (European Commission) 2010)[8].

Following the outcomes of the study, the European Commission is preparing a Communication to the Parliament and the Council to express its view following the outcomes of the commissioned preparatory study (DG ENV (European Commission) 2010). For its part, the European Parliament "has called on the Council, the European Commission the Member States and players in the food supply chain to address as a matter of urgency the problem of food waste along the entire supply and consumption chain" and urged "them to prioritize this within the European policy agenda" (European Parliament 2012a).

Moreover, food waste is not disturbing only for ethical concerns, but also for the environmental impact in terms of garbage treatment and energy used in processing[9].

It is important to stress that, even if food waste can be lowered[10], a certain amount of food surplus is inherent to food processing and marketing (Barilla Center for Food & Nutrition 2012). Therefore, some scholars have suggested a new definition, namely "surplus food", putting emphasis on food disposes as a lost resource rather than wasting

[8] At national level data vary considerably across EU member countries. For example, in Italy food amounts to 16.9% of all food consumed and it accounts 6 million of tons. Most of food surplus is wasted (barely 93%), while only a small amount of it is used to advantage (Garrone, Perego, and Melacini 2012, 6). A study by the British Royal Society of Biological Sciences has pointed out that as it is for most of developed countries, in UK post-consumer food wasted accounts for the greatest overall losses. The same research has also acknowledged the lack of reliable data and the need of more evidence (Parfitt, Barthel, and Macnaughton 2010).

[9] Some scholars have considered the energy contained in wasted food (Cuéllar and Webber 2010, 44). Other studies have accessed the environmental impact of food waste taking in account not only disposal in landfills, but also CO_2 emissions embedded in food (i.e. CO_2 produced in food processing plants, transport, storage) (Venkat 2012, 432).

[10] "Food waste". has been defined as the "wholesome edible material intended for human consumption, arising at any point in the food supply chain that is instead discarded, lost, degraded or consumed by pests" (FAO 1981).

(Garrone et al. 2012, 17)[11]. According to these scholars wasted food is both a resource and a waste: it is a resource given the fact that may be used to feed people in need, but at the same time is also a wasted as it is thrown away (Garrone, Perego, and Melacini 2012, 4).

Following the approach just mentioned, we will investigate how policymakers and private bodies may act to convert food surplus in a resource.

More in details, this article addresses the relevant contribution that legal incentives may put into play for encouraging food producers and retails to donate food surplus and for making easier for charity organizations to recover it. Chapter 2 focus on food safety and tort law, explaining how liability rules may affect a food donor and a charity organization collecting food surplus. Chapter 3 addresses to the *Bill Emerson Good Samaritan Act* in the United States and how it can be considered effective in dealing with the problem of food surplus. Chapter 4 examines the European *acquis* in order to verify if and to what extent the old continent is putting into place solutions in line with the American one. Chapter 5 draws some conclusion providing some policy options for European policymakers.

2. Food Safety and Tort Law

In order to understand the rationale behind the Good Samaritan Act and investigating whether the European Union could adopt similar measures, a brief insight into the field of tort law for defective food products is appropriate. Both the United States and the European Union have developed liability rules and *ex ante* regulations in order to ensure food safety (Owen 2007)[12].

[11] According to these scholars "surplus food" is "the edible food that is produced, manufactured, retailed or served but for various reasons is not sold to/consumed by the intended customer".

[12] For a recent review of the evolution of Tort law in the United States read Owen's scholarship.

Tort law plays a major role in food law: it ensures that victims are compensated while providing a prophylactic function, preventing future harms. Thus, tort law casebooks are rich of cases arising from defective food products responsible for consumer's illness or death (Fortin 2009; Velthuis 2003, 99).

US Courts have proved to be more creative than their counterparts in Europe, developing since the first half of the XIX century a comprehensive set of remedies for victims. Law reports and case study books abound in cases raised from defective food products. Following the seminal and sundry case of *Donugue v. Stevenson*[13], the first step for every tort law student of the common law realm, American court have developed a complex set of remedies to protect the food consumers (Ferrari 2009; Owen 2007)[14]. Even more recently, facing litigation arising from defective food product, American courts have been resolute in affirming strict liability of food manufacturers (cf. *Pinkham v. Cargill, Inc.*,)[15].

For the purpose of this paper, we will limit to recall only those elements that are relevant to our discussion.

The Restatement (Second) of Tort and the Restatement (Third) of the Tort, are currently the blueprint for the regulation of product liability. § 402A of the Restatement (Second) imposes to the seller strict liability for injuries caused by products found to be defective or unreasonable dangerous. In light of § 402A any food manufacturer may be considered a seller, as the Restatement does not require that the user or the

[13] *Donughue v. Stevenson*, [1932] AC 562.

[14] For a short review of the evolution of American Tort Law please refer to Owen 2005.

[15] *Pinkham v. Cargill, Inc.*, No. 11-340 (Me., decided July 3, 2012).. The case decided by the Main Supreme Judicial Court concerned the presence of a bones in a hot turkey sandwich. The Court ruled in favor of the defendant, upholding the "foreign-natural doctrine", while rejecting plaintiff arguments based on consumer's expectation test.

consumer directly buys the product from the producer (Hunter Jr, Amoroso, and Shannon 2012a, 36; Owen 2005, 255)[16].

The Restatement (Third), supplemented the previous edition of the Restatement, by listing three type of defects: manufacturing defects, whenever product deviated from product of same kinds or from producer's design; design defects, whenever the designed chosen by defendant pose unreasonable danger to the plaintiff in light of the availability of some other designs; and, defective warning, whenever plaintiff failed to provide information to avoid rendering the product unreasonably dangerous (Baez 2010, 116 ff.). The Restatement restricts consumer expectation test and strict liability to manufacturing defects. Section 7 addresses expressly the topic of (manufacturing) defective food providing strict liability for food producers, meanwhile in case of defective design or warning, ordinary negligence rules apply. In the latter case compliance with statutes and regulations ensuring food safety becomes relevant (Spahn 2011, 51 ff.; Ferrari 2009, 100 ff.). Even if case law provides some examples of design defects cases[17], the vast majority cases of defective food products examined by courts fall in the category of manufacturing defects either because of the presence of foreign matter (e.g., fishbone[18], bone[19], animal[20], pit[21], screw[22],

[16] Before the Restatment (Second) of Torts was published, Courts had already come to these conclusion repealing the old theory of the privity of contract. The following disputes were the leading case that dismissed the theory of the privity of contract: *MacPherson v. Buick Motor Co.*, III N.E. 1050 (N.Y. 1916), *Decker & Sons, Inc. v. Capps*, 164 S.W.2d 828 (Tex. 1942). *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960).

[17] One of the most famous case of design defective food product involved coffee served at high temperature which caused a second degree burns to the plaintiff (cf. *Nadel v. Burger King Corp*., 695 N.E.2d 1185 (Ohio Ct. App. 1997))

[18] *Webster v. Blue Ship Tea Room*, Inc. 347 Mass. 421, 1964

[19] *Mix v. Ingersoll Candy Co. 6 Cal.* 2d 674, 1936

[20] For a worm see: *Yong Cha Hong v. Marriott Corp*., 656 F. Supp. 445 (Maryland U.S. District 1987); *In re Opelika Coca-Cola Bottling Co. v. Johnson*, 241 So.2d 331 (Ala.1970); for a dead mouse see: *atargias v. Coca-Cola Bottling Co. of Chicago*, 74 N.E.2d 162, 165-66 (Ill. Ct. App. 1947); *Asher v. Coca Cola Bottling Co.*, 112 N.W.2d 252, 255 (Neb. 1961); *Kenney v. Wong Len Et Al.*, 128 A. 343 (N.H. 1925).

condoms (!)[23] etc.) or because of chemical or biological contamination (e.g., pesticide residues[24], bacteria[25]). Consequently, following the Restatement (Third) strict liability is the common standard of liability in case of a defective food product (Wilson 2004).

In light of our problem, that it is to say the donation of food from a food manufacturer or a reseller, one could argue that this kind of transaction did not fall in the scope of the Restatement of Torts. Transferring surplus food to a charity organization could not be considered a sale in the sense of the Restatement (Second) of Torts.

However, it noteworthy that the wording of § 402A was developed by Dean Prosser, who deemed necessary to protect all consumers, not only those entered in contractual relation with the producer. Comment *l* to § 402A makes this concept even more clear explaining that "[…] It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser" (Owen 2005, 266).

In this respects some courts have gone so far as to hold that strict liability protection could extend even to (foreseeable) bystanders[26] (Hunter Jr, Amoroso, and Shannon 2012b, 6).

Another issue is the different position of the food manufacturer vis-à-vis the retailers and reseller. As Daluiso notes, "American products liability law generally insulates retailers from strict liability claims and

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[21] *Wintroub v. Abraham Catering Service* 183 N.W.2d 741 (Neb. 1971); *Williams v. Braum Ice Cream Stores, Inc.*, 534 P.2d 700 (Okla.Ct.App. 1974).

[22] *Hickman v. Wm. Wrigley, Jr. Co., Inc.*, 768 So.2d 812, 816 (La. Ct. App. 2000)

[23] *Chambley v. Apple Restaurants*, INC.*504 S.E.2d 551 (Ga. App. 1998)*

[24] *Fulton v. Kroger Co.*, 120 N.W.2d 232 (Mich. 1963).

[25] For a salmonellosis case see: *Koster, et al v. Scotch Associates, et al*, 640 A.2d 1225 (1993); for *Shigella* infection see: *Gant v. Lucy Ho's Bamboo Garden, Inc.*, 460 So.2d 499 (Fla. Dist. Ct. App. 1984); for trichinellosis see: *Trabaudo v. Kenton Ruritan Club, Inc.*, 517 A.2d 706 (Del.Super.1986).

[26] In this respect see: *Stegmoller v. ACandS, Inc.*, 767 N.E.2d 974 (Ind. 2002); Jones v. Nordic-Track, Inc., 550 S.E.2nd 101 (Ga. 2001).

holds them accountable only for their own negligence[27]. Therefore, in case of a food donation the retailers is in a better position than the manufacturer for what it relates liability.

Besides judicial tort law rules, also statutory rules requiring food safety are extremely relevant, since they may provide a useful ground for affirming *negligence per se*[28]. In light of this theory, any violation of a statute or administrative regulation (i.e., public health regulations) may constitute negligence[29] (Kinzie and Hart 2002).

The Federal Drug and Cosmetic Act provides that a food must be considered misbranded "if it contains any poisonous or deleterious substances, such as chemical contaminants, which may or ordinarily render it harmful to health" (cf. §402(a)(1)). Even if the FDCA does not provide any action to consumer and empowers only the Federal Drug Administration to enforce the provision the Act, nonetheless consumer may still rely on the protection provided by state legislation (Daluiso 2012, 1011 ff.).

In the European Union, Directive 85/374/EEC enshrines an harmonized body of rules providing liability for defective products. Article 3 of Directive 85/374/EEC provides a broad definition of producer including (Palmigiano and Bongiorno 2005, 397 ff.):

- the manufacturer of a finished product or a component part or a raw material;

[27] The authors recalls how different state legislatives even completely exempt seller form strict liability and only allow strict liability against manufacturers". According to the author this evolution was also trigged by the development of the Model Uniform Products Liability Act (MUPLA)

[28] Prosser and Keeton note how prior the judicial revolution that established strict liability as a general principle for torts arising from defective products, in the food field many pure food acts mandated the seller of defective food liable also in case of due care (Keeton and Prosser 1984, 581)

[29] Reads Restatement (Second) of Torts § 286 (1965); See following cases *Whitley Constr. Co. v. Price*, 79 S.E.2d 416 (Ga. Ct. App. 1953); *Ceco Corp. v. Coleman*, 441 A.2d 940, 945 (D.C.1982), *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2s 1268, 1274 (D.C. 1987); *McNeil Pharmaceutical v. Hawkins*, 686 A.2d 567, 578 (D.C.1996); *Joy v. Bell Helicopter Textron. Inc.*. 999 F.2d 549 (D.C. Cir. 1993).

- the bearer of the label placed on the product;
- the product supplier when is not possible to identify the producer;
- the importer in case of a product produced outside the common market.

With regard to the producer, the scope of the Directive was subsequently amended as to include also primary agricultural producer and professional hunter (Harpwood 2009, 344)[30].

Like the definition of producer, also the definition of consumer is broadly considered, including any person [31] who is injured by a "defective product", regardless of whether that person directly purchased the product. Therefore, the producer is responsible for its product safety no matter of the number of transactions that the product undergoes (Palmigiano and Bongiorno 2005).

However, a careful consideration of the scope of the Directive, makes clear that this latter does not apply to the case discussed in this paper. Article 7 of the Directive which has been implemented by the Member States, provides some defenses for producers. For example, the Consumer Protection Act of the United Kingdom (echoing Article 7 of the Directive) expressly provides that strict liability applies only when the product is sold to the consumer or is placed in the circuit of sales. Section 4 of the Act exculpates the manufacturer for goods supplied for nonprofit reason (e.g., gifts, charity, etc.) (Floudas 1994). In Italy Article 118 of *Codice del Consumo* (D. Lgs. 206/2005), whose wording is the same of Article 7 of the Directive, exonerates the producer whenever the product "was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business". Therefore, a food surplus delivered to a charity by a food business operator, cannot be

[30] In this respect Directive 85/374/EEC was amended by Directive 99/34/EC which was adopted in the wake of the mad cow disease scandal.

[31] A consumer is anyone who does not purchase and/use the product as a part of his/her business.

considered a sale in the sense of the Consumers Protection Act. Nor retailers delivering food surplus to a food bank may be considered final consumers, since they are engaged in their business.

Nonetheless, European food law encompasses rules with a broader scope to ensure food business operator's responsibility. Thus, food business operator's responsibility is one of the pillar of the General Food Law which is regarded by scholars as a landmark statute of European food law (Costato L. 2003, 333; Ferrari and Izzo 2012; Costato and Albisinni 2012).

Article 17 of the Regulation states that the food business operator bears the primary responsibility for the food placed on the market (Di Lauro 2003). Food safety and public health authorities of the Member States of the EU are entrusted to ensure food operator's compliance with this rule and all business operator's duties. With minor variations, all member States, alongside with civil liability remedies, have in place criminal and administrative enforcement systems. Therefore, public official are entitled to impose penalties, to seize food products, to halt production and suspend the activity. However, contrary to civil remedies (where strict liability is applied), in most cases business operator are prosecuted with administrative enforcement only when they are negligent (Brusa and Gonzaga 2012, 81)[32].

As an example, in Italy D. Lgs. 190/2006, a food business operator who fails to recall from the market a food deemed to be unsafe for consumer may be fined up to € 18,000 and her production may be halted. The same happens in light of *The General Food Regulations 2004* of United Kingdom which provides a fine up to £ 20,000 for a person guilty of an offence under the General Food Law. This latter defines food businesses operator as an "undertaking, whether *for profit or not* and whether public or private, carrying out any of the activities related

[32] Brusa and Gonzaga provide some example for Italian case law. Cass., August, 8 2006, No. 28375 in *Riv. Pen.*, 2007, 6, 693; Cass., November, 10 2006, No. 37307/2006 in *Mass. 2006*; Giudice di Pace di Monselice, 280/07 in *Dir. com. scamb. int.*, 3, 2007.

to any stage of production, processing and distribution of food" (emphasis added). Therefore, contrary to the Directive 85/374/EEC, it is crystal clear that not only private companies fall in the scope of the General Food Law, but also non-profit-making charity organizations and NGOs handling food for their ethical mission. This point was made clear in 2004, when the European Commission expressed the view that also charity organization involved in food surplus distribution fell in the scope of the Regulation. In facts, food banks store handle food in the same way of a retailers and therefore they must fulfil the same requirements (European Commission 2004; Meulen et al. 2009, 258).

Responsibility provided by Article 17 of the General Food Law may be considered a duty of care and therefore become relevant general under tort law rules (i.e. negligence).

Consequently, even if food donors and charity organizations do not fall in the scope of Directive 85/374/EEC, they may nonetheless face liability for negligence arising from food they produce (the donor) or handle (charity organization).

Despite these provisions, there has been a vast debate among scholars as to whether they are able to ensure a higher degree of food safety. According to Buzby and Frenzen the limited number of tort cases involving food safety settled by courts is a clear signal that tort law is unable to provide to manufactures stronger legal incentive to produce safer food. Though admitting that US legal system encourages more claims than European system, they explain this phenomenon underling that high transaction costs and low monetary compensation provide week incentives to pursue litigation (Buzby and Frenzen 1999, 648). They argue also that given the nature of foodborne illness (with long incubation period) and variety of food consumed, consumer are unlikely to be able to link an illness to the specific food source and therefore to

identify the defendant (Buzby, Frenzen, and Rasco 2001, 11; Antle 1996, 1244)[33].

On the contrary Louriero's findings seem to deny the Buzby's and Frenzen's position. According to the former Author, by developing a more comprehensive statistical model it is possible to ascertain that "strict liability joined with punitive damage decreases the number of food safety cases and consequently increases the applied rate of care by firms" (Loureiro 2008, 210).

Vis-à-vis the small amount of cases in European tort law arising from foodborne illness, both Havinga and Van Dam suggest that one reason is that European food producers prefer to settle dispute out of courts (Havinga 2012, 18; Dam 2006, 137)[34].

But there is at least another indirect effect of tort law. Meidinger affirms that tort law has an indirect effect mediated by insurance companies that demand higher premiums whenever a food manufacturer is non-compliant with food safety regulations and when litigation arises (Meidinger 2009, 4).

For what it relates to the topic of this paper, it is possible to reckon that facing an unclear regulatory environment, a food producer could have no or few incentives to donate food surplus (Fortin 2003, 574). Furthermore, having to deale with legal uncertainties, charity organizations may incur in higher assurance premiums and in an increase of overall costs [35].

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[33]In this respect, Antles illustrates the difference between a foodborne illness caused by a biological contamination (with acute effects immediately detectable) and a chemical contamination (which most times manifests itself after a long chronic low exposure).

[34] However, according to latest Report of the European Commission on functioning of Directive 85/374/EEC, seems that in the last five years there has been a significant increase of litigation in the field of defective products (European Commission 2011a).

[35] According to Fortin liability rules have a strong influence on company's behavior as they provides signal to firms whether to invest more in safety and precautionary measures. This conclusion is supported by the classical theories of law and economics, expressed by Shavell and Ulen and Cooter (Cooter and Ulen 2004, 324; Shavell 2004, 179 ff.; Polinsky and Shavell 2007, 143 ff.).

3. The United States Good Samaritan Act

Despite the USA have a long story of laws giving incentives for food donation, the topic has rarely been examined by scholars[36].

These pieces of legislation are rooted in the tradition of the charitable immunity doctrine, that provided a safe harbour for people engaged in non-profit activities (mainly free hospital assistance). Kotler, explains that "given the American mythology of self-reliance, the obvious antipathy toward those who have accepted charity [was] hardly surprising (Kotler 2007, 794). This position is also upheld by Glendon who stressed the "extreme individualism typical of Anglo-Saxon legal thought" (Glendon 1991, 82). Therefore, before the 1950s "there were many rules in place which immunized charitable hospitals by those whom those to whom services were negligently provided (Izzo 2007). This doctrine[37], later superseded by more restrictive rules, still endured in some federal statutory provisions (i.e. Volunteer Protection Act of 1997) (Kotler 2007, 794; Horwitz 2009, 56 ff.)[38].

[36] For this reason the present paragraph will rely extensively on Morenoff's contribution.

[37] In the United States provisions "that require a person to come to the aid of another who is exposed to grave physical harm" are also addressed as Good Samaritan statutes (Black and Garner 1996). See Pardun's scholarship for a complete overview of the topic (Pardun 1997). However, for the purpose of this paper we will address solely statutory provisions protecting volunteers and non-profit organizations.

[38] As an example, the Good Samaritan immunity doctrine has survived in different state statutes covering not only people, but also company volunteering in disaster relief during emergencies (i.e. earthquakes, hurricanes, flooding). The Good Samaritan immunity doctrine applies also for persons rendering bystander medical aid. California was the first state to give physicians Good Samaritan immunity rendering emergency care (Reuter 1999, 157). Those provisions have been particularly sponsored by surgeons' organization (i.e. American College of Emergency Physicians (ACEP), in case of a physician's response outside of the emergency department (American College of Emergency Physicians 2006). Brown provides a critical review of Good Samaritan statutory law in health field (Brown 2010).

Thus, it is not surprising that the USA started to addressed the problem of food waste and food charity's protection already in 1977, when the California National Legislature passed the first Good Samaritan food law (Morenoff 2002, 109 ff.). The Bill endorsed by the Californian Capitol Hill relieved donors from any liability from injures (even if food banks or charity done were not exempted from liability), and provided a tax exemption equally to the amount of food donated (cf. California Food & Agricultural Code § 58,501-58,509).

The Good Samaritan food donation law in California paved the way for the spread of similar initiatives in other states (Stanford Project For Hunger (SPOON) 1994)[39]. However, states adopted statutory measures slightly different one from each other. For example, Oregon not only provided protection donors[40], but also to donees and food banks were exempted from liability[41].

In 1983 the US General Accounting Office (GAO) acknowledged that liability was an obstacle preventing food donors from giving food surplus to charity organization. The GAO suggested that the US could benefit from the adoption of a Good Samaritan Act at the federal level following the example of the acts already enacted at the state level (US General Accounting Office 1983) [42].

However, for long time Federal Agencies had been able to tackle hungry with program like the Food Stamp Program, which provided

[39] A list of all statutes at state level is provided by SPOON project(Stanford Project For Hunger (SPOON) 1994).

[40] Cf. Or. Rev. Stat. (2012) § 30.890 *Liability of food gleaners, donors and distributors* and § 30.892 (2012) *Liability of donors and distributors of general merchandise and household items*

[41] In hearing beside the Oregon Legislature, witnesses besides recalling donors' potential liability as an impeding fact, they also referred of the increasing insurance cost for food banks (Morenoff 2002, 113). Colorado Good Samaritan Act, protected nonprofit organization and donors from criminal prosecution, but did not apply to the willful, wanton, or reckless acts of donors which resulted in injury to recipients donated foods Cf. C.R.S. 13-21-113 (2012)

[42] As was reported by the GAO, in 1982 34 states over 50 had adopted a Good Samaritan Act in the USA

low-income households with coupons benefit for purchasing food; the National School Lunch Program, which granted lunch for low-incomes students; and the Woman, Infant, Children (WIC) program which served to safeguard the health of low-income pregnant, postpartum, and breastfeeding women, infants, and children[43]. Later on it became evident that those programs were unable to deal with the increasing number of hungry people, so that the action of non-profit organizations proved to be extremely important (Cohen 2006, 463; Greene 2009, 382 ff.)[44].

In 1990 the Congress passed the Good Samaritan Donation Act (title IV of P.L. 101-610) "which outlined a donation law, to serve as a model" for states (US General Accounting Office 1991, 5 ff.). The Model Act provided that "individuals and business entities that donated «apparently fit» and «wholesome» food grocery products would not be held liable if their donations resulted in injury, unless the donor acted with gross negligence or intentional misconduct" (Cohen 2006, 471).

The variety of statutory provisions adopted by states and the consequential lack of clarity for potential food donors (which resulted in a significant decrease in food donated), led the US Congress to take actions. Addressing the concerns raised by the most important NGOs, House Representatives Pat Danner (D-MO) and Bill Emerson (R-MO) sponsored a Bill (H.R. 2438) that would regulate the liability of food donors and food banks at federal level (Morenoff 2002).

The Bill was referred to the Committee on Economic and Educational Opportunities, which hosted several hearing with NGO's representatives. The text faced many challenges, even though it was

[43] The Food Stamp Program was started in 1939 permitting people in relief to obtain stamps issued by the Department of Agriculture equal to their normal food expenditure. More than 70 years the program is still in place, even the Farm Bill 2008 changed its name in the Supplemental Nutrition Assistance Program (SNAP). Facing the consequence of the economic crisis, in 2008 the Congress made possible for the USDA spend more than 10$ billion over the following 10 years (USDA 2012).

[44] In its article Greens argues describes the Federal programs to ensure right to food, enlightening reasons for failures of federal action.

approved and signed into law by President Clinton on October 1, 1996 (cf. P.L. No. 104-210, 110 Stat. 3011 (1996)) (Cohen 2006, 72 ff.; Morenoff 2002, 125)[45].

Some remarks are needed here. The Congress deemed appropriate to protect not only food donors, but also nonprofit organizations as the majority of states had similar rules in place. However, the Good Samaritan Act maintained gross negligence for persons who donated foods, namely the "voluntary and conscious conduct by a person with knowledge (at the time of the conduct) that the conduct is likely to be harmful to the health or well-being of another person". The Good Samaritan Acts provided that the donated food should have been "apparently wholesome" or "fit" for grocery sale (cf. 42 USC §1791(b)(3)). Feeling the need to provide a standard for interpreting these expressions, the Committee on Economic and Educational Opportunities gave some example of cases falling outside gross liability. In the Report, the Committee acknowledged that donated food could fall below the donator's standard quality or be near the "freshness date" or "code date" on label. Furthermore, according to the Committee, the donor's gross negligence depended upon the type of food donated and its condition (i.e., a box of cereal even after the date of rail sail could be perfectly safe). The handling of food by the food pantry should also have been considered to imply gross negligence. The Good Samaritan Act exempted for liability also in case of food products not meeting all the quality and labeling standards required by Federal and State Law, provided that the receiving charity is informed and able to recondition food (cf. 42 USC §1791(e)) (Committee on Economic and Educational Opportunities 1996).

As it is clear, the Good Samaritan Act went well beyond the provisions of many state statutes. Therefore, after the enactement of the Good Samaritan Act, people started to wonder if the Act had pre-empted state

[45] Both Cohen and Morenoff report that the bill was renamed as to pay a tribute to Bill Emerson who had passed pending the approval of the bill. According to Morenoff this made the bill navigate the legislative procedure easily passing off.

statutes in the same field. Congress consulted the Assistant Attorney General, Johnsen, who supported the idea that the Good Samaritan Act had prompted only statutes providing less protection, leaving the door opened for more protective provisions. Johnsen explained that because the express purpose of the Act was encouraging food donation, the Good Samaritan Act had prompted state provisions less protective for donors and donees. The Assistant Attorney General went further saying that the existence of standard providing even greater protection was fully in line with the spirit of the Act (Johnsen 1997)[46].

Critics were addressed to the adoption of the Federal Bill Emerson Good Samaritan Acts. According to Cohen, the Act undermined the role of the public bodies, "misguidedly shifting responsibility of feeding America's poor to the private sector". Despite this, Cohen admits that after the entry in force of the Act, there has been a significant increase in food donations (Cohen 2006; Poppendieck 1998)[47]. Other scholars argue that the Act provide food donors and donees with excessive protection, while persons involved in assisting poor should exercise reasonable care (Waisman 2011)[48]. Furthermore, other commenters pointed out that the Act is unfair because it deprive low-income people of protection because their lack of recourse to file a lawsuit (Cohen 2006).

However, the empirical evidence given by the success of the food banks as well as the absence of any reported foodborne illness caused by donated food contradict these concerns (Cotugna and Dobbe Beebe 2002). The largest organization involved in distributing food surplus is

[46] The opinion reads "*We believe that the legislative history of the Act, together with its express purpose and the context in which it was enacted, indicate that Congress intended to establish a "uniform national law" that displaces conflicting State Good Samaritan statutes -- i.e., those that provide less liability protection than federal law […]The existence of state standards that provide even greater protection from liability should not deter food donation; indeed, they may further promote it*". (Johnsen 1997)

[47] Poppendieck goes even further suggesting that food banks provide illusion of effective action against hunger, weakening public action.

[48] The critic is moved to the Good Samaritan Acts in the medical field, but it also pertinent to the Bill Emerson Good Samaritan Act.

Second Harvest, a respected NGO able to feed one out of ten Americans thanks to food donations (Mathematica Policy Research 2010). The majority of food pantries affirm that the Good Samaritan Act was extremely helpful in performing their mission (Hawkes and Webster 2000). The Good Samaritan Act has also eased the public-private partnership, giving impetuous to the involvement of the citizens (USDA and EPA 2009). As many authors have pointed out citizen's activism and community involvement could be an extraordinary source in saving food surplus (Popielarski and Cotugna 2010; Finn 2011). Community Food Security Coalition has become a strong supporter of this view, claiming for a process of self-empowerment of local communities that is environmentally sustainable and not dependent on public action(Anderson and Cook 1999). As for the protection of those who receive donated food, due to a general lack litigation arising from foodborne illness, it is difficult to argue that they are discriminated (Fortin 2003).

4. The current legislative framework in the European Union

The European Union still lacks of an official position with regard to food waste and recovery of surplus food. At the moment there is an ongoing discussion on the issue between the European Commission, the European Parliament and Member states. The European Commission has made clear that the topic has to be considered in light of the Lisbon Strategy, by virtue of which the EU is committed to develop a sustainable economy. The DG Environment (DG ENV) of the European Commission has taken the lead of the discussion, commissioning the already mentioned report to the *Bio Intelligence Service Consortium*, in order to ascertain the magnitude of food waste in Europe (DG ENV (European Commission) 2010). Inside the European Commission, also DG Health & Consumers (DG SANCO) has been associated in the dossier, being pledged to enhance the efficiency of the food chain in EU (DG SANCO (European Commission) 2012). By means of adopting the

"*Roadmap to a Resource Efficient Europe*", the European Commission has committed itself to foster an efficient use of resources in the EU. Therefore, the European Commission considers the problem of food waste falling in this framework (European Commission 2011b).

With the "Resolution of 19 January 2012, on "*How to avoid food wastage: strategies for a more efficient food chain in the EU*", the European Parliament, from its side, urged the Commission to take steps to face challenges posed by food waste. In particular, the European Parliament valued the contribution made by charity organizations redistributing left over food, at the same encouraging the European Commission to adopt procurement model rewarding caterers able to redistribute food surplus (European Parliament 2012a). This urgency has been reinforced, as in the past two years many Members of the European Parliament have repeatedly urged a stronger support to food banks by European institutions[49].

On the basis of this documents, we will investigate if there is the room for a Good Samaritan Regulation in the European legal framework.

As we already mentioned, despite Directive 85/374/CEE is not likely to apply to food donors and food donees as the food donated is not placed on the market, however food manufacturer, retailers and charities handling food are responsible for its safety under the General Food Law. By means of examining deeply food regulations, it is possible to affirm that also European Food Law provides some grounds to introduce a provision analogous to the Good Samaritan Act.

In facts, European food law grants some degree of flexibility in line with one of the most important principle of the European administrative action, namely the principle of proportionality (Chalmers, Davies, and Monti 2010).

[49] Cf. The following Questions for written answer (Rule 117) have been addressed to the Commission by Members of the European Parliament: Diogo Feio, May 16, 2012 (E-005062/2012); Dominique Vlasto, July, 26 2011 (E-007383/2011); Raül Romeva i Rueda, October 19, 2011 (E-009350/2011) (Source: European Parliament 2012b).

As an example, Regulation (EC) 852/2004 on the hygiene of foodstuffs, better defines the concept of food business operator. Recital 9 of Regulation (EC) 852/2004 reads "Community rules should not apply either to primary production for private domestic use, or to the domestic preparation, handling or storage of food for private domestic consumption. Moreover, they should apply only to undertakings, the concept of which implies a certain continuity of activities and a certain degree of organisation" (emphasis added) (Szajkowska 2012, 39). Concerning this point, in another occasion the European Commission has expressed the view that food prepared by child-minders providing day-care in their own premises is considered domestic preparation in the sense of Recital 9 of Regulation (EC) 852/2004[50].

Thus, one wonders whether a charity organization without a stable organization, supplying food received from a food bank may be considered a food business operators (Bundesministerium für Ernährung Landwirtschaft und Verbraucherschutz 2012). Moreover, the coherence of criterion could be questioned in case of community with high number of members sharing same premises and food in a domestic manner. Therefore, in case of a food bank dispatching food to third party charity organization or a community kitchen assisting low income householder, the third party activity could be arguably considered a domestic food preparation.

After all, flexibility is one of the *raisons d'être* of the Hygiene Package and it is recalled by Recital 15 and 16 of Regulation (EC) No. 852/2004 and by recital 19 and 20 of Regulation (EC) No. 853/2004 (O'Rourke 2005, 76; Wijnands, Meulen, and Poppe 2007, 77).

There are several examples of application of flexibility provided by the Regulations. As an example, Regulation (EC) No. 852/2004 exempts primary producers from complying with many hygienic rules (the need

[50] This position is reported by German Federal Government. On the contrary, chapter III of Annex II of Regulation (EC) No. 852/2004, provides that persons preparing food at home and selling it on the market or through vending machine are food business operators.

of a HACCP system in place being just one example of this). Food banks and charity organizations could be associate to this category, enjoying the same status and facing less burdensome regulations[51].

Even Regulation (EC) No. 1169/2011 on the provision of food information to consumers, which triggered a complete reform of the labelling provisions in the EU, reads at recital no. 15 "Operations such as the occasional handling and delivery of food, the serving of meals and the selling of food by private persons, for example at charity events, or at local community fairs and meetings, should not fall within the scope of this Regulation". Therefore, the charitable nature of an event may make it to fall outside the scope of the Regulation.

Besides this, the European Commission is engaged in not only in simplifying and reducing European legislation (European Commission 2005)[52] but also ensuring a better functioning of the Food Supply Chain (European Commission 2009). As a consequence, relying on the flexibility provided by regulations at European level, charity collecting food surplus could enjoy a preferential treatment by national public Authorities enforcing European food law.

In this sense, at least one European member State, Italy, has developed a statutory provision in line with the US Good Samaritan Act. L. 155/2003 protects food donors and the charity organization collecting food surplus recognizing the latter ones as final consumers. This *fictio iuris* prevent people receiving food from banks from being able to file a lawsuit against the food donor, as the charity organization is considered the final link in the food chain (Pezzana, Vassallo, and Amerio 2010; INRAN 2007, 29).

[51] Besides primary producers, also gelatine or collagen manufactures are exempted from having an HACCP system in place (cf. Article 1).

[52] In this respect the European Commission expressed its preference for a "a legislative method entailing a clear preference for essential requirements rather than technical specifications, the increased use of co-regulation, the promotion and increased
use of information technologies" (cf. Conclusions) (European Commission 2005).

Even putting aside for a while the food law arguments, one could still wonder if provisions assuring a shield both to the food donor and donee could be in line with other field of the European *aquis*.

As an example, from the European competition perspective, it is more than obvious that food banks cannot be considered undertakings. In facts, the extensive case law of the European Court of Justice has cleared that a private entity "may be classified as an undertaking for the purpose of applying the Community competition rules […] [when] is engaged in an economic activity […]"[53]. Furthermore, as pointed out by Perrone, the non-profit sector and welfare systems are not matters falling under European law. As a consequence Member States are free to adopt the policy they considered most suitable for their situation and therefore, legislative provision incentivizing (directly or indirectly) food donation cannot be considered a state aid (Perrone 2011, 6; Prosser 2010).

Even considering the option to adopt a Good Samaritan Regulation at European level following the Italian experience, there are arguments for deeming this option in line with European law. The Treaty on the European Union enshrines the idea, already developed by the Court of the European Union, that the European Union is rooted in the legal traditions of the member states (Hofmann, Rowe, and Türk 2011, 112 ff.). Therefore, the EU institutions have to take in account the traditions of the states. In this respect, we know that many Member States of the EU have Good Samaritan provisions in different sectors from food law. Some states (i.e., Ireland) in the Common Law are traditions are taking

[53] Court of Justice of the European Communities, April 23, 1991, C-42/90, *Höfner & Elser v Macrotron GmbH.*, in *Reports of Cases*, 1991, I-01979. The European Court of Justice drew a line between a charity organization and an undertaking in the *Cassa di Risparmio di Firenze* case, affirming "*A legal person […] which is limited to the payment of contributions to non-profit-making organisations, cannot be treated as an 'undertaking' within the meaning of Article 87(1) EC. Such an activity is of an exclusively social nature and is not carried on on the market in competition with other operators.*" European Court of Justice, January 10, 2006, C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA*, in *Reports of Cases*, 2006, I-00289.

steps for adopting Good Samaritan acts giving incentives to rescuers and volunteers similar to those ones that were common in the USA at the beginning of the XX Century (Law Reform Commission - Ireland 2009). In this respect, even stressing the difference among European Member States, Smits acknowledges that while all States hold people volunteering and providing assistance liable only when they cause a damage intentionally or grossly recklessly, most of them do not provide responsibility for Samaritans (Smits 2000, 21).

Finally, this type of provision appears reasonable even considering the problem taking also in account the economic analysis of law theories. We will easy find out that the strict liability rule creates disincentive in donating surplus food, as it may drive to self-interest prevailing on reciprocity. In facts, most food suppliers/retailers may be driven to dispose the food instead of addressing it to charity organizations in order to avoid liability. Under liability rules, as we have already mentioned, food donor (i.e. food producer) may be hold liable toward final consumer who receives food from a charity organization (i.e., food bank) as the foodstuff is placed "on the market" and he or she is a food business operator in the sense of the General Food Law. Furthermore, even in the case of a food producer/retailers committed with a strong corporate social responsibility and investing in philanthropic activities, food safety rules (i.e., HACCP, Record keeping) may nonetheless make difficult for charity organizations to manage surplus food.

What it is important to underline in this respect is that beside potential damages, by means of conferring surplus food to charity organizations the food producer may carry on positive externalities that outweigh social costs. Therefore, in order to correctly estimate the social cost for accident from defective donated food not only should be taken in account injurer's care cost and expected victim's loses, but also victim's benefits (which could neutralized social victim's loses). As a consequence applying strict liability to a food donor would amount to create social loses (opportunity cost), as food donor could be not

incentivized[54] to deliver food surplus[55] (Garrone, Perego, and Melacini 2012, 7).

5. Conclusion

Food surplus is a resource that cannot to be wasted in the context of an increasing demand of food commodities at global level. Given the fact that food surplus can be reduced only to a certain extent, it is extremely important to explore strategies to exploit it (Barilla Center for Food & Nutrition 2012). To this extent food law rules could have an important role in reaching this goal. The issues we have discussed prove that a special set of rules for charities and food donors' liability could be an effective tool to boost surplus food redistribution.

The law and economic analysis arguments show that without any adaptation of tort law food donors may be discouraged to address their food surplus to charity organization.

As the US case demonstrates, an adjustment of general tort rules, as performed with the Good Samaritan Act, may be rational and coherent with the aim to combat hunger and food waste, especially when some European Member States (i.e., Greece) are taking steps to loosen rules on product shelf life.

A set of rule as the one provided by the Good Samaritan Act would be compatible with the European legal framework. Furthermore, they could be adopted also in light of Article 6.3 of the Treaty on the European Union, which recognizes "constitutional traditions common to the Member States" as pillar for human rights in the EU, these. As a

[54] The New Palgrave Dictionary of Economics defines an "Opportunity cost" as "*the evaluation placed on the most highly valued of the rejected alternatives or opportunities*. It is that value that is given up or sacrificed in order to secure the higher value that selection of the chosen object embodies." (Buchanan 2008)

[55] Another solution to this problem could be impose taxes to make food waste more expensive, but this option could face opposition during economic crisis time. The polluter-pays principles is one of the cornerstone of the European Environmental law and could be a legal basis to impose taxes for food waste (Jans and Vedder 2008, 43).

consequence a European a common standard for liability in case of charity organization collecting food surplus and their donors, could be implemented by means of amending Regulation (EC) 178/2002 or adopting an *ad hoc measure*.

Enabling volunteers, that already are active in private projects assisting low-income people and collecting left over food, should be a priority of the European bodies in line with the goals of the Lisbon agenda (McGlone et al. 1999).

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