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Managing the Covid emergency in the global food market: the role of private regulation

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1.- Introduction

Even if it is too early to fully understand all the repercussions that the Covid pandemic will have on law in general, and on food law in particular, it is anyway worth noting that the sanitary emergency has put a strain on supply chains, raising issues about the resilience norms have in coping with global crises. An increasing number of scholars have questioned the capability of risk regulation, contract law, labour law, health law and the like to provide effective solutions to manage the Covid emergency. The somewhat implicit fear lying behind many of these voices is that the crisis might exacerbate some, if not many, of the inequalities already affecting national and international markets.

Against this background, art. 78, par. 2-bis of the Italian Decreto Legge 18/2020 provides that it is an unfair trading practice requiring voluntary certification related to the Covid-19 as a precondition to sell agri-food products and/or to continue sale agreements signed before the Covid emergency[1]. The norm does not specify the types of certification schemes to be forbidden; but, being voluntary in nature, it likely refers to private certification schemes employed and/or imposed especially (but not only) by large retailing chains. Taking inspiration from the provision, the focus of the paper will be on an issue evoked by the provision, namely the role that private standards and certification schemes have played and still play in coping with the Covid pandemic.

A few words must be nonetheless spent with regard to art. 78 since it represents the starting point for our analysis. In particular, the norm hints at a typology of problems that are placed at the intersection between, on one hand, the asymmetry that often characterizes the size of the subjects operating in the agrifood chain (input suppliers, farmers, processors, retailers) and, on the other hand, the use of such asymmetry to distort a fair and balanced apportionment of risks and benefits along the chain. Understanding art. 78 against the background of the market power imbalances plaguing the sector helps making sense of the connection that the norm establishes between certification schemes and unfair trading practices. Indeed, imposing private standards and certification is one of the ways to shift the risks associated to a given activity from a stronger subject (usually retailing chains and large processors) to a weaker one (usually farmers and small producers). Operationally, private standards and certification can be conceived as the mechanisms that, by leveraging on the asymmetries of market power existing between the parties, force the weak to disproportionately bear market risks. The scenario taken into consideration by art. 78 is thus one centered on Business to Business (B2B) relations. This is not to say that consumers' or other stakeholders' considerations are irrelevant. They affect the type of problems considered under art. 78 but only indirectly, for example by putting incentives on the stronger part to impose on the weaker one a certification that is asked for by consumers. Coherently with the starting point adopted, the paper will focus only on how private regulation contributes to manage the relations between business parties amid the Covid pandemic.

Since the type of problem under consideration relates to the apportionment of risks, in the case of the Covid emergency the first type of risks to be

([1]) The Decreto Legge has been converted through the Legge n. 20 of 17 March 2020.

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considered are those associated to the marketing of products potentially contaminated with and/or associated to the virus. Scientific literature and national and international health agencies agree that the possibility of getting Covid from eating or handling food is, in the worst case scenario, very low[2]. Many authorities seem to go even a step further by pointing to the fact that there is no evidence so far that food can be a source of Covid contamination[3]. Thus, the general message that science is sending to consumers is that eating food is safe. But real risks and perceived ones do not necessarily correspond. Even if science unanimously states that food safety is not an issue in the Covid case, consumers might fear that food can contribute to the spread of the virus. In addition, States might use negligible or even nonexistent risks of contracting Covid from food to block the import of foreign products[4]. The need to react to these perceived risks can help understanding why retailing chains have asked their suppliers to change their daily operation amid the Covid emergency. In this sense, the new measures to be adopted by suppliers are aimed more at reassuring consumers than at managing a real risk.

There is a second possible explanation for the adoption of specific measures related to Covid. Even if, on one hand, science convey the message that eating food is safe, on the other hand it notes that the virus can survive on some surfaces from a few hours to a few days[5]. This poses a safety issue for food businesses since the activities of processing, handling and packaging could be a source of contamination. To be clear, it is still unknown how contagious the virus is once it is on an external surface; even if present, its viral load could be so low to make the risk to get the virus negligible. Being in a situation of scientific uncertainty, a precautionary approach might require to adopt additional measures to keep under control the risk that food workers, positive to the virus, contaminate surfaces and food packaging materials[6]. Thus, retailing chains might require their suppliers to implement precautions to manage the risks that facilities get contaminated; these precautions concern mostly the conduct that food workers should take since they are the main vehicle of contamination within the business facilities. This is in line with the recommendations published by public institutions. For example, the guidelines for food businesses prepared by the World Health Organization and the Food and Agriculture Organization focus on the precautions that business operators should adopt with regard to their employees and to the cleaning of the surfaces they use[7].

A second type of risks connected to Covid concerns the threat to business continuity. The expression refers to the capability of a professional operator to promptly and efficiently react to internal or external menaces and disruptions in order to maintain the operability of the business. It is a form of business resilience since its goal is to avoid stopping the production and/or the supply of products and services during and after events that adversely affect daily operation. Business

(2) Centers for Disease Control and Prevention, *Food and Coronavirus Disease 2019 (COVID-19)*, available at: https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/food-and-COVID-19.html; Food and Agriculture Organization, World Health Organization, *COVID-19 and food safety: Guidance for food businesses*, 7 April 2020, available at: http://www.fao.org/documents/card/en/c/ca8660en/.

(3) European Food Safety Authority, Coronavirus: *No evidence that food is a source or transmission route*, available at: https://www.efsa.europa.eu/en/news/coronavirus-no-evidence-food-source-or-transmission-route; World Health Organization, *Questions relating to food safety customers*, available at: https://www.who.int/news-room/q-a-detail/questions-relating-to-consumers; Food and Agriculture Organization, Food safety in the time of COVID-19, available at: http://www.fao.org/documents/card/en/c/ca8623en.

(4) This seems the case with China. The country is testing imported food, especially chilled and frozen ones, for Coronavirus. During a WTO meeting Canada, supported by Australia, Brazil, Mexico, Britain and the USA, claimed that such practice, being not based on any scientific evidence, amounts to a trade restriction: https://globalnews.ca/news/7469353/china-coronavirus-frozen-food/.

(5) Food and Agriculture Organization, World Health Organization, *COVID-19 and food safety: Guidance for food businesses*, cit., 1.

(6) For an analysis of the application of the precautionary principle and the subsidiarity principle in the Covid context R. Saija, *Principio di precauzione e sussidiarietà: esiti sul diritto alimentare in tempo di emergenza*, in q. *Riv*. www.rivistadirittoalimentare.it , n.2-2020, 45.

(7) Food and Agriculture Organization, World Health Organization, *COVID-19 and food safety: Guidance for food businesses,* cit., 2 ff.

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continuity is one of the strongholds of private standards and it has a prominent role in many of the documents that private standard-setters have published to deal with the Covid emergency. The reason is intuitive. One of the paramount interests of retailing chains is to have a reliable and steady supply chain, resilient to any change that might jeopardize its functioning. This emerges in clear terms if we consider the definition of business continuity offered by the International Organization for Standardization (ISO): "Business continuity is the capability of the organization to continue delivery of products or services at acceptable predefined capacities following a disruption"[8]. The definition stresses the importance to maintain the supply of products/services running, adding that this must occur by meeting given criteria that are qualified as acceptable and predefined. The terms imply both a quantitative and a qualitative dimension: in the case of events that threaten business operations it is not sufficient to provide any product, but this must be in a quantity and of a quality such to meet buyers' needs and expectations. The latter are usually identified in a contract; contractual obligations become thus the benchmark against which to measure the fulfilment of the business continuity requirement.

The risks considered under the business continuity notion go beyond food safety and refer, more in general, to logistic aspects; food safety can be one aspect of business continuity, but the range of the latter is wider and involve all the different facets of the supply chain. The importance of business continuity is magnified if we consider that more and more the food supply chain is a global one. In a transnational environment logistics are more complex; guaranteeing the capability to supply products depends on a series of factors some of them are out of the control of single business operators[9]. Business resilience, and in particular business continuity, must take into account also the geographic dimension of the relations that modern food supply chains entail.

A further element to be considered is that the risks arising in the Covid scenario can be different: in some cases, consumers might ask compensation for damages allegedly due to the presence of the virus in the food they bought; in other cases, business operators (processors, retailing chains) might ask compensation for not having been supplied with the products they contracted for or for having been prevented to use/sell food they bought since it is contaminated; in yet other cases, even if no quantifiable or ascertainable damage has occurred, reputational losses might accrue[10]. These are all risks that business operators have to take into account and that can affect their daily operation. The first example refers to food safety, while the second to business continuity; both have specific legal implications. The last one is cross-cutting with reference to the distinction between food safety and business continuity; it can give rise to different legal consequences ranging from compensation to contract termination.

In the following section the paper will explore the interplay between Covid emergency, private food regulation and contract. The notions of private standards and certification will be introduced, as well as how these tools, together with the contract, are employed to vertically integrate the food supply chain. The third section will analyze in more detail how private standards have been interpreted vis à vis the Covid emergency, focusing on a few variables. In the last section some remarks on the interplay between private regula-

([8]) See the ISO standard 22313:2020, point 0.6, available at: https://www.iso.org/obp/ui/#iso:std:iso:22313:ed-2:v1:en.

([9]) The examples are several: the diffusion of the contagion in some geographical areas more than in others; restrictions to the movement of goods imposed by national public authorities; access to infrastructure; etc.

([10]) I will not consider the compensation issues that might arise between the employer and his employees in the case the latter get contaminated in the working place. This is an issue which is governed (also) by private standards, which can have an impact on food safety (reducing the risk that employees contract the virus reduces also the risk the food they handle become contaminated), but which is not directly connected to the issue we are dealing with here.

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tion, globalization and crisis management will be offered.

2.- Covid, Contract and Private Regulation

Retailing chains have a leading role within the agrifood chain and face an incentive to shift some of the risks they bear on other players of the chain, namely producers and farmers. The modalities to shift the risks associated to Covid from the retailing level to the production level are several. The contract is one of the most intuitive; a second one is represented by private regulation.
While the concept of contract does not need to be introduced and, in addition, contract law will be peripheral to our analysis, the notion of private regulation requires some more consideration. In the food context, private regulation can be conceived as a mode of food governance alternative to governmental regulation in which private subjects develop and employ an array of instruments aimed at governing the activities of some subjects[11]. The definition of private regulation provided is broad enough to encompass the contract too; nonetheless, contract has been traditionally studied apart because of a variety of reasons. While contract is historically one of the pillars of private law, private regulation is a much more recent phenomenon that has gained visibility especially thanks to the emergence of transnational value chains[12]. History is thus the first reason explaining why contracts and private regulation are considered as separate entities. In addition, the two differ in their nature somewhat. First, the scope of contract is confined to two or a limited number of parties; in the case of private regulation, standards and certification that, as we will see, are two of its main components are more catholic in their range of application since they can involve a potentially indefinite number of subjects. Second, while contracts are directly binding among the parties, standards and certification schemes are not binding per se, since they are private voluntary tools; to make them binding, another legal tool is needed in the form of a contract or a membership in an association. But, beside these different characters, private regulation and contracts share the fact that both are expression of private autonomy. Private autonomy is also the source of self-regulation, which is another form of private regulation in its broadest sense. But self-regulation and private regulation do not necessarily correspond. Self-regulation refers to norms that members of a given group self-impose; standards and certification schemes are often hetero-imposed by a leader on other subjects. Even in the context of groups, not always its members self-impose norms in a proper sense; there are cases where subjects join an association to get access to a market segment and, by doing that, they have to accept the norms already (im)posed by the association. In such cases, the association is the legal artifact employed to dictate private norms to other subjects.
As mentioned, private regulation is based on two main tools: private standards and certification. Private standards are norms created by private subjects regulating technical features, processes, other characteristics that a product and/or a process must possess. Crucial to the idea of private standards is that of conformity. A product and/or a process is in conformity with a given standard insofar it complies with that standard. Standards are ubiquitous and there are countless types of them[13]: their scope, range of application, contents can differ. Just to name a few examples, we have

([11]) See B. van der Meulen (ed.), *Private food law*, Wageningen, 2011; T. Havinga, F. van Waarden, D. Casey (eds.), *The Changing Landscape of Food Governance. Public and Private Encounters*, Cheltenham, 2015; P. Verbruggen, T. Havinga (eds.), *Hybridization of Food Governance. Trends, Types and Results*, Cheltenham, 2017.
([12]) On global value chains S. Ponte, G. Gereffi, G. Raj-Rechert (eds.), *Handbook on Global Value Chains*, Cheltenham, 2019.
([13]) N. Brunsson, B. Jacobsson, *A World of Standards*, Oxford, 2000.

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environmental standards, related to how much a product/process is environmentally-friendly[14]; social accountability standards, concerning the well-being of workers and other stakeholders and, more in general, the social impact that a product/process has on communities[15]; quality management standards, providing a set of best practices in order to increase the efficiency of a firm and to better manage it[16]; food safety standards, concerning the requirements aimed at guaranteeing the hygiene of the processes and products[17].
A characteristic common to all private standards is the fact they are set by a private subject, being a physical person, an association, a corporation, etc. Beside this shared feature, the nature of the private subjects can be very different: some are for profit organization, while others NGOs or charities; some represent a specific segment of a production chain, while others include subjects operating in different stages of the same chain. In many cases, the subjects setting the standards for those operating within a chain are the so called chain leaders. Because of the market power they enjoy, chain leaders are able to determine the conditions the other chain players must comply with: in other words, they are able to set the rules of the game.
In the case of the food chain, supermarkets are usually the chain leaders[18]. Indeed, retailing chains are few, well-organized and equipped with meaningful human and material resources, especially if compared to farmers and processors who are smaller and more dispersed. Along with the fact they control end markets, retailers are thus in a position to dictate what their suppliers should do[19]. Taking into consideration all these aspects, the European legislator has recently enacted legislation on unfair trading practices in the food chain whose primary target are retailing chains[20]. Indeed, the market power they exercise can both distort competition and burden disproportionately farmers and processors[21].
The voluntary nature of private standards requires a few additional remarks. Subjects are free to decide whether or not to comply with standards, at least in theory. In operational terms, some private standards are so widespread that their adoption amounts to standard practice within the industry[22]. In addition, for some operators the choice

([14]) E.g.: ISO 14000 series on environmental management.
([15]) E.g.: SA8000 on social accountability.
([16]) E.g. ISO 9000 series on quality management; ISO 22301 on Security and resilience — Business continuity management systems.
([17]) E.g.: FSSC (Food Safety System Certification) 220000 incorporating the ISO 22000 Food safety management systems; BRC (British Retail Consortium) Global Standard for Food Safety; IFS (International Featured Standards) Food. On the impact private standards have in the food safety governance see T.D. Lytton, *Technical standards in health & safety regulation: Risk regimes, the new administrative law, and food safety governance*, 2018, paper available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3214127.
([18]) J. Falkowski, C. Ménard, R.J. Sexton, J. Swinnen, S. Vandevelde, *Unfair trading practices in the food supply chain. A literature review on methodologies, impacts and regulatory aspects*, JRC Report, Luxembourg, 2017.
([19]) S. Henson, J. Humphrey, *The impacts of private food standards on the food chain and on public standard-setting processes*, Joint FAO/WHO Food Standards Programme, Rome, 2009. Private standards can both be a factor capable to promote rural development or, on the contrary, disproportionately affect farmers and processors in developing countries thus impairing the process of rural development: J. Lee, G. Gereffi, J. Beauvais, *Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries*, in *Proceeding of the National Academy of Sciences of the United States of America*, 2012, 109, 12326.
([20]) Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. For a comment see A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, in *Riv.dir.agr*., 2019, 3; L. Russo, *La direttiva UE 2019/633 sulle pratiche commerciali sleali nella filiera agroalimentare: una prima lettura*, in *Riv.dir.civ*., 2019, 1418; F. Cafaggi, P. Iamiceli, *Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive*, in *European Review of Private Law*, 2019, 1075.
([21]) A. Jannarelli, *Profili del sistema agro-alimentare e agro-industriale. I rapporti contrattuale nella filiera agro-alimentare*, Bari, 2018; L. Russo, *I nuovi contratti agrari*, in *Riv.dir.agr.*, 2013, I, 36.
([22]) The legal consequences can be several. For example, in the case of contractual and tort liability they might be used by the courts as a benchmark against which to assess if there was breach of contract or a negligent conduct: M. Ferrari, *Private standards, uncertainty and liability. The Sudan I Saga*, in q. *Riv*. www.rivistadirittoalimentare.it , n. 4-2017, 52.

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whether or not to comply with a standard is more hypothetical than real. This remark leads to explore the incentives subjects face to adopt private standards. In the food context, as noted supermarkets are the game-setters: therefore, we have to consider the incentives suppliers have in adopting the standards established by retailing chains. The main one is represented by market access. Since retailers control a very large share of the end market, if farmers and processors wish to sell their products they have to go through supermarkets. A second incentive is represented by interoperability. In the case of integrated supply chains, in which different stages of the production and marketing processes are carried out by different operators, it is very important that such operators are able to interact on the basis of some common features. With the surge of globalization and the emergence of international supply chains, an additional incentive concerns legal homogeneity. Especially in the case of long supply chains involving players acting in different legal systems, it becomes crucial to have a set of rules that are homogenous and able to overcome differences in national regulations.

The other tool playing a crucial role within the private regulation domain is given by certification schemes; these can be conceived as the enforcing tool of voluntary standards[23]. The latter, being private, cannot rely on the public enforcement mechanisms provided for by statutory norms; at the same time, private norms need some type of enforcement device. Certification represents one of the main mechanisms through which the enforcement function is performed. In order to understand how certification schemes work, two different point of views can be adopted. The first highlights the etymological origin of the word certification. It derives from the latin *certum facere*; in its turn, *certum* comes from *cernere*, a verb that means 'to select'. Therefore, certification operates a selection. Any selection implies the use of a yardstick: the certifier must have a benchmark against which to assess if a good/service/subject complies with given requirements and can thus be selected. In the case of certification, private standards represent the parameters to be used. The certification body measures the level of conformity that a product/process has with some standards.

The second viewpoint employs the notion of information asymmetries[24]. The latter refer to a different quantity of information two subjects have: this asymmetry makes possible for one subject (the one with more information) to drive (if not to mislead) the conduct of the other subject (the one with less information). Information asymmetries can be different in nature: some are trivial since they can be autonomously filled by subjects before purchasing the product or service (search attributes); some others are more serious, since subjects can fill them autonomously but only after having purchased and experienced the product or service (experience attributes); finally, others are of great concern since they cannot be filled autonomously by subjects, even after having experienced the product/service (credence attributes). In many cases, conformity to a standard can be considered a credence attribute: even after having consumed and/or used the product, the subject is unable to understand if that product had the characteristics searched for. Organic is an example of a credence attribute. To be organic a product must comply with specific standards; the consumer who buys an organic product is unable, even after having consumed it, to assess whether or not the product was really organic. The role of certification with regard to information asymmetries is to contribute to fill them. Especially in the case of credence attributes, the certifier assesses their presence on behalf of a class of subjects who are unable to detect them autonomously.

([23]) C. Poncibò, *Private certifications schemes as consumer protection: a viable supplement to regulation in Europe?*, in *International Journal of Consumer Studies*, 2007, 31, 656.
([24]) G. Jahn, M. Schramm, A. Spiller, *The Reliability of Certification: Quality Labels as a Consumer Policy Tool*, in *Journal of Consumer Policy*, 2005, 28, 53.

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Thus, in the case of organic products the certification body assesses if the products fulfill the requirements to be labelled as organic on behalf of consumers. A notable feature characterizing certifiers is that they must be independent. The reason is intuitive: consumers must trust the fact that the certifier will assess the presence of given features in the products they buy without colluding with the producer[25]. The two perspectives employed to describe certification shed light on its nature by stressing the strong relation existing between private standards and certification schemes and by underlining how the latter represent the enforcing mechanism of the first.

Within the large word of private regulation, our focus will be on a few standards, and related certification schemes, widely employed by the retailing industry. These standards encompass both quality (in the sense of management) and safety aspects. The reason of the choice is that, as noted, the two main types of risk arising amid the Covid emergency are related to food safety and business continuity. In particular, we will consider the following standards: the British Retail Consortium (BRC) standards, the International Featured Standards (IFS), the ISO standards and the Food Safety System Certification Scheme 22000 (FSSC 220000, incorporating the ISO 22000 standards).

Before moving to a more detailed analysis of how private standards and certification have reacted to the Covid pandemic, two additional elements are worth to be stressed. The first is that, even if contract and private regulation must analytically be kept distinct, this does not mean that the two are not operationally intertwined[26]. Indeed, compliance with private standards is almost invariably the subject of contractual clauses by which one party commits himself to supply only products/services that fulfil one or more standards. In this way, private standards, which are voluntary per se, become mandatory for the contractual parties. Contract and private regulation work symbiotically: the first provides a frame within which to make formally binding the second.

The second element is that the symbiotic nature of contract and private regulation can be better understood if we consider that the two share the same horizon. This is represented, as already noted previously, by the imbalances in power that, first, characterize especially (but not only) the relations between retailing chains and suppliers and, second, operate at the global level. With regard to the first aspect, private regulation and contract are factors within the process of vertical integration of the food chain[27]. Both are employed to coordinate the activities of farmers and processors in a broader programme whose contents are decided by the chain leader. With reference to the second aspect, the role of contract and private regulation is magnified by globalization. The absence of a global public regulation ensures that a broad space is left to private autonomy and, in particular, to contract, standards and certification as tools useful to govern the relations between subjects operating in different geographical areas and institutional contexts. In the case of the Covid emergency, all these elements help explaining why private standards became one of the leverages through which to address the conduct of food operators.

3.- Food Safety and Business Continuity amid the Covid Pandemic

Two threats seem to emerge amid the Covid

(25) The absence of conflict of interests by certification bodies poses the question of their accountability: M. Ferrari, *The Liability of Private Certification Bodies for Pure Economic Loss: Comparing English and Italian Law*, in *Journal of European Tort Law*, 2010, 3, 266.
(26) F. Cafaggi, P. Iamiceli, *Supply chains, contractual governance and certification regimes*, in *European Journal of Law and Economics*, 2014, 37, 131.
(27) A. Jannarelli, *I rapporti contrattuali nella filiera agro-alimentare*, in A. Germanò, E. Rook Basile (a cura di), *I contratti agrari*, Torino, 2015, 275, 281 ss.; F. Cafaggi, *Regulation through contracts: Supply-chain contracting and sustainability standards*, in *European Review of Contract Law*, 2016, 12, 218.

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emergency as being of paramount relevance: the first consists in the risk to market products that can be vehicle for the virus; the second in the risk that, because of the restrictions established to limit the spread of the pandemic, the smooth functioning of the supply chain will be in jeopardy. As noted, the first pertains to food safety, while the second to business continuity. In order to understand how private standards and certification have been employed to manage such risks, three topics will be considered: the HACCP plan, the suppliers' approval procedure, the business continuity principle. In particular, the analysis will focus on if, and to what extent, suggestions, guidelines or other documents have been published by BRC, IFS and FSSC to review the HACCP plan, to update the approval procedure for suppliers and, more in general, to better guarantee business continuity within the food supply chain.

The HACCP (Hazard Analysis and Critical Control Points) system refers to a set of procedures based on seven principles and aimed at identifying, preventing and keeping under control hazards that can arise during the production and distribution processes. In Europe implementing an HACCP system is a statutory obligation posed by art. 5 of Reg. 852/2004[28]. But the HACCP is not only contemplated in public norms; it is also the subject of private standards that identify in more details than public legislation the steps that operators must take in order to establish proper procedures. The HACCP plan is the document listing all the processes, cautions and requirements that a firm decided to adopt vis à vis the hazards it identified in its risk analysis. If we consider the Covid case, the HACCP plan is the natural place where to assess if food safety risks have been considered by the business operator and to identify the possible measures to manage them. In preparing and/or reviewing their HACCP plans, firms do not act in a vacuum: usually, they receive some direction from consultants, professional associations, certifiers and standard-setters. Therefore, the analysis should consider suggestions and/or guidelines published by certifiers and standard-setters that address firms in considering and managing Covid risks from a food safety perspective.

The BRC has published a guidance document to manage food safety during the Covid emergency[29]. One section is devoted to the HACCP plan. Interestingly, the section does not establish that the firm should review the plan in order to directly consider the risk of getting the virus via the foodstuffs; rather, it invites to update the HACCP procedures when changes to the production process are introduced because of the virus. Examples offered in the guidance will better explain the point. Changes in the type of raw materials employed (e.g.: frozen material vs. chilled material), in the production line speed and in the frequency of the testing (e.g.: because of the reduced number of the staff), in the cleaning procedures (e.g.: because of new detergent employed) can affect food safety and, therefore, need to be considered under the HACCP system.

In the case of the IFS standards, the guidance is even more concise and generic. The document states the need to be aware of the hazards that the Covid crisis can trigger and that the analysis of the Covid-related risks should also become part of the HACCP plan[30]. Again, there is no indication that the review of the HACCP plan should directly consider the risk that foodstuffs become contaminated by the virus. Finally, the ISO 22000 standard seem not consider expressly food safety risks connected to the Covid Pandemic, while the FSSC has a more nuanced position. In its Questions & Answers the FSSC expressly states that the Covid does not pose any threat to the safety of foodstuffs[31], while in its guidance to certifiers it makes a quick reference to the fact that

([28]) Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.
([29]) BRCGS Guidance Document. Managing Food Safety during Covid-19, 2020.
([30]) IFS, Guidance on Crisis Management Concerning the COVID-19 Crisis, 2020.
([31]) See https://www.fssc22000.com/scheme/covid-19-resources/.

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the risk assessment conducted by the certification body should also consider the firm's HACCP plan[32]. In the same document, it states that the certifier should ensure "that the certified organization has developed/adjusted its procedures and operations to ensure continued compliance to the Scheme and the supply of safe products".

All the standards seem to adopt a similar position. Covid does not pose a direct and serious threat to the safety of foodstuffs and, therefore, does not need a special and detailed consideration under the HACCP plan. This conclusion is supported by scientific evidence: as noted, health agencies agree that the Covid virus cannot be transmitted via food consumption. Two more notes can be added. The first is that the issue of packaging does not receive direct and specific attention, even if the risks that packaging could pose are to be considered within the HACCP review that all standards recommend. The second is that food safety issues could be posed not directly by the virus but, rather, by changes in the logistic of the supply chain and/or in the production process because of the virus. The BRC standard considers expressly this scenario, highlighting how food safety is a complex and multifactorial domain.

The second topic to be considered concerns the suppliers' approval. This expression refers to the requirement, posed almost invariably by all private standards, to set up an approval and monitoring system for suppliers "to ensure that any potential risks from raw materials (including packaging) to the safety, authenticity, legality and quality of the final product are understood and managed"[33]. Since chain leaders are in a contractual relation only with their direct suppliers, any (sub-)supplier the direct supplier employs is, by definition, out of the range of the chain leader's control. Nonetheless, sub-suppliers play a crucial role in guaranteeing the safety, quality, authenticity of the final product; therefore, the chain leader has a keen interest in exercising some form of control even on sub-suppliers. This is made possible by requiring the direct supplier to employ only sub-suppliers who have been pre-approved and who can assure compliance with minimum requirements in terms of safety, quality, authenticity, etc.[34].

The Covid emergency can disrupt well-established supply lines, for example by making unavailable raw materials satisfying minimum requirements, by reducing the volume of products sub-suppliers are able to supply, by completely stopping sub-suppliers' production and/or making difficult or impossible the shipment of their products. Of course, the fact that sub-suppliers are unable to supply their products will reverberate on the direct supplier, who, in its turn, will be prevented to supply the chain leader. Therefore, in order to maintain their supply steady and running, chain leaders and direct suppliers might have to resort to new suppliers and sub-suppliers or raw materials. In an emergency context, following the standard procedures required to approve these new suppliers and materials might prove too slow and costly, if not impossible. All the standards under consideration include the possibility to follow emergency procedures for the suppliers' approval. The clearest example is offered by the BRC standard that provides for alternatives to in situ audit for suppliers, such as online searches for site issues, request of product samples, review of audit reports done in the past, remote site

(32) FSSC, CB Requirements in relation to Novel Coronavirus (COVID-19) – Version 2, 2020.

(33) BRC Global Standard Food Safety, section 3.5: "The company will have a documented supplier approval and ongoing monitoring procedure to ensure that all suppliers of raw materials, including packaging, effectively manage risks to raw material quality, and safety […]. The approval and monitoring procedure shall be based on risk and include one or combination of: 1. certification (e.g. to BRC Global Standards or other GFSI-recognised scheme); 2. supplier audits"

(34) In order to guarantee the fulfilment of minimum requirements by sub-suppliers, standards require suppliers to ask their (sub-)suppliers to be certified as complying with that same standard they are required to comply with or with another standard recognised as equivalent within the so called Global Food Safety Initiative. See E. Fagotto, *Resolving gaps in third-party certification for food safety hybridization*, in P. Verbruggen, T. Havinga (eds), *Hybridization of Food Governance. Trends, Types and Results*, Cheltenham, 2017, 54-77, 66 ff.

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audits[35]. The IFS standard suggests to increase analyses and testing: the reason is that employing new suppliers and buying new raw materials could pose additional risks that must be monitored[36].

The suppliers' approval procedures are part of a broader set of requirements that, if observed as a whole, represents one of the main pillars of private regulation. The reference is to the principle of business continuity that, as noted, refers to the capability to react to an emergency in order to maintain the productivity at acceptable levels. Different elements contribute to ensure the business continuity of an organization, ranging from internal and external communication to the site management, from the way the organizational chart is structured to the training of the personnel. Business continuity performs a crucial role in the Covid context because it is the tool that standard-setters specifically conceived to manage the situation of disruption that can follow an emergency event. The IFS standard states that "one of the most important steps right now [i.e. during the Covid emergency] is the activation and deployment of a crisis management protocol to enforce a business continuity strategy and assist product supply", in this way highlighting that business continuity is a priority for standard-setters and chain leaders[37]. At the same time, business continuity plans go beyond the contingencies depending on Covid: they represent a general strategy to govern any situation of emergency, Covid included. The ISO, for example, has published a specific standard, the ISO 22301, that is devoted to business continuity management systems[38]. The overarching scenario within which these systems are placed evokes the idea of resilience. At the operational level, the ISO 22301 standard provides for the creation of business continuity plans and procedures "to manage the organization during a disruption"[39]. These plans and procedures are run by a response structure composed of one or more teams. In the Covid case, the relevance of a strategy for ensuring business continuity is clear. Maintaining supply chains running is vital for chain leaders: employing suppliers equipped with alternative strategies for their production activities in a context of disruption represents a priority. In the future, it is likely that the lessons taught by the Covid crisis will drive chain leaders to require more and more compliance with norms such the ISO 22301.

4.- Private Regulation, Globalization and Crisis Management

The way standards and certification have been used to deal with the consequences of Covid is representative of a broader set of issues revolving around the interplay between private regulation, globalization and crisis management. These issues are placed within a broader context characterized by the dialogic interactions occurring between food law and globalization[40] and can, therefore, be conceived as a manifestation of such interactions. There are at least three points that seem worth to be stressed.

First, flexibility is commonly recognized as one of the key features of private regulation and it is an important variable in explaining why standards and certification play a role in managing the Covid emergency. The need for flexibility is due not only to the fact that in a scenario of emergency the imperative is to cope quickly with the effects triggered by a crisis, but also to the global dimension

(35) BRCGS Guidance Document. Managing Food Safety during Covid-19, 2020, 2-3.
(36) IFS, Guidance on Crisis Management Concerning the COVID-19 Crisis, 2020, 9.
(37) IFS, Guidance on Crisis Management Concerning the COVID-19 Crisis, 2020, 1.
(38) ISO 22301: Security and resilience — Business continuity management systems.
(39) ISO 22301: Security and resilience — Business continuity management systems, point 8.4.
(40) F. Albisinni, *Agri-Food Law and Comparative Tools in Global Markets*, in *The Cardozo Electronic Law Bulletin*, vol. 26, 2020, 1; Id., *Diritto agro-alimentare e metodo comparativo: oggetto, strumenti e prospettive*, in L. Scaffardi, V. Zeno-Zencovich (a cura di), *Cibo e diritto. Una prospettiva comparata*, Roma, 2020, vol. I, 191.

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crises now have. In order to better appreciate the latter point, we must start from the consideration that markets drive private regulation, or at least a large part of it. In other terms, economic interests, directly or indirectly, shape the scope, contents and even the form of private regulation. Since markets are global, also the way to manage crises capable to have disruptive repercussions must be global. Providing global regulatory responses is difficult, especially if we take in consideration a second common feature of markets, that of being almost instantaneous. Therefore, the regulatory responses should be both global and rapid in order to meet market expectations. Public regulation has clearly hard times in satisfying these features, while private regulation, being more flexible and devoid of a geographical characterization, is better equipped.

Second, the fact that the approach followed by private regulation is market-driven emerges clearly if we consider that the paramount and overarching goal of private standards is to guarantee business continuity. This type of approach is unilateral in a twofold sense. First, because it considers only the market and not other interests: some values, as well as some stakeholders who do not partake to the market dynamics, are placed outside the (private) regulatory horizon. Second, because it is promoted by the stronger party in a context of power imbalances: private regulation can thus exacerbate these imbalances and give rise to unfair trading practices.

The operational consequences of the unilaterality of the market-driven approach are manifold. Two examples can be offered. The first concerns the non-market interests we referred to. We might wonder what is the impact that private regulation has on food security and food sovereignty[41]. The focus of private regulation on markets can represent an obstacle to pursue food security goals especially in those countries where markets are not profitable? In a situation of emergency, like the Covid crisis, can private regulation even exacerbate food security issues? There is no clear-cut answer to these questions. On the one hand, the business continuity requirement is finalized to guarantee a steady supply, first and foremost, toward the most profitable markets; on the other hand, this same requirement increases the producers' resilience by improving their organizational structure, in this way allowing producers to keep their facilities open and running also in those areas that, because of the socio-economic and institutional context, would be more subject to the negative effects of health crises. The second example concerns the relationship between private regulation, power imbalances and the contract. As noted, business continuity plays a crucial role. What is the role of this requirement vis à vis the contract? One possible consequence is to limit the possibility to invoke the force majeure doctrine. The unpredictability of the Covid crisis has moved many scholars to explore the possibility to terminate or to re-negotiate a contract because of the disruption to the supply lines caused by the pandemic[42]. By imposing to consider ex ante other supply alternatives in cases of unforeseen emergencies and/or disruption, business continuity can arguably transform what is unpredictable in something at least partially predictable. In this way the chain leader is shifting the risk of unpredictability on the weak party and, at once,

([41]) In general, on the impact of the Covid pandemic on food security L. Petetin, *The COVID-19 Crisis: An Opportunity to Integrate Food Democracy into Post-Pandemic Food Systems, in European Journal of Risk Regulation*, 2020, 2, 326..

([42]) A.A. Schwartz, *Contracts and COVID-19*, in *Stanford Law Review Online*, 2020, 73, 48; J.A. Trenor, H. Lym, *Navigating Force Majeure Clauses and Related Doctrine in Light of the COVID-19 Pandemic*, in *Young Arbitration Review*, aprile 2020, 13; K.P. Berger, D. Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, in *McGill Law Journal of Dispute Resolution*, 2020, 29; C. Twigg-Flesner, *A Comparative Perspective on Commercial Contracts and the Impact of Covid-19 – Change of Circumstances, Force Majeure, or What?*, 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3582482; R. Mathew, Force-Majeure under Contract Law in the Context of Covid-19 Pandemic, 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3588338.

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he can claim that force majeure should not apply. At the same time, the business continuity requirement is not just a way to shift the risk of unpredictability, but it represents also an organizational framework aimed at reducing such risk, in this way benefitting the suppliers complying with such requirement. If we adopt this perspective, the consequence is that by implementing the business continuity standard suppliers can claim that they have done their best to meet the buyers' interests, thus reducing their exposure to liability. Both interpretations can reasonably be argued: when conflicting, the preference for one interpretation over the other will depend not only on the power relations among the parties, but also on the values and interests considered as prevailing in a given legal system. The protection of farmers' interests envisioned in the Common Agricultural Policy, as well as the regulation of unfair trading practices established in the Directive 2019/633, represent two important indexes at this regard.

Third, private regulation is not acting in a vacuum: it must be placed in context. The context is represented by the presence of public norms that, at the very least, set the boundaries within which private regulation can operate. In other words, these norms pose limits to the regulatory autonomy of standard-setters. One example of an explicit limit has been offered at the outset of this paper by making reference to the art. 78 of Decreto Legge 18/2020. Implicit limits are much more frequent and can be found both in general principles such as those of 'public order' and 'good faith' or in specific provisions such as those pertaining to antitrust law. The public regulatory context within which private regulation is placed has thus a role in limiting its negative consequences in terms, for example, of power imbalances, food security and the like. But the relation between public and private normative spheres is not unilateral as the idea that public law limits private regulatory autonomy might suggest. Indeed, what is interesting further to note is the interplay between private and public regulation and what has been called the hybridization of food governance[43]. The expression refers to the fact that private standard-setters ask for the support of public institutions in endorsing their (private) rules and, vice versa, public regulators quote private standards and sometimes use them as a substitute for public regulation[44]. These mutual and iterative exchanges between the two spheres are to be considered beneficial insofar competencies and responsibilities of the two are maintained clearly distinct. In other words, a hybrid model of food governance working in an effective and efficient way, even (if not especially) in times of crises, requires a virtuous dialogue between public and private regulators. The mistake to avoid is a public regulation relying submissively on private standards and/or abdicating its role in setting the boundaries for private autonomy.

ABSTRACT

The increasing internationalization of food supply chains has meaningful implications for the management of the Covid-related emergency. The paper explores how private regulation and, in particular, private standards and certification schemes employed by retailing chains have adapted to cope with the issues posed by the Covid pandemic. The analysis focuses on the following aspects: review of the HACCP plan; suppliers' and raw materials' approval; the principle of business continuity. In the final part the paper assesses the role that private regulation can have on contract law and risk management in times of global crises.

([43]) P. Verbruggen, T. Havinga (eds), *Hybridization of Food Governance. Trends, Types and Results*, Cheltenham, 2017.
([44]) On the risks that the relations between private standards and international organizations can entail L. Russo, *Fare cose con regole: gli standard private per la produzione alimentare nel commercio internazionale*, in *Riv.dir.agr.*, 2007, I, 607.

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La crescente internazionalizzazione delle filiere alimentari reca con sé significative conseguenze anche per la gestione dell'emergenza Covid. Lo scritto analizza come la regolazione privata e, in particolare, gli standard privati e gli schemi di certificazione utilizzati dalla grande distribuzione organizzata si sono adattati per far fronte alle questioni poste dalla pandemia. L'analisi si concentra su tre variabili principali: la revisione del piano HACCP; le procedure di approvazione dei fornitori e dei materiali; il principio di continuità aziendale. Nella parte conclusiva, il contributo valuta il ruolo che la regolazione privata è in grado di esprimere rispetto al diritto dei contratti e alla gestione del rischio nel contesto di crisi globali.

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