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The European Green Deal faced with the pandemic from Covid-19: the case of Italy

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1. Introduction: The EU Green New Deal and the sustainability of agriculture

The term "sustainability" appears increasingly combined with business activity, especially with regard to the environmental impact that this activity entails, as the shared objective is to avoid that the performance of any productive activity, due to the progressive development of new and increasingly sophisticated technologies, can have a negative impact on the conservation of the environment, on the one hand by irreversibly impoverishing natural resources and, on the other, contributing to the deterioration of the ecosystem as a result of polluting emissions.

It is worth to reflect, with regard more specifically to entrepreneurial agricultural activity, on emphasis placed on environmental sustainability in the documents relating to the outline of the framework of the next CAP, which will apply for the period 2021 - 2027, as evidenced by the recent Commission communications on the so-called "The European Green Deal", involving a particularly ambitious future action in this respect, aimed at promoting not only an agriculture more resilient to climate changes but also able to contribute to their fight, and to ensure that the European continent can become climate-neutral by 2050. This strategic programme - which goes, moreover, beyond the agricultural sector alone - has led, so far, to the adoption of an action plan for the circular economy [COM (2020) 98], a proposal for a framework regulation for the achievement of climate neutrality [COM (2020) 80]; furthermore, as far as the agricultural sector is concerned, the Communications from the Commission to the EP and the Council of 20 May 2020 on the strategies "A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system" [COM (2020) 381] and "EU Biodiversity Strategy for 2030. Bringing nature back into our lives" [COM (2020) 380] must be remembered.

Considering these latter documents, whose perspective transcends the contingencies of the current Covid-19 pandemic, they show the intention to develop an even "greener" CAP than the current one, where rules concerning greening, cross-compliance and agro-climatic-environmental measures already operate, albeit in a poorly coordinated way, and with not particularly satisfactory results.

For the next financial programming period the E.U., with this new strategy, outlines a series of actions that will inevitably involve the agricultural activity from different points of view: think about the objective of increasing the protected areas, to reach their extension up to 30% of the land surface and of the sea surface as well, of which at least one third should be subject to protection defined as "strict". The increase of the protected areas will, therefore, inevitably affect the agricultural activity, since, especially in the presence of "strict" protection measures, it may go so far as to inhibit the development of productive activity. In the framework of the new CAP for the period 2021 - 2027 should, moreover, according to the above-mentioned planning documents, be encouraged completely sustainable agricultural practices - such as precision farming, organic farming, agro-ecology, agro-forestry, low-

intensive permanent grassland, the adoption of stricter animal welfare standards. At the same time regulatory provisions should be introduced to impose a reduction, by 2030, 50% of the use of chemical pesticides in general and 50% of the hazardous ones; by the same date at least 10% of the agricultural land must be brought back under high-diversity landscape features, and that at least 25% of the agricultural land must be organic farmed, with a reduction in the use of fertilizers of at least 20% compared to today's levels.

What is most interesting about this program, for the moment only outlined, is the provision not only of financial incentives to encourage the adoption of virtuous practices from an environmental point of view, but also, and above all, the expected introduction of rules prohibiting or otherwise limiting the use of pesticides and chemical fertilizers and binding on the use of certain agricultural land.

Certainly, it is that it will be necessary to wait and verify as such strategic intentions will be then concretely implemented: it is desirable, in fact, that the innovations foreseen do not bring with themselves further complexities in the management of the future CAP and the assuring of the availability of supplies of the agricultural products, as established by art. 39 TFEU.

In fact, it is not in doubt that food security remains one of the main objectives of the CAP as well as recent experiences, linked to the Covid-19 pandemic, have well highlighted. It is necessary, therefore, not to forget, alongside the sacrosanct aspects of environmental sustainability that must characterize agricultural production activity, the sustainability profiles related to the security of food supply, since the indispensable function of the CAP is to be able to guarantee European citizens the regular and adequate supply of agricultural products needed to meet the food needs of the continent, avoiding the dependence on imports that, as the pandemic has clearly demonstrated, cannot concern, beyond a certain extent, essential goods, to avoid an economic-political-strategic dependence on other States.

It goes without saying that the task of coordinating the profiles of environmental sustainability, as outlined in the planning documents mentioned above, with those related to food security does not seem to be an easy job, with the risk of having, as a result, regulatory texts messed up as they are the outcome of the countless and increasingly inevitable compromises between the various Member States.

Moreover, next to environmental sustainability, and next to food security, there is a third form of sustainability: the necessary economic sustainability of the primary activity.

On the contrary, to see well the economic sustainability of the agricultural entrepreneurial activity (as of any other business activity) is a necessary prerequisite with respect to any other form of sustainability, since it will be possible to have agricultural enterprises capable of producing essential goods for society only if such activity is able to ensure them an adequate economic return.

And there is no doubt that even this form of sustainability had already been taken into due account at the time of drafting the Treaty of Rome, as it is easy to see from the reading of Article 39 TFEU which, unchanged from the original version of the Treaty of Rome, identifies the objectives of the common agricultural policy, including the need to ensure a "fair" standard of living for the agricultural community.

As known, the economic sustainability of the European agricultural production sector is severely tested by the characteristics of the activity and its market.

As for the former, think of the fact that farmers deal with living entities - vegetable or animal - with all the consequent problems linked to the possible presence of various types of pathologies that may not lead to the planned and hoped-for results; to the interdependence between most agricultural production activities and the surrounding environment, so that production may be jeopardized by adverse or otherwise unfavorable climatic conditions; to the need to respect the times imposed by nature, such as to involve most often long production cycles, with the consequent financial difficulties.

As for the latter, it is sufficient to recall the strong fragmentation that affects the supply sector of agricultural products, the dynamics that contribute to the determination of prices, the inelasticity of demand with respect to prices of goods and consumer incomes. In this way, even when it is possible to reach the quality and quantity targets, the producer is still faced with the additional obstacles present in the marketing phase of the production obtained.

In this context, the support that the CAP proposes to provide to those who, without such intervention, would probably not find reasons to continue in a business activity subject to such constraints and limitations, cannot be so surprising.

These considerations, although taken for granted and at the limit of the obviousness, have to be taken into account every time the European legislator puts his hand to the regulatory system of the CAP since, with increasing emphasis, is regularly emphasized the need for agricultural production to be carried out in an environmentally sustainable way. This is indisputably a necessity also because, in addition to responding to a precise public opinion demand, the pursuit of environmental sustainability of agriculture is a mandatory path, because only by safeguarding productive resources (think of the soil and its wealth, or the availability of water) and only by contributing effectively to climate change it is possible to assume an agriculture even in the most distant future.

"Green" agriculture is not, therefore, a whim, but a necessity, only if we want to look at medium-long term time horizons and ensure that Europe can continue to have an agri-food production in adequate quantity and quality.

At the same time, however, it is not possible to focus attention only on aspects of environmental sustainability, as farmers must in any case be guaranteed sufficient income to induce them to continue their business activities.

And so, the "blanket" represented by the financial current measures allocated by the CAP risks proving to be too short, as it does not seem possible that the allocated resources for the benefit of farmers can effectively guarantee the pursuit of sustainability in the three essential declensions mentioned above.

The task for the Institutions of the Union, in the next future, is therefore very difficult: currently, however, it seems premature to examine the texts of the regulatory proposals and strategic documents drawn up by the Commission, also because the process for the definition of new regulatory texts is long and not easy, so that the final choices may differ from the original proposals.

It is therefore advisable to focus on the immediate. And the immediate does not seem particularly reassuring, in the light of the dramatic effects linked to the Covid-19 pandemic that have, in many cases, further aggravated the fate of the sector.

We will then analyze some of the interventions implemented by national authorities to deal with the effects of the pandemic, with regard to both the functioning of the agricultural market and to the contractual relationships of the supply chain.

2. The measures adopted in Italy: to protect the agricultural market struggling with Covid-19

There is no doubt that Covid-19 has had a strong impact on world agricultural markets, and not only European.

In particular, with the spread of the virus, national markets for agri-food products - as well as those relating to other essential products, just think of personal protective equipment or certain medical aids or pharmaceutical products - have in many cases been subject to protectionist measures by government authorities, in order to avoid exports of goods necessary to combat the virus or for the lives of their citizens, so that obstacles to the free circulation of these products on the world market have often been encountered, with the consequent alarms - as regards agri-food products - in order to ensure the regular supply of food. In addition to the free movement of goods, the spread of the pandemic has also heavily affected the movement of people in general and of workers in particular, and this also within the EU Member States, giving rise to problems in recruiting the necessary manpower, especially for the phase of the harvest of many agricultural productions.

Add to this the psychological impact caused by the advent of the virus which led, especially in the early days, to real attacks on supermarkets in fear - irrational - of a sudden emptying of the shelves.

Thus, the specter of food insecurity has returned to hover, even in light of the modest stocks of strategic commodities, such as cereals, in the European Union, equal to only 12% of their annual consumption, and thus sufficient to a period of only approx. 43 days.

The rules of the WTO, already in a state of great crisis following the commercial disputes that developed between major world powers, in particular between the USA and China, have undergone further weakening following Covid-19 crisis also for agricultural products, although in many cases temporary restrictions on exports of essential goods, such as agricultural and foodstuffs, could not be said to be without legitimacy in the light of the GATT principles.

It is therefore not surprising that in such a framework many States have expanded the scope of companies considered of strategic importance and have encouraged industrial reconversions in order to obtain endogenous production of goods whose production was previously regularly outsourced to countries third parties.

Even Italy has not remained inert on this front, as evidenced by the extension of the rules on the so-called "golden power" also to the food sector. Quickly reviewing the legislation in this regard, it should be noted that with the d.l. (law decree) 15 March 2012, n. 21, converted, with amendments, into law 11 May 2012, n. 56, was provided, in art. 1, that with DPCM (Decree of the Prime Minister) the activities of strategic importance for the national defense and security system should have been identified for which a series of measures, indicated therein, could have been adopted in order to protect the "Italian character" of the companies concerned, banning or limiting the entry of foreign capital.

This rule, still in force, requires that the adoption of one or more Prime Minister's Decree for the identification of companies considered strategic must take place on the proposal, depending on the reference areas, of the Minister of Defense or of Internal Affairs, in agreement with the Ministers of Economy and Finance, Foreign Affairs and Economic Development. Although the provision referred to the possible imposition of specific conditions in the event of the purchase by foreign investors of shareholdings "relating to security of supply" (thus letter a) of paragraph 1 of art. 1), the same letter clarified that the companies concerned were those "strategic for the national defense and security system". So that the food sector did not seem involved in the regulatory provision, as indirectly confirmed by the identification of the competent Ministers to intervene in the drafting of the Prime Minister's Decree and by the very title of the law, which in fact refers only to the defense and national security sectors, energy, transports and communications.

Subsequently, Regulation (EU) 2019/452 was adopted, applicable from 11 October 2020 pursuant to art. 17: it was intended to create a common regulatory framework to be able to screen (art. 2, par. 1, (3): 'screening' means a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments) foreign direct investments, noting that the main trading partners of the Union had already developed regulatory frameworks for this type. The regulation thus allows Member States to maintain, modify or adopt mechanisms to screen foreign direct investments in their territory on the grounds "of security and public order" (thus Article 3, par. 1, reg. 2019/452).

Pursuant to art. 4, in determining whether a foreign direct investment may affect security or public order, Member States and the EU Commission "may" take into account its potential effects at the level, *inter alia*, of "supply of critical inputs, including energy or raw materials, as well as food security"(art. 4, par. 1, c).

Food security needs can, therefore, justify the activation of control measures and limitation of foreign direct investments even if, obviously, it will be necessary to concretely highlight the existing link between a target agri-food company and the reasons for security and public order that can legitimize restrictions to foreign direct investments. In essence, the regulatory provision just mentioned generically identifies food security needs among those potentially suitable to justify interventions to protect security or public order and identified, in any case, purely by way of example ("*inter alia*") by the regulation.

As often happens, the Italian legislator then transformed the "finger" into an "arm" when, in full emergency from Covid-19, fearing that the effects of the pandemic could have made many national companies, weakened by emergency measures, a land of conquest of foreign investors, has adopted the d.l. (law decree) 8 April 2020, n. 23, then converted, with amendments, into law no. 40, with which art. 15 has extended the obligation to notify the purchase for any reason of shareholdings in companies that hold assets and relationships in all the sectors identified in art. 4, par. 1, lett. from a) to e) of reg. EU n. 2019/452 and, therefore, also in the sector of supply of critical inputs, including food (mentioned in letter c).

Despite the complexity of the topic and of the legislation, the approximation with which the present regulation was written is evident *prima facie*, given that the absence of limitations means that substantially every acquisition of shareholdings in food companies (to limit the field to this sector only)

should, strictly speaking, be considered subject to the discipline in question, as if every food business can or should be considered strategic for the purposes of security of supply.

The state of emergency has also induced the European Union to intervene in the state aid sector, in order to allow Member States to be able to provide liquidity to businesses in every sector, including the agri-food sector, in order to avoid a possible systemic collapse. And, thus, ensure the economic sustainability of businesses, the pursuit of which has been the cornerstone of most of the emergency measures.

Thus, already on March 19, 2020, the Commission adopted Communication C (2020) 1863 laying down a "Temporary framework for state aid measures to support the economy in the current Covid-19 outbreak": in summary, this communication contains the Commission's guidelines to allow the Member States to be able to assess the compatibility with the treaty of the state aid granted until 31 December 2020, in order to allow the respective businesses to be able to cope with the emergency resulting from Covid-19, expanding substantially the eligibility thresholds respect to the "ordinary" regulatory framework.

Italy has also made use of this opportunity on several occasions, such as the so-called d.l. "raise" (19 May 2020, n. 34), containing a flood of aid measures authorized by the Temporary Framework, notified to the Commission on 20 May and approved by the latter already the following day. Before that, art. 78 of the d.l. 17 March 2020, n. 18, converted, with modifications, into law 24 April 2020, n. 27, contains aid measures dedicated to agricultural enterprises, also approved by the Commission as they are deemed to comply with the aforementioned Temporary Framework.

Still on the topic of the functioning of agricultural and agri-food markets, the pandemic has also accelerated the process for the implementation of the possibility, offered by Union law by means of the Commission regulation n. 2019/316, to increase the threshold of aid payable to primary sector operators within the scheme relating to the de minimis aid. The reg. EU 1408/2013, in fact, allowed Member States to grant certain minor aid to primary producers without the need for notification, as they are considered not distortive of competition: in particular, such aid cannot exceed the amount of € 20,000 for a single undertaking over a three-year period and, overall, the aid granted under this heading cannot exceed a specific national cap set out by the regulation itself.

The EU regulation 2019/316 has amended the reg. EU 1408/2013, assigning to the States the possibility of legitimately providing de minimis aid within a higher threshold for each single undertaking, established in € 25,000 over the three-year period, with a consequent increase in the national cap (equal to 1,5% of the annual output), provided that the aid intended for a specific production sector does not exceed a sectoral limit identified in 50% of the total de minimis aid granted over the three-year period. To allow the verification of the non-exceedance of this sectoral limit, the 2019 regulation prescribes, as a further condition for the increase in the amount of aid payable to each single undertaking, the mandatory introduction of a national aid register, whose activation was previously left to the discretion of Member States. Only a national register can, in fact, allow the verification of the sectors benefiting from the aid measures and the control of whether the maximum limit set for the sector is not exceeded.

At the same time, the new regulation has extended the period of validity of the reg. 1408/2013 as amended, originally intended to expire on 31 December 2020, until 31 December 2027.

As anticipated, the negative externalities of the pandemic on the agricultural sector led the Italian government, with the D.M. (Ministerial Decree) 15 May 2020, n. 5591, to take advantage of this possibility by increasing the threshold of de minimis aid payable to a single undertaking over the three-year period in the agricultural sector from € 20.000 to € 25,000, using the state aid register already established at the SIAN (National Agricultural Informative System), with which it will be possible to monitor whether the sectoral limit set by EU law is not exceeded.

In this way, the ceiling available for Italy for this type of aid has increased from approx. 700 million euros to 840 million euros, thus making approx. 140 million additional: which, in a generalized moment of difficulty, however, represents a wise use of a faculty attributed by EU law.

During the most acute period of the emergency phase, however, it seems that the entire agri-food system has continued to operate regularly, as confirmed by the ICQRF (the national body with the task of controls on agri-food quality products) with its Report on the controls in the agri-food chain carried out in the period 1 February - 30 April 2020: this report shows that the rates of irregularities found as a result of the control activity carried out are substantially corresponding to those found in previous periods, without significant deviations.

3. ... and in sector of agri-food supply chain contracts

As can be imagined, the COVID-19 emergency has produced effects not only on the functioning of the agri-food market as a whole, but also in relation to the individual contractual relationships that connect the various links of the product chain, and this even if the sector has not been affected by measures of suspension of the activity which, on the other hand, have concerned other productive sectors.

As regards, specifically, the contractual relationships operating within the agri-food product chain, the Italian legislator - unlike the Union one - felt the need to intervene in the matter, even if with a certain approximation and superficiality and for purposes that could be essentially, if not exclusively, "theatric".

It is worth mentioning the emphasis given to the opening, on March 30, 2020, of the e-mail box "praticheleali@politicheagricole.it" at the Ministry of Agriculture, Food and Forestry Policies: this box should facilitate the forwarding of reports about the existence of unfair commercial practices in contracts for the sale of agricultural or foodstuffs products.

In the aforementioned Report on the control activity carried out in spring 2020, the ICQRF reports that in the month of April 2020 alone about twenty complaints were received, of which about half related to the bovine and buffalo milk sector, concerning unilateral changes of the contractual conditions (agreed prices and quantities) carried out by milk processors and cheese factories. The other complaints concern increases in the prices of fruit and vegetables in central and local markets: cases which, at least at first glance, appear unrelated to the phenomenon of unfair commercial practices (hereinafter, u.p.c.).

As anticipated, the legislator has not remained inert in the face of the spread of the pandemic and the disturbances it has brought on the market. In fact, at the very beginning of the spread of the virus, the Government adopted the D.L. (law decree) 2 March 2020, n. 9, whose art. 33 (later repealed by

art. 1, paragraph 2, of the law n. 24.4.2020, n. 27) contained "measures for the agricultural sector". In particular, paragraph 4 of art. 33 provided that the "subordination of the purchase of agri-food products to non-mandatory certifications referring to Covid-19 nor indicated in supply agreements for the delivery of products on a regular basis prior to the agreements themselves" is "an unfair commercial practice prohibited in relations between buyers and suppliers pursuant to Directive (EU) 2019/633". The next paragraph provided, for the case of infringement, the pecuniary administrative fee from € 15,000 to € 60,000, to be established in relation to the benefit received by the offender. The tasks of assessment (upon notification or even ex officio), control and sanctions have been assigned to the ICQRF: and this should explain why the form for reports, referred to in the e-mail box activated at the Ministry is addressed to that body.

The aforementioned law decree has not been converted into law and the article in question has been expressly repealed (without prejudice to the effects produced and the legal relationships arising from it) by law April 24, 2020, n. 27, of conversion of the d.l. 17 March 2020, n. 18: which, with some modifications (for example, the express reference, alongside the agri-food products, also to those of fishing and aquaculture: which, moreover, are always agri-food products), repropounded the text repealed in its art. 78, paragraphs 2-bis and 2-quater.

There are innumerable perplexities regarding this provision and in relation to which specific work should be dedicated to them. Here it is sufficient to point out that: i) the provision refers to a notion of u.c.p. pursuant to EU directive 2019/633 which has not yet been implemented in our legal system, and for which the deadline of 1 May 2021 for its implementation applies; ii) the aforementioned directive, moreover, does not identify an abstract category of u.c.p., but only some typified cases of conduct that can constitute u.c.p., however, leaving the Member States the possibility to introduce additional cases; iii) it is not clear whether the subordination of the purchase to the presence of non-mandatory certifications referring to Covid-19 is prohibited, constituting u.c.p., only if requested after the conclusion of the contract - and thus constitutes an arbitrary and illegitimate behaviour of the purchaser - or whether such an agreement is to be considered prohibited; in this regard, the second sentence "nor indicated in supply agreements for the delivery of products on a regular basis prior to the agreements themselves" does not help: in particular, it is not clear whether the latter should exist to integrate the u.c.p. or if it is a second type of u.c.p. ; even before that, the literal formulation of the provision itself appears ambiguous, not understanding how it is possible to identify agreements that contain the request for non-mandatory certifications referring to Covid-19 that occur "on a regular basis" and that are, moreover, "prior to the agreements themselves"; it is self-evident that a prohibitive rule must, on the contrary, be easily intelligible and equally easy to apply: otherwise, the rule risks remaining a dead letter; iv) it is not clear what influence the prohibited behavior has for the purposes of the validity and effectiveness of the contract that has already been concluded without certification request clauses and, therefore, whether the seller still has the possibility to request fulfillment of the contract and / or compensation for damages for non-sale; v) the penalties provided for differ from those already indicated in art. 62, d.l. n. 1 of 2012 (containing the general regulation on the subject of u.c.p. in the agri-food sector) both in relation to the amounts and in relation to the criteria indicated for the concrete quantification of the penalties; vi) the powers of control and sanctions are attributed to the ICQRF when the same powers, for any other u.c.p. in the same sector, are attributed to the Italian Antitrust Authority.

In summary, the provision appears to assume above all "media" value (as evidenced by the emphasis shown by the government authority towards the mass media) rather than as an effective tool for the protection of primary producers, as well as being a harbinger of serious regulatory distortions.

Still on contractual relationships concerning agricultural or agri-food producers, can be mentioned the provisions of paragraph 2-duodecies of art. 78 of the aforementioned Law Decree n. 18/2020, which provides that PDO and PGI agricultural and food products, including wines and spirits, can, in a manner to be defined in a subsequent Ministerial Decree, be subject to a revolving pledge. Actually, this is not an absolute novelty, since law no. 401 of 1985 provided for the revolving pledge for hams with designation of origin, and art. 7 of the law n. 122 of 2001 (and the related Ministerial Decree of 26.7.2016) had extended it, and regulated it, for long-matured cheeses with designation of origin. With the provision in question, however, the basket of products susceptible to a revolving pledge has been substantially expanded, which entails the benefit, for the debtor, of avoiding dispossession of the assets granted as pledges. The Ministerial Decree required by law was quickly adopted as early as 23 July 2020, and essentially contains the implementing provisions regarding the discipline of the register required by law for the identification of products subject to the revolving pledge.

Also in this case, we are faced with a measure linked to the emergency (although, it seems, permanent and not only transitory), to allow interested entrepreneurs to be able to access credit more easily, in light of the collateral acquired by the lender, even if some cones of shadow remain, given that the regulatory provision does not shine for clarity, giving rise to numerous applicative and interpretative doubts, such as to be able, ultimately, to undermine the functionality and effectiveness of the measure.

Among the various measures intended to deal with the emergency and such as to affect contractual relationships involving agricultural and agri-food producers, it is worth recalling paragraph 3-quater of art. 78, d.l. n. 18 of 2020, which allows, in the emergency period, the issuance by the control bodies of certificates of suitability in relation to organic production and PDO or PGI agri-food products even if without on-site accesses, "also on the basis of a risk assessment "and provided that" sufficient information and evidence is collected" and on the basis of formal declarations made by the businesses concerned, and without prejudice of subsequent business verification once the emergency has ceased. Also in this case, in the balance between environmental sustainability and economic sustainability, the crisis resulting from the pandemic has made - albeit in an exceptional and transitory way - hang the heaviest weight on the plate of the second.