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ONLINE PLATFORMS: NEW ACTORS OF THE FOOD CHAIN QUALIFICATION CHALLENGES AND FOOD INFORMATION RESPONSIBILITIES

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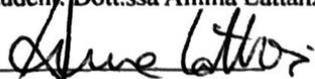
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*Online platforms: new actors of the food chain
Qualification challenges and food information responsibilities*

Amina Lattanzi
Ph.D. thesis
Verona, 27 June 2021

Foreword

Why food online platforms¹?

In recent years and particularly since this research has started, it has been difficult not to notice the growing volume of talk around food online². At least from an economic, social, and cultural prospective, experts have been conducting a wealth of studies and producing endless data on the digital revolution of the food chain. This revolution has been reflected, understandably, on the news. The COVID-19 pandemic that hit the world in 2020 and its extensive media coverage only made obvious a phenomenon that was already happening and expanding at full speed³.

Below, I cite a few articles published in Italian and international newspapers in the last three years. They all target online platforms; they all mention food. Simply put, they all describe the emergence of a phenomenon unimaginable in the past decades, that of food online. These are merely a few examples of the vast spectrum of pieces featuring food online platforms that are drafted every week. The number of reviews and studies on the topic is an undeniable demonstration of the economic viability of food e-commerce. The extent of its media and academic coverage shows how food online is not only attractive but also, and foremost, how we are still far from finding solutions to the many challenges it raises. Better yet, and from a legal standpoint, we are still in a position to study it and make legislative choices.

This thesis intends to explore food online with passion for Food Law and interest in its digital dynamism. It is proposed as an initial guide to the role and responsibilities of online platforms as new actors of the food chain, without the presumption of being exhaustive. Rather, it is intended as an early contribution to

¹ This concept will be defined in section I.4.

² Ibidem: see section I.2.

³ MONTANARI F., *Food e-commerce and consumer information in the post-COVID-19 between due diligence and digital innovation*, in *Agroportal*, 17 May 2020; MERTEN-LENTZ K., *How the EU is dealing with illegal food sold online during the COVID outbreak*, in *Tomorrow's Food and Feed*, Keller and Heckman LLP, 18 September 2020.

the disciplines of Food Law and E-Commerce Law in order to find – or construct, when missing - useful answers to the issues raised when these two areas meet.

“Ocado, the tech startup you thought was a supermarket”, *The Economist*, 24 May 2018

“Le phygital food et son impact dans l’agroalimentaire”, *AgroMédia*, 3 January 2019

“Tutto o niente: perché Amazon chiude (per ora) il suo food delivery”, *AGI*, 13 June 2019

“Deliveroo and Just Eat customers complain of fraud”, *BBC*, 22 June 2019

“Trust 'undermined' by food delivery firms over hygiene”, *BBC*, 26 June 2019

“Accordo di fusione tra Takeaway e Just Eat: nasce il primo operatore di food delivery in Europa”, *Corriere della Sera*, 29 July 2019

“The foodoo economics of meal delivery”, *The Economist*, 1 August 2019

“Food Delivery Looks Like Another Gig-Economy Dead End”, *Bloomberg*, 31 October 2019

“The Great Food-Delivery Fight Arrives in the U.S.”, *Bloomberg*, 9 January 2020

“UK – Facebook and e-Bay pledge to curb on fake reviews on online products”, *Food Law Latest*, 15 January 2020

“Il supermercato amplia i confini: dal risto-retail al food delivery”, *Il Sole 24 Ore*, 19 January 2020

“FeatFood consegna a domicilio l’alimentazione per gli amanti del fitness”, *Il Sole 24 Ore*, 29 January 2020

“Ktchn Lab, altri 8 ristoranti virtuali dopo la crescita record”, *Il Sole 24 Ore*, 17 February 2020

“Amazon all set to enter India’s food delivery market”, *TechCrunch*, 26 February 2020

“Food delivery firms start contactless services during pandemic”, *Bloomberg*, 12 March 2020

“Grocery delivery apps see record downloads amid coronavirus outbreak”, *TechCrunch*, 16 March 2020

“È una buona idea usare i servizi dei rider in questi giorni?”, *Il Post*, 21 March 2020

“L’e-commerce funziona ancora?”, *Il Post*, 25 March 2020

“Qualche soluzione alternativa di ecommerce per fare la spesa”, *Wired*, 11 April 2020

“Amazon puts new online grocery shoppers on a waitlist”, *TechCrunch*, 13 April 2020

“Facebook bets on a different sort of e-commerce in India”, *The Economist*, 25 April 2020

“BUBBLE online marketplace sees surge in sales, basket size as consumers explore new online platforms”, *Food Navigator*, 4 May 2020

“Uber Eats exits seven markets, transfers one as part of competitive retooling”, *TechCrunch*, 4 May 2020

“Il cibo ordinabile su Instagram e non solo: così Facebook si schiera con le Pmi in crisi”, *Il Sole 24 Ore*, 11 May 2020

“In the dark days of retail, consumers’ online shift lifts Mars”, *Bloomberg*, 15 May 2020

“Digital transformation: Alibaba predicts boom in China retail digitisation and healthy foods due to COVID-19”, *Food Navigator*, 8 June 2020

“Cities capped food delivery platform fees during the pandemic. Grubhub and Postmates resisted these limits, citing confusion”, *The Counter*, 19 June 2020

“From farm to brand: Why digital food supply chain transformation in APAC crucial post-COVID-19”, *Food Navigator*, 10 August 2020

“Come funziona il primo contratto per i rider delle app di food delivery”, *Wired*, 16 September 2020

“Una campagna di phishing sta colpendo i rider di Uber Eats”, *Wired*, 17 November 2020

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This thesis has been a long journey and would not have been possible without the support and guidance of many people. I would like to use a few words to express my gratitude to them.

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Further, I am truly grateful to Prof. Chris Reed for his valuable support during my visiting at the Centre for Commercial Law Studies, Queen Mary University of London, and for giving me the opportunity to discover different approaches to legal research.

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Online platforms: new actors of the food chain

Qualification challenges and food information responsibilities

What is food online and where does the EU stand in regulating it? In particular, are online platforms responsible for the food information accessible from their channels?

Abstract

Food e-commerce is a rapidly developing market. Regrettably, the number of products exchanged on the web that may be harmful to consumers is steadily growing, too. This new development poses challenges for controlling authorities and legislators in their mission to protect EU consumers' health and economic interests, leading to a lively discussion on the status, role, and responsibilities of e-platforms in the age of food online.

Standing at the intersection of law, food and digital technology, this thesis looks at the development of food online and documents how – and first, whether - EU regulators and courts have been addressing it. It pays particular attention to two aspects of food e-commerce regulation: the qualification of food online and the role of e-platforms with regards to food information, and ultimately, food safety.

Keywords

food online, e-commerce, online platforms, food information, qualification, responsibility, liability, controls.

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This thesis consists of 107 758 words.

Chapter I – Introduction: the online disruption of the food chain

1. Online platforms, key actors of the digital revolution

In recent years, commercial activities have largely moved from “bricks” to “clicks”, shifting from a physical dimension to a digital world where transactions are concluded via the internet⁴. Online platforms are the main protagonists of this digital shift and indisputably stand at the heart of today’s online economy^{5 6}.

*Technological innovation*⁷ may be defined as the deliberate introduction by companies and institutions of new products and services, as well as new methods of producing, distributing, and using them⁸. Such innovation is typically accepted by users, whether they are customers purchasing the new good or service on the market or users of a public service⁹. *Digital innovation*¹⁰ is the use of digital technologies to produce novelty. It refers to the creation of new business models through electronic tools, systems, devices, and resources that generate, store or

⁴ VAN DER VEER L., *Food online: radical changes to the digital shop window*, in *European Food and Feed Law Review*, 2014, issue 2, p. 78.

⁵ In fact, the digital economy is also known as platform-based economy.

⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, 28 September 2017, COM(2017) 555 final, p. 2. See also CAUFFMAN C. and SMITS J., *The sharing economy and the law: food for European lawyers*, in *Maastricht Journal of European and Comparative Law*, December 2016, p. 903.

⁷ Emphasis added.

⁸ SALVI L., *Agri-food law and innovation through the lenses of better regulation*, in Session I of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, pp. 26 ss: innovation is the “*action of innovating, the introduction of novelties and the alteration of what is established by the introduction of novelties and the alteration of what is established by the introduction of new elements or forms*”; “*innovation may also concern the legal dimension, in terms of evolution which affects both rules and institutions*”.

⁹ SIRILLI G., *Innovazione tecnologica*, in *Treccani*.

¹⁰ Emphasis added.

process data¹¹. Data – in the capacity of food information – is precisely the core of this thesis.

Online platforms pervade our lives¹². They offer a new outlet for goods and services, easier access to information, a large variety of options, real price competition and new business prospects. They influence the way we communicate, keep up to date with the latest news, book our flights, make payments, look for jobs, buy Christmas gifts. The list is endless. In fact, it is quite difficult to identify an economic area that has not been touched, in one way or another, by online platforms¹³. By connecting users with upstream entities that provide all sorts of content¹⁴, they act as information go-betweens and their online presence facilitates the provision and dissemination of opinions, knowledge, entertainment, advertising, products, and services.

The online platforms' umbrella includes hundreds of models and activities¹⁵. They also come in all shapes and sizes, from micro-businesses to multinationals,

¹¹ European Parliament, *Research for AGRI Committee - Impacts of the digital economy on the food chain and the CAP*, February 2019, p. 11.

¹² ANGUS A. and WESTBROOK G., *Top 10 Global Consumer Trends 2019*, Euromonitor International, 2019, p. 25; YEO V. C. S., et al., *Consumer experiences, attitude and behavioral intention toward online food delivery (OFD) services*, in *Journal of Retailing and Consumer Services*, 2017, volume 35, p. 150.

¹³ *Liability regulation of online platforms in the UK*, Hogan Lovells Publications, 21 April 2018, pp. 7 ss. See also SAVIN A., *Regulating internet platforms in the EU: the emergence of the “Level playing Field”*, in *Computer Law and Security Review: The International Journal of Technology Law and Practice*, 2018, pp. 1 ss; KIM C. G., *Web of Things: Future Internet Technologies and Applications*, in *Journal of Platform Technology*, December 2013, volume 1, issue 1, p. 33.

¹⁴ DUCH-BROWN N., *Platforms to business relations in online platform ecosystems*, JRC Digital Economy Working Paper 2017-07, European Commission's Joint Research Centre, 2017, p. 4.

¹⁵ For an excursus on online platforms' diversity, see *Liability regulation of online platforms in the UK*, cit.; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, 25 May 2016, COM(2016) 288 final; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe*, 6 May 2015, COM(2015)

and some of them are today true economic titans. Their common denominator, though, appears to be their function, that of providing economic players with an alternative way of interacting in various settings.

Technological changes involving platforms are happening at such a scale and speed that they are revolutionizing conventional habits, bringing innovation and growth, on the one hand, and raising policy and legal concerns, on the other¹⁶. Indeed, technological innovation not only involves the scientific and industrial world – in this case, the food industry -, but also the social sciences – *in primis*, law¹⁷ -, called upon to take a problem-solving approach to real-life scenarios¹⁸. Think of the questions raised by the gig economy in terms of Labour Law or data protection¹⁹. Well, this thesis will prove that the challenges related to Food Law are

192 final, p. 11: among the great variety of online platforms, one can identify search engines, social media, e-commerce platforms, app stores, price-comparison websites and so on.

¹⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe*, cit.; HATZOPOULOS V., *La première prise de position de la Cour en matière d'économie collaborative*, in *Revue trimestrielle de droit européen*, 2018, pp. 273 ss. For instance, challenges raised by the emergence of titanic online platforms include that of finding the right balance between their growing market powers and the safeguard of meaningful competition and data protection policies. See also DESSEMOND E. G., *Restoring competition in "winner-took-all" digital platform markets*, UNCTAD, 4 February 2020.

¹⁷ JANNARELLI A., *Conclusions*, in Session III of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, pp. 221 ss.

¹⁸ PASCUZZI G., *The creativity of agri-food lawyers*, in Session I of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, p. 17, considers law as a technology: "*If technology can be defined as any instrument improving human life conditions (ie: means aimed at a purpose), the emphasis on law as a tool to meet human needs and to solve problems strengthens the idea that the law itself can be considered a technology. The law, therefore, is a tool needed to solve problems or to achieve goals useful to man and society*". See also p. 23: "*Jurists are innovators. Behind these innovations rests the know-how of the lawyer that uses a number of techniques to provide new answers to old and new legal problems*".

¹⁹ SUN P., *Your order, their labor: An exploration of algorithms and laboring on food delivery platforms in China*, in *Chinese Journal of Communication*, 2019, issue 3, pp. 308 ss; HELBERGER N. et al., *Governing online platforms: from contested to cooperative responsibility*, in *The Information Society*, 2018, volume 34, p. 5.

no less impressive. Sections I.3 and I.4 will detail the specific issues this research plans to tackle and iron out.

One final note. For the purposes of the present work, the terms “platform”, “online platform”, “web platform”, “e-platform”, “internet platform” and “internet-based platform” will be used interchangeably. Section II.3 will analyse the definition of online platform, or better yet, the lack thereof. The term “intermediary”, at the core of section IV.4, refers to only one category of online platforms, namely those platforms mediating between users/consumers and third-party providers of content. They will be defined more pointedly at the end of section IV.3.c.

2. The Internet of Food

In the food sector, the impact of digital technologies on traditional dynamics has forced legal scholars to try to adjust known legal concepts and categories to unprecedented problems²⁰. The present section sketches, as a preliminary overview, how the internet has in fact affected the food chain.

Novelty and innovation have been a constant drive of the food industry²¹. For instance, the expression “food innovation” has been linked to the introduction, in the past decade, of products unfamiliar to certain communities, especially gluten-free, vegan, kosher and halal foods. Largely, and more importantly, food innovation has been known to refer to scientific research applied to agriculture. Until recently, it mostly involved new techniques of agricultural production and processing and

²⁰ For instance, the impact of blockchain on the food industry: see SPOTO G., *Gli utilizzi della Blockchain e dell’Internet of Things nel settore degli alimenti*, in *Rivista di diritto alimentare*, 2019, issue 1, pp. 25 ss.

²¹ CANFORA I., “*Products of innovation*” in *agri-food markets. Legal rules for the access of innovative products and paradigms in the agri-food market*, in Session I of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, pp. 61 ss; IZZO U., *The symbiotic role played by technology and law in the agri-food field: an introduction*, in Session III of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, pp. 145 ss.

generally happened in laboratories²² ²³. In this context, innovation was an engine towards food security, driven by the human right need to ensure availability and accessibility of food for all individuals.

Today, not only has innovation shifted its attention towards food safety, even though food is far from secured²⁴. But it has also been engulfed by the internet wave. In recent years, indeed, the digital revolution has hit the food sector, as any other industry²⁵, and the internet has become the instrument through which the agri-food industry has started one of its most radical makeovers²⁶.

Indeed, the food sector is facing one of the most significant disruptions²⁷ it has seen in decades²⁸ and we are now deep in the era of “food online”. Specifically, this thesis borrows this expression from van der Veer’s thesis “Food Online”²⁹ and uses

²² GOULD D., *When It Comes to Food, Technology is Changing the Game*, Food+Tech Connect, 2 July 2013; COSTATO L., *Editoriale. Soluzioni diverse non esistono*, in *Rivista di diritto alimentare*, 2019, issue 1, pp. 1 ss; SALVI L., *Agri-food law and innovation through the lenses of better regulation*, cit., pp. 25 ss.

²³ Think of the technological modifications for cultivating plants and breeding animals (i.e., GMOs).

²⁴ COSTATO L., *Editoriale. Circolazione dei prodotti agro-alimentari e controlli: la ricerca di nuove regole*, in *Rivista di diritto alimentare*, 2018, issue 4, pp. 1 ss.

²⁵ Notably, the internet has its origins in the late 60s in the limited arena of military and academic research. See MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, Egea, 2018, p. 51.

²⁶ For recent developments in the area of food digital innovation, PONTIGGIA V., *Fermento digitale e innovativo nel settore Alimentare: le ultime news*, Osservatori Digital Innovation, School of Management, Politecnico di Milano, 2 March 2020.

²⁷ European Parliament, *Research for AGRI Committee - Impacts of the digital economy on the food chain and the CAP*, cit., p. 11: “Clayton Christensen popularized the idea of disruptive technologies in the book “*The Innovator’s Dilemma*” published in 1997. Disruptive technologies are those that significantly alter the way businesses or entire industries operate”. See also THRASYVOULOU X., *Understanding the Innovator’s Dilemma*, in *Wired*, 2014.

²⁸ FORCUM M. A., *From Silicon Valley to the kitchen table: innovative online agriculture and food start-ups and the Law*, in *Kentucky Journal of Equine, Agriculture and Natural Resources Law*, 2014, volume 7, issue 2, p. 326: “as the internet decentralizes food and agriculture innovation, there is the potential for the most significant transformation the food industry has seen in decades”.

²⁹ The term food online has been coined by Lomme van der Veer to label the distinctive sub-branch of law that studies the regulation of food “travelling” on the internet: see VAN DER VEER L., *Food*

it to refer, comprehensively, to the phenomenon of food sold, advertised, exchanged, distributed through online channels. In the food sector in fact, digitalisation³⁰ has had a huge impact on one particular stage of the food chain, that of distribution: food online has transformed both consumers' shopping habits and businesses' economic models, allowing them new means of communication and commerce away from typical physical settings.

Food online is merely a food-specific reflection of the exponential growth of electronic commerce in all industries³¹. Broadly speaking, electronic commerce (also widely known as e-commerce) refers to internet-based purchases and sales of products and services³². More pointedly, the Organization for Economic Cooperation and Development (OECD) defines an e-commerce transaction as the “*sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online*”. It further clarifies that such transaction can be made between enterprises, households, individuals, governments, and other public or private organisations³³. Simply put,

online, Ph.D. Thesis on food legal and civil law requirements for digital contracts regarding food purchases by consumers in the Netherlands, 2017, Lexxion, p. 19: “Each time when more general elements of civil law are discussed, it is highlighted how this specifically applies in case the merchandise is food. Each time when more general elements of food law are discussed, it is highlighted how this specifically applies in case the food is purchased online. In this way a distinct sub-area of law emerges; an area that this thesis labels as: food online. This area of law shows the characteristics of a functional field of law in that it is cross cutting through civil law and public law and through national law and European Union law”.

³⁰ Digitalisation is the use of digital technologies to transform business models. See European Parliament, *Research for AGRI Committee - Impacts of the digital economy on the food chain and the CAP*, cit.

³¹ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2017, pp. 122 ss.

³² *E-commerce in Italia. Come evolvono gli acquisti online dei consumatori italiani*, Osservatori Digital Innovation, School of Management, Politecnico di Milano.

³³ OECD, *Glossary of statistical terms: Electronic Commerce*, last updated January 2013.

e-commerce is about selling online: physical products, information (e.g., access to information via subscription such as Spotify), and services (e.g., insurance, travel).

The growth of e-commerce represents one of the explicit goals of the European Union Digital Single Market Strategy (DSMS)³⁴. Its functioning is mainly divided into two categories³⁵: Business-to-Business (B2b)³⁶ and Business-to-Consumer (B2c). The former occurs between two companies (a supplier and a buyer), whereas the latter refers to the relationship between a supplier company and a final consumer.

In general, and not only as regards to food, electronic commerce is offering businesses unprecedented opportunities to sell goods nationally and across borders³⁷. At the same time, consumers are more and more inclined to purchase online. According to a recent survey carried out by the European Commission (hereinafter also EC), the percentage of people aged between 16 and 74 who have ordered goods or services over the internet has grown year-on-year from about 50% in 2007 to 68% in 2017³⁸.

³⁴ European Commission, *Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy. A connected Digital Single Market for all*, 10 May 2017, COM(2017) 228 final, p. 5.

³⁵ “Depending on the different nature of the intervening agents”, the following e-commerce models may also be observed: Consumer-to-Consumer (C2c) and Business-to-Government (B2g): see ZÚÑIGA F-R., *The electronic commercialisation of fresh foods*, in *European Food and Feed Law Review*, 2019, issue 6, pp. 513 ss; KIETZ M., *Editorial*, in *European Food and Feed Law Review*, 2019, issue 6, p. 501.

³⁶ Business-to-Business platforms are typically sector-specific, as they do not offer a range of products but only one product specific to a particular industry (e.g., airplanes’ engines).

³⁷ European Commission, *Report from the Commission to the European Parliament and the Council on the functioning of the Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet*, 18 April 2013, COM(2013) 209 final, p. 5.

³⁸ European Commission, *Overview Report of a series of fact-finding missions carried out in 2017 concerning Official Controls on Internet Sales of Food in EU Member States*, DG(SANTE) 2018-6537.

Within the B2c model, online trade of food is constantly expanding³⁹ and e-sales are expected to soon outperform grocery sales in physical stores⁴⁰. All types of foods and beverages can now be purchased offline as well as online, both on small web shops and on large e-platforms such as Amazon, eBay and Alibaba⁴¹. Furthermore, an increasing number of food businesses – especially start-ups – are now online only, where web structures are not used as an alternative to physical stores but are the sole access to food⁴².

Recent data examined by the European Commission showed how the percentage of individuals who purchased food over the internet in the European Union (hereinafter also EU) increased in the last 10 years: in 2007, the percentage of the total EU population ordering food online was 11%; in 2017, that number raised to 24%⁴³. More generally, according to a survey carried out by Nielsen in 2015 based on a pool of purchasers with online access in 60 countries, one quarter of them

³⁹ Ibidem. See also LOMBARDI N., *Digital food on line in Europa: e-commerce e delivery*, Digital Coach, 8 April 2019; *E-commerce in Italia. Come evolvono gli acquisti online dei consumatori italiani*, Osservatori Digital Innovation, School of Management, Politecnico di Milano, cit., where food and groceries are listed in the top 5 categories of products most sold in Italy through online channels, along with electronics, clothing, furniture and home living, and publishing.

⁴⁰ European Commission, *Commission Recommendation of 24.7.2017 on a coordinated control plan on the official control of certain foods marketed through the Internet*, C(2017) 4986 final, p. 2; HENG Y. *et al.*, *Exploring hidden factors behind online food shopping from Amazon reviews: A topic mining approach*, in *Journal of Retailing and Consumer Services*, 2018, volume 42, p. 167.

⁴¹ For an illustration of the birth and development of online food shopping, KREWINKEL A. *et al.*, *Concept for automated computer-aided identification and evaluation of potentially non-compliant food-products traded via electronic commerce*, in *Food Control*, 2016, pp. 204 ss.

⁴² ROOSEDAAL A. P. and VAN ESCH S., *Commercial Websites. Consumer Protection and Power Shifts*, in *Journal of International Trade Law and Policy*, 2007, volume 6, issue 1, pp. 13 ss. For instance, the platform Macai was launched during the COVID-19 pandemic as an online-only supermarket that delivers in Milan and Turin, Italy: <https://www.macai.com/>; VINCI A., *Spesa online, Macai: il supermercato digitale a Milano e Torino*, in *Il Sole 24 Ore*, 17 April 2020; BALESTRERI G., *Coronavirus, apre Macai il supermercato online che consegna la spesa a casa entro 24 ore*, in *Business Insider Italia*, 17 April 2020; NASATO F., *Tre ragazzi hanno creato il primo supermercato completamente digitale d'Italia*, in *Forbes*, 28 April 2020.

⁴³ European Commission, *Overview Report of a series of fact-finding missions carried out in 2017 concerning Official Controls on Internet Sales of Food in EU Member States*, cit., p. 2.

indicated that they already order grocery products online and more than half are willing to do so in the future⁴⁴. Online trade of fresh food alone has a market share of 1% and is expected to rise to 4-6% in the coming years⁴⁵.

These data should not come as a surprise considering that food e-commerce offers consumers and businesses many advantages. First, and foremost, delivery: the most significant benefit of food online for consumers is that they receive their products wherever they want, without leaving the comfort of their home or workplace. Second, food e-trade tends to lead to better quality of products due to less handling. Third, prices are usually more competitive thanks to the elimination of certain intermediate stages. Fourth, online channels provide more choices, including commodities that may not be available in conventional local stores (e.g., food supplements, and gluten-free, vegan, or kosher products). Fifth, e-platforms offer easier food access to people living in remote areas or to specific categories of the population (senior citizens, large families, full-time employed)⁴⁶. Finally, and from the businesses' point of view, e-commerce typically presents a wider market and enables easy consumer identification mechanisms in case of recall.

The above illustration demonstrates how food online has taken a huge portion of the food market and why food businesses are gradually paying attention to it. In the Internet of Food age, the path “from farm to fork” has undeniably grown in complexity. Notably, it has called into the food game players that were unimaginable in the past decades, namely web platforms.

As anticipated in the previous section, the latter are key players of today's digital economy and have certainly become the protagonists of the food sector's digital makeover. From small retailers to companies that hold a strong market position, from traditional businesses that have been around for decades to recent start-ups, businesses are all turning to the e-platform tool, by either creating their own web channel or using third-party services.

⁴⁴ *The future of grocery. E-commerce, digital technology and changing shopping preferences around the world*, Nielsen, April 2015.

⁴⁵ ZÚÑIGA F-R., *The electronic commercialisation of fresh foods*, cit., p. 512.

⁴⁶ GONZÁLEZ VAQUÉ L., *Is it Necessary to (Urgently) Adopt a Community Regulation for Online Food Sales?*, in *European Food and Feed Law Review*, 2019, issue 5, p. 433.

That said, how have the emergence of food online and the rise of food online platforms (hereinafter also FOPs) affected the food sector in the EU? While digitization presents major opportunities, the need for industry leaders to meet legal requirements on food safety, food quality, and food information is ever more vital. The following section will explain why.

3. Problem statement

The present section seeks to frame the problems this thesis intends to clear up. For that, a few preliminary observations need to be put on the table.

This is how much we know.

First, food is a unique commodity. Therefore, it demands rules and standards worthy of that uniqueness. Strictly connected to human life and health, it is the only product meant for daily consumption and intended to be ingested by everyone, every day, multiple times a day. Regulation 178/2002, known as EU General Food Law (hereinafter also GFL)⁴⁷ defines it as “*any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans*”. It covers drink, chewing gum and any substance, including water, intentionally incorporated into food during its manufacture, preparation, or treatment.

Second, food and food regulations do not only involve the material product, but also what comes with it, such as its packaging, its transport methods, its label and so on. This thesis will mostly be focusing on the latter, specifically food information, i.e., every indication, statement, communication, and tag accompanying food.

Third, any Food Law analysis cannot set aside the complexity of the food chain⁴⁸. The latter connects a variety of players, businesses as well as consumers,

⁴⁷ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

⁴⁸ CANFORA I., “*Products of innovation*” in *agri-food markets. Legal rules for the access of innovative products and paradigms in the agri-food market*, cit., pp. 61 ss.

and affects the relationships between many economic operators. The food chain is dotted with several actors, each bearing responsibilities specific to the stages they are involved in, from farming production to distribution to the final “eater” – the consumer. The latter stage, as explained in the previous section, has been fiercely disrupted by the emergence of e-commerce.

Fourth, digitalisation enables closer and direct communication between businesses and their customers. It typically shapes an environment where food consumers have access to more information, which tends to improve their decision-making and awareness⁴⁹. In general, the internet has given visibility to an immense and boundless volume of information⁵⁰.

Finally, the EU food sector has become more and more a consumer-centric environment⁵¹ and food information has turned into the pillar of consumer protection. Consumers – regardless of the online or offline setting in which they operate - are actively defending their right to knowledge and transparency with regards to the food they eat.

This is the issue.

The internet has fundamentally transformed the role of information and our relationship to it. Sources of information have become more diverse and intricate due to the technological developments of communication, which have influenced not only the speed at which content is provided but also the amount of data available on the web⁵². Information in the digital age is global and extensive, ubiquitous and instant⁵³. Anyone with an internet connection has the possibility to acquire a large

⁴⁹ European Parliament, *Research for AGRI Committee - Impacts of the digital economy on the food chain and the CAP*, cit., pp. 15 and 65.

⁵⁰ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 3.

⁵¹ POUTANEN K. *et al.*, *Food Economy 4.0. VTT's vision of an era of smart consumer-centric food production*, 2017, VTT Technical Research Centre of Finland Ltd, Juvenes Print.

⁵² LAIDLAW E., *Private power, public interest: An examination of search engine accountability*, in *International Journal of Law and Information Technology*, 2009, volume 17, issue 1, p. 120.

⁵³ *Ibidem*, p. 121. In the Author's words: “Such formulations derive from a recognition that the Internet's primary function is as 'a conveyor of information'. In contrast to traditional media, the

volume of information, anywhere and anytime, and online platforms are often – not always, as this work will explain⁵⁴ - acting as intermediaries for third-party content, managing and assisting consumers in their online information experience⁵⁵.

Turning specifically to the food sector, the multiplication of distribution channels has sensibly changed the way food products are sold and information is generated and accessed⁵⁶. A significant volume of food products – and consequently food information - is not only directly available to a vast pool of potential consumers, one click on the computer or smartphone away. Such content also derives from an increasingly large variety of sources⁵⁷, i.e., occasional or professional traders mushrooming on the internet⁵⁸.

Although internet-based companies undeniably bring strong advantages to society, their platforms have been abused and misused over the years and proved to constitute a prolific channel for unlawful content. Simply put, the relocation of commercial transactions to the online world means that anyone may offer for sale any product to any potential consumer, and the chances of it being unsafe or non-compliant with applicable laws are substantial⁵⁹. Think of online meal ordering. Thousands of meals are hourly sent out across cities for delivery, but shelf-lives are

costs to becoming a speaker in cyberspace are low, and the distributed architecture of the Internet have 'fundamentally altered' the capacity of individuals to engage in the public sphere”.

⁵⁴ As Chapter II will clarify in detail, this thesis does not only focus on food online intermediaries, as in platforms mediating for third-party content, but also on companies trading their own products online. However, the research will prove how online intermediaries are those raising more challenges in terms of qualification and responsibilities applicable to them.

⁵⁵ LAIDLAW E., *Private power, public interest: An examination of search engine accountability*, cit., p. 120.

⁵⁶ MCCARTHY H. J., *Is The Writing on the Wall for Online Service Providers? Liability For Hosting Defamatory User-Generated Content Under European and Irish Law*, in *Hibernian Law Journal*, 2015, volume 14, p. 16.

⁵⁷ REED C., *Liability of Online Information Providers - Towards a Global Solution*, in *International Review of Law, Computers & Technology*, 2003, volume 17, issue 3, p. 256.

⁵⁸ Thus, creating an information clutter, as Emily Laidlaw puts it: LAIDLAW E., *Private power, public interest: An examination of search engine accountability*, cit., p. 145.

⁵⁹ PITOZZI A., *Quasi due prodotti su tre venduti via ecommerce non sono sicuri*, in *Wired*, 25 February 2020.

typically unknown, products travel without labels – e.g., no ingredient and allergen list -, packaging may not be suitable for transport, boxes are usually not sealed, and no instruction is provided in terms of reheating, storage, and freezing conditions⁶⁰. Plus, who guarantees that the information on the web menu is complete and accurate?

This new way of exchanging foods and processing information in the digital age has unleashed hundreds of products non-compliant with food safety rules, as evidenced by the first control programme launched by the EU on food offered online. While this plan will be examined in detail in section IV.6.a in the context of food online monitoring challenges, the next few paragraphs will outline its main points.

In 2017, the European Commission implemented the first EU coordinated control plan (CCP) on online offered food products⁶¹. On a voluntary basis, Member States were asked to search for products non-compliant with EU Food Law^{62 63}, including Regulation 1169/2011 on food information to consumers. More specifically, in order to avoid an overload of control authorities' capacities, the plan

⁶⁰ McGLINN M., *Just Eat and Deliveroo respond to food safety concerns*, in *Food On The Move*, 26 February 2019.

⁶¹ The coordinated control plan was implemented during the month of September 2017 according to the *Commission Recommendation of 24.7.2017 on a coordinated control plan on the official control of certain foods marketed through the Internet*, cit.

⁶² The legal basis for anonymous online searches of food in the European Union is provided by the new Official Controls Regulation. See Recital 49 and Article 53(1)(d)(iii) of Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products. These new rules will be examined in section IV.6.b.

⁶³ According to VAN DER VEER L., *Food online*, cit., p. 14: “*all rules pertaining to food, regardless if they are public or private, national, European or international, belong to food law. If, therefore, in the interplay between the law of obligations, consumer law and food information law a set of rules emerges that is specific for the legal position of the consumer of food product, then this is food law*”.

dealt with only two specific infringing products: non-authorised novel foods⁶⁴ and food supplements with health claims⁶⁵.

As it was to be expected, an impressive number of unlawful products were found to be offered online. The food supervisory authorities mainly focused on traders based nationally. In some cases, they also identified offers in their respective official languages from traders located in other EU Member States or in third countries, in particular United States and China.

The Commission's subsequent analysis of the CCP's outcome concentrated on strengthening the coordination between competent authorities, training staff in online investigations and establishing contact points with major marketplaces, reminding all key players – including platforms and traders - of their responsibilities for ensuring that safe and non-misleading food is offered to EU consumers.

However, such responsibilities remain unclear.

⁶⁴ In the EU, the framework applicable to the CCP – Regulation (EC) No 258/97 - required novel foods and novel food ingredients to be authorised based on a scientific risk assessment performed by the Member States or by the European Food Safety Authority (EFSA). For the purposes of the CCP, national food control authorities were asked to search the internet for offers in their respective official languages of four non-authorized novel foods: Agmatine (4-aminobutyl) guanidine sulfate³, *Acacia rigidula*, *Epimedium grandiflorum* and *Hoodia gordonii*. It is worth noting that this Regulation is no longer in force – end of validity: 31 December 2017 - and has been replaced by Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001.

⁶⁵ Article 7 of Regulation 1169/2011 on food information to consumers prescribes that food information must not be misleading, in particular “*by attributing to the food effects or properties which it does not possess*” or “*by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics*”. In the context of the CCP, authorities were to identify internet offers of food supplements with misleading statements attributing to them the property of “*preventing, treating or curing bone and joint diseases or refer[ring] to such properties with disease related expressions, pictures or symbols*”.

This is what this thesis intends to do.

This work comes into play to shed some light on internet platforms' status, role, responsibilities, and enforcement mechanisms in the age of food online.

Indeed, the impact of digital innovation on the food supply chain and its threats to consumers' health and safety have raised a plurality of legal problems, as risks need to be both avoided and repaired. This leads to the issue of online platforms' contribution to consumer protection: *are*⁶⁶ they or *should*⁶⁷ they be responsible and what for?

In particular, this thesis seeks to provide answers to the following questions:

- What are we referring to when we talk about food online platforms?
- What qualifies as “food online”?
- Which rights do consumers have when entering the food online market and why is the right to be informed particularly relevant for food online consumers?
- To which extent are online platforms responsible for food information?
- To which extent are they liable for illegal food information?
- How far should online platforms be responsible for food information?
- How are food laws enforced on web channels?
- Ultimately, where does “food online” stand in EU law and which gaps need to be filled to provide the highest level of consumer protection in the EU?

These questions demand the assessment of the laws covering food trade and those applicable to web platforms, to check how these two areas may work together. The final goal is to evaluate whether the current EU legal framework is fit for purpose, that is to say whether it addresses the many challenges raised by food online, especially in terms of consumer protection and responsibilities' allocation.

One final observation, before displaying this work's roadmap. While the nature of e-commerce, and internet regulation in general, is internationally focused, the present analysis will focus primarily on the European Union legal framework. However, a few examples are taken from Italian law as well, to illustrate the legislative choices made by national regulators on certain aspects of food online:

⁶⁶ Emphasis added.

⁶⁷ Ibidem.

administrative sanctions for food information infringements (section IV.3.a) and public enforcement of food laws (section IV.6.b).

4. Roadmap

As anticipated, the present study points at examining food online platforms, by exploring their activities and responsibilities under EU law and ultimately evaluating whether the frameworks that currently govern them secure the standards required to protect food consumers.

FOPs may be defined as internet-based operators involved in one or more stages of the food chain. They are reshaping all segments of the food sector, especially in relation to sale and distribution⁶⁸. Indeed, while the entire food chain includes agricultural production, manufacturing, processing, distribution, catering, import, export⁶⁹ - echoing the famous saying “from farm to fork” – this work will only focus on online platforms involved in the distribution side of it. More particularly, this thesis seeks to tackle certain *modi operandi* of e-companies handling food sale and distribution with the specific goal of qualifying their services and examining their responsibilities in terms of food safety and consumer protection.

The thesis is organized as follows.

Chapter II will tackle the legal qualification of food online. First, it will contextualize the research by illustrating the main shapes in which food online has revealed itself and providing its real-life samples. Second, it will outline the challenges of defining e-platforms, thence introduce the principal legal frameworks involved in qualifying food online. Further, it will review three strategic Judgments recently issued by the Court of Justice of the EU on two well-known web platforms, in order to pick up the Court’s direction on their legal classification. In such cases, the e-companies are in no way involved with food products: nevertheless, the goal of the analysis will be to check how the criteria laid down by the Luxembourg judges may apply to the food sector. The final sections will then capitalize on the

⁶⁸ McGLINN M., *Food Delivery Platforms – Transforming Operations*, in *Food On The Move*, 12 November 2018.

⁶⁹ XIAO P., *Regulating china’s food e-commerce: harmonization of laws*, in *Journal of Food Law and Policy*, 2018, volume 14, issue 2, p. 305.

Court's lessons in order to provide a reasonable qualification of the activity exercised by food online platforms. As it is to be expected, certain questions will be left unsolved, opening to different alternatives.

Chapter III will examine rights and responsibilities in food online. More specifically, it will illustrate the challenges of protecting consumers when they operate online, by concentrating on two particular consumer rights - i.e., the information right and the right of withdrawal - and by explaining why this thesis will mostly deal with the former. Chapter III will then look at the other side of the coin, that of obligations. In other words, it will explain who, under current law, is responsible for these rights to be satisfied. The research will not only focus on food consumer rights provided by supranational law – the EU Consumer Rights Directive, the General Food Law, and the Food Information to Consumers Regulation -, but also on how these rights are translated into platforms' contractual regulation, especially into their Terms & Conditions. Specific examples will describe how online companies address consumers' right to be informed and give the opportunity to introduce the issue of platforms' liability when this right is breached.

Chapter IV will search for a sensible answer to the following question: are online platforms *liable*⁷⁰ for infringing food information and should the law hold them *responsible*⁷¹? The research intends to examine whether infringing food information amounts to platforms' liability, which will be analysed both in terms of primary liability and with regards to a potential secondary liability. This latter issue will lead to an inspection of platforms' role as gatekeepers and of their control over online information. Further, Chapter IV will show how the debate over platforms' liability is moving towards platforms' enhanced preventive responsibility and propose duty of care standards specific to food information on e-commerce sites. Finally, the analysis will display recent developments in the enforcement of food online rules, both in terms of public official controls and in the context of online platforms' transformation into web police.

⁷⁰ Emphasis added.

⁷¹ Ibidem. Chapter IV will explain the difference between responsibility and liability for the purpose of this thesis.

Finally, the work's closure will summarize the findings of this research and show fortes and weaknesses of the current legal framework covering food online.

5. Research methodology

The three-year research was library-based and the methodology followed to produce this thesis was doctrinal. It involved the analysis of academic journals, cases, legislation, and other legal sources to identify the rules applicable to food online, and to its main actors, food online platforms. The prospective is mostly legal, despite the illustration of business models and reference to socio-economic data to provide a comprehensive picture of the emergence of food online.

In some cases, the research was also extra-legal and more policy-focused, considering the gaps EU laws have left behind in terms of food online trade. More generally, this thesis did not only aim at answering legal questions according to current EU law. While the research was certainly undertaken from the standpoint of “what the law is”, it also cast some suggestions on “what the law should be”, by providing tentative solutions to identified holes in the EU legal framework.

The research was conducted at the Department of Law of the University of Verona from September 2017 to December 2020 and benefitted from three research periods at and interviews with experts from:

- the Directorate-General for Health and Food Safety (DG SANTE) of the European Commission, Brussels (March – May 2018);
- the Centre for Commercial Law Studies, Queen Mary University of London (May - November 2019);
- the Institute of Advanced Legal Studies (IALS), London (March 2020).

On a concluding note, this thesis uses a variety of acronyms, including in reference to crucial pieces of legislation examined throughout the text. While the acronyms are explained the first time they are introduced, a Glossary is provided for at p. 293.

Chapter II - Qualifying food online

How does food online manifest itself in today's digital economy? Are online platforms involved in a food business?

1. Work plan

The present Chapter addresses definitional questions. The purpose is to clarify the status of online platforms as key actors of the food chain. To this end, it will try to examine what constitutes a food online activity and whether certain circumstances need to be taken into consideration to distinguish between different ways food online manifests itself in today's economy.

In general, each empirical fact may be interpreted and studied differently depending on the lenses through which one chooses to view it, i.e., on the qualification criteria one plans to use. In this case, without an adequate understanding of food online platforms' functioning and operative systems, it would not be possible to assess their role in society, and more specifically, in the food chain. The practical reason behind qualification will be cleared out in Chapter III but needs to be anticipated briefly. The goal is to avoid imposing the same obligations indiscriminately, without differentiating among the large array of internet platforms involved in the food chain. Specifically, Chapter III will address food information responsibilities and explore which platforms must fulfil the obligations prescribed by EU food laws. In order to do so, one needs to check whether platforms may be covered by these laws in the first place. This is where qualification comes into play. In general, identifying FOPs' *modus operandi* will help clarify their involvement in food distribution and food information, their role as controllers over the flow of information, their potential contribution to illegal activities and ultimately their responsibilities towards food consumers. Simply put, answering questions on platforms' responsibilities and liability throughout Chapters III and IV goes hand-in-hand with assessing their function in the digital food chain and strictly depends on their concrete business model.

A brief example might be useful. One might already sense that there should be differences between a platform that delivers your sushi for the night (let us say Just Eat), a platform that allows you to order your fresh groceries online (e.g., your local

Asda) and a food company that creates a website to sell their own product (for instance, farmhouses that produce their own olive oil or ready-to-eat sauces). These are all online platforms involved in the food chain. However, their involvement and level of control vary, and this has consequences on their legal obligations. In other words, an analysis of what is meant by food online and which services are platforms delivering not only serves a qualification purpose, but also guides the extent of their duties.

That said, the present Chapter will trace the world of food online, distinguishing between platforms offering groceries online and those supplying meal delivery (section II.2). Section II.3 will introduce the issues behind defining online platforms while section II.4 will show how the qualification of food online lies in the intersection between two areas of EU regulation: EU food laws and rules governing internet services. Section II.5 will then tackle the core of this Chapter and examine three EU Judgments on the qualification of the digital economy. Section II.6 will assess how these Judgments are applicable to the food sector, after which section II.7 will conclude with a series of observations.

2. “Food online”: a variety of business models

As mentioned previously, e-platforms have affected all economic sectors, including the food industry, bringing along heavy logistics structures. When it comes to buying physical products online, platforms activate a series of logistics mechanisms thanks to which online acceptance of the offer translates to physical delivery of the product to the final consumer, passing through several stages such as packing, storage, transport. The way logistics are defined – e.g., who deals with transport and warehousing and how - helps identify a series of business models. Generally, food e-companies may build their own selling website, trade via third-party platforms, or even use social media networks⁷² - the latter “social selling” is

⁷²For an illustration of the heterogeneity of food online platforms, see SUN J. and BUIJS J., *Online Food Regulation in China. The Role of Online Platforms as a Critical Issue*, in *European Food and Feed Law Review*, 2018, volume 13, issue 6, p. 504; European Commission, *Overview Report of a series of fact-finding missions carried out in 2017 concerning Official Controls on Internet Sales of Food in EU Member States*, cit., p. 4.

also known as f-commerce⁷³. Online platforms may provide a channel for web auctions or offer an advertising vehicle for goods sold by others. Products may be delivered to consumers' homes or to pick-and-collect lockers with a code access, via sellers' or platforms' transport mechanisms or contracted distribution companies. Typically, platforms supply a series of services that make the sale possible: catalogue and hosting of product listings, record of communications, assistance with effective selling, link to payment, identification, security and so on.

Simply put, food online comes in all forms, sizes, and business models. Indeed, food online platforms follow the tendency displayed by internet companies in every other sector, that of developing various models and often changing strategies and approaches along with social, economic, and technological developments.

In today's digital economy, it is no longer a question of whether to build online capabilities but, rather, of how to enter the online market, i.e., of which models to adopt^{74 75}. In this respect, the digital revolution has allowed another disruptive change, that of mobile channels: through mobile applications, internet-based platforms are not bound to static and fixed settings anymore and any economic interaction may occur anywhere and everywhere, one click on the mobile – *smart*⁷⁶– phone away.

⁷³ ZÚÑIGA F-R., *The electronic commercialisation of fresh foods*, cit., p. 514.

⁷⁴ For an extensive depiction of online business models, see RAPPÀ M., *Business Models on the Web*, Managing the Digital Enterprise Course, 2010: “*Business models are perhaps the most discussed and least understood aspect of the web. There is so much talk about how the web changes traditional business models. But there is little clear-cut evidence of exactly what this means. In the most basic sense, a business model is the method of doing business by which a company can sustain itself - that is, generate revenue. The business model spells-out how a company makes money by specifying where it is positioned in the value chain. [...] Internet commerce will give rise to new kinds of business models. That much is certain. But the web is also likely to reinvent tried-and-true models*”.

⁷⁵ For an illustrative example of the different selling channels used by hotels, see MOMTAZ M. A., *The dual distribution discourse: a new perspective for the online hotel booking platforms*, in *European Competition Law Review*, 2017, volume 38, issue 4, pp. 171 ss.

⁷⁶ Emphasis added. See FRATERNALI S., *Mobile Commerce: gli acquisti online da Smartphone*, Osservatori Digital Innovation, School of Management, Politecnico di Milano, 30 May 2019. The Author mentions that 39% of e-commerce purchases in Italy were made via smartphone in 2019.

Among the great variety of food web platforms⁷⁷, this thesis chooses to focus on two main categories, which play a key role in the new digital food chain and are worth highlighting: online groceries platforms (section II.2.a) and online meal platforms (section II.2.b). The first category will be divided into own-brand sellers, pure e-markets, and hybrids, while the second will be split into aggregators and “new delivery” platforms⁷⁸.

a. Online groceries: own-brand sellers, pure e-markets, and hybrids

As for the first category, more and more own-brand sellers are now offering an online alternative to bricks-and-mortar shops, building on a multi-channel environment⁷⁹. Indeed, the internet has revolutionized product distribution, and food vendors have been forced to expand and diversify their selling platforms, creating online commerce sites to not lose shoppers to competitors⁸⁰. The online platform not only helps retain existing clients, but also increases the possibility of new customers used, now more than ever, to the digital highway.

Through the second model, marketplaces provide third-party sellers with a digital “window” to display and sell their products. The online operator acts solely as an intermediary between consumers and traders by managing - and partly regulating and monitoring – a digital platform used by third parties to conclude transactions⁸¹.

⁷⁷ Food Standards Agency UK, *Food sold online. Guidance for local authorities*, December 2016, p. 8.

⁷⁸ Please note that in the dynamism of the digital economy, the above illustration is extremely simplistic and several variations of the five business models may be put in place.

⁷⁹ MELIS K. *et al.*, *The Impact of the Multi-channel Retail Mix on Online Store Choice: Does Online Experience Matter?*, in *Journal of Retailing*, 2015, volume 91, issue 2, p. 272.

⁸⁰ VERHOEF P. C. *et al.*, *From Multi-Channel Retailing to Omni-Channel Retailing Introduction to the Special Issue on Multi-Channel Retailing*, in *Journal of Retailing*, 2015, volume 91, issue 2, p. 174.

⁸¹ RODRIGUEZ DE LAS HERAS BALLELL T., *The legal autonomy of electronic platforms: a prior study to assess the need of a law of platforms in the EU*, in *Italian Law Journal*, 2017, volume 3, issue 1, p. 158.

Next to this “basic” *modus operandi* - that might be called “pure online marketplace” -, an online platform may adopt several operational variations that turns it into a more hybrid version, i.e., a “hybrid online marketplace”. For instance, the online platform, while acting as an intermediary, may also offer traders the possibility to store their products in the company’s warehouses. Additionally, it may be directly involved in transporting goods from warehouses to consumers. Furthermore, the same online company may act both as an intermediary for third-party goods and be involved in selling its own-brand products as a genuine trader⁸². Finally, e-platforms may supply an online grocery pickup service, which allows customers to order food products on the website or via the app and to pick them up in person at designated locations – this last alternative is known as the “click-and-collect” model⁸³.

Compared to conventional stores and supermarkets, online shopping, regardless of the typology – own-brand sellers or marketplaces – presents customers with several opportunities, offering them a new and more efficient experience. For instance, instead of walking down the aisles to find products, purchasers may search for items in different ways, such as “*entering a search term, navigating through categories of products, or browsing special offer pages*”⁸⁴. Online shoppers may have more information available via web, including on which products are usually bought together or extra clarification on the ingredients used⁸⁵. Plus, prices are often proved to be more convenient when buying online.

One final note on the 2020 global health crisis. The COVID-19 pandemic has accelerated the growth of online groceries in unexpected ways. As governments have multiplied restrictions all over the world and millions of people have been asked to stay at home, online food distribution has become one of the main

⁸² Ibidem, p. 159.

⁸³ For instance, Amazon has offered a “click-and-collect” service through its “bricks-and-mortar” Whole Foods stores: see CORKERY M., *Amazon Chases Walmart on Food Pickup*, in *New York Times*, 9 August 2018.

⁸⁴ BENN Y. *et al.*, *What information do consumers consider, and how do they look for it, when shopping for groceries online?*, in *Appetite*, 2015, volume 89, p. 265.

⁸⁵ Ibidem.

protagonists of the quarantine. Consumers have turned to online grocery providers as a safer alternative to shopping in stores. Not only have large supermarkets seen an unprecedented online demand for food, which short-circuited their delivery systems. Many local shops have opened their first online channel as well, to avoid going out of business because of the mandatory or strongly encouraged confinement. Online sales have grown with regards to the whole food sector, from large supermarkets and discount stores, to local small vegetable shops and butchers. In one of the most impacted countries worldwide, Italy, online purchases have increased by 81 percent in the last week of February 2020, and by 97 percent in the second week of March 2020, according to the Italian Institute of Services for the Agricultural Food Market (*Istituto di Servizi per il Mercato Agricolo Alimentare - ISMEA*)⁸⁶. “*That early reliance on e-commerce has [now] expanded into a fundamental dependence on still-evolving omnichannel shopping experiences*”⁸⁷.

b. Online meals: aggregators and “new delivery” platforms

Notwithstanding its relatively young age, online grocery shopping is speedily growing in popularity, along with another remarkable movement, i.e., online meal delivery⁸⁸. First developed in the form of take-out meals and limited to fast food such as pizzas and burgers, digital platforms are now dominating the delivery market. By organizing deliveries in major cities around the world, they present an innovative model that competes with old arrangements.

Meal ordering platforms supply a simple – yet, highly demanded and useful – service, that of connecting customers with local restaurants through an application⁸⁹:

⁸⁶ AMADORE N., *Coronavirus, il Sud vince la corsa a riempire i carrelli della spesa*, in *Il Sole 24 Ore*, 31 March 2020; *Che cibo stiamo comprando*, in *Il Post*, 19 April 2020.

⁸⁷ *COVID-19 has flipped the value proposition of omnichannel shopping for constrained consumers*, Nielsen, October 2020.

⁸⁸ AGUILERA A., DABLANC L., and RALLET A., *L'envers et l'endroit des plateformes de livraison instantanée. Enquête sur les livreurs micro-entrepreneurs à Paris*, in *Réseaux*, 2018, issue 6, pp. 23 ss.

⁸⁹ SUHARTANTO D. *et al.*, *Loyalty toward online food delivery service: the role of e-service quality and food quality*, in *Journal of Foodservice Business Research*, 2019, volume 82, issue 1, pp. 81 ss.

the online delivery company puts in place an ordering system, coordinates transportation and collects a portion of the order's earnings. It may also handle marketing⁹⁰ for specific products or eating-places. The flourishing online delivery market responds to the needs of our fast-moving society, less inclined to "waste" time waiting in line or moving through town to dine out. On the one hand, eating-places have the opportunity to increase their revenue, without any "physical" transformation – such as hiring new staff or expanding seating capacity. On the other, customers are offered new and numerous choices, rapidity, the ease of obtaining food from the comfort of their own home and various "extra" services, e.g., reviews, ratings, invoicing⁹¹. Most online platforms personalize the ordering experience by storing relevant customer data. This allows them to withhold a large number of customers once they sign in, as the latter rarely leave for another channel.

It is worth pointing out that online meal delivery usually falls into two categories, the type described above being the most recent, namely "new delivery". The second – traditional - model is known as the "aggregator". Emerged roughly in the early two thousands, aggregator platforms collect menus and eating options through a web portal, but restaurants are required to handle delivery themselves⁹². Simply put, the customer places an order on the platform (e.g., Just Eat⁹³, Delivery Hero)⁹⁴ with the local pizza parlour, Chinese deli or vegan restaurant and waits for the restaurant to bring the food to their door.

⁹⁰ For instance, by displaying a particular restaurant as "preferred" in user searches.

⁹¹ HE Z. *et al.*, *Evolutionary food quality and location strategies for restaurants in competitive online-to-offline food ordering and delivery markets: An agent-based approach*, in *International Journal of Production Economics*, 2019, volume 215, pp. 61 ss.

⁹² ISAAC M., *UberEats Picks Up Steam Against Rivals*, in *New York Times*, 25 September 2017.

⁹³ WARNER J., *Just Eat and Deliveroo: what has the takeaway delivery market got on the menu?*, in *IG.com*, 22 June 2018.

⁹⁴ HIRSCHBERG C. *et al.*, *The changing market for food delivery*, McKinsey&Company Article, November 2016.

By contrast, the “new delivery” model – born in 2013 - refers to online platforms (e.g., one of the business models of Deliveroo⁹⁵, Foodora)⁹⁶ that have their own organisational structure and provide transport to restaurants that do not offer delivery services⁹⁷. This model extends home delivery to categories of businesses typically reticent to it: higher-end restaurants⁹⁸.

Simply put, both aggregators and “new delivery” platforms allow consumers to check restaurants, compare menus and prices, scan reviews from other customers, order and post ratings. Where the former merely take orders and direct them to restaurants, the “new delivery” actors build their own logistics networks and deal with final distribution. With the assistance from the platform, restaurants get advantages such as customer Wi-Fi, printing services, help with packaging, and payment facilitation⁹⁹.

One final consideration on food platforms’ typologies. The meal kit model stands halfway between grocery delivery and meal ordering. It allows users to order a box full of fresh and partially cooked food products, to have it delivered at home and to cook meals following the kit’s instructions and recipes from – often-renowned - chefs. Ready-to-make meal kits are a way to rethink cooking and eating, striking a balance between wanting a fresh homemade dinner, the experience of feeling the products, and cooking food as a social activity, on the one hand, and not wasting time going through the process of pondering over the menu and shopping for groceries, on the other. The online platform usually offers numerous options in

⁹⁵ Deliveroo UK, *Terms of Service*: “Where you order from a Partner Restaurant, Deliveroo acts as an agent on behalf of that Partner Restaurant to conclude your order from our Application and to manage your experience throughout the order process. Once you have placed an order, your Items will be delivered to you by Deliveroo (“Deliveroo Delivery”) or our Partner Restaurant (“Partner Delivery”) (each a “Delivery”) depending on the Partner Restaurant you have selected. In some cases, the Partner Restaurant may be owned by or affiliated with us”.

⁹⁶ HIRSCHBERG C. *et al.*, *The changing market for food delivery*, cit.

⁹⁷ McGLINN M., *Food Delivery Platforms – Transforming Operations*, cit.

⁹⁸ HIRSCHBERG C. *et al.*, *The changing market for food delivery*, cit.

⁹⁹ On Deliveroo’s functioning, WARNER J., *Just Eat and Deliveroo: what has the takeaway delivery market got on the menu?*, cit.

relation to taste, health concerns (e.g., allergies), diets (e.g., low carb) and moral choices (e.g., vegan).

c. Today's digital economy

Whichever business model they follow, online platforms are key agents of the modern food chain, especially in relation to securing food safety¹⁰⁰. The overall goal, indeed, is to achieve the highest level of safety and consumer protection regardless of whether commodities are exchanged online or in physical conventional settings¹⁰¹. Before moving on to the core of this Chapter - food online qualification – the following paragraphs will briefly illustrate some of the e-platforms currently populating the food industry, in order to provide a clearer picture of the actors involved in today's digital food chain¹⁰². Countless examples of food e-businesses may be found on the web and most of them are well known to the public.

Several supermarkets have established a web shop through which they sell both own-brand and third-party food products. The Italian supermarket chain Coop, for example, allows customers to order online Coop products as well as other products through its EasyCoop platform¹⁰³. The same ordering-and-delivery service is supplied by the French-born Carrefour and it refers to both own-brand and non-Carrefour merchandise¹⁰⁴. Equally, Asda¹⁰⁵ and Instacart¹⁰⁶ provide online grocery

¹⁰⁰ European Commission, *The first EU coordinated control plan on online offered food products. Analysis of the main outcome of the implementation of the Commission Recommendation on a coordinated control plan on the official control of certain foods marketed through the Internet*, 15 February 2018, p. 5.

¹⁰¹ KREWINKEL A. *et al.*, *Concept for automated computer-aided identification and evaluation of potentially non-compliant food-products traded via electronic commerce*, cit., p. 205.

¹⁰² For a portrayal of the Italian food-tech ecosystem, see *L'AgriFood Tech in Italia*, StartUp Geeks, April 2019.

¹⁰³ <https://www.easycoop.com/>.

¹⁰⁴ <https://www.carrefour.it/>. See WILLIAMS R., *Google Enters Deal With Carrefour to Sell Food Online in France*, in *Bloomberg*, 11 June 2018.

¹⁰⁵ <https://groceries.asda.com/>.

¹⁰⁶ <https://www.instacart.com/>.

delivery services, in the United Kingdom and in Canada and the United States, respectively.

When it comes to meal delivery¹⁰⁷, the internet-based platform Uber – whose functioning is at the heart of section II.5 – has recently developed a food-ordering branch through its UberEats¹⁰⁸ application. Distinct from the taxi platform but available to all owners of an Uber account, the delivery service allows customers to choose a meal from a local restaurant, which will be transported by a nearby Uber driver or rider¹⁰⁹. Equally, the British-born Deliveroo¹¹⁰ offers restaurants and takeaways delivery services using riders in bikes and mopeds¹¹¹. The London-based JustEat¹¹² and the German Foodora¹¹³ are food courier players that operate globally as well. The Barcelona-founded Glovo¹¹⁴ does not only offer meals, groceries, and drinks but also pharmaceuticals and a selection of gifts. Whereas Blue Apron¹¹⁵, Plated¹¹⁶ and Hello Fresh¹¹⁷ lead the meal kit industry¹¹⁸.

Many food online platforms seek to contribute to the environment, sustainable production, or social assistance. Barn2Door¹¹⁹ is a farm food marketplace: it

¹⁰⁷ Recent articles on the boom of meal delivery include *Tous les chemins mènent à la Food Delivery*, SmartFood Paris, 28 October 2019 and SINGH S., *The Soon To Be \$200B Online Food Delivery Is Rapidly Changing The Global Food Industry*, in *Forbes*, 9 September 2019.

¹⁰⁸ <https://about.ubereats.com/en/>.

¹⁰⁹ BOND S., *Quick bites: Arriving now – UberEats*, in *Financial Times*, 11 July 2015; MAGNANI A., *UberEats, come funziona “l'altra Uber” da 3 miliardi di dollari*, in *Il Sole 24 Ore*, 27 October 2017; BIAGIO S., *L'economia on demand dietro la consegna del cibo*, in *Il Sole 24 Ore*, 15 November 2016.

¹¹⁰ <https://deliveroo.it/en/>.

¹¹¹ *Deliveroo: not so dishy*, in *Financial Times*, 26 September 2017; McCLEAN P., *PizzaExpress teams up with Deliveroo*, in *Financial Times*, 1 June 2016; BIAGIO S., *L'economia on demand dietro la consegna del cibo*, cit.

¹¹² <https://www.just-eat.co.uk/>.

¹¹³ <https://www.foodora.com/>.

¹¹⁴ <https://www.glovoapp.com/>.

¹¹⁵ <https://www.blueapron.com/>. See *La moda delle “subscription box”*, in *Il Post*, 8 July 2019.

¹¹⁶ <https://www.plated.com/>.

¹¹⁷ <https://www.hellofresh.com/>.

¹¹⁸ See also CucinaBarilla, www.cucinabarilla.it/.

¹¹⁹ <http://www.barn2door.com/>.

connects farmers to customers through a web platform that integrates online and local sales¹²⁰. The French La ruche qui dit oui!¹²¹ is an online platform that links consumers with local producers for the exchange of foodstuffs produced within a short distance from the point of distribution. The Copia¹²² platform connects businesses with excess food – such as restaurants – to underprivileged people, with the double aim of fighting against food waste and redistributing food to those in need.

Digital food innovation is in constant growth and new business models keep mushrooming¹²³. One could think of the recent phenomenon of virtual restaurants or ghost kitchens, namely restaurants made of kitchens only¹²⁴. More specifically, virtual restaurants are defined as traditional restaurants that operate “physically” but decide to manage an additional “sub-restaurant”, which only exists online and which does not use the same brand as the bricks-and-mortar business. The model adopted by ghost kitchens, on the contrary, does not include a restaurant, but only a kitchen and a counter/window that allows riders to take on the food and deliver it.

In this regard, the French start-up Taster¹²⁵ is taking meal delivery to another level, by providing restaurant-quality food without restaurants. In other words, the company builds new “restaurants” – rather, kitchens - that only serve food through third-party online platforms such as UberEats and Deliveroo¹²⁶. Similar examples may be found in Italy with the recently born KtchN Lab¹²⁷ and Whimsy¹²⁸, which

¹²⁰ *Barn2Door disrupts local food ecommerce by eliminating mark-ups to all food purchases*, PR Newswire, 2 February 2016.

¹²¹ <https://laruchequiditoui.fr/fr>.

¹²² <https://www.gocopia.com/about>.

¹²³ AGUILERA A., DABLANC L., and RALLET A., *L'envers et l'endroit des plateformes de livraison instantanée. Enquête sur les livreurs micro-entrepreneurs à Paris*, cit.

¹²⁴ *I ristoranti fatti di sole cucine*, in *Il Post*, 19 August 2019; *CCCS Concludes Investigation into Online Food Delivery and Virtual Kitchen Sectors*, Singapore Competition and Consumer Commission, 5 August 2020.

¹²⁵ <https://www.taster.com/en/about-us/>.

¹²⁶ *Taster creates restaurants for Deliveroo and UberEats*, Plus Company Updates, 28 June 2018.

¹²⁷ <https://www.ktchnlab.com/>.

¹²⁸ <https://www.whimsykitchen.com/>.

are based in Milan. These virtual kitchens are generally set up on restaurants' own initiative: in other words, restaurant owners may decide on their own accord to open these alternative channels and collaborate with food delivery platforms. However, delivery platforms may take the initiative themselves and encourage restaurants to launch online-only sub-branches, while they organize the entire management¹²⁹.

The above picture proves how food is increasingly distributed through conduits that would not exist without internet platforms¹³⁰. And the list goes on¹³¹. Think of the latest emergence of the Business-to-Employee model (B2e), namely online canteens dedicated to workers and professionals¹³². The space of food online platforms is crowded, and competition is tight. Rather, two powerful platforms have established themselves as crucial players of the online food game and have been known in the last two decades as e-commerce titans: Alibaba and Amazon.

Born as an online bookshop in the nineties, Amazon¹³³ is now the largest American internet-based retailer, and in general, one of the largest retailers in the United States¹³⁴. It supplies all sorts of products, including food and beverages. On the one hand, Amazon provides a pure web-window to food sold by others, operating a marketplace where third parties offer their merchandise for sale¹³⁵. In this case, sellers¹³⁶ are the ones fixing the prices of their products and dealing with

¹²⁹ For an illustration of the growth of virtual restaurants during the COVID-19 pandemic: MANCEAU J.-J., *Les marques de restaurants virtuels se régalent pendant la crise*, in *Forbes France*, 30 April 2020.

¹³⁰ *I ristoranti fatti di sole cucine*, cit.

¹³¹ Additional online platforms involved in the food industry are mentioned in *Agriculture and food: the rise of digital platforms*, in *Paris Innovation Review*, 12 February 2016. See also *The future of on-demand food delivery*, Sifted Report, 2020.

¹³² MANUELLI M. T., *Il supermercato amplia i confini: dal risto-retail al food delivery*, in *Il Sole 24 Ore*, 19 January 2020.

¹³³ <https://www.amazon.com/>.

¹³⁴ WINN J. K., *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, in *Arizona Law Review*, 2016, volume 58, p. 193.

¹³⁵ Amazon, *How to start selling on Amazon*.

¹³⁶ Please note that the term seller is not fortuitous. In the Amazon world, sellers sell directly to the end customer through Amazon Marketplace whereas vendors are Amazon Retail suppliers and sell

final delivery. On the other, the web-company sells goods under a variety of its brand names, thus acting as an own-brand seller. In its marketplace capacity, Amazon is neither the buyer nor the seller, but it only creates a venue for sellers and customers to conclude transactions, allowing the former to use an online retail channel without the costs of creating their own websites¹³⁷. Plus, relying on a universally known platform such as Amazon avoids the risks linked to reduced internet traffic as hundreds of customers access the platform daily.

In addition, Amazon presents variations in its business model, by handling one of the most advanced logistics systems worldwide. Amazon logistics include storage, packing, delivery, payment, processing, and web hosting services for sellers. Specifically, through its “Fulfilment by Amazon” (FBA) model¹³⁸, third parties sell their products via the online platform and the web company deals with storage, packing, shipment, and customer service, distancing itself from the mere marketplace role. FBA sellers store their products in Amazon’s fulfilment centres, and then Amazon picks, packs and delivers orders to the customer as they come. Sellers must monitor the levels of available inventory and independently send the products to Amazon’s warehouses when necessary, to guarantee the availability of their offers. Amazon Seller Central, the web-company’s management platform, provides sellers with estimated inventory durations and makes recommendations on the quantity of supplies needed. Sellers who choose the FBA model do not deal with customer service directly, as this is mostly provided by the web platform. On the contrary, sellers who do not use the FBA channel are responsible for offering customer service in users’ local language. Similarly, returns are managed by Amazon when transactions are concluded through the FBA programme, whereas they are dealt with directly by sellers in the pure marketplace model¹³⁹.

Furthermore, certain Amazon “branches” are specifically focused on groceries and meals. For instance, Amazon Fresh allows customers to shop online for frozen,

their products to Amazon wholesale. Vendors can only negotiate the price of wholesale goods to be sold to Amazon and the latter has the right to change the sale price to the final customer.

¹³⁷ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 2.

¹³⁸ Amazon, *Save time and help grow your business with FBA*.

¹³⁹ *Vendere su Amazon: la guida alle differenze tra vendor e seller*, in *Witalier*, 16 April 2018.

perishable, ambient or local grocery products and have them delivered at a selected time, either at pick-up spots or at home. Amazon Fresh carries a same-day grocery delivery business, using logistics and technology in fresh food to focus on the speed of the supply chain. Via Prime Pantry, Prime members can shop online for “pantry” merchandise such as groceries and household products. Through its short-lived “Amazon Restaurants” model, the platform provided a meal-ordering service, connecting customers with local restaurants¹⁴⁰. Most of these services are/were only available in selected countries and/or cities.

On a final note, Alibaba¹⁴¹. Founded in 1999 by Jack Ma, the multinational company is an e-commerce titan, currently providing Consumer-to-Consumer, Business-to-Consumer and Business-to-Business sale services via its web portals as well as some other electronic services such as online payments. It operates through three main platforms: Taobao, Tmall, and Alibaba.com.

Alibaba is considered today China’s – and by some measures the world’s – largest online commerce business¹⁴². Indeed, China has quickly become the global leader in e-commerce and Alibaba is riding its wave, including in relation to food products¹⁴³. Not only is the Chinese population larger than that of any other country but Chinese consumers are also traditionally more inclined to shop for groceries online¹⁴⁴, due to geographical constraints and the market scale. The online

¹⁴⁰ PERRY A., *Amazon Restaurants food delivery service is shutting down*, in *Mashable*, 11 June 2019.

¹⁴¹ <https://www.alibaba.com/>.

¹⁴² LAJOIE M. and SHEARMAN N., *What is Alibaba?*, in *The Wall Street Journal*, last accessed 29 December 2018; XIAO P. and LIU X., *The Enactment of the e-Commerce Law in China and its Impact on Food e-Commerce*, in *European Food and Feed Law Review*, 2019, issue 3, p. 257. On Alibaba’s recent plans to expand in Europe, HEIKKILÄ M., *‘Go back to your cave’: Alibaba’s European expansion triggers anger in Liège*, in *Politico*, 3 February 2020; *Arriva Alibaba*, in *Il Post*, 11 February 2020.

¹⁴³ PHAM S., *It’s not just Amazon: Chinese tech giants are selling groceries too*, in *CNN Business*, 10 October 2017; VAN DER MEULEN B., *The Times They Are a-Changin’*, in *European Food and Feed Law Review*, 2017, issue 2, p. 116.

¹⁴⁴ XIAO P., *Legislative developments of food e-commerce regulation in China and its challenges*, in *European Food and Feed Law Review*, 2018, volume 13, issue 4, pp. 313 ss; see also LEPLATRE

marketplace's range of food products includes fresh produce and pre-packaged goods¹⁴⁵.

In China, e-commerce, and internet technology in general, are also key to boosting prosperity in rural areas. In fact, China holds a peculiar position. It is still very much dependent on agricultural production, but it has also developed a solid electronic selling system to overcome the difficulties of a small-farm economy within a large country¹⁴⁶. Through online platforms, not only are farmers provided with greater access to advanced agricultural machinery, but they are also given a channel for selling their products¹⁴⁷. This way, food produced by farmers can be sold to consumers directly, omitting the steps of wholesale and retail. In this regard, Alibaba runs a site - the Rural Taobao portal - that serves several purposes in the context of rural e-commerce development: it gives villagers access to a broad range of consumer products and services, provides a conduit for procuring agricultural tools and resources and enables farmers to sell their specialty products to locations beyond their villages. The expression "Taobao villages" refers to the rural communities who turn to the online portal to sell their food products¹⁴⁸.

S., *En Chine, le e-commerce à l'heure de la régulation*, in *Le Monde*, 10 March 2019; United States Department of Agriculture, *COVID-19 Drives E-commerce in China*, GAIN Report, 19 June 2020.

¹⁴⁵ It is worth pointing out that food e-commerce and online platforms have recently been the target of major legislative developments in China. In this respect, see XIAO P., *Legislative developments of food e-commerce regulation in China and its challenges*, cit. and CLARK E., *China's new e-commerce law: A step in the right direction*, in *China.org*, 9 January 2019.

¹⁴⁶ ZANLIN R. and YANGYAO Y., *Small farmers big markets and agricultural food safety*, in Session II of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, pp. 103 ss.

¹⁴⁷ *Taobao Villages: How Ecommerce Helps China's Rural Economy*, Sampi, 16 August 2017; UNAL A., *China uses e-commerce as tool for rural development*, in *The Daily Sabah*, 30 September 2016.

¹⁴⁸ For an illustration of the use of e-commerce in the context of agricultural development and of the role of Alibaba, see also *Online buying and selling potential game changer for small-scale farmers*, FAO news, Support to Investment, 13 December 2017.

3. The need for legal qualifications: defining online platforms

Given the above considerations on the importance of the digitalization, in all sectors and specifically in the food industry, it seems natural that scholars and legislators have been debating for decades over internet regulation¹⁴⁹, and consequently over rules applicable to internet-based platforms. As anticipated, the present Chapter explores a significant – preliminary - aspect of food online regulation, namely food online qualification. Specifically, the first step to understanding the role of food online platforms in the EU is foremost a question of understanding what they are and what their activity entails. The goal here is to address the legal classification of food online services in the light of three cases recently brought to the attention of the Court of Justice of the EU (hereinafter also CJEU): *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*¹⁵⁰ (hereinafter *Uber Systems Spain*), *Uber France SAS*¹⁵¹ (hereinafter *Uber France*) and *Airbnb Ireland UC*¹⁵² (hereinafter *Airbnb*).

Definitions and qualifications are essential to address the challenges that the digital era is faced with. In particular, any qualification exercise appears imperative in the fields of e-commerce and internet regulation, which intrinsically affect different legal systems. Qualifying is not an end in itself. By clarifying who is who and what rule governs which situation, legal qualifications and classifications ease communication and guarantee stronger security in interpreting and applying the law¹⁵³.

Notwithstanding the fundamental role of online platforms in the current digital society, no general legal definition has been agreed upon at European Union level

¹⁴⁹ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., pp. 111 ss; DE LAUBIER C., *Le commerce électronique doit être régulé*, in *Le Monde*, 10 March 2019.

¹⁵⁰ Judgment of 20 December 2017, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, C-434/15, EU:C:2017:981.

¹⁵¹ Judgment of 10 April 2018, *Uber France SAS*, C-320/16, EU:C:2018:221.

¹⁵² Judgment of 19 December 2019, *Airbnb Ireland UC*, C-390/18, EU:C:2019:1112.

¹⁵³ GERMANÒ A. and ROOK BASILE E., *Definitions of European Food Law*, Chapter VIII of *European and Global Food Law*, ed. COSTATO L. and ALBISINNI F., 2016, Wolters Kluwer, pp. 173 ss.

yet. The failure of settling on a “single, legally relevant and future-proof definition”¹⁵⁴ of e-platforms can be explained by several factors, including the large variety of types and business models, their diversified activities¹⁵⁵, and the fast-developing and dynamic structure of the digital world¹⁵⁶. Plus, “online platform” is a term born in the economic context together with the emergence of new technologies, receiving only later a legal connotation¹⁵⁷.

Although no official definition of online platforms has yet found a consensus in the Union, certain authors have attempted at providing a wide-ranging one. Helberger - citing Van Dijck¹⁵⁸ - refers to online platforms “as socio-technical architectures that enable and steer interaction and communication between users through the collection, processing and circulation of user data”. Savin¹⁵⁹ first reminds that “although the concept is intuitive and close to most Internet users, it is difficult to give a precise definition of platforms. In IT parlance, platforms normally mean hardware or software as a standard around which a system could be developed”, later simplifying the concept by saying that “at present, though, the practice as well as the academic community considers platforms simply to be one type of a much wider category of information society services”. The latter notion will be defined shortly (section II.4.c). Van Gorp and Batura¹⁶⁰ focus on the

¹⁵⁴ European Parliament, *Resolution on online platforms and the Digital Single Market*, 15 June 2017, P8_TA(2017)(0272).

¹⁵⁵ For instance: payment systems, social networks, e-commerce, communication services, collaborative economy, crowdfunding, and search engines.

¹⁵⁶ STALLA BOURDILLON S., *Uniformity v. diversity of Internet intermediaries' liability regime: where does the ECJ stand*, in *Journal of International Commercial Law and Technology*, 2011, volume 6, issue 1, p. 59.

¹⁵⁷ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 14.

¹⁵⁸ HELBERGER N. *et al.*, *Governing online platforms: from contested to cooperative responsibility*, cit., p. 1, which cites VAN DIJCK J. *et al.*, *Forthcoming. The Platform Society. Public values in a connective world*, 2016, Oxford University Press.

¹⁵⁹ SAVIN A., *Regulating internet platforms in the EU: the emergence of the “Level playing Field”*, cit., p. 3.

¹⁶⁰ VAN GORP N. and BATURA O., *Challenges of Competition Policy in a Digitalised Economy*, Study for the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee), 2015, p. 7.

functional aspect of platforms, namely their mediation role: “*A platform provides a (technological) basis for delivering or aggregating services/content and mediates between service/content providers and end-users. The digital economy can be described as a complex structure of several levels/layers connected with each other by an almost endless and always growing number of nodes. Platforms are stacked on each other allowing for multiple routes to reach end-users and making it difficult to exclude certain players, i.e. competitors*”.

Despite the options proposed by scholars, there is still a gap at regulatory level. The lack of a unique EU definition of internet platforms - which have an inherent cross-border nature¹⁶¹ - could lead to the proliferation of fragmented national qualifications and rules, jeopardizing legal certainty for both businesses and consumers¹⁶².

In fact, the internet, and more specifically online platforms, pose their own challenges to competent authorities, and primarily regulators¹⁶³. Platforms are not neutral and silent players: they are not only potentially covered by numerous

¹⁶¹ LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, January 2012, pp. 23 ss, talks about “*the removal of spatial and temporal bounds*”.

¹⁶² Recital 59 of the Directive on E-Commerce, which will be examined later on, specifies: “*Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework*”.

¹⁶³ European Commission, *Commission Recommendation of 24.7.2017 on a coordinated control plan on the official control of certain foods marketed through the Internet*, cit., p. 2. See also MCKEE D., *The platform economy: natural, neutral, consensual and efficient?*, in *Transnational Legal Theory*, 2017, volume 8, issue 4, p. 455.

legislative measures¹⁶⁴, usually tailored to sector-specific needs¹⁶⁵; they are also the current target of major social and political discussions at EU level¹⁶⁶. These discussions are a reaction to the exponential increase in illegal content hosted by or exchanged through e-platforms in recent years. The growing volume of unsafe, counterfeit, mislabelled, harmful or discriminatory material found online poses severe risks to consumers. The obvious result is a great loss of trust in internet services, which is triggering considerable turmoil over platforms' role in today's digital society.

Considering the rising focus on online platforms at EU level, both from a legislative perspective and from the standpoint of soft law, the lack of a harmonized definition makes it difficult to identify who is who and what applies to whom. Subscribing to a unique and wide-ranging definition of online platform might not be feasible for the time being, nor beneficial to the digital revolution. However,

¹⁶⁴ *Liability regulation of online platforms in the UK*, cit., p. 5: "Critics who argue for new regulation imply that platforms represent an unregulated "wild west". In fact, there is extensive regulation of online content and, in practice, that regulation is being enforced"; p. 17: "It is important not to lose sight on the fact that the content on online platforms is far from unregulated". See also European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, cit., p. 5; STALLA-BOURDILLON S., *Regulating the electronic marketplace through extraterritorial legislation: Google and e-Bay in the line of fire of French judges*, in *International Review of Law Computers & Technology*, 2010, volume 24, issue 1, p. 39; RODRIGUEZ DE LAS HERAS BALLELL T., *The legal autonomy of electronic platforms: a prior study to assess the need of a law of platforms in the EU*, cit., p. 151; MURRAY A. D., *Nodes and Gravity in Virtual Space*, in *Legisprudence*, 2011, volume 5, issue 2, p. 200: "In fact, because the Internet is accessible from almost everywhere in the world, transactions whose real-world analogues would have been restricted to only one or two jurisdictions may potentially be subject to every jurisdiction [...] It may be that the Internet, rather than being unregulated, is in fact the most heavily regulated "place" in the world".

¹⁶⁵ This thesis will examine at length the legislative measures specific to food online. In anticipation of Chapters III and IV, it is worth mentioning Regulation 1169/2011, which aligns food labelling in online settings with that required in physical shops and Regulation 2017/625, which provides national control authorities with the legal basis for mystery shopping and closing websites used by infringers.

¹⁶⁶ Section IV.5.a will illustrate the main points of this debate.

sector-specific distinctions and clarifications are critical for a sound application of laws and policies. This is even more significant when turning to the Food Law scene, in light of the ever-increasing part played by online platforms in the food safety chain.

4. The dual capacity of “food online”

The previous sections introduced food online platforms and the main business models they adopt. They also explained that, despite the impracticability of a one-fit-for-all definition of online platform, it would be desirable to provide tailored clarifications. For the purposes of this thesis, this means that any analysis of food online platforms cannot leave out one preliminary question: what is food online?

a. Food business or information society service: introducing the General Food Law and the Directive on E-Commerce

As mentioned, qualification helps identify which law governs a specific situation. Thus, it is essential to locate the legal frameworks involved when it comes to food online qualification. Such legal frameworks are, as for any case in point, numerous. Nonetheless, for the purposes of the present investigation, a simplified approach could be more reasonable and effective. At EU level, such approach mainly calls for two pieces of legislation.

Indeed, food online platforms may be viewed as actors intrinsically bringing in two features. On the one hand, the issue of food online may be considered from the perspective of its core *substance*¹⁶⁷, that of food. This first aspect, naturally, challenges the heart of European food ruling, Regulation 178/2002^{168 169}. On the other hand, the second – *formal*¹⁷⁰ - trait relates to e-platforms’ external garb, the

¹⁶⁷ Emphasis added.

¹⁶⁸ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, cit.

¹⁶⁹ For an illustration of the structure of the EU legal framework applicable to the food sector, see VAN DER MEULEN B., *The Structure of European Food Law*, in *Laws*, 2013, volume 2, issue 2, pp. 69 ss.

¹⁷⁰ Emphasis added.

means used by food e-companies to offer their services, as in the electronic – online - structures built by platforms to engage in the food chain. This second aspect calls for the main EU law governing the internet world and online platforms, Directive 2000/31 on E-Commerce (hereinafter also ECD)¹⁷¹.

Qualifying food online unquestionably requires a preliminary exploration of certain key definitions provided by these two legislative measures. More generally, any assessment of food online platforms' regulation cannot disregard the scopes and regimes of both the GFL and the ECD. This will serve to the subsequent analysis in Chapters III and IV. Indeed, the principles that govern platforms' responsibilities and liability in the food chain can be found in both frameworks and the goal of this thesis is to check how these can work together to provide a sensible answer to the following questions: are online platforms responsible for food information? Are they liable when information is unlawful? Ultimately, how far should the law hold them responsible for the information accessed through their channels?

b. The GFL and the concept of “food business”

The GFL¹⁷² dictates several principles governing food (and feed) in general and food safety (and feed safety) in particular¹⁷³. It is expressly applicable to all phases of the food chain, from production and processing to distribution. Indeed, the line pursued by the GFL is that of a broad meaning of “Food Law”, which encompasses the wide range of provisions that affect, directly or indirectly, the safety of food¹⁷⁴.

¹⁷¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

¹⁷² For an excursus on the socio-economic, political, and legal context that led to the adoption of the GFL, see VAN DER MEULEN B. and FRERIKS A. A., *Millefeuille. The emergence of a multi-layered controls system in the European food sector*, in *Utrecht Law Review*, 2006, volume 2, issue 1, pp. 158 ss.

¹⁷³ While the GFL covers both food and feed, this thesis will solely focus on the former.

¹⁷⁴ Recital 11 of the GFL: “*In order to take a sufficiently comprehensive and integrated approach to food safety, there should be a broad definition of food law covering a wide range of provisions with a direct or indirect effect on the safety of food and feed, including provisions on materials and*

However, primary production, preparation, handling, and storage for domestic purposes are excluded (Article 1).

The scope of the GFL lies in food safety, in such a way that it is argued that EU Food Law has evolved into EU Food Safety Law¹⁷⁵. The safety of foods is deemed crucial to the health and general well-being of EU citizens¹⁷⁶ as well as to their economic interests, and it is viewed as the *conditio sine qua non* for the proper functioning of the entire food industry¹⁷⁷. This goal is aligned by the GFL with that of achieving the free movement of food products between Member States¹⁷⁸.

The GFL applies to food business operators (hereinafter also FBOs). Hence, the following paragraphs will first examine what is a food business and a food business operator under the GFL. Article 3 defines food business as “*any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of production, processing and distribution of food*”. Pursuant to the same provision, the expression “*food business operator*” means the natural or legal person responsible for ensuring that the requirements of Food Law are met within the food business under control. The phases of production,

articles in contact with food, animal feed and other agricultural inputs at the level of primary production”.

¹⁷⁵ CORINI A., *Behavioural infringements due to the human factor: how is the EU reacting? A focus on EU food safety law rules, food law tools and the Fipronil case*, ERA Forum, April 2019, volume 19, issue 4, pp. 659 ss.

¹⁷⁶ GONZÁLEZ VAQUÉ L., *The European Commission Proposal to Simplify, Rationalise and Standardise Food Controls*, in *European Food and Feed Law Review*, 2013, volume 8, issue 5, p. 308.

¹⁷⁷ The primary position held by safety within the EU legal framework on food has been stressed by Bernd van der Meulen’s work on Article 14(1) of Regulation 178/2002, which explicitly states “*Food shall not be placed on the market if it is unsafe*”. See VAN DER MEULEN B., *The Core of Food Law. A Critical Reflection on the Single Most Important Provision in All of EU Food Law*, in *European Food & Feed Law Review*, 2012, issue 3, p. 117. See also BREMMERS H., VAN DER MEULEN B., *et al.*, *Legal-Economic Barriers to Price Transfers in Food Supply Chains*, in *Applied Studies in Agribusiness and Commerce*, 2012, volume 6, p. 28.

¹⁷⁸ European Parliament, *Food Safety*, Fiche Technique, 2013: “*European food safety policy aims are twofold: to protect human health and consumers’ interests, and to foster the smooth operation of the single European market*”.

processing and distribution of food are further specified as covering “*any stage, including import, from and including the primary production of a food, up to and including its storage, transport, sale or supply to the final consumer*”.

It is worth noting that the 2002 Regulation uses a generic and inclusive term - “*operator*” - to refer to the subject responsible for complying with GFL provisions. This choice not only reflects the need to include different concepts – such as “*entrepreneur*”, “*undertaking*” or “*legal person*” – used in distinct ways in the laws of EU Members, but it also shows that FBOs are not considered through their subjective legal nature – their entrepreneurial classifications - but through their activities and doings¹⁷⁹. Additionally, the reference to *any undertaking* carrying out *any of the activities* related to *any stage*¹⁸⁰ in the definition of food businesses implies that any fragment related to the food chain, any economic initiative that can be defined as production, processing or distribution of food should fall under the scope of the GFL¹⁸¹.

Simply put, the status and therefore Food Law obligations of FBOs arise from carrying out any activity considered a food business, regardless of the legal nature of the subject. These obligations are specified in detail throughout Regulation 178/2002: essentially, operators must ensure that the food produced, stored, transported, and sold satisfies safety conditions.

In consideration of the seemingly all-inclusive definition of “*food business*”, it is natural to wonder as to whether the activity undertaken by food online platforms in general, or by platforms adopting certain business models, should fall under the category of “*food business*” and FOPs should therefore be subject to all GFL obligations, such as any bricks-and-mortar shop. At first glance, most of the categories described in sections II.2.a and II.2.b seem to refer to one or more of the activities of storage, transport, sale or supply of food products: hence, these activities would be covered by the definition of food business ex GFL. Section II.6

¹⁷⁹ GERMANÒ A. and ROOK BASILE E., *Definitions of European Food Law*, cit., p. 179. See also BRUNO F., *Il diritto alimentare nel contesto globale: USA e UE a confronto*, 2017, Wolters Kluwer, pp. 153 ss.

¹⁸⁰ Emphases added.

¹⁸¹ GERMANÒ A. and ROOK BASILE E., *Definitions of European Food Law*, cit., p. 189.

will verify whether this assumption reasonably reflects reality and how it is in line with the definition of information society service (hereinafter also ISS), which stands at the heart of the ECD regime.

c. The ECD and “information society services”

Following internet’s birth, the European Union decided to enact a legislative measure that would take a lenient approach towards online platforms, in order to build a friendly environment for internet services¹⁸². In particular, the goal of Directive 2000/31 on E-Commerce was to shape a basic legal framework for online services, including electronic commerce, to ensure their free movement within the EU (Recital 8), thus contribute to the proper functioning of the internal market (Article 1).

The main purpose of the ECD, that of removing all obstacles to cross-border online services in the EU, entails that Member States “*may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State*” (Article 3(2)). To this end, Member States must ensure that the activity of ISS providers is not to be subject to prior authorisation (Article 4) and national legal systems must allow contracts to be concluded by electronic means, without unnecessary impediments to their legal validity or effectiveness deriving from the use of such means.

The 2000 Directive is especially known for prescribing harmonised rules on liability immunity – known as safe harbour - for ISS providers. This regime will be examined in detail in section IV.4. However, the ECD also deals with transparency and information requirements for online service providers, commercial communications, and electronic contracts.

As anticipated, the second characteristic of food online platforms is the use of digital structures to operate in the food chain. Therefore, food online cannot ignore the definition of information society services provided by the ECD. In this regard,

¹⁸² ROWBOTTOM J., *To rant, vent and converse: protecting low level digital speech*, in *Cambridge Law Journal*, 2012, volume 71, issue 2, pp. 355 ss.

the ECD does not directly define¹⁸³ the concept but refers to the definition established by Directive 1998/34 laying down a procedure for the provision of information in the field of technical standards and regulations¹⁸⁴ ¹⁸⁵. The latter broadly¹⁸⁶ qualifies an ISS as “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*” (Article 1(2)). It is clarified that ISSs are not solely restricted to services involving online contracting, but they also embrace services which are not remunerated by those who receive them, insofar as they refer to economic activities¹⁸⁷. The expression “*by electronic means*” alludes to data sent and received entirely by wire, radio, optical means, or other electromagnetic ways.

¹⁸³ See also Recital 17 of the ECD: “*The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services(21) and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access(22); this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition*”.

¹⁸⁴ Directive (EU) 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998.

¹⁸⁵ Please note that this act is no longer in force and has been replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. However, the definition of ISS still stands.

¹⁸⁶ SCHAUB M. Y., *Why Uber is an information society service. Case Note to CJEU 20 December 2017 C-434/15 (Asociación profesional Élite Taxi)*, in *Journal of European Consumer and Market Law*, 2018, volume 7, issue 3, pp. 109 ss: “*Probably, the drafters attempted to keep this concept broad and without reference to any specific applications, so that it would not be outdated by the fast developments in information technology*”.

¹⁸⁷ E.g., the offer of online information or commercial communications. See ADEYEMI A., *Liability and exemptions of internet service providers (ISPs): assessing the EU electronic commerce legal regime*, in *Computer and Telecommunications Law Review*, 2018, volume 24, issue 1, pp. 6 ss.

Recital 18 of the ECD reminds that the definition of ISSs covers a wide range of economic activities, including “*selling goods online*”. However, it is further specified that the delivery of products and, generally, the provision of services offline are not included in the scope of the ECD.

Additionally, Recital 20 explains that the expression “recipient of a service” incorporates all types of ISSs’ users, including people who provide the information and those who seek it on the internet, regardless of the reasons. More specifically, Article 2 defines recipients as all natural or legal persons who use an information society service, for professional or non-professional purposes, especially to search for information or make it accessible to others.

Finally, the term “service” is interpreted based on Article 57 of the Treaty on the Functioning of the European Union (TFEU), which clarifies that “*services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons*”. The provision further specifies that the term includes activities of an industrial or commercial character as well as craftsmen’s and professional activities¹⁸⁸.

Again, similarly to the conclusions drawn on the definition of food business ex GFL, it appears that the services offered by FOPs comply with the definition of ISSs as well. Indeed, own-brand sellers, marketplaces and delivery platforms all seem to provide remunerated services at a distance, using electronic structures – via web – and at the individual request of a recipient of the services.

The following sections seek to address this apparent double classification with the help from a qualification exercise recently conducted by the CJEU in *Uber Systems Spain* and subsequent cases.

¹⁸⁸ See MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 26 and European Commission, *Guide to the case law of the European Court of Justice on Articles 56 et seq. TFEU*, 2016.

5. Legal classifications following EU case-law: *Uber Systems Spain, Uber France and Airbnb*

a. *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*

i. Context

Legal reactions generally follow technological innovation and, as it frequently occurs¹⁸⁹, courts are called upon to (re)act before legislators¹⁹⁰ and provide some clarity on fast-changing sectors of today's society¹⁹¹. The digital revolution is no exception. The ever-growing incidence of the internet on every aspect of our lives, and particularly the businesses' relocation to online settings, have questioned the usefulness and viability of existing frameworks, asking courts to navigate old rules and find solutions to new issues.

Delivered on December 2017, the *Uber Systems Spain* Judgment has been welcomed with high media and political interest, as it provides a first clarification of the legal nature of e-platforms' services¹⁹². The importance of the case has also

¹⁸⁹ For an historic illustration of CJEU cases on internet regulation since 2004, LENAERTS K., *The case law of the ECJ and the Internet (2004 - 2014)*, in *ELTE Law Journal*, 2014, issue 1, pp. 9 ss. See also the recent case regarding the working relationship between Uber and its drivers before the French Cour de Cassation: Arrêt n°374 du 4 mars 2020 (19-13.316) - Cour de cassation - Chambre sociale - ECLI:FR:CCAS:2020:SO00374; *Uber : l'arrêt de la Cour de cassation signe « la fin d'un savant enfumage »*, in *Le Monde*, 14 March 2020.

¹⁹⁰ Legislators have nonetheless started playing their part. Think of the recent laws targeting the gig economy in California and Italy: BARBIERI F., *Gig economy, stretta su Uber e Lyft: ai «riders» stessi diritti dei dipendenti*, in *Il Sole 24 Ore*, 11 September 2019; *La California ha approvato una legge sui riders*, in *Il Post*, 11 September 2019. As anticipated, Chapters III and IV will illustrate the measures adopted by the EU legislator to address food online.

¹⁹¹ MIDIRI M., *Nuove tecnologie e regolazione: il "caso Uber"*, in *Rivista Trimestrale di Diritto Pubblico*, 2018, issue 3, p. 1020.

¹⁹² Indeed, this Judgment has not gone unnoticed. See BOWCOTT O., *Uber to face stricter EU regulation after ECJ rules it is transport firm*, in *The Guardian*, 20 December 2017; SCOTT M., *Uber is a transportation company, Europe's highest court rules*, in *Politico*, 20 December 2017; TURCI M., *Sulla natura dei servizi offerti dalle piattaforme digitali: il caso Uber*, in *La nuova giurisprudenza civile commentata*, 2018, issue 1, pp. 1089 ss; PALMIERI A., *Uber Pop: fine delle*

been stressed by Advocate General (hereinafter also AG) Szpunar, in his May 2017 Opinion: “*although the development of new technologies is, in general, a source of controversy, Uber is a case apart. Its method of operating generates criticisms and questions, but also hopes and new expectations. In the legal field alone, the way Uber works has thrown up questions concerning competition law, consumer protection and employment law, among others. [...] This request for a preliminary ruling therefore presents the Court with a highly politicised issue that has received a great deal of media attention*”¹⁹³.

In 2014, a Spanish professional taxi drivers’ association brought an action before a national court seeking a declaration that Uber Systems Spain, a company linked to Uber Technologies¹⁹⁴, was engaging in misleading practices and unfair

corse in (mezza) Europa?, in *Il Foro italiano*, 2018, issue 2, pp. 95 ss; COTTONE M. and DEGL’INNOCENTI P., *The European Court of Justice: Uber is a transport service*, Legance Newsletter, January 2018; MARASÀ E. and POLLICINO O., *EU Court of Justice rules that Uber provides a transport service and is not a mere electronic intermediary: regulatory implications and “digital” judicial insulation*, in *Rivista di Diritto dei Media*, 26 January 2018.

¹⁹³ On the innovative and yet disruptive nature of Uber, SIMON, P., *Uber saisi par le droit du marché intérieur*, in *Revue des affaires européennes*, 2017, issue 3, p. 521. See also SYED N., *Regulating Uberification*, in *Computer and Telecommunications Law Review*, 2016, volume 22, issue 1, pp. 14 ss: “*“Uberification” is a term that is now used to refer to disruption of an industry by a mobile application that enables users to quickly source a homogenous service directly from a vast group of private citizen providers. As well as taxis, we have seen the crowd-sourced disruption of the supply of holiday accommodation in the form of Airbnb, as well as package delivery scheduling services (Doorman), event discovery and booking services (YPlan), cleaning, handymen and plumbing services (Handybook) and even massages (zeel). Indeed, investors now routinely hear pitches by start-ups describing themselves as the Uber of X, Y, or Z*”.

¹⁹⁴ For the purposes of the present analysis, Uber Systems Spain and Uber Technologies will be referred to as Uber. For details on the company’s structure, see the Advocate General’s Opinion, paragraph 12: “*Uber is the name of an electronic platform developed by Uber Technologies Inc., a company having its principal place of business in San Francisco (United States). In the European Union, the Uber platform is managed by Uber BV, a company governed by Netherlands law and a subsidiary of Uber Technologies*”. The Advocate General further specifies that his use of the term “platform” should not draw any conclusion on the nature of the subject: “*in particular, this term does not mean that a mere intermediary is involved, since Uber is not an intermediary, as I will explain below*”.

competition considering that both the company and the drivers were acting without the necessary authorizations required by national regulation.

In order to decide whether Uber was involved in unfair competition practices, the Spanish court deemed it necessary to ascertain the legal classification of the company's services¹⁹⁵, stating that determining whether prior authorization was required depended on assessing whether the services provided by Uber were to be considered "*transport services, information society services or a combination of both*"¹⁹⁶. To that end, the national judge referred to the Court of Justice of the European Union requesting a preliminary ruling on the legal nature of the service provided by Uber¹⁹⁷. The Court issued its Judgment on 20 December 2017.

ii. Legal framework

Determining how Uber's activities should be classified requires a reminder to what constitutes an "information society service" under EU law. As anticipated, Article 2(a) of the ECD refers to Directive 1998/34 laying down a procedure for the provision of information in the field of technical standards and regulations¹⁹⁸ to define the concept. The latter states that ISSs include "*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*" (Article 1(2)). More specifically, "at a distance" means that the parties are not present in the same location at the same time, whereas

¹⁹⁵ In Advocate General Szpunar's words, "*The interpretation that the Court has been asked to provide must serve only to ascertain where Uber stands in terms of EU law, in order to determine whether, and to what extent, its functioning falls within the scope of EU law*".

¹⁹⁶ Paragraph 15 of the Judgment.

¹⁹⁷ In fact, the Spanish Court clarified that, even though Uber Systems Spain operates within the national territory, its activity is linked to an international platform, thus justifying an EU level assessment of its *modus operandi* (paragraph 14 of the Judgment). In this regard, see CARTA C., *Uber face à la compétition économique et au respect des règles de droit*, in *Revue des affaires européennes*, 2017, issue 4, p. 758.

¹⁹⁸ As mentioned, Directive 98/34 was repealed by Directive (EU) 2015/1535. Nevertheless, Directive 98/34 remains applicable *ratione temporis* to the main proceedings of *Uber Systems Spain*: see paragraph 4 of the Judgment.

the expression “by electronic means” comprises data sent and received entirely by wire, radio, optical means, or other electromagnetic ways.

Again, the interpretative question addressed to the CJEU, which solely concerns the legal nature of Uber’s services, is crucial to determining the regulatory framework applicable to the company’s activities. As previously mentioned, in fact, qualification is not valuable *per se* but serves the purpose of identifying which rules govern specific circumstances: in the present case, the rules concerning the freedom to provide services¹⁹⁹.

In particular, if the services at hand were not to be considered as transportation but were to be covered by the Directive on E-Commerce or by Directive 2006/123/EC²⁰⁰ on services in the internal market (IMSD), the activities undertaken by Uber without a licence or authorization could not be considered as unfair practices²⁰¹. On the one hand, the main purpose of the ECD is to ensure effective freedom to provide information society services. Its Article 3(2) dictates that Member States “*may not, for reasons falling within the coordinated field*²⁰², *restrict the freedom to provide information society services from another Member State*”. On the other hand, the IMSD - which explicitly does not apply to transport services – aims at facilitating the free movement of services. Pursuant to its Article 9, “*Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied: (a) the authorisation scheme does not discriminate against the provider in question; (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective*”.

¹⁹⁹ TURCI M., *Sulla natura dei servizi offerti dalle piattaforme digitali: il caso Uber*, cit., p. 1088.

²⁰⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

²⁰¹ Paragraph 15 of the Judgment.

²⁰² Article 2(h) of the Directive on E-Commerce defines the coordinated field as “*requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them*”.

Alternatively, if Uber's activities were to be classified as transport services, they should be excluded from the scope of the freedom to provide services and, as the European Union legal framework currently stands, it would be for the Member States to regulate the conditions under which transport services may be offered, in accordance with EU primary law²⁰³. National legislation is, in this case, free to restrict providers' freedom, within the limits that may be imposed by other EU provisions.

iii. Qualification criteria: the Opinion of Advocate General Szpunar

Uber is described as a for-profit company that contacts drivers and provides them with a smartphone and electronic platform interface, which allows them, in turn, to connect with people who wish to make urban journeys. In other words, the company acts as an intermediary between drivers and people who need a ride within a city. The transport services offered by the platform may be classified into various categories depending on drivers' qualities and vehicles' types. In particular, the service known as UberPop connects potential passengers with non-professional private drivers who use their own vehicles²⁰⁴. The latter service is the one at issue in the present case.

Under Article 2(a) of the ECD – by reference to Article 1(2) of Directive 1998/34 – ISSs are *entirely*²⁰⁵ transmitted, conveyed, and received by electronic means. Advocate General Szpunar acknowledges, though, that among the large array of online businesses, some stages of the activity may not be pursued electronically as they necessarily involve material elements. For instance, this is true for delivering physical goods in the context of online sales. This applies to the present case as well, where the act of physically moving passengers from one place to another cannot be carried out online.

²⁰³ Paragraphs 46 and 47 of the Judgment. In this case, Uber's services would fall within the scope of the shared competence between EU and Member States in the local transport sector, a competence not yet exercised at supranational level. See also paragraph 2 of the Advocate General's Opinion.

²⁰⁴ Paragraph 14 of the Opinion.

²⁰⁵ Emphasis added.

These examples introduce the qualification challenges of “composite or mixed services”, for which the central question is whether they fall – at all times or in particular hypotheses - within the scope of the ECD²⁰⁶. In his Opinion, Mr Szpunar explains that in the case of mixed services, namely those that comprise electronic and non-electronic elements, “*a service may be regarded as entirely transmitted by electronic means, in the first place, when the supply which is not made by electronic means is economically independent of the service which is provided by that means*”²⁰⁷. Simply put, where an activity includes both electronic and non-electronic services, the electronic services may directly meet the definition of information society services – in the presence of all the conditions required by the ECD definition - solely if they are economically independent of those carried out non-electronically²⁰⁸. Otherwise, where the provider of the electronic service is also the provider of the non-electronic one, or where the former exercises significant control – i.e., “decisive influence” - over key requirements of the latter service, “*so that the two services form an inseparable whole*”²⁰⁹, the business must be examined in its entirety, and the “main component” criterion – as in, the element that gives the entire operation meaning in economic terms – shall be applied. In this last case, to be classified as an information society service, the main component must be performed electronically.

To sum up, where an online platform supplies composite services, qualification is a process that may involve two steps. The first – necessary - stage seeks to clarify whether these services are independent or whether they should be qualified together. In the former hypothesis, the electronic and non-electronic services may be classified separately and connected to different provisions. By contrast, where these services must be examined together as part of a unique operation, because

²⁰⁶ Paragraph 28 of the Opinion.

²⁰⁷ Paragraph 33 of the Opinion.

²⁰⁸ For instance, platforms for the purchase of flights, where the service provided by the intermediary – as in, connecting users with independent sellers – remains economically independent since traders pursue their activity autonomously: see paragraph 34 of the Opinion. Section II.5.c will focus on an accommodation-booking platform, Airbnb.

²⁰⁹ Paragraph 35 of the Opinion.

they are provided by the same operator or because the provider of one service exercises significant control – “*decisive influence*” criterion²¹⁰ – over the other, we move to the second stage of the qualification process. In this case, the “*main component*” criterion²¹¹ decides which service absorbs the other for the purposes of legal qualification^{212 213}.

iv. Judgment

Building on Advocate General Szpunar’s points, the CJEU recognises that, in principle, the intermediation service that digitally connects drivers with clients could be considered a service separate from “*the physical act of moving persons or goods from one place to another by means of a vehicle*”, namely the transport service^{214 215}. Simply stated, the Court does not exclude, *a priori*, that those services may be examined distinctly and linked to different provisions²¹⁶. Consequently, the intermediation service provided by Uber may be classified, theoretically, as an

²¹⁰ Emphasis added.

²¹¹ Ibidem.

²¹² For a detailed analysis of the main component criterion, see DIVERIO D., *Se Uberpop è un servizio di trasporto un via libera (condizionato) alla sua regolamentazione da parte degli Stati membri*, in *Rivista italiana di diritto del lavoro*, 2018, issue 2, p. 416.

²¹³ It is worth stressing that these criteria are in part consistent with the principles laid down by the European Commission in its 2016 agenda for the collaborative economy: European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy*, 2 June 2016, COM(2016) 356 final, p. 6. In particular, the EC starts by stating that collaborative platforms supply information society services. Nevertheless, in certain cases, collaborative platforms may be considered as offering other – underlying - services in addition to the mere intermediation ISS (e.g., transport). Whether a collaborative platform also provides the underlying service will normally have to be established on a case-by-case basis, but certain criteria might help in the assessment, including the level of control or influence that the collaborative platform exerts over the provider of such services. See also PALMIERI A., *Uber Pop: fine delle corse in (mezza) Europa?*, cit., p. 97.

²¹⁴ Paragraph 34 of the Judgment.

²¹⁵ DIVERIO D., *Se Uberpop è un servizio di trasporto un via libera (condizionato) alla sua regolamentazione da parte degli Stati membri*, cit., p. 408.

²¹⁶ Ibidem.

“information society service” ex Article 2(a) of the ECD, as it is “*normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”²¹⁷.

That said, however, the Court further observes that the service provided by Uber is more than an intermediation, namely more than a strict digital connection between supply and demand: in fact, Uber creates the supply itself, by selecting non-professional drivers and providing them with an application without which the drivers would not offer transport services to begin with. Otherwise stated, such drivers do not pursue an autonomous activity that would exist independently from the platform. The provider of the intermediation is also the one simultaneously offering transport services, laying down the essential conditions of the entire business and organising the supply. In fact, the CJEU highlights the “decisive influence” exercised by the company over relevant conditions of the service, including maximum fares²¹⁸, safety requirements and vehicles’ quality²¹⁹. In the Court’s words, “*Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion*”²²⁰.

²¹⁷ Simply put, and *prima facie*, the service allowing users of an electronic platform to be connected corresponds to the definition of ISS. Such conclusion was reached by the CJEU in *L’Oréal v eBay*, where the Court affirms that the operation of an online marketplace, that is to say, an internet service consisting in facilitating relations between sellers and buyers of goods, may, in principle, constitute an information society service within the meaning of Directive 2000/31. See paragraph 109 of Judgment of 12 July 2011, *L’Oréal SA and Others v eBay International AG and Others*, C-324/09, EU:C:2011:474. This case will be investigated more thoroughly in section IV.4.c with regards to case-law developments of the ECD immunity regime.

²¹⁸ Paragraph 15 of the Advocate General’s Opinion: “*The fare scale is drawn up by the operator of the platform based on the distance and duration of the trip*”.

²¹⁹ See also the Advocate General’s Opinion, paragraphs 14-15, 41-53.

²²⁰ Paragraph 39 of the Judgment.

The “decisive influence” criterion along with the fact that the “connecting” service is only a tool inherently linked to the final transport lead the Luxembourg Court to conclude that the services offered by Uber should be regarded as a whole and cannot be qualified separately²²¹. The company, in fact, manages the general operation and not only the “intermediation” fragment and the service is presented to users as being provided, from an economic standpoint, by Uber or on its behalf²²².

It is worth observing that, as Advocate General Szpunar highlights in paragraph 52 of his Opinion, the control exercised by Uber over relevant conditions of the activity ignores Labour Law specific structures, that is to say that such decisive influence happens regardless of the legal relationship binding the two parties. Indeed, Uber’s control, despite it being somehow indirect, appears to be stronger and more effective than management based on formal orders given within traditional employer-employee mechanisms.

Once acknowledging that the entire operation carried out by Uber should be considered as an indivisible whole, the EU judges use the additional “main component” criterion to fully qualify the company’s service: the platform’s online intermediation forms an integral part of an overall service whose central element is urban transport. In fact, the general aim of the operation is transportation from one place to another, the connection being only a preparatory, not self-standing stage to the main transport supply.

In line with a purposive – teleological – interpretation of online platforms’ functioning²²³, the Court closes its Judgment by stating that an intermediation service such as that at hand, the purpose of which is to connect through an application non-professional drivers and passengers, must be classified as a service in the field of transport and not as an information society service. The CJEU subsequently concludes that the ECD does not apply to the activity at hand, nor

²²¹ SIMON, P., *Uber saisi par le droit du marché intérieur*, cit., p. 524: the Author speaks of “*la stricte indissociabilité*” of its services.

²²² Paragraph 53 of the Advocate General’s Opinion.

²²³ TURCI M., *Sulla natura dei servizi offerti dalle piattaforme digitali: il caso Uber*, cit., p. 1090.

does the 2006 IMSD, which expressly excludes transport services from its scope (Article 2(2)(d))²²⁴.

b. *Uber France SAS*

i. Context

The CJEU and Advocate General Szpunar were called upon to deal with the functioning of Uber in a second case, for which the Judgment was delivered on 10 April 2018.

Uber France relates to criminal law proceedings brought before the Lille Regional Court against Uber France for setting up, through the UberPop service, an intermediation scheme between customers and non-professional drivers. Such criminal proceedings were based on recent French legislation, which prohibits the organisation of a system that puts passengers in touch with persons undertaking certain activities, namely “*the carriage of persons by road for remuneration using vehicles with fewer than ten seats, with the exception of collective public transport and private carriage of persons by road*”, where such persons are not road transport undertakings entitled to occasional services nor taxi drivers²²⁵.

Uber France considered the above French legislation as technical regulation concerning an information society service within the meaning of Directive 1998/34. The latter requires Member States to immediately notify the European Commission of any draft legislation providing technical regulations relating to information society services, failing which that legislation would be unenforceable against individuals. Because French authorities did not make any notification prior to promulgation, Uber France inferred that no charges could be pressed. Uncertain on how to qualify the national legislation at hand, the Lille Regional Court referred to

²²⁴ For the sake of completeness, the CJEU infers that such service is therefore covered by Article 58(1) TFEU, according to which “*freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport*”, and not by Article 56, which refers to the freedom to provide services in general. However, the EU has not yet adopted common rules on the subject. Hence, as the supranational framework currently stands, it is for Member States to establish the conditions under which services such as Uber’s are to be provided.

²²⁵ Paragraph 8 of the Judgment.

the CJEU the preliminary question as to whether it represented a technical regulation related to ISSs under EU law, such that it had to be previously notified to the Commission²²⁶.

ii. Qualification criteria: Advocate General Szpunar’s additional considerations

Setting aside the merits of *Uber France*, which fall outside the scope of the present analysis, the Luxembourg Court confirms *Uber Systems Spain* findings with regards to the legal classification of the platform’s services. The CJEU observes that, since the services offered by Uber France are not essentially different from those provided by Uber Systems Spain, the same conclusions in terms of qualification may be drawn. In particular, the intermediation service supplied by Uber forms an integral part of an overall service the main component of which is transportation. Therefore, the service offered by Uber must be entirely classified as a service in the field of transport and not as an ISS.

That said, in his July 2017 Opinion, the Advocate General focuses on two points that are worth examining. While reiterating *Uber Systems Spain* criteria – according to which the connection service is not independent of the transport service, the latter being the economic *raison d’être* of the whole activity –, Mr Szpunar adds two considerations that help clarify the nature of Uber’s activities and, more generally, qualify the services provided by e-companies.

First, the AG draws a distinctive line between Uber’s services and the activity of “*advertising for a dental practice posted on an internet website created by the practitioner*”, whose functioning was analysed in *Vanderborgh*²²⁷. In Mr Szpunar’s opinion, the latter falls within the definition of information society services. Such conclusion stems from the argument that the website is a communication of information primarily directed to the public, a strict marketing tool set by the practitioner to enlarge the pool of potential patients. Yes, the advertisement run online is closely connected with the dental practice. Nonetheless, it has no certain

²²⁶ On *Uber France*, see SIMON, P., *Uber saisi par le droit du marché intérieur*, cit., p. 522 and p. 525.

²²⁷ Judgment of 4 May 2017, *Luc Vanderborgh*, C-339/15, EU:C:2017:335.

link to the dental care provided to individual patients, as this communication may or not result in the subsequent provision of dental services – and, in most cases, it will not. The opposite is true when it comes to the connection service provided by Uber. The platform targets persons who are already Uber customers and the intermediation leads to the actual provision of a transport service. Moreover, the intermediation is a necessary precursor to the following transportation, whereas dental patients may consult the practitioner regardless of the advertising website.

These considerations seem consistent with *Uber Systems Spain*. As previously explained, where an operation involves both electronic and non-electronic services, the electronic services may be defined as ISSs if they are economically autonomous from those carried out non-electronically. Although advertising on the web a particular service is delivered by the same operator that undertakes the promoted practice – in this case, the dental practitioner -, this online service is independent of the specific medical care, which may or may not occur afterwards. Unlike the provision of the transport service, which is strictly and necessarily connected to the online platform²²⁸.

From Mr Szpunar’s first point, the following considerations on classification may be inferred: a website that solely advertises for a particular activity must be classified independently of the non-electronic practice, even though both the electronic service – the online marketing – and the non-electronic service – in *Vanderborght*, the actual dental care – are provided by the same operator. Not only is web advertising directed to the general public for the sole purpose of attracting new clients; but it is also “loosely” linked to the non-electronic activity, which may or may not happen and which may very well be offered regardless of the online communication.

Through his second point, Mr Szpunar further clarifies the concept of influence of one operator over the other, which constitutes one of the qualification criteria

²²⁸ These points are fully in keeping with the AG’s considerations expressed in *Uber Systems Spain*: in particular, in paragraphs 57-59, Mr Szpunar draws the line between the functioning of Uber and that of “intermediation platforms such as those used to make hotel bookings or purchase flights”. Indeed, the latter are deemed “*simply one of a number of ways of marketing*” the services offered by hotels and airlines.

expressed in *Uber Systems Spain*. To this end, the AG distinguishes between the functioning of the Uber platform and “*the relationship between a franchisor and its franchisees under a franchise agreement*”²²⁹. More particularly, he focuses on the control that the franchisor typically exercises over the franchisees’ activities and explains why such control cannot be perceived as the decisive influence that Uber has over the platform’s drivers. On the one side, franchisors solely provide specific services and tools, such as know-how and equipment, but have no direct contact with the customers of the final service. The franchisor’s activity and that of franchisees are autonomous undertakings, and the former only determines certain conditions under which the service may be provided to the final user. On the opposite side, Uber is directly involved in the whole operation and, contrary to the franchisor, it may be regarded as the provider of the transport service, even though the material act of moving passengers from one place to another is performed by drivers.

According to *Uber France*, the “decisive influence” criterion does not occur each time one operator exercises some control over the other – in the case of franchisors, providing know-how, trademark licenses or advice. In his Opinion, the AG seems to indicate that the influence of the platform should be substantial – “decisive” -, the relationship with customers should be direct and the service should be offered by the online company in order for the activity to be qualified as a whole. Simply stated, what differentiates Uber’s functioning from the relationship between a franchisor and a franchisee is that the former is involved in the provision of the whole service, whereas the franchisor is not the service provider and has no relationship with users but simply offers specific services and exercises some control over certain conditions. Therefore, the services of the franchisor are independent of the final services offered by the franchisees²³⁰.

²²⁹ Paragraph 22 of the Advocate General’s Opinion.

²³⁰ See also paragraph 53 of the Advocate General’s Opinion on *Uber Systems Spain*, where the online company is described as the one providing the service from an economic standpoint.

c. *Airbnb Ireland UC*

i. Context

Recently, the CJEU was involved with a third case on the legal classification of services provided via electronic platforms. Unlike the two previous cases, this one did not focus on a web company related to urban transportation but dealt with Airbnb, an online accommodation platform. The Luxembourg judges were asked to determine whether a service consisting in connecting hosts with accommodation to rent with potential guests corresponds to the definition of information society service ex ECD and hence benefits from the free movement of services guaranteed by the Directive. More specifically, the Court was invested with a request for a preliminary ruling concerning the interpretation of Article 3 of the ECD, according to which each Member State may not, for reasons falling within the coordinated field²³¹, restrict the freedom to provide information society services from another Member State.

Airbnb Ireland UC is a company based in Dublin, Ireland, established under Irish law, and part of the larger Airbnb Group, which is composed of several companies directly or indirectly owned by Airbnb Inc., and based in the United States. Airbnb Ireland administers, for all users established outside the United States, an online platform designed to connect hosts (professionals and individuals) with an accommodation available to rent, on the one hand, with persons seeking that type of accommodation, on the other. Airbnb Ireland provides potential guests with a list of available options matching their criteria (dates, number of people, location etc.) so that users can select their accommodation and proceed to book it online. Airbnb Payments UK Ltd is a London-based company supplying online payment services as part of this connection service. Airbnb France SARL, a company established under French law, is a supplier to Airbnb Ireland and responsible for promoting the

²³¹ As explained in footnote 202, the term “coordinated field” is defined by the ECD as “requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them”.

platform in the French market, including through advertising campaigns for target audiences.

In addition to the online intermediation, Airbnb Ireland offers hosts other services²³², which will be illustrated in the following section. In terms of payment, guests transfer the rental price to Airbnb Payments UK to which a specific percentage²³³ of the amount is added for charges and services offered by Airbnb Ireland. Airbnb Payments UK holds the payment on behalf of the guest and then, 24 hours after the guest checks in, sends the money to the host. Simply put, users – i.e., hosts and guests - conclude a contract with Airbnb Ireland for the use of the platform and with Airbnb Payments UK for the payments made via that platform.

That said, in January 2017 a French Association for professional tourism and accommodation (the *Association pour un hébergement et un tourisme professionnels*) made a complaint against the practice, between 11 April 2012 and 24 January 2017, of activities concerning the mediation and management of buildings and businesses without a professional licence, as required by the French Hoguet Law²³⁴. The latter, i.e., Law No 70-9 of 2 January 1970 regulating the conditions for the exercise of activities relating to certain transactions concerning real property and financial goodwill, in the version applicable to the facts in the main proceedings, applies to natural or legal persons who lend themselves to or give their assistance on a regular basis, even in an ancillary capacity, to any transaction related to the purchase, sale, search for exchange, leasing or sub-leasing, seasonal or otherwise, furnished or unfurnished, of existing buildings or those under construction. Pursuant to the Law, only natural persons or legal entities holding a

²³² Interesting to note that this Judgment was adopted just a few months before Airbnb implemented new changes to its services to address the negative impact of the COVID-19 pandemic on the travel sector. The platform now includes an extra section dedicated to digital experiences, where the user can connect via Zoom and participate in cooking, yoga, drawing sessions etc. held by hosts all over the world. See MACCAFERRI A., *Airbnb reagisce al tracollo e lancia le Esperienze online*, in *Il Sole 24 Ore*, 9 April 2020; *La crisi della sharing economy*, in *Il Post*, 3 May 2020.

²³³ 6 to 12 %.

²³⁴ Loi n°70-9 du 2 janvier 1970 réglementant les conditions d'exercice des activités relatives à certaines opérations portant sur les immeubles et les fonds de commerce.

professional licence can carry these activities, on penalty of imprisonment and fines.

The *Association* claimed that Airbnb Ireland does not merely connect hosts and guests; it is also the supplier of additional services that amount to an intermediary activity in property transactions²³⁵. Thus, in March 2017, charges were brought before the Tribunal de Grande Instance de Paris (Paris Regional Court). By contrast, Airbnb Ireland denied its role as a real estate agent and argued that the Hoguet Law is incompatible with the ECD, and specifically with Article 3.

Uncertain whether the services provided by Airbnb Ireland should be classified as information society service and, if so, whether the Hoguet Law cannot be applied to the company in the main proceedings, or whether, on the contrary, the ECD does not preclude criminal proceedings being brought against Airbnb Ireland on the basis of French Law, the national investigating judge decided to refer to the CJEU for a preliminary ruling.

Setting aside the questions irrelevant to the present thesis²³⁶, the referring court asked whether Article 2(a) of the ECD “*must be interpreted as meaning that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of other services, such as a format for setting out the content of their offer, a photography service, civil liability insurance and a guarantee against damages, a tool for estimating the rental price or payment services for those accommodation services, must be classified as an ‘information society service’*” under that same Directive²³⁷.

²³⁵ Paragraph 24 of the Judgment.

²³⁶ Mainly, whether the Hoguet Law is enforceable against Airbnb Ireland (paragraphs 78 ss of the Judgment): more particularly, “*the second question should therefore be construed as asking whether Article 3(4) of Directive 2000/31 must be interpreted as meaning that, in criminal proceedings with an ancillary civil action, an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide an information society service which that individual provides from another Member State, where those measures do not satisfy all the conditions laid down by that provision*”.

²³⁷ Paragraph 39 of the Judgment.

ii. The AG’s Opinion: clarifying *Uber System Spain*

That said, and before moving on to the Court’s Judgment, it is interesting to refer to Advocate General Szpunar’s Opinion, to check whether he provides additional guidance on the qualification of services provided by online platforms.

In his Opinion delivered on 30 April 2019, the AG assesses whether the activity delivered by Airbnb Ireland is comparable to that of Uber. In particular, his goal is to examine if the service provided by the web company is an information society service ex ECD or an intermediation service, which in conjunction with the other services offered by Airbnb Ireland, “*constitutes a global service the main element of which is a service connected with real property*”²³⁸. In order to answer this question, the AG studies the functioning of the electronic platform.

As mentioned in the previous paragraph, Airbnb Ireland administers an online platform that connects hosts with guests. The e-company also supplies a range of ancillary services to hosts, including a scheme defining the content of their offer, a photography service, civil liability insurance, a guarantee for damage of up to € 800 000, a tool for estimating rental prices²³⁹ and payment services related to these services. The AG highlights that it is the host’s responsibility to set tariffs, establish the calendar of availabilities, determine the reservation criteria, and draw up house rules, which any guest must accept²⁴⁰. Furthermore, the platform also includes a system through which hosts and guests may leave assessments. Where a host receives mediocre ratings and negative comments or cancels confirmed reservations, the platform may temporarily suspend the listing, cancel a reservation, or even prohibit access to the site.

The AG affirms that *prima facie* and taken separately, the service allowing users of an electronic platform to be connected corresponds to the definition of an information society service, as it is provided for remuneration, at a distance, by electronic means and at the individual request of the recipient.

²³⁸ Paragraph 23 of the Advocate General’s Opinion.

²³⁹ The optional rental price estimation tool is based on the market average available on the platform.

²⁴⁰ Paragraph 27 of the Opinion.

However, and following up on what already pointed out in *Uber Systems Spain*, the AG reminds that while the test as to whether a service is for remuneration and provided upon individual request does not appear to be problematic, the same cannot be said of the test as to whether a service is offered at a distance by electronic means. This happens since the line between the components provided by electronic means and those delivered in the “physical world” may be blurred. In particular, to classify Airbnb Ireland’s mixed services, that is to say, services consisting of an element provided by electronic means and another that is not provided by electronic means, one needs to investigate how the electronic service of mediation between guests and hosts is combined and interacts with the non-electronic one of consequent accommodation. Referring to *Uber Systems Spain*, the AG reminds that this classification implies testing whether these services form an inseparable whole.

According to Mr Szpunar, the service provided by Uber is considered more than an intermediation as the online provider “*simultaneously offers urban transport services*”²⁴¹, whose “*general operation it organizes*”^{242 243}. In relation to the first criterion – i.e., offer of services -, the Advocate General explains that Uber drivers would not be led to provide transport services and people who need a ride would not be able to use these drivers’ services, if it were not for the application provided by the platform. Simply put, the service would not exist without Uber, leading to conclude that the web company does “*offer services*”²⁴⁴ having material content. Turning to the second criterion – i.e., organization of the general operation -, the AG takes the opportunity to clarify the decisive influence criterion introduced in *Uber Systems Spain*. This influence over the conditions under which services are provided by the drivers (e.g., maximum fare, quality of the vehicles and their drivers) is only a tool proving that Uber does organise “*the general operation of the services that [are] not provided by electronic means*”²⁴⁵.

²⁴¹ Emphasis included in the Opinion.

²⁴² Ibidem.

²⁴³ Paragraph 49 of the Opinion.

²⁴⁴ Emphasis included in the Opinion.

²⁴⁵ Paragraph 52 of the Advocate General’s Opinion.

In other words, AG Szpunar’s Opinion on *Airbnb* seeks to refine the principles traced in *Uber Systems Spain* and *Uber France*. Determining whether a service provided by electronic means – meeting, in theory, the definition of an ISS - is separable from other services having material content, demands a two-step test: (1) whether the service provider offers services having a material content and (2) whether the service provider exercises a decisive influence on the conditions under which these services are provided. That said, the AG proceeds to check how these two criteria apply to Airbnb Ireland.

The question as to whether the online company creates an offer is answered negatively. Echoing Uber’s functioning, the AG explains how UberPop involves non-professional drivers, whose service could not be provided without the Uber platform. “A non-professional driver could, admittedly, have himself attempted to provide an on-demand transport service; however, without Uber’s application, that driver would have been unable to guarantee a match between his offer and demand”²⁴⁶. On the contrary, the Airbnb platform is directed to both professional and non-professional hosts and the short-term accommodation scheme exists through various traditional channels and hosts’ own websites, since long before the web company started its services. Mr Szpunar thus concludes that the accommodation services are not inseparably linked to the service provided by the platform by electronic means, in the sense that they can be supplied independently.

The AG further addresses the question of the relationship between the criterion just mentioned – i.e., offer of services – and the criterion related to the control exercised over the provision of services, pointing out that this question did not arise with respect to Uber, since these two criteria were satisfied in that case. In Mr Szpunar’s Opinion, the test “creation of a supply of services” is a mere indication that the service provided by electronic means and the one having material content are not independent. However, it is not enough that a provider creates a new supply of services: the offer of those services must be followed by the maintenance, under the control of that provider, of the conditions under which they are provided²⁴⁷. In other words, the criterion concerning the creation of a supply of physical services

²⁴⁶ Paragraph 57 of the Advocate General’s Opinion.

²⁴⁷ Paragraph 65 of the Advocate General’s Opinion.

is not decisive to answer the question as to whether those services form an inseparable whole with the service provided by electronic means. *“It is the decisive influence exercised by the service provider over the conditions of the supply of the services having material content that is capable of rendering those services inseparable from the service that that provider provides by electronic means”*²⁴⁸.

On this basis, the AG examines whether Airbnb Ireland exercises such control over the conditions governing the provision of the short-term accommodation and compares it to the type of control exercised by Uber. In the latter case, the decisive influence over the conditions under which transport is delivered was confirmed by a series of elements, including the fact that the company determines the maximum fare, collects the price from the customer before paying part of it to the non-professional driver and has control over the quality of the vehicles and the drivers’ conduct, which would, in some circumstances, result in their exclusion.

On the contrary, Airbnb Ireland does not seem to exercise control over all the economically significant aspects of the short-term accommodation, such as the location and standards of the houses/rooms. Plus, Airbnb Ireland does not control the price of the accommodation. While Airbnb Ireland provides optional assistance in establishing the price, it is up to the host to set it. In addition, unlike Uber drivers, Airbnb hosts are not discouraged from setting the price themselves, the only factor that might inhibit them from doing so being the logic of supply and demand. Hosts are also the ones determining the letting conditions. Airbnb Ireland does pre-define the options for cancellation. However, it is always the host who chooses one of the options proposed and, ultimately the decision on the cancellation conditions rests with them. Another difference lies in quality control. While Uber has control over the quality of the vehicles and their drivers as well as over the drivers’ conduct by referring to the standards that Uber itself has determined, Airbnb Ireland’s control concerns users’ compliance with standards chosen by those users. Finally, the AG points out that the mere fact that a service provided by electronic means includes payment facilities for the services that are not provided by electronic means does not lead to the conclusion that all of these services are inseparable.

²⁴⁸ Paragraph 67 of the Advocate General’s Opinion.

Hence, according to the Advocate General, it cannot be concluded that Airbnb Ireland passes the test related to the control over the services having material content, namely the short-term accommodation.

AG's final considerations focus on the other services offered by Airbnb Ireland, including a photography service, civil liability insurance and a guarantee for damage. Referring to the Judgment issued for *Ker-Optika*²⁴⁹, the AG reminds that services not inseparably linked with the one provided by electronic means, in the sense that the former may be provided independently of the latter, are not capable of affecting the nature of that service²⁵⁰. Indeed, the service provided by electronic means does not lose its economic interest and continues to be independent of the physical services²⁵¹. The extra services offered by Airbnb Ireland are “*optional and, accordingly, ancillary in nature*” by comparison with the service provided by electronic means. As a host may very well obtain photos or insurance through other means, they are separable from the electronic service and do not alter its nature. If this were not the case, ISS providers would tend to limit the attractiveness of their offer or to outsource, even in an artificial manner, the services having a material content. In sum, extra material services provided by an online provider do not prevent the electronic service from being classified as an information society service, provided that those other services are separable from the service provided by electronic means.

To conclude on Advocate General Szpunar's considerations:

- services having a material content, and not inseparably connected to the service provided by electronic means, are not capable of affecting the nature of the latter;

²⁴⁹ Judgment of 2 December 2010, *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézete*, C-108/09, EU:C:2010:725.

²⁵⁰ In *Ker-Optika*, the Court considered whether the fact that the sale of contact lenses might be subject to the requirement that patients obtain prior medical advice through a physical examination would lead to preventing the online sale of lenses from being classified as an ISS. In that regard, the Court held that obtaining medical advice is not inseparable from the sale of contact lenses since it can be carried out independently.

²⁵¹ Paragraph 46 of the Opinion.

- the criterion related to the creation of a supply of services and the criterion concerning the control over the conditions under which those services are provided, constitute the test as to whether a service provided by electronic means – which, taken separately, meets *per se* the definition of information society service - is or is not separable from other services having a material content;
- the creation of a supply, however, is merely an indication of whether a service provided by electronic means forms an inseparable whole with a service having a material content. There must be maintenance of control, by that provider, over the conditions under which those services are provided.

Thus, the AG concludes that “*a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of those services, constitutes an information society service [ex ECD]. The fact that that service provider also offers other services having a material content does not prevent the service provided by electronic means from being classified as an information society service, provided that the latter service does not form an inseparable whole with those services*”²⁵².

iii. Judgment

The following paragraphs will illustrate the Court’s observations that led it to its final Judgment.

Preliminarily, the CJEU considers that the service provided by Airbnb Ireland meets, in principle, the four conditions of a service normally provided for remuneration²⁵³ (first), at a distance (second), by electronic means (third)²⁵⁴ and at the individual request of a recipient of services (fourth). Thus, it constitutes,

²⁵² Paragraph 89 of the Opinion.

²⁵³ Even though the remuneration received by Airbnb Payments UK is only collected from the guest and not also from the host (paragraph 46 of the Judgment).

²⁵⁴ Indeed, at no point during the contractual relationship, Airbnb Ireland or Airbnb Payments UK, on the one hand, and hosts or guests, on the other, come into physical contact (paragraph 47 of the Judgment).

theoretically, an information society service within the meaning of the ECD. However, in paragraph 50, the CJEU refers to its guidelines in *Uber Systems Spain*. An intermediation service that satisfies all these conditions constitutes, typically, a service distinct from the subsequent service to which it relates and must therefore be classified as an ISS. This does not apply, though, to an intermediation service that forms an integral part of an overall service whose main component is a service coming under another legal classification.

In the Court's opinion, although the purpose of the intermediation of Airbnb Ireland is to enable the renting of accommodation, the connection between these services does not justify departing from the classification of that intermediation service as an ISS. According to the Luxembourg judges, the compiling of offers and the existence of tools to search, locate and compare those offers, constitute a service which cannot be deemed as merely subsidiary to an overall service coming under a different legal classification, namely provision of an accommodation service. Hence, the intermediation service does have an autonomous nature. In addition, the service provided by Airbnb Ireland is not indispensable to the provision of accommodation services, as there are different alternatives that can be used by both guests and hosts to find and advertise accommodations (hosts' own website, estate agents etc.). Some of these alternative channels have been around for a long time prior to the birth of Airbnb. Hence, with reference to the AG's Opinion, the criterion "creation of a supply of services" is not applicable here. Finally, the judges further confirm that Airbnb Ireland does not set or cap rents and does not determine, directly or indirectly, the rental price charged, the hosts or the accommodation, which means that there is no decisive influence over significant elements of the service. In other words, the Airbnb intermediation service is not an integral part of an overall service, the main component of which is the provision of accommodation.

The Court then clarifies – in agreement with the AG - that the services, optional or otherwise, provided by Airbnb Ireland do not affect the independent nature of the intermediation service and its classification as an ISS as its specific traits are not modified. These various services are merely accessory to the mediation carried by the company. Rather, it would be a paradox, according to the Court, that

additional ancillary services as such would result in a modification of the legal classification of the platform's activity²⁵⁵.

Following up on the AG's words, the Court concludes that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation, while also providing a certain number of services ancillary to that intermediation service, must be classified as an information society service ex ECD²⁵⁶.

The next section will capitalize on the Court's guidance from *Uber Systems Spain*, *Uber France* and *Airbnb* and attempt to find reasonable solutions to the issue of food online qualification. For this, it is worth summarizing very quickly the CJEU criteria on the classification of services provided by electronic platforms.

First, according to *Uber Systems Spain*, where an online platform offers composite services, qualification is a process that may involve two steps. The first stage intends to examine whether these services are independent or whether they should be qualified together. In the former hypothesis, the electronic and non-electronic services may be classified separately and connected to different provisions. By contrast, where these services must be examined together as part of a unique operation, because they are provided by the same operator or because the provider of one service exercises significant control – “decisive influence” – over the other, the second stage of the qualification process is activated. In this case, the “main component” criterion decides which service absorbs the other for the purposes of legal qualification.

Second, and in reference to *Uber France*, the decisive influence criterion does not occur each time one operator exercises some control over the other. Rather, the influence of the platform should be substantial and decisive, the relationship with customers should be direct and the service should be offered directly by the online company for the activity to be qualified as a whole. Simply stated, what is important

²⁵⁵ See also paragraph 46 of the Advocate General's Opinion.

²⁵⁶ BRONZO E., *Airbnb vince causa Ue contro la Francia che voleva imporgli norme immobiliari*, in *Il Sole 24 Ore*, 19 December 2019.

is the involvement in the provision of the whole service and engagement in a direct relationship with users.

Finally, pursuant to the principles laid down in *Airbnb*, when an e-platform provides other services having a material content, these do not affect the nature of the services delivered by electronic means, provided that the latter service may be offered independently. To determine whether a service delivered by electronic means forms an inseparable whole with a service having physical content, one should check whether the service provider creates a supply of services and offers services having a material content and whether the service provider exercises decisive influence on the conditions under which these services are provided. It is further specified, however, that the criterion relating to the creation of a supply of physical services is not conclusive. Rather, there must be maintenance of control over the conditions under which these services are provided. Therefore, to determine whether mixed services constitute an inseparable whole, one should focus on the decisive influence exercised by the service provider over the conditions under which the services having material content are supplied.

The Court's principles have been confirmed in yet another preliminary ruling on the qualification of the digital economy: *Star Taxi App SRL v Unitatea Administrativ Teritorială Municipiul București prin Primar General, Consiliul General al Municipiului București* (hereinafter *Star Taxi App*)²⁵⁷, for which the Judgment was issued on 3 December 2020.

Star Taxi App refers, once again, to urban transport services booked through a web platform. More specifically, the eponymous online company, incorporated under Romanian law, operates an electronic application that connects taxi drivers and passengers. Unlike Uber, though, there is no “*inherent link*”²⁵⁸ between the service provided by electronic means and the “physical” transport service. First, *Star Taxi App* does not create and provide *ex nihilo* a transport service to be supplied by non-professional drivers, as it merely offers “*an adjunct to a pre-*

²⁵⁷ Judgment of 3 December 2020, *Star Taxi App SRL v Unitatea Administrativ Teritorială Municipiul București prin Primar General, Consiliul General al Municipiului București*, C-62/19, EU:C:2020:980.

²⁵⁸ Paragraphs 43-44 of Advocate General Szpunar's Opinion, delivered on 10 September 2020.

existing and organised taxi transport service”²⁵⁹. The platform is merely an external provider of an ancillary service to authorized professional taxi drivers already operating on the market, and that ancillary service is not essential for the efficiency of the primary transport service. Second, the online company does not exercise any control or decisive influence over the essential aspects of the transport service, which are decided by drivers freely. Indeed, Star Taxi App does not recruit nor select drivers and does not monitor their quality or conduct, nor the quality of their vehicles. The platform does not forward bookings to the drivers, set fares nor receive payment from passengers. Fares are in fact paid directly to the drivers at the end of the journey.

Therefore, and fully in line with previous case-law, *Star Taxi App* confirms that to qualify services of the digital economy, one should first assess whether the electronic service is inherently linked to the physical service in such a way that the two components form an integral whole: the inherent link only occurs when the provider of the electronic service creates and organises the supply of physical services and controls the essential traits of the latter.

That stated, what is “food online”?

6. Qualifying food online following *Uber Systems Spain, Uber France* and *Airbnb*

a. Specific challenges

The EU case-law examined in the preceding sections has the potential to deeply affect the regulatory framework governing tech companies.

First, the three Judgments were issued in the context of preliminary rulings concerning the interpretation of specific EU provisions. The interpretative Judgments will tend to acquire a wide-ranging – rather, *erga omnes* - binding force, considering the general goal of ensuring a uniform interpretation of EU laws²⁶⁰.

²⁵⁹ Paragraph 49 of the Opinion.

²⁶⁰ CAVALLARI C., *Manuale di Diritto dell’Unione Europea*, Nel Diritto Editore, 2018, p. 253. See also MIKELSONE G., *The binding force of the case law of the Court of Justice of the European Union*, in *Jurisprudencia*, June 2013.

Second, *Uber Systems Spain* guidelines – specified in *Uber France* and *Airbnb* - may not only influence the transport and accommodation sectors but rather the classification of all services offered through a digital application. In relation to the online sale of goods, Mr Szpunar reminds that Recital 18 of the ECD generally considers it as necessarily falling under the information society service category. Indeed, the main components of the operation, namely the transmission of the offer, the acceptance by the buyer, the conclusion of the contract and often payment are typically performed via web, therefore through electronic means. Subsequent delivery is not covered, and simply constitutes the direct effect – rather, the performance - of the contractual obligation, “so that the rules applying to the delivery should not, in principle, affect the provision of the main service”²⁶¹.

Online sales’ categorization as information society services is a valuable start on the issue of food online qualification. However, two challenges specific to the food sector arise. First, any qualification choice must take into consideration the definition system set by EU General Food Law; second, whether food online qualification requires the differentiation between food tech companies’ many business models.

Concerning the first issue, this work has illustrated how the GFL has given to the concept of food business an extensive, all-embracing meaning, which appears to be covering any activity related to the food chain, regardless of the stage or intensity of the commitment. Simply put, from a preliminary assessment, all food online platforms seem to be carrying a food business, an undertaking related to storage, transport, sale, or supply of food. Following this interpretation, all platforms, even mere intermediaries, would be governed by EU food laws and subject to their stringent obligations, and no distinction would be made in terms of legal responsibilities. How does this seemingly all-inclusive definition of food business work with the equally all-inclusive definition of ISS?

Turning to the second concern, the AG expressly specifies that the ECD classification should not be interpreted “as meaning that any trade-related online activity, be it merely incidental, secondary or preparatory in nature, which is not

²⁶¹ See paragraph 36 of the Advocate General’s Opinion in *Uber System Spain*.

*economically independent is, per se, an information society service*²⁶². That is to say, online activities with no self-standing economic value may not be brought within the scope of the ECD. *Uber Systems Spain* and *Airbnb* prove, indeed, how the analysis of the exact *modus operandi* of the e-platform is essential to come to a sensible qualification. Classification criteria may lead to diverse solutions depending on the characteristics of the operation and the specific functioning of the online company. As previously explained, platforms' business models range along a large array of possibilities and this is true for the agri-food sector as well. However, simple schemes help appreciate complex hypotheses. In this regard, sections II.2.a and II.2.b identified the following key food online models: own-brand sellers, namely food vendors who sell their products through their own website; marketplaces (pure and hybrid), where operators trade foods and beverages through third-party platforms; lastly, delivery platforms (traditional and new), through which restaurants offer meal ordering services.

Thus, how do the principles derived from *Uber Systems Spain*, *Uber France* and *Airbnb* help address the above challenges with regards to these food online businesses?

b. Own-brand sellers

As described above, the first category of food e-platforms refers to own-brand sellers. Within the model in question, operators put in place and manage an online

²⁶² Indeed, “*in order for Directive 2000/31 to attain its objective of liberalising information society services, liberalisation confined to the electronic component alone must have a real impact on the possibility of pursuing the activity. This is why the legislature focused on services that are, in principle, entirely transmitted by electronic means, any supplies that may be made by other means being simply incidental to such services. It would be pointless only to liberalise a secondary aspect of a composite supply if that supply could not be freely made on account of rules falling outside the scope of the provisions of Directive 2000/31. Not only would such apparent liberalisation fail to attain its objective, it would also have adverse consequences, leading to legal uncertainty and diminished confidence in EU legislation. For this reason, an interpretation of the notion of information society services which brings online activities with no self-standing economic value within its scope would be ineffective in terms of the attainment of the objective pursued by Directive 2000/31.*” (Paragraphs 31 and 32 of the Advocate General’s Opinion in *Uber Systems Spain*).

selling channel where customers can purchase the food store's brands with an easy click. Carrefour or Coop, for instance, may be included in the list of food companies adopting this business model: these big supermarket chains sell their own products – along with third-party merchandise - on the e-commerce website created as an online alternative to their conventional stores.

Turning to the key definitions of food business and ISS examined in the present Chapter, it is easily perceived that, at a quick glance, the services offered by own-brand sellers meet them both. On the one hand, this business model refers to undertakings involved in key stages of the food chain, namely production/transformation, storage, transport, and sale of food products, and it is irrelevant that the latter is carried out online. On the other, it also concerns businesses offering distance services for remuneration using electronic means. Therefore, from a preliminary assessment, the services delivered by own-brand sellers should be covered by both the GFL and the ECD. What follows will determine whether applying the CJEU criteria confirms such hypothesis, or whether their activity should be qualified either as food business or as ISS.

According to *Uber Systems Spain* principles, own-brand sellers deliver a composite service: customers are offered both non-electronic and electronic services. The former include production/processing, storage and transport of food; the latter relate to online marketing and sale, i.e., sale on the e-commerce platform.

The first step would be to check if these services should be qualified separately or as forming two parts of an undividable operation.

Taking up on Mr Szpunar's observations, the non-electronic services of producing, storing, and delivering and the electronic service of online mediation should be regarded as forming a whole. In other words, the activity undertaken by the own-brand seller is a concatenation of online and offline services that should not be split for the purposes of classification. First, both these components are offered by the same operator, who manages and controls the general operation and not only the e-commerce fragment. Second, the final service is presented to users as being provided by the own-brand vendor and it is irrelevant that some stages – delivery, for instance - may be physically supplied by different operators. The online service provider appears to be the one undertaking the whole operation, and

specifically both those stages having material content and those carried out electronically. The online platform also exercises a decisive influence on the conditions under which all services are provided, starting from the quality and prices of its own products.

The “main component” test constitutes, then, the second qualification step: *Uber Systems Spain* specifies that the operator’s activity should be classified according to the element that gives the entire operation economic significance. In this regard, it could be fairly assumed that the online intermediation acts merely as an integral tool to the larger food production/processing and trade activity undertaken by the food company, where the web shop typically constitutes one of its many selling channels. Simply put, the online intermediation is ancillary to an overall service coming under a different legal classification, namely provision of a food business. Therefore, the online service of connecting traders and purchasers and allowing them to conclude transactions should not be classified as an independent ISS. Rather, according to the CJEU criteria, the activity carried by an own-brand seller should be qualified as a food business.

This conclusion is in line with Advocate General Szpunar’s clarification on online sales: as mentioned, Recital 18 of the ECD states that internet-based sales fall within the ISS category, even though strict delivery is not covered. Nonetheless, in his Opinion on *Uber Systems Spain*, the AG specifies that it should not be inferred that any trade undertaken via web should be qualified, in itself, as an information society service: it is necessary that the online activity is seen as economically independent, failing which the entire operation must be classified as a whole, using the “main component” criterion. In the case of own-brand online vendors, the e-commerce fragment is not autonomous: it is part of a larger operation that includes production/processing, storage, marketing, sale, and delivery of food, namely both electronic and non-electronic components.

Therefore, if one were to follow *Uber Systems Spain* and *Airbnb* criteria, own-brand sellers are carrying a food business. Hence, they should fall outside the scope of the ECD²⁶³ and should be governed by the regime established by the GFL.

²⁶³ In line with the CJEU conclusion for *Uber Systems Spain* (paragraph 42).

c. Pure online marketplaces

The second business model which a food internet platform may adopt is the pure online market model. As demonstrated in section II.2.a, online markets present different variations, but its pure version refers to marketplaces that act as mere showcases to goods sold by third parties. The platform operator connects consumers and traders by managing a digital environment used by third parties to conclude commercial transactions. As a widely known example, among Amazon's various *modi operandi*, the platform also acts as a pure online window to foods and beverages offered by third parties. In such capacity, sellers are the ones handling shipping.

Pure markets' activity refers to food sale and delivery, on the one hand, and a remunerated service offered at a distance and through the internet, on the other. Again, from a literal interpretation of legal definitions, the business carried by pure online marketplaces seems to satisfy the definitions of food business and information society service and should theoretically be covered by both the GFL and the ECD.

Turning again to *Uber Systems Spain*, its principles clarify that the first step to qualification regards the independence of all services involved. For pure online markets, the electronic services – e.g., connection between demand and supply, online marketing - and the non-electronic services - especially manufacturing, storage, and distribution - are delivered by different subjects. The basic premise is that the online platform and the food producer and/or trader constitute separate entities. The web company does not sell its brand products but acts as a mere intermediary between food vendors and persons who wish to shop for groceries.

As proved, the Luxembourg Court does not exclude, *a priori*, that the various components of the activity may be qualified separately and that the service offered online may be classified alone as ISS. Nonetheless, it is essential to verify whether all the services involved should be examined autonomously. In order to do so, having excluded that in the pure marketplace model the electronic and non-electronic stages are dealt with by the same operator, one should check whether the online platform exercises decisive influence over food traders – and other operators

involved (e.g., delivery may be provided by third companies). Or vice versa, whether food traders exercise substantial control over the e-company. Should the services be viewed as pursuing independent economic purposes, the e-commerce component would alone be qualified as an information society service as it matches the ECD definition of a “*service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”. Alternatively, should the exact functioning of the business model lead to the conclusion that one operator markedly controls the other²⁶⁴, both electronic and non-electronic services would be qualified together and the “main component” criterion would identify which service has more practical implications overall.

It appears reasonable to conclude that the physical and online services are not to be considered an inseparable whole. Pure marketplaces typically act as mere connectors between supply and demand. Referring to the Court’s guidance *ex Airbnb*, pure e-markets do not seem to offer services having material content. Nor is their service indispensable to the provision of food, from the point of view of both businesses and consumers, since there are other, long-standing, channels at their disposal, such as traditional advertisement or businesses’ own websites. Without the online marketplace, food traders would still offer their products in physical stores or through their own website. The e-platform is only a marketing tool to ease trade and expand selling channels. Simply stated, food vendors do pursue an independent activity that would exist regardless of the third-party web shop. According to *Airbnb*, the mere fact that a service provided by electronic means includes payment facilities for the services that are not provided by electronic means does not lead to the conclusion that all of these services are inseparable. In addition, online marketplaces do not usually establish substantial conditions of the food business: the operator of the latter is typically the one dealing with the main aspects of the operation. The e-commerce platform is only concerned with specific fragments of the food trade – intermediation – and it does not organize the general operation nor is directly involved in the provision of the final service to

²⁶⁴ For instance, where web shops set food prices, quality requirements, safety conditions, transport obligations and so on.

users. Therefore, the online platform does not exercise a decisive influence over the services having material content.

Take eBay, for instance. The platform's User Agreement²⁶⁵ demonstrates how eBay intends to act only as an intermediary and not control the conditions of the transaction between buyers and sellers. The contract for the sale is directly between the buyer and the seller. And eBay does not review listings or content: "*eBay has no control over, and does not guarantee the existence, quality, safety or legality of, items advertised; the truth or accuracy of users' content, listings or feedback; the ability of sellers to sell items; the ability of buyers to pay for items; or that a buyer or seller will actually complete a transaction or return an item*"²⁶⁶.

Hence, the pure e-market's intermediation should be qualified separately from the remaining - non-electronic – stages and should be defined alone as an information society service.

Interestingly, the business model at hand may be brought, in some way, close to the example provided by the AG in its Opinion on *Uber Systems Spain*²⁶⁷, which refers to situations where "*an intermediary service provider facilitates commercial relations between a user and an independent service provider (or seller)*". These include, for instance, platforms for the purchase of flights. Notwithstanding the real added value provided by the web business for both users and traders, in these hypotheses the online intermediary remains economically autonomous. Likewise, pure e-markets provide an independent service whose intent is to ease and promote traders' offer of food.

One final note. In reference to EU Food Law's definitions, all activities related to the non-electronic stages are certainly to be considered food businesses, namely food production, third-party sale, delivery and so on. Should the service offered by online marketplaces fall under that same category too? Reasonably, pure online markets are not involved in the sale of food products but only act as facilitators between third sellers and purchasers. Hence, the activity carried by pure

²⁶⁵ eBay, *User Agreement*, effective as of July 2019.

²⁶⁶ Paragraph 2 of eBay's User Agreement.

²⁶⁷ Paragraph 34 of the Advocate General's Opinion.

intermediaries should not be defined as a food business. The Overview Report²⁶⁸ of a series of fact-finding missions carried out in 2017 concerning Official Controls on Internet Sales of Food in EU Member States seems to confirm this conclusion: *“Online platforms that act solely as third party service providers are not considered FBOs operating online, since they never own or/and physically handle the product. These are considered as information society service providers under the EU's Directive 2000/31/EC”*.

d. Hybrid online marketplaces

As anticipated, web shops may distance themselves from the pure “showcase” version. Online platforms operating in today’s foodscape have adopted various – hybrid - business models, offering different services to all parties involved. For instance, the online platform may supply storage and/or delivery services or set up a “click and collect” system for customers to pick groceries at designated places. As an illustrative example, via its “Fulfilment by Amazon” model, the eponymous e-commerce titan allows third parties to sell their products via the web store while Amazon deals with storage, packing, shipment, and customer service²⁶⁹.

Once again, the activity undertaken by hybrids qualifies, in principle, both as food business and as ISS. On the one hand, hybrid online markets do engage in one or more stages of food transport, storage, sale, and supply. On the other, the online intermediation and the possibility of concluding online sales via the platform do meet the conditions of a remunerated service provided at a distance, through electronic means and at the individual request of the recipient. Applying the CJEU

²⁶⁸ European Commission, *Overview Report of a series of fact-finding missions carried out in 2017 concerning Official Controls on Internet Sales of Food in EU Member States*, cit., p. 12.

²⁶⁹ Again, this illustration is a schematic description of how real-world e-companies operate in today’s digital economy. Often, the advertising function is provided by one company and logistics such as packing and shipment by another. Additionally, cross-border delivery may be provided by yet another operator. The choice of describing hybrid online markets in a simplified way stems from the fact that the present examination only deals with legal classifications and does not address factual issues relating to each company’s operating method. The latter is a question of fact that should be analysed in the context of a concrete case.

principles to the case at hand will help attest whether such preliminary statement is confirmed.

The functioning of hybrid online marketplaces involves both electronic services – in particular, intermediation – and non-electronic ones – storage and transport. Again, the CJEU guides us through the qualification process of composite services by indicating that the first step calls for the “(in)dependence” check. This test seeks to verify whether each component should be classified separately or as part of a whole.

In line with the CJEU considerations, it is not excluded, in theory, that the online service may obtain a legal classification independent of the one ascribed to (physical) delivery and storage. Therefore, the web mediation could alone be qualified as ISS as its running coincides with the ECD definition. According to *Airbnb* clarifications, services having a material content do not affect the nature of the services provided by electronic means only where the latter service does not form an inseparable whole with the former. To determine whether a service provided by electronic means is independent from a service having physical content, one must check whether the service provider offers services having a material content and whether the service provider exercises decisive influence on the conditions under which such services are provided.

The service supplied by the hybrid online market seems to be more than a strict intermediation between food vendors and consumers. In this thesis’ schematic approach, the e-commerce platform is involved in major stages of the operation: from intermediation, marketing and sale to storage and final delivery. All components are strictly and necessarily connected and form an inseparable whole. Arguments may be drawn from the three CJEU Judgments analysed above. On the one hand, following *Uber Systems Spain*, the provider of the online intermediation is simultaneously the provider of the final delivery. It also sets certain key conditions, such as safety constraints regarding storage and transport. On the other, in line with *Uber France* clarifications, the online platform does not only act as a necessary precursor to the provision of a more general service that culminates with food delivery. It is also the one having direct contact with final consumers in such a way that, from a consumer’s standpoint, it may be regarded as the actual provider

of the whole service. Finally, ex *Airbnb*, hybrid online marketplaces are the ones offering services having material content (storage and transport of food products) and seem to exercise control over the economically significant aspects of these services.

For instance, the “Fulfilment by Amazon” platform not only deals with online intermediation but also delivers a series of additional services, *in primis* (physical) storage and transport. Moreover, it has direct contact with customers in such a way that it is common to say that a product is bought from Amazon rather than from the actual seller. Finally, the great deal of requirements that sellers must comply with to have access to the FBA platform is a demonstration of the high level of control that the company exercises over key elements of the offer. To name a few, Amazon requires FBA sellers to observe strict conditions for listing, preparing, and sending inventory to Amazon fulfilment centres²⁷⁰. These conditions include FBA product title requirements²⁷¹, product barcode requirements²⁷², inventory storage limits²⁷³, strict packing guidelines²⁷⁴ and shipping and routing conditions²⁷⁵ to prepare products for safe and secure transportation to a fulfilment centre. Moreover, according to the company’s terms, certain products that may be eligible for sale on the Amazon marketplace may not be eligible for FBA. Products must adhere to specific expiration date and temperature-sensitive product rules to be sold via the FBA programme²⁷⁶.

Therefore, in a situation where the provider of the online service does exercise control over the essential segments of the activity, online intermediation and subsequent storage, delivery and potential customer service are inseparable for the purposes of classification. The second step to qualification involves the use of the “main component” criterion ex *Uber Systems Spain*: in this case, online

²⁷⁰ Amazon Seller Central United States, *FBA inventory requirements*.

²⁷¹ Amazon Seller Central United States, *FBA product title requirements*.

²⁷² Amazon Seller Central United States, *FBA product barcode requirements*.

²⁷³ Amazon Seller Central United States, *FBA inventory storage limits*.

²⁷⁴ Amazon Seller Central United States, *Prepare your products for FBA shipping*.

²⁷⁵ Amazon Seller Central United States, *Shipping and routing requirements*.

²⁷⁶ Amazon Seller Central United States, *FBA product restrictions*.

intermediation and sale may be considered the economic essence of the operation. In agreement with Recital 18 of the ECD, the substantial service supplied by hybrids is online trade, delivery (and storage) simply being the performance of the contractual obligation, “*so that the rules applying to the delivery should not, in principle, affect the provision of the main service*”. Therefore, the service offered by hybrid online markets should be qualified as information society service and should be covered by the ECD regime.

In relation to EU Food Law, even though the intermediation service provided by the food online platform is to be qualified as ISS, hybrid e-markets do handle food physically. They touch it, store it, pack it, and ship it. It is undeniable that some activities undertaken by the e-commerce platform are included in the definition of food business, given that the company not only intermediates the sale of food products but also deals with storage and final distribution. The latter are necessarily delivered non-electronically. Such conclusion is supported by Recital 18 of the ECD, which specifies that even though ISSs encompass a wide range of economic activities, including “*selling goods online*”, delivery of products and, generally, the provision of services offline are not covered by the ECD. Therefore, it is reasonable to conclude that the non-electronic services offered by the hybrid online market are to be governed by the GFL.

Lastly, nothing excludes that grocery delivery may be considered as the main service offered to the final consumer. In such case, the delivery component absorbs the whole operation, qualifying the whole activity of hybrid markets as food business. Thus, the online company may not be considered as supplying an ISS and, according to *Uber Systems Spain* criteria, the ECD does not come into consideration.

e. Delivery platforms

Finally, meal delivery typically involves two main activities. First, provision of an ordering service through a web platform along with extra advertising services. Second, actual – physical - delivery. More specifically, the business model at hand may be sectioned into two services, one being the electronic service of connecting consumers and eating places, the other referring to the non-electronic operation of

transporting meals from restaurants to the consumer's location. UberEats, Deliveroo, JustEat, and Foodora are only a few examples of companies populating the meal-ordering scene.

As previously clarified, delivery platforms typically fall into two categories. On the one hand, traditional delivery companies – known as “aggregators” – act as mere intermediaries between supply and demand and require restaurants to handle delivery themselves; on the other, “new delivery” operators establish their own organisational structure and offer a delivery service to restaurants that have not established a transport branch. When it comes to qualifying food online, distinguishing between these two typologies is essential.

Within the former, the electronic service of mediating between customers and eating-places and the non-electronic service of meal transportation are supplied by two different operators – respectively, the e-platform and the restaurant/or third-party transport company on the latter's behalf. Turning to *Uber Systems Spain* and *Airbnb* criteria, it seems reasonable to conclude that, in this case, the two fragments do not form an inseparable whole. Not only are the providers of the various services distinct but also no operator appears to hold substantial control over the other. In particular, the aggregator does not simultaneously offer physical services but only serves as a promotional tool, a marketing and ordering window to third-party restaurants. It does not organize the general operation, nor does it exercise a decisive influence over key conditions of this operation (e.g., prices, quality of food, ingredients, packaging conditions, time of delivery).

Just Eat, for instance, specifies in its Terms & Conditions (hereinafter also T&Cs)²⁷⁷, that the legal contract for the supply and purchase of meals is between customers and restaurants. The online platform has no control over restaurants, which may or may not fulfil orders and which “*have the ability to reject orders at any time because they are too busy, due to weather conditions or for any other reason*” (paragraph 4.4). Estimated times for deliveries and collections are decided by restaurants (paragraph 4.5). The online platform does not control the quality of

²⁷⁷ Just Eat UK, *Terms & Conditions*, last updated 24 April 2020.

products or services provided by restaurants either (paragraph 6.5)²⁷⁸. Plus, Just Eat does not seem to ensure or monitor restaurants' compliance with the law, but only refers to a general cooperation with industry authorities "*to help raise awareness among restaurants about their obligations and how they can provide the best service to customers with food allergies and/or intolerance*"²⁷⁹. Therefore, while Just Eat appears to be checking restaurants' trading licenses and registrations, the platform does not exercise any significant influence over substantial conditions of the meal ordering service such as delivery times or quality and safety of restaurants and meals.

Furthermore, a service such as the one provided by aggregators does not seem indispensable to the provision of delivery services considering that restaurants do have their own logistics in place and could market their ordering service via different channels, such as classified advertisement or by creating their own website. Simply put, traditional meal delivery platforms only arrange the economic exchange *per se*, and do not deal with the service effectively supplied to the customer.

Along this line of thought, the conclusion would be as follows: the online company alone provides an economically independent service that may be qualified as information society service, given that it is performed for remuneration and at a distance through electronic means. Restaurants' undertakings, on the contrary, fall under the definition of food business. More specifically, Article 3(7) of the EU General Food Law includes "*restaurants and other similar food service operations*" in the category of operators involved in retail, the latter being defined as "*handling and/or processing of food and its storage at the point of sale or delivery to the final consumer*". For the sake of clarity, in such a case, the online platform is not involved in a food business: indeed, solely connecting restaurants and customers does not seem an undertaking "*carrying out any of the activities related to any stage of production, processing and distribution of food*".

²⁷⁸ See also paragraph 11.3.1: "*We do not give any undertaking that the Products ordered from any Restaurant through the Website will be of satisfactory quality or suitable for your purpose and we disclaim any such warranties*".

²⁷⁹ Just Eat, *What should I do if I have an allergy?*.

A reasonable classification may not come as easily when turning to the second – “new delivery” – model.

According to *Uber Systems Spain*, the first step is to check whether the electronic and non-electronic services are to be considered separately. When speaking of “new delivery”, the provider of the electronic service – online mediation - is also the provider of the non-electronic one – transport -, as the operator of the online platform deals with actual delivery. Moreover, the e-platform seems to manage a large operation, starting from online connection between customers and restaurants to final home delivery, and not only the intermediation fragment.

In the present case, online intermediation could be seen as a necessary precursor to subsequent delivery, which is strictly connected to the online platform. If one were to follow the Court’s criteria, indeed, the service provided by “new delivery” platforms, which by their very nature offer a delivery channel to restaurants that do not have one, may be seen as indispensable to the provision of food delivery. The service having a material content cannot be provided independently as it seems to be inherently linked to the online intermediation. Plus, the overall service is typically presented to users as being provided, from an economic standpoint, by the e-company or on its behalf. For instance, customers commonly order from “Deliveroo” or “Foodora”, rather than from a specific restaurant, and food is handed to them by a rider who clearly represents the e-platform (e.g., logos on jackets and heating bags).

These observations suggest that the online intermediation and subsequent transport of food may be considered as a whole for the purposes of qualification. The following qualification step uses the “main component” criterion, which identifies the service that gives economic worth to the entire activity. In this regard, “new delivery” platforms seem to offer more than an intermediation. By establishing an e-environment, selecting riders, deciding what percentage of the restaurant’s earnings should be aimed at delivery, they create a service that would not exist if not provided by the digital company. Intermediation constitutes a fragment of an overall service that is directly managed by the internet company and whose central element is food delivery.

Therefore, the service offered by “new delivery” platforms should not be qualified as an information society service and should not fall under the scope of the ECD. Their activity could be defined as a food business, given that it refers to distribution and transport of food products to the final consumer.

However, the above conclusions are not free from doubt. First, the decisive influence is not that obvious. “New delivery” platforms do not set prices nor control the quality of food or restaurants. They do not handle packaging either. Plus, restaurants decide on their own accord whether they take up an order²⁸⁰. Second, a different interpretation may consider online ordering as the main component of the general operation, and delivery simply the performance of the contractual obligation. In such a case, the online sale component should absorb the whole operation, qualifying the service as information society service ex ECD.

7. Concluding remarks on food online qualification

The present Chapter responded to the long-lasting claim of online platforms that they do not carry a food business. By means of recent CJEU cases on the qualification of internet platforms’ services and *provided their reasonableness*²⁸¹, this research tried to prove that such statement does not always apply. To briefly summarize, own-brand sellers undoubtedly undertake a food business while the intermediation services provided by pure online marketplaces and traditional delivery platforms (i.e., aggregators) are sensibly classified as information society services. When turning to hybrid online markets and “new delivery” platforms, EU case-law is not as easily applicable as for the first three categories. On the one hand, hybrids may be carrying a food business or supplying an information society service depending on whether food delivery or food online sale is considered as the main component of the whole operation. On the other, while “new delivery” platforms

²⁸⁰ For instance, in its Frequently Asked Questions, Deliveroo can only *encourage* restaurants to always use the same pricing for delivery as they do for their in-house menu, although there may be exceptions. Restaurants are also the ones dealing with packaging: <https://deliveroo.it/en/faq>.

²⁸¹ Emphasis added. For arguments against the Court’s outcome on Uber’s legal classification, SCHAUB M. Y., *Why Uber is an information society service. Case Note to CJEU 20 December 2017 C-434/15 (Asociación profesional Élite Taxi)*, cit.

create a service that would not exist without the platform and are involved in the actual handling of the non-electronic stages, uncertainties remain in terms of their influence over the substantial component of food delivery (prices or quality of food, to name a couple). Plus, even if the electronic and non-electronic services were to be seen as a whole, the main component is not straightforward: which is it, online trade or food transport?

With its Judgments on *Uber Systems Spain*, *Uber France*, and *Airbnb*, the CJEU confirms how legal classifications still carry an enormous weight. However, considering the novelty of the issue at hand, e-platforms' variety, and the speed of digital technology, one can only voice hypotheses on which classifications may be more reasonable and useful to specific circumstances. While one will need to wait for new judgments to fully appreciate the direction that courts will take following these three cases and evaluate whether these principles will effectively come in handy in different sectors²⁸². For the time being, such qualification exercise needs to take into consideration the different paces in which regulation and online markets progress. In the sense that law making – and legal reactions in general – usually move slowly when compared to digital transformations and legal qualification is to find the right balance between these diverse rhythms²⁸³.

Moreover, the present investigation proved how the food sector raises its own questions when it comes to food online qualification. More often than not, digital companies involved in the food industry will deliver several services, pursue a combination of activities and will not be classified within pure models' boundaries. Simply, the reality today is that there are as many models as there are platforms. Hence, it is essential that any legal qualification follows a strict factual analysis of

²⁸² Along these lines, PALMIERI A., *Uber Pop: fine delle corse in (mezza) Europa?*, cit., p. 99: “*Alcuni passaggi dell’iter motivazionale della sentenza si prestano a puntellare eventuali iniziative di contrasto ad altre epifanie dell’attività di intermediazione nel campo del trasporto urbano (e, perché no, in altri campi in cui le piattaforme di collaborazione hanno preso piede)*”.

²⁸³ FULBROOK J., *Airbnb: an elusive defendant in the cyberworld*, in *Journal of Personal Injury Law*, 2016, issue 2, p. 66: “[...] *the legal response, which has found it very difficult to keep up with this rapidly changing commercial model self-describing as a “community”*”.

the platform's real functioning²⁸⁴. In particular, the main challenge relates to checking whether the control exercised by any e-platform amounts to the decisive influence established by the Court as the primary criterion to classify the composite service as a whole. This assessment can only be fact-based, and requires the detailed examination of who sets prices, verifies safety standards, decides on the quality of products and so on. Nevertheless, it has also been demonstrated how simple schemes are crucial to grasping complex cases.

It is worth stressing, though, that nothing excludes that the issue of food online becomes its own laboratory²⁸⁵, independent from *Uber Systems Spain*, *Uber France*, and *Airbnb* guidelines. Indeed, subsuming food online into the framework suggested by the Court with reference to the transport and accommodation sectors, may not help tackle the particular – and different – issues of food e-commerce, *in primis* responsibilities with regards to food safety. Hence, the challenges raised by food online may call for different – new – classifications or even rules, to provide the food chain's digital innovation with an adequate legal response^{286 287}.

²⁸⁴ In a nutshell, the answer for food online qualification is “it depends”: in this case, on the *modus operandi*.

²⁸⁵ Speaking of independent laboratory, it is interesting to pinpoint that EU Food Law has had its moments of legal innovation. One could think of the *Cassis de Dijon* case, born in the context of food trade but bringing about a much larger principle, that of mutual recognition. See HOLLE M., *Globalisation of innovation. (re)localization of food law?*, in Session II of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, p. 125.

²⁸⁶ HATZOPOULOS V., *La première prise de position de la Cour en matière d'économie collaborative*, cit., p. 283. This alternative, as the Author righteously anticipates, carries along several subsequent questions: would the new rules be adopted at EU or national level?; would they be soft law or hard law measures? And so on. See also CARTA C., *Uber face à la compétition économique et au respect des règles de droit*, cit., p. 763.

²⁸⁷ SPOTO G., *Gli utilizzi della Blockchain e dell'Internet of Things nel settore degli alimenti*, cit., p. 33, where, in reference to the new challenges raised by blockchain in the food sector, the Author suggests departing from known and traditional categories and trying to give innovative legal solutions to the emergence of new technologies: “A questo punto è veramente possibile semplificare tutti i problemi seguendo la tradizionale logica e applicando le categorie generali in tema di responsabilità civile oppure occorre una riflessione più matura, connessa a problemi inediti che sono il risultato delle nuove tecnologie? forse è arrivato il momento di cominciare ad esaminare i

More generally, *Uber Systems Spain*, *Uber France* and *Airbnb* testify that legal protagonists are catching up on the fast-growing world of the digital economy and that legal players are showing a growing appetite for a clear status of online platforms. However, the challenges of innovation cannot be addressed solely within judicial settings: legislators must intervene as well²⁸⁸. As repeatedly stated, legislative action is particularly pressing in the field of technological innovation, where fast developments make it difficult to identify applicable law. Moreover, regulatory inertia shows itself to be rather risky in a field that is subject to contradictory trends²⁸⁹. In the specific context of food online, the central conflict concerns tech companies, on one side, and consumers, on the other²⁹⁰. In other words, qualification fits in the larger, long-lasting battle “innovation versus safety” and regulators face the challenge to strike a fair balance between traditional ways and new issues raised by the digital economy²⁹¹.

To conclude this first Chapter. Online platforms are nowadays among the most prominent and valuable companies in the world, and their services are transforming

nuovi problemi, muovendo da prospettive differenti, perché ci troviamo di fronte a livelli di normatività inesplorata. Nell’ambito delle nuove tecnologie, gli esperti di informatica giuridica e di algoritmi contrattuali sono divisi tra chi ritiene possibile applicare gli strumenti giuridici elaborati tradizionalmente nell’ambito del diritto dei contratti e della responsabilità civile, e chi invece ritiene necessario riformulare elaborazioni concettuali ex novo”.

²⁸⁸ MIDIRI M., *Nuove tecnologie e regolazione: il “caso Uber”*, cit., p. 1021.

²⁸⁹ LA ROSA M. V., *UberPop: società dell’informazione o operatore dei trasporti? Il punto di vista della Corte di Giustizia UE e le implicazioni sulla disciplina delle piattaforme*, in *FiloDiritto*, 3 May 2018.

²⁹⁰ VAN DER MEULEN B., SZAJKOWSKA A., *Regulatory challenges of innovation in food and agriculture. Market authorization requirements for new foods*, in *Applied Studies in Agribusiness and Commerce*, 2012, volume 6, p. 137: “Regulatory authorities around the globe face challenges of keeping pace with innovations in the food and agricultural sectors” and p. 141: “with regard to innovations in food and agriculture, regulatory authorities face the challenge to strike a fair balance between the requirements of safety – that is consumer protection – and the interests of the business sector”.

²⁹¹ FORCUM M. A., *From Silicon Valley to the kitchen table: innovative online agriculture and food start-ups and the Law*, cit., p. 342; MIDIRI M., *Nuove tecnologie e regolazione: il “caso Uber”*, cit., p. 1034.

whatever industry they are entering. In relation to the foodscape, there is a strong wave of innovation, entrepreneurship, and creativity: e-platforms are offering an online alternative to tradition, by pushing operators and customers away from the typical approaches to food trade and consumption²⁹². Some of these internet-based actors have a dominant market share, exercise unprecedented social power, and fully control the trends of their industry²⁹³. Clarifying the legal nature of their activity, from a sector-specific point of view or through a broad qualification, will only result in increasing trust and legal certainty for all stakeholders involved, from consumers and food businesses to regulators and law enforcement authorities.

For the purposes of this thesis, clarifying food online will assist in the investigation on platforms' role in the food chain. The following analysis will illustrate how this qualification exercise helps answer this crucial question: are online platforms responsible for the obligations laid down by EU food laws, especially in terms of food information?

²⁹² CHEA T., *Virtual farmers markets*, in *The Post and Courier*, 24 December 2013.

²⁹³ MAZZIOTTI G., *What Is the Future of Creators' Rights in an Increasingly Platform-Dominated Economy?*, in *International Review of Intellectual Property and Competition Law*, 2020, volume 51, pp. 1027 ss.

Chapter III – Rights and responsibilities in food online: focus on food information

Which rights do consumers have when entering the food online market? Are online platforms responsible for these rights?

1. Work plan

As illustrated in the first two Chapters, the movement towards food digitalization and the emergence of new actors in the food chain do not only result in changes in consumption trends and selling models²⁹⁴. These phenomena also affect legal mechanisms, requiring scholars and regulators to address the many challenges they raise. After concentrating on food online qualification, this thesis will consider the following issue: that of verifying whether EU law provides food online consumers with specific rights and finding out which actors bear the obligation to ensure them.

More specifically, the present Chapter intends to answer the following queries:

- Does the EU legal framework provide food consumers with rights specific to online trade?
- Why does this thesis focus on the right to information?
- Under EU food laws, who is responsible for food information?
- How are online platforms involved in food information?
- Ultimately, are they responsible for the information hosted on their service?

The analysis will focus on what the current EU law tells us. In other words, it will try to answer the questions listed above based on what the law, at this stage, is. As outlined in section I.4, this Chapter will not only examine consumer rights (sections II.2 and II.3) and information responsibilities (section II.4) established by supranational law – foremost the EU Consumer Rights Directive, the General Food Law, and the Food Information to Consumers Regulation. It will also illustrate how platforms address food information via their Terms & Conditions (section II.5) and give a sneak peek to the issue of platforms' liability, which will be the core of the following Chapter IV.

²⁹⁴ KIETZ M., *Editorial*, in *European Food and Feed Law Review*, 2018, issue 6, p. 493.

2. The Consumer Rights Directive: introducing consumer protection in food online

It is well established that the European Union intends to be a high-protection region. The general objective of EU regulators is to safeguard consumers and to strengthen their position through a variety of instruments. Consumer protection may range from a general obligation to act fairly to specific requirements involving performance by the supplier, quality of goods and services, compensation for defects, and so on. The goal is to secure both consumers' right to health and safety, and the respect of their economic, social, cultural, ethical, and religious interests²⁹⁵.

The internet boom in all economic sectors came with enormous shifts of power in contractual relations, due to the absence of direct and physical contact between consumers and businesses, on the one hand, and between the former and the product they intend to purchase, on the other²⁹⁶. Not only is the business the one informing consumers about the product, typically omitting certain aspects of the exchange, but there is also no room for negotiation. Online consumers are forced to choose between purchasing at the conditions set by the business and not purchasing at all, without any possibility of bargaining.

Among the large arsenal in favour of consumers, two rights are of primary importance when transactions are transferred to the online world: the right of withdrawal and the right to information. Even though the latter is chronologically prior to the former – as information is to be ensured well before concluding the contract, whereas the right to return may be activated only once the transaction is completed and the retailer has already fulfilled their side of the agreement by delivering the product – this analysis will start by reviewing the right of withdrawal (section II.2.b). Indeed, this right appears to be less effective and compelling when applied to food transactions, giving full room to the right to information (section II.2.c) to balance out consumers' weak position in food online.

²⁹⁵ DI LAURO A., *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi. La costruzione di una "responsabilità del consumatore"*, in *Rivista di diritto alimentare*, 2012, issue 2, pp. 1 ss.

²⁹⁶ YEO V. C. S., *et al.*, *Consumer experiences, attitude and behavioral intention toward online food delivery (OFD) services*, cit., p. 152.

a. The Consumer Rights Directive: consumers, traders, and distance contracts

The European legislator's goal is to guarantee that consumers buy only those products that they intend to. In the context of online sales, where products cannot be viewed, touched, smelled, weighed, or measured, Directive 2011/83 on Consumer Rights (hereinafter also DCR)²⁹⁷ provides for remedies against this contractual imbalance. Entered into application in June 2014, the DCR gives consumers the same strong rights across the European Union. Its aim is to align Member States' consumer protection rules, hence ensure that all consumers can rely on equal rights wherever they shop within the Union.

The DCR applies to all contracts concluded between a consumer and a trader. Consumers are defined as any natural person who, in contracts covered by the Directive, is acting for purposes that are outside their trade, business, craft, or profession. Traders refer to any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft, or profession in relation to contracts covered by the DCR (Article 2).

The following sections will tackle the right to information and the right of withdrawal applicable to distance and off-premises contracts²⁹⁸, as regulated by the DCR. The latter defines distance contracts as “*any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded*” (Article 2(7)). Pursuant to Recital 20, this definition covers transactions concluded via web.

²⁹⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

²⁹⁸ VAN DER VEER L., *Food online*, cit., pp. 53 ss.

b. Right of withdrawal and hygiene exemptions: whys behind the focus on food information

The right of withdrawal is an imperative stipulation: the DCR requires EU Member States to grant consumers a withdrawal period in distance and off-premises contracts, as in an appropriate period for reflection during which they can test the products they have purchased and freely return them if they wish. More specifically, and except for the exemptions ex Article 16 that will be examined further, the EU consumer is given the fundamental right to withdraw from the contract after the trader has already fulfilled their side of the agreement. What follows will outline the specifics of this right as set up by the DCR.

First, according to Article 6(1)(h), information on the right of withdrawal, inasmuch as it exists, is to be provided to the consumer before they are bound by the contract, including information on the conditions, time limit and procedures for exercising that right.

Second, in terms of the timeframe applicable to the right of withdrawal, Article 9 states that the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, after having informed the trader about their decision (Recital 48). This right may be exercised without giving any reason, and without incurring any costs other than those provided for in Article 13(2)²⁹⁹ and Article 14³⁰⁰. For sales contracts³⁰¹, the 14-day period starts from the day on which the consumer - or a third party other than the carrier and indicated by the consumer - acquires physical possession of the goods³⁰². If the trader has not provided the

²⁹⁹ Where the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.

³⁰⁰ Article 14 lays down consumers' obligations in the event of withdrawal. Among others, the consumer is obliged to bear the direct cost of returning the goods "*unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them*".

³⁰¹ A sales contract is "*any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services*" (Article 2(5)).

³⁰² Article 14 clarifies additional hypotheses for sales contracts. First, in relation to multiple goods ordered by the consumer in one order and delivered separately, the withdrawal period is activated from the day on which the consumer or a third party other than the carrier and indicated by the

mandatory information ex Article 6(1)(h), the withdrawal period is extended to 12 months from the end of the initial 14-day period, or to 14 days after the day upon which the consumer receives that information³⁰³.

In light of the above depiction, how does consumers' "right to change their minds" work when the product bought and delivered is food? Food is undeniably a unique commodity, far different from a book or a piece of furniture. Its characteristics are *sui generis* and include consumption through necessary ingestion, perishability, hygiene requirements, and strong link to human health. It is one of the most difficult products to handle, especially when it comes to fruits, vegetables, and animal by-products considering their relatively short shelf-life and rapid deterioration. These considerations cast some doubts as to the applicability of the withdrawal right in food online.

Surprisingly, the DCR does not directly focus on the particularities of withdrawal when this right is exercised by food consumers. Recital 49 simply reminds that withdrawal might be "*inappropriate*" for certain goods or services, but food is not mentioned³⁰⁴. Rather, the whole text of the law does not explicitly refer to the term "food", except for Article 3 and Recital 11. The latter merely confirms that the DCR does not affect certain *leges speciales*, including those regulating food labelling. The former excludes from the scope of the Directive contracts "*for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace*". This exception

consumer acquires physical possession of the last good. Second, in the case of delivery of a good consisting of multiple lots or pieces, the activation day is the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece. Finally, with regards to contracts for regular delivery of goods during defined periods of time, the 14-day time frame starts on the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first good.

³⁰³ Recital 43: "*If the trader has not adequately informed the consumer prior to the conclusion of a distance or off-premises contract, the withdrawal period should be extended. However, in order to ensure legal certainty as regards the length of the withdrawal period, a 12-month limitation period should be introduced*".

³⁰⁴ VAN DER VEER L., *Food online*, cit., p. 55.

requires that two conditions be met, namely that the trader “*physically*” delivers the goods on “*frequent and regular rounds*”, and that these goods are intended for “*current consumption in the household*”³⁰⁵. This means that consumer protection rules should not apply to online supplies of food when they are part of a regular business relationship between the trader and the consumer and when the former deals with physical supply (e.g., in the pure online market model). Beside the uncertainty of the expression “*frequent and regular*” – how frequent is frequent? – it is not entirely clear as to why food supplies are exempted from the DCR when regular, frequent, intended for current consumption in the household and handled directly by traders.

More importantly, Article 16 contains a series of exceptions to the right of withdrawal with regards to distance and off-premises contracts. Reference needs to be made to the following exemptions: “*the supply of goods which are liable to deteriorate or expire rapidly*” and “*the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed*”

³⁰⁵ European Commission, DG Justice, *DG JUSTICE GUIDANCE DOCUMENT concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, June 2014, p. 10.

after delivery³⁰⁶” (Article 16(d) and (e)). By their very nature, most food products either decay rapidly or become unhealthy or unhygienic if returned unsealed³⁰⁷.

Where one of the exceptions to the right of withdrawal applies, the consumer should be informed of such exception (Article 6(1)(k)). More specifically, where one of the *unconditional*³⁰⁸ exceptions applies – e.g., rapid deterioration or expiration - only the information required under Article 6(1)(k) should be provided, as in consumers must only be informed that they will not benefit from a right of withdrawal. By contrast, for exceptions that only apply *in certain circumstances*³⁰⁹ – for instance, unsuitable return if cans are open - the information required by Article 6(1)(k) should be provided in addition to the information required under Article 6(1)(h) and (j), as in traders should inform consumers of the conditions, time limits, procedures, and costs for withdrawal³¹⁰.

³⁰⁶ The CJEU has recently ruled on this exception in Judgment of 27 March 2019, *slewo — schlafen leben wohnen GmbH v. Sascha Ledowski*, C-681/17, EU:C:2019:255: “Article 16(e) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council must be interpreted as meaning that goods such as a mattress, from which the protective film has been removed by the consumer after delivery, do not come within the scope of the concept of ‘sealed goods which are not suitable for return due to health protection or hygiene reasons and which have been unsealed by the consumer after delivery’ within the meaning of that provision”. Simply put, the removal of a protective film from a mattress purchased online does not inhibit consumers from exercising their right of withdrawal. Indeed, that fact alone does not prevent the mattress from being safely used by another party or sold again as traders are in a position to clean and disinfect mattresses after they are returned, in such a way as to ensure health and hygiene.

³⁰⁷ European Commission, DG Justice, *DG JUSTICE GUIDANCE DOCUMENT concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, cit., pp. 40 ss.

³⁰⁸ Emphasis added.

³⁰⁹ *Ibidem*.

³¹⁰ European Commission, DG Justice, *DG JUSTICE GUIDANCE DOCUMENT concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on*

In light of the exceptions illustrated above, the right of returning products seems to fail precisely when applied to the purchase of food, or at least under certain common circumstances. It is obvious to anybody who orders a pizza or a sushi meal from an online delivery platform that that food cannot be returned after a period of 14 days. Meals ordered online are undoubtedly excluded from the right of withdrawal as they are products intended for current consumption in the household and typically liable to expire within one or two days, regardless of the regularity of the purchase and irrespective of who deals with physical delivery (pursuant to Articles 3 and 16(d)). When it comes to food products ordered through a grocery delivery platform, one should distinguish between products that expire rapidly (such as meat or yogurt, generally commodities to be kept in the fridge) and those that do not (e.g., canned foodstuffs or packs of pasta). The former seem to fall outside the scope of the right of withdrawal (Article 16(d)), whereas the latter may be returned as long as the package that contain them is sealed, i.e., as long as health and hygiene conditions are satisfied.

That said, the European legislator does not specify which meaning is to be given to the terms “*deteriorate or expire rapidly*” and does not offer criteria that would help determine whether returns are unsuitable “*due to health protection or hygiene reasons*” (ex Article 16). Does the expression “*deteriorate or expire rapidly*” refer to products’ shelf-life? For instance, would it be possible to return a pot of yogurt within its expiry date? Does the term indicate that the product can or must expire in the period between delivery and return? Simply put, what does “*rapidly*” mean? The wording of the law remains unjustifiably unprecise³¹¹. Moreover, who takes the decision as to whether (un)sealed goods are unsuitable for return due to health protection or hygiene reasons? Are sealed products unreturnable only when the packaging is damaged or open? What about sealed food that might be unhealthy? For instance, it may still be unsafe to return a can of beans, even when it has not been opened, as the holder may have not handled it properly or may have stored it

consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, cit., p. 41.

³¹¹ VAN DER VEER L., *Food online*, cit., pp. 57 ss and 120 ss.

in unfitting conditions (temperature, humidity, light and so on). Indeed, unsafety may occur with regards to all kinds of preserved foods, even if the packaging is still intact.

Some clarification may derive from the *ratio* behind the exclusion of certain products from the right of withdrawal. Where the reason is found to be in the value the returned product might still have for the retailer, then products might be returned within their expiry dates, if sealed. Should one tend towards hygiene and health, any product that has left the control system of a professional operator – from the time it is delivered to the consumer to the moment of return – should not be returnable, as consumer safety cannot be guaranteed.

In this regard, a gap filler may come from the information requirements established for the right of withdrawal. As mentioned, the DCR states that it is for the trader to inform the consumer that he/she will not benefit from the right of withdrawal (Article 6(1)(k)) or to indicate the circumstances under which the consumer loses such right according to Article 16. This information needs to be provided in a clear and comprehensible manner before conclusion of the distance contract. Again, traders are defined as “*any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive*” (Article 2(2)). Considering the largely inclusive definition of trader, would online markets be the addressees of such obligation and be required to specify, for each product, whether and in which circumstances the right of withdrawal may be exercised? Or does this obligation only apply to sellers – including online platforms acting as own-brand sellers?

In essence, traders may exclude food products from the right of withdrawal in most cases, due to high perishability, hygiene, and safety reasons. However, this exclusion cannot be left to the judgment of consumers³¹². These exceptions need to be provided in a clear statement even when it is obvious that the product cannot be returned, on penalty of a significant expansion of the withdrawal period (14 days +

³¹² Ibidem. p. 58.

12 months). Considering the broad definition of traders, online platforms could be arguably covered by such obligation.

To conclude, withdrawal rights in distance contracts turn out to be rather scarce when applied to food online. The above depiction demonstrates how the withdrawal instrument handed to online consumers to offset the drawbacks of internet transactions – anonymity, inability to physically check the quality and appearance of the product before purchase - does not achieve the intended results when products are food. This is where information accessed through online platforms comes into play. The gap in consumer protection is indeed filled by consumers' crucial right to be adequately informed.

c. Pre-contract information rights

The previous section revealed how the right of withdrawal provided for the purposes of online consumer protection misses its objective when exercised by food consumers.

The present section shows how the contractual imbalance to online food consumers' detriment is outweighed by information, to be supplied at all times, especially before the transaction is concluded. The growing attention towards information online is in line with the gradual interest of EU law in consumers' health, safety, and economic interests and with the consequent reorganisation of the EU market around consumer protection, where the right to be informed³¹³ plays the most crucial role. Simply put, information is considered one of the key tools to counterbalance the typical disadvantages consumers face when entering a contractual relationship through and/or with online platforms.

³¹³ On food consumers' right to know, LEONE L., *Open Data and Food Law in the Digital Era: Empowering Citizens through ICT Technology*, in *European Food and Feed Law Review*, 2015, issue 5, p. 357: "In particular, Regulation No 178/2002 - the cornerstone of the reformed food safety system - has built a process aimed at overcoming a purely "educational" approach that considers citizens' right to know as a simple mean to educate and inform the public. The trend is now towards a more effective and interactive citizen involvement in public affairs"; CARMIGNANI S., *Consumer protection*, Chapter XI of COSTATO L. and ALBISINNI F., *European and Global Food Law*, 2016, Wolters Kluwer, pp. 238 ss.

Directive 2011/83 on consumer rights confirms this tendency to protect consumers through ensuring their right to information. Article 6 lays down an extensive list of information requirements the trader must provide to consumers before concluding the contract, to allow them to take the most informed decision. These requirements include information on the trader (e.g., identity, geographical address, email address), on the contract or contractual relationship (e.g., total price of the goods, arrangements for payment, duration of the contract and right of withdrawal), and on the product³¹⁴.

In relation to the latter, the DCR sets a general “loose-knit” information obligation, simply stating that in the context of distance contracts the trader must indicate clearly and in a comprehensible manner “*the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services*” and provide “*a reminder of the existence of a legal guarantee of conformity for goods*” (Article 6(1)(a) and (l))³¹⁵. Where such product is food, the lack of a far-reaching obligation ex DCR is corrected by a strict and detailed information regime established by EU food legislation³¹⁶.

To sum up, if one were to follow the DCR, food online consumers find themselves in a situation where products are scarcely described and where it is difficult to return them after purchase for hygiene, health, and shelf-life reasons. This considerable gap in consumer protection is closed by EU Food Law and especially food information law³¹⁷. With a focus on food online, the next section will examine the *right*³¹⁸ to information under EU horizontal³¹⁹ food legislation; the following one (section III.4) will explore the other side of the coin, that of

³¹⁴ VAN DER VEER L., *Food online*, cit., pp. 47 ss.

³¹⁵ Ibidem, p. 60.

³¹⁶ Again, Recital 11 of the DCR stresses that the “*Directive should be without prejudice to Union provisions relating to specific sectors, such as [...] food labelling*”.

³¹⁷ VAN DER VEER L., *Food online*, cit., p. 94.

³¹⁸ Emphasis added.

³¹⁹ “Horizontal” as in covering all food products indistinctly, and without prejudice to the EU legislative measures specific to certain food products.

*responsibilities*³²⁰, and address the issue as to who bears the obligation to ensure this right.

3. Information rights under EU Food Law

The food industry is one of the most regulated and regularly updated sectors in EU law. Since the outbreaks of food-borne illnesses in the nineties, EU officials have increasingly turned their attention to food safety and food consumers' rights. Consumers' interests are at risk not only when food is dangerous for their health, but also where they are not appropriately informed about the quality of a certain product, where the quantity of ingredients is not accurately indicated, or where the label falsely mentions the origin of a product, regardless of the final safety or unsafety of food^{321 322}. Information and trust in the data provided are now pillars of food consumer protection. Knowledge is a right and a power of food consumers, especially in globalized markets. It is functional to a preventive approach to food safety, aimed at avoiding – upstream and pre-emptively - any act likely to cause a damage. This right to be informed is strictly connected to the safeguarding of human health³²³ and consumer interests and typically ranges from pre-contractual information up to the information consumers deserve to have in the aftermath of a food-safety crisis.

In the age of food online, the right to information is of even greater importance. Buyers who choose the online route cannot examine the product prior to or during purchase and are unable to make an informed choice about the food they consume,

³²⁰ Emphasis added.

³²¹ CORINI A., *Behavioural infringements due to the human factor: how is the EU reacting? A focus on EU food safety law rules, food law tools and the Fipronil case*, cit., p. 663.

³²² PINI O., *Il riparto di competenze in materia di correttezza informativa sui prodotti alimentari: alcune riflessioni*, in *Rivista di diritto alimentare*, 2017, issue 4, p. 21, highlights the multipurpose nature of the food information legal framework. On the one hand, it serves as a tool to enhance consumer protection and to safeguard their right to an informed choice; on the other, as a way to ensure the free competition principles for the purposes of the single market.

³²³ CARMIGNANI S., *Controlli e informazione al pubblico*, in *Rivista di diritto alimentare*, 2018, issue 1, p. 45. See also *Le informazioni al consumatore di alimenti*, Chapter IV of COSTATO L., et al., *Compendio di diritto alimentare*, 2019, Wolters Kluwer, pp. 173 ss.

a choice that may be shaped by health reasons as well as economic, moral, religious, and environmental considerations³²⁴. The absence of a direct connection with the product along with increased anonymity on the internet and online platforms' mediation is counterbalanced by a rigorous right to food information³²⁵.

a. Food information under EU General Food Law

The importance of protecting consumers through their right to information is reflected in the framework created by Regulation 178/2002, namely EU General Food Law.

Since 2002, the cornerstone of EU food system is safety, designed as the primary condition to a high level of human health and consumer protection, and information is considered one of its key elements (Article 8³²⁶). Rules on food information contribute to the general goal of legal certainty and predictability³²⁷ in an industry that affects each consumer every day³²⁸.

In particular, the core of EU food safety lies in one particular provision, namely Article 14, which establishes the general principle which the entire food sector is based on: “*Food shall not be placed on the market if it is unsafe*”³²⁹. To determine

³²⁴ CARMIGNANI S., *Consumer protection*, cit., p. 244; JANNARELLI A., *La fornitura di informazioni sugli alimenti ai consumatori nel nuovo Reg. n. 1169/2011 tra l’onnicomprendività dell’approccio e l’articolazione delle tecniche performative*, in *Rivista di diritto agrario*, 2012, issue 1, p. 41; LANZI S., *Front-of-package food labels and consumer’s autonomous decision-making*, in *Rivista di diritto alimentare*, 2020, issue 1, p. 57.

³²⁵ BRUNO F., *Il diritto alimentare nel contesto globale: USA e UE a confronto*, cit., p. 132.

³²⁶ Article 8 of the GFL expressly states that “*Food law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume*”.

³²⁷ PINI O., *Il riparto di competenze in materia di correttezza informativa sui prodotti alimentari: alcune riflessioni*, cit., p. 20.

³²⁸ Food is by its true nature intended for human day-to-day consumption.

³²⁹ As a confirmation to the statement, Regulation 178/2002 defines food law as the entire set of “*laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at Community or national level*”. See also Article 5 of the Regulation, which identifies the objective of the GFL as being “*a high level of protection of human life and health and the protection of consumers’ interests, including fair practices in food trade*”.

whether any food is unsafe one must take into consideration not only its normal conditions of use, but also the “*information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods*”³³⁰. Hence, any food product is not only built on its physical characteristics, but it also encompasses the information accompanying it, as one of the integral elements that play a key role in assessing its safety.

EU Food Law’s focus on information is further testified by Article 16, according to which food presentation must not be misleading to consumers. The GFL intends to target all the information associated with food products, which includes any labelling, advertising, shape, packaging, up to “*the manner in which they are arranged and the setting in which they are displayed, and the information which is made available about them through whatever medium*”. Simply put, the GFL lays down a multi-channel information system where any label, communication, indication is relevant. This system undeniably comprises food information available on websites.

To sum up, information plays a major role in the GFL system and becomes one of the main criteria to measure food safety³³¹. Hence, it should not come as a surprise that one of the most recent codifications in EU Food Law deals precisely with food consumers’ right to be informed³³². The main traits of this codification are analysed in the next section.

³³⁰ VAN DER MEULEN B. and FRERIKS A. A., *Millefeuille. The emergence of a multi-layered controls system in the European food sector*, cit., p. 161; ALBISINNI F., *La comunicazione al consumatore di alimenti, le disposizioni nazionali e l’origine dei prodotti*, in *Rivista di diritto agrario*, 2012, issue 1, p. 77.

³³¹ GIUFFRIDA M., *Innovazione tecnologica e responsabilità dell’operatore del settore alimentare*, in *Rivista di diritto alimentare*, 2018, issue 4, pp. 4 ss.

³³² Interestingly, the EU legal framework on food information is far from recent. The first legal measure adopted at supranational level was Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, modified in 1989 and in 1997. Directive 79/112 was last replaced by Directive 2000/13/EC of the European Parliament and of the Council

b. The Food Information to Consumers Regulation: online-offline symmetry

Regulation 1169/2011 on the provision of food information to consumers (hereinafter also FIC)³³³ entered into force, for most of its provisions, on 13 December 2014³³⁴. In line with the GFL, the Regulation on food information acknowledges that consumers' choices may be affected by several – health, economic, social, ethical, and religious - considerations: hence, consumers should be appropriately informed on the food they purchase (Recital 3). To this end, the FIC prescribes a harmonized and horizontal framework for food information³³⁵, which means that it applies to all food products “*without prejudice to labelling requirements provided for in specific Union provisions applicable to particular foods*” (Article 1(4))³³⁶. The FIC also includes additional vertical rules specific to certain products³³⁷.

of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation, and advertising of foodstuffs.

³³³ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

³³⁴ The obligation to provide nutrition information is applicable as of 13 December 2016.

³³⁵ The FIC is a vast and complex legislative initiative, comprised of 55 Articles, 59 Recitals and 15 Annexes.

³³⁶ Vertical rules specific to certain food products are included in the following non-exhaustive list of Regulations: Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007; Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000; Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007.

³³⁷ DI LAURO A., *Labels, names and trademarks*, Chapter XIX of COSTATO L. and ALBISINNI F., *European and Global Food Law*, 2016, Wolters Kluwer, pp. 369 ss; BRUNO, *Il diritto alimentare nel contesto globale: USA e UE a confronto*, cit., p. 134.

The FIC is not only in line with the intention of the EU legislator, since the GFL, to entrust food ruling to a Regulation and not a Directive³³⁸. It is also a confirmation of EU Food Law's shift from mere labelling to a comprehensive approach to food communication³³⁹. Indeed, its aim is to regulate all matters related to food information, which is defined as any “*information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication*” (Article 2(2)(a))³⁴⁰. Thus, the FIC adjusts food information to the new and wider communication environment, covering all written and oral data accompanying food and beverages (Recital 14³⁴¹)³⁴²: information available on online platforms is, again, well within the scope of the Regulation³⁴³.

³³⁸ As it is common knowledge, EU Regulations – unlike Directives - are immediately applicable and do not generally leave discretionary margins to Member States. See RIZZIOLI S., *Il Regolamento (UE) n. 1169/2011 e le informazioni sugli alimenti*, in *Le informazioni al consumatore di alimenti*, Chapter IV of COSTATO L., et al., *Compendio di diritto alimentare*, cit., p. 175.

³³⁹ LEONE L., *Open Data and Food Law in the Digital Era: Empowering Citizens through ICT Technology*, cit., p. 362. See also RIZZIOLI S., *Il Regolamento (UE) n. 1169/2011 e le informazioni sugli alimenti*, cit., p. 176, where the Author reminds how the FIC has a much larger scope than the previous framework laid down by Directive 2000/13, considering that it covers food information and not labelling, presentation and advertising.

³⁴⁰ Ibidem. See also DI LAURO A., *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi. La costruzione di una “responsabilità del consumatore”*, cit.

³⁴¹ Recital 14: “*In order to follow a comprehensive and evolutionary approach to the information provided to consumers relating to food they consume, there should be a broad definition of food information law covering rules of a general and specific nature as well as a broad definition of food information covering information provided also by other means than the label*”.

³⁴² FINARDI C. and GONZÁLEZ VAQUÉ L., *European Food (Mis)Information to Consumers: Do Safety Risks Lie Just Around the Corner?*, in *European Food and Feed Law Review*, 2015, issue 2, p. 94.

³⁴³ AMMANNATI L., *Information in agri-food market: the role of digital technologies*, in *Rivista di diritto alimentare*, 2020, issue 1, p. 51: “*The Reg. 1169 reveals the evolution in shaping modes and instruments following the innovative strategies of the information-based regulation. Therefore, it focuses on food labelling in order to “benefit citizens by requiring clear, comprehensible and legible labelling of foods” as well as “to ensure easier compliance and greater clarity for stakeholders*”. Moreover, it highlights not only labelling, but more generally food information made

As a general overview, the FIC's goals are, among others, to improve legibility (through minimum font sizes for mandatory information), to ensure a clearer and harmonized presentation of allergens for prepacked foods in the list of ingredients (emphasis by font, style, or background colour), to provide for mandatory allergen information for non-prepacked food, including products offered in restaurants and eating places. The present section will address information requirements relevant to food products sold on the internet.

Article 7 lays down the principles for ensuring fair information practices. First, it upholds the general ban on misleading information³⁴⁴, especially as to the characteristics of the food, properties, or effects it does not possess, or by suggesting it has special characteristics that are in fact typical of all products of that kind. Second, it dictates that consumers have the right to clear, accurate and easily understandable food information. These principles have a wide scope, applying to advertising and to “*the presentation of foods, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed*”. Article 15 deals with language requirements: mandatory food information needs to appear in a language easily understood by the consumers of the Member State where the food is marketed. This does not preclude the use of several languages. Article 9 lists a series of twelve information particulars that are mandatory for all food products, including the name of the food, a list of ingredients³⁴⁵, the net quantity, the date of minimum durability or, in the case of highly perishable foods, the “use by” date (Article 24). Articles 12 and 13 ensure that food consumers have an effective access to information by

available by any means, including modern technological tools. The advent of new media has led the European legislator to create a comprehensive and evolutionary approach to food information, which has led to the adoption of rules aimed at “covering information provided also by means other than the label””.

³⁴⁴ BREMMERS H. J. and VAN DER MEULEN B., *Opportunities, problems and pitfalls of nutrition and health claims*, in *Applied Studies in Agribusiness and Commerce*, 2013, volume 7, p. 98.

³⁴⁵ Details on how information on ingredients needs to be displayed can be found in RIZZIOLI S., *Gli ingredienti*, in *Le informazioni al consumatore di alimenti*, Chapter IV of COSTATO L., *et al.*, *Compendio di diritto alimentare*, cit., pp. 193 ss.

prescribing rules on placement and availability of the information. In the case of prepacked food, mandatory food information needs to appear directly on the package or on a label attached to it. It must be placed in such a way as to be easily visible, clearly legible and, where appropriate, indelible.

That said, the core of food information online lies in Recital 27: *“In order to ensure the provision of food information, it is necessary to consider all ways of supplying food to consumers, including selling food by means of distance communication. Although it is clear that any food supplied through distance selling should meet the same information requirements as food sold in shops, it is necessary to clarify that in such cases the relevant mandatory food information should also be available before the purchase is concluded.”* Almost casually, the FIC uses this Recital to establish two significant principles. First, that of a symmetry between information requirements in physical settings and in distance selling – which includes sales via online markets³⁴⁶. Second, that distance selling consumers have the right to receive food information prior to concluding the transaction. Therefore, Recital 27 harmonizes food information, and aligns the information supplied online to the one offered offline³⁴⁷, answering the call to fine-tune consumers’ right to be informed to *“a rapidly changing social, economic and technological environment”* (Recital 51). For the purposes of this work, this means that online consumers must be provided, before purchase³⁴⁸, with the same food information as any customer in bricks-and-mortar shops. Typically, the information is available on the webpage’s fiche or tab next to the product or on the product’s photo, which can be zoomed in and examined³⁴⁹. Pictures tend to be favoured compared to text, as the former allow web operators to show the same information displayed on the package, where text needs to be copy-pasted or retyped.

Recital 27 principles are further specified in Article 14, which reaffirms that mandatory food information is to be available before the transaction is concluded

³⁴⁶ FINARDI C. and GONZÁLEZ VAQUÉ L., *European Food (Mis)Information to Consumers: Do Safety Risks Lie Just Around the Corner?*, cit., p. 103.

³⁴⁷ VAN DER VEER L., *Food online*, cit., p. 21, p. 44 and p. 49.

³⁴⁸ *Ibidem*, p. 107.

³⁴⁹ *Ibidem*, p. 64.

and appear on the material supporting the distance selling or be offered through other appropriate means clearly identified by the food operator. The only information particular not to be provided prior to purchase when it comes to distance contracts relates to the date of minimum durability or the “use by” date mentioned in Article 9(1)(f). Such exemption is of a practical nature considering that web windows do not typically display the actual product offered for sale but a sample of the same genre. Shelf-lives are constantly changing, and it would be nearly impossible for the online operator to keep track and update the digital image on a daily or weekly basis.

On the contrary, all mandatory particulars, including minimum durability or “use by” date, must be available at the moment of delivery: in other words, when it comes to food sold online, information must be supplied both before the purchase and upon delivery, constituting the second symmetry established by the FIC for distance food selling. The only distinction is that minimum durability or “use by” date must be specified only when food is handed to the customer³⁵⁰.

On a final note, it is worth stressing that the regime described above applies to prepacked food products. These are defined as “*any single item for presentation as such to the final consumer and to mass caterers, consisting of a food and the packaging into which it was put before being offered for sale, whether such packaging encloses the food completely or only partially, but in any event in such a way that the contents cannot be altered without opening or changing the packaging*”. The term does not cover products packed on the sales premises (Article 2(2)(e)). When it comes to non-prepacked foods, Article 44 provides some clarification, identifying them as foods offered for sale to the final consumer or to mass caterers without pre-packaging, or foods packed on the sales premises at the consumer’s request or prepacked for direct sale. When non-prepacked foods are offered for sale by means of distance communication, only information on ingredients causing allergies or intolerances must be provided (Articles 44(1)(a), 14(1) and 9(1)(c)), both prior to the purchase and at the moment of delivery. However, national laws are allowed to require the provision of other particulars

³⁵⁰ FINARDI C. and GONZÁLEZ VAQUÉ L., *European Food (Mis)Information to Consumers: Do Safety Risks Lie Just Around the Corner?*, cit., p. 104.

mentioned in Articles 9 and 10³⁵¹. Section III.5.b will explore how – better yet, whether - meal delivery platforms address food information for non-prepacked products on their websites.

To conclude, the GFL coupled with the FIC provide online consumers with extensive food information rights. The latter, especially, clarifies that distance-selling consumers must be protected as any other consumer and that their right to information should be ensured before and after conclusion of the contract and final delivery. However, this system, which places preventive food information requirements at the heart of consumer protection, is not only based on a series of mandatory particulars to ensure consumers' information right. It also strictly depends on responsibilities' allocation, i.e., the identification of which actors these information obligations are placed upon. This aspect will be explored in the following section.

4. Information responsibilities under EU Food Law

The issue of food information lies in the larger discourse on information in our modern society – not surprisingly referred to as “information society” - where knowledge and data have become some of the most significant commodities in today's transactions. The world is more and more dedicated to the creation, access, management, and circulation of data, and information is produced and transferred at such a speed and volume that it is fully dominating our lives³⁵².

³⁵¹ GONZÁLEZ VAQUÉ L., *The New European Regulation on Food Labelling: Are we Ready for the “D” day on 13 December 2014?*, in *European Food and Feed Law Review*, 2013, issue 3, pp. 165 ss.

³⁵² LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, cit., p. 16: “We are living in an Information Age, where access to information and participation in the circulation of information is a distinguishing feature of our world. It is an era represented by a shift from the manufacturing jobs typical of the industrial society to a world in which jobs are increasingly devoted to the creation, handling or circulation of information. In this networked society information flows dominate and shape our ways of life, because of the speed and distance that information circulates and our dependence on ‘the production and distribution of information [as] a key source of wealth’ In this information society,

The critical participation of online platforms in today's information society has already been established, especially in their capacity as mediators of information (section I.1). Those in charge of or involved with data are in a crucial position, attracting the attention of national governments and public opinion on their role as information managers. This role is launching a debate as to whether they are responsible for that information and whether they should be held liable when the latter is harmful³⁵³.

Turning to food online, and as proved in section III.3, the EU legislator is highly interested in food consumers and in their rights to safety and knowledge. The reinforcement of consumers' position translates into responsibilities elsewhere in the food chain. More specifically, from the businesses' point of view, consumer rights correspond to rigorous obligations to be fulfilled by specific parties. Hence, the next paragraphs will examine which actors are responsible for ensuring compliance with food information rules by starting with the *lex specialis* – the FIC – and then moving to a wider overview of the GFL. This analysis intends to clarify further (section III.4.c) whether and in which circumstances online platforms are responsible for food information under current EU law.

a. Responsibilities under the Food Information to Consumers Regulation

As anticipated, Regulation 1169/2011 on the provision of food information to consumers defines a horizontal legal framework of strict information requirements applicable to all food products. Towards the GFL, which only mentions that food presentation and information shall not mislead consumers, the FIC acts as *lex specialis*³⁵⁴.

the Internet has emerged as a key tool for the creation and circulation of information, but more broadly, it has developed into an important mechanism for participation in democratic culture”.

³⁵³ The present Chapter focuses on responsibilities for food information while Chapter IV will address the issue of platforms' liability for infringing food information.

³⁵⁴ The *lex specialis* is the law governing a specific subject matter. It provides a more complete, exhaustive, and specific framework than the one provided by the general discipline (*lex generalis*). In the interpretation and application of two conflicting laws, one *specialis* and the other *generalis*, the former overrides the latter.

The FIC specifies which actors are responsible for food information, targeting all food business operators at any moment of the food chain, where their activities concern the provision of food information to consumers. It also covers catering services provided by transport undertakings when the departure takes place on the territories of the Member States. It applies to all foods intended for the final consumer, including products delivered by mass caterers and those intended for supply to mass caterers (Article 1).

With regards to the definitions of FBOs and food business, the FIC refers to the meanings determined by Regulation 178/2002 and illustrated in section II.4.b. As a brief reminder, the latter defines food businesses as “*any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of production, processing and distribution of food*” (Article 3 of the GFL). Whereas “*food business operators*” refer to the natural or legal persons responsible for ensuring that the requirements of Food Law are met within the food business under their control. Production, processing, and distribution of food cover “*any stage, including import, from and including the primary production of a food, up to and including its storage, transport, sale or supply to the final consumer*”.

More specifically, according to Article 8 of the FIC, the FBO responsible for the presence and accuracy of food information is the “*the operator under whose name or business name the food is marketed or, if that operator is not established in the Union, the importer into the Union market*”³⁵⁵. Article 8 reflects the general approach of the Union in terms of Food Law obligations, that to consider the food business operator as the primary responsible party for ensuring compliance with applicable rules. However, after recognizing which specific FBO is responsible for food information (Article 8(1)), the provision further distinguishes between the latter and operators “*which do not affect food information*”. Where the main obligation of the FBO “*responsible for the food information*” is that of ensuring the presence and accuracy of the information in accordance with the applicable food information law and requirements of relevant national provisions (Article 8(2)),

³⁵⁵ VAN DER VEER L., *Food online*, cit., p. 61; BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, in *Cultura giuridica e diritto vivente*, 2019, volume 6.

Article 8(3) deals, instead, with the responsibilities of food business operators “*which do not affect food information*” (e.g., distributors). The latter are prohibited from supplying food which they know or presume, on the basis of the information in their possession as professionals, to be non-compliant with applicable rules. Simply put, operators that usually receive food products and their accompanying information, and then further transfer that information the same way they have received it, cannot place that food into the market when they know or presume it to be unlawful³⁵⁶. This knowledge or presumption is based on the information available to them as professionals.

Moreover, all food business operators, “*within the business under their control*”, cannot modify the information accompanying a product where such modification would be misleading or otherwise reduce consumer protection and the possibilities for the final consumer to make informed choices. Food business operators are responsible for any change they make to food information associated with a food (Article 8(4)). Such statement seems to imply that modifying food information is possible as long as consumer rights are protected. Further and without prejudice to paragraphs 2, 3 and 4, all food business operators, “*within the businesses under their control*”, must ensure compliance with food information requirements ex EU and national laws relevant to their activities and verify that such requirements are met (Article 8(5)).

The FIC also deals with information accompanying non-prepacked food, by stating that FBOs, “*within the businesses under their control*” are responsible that such information is transmitted to the operator receiving the food in order to enable, when required, the provision of mandatory food information to the final consumer (Article 8(6)).

Hence, pursuant to EU food *lex specialis*, not every food operator is directly responsible that each product contains the necessary and accurate information, but

³⁵⁶ See PAGANIZZA V., *L’indicazione del “responsabile commerciale”*, in *Le informazioni al consumatore di alimenti*, Chapter IV of COSTATO L., et al., *Compendio di diritto alimentare*, cit., pp. 218 ss; DONGO D. and TORRE G., *Sicurezza alimentare, ABC responsabilità operatori*, Great Italian Food Trade, 6 April 2018.

solely the one that has associated his/her name with the product³⁵⁷. Thus, the main criterion for allocating responsibilities under the FIC refers to ownership of the trademark or trading name. However, FBOs who do not affect information – usually distributors of third-party products - are responsible when they are aware or they presume that food information is unlawful, based on the data in their possession as professionals. More generally, the FIC suggests that all food business operators, “*within the businesses under their control*”, should ensure and verify compliance with food information requirements (Article 8(5)).

Turning to online platforms, these conclusions lead to the following preliminary observations: a takeaway which supplies food under its own name has information responsibilities, whereas the delivery service operator which merely transports that food to the customer does not (unless it delivers food with information it knows or presumes to be illegal). In general, though, the goal of the FIC is that all food operators, within the businesses under their control, contribute to ensuring compliance with information legal rules, even though it is not clear how. Section III.4.c will assess how these observations translate into this thesis’ business models: own-brand sellers, marketplaces, and delivery platforms.

One final note to conclude. By attributing information responsibilities to operators who trade their own products, to those modifying the information in such a way as to put consumer protection at risk and to those knowing or presuming that the information is illegal, the FIC’s responsibility system appears to be based on the real possibility of controlling food information and influencing its presence, accuracy, and lawfulness. In other words, only those operators who exercise control over food information, directly or indirectly, are responsible for it. This concept of control, briefly mentioned here, will be reprised in the next section.

b. Responsibilities under EU General Food Law

Food information ultimately lies in the wider purpose of ensuring the highest level of food safety and consumer protection in the EU. In terms of information obligations, the FIC makes an explicit reference to the GFL regime on

³⁵⁷ VAN DER VEER L., *Food online*, cit., p. 62 and p. 95.

responsibilities: “*in order to prevent a fragmentation of the rules concerning the responsibility of food business operators with respect to food information it is appropriate to clarify the responsibilities of food business operators in this area. That clarification should be in accordance with the responsibilities regarding the consumer referred to in Article 17 of Regulation (EC) No 178/2002*” (Recital 21 of the FIC). In other words, the above-illustrated Article 8 of the FIC, which lays down FBOs’ responsibilities with regards to information, is no other than a specification of the general responsibility system set up by Article 17 of the GFL³⁵⁸.

Indeed, Regulation 178/2002 does not only dictate the principles for securing food safety, but it also defines the actors involved in the food chain and their position in protecting consumers’ rights. The GFL is primarily addressed to food businesses and their operators. Again, food businesses encompass a wide range of activities, such as production, processing, and distribution of food (Article 3) and FBOs are those responsible for ensuring that Food Law requirements are met within the food business under their control³⁵⁹.

In the EU legislator’s view, FBOs are best placed to conceive a safe system for supplying food: thus, they hold primary legal responsibility for ensuring food safety (Recital 30). More specifically, Article 17 announces that the primary responsibility for guaranteeing Food Law compliance rests with food business operators “*at all stages of production, processing and distribution within the businesses under their control*”. FBOs must also verify that Food Law requirements are effectively met through mechanisms of self-control.

It is worth observing that the definition of “food business operator” raises some concerns. Not only does its circularity seem to get us no further as the operator

³⁵⁸ CANFORA I., *La Responsabilità degli operatori alimentari per le informazioni sugli alimenti*, in *Rivista di diritto agrario*, 2012, volume 91, issue 1, p. 124.

³⁵⁹ Analogously, the recent Regulation 625/2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, specifically states, in Recital 13, that “*Union agri-food chain legislation is based on the principle that operators at all the stages of production, processing and distribution which are under their control are responsible for ensuring compliance with the requirements relevant to their activities established by Union agri-food chain legislation*”. Regulation 625/2017 will be analysed in detail in section IV.6.b.

responsible for meeting Food Law requirements is identified by this same responsibility. But this definition also leads to interpretative doubts when compared to the similar concept of food business. In relation to the latter, the European Court of Justice clarified that an undertaking covers any entity engaged in an economic activity, regardless of its legal status, the way in which it operates and the way in which it is financed³⁶⁰. In EU Food Law, though, the concept of food business is largely recognized as being a synonym of activity³⁶¹. In other words, a food business is any act of production, transformation, and distribution of food and the FBO is the owner of such business, the owner of the economic activity.

Article 19 of the GFL is worth highlighting as well. According to this provision, an FBO who “*considers or has reason to believe*” that a food which they have “*imported, produced, processed, manufactured or distributed*” violates food safety rules, must initiate procedures to withdraw it from the market if the product has left their immediate control and inform the competent authorities thereof. Where the product may have reached consumers, the operator must effectively inform them of the reason for its withdrawal, and if necessary, recall the products already supplied to them. In other words, FBOs bear the responsibility to take action even when food products have left their immediate area of control. At the same time, though, such action is applicable only to those who have a sort of knowledge – rather, consideration or reason to believe - of Food Law infringements.

Further, Article 19 specifies that a food business operator “*responsible for retail or distribution activities which do not affect the packaging, labelling, safety or integrity of the food*” is responsible, within the limits of their respective activities, for withdrawing infringing products. Such operator must also contribute to the

³⁶⁰ Judgment of 16 November 1995, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie, Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs and Ministère de l'Agriculture et de la Pêche*, C-244/94, EU:C:1995:392, paragraph 14.

³⁶¹ GIUFFRIDA M., *Innovazione tecnologica e responsabilità dell'operatore del settore alimentare*, cit., p. 8. See also GIUFFRIDA M., *Technological innovation and the food business operator liability*, in Session III of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, pp. 158 ss.

safety of food by passing on relevant information necessary to trace a product and cooperate in the action taken by producers, processors, manufacturers and/or the competent authorities. That is to say, retailers and distributors of food, regardless of their actual participation in food labelling or food safety, are responsible for withdrawal and, more generally, for the safety of the food chain by cooperating with competent actors and authorities.

Hence, the GFL has designed a framework according to which participation in the food chain is a source of responsibility for food business operators. The latter hold primary legal responsibility for ensuring that food is lawful and safe. As explained in section III.3.a, information is an integral part of food and its compliance with applicable legislation is a necessary precursor to food safety: therefore, under the *lex generalis* on food information – i.e., the GFL -, FBOs are responsible for any labelling, indication, instruction, information associated with a food product. However, and this must be stressed, the GFL focuses on FBOs' responsibilities only “*within the businesses under their control*”. Once again, and in line with what already mentioned with regards to the responsibility system pursuant to the FIC, EU Food Law links responsibility with control. Simply, operators should be responsible for food information, and in general food safety, only towards those stages of production, processing, and distribution they have control over. Such control will be of crucial importance when this research will examine liabilities in food online (Chapter IV).

That said, the following analysis will now move to the role of online platforms in the food chain, in order to clarify where they stand in terms of food information responsibilities under EU law.

c. Information responsibilities in food online

Digital innovation has led to a complex food chain and has given birth to actors that were unconceivable a decade ago. This phenomenon has challenged the responsibility landscape and the identification process of the party responsible for the effects of such innovation. In particular, one question is left to answer: are online platforms responsible for food information under current EU law?

As a quick reminder, pursuant to Article 8 of the FIC the food business operator responsible for food information is the operator under whose name or business name the food is marketed or, if that operator is not established in the Union, the importer. More broadly, under the GFL, food business operators are those responsible for ensuring that food abides by all applicable laws within the businesses under their control, including rules governing consumers' right to information (Article 17).

Thus, answering the question as to whether online platforms are responsible for food information requires a preliminary assessment as to whether they are considered carrying a food business under the GFL and the FIC. This question was the subject of the previous Chapter on food online qualification (section II.6).

i. Classification principles under EU case-law: a reminder

Chapter II examined the principles of classification used by the European Union Court of Justice in *Uber Systems Spain*, *Uber France* and *Airbnb*. While the CJEU cases focused on two online platforms involved, respectively, in the transport and accommodation sectors, this work measured how far these principles could be applied to the food industry as well. Briefly, the Court concluded that where an online platform offers electronic and non-electronic services (i.e., mixed or composite services), qualification is a process that may involve two steps. The first stage aims at checking whether these services are independent or whether they should be qualified together. In order to do so, one should appraise whether the service provider creates a supply of services and offers services having a material content and whether the service provider exercises decisive influence on the conditions under which these services are supplied. It was also specified that the decisive influence criterion is the conclusive one and that such influence needs to be substantial. If considered as autonomous components, the electronic and non-electronic services may be classified separately, and the electronic service may be defined as an information society service. By contrast, where these services must be examined together as part of a unique operation, the second stage of the qualification process turns to the "main component" criterion. The latter decides which service absorbs the other for the purposes of legal qualification.

Moving to the food arena, this thesis suggested that a distinction was to be made between own-brand sellers, pure online marketplaces, and hybrids and between “new delivery” platforms and traditional aggregators.

To sum up the previous findings, it was argued that own-brand sellers - encompassing a wide range of activities from production through marketing to online sale and final distribution - undoubtedly undertake a food business while the intermediation service supplied by pure online marketplaces and traditional delivery platforms (i.e., aggregators) may be reasonably classified as information society services. As for hybrid online markets and “new delivery” platforms, EU case-law did not lead to unique and unequivocal conclusions. Indeed, on the one hand, hybrid online marketplaces may be carrying a food business or offering an ISS depending on whether food delivery or online trade is deemed economically prominent. At the same time, hybrid online markets are undeniably the ones dealing with (physical) transport and/or storage of food and these are activities they control. On the other, while “new delivery” platforms create a service that would not exist without the platform and are involved in the actual handling of the non-electronic stages, concerns were raised with regards to their actual influence over the substantial features of food delivery – e-platforms typically have no control over the quality of food, the quality of restaurants or the price of meals. Plus, even when one was to consider these services as a whole, the main component would still be unclear: is it online trade or food transport? Again, though, they do handle food when transporting it to customers and such stage falls within the definition of food business.

In what follows, the analysis will turn to these business models in order to assess whether or in which circumstances online platforms are responsible for food information under the framework of the FIC (section III.4.ii) and the GFL (section III.4.iii).

ii. Responsibilities under the FIC

First, in terms of information responsibilities in the context of food online, crucial guidance may be provided by the Questions and Answers on the application of Regulation 1169/2011, published by the EC Directorate General for Health and

Food Safety in January 2013³⁶². When asked “*where foods are offered for sale by means of distance selling, who (a) is accountable for giving the information to consumers and (b) is responsible for the presence and accuracy of the food information*”, the European Commission declared that “*the responsibility for providing mandatory food information before the purchase is concluded lies with the owner of the website*”³⁶³. Therefore, according to the European Commission’s guidelines, the owner of the e-platform on which food information is displayed is responsible for making sure that all mandatory information particulars are available to consumers before the transaction is concluded. The following examination will explore how these guidelines reflect the outcome resulting from hard law.

When producers or those who own the trademark or market their own brand are also the ones dealing with the online offer, the solution seems straightforward. Own-brand sellers are surely responsible for food information: they are covered by the FIC as operators undertaking a food business, they market food under their brand – as required by Article 8 - and own the website where transactions are concluded³⁶⁴.

When it comes to pure online marketplaces, the answer does not come as easily: as explained in the previous section, their activity should not be qualified as a food business according to recent CJEU case-law as they are mere mediators between consumers and traders. Thus, their functioning should lie outside the scope of the FIC. Moreover, they do not associate their name with the food anyway, as they only facilitate the sale of third-party products. Therefore, from FIC’s standpoint, pure e-markets do not bear any responsibility for the presence and accuracy of food information. Falling outside the scope of the Regulation, pure online markets should not be governed by Article 8(3) either, which targets food business operators that “*do not affect food information*” and prevents them from supplying food which they

³⁶² European Commission, *Questions and Answers on the application of the Regulation (EU) N° 1169/2011 on the provision of food information to consumers*, 31 January 2013.

³⁶³ GONZÁLEZ VAQUÉ L., *The New European Regulation on Food Labelling: Are we Ready for the “D” day on 13 December 2014?*, cit., p. 165; GONZÁLEZ VAQUÉ L., *Is it Necessary to (Urgently) Adopt a Community Regulation for Online Food Sales?*, cit., p. 432

³⁶⁴ VAN DER VEER L., *Food online*, cit., p. 62.

know or presume to be unlawful. Nevertheless, should one look at the European Commission's Questions and Answers, pure online marketplaces do own the website through which online sales occur and should then be responsible for providing mandatory food information before purchase. In such hypothesis, the Q&A's soft law guidance tends to be useless. Not only is the Commission's Q&A unenforceable³⁶⁵ but it also clashes with the solution extracted from hard law – the FIC. The lack of accompanying clarification or updated Q&A on the matter of food information online creates uncertainties as to which motivations might have led EU officials to consider website owners responsible for that information.

Interesting to note here that the European Commission did update its 2013 Q&A a few years later through its 2018 Notice³⁶⁶ on Questions and Answers on the application of Regulation 1169/2011. This document provides answers to a series of additional questions on the application of the FIC that were raised since the entry into application of the Regulation. However, no query on online sales has been submitted, which seems somehow curious considering the exponential rise of food online between 2013 and 2018.

Comparable considerations may be outlined with reference to hybrid online marketplaces. On the one hand, the online platform is indeed the owner of the website. On the one other, even if one were to lean towards classifying their activity as a food business and thus towards FIC's applicability, food is not traded under the platform's name. Hence, hybrid online markets may not be held responsible for the accuracy and presence of food information (Article 8(2)). However, and in so far as they are deemed falling within the scope of the FIC, one could argue that hybrids are covered by other provisions, such as the general clause ex Article 8(5), according to which all FBOs are responsible for ensuring and verifying compliance with food information requirements, within the businesses under their control.

³⁶⁵ GONZÁLEZ VAQUÉ L., *The New European Regulation on Food Labelling: Are we Ready for the "D" day on 13 December 2014?*, cit., p. 167.

³⁶⁶ European Commission, *Commission notice on questions and answers on the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers* (2018/C 196/01), 31 May 2018.

As for meal delivery problems, the challenge between hard law and soft law is analogous. Aggregators are similar to pure online markets. If one were to follow the classification principles of the CJEU, they are not governed by the FIC as they are acting as mere intermediaries between customers and restaurants. Plus, they would not be directly responsible for the presence and accuracy of food information ex Article 8(2) anyway as they do not market their product. However, they are indeed owners of the website where food is advertised. “New delivery” platforms also own the website through which transactions are concluded. At the same time, they could be interpreted as operators carrying out a food business, which allows them to lie within the scope of the FIC. Nevertheless, restaurants – and not platforms - are the ones linking their brand to the meal for the purposes of the FIC.

To sum up, Article 8(1) and (2) of the FIC suggests that only own-brand sellers should be held responsible for the presence and accuracy of food information. Hybrids and “new delivery” platforms, in so far as they are considered carrying a food business, may fall within the general clause ex Article 8(5), which requires all operators, within the businesses under their control, to make sure food abides by food information rules. Pure online marketplaces and aggregators, on the contrary, do not seem to be involved in the FIC’s regime. These conclusions seem inconsistent with the intent of the European Commission, according to which the responsibility for providing mandatory food information before the purchase is concluded should lie with the owner of the website, namely all online platforms involved in selling, marketing, and distributing food.

However, it is worth recalling that FBOs “*which do not affect food information, shall not supply food which they know or presume, on the basis of the information in their possession as professionals, to be non-compliant with the applicable food information law*” (Article 8(3)). That is to say, food operators that are not involved in the “provision” of food information (e.g., distributors) should be cautious of what they place into the market and stop the offer when they know or even only presume that food information does not meet legal requirements. And that on the basis of the data they hold as professionals.

As rightly stated by Paganizza³⁶⁷, if operators not affecting information were only to focus on whether mandatory information is *present*³⁶⁸, there would not be much concern. FBOs not directly involved with the provision of food information should realize that an offer or menu does not display the complete information required by law. Things get much more complicated when turning to the *content*³⁶⁹ of information, i.e., when focusing on whether it is accurate (for instance, if the label shows the exact name and quantity of ingredients contained in the food). It would not only be costly and time consuming (e.g., setting a specific laboratory in charge of the “nutritional” surveillance of products), but mostly unfeasible (packages need to be opened each time). The answer might be found on a “reasonable effort” basis. Reasonable responsibility should only prompt the operator unable to affect the content of the information to check external elements additional to the data that may come with the product, e.g., communications from public authorities or the scientific community. In other words, it is unlikely that platforms vet the *accuracy*³⁷⁰ of labels. But knowledge, contacts, and expertise available to them as professionals could put them in a position to presume the *inaccuracy*³⁷¹ of information (especially when data are, in fact, missing: the “call the restaurant” example in meal delivery platforms, which will be illustrated in section III.5).

Keeping these considerations on Article 8(3) in mind, hybrid online markets and “new delivery” platforms appear to be the ones raising the most concern not only in terms of classification – are they carrying a food business or offering an internet service? – but also in terms of food information responsibilities: they are the owners of the website and might be covered by the FIC, but they do not market their own products. While responsibility for the presence and accuracy of information ex

³⁶⁷ PAGANIZZA V., *L’indicazione del “responsabile commerciale”*, in *Le informazioni al consumatore di alimenti*, Chapter IV of COSTATO L., *et al.*, *Compendio di diritto alimentare*, cit., pp. 219 ss.

³⁶⁸ Emphasis added.

³⁶⁹ Ibidem.

³⁷⁰ Ibidem.

³⁷¹ Ibidem.

Article 8(1) and (2) can be sensibly excluded, as these two platforms are not the “operator under whose name or business name the food is marketed”, their responsibility ex Article 8(3) might be argued when they know or presume food information is in violation of applicable laws.

As anticipated with regards to hybrids, additional considerations stem from Article 8(5). According to this general clause – which will be developed in the next section - all food business operators, “within the businesses under their control”, are responsible for ensuring compliance with food information legal requirements and for verifying that the latter are met. Simply put, the operator of the food sector is burdened with the broad obligation of guaranteeing and verifying compliance with food information laws within the stage of production, processing, or distribution they deal with³⁷². While it remains unclear as to what this verification entails - are operators obliged to monitor only the stages of the activity within their control? Or should they verify, for the time they are in charge of the food, that the individual product satisfies all legal requirements? Are they asked to set up proactive surveillance mechanisms? – one could argue that hybrid online markets and “new delivery” platforms should be responsible for a general compliance with food information law. For the sake of completeness, pure online markets and aggregators, on the contrary, should not be covered by Article 8 altogether, as it would be difficult to claim that they are carrying a food business – see sections II.6.c and II.6.e.

To conclude. While the EU legislator wanted to cover all the possible stages of the food chain and all the possible actors directly and indirectly involved in the provision of food information, many questions are left unanswered when it comes to food online. The position of certain food online platforms remains ambiguous, especially if one takes into consideration the (mis-)guidance from European Commission’s soft law. For the time being, one can only reach the following conclusion.

When it comes to responsibilities under EU food information *lex specialis*, online operators selling their food products via their own web-platform are certainly

³⁷² GIUFFRIDA M., *Technological innovation and the food business operator liability*, cit., p. 162

responsible for food information under the FIC – and this is confirmed by the Commission’s Q&A document. Online markets – pure and hybrid – and meal ordering platforms should not be directly responsible for the presence and accuracy of information under the strict responsibility regime of the FIC, as they do not link their name to the products. In this regard, the Commission’s answer – according to which the party responsible for providing mandatory food information before purchase is the owner of the website - appears to be rather hasty and dismissive, and even more, to be a false statement of the law. It would be worth for EU officials to clarify the reasons behind such choice. However, the previous paragraphs showed how responsibilities ex Article 8(3) and (5) may be argued with respect to hybrid online markets and “new delivery” platforms, namely internet-based platforms not acting as mere online intermediaries between offer and demand but generally involved in more stages of the whole operation and especially in the final transport and delivery of food.

Simply put, the FIC places primary responsibility for complete, accurate and detailed food information on one category of online platforms only, that of own-brand sellers. However, the principles governing food information are part of a larger scheme, set by the GFL, to ensure the highest level of human health and consumer protection in the European Union. The difficulties of clarifying the position of food online platforms with regards to food information may be overcome through a necessary coordination with the guiding criteria of the GFL and its focus on control³⁷³.

iii. Responsibilities under the General Food Law: the concept of control

The whole EU Food Law system springs from the need to ensure not only an efficient functioning of the food market and the respect of fair competition principles, but also and foremost the highest degree of food safety and protection

³⁷³ GONZÁLEZ VAQUÉ L., *Is it Necessary to (Urgently) Adopt a Community Regulation for Online Food Sales?*, cit., p. 431: “In short, to determine what is the responsibility of the platforms that are the object of this study in terms of protecting the health and economic interests of consumers, in the absence of a *Lex specialis*, I must make reference to Regulation (EC) No 178/2002 laying down the general principles and requirements of food law”.

of food consumers. Indeed, the adoption of Regulation 178/2002 almost twenty years ago marked a turning point in the Union, launching the construction of a framework based on the overarching principle of food safety. Such framework is triggered any time food is produced, marketed, and consumed and its pillar – safety - directly affects the position, role, and responsibilities of all those involved.

Pursuant to Article 17 of the GFL, this role seems to be a wide-ranging one: any FBO must both ensure and verify that foods do not infringe applicable laws. Accordingly, primary responsibility ex GFL is placed upon all food business operators indistinctively – unlike the FIC – and constitutes a general obligation to watch over the food chain and make sure that all food laws are complied with. However, as pointed out at the end of section III.4.b, FBOs' position is determined by the level of control that they exercise over their business. In other words, while it is true that participation in the food chain triggers Food Law responsibilities, such participation needs to be a significant, considerable, controlled one. In essence, FBOs are responsible for food safety only towards those stages of production, processing, and distribution they have control over, and not for circumstances beyond their reach.

Turning to the issue of food information, this leads to distinguish between operators that can affect the presence, content, and accuracy of information from those who do not have control over it. In this regard, some guidance is supplied by the European Court of Justice in the case *Lidl Italia Srl v Comune di Arcole (VR)* (hereinafter *Lidl*)³⁷⁴, where the Luxembourg judges were invested with a reference for a preliminary ruling on labelling obligations under the previous EU law on food information, Directive 2000/13³⁷⁵ ³⁷⁶. While the latter is now no longer in force and the current Article 8 of the FIC seems to solve the issue of FBOs' responsibilities

³⁷⁴ Judgment of 23 November 2006, *Lidl Italia Srl v Comune di Arcole (VR)*, C-315/05, EU:C:2006:736.

³⁷⁵ Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. The Directive is no longer in force as it has been repealed by Regulation 1169/2011.

³⁷⁶ BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, cit., p. 23.

by allocating them primarily on the operator under whose name or business name the food is marketed, *Lidl* offers an interesting perspective on the interlace between responsibility and control when it comes to food information.

What follows briefly lays down the context of the case.

Lidl Italia brought an action against a sanction inflicted on the retailer by a local enforcement authority in Northern Italy for selling an herbal liqueur with an alcoholic strength by volume different from that indicated on the label. The liqueur was produced by a different business operator who was based in Germany. The national court referred to the CJEU to address the issue as to whether administrative fines provided by legislation could be applicable to the mere retailer, not involved in labelling or packaging but merely in selling the product as delivered by the producer.

The Court stressed the lack of legal criteria, under the previous food information framework, that could assist in allocating responsibilities on the various actors of the food chain³⁷⁷. Nevertheless, it focused on the responsibilities laid down by the GFL - even though it did not apply *ratione temporis* to the facts of the main proceedings³⁷⁸ - and concluded that Directive 2000/13 was to be interpreted as not precluding national provisions that make it possible for a distributor of a pre-packaged alcoholic beverage to be held liable for an infringement resulting from the producer's inaccurate labelling even where, as the mere distributor, it simply markets the product as delivered to it by the producer. In other words, the system of EU Food Law – prior to the FIC - was not to be interpreted as meaning that

³⁷⁷ Paragraph 40 of the Judgment: “Although, therefore, it follows from a combined reading of Articles 2, 3 and 12 of Directive 2000/13 that the labelling of certain alcoholic beverages, such as that at issue in the main proceedings, must state, within a certain tolerance, the actual alcoholic strength by volume thereof, the fact remains that that directive, contrary to other Community acts imposing obligations as regards labelling (see, *inter alia*, the Directive at issue in Case C-40/04 *Yonemoto* [2005] ECR I-7755), does not designate the operator which must satisfy that obligation with regard to labelling and nor does it contain any rule with a view to the designation of the operator which may be held liable for infringement of that obligation”. See also MONTANARI F. and PISANELLO D., *Responsibilities for Food Information to Consumers: Much Ado about Nothing?*, in *European Food and Feed Law Review*, 2015, issue 2, pp. 107 ss.

³⁷⁸ Paragraph 53 of the Judgment.

obligations are imposed exclusively on the producer of a pre-packaged food product.

While welcomed as a key intervention of EU case-law in the area of food labelling, the Judgment did not clarify which actor – the producer and/or the retailer – was liable for the accuracy of food information³⁷⁹, thus generating several interpretations of the ruling. Some authors, in fact, tended towards a confirmation of retailers' liability for all the products' defects, while others saw the Judgment as the mere statement that national regulators are the sole authorities with the power to establish administrative fines³⁸⁰.

That said, and setting aside the specifics of the case at hand, guidance on the link between food information responsibility and control may be found in the Advocate General's Opinion, delivered on 12 September 2006. The AG clarified that *“responsibility in this regard is [also] carried by all persons involved in the production and distribution process, albeit on condition that those persons are actually in a position to verify the accuracy of the particulars on the label of the foodstuff. It is a matter for the national court to establish whether this is in fact the case”*³⁸¹. In particular, the AG stressed how it was crucial to differentiate between distributors depending on their power to influence labelling, stating that responsibility for food labelling is only applicable to those in a position to verify that the particulars on the label are indeed accurate. *“It is not entirely inconceivable that, in certain cases, the distributor may be able to undertake such supervision. Lidl Italia itself does not deny this when it notes that a distributor who is involved in the pre-packaging of products could be held responsible”*. She further referred to the EU Commission's conclusions in this regard according to which some distributors (for example, large supermarket chains) *“have sufficient power to impose on manufacturers rules or quality criteria relating to the manufacture of foodstuffs which could be enforced by means of inspection programmes or regular*

³⁷⁹ BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, cit., pp. 23 ss.

³⁸⁰ Ibidem.

³⁸¹ Opinion of Advocate General Stix-Hackl, paragraph 65.

*checks. Moreover, other distributors ought to be in a position to undertake effective supervision themselves over the accuracy of the particulars on the label*³⁸².

Notwithstanding the interpretation of legal rules no longer in place, the principles laid down in *Lidl* confirm that responsibility for information is firmly connected to a position of power over such information, whether the operator provides it or is able to verify its accuracy. This appears to be confirmed by Article 8 of the FIC, as examined in section III.4.a. By attributing information responsibilities to operators who trade their own products (Article 8(1)), to those modifying the information in such a way as to put consumer protection at risk (Article 8(4)) and to those knowing or presuming that the information violates applicable laws (Article 8(3))³⁸³, the FIC does link responsibility for food information to the concrete control over such information.

To sum up, EU Food Law's safety system is based on a general clause according to which all actors involved in the food chain are responsible for ensuring and verifying that food complies with safety rules. As anticipated, the same provision is echoed in the more recent FIC, where all food business operators are reminded of their responsibility for ensuring and verifying compliance with the requirements of food information law relevant to their activities (Article 8(5))³⁸⁴. This broad responsibility goes hand in hand with control. As mentioned in the previous section, this means that regardless of whether operators are actually involved in the provision of information (primarily manufacturers), they should still be covered by the general obligation to guarantee and check that such information is lawful, as long as they exercise a certain power over it (Article 17 of the GFL, specified by Article 8(5) of the FIC).

Now, where do online platforms stand? The answer needs to distinguish between various types of online providers, depending on whether they are in a position to

³⁸² Paragraphs 61 and 63 of the Opinion.

³⁸³ MONTANARI F. and PISANELLO D., *Responsibilities for Food Information to Consumers: Much Ado about Nothing?*, cit., p. 110.

³⁸⁴ Article 8 of the FIC is in line with Article 17 of the GFL, which refers to all food law requirements (and not only food information).

verify the existence and content of the information accompanying food³⁸⁵, impose specific rules on information to manufacturers and third-party traders or set up effective inspection mechanisms (arguments ex *Lidl*).

As anticipated, this query mainly applies to hybrid online markets and – to a certain extent - “new delivery” platforms. Indeed, own-brand sellers are already covered by strict information requirements under the FIC as they market food under their own name and, as a soft-law plus, do own the website in which information is displayed. Pure online markets and traditional delivery platforms are online intermediaries not involved in a food business. It would not only be hard to contend that the GFL and the FIC are applicable to them, they also do not seem to have any control over products and information anyway. Instead, hybrids and in some ways “new delivery” platforms arguably carry a food business ex GFL over which they exercise various degrees of control. However, they typically act as intermediaries of third-party products, which means that they are not the ones providing food information. Pursuant to Article 8(1) and (2) of the FIC, they would not be directly responsible for the presence and accuracy of food information, as they do not associate their names with the product. Nonetheless, should they ensure and verify the legality of such information under Article 17(1) of the GFL, as specified in Article 8(5) of the FIC? In other words, are they in a position to intervene effectively on food information, check its presence or accuracy or build monitoring mechanisms?

While there is no doubt as to the lack of control over the content of the information - they certainly cannot validate whether the information on allergens is accurate for instance -, they should be in the position to verify its existence and attest whether certain particulars are missing. As section III.5.b will prove, most online delivery platforms do not display, as of today, allergen information next to menus, asking customers to call the restaurant on their own if they wish additional information on ingredients. However, online delivery platforms have sufficient powers to establish an effective mechanism that would require restaurants to write up information on ingredients and prevent them from uploading their menus where

³⁸⁵ BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, cit., p. 26.

that information is incomplete. Similarly, platforms are in a position to monitor – through their riders - whether an allergen notice is available to customers upon delivery.

Let us turn to a hybrid market. With reference to Amazon’s rules on groceries sold in the United States³⁸⁶, the e-platform appears to exercise substantial control over significant segments related to information, as it requires third-party sellers to follow strict rules on packaging, sealing and labelling. In this latter regard, Amazon specifies that “*food is viewed as date-sensitive. It must have an expiration date permanently marked on every unit, unless the product is exempt. This includes every unit that is shipped, and every unit displayed for sale*”. Sellers must “*keep the Fulfilment Center (FC) shelf life details up to date for grocery products*” and in the file template, “*set the value of the is_expiration_dated_product field to "true"*”. All labels need to be in English. Any dietary or allergen-free claims (such as organic, kosher, gluten-free and dairy-free) must be mentioned on the label and must have received appropriate regulatory approvals. Amazon enforcement actions include prohibition from selling on the platform in case of repeated failure to meet performance targets and food safety and quality standards, periodic audits to check chill chain compliance, and removal of selling privileges.

Echoing the Advocate General’s words in *Lidl*, these examples prove that “*it is not entirely unconceivable*” that an online platform involved in food distribution exercises control over food information and undertakes an effective supervision. Especially when platforms are the ones managing the webpage of a restaurant or an offer or when they are involved in packaging, they are at least in the position to verify whether all mandatory information is present. Platforms’ control over information is even more obvious when they impose – and enforce - rules on food information and develop inspection programmes or carry regular checks. Where these control powers can be proved, online platforms – once again, hybrid online marketplaces and to some extent “new delivery” platforms – are responsible, under the GFL’s general clause, for ensuring and verifying that food products and food information are lawful within the business they control. Involving in the

³⁸⁶ Amazon Seller Central United States, *Grocery & Gourmet Foods*.

responsibility scope all platforms that exercise substantial control over food information would be more in line with the larger scheme, set by the GFL, to secure the highest level of human health and consumer protection in the European Union.

That said, a new phenomenon has recently emerged and enriched the sources of law applicable to food online. In fact, examining the framework covering food information online and the responsibilities of e-platforms in this respect cannot ignore the rules deriving directly from these platforms. In other words, what does the contractual law of online marketplaces and delivery platforms say on food information? Answering this question will help introduce the issue of platforms' liability, which will be the core of Chapter IV.

5. Information on food online platforms: examples from online markets and meal delivery platforms

a. Information on online markets: from rule takers to rule makers

The emergence of large-scale internet companies has led to a concentration of powers in their hands. In many cases, e-platforms exercise significant control over the environment that they have envisioned and created, especially through specific clauses imposed on users via Terms & Conditions³⁸⁷. In fact, the undeniable benefits of online shopping (speed, greater choice, convenience, large access) have been somehow mitigated by the “cost” of contractual terms, developed unilaterally by the platform, and all participants, businesses and consumers alike, must agree with them to have access to the services offered by the online company³⁸⁸.

Through their Terms & Conditions, online platforms have acquired the role of rule makers, rather than mere rule takers³⁸⁹, in particular with regards to consumer

³⁸⁷ BELLI L. and SAPPA C., *The Intermediary Conundrum: Cyber-Regulators, Cyber-Police or Both?*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2017, volume 8, p. 189.

³⁸⁸ MARKS C. P., *Online and “As Is”*, in *Pepperdine Law Review*, 2018, volume 45, issue 1, p. 1. See also WINN J. K., *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, cit., p. 193.

³⁸⁹ WINN J. K., *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, cit., pp. 193 ss. The Author examines the phenomenon of global online

protection and related liability. T&Cs should be included in the final page just before concluding the order - close to the buy button – and reminded at every purchase.

E-platforms’ self-regulation should not come as a surprise: their “insider” knowledge, control, greater capacities, and stronger technology allow them to formulate rules more efficient than those established by competent authorities³⁹⁰. Further, their superior bargaining power enables them to set the terms of the game unilaterally. Thus, online private players become the primary regulators and enforcers³⁹¹ of e-commerce transactions, giving rise to a novel framework via their contractual T&Cs.

This framework constitutes a source for consumer protection, parallel to – and arguably more effective than - the one deriving from public regulators. Such effectiveness generally stems from strong power levels, such as e-companies’ ownership of the e-channels, their management of payment – simply, if sellers want to get paid, they need to follow the platform’s rules - and their authority to exclude users from the platform in case of non-compliance. Their legitimacy is not based, unlike that of most national authorities, on representative democracy but rather from their market power, and from contract and property rights pursuant to their national legal systems³⁹².

Online markets’ explicit goal is to meet customers’ satisfaction. To this end, they require all participants to share the same effort towards a high level of consumer protection. Online platforms’ Terms & Conditions typically impose that all listings and products be safe and comply with applicable laws and that the website be used only in a lawful manner. While “legislative” consumer protection is still mandatory

marketplaces acting as private regulators, and brings it close to “*the "Secession of the Successful" described by Robert Reich in 1991- the withdrawal from civil society of the wealthy and powerful into private gated communities*”.

³⁹⁰ SUN J. and BUIJS J., *Online Food Regulation in China. The Role of Online Platforms as a Critical Issue*, cit., p. 510.

³⁹¹ Today’s online operators not only regulate the platforms they manage, but they also enforce the rules they issue. The phenomenon of private enforcement will be studied in section IV.6.c.

³⁹² WINN J. K., *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, cit., p. 209.

- which means that the legislative rules safeguarding consumers are to be included in the T&Cs - this private regulation strengthens national consumer law: online platforms, in fact, take it upon themselves to ensure fairness for their customers as part of their agenda³⁹³.

Here are some examples of contractual regulation from two of the largest e-markets operating worldwide: Amazon and eBay.

With reference to food trade in the United States³⁹⁴, as illustrated in the previous section, Amazon lists a series of labelling requirements, including language and dietary claims. Turning to food exchanged in the European Union³⁹⁵, Amazon's conditions applicable to selling food in the United Kingdom state that products are permitted only if correctly packaged, labelled and delivered. The T&Cs explicitly remind that since December 13, 2014, "*all listings must comply with the EU regulation on the provision of food information to consumers*" and that food must be labelled in the language of the website³⁹⁶. The same compliance with the FIC is required for selling food and beverages in Italy³⁹⁷, France³⁹⁸ and Germany³⁹⁹ 400. The platform prohibits any misleading activity, especially in relation to the information provided in listings⁴⁰¹. Similarly, eBay's T&Cs forbid sellers from posting misleading content and breaching applicable law⁴⁰².

³⁹³ Ibidem, p. 195.

³⁹⁴ Amazon Seller Central United States, *Grocery & Gourmet Foods*.

³⁹⁵ It is worth noting that Amazon's Terms & Conditions are national/regional, and not global. This entails that the rules applicable to sellers vary depending on the country they are selling in.

³⁹⁶ For selling in the United Kingdom, see Amazon Seller Central, *Food & Beverage*.

³⁹⁷ Amazon Seller Central Europe, *Alimenti e bevande*.

³⁹⁸ Amazon Seller Central Europe, *Aliments et boissons*.

³⁹⁹ Amazon Seller Central Europe, *Food & Beverage*.

⁴⁰⁰ Similarly, as a non-European example, Amazon United States requires the following: "*If you supply products for sale on Amazon, you must comply with all federal, state, and local laws and Amazon policies applicable to those products and product listings*". Permitted listings include "*properly prepared and sealed foods and beverages that are appropriately packaged and labeled*". See Amazon Seller Central United States, *Food & Beverage*.

⁴⁰¹ For selling in the United Kingdom: Amazon Seller Central, *Selling Policies and Seller Code of Conduct*. Similarly, for selling in Italy: Amazon Seller Central Europe, *Condizioni di vendita*.

⁴⁰² For selling in the United Kingdom, eBay, *Your User Agreement*.

Simply put, Amazon require sellers to display lawful, fair, and not misleading offers. However, it also reminds that while the company works “*to ensure that product information on [the] website is correct, actual product packaging and materials may contain more and different information to that displayed on our website. Ingredients may also change [...]*”. Users are recommended to “*not rely solely on the information presented on [the] website*”⁴⁰³. In other words, Amazon informs consumers, via its contractual terms, that the platform in no way guarantees that products’ descriptions are “*accurate, complete, reliable, current, or error-free*”⁴⁰⁴.

In this regard, one of the most relevant clauses included in online marketplaces’ terms refers to liability exemptions for third-party content. While this issue will be examined in detail in the next Chapter, it is worth mentioning here that platforms tend to use their T&Cs to affirm their lack of responsibility towards products and content provided by businesses. More generally, they deny liability for any illegal action exercised by users and require businesses to indemnify them for all claims connected with the material supplied, except when liability arises from failure to remove illegal content when notified⁴⁰⁵. In other words, sellers are the ones responsible for ensuring that the products supplied are safe and in compliance with applicable laws⁴⁰⁶. With regards to Amazon, its T&Cs expressly exclude that the platform guarantees that the information, content, or products accessed via the site will be as represented by sellers, or lawful to sell, and declare that the company is not to be held liable for any damage resulting from goods purchased through its services⁴⁰⁷. Similarly, eBay claims it has no control over and does not guarantee the quality, safety or legality of any item advertised or the truth or accuracy of content and listings: “*despite our reasonable endeavours, we are unable to verify or*

⁴⁰³ For selling in the United Kingdom, Amazon, *Conditions of Use & Sale*, last updated 10 July 2019.

⁴⁰⁴ For selling in the United Kingdom, Amazon, *Conditions of Use*, last updated 21 May 2018.

⁴⁰⁵ Amazon, *Conditions of Use & Sale*, cit. Similarly, for selling in France, see Amazon Seller Central Europe, *Conditions d'utilisation et générales de vente*, last updated 27 June 2019.

⁴⁰⁶ Amazon, *Conditions of Use & Sale*, cit.

⁴⁰⁷ Amazon, *Selling at Amazon, Participation Agreement*, 2016.

*authenticate any information you provide to us*⁴⁰⁸. Sellers on eBay are the sole responsible party for ensuring that listings are accurate, legal, and not including misleading information and the e-marketplace denies any accountability for the validity of the information posted by third parties on its sites⁴⁰⁹.

To sum up, online marketplaces typically address the issue of food information in their T&Cs, by either referring to a general compliance to applicable laws or imposing strict requirements on sellers. In terms of food information responsibilities, they tend to use contractual conditions and indemnification clauses to sweep away any obligation in that regard, granting themselves no responsibility for the data provided by third parties and stored on their platforms. Simply stated, sellers are the ones responsible for ensuring consumer protection.

The above analysis focused on food information for products sold on online markets, namely prepacked products. Should the website not meet consumers' rights in terms of food information – e.g., the product's picture cannot be zoomed in or the label is not clear -, customers of such markets have at least access to that information once the product is delivered and physically available to them. On the contrary, the situation with meal online delivery is substantially different, as meals are usually not brought to customers in labelled packaging. No one receives a pizza ordered through a delivery platform in a box where allergens are expressly listed. The following section will illustrate some of the challenges raised by food information when it comes to non-prepacked food.

b. Information on meal delivery platforms: challenges of non-prepacked food

As repeatedly proved, EU Food Law builds a regulatory environment where consumers' interests are strongly protected, including their right to be informed. It is worth pointing out, though, that the framework set up by the FIC is planned largely from the perspective of prepacked food⁴¹⁰. These products are designed in

⁴⁰⁸ For selling in the United Kingdom, eBay, *Your User Agreement*.

⁴⁰⁹ eBay, *User Agreement*, 2016. For selling in Italy, see *Accordo per gli utenti*.

⁴¹⁰ JANNARELLI A., *La fornitura di informazioni sugli alimenti ai consumatori nel nuovo Reg. n. 1169/2011 tra l'onnicomprendività dell'approccio e l'articolazione delle tecniche performative*, cit.,

such a way as to enable, at the time of purchase or delivery, a fair communication of food information through adequate messages printed on the packaging. On the contrary, non-prepacked foods, namely “*foods offered for sale to the final consumer or to mass caterers without pre-packaging, or [...] foods [...] packed on the sales premises at the consumer’s request or prepacked for direct sale*” (Article 44(1) of the FIC), are recipients of an underdeveloped set of rules. Indeed, the EU legislator has somehow relegated food intended for direct consumption in a secondary position. However, as exemplified in section II.2.c, meal delivery is certainly not a secondary phenomenon in the world of food online.

According to Article 1(3), the FIC covers “*all foods intended for the final consumer, including foods delivered by mass caterers, and foods intended for supply to mass caterers*”. Mass caterers are defined as “*any establishment (including a vehicle or a fixed or mobile stall), such as restaurants, canteens, schools, hospitals and catering enterprises in which, in the course of a business, food is prepared to be ready for consumption by the final consumer*” (Article 2(2)(d))⁴¹¹. As previously explained, the FIC defines food information as any information concerning a food and made available to the final consumer by any mean, “*including modern technology tools or verbal communication*” (Article 2(2)(a)).

Section III.3.b also mentioned that, compared to the extensive list of information requirements outlined for prepacked products, non-prepacked foods only demand information on ingredients causing allergies or intolerances but national law may impose the provision of other particulars listed in Articles 9 and 10. Information on potential allergens, while limited, is considered crucial for the purposes of consumer health, especially considering that the number of people with food

pp. 41 ss; PAGANIZZA V., *A European overview on Regulation (EU) No 1169/2011 after the entry into force*, in *Rivista di diritto alimentare*, 2020, issue 1, p. 11: “*the Regulation is that the EU act might be considered somehow incomplete: on the one hand, it does not cover all the aspects of food labelling (non-prepacked food and food not intended for final consumers are not covered by the provisions on mandatory particulars of the Regulation)*”.

⁴¹¹ JANNARELLI A., *La fornitura di informazioni sugli alimenti ai consumatori nel nuovo Reg. n. 1169/2011 tra l’onnidimensionalità dell’approccio e l’articolazione delle tecniche performative*, cit., p. 42.

intolerances and allergies is proved to be increasing year after year⁴¹². In fact, according to Recital 48, “*evidence suggests that most food allergy incidents can be traced back to non-prepacked food. Therefore, information on potential allergens should always be provided to the consumer*”. This certainly applies to non-prepacked food offered through online meal delivery platforms too. Simply put, information on food potentially causing allergies or intolerances must be made available to consumers, regardless of whether they purchase offline or online.

According to Article 44, Member States may adopt national measures concerning the means through which the particulars on allergens – or those ex Articles 9 and 10 imposed by national law - are to be made available and their form of expression and presentation⁴¹³. In principle, all means of communication are allowed as long as they enable consumers to make an informed choice. Information may be supplied in a number of ways, including on the menu, on chalkboards, or verbally (i.e., verifiable oral information), provided it is accurate and presented clearly⁴¹⁴.

For instance, amid COVID-19 growing concerns and the consequent rise in the demand for home meal delivery in March 2020, the UK Food Standards Agency reminded food delivery businesses of their obligation to supply allergen information to customers when taking up an order, which “*can be done orally (by phone) or in writing (through [the] website or a printed menu)*”. When restaurants own a website, they need to provide a statement on their webpage, advising

⁴¹² European Parliament, *Research for AGRI Committee - Impacts of the digital economy on the food chain and the CAP*, cit., p. 16. See also WEN H. and KWON J., *Food allergy information sharing and communication strategies in full-service restaurants in the U.S.*, in *Journal of Foodservice Business Research*, 2019, volume 22, issue 1, pp. 50 ss; SALITO G., *Alimentazione (in)consapevole e rischi per il soggetto allergico*, in *Rivista di diritto alimentare*, 2020, issue 1, pp. 65 ss.

⁴¹³ On recent proposals on allergen labelling in Belgium, MAHY A., *May contain: new developments in Belgium for allergen precaution labelling*, in *European Food and Feed Law Review*, 2019, issue 4, pp. 372 ss.

⁴¹⁴ European Commission, *Commission Notice of 13 July 2017 relating to the provision of information on substances or products causing allergies or intolerances as listed in Annex II to Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers*, paragraph 30.

customers on where they can obtain allergen information before placing an order. It is further specified that this information must be provided at two stages of the ordering process: before completion of the purchase - in writing (on the website, catalogue, or menu) or orally (by phone) - and upon delivery - in writing (allergen stickers on food boxes/packages or an enclosed copy of the menu) or orally (by delivery driver)⁴¹⁵.

Turning to Italian law, Legislative Decree 231/2017⁴¹⁶ regulates, among other topics⁴¹⁷, consumer information for non-prepacked food. Article 19 provides that these products must display a series of particulars, additional to the information on allergens as required by the FIC. These particulars include the name of the product, ingredients, storage conditions where necessary, and the defrosted status. Non-prepacked products must be coupled with a signboard placed next to the food containers or with another equivalent system, including digital mechanisms, which must be easily accessible and available in the location where food is offered. When non-prepacked food is supplied by mass caterers (such as restaurants), Italian law requires that food information – in this case solely concerning substances likely to cause allergies and intolerances and the defrosted state of the product - is included in menus, registers, signboards, or other equivalent system, which must be easily accessible. Alternatively, menus, registers or signboards may notify customers of the possibility that the product contains allergens and advise them to refer to staff for further details. However, these details must be available in a written statement, easily available to both public authorities and final consumers.

While Member States remain competent to adopt national rules on the means to communicate allergen information in a proper manner, in the absence of such rules, the FIC's principles concerning prepacked food govern non-prepacked food, too.

⁴¹⁵ Food Standards Agency UK, *Food safety for food delivery*, last updated 6 May 2020.

⁴¹⁶ Decreto Legislativo 15 dicembre 2017, n. 231. Disciplina sanzionatoria per la violazione delle disposizioni del regolamento (UE) n. 1169/2011, relativo alla fornitura di informazioni sugli alimenti ai consumatori e l'adeguamento della normativa nazionale alle disposizioni del medesimo regolamento (UE) n. 1169/2011 e della direttiva 2011/91/UE, ai sensi dell'articolo 5 della legge 12 agosto 2016, n. 170 «Legge di delegazione europea 2015».

⁴¹⁷ Specifically, sanctions and enforcement authorities for FIC's violations, which this thesis will tackle in Chapter IV.

Accordingly, information about allergens must be easily visible, clearly legible and, where appropriate, indelible, and provided in a written form. Thus, it is generally not possible to provide allergen information solely upon consumers' request⁴¹⁸.

The following paragraphs will briefly illustrate, through practical examples, whether food information on meal delivery platforms actually meets these requirements. The examples refer to well-known online ordering companies operating in the EU: Just Eat, Deliveroo, Uber Eats and Moovenda.

The Terms & Conditions set out by Just Eat⁴¹⁹ and applicable to meal ordering in the United Kingdom first remind users that by ordering products through the website they agree to be bound by the terms laid down by the platform. One of the clauses relates specifically to food allergies and intolerances: *“You acknowledge and agree that if you have a specific food allergy or intolerance, you will contact the Restaurant directly to check that the food is suitable for you, before placing your order directly with them”*. All restaurant-assigned pages display a *“Do you have a food allergy?”* window that asks customers to phone the restaurant directly. When it comes to images of food shown on the online platform, it is specified that they are provided as a *“design feature of the website only and may not be either (a) an image of food prepared or produced by the Restaurant from which you choose to order; or (b) representative of the food you receive from a Restaurant”*. Its webpage dedicated to food allergy, Just Eat clarifies its position on consumer information by stating that *“If you have a food allergy or intolerance, or someone you are ordering for has, please contact the restaurant to check whether your chosen food is suitable, before placing your order. We can help provide the restaurant's phone number if you click on the allergy links on the restaurant's menu page so that you can contact the restaurant directly. If you're unable to contact the*

⁴¹⁸ European Commission, *Commission Notice of 13 July 2017 relating to the provision of information on substances or products causing allergies or intolerances as listed in Annex II to Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers*, cit., paragraph 31; MONTANARI F., SZYMECKA-WESOŁOWSKA A., VARALLO C., *Prodotti non preimballati, Informazioni obbligatorie. Spagna, Polonia, Portogallo e Italia a confronto*, in *Alimenti & Bevande*, 2015, issue 4, pp. 37 ss.

⁴¹⁹ Just Eat, *Terms and Conditions*, last updated 7 November 2018.

restaurant, we recommend not placing or cancelling your order”⁴²⁰. Further, where customers use third-party websites provided on the platform, Just Eat reminds them that they have no control over these websites, thus bear no responsibility over their content.

Similar to Amazon and eBay, Just Eat’s T&Cs explicitly state that no promise can be made on the accuracy or completeness of the information provided on the website. Users are informed that “*when a Restaurant signs up with [Just Eat], they have to provide [...] up-to-date menu information*” that is then included by the platform operator itself on the page dedicated to the restaurant. When information relates to allergy or other dietary restrictions, Just Eat promises to “*do [its] best*” to publish this information on the website as it appears on the restaurant’s menu, but asks customers to contact the restaurant directly before placing any order. It further discourages consumers from writing on the “*leave a note for the Restaurant*” box for any question or problem concerning allergies and intolerances. Finally, the platform’s terms stress that the contract is only between customers and restaurants: no control is exercised by the online company over the conduct of the latter.

Turning to a second well-known meal delivery platform, Deliveroo UK⁴²¹ addresses the issue of allergies in its Q&A section, instructing customers concerned by food restrictions and health conditions to “*check the Good To Know section of the restaurant menu or contact the restaurant directly*”. Webpages dedicated to each restaurant display a “*Restaurant info*” window where it is specified that any assistance with allergens information requires a direct call to the restaurant and that all dishes may contain all sorts of allergens (soy, nuts, gluten, lupin and so on). Restaurants checked – around 30 – follow the same format, merely informing customers that any allergen is potentially used to cook meals. In terms of liability, Deliveroo’s Terms & Conditions⁴²² clarify that the platform has no responsibility for errors or omissions related to the content of the website. Claims of no liability do not cover liability for death or personal injury arising from the platform’s

⁴²⁰ Just Eat, *What should I do if I have an allergy?*.

⁴²¹ Deliveroo, *About Deliveroo - FAQ*.

⁴²² Deliveroo, *Terms of Service*.

negligence, or any other liability that cannot be excluded or limited under applicable law.

Moving on to a third platform - Uber Eats - every dish on the restaurants' menu displays the following notice: "*Allergies, intolerances and dietary requirements: before ordering, please contact the restaurant directly and ask to speak to a member of staff who can assist if you require information about ingredients and help cater for your needs*". Some restaurant-dedicated pages specifically explain "*We cannot guarantee your food is allergen free. Your food and its packaging may come into contact with allergens during preparation, cooking or delivery. The food is produced in kitchens where allergens are handled and where equipment and utensils are used for multiple menu items, including those containing allergens*" and then redirect customers to the restaurant's website for further information. The T&Cs - applicable to delivery in the UK - lay down the obligations that Uber Eats users must fulfil. Food needs to be prepared, handled, and stored in accordance with applicable laws, including those on food safety. Businesses⁴²³ are the ones determining the information accompanying the product and ensuring that the latter matches that information, as displayed to customers on the app. Food information should refer to "*quality, portion, size, ingredient, allergen, origin or nutritional information*". Businesses are also responsible for complying with all health and safety laws applicable in relation to their products, up to and including the time of delivery.

Similar observations can be made with regards to the Italian Moovenda⁴²⁴: the platform requires customers to contact the restaurant directly for information on allergens. Through its contractual terms, the e-company declines any responsibility for guaranteeing that the information available on the platform and submitted by its business partners is accurate and updated.

Overall, these examples follow the same path. When it comes to mandatory information on ingredients affecting consumers' intolerances and allergies, online platforms remind that restaurants use a variety of ingredients and that there is no

⁴²³ The Terms & Conditions use the expression "*merchant*" defined "*as the party who entered into the Agreement with Uber*".

⁴²⁴ <https://www.moovenda.com/>.

guarantee that meals are free from allergens. For further and secure information, platforms redirect queries to restaurants, providing either their website or their telephone number⁴²⁵. Moreover, T&Cs typically incorporate waivers for the platform.

Where EU Food Law demands food information to be accurate, clear, and easily accessible, one is left to wonder whether this *modus operandi* meets the needs of consumer protection and, specifically, whether it ensures fair and effective communication of allergen information. Especially when most food allergy incidents follow consumption of non-prepacked food (Recital 48 of the FIC). The option to call the restaurant is a burden for customers: restaurants may not answer right away on busy nights, hindering the very comfort of online delivery, i.e., speed and easy access. Moreover, asking consumers to call restaurants does not allow record and proof of the conversation in case a health risk actually materializes upon consumption. Besides, if restaurants would be able to answer allergens' questions on an *ad hoc* basis on the phone, one can wonder why a similar capacity cannot be imposed while populating the webpage. Plus, it could be argued that meal delivery platforms do have the possibility to easily inform consumers on allergens when they intermediate for large chains that offer a webpage specific to this issue (e.g., McDonald's⁴²⁶).

To conclude. Today's communication on online delivery platforms does not seem to comply with the need to provide consumers with clear and accessible information on allergens. This applies even more upon physical delivery, as customers do not generally receive an enclosed menu along with their order nor their meals in boxes labelled with a list of allergens.

6. Concluding remarks on rights and responsibilities in food online

The present Chapter addressed the issue of food information in the context of online trade. Considering the crucial position of web companies in today's information society, and their role in hosting and giving access to all sorts of data

⁴²⁵ McGLINN M., *Just Eat and Deliveroo respond to food safety concerns*, cit.

⁴²⁶ McDonald's webpage allows customers to check both nutritional facts and allergens of each product.

through their platforms, the goal was to examine their responsibilities when information refers to food.

First, this analysis proved why the focus on food information is of primary importance for consumer protection online, as the right of withdrawal, typically available in distance contracts to allow customers to change their mind after handling the product, has little use when it comes to foods and beverages.

Second, it showed how the right to food information is one of the pillars of EU Food Law, contributing to the goal of ensuring the highest level of safety and health in the Union. In particular, the recent Food Information to Consumers Regulation intends to protect online consumers as any other, by establishing a unique framework according to which what applies offline applies online. The key difference is that in distance sales, consumers must be informed both before the purchase and upon delivery.

Third, the research illustrated how food information rights translate into obligations. In other words, it analysed whom information responsibilities are imposed upon. Under the food information *lex specialis* – the FIC -, the operators responsible for the accuracy and presence of food information are those who market their own-brand products. However, under EU General Food Law, all food business operators are commonly responsible for ensuring and verifying that products comply with applicable laws, and these include rules on food information. This responsibility is strictly connected to control though: operators are responsible for food information, and in general food safety, only towards those stages of production, processing, and distribution they have control over.

That said, the aim of this Chapter was to explore where web platforms stand in this framework. The analysis examined food online's main business models (own-brand sellers, online markets, and meal delivery platforms), to assess whether they could be considered responsible, under current EU law, for the food information displayed on their websites. Referring to the study on food online qualification in Chapter II and to additional case-law – *Lidl* –, it was concluded that under the FIC, only one category of online platforms seems immediately and directly responsible for the presence and accuracy of food information, that of own-brand sellers. Despite ownership of the web platform, to which EU soft law surprisingly links

food information responsibilities, online markets and meal delivery platforms do not associate their name with the product, which means that a direct and immediate responsibility for ensuring food information as per the FIC cannot be allocated to them. However, it was proved how food information principles are part of a larger framework, set by the GFL, which requires all participants of the food chain to ensure, within the business they control, lawfulness and safety of all products.

In that regard, it was claimed that pure online marketplaces and traditional delivery platforms (i.e., aggregators) are reasonably excluded from food information responsibilities. Not only because Chapter II concluded that they should be considered as offering an information society service and not carrying a food business, but also because, under the GFL, they do not seem to exercise any control over food information.

On the contrary, it is not entirely unconceivable that hybrid online marketplaces and “new delivery” platforms exercise some control over food information and undertake an effective supervision. Therefore, they should have the responsibility, as any FBO, for ensuring and verifying that food products and food information are lawful, within the business they control. For instance, when platforms fill or manage restaurants’ webpages, or have an effective inspection system of the products they handle, they are in a position to at least check whether all mandatory information is present.

Chapter III closed with a picture of food information in today’s digital economy. More specifically, it showed how consumers’ right to be informed has been addressed by some major online platforms. To sum up, the study demonstrated how, via their terms of service, online platforms are keen on claiming no control over and no responsibility for the data available on their websites. This is even more evident when it comes to meal delivery, where mandatory information on allergens is blatantly missing from both the webpage and the food boxes delivered to the final consumer and where all customers can do is call restaurants. Does such type of communication meet the EU requirements of accuracy, clarity, and easy access?

The digital food chain has grown in complexity, generating an intricate web of operators involved in the production, transformation, and distribution of products. Food information needs to be accurate and exhaustive all along this chain up to final

consumption. This Chapter examined what current EU law says about food information responsibilities and how they apply to food online. It also documented how online companies typically claim their neutrality with regards to information, and define specific contractual terms aimed at avoiding liability for any illegal activity exercised by third parties on their channels or unlawful content found on their platforms⁴²⁷. The next Chapter will focus on the very issue of liability for illegal food information, from the perspectives of what the law is and what it should be.

⁴²⁷ BELLI L. and SAPPÀ C., *The Intermediary Conundrum: Cyber-Regulators, Cyber-Police or Both?*, cit., p. 190.

Chapter IV – Liability and controls in food online: towards platforms’ enhanced responsibility?

Are online platforms liable for infringing food information? How far should they be responsible for food information? How are food safety laws enforced on online channels?

1. Roadmap

In any legal system, dictating rules on rights and obligations is not enough. These must be put into practice and ensured through an effective and proportionate system of controls and sanctions. The present Chapter will focus on what happens when food information online is unlawful and what role e-platforms *can*⁴²⁸, *must*⁴²⁹ and/or *should*⁴³⁰ play in preventing and addressing Food Law violations.

First, section IV.2 will distinguish between responsibility and liability for the purposes of this thesis. It will detail the meaning and value of platforms’ liability in the context of the recent exponential growth of illegal content online. Indeed, the attention around this legal topic is not merely intellectual curiosity but directly ensues from the urgent need to curb violations occurring on the web.

Section IV.3 will narrow the research and assess how breaches of food information obligations amount to primary liability under current EU and national law. After briefly mentioning the framework of administrative sanctions in Italy⁴³¹, the analysis will focus on EU civil liability for defective products and examine the status of online platforms in that regard. The resulting conclusions will lead to investigating platforms’ secondary liability for third-party infringements, specifically their liability for facilitating, contributing to, or being responsible in some other way for the unlawful information uploaded by users (section IV.4). This issue lies in the larger discourse of intermediary liability and gatekeepers’ control

⁴²⁸ Emphasis added.

⁴²⁹ Ibidem.

⁴³⁰ Ibidem.

⁴³¹ On the contrary, the research is not focused on the set of punitive measures for food law infringements established by Italian criminal law.

over information and requires a depiction of the safe harbour regime of the ECD and subsequent CJEU case-law.

The following section will then introduce a new phenomenon, that of platforms' preventive enhanced responsibility. In light of soft law developments and a function-based approach adjusted to food online, this Chapter will argue that the role of platforms with regards to food information could be studied through the lenses of a framework of *ex ante*, legally imposed, obligations that operate regardless of and well before liability to ensure the safety and accuracy of online information. The concept of enhanced responsibility surely circles back to and reflects EU Food Law's system of obligations – *rectius*, responsibilities – as illustrated in Chapter III (Article 17 of the GFL, Article 8 of the FIC). However, enhanced responsibility in food online, as proposed in this Chapter, is precisely an attempt to bridge the gaps of EU Food Law when applied to e-platforms. In essence, the notion is the same – preventive obligations rather than *ex post* repair – but the scope is different – online platforms, regardless of them being food business operators or operators “*under whose name or business name the food is marketed*” – and tailored to one goal: preventing unlawful food information on online channels.

Finally, section IV.6 will unfold the challenges raised by food online when it comes to product control and Food Law enforcement. The analysis will reveal which answers have been found by the EU legislator in terms of official controls and by online platforms via their contractual terms. Section IV.7 will summarize this Chapter's outcomes and bring it to a close.

2. The internet, privileged channel for illegality

a. The increase in infringing products exchanged online

The present section seeks to explain the reasons behind the focus on e-platforms' liability.

As anticipated when introducing this thesis' problem statement (section I.3), digital innovation has revolutionized the way food information circulates. While the latter mostly referred to labels printed on packages in the past, it is now a large

umbrella of data, communications, messages, and notices available to food consumers via web channels. The online route has helped food businesses reach an increasing number of potential customers, allowing food information to expand its borders and to touch millions of consumers every day, one click on the keyboard away. Thanks to e-platforms, food information is now instant, ubiquitous, global, and deriving from an incredibly large pool of sources.

The emergence of food online has, however, led to a huge number of Food Law violations, including information infringements. These are part of the wider problem of illegal content online.

No official definition of illegal content has been adopted at European Union level. However, the expression is deemed to comprise any material or information that breaches Union law or the law of a Member State. Infringing material found on the internet largely includes terrorism-related content, pedo-pornographic images, obscene videos, and hateful speeches. This content affects fundamental values and human rights, such as national security, child protection, equality, human dignity, and the right to non-discrimination.

When turning to the food sector, non-compliance with EU and Member States' food laws has primarily an impact on product safety and quality. Unsafe, substandard, and counterfeit products are gradually populating the web, threatening human health and consumers' interests⁴³². One of the main issues pertaining to Food Law violations nowadays concerns the very topic of information online, which is available on e-commerce websites next to the product's picture or in the offer and often in breach of applicable laws⁴³³.

⁴³² SUN J. and BUIJS J., *Online Food Regulation in China. The Role of Online Platforms as a Critical Issue*, cit., p. 503.

⁴³³ European Commission, *The first EU coordinated control plan on online offered food products. Analysis of the main outcome of the implementation of the Commission Recommendation on a coordinated control plan on the official control of certain foods marketed through the Internet*, cit.

In today's digital food chain, the barriers to entry into the market have lowered⁴³⁴. Food consumers have access to *more*⁴³⁵ information, receiving it *faster*⁴³⁶ and from a *wider*⁴³⁷ range of sources, and the consequence is that the proportion of reliable information is potentially *lower*⁴³⁸. Simply stated, consumers are confronted with an overabundance of information without the professional capacity of vetting as to its lawfulness and accuracy. The task of the present Chapter is precisely to identify – and suggest, where such identification is not immediately retrievable from existing rules – who is to deal with infringing food information.

b. Responsibility vs liability: towards platforms' enhanced responsibility?

The purpose of EU General Food Law is to place *responsibilities*⁴³⁹ upon all food actors, building a joint responsibility chain aimed at the highest possible degree of food safety. Similarly, Article 8 of the Food Information to Consumers Regulation refers generically to the concept of *responsibility*⁴⁴⁰ to impose positive and negative obligations upon FBOs identified in the provision. The goal of these two Regulations is not, however, to shape a liability system⁴⁴¹.

Indeed, in relation to the consequences of law infringements, and the existing framework for sanctions, one must turn to the distinct notion of liability. Liability is the legal possibility of ascribing the negative consequences of an act or an

⁴³⁴ALDORT J. AR., MARRONE M., and CARPENTER A. J., *Lost in the Amazon: how to combat trademark infringement in the e-commerce marketplace*, in *World Trademark Review*, 16 January 2020.

⁴³⁵ Emphasis added.

⁴³⁶ Ibidem.

⁴³⁷ Ibidem.

⁴³⁸ Ibidem.

⁴³⁹ Ibidem.

⁴⁴⁰ Ibidem.

⁴⁴¹ DEFARES K. and HAZEVELD N., *Chronicle European Food Law 2010–2012*, in *European Food and Feed Law Review*, 2013, issue 3, p. 168; European Commission, *Guidance on the implementation of articles 11, 12, 14, 17, 18, 19 and 20 of Regulation (EC) N° 178/2002 on General Food Law, Conclusions of the Standing Committee on the Food Chain and Animal Health*, 26 January 2010, p. 13.

omission to its author or to a third person⁴⁴². Where responsibility works at the forefront of illegality, tracing dos and don'ts for all actors involved in a specific activity, liability is activated *ex post*, determining who should face the effects of illegality once this has happened.

Online platforms' liability for food safety breaches might be examined from two perspectives: that of *primary liability*⁴⁴³, i.e., considering the role of the operator whose behaviour has led to a specific violation (section IV.3); that of *secondary liability*⁴⁴⁴, i.e., which focuses on the behaviour of the party supposed to control, prevent, and avoid infringements of others (section IV.4). However, a new approach has recently emerged in the context of platforms' role against illegal content. As anticipated in the roadmap, section IV.5 argues that e-platforms' contribution to a safer internet is currently moving away from literal liability and gradually shifting to a new concept, that of *enhanced responsibility*⁴⁴⁵. Again, the latter involves a series of obligations requiring internet-based operators to take action and assist in preventing third-party violations, regardless of issues pertaining to liability⁴⁴⁶, that is to say regardless of any secondary liability claim for the conduct of their users.

3. Primary liability for unlawful food information: focus on product liability

As illustrated in the previous Chapter (section III.4), the FIC imposes primary information responsibilities mostly upon those operators who market their own products. However, Article 17 of the EU General Food Law – replicated subsequently in Article 8(5) of the FIC - creates a system where each operator involved in the food chain should ensure and verify, within the business they have control over, that food meets Food Law requirements.

⁴⁴² GIUFFRIDA M., *Innovazione tecnologica e responsabilità dell'operatore del settore alimentare*, cit., p. 9.

⁴⁴³ Emphasis added.

⁴⁴⁴ Ibidem.

⁴⁴⁵ Ibidem.

⁴⁴⁶ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, Chapter I of DINWOODIE G. B., *Secondary liability of internet service providers*, 2017, Springer, Oxford Legal Studies Research Paper 47/2017, p. 2.

The present analysis examines whether and how these responsibilities amount to liability, taking into consideration one preliminary observation, namely that liability in the food sector is largely national based. Article 17 of the GFL clearly states that it is up to the Member States to put in place the “*rules on measures and penalties applicable to infringements of food and feed law*”⁴⁴⁷. Indeed, the EU horizontal framework on food safety is not complemented by an adequate regime of sanctions, thus needing the intervention of national implementing mechanisms⁴⁴⁸. These mechanisms must be effective, proportionate, and dissuasive.

In other words, liability under EU Food Law is a matter of national law and largely flows from the rules on liability laid down at Member States’ level. While this research primarily focuses on civil liability, in its harmonized product liability capacity -, the next section will briefly mention the rules governing administrative pecuniary sanctions for food information infringements in the Italian legal system, in order to show how food information responsibilities established at Union level have been translated into liabilities at national level.

a. Administrative pecuniary sanctions: brief overview of Italian law

Italy adopted via its Legislative Decree 231/2017⁴⁴⁹ a specific regime of sanctions for infringements of the FIC. Broadly speaking, the Decree⁴⁵⁰ establishes that, unless the act constitutes a crime, food information breaches are to be punished with administrative fines, that range from a minimum of € 500 to a maximum of € 40 000, depending on the provision infringed⁴⁵¹. Specifically, Article 3 deals with

⁴⁴⁷ GIUFFRIDA M., *Innovazione tecnologica e responsabilità dell’operatore del settore alimentare*, cit., p. 29.

⁴⁴⁸ PINI O., *Il riparto di competenze in materia di correttezza informativa sui prodotti alimentari: alcune riflessioni*, cit., p. 28.

⁴⁴⁹ Decreto Legislativo 15 dicembre 2017, n. 231, cit.

⁴⁵⁰ In the Italian system of sources of the law, legislative decrees are legislative acts adopted by the Government and delegated by Parliament, which identifies principles and criteria to be followed by the former (see Articles 76 and 77 of the Italian Constitution, adopted in 1947 and entered into effect in 1948: Costituzione della Repubblica Italiana, Gazzetta Ufficiale 27 dicembre 1947, n. 298).

⁴⁵¹ KLAUS B. and BUSANI C., *Italy Adopts Legislation Establishing Sanctions for the Violation of the Provisions of Regulation (EU) No. 1169/2011 on Food Information to Consumers*, in *European*

unfair information practices (in reference to Article 7 of the FIC). Article 4 applies to those violating the obligations laid down in Article 8 of the FIC. Articles 5 and 6 refer to mandatory food information infringements (i.e., Article 9 of the FIC). Article 7 addresses violations concerning distance selling ex Article 14 of the FIC, for which administrative fines range from € 2 000 to € 16 000. Articles 8 to 15 focus on violations of specific mandatory requirements (name of the product, ingredients, allergens, net quantity and so on). Whereas Article 16 covers infringements of voluntary information requirements ex Article 36 of the FIC.

According to the Italian Law, the liable party for food information infringements is identified in reference to Article 8(1) of the FIC, as in the FBO “*under whose name or business name the food is marketed or, if that operator is not established in the Union, the importer into the Union market*”. The liable party is also the operator whose name or business name is mentioned in a registered trademark (Article 2). Beyond this brief overview of Italian administrative sanctions for FIC’s violations, the present Decree will be examined again in section IV.6.b with regards to public enforcement in food online.

Turning to infringements of EU General Food Law, and more specifically of its Articles 18, 19, and 20, Italy established a system of sanctions through Legislative Decree 190/2006⁴⁵². The latter dictates, among other provisions, that unless the act constitutes a crime, FBOs⁴⁵³ are subject to an administrative fine where they knowingly do not withdraw an unsafe food product or do not inform consumers of the reasons of such withdrawal.

Interesting to note that Italian law does not cover all GFL’s violations but only those concerning traceability and withdrawal mechanisms (as in Articles 18, 19 and

Food and Feed Law Review, 2018, issue 2, pp. 148 ss; ARTOM A. and ARTOM A., *Il nuovo Regolamento UE sui controlli ufficiali e le problematiche sanzioni*, in *Rivista di diritto alimentare*, 2018, issue 4, pp. 54 ss; ALBISINNI F., *National enforcement of food communication rules*, in *Rivista di diritto alimentare*, 2020, issue 1, pp. 6 ss.

⁴⁵² Decreto Legislativo 5 aprile 2006, n. 190. Disciplina sanzionatoria per le violazioni del regolamento (CE) n. 178/2002 che stabilisce i principi e i requisiti generali della legislazione alimentare, istituisce l’Autorità europea per la sicurezza alimentare e fissa procedure nel settore della sicurezza alimentare.

⁴⁵³ Hence, all operators involved in the food supply chain, from producers to distributors.

20 of Regulation 178/2002). The general clause according to which all food business operators have the primary responsibility to guarantee that food is lawful “*at all stages of production, processing and distribution within the businesses under their control*” (Recital 30 and Article 17 of the GFL) does not seem to fall within the scope of the Decree.

b. Civil liability: harmonized liability for defective food products

Food Law transgressions activate civil liability as well. Better yet, the most relevant aspects of Food Law liability have been forged within civil law and its rules on liability for damages⁴⁵⁴.

Indeed, while EU food legislation does not directly provide consumers with specific remedies, violations of food safety requirements, and food information principles in particular, may trigger both contractual and tort liability. With regards to the latter, non-contractual remedies are generally defined by consumer protection law, including product liability law.

Again, pertinent provisions on product liability – as any rule on liability in Food Law - directly arise from national legislation and are included, for instance, in the Italian Consumer Code (Legislative Decree 206/2005⁴⁵⁵)⁴⁵⁶. What is interesting about product liability though, is that national normative frameworks have been harmonised at supranational level by Directive 1985/374 on the approximation of

⁴⁵⁴ SCIAUDONE A., *Responsibilities of food business operators*, Chapter XII of COSTATO L. and ALBISINNI F., *European and Global Food Law*, 2016, Wolters Kluwer, p. 251.

⁴⁵⁵ Decreto Legislativo 6 settembre 2005, n. 206. Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n. 229. The liability for defective products is covered by Part IV, Title II, Articles 114 ss.

⁴⁵⁶ CARMIGNANI S., *Consumer protection*, cit., p. 243.

laws concerning liability for defective products (hereinafter also LDP)^{457 458}, amended by Directive 1999/34⁴⁵⁹.

Product liability as laid down by the LDP is distinct from contractual liability since consumers may not have – and usually do not have – any direct contractual relationship with producers. It differs from typical non-contractual liability as well, as it normally ignores rules on fault⁴⁶⁰. Both these Directives, indeed, refer to “*liability without fault*”⁴⁶¹ (Recital 2⁴⁶² of Directive 1985/374 and Recital 8⁴⁶³ of Directive 1999/34). More specifically, the LDP regime relies on a form of non-contractual strict liability of producers⁴⁶⁴: that is to say, producers may be held liable for a damage caused by a defective product regardless of their intention or negligence. Thus, the burden of proof is made easier on the consumer who must

⁴⁵⁷ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

⁴⁵⁸ VAN DER MEULEN B., *The Structure of European Food Law*, cit., p. 88.

⁴⁵⁹ Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

⁴⁶⁰ *La legislazione alimentare dell’Unione Europea: il Regolamento (CE) n. 178/2002*, Chapter II of COSTATO L., et al., *Compendio di diritto alimentare*, cit., pp. 123 ss.

⁴⁶¹ GIUFFRIDA M., *Innovazione tecnologica e responsabilità dell’operatore del settore alimentare*, cit., pp. 4 ss; GIUFFRIDA M., *Dalla responsabilità dell’imprenditore all’imprenditore responsabile*, in *Rivista di diritto agrario*, 2007, issue 4, p. 557.

⁴⁶² Recital 2 of Directive 1985/374: “*Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production*”.

⁴⁶³ Recital 8 of Directive 1999/34: “*Whereas the principle of liability without fault laid down in Directive 85/374/EEC must be extended to all types of product, including agricultural products as defined by the second sentence of Article 32 of the Treaty and those listed in Annex II to the said Treaty*”.

⁴⁶⁴ In the presence of a damage resulting from the existence of a product defect, liability is released from the ascertainment of fault; only the causal relationship between one's own conduct and another's harmful event is required.

prove damage, defect, and causal link but not fault (Article 4)⁴⁶⁵. However, producers may avoid liability by demonstrating a cause of exemption (Article 7)⁴⁶⁶.

Producers are defined as any “*manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer*”. By way of exception, if the producer cannot be identified, suppliers who distributed the product will be equally liable unless they communicate to the injured person, within a reasonable time from the request, the identity of the producer or of the person who supplied the product to them.

Originally, primary agricultural products – including food but excluding products that had initiated some kind of processing - were left outside the scope of the LDP. Member States, though, were allowed to provide for their inclusion. Subsequent to the 1999 amendment, such exclusion no longer applies and liability for defective products now covers all movables⁴⁶⁷, including food. This conclusion not only results from the fact that Article 21 of the GFL plainly safeguards the LDP, by stating that the rules and principles of the General Food Law are without prejudice to Directive 1985/354⁴⁶⁸. But one may also refer to Recitals 5-9⁴⁶⁹ of the

⁴⁶⁵ GIUFFRIDA M., *Liability for defective food products*, Chapter XIII of COSTATO L. and ALBISINNI F., *European and Global Food Law*, 2016, Wolters Kluwer, p. 264.

⁴⁶⁶ For a detailed illustration of the causes for liability exclusion, see *ibidem*, pp. 271 ss.

⁴⁶⁷ See Article 1 of the 1999 amendment: “*Directive 85/374/EEC is hereby amended as follows: 1. Article 2 shall be replaced by the following: ‘Article 2 For the purpose of this Directive, “product” means all movables even if incorporated into another movable or into an immovable. “Product” includes electricity’. 2. In Article 15, paragraph 1(a) shall be deleted*”.

⁴⁶⁸ JANNARELLI A., *La fornitura di informazioni sugli alimenti ai consumatori nel nuovo Reg. n. 1169/2011 tra l’onnidimensionalità dell’approccio e l’articolazione delle tecniche performative*, *cit.*, p. 40.

⁴⁶⁹ Recital 5: “*Whereas including primary agricultural products within the scope of Directive 85/374/EEC would help restore consumer confidence in the safety of agricultural products; whereas such a measure would meet the requirements of a high level of consumer protection*”. Recital 6: “*Whereas circumstances call for Directive 85/ 374/EEC to be amended in order to facilitate, for the benefit of consumers, legitimate compensation for damage to health caused by defective agricultural product*”. Recital 7: “*Whereas this Directive has an impact on the functioning of the internal market in so far as trade in agricultural products will no longer be affected by differences between rules on*

1999 amendment, which attest to the intention of the EU legislator to expand consumer protection and tackle all products that can generate a safety hazard⁴⁷⁰.

Once proved that food products are indeed within the scope of the liability regime ex LDP, - in particular, once the idea that unprocessed food products are *per se* safe has been rejected⁴⁷¹ - the question now arises as to whether illegal food information may activate this regime, that is to say, whether infringing food information may amount to a defect ex LDP.

A defect occurs when the product does not provide the safety that can reasonably be expected from that product or from the products of the same series, taking into consideration all circumstances. These include the presentation of the product (Article 6(a)) – as in the indication of its characteristics, the warnings, the instructions, and generally all the information complementary to the product (see for instance Article 117 of the Italian Consumer Code). In other words, unsafety and consequent defectiveness are not only caused by structural failures of the product but also from the inaccuracy and insufficiency of the information linked to it⁴⁷².

Turning specifically to food information, the analysis in section III.3.a proved how safety stands at the heart of EU Food Law and how information is one of its pillars. Food information constitutes an integral part of the product, and it is crucial to assessing its safety. Where such information is absent, incorrect, or misleading,

producer liability”. Recital 8: “Whereas the principle of liability without fault laid down in Directive 85/374/EEC must be extended to all types of product, including agricultural products as defined by the second sentence of Article 32 of the Treaty and those listed in Annex II to the said Treaty”. Recital 9: “Whereas, in accordance with the principle of proportionality, it is necessary and appropriate in order to achieve the fundamental objectives of increased protection for all consumers and the proper functioning of the internal market to include agricultural products within the scope of Directive 85/374/EEC; whereas this Directive is limited to what is necessary to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty”.

⁴⁷⁰ GIUFFRIDA M., *Liability for defective food products*, cit., p. 266.

⁴⁷¹ Originally justifying the exclusion of natural products from the LDP.

⁴⁷² JANNARELLI A., *La fornitura di informazioni sugli alimenti ai consumatori nel nuovo Reg. n. 1169/2011 tra l’onnicomprendività dell’approccio e l’articolazione delle tecniche performative*, cit., p. 40.

the safety of food may be affected: for instance, a pot of yogurt with a wrong expiration date may cause severe harm if the product is spoiled. In this case, lack or inaccuracy of food information unquestionably amounts to a defect *ex LDP*. Therefore, product liability does not only occur in case of manufacturing deficiencies, but also when food comes with warning defects⁴⁷³ or other information flaws that result in its unsafety. These flaws may include existence (e.g., failure to mention allergens or lack of mandatory instructions on the specific conditions for storage), content (e.g., an incorrect notice indicating that the product may be eaten raw), clarity (e.g., blurred print), completeness (e.g., incomplete information on cooking conditions), visibility of and access to the information (e.g., information available only if consumers go to a certain website). Hence, according to the 1985 Directive, food producers or, if producers cannot be identified, suppliers may be held liable where information infringes EU food legislation, and that infringement leads to a safety risk⁴⁷⁴.

In conclusion, testing the defectiveness of a food product under Directive 1985/374 needs verification as to whether that same product satisfies EU Food Law requirements, including food information constraints. Indeed, the rules on product liability are not isolated but intertwined with the principles governing EU Food Law. As two sides of the same coin, GFL/FIC and LDP are linked by strict complementarity: the former apply beforehand while the latter is activated *ex post*, once a damage actually occurs⁴⁷⁵. This creates an integrated civil liability system for the food sector where rules of Food Law connected to rules on liability, at EU and national levels, are crucial to verifying, case-by-case, whether a violation of a

⁴⁷³ BRUNO F., *I Punitive Damages nel settore alimentare*, in *Rivista di diritto alimentare*, 2018, issue 4, pp. 24 ss.

⁴⁷⁴ VAN DER VEER L., *Food online*, cit., p. 95.

⁴⁷⁵ BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, cit., p. 21.

food safety principle leads to liability⁴⁷⁶. According to Montanari and Pisanello⁴⁷⁷, this integrated system is even more obvious with regards to the responsible/liable party. Indeed, by establishing that food information responsibilities lie with those operators “*under whose name or business name the food is marketed*”, Article 8 of the FIC mirrors the regime set up by the LDP, which identifies the producer as the liable party, as in “*the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer*”. This “*alignment of the FIC Regulation with EU rules for defective products in this area cannot be considered merely fortuitous, being rather the result of the effort deployed by the EU legislator to ensure convergence between the two regimes*”.

Now that the EU scheme on product liability in the food sector has been ironed out – as well as the Italian framework of administrative sanctions - the following section will illustrate how these principles apply to food online platforms when information on their channels is illegal.

c. Online platforms’ liability for infringing food information

As demonstrated in section III.5, online platforms tend to claim their neutrality with regards to the information accessible via their websites. Via their T&Cs, they typically dictate clauses directed at exempting them from any liability for the illegal content they display. Taking into consideration the above examination on product liability, this section will verify whether their claim is consistent with LDP’s principles. Simply put, are e-platforms liable under Directive 1985/374 when food information infringes applicable laws?

Distinguishing between food online platforms’ various business models is, once again, crucial.

⁴⁷⁶ SCIAUDONE A., *Responsibilities of food business operators*, cit., p. 261; BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, cit., p. 7.

⁴⁷⁷ MONTANARI F. and PISANELLO D., *Responsibilities for Food Information to Consumers: Much Ado about Nothing?*, cit., p. 111.

When it comes to own-brand sellers, the answer seems immediate. By linking their name to the product, they bear primary responsibility for food information under the FIC (see section III.4.c.ii). This responsibility easily translates into product liability in case that information is unlawful and unsafe, as own-brand sellers fall within the definition of producer – of food - under Article 3 of the LDP⁴⁷⁸. Pursuant to the latter, indeed, a producer is the manufacturer of a finished product or any person who, by putting their name, trademark or other distinguishing feature on the product presents themselves as its producer.

Food online intermediaries, as in platforms mediating between consumers and third-party traders (of groceries or meals), are more challenging. As illustrated in section III.4.c.ii, online marketplaces, as well as meal delivery platforms - where FIC's applicability could be argued⁴⁷⁹ - do not associate their name with the product. Therefore, from FIC's standpoint, they do not have a direct responsibility for the presence and accuracy of food information. However, it was also mentioned how this conclusion contradicts the European Commission's explicit intention of imposing mandatory food information responsibilities upon website owners.

In terms of product liability, online platforms that act as intermediaries for third-party sellers are in no way producers ex LDP, which means that they cannot be held liable under that regime for infringing food information. However, it is worth reminding that the LDP considers the supplier subsidiarily liable "*where the producer of the product cannot be identified, [...] unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product*". Simply put, suppliers are liable, by way of

⁴⁷⁸ As mentioned by BORGHI P., *La responsabilità del produttore per prodotto difettoso*, in *La legislazione alimentare dell'Unione Europea: il Regolamento (CE) n. 178/2002*, Chapter II of COSTATO L., *et al.*, *Compendio di diritto alimentare*, cit., p. 125, one could cast some doubts on the very notion of manufacturer when it comes to food. Agricultural products do not seem to be manufactured *per se*, as they are the result of plants' and animals' biological processes, and these are merely assisted by humans.

⁴⁷⁹ Specifically, with regards to hybrid online markets and "new delivery" platforms. On the contrary, pure online markets and aggregators seem to fall outside the scope of the FIC (and the GFL) as they are mere intermediaries to third-party sellers and are not involved in a food business.

exception, where consumers cannot identify the producer within a reasonable amount of time – 3 months in the Italian Consumer Code⁴⁸⁰.

In the context of food online, it is not entirely unconceivable that products sold through e-commerce websites present difficulties with traceability, especially when the name of the producer is not mentioned. Considering the lack of a definition for the word “supplier” under the LDP, could it be argued that online intermediaries supply food and are hence liable in case the name of the producer is not available? Or are suppliers only those third-party sellers trading food through the platform? If one were to follow the Italian implementing rules, for instance, suppliers are those distributing the product in the course of their commercial business⁴⁸¹. Excluding pure online marketplaces and traditional meal deliveries who act as mere mediators for third-party sellers, one could suggest that the term supplier includes hybrids and “new delivery” platforms, who are indeed involved in and in control over distribution to the final consumer⁴⁸².

As for the administrative penalties laid down by Italian Legislative Decree 231/2017 (section IV.3.a), only those e-companies associating their name with the food or whose name or business name is mentioned in a registered trademark can be held liable. This, once again, applies to own-brand sellers only.

To conclude. According to arguments directly deriving from the FIC, EU rules on product liability and national provisions establishing administrative sanctions,

⁴⁸⁰ Article 116(1) of the Italian Consumer Code: *“Quando il produttore non sia individuato, è sottoposto alla stessa responsabilità il fornitore che abbia distribuito il prodotto nell’esercizio di un’attività commerciale, se ha omesso di comunicare al danneggiato, entro il termine di tre mesi dalla richiesta, l’identità e il domicilio del produttore o della persona che gli ha fornito il prodotto”*.

⁴⁸¹ Article 116(1) of the Italian Consumer Code.

⁴⁸² Similarly, arguments in favour of Amazon meeting the definition of seller under Pennsylvania state law can be found in LECHER C., *How Amazon escapes liability for the riskiest products on its site. Who’s at fault when something you buy on Amazon goes bad?*, in *The Verge*, 28 January 2020: *“That court decided Amazon was so involved in the purchasing process that the company meets the definition of a “seller” of products under state law, and so could be held liable for defective third-party products on its platform. [...] ‘If you look at the body of law defining what a seller is, and look at Amazon in comparison,’ he says, ‘[it’s] hard to see why the corner deli is deemed to be a seller for all the stuff in the store there, and the amount of control they have for safety and the like is much less than what Amazon has.’”*.

online operators selling their own food via their web platform are certainly liable for illegal food information - provided that non-compliance results in a safety defect, when it comes to product liability. Online markets – pure and hybrid – and meal ordering platforms are not directly liable under the LDP or national law – precisely, Italian law on administrative penalties - as they are not producers or trading food under their own name. While the EU legislator wanted to target, in terms of responsibilities, all actors directly and indirectly involved in the provision of food information (see section III.4), this goal fails to succeed when the discussion moves to liability, as in when food information is unlawful, and consumers seek a remedy. Indeed, liability seems to cover only manufacturers and/or those linking their name to the product, clashing with the spirit of EU Food Law and the legislative intention of securing a general contribution to food safety within the Union.

However, and especially in terms of civil liability, one additional consideration is critical. Food information responsibilities and consequent liability are part of an integrated system of rules relevant to Food Law and to liability, both at EU and national levels, and product liability is just one minimum standard⁴⁸³ of that system. While most FOPs are largely left out of primary liability if one were to follow literal arguments deriving from principles of strict product liability, this does not mean that liability cannot be based on different criteria. Especially if one reminds that the principles laid down by the LDP, while applicable to food, have not been written having that specific product in mind. In fact, the question is not only whether online markets are liable for infringing information under current EU law but also, from a prospective standpoint, how much liability should the law place on them in order to protect food consumers online. Online intermediaries may not be the ones creating the information but by allowing infringing material to be accessed via their services, they are contributing to maintaining an unsafe internet environment.

In other words, violations of food safety rules, and of provisions on information in particular, constitute an offense for which the direct infringer would incur in civil

⁴⁸³ BORGHI P., *La responsabilità del produttore per prodotto difettoso*, in *La legislazione alimentare dell'Unione Europea: il Regolamento (CE) n. 178/2002*, Chapter II of COSTATO L., *et al.*, *Compendio di diritto alimentare*, cit., p. 127.

liability and administrative/criminal sanctions depending on the national regime of each Member State, and in accordance with EU legislation. However, when it comes to food offered through online intermediaries – i.e., e-markets and delivery platforms –, these act as mediators to products sold by third parties (i.e., sellers/restaurants) and the information connected to the food is ordinarily generated by the latter. While the infringement is certainly by the provider of the information, should it also be by online platforms? Simply stated, is there any argument supporting online platforms’ secondary liability for third-party illegal information⁴⁸⁴, considering that they host that information and give millions of consumers access to it? If one comes to think of it, from a “consumer perception” point of view, customers tend to buy from the platform – rather than from the seller –, blaming and remembering that same platform if they are not satisfied with the food or if anything goes wrong.

Section IV.4 will tackle the core of online platforms’ secondary liability and introduce their role as internet gatekeepers. The purpose will be to check whether there are any justifications, in terms of law-making policy⁴⁸⁵, for intermediary liability in food online. That is to say, even though most food online platforms may not be primarily covered by existing product liability rules, this does not mean that the law may not or *should*⁴⁸⁶ not find a different answer that effectively ensures food consumer protection.

Needless to say, the following analysis will only refer to food online intermediaries, as in online platforms acting as windows for third-party food products. Own-brand sellers, on the contrary, as this has been repeatedly demonstrated, are well within primary liability. Located between or among two or more actors, online intermediaries assist in the dissemination of content created and initiated by others. While the concept of intermediaries is expressly mentioned in the ECD as the title of the section that will be examined further (i.e., “*Section 4: Liability of intermediary service providers*”), the Directive does not clarify its

⁴⁸⁴ The concept of secondary liability and its categorisations will be defined in detail in section IV.4.a.

⁴⁸⁵ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 61.

⁴⁸⁶ Emphasis added.

meaning⁴⁸⁷. Nonetheless, a definition of internet intermediaries was proposed by the Organization for Economic Co-operation and Development (OECD) in 2010: “*Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties*”⁴⁸⁸.

4. Secondary liability for third-party illegal content: the role of intermediaries

a. Platforms’ secondary liability: two approaches

The extension and dissemination of illegal content online makes legal action challenging as it is rarely practical and economically worthy to go after individual users. Hence, those damaged by unlawful activities online – e.g., IP right holders - have tried to seek remedy from hosting platforms, rather than from individuals who post infringing content⁴⁸⁹. This has been possible through the secondary liability doctrine, according to which internet service providers would be liable for facilitating, or not stopping, violations through their channels.

Specifically, secondary liability is a type of legal obligation where one party assumes legal responsibility for the actions of another party. Also called indirect liability, it refers to the liability imposed on someone for enabling, in some ways, other parties to engage in unlawful activities⁴⁹⁰. Simply put, web platforms’ secondary liability does not originate from illegal acts performed directly by

⁴⁸⁷ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 3: “*An equally (perhaps more) common usage in the literature is “intermediary”. But, like “online service provider”, this term lacks a single, common and consistent usage*”.

⁴⁸⁸ Organization for Economic Co-operation and Development, *The economic and social role of internet intermediaries*, April 2010, p. 9.

⁴⁸⁹ SMITH E., *Lord of the Files: International Secondary liability for Internet Service Providers*, in *Washington and Lee Law Review*, 2011, volume 68, issue 3, p. 1558.

⁴⁹⁰ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit.

platforms, but relates to infringements of third parties, typically users, that could not have happened if they were not made possible by the online operator⁴⁹¹.

Secondary liability may be distinguished between participant-based and relationship-based liability. The former, often called contributory liability, revolves around online platforms' participation in the unlawful activity of the third party: in other words, platforms contribute to or induce someone else's infringement. With regards to the latter, also known as vicarious liability, the attention is brought to the relationship between the platform and the direct infringer. Such relationship allows online platforms to enable or facilitate third-party infringements.

Participant-based liability focuses on the level of knowledge that the platform has or should have of the wrongful act and on the extent of the material contribution to or involvement in it. Such knowledge may be constructively imputed through legal presumptions. Relationship-based liability, on the contrary, is activated when the position of the online platform is so close to that of its users, that they are legally treated as one, especially because the online platform may benefit from the infringement and is able to prevent it⁴⁹². Online actors typically have the ability to supervise the infringing conduct of the direct acting party and have a direct financial interest in the exploitation of the content.

Simply put, secondary liability is triggered when the intermediary is either aware, contributing to or inducing the infringement – i.e., contributory liability - or enabling or facilitating it – i.e., vicarious liability. Essentially, online platforms' secondary liability occurs when they are held liable for unlawful acts carried by someone else on their channels. It is indirect and derivative, that is to say that

⁴⁹¹ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 50.

⁴⁹² MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 52-53 and DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., pp. 6-8.

platforms' liability should⁴⁹³ only be raised once the direct infringer's primary liability has been ascertained⁴⁹⁴.

That said, the standards governing e-platforms' secondary liability remain unclear. This is true both between jurisdictions and within jurisdictions and partly reflects the fast-changing nature, diversity, and variability of e-platforms⁴⁹⁵. However, while secondary liability is mostly ruled by national law and its governing principles differ from country to country, the emergence of online intermediaries and particularly the increasing breaches of intellectual property rights on their platforms have somehow led to common lines, both in terms of positive and negative secondary liability.

Indeed, online platforms' secondary liability has been addressed by legislators, policy makers and courts following two approaches. A positive one, which defines the cases and conditions where online platforms' liability can actually be claimed; and a negative one, which identifies and harmonizes the exceptions to such liability⁴⁹⁶. The former refers to the use of traditional civil law principles on secondary liability to activate liability when illegal content is found online. Negative secondary liability, on the contrary, grows out of the circumstances under which online platforms can seek immunity from such liability. This latter approach has been largely followed by legislators since the very beginning of the digital revolution, to favour the rise of internet platforms, shield them from an excessive

⁴⁹³ It is not always necessary to prove the primary infringement. See DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 8: "Thus, Jaani Riordan notes that although 'all secondary liability is in some sense derivative from primary liability . . . the picture becomes somewhat more complicated when one considers that secondary liability does not actually require primary liability to be alleged, much less established, against anyone in particular; a service provider could be targeted alone, and frequently is in internet disputes - where the primary wrongdoer is often anonymous, insolvent or beyond jurisdiction'".

⁴⁹⁴ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 53 and DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 8.

⁴⁹⁵ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 15.

⁴⁹⁶ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 58.

liability for users' violations and offer a climate of legal certainty for digital development⁴⁹⁷. Legal safe harbours may be horizontal or sector-specific, or even restricted to particular claims⁴⁹⁸.

Most notably, the EU legislator has addressed the issue of intermediary liability by laying down a negative regime, that is to say, by focusing on its exceptions rather than on the conditions for its activation. Considering the lack of harmonized standards for – positive - secondary liability, this negative regime plays a key part in the governance of intermediaries. The following section will examine when online platforms may be immune, under current EU law, from liability for users' wrongful activities carried on their networks⁴⁹⁹.

b. EU negative approach: platforms' safe harbour under the Directive on E-Commerce

At the dawn of the digital era, the European Union decided to adopt a legislative measure that would build a friendly environment for web companies⁵⁰⁰. The intent of the ECD was to ensure the free movement of information society services in the EU (Recital 8), guarantee a full freedom of expression (Recital 9)⁵⁰¹ and contribute

⁴⁹⁷ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 15: "This latter approach has been more dominant than one might expect in defining online service provider liability, possibly because statutes immunizing online service providers from liability arose on a widespread basis soon after initial commercial exploitation of the internet and are arguably the most common expression of legislative decisions regarding ISPs".

⁴⁹⁸ *Ibidem*, p. 25.

⁴⁹⁹ KUR A., *Secondary Liability for Trademark Infringement on the Internet: The Situation in Germany and throughout the EU*, in *Columbia Journal of Law and the Arts*, 2014, issue 4, p. 531.

⁵⁰⁰ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., p. 111.

⁵⁰¹ LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science for the degree of Doctor of Philosophy*, cit., pp. 12 ss: "The Internet was celebrated in its infancy as a democratising force. Its decentralised structure invited anti-establishment-type rhetoric arguing that it was uncontrollable by governments, and that it was a new space outside of legal institutions and territoriality. 'Information wants to be free' was the slogan. The courts reflected this optimism,

to the proper functioning of the internal market (Article 1)⁵⁰². In essence, and as the title of the Directive suggests, to protect e-commerce. Indeed, in the internet's early ages online intermediaries were seen as vital actors of the new digital market, thus needing protection against rigorous claims of liability for illegal content created by third parties.

As illustrated in section II.4.c, the ECD defines information society services by referring to Directive 1998/34, which qualifies them as “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*” (Article 2(a) of the ECD). Recital 18 reminds that the concept of ISS covers a wide range of economic activities, including “*selling goods online*”. It is further specified, though, that the delivery of products and, generally, the provision of services offline are not within the scope of the ECD.

The Directive on E-Commerce focuses on a variety of topics related to the activity of ISS providers, including establishment and information requirements, commercial communications, and contracts concluded by electronic means. One of the most significant issues regulated by the ECD is online platforms' safe harbour. In particular, the Directive defines the circumstances under which an information society service provider will be immune from liability for the unlawful content communicated by a third party⁵⁰³.

The core of content liability – rather, of its limits - lies in section 4. Divided into four key Articles, this section seeks to restrict the situations in which certain ISS providers may be held liable for the content transmitted or stored through their services. More specifically, Articles 12 to 14 cover only those providers of information society services that may be defined as intermediary service providers,

noting the increasingly important role of the Internet in facilitating communication in democratic society”.

⁵⁰² The ECD was implemented in Italy almost word for word via Legislative Decree 70/2003: Decreto Legislativo 9 aprile 2003, n. 70. Attuazione della direttiva 2000/31/CE relativa a taluni aspetti giuridici dei servizi della società dell'informazione nel mercato interno, con particolare riferimento al commercio elettronico.

⁵⁰³ LAIDLAW E., *The responsibilities of free speech regulators: An analysis of the internet watch foundation*, in *International Journal of Law and Information Technology*, 2012, volume 20, issue 4, p. 320.

namely e-actors offering mere conduit, caching, and hosting services⁵⁰⁴. Hosting service providers, in particular, supply an information society service consisting of the storage of information provided by a recipient of the service. This category includes a variety of actors, such as online marketplaces, video-sharing platforms, social networks, and review websites⁵⁰⁵.

For hosting service providers, the storage of content is lasting while it is merely transitional for mere conduit service providers and temporary for caching service providers. As this will be demonstrated further, this difference in the duration of information storage entails that the immunity conditions for hosts are more rigorous than for the previous two actors. Indeed, not only does content's "existence" on hosting online channels last longer compared to information just passing through in mere conduit and caching platforms, which makes it much riskier to internet users when they "meet" unlawful content. But hosts are also able to build a sound and stable relationship with that information, in such a way as to hold a stronger position in preventing and removing infringements⁵⁰⁶.

The 2000 Directive has a horizontal nature: it does not apply to a specific field but governs all sectors of society, covers all typologies of illegal data⁵⁰⁷ and harmonizes immunity from all kinds of liability, whether criminal or civil, direct or indirect⁵⁰⁸. However, and this is worth stressing, it does not assign liability: the legal

⁵⁰⁴ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 78, points out that the harmonization intended by the ECD is partial as it only covers mere conduit, caching and hosting service providers, raising challenges as to where other online actors may be positioned, in light of the constant digital evolution and emergence of new models.

⁵⁰⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 5.

⁵⁰⁶ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 94-95.

⁵⁰⁷ ROCHE LAGUNA I., *Limited liability for the Net? The future of the E-Commerce Directive*, DG Connect, 21 March 2017.

⁵⁰⁸ KUCZERAWY A. and AUSLOOS J., *From Notice-and-Takedown to Notice-and-Delist: Implementing Google Spain*, in *Colorado Technology Law Journal*, 2016, volume 14, p. 233. See also DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., pp. 28 ss.

grounds on which ISS providers are eventually held liable, and whether liability is for primary or secondary infringement, are to be determined by national law⁵⁰⁹. Notwithstanding its horizontal nature, some topics lie outside the scope of the ECD: taxation, data protection, gambling, agreements or practices under cartel law, activities connected to the exercise of public authority, and legal representation before courts (see Recitals 12 to 16 and Article 1).

The ECD does not define which content is deemed illegal: the overall goal is to consider what is illegal offline to be illegal online too⁵¹⁰. Whether content is illegal depends on national or EU law. For the purpose of this thesis, illegality with regards to food information primarily derives from breaches of the GFL and the FIC, and connected national measures (sections III.3 and III.4).

The following paragraphs focus on the specifics of the Directive's safe harbour applicable to hosting service providers, including e-commerce marketplaces. In particular, online hosts are not to be held liable for the information stored at the request of third parties, as long as the following two conditions are met (Article 14). First, they do not have actual knowledge of the illegal activity or information and as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent; second, upon obtaining such knowledge or awareness, they remove or disable access to the illegal material expeditiously. In other words, pursuant to Article 14, the liability shelter against illegal content uploaded by users applies only to those actors that can effectively be considered hosting providers, provided that they do not know of any illegal

⁵⁰⁹ KUR A., *Secondary Liability for Trademark Infringement on the Internet: The Situation in Germany and throughout the EU*, cit., p. 526. See also MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 49 and 79 ss where the Author mentions the challenges behind the project of harmonizing liability among EU Member States, as this is a sector – as civil law in general - deeply attached to national legal traditions; ALESSI R., *Il difficile percorso della responsabilità civile europea*, in *Danno e Responsabilità*, 1999, issue 4, pp. 377 ss.

⁵¹⁰ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 2.

information and that they expeditiously remove or block it once they are aware of its unlawful nature⁵¹¹.

On the one hand, the system established by the ECD is based on online platforms' actual knowledge of the infringing material⁵¹²: platforms are immune only when they do not know. Knowledge or awareness may be obtained through various means. These include situations in which the online operator carries an investigation on its own initiative, as well as circumstances in which they receive a third-party notification advising on the illegal content: both lead to actual knowledge. On the other, the safety net follows a notice-and-take-down approach according to which online intermediaries must take immediate action against non-compliant content once they are aware of it⁵¹³. Simply put, "*hosts can only escape liability if they did not know, nor was it apparent, that the information was unlawful, or if they obtained such knowledge, provided they acted 'expeditiously' to remove or disable access to the content*"⁵¹⁴.

In addition to the two requirements ex Article 14, it is worth reminding that a preliminary – neutrality - condition for liability immunity lies in Recital 42⁵¹⁵. While the latter only applies to caching and mere conduit services, the EU Court of Justice has clarified that this condition covers online hosts as well⁵¹⁶. Specifically,

⁵¹¹ VAN EECKE P. and TRUYENS M., *Recent events in EU internet law*, in *Journal of Internet Law*, 2008, volume 12, issue 4, pp. 28 ss.

⁵¹² FROSIO G. F., *Reforming intermediary liability in the platform economy: a European Digital Single Market Strategy*, in *Northwestern University Law Review*, 2017, volume 112, p. 41.

⁵¹³ SLANE A. and LANGLOIS G., *Debunking the Myth of Not My Bad: Sexual Images, Consent and Online Responsibilities in Canada*, in *Canadian Journal of Women and the Law*, 2018, volume 30, issue 1, p. 49 and p. 75.

⁵¹⁴ LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, cit., p. 121.

⁵¹⁵ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 95-96.

⁵¹⁶ Joined cases: Judgment of 23 March 2010, *Google France SARL, Google Inc. v. Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v. Viaticum SA, Luteciel SARL* (C-237/08), *Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL* (C-238/08), EU:C:2008:389. Paragraph 114: "Accordingly, in

Recital 42 states that the scope of the safe harbour includes only those cases where the activity of the ISS provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient. This activity is “*of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored*”. In other words, the friendly framework put in place by section 4 of the ECD is only available to those providers who confine themselves to a neutral role of technical and automatic processing of data and who have no knowledge nor control over the information hosted. This information must be provided by third parties, without any direct involvement of the platform. The two criteria – knowledge and control – seem to be alternative. Consequently, one can think of the situation where an online platform does not know of the illegal content but still has control over the data stored⁵¹⁷.

To conclude. Although e-platforms’ secondary liability has not been dealt with from a positive point of view by the EU legislator considering the difficulty of composing national conceptual differences, the conditions under which online intermediaries and particularly hosts are exempt from liability for third-party illegal content - under any law, whether criminal, administrative, or civil, and whether national or supranational - are well harmonized at European level⁵¹⁸. In this

order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores”. See also paragraph 123 of *L’Oréal v. eBay*, which will be illustrated thoroughly in the next section; MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 104; ROSATI E., *Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary Under EU Copyright Law*, CREATE Working Paper 2016/11, 26 August 2016, pp. 5 ss.

⁵¹⁷ STALLA BOURDILLON S., *Uniformity v. diversity of Internet intermediaries’ liability regime: where does the ECJ stand*, cit., p. 58.

⁵¹⁸ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 28.

harmonized system, online platforms are not to be held liable when they have no actual knowledge of the unlawful activity or information or they are unaware of facts and circumstances from which that would have been apparent. On the contrary, they are liable when they are aware of infringements and do nothing to remove them. This applies, however, only to those providers who are passive and have no knowledge of nor control over the information stored.

Interesting to note how the concept of control resurfaces. As illustrated in section III.4, EU Food Law has built a system where responsibilities are inextricably linked to control. Pursuant to both the GFL and the FIC, operators are responsible for food information, and in general food safety, only towards those stages of production, processing, and distribution they have concrete control over. The same concept of control is crucial to understanding the new role of platforms in today's digital economy. As the next sections will portray, the radical changes in online platforms' powers and control capacities since the enactment of the ECD have grabbed the attention of courts, policy makers and scholars, encouraging them to undergo a substantial rethinking process of platforms' secondary liability.

On a final note, Article 15 of the ECD – which closes section 4 on online platforms' immunity - prohibits Member States from imposing a general obligation on ISS providers to monitor the information stored or transmitted or to actively seek facts and circumstances indicating illegal activities⁵¹⁹. This provision offers ISS providers one extra protection, as they cannot be required by national law to monitor all the information uploaded and all the activities carried out by users on their web channels⁵²⁰. Recital 47 of the ECD specifies that this only refers to monitoring obligations of a general nature and “*does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation*”⁵²¹. Section IV.5.a will illustrate how this “no

⁵¹⁹ GONZÁLEZ VAQUÉ L., *Is it Necessary to (Urgently) Adopt a Community Regulation for Online Food Sales?*, cit., p. 430.

⁵²⁰ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 75.

⁵²¹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 5.

monitoring” obligation interacts with the direction policy officials have recently taken in the fight against illegal content online.

c. The safe harbour under EU case-law: the “diligent economic operator”

The ECD focuses on neutral intermediaries, whose position is far different from that of content creators who design and upload information on the web. Through this Directive, the EU legislator sought to limit its protection to mere storage of information and all accompanying technical aspects of the service provided. In the last twenty years however, online platforms have dramatically transformed their nature, shifting from being neutral facilitators of transactions concluded by third parties to becoming active players of the digital economy. Over time, the functions exercised by platforms have multiplied⁵²² and changed massively and online operators have started to establish a qualified relationship with the content stored. If one looks at B2c platforms for instance, the emergence of new functions (e.g., involvement in transport and customer service) and powers (especially in terms of regulation of and control over users’ activities) has significantly disrupted their role as mediators and marketplaces now appear more and more as primary sellers rather than neutral go-betweens. How many times have we heard someone say that they bought a specific product “from Amazon” rather than from the actual seller? The latter is in fact rarely acknowledged.

This transformation of platforms’ nature has brought along significant complications to the safe harbour system elaborated by the ECD, requiring national and supranational courts to intervene on several occasions and address the question as to whether and in which circumstances today’s internet providers may still access the protection of Directive 2000/31⁵²³. In this regard, some of the leading examples of secondary liability claims have been actions brought against marketplaces and

⁵²² STALLA BOURDILLON S., *Uniformity v. diversity of Internet intermediaries’ liability regime: where does the ECJ stand*, cit., p. 52.

⁵²³ VAN DER SLOOT B., *Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2015, volume 6, issue 3, p. 222.

online auction sites by trademark owners (especially owners of luxury brands, e.g., Tiffany, Lancôme), who have insisted on platforms' liability for enabling third-party unlawful offers of counterfeit products on their websites⁵²⁴. E-platforms, on the other hand, have generally argued their traditional neutrality and consequent immunity ex Article 14 of the ECD.

As illustrated, the latter only covers passive actors and puts the emphasis on two subjective conditions: actual knowledge and awareness. In particular, the challenge is to find the cut-off line between passive and active platforms and assess when the online operator is deemed to be aware of facts or circumstances from which the illegality of information is apparent.

The 2011 landmark case on e-markets' liability, *L'Oréal v. eBay*⁵²⁵, focused precisely on explaining the “*mere technical, automatic and passive nature*” required for liability exemptions to be set in motion⁵²⁶ and introduced the concept of awareness by a diligent economic operator. The context of the case is briefly illustrated in the following paragraphs.

eBay is a global internet marketplace used by third parties to display and sell goods. The company, in return, charges a percentage fee on transactions⁵²⁷. The online company follows different models: prospective buyers may bid for items or the merchandise may be offered without the auction tool, at a fixed price⁵²⁸. Additionally, sellers may create their own internet-based shop via the eBay platform. The latter does not act as agent for third-party sellers. It does not own, handle, or ship the products, which are in no way in the company's possession. However, “*eBay provides detailed assistance to sellers in categorising and describing the items they offer for sale, in creating their own on-line shops and in promoting and increasing sales. eBay thus organises the sale, conducts the auction*

⁵²⁴ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 5.

⁵²⁵ Judgment of 12 July 2011, *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, EU:C:2011:474, cit.

⁵²⁶ MARTINET B. and OERTLI R. J., *Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour*, in *Landslide*, 2015, volume 7, issue 5, pp. 41 ss.

⁵²⁷ Paragraph 28 of the Judgment.

⁵²⁸ Paragraph 29 of the Judgment.

*[...] provides a watching service to notify members of items in which they are interested and promotes and advertises goods through third party websites”*⁵²⁹.

L’Oréal, the renowned company producing perfumes, cosmetics, and hair products, accused eBay of widespread infringements of its intellectual property rights on the platform’s European websites. In particular, L’Oréal sought a ruling affirming that the online platform and third-party users violated its trademark rights, and that eBay directed buyers towards illegal goods by purchasing advertising keywords corresponding to the names of L’Oréal trademarks from paid internet referencing services⁵³⁰. L’Oréal also contended that eBay’s efforts to prevent the sale of unlawful goods on its websites were insufficient. It also rejected the participation in eBay’s VeRO programme⁵³¹, a notice-and-take-down system intended to assist IP owners with the removal of infringing listings from the marketplace, arguing that it was inadequate⁵³². Finally, L’Oréal claimed that even if no liability could be found upon the online marketplace for the infringements of its users, it should be granted an injunction against eBay by virtue of Article 11 of the Directive on the enforcement of intellectual property rights⁵³³.

The case was first brought before the United Kingdom High Court, which subsequently referred the case to the Court of Justice of the European Union, to

⁵²⁹ Paragraphs 27 and 28 of the Advocate General’s Opinion.

⁵³⁰ VAN EECKE P. and TRUYENS M., *Advocate General clarifies the status of hosting providers under EU law*, in *Journal of Internet Law*, 2011, volume 14, issue 8, pp. 29 ss.

⁵³¹ To participate in the Verified Rights Owner programme, “rights owners must complete and submit a form in respect of listings which they consider infringe their rights. They must identify each listing complained of by item number and in each case identify the reason for objecting to the listing by means of a ‘reason code’. There are 16 reason codes identifying different types of infringement. When a listing is taken down, eBay reimburses any fees paid by the seller. According to the information set out in the order for reference, more than 18 000 right owners participate in the VeRO programme”. See paragraph 30 of the Advocate General’s Opinion.

⁵³² CLARK B. and SCHUBERT M., *Odysseus between Scylla and Charybdis? The ECJ rules in L’Oréal v eBay*, in *Journal of Intellectual Property Law & Practice*, 2011, volume 6, issue 12, p. 881.

⁵³³ Article 11 of Directive 2004/48 on the enforcement of IP rights requires EU Member States to ensure, *inter alia*, that IP right holders may apply for an injunction against intermediaries whose services are used by third parties to infringe their right.

receive guidance on the interpretation of EU rules regarding trademarks and online service providers' liability. The Luxembourg judges were called upon to draw the balance between the protection of trademark proprietors' rights, on the one hand, and the interests of businesses and private individuals trading via digital channels, on the other hand.

Advocate General Jaaskinen delivered his Opinion in December 2010. With respect to platforms' primary liability, the AG observes that in national court cases concerning the liability of electronic marketplaces, no judgment found them to be the primary infringers of third-party trademarks⁵³⁴. He later stresses how the conduct of individual participants could be imputed to the marketplace operator only where there are grounds for secondary liability, which is a matter of national law. He compares eBay's position to that of a shopping centre's operator, which is not held responsible if a grocery shop in its premises sells rotten apples⁵³⁵. "*A marketplace operator is entitled to presume that market participants using its services act legally and follow the agreed contractual terms and conditions relating to the use of the marketplace until it is concretely informed of the contrary*"⁵³⁶.

Regardless of the issues concerning trademark use⁵³⁷, the UK High Court also raised the question of eBay's position in relation to the liability exemption under

⁵³⁴ Paragraph 58 of the Opinion.

⁵³⁵ VAN EECKE P. and TRUYENS M., *Recent events in EU internet law*, cit.; paragraph 117 of the AG's Opinion.

⁵³⁶ Paragraph 117 of the AG's Opinion.

⁵³⁷ In its July 2011 Judgment, the CJEU held that a trademark proprietor is entitled to prevent an online market from advertising for sale its products using a keyword which is identical to its trademark, in case it is not possible for reasonably well-informed internet users to easily determine where these products originate from, whether from the proprietor of the trademark, from a linked business or from a third party. In addition, the CJEU concluded that an online market's operator is not considered to 'use' – under the EU laws on trademark applicable to the case – signs identical with or similar to trademarks that appear in offers displayed on its site. Finally, it stated that Article 11 of the EU Directive on the enforcement of intellectual property rights must be interpreted in such a way as allowing national courts to order online marketplace operators to take measures aimed at putting an end to and preventing infringements. These injunctions must be effective, proportionate, and dissuasive and must not create barriers to legitimate trade. See SMITH J. and SILVER J.,

the Directive on E-Commerce. Specifically, it was asked whether the service provided by the operator of an online marketplace is covered by Article 14 of the ECD and, if so, in what circumstances it may be concluded that such operator has “awareness” within the meaning of this same provision⁵³⁸.

The CJEU first clarifies that online markets are in principle well within the scope of the ECD. Not only does the Directive cover, as suggested by its title, “*information society services, in particular electronic commerce*”. But the activity carried by online markets also meets, in theory, the definition of ISSs, as in “*services provided at a distance by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of services and, normally, for remuneration*”⁵³⁹. The Court also reminds that, although it is for the national court to determine the conditions under which liability arises, it is for the EU Court to consider whether an online marketplace may be covered by liability immunity.

In that regard, the Luxembourg judges recall that for an internet service provider to fall under the scope of Article 14, such provider must be an intermediary. Specifically, it must offer a neutral, technical, and automatic service of processing

L’Oréal v eBay: a warning to online marketplace operators, in *Journal of Intellectual Property Law & Practice*, 2011, volume 6, issue 11, pp. 765 ss.

⁵³⁸ Paragraph 106 of the Judgment.

⁵³⁹ Paragraph 109 of the Judgment.

third-party data, without playing an active role of such a kind as to give it knowledge of or control over the information^{540 541}.

In other words, it is necessary to check whether the role played by the platform may be seen as neutral, in the sense that its conduct is merely technical, automatic and passive, and based on a lack of knowledge of or control over the data hosted. Whether this is the case or not, it is for the national judges to examine. However, the Court provides some general principles to guide national courts in this assessment. Citing *Google France*⁵⁴², the CJEU stresses that the mere fact that the

⁵⁴⁰ The distinction between active and passive hosting providers was first elaborated by the CJEU in the *Google France* cases (Judgment of 23 March 2010), to which the Court refers (paragraphs 112 and 113 of the Judgment): Joined cases, Judgment of 23 March 2010, *Google France SARL, Google Inc. v. Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v. Viaticum SA, Luteciel SARL* (C-237/08), *Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL* (C-238/08), cit. The *Google France* Judgment ends in these terms: “Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned”.

⁵⁴¹ It is worth mentioning that the Advocate General shared his doubts as to whether Recital 42 applies to hosting providers referred to in Article 14. See paragraphs 138 ss: “Even if recital 42 of the directive speaks of ‘exemptions’ in plural, it would seem to refer to the exemptions discussed in the following recital 43. The exemptions mentioned there concern – expressly – ‘mere conduit’ and ‘caching’. [...] Rather, in my view, it is recital 46 which concerns hosting providers mentioned in Article 14 of Directive 2000/31, as that recital refers expressly to the storage of information. Hence, the limitation of liability of a hosting provider should not be conditioned and limited by attaching it to recital 42. [...]”

⁵⁴² Joined cases, Judgment of 23 March 2010, *Google France SARL, Google Inc. v. Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v. Viaticum SA, Luteciel SARL* (C-237/08), *Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL* (C-238/08), cit.

online company hosts sale offers, establishes the conditions of its service, receives a remuneration for it and provides general information to its customers does not lead to the loss of the liability exemption ex Article 14. By contrast, such effect occurs when the platform provides assistance, intended in particular to optimise the presentation of or promote certain offers⁵⁴³. In such a case, the ISS provider is considered to play an active role of such a kind as to give it knowledge of, or control over, the data relating to these offers⁵⁴⁴.

Further, where the provider confines itself to a merely technical and automatic processing of information, it may only be exempt from liability where it has no actual knowledge of the illegal activity or information and, as regards claims for damages, no awareness of facts or circumstances from which the unlawfulness is apparent. Plus, once that knowledge or awareness is obtained, the exemption only applies if it acts expeditiously to remove or disable access to the illegal information. While it is for the referring court to consider whether eBay was in fact aware of the infringements, the Court specifies that it is sufficient, in order for an ISS provider to be denied the safe harbour, for it to have been “*aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question*”⁵⁴⁵.

The CJEU clarifies that Article 14 covers all situations in which the ISS provider becomes aware, in any way, of such facts or circumstances, including as a result of an investigation undertaken on its own initiative, or following a third-party notification⁵⁴⁶. In the latter case, although notifications cannot, *per se*, preclude the

⁵⁴³ Paragraphs 114 ss of the Judgment. See also European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 11; KUR A., *Secondary Liability for Trademark Infringement on the Internet: The Situation in Germany and throughout the EU*, cit., p. 531.

⁵⁴⁴ CLARK B. and SCHUBERT M., *Odysseus between Scylla and Charybdis? The ECJ rules in L'Oréal v eBay*, cit., pp. 880 and 886.

⁵⁴⁵ Paragraph 120 of the Judgment.

⁵⁴⁶ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 30; LIEVENS D., *L'Oréal v. eBay – Welcomed in France, Resented in England*, in *International review of industrial property and copyright law*, 2012, volume 43, issue 1, p. 70.

immunity – as they may be inadequate or insufficient - national courts must generally take them into account when determining whether ISS providers were aware of facts or circumstances on the basis of which a diligent operator should have identified the illegality.

To sum up, the Court concludes the question on intermediary immunity by stating that Article 14 of the ECD only applies to the operator of an online marketplace who has not played an active role allowing it to have knowledge or control of the data stored. Such active role is fulfilled when it provides assistance, which entails, in particular, optimising the presentation of the offers or promoting them.

In addition, where the operator of the online market has neutrally confined itself to a technical and automatic processing of information, it may lose the exemption nonetheless if it was aware of circumstances on the basis of which a *diligent economic operator*⁵⁴⁷ should have realized that the offers were indeed unlawful and failed to act expeditiously in accordance with Article 14⁵⁴⁸. Thus, the Court introduces a new guiding standard in the issue of marketplaces' liability: ISS providers are to be held liable if it is sufficiently clear – from the standpoint of a *diligent economic operator*⁵⁴⁹ - that the content at issue is illegal⁵⁵⁰.

L'Oréal v. eBay acts as a warning to online marketplaces⁵⁵¹: the safe harbour regime may not be raised unconditionally, and it is only applicable to neutral platforms that are not active in the promotion or sale of goods. On the contrary, knowledge of or control over the information tends to dismiss the immunity. The Judgment, though, remains generic and refers to national courts to measure, case-by-case, how much assistance, how much intervention, how much knowledge of and how much control over the content stored amounts to this active role. Given the characteristics of the internet world, national judges may be in a better position to

⁵⁴⁷ Emphasis added.

⁵⁴⁸ Paragraph 119 of the Judgment.

⁵⁴⁹ Emphasis added.

⁵⁵⁰ KUCZERAWY A. and AUSLOOS J., *From Notice-and-Takedown to Notice-and-Delict: Implementing Google Spain*, cit., p. 242.

⁵⁵¹ SMITH J. and SILVER J., *L'Oréal v eBay: a warning to online marketplace operators*, cit.

adapt the law to the complex and fast-moving digital environment and to real-world models, in line, of course, with the CJEU guidelines⁵⁵². Specifically, distinguishing between active and passive hosts relies on a factual examination of the powers, faculties, and terms that the platform contractually establishes in its relationship with users.

However, despite introducing negligence of an online auctioneer as a criterion to rebut its argument for a liability exemption, the Judgment does not consider negligence itself to be sufficient to claim platforms' secondary liability⁵⁵³. Failing to comply with the safe harbour's requirements does not lead to liability; it just means no automatic immunity⁵⁵⁴. That is to say, and it is worth highlighting, that the case at hand does not directly deal with liability of online intermediaries, but only focuses on liability exemptions.

Determining the conditions for holding online marketplaces secondarily liable is still strictly delegated to the Member States⁵⁵⁵. These conditions vary from country to country but typically share some common grounds. The next section will examine how the principles laid down in *L'Oréal v. eBay* on liability immunity – i.e., negative approach – might help clarify the issue of intermediary liability – i.e., positive approach. Simply put, it will detail the arguments behind platforms' secondary liability and the connection between the criteria for immunity and the standards for liability⁵⁵⁶. Indeed, the two approaches are not watertight compartments. In Dinwoodie's words, “*where statutory safe harbors have been enacted, they could represent the line between the area of immunity conferred by defenses and the zone of liability. [...] Alternatively, the safe harbor may simply*

⁵⁵² STALLA BOURDILLON S., *Uniformity v. diversity of Internet intermediaries' liability regime: where does the ECJ stand*, cit., p. 59.

⁵⁵³ LIEVENS D., *L'Oréal v. eBay – Welcomed in France, Resented in England*, cit., p. 76.

⁵⁵⁴ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 31.

⁵⁵⁵ LIEVENS D., *L'Oréal v. eBay – Welcomed in France, Resented in England*, cit., p. 69: “*the ECJ has by no means affected the discretion of Member States to draft accessory liability criteria which go beyond the negligence prerequisite postulated by the ECJ*”.

⁵⁵⁶ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 2.

*create reassurance about activities that may or may not have been infringing. The benefit of such a scheme is that, despite its apparent redundancy, the safe harbor provides certainty, which is important because even valuable non-infringing activity can be chilled by the threat of liability. [...] Finally, such a scheme may also, by virtue of the conditions on which it offers immunity, nudge service providers towards modes of conduct that we deem desirable*⁵⁵⁷.

d. Standards activating platforms' secondary liability from a positive perspective

As anticipated, intermediary liability has been handled in two ways. The negative approach, analysed in the previous two sections, only concerns the circumstances under which platforms are immune from liability. From a positive standpoint, the question now arises as to how and when secondary liability can be claimed. Simply put, when should the rule to which immunity is the exception be activated⁵⁵⁸?

Three preliminary observations. First, the conceptual relationship between safe harbour and liability standards – i.e., between the negative and positive approaches to secondary liability - has not been defined directly at legislative level. Second, there is currently no harmonized positive regime on e-platforms' secondary liability in the EU and the rules remain a matter of Member States' law. Third, although the issue of - and claims based on - e-platforms' secondary liability have grown in popularity, the standards under which an internet service provider can be held liable for the conduct of third-party users remain unclear, even within single jurisdictions.

Yet, certain common principles have been drawn from the – negative - safe harbour's conditions as established by the ECD and subsequent case-law⁵⁵⁹, on the

⁵⁵⁷ Ibidem, p. 32.

⁵⁵⁸ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 49.

⁵⁵⁹ Indeed, the intent of EU decision makers is to protect only those passive hosting providers that do not know of or control illegal content and diligently remove it once they are aware of it. Even though these criteria are not enough to claim – from a positive standpoint - secondary liability, as this remains solely with national legislation, they do provide some guidance when it comes to clarifying the issue of online platforms' secondary liability.

one hand, and from the function allocated to online platforms – or the role they took upon themselves - in the fight against illegal content online, on the other.

In essence, online platforms' secondary liability remains a matter of national law. Yet, the very nature of electronic commerce has opened the path for some uniform approaches. Not only in terms of liability immunity, which has been harmonized for decades in the EU, but also in terms of positive converging systems of liability. The following paragraphs will expand on these preliminary considerations and focus on certain key arguments used to support e-platforms' liability for users' wrongdoings: mainly control, diligence and economic costs. These standards for intermediary liability will be analysed based on a brief literature review of Laidlaw's, Montagnani's and Dinwoodie's work on the topic.

i. Gatekeepers, diligent operators, and least cost avoiders

The previous sections explained how EU law intends to protect only those online intermediaries that do not establish a direct and qualified relationship with the illegal content and have no knowledge of or no control over it. Moving to the subsequent case-law, *L'Oréal v. eBay* focuses on the degree of involvement of online platforms in the unlawful acts of third parties. The Court distinguishes between passive and active hosts and clarifies that marketplaces play an active role when they provide assistance that entails, in particular, optimising the presentation of the offers or promoting them. Further, the CJEU denies protection to online auctioneers that are negligent in failing to remove an offer whose infringing nature would be apparent to a diligent economic operator: hence, EU case-law postulates a diligence pre-requisite according to which online operators should act in a diligent manner⁵⁶⁰. In other words, EU law introduces the idea that the degree of control exercised by an online platform over what happens on its channels and its negligence in failing to realise that other parties accessed those channels to conduct illegal activities should be used as a measure to rebut its plea for a safe harbour.

Once again, and as recurrently demonstrated throughout this thesis, what is critical in the analysis of e-platforms is their concrete functioning, their *modus*

⁵⁶⁰ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., p. 120.

operandi. Examining the real-life business model followed by web companies to operate in the digital market was essential to answering the challenges of food online qualification (Chapter II) and to understanding their food information responsibilities (Chapter III). Equally, appreciating their functioning in terms of awareness of and control over their channels is essential to examining their secondary liability. Specifically, distinguishing between passive and active hosts, checking whether they meet the level of diligence hinted at in *L'Oréal v. eBay* and determining the degree of control they exercise over content can only be done on a case-by-case basis⁵⁶¹.

Secondary liability typically stems from an effort to shift the costs of deterring wrongful conduct to online intermediaries, basing claims on their knowledge of or control over third-party tortious activities. Indeed, the first “functional” standard for intermediary liability is control. In this regard, this thesis cannot overlook Emily Laidlaw’s work on information gatekeepers⁵⁶². From a very general perspective, gatekeeping is the process of controlling information as it moves through a gate, and gatekeepers are those who decide what shall or shall not pass through such gate. Interestingly, the term was first coined by Kurt Lewin in 1947 to refer to mothers’ role as gatekeepers when they choose which foods are placed on the table⁵⁶³. The theory of gatekeeping was used to explain how the whole set of consumption habits of one population could be influenced by those who control access channels, from producers and retailers to consumers.

⁵⁶¹ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 104.

⁵⁶² LAIDLAW E., *Private power, public interest: An examination of search engine accountability*, cit.; LAIDLAW E., *A Framework for Identifying Internet Information Gatekeepers*, in *International Review of Law, Computers & Technology*, 2010, volume 24, issue 3, pp. 263 ss; LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, cit.

⁵⁶³ LEWIN K., *Frontiers in Group Dynamics*, in *Human Relations*, 1947, volume 1, issue 2, pp. 143 ss.

Laidlaw first distinguishes between online intermediaries and gatekeepers by using the very concept of control⁵⁶⁴. On the one hand, the former mediate between users and providers of information, by facilitating or preventing access to this information and guiding consumers in their information experience. The position of gatekeeper, on the other hand, is grounded on a strengthened control over access to content, information, goods, and services: gatekeepers have the authority over who and what may access the platform. In a nutshell, gatekeepers are those controlling the flow of information⁵⁶⁵. In the Author's opinion, the ECD "*implicitly recognizes these differences in assigning varying liability to service providers depending on their functions as mere conduits, caching, or hosts*"⁵⁶⁶.

Further, Laidlaw draws a line between two kinds of gatekeepers: those who control access to information, by limiting access to it or restricting the scope of information, and those who act as "*innovator, change agent, communication channel, link, intermediary, helper, adapter, opinion leader, broker, and facilitator*". The former are inward looking as they inhibit access, the latter operate outward, shaping trends and behaviours. In her view, gatekeepers may simultaneously be inhibitors and facilitators^{567 568} and internet service providers are well included in the definition of internet gatekeepers⁵⁶⁹.

⁵⁶⁴ LAIDLAW E., *Private power, public interest: An examination of search engine accountability*, cit., p. 115: "*Gatekeeping connotes more control than the term intermediary; an additional, more specific function must be carried out*".

⁵⁶⁵ MURRAY A. D., *Nodes and Gravity in Virtual Space*, cit., p. 212.

⁵⁶⁶ LAIDLAW E., *Private power, public interest: An examination of search engine accountability*, cit., p. 115.

⁵⁶⁷ LAIDLAW E., *A Framework for Identifying Internet Information Gatekeepers*, cit., p. 264. See also LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, cit., pp. 47 ss.

⁵⁶⁸ Of course, the online game is dynamic. There might be a multitude of gated and gatekeepers, and roles change constantly: "*For example, an individual who runs a blog might be gated by the terms of service of the blog provider, yet might also man the gates of the comments section of his or her blog*". LAIDLAW E., *A Framework for Identifying Internet Information Gatekeepers*, cit., p. 266.

⁵⁶⁹ *Ibidem*, p. 263.

Laidlaw further highlights how gatekeepers' control over the informational flow is connected to the tort doctrine of secondary liability – gatekeeping liability - and how online gatekeepers have recently been pursued through tort law secondary liability principles⁵⁷⁰. According to the Author, while gatekeepers may not benefit from third parties' illegal activities, they are typically well placed to prevent and stop misconducts as they control access to the tools required to commit such misconducts⁵⁷¹. Hence, in Laidlaw's opinion, modelling a liability regime vis-à-vis gatekeepers instead of those directly breaking the rules is likely to have more impact and may be more effective⁵⁷². She explains that this enhanced effectiveness derives from the very nature of the activity carried – for instance, actual involvement in determining what information is available online – or from gatekeepers' better capacity to regulate a specific conduct, considering their knowledge of the issue or their authority over users⁵⁷³. In her own words, "*gatekeeper regulation tends to emerge where a government's capacity to regulate a specific issue might be limited, while a third party gatekeeper's capacity to regulate the conduct, whether owing to resources, information, or authority, might be better*". Simply put, gatekeepers are seen as non-state actors with the capacity to alter the behaviour of others in circumstances where the public authorities have a more limited capacity to do the same⁵⁷⁴. This applies even more to those gatekeepers that play a crucial role in shaping the functioning of today's society (e.g., large online platforms).

⁵⁷⁰ LAIDLAW E., *A Framework for Identifying Internet Information Gatekeepers*, cit., p. 264; LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, cit., p. 45: "the liability of accountants and lawyers for their clients, and employers for their employees, was in essence an issue of gatekeeper liability".

⁵⁷¹ LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, cit., p. 44.

⁵⁷² LAIDLAW E., *A Framework for Identifying Internet Information Gatekeepers*, cit., p. 264.

⁵⁷³ LAIDLAW E., *Internet Gatekeepers, Human Rights and Corporate Social Responsibilities. A thesis submitted to the Law Department of the London School of Economics and Political Science For the degree of Doctor of Philosophy*, cit., pp. 44 ss.

⁵⁷⁴ LAIDLAW E., *A Framework for Identifying Internet Information Gatekeepers*, cit., p. 264.

Turning specifically to online platforms, the latter host information that deeply influences consumers, even though most e-platforms are not involved in creating and sourcing such information. Laidlaw identifies the category of Internet Information Gatekeepers: she specifies that a gatekeeper bears certain responsibilities – and becomes an Internet Information Gatekeeper - when “*the space for which [they] intermediate becomes one that facilitates or impedes democratic discourse*”. In such context, “*the entity is a ‘gatekeeper’ for the protection of civil and political rights*”⁵⁷⁵. Whether these human rights responsibilities should be activated and the extent to which these responsibilities should be available depend on the level of control the gatekeeper has over deliberation and participation in the forms of meaning-making in democratic culture. “*This reflects the most mainstream conception of the corporate social responsibility model, which is that businesses are responsible for human rights within their sphere of influence*”⁵⁷⁶.

While Laidlaw’s work is mostly focused on issues outside the scope of this thesis – effects of online gatekeepers on democratic participation and human rights, *in primis* right to freedom of expression and privacy -, the Author examines extensively how the role, responsibilities and liabilities of e-platforms are rigorously connected to their sphere of influence and control over information. These obligations increase or decrease based on the degree to which gatekeepers facilitate or hinder democratic culture. Specifically, “*a business’s human rights obligations are strongest [...] where it has the most influence, and gradually weakens as its sphere of influence decreases out to the supply chain, marketplace, community and government*”⁵⁷⁷.

More on e-platforms’ secondary liability, Montagnani has framed the issue of intermediary liability both in its negative and positive dimensions, proving how the former can influence the latter⁵⁷⁸. Precisely, the safe harbour regime refined by

⁵⁷⁵ Ibidem, p. 267.

⁵⁷⁶ Ibidem, p. 268.

⁵⁷⁷ Ibidem.

⁵⁷⁸ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 71 ss.

case-law introduces a system according to which intermediaries are immune only under certain circumstances. These affect – mirror-like – the positive criteria for intermediary liability, as in the conditions under which these actors are indeed liable⁵⁷⁹.

Despite the lack of legislative harmonization in terms of positive liability in the EU, the Author identifies an aligned model of intermediary liability based on specific principles. These tend to associate secondary liability with the level of control exercised by platforms over users' activity, the degree of risk deriving from such activity, platforms' knowledge of and intention towards unlawful content and the existence of a diligence obligation⁵⁸⁰.

First and with regards to the latter, Montagnani links secondary liability to non-compliance with a diligence obligation, a duty of care⁵⁸¹. In her view, the diligence criterion not only plays a major role in terms of exemption from liability but also and foremost to activate liability⁵⁸². Specifically, the same diligence required to be immune pursuant to *L'Oréal v. eBay* – the “diligent economic operator” criterion – may be used to trigger secondary liability, which is justified on the basis of negligence, i.e., when online platforms carry their activity not as carefully as any diligent economic operator would in similar circumstances. In essence, the Author focuses on what online platforms can achieve, control, or prevent through a diligent behaviour⁵⁸³. While immunity covers activities that cannot be controlled and known, liability may be claimed when infringements are controllable and preventable by diligent economic operators⁵⁸⁴.

Second, Montagnani studies the issue of online platforms' liability by focusing on their function on the web. Specifically, secondary liability is seen as a corollary

⁵⁷⁹ Ibidem, pp. 49 ss.

⁵⁸⁰ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit, p. 58.

⁵⁸¹ Ibidem, p. 59.

⁵⁸² Ibidem, p. 60.

⁵⁸³ Ibidem, p. 86. The intermediary regime is described as a pyramid, whose shape depends on the level of risk connected to mere conduit, caching, and hosting providers and ultimately on the degree of diligence imposed upon these different actors. In this hierarchy, mere conduit benefit from a high level of protection whereas hosts, at the other far end, are exposed to more risks.

⁵⁸⁴ Ibidem, p. 86.

of their role as internet controllers – gatekeepers –, which justifies, from a law-making policy perspective, some form of liability. This role is based on intermediaries’ power to predict, avoid and limit third parties’ infringements at reasonable costs and on the impracticability to prosecute direct infringers⁵⁸⁵. Simply put, intermediaries are better placed, from an economic point of view, to take action and prevent damages at reasonable costs. The degree of intervention is subject to their gatekeeping level and may range from a requirement to act only when aware to a liability entirely similar to that of the direct infringer⁵⁸⁶.

More generally on the impact of economic theories on intermediary liability, Montagnani stresses how the economic principle aimed at allocating existing resources in an optimal manner and promoting efficient conducts has heavily affected tort law. In particular, the “least cost/best risk avoider” strategy places the responsibility for preventing, detecting, and eliminating infringements with the party best positioned to accomplish this goal at acceptable costs⁵⁸⁷. In this context, one of the primary goals of tort law is precisely efficient prevention and any liability regime must identify the actors best able and with more financial resources to avoid and, subsequently, repair damage⁵⁸⁸. These actors not only include those who created the risk from which the damage was sourced but also those who can bear the burden of prevention and repair, especially because they are the ones benefitting from the illegal activity⁵⁸⁹.

In line with Montagnani’s analysis, Dinwoodie highlights how claims against the platform for third-party violations may be more economically effective:

⁵⁸⁵ Ibidem, p. 61.

⁵⁸⁶ Ibidem, p. 62.

⁵⁸⁷ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., p. 112 talks about “retrospective responsibility in the absence of other suitable actors”.

⁵⁸⁸ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit, p. 64.

⁵⁸⁹ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit, pp. 63, 64, 88. See also ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., p. 126: “there is a correct recognition on the part of the EU that ISPs will need to be asked to bear more responsibilities for the content they host, especially when they derive economic gains from it”.

“claimants might strategically prefer to bring a secondary liability claim instead of suing the third party wrongdoer for any number of reasons. A secondary infringement action may increase efficiency by allowing the claimant to secure, in a single proceeding, relief against a party whose conduct is simultaneously enabling multiple wrongful acts by a number of primary tortfeasors. The intermediary offers a “choke point.” As a result, it may ensure more effective enforcement of rights”⁵⁹⁰. In particular, the least cost avoider principle explains why detection might be imposed upon right owners (e.g., IP right owners), while prevention and termination of infringements should rest with the online intermediary, assuming that it has control over its users, the information uploaded and generally the means used to carry illegal activities⁵⁹¹.

Further, Dinwoodie explains how secondary liability has been linked to assistance and knowledge⁵⁹² (participant-based or contributory liability⁵⁹³). However, mere knowledge that the online platform *might*⁵⁹⁴ be used to engage in unlawful conduct is not enough. Participation must be substantial and amount to a joint tort-feasorship, namely an inducement, incitement, or persuasion or even a common design towards the infringement. In addition to secondary liability grounded on the contribution to and participation in the infringement, the Author recalls that liability may be based on the degree of proximity between the primary violator and the platform (relationship-based or vicarious liability⁵⁹⁵). The relationship might be so close that the two parties are seen as one, in such a way that the intermediary not only benefits from the activity undertaken by the user but

⁵⁹⁰ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 13.

⁵⁹¹ *Ibidem*, p. 56: “while brand owners may be best positioned to determine infringing conduct, intermediaries may be best positioned to implement preventive measures—and, indeed, may have the expertise best to do so in technologically innovative ways, as many have done”.

⁵⁹² *Ibidem*, pp. 16 ss.

⁵⁹³ See section IV.4.a for details on contributory liability.

⁵⁹⁴ Emphasis added.

⁵⁹⁵ See section IV.4.a for details on vicarious liability.

also has an ability to stop infringements⁵⁹⁶. These arguments, once again, take back to the general concept of control: a platform should be liable if it is aware of violations or has a capacity to prevent and limit them.

To sum up. Attracting in the pool of potential liable parties those who are aware of, contribute to or participate in the infringement, those who have substantial control over the illegal content, those who have not acted diligently in preventing violations, and/or those who are best placed to avoid violations considering their financial possibilities and powers over users aims at allocating risks in the best possible way. An excessively lenient secondary liability regime would lack in efficiency as intermediaries would make no diligent effort in controlling users' infringements. On the contrary, a system that is too rigorous for intermediaries would have negative consequences in terms of freedom of expression, right to conduct a business, privacy, and the development of the digital market. It would also hinder competition, as it would exclude from the market all those small and medium-sized operators that are not solid enough to face the costs of building monitoring and prevention mechanisms. Simply put, all these theories expand the list of actors that could be held liable for illegal activities carried on the internet and tend to find a fair balance between all interests involved.

ii. Intermediary liability in food online

That said, where do food online platforms stand in terms of intermediary liability for infringing food information? Notwithstanding the lack of legislative standards on secondary liability specific to food online, this section explores how the arguments illustrated above could help address this question.

Secondary liability, just like qualification and primary liability, cannot depart from the business model followed by the online intermediary in its day-to-day operations. The concrete *modus operandi* explains the control that platforms *de facto* have over information, their relationship with consumers, their powers over business users and their involvement in logistics mechanisms. As illustrated, this thesis chose to follow a schematic approach which distinguishes between pure e-

⁵⁹⁶ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 22.

markets and hybrids and between aggregators and “new delivery” platforms⁵⁹⁷, even though one is well aware that analysing platforms’ role demands a strict factual evaluation of their concrete course of action, especially with regards to their relationship with and authority over third-party businesses (i.e., sellers and restaurants).

Typically, pure online marketplaces and aggregators act as mere windows to third-party content and do not determine substantial conditions of the food business: the latter is normally the one dealing with the main aspects of the food operation. For instance, eBay’s User Agreement⁵⁹⁸, mentioned in section II.6.c, shows how the platform intends to act only as an intermediary, with no control over the conditions of the transaction between buyers and sellers: “*eBay has no control over, and does not guarantee the existence, quality, safety or legality of, items advertised; the truth or accuracy of users' content, listings or feedback; the ability of sellers to sell items; the ability of buyers to pay for items; or that a buyer or seller will actually complete a transaction or return an item*”⁵⁹⁹. Likewise, the aggregator Just Eat has no control over restaurants⁶⁰⁰, which may or may not fulfil orders and which “*have the ability to reject orders at any time because they are too busy, due to weather conditions or for any other reason*” (paragraph 4.4 of the T&Cs). Estimated times for deliveries are defined by restaurants (paragraph 4.5) as well as product quality (paragraph 6.5)⁶⁰¹. The online company does not seem to ensure or monitor restaurants’ compliance with the law, but only refers to a general cooperation with industry authorities “*to help raise awareness among restaurants about their obligations and how they can provide the best service to customers with food allergies and/or intolerance*”⁶⁰². Therefore, while Just Eat appears to be

⁵⁹⁷ As clarified previously, own-brand sellers are not concerned by intermediary liability, as they do not act as mediators for third-party sellers but sell their own products.

⁵⁹⁸ eBay, *User Agreement*, effective as of July 2019.

⁵⁹⁹ Paragraph 2 of eBay’s User Agreement.

⁶⁰⁰ Just Eat UK, *Terms & Conditions*, last updated 24 April 2020.

⁶⁰¹ See also paragraph 11.3.1: “*We do not give any undertaking that the Products ordered from any Restaurant through the Website will be of satisfactory quality or suitable for your purpose and we disclaim any such warranties*”.

⁶⁰² Just Eat, *What should I do if I have an allergy?*.

monitoring trading licenses of restaurants, the platform does not exercise any significant influence over substantial conditions of the meal ordering service such as quality and safety of restaurants and meals or delivery times.

Hybrid online markets and “new delivery” platforms, on the contrary, are involved in more stages of the operation: from intermediation, marketing, customer service and sale to final delivery. As illustrated throughout this thesis, the most prominent example of a hybrid e-commerce market is Amazon’s FBA model. In this capacity, the platform handles products physically and has direct contact with customers in such a way that products are considered coming from the platform rather than from the actual seller. Sellers must also respect a long list of requirements to have access to the FBA model, which attest to the high level of control that the company exercises over significant elements of the offer. Amazon requires FBA sellers to observe strict conditions for listing, preparing, and sending inventory to Amazon fulfilment centres⁶⁰³. These include FBA product title requirements⁶⁰⁴, product barcode requirements⁶⁰⁵, inventory storage limits⁶⁰⁶, strict packing guidelines⁶⁰⁷ and shipping and routing conditions⁶⁰⁸ to prepare products for safe and secure transportation to a fulfilment centre. Moreover, according to the company’s terms, certain products that may be eligible for sale on the Amazon marketplace may not be eligible for FBA. The latter products must adhere to specific expiration date and temperature-sensitive product rules to be sold via the FBA channel⁶⁰⁹. Amazon also outlines in great details how offers must be created and what information they must include⁶¹⁰. For groceries sold in the United States⁶¹¹, for instance, Amazon require third-party sellers to follow strict conditions

⁶⁰³ Amazon Seller Central United States, *FBA inventory requirements*.

⁶⁰⁴ Amazon Seller Central United States, *FBA product title requirements*.

⁶⁰⁵ Amazon Seller Central United States, *FBA product barcode requirements*.

⁶⁰⁶ Amazon Seller Central United States, *FBA inventory storage limits*.

⁶⁰⁷ Amazon Seller Central United States, *Prepare your products for FBA shipping*.

⁶⁰⁸ Amazon Seller Central United States, *Shipping and routing requirements*.

⁶⁰⁹ Amazon Seller Central United States, *FBA product restrictions*.

⁶¹⁰ Amazon Services, *Online Selling – How to create offers on Amazon. A step-by-step guide to creating offer/promotion for your products*, 2018.

⁶¹¹ Amazon Seller Central United States, *Grocery & Gourmet Foods*.

on packaging, sealing, and labelling. As mentioned in section III.4.c.iii, the platform specifies that “*food is viewed as date-sensitive. It must have an expiration date permanently marked on every unit, unless the product is exempt. This includes every unit that is shipped, and every unit displayed for sale*”. Sellers must “*keep the Fulfilment Center (FC) shelf life details up to date for grocery products*” and in the file template, “*set the value of the is_expiration_dated_product field to "true"*”. All labels need to be in English. Any dietary or allergen-free claim (such as organic, kosher, gluten-free and dairy-free) must be mentioned on the label and must have received appropriate regulatory approvals. Moreover, Amazon enforcement actions include prohibition from selling on the platform in case of repeated failure to meet performance targets and food safety and quality standards, periodic audits to check chill chain compliance, and removal of selling privileges.

Some sort of control on – the presence of - food information mandatory requirements is exercised by “new delivery” platforms as well, especially as they are the ones handling physical delivery of meals (e.g., they are in a position to check whether meal boxes are labelled with mandatory allergen information) and some platforms deal with data entry on the website (e.g., filling online menus).

In this context, hybrids – and, in a limited way, “new delivery” platforms - have more grip on the products and are better placed to control the distribution chain, compared to pure online markets and aggregators, which merely supply the online interface. In addition, one might argue that the intense proximity between hybrid platforms and sellers justifies the former’s secondary liability: the two parties are often so intertwined that they are seen as one, in such a way that customers feel they interact with the platform rather than with the seller. For instance, the FBA channel is the key element to the relationship between seller and consumer, it handles communication with customers⁶¹² and deals with the whole logistics system, final delivery, and A to Z guarantee. Plus, it has been observed how eBay is easily identified as a mere auction site while it is often impossible to figure out whether Amazon is selling its own brands or third-party products and whether sellers are using the online marketplace or the FBA platform. Often these branches are so

⁶¹² FEINER L. and RODRIGUEZ S., *Federal appeals court says Amazon is liable for third-party sellers’ products*, in *CNBC*, 3 July 2019.

interconnected than customers hardly know the model and the regime applicable to the purchase. From a consumer perception standpoint, products are bought “from Amazon”⁶¹³, regardless of these distinctions.

Therefore, in a situation where certain providers play a more active role (e.g., participation in data entry, promotion of products, provision of strict information and quality rules), control essential segments of the activity (e.g., control over final distribution through riders; performance of regular spot checks), and are so linked to the seller that they appear as one, they are better placed to prevent and stop misconducts. Simply put, their level of control – which must be assessed on a case-by-case basis – supports some form of liability for food information infringements. In addition, and following up on Laidlaw’s, Montagnani and Dinwoodie’s considerations on economic efficiency and practicability, food online platforms’ liability is likely to have more impact and be more effective than going after sellers, considering traceability challenges on online channels (e.g., online sellers, unlike bricks-and-mortar shops, might “disappear” from the e-commerce market or might trade anonymously), platforms’ financial abilities (e.g., resources to build monitoring mechanisms and to pay for damages), and their authority over users (e.g., regulation of conducts; enforcement through suspension of user accounts and removal of offers). The idea is, once again, to shift the burden to those who have better control over the activity and more power to prevent and limit damages at reasonable costs.

⁶¹³ When a consumer buys a product from an e-commerce site, it is not unusual that they do not remember the name of the third-party company supplying that product. In customers’ common perception, that food is sold by the online platform. LECHER C., *How Amazon escapes liability for the riskiest products on its site. Who’s at fault when something you buy on Amazon goes bad?*, cit.: “ ‘How many people even really remember after they might briefly see it, when they’re buying a third party product that’s shipped and stocked by Amazon, what the name of that company is?’ says John Bergmayer, legal director at the advocacy group Public Knowledge”; “Aaron Twerski, a professor at Brooklyn Law School and one of the authors of the paper, says “Amazon’s got its fingers all over the sale from the beginning to the end.” The average consumer buying through Amazon has no idea of the logistics that go into shipping a product. For most people, buying through Amazon means buying from Amazon. “You’d have to be a genius to figure out what’s going on,” Twerski says”.

Obviously, not all platforms have the same impact on the flow of information. This depends on platforms' actual involvement in determining the format, readability, or content of the webpage and on the setup of monitoring mechanisms. Even when platforms do not deal with content creation – for instance, when restaurants populate their own page on the delivery channels -, negligence in their role of controller – i.e., in failing to recognize the illegality of the offer - may be substantiated by the obvious nature of the illegal content: for instance, explicit notifications from consumers and competent authorities, noticeable omission of mandatory information upon delivery, reiterated infringing conduct suggesting an illegal trend, spot checks identifying foreign language or blurred picture when zoomed in.

To conclude, FOP's intermediary liability strictly depends on their sphere of influence on users, stages of the operation and content uploaded. Once proved, such influence enables them to predict, prevent, avoid and limit third parties' infringements at reasonable costs. While not all platforms have the same relationship with the flow of data uploaded on their channels⁶¹⁴, and FOPs may counter argue that their control does not extend to labels – how can they verify that the information is truthful? - they might be asked to take a greater part in securing that food information available on their sites abides by applicable law, irrespective of primary or secondary liability.

Indeed, the above analysis on secondary liability standards suggests one interesting trend. As illustrated, intermediary liability in the EU started from a legislative negative regime put in place to protect only passive hosts who have no knowledge of nor control over the content accessible via their platforms. Their one obligation, pursuant to the ECD, was a reactive one, that to remove or disable access to illegal content only once knowledge or awareness was obtained. Now the reaction point has been somehow anticipated. Not only through the diligence criterion ex *L'Oréal v. eBay*, according to which an operator is deemed to *know*⁶¹⁵ of the illegal content even when it *should have known*⁶¹⁶, as any diligent economic

⁶¹⁴ MURRAY A. D., *Nodes and Gravity in Virtual Space*, cit., p. 212.

⁶¹⁵ Emphasis added.

⁶¹⁶ *Ibidem*.

operator. But also when one gathers up the loose ends of the debate on positive secondary liability. Laidlaw's, Montagnani, Dinwoodie's investigation showed how economic and political justifications of intermediary liability typically stem, among others, from the level of control online operators exercise over users and information and/or from their capacity to prevent infringements. Indeed, the issue of platforms' liability is now focused on prevention and predictability, where online intermediaries are expected to act beforehand to avoid violations, rather than wait for notices or complaints⁶¹⁷. Thus, the traditional passive-reactive paradigm of the ECD appears to be moving towards one that is active-proactive, according to which web-based operators are called upon to engage in affirmative steps against future violations.

The following section will illustrate how this trend has been put into practice outside the realm of scholarly debate, resulting in the core of EU soft call – and recent sectorial legislation - towards platforms' enhanced *responsibility*⁶¹⁸. The goal will be to propose – in the second part of the analysis – a new approach to platforms' role towards food information: instead of focusing on liability post-damage, section IV.5.b will test the ground for platforms' duty of care in food online, which incorporates a series of legal obligations to prevent unlawful information, regardless of and well before any liability challenge.

5. From reactive liability to preventive responsibility

From a hard law point of view, the general principles that govern intermediary liability so far are still those established by the ECD. Platforms are not liable for the content they host provided that they maintain a technical, automatic and passive conduct and they are not aware of infringements occurring on their channels. Today, while legislative safe harbours still hold and remain untouched⁶¹⁹, voices

⁶¹⁷ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 133- 134.

⁶¹⁸ Emphasis added. The term responsibility is used to reflect EU rule makers' choice of words, as the following section will detail.

⁶¹⁹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online*

demanding e-platforms' greater contribution to a safer internet are increasingly louder.

Indeed, the ECD was enacted as a single market measure to promote internet services. Its goal, though, was not to keep the web clean⁶²⁰. However, the ECD liability exemptions do not fit quite well in the new digital market, where online platforms have an unprecedented impact on all economic sectors and where illegal content is soaring. The fight against such content is now attracting increasing attention⁶²¹ and the debate largely focuses on platforms' powers over the flow, content, and accessibility of information, rather than third-party illegal activities.

Simply put, as the internet, and with it online platforms, come of age, the idea of their exceptionalism has been questioned: where they perform a certain function and exercise a certain power over content, they should be asked to act more responsibly to prevent and limit infringements⁶²². Thus, the discussion over intermediary - *ex post* - liability is gradually moving towards what could be called enhanced responsibility, that is to say towards a framework of *ex ante* obligations that shape platforms' role against illegal content irrespective of liability⁶²³. As anticipated, this enhanced responsibility reflects the same concept of preventive contribution crucial to the EU food system, but is adapted to the digital food chain, to the specific goal of preventing illegal food information online, and to a specific pool of actors, e-platforms, regardless of their qualification under EU food laws.

Section IV.5.a will examine how EU non-mandatory instruments are driving this phenomenon, with an additional sneak peek to recent sector-specific legislation; section IV.5.b will capitalize on the lessons from EU soft law and sectorial

Platforms and the Digital Single Market Opportunities and Challenges for Europe, cit.; GONZÁLEZ VAQUÉ L., *Is it Necessary to (Urgently) Adopt a Community Regulation for Online Food Sales?*, cit., p. 431.

⁶²⁰ ROCHE LAGUNA I., *Limited liability for the Net? The future of the E-Commerce Directive*, cit.

⁶²¹ FROSIO G. F., *Internet Intermediary Liability: WILMap, Theory and Trends*, in *The Indian Journal of Law and Technology*, 2017, volume 13, pp. 16 ss.

⁶²² MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 72.

⁶²³ FROSIO G. F., *Reforming intermediary liability in the platform economy: a European Digital Single Market Strategy*, cit., p. 19.

measures to propose regulatory standards against infringing food information and give concrete form to platforms' enhanced responsibility in food online.

a. EU law towards e-platforms' enhanced *responsibility*⁶²⁴: duty of care, voluntary measures, and sectorial legislation

Irrespective of the conclusions in terms of platforms' *liability*⁶²⁵, EU officials have recently been calling for a more *responsible*⁶²⁶ use of the internet through a series of measures, stressing the need for platforms to step up their action against illegal activities undertaken online. This intent to encourage online platforms' responsibilities is a reaction to the ground-breaking transformations in their business models, activities, and control mechanisms, which growingly affect information online.

As anticipated, evidence of this movement may be found in EU soft law⁶²⁷. In recent years, and especially since 2015⁶²⁸, EU policy makers have indeed been engaged in a debate as to whether the ECD liability regime is still fit for purpose⁶²⁹. In particular, the European Commission has been leading the way in assessing the

⁶²⁴ Emphasis added.

⁶²⁵ Ibidem.

⁶²⁶ Ibidem.

⁶²⁷ Non-binding measures have been complemented by legislative actions: see European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 3: among others, Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA and Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. Recent sectorial legislation is detailed in section IV.5.a.ii.

⁶²⁸ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 173.

⁶²⁹ ROSATI E., *Why a Reform of Hosting Providers' Safe Harbour is Unnecessary Under EU Copyright Law*, cit., p. 1.

need for new tools against illegal content online⁶³⁰, such as rigorous removal systems, reporting obligations, consultation mechanisms, dispute resolution systems, coordination with public authorities, actions against repeated infringers as well as guidance on liability rules⁶³¹. The goal is to encourage platforms to adopt voluntary proactive measures against unlawfulness online: primarily, terrorism, hate speech, child pornography and, for the purposes of this thesis, unsafe products.

Most notably, within its May 2015 Digital Single Market Strategy⁶³², the EC introduced a lively discussion on whether the new digital economy requires additional responsibilities of all actors involved and specifically platforms' "*due diligence in the way they manage their networks and systems – a duty of care*". The latter term reflects Recital 48 of the ECD, which reminds that the legislative regime "*does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities*".

⁶³⁰ For an excursus on EU actions against illegal content online, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 3: among others, the Code of Conduct on Countering Illegal Hate Speech Online, the work of the EU Internet Forum as regards terrorist propaganda, the Memorandum of Understanding on the sale of Counterfeit Goods, the Commission Notice on the market surveillance of products sold online, the EU Action Plan against Wildlife Trafficking.

⁶³¹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the Implementation of the Digital Single Market Strategy. A Connected Digital Single Market for All*, cit.

⁶³² European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe*, cit.

i. The 2017 Communication and the 2018 Recommendation against illegal content online

In this regard, the European Commission adopted two specific measures to address illegality on internet channels – respectively, the 2017 Communication on tackling illegal content online⁶³³ and the 2018 Recommendation on measures to effectively tackle illegal content online⁶³⁴. These initiatives were backed by the European Parliament’s call to action in June 2017⁶³⁵, which urged online platforms to strengthen their measures against illegal and harmful content online, including abusive content on video-sharing platforms, hate speech, and content relating to incitement to terrorism.

In general, the two initiatives insist on e-companies’ *societal responsibility*⁶³⁶ to protect users against illegality online and to prevent their infrastructure from being used to commit infringements. “*Even if such content is created and uploaded by third parties, the constantly rising influence of online platforms in society, which flows from their role as gatekeepers to content and information, increases their responsibilities towards their users and society at large*”⁶³⁷. This responsibility is rooted in their central role in society and in their technological abilities⁶³⁸, which typically allow them to possess the means to identify and remove unlawful content. The EC focuses on voluntary measures and self-regulation as preferential weapons against violations⁶³⁹ and aspires to a more proactive approach of internet-based

⁶³³ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit.

⁶³⁴ European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, 1 March 2018, C(2018) 1177 final.

⁶³⁵ European Parliament, *Resolution on online platforms and the Digital Single Market*, cit.

⁶³⁶ Emphasis added.

⁶³⁷ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 20.

⁶³⁸ *Ibidem*, p. 2.

⁶³⁹ See Recital 41 of the ECD, which refers to “*principles upon which industry agreements and standards can be based*”.

companies, which should act beforehand instead of limiting themselves to reacting to third-party notices. This entirely reflects the conclusions of section IV.4.d.ii, which demonstrated how intermediary liability in scholarly debate now follows an active-proactive approach, rather than the traditional passive-reactive one.

Specifically, the 2017 Communication “*lays down a set of guidelines and principles for online platforms to step up the fight against illegal content online*”, aiming at implementing good practices for preventing, detecting, removing, and disabling access to such content. It also seeks to provide clarifications on platforms’ liability when they take proactive steps against illegal content – which the European Commission refers to as “Good Samaritan” actions. Similarly, the 2018 Recommendation encourages hosting service providers to adopt effective, appropriate, and proportionate measures to tackle illegal content provided by third parties. “*Such proactive measures could involve the use of automated means for the detection of illegal content only where appropriate and proportionate and subject to effective and appropriate safeguards*”⁶⁴⁰.

In greater detail, the 2017 Communication sets out what online platforms *should*⁶⁴¹ do in order to detect illegal activities quickly and efficiently. These may come to their knowledge via a variety of ways such as court orders, administrative decisions, notices from law enforcement bodies, right holders, or ordinary users. In this regard, their responsibility should include the arrangement of an “*easily accessible and user-friendly mechanism that allows [...] users to notify content considered to be illegal and which the platforms host. Where the content is publicly available, such reporting mechanisms should also be available to the general public, without needing to be signed-in as a user*”. Notification mechanisms should be available via electronic means⁶⁴². Furthermore, the Commission asks online platforms to proactively detect and remove illegal content online and not only react

⁶⁴⁰ European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 12.

⁶⁴¹ Emphasis added.

⁶⁴² European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 9.

to notices and complaints. Voluntary proactive measures encouraged by the Commission encompass the use of automatic detection and filtering technologies, including tools meant to ensure that previously removed content is not re-uploaded. The Communication also mentions fully automated deletion or suspension of content, which should be applied where the circumstances leave little doubt over the illegality of the information⁶⁴³. Online platforms should also take measures against repeat infringers, dissuading them from uploading illegal content of the same nature on a regular basis⁶⁴⁴.

The 2018 Recommendation follows up on the 2017 Communication. It reminds how the ECD allows Member States to require service providers to apply a duty of care in respect of the content they store⁶⁴⁵ and how online service providers have particular societal responsibilities to help tackle unlawful data. The Commission not only reiterates the importance of notice-and-action mechanisms⁶⁴⁶, but also that of proportionate proactive measures taken voluntarily by hosting service providers, including automated means for detection. These measures need to be coupled with appropriate safeguards, such as informing content providers of the removal of content, where the contact details of the latter are known. This does not apply where content is illegal in a manifest manner and relates to serious criminal offences involving a threat to human life or safety. Content providers should also be given the possibility to contest platforms' decisions and online hosts are encouraged to publish clear explanations of their policy in respect of illegal content's removal or disabling.

The Recommendation also acknowledges how major progress has been made through voluntary arrangements, which the Commission takes as guidance for the present Recommendation and future steps. One prominent example of self-

⁶⁴³ Ibidem, pp. 10 ss.

⁶⁴⁴ Ibidem, p. 18.

⁶⁴⁵ European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 2

⁶⁴⁶ These mechanisms should allow for precise and substantiated notices so that the hosting provider can take an informed and diligent decision in respect of the content (including the reasons why content is considered illegal and a clear indication of where it is located).

regulation in the EU is the Memorandum of Understanding on the sale of counterfeit goods⁶⁴⁷ (hereinafter also MoU), a voluntary agreement between thirty brand owners and online platforms that addresses their roles in tackling counterfeiting online. Facilitated by the European Commission, the MoU was first concluded in May 2011 and revised in 2016, bringing together major online platforms and right holders to prevent offers of counterfeit goods (e.g., fast-moving consumer goods, consumer electronics, fashion and luxury goods, sports goods, films, software, games, and toys) from appearing on online marketplaces.

Signatories⁶⁴⁸ of the MoU agree that the primary responsibility for the protection and enforcement of Intellectual Property Rights⁶⁴⁹ remains with the respective right owners while it is “*the primary responsibility of Internet Platforms to enable a safe online environment for consumers*”. Platforms commit to offer efficient and effective notice-and-take-down, which should be accessible electronically, not burdensome, and simple to process. Moreover, they promise to assess notifications in an efficient and comprehensive manner, without undue delay, and to adopt deterrent measures in relation to sellers. Platforms also pledge to implement “*proactive and preventive measures*”, including commercially and technically reasonable steps to request sellers’ contact information and to verify this information in specific circumstances. Platforms also commit to take into consideration information received by right owners, including keywords commonly used by sellers to offer obvious counterfeit goods. The MoU specifies, however, that “*the receipt of such information shall not lead to a general obligation to monitor for Internet Platforms*”. More generally on proactive measures, platforms promise to “*take appropriate, commercially reasonable and technically feasible*

⁶⁴⁷ Memorandum of Understanding on the sale of counterfeit goods, 21 June 2016.

⁶⁴⁸ Signatories include right owners Adidas International Marketing BV; Apple; Duracell; Hermès; Lexmark; Luxottica Group Spa; Moncler Spa; Nike Inc.; Procter & Gamble; Philip Morris International; Philipp Plein; Signify; Zanellato and internet platforms Alibaba Group Inc.; Amazon Services Europe Sarl.; eBay; Facebook Marketplace; Grupa Allegro sp. z o.o.; and Rakuten France. See Appendix 1 to European Commission, *Commission Staff Working Document. Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, 14 August 2020, SWD(2020) 166 final/2.

⁶⁴⁹ Registered trademarks, design rights or copyrights.

measures, taking into consideration their respective business models, to identify and/or prevent pro- actively the sale of Counterfeit Goods, especially obvious Counterfeit Goods, and to prevent such goods being offered or sold through their services. The measures taken by Internet Platforms shall be at their discretion”. Further, platforms recognize the importance of consumer confidence and participation, promising to establish appropriate means for consumers to identify and report counterfeit offers and to assist them when they unintentionally purchase illegal goods on their website. Finally, the MoU addresses repeat and continuous breaches. Internet platforms commit to cooperate with right owners in the detection and deterrence of repeat infringers, especially with regards to those selling high volumes of, dangerous or obvious counterfeit goods. Deterrence measures should include suspension (temporary or permanent) or restriction of their accounts.

In recent years, examples of proactive voluntary measures have appeared in the world of food online, too. For instance, some platforms (e.g., Just Eat UK) have claimed that they were taking steps to remove all zero-rated restaurants, to include “*a minimum standard of FHRS rating of 3 for all new restaurant sign-ups*”, and to fund safety improvement programmes for restaurants. Some others (e.g., Deliveroo) have launched initiatives to support restaurants in raising their standards by making sure they have access to independent, expert advice⁶⁵⁰.

EU soft law and industry voluntary arrangements demonstrate how online platforms are now encouraged to “*do their utmost to proactively detect, identify and remove illegal content online*”⁶⁵¹. It is worth specifying, though, that proactivity should not be absolute and without reference to any objective criteria. For instance, the MoU on counterfeit goods links platforms’ proactive and preventive commitments to “*appropriate, commercially reasonable and technically feasible*

⁶⁵⁰ McGLINN M., *Just Eat and Deliveroo respond to food safety concerns*, cit.; TURNER G., *Deliveroo and Uber Eats Are Sharing London Restaurants’ Low Food Safety Scores*, in *Bloomberg*, 4 May 2018.

⁶⁵¹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 13.

measures, taking into consideration [their] respective business models”⁶⁵². More generally, Article 15 of the ECD, introduced in section IV.4.b, provides for a “*no general obligation to monitor*”, which attests to the legislator’s intent to prevent proactive measures from being extended indiscriminately. Specifically, Member States cannot impose “*a general obligation on providers, when providing the services covered by Articles [12, 13 and] 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*”. Recital 47 clarifies, though, that this only concerns monitoring obligations of a general nature and “*does not automatically cover monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation*”. However, the line between general and specific monitoring obligations is often blurred⁶⁵³. Article 15 also dictates that Member States may establish obligations for ISS providers to inform competent authorities of alleged illegal activities. Simply stated, while online platforms are encouraged to take up higher responsibilities, these cannot depart from their concrete *modus operandi* and cannot result in a general monitoring obligation.

One final question may be raised: how does EU soft law’s call for platforms’ proactivity live alongside the spirit of the ECD to protect only passive and neutral hosts that have no knowledge of nor control over illegal activities?

The 2017 Communication expressly clarifies that adopting such voluntary, proactive measures does not automatically result in the loss of the safe harbour provided for in Article 14⁶⁵⁴. The mere fact that an online platform takes these measures in a general manner “*does not necessarily mean that it plays an active role in respect of the individual content items it stores and that the online platform*

⁶⁵² See DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 37.

⁶⁵³ According to FROSIO G. F., *The death of “no monitoring obligations”: a story of untameable monsters*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2017, volume 8, pp. 199 ss, we are already witnessing the death of “no monitoring obligations”.

⁶⁵⁴ This clarification is confirmed by the 2018 Recommendation, paragraph 26. See also SAVIN A., *Regulating internet platforms in the EU: the emergence of the “Level playing Field”*, cit., p. 8.

cannot benefit from the liability exemption for that reason”. Whether or not platforms can benefit from such exemption needs to be “*established on a case-by-case basis, depending on the level of knowledge and control of the online platform in respect of the information it hosts*”⁶⁵⁵. Plus, where proactive measures lead to knowledge or awareness of illegal information, the online platform can still act expeditiously to remove or disable access to such information and thus benefit from the liability exemption. Therefore, according to the Commission, concerns of losing the safe harbour “*should not deter or preclude the application of the effective proactive voluntary measures that this Communication seeks to encourage*”⁶⁵⁶. Especially, if one recalls how the ECD itself acknowledges the importance of voluntary initiatives: “*service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States*” (Recital 40).

It is important to note, however, that this clarification is proposed in a soft law instrument and still does not clear up doubts as to what platforms should do when hard law – the ECD –, on the contrary, links immunity to a passive role, implicitly discouraging platforms from adopting voluntary measures in the fear of losing the safe harbour. While the 2018 Recommendation highlights that soft law is “*without prejudice to the position of hosting service providers under Directive 2000/31/EC*”⁶⁵⁷, concerns remain about the actual relationship between law and social responsibility, especially considering the extent to which EU officials have relied on non-binding initiatives to address the role of platforms against illegal

⁶⁵⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy*, cit., p. 8; MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 187.

⁶⁵⁶ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., pp. 10 ss.

⁶⁵⁷ European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 9.

content. In essence, platforms find themselves in a situation where they are protected by the ECD only if passive, while they are asked by soft law to be active at the same time⁶⁵⁸.

ii. Recent steps: from soft law to hard law?

EU officials are clearly encouraging internet platforms to step up their action against unlawful conduct. This change of perspective has been a long time coming since the enactment of the ECD twenty years ago. However, this soft, non-mandatory, movement is testimony to EU light approach towards e-platforms' responsibility: – *societal*⁶⁵⁹, rather than legal; *responsible online platforms*⁶⁶⁰, rather than online platforms' legal responsibility. Simply put, EU decision makers have proved, at least until mid-2020, to be keener on collaborating with online platforms rather than imposing severe obligations.

Platforms' voluntary initiatives have been mentioned in recent sectorial legislation as well. Think of Directive 2017/541 on combating terrorism⁶⁶¹, which “*is without prejudice to voluntary action taken by the internet industry to prevent the misuse of its services or to any support for such action by Member States, such as detecting and flagging terrorist content*” (Recital 22). Similarly, according to the Audiovisual Media Services Directive⁶⁶², it should “*remain possible for video-sharing platform providers to take stricter measures on a voluntary basis in accordance with Union law, respecting the freedom of expression and information and media pluralism*” (Recital 49). Interesting to note that self-regulation through

⁶⁵⁸ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 135.

⁶⁵⁹ Emphasis added.

⁶⁶⁰ Ibidem.

⁶⁶¹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, cit.

⁶⁶² Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

codes of conduct is explicitly encouraged to prevent harmful food information on platforms, in particular to reduce “*the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. Those codes shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages*” (Article 1(23)-Article 28(b)(2)).

Voluntary measures encouraged by non-binding acts or sectorial legislation do not alter the applicable legal framework *per se*. Yet, they might serve as an early warning to the various stakeholders, an implicit message that future binding rules might be adopted and stringent legal responsibilities imposed should the former – *in primis* platforms - ignore the invitation to cooperate towards a safer online experience. Typically, political calls for action, while not part of law, might indicate how law is likely to be adopted or amended.

In this regard, some Good Samaritan efforts against online illicit acts have recently been translated into binding obligations, albeit specific to certain subjects. The same Audiovisual Media Services Directive requires Member States to ensure that video-sharing platform providers take appropriate measures to protect minors from programmes and communications “*which may impair their physical, mental or moral development*”; and the general public from programmes and communications “*containing incitement to violence or hatred*” or “*containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence*” (Article 1(23)-Article 28(b)(1)). Directive 2019/790 on copyright⁶⁶³ refers to the professional diligence of online content-sharing service providers to make their best efforts “*to achieve the result of preventing*⁶⁶⁴ *the availability of unauthorised works or other subject matter on [their] website*”. More importantly, providers are liable

⁶⁶³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

⁶⁶⁴ Emphasis added.

not only for unauthorised communication to the public of copyright-protected works, if they receive a substantiated notice and fail to act expeditiously to disable access to or remove those works. But also, if they fail to demonstrate that they have made their best efforts to *prevent*⁶⁶⁵ the future uploading of specific unauthorised works (Recital 66 and Article 17(4))⁶⁶⁶.

Setting aside these sectorial pieces of law, the EU legislator has also recently adopted one significant horizontal piece of legislation concerning platform-to-business relationships. Briefly, EU Regulation 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services⁶⁶⁷ (also known as Platform-to-Business (P2B) Regulation) lays down a set of rules aimed at ensuring a fair, transparent and predictable business environment for smaller businesses and traders on online platforms. Applicable from July 2020, the P2B Regulation addresses the risks of unilateral trading practices that are unfair and harmful to corporate website users and, indirectly, to EU consumers⁶⁶⁸. The new rules are part of the Digital Single Market Strategy and their scope extends to the entire online platform economy operating in the EU – *circa* 7000 online platforms⁶⁶⁹. Online platforms fall within the scope of the Regulation if they supply

⁶⁶⁵ *Ibidem*.

⁶⁶⁶ MAZZIOTTI G., *What Is the Future of Creators' Rights in an Increasingly Platform-Dominated Economy?*, cit., p. 1030: “*Veering away from the safe harbour provision embodied in Art. 14 of the 2000 e-Commerce Directive, Art. 17 requires social media companies to obtain a licence for all contents uploaded by their users and to restrict access to unauthorised works. The main goal of this provision is to protect legacy content industries, which are pillars of Europe's cultural and linguistic diversity and produce outside the domain of online platforms*”.

⁶⁶⁷ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

⁶⁶⁸ The P2B Regulation, in fact, only applies to P2B2C relationships, namely when all three actors – platforms, businesses (parties acting in their professional capacity) and consumers (those who purchase goods or services for personal reasons and mere consumption) – are involved.

⁶⁶⁹ European Commission, *Questions and Answers - EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices*, 14 February 2019: “*Online platform intermediaries include third-party e-commerce market places (e.g. Amazon Marketplace, eBay, Fnac Marketplace, etc.), app stores (e.g. Google Play, Apple App Store, Microsoft Store etc.), social media for business (e.g. Facebook pages, Instagram used by makers/artists etc.) and price*

their services to businesses established in the EU, which offer goods or services to consumers located in the EU⁶⁷⁰. Simply put, both businesses and consumers must be established or located in the EU. Platforms, on the contrary, may be based anywhere.

The P2B Regulation is based on the finding that several online platforms have superior bargaining power, enabling them to behave unfairly towards the many business users that need their channels to operate, namely businesses that are economically dependent on the platforms. The new system focuses on a key tool, the Terms & Conditions, which must clearly outline the rules followed by the platform in its relationship with users. T&Cs must be easily available and provided in plain and intelligible language. Any change to contractual clauses needs to be notified to business users. Platforms must also guarantee transparent ranking, revealing the main parameters they use to rank goods and services on their sites. In addition, considering that some online platforms not only supply a marketplace, but are also sellers on that same marketplace, they need to disclose any advantage they may give to their own offers⁶⁷¹. The EU legislator also provides new possibilities for resolving disputes and complaints: all platforms must establish an internal complaint-handling system to assist business users. Smallest platforms - in terms of head count or turnover – can benefit from exemptions. Furthermore, platforms are to set up options to resolve disputes through mediators.

While the P2B Regulation focuses on issues outside the scope of this thesis – mostly the relationship between platforms and companies that depend on the latter to reach consumers, rather than the actual relationship between platforms and

comparison tools (e.g. Skyscanner, Google Shopping)”. Among others, the Regulation does not cover “online retailers, such as grocery stores (supermarkets) and retailers of brands (e.g. Nike.com), to extent that such online retailers directly sell only their own products, without relying on third party sellers and are not involved with facilitating direct transactions between those third party sellers and consumers”.

⁶⁷⁰ LOMAS N., *Europe agrees platform rules to tackle unfair business practices*, in *TechCrunch*, 14 February 2019.

⁶⁷¹ European Commission, *Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices*, cit.

consumers - it proves how the EU is well on track when it comes to regulating web platforms, beyond mere soft law and even on a horizontal, non-sector specific level.

This new impetus in platforms' regulation is even more palpable since June 2020, when the EU Commission launched a public consultation⁶⁷² on the role and responsibilities of today's online actors, especially the largest ones, which the 2000 regulatory framework does not seem to address⁶⁷³. The consultation focused on the Digital Services Act (hereinafter also DSA), a package announced by President Ursula von der Leyen in her political agenda⁶⁷⁴ and in the Commission's Communication *Shaping Europe's Digital Future* of 19 February 2020⁶⁷⁵ to "upgrade [...] liability and safety rules for digital platforms, services and products, [...] complete [the] Digital Single Market"⁶⁷⁶, and adapt internet rules to the current context⁶⁷⁷.

The DSA final proposal⁶⁷⁸ was published in December 2020, along with the Digital Markets Act⁶⁷⁹: the two "Acts" are in fact horizontal Regulations as they are not specific to a single sector.

⁶⁷² European Commission, *Commission launches consultation to seek views on Digital Services Act package*, 2 June 2020. The consultation, which ran from June to September 2020, intended to gather views and data from all interested parties on several issues such as safety online, freedom of expression, fairness and a level-playing field in the digital economy.

⁶⁷³ PEHLIVAN C. N., *The EU's Digital Services Act: Difficult choices ahead*, Linklaters, 12 June 2020: "For example, how can you ensure rights to freedom of information but prevent disinformation? How can electronic commerce be conducted fairly given the power of some tech companies?"

⁶⁷⁴ *A Union that strives for more. My agenda for Europe*, by candidate for President of the European Commission Ursula von der Leyen, Political Guidelines for the Next European Commission 2019-2024. The Political Guidelines focus on six headline ambitions for Europe, including "A Europe fit for the digital age".

⁶⁷⁵ European Commission, *Shaping Europe's digital future*, February 2020.

⁶⁷⁶ *A Union that strives for more. My agenda for Europe*, cit.

⁶⁷⁷ *L'UE vuole riscrivere le regole di internet*, in *Il Post*, 16 December 2020.

⁶⁷⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Brussels, 15.12.2020 COM(2020) 825 final.

⁶⁷⁹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, Brussels, 15.12.2020

In particular, the DSA seeks to establish a common set of up-to-date provisions concerning online intermediaries' obligations and liability for illegal content, as well as rules for a more effective enforcement. As for the scope, the proposal targets all online intermediaries offering their services in the single market, whether they are established in the Union or outside. What is interesting, though, is that the new Regulation provides for obligations and responsibilities adjusted to platforms' size, role, and impact in the online ecosystem.

All "intermediary service providers" have, among others, the obligation to establish a single point of contact to facilitate direct communication with Member States' authorities and the European Commission (Article 10); the obligation to set out in their contractual terms any restrictions that they may impose on the use of their services, including information on content moderation policies, procedures, and tools such as algorithmic decision-making and human review (Article 12); and transparency reporting obligations in relation to the removal and the disabling of information considered illegal or contrary to their terms and conditions (Article 13). In addition to the above obligations, "online hosts" are requested to put in place mechanisms allowing third parties to notify the presence of alleged illegal content (Article 14); and to motivate decisions to remove or disable access to specific information (Article 15). Further, extra responsibilities are imposed upon "online platforms"⁶⁸⁰, such as social media and marketplaces, except for micro or small enterprises. These extra obligations include: provide an internal complaint-handling system with regards to the decisions concerning alleged illegal content or information incompatible with terms and conditions (Article 17); engage with certified out-of-court dispute settlement bodies to resolve disputes with users (Article 18); receive, store, make reasonable efforts to assess the reliability of and

COM(2020) 842 final. The Digital Markets Act intends to target platforms' anti-competitive practices.

⁶⁸⁰ Article 2(h) of the DSA defines an online platform as «*a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation*».

publish specific information on traders using the platform's services where consumers are allowed to conclude distance contracts with those traders (Article 22). These platforms are also required to organise their online interface in a way that enables traders to respect EU consumer and product safety law (Article 22 (7)).

Lastly, the DSA targets “very large online platform(s)”, an expression that appears 161 times in the proposal. These are the platforms supplying their services to a number of average monthly active recipients in the Union equal to or higher than 45 million, i.e., 10% of the total EU population (Article 25). “Very large online platforms” are required to, among others, conduct risk assessments on the systemic risks related to the functioning of their services (Article 26), take reasonable and effective measures aimed at mitigating these risks (Article 27) and allow for external and independent audits (Article 28)⁶⁸¹. The DSA also provides for the possibility to impose fines not exceeding 6% of the total turnover where “very large online platforms” infringe relevant provisions of the Regulation.

The Digital Services Act, while still a proposal, attests to the latest intent of EU decision makers to increasingly rely on binding measures to enhance internet safety and fairness next to - and maybe instead of? - soft law nudges. Indeed, following the words of Commissioner for Internal Market Thierry Breton, “*platforms have taken a central role in our life, our economy and our democracy. With such a role comes greater responsibility, but this can happen only against the backdrop of a modern rulebook for digital services*”.

iii. What about food online?

As examined, EU rule makers see platforms' – preventive - participation, either mandatory or voluntary, as a crucial piece in the puzzle against illegal content. The legal framework is increasingly converging around systems of enhanced responsibility where intermediaries are the ones preventing and limiting wrongful conduct of third parties, irrespective of monetary liability. Considering the overview on platforms' societal and legal responsibilities that seem to be put in place in the Union at various levels, where do food online platforms stand?

⁶⁸¹ *La soluzione europea al governo dei social network*, in *Il Post*, 17 January 2021.

First, EU non-binding call for a stronger participation in today’s digital safety is a general one, involving all online actors, including those engaged in the food chain. While not referred to specifically, online food safety is well within the scope of the fight against illegal content. In this respect, the European Commission published in March 2018 a Factsheet “*A Europe That Protects: Countering Illegal Content Online*”, where it reminds that ensuring product safety demands an active input of e-commerce markets and their cooperation with competent authorities. This is all the more true for those e-markets monopolizing *de facto* food online, due to the significant amount of products “travelling” through their platforms and the high level of control they exercise. In the Commission’s words, “*further voluntary commitment is expected from them to improve product safety going beyond their legal obligations*”.

This enhanced participation is pursued on a voluntary basis. Indeed, e-markets’ Terms & Conditions are in line with the Commission’s choice – at least until the latest DSA - of privileging voluntary responsibility. For instance, Amazon reserves the right to remove food “*it considers to be inappropriate for sale for any reason*” and “*sellers who list prohibited items can have their selling permissions removed, either temporarily or permanently*”. It is a discretionary right, not an obligation⁶⁸². Similarly, eBay *may*⁶⁸³ - it does not commit to - remove or restrict the visibility of listings and hosted content or take technical and legal steps in case users infringe third parties’ rights or eBay is unable to verify the information provided⁶⁸⁴. Similarly, Deliveroo informs its users that it *may*⁶⁸⁵ suspend the provision of its services if they are found to be in breach of “*all Applicable Law and Deliveroo Policies*”⁶⁸⁶.

⁶⁸² For selling in the United Kingdom, see Amazon Seller Central, *Food & Beverage*. Similarly, for selling in Italy, Amazon Seller Central Europe, *Alimenti e bevande* or France, Amazon Seller Central Europe, *Aliments et boissons*.

⁶⁸³ Emphasis added.

⁶⁸⁴ *eBay User Agreement*, United Kingdom. Similarly, for eBay Italy: *Accordo per gli utenti*.

⁶⁸⁵ Emphasis added.

⁶⁸⁶ Deliveroo, *Deliveroo food information policy*.

A distinct question would be whether (hard) law should impose on them such effort and translate the Good Samaritan policy into specific responsibilities *ex lege*⁶⁸⁷. Detailed and clear-cutting obligations would help platforms navigate the current framework, in which they are supposed to be as passive as possible to have access to the ECD safe harbour and, simultaneously, take action to meet their societal responsibility. These obligations would provide structure, legal certainty and transparency for all actors involved, they would be duly enforced by public authorities and the judiciary, unlike *ad hoc* private standards which are open-ended, involving, from time to time, one online company and not the other and which are implemented on a voluntary basis.

The next section will attempt an answer tailored to food online.

b. *Enhanced responsibility*⁶⁸⁸ in food online

The *status quo* may be summed up as follows: the original *liability*⁶⁸⁹ structure set up by the Directive on E-Commerce is left unchanged⁶⁹⁰, while case-law, soft law, industry voluntary agreements, sectorial legislation and the latest DSA

⁶⁸⁷ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 52.

⁶⁸⁸ Emphasis added.

⁶⁸⁹ *Ibidem*.

⁶⁹⁰ Explanatory Memorandum for the *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, cit.: “*The resolution on ‘Digital Services Act – Improving the functioning of the Single Market’ calls for an ambitious reform of the existing EU e-commerce legal framework while maintaining the core principles of its liability regime, the prohibition of general monitoring and the internal market clause, which it considers to be still valid today*”; “*The proposal maintains the liability rules for providers of intermediary services set out in the e-Commerce Directive – by now established as a foundation of the digital economy and instrumental to the protection of fundamental rights online. Those rules have been interpreted by the Court of Justice of the European Union, thus providing valuable clarifications and guidance. Nevertheless, to ensure an effective harmonisation across the Union and avoid legal fragmentation, it is necessary to include those rules in a Regulation*”; “*this Regulation deletes Articles 12-15 in the e-Commerce Directive and reproduces them in the Regulation, maintaining the liability exemptions of such providers, as interpreted by the Court of Justice of the European Union*”.

proposal are increasingly voicing the need for an active participation of platforms against illegal content online⁶⁹¹. The literature review on intermediary liability (section IV.4.d) showed how legal, political, and economic arguments are eroding platforms' neutrality. The latter are considered better placed to prevent violations, considering their authority over users – contractual partners of large platforms have typically no or low contractual power – and their financial possibilities. EU decision makers are looking to impose an obligation on e-platforms to behave *responsibly*⁶⁹², to actively solve problems instead of reacting to them⁶⁹³, simply put to be responsible for what happens on their channels. Moreover, sector-specific initiatives that have recently been adopted demonstrate how EU law is taking a problem-driven approach, which seeks to address single challenges in particular areas, rather than amending the ECD altogether⁶⁹⁴.

In other words, the idea of tackling illegal content online from a vertical perspective has gained ground, adding to the horizontal approach envisaged by the ECD. While the latter is left intact and still considered fit for purpose, EU officials

⁶⁹¹ FROSIO G. F., *Reforming intermediary liability in the platform economy: a European Digital Single Market Strategy*, cit., pp. 24 and 45; MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 134.

⁶⁹² Emphasis added.

⁶⁹³ TALLACCHINI M., *Sicurezza e responsabilità in tempi di crisi*, in *Rivista di diritto alimentare*, 2012, issue 1, pp. 14 ss: the word “responsibility” – as used in Italian regulatory documents and academic work for instance – has a variety of meanings. It does not only refer to compensation upon damage (i.e., liability), but also and ever more to the need for preventive response, that is, the obligation of proactive measures to avoid that very damage, and to the identification of who is responsible on the basis of their professional position. The person who is responsible, according to this approach, is not only the one who caused negative consequences but also the person who has the power to avoid them.

⁶⁹⁴ As illustrated in the previous section, key sectors tackled by binding and non-binding measures include terrorism, audiovisual media services, copyright, and child pornography. See MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 202, 214 and 219; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 3.

are also focusing on individual problems and tailored rules, which should be adjusted to the sector one is dealing with and to the nature, importance, and gravity of the illegal content⁶⁹⁵.

That said, the following section seeks to capture these changes and adapt them to food online: how does this preventive and sectorial approach apply to platforms' food information responsibilities?

i. Platforms' enhanced responsibility: a function-based approach

Where the considerations based on primary liability leave out most food online platforms (section IV.3.c), where principles on secondary liability are undergoing a profound rethinking process (section IV.4) this thesis suggests to investigate the role of food online platforms against unlawful information following a sectorial, function-based approach and in terms of legal – rather than societal – enhanced responsibility, as in a network based on clear, legally imposed, *ex ante* obligations. As anticipated, enhanced responsibility is a growing feature in the world of online platforms, which are called to actively assist in preventing illegal content, regardless of and well before liability and potential fault. This set of obligations would fit like a glove in the EU Food Law regime, fully grounded, as the present section will remind shortly, on preventive responsibility, which operates upstream to avoid – rather than repair - any food safety risk.

This thesis recommends that such obligation to assist and help should not be voluntary, as suggested by EU soft law, but compulsory. Instead of relying on platforms' voluntary contribution via their contractual terms, legislative instruments would delineate obligations specific to the sector in which they operate. Simply put, the question of e-platforms' participation in a safer food online

⁶⁹⁵ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., pp. 113 ss; FROSIO G. F., *Reforming intermediary liability in the platform economy: a European Digital Single Market Strategy*, cit., p. 25; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, cit., p. 9: “The Commission will maintain the existing intermediary liability regime while implementing a sectorial, problem-driven approach to regulation”.

experience could be solved through the establishment of proactive mechanisms that require online markets to assist in preventing wrongdoings, shaping their conduct in such a way as to reduce business users' infringements.

In the context of EU silence on food online platforms, this enhanced responsibility is explored from a law-making, public policy perspective: in essence, which preventive obligations should regulation impose on internet platforms to limit illegal food information? The goal is not to enforce a change of structure for food online platforms that would require them to hunt down violations. This would not only clash with Article 15 of the ECD (as well as Article 7 of the proposed DSA entitled "*No general monitoring or active fact-finding obligations*"), but it would also often be unfeasible as most Food Law infringements require physical checks of the product – e.g., a platform could attest whether online data on allergens is missing, but not guarantee that the product contains no other ingredient. Rather, the present investigation intends to propose a change of perspective in what they can actually do to ensure a better protection of consumers. This considering EU Food Law's preventive approach to food safety⁶⁹⁶ and bearing in mind that Recitals 47 and 48 of the ECD respectively allow monitoring obligations in specific cases and enable Member States to require hosting service providers "*to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities*"⁶⁹⁷.

Of course, food online platforms' enhanced responsibility cannot be seen in isolation from their function in the food chain and the context in which they operate.

⁶⁹⁶ It is a prevention system for the very reason that wrongdoings may cause severe damage to crucial interests that individuals have as human beings (human life and health, ethical choices, religion etc).

⁶⁹⁷ See also Recital 45: "*The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it*"; and Recital 46: "*this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information*"; MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 119 and 190.

Indeed, responsibility in food online is not a sector-neutral allocation of obligations: it is well rooted in the policy objectives of the sector of law where claims arise.

Food surely is a consumer good. However, unlike any other product, it does not simply come into contact with consumers, but penetrates their body and is strictly intertwined with their right to health, as well as to the right of self-determination in individual life choices⁶⁹⁸. Specifically, foods are intended to be ingested by humans, as most of medicinal products, but, unlike the latter, they are typically meant to be consumed by each human being on the planet, on a daily basis, multiple times a day⁶⁹⁹. This puts food in a position rather different from all other products destined to consumers, as it is substantially linked to us as human beings. To quote Luigi Costato⁷⁰⁰, food is “*the fuel for life and growth*”. It is a necessity, the only real necessity, without which human life would not exist to begin with. Where food represents a unique class of goods, essentially connected with human health and life⁷⁰¹, it does not come as a surprise that EU Food Law aims at the highest level of food safety. Indeed, the rules and principles adopted by EU decision makers in the food sector are not only important for their legal content, but also and foremost for their scope, which encompasses food in general, and for their political goal, according to which all foods must be safe from the moment they are found in nature to when they are ready to be eaten.

As anticipated, EU General Food Law does not really focus on compensation but opts for a regime of preventive protection, based on key tools such as risk

⁶⁹⁸ BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, cit., p. 1.

⁶⁹⁹ As this is an obvious statement, it is equally obvious (and inhumane) that food is not available to everyone on the planet and that large parts of the world population are still suffering from hunger.

⁷⁰⁰ COSTATO L., *Production know-how and the food market: the Italian example*, in Session I of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, pp. 55 ss.

⁷⁰¹ BONINI R. S., *La responsabilità civile nel settore agroalimentare tra principio di precauzione e tutela della salute*, cit., pp. 3 ss.

analysis⁷⁰² and the precautionary principle^{703 704}. This regime intends to mitigate or eliminate risks at the source, and it is highly dependent on the collaboration of all actors involved. The term “responsibility” used by both the GFL and the FIC does not really mark the obligation of food operators to pay for damages once they occur, in line with a restorative and compensatory dimension of liability – but mostly refers to their obligation to *respond*⁷⁰⁵ to the challenges of food safety preemptively and proactively (i.e., preventive responsibility)⁷⁰⁶. Specifically, the GFL requires all food business operators to activate a forecasting capacity, aimed at avoiding damages to present and future generations of consumers⁷⁰⁷. FBOs are considered from a unitary standpoint and evaluated on their capacity to act consciously and control in advance the various links of the food chain carried out under their authority⁷⁰⁸. Simply put, the EU legislator wants to ensure that all operators play a role of mutual guarantee, prescribing supervisory duties of compliance with food law in all phases of the production and distribution chain (section III.4 and Article 17 of the GFL). Of course, traditional liability mechanisms

⁷⁰² Article 6: “1. *In order to achieve the general objective of a high level of protection of human health and life, food law shall be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure.* 2. *Risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner [...]”.*

⁷⁰³ Article 7: “1. *In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment. [...]”.*

⁷⁰⁴ GIUFFRIDA M., *Technological innovation and the food business operator liability*, cit., p. 155.

⁷⁰⁵ Emphasis added.

⁷⁰⁶ TALLACCHINI M., *Sicurezza e responsabilità in tempi di crisi*, cit.

⁷⁰⁷ Article 14: “*In determining whether any food is injurious to health, regard shall be had: (a) not only to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations; [...]”.* The crucial position of food safety in the system of the GFL is indeed testified by the fact that food is deemed injurious to health, not only in relation to the effects on the person consuming it, but also on subsequent generations.

⁷⁰⁸ ALBISINNI F., *Agri-food law: innovation and globalization in comparative perspective*, in Session II of *Innovation in agri-food law between technology and comparison*, ed. Italian Food Law Association, 2019, Wolters Kluwer, p. 77.

spring into action when prevention does not reach the intended goal (extensively, section IV.3 and Article 21 of the GFL), but EU Food Law wants to prevent rather than fix: those who have control need to ensure that everything is in order.

These considerations need to be taken into account when one addresses the question of FOPs' compliance with food information rules. Simply, the issue of platforms' enhanced responsibility should be tackled having regard to the prevention goals of the sector in which they operate and analysed in the face of various interest, *in primis* human health. And, as demonstrated, the legislative liability framework fails to account for human health and for the fundamental rights food is strictly linked with, as it leaves out most e-platforms. Hence, this analysis seeks to define what online providers should reasonably be expected to do against third-party infringements, while making sure, at the same time, that their right to conduct a business is well preserved.

Similarly to what has been observed on secondary liability (section IV.4.d), platforms' (preventive) responsibility with regards to food exchanged online – and specifically food information available online – should go hand-in-hand with their function in the digital food chain and be grounded on their concrete business model⁷⁰⁹. This enhanced responsibility follows a function-based approach where platforms' obligations synchronise with the specific role they play, which puts them, in certain cases, in a position to intervene and limit infringements. Hence, the extent of their responsibility should pivot around the legal and factual characteristics of their online activity, namely around the model they chose and the powers they allocated upon themselves in their relationship with business users via Terms & Conditions.

As illustrated, control is the main key to understanding platforms' new role in today's economy. Typically, food online platforms aim at a high level of customers' satisfaction. The need to defend their reputation urges them to regulate sellers' performance, to validate their quality, ultimately to enhance their control over the different stages of the operation and to take up the role of guarantors of the transactions. Equally, the concept of control has been placed at the heart of Food

⁷⁰⁹ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., p. 120.

Law's responsibility system, as the GFL and the FIC impose obligations to operators in strict relation to the businesses "*under their control*" (section III.4). Surely, not all food online platforms have the same impact on consumer protection, on sellers, on content. As proved throughout this thesis, some food online intermediaries are very much involved in the selling and distribution process, have their hands over the logistics process and are in a position to control significant stages of the food distribution chain. Other platforms truly act as mere mediators, and do not have any contact with food products, which are directly sold and shipped by businesses to consumers.

Turning specifically to food information online, the relationship of online e-markets (pure and hybrid) and meal delivery platforms (aggregators and "new delivery") with it is a challenging one. While online intermediaries are not creators of information, they play a critical role in allowing and facilitating its exchange between businesses and consumers. Whether food information responsibilities should incur, and the amount of these responsibilities depend on the extent to which the platform can control online content creation (e.g., existence of a team that participates in the population of offers by drafting, correcting, selecting and reprocessing data), impose on sellers and restaurants certain obligations (e.g., the obligation to insert a menu before handing food to the rider), or build monitoring mechanisms (e.g., surveillance teams, *ad hoc* checks, automated filters). Some online markets for instance, are the ones filling up the webpage displaying menus⁷¹⁰ and are capable of verifying whether than information is provided clearly, in an accessible manner and whether it includes all mandatory particulars. Additionally, emphasis may be put on systems that suggest certain menus or direct customers towards specific third-party businesses: in this case, platforms' responsibility should be stronger as they actively recommend an offer over another. Where food online platforms do not handle food physically (e.g., Just Eat, where the platform mediates and restaurants deliver), it would be hard to argue that they have any

⁷¹⁰ Just Eat Italy, *Termini e Condizioni del sito Just Eat*: "11.2. *Informazioni relative alle allergie, informazioni di carattere dietetico e altre informazioni sul menu: Quando un Ristorante si registra con noi, deve fornirci informazioni aggiornate sul menu. Dopodiché noi includiamo queste informazioni nella pagina a loro dedicata sul Sito Web*".

control over the information printed on the package or meal box. However, they could ensure that food information is clear, transparent, accessible, and legible by requiring businesses to attach an allergen sticker on packages or enclose a menu upon delivery and ask customers via the app whether this obligation was fulfilled (e.g., feedback for customer service satisfaction). These obligations imposed on business users via Terms & Conditions are clearer rules to follow instead of generally reminding them to abide by applicable laws.

More generally, whether they handle food or not, they all provide an online interface where information is available to millions of consumers. Again, they are not in the position to guarantee whether the content provided by the food business is accurate or true, but they may be asked – by law - to bear some responsibilities to reach that goal. The next section will expand on these considerations and propose some duty of care standards which could be reasonably imposed on platforms to better secure safer food information online.

ii. Duty of care in food online: recommending practical legal standards

In line with the problem-driven approach recently followed by EU rule makers in the fight against illegal content online, this thesis proposes that the law should provide for a graduated response to illegal food information and that online platforms should bear *ex lege* obligations to prevent infringements. Online operators should be asked to comply with a series of tailored responsibilities, which would fit into EU Food Law's preventive regime while being fully compliant with the non-monitoring obligation ex Article 15 of the ECD. Simply put, what could a diligent marketplace platform be asked to do to avoid illegal food information?

The following paragraphs will lay down a (non-exhaustive) list of legal responsibilities revolving around the presence and accuracy of food information online and, more specifically, aiming for information that is accessible, legible, consumer-friendly, and correct.

First, FOPs' enhanced responsibility should focus on the existence and completeness of food information, that is to say ensure that all the information required by law is at least included. Platforms should be imposed a set of informational requirements, namely they should be asked – by law - to advise

business users on all mandatory information particulars. When platforms do not personally curate the webpage dedicated to each restaurant or offer (e.g., Just Eat), this could be achieved by asking the former to establish precise templates and standardized pages for sellers/restaurants to fill, instead of merely telling businesses to provide all necessary information, without any specifics, or requiring only the name and description of the product⁷¹¹. These mandatory, step-by-step, templates should not be uploadable if the required information is missing. Simply put, platforms' duty of care with regards to food information should include the setup of a list of compulsory and detailed steps for businesses to follow while populating their offer, instead of simply referring to useful links or merely reminding them to respect applicable laws⁷¹². One could also suggest automated tools that would directly fill the allergen tab for offers of specific products (e.g., pasta/gluten, mayonnaise/eggs), with an opt-out option to be manually filled by the seller on an *ad hoc* basis in case that specific product does not contain that allergen (e.g., gluten free pasta).

Platforms' enhanced responsibility with regards to the presence of information should go beyond what appears on the webpage. As previously explained (sections

⁷¹¹ eBay, *Creating a listing*: “You are required to provide only the title, description, and price. However, providing pictures, details about payment options, shipping, and your return policy will reduce the time you spend answering questions from buyers”.

⁷¹² eBay, *Food policy*: “Be sure to follow relevant laws when listing food items. Here are a few examples: *Ingredients*: Regulations govern the use of additives, sweeteners, flavourings and colourings; *Labelling*: Labels are required to state, among other things, the food's name, ingredients, any special storage conditions, nutrition information, and place of manufacture; *Import/export*: Laws restrict the import and export of many food products; *Protected agricultural products and foodstuffs*: EU regulation promotes and protects names of quality agricultural products and foodstuffs under three EU schemes known as: *PDO* (protected designation of origin), *PGI* (protected geographical indication) and *TSG* (traditional speciality guaranteed). It is prohibited to name or reference the name of a product registered under these schemes in listings for products that are not covered by the registration. For more information on PDO/PGI/TSG, please click here. To learn more about laws relating to food sales, visit these websites”; Amazon Seller Central, *Food & Beverage*: “All food products offered for sale on an Amazon website must comply with all applicable EU and local laws, including but not limited to food information and labelling regulations (such as Regulation 1169/2011/EC)”.

III.3.b and III.5b), mandatory food information must be available both on the website, before purchase, and upon delivery, when the product is physically handed to customers. With regards to non-prepacked food, namely meals, this means that food ordered and delivered either by the restaurant or the platform should be accompanied with stickers or an enclosed copy of the menu where ingredients are displayed. As these are missing in the vast majority of meals ordered online, the law should impose upon platforms a specific responsibility to require restaurants to include a written allergen notice to be provided upon delivery and enable consumers to report via app when they have not received it (see previous section). Such obligation would be even more justified when food online platforms are involved in physical distribution⁷¹³: in this case, they should be asked to monitor – via riders - that full information is actually provided to consumers upon delivery⁷¹⁴.

Second, standards for duty of care should secure readability and accessibility of the information, which is not the case when pictures are ill-defined or particulars difficult to find on the website. For instance, one reported concern relates to the difficulty of searching for information on ingredients on meal-ordering sites as customers need to open several tabs before they find anything relevant. One suggested obligation would be to impose a maximum number of clicks necessary for the consumer to be able to view the information that should be provided by law⁷¹⁵. The responsibility for making information intelligible should inspire practical standards for pictures (quality, size, light, zoom-ins) and automated detection filters, which would refrain incomprehensible text, content not written in

⁷¹³ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., p. 123.

⁷¹⁴ Deliveroo, *Deliveroo food information policy*: “*Food Information Regulations: You must comply with your obligations under Regulation 1169/2011 on Food Information for Consumers. This includes ensuring that the required food information is available to the customer before they buy and when it is delivered to them. For example, your staff should be trained to respond to telephone queries from customers about food information and you should have in place a method for this information to be available upon delivery*”.

⁷¹⁵ MONTANARI F., *Food e-commerce and consumer information in the post-COVID-19 between due diligence and digital innovation*, cit.

the official language of the country where products are sold, or blurred pictures or logos from being uploaded⁷¹⁶.

Third, platforms' responsibility in terms of food information may be enhanced through consumer participation. E-commerce websites and meal delivery platforms should be required, for example, to establish appropriate mechanisms that would allow consumers to provide feedback on readability or accessibility of information, to send notices reporting suspected illegal offers (e.g., offers missing mandatory information)⁷¹⁷ and to complain about food safety. They could also be obliged to assist customers when they unintentionally purchase unsafe products from their website. These mechanisms would need to be accessible and easy to use, e.g., a dedicated comment tab or report button placed next to (infringing) offers or menus.

Fourth, responsibility in food online should include specific and restricted monitoring obligations, which would not exceed the limitation ex Article 15 of the ECD. Food online platforms could be required, for instance, to carry a certain number of mystery purchases or inspections over a period of 12 months. Where general monitoring of all offers posted on the e-commerce website would infringe the ECD and mostly be impracticable, requiring online companies to sample-test a certain volume of content in a determined period of time would instead allow them to grasp the amplitude of illegality on their channels and report to competent authorities. Platforms could also perform spot identity checks, to ensure sellers are easily identified through contact details included in their accounts and to detect multiple or fake accounts. These contact details should be archived and regularly

⁷¹⁶ European Commission, *Commission Staff Working Document. Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit.

⁷¹⁷ Truth be told, one of the main issues raised when discussing illegal content in food online is detection. Specifically, detection of Food Law infringements, including those relating to food information, cannot be performed by right owners – as with IP violations – considering that consumers are the weak link of the chain and hardly know that information as displayed on platforms does not abide by EU laws and may affect their consumer rights. Those affected by infringing food information are not businesses – restaurants, sellers, food manufacturers – but consumers themselves, who are usually in no position to notify infringements, unless they are obvious (absence of data for instance). In order to submit notices, consumers need to know how to “read” labels, communications, official logos, which requires specific technical skills.

updated. The number of mandatory checks should vary depending on the size or revenues of the platform or its impact on the online ecosystem: this would ensure a fair balance between the need to spot infringements and the importance to avoid over-monitoring for platforms that do not have enough resources. An additional monitoring obligation should rely on vetting processes for sellers and restaurants: for instance, a food online platform could be asked to establish procedures to verify that all sellers are indeed registered as food business operators with competent authorities^{718 719} and suspend their accounts until checks are finalized. Appropriate licenses should be displayed in a visible place on the platform's website.

Fifth, duty of care in food online should also be tailored against infringers, to prevent them from selling further. Primarily, platforms should be required by law to terminate contracts, suspend accounts, and block illegal offers, instead of simply having the right to do so⁷²⁰. Their responsibility might include prevention of repeat

⁷¹⁸ Regulation 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs requires food businesses to register with national authorities. See Recital 19: *“The registration of establishments and the cooperation of food business operators are necessary to allow the competent authorities to perform official controls efficiently”* and Article 6: *“Official controls, registration and approval 1. Food business operators shall cooperate with the competent authorities in accordance with other applicable Community legislation or, if it does not exist, with national law. 2. In particular, every food business operator shall notify the appropriate competent authority, in the manner that the latter requires, of each establishment under its control that carries out any of the stages of production, processing and distribution of food, with a view to the registration of each such establishment [...]”*. See DIMOPOULOU O., *Online food distribution in the European Union*, Legal Mondo, 11 September 2018.

⁷¹⁹ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, cit., p. 123: *“A web crawler operated by tax authorities has been modified to search for non-registered food businesses, as well as “high-risk” or borderline food. According to this study, 40% of food online retailers had not registered with authorities in 2014. Authorities took concrete action by agreeing with Germany’s major e-commerce trust mark certifiers that sellers who failed to register with authorities be denied certification indicating them as providing a safe shopping experience”*. See also eBay UK, *Food policy: “Before selling food items, you must register your business with the UK local authority”*.

⁷²⁰ eBay UK, *Food policy: “Activity that doesn't follow eBay policy could result in a range of actions including for example: administratively ending or cancelling listings, hiding or demoting all listings from search results, lowering seller rating, buying or selling restrictions, and account suspension”*;

infringers through automated instruments, such as mechanisms that detect contact details identical to accounts that have already been restricted and identification tools against suspicious sellers (names formed with numbers and letters for instance) or similar infringing offers. Platforms may also be asked to cooperate by sharing information on recurrent flags (e.g., this would refrain specific restaurants that have been reported on a meal delivery platform from accessing another platform without taking steps to comply with food information requirements). Depending on their size, online markets could also be asked to establish internal teams dedicated to Food Law enforcement, similar to the teams which platforms have committed to in the MoU against Intellectual Property Rights violations⁷²¹.

To sum up. Actors who perform a certain function and exercise a certain power over information should be asked by the law to act more responsibly to prevent and limit infringements. Where they obtain profits from a certain business, the economic risk should include the burden of setting up preventive mechanisms against violations⁷²². Plus, their contractual relationship with users places them in the best position to impose certain requirements and threaten termination when these are not fulfilled. These requirements would be accepted by business users as their legitimacy would be approved by an already legitimate source – the legislator⁷²³.

A framework based on tailored legal obligations has the potential to affect the future structure of online business models and the direction taken by technological development in today's digital economy. Via specific, preventive responsibilities against illegal food information, platforms would play an active role in consumer protection and enable customers to engage confidently in online shopping. Structured platforms' responsibility – imposed by law – would effectively restrain

Amazon Seller Central, *Grocery & Gourmet Foods*: “Amazon enforcement actions [„] Amazon can remove your selling privileges”; Amazon Seller Central, *Food & Beverage*: “Amazon reserves the right to remove any listing it considers to be inappropriate for sale for any reason”.

⁷²¹ European Commission, *Commission Staff Working Document. Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*, cit., p. 16.

⁷²² MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 68.

⁷²³ MURRAY A. D., *Nodes and Gravity in Virtual Space*, cit., p. 221.

unlawful conduct in a number of jurisdictions and against all users of the platforms, unlike *ex post* individual actions reacting to a damage once it has already occurred. These obligations would also allow platforms to act responsibly in the context of a precise agenda, avoiding the under- and over-compliance towards which the current ECD-soft law combination seems to force them. Surely, these specific obligations should also be coupled with a more flexible general clause imposing platforms' duty of care against illegal content, in order to cover all risks related to illegal food information beyond the checklist provided above.

In essence, this section argues that platforms should have a legal obligation to create the best conditions to nudge business users towards regulatory compliance⁷²⁴. They should educate, inform, assist them to make sure they comply with applicable regulations. This seems in agreement with the future of internet regulation, as drawn by the new rules of the Digital Services Act. As mentioned, the latter intends to rewrite platforms' role against illegal content, creating a predictable legal framework in which all online actors are aware of their obligations and responsibilities. These include general obligations concerning reports on content moderation, cooperation with competent authorities and the setup of notification mechanisms as well as more specific responsibilities to ensure traders' traceability and reliability on e-commerce channels and to "*design and organise [the] online interface in a way that enables traders to comply with their obligations regarding pre-contractual information and product safety information under applicable Union law*" (Article 22(7) of the DSA).

The proposals laid down in this thesis also prove that stronger participation of platforms in a safer food e-commerce does not need to focus exclusively on the content of food information but does require legally imposed mechanisms that indirectly improve the chances that such information is lawful, accurate, and complete. Of course, the natural development of preventive responsibilities is that the issue of – indirect - secondary liability for third-party infringements will likely

⁷²⁴ HELBERGER N. *et al.*, *Governing online platforms: from contested to cooperative responsibility*, cit., p. 3.

be translated into a question of – direct - primary liability for failing to meet the obligations prescribed by law⁷²⁵.

Still, this route towards platforms’ enhanced responsibility must be a careful one. Any set of obligations that may be imposed on them must strike a fair balance between the various values involved, including the right to pursue a business and to legitimate trade, the freedom of expression, privacy rights, due process, and consumer interests. In particular, preventive responsibilities would need to take into consideration the disadvantages of intrusive regulation and the costs of implementing compulsory preventive systems. These, in fact, typically result in higher prices of consumer goods. They also threaten digital development and competition as fewer companies will decide to enter the digital market because of stringent responsibilities, which would lead to a monopolistic environment in the hands of a very small number of digital giants.

One of the main concerns related to platforms’ enhanced responsibility is the risk of private censorship of allegedly illegal content. Proactive measures, automated removal mechanisms, private actions against repeat infringers should be established objectively, implemented in a proportionate and non-discriminatory manner, and not result in over-blocking. Simply put, laws should secure a balance between platforms’ obligation “to help” and the potential tendency to “over help”, which would end in private policing of online conducts. The terms of the debate on internet police and over deterrence will be detailed in section IV.6.c, in the context of food online enforcement. Indeed, establishing obligations is only one piece of the puzzle. Fostering consumer protection online also requires controls and enforceability, as the following section will detail.

6. Countering illegal commerce in food online: the challenges of enforcement activities

EU Food Law is a series of regulations and principles striving for food safety and consumer rights’ protection (e.g., rules on food information, traceability, packaging and so on). Regardless of whom obligations are imposed upon, it is

⁷²⁵ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 221.

undeniable that the EU legislator has built a rigorous legal framework applicable to food trade. As illustrated throughout this thesis, such framework covers food online as well, and includes some sporadic rules specifically written for products exchanged via web (*in primis*, Article 14 of the FIC). Similarly, the previous section suggested that platforms' intermediary liability may be moving towards mechanisms of preventive responsibility, where online operators are – better yet, should be - asked to perform a series of tasks tailored to the sector in which they operate – i.e., food - and to specific problems – i.e., illegal food information online.

Yet, rules, principles, and obligations – whether established or proposed - need to be enforced. In fact, any legal regime remains nothing but fine words if it is not escorted by a control system, able to monitor the activities undertaken by all actors involved, detect infringements, and implement measures when non-compliance is ascertained⁷²⁶. This is even more crucial when scientific and technological innovations disrupt an entire industry the way e-commerce has done with regards to food. The internet makes matters of controls and enforcement more complex, especially as transactions are typically cross-border and online sellers are less tangible and more difficult to locate than bricks-and-mortar shops⁷²⁷.

Food online raises interesting questions on the enforceability of legal rules and new challenges are put forward in terms of supervisory activities. These challenges include cooperation with non-EU countries (e.g., enforcement against individual sellers based outside the Union), users' quick access to and exit from online marketplaces (e.g., rogue traders can easily change their digital identity or move to a different website once one channel is disabled), users' anonymity (e.g., missing or wrong address indicated on the website makes follow-up investigations and on-site inspections very difficult)⁷²⁸, legal constraints to carry out online purchases for the purposes of control (e.g., lack of official credit cards to carry sample purchases).

⁷²⁶ *Controlli ufficiali e regime sanzionatorio nel settore alimentare*, Chapter VII of COSTATO L., *et al.*, *Compendio di diritto alimentare*, 2019, Wolters Kluwer, pp. 324 ss.

⁷²⁷ ULLRICH C., *Standards for duty of care? Debating intermediary liability from a sectoral perspective*, *cit.*, p. 112.

⁷²⁸ Also, products sold through social media, where competent authorities can hardly access closed groups.

The present analysis intends to address the following problems:

- Are there enforcement rules and measures specific to food online?
- Who is competent to monitor the food online market?
- What are the opportunities and risks of enforcement performed by private companies instead of official public bodies?

Before moving on to the EU legal framework on official controls (section IV.6.b) and to the emergence of private enforcement (section IV.6.c), the following section will illustrate the initiatives recently launched in the EU to monitor online food sales and the issues raised in terms of controls and enforcement.

a. Control plans in food online: the challenges of control authorities

European and national authorities are facing new challenges related to internet sales of food. Notably, a huge compliance gap has been found online, where numerous products have been proved dangerous – where not fatal –, including unsafe food supplements, products with a wrong nutrition table, missing information on allergens or with unlawful health claims, and products recalled from traditional markets and subsequently resold online.

In this regard, the Directorate-General for Health and Food Safety of the European Commission has undertaken a number of actions to assist Member States in their control activities and contribute to strengthening cooperation, effective surveillance, and enforcement.

As part of these actions, a series of fact-finding missions was carried out in 2017 to evaluate how national control authorities have integrated online food controls into their official control systems and to gain a valuable understanding of national approaches when it comes to monitoring internet sales of food. The initiative involved seven Member States and focused on Business-to-Business and Business-to-Consumer commerce⁷²⁹.

⁷²⁹ The series was performed based on an agreement with national control authorities of the Member States involved in the mission.

The Overview Report⁷³⁰ of the fact-finding missions first highlights how most national legal frameworks involved do not have provisions tailored to online food sales. Where national legislation specific to food online is in place, it usually gives competent authorities powers to carry out official controls and to request information in the course of investigations. However, regardless of whether national legislation is present or not, all national authorities involved by the initiative have published relevant guidelines, explaining business operators their responsibilities online and providing advice to consumers when they shop on e-commerce sites. The Report also points out uncertainties and inconsistencies between Member States with regards to which rules apply to whom: *“Different views were expressed by the MS on the rules applicable to certain FBOs selling online (i.e. FBOs carrying out direct sales of small quantities of food of animal origin to the final consumer falling within the exemption for the localised marginal activity) and whether those could sell their products also online. Some MS consider that these sales can be concluded by means of Internet sales whereas others are of the view are that online sales cannot be considered as direct supply and a few others are still reflecting on this point”*⁷³¹. In particular, different approaches have been taken nationally in relation to temperature requirements during transport of refrigerated and frozen foods for which there is no harmonized legislation.

In terms of control authorities, the fact-finding missions confirm that the responsibility for enforcing food online lies with the authorities generally responsible for food controls. Minor aspects may involve authorities dealing with advertising or medicines agencies, when products fall into more than one category.

Largely, no systematic proactive searches are carried out in Member States to identify unregistered FBOs operating online. More importantly, there is no common and uniform approach among Member States in terms of controls' scope. In particular, different criteria are used to determine whether a specific website is destined to national consumers and is therefore covered by national official controls. These criteria include offers in the national official language, prices in

⁷³⁰ European Commission, *Overview Report of a series of fact-finding missions carried out in 2017 concerning Official Controls on Internet Sales of Food in EU Member States*, cit.

⁷³¹ *Ibidem*, p. 7.

national currency, registered office of the responsible legal entity located in the country, a physical address on the website, even the absence of a disclaimer that the products bought cannot be delivered to an address in the country⁷³².

As for procedural mechanisms, the Overview Report shows how certain national control authorities are able to perform online purchases for sampling and analysis provided that the FBO is notified that such sample has been taken. National disparities have been evidenced as to whether assumed identities during online searches are allowed. Indeed, mystery shopping has been confirmed to be a useful tool. However, at the time of the missions most national laws did not provide a legal basis to purchase anonymously. The next section will illustrate how the situation has changed in the EU since the end of 2019.

Overall, control authorities in Member States differ in terms of powers, structures, priorities, equipment, and expertise. Control authorities visited explained that the majority of official controls involved food hygiene (e.g., temperature requirements, transport), health and nutritional claims and labelling. Online investigations are typically undertaken in conjunction with physical ones (i.e., premises of an FBO operating online). Where operators sell via web exclusively, then controls are carried out on their websites and social media accounts. National control authorities normally apply available traditional enforcement tools to internet sales too. Enforcement measures include: rejecting health claims, revising labels, removing products from the market, recalling products from consumers, and seizing products. Where FBOs selling online do not comply with these measures, host platforms may be asked to remove or to disable access to the illegal content ex ECD, which the Report refers to.

The Report concludes that controls in food online are now integrated in the general official control system. However, the instruments to implement these controls still need to be tailored to this particular channel and respond to its challenges. At this point, proactive searches are extremely limited and the enforcement of EU Food Law too burdensome with regards to entities based in non-EU countries.

⁷³² Ibidem, p. 10.

To enhance cooperation between authorities and to increase efficiency in online food controls, in 2017 the EU also organised the first EU coordinated control plan on food offered via the internet⁷³³. As anticipated in the introductory Chapter, the Commission launched a search for infringing food supplements with medicinal claims and non-authorized novel foods, which represent key cases of Food Law violations in the EU⁷³⁴. The objective was to encourage Member States to identify, in a coordinated manner, online platforms displaying specific types of illegal offers. The CCP's goals were to boost national surveillance of the e-commerce food market and to promote the electronic systems put in place by the Union to control food quality and safety and already used with respect to physical trade: the EU Rapid Alert System for Food and Feed (RASFF)⁷³⁵ for notifications of products which raise health concerns and the EU Administrative Assistance and Cooperation System (AAC)⁷³⁶ for notifications of non-compliant offers, which are not health-related but mainly misleading to consumers.

⁷³³ The coordinated control plan was implemented during the month of September 2017 according to the *Commission Recommendation of 24.7.2017 on a coordinated control plan on the official control of certain foods marketed through the Internet*, cit.

⁷³⁴ MERTEN-LENTZ K., *How online sales of food pose a regulatory challenge in the EU*, in *Tomorrow's Food and Feed*, Keller and Heckman LLP, 7 January 2020: "As online sales do not allow the direct testing of a product's composition, online traders are often tempted to circumvent the pre-market authorization procedure applied in the EU for novel foods or the national requirements for food supplements".

⁷³⁵ The RASFF was established to provide control authorities with a tool to exchange information about initiatives taken against serious risks related to food or feed, encouraging Member States to act in a coordinated manner in response to a health threat linked to food or feed. Essentially, it identifies contact points in the European Commission, the European Food Safety Authority, the European Economic Area (EEA) and Member States, which exchange data through an online platform. Its legal basis lies in Article 50 of the GFL. For more details, see European Commission, *The Rapid Alert System for Food and Feed 2018 Annual Report*, 2019.

⁷³⁶ The AAC is an IT application available to Member States. The system is divided into two instances, one dealing with non-compliances classified as fraudulent activities along the agri-food chain (AAC-FF), and the other dealing with any other non-compliance (AAC-AA). For more details, see European Commission, *The EU Food Fraud Network and the System for Administrative Assistance - Food Fraud 2018 Annual Report*, 2018.

Participating authorities were asked to search for infringing products between the 4th and 29th of September 2017 and to report their results to the European Commission by the 10th of November 2017. On a voluntary basis, nearly all Member States (specifically 25), Switzerland and Norway, participated in this coordinated control plan. They examined 1077 websites and found 428 offers of unauthorised novel foods and 351 offers of food supplements with medicinal claims for a total of 779 non-compliant offers. The control authorities concentrated mainly on nationally located traders (65%) but identified offers in their respective official language(s) from traders based in other EU Member States as well. Certain offers were from third-countries' traders (110 offers), especially from United States and China.

The large number of notifications demonstrate significant capabilities to identify infringements online. However, the high volume of illegal offers equally shows that control systems require strengthening through training of staff in online investigations, single contact points with major platforms, renewed cooperation with payment service providers and the *“adjusting [of] legislation and electronic reporting systems to the needs of official eCommerce control”*. Cooperation and administrative assistance are crucial, especially against infringers located in other Member States and third countries, since *“only with the help of the authority of the respective country can a non-compliant offer be closed or the misleading information being corrected and the respective traders put under official control”*.

Although this was not required, authorities also reported on which steps were taken against unlawful offers, such as inspections of the traders' premises, warnings, and fines. In this regard, the EU has recently provided the legal basis for certain enforcement measures available to control authorities in food online.

b. Public enforcement in food online: new Official Controls Regulation and national enforcement

As illustrated in the previous section, digital innovation in the food chain has deeply affected the organisation and effectiveness of public controls. Authorities overseeing the application of food regulations are faced with specific challenges, to which enforcement powers need to be adjusted to.

The ECD explicitly refers to public enforcement powers against illegal content online in the context of liability immunity. Pursuant to Article 14 indeed, the safe harbour does “*not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information*”.

In the food sector, enforcement tools typically include authorizations to enter the food market, certifications, inspections of products and premises, and sanctions. The following paragraphs will focus on how EU rule makers have recently addressed official controls in food online and briefly examine public enforcement in the Italian food online context. While the latter involves all bodies engaged in official inspections and initiatives against illicit activities in the food chain, this section will only mention the food industry’s public governance as established by Italian law and not the functions – although crucial – of police forces carrying out investigations related to judicial inquiries or programmes for the repression of criminal offenses. These police activities are quite different from regular control programmes subject to annual planning since they are normally activated by a detailed crime report and use investigation techniques and coercive tools justified by the existence of an alleged criminal offense.

As for the EU framework, the Official Controls Regulation 625/2017⁷³⁷ (hereinafter also OCR) became applicable - for its main part - on the 14th of

⁷³⁷ Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/ EC and Council Decision 92/438/EEC (Official Controls Regulation).

December 2019, replacing Regulation 882/2004⁷³⁸ on official controls and other pieces of legislation governing Food Law enforcement. It prescribes harmonized principles on governance and control of the European agri-food chain and establishes mechanisms to secure compliance with applicable laws, from official controls to measures against infringements.

The 2017 Regulation is far from easy to navigate, not only in terms of length - 167 Articles, 5 Annexes, amounting to 142 pages – but also considering its coverage and its entry into force schedule. As for the former, the scope of the legislation has been extended, now covering controls to monitor compliance with Food and Feed Law and rules on animal health and welfare, plant health and animal by-products⁷³⁹. As for the latter, the Regulation provides for four different dates of effectiveness, depending on the provisions concerned⁷⁴⁰.

The new rules maintain the risk-based approach to controls laid down by the previous legislation. In this regard, national competent authorities are to determine which areas and activities are sensitive and how frequently controls on animals and

⁷³⁸ Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

⁷³⁹ Specifically, the scope now includes the deliberate release of GMOs into the environment, protection measures against organisms harmful to plants, regulations on the placing on the market and the use of plant protection products, biological production and labelling of related products, protected geographical indications, official certificates, and official controls on products entering the European Union. See DONGO D. and TORRE G., *Sicurezza alimentare, ABC responsabilità operatori*, cit.; ALBISINNI F., *Regulation (EU) 2017/625: official controls, life, responsibilities, and globalization*, in *European Food and Feed Law Review*, 2019, issue 2, pp. 118 ss; MERTEN-LENTZ K., *EU official controls: simplified and more coherent along the entire agri-food chain*, in *Tomorrow's Food and Feed*, Keller and Heckman LLP, 10 February 2020.

⁷⁴⁰ PAGANIZZA V., *Il Regolamento (UE) 2017/625*, in *Controlli ufficiali e regime sanzionatorio nel settore alimentare*, Chapter VII of COSTATO L., et al., *Compendio di diritto alimentare*, cit., pp. 331 ss. Briefly, Article 163 “Amendments to Regulation (EU) No 652/2014” was immediately applicable as of 28 April 2017, provisions on European Union reference centres entered into force on 28 April 2018, while Articles 1(2), 34(1), (2) and (3), point (e) of Article 37(4) and Article 37(5) will apply from 29 April 2022. The rest of the Regulation, as mentioned, is effective as of 14 December 2019.

goods need to be activated. To this end, in the context of control planning, competent authorities must take into consideration businesses' past record of compliance, the reliability of their own checks, the likelihood of fraudulent behaviours, the risks to human, animal or plant health, animal welfare or the environment, as well as the chances that consumers might be misled about the nature, quality or origin of products. Official controls must be performed in a way as to minimise the burden on businesses (Recital 34 and Article 9(5)) and without prior notice, except where such notice is necessary and duly justified for the official control to be carried out (Article 9(4)).

According to the OCR, competent authorities have the power to perform official controls regularly and with appropriate frequency, on all operators at all stages of production, processing, distribution and use of animals, goods, substances, materials, or objects that are covered by food laws (Recital 32). Competent authorities may be the central authority (or authorities) of a Member State that is (are) responsible for organising official controls, any other authority which has been given that responsibility and, where appropriate, the corresponding authority of a third country (Article 3(3))⁷⁴¹. Indeed, pursuant to Recital 26, Member States are best placed to determine which authorities are competent for each area falling within the scope of the OCR⁷⁴². Official controls are defined as activities performed by the competent authorities, or by delegated bodies or natural persons, in the Member States aimed at verifying: (1) compliance with the “*Regulation and with the rules referred to in Article 1(2)*” and (2) “*that animals or goods meet the requirements laid down in the rules referred to in Article 1(2)*”, including with

⁷⁴¹ European Commission, *Questions & Answers on Commission Regulation (EC) No 2017/625 (Official Controls Regulation)*, 17 April 2017.

⁷⁴² See also Recital 27: “*For the performance of official controls aimed at verifying the correct application of Union agri-food chain legislation, and of the other official activities entrusted to Member State authorities by Union agri-food chain legislation, Member States should designate competent authorities which act in the public interest, are appropriately resourced and equipped, and offer guarantees of impartiality and professionalism. Competent authorities should ensure the quality, consistency and effectiveness of official controls*”.

regards to official certification (Article 2(1))⁷⁴³. Article 1(2) identifies the sectors covered by the new rules: among others, “*food and food safety, integrity and wholesomeness at any stage of production, processing and distribution of food, including rules aimed at [...] protecting consumer interests and information*”.

Who does the OCR target? The new system does not only apply to food business operators as defined by the GFL, but more generally to any “*operator*” as “*any natural or legal person subject to one or more of the obligations provided for in the rules referred to in Article 1(2)*” (Article 3(29))⁷⁴⁴. Thus, it does not only govern operators directly dealing with the production and distribution of food, but also anyone involved in food safety, human health, consumers’ interests and information, animal health, plant protection against harmful organisms, or GMOs. Simply put, anyone involved in what Albisinni calls the “*cycle of life*”, regardless of its location within the food chain⁷⁴⁵. Considering the seemingly all-inclusive definition of operators, food online platforms and especially those dealing with one or more stages of food production and/or distribution (i.e., own-brand sellers, hybrid online markets and “new delivery” platforms) should fall within the scope of the OCR, regardless of the qualification of their service as food business pursuant to the GFL (ref. Chapter II on qualification).

Turning to food online. The OCR provides national authorities with renewed powers with regards to sales “*by means of distance communication*”. As the Questions and Answers on the Regulation⁷⁴⁶ confirm, “*food law applies to products*

⁷⁴³ European Commission, *Questions & Answers on Commission Regulation (EC) No 2017/625 (Official Controls Regulation)*, cit.

⁷⁴⁴ VAN DER MEULEN B., *Enforcement of EU agri-food law. Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products*, in *ERA Forum*, 2019, volume 19, issue 4, p. 626: “*Now that the scope is widened beyond food law proper, the range of addressees is also no longer limited to food business operators (FBOs). The terminology the new Regulation uses for the addressees is now simply: business operators (BOs)*”.

⁷⁴⁵ ALBISINNI F., *Agri-food law: innovation and globalization in comparative perspective*, cit., pp. 80 ss.

⁷⁴⁶ European Commission, *Questions & Answers on Commission Regulation (EC) No 2017/625 (Official Controls Regulation)*, cit.

sold via the Internet in the same way as to conventional sales (i.e. via markets, brick-and-mortar stores, catalogues etc.). Hence controls of e-commerce of food must be performed in accordance with the OCR rules". First, operators must disclose to competent authorities updated details about their name, their activities, including those undertaken by means of distant communication, and the places under their control (Article 15(5)). They also must give official staff access to any equipment, means of transport, premises under their control as well as "*their computerised information management systems*" (Article 15(1)). Article 77 also requires the European Commission to adopt future delegated acts regulating the performance of specific official controls, including in relation to "*animals and goods ordered by sales through distance contracts and delivered from a third country to an address in the Union*".

One of the most important features of the OCR is Article 36, dedicated to the "*sampling of animals and goods offered for sale by means of distance communication*". Specifically, it allows national authorities to engage in mystery shopping when conducting official controls online: "*in the case of animals and goods offered for sale by means of distance communication, samples ordered from operators by the competent authorities without identifying themselves may be used for the purposes of an official control*". In other words, Member States' competent authorities now have the legal basis to obtain random products and to use them as official samples, by simply ordering them online without identifying themselves – e.g., through fake accounts - and without revealing the objective of their purchase⁷⁴⁷. Once in possession of these samples, authorities must reveal their identity and inform operators that sampling has been carried in the context of an official control. Operators must also be able to exercise the right to a second expert opinion.

Thanks to this new provision, authorities can now perform checks on food products by merely ordering them through websites and having them delivered. This means that the scope of their control can finally go beyond detecting illegal online labels and can now reach physical infringements, including products whose

⁷⁴⁷ MERTEN-LENTZ K., *How online sales of food pose a regulatory challenge in the EU*, cit.

information is missing upon delivery or products containing ingredients not mentioned on the webpage. In practical terms, however, mystery shopping raises several concerns. First, with regards to its economic feasibility and necessary public funding, as products bought anonymously must obviously be paid, even if the purchase is part of an official control. Second, in terms of effectiveness and staff capabilities: how many anonymous orders are worth carrying and how is representativeness of the sample guaranteed? Finally, mystery shopping still does not solve the issue of actual enforcement when operators cancel their accounts, leave no trace of their digital identity, or are based outside the EU.

A significant additional piece of the OCR concerns rating schemes, as in schemes for “*a classification of operators based on an assessment of their conformity with rating criteria*” (Article 3(31)). Competent authorities have now the power to publish information about the rating of individual operators, based on the outcome of official controls⁷⁴⁸. This means that consumers may now be informed about businesses’ degree of compliance – from producers through retailers to restaurants – on the grounds of objective, fair, consistent, and transparent rating criteria (Recital 39, Article 11(3))⁷⁴⁹.

The new OCR also provides a large range of enforcement actions, by laying down an extended, non-exhaustive, list of possible measures in case of established non-compliance. In particular, Article 138 clarifies that competent authorities may take any action necessary to determine the origin and extent of the infringement, to establish the operator’s responsibilities and to ensure that the infringer remedies the current violation and engages in preventive initiatives for future illegal actions. Simply put, it is for the operator to remedy the situation and for control authorities to make sure this obligation is fulfilled. Enforcement actions encompass, but are

⁷⁴⁸ DONGO D. and TORRE G., *Controlli pubblici ufficiali, al via il regolamento UE 2017/625*, Great Italian Food Trade, 18 December 2019.

⁷⁴⁹ The model could be the one used in the UK by the Food Safety Agency, which applies hygiene ratings to eating places following specific inspections. Along this line, one could also suggest a seal system for food online: following the positive outcome of official e-commerce controls performed in a frequency adequate to the risks raised by online shops, these could be allowed to identify themselves via quality logos in order to help consumers recognize reliable suppliers.

not limited to, information correction, increased controls, withdrawals, and closure of businesses: “*order treatments on goods, the alteration of labels or corrective information to be provided to consumers*”; “*order the operator to increase the frequency of own controls*”; “*order the recall, withdrawal, removal and destruction of goods*”. In relation to products sold online, Article 138(2)(i) allows competent authorities to “*order the cessation for an appropriate period of time of all or part of the activities of the operator concerned and, where relevant, of the internet sites it operates or employs*”. In other words, competent authorities have now the legal basis to permanently or temporarily close the website used by an operator, when they do not comply with applicable food laws. Of course, suspending, closing, or restricting access to websites requires further details on how this would work in practice, especially in terms of cooperating with online platforms. While removing or restricting access to a specific illegal offer or a restaurant’s dedicated webpage seems granted, does the OCR also enable authorities to suspend a major internet platform, especially when a large volume of third-party infringements has been identified during a certain period of time – via mystery shopping maybe?

The new Regulation distinguishes between actions – i.e., enforcement measures ex Article 138, illustrated above - and penalties, which the following Article 139 focuses on. In particular, Member States must lay down the rules on penalties applicable to infringements of the OCR and ensure that they are implemented. These penalties must be effective, proportionate, and dissuasive and should typically be activated only after the adoption of enforcement measures⁷⁵⁰. Enforcement measures ex Article 138 are subject to a right of appeal (Article 7). Strangely, decisions on sanctions – i.e., penalties ex Article 139 – are not.

One final note on consumers’ participation in official controls and food enforcement. Article 140 requires Member States to ensure that competent authorities set up effective mechanisms to enable reporting of actual or potential OCR infringements. These mechanisms should include at least procedures for the receipt of reports and their follow-up. However, Article 140 does not seem to

⁷⁵⁰ VAN DER MEULEN B., *Enforcement of EU agri-food law. Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products*, cit., p. 630.

provide consumers with a right to be heard, a right to demand investigations and enforcement, a right to a decision or a right to appeal it if it is adopted. The OCR focuses on competent authorities but does not give an effective voice to those directly affected by violations, which clashes with consumers' central position in the EU Food Law system⁷⁵¹.

The OCR has built a system where enforcement of applicable food legislation is mainly to be performed by Member States' authorities. The following paragraphs will briefly look, once again, at the Italian legal system and offer a glimpse at how the EU rules on official controls operate in national law, especially with regards to competent authorities.

Enforcement powers and authorities in the Italian food sector are far from clear and typically involve two functions: official controls and sanctions. Pursuant to the EU legal framework on official controls preceding the OCR – Regulation 882/2004 as well as Regulations 852/2004⁷⁵², 853/2004⁷⁵³ ad 854/2004⁷⁵⁴ - the Italian legislator adopted Legislative Decree 193/2007⁷⁵⁵, which identifies the national competent authorities for official controls and establishes sanctions for infringements of the same Regulations. With the entry into force of the OCR, the Law of 4 October 2019, n. 117⁷⁵⁶, asked the Government to issue, by November 2020, provisions ensuring that existing national laws comply with the new

⁷⁵¹ Ibidem, p. 637: *“In short, the victim, the consumer is nobody in the new OCR. If we are serious about the claim that food law serves to protect the consumer, this has to change. Who knows the needs of consumers better than the consumers themselves?”*

⁷⁵² Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.

⁷⁵³ Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin.

⁷⁵⁴ Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption. No longer in force.

⁷⁵⁵ Decreto Legislativo 6 novembre 2007, n. 193. Attuazione della direttiva 2004/41/CE relativa ai controlli in materia di sicurezza alimentare e applicazione dei regolamenti comunitari nel medesimo settore.

⁷⁵⁶ Legge 4 ottobre 2019, n. 117. Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2018.

harmonized framework (Articles 11 and 12). In terms of competent authorities, the Law required the Government to identify the Ministry for Health as the sole coordination and contact authority pursuant to Article 4(2)(b) of the OCR, as well as the regions, the Autonomous Provinces of Trento and Bolzano and health local authorities, within their respective competence, as additional competent authorities pursuant to Article 4 of the OCR. However, Article 12 further referred to the Ministry for Agricultural, Food, and Forestry Policies as the competent authority for official controls in several areas, including: “*food and food safety, integrity and wholesomeness at any stage of production, processing and distribution of food, including rules aimed at ensuring fair practices in trade and protecting consumer interests and information, and the manufacture and use of materials and articles intended to come into contact with food*” and “*feed and feed safety at any stage of production, processing and distribution of feed and the use of feed, including rules aimed at ensuring fair practices in trade and protecting consumer health, interests and information*” (Article 2(2)(a) and (b) of the OCR), for aspects with no impact on food and feed safety but likely to affect the fairness and transparency of commercial transactions; “*protective measures against pests of plants*” (Article 2(2)(g) of the OCR); “*organic production and labelling of organic products*” (Article 2(2)(i) of the OCR); “*use and labelling of protected designations of origin, protected geographical indications and traditional specialities guaranteed*” (Article 2(2)(j) of the OCR).

Notwithstanding the November 2020 deadline, Italian decision makers have not yet exercised their delegation powers⁷⁵⁷. Therefore, pending the law reform, controls and sanctions in the food sector are still governed by existing rules⁷⁵⁸ – to name a few, the above-mentioned Legislative Decree 193/2007, Legislative Decree

⁷⁵⁷ Parlamento italiano, L. 04 ottobre 2019, n. 117 "Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2018 (1201-B)". Elenco delle deleghe e dei decreti legislativi emanati.

⁷⁵⁸ DONGO D. and TORRE G., *Controlli pubblici ufficiali, al via il regolamento UE 2017/625*, cit.

27/2017 on health claims⁷⁵⁹ or Legislative Decree 29/2017 on food contact materials⁷⁶⁰. Turning specifically to the scope of this thesis, section IV.3.a already examined Legislative Decree 231/2017, which lays down a specific set of sanctions for food information infringements. Broadly speaking, the Decree establishes that, unless the act constitutes a crime, food information breaches are to be punished with administrative fines. The Legislative Decree was adopted by delegation of Law 170/2016⁷⁶¹, which confirms that, except for criminal offenses, the State should have the power to impose administrative sanctions for FIC's violations. The Law also identifies the Department of the Central Inspectorate for Quality Protection and Fraud Prevention of Agri-food products (in Italian, *Dipartimento dell'Ispettorato Centrale della Tutela della Qualità e della Repressione Frodi dei Prodotti Agroalimentari* - ICQRF) of the Ministry for Agricultural, Food and Forestry Policies, as the competent administrative authority (Article 5(3)(b) of Law 170/2016). The Law further specifies, though, that this is without prejudice to the powers of the Competition and Market Authority (*Autorità garante della concorrenza e del mercato*), as well as, using a general expression, of those bodies responsible for ascertaining violations (Article 5 of Law 170/2016).

In line with Law 170/2016, Legislative Decree 231/2017 still designs the ICQRF as the competent authority to carry controls and impose administrative fines with regards to food information. In particular, the ICQRF has expertise in, among others, the prevention and repression of infringements in the preparation and trade of agri-food products and technical means of agricultural production; in the supervision of registered quality productions and labelling; and in control programmes against the illegal marketing of food introduced by Member States or

⁷⁵⁹ Decreto Legislativo 7 febbraio 2017, n. 27. Disciplina sanzionatoria per la violazione delle disposizioni di cui al regolamento (CE) n. 1924/2006 relativo alle indicazioni nutrizionali e sulla salute fornite sui prodotti alimentari.

⁷⁶⁰ Decreto Legislativo 10 febbraio 2017, n. 29. Disciplina sanzionatoria per la violazione di disposizioni di cui ai regolamenti (CE) n. 1935/2004, n. 1895/2005, n. 2023/2006, n. 282/2008, n. 450/2009 e n. 10/2011, in materia di materiali e oggetti destinati a venire a contatto con prodotti alimentari e alimenti.

⁷⁶¹ Legge 12 agosto 2016, n. 170. Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2015.

third countries^{762 763}. However, responsibilities in terms of carrying official controls and imposing sanctions are allocated primarily to the ICQRF, not exclusively. The Competition and Market Authority and local bodies responsible for ascertaining violations (Regions, local health authorities etc.) are still asked to control business operators and check for non-compliant activities (Article 26 of the Legislative Decree⁷⁶⁴). Therefore, the current Italian legal framework not only infringes the updated legislator's intent – which identifies the Ministry for Health as the sole coordination and contact authority for matters related to food official controls. It also does not establish one competent authority for FIC's infringements, and more importantly, does not lay down any criterion in terms of responsibilities allocation, leading to a potential overlap of all authorities involved⁷⁶⁵. Especially if one takes into consideration that the Italian Competition and Market Authority exercises large powers - in terms of investigations, controls, and sanctions - directed to protecting consumers against abusive businesses (including those involved in the food chain)⁷⁶⁶. This overlap of responsibilities between Italian competent authorities is

⁷⁶² See Article 4 of Decreto del Presidente del Consiglio dei ministri 27 febbraio 2013, n. 105. Regolamento recante organizzazione del Ministero delle politiche agricole alimentari e forestali, a norma dell'articolo 2, comma 10-ter, del decreto-legge 6 luglio 2012, n. 95, convertito, con modificazioni, dalla legge 7 agosto 2012, n. 135.

⁷⁶³ *Controlli ufficiali e regime sanzionatorio nel settore alimentare*, Chapter VII of COSTATO L., et al., *Compendio di diritto alimentare*, cit., p. 341.

⁷⁶⁴ Article 26 of Legislative Decree 231/2017: “*Autorità competenti all'irrogazione delle sanzioni*
1. Il Dipartimento dell'Ispettorato centrale della tutela della qualità e repressioni frodi dei prodotti agroalimentari del Ministero delle politiche agricole alimentari e forestali è designato quale autorità competente all'irrogazione delle sanzioni amministrative pecuniarie previste dal presente decreto. 2. *Restano ferme le competenze spettanti all'Autorità garante della concorrenza e del mercato ai sensi del decreto legislativo 2 agosto 2007, n. 145, e del decreto legislativo 6 settembre 2005, n. 206, e quelle spettanti, ai sensi della normativa vigente, agli organi preposti all'accertamento delle violazioni.* 3. *I soggetti che svolgono attività di controllo sono tenuti agli obblighi di riservatezza sulle informazioni acquisite in conformità alla vigente legislazione”.*

⁷⁶⁵ *Controlli ufficiali e regime sanzionatorio nel settore alimentare*, Chapter VII of COSTATO L., et al., *Compendio di diritto alimentare*, cit., p. 344.

⁷⁶⁶ These powers include the temporary suspension of unfair commercial practices and the application of a pecuniary administrative sanction of € 5 000 to € 5 000 000, taking into account the severity and the duration of the violation (Article 27(8) and (9) of the Italian Consumer Code).

not consistent with the OCR's goal towards a clear, coordinated, and centralized control system in the food chain⁷⁶⁷.

That said, how is this public - administrative - enforcement being applied in practice? With regards to food online, the ICQRF has officially entered into agreements with the main world players of e-commerce to carry checks for the protection of Italian quality productions⁷⁶⁸. These agreements allow the ICQRF to intervene on platforms and obtain the prompt cancellation of illegal offers⁷⁶⁹. The 2019 ICQRF Report⁷⁷⁰ specifies that the Department has been cooperating for years with eBay, Alibaba, and Amazon as "Right Holder" (owner) to protect Italian

Where unfair business practices concern products likely to endanger the health and safety of consumers, fines cannot be less than € 50 000 (Articles 21(3) and 27(9)). See ARTOM A., *An overview on the implementation of Regulation 1169/2011/EU in Italy: sanction models and check rules adopted*, cit., pp. 31 ss.

⁷⁶⁷ Article 4(2) of the OCR clearly establishes that: "Where, for the same area, a Member State confers the responsibility to organise or perform official controls or other official activities on more than one competent authority, at national, regional or local level, or where the competent authorities designated in accordance with paragraph 1 are allowed by that designation to transfer specific responsibilities for official controls or other official activities to other public authorities, the Member State shall: (a) ensure efficient and effective coordination between all authorities involved, and the consistency and effectiveness of official controls or other official activities across its territory; and (b) designate a single authority, in conformity with Member States' constitutional requirements, responsible for coordinating the cooperation and the contacts with the Commission and with other Member States in relation to the official controls and other official activities performed in each of the areas governed by the rules referred to in Article 1 (2)". See also ARTOM A. and ARTOM A., *Il nuovo Regolamento UE sui controlli ufficiali e le problematiche sanzioni*, cit., pp. 58 ss.

⁷⁶⁸ ARTOM A., *An overview on the implementation of Regulation 1169/2011/EU in Italy: sanction models and check rules adopted*, in *Rivista di diritto alimentare*, 2020, issue 1, p. 36.

⁷⁶⁹ Dipartimento dell'Ispettorato Centrale della Tutela della Qualità e Repressione Frodi dei Prodotti Agroalimentari, *Audizione del Capo dell'ICQRF Stefano Vaccari presso la II Commissione Giustizia della Camera dei Deputati. Proposta di legge C. 1011 Paxia, recante "disposizioni in materia di contrasto della contraffazione e del contrabbando, nonché delega per l'adozione di un testo unico in materia di tutela dei prodotti nazionali e l'istituzione del marchio «100% Made in Italy»*, 11 April 2019.

⁷⁷⁰ Ministero delle politiche agricole alimentari e forestali, Dipartimento dell'Ispettorato Centrale della Tutela della Qualità e della Repressione Frodi dei Prodotti Agroalimentari, *Report 2019*, p. 7.

Geographical Indications, and especially stop offers of products infringing Italian PDOs and PGIs. Last year, the ICQRF identified 513 cross-border and online infringements of PDOs and PGIs, of which: 254 products on sale on eBay, 65 on Amazon, and 21 on Alibaba.

More generally, the 2019 Report shows that official controls (on the website, on premises, on the products) and measures (removal of illegal advertisement, seizure of products, warnings, administrative penalties, crime reports) were mostly directed to enforcing rules on food labelling, GMOs, oil, and wine as well as to protecting the “made in Italy” and organic production. One explicit reference of the Report to enforcement measures against online infringements is listings’ removal⁷⁷¹. Controls by the ICQRF on e-commerce channels massively increased during the first half of 2020, given the rise of online sales following COVID-19 restrictions in Italy. By July 2020, 710 removals of illegal listings were carried on Alibaba, Amazon, and eBay⁷⁷².

More on public enforcement in food online, the latest annual Report from the Italian Competition and Market Authority⁷⁷³ mentions how the latter has taken action against one (nameless) “*important online platform*” with regards to mandatory food information. Specifically, the Authority asked the online operator to display all required particulars for prepacked products in Italian, including the list of ingredients, allergens, the name and address of the FBO, the nutrition table and, for organic products, the control body’s code number and the indication of the location where the agricultural raw materials were cultivated. It is reported that the platform accepted the invitation to remove offers missing mandatory information and illustrated to the Authority the internal measures established to avoid non-compliance in the future. However, no other official data could be found with

⁷⁷¹ Ibidem, p. 10.

⁷⁷² Ministero delle politiche agricole alimentari e forestali, Dipartimento dell’Ispettorato Centrale della Tutela della Qualità e della Repressione Frodi dei Prodotti Agroalimentari, *Emergenza Covid-19. Sei mesi di controlli nella filiera agroalimentare REPORT attività ICQRF febbraio - luglio 2020*, July 2020.

⁷⁷³ Autorità Garante della Concorrenza e del Mercato, *Relazione annuale sull’attività svolta*, 31 March 2020.

regards to recent initiatives taken by the Authority against violations of food information rules on web channels, notwithstanding several complaints of structural weaknesses in the food online information system⁷⁷⁴.

To sum up and setting aside the lack of coordination between competent bodies in the Italian legal system, the Official Controls Regulation shows that EU decision makers are aware of food online. However, rules specific to the latter are scarce and the new framework does not address the practical challenges of official controls in e-commerce, such as funding, interchangeable online channels, anonymity, and fake accounts. Plus, even if individual sellers are subject to the law, enforcing against them is practically impossible if they disappear from the web or are located outside the EU. This not only puts focus on online platforms' preventive responsibilities (section IV.5) but also on private enforcement.

c. Private enforcement: online platforms, new “internet police”?

The previous section illustrated public enforcement in food online, as in controls carried and measures implemented by public competent authorities to make sure that food laws are abided by on online sites. It gave a sneak peek to the Italian administrative enforcement system, mostly undertaken by two administrative authorities and still not fully in line with the OCR regime. The present section will direct its attention to the new phenomenon of private enforcement, namely enforcement performed by the same online platform to ensure compliance on its channels. Indeed, enforcement of legal rules has recently taken a decentralized approach, where private companies build voluntary systems and technologies to prevent and remove illegal content, regardless of any order in that sense from a

⁷⁷⁴ DONGO D., *Amazon Pantry, cosa non va*, Great Italian Food Trade, 19 December 2017; DONGO D., *Antitrust, rassegna alimentare*, Great Italian Food Trade, 15 November 2017, DONGO D., *Ecommerce alimentare, l'informazione latitante*, Great Italian Food Trade, 18 April 2017; DONGO D., *Amazon, nuove denunce a Antitrust e ICQRF*, Great Italian Food Trade, 7 February 2019; FORMICA F., *Amazon segnalato ad Antitrust: "Viola le norme sull'etichettatura del cibo"*, in *La Repubblica*, 22 December 2017; FORMICA F., *"Etichette alimentari fuorilegge": Amazon di nuovo denunciata ad Antitrust*, in *La Repubblica*, 14 February 2019.

public – central - authority (courts, administrative bodies). Simply put, it is enforcement *by*⁷⁷⁵ the platform, not *of*⁷⁷⁶ the platform.

The issue of private enforcement in the EU follows the discourse on platforms' participation in the fight against illegal content online and, specifically, fits into the notice-and-take-down regime set up by the ECD. As illustrated in section IV.4.b, the latter constitutes “*the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information*” (Recital 40). More specifically, the Directive establishes that once online hosts know or are aware of the illegal information, they must act expeditiously to remove or disable access to it (Article 14). However, the EU legislator gives no further detail as to what such removal or disabled access consists of or when it must be performed – e.g., following a notification from a competent authority, a user and/or when awareness is obtained through self-policing mechanisms? how short is expeditious? The ECD does not lay down the procedure to be followed by online companies to remove illegal content, let alone mechanisms – ways, possibilities, and time frames - for businesses to oppose this decision⁷⁷⁷. In that sense, not only has the issue of specific removal and disabling procedures been left to national legislators to address (Recital 46⁷⁷⁸), but the EU legislator has also and foremost encouraged companies' self-regulation.

However, guidelines towards a more horizontal European framework for notice-and-action procedures have been provided through the years by EU soft law. In

⁷⁷⁵ Emphasis added.

⁷⁷⁶ Ibidem.

⁷⁷⁷ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 111.

⁷⁷⁸ Recital 46: “*In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information*”.

2012, the Commission Communication⁷⁷⁹ on a coherent framework for building trust in the Digital Single Market for e-commerce and online services introduced the “notice-and-action” initiative, encouraging efficient mechanisms to stop abuse and illegal information “*within a framework which guarantees legal certainty, the proportionality of the rules governing businesses and respect for fundamental rights*”. These mechanisms could involve take down of illegal content or requests that it be voluntarily taken down by the persons who posted it online⁷⁸⁰. Efforts on notice-and-action continued with the 2016 Communication on online platforms and the Digital Single Market⁷⁸¹, which highlighted the importance of diversifying notice-and-action policy approaches depending on the category of illegal content. More recently, the Commission identified specific principles to be followed by platforms when acting against infringements online. The 2017 Communication against illegal content online (introduced in section IV.5.a.i), reminds that removal may follow notices from court orders, administrative authorities, law enforcement bodies, right owners (e.g., IP right holders), ordinary users (e.g., consumers) or may be the result of platforms’ own detection mechanisms. In particular, ordinary users (in food online, mostly consumers) should have the possibility to notify infringements through effective and user-friendly electronic tools⁷⁸² (e.g., a report button next to the offer; notice-dedicated pages on the e-market’s website).

For instance, eBay has outlined clear steps to notify a suspicious fraud, or to report an item, or an issue with a seller when users believe the latter is violating the

⁷⁷⁹ European Commission, *Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. A coherent framework for building trust in the Digital Single Market for e-commerce and online services*, 11 January 2012, COM(2011) 942 final.

⁷⁸⁰ *Ibidem*, p. 13.

⁷⁸¹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, *cit.*

⁷⁸² European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, *cit.*, pp. 6 ss.

platform's policies⁷⁸³: “We're actively addressing reports that some sellers are charging unfair or unreasonable prices for certain items on eBay. We encourage our community to report any listings they suspect of unfair pricing to us. See our page on Reporting price gouging on eBay for more information and details on how to start a report”; “If your issue is that an item arrived faulty, damaged, different from the listing description, or didn't arrive at all, don't report the seller to us—use one of the buttons below instead: My item hasn't arrived - I want to return my item”; “If you spotted an item that shouldn't be listed on eBay, you don't have to report the seller; just let us know by reporting the item. You should only report a seller if you think they're violating our policies”⁷⁸⁴. eBay's reporting mechanisms also include the Verified Rights Owner (VeRO) programme, which allows owners of intellectual property rights and their authorized representatives to notify listings that may be in breach of those rights. Sellers who repeatedly violate intellectual property rights may be subject to a range of consequences, from selling restrictions to full suspension from the website⁷⁸⁵.

Further, the 2017 Communication states that any online enforcement action should not impede civil or criminal follow-up to law breaches⁷⁸⁶. With regards to the length of time - “expeditiously” - required to remove illegal content, the EC stresses how different content types may need different amounts of contextual information to determine their legality or illegality. For instance, while detection of child abuse pictures is almost automatic and must be swift and efficient, removals of defamatory statements are more uncertain, demanding careful analysis of the context in which these statements were made⁷⁸⁷ and raising doubts as to whether removals should actually be decided by platforms⁷⁸⁸. With regards to food online,

⁷⁸³ eBay, *Resolving issues with sellers*.

⁷⁸⁴ eBay, *Report an issue with a seller*.

⁷⁸⁵ eBay, *Verified Rights Owner Program*.

⁷⁸⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 13.

⁷⁸⁷ *Ibidem*, p. 14.

⁷⁸⁸ SAVIN A., *Regulating internet platforms in the EU: the emergence of the “Level playing Field”*, cit., p. 8.

determining whether food information accompanying a specific offer is illegal seems more straightforward than hate speeches for instance, as missing data, blurred pictures. or foreign languages are simple to spot and difficult to counter-argue. However, the illegality of a content may still be challenging: e.g., after how many clicks required to find information on allergens can a consumer claim that such information is unclear and inaccessible, thus non-compliant with EU food laws? The Commission also highlights how short timeframes are crucial when serious harm is at stake (e.g., terrorism content). In food online, this especially applies to information on ingredients, as serious injuries and deaths related to missing allergen information have grown in recent years. Less harm may be argued when ethical or religious eating choices are affected, though crucial for individuals' own beliefs.

Platforms' enforcement, in addition to being private, is also becoming automated and algorithmic⁷⁸⁹. Indeed, private enforcement not only concerns measures to disable access to or remove illegal content once it is reported by third parties but also involves digital mechanisms established by online platforms to prevent and spot infringements. Given the progress in automatic detection software, filtering technologies, and machine intelligence, large online platforms have recently taken proactive steps to improve surveillance on their channels, rather than wait for external signals. The ECD itself affirms that its provisions “*should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology*” (Recital 40). In 2007 for instance, Google released Content ID, a digital fingerprinting system used to easily identify and manage copyrighted content on YouTube. Videos uploaded on YouTube are compared against audio and video files registered with Content ID by content owners and once there is a match, the system flags it. It is up to the copyright owner to decide what to do if the content of a YouTube video matches one of their works, choosing between blocking the entire video from viewing; monetizing the video by running ads, sometimes sharing revenue with the user who uploaded the video; or

⁷⁸⁹ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 222.

tracking video view statistics⁷⁹⁰. Vimeo’s Copyright Match programme, launched in 2014, works similarly⁷⁹¹. Voluntary detection mechanisms do not only tackle IP infringements but also terrorist propaganda, through the use of digital fingerprints – called hashes - to identify images and videos promoting terrorism⁷⁹². Amazon Brand Registry is an instrument designed to protect users’ brands. It provides IP right holders with tools to search for infringing products using images, keywords or lists of Amazon standard identification numbers⁷⁹³. The automated protection system uses information about brands to proactively remove suspected infringing or inaccurate content: the system is proactive, as in activated to prevent or block listings from being published. This mechanism depends on the owner’s uploaded information. Thus, the more information is uploaded, the more protection is received. Right owners can also file notices to Amazon identifying allegedly unlawful offers. If Amazon decides that an infringement has indeed been made, it will remove the unlawful products and will take appropriate action against the sellers, including suspension or ban from the website⁷⁹⁴.

Turning to illegal information in food online, section IV.5.b.ii listed some duty of care proposals involving automated detection filters, which would refrain incomprehensible text, information not written in the official language of the country where products are sold or blurred pictures from being uploaded. Similarly, filtering technologies could identify whether the information written on the

⁷⁹⁰ FROSIO G., F., *The death of “no monitoring obligations”: a story of untameable monsters*, cit., p. 202; Support Google, *Funzionamento di Content ID*.

⁷⁹¹ WELCH C., *Vimeo rolls out Copyright Match to find and remove illegal videos*, in *The Verge*, 21 May 2014.

⁷⁹² MENN J. and VOLZ D., *Exclusive: Google, Facebook quietly move toward automatic blocking of extremist videos*, in *Reuters*, 25 June 2016.

⁷⁹³ ALDORT J. AR., MARRONE M. and CARPENTER A. J., *Lost in the Amazon: how to combat trademark infringement in the e-commerce marketplace*, cit.: “An ASIN is a 10-character alphanumeric unique identifier assigned by Amazon.com and its partners for product identification within the Amazon organisation. ASINs are found on the item’s product information page on the site”.

⁷⁹⁴ Amazon Brand Registry, *Build and protect your brand*; ALDORT J. AR., MARRONE M., and CARPENTER A. J., *Lost in the Amazon: how to combat trademark infringement in the e-commerce marketplace*, cit.

webpage corresponds to the information on the picture. Automatic filters may also be used to detect repeat infringers (e.g., blocking a trader who has already been flagged from opening an account with the same name but a different email address).

Moving on to the enforcement measures against illegal content online, these stem from platforms' contractual conditions and typically involve investigations, warnings, requests to stop the infringement, deletion of offers, disabling access to businesses' (e.g., traders' or restaurants') websites, suspension of sellers' accounts, blocking of selling privileges, removal of inventory in case products are stored in the platform's warehouse, and/or fines. Enforcement measures against repeat infringers typically include termination of accounts and shadow-banning, namely blocking of a user from the online platform without them knowing they have been banned⁷⁹⁵. Marketplaces' T&Cs list these measures to make sure businesses are aware of the consequences of them breaching applicable EU or national laws as well as platforms' own terms of services. For instance, Amazon's terms for product authenticity and quality⁷⁹⁶ explicitly state that "*Amazon enforces sellers who violate [...] selling policies*", especially with regards to intellectual property violations (e.g., copyrights, patents, trademarks, and rights of publicity) and product condition violations (e.g., description, pictures, and all other information on the product detail page). The online operator clarifies that, depending on the severity of the policy violation, it may remove listings; limit, suspend, or block sellers' ability to list and sell; remove or dispose of their FBA inventory; or withhold their payments. Sellers are notified via email of the removal or suspension and may be asked to submit invoices from their suppliers or provide suppliers' contact information. Amazon may also ask for a plan of action that describes the steps taken to resolve the issue and prevent complaints⁷⁹⁷. For products listed on the "Fulfillment by Amazon" channel, non-compliance with FBA product preparation requirements, safety requirements, and product restrictions may result in the "*refusal, disposal or return*

⁷⁹⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., p. 18.

⁷⁹⁶ Amazon Seller Central United States, *Amazon product authenticity and quality*.

⁷⁹⁷ Amazon Seller Central United Kingdom, *Amazon product authenticity and quality*.

*of inventory upon reception at the Amazon fulfillment center, the blocking of future shipments to the Amazon fulfillment centers, charges for preparation or for noncompliance, the deactivation of [...] selling account, or fines”*⁷⁹⁸. Specifically on food online, Amazon’s Grocery and Gourmet section outlines the following enforcement actions: *“If you repeatedly fail to meet performance targets and food safety and quality standards, you won’t be allowed to sell your products on Amazon. You will have to complete a root cause investigation, and take action to stop it happening again. Amazon might conduct periodic audits to check chill chain compliance. Amazon can remove your selling privileges”*⁷⁹⁹. Similarly, violations of eBay’s Food policy could result in a range of actions including *“administratively ending or cancelling listings, hiding or demoting all listings from search results, lowering seller rating, buying or selling restrictions, and account suspension”*. All fees paid or payable in relation to listings or accounts on which action is taken is not refunded or otherwise credited to the sellers’ account⁸⁰⁰. Turning to meal delivery platforms, some online operators explicitly commit to conduct investigations when something goes wrong. For instance, with regards to Deliveroo, complaints about a rider as well as complaints of sickness, allergy reaction, and foreign object found in the food are followed by an internal investigation⁸⁰¹. No further clarification is given on which measures may be taken after the investigation. Equally, Just Eat provides a Live Chat to report safety, health, or privacy issues, which leads to a 48h-max investigation⁸⁰².

Private enforcement on online platforms goes down as far as private judicial resolution. Within most jurisdictions, judicial proceedings are ordinarily costly, lengthy, and time-consuming. For cheap purchases – thus, low claims - and as long as the harm is not serious – e.g., in food online, death from consuming non-labelled allergens - consumers have no intention to enforce their rights before public courts as the economic and time energies required are definitely not worth the trouble.

⁷⁹⁸ Amazon Seller Central United States, *FBA product restrictions*.

⁷⁹⁹ Amazon Seller Central United States, *Grocery & Gourmet Foods*.

⁸⁰⁰ eBay Customer Service, *Food policy*.

⁸⁰¹ Deliveroo, *Frequently asked questions*.

⁸⁰² Just Eat, *How do I report a safety, health or privacy issue?*.

This is where dispute resolution systems provided by the same platforms come into play. Large marketplaces generally have some out-of-court method for resolving consumer disputes related to transactions and activities occurring on their channels. These methods are typically much quicker and cheaper – or free of charge – than public judicial proceedings and can involve mediation and arbitration. Private dispute resolution systems intend to provide a neutral and fair platform for users to resolve misunderstandings and generate trust in commercial exchanges on the e-commerce website. For instance, eBay has established an online dispute resolution platform⁸⁰³, for disputes involving eBay transactions. SquareTrade, the marketplace's dispute resolution provider, offers two services: a free web-based forum which allows users to try to resolve their differences on their own and, if necessary, the use of a professional mediator. The service is open to all eBay buyers and sellers and filing a complaint is free. The optional assistance of a professional mediator costs \$15 as eBay commits to subsidize the rest of the cost. According to eBay, the process generally takes 10 days. This same platform offers additional mechanisms for specific claims or disputes⁸⁰⁴: i.e., appealing an unpaid item case and handling feedback disputes with sellers. As for Amazon, the platform offers a Buyer Dispute Programme⁸⁰⁵ for disputes between buyers and sellers, including under the Amazon Pay A-to-Z Guarantee. The programme only covers payments made to purchase an item that did not arrive or that was materially different than the way the seller described it. Items are considered "materially different" in the following circumstances: wrong version or edition; item condition or details not as described; wrong item; missing parts or components; defective item; damaged item. It does not apply, however, to unlawful or prohibited items. Complaints should be resolved within 45 days from the date they are submitted. Amazon also commits to take measures (e.g., restriction of account privileges) against sellers who do not cooperate with the dispute resolution programme: for instance, if they do not respond timely to a dispute or do not honour commitments made to resolve the dispute. Moving on to meal delivery platforms, Deliveroo customers can claim a

⁸⁰³ eBay, *Dispute Resolution Overview*.

⁸⁰⁴ eBay, *Resolving issues with sellers*.

⁸⁰⁵ Amazon Pay, *Buyer Dispute Programme*.

refund internally if the order is not right (missing, cold, damaged, late, and so on), which will be covered by either Deliveroo or the restaurant (or both)⁸⁰⁶. Restaurants receive a daily email with the orders that have been refunded that day and the reason why. They can challenge the refund through local partner teams. Just Eat's⁸⁰⁷ first step to handle complaints on the quality of any product or the service supplied by a restaurant is inviting customers to provide feedback in the form of ratings, comments, and reviews on the website. If customers seek a refund, a proportionate price reduction or any other compensation, they should contact the restaurant directly to lodge a complaint and follow the restaurant's own complaint procedure. If this is unsuccessful as the restaurant cannot be contacted or refuses to deal with the complaint, the platform's Customer Care Team will contact the restaurant in order to request compensation on the customers' behalf.

The emergence of private enforcement demonstrates that private, for-profit, entities own tools and intervention skills similar to – and arguably more efficient than – those available to public enforcement bodies. However, this decentralized enforcement can unduly cause limitations to legal activities⁸⁰⁸, raising public values concerns. Monitoring and sanctioning measures not only need to be effective and proportionate to the actual threat but also adequate to the fundamental rights of a democratic society, *in primis* right of defence and due process, presumption of innocence, data protection⁸⁰⁹, right to pursue a business⁸¹⁰, freedom of contract, right to not be discriminated, and freedom of expression, including the right to receive information⁸¹¹. Therefore, platforms' enforcement powers need to be coupled with guarantees against abusive claims.

⁸⁰⁶ Deliveroo, *Managing refunds*.

⁸⁰⁷ Just Eat, *Just Eat - Terms and Conditions*, last updated 24 April 2020.

⁸⁰⁸ Especially automatic filters, which cannot distinguish between illegal and legal content adequately. MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 128.

⁸⁰⁹ Constant and unlimited monitoring by platforms typically entails collecting users' personal data.

⁸¹⁰ FROSIO G. F., *Reforming intermediary liability in the platform economy: a European Digital Single Market Strategy*, cit., p. 42.

⁸¹¹ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 140 and 147; European Commission, *Commission Recommendation of 1.3.2018 on measures to*

First and upstream, platforms should detail their content policy in their terms of service, as to inform users on what is allowed and prohibited on their channels. This policy should specify the consequences of uploading both illegal content and content undesirable or objectionable for the platform's T&Cs. Second, third-party notices of alleged infringements should be served in good faith⁸¹² and should include the exact identification and location of the illegal content. Should online platforms decide to take action against illegal content, they must inform business users that their offers, menus or websites are going to be or have been disabled, removed or cancelled⁸¹³. Further, users should have a right to put an end to the infringement: for instance, if platforms are made aware of offers not containing all the necessary information required by law, they should give businesses a reasonable time to make sure the webpage is in order before implementing any enforcement measure. Platforms should also give users the opportunity to counter-notice, as in contest the platform's decision to remove content: this would avoid risks of over-removal – i.e., removal of legal content - and potential abuses from untrusted flaggers. Finally, notice-and-action mechanisms should in no way affect the right of content owners and consumers to initiate legal proceedings: all parties involved still have the right to bring their claims before a court, regardless of any decision taken by the platform. Automated enforcement brings additional problems on its own. A huge collection of data is analysed by specific programmes, which ultimately decide whether a certain content is illegal – thus subject to automatic removal – or legal. Hence, decision-making is transferred to machines, and there is

effectively tackle illegal content online, cit., pp. 3 ss; FROSIO G., F., *The death of “no monitoring obligations”*: a story of untameable monsters, cit., p. 212.

⁸¹² For instance, the United States Millennium Copyright Act, 17 United States Code, 1998, § 512(c)(3): “*To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following: [...] A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law*”.

⁸¹³ European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 5 and pp. 11 ss.

no transparency in terms of which criteria are used in this process, as decisions depend on the volume of information used as input⁸¹⁴.

As mentioned, one crucial safeguard against abusive enforcement initiatives is giving users the power to counter them. The 2018 Commission Recommendation on measures to effectively tackle illegal content online encourages Member States to facilitate out-of-court settlement for disputes arising from private removal and access disabling. Such mechanisms should be easily accessible, effective, transparent, and impartial and should secure fair resolutions, in compliance with applicable laws. Of course, these mechanisms should be without prejudice to court access⁸¹⁵. Amazon, for instance, provides for an internal appealing platform against account deactivations or listing removals⁸¹⁶. Submitting an appeal may also activate a plan of action to reinstate selling privileges⁸¹⁷, which aims at identifying the causes that led to the issues and the steps planned to resolve them and prevent future cases. One prominent – and highly controversial - example of this type of internal dispute handling system, known as the Oversight Board, was announced by Facebook in September 2019⁸¹⁸ and launched in October 2020⁸¹⁹. The Board was created to help Facebook address some of the toughest issues surrounding free speech online: what to remove, what to leave, and why. It intends to judge disputes

⁸¹⁴ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 224.

⁸¹⁵ European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., pp. 5 and 12.

⁸¹⁶ Amazon Seller Central Italy, *Appeal an account deactivation or listing removal*.

⁸¹⁷ Amazon Seller Central Italy, *Create a plan of action to reinstate selling privileges*.

⁸¹⁸ Facebook, *Establishing Structure and Governance for an Independent Oversight Board*, 17 September 2019; *Facebook avrà una commissione di vigilanza indipendente*, in *Il Post*, 18 September 2019; CONSTINE J., *Facebook's new policy Supreme Court could override Zuckerberg*, in *TechCrunch*, 17 September 2019; *Ora Facebook ha due comitati di controllo*, in *Il Post*, 25 September 2020; GJERGJI I., *Real Facebook Oversight Board, la società civile tenta di vigilare sul colosso. Ma non credo basti*, in *Il Fatto Quotidiano*, 7 October 2020.

⁸¹⁹ HARRIS B., *Oversight Board to Start Hearing Cases*, Facebook News, 22 October 2020; LYONS K., *Facebook's independent oversight board is now accepting cases*, in *The Verge*, 22 October 2020; PORRO G., *Come funziona l'Oversight Board, il nuovo consiglio di sorveglianza sui contenuti di Facebook*, in *Wired*, 23 October 2020.

on content moderation criteria set by Facebook, review appeals to its policy decisions such as content take-downs, and propose recommendations for policy changes. In particular, if a user disagrees with a decision from the company to remove their content, they can appeal to Facebook first and then they will be able to further appeal to the independent board. The Board's decisions to uphold or reverse the platform's content decisions will be binding, meaning that Facebook will have to implement them, unless doing so could violate the law⁸²⁰. The cases before the Board will be the ones deemed significant and difficult, namely cases with real-world impact in terms of scale, severity and relevance to the public and cases where the content is disputed, the decision uncertain or the values involved competing.

While the scope of the Oversight Board is far different and more challenging than food laws' infringements – the latter are definitely more straightforward, obvious and uncontroversial compared to issues related to freedom of expression and safety of speeches – some concerns raised with regards to its functioning are common to any private appeal body. The first relates to ensuring actual independent judgment. It is unclear, for instance, how independent the Oversight Board can be where its four original members have been chosen by Facebook and helped the company select the additional members⁸²¹. Plus, payrolls are expected to come from an independent trust and not directly by the company, but “*Facebook has made an initial commitment of \$130 million, which will cover operational costs such as office space, staff and travel expenses, and should allow the board to operate for at least its first two full terms, approximately 6 years [...] Facebook intends to continue funding the board's operations in the future*”⁸²². More generally, given Facebook's status as a private company, it is impossible to have guarantees on the autonomous decision-making process of the body. Second, there is little doubt that these private appeal mechanisms are not available to all platforms. Online businesses may not have sufficient resources and expertise, because of their size

⁸²⁰ Oversight Board, *Ensuring respect for free expression, through independent judgement*.

⁸²¹ CLEGG N., *Welcoming the Oversight Board*, Facebook News, 6 May 2020.

⁸²² HARRIS B., *An Update on Building a Global Oversight Board*, Facebook News, 12 December 2019.

and scale, to set up dispute-dedicated bodies. Finally, who would ultimately bear the economic cost of these mechanisms? Online platforms are private for-profit entities, and will typically transfer these costs to consumers, who will face higher prices for purchases on e-commerce sites.

Two final notes specific to food online, before closing. On the one hand, platforms' private enforcement suits the preventive approach against illegal food information, proposed in the context of platforms' enhanced responsibility in food online (section IV.5.b). Considering the fundamental values involved when consuming food – *in primis*, health -, traditional *ex post* compensation mechanisms are not fit for purpose in food online: the idea is to protect consumers from accessing unsafe information, not indemnify them afterwards. In this sense, automatic detection tools, removal of offers, cancellation of selling privileges, suspension of accounts are means to prevent illegal content from being accessible to the marketplace's community. On the other, private enforcement is the natural continuation of another development analysed in section IV.5.a: EU decision makers' choice to rely on soft law and private regulation to govern the online market. While some sectorial legislative initiatives have been glimpsed recently, EU rule makers have relied greatly on self-regulation and voluntary action, rather than introduce heavy legislative changes to the *status quo*. In fact, online markets have had – so far - the power and the authority to decide on their own which control and sanctioning system is more suitable to their web channels. This is about to change with the adoption (planned for 2023) of the Digital Services Act, not only in terms of compulsory noticing procedures for illegal content (Article 14), mandatory statement of reasons for removal decisions (Article 15) and the possibility to challenge the platforms' content moderation verdicts (Article 17), but especially with regards to new supervision, investigation, enforcement and monitoring rules applicable to “very large online platforms” (Articles 50ss).

To conclude, enforcement on online platforms requires a holistic approach. It is a shared competence between various entities, public and private, which cooperate closely. Through mutual points of contact, platforms can be rapidly notified when removal is necessary, and *vice versa*, rapidly alert law enforcement bodies and other competent authorities when facts suggest that a criminal activity is carried on their

channels. Online platforms do not only cooperate with official authorities but also with each other, to stop illegal content from migrating to other e-markets. In this regard, the EU Commission encourages the sharing of experience, best practices, and technological solutions⁸²³. This shared enforcement increases the efficiency of anti-illegality measures as well as avoid duplications of effort.

Private enforcement comes with opportunities and challenges. On the one hand, platforms' enforcement allows for a swift, simple way to counter infringements online. It is the answer to the crisis of public enforcement in the digital economy, which is due to the lack of resources, knowledge, and jurisdiction in an area – internet trade – that does not follow the same rules as the offline world. Indeed, infringers may “disappear” at any time, it is much easier for them to change websites or operate anonymously, and of course they may be based in a country where national public bodies have no authority. On the contrary, platforms' knowledge of their channels, expertise with detecting and removal tools, economic interest in building the safest and therefore most attractive environment for consumers place them in the best position to act against undesirable offers. Plus, private enforcement represents an opportunity to effectively restrain unlawful conduct in a number of jurisdictions, without the territorial issues faced by public enforcement⁸²⁴. Enforcing against an operator selling in an EU country but is based in another (EU or non-EU) country is indeed challenging as public authorities are generally limited to national jurisdictions. While States seem impotent outside national borders, hence ineffective against transnational digital structures, the efforts undertaken by online platforms to police third-party illegal activities inherently apply across borders⁸²⁵. *“This should not be a surprise; the nation-state has historically been slower to disregard political borders than commercial*

⁸²³ European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 7.

⁸²⁴ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 83: “può quindi ben dirsi che le doti ubiquitarie di Internet abbiano significative ricadute in materia di giurisdizione”.

⁸²⁵ *Ibidem*, p. 161.

actors”⁸²⁶. Of course, public enforcement against sellers - and against the platform itself - is still valuable, especially when the private enforcement route is unfeasible – e.g., reiterated and serious violations on the platform, which does not activate its detection and removal mechanisms.

On the other, hiring online platforms as the internet police of their own channels may be a threat to fundamental values (e.g., due process and users’ right to conduct a business) when solid safeguards are not in place. Especially when considering that platforms decide on their own which monitoring and sanctioning regime they apply to their users, and online enforcement is thus subject to unclear self-regulated standards, rather than legal rules duly implemented by public bodies. Even more so for algorithmic enforcement, where control and/or removal are not conducted by online platforms *per se* through forms of human control – e.g., a surveillance board – but through obscure digital filtering technologies⁸²⁷. Where the ECD requires online operators to act “expeditiously” to access its safe harbour, where platforms’ prime goal is to shield their business against liability claims, their attention on specific matters such as due process, data protection and freedom of expression is close to none. Simply put, private enforcement pushes platforms into an extreme activism – internet policing⁸²⁸ - to avoid any sort of fault, with severe consequences for the rights of all parties involved. Therefore, for it to be a legitimate and safe alternative to public enforcement, private enforcement needs to address these serious concerns around fundamental freedoms and legal uncertainty and find a fair balance between efficiency in the fight against illegal content and protection of users’ interests.

⁸²⁶ DINWOODIE G. B., *A comparative analysis of the secondary liability of online service providers*, cit., p. 53.

⁸²⁷ FROSIO G. F., *Reforming intermediary liability in the platform economy: a European Digital Single Market Strategy*, cit., pp. 19 and 25; MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 117.

⁸²⁸ MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., pp. 218-233.

So far, some steps towards this balance have been taken by recent sectorial legislation⁸²⁹ as well as soft law. The latter calls for transparency first and foremost. As illustrated, platforms are encouraged to clarify, in their terms of service, content and enforcement policies, removal times and procedures for different forms of illegal content, and safeguards against over-removal. Further, platforms should publish transparency reports on a regular basis, detailing the number and type of notices received and measures adopted, the time taken for processing them, the source of the notification as well as information on counter-notices, if any, and the response given to these⁸³⁰. Again, this encouragement will likely be translated into binding – horizontal - obligations as soon as EU rule makers finalize the ordinary

⁸²⁹ Directive 2017/541 on combating terrorism, Recital 22: “*this Directive is without prejudice to voluntary action taken by the internet industry to prevent the misuse of its services or to any support for such action by Member States, such as detecting and flagging terrorist content. Whichever basis for action or method is chosen, Member States should ensure that it provides an adequate level of legal certainty and predictability for users and service providers and the possibility of judicial redress in accordance with national law. Any such measures must take account of the rights of the end users and comply with existing legal and judicial procedures and the Charter of Fundamental Rights of the European Union*”; the 2018 Audiovisual Media Services Directive, Recital 50: “*The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter. The provisions of Directive 2010/13/EU should not, therefore, be construed in a way that would prevent parties from exercising their right of access to the judicial system*”; Recital 51: “*When taking the appropriate measures to protect minors from harmful content and to protect the general public from content containing incitement to violence, hatred and terrorism in accordance with Directive 2010/13/EU, the applicable fundamental rights, as laid down in the Charter, should be carefully balanced. That concerns, in particular and as the case may be, the right to respect for private and family life and the protection of personal data, the freedom of expression and information, the freedom to conduct a business, the prohibition of discrimination and the rights of the child*”.

⁸³⁰ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms*, cit., pp. 15-19. See also European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, cit., p. 6, paragraph 23 and p. 12, points 16 and 17; MONTAGNANI M. L., *Internet, contenuti illeciti e responsabilità degli intermediari*, cit., p. 231.

legislative procedure for the DSA. If and once adopted, the new rules will be directly applicable across the Union.

7. Concluding remarks on liability and controls in food online

Traditionally, internet-based platforms have long resisted liability claims concerning the products exchanged on their channels, arguing their neutrality⁸³¹ and generally shifting liability for safety violations to the actual sellers – traders and restaurants. Chapter IV addressed this long-lasting neutrality argument, by examining EU food legislation and national/harmonized principles on liability – both primary and secondary. More specifically, while Chapter III dealt with the rules that need to be followed with regards to food information online, Chapter IV studied the position of e-platforms when such information is unlawful.

The analysis started with an overview of illegal content online and introduced the scope of the Chapter through definitional clarifications. Section IV.2 explained that while EU Food Law focuses on responsibilities, liabilities – i.e., the consequences of law infringements – are a matter of national law. It then illustrated how liability is divided into primary and secondary liability and showed how a new concept, enhanced responsibility, is currently playing an increasing part in the fight against illegal content online.

In particular, the Chapter examined platforms' primary liability for unlawful food information. It concluded that, as the law currently stands, primary liability, whether civil (*rectius* harmonized product liability) or based on administrative sanctions in the Italian legal system, seems to cover own-brand sellers only. E-markets – pure and hybrid – and meal ordering platforms are not directly liable as they are not producers nor trading food under their own name.

⁸³¹ LECHER C., *How Amazon escapes liability for the riskiest products on its site. Who's at fault when something you buy on Amazon goes bad?*, cit.: "two professors argue that Amazon acts as a "heavy hand" in its Marketplace, closely influencing purchases on its platform. "In our view," the professors write, "the courts do not grasp the magnitude of the problem or the reality of the situation." The company's "contention that it is a neutral platform that simply facilitates sales between sellers and buyers is a myth," they conclude".

Consequently, the research focused on whether there was any argument justifying online intermediaries' secondary liability in food online, as in platforms' liability for hosting, facilitating, enabling and/or giving access to third-party unlawful information. This question obviously targeted marketplaces and meal delivery platforms only, namely FOPs involved in the distribution of food produced, traded, or prepared by others. It required a long excursus on the harmonized safe harbour regime pursuant to the ECD and subsequent developments under case-law and in academic debate. Based on legal, political, and economic criteria, the research tried to shift the burden of illegal content to those who have better control over food information and more power to prevent and limit damages at reasonable costs. Specifically, it was suggested that certain online platforms could be better placed to prevent and stop misconducts depending on their active role in the provision of information, on their control powers over essential segments of the activity, and on their close relationship with businesses using their channels. In fact, their interposition and involvement are sometimes so extensive that consumers feel they are buying from them, rather than from the sellers. Plus, it was demonstrated how food online platforms' liability is likely to have more impact and be more effective than going after sellers, considering traceability challenges on online channels, platforms' financial abilities and their authority over users, who can be imposed certain rules of conduct and suspended if they do not follow them. Following a concrete analysis of major platforms' T&Cs, it was concluded that intermediary liability for illegal food information may be claimed with regards to hybrid online markets – and in a limited way “new delivery” platforms. Pure online markets and aggregators, on the contrary, merely supply an online interface.

Chapter IV further showed how platforms are now asked to take on a more proactive route and adopt preventive measures against the very access to illegal content, rather than wait to compensate any damage. This is turning the debate around intermediary liability into a discussion over platforms' enhanced responsibility, a framework of preventive obligations that shape platforms' contribution to a safer internet, regardless of and well before any question on liability. In other words, the idea is to impose some responsibilities on intermediaries to prevent and limit infringements from third party users without

finding them secondarily liable for the conduct of these users. Initiatives from soft law and sectorial legislation also suggest that a vertical, problem-driven approach to illegal content online may contribute to tackling single challenges in specific areas, regardless of any horizontal proposal to amend the regulatory framework – i.e., the December 2020 Digital Services Act. In this sense, responsibility in food online should be tailored to the specifics of the food sector and revolve around its values, *in primis* food safety and consumer protection.

That said, Chapter IV proposed a series of tailor-made duty of care standards for food information online. Imposing on platforms specific legal responsibilities to prevent illegal food information from being available to online consumers would not only encourage online operators to behave responsibly but they would also do so in the context of a precise legislative agenda, in full compliance with the current legislative framework (*in primis*, the non-monitoring obligation ex Article 15 of the ECD and the preventive regime of EU Food Law).

The final part of the Chapter dealt with enforcement. It first gave a picture of recent control programmes launched by the EU in the area of food online and illustrated some of the practical challenges faced by competent authorities: lack of national rules specific to controls in food online, limited proactive searches, insufficient capacities, lack of a uniform approach as to which platforms should be targeted, limited jurisdiction. These issues explain why the volume of unlawful offers of food is still significantly high. The analysis then moved to the OCR and examined the new enforcement powers available to national officials: mainly mystery shopping and the authority to close websites used by infringers. However, it was also proved how the EU legal framework does not tackle practical issues such as funding, interchangeable online channels, anonymity, fake accounts, and jurisdiction. Chapter IV closed with privatized enforcement, namely monitoring and sanctioning mechanisms put in place by the same platforms to ensure compliance on their websites. The investigation concluded that while private enforcement brings many advantages (rapidity, cheapness, expertise, and digital capacities), hiring online platforms as the internet police of their own channels may lead to over removal and may be a threat to fundamental values, including the right of defence and due process, presumption of innocence, data protection, right to

pursue a business, freedom of contract, right to not be discriminated, and freedom of expression.

To conclude. Food and beverages are special commodities due to their relationship with human life and consumer protection. Where the system constructed by the EU food legislator has a public character and is deeply linked to these fundamental values, solutions must aim at preventing and deterring future infringements rather than merely addressing violations once they happen. In this context, key links of the digital food chain cannot claim their absolute neutrality anymore. While food online platforms intermediaries should not be responsible for policing all the content that flows through their services, a rethinking of their role is necessary. This role in contributing to food safety demands both public and private law mechanisms⁸³². The former refer to the system of food safety responsibilities created by EU General Food Law and the FIC acting as *lex specialis*, along with the regime adopted by Member States in terms of criminal and administrative penalties. The latter relate to the principles of tort liability, as laid down by national and harmonized legislation. Similarly, ensuring compliance with the law involves both public and private tools of enforcement, which must work together in the context of a holistic approach to food safety online.

The following section will draw this thesis to a close by summarizing the findings of this research and outlining some open questions for future examination.

⁸³² In similar terms with reference to the Chinese legal framework, the recent enactment of the new E-Commerce Law and its impact on food online, see XIAO P. and LIU X., *The Enactment of the e-Commerce Law in China and its Impact on Food e-Commerce*, cit., p. 258. See also VAN DER VEER L., *Food online*, cit., p. 4. The author introduces his thesis by laying down the duality of food online, reminding that the applicable framework “*consists of existing contract law and food law, both national and European*”.

Conclusion: online platforms, new actors of the food chain

1. Research findings

In recent years, the business community and consumers have become increasingly aware of the (unbreakable?) bond between food and the internet. Online routes have come to be inescapable means for selling and purchasing food and meals, in such a way that there are only a few alternatives for those who do not take them. That is to say that local producers, shops, restaurants as well as consumers may very well plan on avoiding the online channel altogether but those who follow this road are decreasing year after year. The 2020 pandemic seems to have marked a point of no return from food online.

When this research has started, however, limited studies focused on food online from the perspective of law and regulation. Most of the work carried on the topic dealt with the boom of food online platforms from economic, marketing, and social perspectives and the research had to navigate the legal issues of food online by borrowing the reasoning from “partial” stances. That of food trade without the component of digital innovation; that of online platforms without the peculiarity of food.

The goal of the thesis was to put the existing EU framework applicable to food online into question and launch a discussion over what the law is and what it should be. It examined available rules and principles, and then laid down some proposals when these were not retrievable. The research focused on the interplay between regulation and innovation, where regulation needs to adapt to innovative developments, and innovation needs to find a direction in regulation⁸³³. Specifically, the purpose was to address the extent of food online “newness”: is the phenomenon so innovative that existing laws cannot apply or could we stick to what we already have?

In particular, this work wanted to check whether the current EU legal framework is fit for purpose when it comes to ensuring safety in food online commerce. Where data and online platforms are the first two drivers of the digital economy, this

⁸³³ SALVI L., *Agri-food law and innovation through the lenses of better regulation*, in Session I of *Innovation in agri-food law between technology and comparison*, cit., p. 26.

research tackled them both – in the capacity of food information on web channels - and was motivated by one crucial question: how far should online platforms be responsible for food information? The following paragraphs will briefly break down the findings of the thesis.

The research first focused on qualification. “How does food online manifest itself in today’s digital economy” and “are online platforms involved in a food business” were the two questions that guided Chapter II. The analysis illustrated how online platforms are currently dominating the food scene in terms of numbers, innovative business models, market share and economic powers. From recent start-ups to traditional companies, from small retailers to giants such as Amazon, eBay and Alibaba, businesses involved in food sale and distribution are all turning to the online platform tool. Among the vast sea of online channels, this thesis identified five business models: (1) own-brand sellers selling their products through their own website; (2) pure online marketplaces, acting as a mere web interface to third-party products; (3) hybrid online marketplaces, which add to the pure version extra services such as storage, transport, or click-and-collect; (4) aggregators, as in meal delivery platforms that are pure intermediaries between restaurants and customers; (5) “new delivery” platforms, which handle meal transport for restaurants that do not offer a delivery service. Further, the research sought to understand whether these online platforms carry a food business, and therefore whether they fall within the scope of the EU food system. Referring to three CJEU Judgments on the qualification of the digital economy (*Uber Systems Spain*, *Uber France*, and *Airbnb*), an answer to the question was proposed using a series of criteria: creation of a supply of services, decisive influence, and main component. It was concluded that own-brand sellers do undertake a food business while the intermediation services supplied by pure online marketplaces and aggregators should be classified purely as information society services ex Directive on E-Commerce and fall outside the scope of EU food laws. When turning to hybrid online markets and “new delivery” platforms, EU case-law did not lead to a straightforward response. Hybrids may be carrying a food business or supplying an information society service depending on whether food delivery or food online sale is considered as the main component of the whole operation. “New delivery” platforms raised similar

problems. Specifically, should the economic essence of the whole operation be online trade or food transport?

Chapter III put the results from qualification into practice. In particular, it intended to tackle the following questions: “which rights do consumers have when entering the food online market and why is the right to be informed particularly relevant for online consumers” and “to which extent are online platforms responsible for food information”?

The right to information was placed at the centre of consumer protection in food online, considering how the right of withdrawal fails to provide enough guarantees when applied to food (hygiene, health and perishability concerns are intrinsic to foods and beverages). This right to information is crucial to the EU food safety system, such that a whole piece of legislation has been adopted in 2011 to target every communication, instruction, label, and notice accompanying food, including information available online. The Food Information to Consumers Regulation intends to protect online consumers as any other, and builds a regulatory *unicum* according to which what applies offline applies online. The key difference is that online consumers have the right to be informed both before the purchase and upon delivery. The investigation then turned to the other side of the coin, that of responsibilities, and explored where platforms stand in this regard, i.e., whether they are responsible, under current EU law, for the food information displayed on their websites. Referring to the study on food online qualification and to additional case-law – *Lidl* –, it was concluded that only one category of online platforms seems immediately and directly responsible for the presence and accuracy of food information under the FIC, that of own-brand sellers. On the contrary, online markets and meal delivery platforms do not link their name to the product, which means that a direct and immediate responsibility for ensuring food information as per the FIC cannot be imposed upon them. Yet, it was proved how food information lies in the larger framework of the General Food Law, which seeks to target all participants of the food chain as long as they are in control of their business. In that sense, and following a concrete analysis of their functioning, hybrid online marketplaces and “new delivery” platforms were deemed in a position to exercise some power over food information and undertake an effective supervision on – at

least the presence of – all the particulars required by law. Especially as they handle products physically, or when they instruct traders on specific information requirements, set up inspection mechanisms and filtering tools or fill the menus according to the information supplied by restaurants. Pure online marketplaces and aggregators, on the contrary, were excluded from food information responsibilities. Not only because their activity could not be qualified a food business – thus leaving them outside the scope of EU food laws - but also because, under the GFL, they do not have significant control over food information. Despite these conclusions, all platforms typically claim their neutrality through their terms of service, arguing their lack of control over and responsibility for the data available on their websites. In fact, the reality of the food information online system is alarming: think of blurred pictures from which mandatory information cannot be viewed, the number of clicks one needs to go through on delivery platforms to find any relevant information on allergens, the absence of nutrition tables or, more markedly, the complete lack of information when meals are delivered to our homes.

The final Chapter dealt with unlawful food information from three perspectives: “are platforms liable for unlawful food information under current EU law”, “how should the law address gaps in terms of preventive enhanced responsibility” and “how are food laws enforced on web channels”? Specifically, while Chapter III focused on platforms’ responsibilities under EU Food Law, Chapter IV first explored whether these responsibilities amount to liability pursuant to existing principles, then suggested to move the discussion over to platforms’ enhanced responsibility against illegal food information. The latter refers to a system of preventive obligations tailored to food online, according to which platforms would be asked – by law – to create the best possible environment to secure accurate and complete information.

In particular, the research showed that current laws on primary liability – with a focus on Italian administrative sanctions and EU product liability – leave most of the web companies involved in the food chain behind, as they only target producers or platforms trading food under their own name. In a nutshell, own-brand sellers. Arguments supporting platforms’ secondary liability (e.g., control, diligent economic operator, least cost avoider) helped extend the pool of potentially liable

parties. Indeed, it was suggested that certain online platforms are better placed to prevent and limit infringements considering their active role in the provision of information, their control powers over essential segments of the activity, and their proximity to businesses selling on their channels. In some instances, in fact, platforms are so close to business users that customers not only trust their authoritativeness and reliability, but also see them as the actual seller. Plus, food online platforms' liability is likely be more effective than going after third-party sellers, considering traceability challenges on online channels, platforms' financial abilities, and their authority over users, who can be imposed certain rules of conduct and suspended if they break them. Following a concrete analysis of major platforms' T&Cs, it was concluded that intermediary liability for illegal food information is best claimed with regards to hybrid online markets – and, in a limited way, “new delivery” platforms. Pure online markets and aggregators, on the contrary, merely supply an online interface and should not be involved in any secondary liability claim.

That said however, liability, whether primary or secondary, is activated *ex post*, as in following a damage. Considering the position filled by food in human life and health and the serious risks to consumers arising from inaccurate, inaccessible, or incomplete food information, this thesis argued that it was best to take a preventive approach when discussing platforms' role towards information online. This approach is based on the concept of *ex ante* enhanced responsibility, where platforms are asked to take on a more proactive route and adopt preventive measures against the very access to illegal content, rather than wait to compensate any damage. Simply put, responsible platforms are those adopting a duty of care towards the content available through their channels. Hence, Chapter IV proposed a series of tailor-made standards for food information online focused on ensuring the presence, readability, accessibility, and accuracy of food information. These specific responsibilities would allow platforms to play an active role in consumer protection while avoiding the confusion between over deterrence and sheer inaction, which the current framework – at least until the adoption of the Digital Services Act - seems to lead towards: soft law's call for action/ECD safe harbour applicable to neutral and passive players only.

The final stages of the research looked at enforcement in food online. As unlawful offers of food are soaring, this thesis examined the tools available to control authorities and uncovered weaknesses of the current legal framework. Specifically, mystery shopping and e-commerce sites' closing attest to the legislator's efforts to take care of food officials controls online. However, they are clearly ignoring the difficulties of enforcing rules against anonymous traders, fake accounts, or sellers based in third countries, which are typical challenges of online commercial exchanges. These challenges may be better addressed through private enforcement, namely enforcement by the same platform to ensure compliance on its channels. The investigation concluded that while private controls and sanctions solve the issue of territorial jurisdiction and involve greater technical capacities against illegal content online (e.g., automated filtering tools), the threat is that platforms start policing third-party content and jeopardizing human rights values such as due process, data protection, right to pursue a business, freedom of contract, right to not be discriminated, and freedom of expression.

2. Resulting *status quo* and call for further studies

The picture above demonstrates that EU decision makers – whether judges, regulators, or policy authorities - are catching up on the legal challenges raised by web platforms. More importantly, the provisions of the FIC on distance selling as well as the new powers provided to enforcement bodies by the Official Controls Regulation prove that food online is not a topic unknown to EU officials. However, the regulatory *status quo* is far from satisfactory.

The first outcome of this thesis is the following: while the subject matter is coming of age, the EU framework governing food online is still too immature. One major and preliminary gap is that the law seems to apply to food e-commerce the same rules targeting traditional (physical) trade. There has not been a great deal of rules specific to food online, which has borrowed most of its legal coverage from the principles governing the offline food chain or from those regulating digital services in other sectors. Simply put, the EU food system is still seen as a *unicum*, where what applies offline, applies online. In this sense, food online appears to be an exception to the cyberspace fallacy, namely the idea that the internet is a virtual

space, a new jurisdiction, in which “*none of the existing rules and regulations apply*”⁸³⁴. Provisions tailored to the Internet of Food are not only scattered and placed haphazardly. They are also rare. In fact, EU rule makers have mostly neglected food safety in their talks on digital platforms as well as overlooked e-commerce when building general and specific rules on food safety. “Food” and “online” are not dealt with as a whole and in a coordinated manner. One need only think that the core of EU food ruling – Regulation 178/2002 - has no mention of the terms “online”, “digital”, “electronic commerce”, “web”, “platform”, “distance contract” or “information society service”. Recital 27 and Article 14 of the FIC do deal with food information online in terms of rights, but the Regulation is limited when we turn to responsibilities in the digital food chain, as it ignores online service providers entirely. Food online is insufficiently addressed in terms of enforcement too. The OCR shows that it is aware of it but the effort is inadequate: in particular, the Regulation evades practical questions raised by sales on web channels such as traders’ anonymity and fake accounts, interchangeable selling platforms, the blocking of large e-commerce sites, and the practicability of mystery sampling. Considering the web’s massive disruption of the physical food sector and the consequent complexities when it comes to understanding each actor’s role, the strategy of disregarding the specifics of food online translates into a weaker consumer protection, which the huge amount of illegal offers online attests to.

A second concern relates to the heterogenous nature of food online regulation. The research brought to light that the regulatory environment in which food online platforms operate is a complicated mix of self-regulation and state/Union regulation, soft laws and hard laws making it hard to place the responsibilities applicable to platforms in a reliable manner. Specifically, the Commission’s non-binding guidance has become the driving force of change of platforms’ role against illegal content – until the DSA proposal in December 2020 -, generating uncertainties in terms of hard law/soft law compatibility. This thesis illustrated the dichotomy between the ECD’s protection applicable to passive and neutral providers only and the “Good Samaritan” actions strongly encouraged by the

⁸³⁴ MURRAY A. D., *Nodes and Gravity in Virtual Space*, cit., p. 199.

European Commission. The clash between these two levels of regulation occurs in terms of food information responsibilities too. Indeed, if one were to follow the Commission's Q&A, according to which the responsibility for providing mandatory food information before the purchase is concluded lies with the owner of the website, all online platforms should be responsible for food information requirements. This ignores the principles from hard law – i.e., “*The food business operator responsible for the food information shall be the operator under whose name or business name the food is marketed*” (Article 8 of the FIC) – following which direct responsibility rests exclusively with online own-brand sellers. Not only does food online require a greater degree of transparency and legal certainty that cannot be left in the lap of soft law. But the latter, when available, should foremost not contradict applicable legislation. For both consumers and well-intentioned platforms deserve a more reliable advice as to what their rights are and what is expected from them, respectively.

The third issue relates to platforms' neutrality. The immunity attitude, which characterized EU regulation on digital services since the enactment of the ECD, mostly stands. Yet, it is now facing backlash as it does not respond to the quasi-monopolistic position and titanic powers some online companies currently hold in the digital economy, including the food industry. If one looks at the definition of food business, and the level of physical involvement of some platforms in the food chain, it is hard to argue their neutrality any longer, notwithstanding any contractual term stating the opposite. In fact, online platforms have been playing a sort of double game, by making inspirational declarations in favour of consumers and shaping their whole *modus operandi* around customer satisfaction, yet constantly avoiding food safety legal obligation and contributing to the uncertainty of what and how much they owe to the public⁸³⁵.

In essence, the current framework does not seem able to provide the rightful protection to food consumers online due to the lack of specific provisions, contradictory soft law/hard law trends and uncertainties between neutrality and strong powers. Not only are rules ambiguous and scarce but authorities also do not

⁸³⁵ LAIDLAW E., *Private power, public interest: An examination of search engine accountability*, cit., p. 127.

have adequate tools to ensure surveillance of the digital distribution chain and effective enforcement of the rules. Somewhat ignored by the EU food legislator and generally in the discussions towards a safer internet, food online platforms' *ex-ante* responsibilities and *ex post* liability are still not clearly defined, and very much open to debate, stuck between stringent safety regulation and immunity to promote innovation. And it will be interesting to follow the legislative process for the adoption of the DSA and monitor how food online will be affected by it.

That said, this thesis argued that the regulatory *status quo* could be greatly improved through tailored, preventive, food information obligations imposed upon platforms. The basic premiss is that platforms should and could tweak their systems to reduce online harms⁸³⁶. These obligations would help address gaps and ambiguities in terms of platforms' responsibilities and liability, while being fully in line with the current legislative framework: on the one hand, the preventive regime of EU Food Law; on the other, the general non-monitoring approach of the ECD. The idea is to build a more forward-looking set of responsibilities, that would create an environment in which the various actors are nudged towards adopting a duty of care behaviour. This framework would be based on a checks and balances mechanism, with a clear-cutting allocation of responsibilities and a system of feedbacks from the primary right holders – i.e., consumers⁸³⁷. Once again, the goal in food online is not to focus on the outcome – after which liability is activated – but to make sure that this outcome is prevented, avoided, limited through a proper organization and placement of responsibilities. This way, participation in the digital food chain would be a source of obligations *ex lege*, transcending the limits of Food Law (applicable to food businesses only), primary liability (covering exclusively producers or own-brand traders), and secondary liability (undefined and unharmonized criteria, *ex post* activation dependent on damage).

⁸³⁶ KELLER D., *Systemic duties of care and intermediary liability*, Center for Internet and Society, Stanford Law School, 28 May 2020.

⁸³⁷ HELBERGER N. et al., *Governing online platforms: from contested to cooperative responsibility*, cit., p. 4: “Although these arguments were developed in response to the organizational failures in large government institutions, they also hold some lessons for the design of online platforms”.

This thesis laid down some proposals but did not intend to put a full stop to regulatory renovation in food online. The hope is that whatever suggestion and analysis were made in this work, they could contribute to further discussions on food online and on duties of care in the digital food sector. Simply stated, far from being exhaustive, this work rather sought to be an invitation to further studies and regulatory action in the field of food online. Whichever direction EU officials decide to take on, though, the who, when and how of platforms' enhanced responsibility should be clarified. It should be unambiguous and predictable to all stakeholders involved as online platforms need to know what is required from them⁸³⁸.

One interesting – related - issue worth exploring in the world of food online is the role of influencers in consumers' habits. The former are individuals – rather, accounts⁸³⁹ - who use their popularity on social media channels (Instagram, YouTube) to advertise, support and market all sorts of causes, services, and products, including foods and beverages. They can be professionals or amateurs and they rely on daily – virtual - interactions with their followers to increase their audience, popularity, credibility, social media presence and therefore the attractiveness of their own persona and authority as opinion leader on a specific subject matter⁸⁴⁰. In recent years, influencers have gradually shaped thoughts, tastes, and views of millions of social media users on a variety of topics.

As for food influencers, the latter typically showcase a lifestyle in which food products play a major part, especially if they are in line with health and ethic trends. With social channels being part of our everyday life, members of the social media

⁸³⁸ ANGELOPOULOS C. and SMET S., *Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability*, in *Journal of Media Law*, 2015, volume 8, issue 2, p. 282: “Indeed, as one of us has previously noted, ‘without concrete instructions from the courts [or legislator], an ISP has no real way of knowing what is and what is not “reasonable” in the eyes of the law’. Thus, it also has no way of securing a viable fair balance”.

⁸³⁹ Some accounts are only virtual, as in they do not refer to actual humans but to robots who conduct branding activities for hundreds of products: think of the account of Miquela Sousa, o Lil Miquela, on Instagram.

⁸⁴⁰ GONZÁLEZ VAQUÉ L., *Do food influencer activities require specific regulation?*, in *European Food and Feed Law Review*, 2020, issue 2, pp. 117 ss.

community are now constantly pampered with tons of food images and links to selling websites. In this sense, influencers have come to be additional actors of the digital food chain and food information providers, that is to say that food information not only originates from businesses (producers, sellers, platforms) anymore but also from “mere” individuals displaying products. In this context, the distinction between marketing and freedom of expression is subtle and it is difficult for consumers to distinguish an advertising message from a spontaneous and disinterested advice⁸⁴¹. These advertising channels and this type of food information raise similar challenges to those expressed in this thesis: where do food influencers stand in EU food laws? Should they be responsible for the information they provide? Or are they only giving personal, genuine opinions on products they try? Considering the huge impact – *rectius*, influence – these actors have over millions of consumers, these questions are worthy of further consideration.

⁸⁴¹ Autorità Garante della Concorrenza e del Mercato, *Relazione annuale sull'attività svolta*, cit., p. 29.

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GLOSSARY

Abbreviation	Explanation
AAC	Administrative Assistance and Cooperation system
AG	Advocate General
CCP	First EU Coordinated Control Plan on online offered food products
CJEU	Court of Justice of the European Union
DCR	Directive on Consumer Rights
DG SANTE	Directorate-General for Health and Food Safety of the European Commission
DMCA	Digital Millennium Copyright Act
DSA	Digital Services Act
DSMS	Digital Single Market Strategy
EC	European Commission
ECD	Directive on E-Commerce
EEA	European Economic Area
EFSA	European Food Safety Authority
EU	European Union
FBA	Fulfilment By Amazon
FBO	Food Business Operator
FIC	Regulation on the provision of Food Information to Consumers
FOP	Food Online Platform
GFL	General Food Law
ICQRF	Ispettorato Centrale della Tutela della Qualità e della Repressione Frodi dei Prodotti Agroalimentari
IMSD	Directive on Services in the Internal Market
ISMEA	Istituto di Servizi per il Mercato Agricolo Alimentare

ISS	Information Society Service
LDP	Directive on the approximation of laws concerning Liability for Defective Products
MoU	Memorandum of Understanding on the sale of counterfeit goods
OCR	Official Controls Regulation
OECD	Organization for Economic Co-operation and Development
P2B Regulation	Platform-to-Business Regulation
RASFF	Rapid Alert System for Food and Feed
T&Cs	Terms & Conditions
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

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<https://www.amazon.com/>;

Asda

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Bar2door

<http://www.barn2door.com/>;

Blue Apron

<https://www.blueapron.com/>;

Carrefour

<https://www.carrefour.it/>;

Copia

<https://www.gocopia.com/about>;

Cucina Barilla

www.cucinabarilla.it/;

Deliveroo

<https://deliveroo.it/en/>; <https://deliveroo.co.uk/legal>; <https://deliveroo.it/en/faq>;

EasyCoop

<https://www.easycoop.com/>;

eBay

<https://www.ebay.com/>;

Foodora

<https://www.foodora.com/>;

Glovo

<https://www.glovoapp.com/>;

Hello Fresh

<https://www.hellofresh.com/>;

Instacart

<https://www.instacart.com/>;

JustEat

<https://www.just-eat.co.uk/>;

Ktchn Lab

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La ruche qui dit oui!

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