

The law of “economic actors” between certitude and control. The case of the Italian, British and American Commodity Exchanges

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Los casos de los mercados de futuros italianos, británicos y americanos

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**A lei dos “atores econômicos” entre a certeza e o controle. ■
O caso das bolsas de mercadorias italianas, britânicas e
americanas ■**

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ABSTRACT:

The paper analyzes, especially with reference to trade, the decentralization of legislative activity which translates into a new widespread sovereignty, that in some respects undermines the “rule of law”.

The purpose of this analysis is to analyze, without any pretense of completeness, from a submission point of view, the Commodity Exchange, where it is possible to research a polychromatic law, which may also be implemented by non-state authorities, and where an attempt is made to record, how actual reality is constituted by an orderly plurality and the relationship between autonomy and heteronomy is made to seek the balance between private and public interests.

KEYWORDS:

Law; Commodity Exchange; Control.

* *Artículo de reflexión*

RESUMEN

Este estudio analiza, especialmente en lo referente al comercio, la descentralización de la actividad legislativa que se traduce en una nueva soberanía generalizada que en algunos aspectos socava al “Estado de derecho”.

El propósito de este artículo es examinar, sin ninguna pretensión de compleción, desde una perspectiva de propuesta, el intercambio de mercancías, donde es posible incursionar en una ley policromática que pueda ser implementada inclusive por autoridades no gubernamentales y donde se intenta dejar el registro de cómo la realidad actual está constituida por una pluralidad ordenada y cómo la relación entre la autonomía y la heteronomía busca un equilibrio entre los intereses públicos y privados.

PALABRAS CLAVE:

Derecho; intercambio de mercancías; control.

RESUMO

O artigo analisa, especialmente no que diz respeito ao comércio, a descentralização da atividade legislativa que se traduz em uma nova soberania generalizada, que em alguns aspectos mina o “estado de direito”.

O objetivo desta análise é analisar, sem qualquer pretensão de completude, do ponto de vista da submissão, a Bolsa de Mercadorias, onde é possível pesquisar uma lei policromática, que também pode ser implementada por autoridades não estatais, e onde uma tenta-se registrar como a realidade real é constituída por uma pluralidade ordenada e a relação entre autonomia e heteronomia é feita para buscar o equilíbrio entre interesses privados e públicos

PALAVRAS CHAVE

Direito; Bolsa de Mercadorias; controle.

INTRODUCTION

The law seems to be linked to economic and political processes that go in the direction of de-politicization, de-centralization and de-formalization. Society differs on a global scale and it erodes the importance of territorial

borders and produces a huge demand for non-state equilibrium. Indeed, global private regimes have given rise to a global right outside the state, that produce regulation in search of “legal validation”. This entails the birth of a heterarchical, polycontextural law. So, the “law” derives from paralegal rules that are produced on the margins of the law, on its border with the economic and technological process. Therefore, a law which is by definition hard, and located in the traditional model of government, is accompanied by a soft law. In this context we have analyzed the Commodity Exchanges in the world legal context, in particular in Italy, England and the United States. Their functioning did not develop according to a predefined scheme; practice has gradually established the rules.

METHODOLOGY

The study was conducted through comparative analysis. It has allowed, above all through the analysis of the differences, which represent the focal point of the comparative analysis, to highlight that the legal system that is better than the others is able to carry out a control over the regulation prepared by the organizations in question, which as known, have no legislative power. This refers mainly to the US legal system. The comparative analysis carried out highlights an important aspect: when the legislator and juridical reflection explore the possibility of a regulation of the economy different from traditional public intervention, one returns to practice and theorizes heteronomous preparation of the rules of economic action.

1. THE NEW CONCEPT OF SOVEREIGNTY

1. The extension of exchange processes beyond national borders, the development of information technologies, the birth of transactional financial markets has also changed the law. In fact, the fragmentation of the new legal actors is spread over multiple levels, geographic and sectoral¹, scenario in which there is a lack of control mechanisms, and which is affected by the absence of a balance of interests at stake.

This awareness introduces a further consideration which, without wanting to legitimize it, will highlight the existence of different needs that must be protected, and which

1. BUSSANI M., (2010), *Il diritto dell'Occidente. Geopolitica delle regole globali*, Torino, Einaudi, p. 95.

are waiting to materialize in the dialogue with living experience². The relationship between the structure of society and the culture of law appears inextricably linked to the change in the proponents of legal life and to the loss of exclusivity that the state subject has suffered in his role as law-maker³.

In the global legal scenario, proponents very different from the traditional ones have appeared, and this has determined a very important consequence: the legal process, which in the past was supposed to make it "not dependent" on legal entities and to depersonalize⁴ it today it yields to a context in which globalization produces the breaking frame of modern law⁵. «Il nuovo diritto globalizzato, nato da esigenze economiche, volto a soddisfare i bisogni degli uomini di affari, non costretto in leggi, non costretto nella volontà solitaria di un legislatore supremo e distaccato, nasce dai fatti, vi si mescola, ne resta intriso, resta impregnato di una intrinseca fattualità. Se il diritto degli Stati è sorretto e controllato dal canone della validità, cioè della corrispondenza a modelli generali autoritari e autorevoli, se la dialettica sua propria è quella che si scandisce in tipicità e atipicità, [...] il nuovo diritto globalizzato tende alla effettività, non è pensabile se non come diritto effettivo, non importa se grondante di informalità, una informalità che nemmeno le categorizzazioni di esperti e di teorici riescono a cancellare»⁶. The change taking place in the global universe, which goes beyond both public law and international law, seeks to establish itself as an order of international organizations and private market forces, in a global space that tends to be boundless⁷.

2. LOMBARDI M.C., *Poesia del silenzio*, (2001), in TRASTRÖMER, T., *Poesie*, Milano, Crocetti, 153, p. 5.

3. See, FERRARESE M.R., (2000), *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, p. 101.

4. WEBER M., *Economia e società* (1922), (1968), I, Milano, Edizioni di Comunità, 1968.

5. The expression refers to the title of a study by TEUBNER, G., (2005), *Breaking Frames: la globalizzazione economica e l'emergere della lex mercatoria*, in TEUBNER, G., *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili*, Roma, Armando, p. 17

6. GROSSI, P., *Santi Romano: un messaggio da ripensare nella odierna crisi delle fonti*, *lectio doctoralis*, del 24 ottobre 2005, Aula Magna della Università di Bologna.

7. FERRARESE, M.R., (2006), *Diritto sconfinato*, Roma-Bari, La Terza.

2. THE GLOBAL LEGAL FRAMEWORK

The situation of the Commodity Exchanges on the world panorama takes a multifaceted attitude. From an economic-technical point of view they have their own characteristic aspects; from a legal point of view, they have a regulation that can be described as broadly identical. Beyond the arguments concerning the organization and functioning of foreign Commodity Exchanges, a profile that deserves to be noted is that on the European and international scenario these bodies, unlike the national ones, are, in most cases, private organizations.

The legal changes on the legal and economic scenario confirm the absence of procedural constraints and formal requirements of all those proponents who participate in the legal game and who redesign the new face of the global universe. This consideration reveals the need to carry out a practical verification in order to detect all the legal consequences useful for the purposes of our analysis. In the perspective outlined, an attempt is made to trace, without any pretense of completeness, the (juridical) peculiarities of the institutes in question.

3. THE LEGAL ORDER OF THE ECONOMIC PROPONENTS. THE COMMODITY EXCHANGE IN ITALY.

The legal order created by the markets is complex. Often an uncertain and bumpy legal path lurks in their indeterminate boundaries and their invisible dynamics, producing a variegated repertoire of legal instruments in search of validation. By the way of example, we refer to the case of Commodity Exchanges⁸, operating on international markets. In Italy the Ministerial Decree of 20 December 2000 assigns to the Chambers of Commerce the task of adopting technical standards, thus delegating to them the function of making the rules on the methods of managing the negotiations and the relative supervision as well as on the methods of accessing to them.

In this way they participate in the "legal game"; in fact, it is a wide range of actions placed along the public/private scale that gives these subjects the opportunity to play as co-decision makers of the rules and to become, together with the others,

8. BANI, E., (2009), *Le borse merci*, Milano, Cedam.

“mercanti del diritto”⁹. We are faced with clearly non-juridical and admittedly economic subjects who, despite their regulatory autonomy, would need constant and continuous legal assistance. Without considering the organizational aspects of these institutes, we must say that in these sectors the “category aggregations” not only manage but even regulate and control them. Although they find their discipline in the law of 1913 and in the related executive regulation, they have, from the beginning, operated by creating different functional regulations between the various squares, favoring the fragmentation of juridical norms and therefore, of the regulation of the markets. The situation has partly changed with the establishment of the telematic Commodity Exchange which took place with a legislative provision¹⁰ which has only ratified the changes that have occurred in the meantime in the sector and noted by practical operators, who in this new scenario can not only sell at the most convenient price but can use speculative practices linked to the change in price. The Decree of the Minister of Productive Activities of 9 March 2002 recognized the management role of the telematic platform and the services connected to it by Meteora spa.

Only with the Decree of the Minister of Agricultural and Forestry Policies of 6 April 2006, n. 174, the Italian Telematic Commodity Exchange (Borse Merci Telematiche Italiane - BMTI) and the National Deputation that, in exercising its supervisory and control functions, uses the of the management company for assistance in order to ensure the transparency and correctness of the market. It is true that public bodies control the negotiations that take place, but it also true that their presence does not prevent private autonomy from taking place.

The adoption by operators of standard contracts does not provide for the application of the civil rules for the general contract conditions contained in art. 1341 of the Civil Code, as the contract is not prepared by one of the parties but by a trade association¹¹. In fact, although

Commodity Exchanges are public structures, they have a strong component of “accettazione”, di partecipazione alle determinazioni da parte degli operatori privati»¹².

Uses constitute «un testo contrattuale [...] che può ben dirsi *predisposto unilateralmente*, in quanto viene utilizzato dal proponente quale partecipe o beneficiario di una organizzazione, che, con lungo e ripetuto studio dei propri legali e successive deliberazioni dei suoi membri, l’ha compilato e poi aggiornato nell’interesse di una determinata categoria di imprenditori»¹³.

A further problem arises here: the distinction in the application between the “clauses of use” (article 1340 of the Civil Code) and the “regulatory uses”. Emblematic in this regard is the sentence of the Court of Genova relating to the uses for the sale of cotton yarns. In the case it was stated that «gli usi di vendita per i filati di cotone, pubblicati dalla Associazione degli industriali cotonieri, vanno considerati, in quanto inseriti nella raccolta degli usi commerciali e agrari [...] non come condizioni generali di contratto, bensì come usi giuridici», pertanto essi trovano applicazione soltanto là dove manchi una corrispondente regolamentazione legislativa. Tuttavia, essi possono valere come usi negoziali «data la generale e costante osservazione per oltre un quarantennio [...] e la diffusa convinzione della necessità di una regolamentazione collettiva»¹⁴. Recognizing that the uses enter into contracts to integrate their content, as they are presumed to be intended, means that the regulations relating to them are evaluated on the level of their validity and effectiveness. As regards the effectiveness of the same uses in relation to the provisions contained in articles 1341 and 1342 of the Civil Code, the Court of Genoa argued that these clauses «se abbiano acquistato efficacia di uso negoziale [...] sfuggono alla forma ed alla sanzione dell’art. 1341»¹⁵.

9. DEZELAY, Y., (1995), *I mercanti del diritto. Le multinazionali del diritto e la ristrutturazione dell'ordine giuridico internazionale*, Milano, Giuffrè.

10. Decreto del Ministro dell'industria, del commercio e dell'artigianato del 20 dicembre 2000.

11. SANTINI, G., (1987), *Borse merci*, in *Dig. disc. priv.*, Sez. comm., Torino, Giappichelli, p. 294. In general, DONISI, C., (1991), Art. 1342, in *Codice Civile*, eds. P. Perlingieri, Napoli,

Edizioni Scientifiche Italiane, pp. 371-372. See, Cass. 6 agosto 2003, n. 11875, in *Giust. civ.*, 2003, p. 7; Cass., 29 novembre 1991, n. 12835, in *Giur. it.*, 1992, I, 1, p. 1512; Trib. Genova, 25 luglio 1949, in *Foro it.*, 1950, c. 364, with note of SCIALOJA, A., *Natura ed efficacia dei c.d. usi cotonieri*.

12. BANI, *Le borse merci*.

13. See, SCIALOJA, *Natura ed efficacia dei cd. usi cotonieri*.

14. Trib. Genova, 25 luglio 1949, in *Foro it.*, cit.

15. So, SCIALOJA, *Natura ed efficacia dei cd. usi usi cotonieri*.

In this case it seems that the provisions of art. 1342 of the Italian Civil Code which provides for the use of forms or forms¹⁶. It means that the customer adheres to the contract, or accepts it without discussing it or without being able to affect the content of the contract itself¹⁷. It is a «modalità dell'accordo, perché l'accordo c'è [...]». Anche nell'aderire c'è un concordare¹⁸. An evaluation of the practical implications of the presence of these subjects on the legal and economic scenario cannot ignore a further consideration regarding the resolution of regulated disputes. In fact, the technicality of the bargaining, the merchandise particularities of the object of the contract, the professionalism of the proponents preferring to resort to the arbitration and not the recourse to the ordinary judge¹⁹.

3.1. UNITED KINGDOM

Commodity Exchanges in U.K. reached their development in the period between the end of the 1800s and the beginning of the 1900s. The operation of these exchanges did not develop according to a predefined scheme; practice has gradually established the rules. Talking about stock exchanges or commodity markets induces to think of commercial organizations of operators governed by rigid self-discipline²⁰. Among the British Commodity Exchanges, the London Metal Exchange (LME) based in London is the most important exchange in the world for non-ferrous metals.

As regards precious metals, we mention the London Bullion Market Association (LBMA), the London Platinum and Palladium Market (LPPM).

They are over-the-counter (OTC) markets, i.e. markets whose discipline does not find place in a regulation and they are characterized by the absence of control over trading both in terms of disclosure obligations regarding prices and quantities, and in terms of control over the operations carried out by market participants. As regards food products, we recall the London Sugar Futures Market (LSFM). It is made up of autonomous associations administered by boards of directors co-opted from among the members. They are assisted by secretariats who exercise the powers that are given to them in the market regulations and that the members have conferred on them. Despite being autonomous, they are supervised by the Bank of England. These bodies, while playing a fundamental role in the economic scenario, escape procedural control as regards the rules applicable to trading operations but, at the same time, are subject to control carried out by a body that carries out monetary policy functions. The market in question provides organized services for the conclusion of contracts for the purchase or sale of goods to be delivered on a set date, in order to protect traders of basic products and goods against the risks of an unfavorable price trend. All contracts traded on the London sugar futures market must be registered with the International Commodities Clearing House Limited (ICCH)²¹, an independent company that performs certain clearing and settlement services on behalf of the LSFM. This company, endowed with substantial capital and reserves, organizes the daily clearing of the business and guarantees to the Clearing Members, in whose name the contracts are registered, the correct execution, in accordance with the rules of the LSFM. London's international futures markets, which are the main hubs for international commodity trade, contribute to the stability and smooth functioning of international trade and pricing mechanisms worldwide. A further consideration emerges that is relevant from a strictly legal point of view, albeit anachronistic to date given the departure of U.K. from the European Union: the statute and regulations of the LSFM, which have been notified, must be considered as agreements pursuant to art. 105 of the Treaty on the Functioning of the European Union. Statute and Regulations indicate

16. See, GENOVESE, A., (1954), *Le condizioni generali di contratto*, Padova, Cedam, p. 393.

17. ROPPO, E., (1975), *Contratti standard, autonomia e controlli nella disciplina delle attività negoziali di impresa*, Milano, Giuffrè; TULLIO, A., (1997), *Il contratto per adesione*, Milano, Giuffrè.

18. So, IRTI, N., *Scambi senza accordo*, in *Riv. trim. dir. proc. civ.*, (1998), 2, p. 347 ss. The author says: «La parte, che adotta moduli o formulari, rifiuta e nega il dialogo: non fa e non riceve domande, non dà e non attende risposte: o, meglio, fa un'unica domanda e attende un'unica risposta. Essa ha già esaurito la propria volontà comunicativa, ma, appunto, in un'espressione che consuma e annulla il dialogo. L'aderire non è un risultato dialogico, ma – 'come rivela l'etimo latino' – soltanto un "rimanere attaccati", un'impossibilità di sciogliersi, un'irreversibilità dell'accaduto».

19. So, COLTRO CAMPI, C., (1998), *Borse merci*, in *Enc. giur.*, 5, Milano, Giuffrè, p. 2.

20. ZECCHI A., *La riapertura delle Borse Merci in Gran Bretagna ed i criteri di controllo valutario della Banca di Inghilterra*, in *Moneta e Credito*, (1954), p. 231.

21. *Decisione della Commissione del 13 luglio 1987 relativa ad una procedura in applicazione dell'art. 85 del Trattato CEE (IV-31.764 - Baltic International Freight Futures Exchange Limited)*, in *GU* 10 agosto 1987, n. L 222, p. 24.

the minimum net commission rates applicable by members, which may be suspended or excluded if they violate the relevant rules. The minimum commission rates vary according to who pays or collects them (clearing clients / non-clearing clients).

This consideration, although anachronistic, seems to be interesting from a legal point of view. In fact, the system thus outlined was considered by the Commission as a form of price fixing contrary to the provisions of art. 105, par. 1, Treaty on the Functioning of the European Union. Therefore, the LSFM was asked to abandon the system of fixed minimum rates. All other transactions that take place between members or between members and non-members involve the payment of a commission fee. The Commission found that the latter does not limit competition, as it only entails the obligation to receive a commission without making any reference to percentages. It follows that there is complete freedom to negotiate the real percentages of brokerage fees. Once again it is highlighted by how the operations carried out within these organizations, although not governed by "national rules", contribute to regulating relevant aspects of economic relations.

3.2. UNITED STATES OF AMERICA

The birth of Commodity Exchanges in the United States of America evokes the concept of "speculation". It reports the thought of Judge Holmes who stated that «people will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain»²².

22. *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 247-248 (1905).

From a structural point of view, U.S.A. Commodity Exchanges are born as non-profit associations, whose members are natural persons, therefore, not banks, nor companies and they participate in the association by paying a membership fee. The Chicago Board of Trade (CBOT), founded in 1848 by a group of 83 businessmen, is the largest grain futures and options exchange in the world. It mainly processes agricultural commodities such as corn, oats, soybeans, soybean meal and wheat. Initially the exchange activities were based on the open auction system, today the needs of the global economy require the use of an electronic exchange system. The Chicago Board of Trade had its own regulations, so much so that part of the doctrine spoke of legislation such as «is largely the saga of a single institution»²³.

In order to counter this legislative hegemony, the legislations enacted the «anti-gaming or "anti-bucket shop" laws - in an attempt to make it as difficult as humanly possible to trade futures in Chicago»²⁴. In 1936 after Congress made changes to the regulations of the New York Stock Exchange, the Department of Agriculture issued the Commodity Exchange Act, based on the unconstitutionality of the Future Trading Act of 1921, «on the ground that the it was an attempt to regulate by means of the taxing power»²⁵. In that decision the Court stated that «sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon».

Here, it is the Supreme Court that argues that Chicago Board of Trade regulation must not overlap federal legislation. In this direction it is easy to understand that the regulation of the Chicago Board of Trade influences trading, as was stated in the case *New York & C. Grain and Stock Exch v. Board of Trade*, where we read that

23. STASSEN, J.H., *The Commodity Exchange Act in Perspective--A Short and Not-So-Reverent History of Futures Trading Legislation in the United States*, 39 Wash. & LEE L. REV. 825 (1982), p. 826.

24. See Taylor, *Trading in Commodity Futures-A New Standard of Legality?*, 43 YALE L. J. (1933), p. 63.

25. *Hill v. Wallace*, 259 U.S. 44 (1922).

the Chicago Board of trade «has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessities of life throughout the country and the world»²⁶. It seems that the law passes through the government of commerce²⁷.

The most used instrument within the U.S.A. Commodity Exchanges is the *future*, a forward contract with which you buy or sell a real underlying product, speculating on commodities. Futures are standardized contracts in which neither the quantity, nor the quality, nor the delivery methods must be indicated; therefore, if the buyer does not want to collect the goods upon expiry (futures contracts have different expirations during the year depending on the raw materials and refer to the month of delivery of the goods), he can delegate the broker to sell a future on the same raw material, or he can conclude the closest contract, in terms of maturity, and open the one with a later maturity, thus carrying out a so-called rollover operation, exposing himself to the risk of realizing a loss that could derive from the unequal price of the two contracts.

On July 12, 2007, the Chicago Board of Trade and the Chicago Mercantile Exchange (CME), specializing in the marketing of perishable products such as eggs, butter and poultry, merged with CME Group. The New York Mercantile Exchange (NYMEX) is the world's largest Commodity Exchange and is part of the Chicago Mercantile Exchange Group.

The regulation of the futures market is entrusted to an independent agency, the Commodity Futures Trading Commission (CFTC)²⁸ created by Congress in 1974. It monitors the exchanges and approves contracts, ensures that prices are disclosed to the public and that traders in futures, they disclose their positions if they exceed certain levels. It promotes the efficiency and competitiveness of the markets, protects participants from the risk of fraud and abusive commercial practices, while ensuring the

financial integrity of the compensation process. Il *Commodity Exchange Act (CEA)* controls the *futures* trading of commodity²⁹ and it has been modified by the *Commodity Futures Trading Commission Act 1974* which expanded the notion of commodities and included «all other goods and articles ... and all services, rights and interests in which contracts for future delivery are presently or in the future dealt»³⁰. The Agency's mandate has been extended several times. We recall the *Dodd Frank Wall Street Reform* of January 11, 2012. Congress has said that it is useful «[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system»³¹. In particular, it aims to reduce the risks associated with negotiations, by providing for new forms of transparency. As regards risks, the reform establishes that negotiators will be required to respect high standards of conduct in order to promote market integrity; in addition, trading on regulated markets is envisaged with the aid of the Clearing Houses. In the United States, all commodity exchanges must register with the Commodity Futures Trading Commission (CFTC), under Section 5 of the Commodity Exchange Act (CEA) of 1936, a supervisory authority established to prevent and remove obstacles to interstate trade, to promote competitive, efficient and transparent markets that help protect consumers from possible fraud and unfair practices³². The Commodity Exchange Act, which foresees its birth; is defined as «a remedial statute that serves the crucial purpose of protecting the innocent individual investor-who may know little about the intricacies and complexities of the commodities market-from being misled or deceived»³³. We highlight the intention of the federal legislator to subject the regulation issued by commodity exchanges to control in the awareness that, in

29. ENGDAHL W. (2008), 'Perhaps 60% of today's oil price is pure speculation', in *Global Research*, May, 2008, 2.

30. This amendment eliminated any distinction between regulated and nonregulated commodities and brought within the regulatory some traded commodities as cocoa, coffee, copper, foreign currencies, iced broilers, lumber, mercury, palladium, platinum, plywood, propane gas, silver, sugar and silver coins. 7 U.S.C. § 2 (1976).

31. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

32. COMMODITY FUTURES TRADING COMMISSION, *Data Repositories*, August 17, 2021.

33. This definition is contained in SCHWARTZ, G., *Deriving an Understanding of the Extraterritorial Applicability of the Commodity Exchange Act*, 91 St. JOHN'S L. REV. (2017), p. 774.

26. *New York & C. Grain and Stock Exch. v. Board of Trade* 127 Ill. 153, 161, 19 N.E. 855, 858 (1889).

27. REICH, A., *The Wto as Law-Harmonizing*, in *Journal Int. E. L.*, (2004), p. 362.

28. See www.cftc.gov/lawregulation/doddfrankact/index.htm.

general, alongside states and positive rights, there are other sources of production of law headed not by sovereign political wills but by economic, social and cultural forces. The old monism³⁴ is being replaced by a large juridical pluralism that produces decentralization, fragmentation and privatization. In this direction, the law frees itself from the monism, demanding di veder riconosciuta la sua effettiva articolazione pluralistica, il suo distendersi a rivestire le coagulazioni sociali più svariate»³⁵.

4. TELEMATIC COMMODITY EXCHANGE

A fact that should be noted today is that Commodity Exchanges are (also) telematic platforms, and this is not without legal consequences. The Italian Telematic Commodity Exchange (BMTI) was born, as already mentioned, from an initiative of the Chamber system with the aim of modernizing its services in support of the marketing of agri-food products and giving transparency to the price formation mechanism. The negotiation of goods takes place through the Authorized Intermediation Entities (Soggetti Abilitati all'Intermediazione - SAI), who collect and manage the orders of the operators accredited to the BMTI. It is possible to carry out transactions both for commodities and for typical and quality products. Accredited operators can also make use of ancillary services to bargaining, including credit insurance and financial services, to guarantee and support their business. The negotiation of products takes place on the basis of a regulation that concerns all aspects of the operations, the characteristics of the products, and the structure of the sales contract, as well as the procedures for managing disputes. In a cost-competitive environment, electronic exchanges are becoming more and more popular. The most important Telematic Commodity Exchange in Europe is the Intercontinental Exchange (ICE). The only physical commodity exchange left in Europe is the London Metal Exchange. The LME is the world center for industrial metals trading - more than three-quarters of all non-ferrous metal futures assets are traded there. As for the U.S.A. Telematic Commodities Exchanges, the New York Mercantile

Exchange has introduced electronic systems for the exchange of goods since 2006. Here it highlights a very important aspect regarding the trade of goods with foreign operators as it exists «the primary impediment to such actions is the presumption against extraterritoriality, which embodies the longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States»³⁶.

In the trading system, the eclipse of legality can be traced back to cases of contractual fraud. The market is the result of agreements between operators free to decide: entrepreneurs and consumers. The principle on which the market is based is compliance with agreements. Fraud pollutes the agreement and, if widespread, destroys the market.

Private contract law is not enough to regulate business. The complexity of the phenomenon requires that the law be sophisticated in order to protect the parties from possible fraud. Market regulation aims to limit business risks to the physiological risk of the economy. In this context, an important role is played by ethics which can prove to be an instrument of protection of the law.

5. COMPARATIVE PROFILE

The comparative analysis conducted, beyond the identification of the similarities and differences between the different Commodity Exchanges discussed, highlights an important aspect: the possibility of a regulation of the economy, different from traditional public intervention, highlights the heteronomous predisposition of the rules of economic action.

The comparative methodology has allowed us to identify the legal system that better than the others is able to check the regulation prepared by these organizations, which, as is well known, do not have any legislative power. We refer to the U.S.A. legal system: here, both Congress and the judicial organization carry out a careful "evaluation" of the rules set up by these organizations. Proceeding in the comparative analysis, with reference to the Telematic Commodity Exchanges, once again it is the U.S.A. legal system that reserves greater control over the rules established by them. In fact,

34. ROMANO, S., (1969), *Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale*, Milano, Giuffrè.

35. GROSSI, P., *Santi Romano: un messaggio da ripensare nella odierna crisi delle fonti, lectio doctoralis, del 24 ottobre 2005, Aula Magna della Università di Bologna*.

36. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266-85 (2010).

the telematic operations carried out by foreign operators are subject to a control identified and described by the Supreme Court in the *Morrison's case*. The Court has foreseen two phases to identify the presumption of extraterritoriality: in the first phase, the Court must verify whether the Congress has clearly stated that the organization's rules also extend to foreign operators. If this is not foreseen, the Tribunal must begin a second phase «of the analysis which asks whether the case involves a permissible domestic application of the statute»³⁷. From the analysis of the case law, seems emerge clearly the intention to protect the negotiations of goods that take place between national and foreign operators in a globalized market.

This consideration recalls the Commodity Futures Modernization Act (CFMA) 2000, which provided more flexible regulation³⁸ regarding the participation of foreign entities in stock exchange trading. It established that «board of trade shall endeavor to avoid [...] imposing any material anticompetitive burden in trading on the contract market»³⁹. The comparative study carried out highlights that in the face of the progressive weakening of state (or federal) sovereignty we find ourselves in the presence of legal rules that are no longer a finished product but a work in progress⁴⁰, determining legal solutions that govern economic relations and that end up forging also the choices of state proponents. This juridical mosaic requires a political and institutional restructuring, through the reorganization of the power structure. In this perspective it becomes useful to bear in mind that «il diritto, nella sua autonomia, forte delle sue radici nel costume sociale, ha vissuto e vive, si è sviluppato e si sviluppa anche al di fuori di quel cono d'ombra, anche fuori dei

binari obbliganti del cosiddetto diritto ufficiale: conseguenza inevitabile di non essere dimensione del potere e dello Stato, ma della società nella sua globalità»⁴¹.

In the reconstruction work undertaken so far, nothing can and should appear to be taken for granted. The inadequacy of a legal construction reduced to conceptual geometries elaborated in the shadow of the positive norm and constantly in tension between the tradition of legal science and the principles, rules and legal institutions handed down within a reality⁴², requires reflection further. The law cannot escape the recognition of the truth and its ascertainment.

There can be no absolute contrast between authority and legal reason⁴³. The "good" legislator is obliged to combine the "legal certain", which derives from authority, and the "truth" that derives from reason⁴⁴. The citations relating to the law-truth relationship would be too numerous to mention and a sterile listing of them could mislead and eliminate legal implications that could derive from them⁴⁵.

It is enough to recall a passage from the Psalms where we read that «your law is certain»⁴⁶, and again «Faith comes up from the earth like a plant; righteousness is looking down from heaven»⁴⁷. The goal of the law is justice⁴⁸.

37. See *Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2101 (2016).

38. FALVEY, J. M. & KLEIT, A.N., *Commodity Exchanges and Antitrust*, 4 BERKELEY Bus. L.J. (2007), p. 134.

39. *Commodity Exchange Act*, 7 U.S.C. § 7(d)(18) (2006).

40. FERRARESE, M.R., *Le istituzioni della globalizzazione*, p. 59.

41. GROSSI, P., (2207), *Mitologie giuridiche della modernità*, Milano, Giuffrè, pp. 62-63.

42. GROSSI, P., (2000), *Scienza giuridica italiana. Un profilo storico 1860-1950*, Milano, Giuffrè, p. 302.

43. VICO, G.B., *De uno universi iuris principio et fine uno*, cap. LXXXII.

44. MOLINARI, P.V., *La verità nell'ordinamento giuridico*, *Conversazione tenuta il 29 ottobre 2004 in Cosenza nella sala dell'Accademia Cosentina*.

45. See PINTORE, A., (1996), *Il diritto senza verità*, Torino, Giappichelli.

46. SALMI, *Cap. 119*, v. 142.

47. SALMI, *Cap. 85*, v. 11.

48. VIOLA, F., *Diritto vero e diritto giusto*, in *Persona y Derecho*, (1991), 24, p. 256.

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