The Berger Case: Food Risk and Public Information. Professional Secrecy and Reputation. Judgement of the Court of Justice (Fourth Chamber) of 11 April 2013.

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In its recent Judgement of 11 April 2013 the Court of Justice had the opportunity to adjudicate on the interpretation of Article 10 of Regulation 178/2002 and how the obligation to inform the public of food risks is regulated. Since the communication of a food risk can potentially have devastating economic effects, Food Law specialists would be very interested in any judicial interpretation providing criteria to help assess when and how food authorities should inform the public of a food risk. Although the Judgement does not specifically elaborate on this question – the interpretative criteria – but rather on when the authorities are able to communicate a food risk or, more specifically, when they are not prevented from doing so, this is still an interesting decision because it deals with an extremely important matter: the question of the balance between the right to information and the right to reputation in the food sector.

I. The background of the case

The facts of the case are described in the Judgement.

On 16 and 18 January 2006, the Passau Veterinary Office (Germany) carried out official inspections in several establishments of the Berger Wild GmbH business group (Berger Wild), a game meat producer and distributor. The authorities found that the hygiene conditions were inadequate and took samples of the game meat concerned, which were sent for analysis to the Bavarian Health and Food Safety Authority. Those analyses led to a finding that the food in question was unfit for human consumption and consequently was unsafe within the meaning of Regulation 178/2002.

After considering Berger Wild's observations in relation to that finding, the Bayerisches Staatsministerium für Umwelt, Gesundheit und Verbraucherschutz (Bavarian State Ministry for the Environment, Health and Consumer Protection), sent a fax on 23 January 2006 declaring its intention to inform the public that the food items in relation to which anomalies had been detected during the inspections were unfit for human consumption. The Ministry moreover communicated to the company that it would not inform the public if the company itself notified the public effectively and promptly.

Berger Wild objected to the proposal to inform the public on the basis that it was disproportionate. It proposed to issue a 'product warning' inviting its customers to attend their usual retail outlet in order to exchange the five game products listed in that warning. While the products might exhibit sensory anomalies, there was, in its view, no risk to health.

The Minister for Consumer Protection of Freistaat Bayern issued three press releases dated 24, 25 and 27 January 2006 announcing that game meat products marketed by Berger Wild were to be recalled and that, during inspections of three Berger Wild establishments, revoltingly unhygienic conditions had been encountered. Furthermore, the Minister informed the Bavarian State Parliament about the situation of Berger, and the European Commission issued a food alert through the rapid alert system for foodstuffs and animal foods of the European Union.

Berger Wild considered it had suffered considerable losses as a result of the press releases issued by the Freistaat Bayern authorities, and brought an action for damages against Freistaat Bayern before the Landgericht München I (Regional Court of

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Munich), in which it argued inter alia that Article 10 of Regulation No 178/2002 allowed for the public to be informed only where there was an actual threat to health, but not where the issue was merely foodstuffs unfit for human consumption.

The referring Court, in the context of its preliminary assessment, regarded the warnings issued to consumers on the basis of German Law as lawful, but nonetheless questioned whether the applicable German Law complied with Regulation 178/2002. The referring Court asks in essence whether Article 10 of Regulation 178/2002 must be interpreted as precluding national legislation allowing information to be issued to the public, mentioning the name of a food and the name or trade name of the food manufacturer, processor or distributor, in a case where that food, though not injurious to health, is unfit for human consumption.

II. The question to be decided

Since Article 10 of Regulation 178/2002 places public authorities under an obligation to inform the public where there are reasonable grounds to suspect that a food or feed may present a risk to human or animal health, does that provision prohibit public authorities from informing the public where a food is unfit for human consumption whilst not injurious to health? (A prohibition that the Court admits is not specified in the text of Regulation 178/2002.)

The Court analyses the option to inform the public from the standpoints of two different legal obligations. The first is the obligation of Member States to maintain a system of official controls and other activities as appropriate to the circumstances and to communicate food safety risks to the public. This obligation is detailed in Regulation 882/2004, which provides that, on the one hand, the public shall have access to information on the control activities of the competent authorities and their effectiveness and, on the other hand, the competent authorities shall take steps to ensure that members of their staff are required not to disclose information acquired when undertaking their official control duties which by their nature are covered by professional secrecy in duly justified cases.

The second consideration is the legal definition of safe food as food that presents no risk to human health and is fit for human consumption, a concept that goes beyond strict safety considerations to protect other interest of consumers.

The Court concludes that where food, even if not injurious to human health, is unfit for human consumption, national authorities may, as provided under the second subparagraph of Article 17(2) of Regulation 178/2002, inform the public thereof in accordance with the requirements of Article 7 of Regulation 882/2004.

III. Which is the balance of rights?

The Judgement does not provide much information on the question of when the authorities must or can inform the public, other than stating that this communication is not restricted to public health issues, since such communication is a legal obligation when public health is at risk and optional in other cases. Therefore, the main interpretative criteria when taking such decisions will stem, in my opinion, from the application of the principle of proportionality. This implies balancing all different legal goods at stake, public health and other economic interests of consumers as well as the protection of the reputation of legal persons, particularly taking into account both the importance of the protection of health and other consumers' interest and also the enormous losses a communication of this kind can produce (as proven by the fact that *Berger Wild* went into insolvency following the press releases). Respect of the principle of proportionality is explicitly required by the applicable German legislation, is implicitly required by European Law, and its application to the case was not questioned by the referring Court, which limited the scope of the decision of the Court of Justice.

Nevertheless, the Court of Justice does not limit itself to assessing the compatibility of national legislation with the specific applicable European legislation as required by the referring Court (in this case, with Article 10 of Regulation 178/2002), but expands the applicable European legislation to Regulation 882/2004 in order to support its interpretation. Article 7 of Regulation 882/2004 provides for the right of the public to have access to information on the control activities of the competent authorities, a right to be informed that is limited by respect of professional secrecy in duly justified cases.

The Judgement takes into consideration the right of the public to be informed of food risks even if

these risks do not affect public health. This consideration stems from the very ample definition of safe food contained in Regulation 178/2002, a definition made by reference not only to health but also – to a certain extent – to quality. The right of the public to be informed about unsafe foods is only limited, in duly justified cases, by the protection of professional secrecy. It would appear therefore, as if it were with respect to professional secrecy that the balance of rights were to be made, by reference to Article 7 of Regulation No 882/2004. However, in my view, the balance of rights should be made not with respect to the right to protection of professional secrecy but to the right to reputation, which is distinct from professional secrecy. Both are a company's intangible assets which can be measured economically, but they refer to different property rights.

In this case, the referring Court, the *Landgericht München I,* was questioning the capacity of the German authorities to communicate the name of the company that produced and placed the product on the market. The name of the food producer is not a secret. A secret would be, for example, the price at which the product is sold to a retailer, a food recipe or formula, a marketing plan or any other internal business information. By focusing on the tension between the right of the public to be informed of food inspection results and the protection of professional secrecy, instead of the right of a person – a legal person, a company – to preserve its reputation, the Judgement, in my opinion, misses the opportunity to adjudicate on the real balance of rights and to apply the principle of proportionality. The approach of the Court is coherent with applicable European Regulations, which ignore the right to reputation when dealing with the communication of food risks, in the sense that they do not specifically regulate it.

It is true that the Court of First Instance (Third Chamber) in its Judgement of 12 October 2007 (Case T-474/04) already considered that the protection of reputation can be covered by professional secrecy and is linked to respect for the presumption of innocence. However, it is my personal view that the current legislation does not correctly take into account the economic impact of the communication of food risks and that professional secrecy is not very well tailored to protect the truly important issue: reputation.