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DISCLOSING INFORMATION IN THE CASE OF FOODS

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DISCLOSING INFORMATION IN THE CASE OF FOODS

I) Introduction and scope of the problem.

- Disclosing information in the context of food risk communication
- Protection of public health by means of disclosing information and economic consequences
- The balance of rights: the rights at stake

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II) Disclosure of information to protect health

In general European Law

- Health protection

Articles 168 and 169, in relation to Article 4.2.f and k of the TFEU. The attainment of a high level of health protection must be ensured in the definition and implementation of Community activities and policies and the Community will contribute to the protection of the health of consumers.

- Access to information

Article 2 and 8 of the European Convention on Human Rights, as interpreted by the ECJ of Human Rights in the Guerra case and Öneriyildiz case, imply the obligation of Authorities to inform consumers of any serious health risk -including risks posed by food- of which they may be aware.

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Article 15.3 of the TFEU regulates the right of citizens to obtain access to the documents of the European institutions, a right that must be balanced with other public or private interests.

Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001, governing public access to European Parliament, Council and Commission documents and establishing the right to access the documents of institutions, within the limits of Article 4 of the same Regulation.

Among these limits is the protection of the commercial interest of natural and legal persons.

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In the specific field of European Food Law

- Health protection

Articles 1 and 5.1 of Regulation 178/2002 (GFL). One of the objectives of Food Law is to provide the basis for the assurance of a high level of protection of human health.

- Access to information

Section 2 of Chapter II of GFL, sets up the principle of transparency

Article 10 of GFL grants the right of consumers to be informed of health risks and the obligation of authorities to inform them. This right to information is not absolute but will depend on the nature, seriousness and extent of the specific health risk and the information provided to the consumer on that risk must be “appropriate”.

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Article 23. j) of GFL . One of the missions of the European Food Safety Authority is to ensure that the public and interested parties receive rapid, reliable, objective and comprehensible information in the fields within its competency.

Articles 19 -for food operators- and 20 -for feed operators- of GFL. Food and feed companies have the obligation to inform consumers and the authorities of the existence of any health risks of which they are aware or have reason to suspect.

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III) The protection of professional secrecy.

In general European Law

Article 339 of TFEU protects professional secrecy

In the field of specific European Food Law

Article 52 of GFL specifically conditions the use of the Rapid Alert System to the respect of the requirements of confidentiality and professional secrecy, except when the publication of this information is required to protect public health

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Article 7 of Regulation 882/2004 on official control on foods provides that the public shall have access to information on the control activities of the competent authorities and their effectiveness and, at the same time, provides that the competent authority 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.

Information covered by professional secrecy includes in particular:

- the confidentiality of preliminary investigation proceedings or of current legal proceedings;
- personal data;
- the documents covered by an exception in Regulation (EC)1049/2001 regarding public access to European Parliament, Council and Commission documents
- information protected by national and Community legislation concerning in particular professional secrecy, the confidentiality of deliberations, international relations and national defence.

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IV) The balance of rights

- Legal requirements of food risks communication.

Article 10 of GFR conditions the taking of informative appropriate action to the existence of reasonable grounds for suspecting that a health risk exists.

Article 50 of GFR conditions recourse to Rapid Alert System for food and feeds to the existence of a serious direct or indirect risk to human health.

There must exist a risk to public health (In case of refusal of imports on public health grounds, criteria set up by ECJ rulings in the cases *Van der Velt* C 17/93 and *Bellamy* C 123/00) and no hypothetical conception of risks is acceptable (in case of the precautionary principle, criteria set up by ruling of the Court of First Instance, Third Chamber, in the case T-70/99, *Alpharma*).

Respect of the principle of proportionality (General principle of EU Law, meaning that no other less restrictive mean can be used to achieve the legitimate result)

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The rights to be balanced, as interpreted by the ECJ

- Judgment of 12 October 2007 of Court of First Instance, Third Chamber in case T 474/04. The protection of professional secrecy is covered by the right to the presumption of innocence.
- Judgment of 11 April 2013 of the ECJ, case 636/11. The Berger Case

In this case, the Court of Justice had the opportunity to adjudicate on the interpretation of article 10 of GFL and how the obligation to inform the public of food risks is regulated.

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The facts of the case. Informing the public of the discovery of unsuitable conditions in the production of foods although public health was not at risk. This information caused enormous economic losses and, eventually, the bankruptcy of the company.

Is this action authorized and covered by the principle of proportionality?

The Judgment 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 article 14 of GFL

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According to the ECJ, the right of the public to be informed about unsafe foods is only limited, in duly justified cases, by the protection of professional secrecy.

However, in my view, the balance of rights should be made not with respect to the right to the protection of professional secrecy but to the right to reputation, which is different to 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.

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V Conclusion.

- It is about reputation!!

It is my personal view that the current legislation is not correctly taking into account the economic impact of the communication of food risks and that professional secrecy is not very well tailored to protect what is the truly important issue (economically): reputation.

- Thank you

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Thank you

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