rivista di diritto alimentare
www.rivistadirittoalimentare.it
Anno V, numero 2 · Aprile-Giugno 2011

Risk Communication

Vicente Rodriguez Fuentes

1.- My report is about Risk Communication and its legal problems. The theme could sound a bit abstract, considering that I have to explain some kind of problems, which are difficult to understand if you haven't seen them happening. But today, we are having this food alert on Spanish cucumbers that has shown the power of this system communication of risk and its strong impact on the market and I think it will let us understand better the problem of risk communication.
First of all, we define risk communication. There are two ways to look at the definition. On one hand, the definition contained in Reg. 178/2002, which defines risk communication mainly as an administrative mechanism, as an administrative tool, concerning the process of taking the decision of communicate the risk. But, in my opinion, this definition has forgotten what it is most important thing in communicating the risk: the impact on the market. The economic impact has a clear effect on companies' rights. In this sense, I will refer only to this external aspect of risk communication, because is the one that has the main relevance for practitioners of law.
What do authorities have to take into consideration in deciding to start a risk communication? They will need to balance the protection of public health and the right of consumers to be informed on food risks, on one side, and the protection of the reputation of companies and products, on the other side. Reputation is very sensitive to communication in the market and it can be very badly damaged by every marketing communication. In taking into consideration this two different rights, we see that they do not have the same value: of course it is more important to be alive than to have a property. Authorities give priority to protection of public health. But the question is: how far can we go in protecting health? And how much are we going to impact the economic rights of the involved companies ?
The principles to follow in this balance are proportionality and precaution. The first one implies that any measure taken by the authorities must be necessary and, whether it is possible, not too aggressive to companies' economic rights and products. The second principle means that in order to react to the protection of public health, authorities do not need to have a full and complete scientific evidence of the health risk. The precautionary principle does not cover hypothetical concept of risk and there have to be some kind of scientific evidence, even if it is not complete.

rivista di diritto alimentare
www.rivistadirittoalimentare.it
Anno V, numero 2 · Aprile-Giugno 2011

The problem of risk communication is the impact on the market. When authorities decide to do a full risk communication (see the case of these days of cucumbers) its impact on the affected companies surpass many times the biggest fine or sanction that can be imposed to a company. In fact, many companies affected by important risk communications just disappear. The losses of the crisis that there is now in Germany it is calculated in Spain at around 27 million Euro per day. At the same time, there is no regulation of due procedure. There can be an administrative action with heavy impact on affected companies, but there is not a proper procedure regulating the ways by which a decision of risk communication can be or can't be adopted.
What we have are some rules and principles contained in different regulations, regarding how these kind of decisions are taken. First of all, there have to be legal premises for risk communication. When a decision that can be an impact on public opinion is taken, the danger for health must be serious and imminent. If the danger is not imminent there are other several less aggressive approaches that authorities are able to take, like an acting regulation.

2.- The second problem regards competent authorities and binding decisions. To identify competent authorities to take the decision it must be checked if the legal requirements are fulfilled: due procedure, legal basis for the decision. The rapid alert system is a decentralized system where there are at least three kind of different authorities that intervene: there is one initiating authority that decides to communicate to the network the existence of an health problem; an authority that makes the system running and takes the decision to communicate to the rest of the network that a risk communication has been made; the implementing authority, that has to react accordingly to the risk.
Who is competent to take the decision and who is responsible for that decision? These things are not clear. There was a case in Spain where an health risk was announced by the Ministry of Health and implemented by the autonomous government. Before the Court, Ministry said that they have only made an advice and that the reaction of the autonomous government was not in their responsibility. The Spanish Supreme Court answered that by giving the task to the autonomous government to implement a measure, the Ministry of Health did not give to it any choice, except reacting immediately. Consequently, the Ministry was responsible for the autonomous government reaction.
There were also some cases in which companies tried to stop food alert and challenged the European Commission, asking to stop the spread of food alert or to assume the responsibility for it. In both cases, the European Court of Justice decided that there was no causal link between the damage and European Commission's activity.

rivista di diritto alimentare
www.rivistadirittoalimentare.it
Anno V, numero 2 · Aprile-Giugno 2011

So, who is responsible for this kind of damage ?
There is a specific Regulation for risk communication which is Regulation 16/2011. It is a very new one and it regulates the system. It is about how communications between authorities shall be made, how the templates shall be used, but has very few references on how to stop food alert. So the system of the regulation is unsatisfactory.

3.- Finally, implementation of risk communication is a matter of National law.
Which are the remedies to risk communication for a law practitioner? First of all, it is possible to challenge risk communication itself and try to annul what the authorities do by putting into question the basis on which the measure has been taken. But this is not easy, because when it is taken a measure on public health the authorities have a large discretionary power and it could be difficult for the Court to examine their behavior and decide if a decision is taken properly or not.
Another remedy is reversing the effect of the risk communication and try to compensate the damages suffered by the affected companies.
Regarding some examples of case law, in cases in which the Court decided to annul a food alert because there were no legal basis to take it, there were different approaches on compensating the companies. In my opinion, it seems that Courts always try to find an excuse not to go deep in the compensation field, for example denying the existence of a causal link between authorities' activity and companies' effective damage. Sometimes, also when they recognize that a food alert is not legal based, they say that in any case companies are responsible for the products they put on the market and consequently not entitled to receive a compensation.

4.- In conclusion on the legal problems arising from a risk communication, because there is no a proper legal procedure the best way to control risk communication is to control the legal premises upon which a risk communication is made and the effective legal challenge of these premises should allow reversing both the communication and its effects. Maybe it is a matter of a new regulation trying to find out a way to compensate these damages or, in my opinion, it could be sufficient the application of general principles of liability, responsibility and extra-contractual responsibility. But nowadays, the answers to these problems are still not satisfactory.