LEGAL PROBLEMS ARISING FROM A FOOD ALERT

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Food Alerts are a new kind of administrative activity with important effect on affected parties, a new kind of legal action which poses new legal problems, problems that are not always well contemplated in Food Alert Regulations.

Legal Problems arising from the Food Alert System in Europe and Spain

I) Intro

Food alerts are designed as a tool for the communication of food risks. Food alerts are instant, rapid, like an alarm bell, intended to be raised in case of serious risk to public health. The system is powerful and its internal working has been carefully designed by a specific Regulation[1] that determines who transmits and receives the information and how it is to be transmitted.

However, no similar attention has been paid to describe when the alert is necessary or, more exactly, when the consequences of the alert are proportionate, *necessary* in the words of the European Court of Justice[2]. As a matter of fact, the regulation of food alerts presumes that its scientific justification and economic impact are correct.

A food alert is more than an internal network of communication; it is an administrative action whose effects can potentially be disastrous for affected companies. The impact of the food alert can very easily surpass that of any possible sanction. We only need to remember the alert on Ecoli and Spanish cucumbers which is said to have led to losses of 20 million euros per day (affecting not only cucumbers and not only Spanish

[1] Regulation 16/2011 in relation with articles 10 and 50 of Regulation 178/2002.
[2] EJC C 217/99

products). Many companies affected by a food alerts went bankrupt and disappeared.

But in spite of this potential impact, no specific procedure is required to adopt the decision to communicate the risk. The recall of products is not considered a sanction nor an expropriation. The food alert is issued without prior contradiction, no respect for the presumption of innocence applies, no typical procedure divided into different stages where parties can defend themselves, present their arguments, use the pieces of evidence that they have at their disposal, exist and so on.

Does due process applies to the food alert system?

The fact is that, due the legal nature of a food alert, its economic consequences, its relevance to public opinion (affecting national culture, as is food), companies affected by a food alert must defend their rights by means of legal instruments that are not always adequate to this new reality and that pose a number of specific legal problems that I would like, very briefly, to outline, without intending to give any answers (although of course, I have my ideas), but rather to share your experiences and discuss possible answers with you.

II) Some of the problems of food alerts

1) The problem of Legal Standing

The first problem that, as a lawyer, I would face would be that of legal standing to contest a food alert, since without legal standing no legal/judicial debate on the alert is possible.

We all know that to contest an administrative activity, which a food alert is, all legal systems require contenders to have a standing in the case. The actions of the European Commission (like transmitting a food alert through the rapid alert system) can be only challenged by the persons to whom this decision is directly addressed. In Spain, you are required to demonstrate that you have a legitimate interest in the case and, I guess, all legal systems require similar interest in the case.

But food alerts can be confidential, sometimes no company or brand is mentioned and the effect of food alerts can easily be felt by companies who do not deal with the product mentioned by the alert, just because they happen to manufacture a similar product or belong to the same country and are affected by the panic some food alerts unleash in the market. On top of this, if the food alert is international, the content of the

alert and its effects are often the result of the original alert plus the particular interpretation of the different national authorities.

The result is that, in some cases, affected companies are not the direct subject of the text of the alert and have first to demonstrate how the alert has affected them directly and demonstrate a causal link between the alert and its effects, in a context where these effects are amplified by the reaction of the market. This is a legal task that is not always simple, because a very strict interpretation of who is affected by the alert could limit the right of some parties to legally act against it.

2) The problem of identifying the responsible authority

A food alert can involve three different levels of public authority. I will call them the initiating, the transmitting and the implementing authorities. These authorities are numerous, based in many different countries and connected through the network of the rapid alert system.

Therefore, one of the main legal problems that face a company affected by a food alert is to identify the contender; who is responsible for the consequences of the alert. In my experience (particularly when a food alert appears disproportionate), different public authorities tend to pass the responsibility onto each other, by saying –the initiating authority- that they simply communicated to the network an information that seemed to justify the alert, but cannot be held responsible for the reaction in other countries or markets. Then, the transmitting authority justifies its action by saying that it has to act when a serious health risk is communicated to them, without questioning the information due to its urgency. In the same manner, implementing authorities affirm that they have no choice but to react and implement the alert that has been communicated to them.

Therefore, if we want to contest the alert (because we believe that is not justified), if we want to stop it and reverse its effect, who do we challenge? Can we afford to sue a foreign authority or to start several legal proceedings in different national jurisdictions? And what would happen in

case of contradictory Court decisions? The answer to these problems in the context of a national legal system is relatively straightforward, because there are rules to determine the appropriate jurisdiction taking preference over the rest. But this does not happen in a food alert, an international, complex and instant administrative action.

The careful –and economically affordable- choice of the responsible authority, in a case where the consequences of the alert could be attributed to the joint action of several authorities, is another difficult legal problem that we face when confronting a food alert.

3) The control of legality of the alert

The legality of the alert can be assessed, like with any other administrative decision, by its correct formal production and by its legal premises.

i) A food alert must be formally justified (in the sense that a sufficient documentary file should exist to help us understand and to question the reasons for the alert) and must be issued by the competent authority, which communicates the food alert through the food alert network. Moreover, it can be the case that the worse effects of a food alert are produced by its communication to the public because this damages the reputation of the product and can produce panic on the market with terrible economic consequences.

Is a press conference an administrative action that can be challenged at Court? How do we control that this communication is made by the competent authority? Is any authority more competent or are all equally competent? Has the issuing authority a greater interest and responsibility than the rest?

As a matter of fact, it is frequently the case that the authorities tend to communicate more when the food alert is provoked by a foreign product. In my opinion this is not only for economic reasons – to be more careful with local interests- but also because a food alert is a powerful means of creating public debate, a debate where both the terms of the debate and

the argument are favorable to the issuing authority (this could better explained by the next speaker, an expert in communication) and were the stereotypes concerning foreign food always play a role (a foreign food producer easily becomes a foreign food product and a foreign food product easily becomes all foreign food products coming from that country or, at least, those food products in that country loosely related to the food affected by the alert) .

Again, we face an important legal problem. How do we defend reputation when it is affected by information unleashed by a food alert? How do we control the formal legality of that information?

ii) A second question is: can we challenge the reasons given for the alert?

A food alert is only possible in response to a serious risk to health. Any other kind of risks – that is, less serious - would justify a different protective action but not a food alert. In a similar way, the extension and scope of the alert, the number of products and countries affected, the content and extension of its communication to public opinion (if there is a need to make the alert public at all) is only justified in case of a serious health risk that cannot be dealt with by less drastic action. This is a requirement of the principle of proportionality, a principle that must be interpreted also in accordance with the precautionary principle, which permits to take action even if the risk is not fully demonstrated, but does not cover actions based on a merely hypothetical assessment of risks.

To revise the factual premises of an administrative action in the field of food risk and public health, where important personal rights are at stake, where authorities enjoy a great degree of discretion and have –justifiably- great powers of intervention, is a legal problem formidable in itself. But at least in this case, this is a legal debate that administrative and judicial procedures are ready to deal with and leave the affected company the possibility to argue and challenge the correctness of these premises.

4) The problem of halting the alert

In any case, it is clear that initiating, implementing of refusing to withdraw a food alert is an administrative decision that can be challenged at the appropriate Court and there are judicial precedents that support this position. As far as I know, a food alert has been annulled in Spain by the Spanish Supreme Court and, similarly, the decision of the Commission not to cancel an alert has been revoked by the European Court of Justice.

However it does not seem legally feasible to obtain an injunction that orders all administrations in all different countries to stop the alert. In fact, Regulation 16/2011 expressly rules that a food alert can be modified or withdrawn, but always with the consent of the initiating authority.

Moreover, another legal problem we face when confronting an alert is that of its legal nature. Since the alert is a mere internal communication through a rapid communication system, it could be considered an interim rather than a final act. Sometimes the authority has denied that it is an administrative act at all. This interpretation on the nature of the food alert has been defended by the administration in some cases where I have intervened. In their view, a food alert is something more than a mere procedural step, but is not a final administrative decision but a *tertium genus,* an intermediate act that cannot be challenged in the administrative courts. In this interpretation, the Courts could only review the

administrative implementation of the alert, for example, a recall of products-. This interpretation (that would leave out of the world of the law, so to speak, the consequences of the alert provoked by the reaction of the market, or the decision to call for a press conference informing of the alert) was excluded by the Spanish Supreme Court.

But it is a reality that the loose legal nature of the food alert makes challenging it more difficult than other administrative decisions, whose consequences are less aggressive that those of the food alert.

5) The problem of removing the effects of the alert

I have no doubt that initiating, implementing or refusing to withdraw a food alert are administrative decisions that can be successfully challenged in the appropriate Court, as has been the case at the Spanish Supreme Court and the ECJ.

However when it comes to removing the effects of the food alert, compensating the damages caused to the affected company, or establishing the extra-contractual liability of the State (or the European Institutions) for a food alert, the answer in the Courts appears to be different. So far, to my knowledge, there have been few cases in Europe where the Court has granted compensation to affected companies.

The European Court of Justice has up to this moment refused to compensate the damages caused by an unjustified food alert, in the Bowland dairy and Malagutti cases. Similarly, the Spanish Supreme Court annulled an alert but refused to compensate for damages on virtually - in my opinion- opposite merits, in the pommace olive oil cases. Something similar happened when the Spanish Supreme Court annulled a communication of risk affecting meat products but refused to compensate damages alleging the lack of a causal link.

The fact is that, in my opinion, Courts tend to be reluctant to admit the extra-contractual liability of the State, in cases like food alert where the

administration enjoys a great degree of discretional power in the protection of public health, a right that takes preference over economic considerations. It seems to me as if the Courts were, somehow, reluctant to limit the ability of the administration to react in cases of risk to public health by making the Administration responsible for an action that the Court has, otherwise, no problem declaring illegal or disproportionate. It seems as if it is one thing to decide that the administrative decision is not justified but a different matter to adjudicate on who is to bear the economic consequences of this unjustified administrative decision.

However, even if the right to health is –without any doubt- more important that the right to property, a balance of interests must always exist. Companies are responsible for the safety of the food products they place in market, but no one should be deprived of their property without sufficient reason and adequate and prompt compensation.

To make matters more complex, the damages caused by a food alert are very frequently (particularly in the worse cases) the consequence of the reaction of the market, sometimes amounting to panic, rather than the result of the direct intervention of the authorities. Therefore, another legal problem comes from the existence of a causal link between action and damages, a causal link which must be clearly demonstrated and which the European Court of Justice has, so far, interpreted in very strict and limited terms.

III) Conclusion

By way of conclusion, the Food Alert represents a new kind of administrative activity with very transcendental effects. This administrative activity has not, in my opinion, been properly regulated nor remedy to its consequences (if unjustified) been properly taken into account by administrative law. The traditional legal and judicial means of control of governmental activities and eventual compensations are, in my opinion, inadequate to this new reality.

A legal regulation of food alerts where the procedure, justification and compensation were better defined would do no harm to public health protection and would favour legal certainty and justice. Within the rule of law, the ends do not always justify the means...

Thank you.

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Abogado