



A Food Alert: Legal Justification and Economic Consequences



LEGAL
AGRIFOOD
ABOGADOS

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Two cases by means of introduction:

Spanish Olive Pomace Oil Food Alert

- The product is accused of high content of HAP
- There was no regulation on HAP levels, therefore there was no specific infringement. Risk to health was not imminent either
- The product was recalled and withdrawn, which provoked a media scandal and an abrupt fall in the value of the product
- Even though the alert was declared null and unjustified no compensation was granted

Ukrainian Sunflower Food Alert

- The product is accused of containing mineral oil
- There was no specific regulation and EFSA declared that there was no significant risk to health
- The product was recalled from the market and, a month later, a Commission Decision forbade the import of all Ukrainian Sunflower Oil
- The product was recalled and withdrawn, which unleashed a media scandal and an abrupt fall in the value of the product

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In both cases:

- Recall and withdrawal of product provoked panic in the market
- There was no specific infringement
- There was no serious nor immediate risk to health
- The producers and owners of the product had to bear enormous losses.

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The question is, are these losses justified?

- Food alerts are designed as an immediate and interim action. It is an administrative action that affected parties find very difficult to contest
- The food alert is not legally defined. I call a food alert the result of the reaction of the market to information provided by authorities on the risk presented by a food product
- There is no specific regulation on the procedure to communicate the risk to the public:
 - Competence
 - Conditions
 - Means

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The existing regulation only concerns:

- 1.- The way the different authorities communicate with each other, as if it were only an internal procedure, with no legal consequences on the rights of affected persons
- 2.- The premises of emergency administrative decisions on food/public health –including communication through RASFF-, defined in a very loose manner

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As for the consequences?

- No specific legislative consideration has been paid to the consequences of the alert. Therefore, we must resort to general principles, like the principle of proportionality, the conditions of application of the precautionary principle and the extra-contractual liability of the administration.
- The principle of proportionality applies to the justification of the food alert and requires some balance between the health risk and the consequences of administrative action
- The conditions for application of the precautionary principle require respect for the principle of proportionality and that immediate action based on precautionary principle is justified only with new information on the health risk
- Extra-contractual liability of the administration requires adequate compensation if the action is not duly justified. However in the case of food alerts, we face three problems:

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- PROBLEMS RELATED TO REQUISITES OF A LEGAL ACTION CLAIMING STATE LIABILITY:
 - How to define a food alert as an administrative act
 - The problem of legal standing
 - The problem of causal link

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Conclusion

- We face a new kind of administrative activity which is very difficult to control
- Future legislation and case-law should pay attention to this new reality in order to avoid unjustified damages, by better defining the causes justifying an alert, how the decision is taken and who is to bear the cost if the alert proves to be unjustified

Some relevant judicial decisions:

EJC; Cases *Malagutti*, *Bowland Dairy*, *Berger*

National Courts (to my knowledge): Cases *La Fleurette* (Fr) *Birkel* (Gr) *Asoliva* (Sp)

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