

Risk-related Communication and Food-related Communication: What Information to Consumers?

Paolo Borghi

1.- The problems of food-related communication can be approached under many perspectives. Two of the main aspects are, for sure, (a) the product-related communication in a broad sense (which, in turn, can be addressed from different points of view: namely, product-related and process-related), and (b) the risk-related communication. As to the latter, which (according to EC Regulation No 178/2002) is known as the third step of the risk analysis process, in order to face an increasing need for a responsible usage of legal instruments (e.g., the RASFF – Rapid Alert System for Food and Feed), maybe in Europe a parallel increasing need for better (and not necessarily more) rules on fair and correct use of them is emerging.

A look to these days' newspapers and web news, where a large space in chronicles is occupied by the *E. Coli* emergency, particularly in Germany (but threatening to spread, as usual) is enough to demonstrate this premise. As well-known, the earliest alarms had been accompanied by some kind of "accuse" to Spanish vegetables (or, at least, by official statements by public authorities in Hamburg, which Spain interpreted as an accuse, or at least as an "unfair blaming"), assuming cucumbers of Spanish provenance were the starting point of the infection by the new virulent bacterium's strain. In such a case, to the extent that Spain files a claim against Germany seeking compensation for the economic damages caused by incautious declarations to press, nobody should raise any problem: it's quite typical of any legal order to consider anyone as liable for his own behaviors. But should an EU member state be challenged simply for having had recourse to RASFF, alleging an improper use of it, an important and unsolved question would arise. Of course, we're *not* talking about a *voluntarily* unfair use of the rapid alert, but rather about a too intense and/or too hurried usage of it. Must any notification to RASFF be always considered as legitimate in itself, regardless of the ways it is carried out, or can we suppose that a sort of code-of-conduct must be observed even in notifying to the System? Which, in second case, would be the divide between legitimate and unlawful notifications? Would a hyper-precautionary use of the RASFF, resulting in a too hasty cry for alarm, be then judged as excusable? Would the good-faith principle be sufficient to serve as a criterion to distinguish legal and illegal behaviors ?

Perhaps, precaution is a rule – if ever – that has to be applied not only in taking sanitary and phytosanitary measures on food trade or on food processing (i.e. in risk management), but also when adopting any other kind of action, including any action implying (even though indirectly) a risk communication leaking out to public, so avoiding, for example, any clumsy or improvident spread of alarming information. No doubt can be raised about the fact that the endangered values are all fundamental; but the answer is very uncertain, if we ask where the borders of legitimate communication are *exactly* placed. And maybe governors have no alternative but to run all the risks of a task whose results often aren't pre-emptively classifiable as legitimate or not.

Only afterward, when all the elements for a reasonable, reasoned and fully rational decision are clearly available, also an *a posteriori* evaluation of the actions taken meanwhile by persons in charge of them – including RASFF notifications, even if implying a communication to the public – will be possible; and maybe the previous unavailability of a complete framework of elements for decision could be the key to a solution of this complicated question, since nobody should be reasonably deemed as liable for having decided (and for having suspended trade, or stopped production, or ordered a recall of a food product, or even for having given media exposure to a RASFF notification) basing only on a limited set of elements for decision, especially when those limits are totally unintentional (meaning that they can't be ascribed to a decision-maker's fault, but rather to an objective impossibility to obtain a complete set of elements within the strict time available).

Besides that, the respect of the transparency principles and of the confidentiality rules, provided for by EC Regulation No 178/02, should be enough as parameters of legitimacy. It can't be neglected that, in general – according to that legal text – even a simple “suspect” that a food or feed may present a risk for human or animal health (provided that such a suspect has “reasonable grounds”) may justify for public authorities the duty to take “appropriate steps” to inform the public of the nature of the risk, identifying to the fullest extent possible the concerned food or feed, the risk, and the measures which are taken (or which are about to be taken): this could seem a rule legitimating even an excess of caution, leaving to authorities a broad range of discretion in evaluating how reasonable are the grounds of a suspect, and the practical utility, on a case-by-case basis, of taking any action that can imply a possible disclosure.

Neither can be neglected how, according to Article 52 of the Regulation, all information in the RASFF network has, in general, to be made available to the public in conformity with the information principle provided for in its Article 10; neither that, generally, the public has a right to access information on product identification, on the nature of the risk and on any measure which is taken. So, notwithstanding the duty for member states, as well as for EFSA and for EU Commission, to ensure protection of professional secrecy, an exception is clearly set about information whose disclosure to

public can be considered as necessary to protect human health ¹: when circumstances require so, even protection of professional secrecy (a merely economic value) finds an exception. The heart of the matter, therefore, is the “necessity-test” that must precede any decision implying a potential disclosure.

Any other approach could lead to worse consequences, causing unlawfully fears even in using the rapid alert instruments, possibly blocking the concrete operation and effectiveness of the alert, and ultimately hindering the new food safety system as a whole. In a midterm perspective, the entire community would suffer from the consequences of a too extreme approach.

2.- The product-related communication is a totally different problem, increasingly showing a significant trend in food-marketing strategies: mere communication (in a genuine sense) and advertising (even disguised forms of it) are more and more tending to overlap with each other. A lawyer’s point of view (and probably even a demand, but general, and not only of lawyers) is that legal instruments should keep these two issues separated as much as possible. Actually, they often seem to act as two sides of the same money, in practice, but very different kinds of liability are implied, so that legislator can’t give up its own mission about this problem.

Some speakers in this Workshop ² notice, and remark, a tendency of 21st century consumers to be somewhat more “rational” in their purchase choices; so that the most paying-off strategies in food labeling would be those focusing on “transparent” labels, on a “near and warm” label, on plausibility and sincerity of the communication. Well, in this regard, no doubt that today’s consumers are, on the average, to some extent less sensible to price (at least, talking about the European average consumer), and more conditioned by their own awareness about nutritional issues of the purchased food ³; or by their own awareness about the “environmental sustainability” of its processing, transport, etc.

Certainly, in 2011 there’s a larger number of “conscious consumers” than in past decades; and, consequently, on the marketplace a more descriptive labeling could, to

⁽¹⁾ While, all the more, whenever just a dissemination of information to competent authorities (and not to the public) is needed to give effectiveness to market surveillance and to enforcement activities in the field of food and feed, all those authorities shall adopt any action in order to protect those secrecy, avoiding any disclosure to the public.

⁽²⁾ Especially M. Abis, *Which Communication to Consumers?*, *infra* in this *Rivista*, *Rivista*, www.rivistadirittoalimentare.it, 2-2011, p. 30.

⁽³⁾ In a broad sense: for example about its contents of attracting elements like vitamins, fibers, etc., but also of unhealthy elements: saturated fats, cholesterol, etc.

some extent, be more appreciated nowadays than in 1960. But it's not so sure that today's consumer is always an "avid reader", demanding for a largely explaining label that satisfies his/her rationality, together with his/her hunger for knowledge. Maybe, this could be true when taking into consideration a medium- or high-culture model of consumer; while, the lower is the culture, the more his/her choices tend to be indifferent to labeling elements of rational nature, to technical descriptions, to analytical specifications about geographical origin, about nutritional factors, about traceability, etc. (it's rather significant that most consumers, when choosing among a number of different brands for the same product, often ignore that the purchased item comes from the same manufacturer as some of the rejected ones, and that the only difference between them is the brand itself).

Indeed, it seems not so sure that transparency, nearness, warmth, plausibility, sincerity, etc. are really definable as "rational" approaches to food-related communication, since e.g. transparency of labels is an award-winning approach only provided that it clearly appears a calming and comfortable transparency (i.e., provided that it's first of all transparent-looking), similarly as a "near-and-warm" label will succeed mainly because of its "irrational" calls to psychological needs of consumers (it has to look protective, regressive, or to remind a comfortable model of life, etc.). It's hard to call it "rational". Likewise, a "plausible" or "sincere" label is expected to work – in terms of commercial success – mainly if it is plausible-looking, sincere-looking, etc. Again, rational-looking means try to touch irrational key-points of consumers' sensibility. The result is a complicated mix-down of rationality and instinct, which is the most important leverage both of labeling and of advertising techniques (to the extent they both can be considered as a basic part of any marketing strategies) in 21st century.

The general need which was perceived for a discipline about claims, which led the EU legislators to adopt EC Regulation No 1924/2006, sounds like confirming this idea. It stemmed from the observation that the former adoption of the 90/496/EEC Directive on nutritional labeling, although appropriate and to some extent even necessary, hadn't been enough to respond to the food sector's needs, since it addressed only a harmonization of national disciplines on "rational" communication instruments (nutritional labels). Food operators, by having a very large and continuous recourse, in practice, to claims on labels as a fundamental marketing mean, showed how important was the role of the irrational part in consumers' response: such a widening (and often uncontrolled) use of nutritional and health claims by food producers on labels – basically rooted in the irresistible appeal of claims on consumers' motivation, and not on consumers' rationality – required Commission to propose (and European Parliament and Council to approve) a specific discipline, in order to govern an otherwise uncontrollable phenomenon (as to health claims, a phenomenon sometimes even contravening the express prohibition, contained in Article 2 of EC Directive No

2000/13, to “attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties”).

Another kind of confirmation can be deduced perhaps from the existence, in most EU members’ national legislations, of a special discipline on consumer’s misleading practices, often applying *ad hoc* criteria and parameters to find out what labels can be qualified as deceptive. Those criteria are often based on notions of falseness, of untruth, of misleading behaviors, which is totally independent from the notion derived by jurisprudence in interpreting and applying the EC Directive 2000/13. At most, the non-compliance of a label with the EC discipline on food labeling is sometimes used as a clue – not as an evidence – that a breach of national rules occurs; but a label, though complying with the Directive (i.e., not “misleading”, according to it), could nevertheless be misleading according to national rules on unfair commercial practices. And that’s because market needs can sometimes lead operators to pursue their own economic purposes by using a labeling content playing on irrational elements, not directly nor clearly violating the prohibitions in Article 2 of EC Dir. 2000/13, yet violating more flexible notions of deception.

If this keen strategy of deception is used, it evidently pays off; and if it pays off, that’s because irrational elements in labels still have a fundamental (and maybe predominant) part in consumers’ choices, despite of a certain (and somewhat more diffused) trend towards more rationality.

3.- That being so, a question rises: is the proposal for a new EU Regulation on food labeling, currently discussed in Bruxelles, in line with that orientation of consumers and of markets ?

In other words, is it oriented to set a limited number of basic principles, aiming at a clarification of discipline (making it even more rational), but also capable at the same time of giving even some more relevance to irrational elements in labeling, disciplining them rather than ignoring (simply by pretending a fair behavior from operators and regulating the label’s content in a simplification perspective) ? Or does it rather follow the myth of an aseptic and rational communication designed to a very learned and rational consumer?

Do the expected new rules on food labels respond even to consumers’ irrationality (both trying to govern the food sector’s efforts to play on that levers), by means of a simpler, lighter and more incisive and effective discipline, or are they rather shifting more and more towards an “obsession for description”, even worse than in the past, potentially transforming food labels into something similar to information leaflets usually inserted in medicine boxes ?

Transparency is at issue: determining whether future food labels will be definable as “transparent” or not, is not easy. For sure, after the Lisbon Treaty transparency lacks

in rules which are about to govern the fixing of the labeling contents in detail. Namely, it lacks in new Commission's powers about specific food labels' contents, since the forthcoming rules – according to the draft proposal currently under discussion – leave an important part of the new discipline to Commission's delegated legislative powers, based on Article 290 TFEU, but perhaps not always providing them with the necessary definition of objectives, content and scope of the delegation, although not lacking indications at all⁴.

A further reason for confusion could be found in Chapter VI, dealing with national measures, since Article 38 allows member states – although after paying its respects to single market's basic principles⁵ – to adopt their own measures requiring additional mandatory particulars for specific types or categories of foods (only if it's justified by the protection of public health or of consumers, or by the prevention of fraud, or by the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition, even introducing measures concerning the mandatory indication of the country of origin or place of provenance of foods)⁶.

In addition to the above, the general rules on mandatory particulars (Article 9), together with the plethora of product-specific and detailed rules (additional mandatory

⁴) It must be admitted that, compared with the original "Proposal for a regulation of the European Parliament and of the Council on the provision of food information to consumers" (COM(2008)0040 – C6-0052/2008 – 2008/0028(COD)), some of the drafted delegated powers of EU Commission have been removed. Still, some have remained in latest version of the proposal (2008/0028 (COD) - Position of the Council at first reading – text of 11 February 2011): for example, in Article 10, amendments to Annex III bearing additional mandatory particulars for specific types or categories of food are left to delegated acts, in order to take account of technical progress, scientific developments, the protection of consumers' health or the safe use of a food; as well as Commission has the power to adopt delegated acts to ensure that consumers can benefit from different means of provision of mandatory food information (other than the s.c. "normal" means: information appearing directly on the package or on a label attached thereto) better adapted for certain mandatory particulars (Article 12); the same is for the adoption of criteria on legibility additional to those (rather complicated) already specified under paragraph 2 of Article 13, or for the possible extension of the mandatory printing in the same field of vision as the main mandatory indications to additional mandatory particulars for specific types or categories of foods; etc. The rules concerning the exercise of the delegated powers, based on Article 290 TFEU, would be, in case, set in Articles 50 and 51 of the Regulation.

⁵) Article 37: Member States "may adopt national measures concerning matters not specifically harmonised by this Regulation provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with this Regulation", but "without prejudice to Article 38".

⁶) Though, only where there is a proven link between certain qualities of the food and its origin or provenance, and providing evidence that the majority of consumers attach significant value to the provision of that information. But, where has the "Warsteiner" principle gone?



rivista di diritto alimentare

www.rivistadirittoalimentare.it

Anno V, numero 2 · Aprile-Giugno 2011

particulars for specific types or categories of foods, Annex III, etc.), the detailed rules on presentation of those particulars, etc. clearly refer to a clever, learned, well-read, careful, well-informed, thoughtful and rational model of consumer, perhaps slightly distant from reality (or, at least, from the majority of real consumers). This approach – even though somewhat improved in latest versions of the draft Regulation, if compared with the first proposal – could be a missed (unique) occasion to simplify, once and for all, the EU discipline of communication related to food, perhaps for the common good of both consumers and producers. Should the text above result in the final one, a closing remark could be made by quoting a late work by English poet T.S. Eliot: “Where is the knowledge we have lost in information ?”⁷.

⁽⁷⁾ T.S. Eliot, *Choruses from the Rock*.