From agricultural to food law
the new scenario

European Food Law Association 19th
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edited by:
Vicente Rodríguez Fuentes
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From agricultural to food law

The new scenario

edited by:

Vicente Rodríguez Fuentes

Proceedings of the European Food Law Association 19th International Scientific Congress
# Table of contents

About the authors 11

Introduction 17

1. Agricultural and food law as innovation engine of European law: the new scenario 19  
*Ferdinando Alabisinni*

1.1 Premise 19  
1.2 The first 50 years of Community Agricultural Law and of Community Food Law 21  
1.3 Common market and health protection in the first steps of approximation 23  
1.4 The ’70s: partial approximation and CAP measures 26  
1.5 The ’80s: judicial interventionism 29  
1.6 The ’90s: food safety as founding pillar of the internal market 30  
1.7 Food quality and food diversity in agricultural legislation 33  
1.8 Food safety crises and the new disciplinary framework 34  
1.9 The 21st century – Regulation No 178/2002 and the systemic dimension 38  
1.10 The reformed CAP 40  
1.11 The regulation on accreditation and market surveillance 42  
1.12 The new scenario: European codes 44

2. Private law and agricultural food law 45  
*Preventing exclusion of small-scale-farmers through private standards in the global food chain – a research agenda*  
*Kai Purnhagen, Cerkia Barnard, Bernd van der Meulen and Harry Bremmers*

2.1 Introduction 45  
2.2 Privatisation: retailers as regulators through standards 48  
2.3 Providing incentives to effectively ensure SFF access to global food markets 49  
2.4 Conclusion 52

3. The new Common Agricultural Policy – objectives relevant to food law 55  
*Donald Rennie*
# Table of contents

4. The regulation of quality: beginning of food law  
   *Mariano López Benítez*  
   63

5. Judicial protection of quality in the case of Parmigiano Reggiano  
   *Giorgio Bocedi*  
   67

   5.1 Parmigiano Reggiano: a noble and historic designation of origin  
   67

   5.2 The protection of the designation of origin Parmigiano Reggiano  
      5.2.1 Italy  
      68
      5.2.2 European Union  
      68
      5.2.3 International framework  
      69

   5.3 The ‘Consorzio del Formaggio Parmigiano-Reggiano’  
   70

   5.4 The enforcement of the PDO Parmigiano Reggiano within the European Union  
      5.4.1 Scope of protection  
      72
      5.4.2 Enforcement  
      74

   5.5 The enforcement of the PDO Parmigiano Reggiano outside of the European Union  
   75

6. Infringement of protected geographical designations by means of evocative behaviours – a critical prospective  
   *Ángel Martínez Gutiérrez*  
   77

   6.1 Preview  
   77

   6.2 Introductory remarks on community tutelage of protected geographical indications  
   78

   6.3 Approach to the negative dimension of the exclusivity right  
      6.3.1 Drafting of the rule, a critical remark  
      80
      6.3.2 Forbidden behaviours  
      82

   6.4 Evocation as unlawful autonomous conduct  
      6.4.1 On the concept of ‘evocation’  
      86
      6.4.2 Evocation and semantic level protection of geographical designations  
      88
      6.4.3 Unfortunate initial exegesis by the CJEU and its recent correction at the request of the OHIM  
      91

7. The working of the food alert system in Germany  
   *Market-related measures, RASFF, publication of information*  
   *Nicola Conte-Salinas*  
   95

   7.1 Overview  
   95

   7.2 Market-related measures  
      7.2.1 Section 39 LFGB  
      95
      7.2.2 Case study  
      96
Table of contents

7.3 Publication of information
   7.3.1 RASFF
   7.3.2 National laws
7.4 Conclusion

8. Legal problems arising out of the food alert system in Spain and Europe
   Vicente Rodríguez Fuentes

8.1 Introduction
8.2 Some of the legal problems of food alerts
   8.2.1 The problem of legal standing
   8.2.2 The problem of identifying the responsible authority
   8.2.3 The control of legality of the alert
   8.2.4 The problem of halting the alert
   8.2.5 The problem of removing the effects of the alert
8.3 Conclusion

9. The case in the USA: safety alerts and the Reportable Food Registry
   Ricardo Carvajal

10. Food alert impact and reputation
    Jorge Cachinero

10.1 Introduction – the economic importance of reputation
10.2 The virtuous model of reputation management or how to sail the sea of expressions
10.3 The management of influence on a political level
   10.3.1 From the open communication channel...
   10.3.2 The management of influence in political spheres
10.4 Crisis management and online activism
   10.4.1 The changing pattern of food communication
   10.4.2 Risk management: secret ingredient of crisis management
   10.4.3 Managing a crisis in food companies
10.5 Reputational risks and legal risks
   10.5.1 Litigation in the food sector: new stimulants for old risks
   10.5.2 Communication during litigation and its impact on the reputation of a company or brand
10.6 Conclusions: be, say and do ... and change your business model
Table of contents

11. EU competition law as applied in the agriculture sector  135
   Nicole Coutrelis

   11.1 The basic principles of EU competition law  135
   11.2 The specific application of competition rules in the agriculture sector: a brief historical overview  137
   11.3 Current situation: provisions of the single CMO  139
      11.3.1 General rules regarding competition law applying to all undertakings in the agriculture sector: Articles 206-210 and 222 of Regulation (EU) No1308/2013  140
      11.3.2 Specific sectorial provisions of Regulation (EU) No 308/2013  142
   11.4 To conclude: a few comments  145

12. Legal and judicial framework in Italy  147
   The new Italian regulation of commercial transactions in the food sector  147
   Alessandro Artom

   12.1 Introduction  147
   12.2 Scope and essential elements of the contract – Article 62(1)  148
   12.3 Forbidden contractual terms – Article 62(2)  151
   12.4 Payment schedules – Article 62(3)  154
   12.5 Perishable foodstuffs – Article 62(4)  156
   12.6 Sanctions – Article 62(5), (6) and (7)  157
   12.7 Monitoring activity and imposition of sanctions – Article 62(8)  158
   12.8 Reparation and injunction – Article 62(10)  158
   12.9 Abrogation – Article 62(11)  159
   12.10 Effectiveness and implementing decree – Article 62(11-bis)  160

Annex  161

Index  191
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Introduction

Food is mainly produced by agriculture and agriculture is mainly devoted to the production of food. Food production and agriculture are interconnected and cannot be understood without taking into account that they are both part one of the main integrated economic and cultural activity of human beings: the production, commerce and consumption of food. Inevitably, food law permeates agricultural law and vice versa. Historically, since the creation of the European Economic Community, the regulation of agricultural activities has been one of the main areas of European legislation. In parallel, harmonisation of food law has been essential in achieving a unified European market. While agricultural law was already a well-developed legal discipline, regulated both by the legal traditions of the Member States and by the several treaties that have formed the European Union, food law is a newer field whose limits are not as well defined and whose structure and content are not yet complete. Food law is, in part, consumer law and in part, market regulation. Sometimes it resembles pharmaceutical law and sometimes it is agricultural law.

In 2012, the European Food Law Association devoted its Seville Congress to the study of Food Law and its agricultural dimension. We decided to discuss how food and agricultural law relate to one another and how the boundaries between them are becoming increasingly overlapping. This book is the result of this Congress. The Congress was divided into four different sessions, each with its respective speakers. Similarly, the chapters of the book, written by some of those speakers, reflect the different aspects presented at the conference.

The first session was an introduction in which we analysed how food and agricultural law were evolving. The introduction was carried out by Horacio Gonzalez Alemán, Secretary General of the Spanish Food and Drinks Association (FIAB), who opened the Congress explaining the importance of the production of foods to our economy. Following this introduction, Professor Ferdinando Albisinni described the evolution from agricultural law to food law, from the EEC Treaty to the judicial decisions that have created a corpus of European food law and how these decisions have shaped the current legal system of the European Union. Kai Purnhagen, Cerkia Barnard, Bernd van der Meulen and Harry Bremmers study, in the subsequent chapters, a new dimension of food law – private food law – a concept established during the previous EFLA Congress in Amsterdam, in 2010.

The second session was devoted to the regulation of food quality, which has traditionally been the subject of agricultural law, as applied to designations of origin and geographical indications. This part of the book, by way of continuation to the previous session, begins with a chapter written by Donald Rennie, President of the European Council for Rural Law, on the new Common Agricultural Policy. This is followed by a chapter written by Professor Mariano López on the importance of the regulation of quality as the origin of food law. The regulation of food quality finds
its more classic expression in designations of origin and geographical indications. In the following chapter, the lawyer Giorgo Bocedi, sets out how one of the oldest and better-known protected designations of origin, Parmigiano Reggiano, defends itself against those attempting to take advantage of the reputation and name of the product. Then Professor Angel Marínez Gutierrez analyses some similarities and differences between the protection of geographical indications and trademarks, in an insightful and critical chapter.

The third section of the Congress was devoted to the control of food-safety and the workings of the food-alert system. Three lawyers from different jurisdictions analyse the situation in their countries, Nicolas Conte-Salina in Germany, Vicente Rodríguez Fuentes (myself) in Europe and Spain and Ricardo Carvajal in the USA. Finally, since the main impact of a food alert affects product reputation, a communications expert, Jorge Cachinero, Group Senior Director at Llorente & Cuenca, addresses in his chapter the importance of managing reputation when affected by a food alert.

The fourth and last session of the Congress was devoted to food trade, to how prices are formed in the market. Nicole Coutrelis contributes to this study with a chapter on the application of competition law to Agricultural Law, both historically and after the reformed CAP. Finally, Alessandro Artom writes an interesting chapter on the regulation of food transactions within the Italian legal system. Moreover, our EFLA colleagues Michel Fogden and Paul Allen assisted us in reviewing the content and language of some chapters of this book. Finally, I have to thank professor Bernd Van der Meulen for all his assistance in the edition of this book.

The content of the presentations and, as a consequence, the content of this book are heterogeneous. Some speakers are academics, others are practising lawyers, some were civil servants while others represent businesses and producers’ organisations. They came from different countries and professional backgrounds. This gave the Congress a unique comparative practical/legal perspective and varied professional points of view, which, in my opinion, are very well suited to the hybrid nature of food and agricultural law.

The selection of contributions from the Congress presented here has produced a very interesting book which is a perfect example of the aims of the European Food Law Association, namely, to foster the study of food law. This is another step forward for EFLA, and we aim to continue the initiative in future, with the publication of a new book after every Congress.

I hope you enjoy the discussion, the diversity of points of view and the many experiences contained in this book.

Vicente Rodríguez Fuentes
President of EFLA
8. Legal problems arising out of the food alert system in Spain and Europe

Vicente Rodríguez Fuentes

8.1 Introduction

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\textsuperscript{210} 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, \textit{necessary} in the words of the European Court of Justice\textsuperscript{211}. 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 \textit{Escherichia coli} 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 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 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

\textsuperscript{210} Regulation 16/2011 in relation with Articles 10 and 50 of Regulation 178/2002.

\textsuperscript{211} ECJ C 217/99.
legal problems that I would like, very briefly, to outline, without intending to give any answers (although of course, I have my opinions).

8.2 Some of the legal problems of food alerts

8.2.1 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, most if not all legal systems require a 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.

8.2.2 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),
Legal problems arising out of the food alert system in Spain and Europe

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.

8.2.3. 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.
1. 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 worst 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 favourable to the issuing authority and were the stereotypes concerning
10. Food alert impact and reputation

Jorge Cachinero

10.1 Introduction – the economic importance of reputation

In these times of hardship in the Spanish economy, many of us probably think that it is no time to be thinking about corporate reputation. And considering the basis and hypothesis of the (supposed) acquired value of intangibles in companies' financial and economic capacity, this argument is understandable. Yet in the current times, marked by a declining confidence and credibility of companies and their leaders, the idea has formed and is gaining strength that reputation is not an accessory issue but, on the contrary, something intrinsic in the company's core business and vital in times of economic difficulties.

We are faced with a new macroeconomic and social scenario, which is causing significant, far-reaching changes in companies' management models and their relations with stakeholders. Each according to its size and position, companies face the challenge of dealing not only with a severe financial crisis, but also a crisis of confidence and values.

The adverse economic effect, the lack of leadership, the need to increase levels of transparency and, above all, the lack of confidence has converted analysis, identification and connection with stakeholders into the cornerstone of the reputation management model.

There are very few today who uphold the theory that a company is only responsible for making an economic profit. On the contrary, investigations have produced convincing evidence that companies should seek to achieve gains in five different Profit & Loss (P&L) accounts: economic, governance, environment, people and social.

If we examine each of these, we find that each one is backed by a group of stakeholders: from shareholders to customers, including persons, suppliers and citizens; and each of them requires the development of different conducts, attitudes, commitments and value proposals.

In short, a company with a good reputation has a much better chance in an adverse economic cycle of creating value, establishing better conditions with its suppliers, attracting capital and talent and generating greater customer loyalty. In the long term it will be a more profitable company with a growing number of fans and very few critics.
Chapter 10

The Spanish food sector is not, and should not be, oblivious to these ideas even though it is currently in good health and spearheads the Spanish economy. According to the Spanish Federation of Food and Beverage Industries (FIAB), in 2010 the sector accounted for 7.6% of the Spanish GDP with a turnover of €81.369 billion, the third sector with a positive balance of exports and imports only after tourism and the motor vehicle sector.

This makes the food sector, traditionally one of the strongest sectors in Spain, one of the basic pillars for economic recovery. It has an outstanding, widely recognised, exterior projection, which largely favours, or could favour, moreover, an upswing of the reputation of Spain.

Both individually and as a whole, the companies in this sector are well considered in Spain and overseas. A good reputation not only enhances the economic and business yield in normal circumstances, but is also a valuable shield in adverse situations. Its importance within the sector, for example, was demonstrated in the case of the Spanish cucumbers and *Escherichia coli* bacteria crisis in 2011.

The unfounded accusations originating in Germany would probably not have had the same impact, had they been hurled against French products; they may not even have been made. But at that time (and at present), Spain's reputation was not exactly the most adequate or most desirable and, therefore, it did not shield the sector when the crisis broke out.

However, the good reputation of the companies in the food sector has kept them going, maintaining a good pace and health, thanks to their good performance in each of the five P&L accounts mentioned above. Even so, they still have a long way to go.

10.2 The virtuous model of reputation management or how to sail the sea of expressions

The economic importance of one's reputation is clear, therefore, but what is the current general state of the food sector reputation and how can it be improved? Numerous companies in the food sector have experienced situations in the past that have jeopardised their business. However, those with a more sound reputation, with greater support among customers and regulatory authorities and portraying a stronger image as responsible companies have stood their ground much better.

This is the case of Nestlé. In 2010, Greenpeace launched a viral campaign in which it related Nestlé to the destruction of the Indonesian rainforests to enlarge plantations, driving out local communities and destroying the orang-utan's natural habitat. Although admitting the facts, Nestlé's reaction from the first day was to request YouTube to withdraw the English version of the video. But Nestlé's attempt
to silence Greenpeace by forcing YouTube to remove the video had a boomerang effect, since hundreds of thousands of internet users watched the video to find out more about the Greenpeace accusation. Nestlé’s reputation was exposed to the different communities.

As if this were not enough, Greenpeace published a report, ‘The footprint of crime’, in which it revealed the process of destroying rainforests in Indonesia to obtain more palm oil. The purpose of the report was to show that the company obtains oil from suppliers such as Sinar Mas, the largest palm oil producer in Indonesia. Greenpeace argued that Sinar Mas was expanding its plantations after cutting down the rainforests and burning and draining the peat-lands, which caused serious social problems, accelerated climate change and destroyed the habitat of endangered species such as the orang-utan.

Greenpeace also stormed the Nestlé Annual General Meeting and supported each of the actions of its activist campaign with slogans such as: ‘every time we have a Kit Kat, we are taking a bite out of the Indonesian rainforests’ or ‘Nestlé should give orang-utans a break and stop using palm oil from suppliers that destroy their habitat, so we also ask consumers to encourage the company to change its procurements policy’.

Hundreds of bloggers from different parts of the world focused their attention on a single supplier. Ikea was also reported by Greenpeace for the same reasons, for the oil it uses in its candles, and in 2008 Greenpeace launched a campaign against Dove cosmetics.

Another case that comes to mind is that of Coca-Cola, but in this case it was not Greenpeace that was behind the campaign but the Belgian minister of health who, without consulting Coca-Cola, announced that the products of the US Company were being taken off the market after finding dozens of cases of poisoning in children. Since the minister gave no details and made no qualifications in his statements, the announcement affected all the varieties of the brand (Coca-Cola, Cherry Coke, Coca-Cola Light, Fanta, Sprite, Sprite Light, Nestea Splash, Nestea, Aquarius, Bon Aqua), causing panic and uncertainty in several countries. Coca-Cola was forced to admit that the problem had been caused by excessive CO₂ in the bottles from the Antwerp factory (northern Belgium) and the presence of fungicides in the pallets used to transport the cans of Coca-Cola manufactured at the Dunkerque plant (France).

Apart from having to convince the authorities and consumers that its products were safe, indicating the source of the raw materials used and the location of its production plants, Coca-Cola had to withdraw all its products from the affected area (Benelux: Belgium, Netherlands and Luxembourg) after finding that the authorities in those countries were recommending people not to consume them.
Chapter 10

After seeing its call centres collapse and a loss of several hundred million euros, Coca-Cola saw its reputation take on a far from happy shade.

These cases show us that the reputation of the sector and its companies stems from the state of relations with stakeholders and their direct experience with the company and its employees, and their subsequent opinion of its business activities and value proposal in different dimensions. Deep down, this opinion influences and generates indirect experience in other stakeholders. And nowadays, with the catalytic effect of modern technologies and social networks, that opinion knows no bounds.

In this context, the importance and ‘moral’ authority of the person expressing his/her opinion are critical elements. And a good understanding, management and efficient use of new technologies are essential for spreading favourable opinions. In short, reputation is the outcome of the perception and opinion held by stakeholders of the commitments that a company has defined in different dimensions, publicly or otherwise, directly or indirectly.

In turn, this is the result of how a company interacts with its critical interlocutors, i.e. how a company has chosen to put across and position the qualities with which it has decided to compete.

This has even greater weight in the food sector, in view of its strong connection with public health, which generates a special sensitivity in all players (regulators, consumers, producers, etc.) participating in it.

But who are the stakeholders and why must the company nurture its relations with them? Stakeholders are any community or interlocutor with moral authority and importance, in the dimensions in which a company (or person, institution, etc.) competes or wishes to compete, that is willing to invest resources (financial or otherwise) in that company’s business plan. In other words, they are individuals or organisations that are sufficiently important to be ‘listened to’ and ‘valued’ by the environment, who are willing to act or speak positively or negatively about a given company.

Making a brief analysis, companies in the food sector have numerous stakeholders, which we can classify into two groups. On the one hand, there are the traditional stakeholders: customers, individuals, suppliers, partners, society and shareholders or investors (the capital); and on the other, the so-called critical stakeholders, who have acquired moral ‘authority’ over recent years, personified as pure activists, whose influence and decisions can produce a considerable effect on the smooth running of companies. This group includes: government, third sector, media, bloggers, scientific and academic community and the alumni community of companies and universities.
The major challenge facing organisations in this regard is, on the one hand, to accept that they have lost ‘moral’ authority and credibility in their environment while other players, in both the digital and analogue worlds, have increased their shares; and on the other hand, to understand that they must win the confidence of their stakeholders and that the latter do not include only investors and shareholders.

They must, therefore, define the necessary tools and processes to build mechanisms of commitment to stakeholders, which are the basis of sustainable development and the levers used by companies to achieve their financial, social, labour, environmental and ethical goals, among others.

In the present context, there are five reasons for believing that an intelligent handling of relations with stakeholders can give organisations a competitive edge: enable a better management of risk and reputation; permit companies and organisations to improve their processes through the transfer of knowledge and the learning of new practices (not everything we do is best); create the channels to meet goals that companies and organisations could not accomplish on their own; substantially increase the ratios of credibility and confidence and, therefore, the respect and admiration for the brands or business of the company; and, in general, lead to fairer, more sustainable social development (Figure 1).

There are two sides to the first step in defining the reputation management model: one theoretical-strategic and the other more ideological-cultural. The first is linked to the analysis of the environment and expressions, opinions and perceptions, which enables companies and/or organisations to find out how confident stakeholders are about a given company and bring the communication strategy in line with the business strategy. The ultimate aim of this stage is to make decisions on the dimensions of reputation in which the organization wants or has to compete and the attributes (differential, naturally) with which it wants to do so. This is very important since it enables us to answer to the following questions: who must I conduct relations with, why and what for? That is where the organisation’s strategy lies.
Chapter 10

The second aspect, the ideological-cultural, is concerned with the definition and clear understanding of the company's mission.

There are three ways to address this matter, but the one that best suits the present times and current demands of the sector is the one that indicates, as we mentioned earlier, that 'profit' is but one of the company's goals, along with others: providing a service for people, fostering professional furtherance, protecting the environment, etc. Based on this concept, the mission (or purpose) of the company is explained by its contribution and service to the needs of its different stakeholders. It is, therefore, the basis of the new relationship model for companies. However, in order to understand the company's mission as above, we must overcome the natural tendency to consider profit as something clearly and exclusively of an economic nature.

The definition is also used when telling the company's story. Storytelling builds up the history of the company, highlights its qualities and the differences from its rivals.

After defining the strategy, the next step is to identify the stakeholders (the present ones, which are kept, and the new ones, depending on the decisions made) and classify them according to three criteria of power: relevance, attitude and authority. This subsequently enables us to qualify the 'state' of the relationship and thus prioritise and identify the organisational systems required for effective relationships with each of them.

Behind this, the process of relations with stakeholders, or the Relations and Connection Plan, must be designed. This refers to the programmes, tactics and assets that respond individually to the needs, attributes and strategic issues identified in the first two phases, the ultimate aim of which is to gain credibility/respect/admiration in the surrounding environment and increase the levels of confidence among stakeholders by implementing shared value activities.

Stakeholder management is extremely complex since, as a rule, different groups of stakeholders will have opposing interests and expectations. This is why it is important to define and clearly inform about the mission and the business gain, which is where the different interests come together.

The circle is completed with a definition of the indicators and tools forming the balanced scorecard – or monitoring system – available to companies and organisations to assess the impact and progress of the Relationship Plan.

We suggest that the balanced scorecard be enriched with diachronic and synchronic elements so that the everyday situation can be assessed, taking this to mean the
progress and impact of our actions and how they affect the attitude, confidence, commitment and satisfaction of our principal and critical stakeholders.

It will also be necessary – in the medium term – to analyse and assess the impact of the decisions adopted at the initial phase and whether the strategy has enabled the company or organisation to make positive progress in respect of opinions and perceptions.

The foregoing, overall, gives companies and organisations an opportunity to play a more important role, but above all to listen and participate in order to generate a greater economic, environmental and social impact.

As a result of the foregoing, we can see that the value of a company is not always determined by its financial performance, as expressed by certain rankings used in the business world, where, for example, the companies with the highest values on the stock exchange are often not the ones with the largest turnover.

They are, nevertheless, among those most admired by users or customers or, for example, those most sought after as a place to work. This observation corresponds to the studies that show that the ‘soft attributes’ (or dimensions), those not related with the purely business or economic activity, have a greater overall weight in the valuation of a company than the ‘hard attributes’ or direct links to economic results (Figure 2).

**Figure 2. The economics of reputation: Trust is at the Heart.**

<table>
<thead>
<tr>
<th>+ Revenue</th>
<th>+ Value</th>
<th>+ Desired</th>
<th>+ Admired</th>
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<tr>
<td>Exxon Mobile</td>
<td>Apple</td>
<td>Google</td>
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<tr>
<td>Wal-Mart</td>
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<td>Edward Jones</td>
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<td>Recreational Equip.</td>
<td>Berkshire Hathaway</td>
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<td>HP</td>
<td>Google</td>
<td>Quicken Loans</td>
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<td>Source: Fortune 500</td>
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Chapter 10

10.3 The management of influence on a political level

One of the objectives of public authorities is to protect consumers and users. The Constitutions of different countries contemplate this duty of active observance in one way or another. The food sector is one of the most sensitive sectors for the authorities. Its products are consumed by the entire population and whenever a problem arises, the consequences can be more serious than those encountered in other sectors.

For these reasons, the government will be forced to take sides in any food crisis, make regular statements and adopt decisions. In many cases, political activity will be disrupted by the reality of the crisis.

In 2011, during the outbreak of *E. coli* in Germany, the health authorities of the European Union and its member states often had to make rapid decisions based on false premises that had very serious consequences for certain agricultural products from Spain. In fact, this crisis is still remembered as ‘the cucumber crisis’, even though in the end Spanish cucumbers were shown not to be responsible for the outbreak.

The pressing need to calm down the population, uncertain as to what food product could be responsible, led to precipitate replies, decisions and political statements. As new cases of *E. coli* patients appeared, measures were taken against Spanish vegetables (not just cucumbers) in Germany, Sweden, Denmark, Finland, the Czech Republic, Belgium, Austria, Russia and the United States.

On 31 May, four days after her initial declarations, Hamburg senator Cornelia Prüfer-Stocks declared that the Spanish cucumbers were not the source of the outbreak, although they did contain *E. coli*. This did nothing to dispel doubts. The next day, the European Commission lifted the health alert.

10.3.1 From the open communication channel...

Since food is a strictly regulated area, politicians' reputations are also at risk in a crisis. This should be borne in mind in all communications with the government.

As mentioned earlier, the authorities always play an extremely important role in any food crisis. Decisions will be made based on the current knowledge of the problem and a calculation of the risks entailed. One must be aware of whether a company is responsible for the situation or just a mere player in the affected sectors.

What information do the authorities receive on what is happening? The sources of information vary widely, but what is essential is that those affected have a significant bearing on the opinion formed by the government.
For this purpose, the communication channel must be permanently open, allowing information to flow freely and transparently. Experience shows that it is not usually a good idea to conceal information. That information will eventually come out and concealing it could break the trust created with the government. Therefore, the greater its responsibility in the cause of the problem, the more proactive and transparent a company should be.

Nevertheless, companies not only have to give information, but should also know to whom they are giving it. It is possible, and can be recommended as we shall see below, that a company may have prior contacts with members of the government. Those contacts are usually on a technical level, but when there is a crisis with public repercussion, the profile of those contacts must be raised. This does not mean that the usual contact with technical advisers must be ignored, but that the company must extend its contacts to encompass those who are going to act directly in respect of the crisis: ministers, secretaries of state, secretaries general, presidents of regional authorities, etc.

Therefore, before any crisis a company should have mapped all the ministries involved and other politicians with interests in the matter.

In Spain or Germany, for example, the powers in relation to matters regarding food and consumption are assigned to the regional authorities (Länder or Comunidades Autónomas) so the map of strategic players would be extensive, on a horizontal level (MPs, staff of the ministries, regional government authorities) and a vertical level (European, national and regional institutions).

Finally, special care should be taken with the storytelling that is going to be undertaken during the crisis. The message put across must be coherent but the language ought to be adapted to the different interlocutors.

Laboratory researchers, for example, will accept and understand a technical message. On the contrary, depending on the responsibilities of a ministry, it is understandable if a minister or secretary of state does not have any specific technical capacity and needs a different explanation. Moreover, in a crisis a politician will most likely not even have enough time to understand the problem in all its dimensions.

Therefore, when directly addressing a minister or regional councillor, some simple rules should be followed, whether during the crisis, on one or several occasions, or at a personal meeting or simply sending a document by e-mail.

- Political messages: politicians will always look for political arguments. Their decisions will always be biased by their respective ideologies so they need to understand why a company's position supports their own storytelling. The
resources used must be geared towards explaining the political advantages of making or modifying a decision.

- **The message, at the beginning.** The time a politician can give any interlocutor will be very limited. A one-hour meeting can easily turn into a fifteen-minute encounter. It is perfectly possible that he/she may not spend more than five minutes reading a document sent to him/her. For this reason, the key message must be stated clearly and precisely in the first few minutes, or on the first page.

- **From the problem to the solution.** A politician's desk is usually full of problems to be solved some time before the hypothetical food crisis breaks out. Your proposal might be taken as just another problem and go unnoticed. So proper attention might not be paid to it. The danger of not listening is that politicians may end up making decisions that go against business interests. So companies should always offer a solution to a problem; a simple solution that the politician can use to strengthen his own discourse. The politician is more than likely already aware of the food alert so the source should be explained and, above all, what is being done to solve the problem and what measures will be taken to ensure that it does not happen again.

- **Advanced, but simple, arguments.** When a company goes to these meetings, it must use advanced arguments, although avoiding excessively technical language; otherwise it may feel underrated. The politician himself/herself will often ask to go into more detail about an explanation provided initially.

- **Avoid disputes.** Getting into a dispute does not help to clarify ideas, but rather to increase the confrontation. If there is an opposing stand, one must be attentive to find out why. One may even detect it in the conversation. In other cases political intelligence tools will have to be used.

- **Modesty.** When dealing with institutional officers, one must always be modest. This is something to be borne in mind, especially when the speaker is a company executive not accustomed to this kind of contact. A bad attitude can close all the doors for a company in the future.

### 10.3.2 The management of influence in political spheres

The crisis provides an opportunity to enter into talks with the government, albeit somewhat hastily. If done properly, it will have discernable advantages for reputation and fluent relations in political spheres. But these relations will be more fluent the greater the benefits to be reaped by both sides. In general, the contacts that might be established with the regulator might be differentiated into three levels: relational, reactive and follow-up.

Within the ‘relational’ level, several ‘win-win’ collaboration channels are opened, with the company putting the political interest on a private interest level so that tools will be implemented that are useful for the politician with whom the relationship exists.
Within the ‘reactive’ level, contact is made with the politician for the first time in the middle of an open issue. Therefore, he/she may well have already received information from other sources, on the basis of which he/she may already have formed a more or less solid opinion. Normally it is unknown what his/her attitude will be on receiving the company's information.

At a ‘follow-up’ level, a company must participate actively in the political conversation, trying to sway it. A company should go to the corresponding Ministry or the affected members of the Parliament to meet those directly in charge of the issue at stake, or alternatively it should send them the appropriate documents. This constant effort of meeting the decision-makers is one that would provide ongoing benefit in terms of respect of a given issue and the credibility of a well-tended reputation.

At the ‘reactive’ level, communication channels need to have been created well in advance. At the ‘follow-up’ one, this channel has to be kept active in order to be able to use it in case of need. At the third level, the ‘relational’ one, the aim is to establish a two-way relationship. It is necessary to study what tools are best adequate to any given company and what the politicians are expecting from us. The aim is for a company not to be seen merely as requesting information or looking for a solution to its problems, but as providing information that is valid, of high-quality and, above all, useful for performing the political duties of the Regulators involved.

An optimum relationship level is established by anticipating political decisions. Once a crisis is solved, contacts with Regulators should be maintained, since public opinion criticisms of insufficient regulation may later push the Regulators to put forward new and stricter controls in any of the business value-chain. This kind of initiative (either within the Government or within Parliament) tends to begin in an informal political setting, behind the scenes, which a company has to be able to detect and influence so that it is not left out due to lack of access or anticipated information.

This is why it is important to change the pattern in which companies and industries operate within the political realm. In Llorente & Cuenca we have observed a growing need for companies and organisations to adapt their public affairs units to a new political and regulatory environment. In this new scenario, informal conversations are the element that must be grasped to ‘move ahead and efficiently sway opinion’.

Tools can be established for this purpose to work on the corporate culture of reporting, relations and anticipation. The decision on what kind of tools are best suited to each organisation is made on the basis of a detailed study focusing on four parameters:
Chapter 10

- influence potential;
- internal management of influence;
- resistance to change;
- the public.

Based on those four parameters, any given company will obtain an analysis of its own organisation and the possibilities of bearing an influence upon the political world.

It is necessary to stress some ideas regarding how to exert influence upon political circles:

- It must be a strategic asset of the organisation, not just based on personal acquaintances and relationships.
- It must be submitted to planning (anticipation).
- It must be possible to account for it (reporting, annual report).
- It is a corporate tool to build long-term, win-win sustainable relations.
- It is supported by, and fosters reputation to create value in companies and organisations.

10.4 Crisis management and online activism

The food industry constantly has to deal with major conflicts, from natural disasters that devastated thousands of harvests in the past to notorious contemporary events, such as the cucumber crisis or BSE (mad cow disease). If we associate the concepts ‘crisis’ and ‘food’, we will surely be able to recall countless situations of conflict experienced by companies in the sector. Traditionally these were crises in which society has been witness and participant, the causes of which varied considerably.

In recent years, the food industry has had to cope with problems generated outside the company and others caused by its employees; other situations may have arisen with a specific product or affecting a whole sector; being national or international; being real crises or caused by false rumours; associated with the composition of the product or relating to an indirect problem generated by it; and numerous other possibilities.

This has shaped a complex framework through which it can be sensed that the management of a crisis must contemplate many factors in order to adapt to each case.

10.4.1 The changing pattern of food communication

If we analyse the essence of the industry, consumers have changed in recent decades from ‘eating’, as the action of physiological satisfaction, to ‘feeding’, an event involving new factors such as health, nutrition, research or physiological...
balance. Logically, the pattern of communication has changed at the same pace and progressively over the years. Companies now face more consumers who are more aware, active in communication/opinion and highly exposed to information.

But not only consumers have changed. The environment is also becoming more and more confusing. New players and stakeholders appear every day, interfering with the play of communication. They unquestionably make the scenario increasingly more complex.

As a result, and directly related with the appearance of 2.0 environments, public opinion is now also published opinion. Although this opens up countless new opportunities for companies in terms of marketing and advertising, it also generates a large number of risks, which may develop into a crisis at any time, hampering their management.

Although many companies have documents and manuals preparing them to react in a conventional crisis, nowadays the speed and force of response required makes them insufficient. All this, together with human factors such as subjective decision-making and the tendency to improvise when factors appear related to the online world, can determine the success or failure of the management of these critical situations.

### 10.4.2 Risk management: secret ingredient of crisis management

Real problems arise unexpectedly. A minor incident can rapidly turn into a crisis with major repercussions on the business and reputation of a company. To avoid this, there are two concepts that must not be overlooked, namely Preparation and Management Tools.

Both online and offline, being prepared for a possible crisis is essential to stop it from getting any worse. This is why it is necessary to minimise any risks that have been identified and that could set off a serious problem.

The first stage of prevention is preparation. There are some risks one ought to anticipate, by educating consumers, boosting their confidence, informing on progress as it is made and enhancing product information.

Secondly, a company must have tools that enable it to detect risks rapidly and handle any incident immediately and objectively. There are both online and offline tools to make this work easier.

In the offline area, crisis manuals are an example of tools for prevention, since they include messages, procedures, scenarios and recommendations. The latter
may be made automatically or adapted to the online environment with handy tools that make them considerably easier to use.

With adequate planning one can prevent a crisis or at least mitigate its most harmful effects.

10.4.3 Managing a crisis in food companies

The line between worlds 1.0 and 2.0 is growing fainter. At present there are very few everyday situations in which the online environment is kept separate from the offline activity and vice versa. For this reason, it is vitally important to have suitable tools to make a combined management of the online and offline environments. And above all, enabling this to be done in the shortest possible time.

There are certain elements in crisis communication that facilitate management of the problem. The digitalization of crisis management contents and material through a darksite or online platform will undoubtedly speed up our reaction. Similarly, having an early alert detection system, such as GUIA designed by Llorente & Cuenca, will enable a company to act swiftly right from the start of the incident.

In the same way, it is important to have a crisis mentality in the organisation, created in advance and enabling management to act in a coordinated and secure way.

The protocols for managing a crisis are similar both online and offline. We describe below the principal phases (Figure 3):

1. **Assessment of the seriousness of the incident** and, more importantly, to do so objectively. To determine how serious an incident is, consider both its source and its effect, which requires appropriate alert and action procedures to handle the incident.

   Something which is not at all ridiculous in an environment in which reactions are not always balanced: people tend to over-react or under-react. Therefore, to cross the barrier from the signs to the crisis requires an analysis enabling a correct diagnosis of the crisis.

![Figure 3. The management of reputation: be prepared; worst happens.](http://www.wageningenacademic.com/doi/book/10.3920/978-90-8686-801-8 - Carlota Jiménez <cjimenez@llorenteycuenca.com> - Tuesday, December 22, 2015 3:47:52 AM - IP Address:80.169.75.100)
2. Activation of alert protocols and reporting lines, in other words, coordinating team organisation: establish the profiles, tasks and responsibilities of those involved in crisis management. It is also crucially important to have an early alert system to identify the risks before they actually occur.

3. Management procedure: Organising the corporate response process to a reputational risk or crisis involves taking measures online and offline; these may be different. The main keys for this are:
   - Give the right message, in the right measure and to the right target audience.
   - If online communication is necessary, it is best to do so using the company's own tools (corporate networks, website, etc.). What measures are best suited to the situation should be assessed.
   - Humble attitude. Admit proven errors and apologise.
   - It is important to be proactive online. Offline, it depends on the situation.
   - Always explain what is going to be done to solve the problem.
   - In the same way, always explain what the organisation plans to do to prevent similar incidents in the future.

4. Reputation recovery. When the crisis ends, or starts to wane, it is very important to remain alert and continue taking several actions. We must:
   - Increase the intensity of monitoring and add new search elements, especially online.
   - Implement new scenarios adapted to the new corporate reality after the crisis.
   - Include more ‘positive’ content in our communications, both through our websites and blogs and offline.
   - Promote the positioning of favourable contents in search engines online (SEO).
   - Assess the development of the crisis, reactions and possible faults that could be avoided in similar events.

10.5 Reputational risks and legal risks

The commencement of any legal action against a company is the beginning of a period in which its reputation will be put to the test in the eyes of all its stakeholders. Almost inevitably, the ‘jury of public opinion’ will end up, when the legal proceedings have concluded, deciding whether or not to continue trusting the company, its products and its executives. In our experience, that decision is not directly driven by the outcome of the legal proceedings, which may be positive or negative for the company's interests, but depends more on how the company (and other players outside the company) handle communications with each stakeholder throughout the duration of the case.

The food sector has accumulated extensive experience over many years in the management of risks associated with food alerts, product recalls and similar actions. Companies are increasingly more aware that the reputation of their products is put to the test every day on the market (in consumers' purchasing decisions) and have learnt to handle these situations swiftly and efficiently.
However, from the point of view of managing their reputation, the present social and economic scenario is causing additional difficulties for companies in the food sector involved in legal proceedings. The sector faces new challenges, which they will overcome or not depending largely on their capacity to connect with their stakeholders’ communication needs and to put across their version credibly and soundly for those who hold the key to their future, from regulators to consumers, including employees, suppliers and distribution chains.

10.5.1 Litigation in the food sector: new stimulants for old risks

It is relatively common for the companies in this sector to face legal actions from consumer associations, which file claims through different channels for a broad array of problems involving quality, labelling, food safety, etc. The sector has also had to fight intense battles over disputes related to anti-trust or fair trading laws, either between producers and manufacturers, or as a sector against national or European anti-trust authorities.

In terms of communication, both these areas (consumer actions and anti-trust disputes) have created major challenges for companies and their brands in the past, since the effect on the purchasing of a product by consumers could be immediate, depending on the sense and significance of the accusations, judgments or resulting penalties imposed on the defendants.

However, two elements stimulating those risks have been triggered recently which have an important effect on reputation management by companies and their brands: on the one hand, increased awareness and sensitivity of public opinion to companies’ actions, and on the other hand, the Internet, which has boosted the capacity of mobilisation against companies or their brands and the lasting effects of a case after conclusion of the legal proceedings.

1. Sensitivity of public opinion to companies’ actions. In the present economic situation, opinion leaders and their followers are more sensitive towards companies that ‘do not behave correctly’ and may be made scapegoats for the crisis or its consequences. It is becoming increasingly common to observe negative reactions in public opinion to companies that are sued by different players, even leading to protests and demonstrations, boycotts or other forms of activism against their brands and products.

In recent months, for example, this sensitivity has meant that legal disputes which in other times would have been paid much less attention, such as tax or labour disputes, have become rallying cries against certain brands or companies, even before obtaining a decision in the corresponding legal instance.

Companies are aware of this situation and no longer consider as ‘minor issues’ certain conflicts which would have gone unnoticed in other times, or whose public impact would have been limited to a particular group. By way of example, disputes associated with lay-offs sway the public opinion much more strongly...
in favour of the ‘weak’ party and against the company, even when there are objective grounds and the correct procedures have been followed. Similarly, the prosecution of legal persons by the Inland Revenue for tax disputes produce a negative reaction among the less specialised public against the companies that appear to be unsupportive of the economic situation, by trying to pay less tax. This scenario makes it essential to prepare very carefully for the management of communication during these proceedings which, as mentioned above, would in other times have had a very small effect on company and product reputations.

2. **Capacity to protest against companies or their brands.** It is widely accepted that the Internet has confirmed itself over recent years as a platform for conversation and the creation of opinion, with speed as its main feature. However, for this analysis, it is more important to bear in mind the capacity it has been developing for some time now as a tool for protesting and calling to action. In the food industry, this quality of the different networks we now umbrella under the term 'Internet' or refer to generally as 'social networks' has become an especially sensitive risk for the reputation of a company or its brands and the business, owing to its potential immediate effect on sales and consumer decisions.

The growing capacity of organisation of ‘online activism’ forces companies to have an appropriate active listening system on the Internet to be able to react appropriately and in good time to this medium, following an adequate online crisis management strategy.

3. **The challenge of the ‘footprint’ of a case on the Internet.** The so-called ‘right to forget’ has arisen precisely from the need to alter the fact that a person or company is ‘labelled’ with certain attributes, based on true or false information, which have an adverse effect on that person's or company's personal or professional life. It is not difficult to find examples on the Internet of companies or products in the food sector that were immersed in legal proceedings and even years later still appear associated with that fact in the first search results produced by search engines.

Owing to the characteristics of the Internet, it is not easy to shed the ‘millstone’ that information from the past (true or otherwise) can come to be, although the desire to do so is perfectly legitimate. It is possible to restore someone's reputation on the Internet and in social networks (reputation recovery) to give a more accurate image of the current situation of a person or company without highlighting certain details from the past by using adequate tools and taking the right actions, which, contrary to popular belief, are not so new in terms of communication because the need has always existed for certain companies to make certain chapters in their past forgotten.
Chapter 10

10.5.2 Communication during litigation and its impact on the reputation of a company or brand

As a starting point, we must bear in mind that legal proceedings are a situation of risk for any company, even when it is the plaintiff. Apart from the fact that the climate of information generated on the case will affect the outcome, the way in which communication is handled during the proceedings will affect the company's reputation, regardless of whether judgment is passed in favour of or against it.

All legal disputes involving a company have a strictly legal aspect and another perspective related with the reputational risk. To correctly handle the latter, a communication strategy aligned with the legal strategy must be designed and implemented, especially if the aim is to minimise public impact of the case.

Particularly when at least one of the parties is a well-known person, company or product, litigation is no longer considered a technical dispute within the courtroom but as a competition in which each of the parties must make his version heard, understood and remembered by those having an influential voice in the ‘trial by media' and by its key stakeholders.

Experience has shown that it is practically impossible to avoid ‘trial by media', especially if the case is well-known or important. What is important is to bear in mind that, to a greater or lesser extent, a case will always arouse a certain amount of interest (by the media, net surfers, etc.), and that, depending on the degree of interest and what is considered best for the company's reputation, each move must be planned considering not only the traditional media but also with our sights set on all the groups or individuals that may be involved or interested in the affair, because the Internet offers them a readily accessible space, simple and absolutely public, in which they can express their opinion and hold a parallel ‘trial', even spurring on protests and demonstrations.

The Internet has a bearing on all phases of the judicial process, because it picks up all conversations generated on and about a case and greatly facilitates searches in newspapers and periodicals for a given case at any time. This is a fact that affects and is present in the initial stage and in the processing and judgment of the dispute, offering instant means for assessing each landmark and comparing and discussing it with what society thinks of the case. The Internet participates and plays a leading role in each of these stages, acting as a bridge for those people and institutions with the greatest social influence to express their views on the progress made. The cycle is closed at this point and the group of ‘influencers' on each stakeholder (for example, suppliers, employees, customers and regulators) contributes towards creating the context for the following decision or progress in the proceedings. According to this vision, the phenomenon will be repeated in each stage of the proceeding, following a cycle.
In short, public opinion on a court case is no longer formed by a linear mechanism produced as a cause-effect relationship in the traditional media (where each development in the proceedings is commented in the press), but is a cyclical phenomenon in which, after each development in the proceedings and its reflection in the media, new information and opinion channels come into play and sway public opinion, namely the Internet and social networking, leading to a logical effect on those people who, in terms of reputation, we could call ‘influencers’ (Figure 4).

5 Keys to success in the communication of litigation (Figure 5):

- **Leadership of the legal team** – The communication strategy must always be developed in line with the legal strategy, taking account of objectives, general defence strategy, landmarks and developments of the calendar of the major decisions in each judicial instance, and the principal communication times.

- **Correct diagnosis of the reputational risk** – When analysing the case, specialised tools are needed to detect the media potential of the process. By identifying...

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**Figure 4. The management of reputation: the ruling of the public opinion.**

**Figure 5. New stimulants for old risks.**
Chapter 10

the main features of the case and detecting the media case law generated, an initial assessment is made of the case to determine the degree of media interest.

- **Multi-stakeholder communication strategy** – It is vital to have a communication strategy with a multi-stakeholder focus. As mentioned earlier, the reputation of a company, product or person consists of the opinion held of it/him/her by the relevant stakeholders, so if legal proceedings entail a reputational risk, it would be logical to implement a strategy that distinguishes between the different stakeholders and meets the communication needs of each one.

- **Monitoring of the ‘trial by media’** – It is important to monitor the information published in the media, both printed and online, and what is posted in the social networks, in order to gauge public opinion, locate the journalists and stakeholders interested in the case, and react and even modify the strategy if necessary.

- **Training of spokesmen/women** – The better the spokesman, i.e. the more convincing and credible he/she is, the greater the possibility that public opinion may take sides with the company’s interests in the litigation and, therefore, the stronger its reputation will be, regardless of the final outcome of the court case. Not only must the content of the message be adequate, but also the person communicating it. A good spokesman can play a key role in the outcome of litigation. Although the judges will be guided by their own criteria for interpreting the rules and applying them to the specific case in hand, the public opinion that forms on a legal dispute, partly thanks to declarations by the spokesman, is unquestionably a factor that affects the final outcome.

Finally, it must be stressed that the reputation of a company or product is an aspect that must be treated very carefully when involved in legal proceedings, since it is difficult to avoid a simultaneous ‘trial by media’. In the food sector, moreover, there are certain stimulants which require communication during the litigation taking account of all the company’s stakeholders with which it wishes to maintain a fruitful long-term relationship of trust.

10.6 Conclusions: be, say and do ... and change your business model

The model of relationships between the company and its stakeholders is changing and the search for, interpretation and care of their interests are of vital importance. The business environment is growing more and more demanding and companies are required to meet unprecedented levels of transparency and visibility. This situation has been heightened by the global nature of companies, mainly due to the astounding development of information technologies, which has increased social scrutiny and their exposure to the entire planet.

Some of the challenges facing companies are, therefore: the generation of empathy to transmit confidence and credibility to the critical stakeholders; astuteness to develop customised connection proposals in order to influence them; and a
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?

2. 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 grounds 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 grounds.

8.2.4 The problem of halting the alert

In any case, it is clear that initiating, implementing or 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, somehow similarly, the decision of the Commission not to withdraw an alert was provisionally 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.

212 STS of 27/06/2007 ASOLIVA (VRF was the legal counsel in this case)
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 rejected by the Spanish Supreme Court\textsuperscript{214}.

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 than those of the food alert.

### 8.2.5 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\textsuperscript{215} dairy and Malagutti\textsuperscript{216} cases. Similarly, the Spanish Supreme Court annulled an alert but refused to compensate for damages on virtually – in my opinion – opposite merits\textsuperscript{217}, in the pomace 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\textsuperscript{218}.

\textsuperscript{214} STS of 27/06/2007.
\textsuperscript{215} ECJ, Judgment of the Court of First Instance (Fifth Chamber) of 29 October 2009, case T-212/06.
\textsuperscript{216} ECI, Judgment of the Court of First Instance (Second Chamber) of 10 March 2004, case T-177/02.
\textsuperscript{217} STS 4/03/2009 and others, particularly the STS of 20/10/2009 which is the first one repealing a Judgment of the lower court granting damages for the consequences of the food alert.
\textsuperscript{218} STS of 3/03/2009.
Chapter 8

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 than the right to property, a fair 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 worst 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.

8.3 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 been remedied 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.