

Global food security: ethical and legal challenges

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**edited by:
Carlos M. Romeo Casabona
Leire Escajedo San Epifanio
Aitziber Emaldi Ciri3n**



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GMO, consumption and consumer vulnerability in Brazilian Consumer Law: the right to be duly informed

A.P. Myszczyk¹ and F. Glitz²

¹University: UniBrasil/QUIS Law School, Rua Konrad Adenauer 442, Curitiba, Paraná, CEP 82820-540, Brazil; ²University: UniBrasil/QUIS Law School, Rua Carneiro Lobo 570, conj. 1501, Curitiba, Paraná, CEP 80240-240, Brazil; anapaulamy@yahoo.com.br; fglitz@gmail.com

Abstract

The Brazilian Consumer Defense system is governed by the principle of vulnerability. The adoption of this principle involves considering the consumer as the center of the legal protection in such a way that it's impossible to reduce him to the *status* of market or suppliers' object. Among other mechanisms of equalization the consumer's right to be duly informed about presence or absence of GMO ingredients on food or feed with adequate, accurate and clear information.

Keywords: consumer, vulnerability, GMO

Initial considerations

The current contractual relations seem to demonstrate the complexity of a 'new' logic of exchange where objects, before even thought, are transformed into negotiable benefits. These 'new' issues demands legal definitions and recognitions. In this sense, one of the dilemmas that arise is the regulation on regard to GMO. The question is even more relevant when dealing with contractual relations established between 'unequal parties' in which there is no balanced bargaining power, access to knowledge, management tools or marketing strategy. This article is proposed in the context of those concerns, aiming to review cases in which the consumer may be subject to legal relationships involving biotechnology, in which he does not necessarily have full access to the due information to found a conscious choice. For that purpose, it's necessary to understand how consumer's right to be informed is settled by the Brazilian Consumer Code and, among its instruments, the mechanisms established to protect the vulnerable contractual part.

The Brazilian Consumer Code and consumer vulnerability

The Brazilian Federal Constitution of 1988, sensitive to the global trend, included the legal protection of the consumer relation, incorporating into its norms the recent tendencies of modern public law (art. 5° XXXII)¹. It was considered an important step taken by the constitutional legislature which would later motivate the edition of the Brazilian Consumer Code (BCC - Law no. 8.078/1990). These norms were stated to have public *status* social interest, in addition to the definition of rules and principles that should be well suited to the global changing socio-economic times. The same constitutional statement, which is related to the citizen's basic rights and guarantees, mentions the need for consumer protection (art. 5°, XXXII) elevates the consumer's protection to the same status as that conferred upon national sovereignty, private property and free competition (art. 170). In the light of these concerns, it is seen the importance of the Consumer Code when it comes to the GMO food and feed production chain, especially when related to the correct and reliable identification of a GMO based product. In the case of GM food, it is evident that information on the nature of it, in the eyes of the consumer, is very important when it comes to freedom of choice.

¹ *In verbis*: 'According to the law, the State shall promote the protection of the consumer.'

Following the provisions in the Federal Constitution, the BCC is based on the principle of consumer protection, where the legislator chooses to protect the consumption relationship by backing it, necessarily, in the principle of objective good faith. To implement that provision, BCC sets the figure of the 'consumer' as any person or entity and/or any group of persons who acquires or uses products or services as consignee. It is necessary to clarify that in this concept remains the protection of the consumer vulnerability. The BCC also prescribes the figure of the 'supplier' as any person or entity, public or private, as well as entities without personification, carrying out activities of production, assembly, creation, construction, import, export, distribution or marketing of products or services.

To operate the consumer protection, the BCC assumes, as a main principle, that the consumer is the vulnerable part of this relationship. The protection is not taken in a paternalistic aspect but as a way to preserve the balanced negotiation, through the promotion of equalization instruments. In other words, the law plays the role of promotion of contractual justice. Legally, therefore, the protection of the consumers is the recognition of their vulnerability. Based on this, the BCC sets out a series of consumer's rights, to facilitate and ensure this protection.

The consumer is considered vulnerable because can easily have his free will limited. This is especially true on regard to the choice of priorities and needs, keeping in view all the procedures, mechanisms, methods and contractual techniques used by suppliers to, even indirectly, promote, maintain, develop and ensure the circulation of their products and services. The consumer vulnerable condition does not allow evidence against it, as a conclusive presumption; it is not questionable and cannot be remedied, since it is a principle and a *praesumptio jure et de jure*. It is an intrinsic quality, inherent and inseparable part of anyone put in the consumer position. Indeed it is admitted, even those who are not *strictu sensu* consumers (article 2^o) to show their vulnerability in order to receive protection under that law, to contractual abuse (article 29). The effective result of the principle of vulnerability is the duty of incitement to any information regarding consumption. In the consumer relations involving GMO, this duty is due strictly to the principle of objective good faith as recognized by the Brazilian legislation currently in force.

It is important to note that the Brazilian consumer's protection is independent of economic, social or intellectual *status*. The consumer is considered economically vulnerable, as the suppliers have full control of the market or on the production chain and products. The technical-professional consumer vulnerability comes from the lack of specific knowledge about a particular business line or service. It should be noted, moreover, that this lack of access is even more evident when analyzing the biotechnological developments. That is especially true about food and feed based on GMO and the lack of information on the consequences of its use. In pitch, the principle of consumer vulnerability is one of the pillars of the BCC that underpins the whole system and a directive to achieve its goals. It is a material guideline for the identification of implied rights, functioning as a limiter for the suppliers activities. It is not only a guarantee that the consumer will not be subject to manipulation that reduces his condition to object, but also a duty of full development of the personality of each individual and/or the community.

The Brazilian Consumers Code, standard form contracts and GMO

Under the legal perspective, it should be noted that the consumer society is broadly subject to standard form contracts. Within this reality, it's possible to sellers to use this type of contract and its complexity and lack of clarity or transparency to inhibit the consumer's expression of free will, leading to the need for legal protection. One mechanism of such protection is to impose to the supplier the duty to provide information about the composition of a particular kind of food, for instance the requirement of special kind of labeling or the definition of the joint liability throughout the supply chain (from the producer to the distributor, who must inform the wholesaler, etc.). Information on the characteristic of the product in this case is a legal requirement which, besides being a guarantee for the consumer, is also a guarantee for

the supplier, who will be able to identify any eventual informational flaws in the production chain. On the other hand, the joint liability of suppliers of products and services (as foreseen by the BCC – art. 7, single paragraph), allows the consumer to ask for compensation to anyone in the supply chain (art. 25). Therefore, if the product causes damage to the consumer, the manufacturer, producer and the importer will be held liable, unless the supplier could prove that they did not place the product on the market, that there is indeed no fault in the product or, in case of damage, that the consumer himself is solely responsible (art. 12). In addition, when dealing with liability for the bad quality or faultiness of products or services, the joint liability includes the seller. Therefore, because the manufacturer and the supplier can be held liable, it is necessary that the information about stages of the production chain to be made very clear, be it for the purposes of reimbursing losses or for dividing liability among the suppliers themselves.

The Brazilian Consumer Code and the consumer right to be duly informed about GMO products

By the Brazilian legislation, the consumer has the right to be duly informed about any product. That information must be provided in an adequate, accurate and clear way (article 6, III). The clarity of the information is not only a result of acting in good faith, but more importantly, it is the result of putting the transparency principle into action (article 4), which is also one of the objectives of the National Consumer Relations Policy adopted in Brazil. The central idea of the BCC is to establish a more sincere and less harmful relationship between consumers and suppliers. In this behalf, the BCC states that suppliers should not dispose any products that are risky to the consumer's health or safety, except those which are known to be so and that are bought at the consumers own risk. But, even then, the manufacturer must supply necessary and suitable information concerning the product and its possible risks (article 8), which is even more necessary on GMO based products. Likewise, article 9 clearly states that the supplier of potentially dangerous or harmful products and services must provide information about the risks of their products and, also, adopt any other applicable protective measures to each concrete case. Once again, the concern is that information about safety issues should be made available to the consumer, even in advertising. Effective result of the principle of vulnerability is the duty of incitement to any information regarding consumption. In relations involving GMO, this duty is due strictly to the principle of good faith and strict liability.

The current Brazilian Biosafety Law (No. 11105/2005), however, already states that the GMO presence or absence in food and food ingredients intended for human consumption or animal feed must be informed (article 40). However, it establishes that the labeling would subject of further regulation. To a large extent, indeed, the absence of labeling regulations does not relieve the supplier to provide the most complete and adequate information on the ingredients of its products. Note, for instance, that the BCC settles the obligation to provide information as fundamental principle of the National Consumer Policy (art. 4, IV) and as a basic consumer's right (article 6, III). On this last point, moreover, the legal text is wide enough to allow supposing that this duty covers the specific foods produced from GMO. It seems clear, therefore, that under any analysis, as about the percentage used in the preparation of the product or on the possible health risks, the supplier must provide the necessary information. Furthermore, the same law stipulates that the supplier shall maintain technical and scientific data to support the advertising about his products (art. 36, sole paragraph), besides that any publicity or silent advertisement can be consider misleading (article 37, § 1 and 3). The same legislation states that any information or advertising about a product in any form of communications media must be accurate and that the manufacturer must be prepared to stand by his information (art. 30). Moreover, the BCC stated that all information about products or services and their characteristics, quality, quantity, composition, price, guarantee, expiry dates and origin must be clear, correct and accurate (art. 31), even more about consumer health and safety. To that extent, if there is failure in complying such provisions, Brazilian legal system states that, along with the civil consequences (for example, compensation for damages or for breach of duty

of good faith), there would be administrative penalties (fines and bans on marketing) and penalties (art. 66, arrest and fine).

About GMO labeling there is, also, a specific Decree (4680/2003) that makes compulsory the labeling of GM food. Therefore, it is necessary to make it clear that the GMO labeling should not be confused with safety. In Brazil, if the GMO is not considered safe for consumption, it will not be authorized for commercialization. Therefore, only GM food or feed that are considered safe will be labeled, because the labeling is part of the consumer right to be duly informed and guarantee of the possibility of freedom of choice. The product is considered to have transgenic nature, by the Brazilian law, when it contains GMO over to one percent of its composition. The Decree also states that the consumer must be informed about the type of gene used to create the GMO, which must be included in the list of ingredients. As for food and ingredients produced from animals that were fed with feed that contains GM ingredients, these must be included on the main part of the label, and must meet requirements for size and highlighting as stated in article 2. As for food and food ingredients that do not contain GMOs or were not produced from GMOs, the label will state that '(name of product or ingredient) is free of transgenic', providing there is a similar transgenic product on the Brazilian market.

Concluding notes

The Brazilian Consumer Code has the purpose of balancing contractual relationships between consumers and suppliers. It recognizes that the consumer is the weaker party in this relationship and for that reason seeks to protect him. This type of protection is extremely important in times when consumption relations are also subject to the technological innovations. It is a fact that there is separation from technological knowledge and cognitive capacity of the consumer. The consumer is not always able to understand the consequences of his consumption habits and even if a certain product or service may come to be harmful to his health. To make this protection effective, it's assumed that any and every consumer, poor or rich, cultured or ignorant, physical person or corporate entity, individual or collective entity is vulnerable, in other words, he/it may have his/its free and conscious manifestation of will attacked by commercial practices, by the absence of knowledge and by the denial of access to information. This recognition is what founds and justifies the existence of the consumer protection system, serving as a guide also for legal developments on biotechnological matters. In this context, it may be seen that the access to a broad kind of information is a consumer right. It limits the activities of suppliers and may not be suppressed or withdrawn.

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Part 7. The role of ethical engagement and public participation in EU food governance