

# GMO, consumption and consumer vulnerability in Brazilian Consumer Law: the right to be duly informed<sup>1</sup>.

A. P. Myszczyk

University: UNIBRASIL/QUIS Law School

E-mail address: [anapaulamy@yahoo.com.br](mailto:anapaulamy@yahoo.com.br).

F. Glitz

University: UNIBRASIL/QUIS Law School

E-mail address: [fglitz@gmail.com](mailto:fglitz@gmail.com).

## Abstract

The Brazilian consumer protection system is governed by the principle of vulnerability and adopts, among other mechanisms of equalization, the figure of "less sufficiency". Often confused, these concepts are distinct and deserve detailed analysis. They are, today, even more relevant if we take into account advances in biotechnology. In this respect an important step is to ensure the right information to consumer, exposed to consumer relations involving genetically modified organisms.

## Keywords

Consumer. Vulnerability. Less sufficiency. Transgenic

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 "ghosts" demand legal definition and recognition. In this sense, one of the dilemmas that arise is the "legal" 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 these 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 information necessary to found a conscious choice. In such way, it's necessary to understand how the protection of the right to be informed is settled by the Brazilian consumerist legislation and, among its instruments, the mechanisms established to protect the vulnerable contractual part.

Sensitive to the changes taking place in society, the Brazilian Federal Constitution of 1988 included the legal protection of the consumer, incorporating into its norms the recent tendencies of modern public law, substantiated in Clause XXXII of Article 5, *in verbis*: "The State will promote the protection of the consumer in the form of a law". This was an important step token by the constitutional legislature which would later become the Consumer Protection Code, Law 8078/1990, which established public and of social interest norms, in addition to rules and principles that were well suited to the changing socio-economic times worldwide. The article 5 of the Brazilian Constitution, which is concerned with the basic rights and guarantees of a citizen, mentions the need for consumer protection in Clause XXXII. Farther on, in Article

---

<sup>1</sup> Published in CASABONA, Carlos M. Romeo; ESCAJEDO SAN EPIFANIO, Leire; EMALDI CIRIÓN, Aitziber. Global food security: ethical and legal challenges. Wageningen Academic, 2010, p. 245-248.

170, clause V, consumer protection is elevated to the same status as that conferred upon national sovereignty, private property and free competition.

These are norms of a public order and of social interest for rights awaiting approval. This is a subject that is considered a basic right and guarantee of every citizen and aims to provide equality for all people in a legal consumer relationship, recognizing the vulnerability and economic weakness, *latu sensu*, of the consumer compared with the supplier in a globalized world and a society completely governed by contracts. In the light of these concerns, we see the importance of the Consumer Protection Code when it comes to the GMO food and feed in Brazilian legislation, because the labeling or identification of GMO is an integral part of responsible consumption and the right of the consumer when deciding whether to acquire a product or service based on safe and reliable information. In the case of GM food, it is evident that information on the nature of food, in the eyes of the consumer, is very important when it comes to freedom of choice.

The Brazilian Consumer Code (Law No. 8078/1990) was based on the principle of consumer protection and as had been determined by the Brazilian Federal Constitution (Article 170, V), were the legislator seems to have choice to protect the consumption relationship by backing it, necessarily, in the principle of objective good faith. To implement this provision, the law sets the figure of the "consumer" as any person or entity and/or any group of persons who acquire or use products or services as consignee. It is necessary to clarify that in this concept remains the protection of the vulnerability. The law 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 Code assumes that the consumer is the vulnerable part of this contractual relationship. This 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 consumer is part of the assignment of an intrinsic quality and inseparable part of anyone put in the position of consumer, i.e., recognition of their vulnerability. Based on this, the Code sets out a series of consumer's rights, to facilitate and ensure this protection.

The consumer is considered vulnerable because he can easily have his free will limited. This is especially true with 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. Also does not allow evidence to the contrary, it is not questionable and cannot be remedied, since it is a principle and not a legal presumption. 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 consumers broadly (article 2 of the Brazilian consumer law) to show your vulnerability in order to receive protection under that law (Article 29 of the Consumer Law). 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 and 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. This is especially significant if we think in terms of the use of GMO in food and feed and the lack of disclosure or the consequences. Under the legal perspective, it should be noted that the consumer society is introducing a new type of agreements, the adhesion contracts, within which they operate contracts and membership. Within this new reality, vendors make use of this type of contract, the complexity, expertise, lack of clarity and transparency inhibit the expression of free will and conscious consumer, leading to the need for legal protection. One such form of protection is to impose to the supplier, to provide information about the composition of a particular food. One would exemplify this type of situation the requirement that the label genetically modified foods the figure of the yellow triangle warning.

In pitch, the principle of consumer vulnerability is one of the pillars of the Consumer's Code Protection that underpins the whole system, and a directive to achieve the goals set for this and its adoption involves considering the consumer as the legal center of the universe and that this vulnerability makes it impossible to reduce the consumer's state of a mere object of the market or suppliers. It is a guideline material for the identification of implied rights, either defensive or stamp service component, functioning as a limiter of the activities of suppliers. It is not only a guarantee that the consumer will not be subject to manipulation that reduces the condition of object, but also a duty of full development of personality of each individual and / or the community.

In the terms of the Consumer Protection Code, the consumer has every right to be duly informed, and the information provided must be adequate, accurate and clear (article 6, clause 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, as the central idea of the Code is to establish a more sincere and less harmful relationship between consumers and suppliers. The Code states that suppliers should not market any products that are risky to the health or safety of consumers, except those which are known to be so and which consumers buy at their own risk and even then the manufacturer must supply necessary and suitable information concerning the product and its possible risks, which is necessary in the case of GMO (article 8). Likewise, article 9 clearly states that the supplier of potentially dangerous or harmful products and services must clearly provide information on these aspects of their products, without affecting the adoption of any other applicable measures in each concrete case. Once again, the concern of the legislator can be seen concerning clear information about safety issues should be made available to the consumer. Brazilian consumer protection legislation is concerned about information 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 wording of Law No. 11105/2005, however, already provides, in its Article 40, that food and food ingredients intended for human consumption or animal feed containing information about the presence or absence of GMO. However establish that the labeling will subject of further regulation. To a large extent, however, 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 example, that the Consumer Code settles the obligation to provide information as fundamental principle of the National Consumer Polices (art. 4, IV) and as a basic right of the consumer (Article 6, III). On this last point, moreover, the device is large enough to allow supposing that this duty covers the specific foods produced from GMO. It seems clear, therefore, that under any analysis, is about the percentage used in the preparation of the product or on the possible health risks, the supplier must provide the necessary information. On top of this interpretation, the same Code stipulates that the supplier maintain (and provide interpretation on systemic) technical and scientific data to support the advertising vehicles (art. 36, sole paragraph). It is certain, also, that any publicity or silent advertisement can be consider misleading (Article 37, § § 1 and 3). Article 30 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 this information when a contract is undertaken. In article 31 it is 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, and this is also the case when it comes to consumer health and safety. To that extent, would be asked which the consequences on failure in complying such provisions are. Along with the civil consequences, for example, compensation for damages or for breach of duty of good faith (objective, linked to information), even the Code provides administrative penalties for such omissions (fines and bans on marketing) and penalties (art. 66, arrest and fine).

It is Decree 4680/ 2003 that regulates the right to information as guaranteed by the Consumer Protection Code. The Decree 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 right of the consumer to have information and freedom of choice. The article 2 states that when food and food ingredients for human or animal consumption which contain or are produced from GMO which make up over one percent of the product are to be commercialized, the consumer must be informed of the transgenic nature of this product. The Decree also states that the consumer must be informed of the type of gene used, which must be included in the list of ingredients. As for food and ingredients produced from animals that were fed with feed with 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, thus: "(name of animal) fed with feed containing transgenic ingredient" or "(name of ingredient) produced from animals fed with feed containing transgenic ingredients". 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 transgenics", providing there is a similar transgenic product on the Brazilian market. Another point to be made on the Decree is that the Ministry of Justice published the MJ Order 2658/03, which regulated Decree 4680/2003 and according to the text of this order, it seeks to define the form and minimum dimensions of the symbol to be included on the labels of food and food ingredients for human or animal consumption packaged as those sold in bulk or *in natura*, which contain or are produced from GMO as stated in Decree 4680, of 24 April, 2003. This order is complementary to the technical Regulations for the Labeling of Packaged Food, approved by Resolution 259 of 20 September, 2002 of the National Agency of Sanitary Inspection (Anvisa).

## References

- Almeida, J. B. de. (1997). A proteção jurídica do consumidor. Saraiva Publisher, Brazil.
- Amarante, M. C. N. (1997). Justiça ou equidade nas relações de consumo. Lúmen Júris Publisher, Brazil.
- Arrua Alvim, J. M. de *et al.* (1991) Código do consumidor comentado. Revista dos Tribunais Publisher, Brazil.
- Bittar, C. A. (1999). Direitos do consumidor. Forense Universitária Publisher, Brazil.
- Bonnato, C. Moraes, P. V. (1999). Questões controvertidas no Código de defesa do Consumidor. Livraria do Advogado Publisher, Brazil.
- Carvalho, S. V. de. (1997) O direito do consumidor. Sagra Luzzatto Publisher, Brazil.
- Filomeno, J. G. B. (2001) Manual de direitos do consumidor. Atlas Publisher, Brazil.
- Grinover, Ada Pellegrini *et AL* (1998). Código brasileiro de defesa do consumidor comentado pelos autores do anteprojeto. Forense Universitária Publisher, Brazil.
- Marques, C. L. Contratos no Código de Defesa do Consumidor. Revista dos Tribunais Publisher, Brazil.
- Nunes, L. A. R. (2000) O Código de Defesa do Consumidor e sua interpretação jurisprudencial. Saraiva Publisher, Brazil.
- Oliveira, J. de (1991). Comentários ao código de proteção ao consumidor. Saraiva Publisher, Brazil.