

# AGRI-FOOD NEWS



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# SUMMARY

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# Analysis of the developments introduced by the 25th February Royal Decree-Law 5/2020

*Concerning the 25th February Royal Decree-Law 5/2020 adopting certain urgent measures in the field of agriculture and food*

The current crisis situation in which the agricultural sector finds itself, caused by a sustained fall in the prices received by farmers, increased costs, lack of balance in the setting of prices in the food chain, imbalance in the power of negotiation between the parties, etc., has forced the public authorities to intervene urgently.

In this context, *the 25th February Royal Decree-Law 5/2020 was approved, adopting certain urgent measures in the area of agriculture and food*, which was validated by the Congress of Deputies on 25th March 2020. This Royal Decree-Law represents a step forward in the various alterations announced in greater depth by the legislator, especially the amendment of the 1st August Law 12/2013 *on measures to improve the food chain* (hereinafter the "Chain Law"), which will be prompted by the transposition of the provisions of the 17th April 2019 Directive (EU) 2019/633 of the European Parliament and of the Council of *concerning unfair commercial practices in relations between businesses in the food and agricultural supply chain, which has yet to be transposed*.

Until the arrival of this amendment, **the importance of the measures adopted by Royal Decree-Law 5/2020 is such that its single transitional provision requires that all food contracts, without distinction, in force on the date of entry into force of the RD, i.e. 27th February 2020, must imperatively be amended and adapted to the new obligations introduced within a period not exceeding 6 months, i.e. before 27th August 2020.**

In this respect, the main novelties and measures agreed by the RDL in the field of the food chain can be summarised as follows:

**1.- An obligation on each operator in the food chain to pay to the next operator a price equal to or greater than the cost of production of the product** incurred by that operator. A product cannot be purchased at a price below its cost of production. Addition of Article 12b to the Law on the Chain.



The aim of this measure is to preserve the growing added value of the products at each of their stages, as well as to contribute to increasing the overall competitiveness of these products through added value.

This measure also serves to prevent the operator making the final sale to the consumer from passing on to any of the previous operators the business risk arising from their commercial pricing policy.

**It is important to note that the Royal Decree admits as evidence of compliance with this obligation any of the means admitted by law, which leads to the necessary pre-procedural advice that provides the basis for evidence in the event of legal disputes or sanctions.**

**2.-** The second measure adopted, also on the Chain Law, is the **inclusion of the cost of production in the price as a minimum element of the contracts**. Closely related to the previous one, it consists of expressly setting the cost of production in the composition of the price, **considering it to be an essential factor in setting the price** and must be explicitly stated in the contract. Letter C) Section 1 Art. 9 Law of the Chain.

In fact, in order to ensure compliance with these measures, the law incorporates an exemplary list of



elements to be considered for agricultural operations (seeds, fertilizers, pesticides, energy or machinery), and indices which, among others, may be used to ensure such objectivity in price determination, such as those published by the Ministry of Agriculture, Fisheries and Food. In short, there is a tendency to objectify the factors that directly indicate the setting of prices, such as the evolution of the market situation, the composition of the product, etc. This fixing of the cost of production will be one of the key factors in the adaptation of these contracts, especially regarding the interpretation of the objective factors that make them up.

**3.-** On the other hand, it is worth noting the novel requirement **that promotional activities carried out within the scope of application of the Chain Law be based on agreement and freedom of agreement, for which minimum contents are established; mutual interest and flexibility** to adapt to the particular circumstances of the different operators. Addition Art. 12 bis the Chain Law.

Likewise, it is stressed that **these promotional activities must not under any circumstances be misleading as to the price and image of the products** or harm the perception of their quality or value.

This new obligation of contractual adaptation requires a significant amount of contractual negotiation, balance between the parties and mutual competition.

**4.-** The last measure adopted by the Royal Decree-Law within the scope of the Law on the Chain is to **publicize the resolutions sanctioning serious and very serious infringements in the area of food contracting**. Repeal of Article 24.2 of the Chain Act and addition of Article 24 bis.

It corresponds to an advance of the mentioned 17th April 2019 (EU) Directive 2019/633 of. This is a clearly dissuasive measure, but at the same time it is very punitive, as it makes us aware of the special importance of the reputational element in the sector. The European legislator justifies its origin in the importance for the public to be aware of the operators who have been sanctioned by the competent authorities. Hence, the adaptation of existing contracts to these new obligations becomes even more important and urgent, in addition to the compliance of new contracts concluded after the entry into force of the RD.

It should be added that the rule restricts this publicity to penalties that have become final through administrative channels or, in the case of contentious-administrative appeals, through judicial channels.

Finally, the Royal Decree-Law also introduces a series of labour and fiscal reforms consisting of:

**5.- In tax matters**, Amendment of Law 35/2006, of 28th November, on Personal Income Tax and partial amendment of the laws on *Corporate Income Tax, Non-Resident Income Tax and Wealth Tax*. They imply that public aid for the first installation of young farmers may be allocated by quarters, in the tax period in which it is obtained and in the following three.

**6.- In employment matters**, the minimum number of actual days paid for access to unemployment benefit or agricultural income is reduced in favour of temporary agricultural workers resident in the territory of the Autonomous Communities of Andalusia and Extremadura.

It is also agreed that companies employing workers under the Special System for Employed Farm Workers established in the General Social Security System that transform, before 1st January 2021, the temporary employment contracts signed with these workers, regardless of the date of conclusion, into contracts of indefinite duration, including permanent-discontinuous contracts, will be entitled to a series of reductions in the company's social security contributions for common contingencies, during the two years following the conversion of the contract.

**7.-** Finally, **regarding Social Security**, section a) article 19.1 of Law 23/2015, of 21st July, on the System of Labour and Social Security Inspection, which defines the scope of action of the latter, is amended. The literal wording of this section determines the exclusion from the scope of action of the Labour and Social Security Inspectorate of accommodation and rest premises, located outside work centres or places where work is carried out.

In short, Royal Decree-Law 5/2020 introduces a wide range of measures that prepare the sector for the new regulation that is to come; with particular emphasis on the new developments in food procurement, which means a clear mandate not only for new food contracts, without distinction, to be concluded from 27 February 2020, but those in force at this date have a legal mandate **to adapt to these new obligations before 27th August 2020, with this adaptation containing a significant burden of pre-procedural strategy under penalty of significant penalties**.



# The Ministry of Agriculture, Fisheries and Food launches the public consultation period to amend the Food Chain Act

*The deadline is April 29th*

Following the coming into force of *Royal Decree-Law 5/2020*, validated by the Congress of Deputies on 25th March, adopting certain urgent measures in the area of agriculture and food, it is now time for the public consultation process that precedes the preliminary draft of the comprehensive reform of 1st August Law 12/2013, which involves the transposition of Community Directive 2019/633 of the European Parliament and Council of 17th April 2019 on commercial practices.

It goes without saying that the reform of the referred Law of the Chain is transcendental for the agro-alimentary sector, since it directly affects and regulates the commercial relations of all the agents intervening in the food chain, especially in the desired transparency of commercial relations, in the strengthening of the position of the producer and in the elimination of unfair commercial practices, which are added to the obligations introduced by the referred RD 5/2020, already in force.

The **public consultation period that began on April 1st and ends on April 29th 2020**, is particularly important insofar as it will allow all those entities, persons or representatives to determine the position and/or interest of each of them in the processing of a key reform for the future of the agri-food sector in Spain.

Public consultation is an obligatory part of the procedure for drawing up legal regulations in the field of the General State Administration, as established in article 26.2 of the Government Act, and is a very useful tool for the Administration insofar as it allows it to know the position of the sector, companies or groups affected by the future regulation, whose interests in some cases are common and in others particular.

For that matter, participation in the prior consultation period is of great importance for those groups whose interests are to be included in the subsequent parliamentary process, as well as the meaning and orientation of those interests, which will provide greater possibilities of influencing the future regulation early than other subsequent attempts to influence it

once the bill has been drafted. It is also important to note that participation in this process makes it possible to work together directly with the administrative heads of the Ministry, who are dynamic and objective, sometimes at a different level from the Ministry.

Finally, a work well-done and well-founded contributions in this previous phase, supported with legal rigour and in accordance with the legal and administrative environment, mark and condition the position and intervention of the different agents in the subsequent parliamentary process, both in Congress and in the Senate, which gives even more importance to the form of participation in this process.

In short, Andersen Tax & Legal and its specialized group of Agro-foods want to emphasize the importance of actively participating in this first phase, which is fundamental for the positioning of future interests and participation in the subsequent parliamentary process, all of which is based on precise, specialized and solid legal advice that ultimately allows the insertion of the proposals in the future Food Chain Law.



## VAT. Special regime for agriculture, livestock and fisheries

*Central Economic Administrative Tribunal (TEAC)  
Resolution No. 00/01485/2019 of 21st November  
2019*

*Advance deductible VAT by financial institutions  
by means of confirming contracts without  
recourse to entities covered by the special  
regime for agriculture, livestock, and fisheries.  
UNIFICATION CRITERIA.*

In this Decision, the TEAC reiterates its criterion, with respect to the deduction of agricultural compensation from the special regime of agriculture, livestock, and fisheries for VAT purposes.

Thus, the question that the TEAC raises is whether, in order for agricultural compensation to be deductible, it

is necessary for it to have been paid to the businessperson covered by the special regime for agriculture, livestock and fisheries and, if so, whether such payment can be considered to have been made, in those cases in which, by means of a reverse factoring contract, a third party anticipates the receipt of such compensation.

After analysing the content of the reverse factoring contract and pointing out the differences between a reverse factoring and a non-recourse reverse charge contract, the TEAC recalls that the flat-rate compensation provided for in the special VAT regime for agriculture, livestock and fisheries is only deductible when it has been paid.

Thus, in the TEAC's view, when a reverse factoring contract with or without recourse is involved, such a payment cannot be considered to have taken place, since in such cases it is the financial institution which anticipates the receipt of such compensation by the businessperson covered by the special scheme.

You can see the decision of the TEAC [here](#).



## The European Commission adopts measures to support the agri-food sector in the face of the coronavirus

The European Commission has as one of its priorities to ensure food safety and an efficient food supply chain across the continent. At a time when the European Union's agri-food sector is showing its resilience and continues to provide Europeans with safe, high-quality food despite difficulties, the Commission is taking a few support measures, including:

- **Extension of the deadline for submission of applications for CAP support:** the *new deadline* for submission of applications will be 15th June 2020 (instead of 15th May), which gives farmers more scope to complete their applications in such difficult and unprecedented times. Italy has already been informed of the enlargement and the Commission is working on the legal procedures necessary to implement it in all Member States.

- **Increased state aid:** under the recently adopted Temporary Framework for state aid measures, farmers can benefit from a maximum aid of EUR 100,000 per farm, and food processing and marketing companies can benefit from a maximum of EUR 800,000. This amount may be supplemented by *de minimis* aid, a type of national aid specific to the agricultural sector which may be granted without prior approval by the Commission. Recently, the ceiling for this aid was raised to EUR 20,000 (up to EUR 25,000 in specific cases). This means that the total national aid that can be granted per farm amounts to EUR 120,000 (or EUR 125,000) under the Temporary Framework.

- **Continuous flow of food products across the EU:** The Commission is working closely with the Member States to ensure the functioning of the single market for goods through "*green lanes*". These green lanes, mapped out in relation to designated key border crossings, will be subject to border checks of no more than 15 minutes. All goods, including agri-food products, will now be granted passage.



## Possible impact on the agri-food sector of the imprint of non-traditional brands

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Arising from the transposition of the Community Trademark Directive 2015/EU/2436, the Spanish Trademark Law 17/2001, hereinafter Law 17/2001, had to modify some of its articles. Among them, the article referring to the opening of the concept of trademarks, to include non-traditional trademarks, which have been imposed on the market, mainly due to the advance of new technologies. Before the aforementioned amendment, Law 17/2001 established as a concept of trademark (Article 4.1) "... *any sign capable of being represented graphically which serves to distinguish the goods or services of one undertaking from those of other undertakings in the marketplace*". However, when the development of new technologies makes the emergence of new media possible, the need to recognize non-traditional trademarks is strengthened, going beyond the limit of graphic representation, which even limited the registration of sound trademarks, since only those that could be represented by scores could be applied for. In addition, other types of signs have emerged as a result of human creativity in using certain attributes to differentiate products and their trademarks in the marketplace. However, in addition to the mandatory requirement that signs must be capable of distinguishing the goods or services of one undertaking from those of other undertakings, the new wording of Article 4 includes the condition that signs may "*be represented in the Trademark Register in such a way as to enable the competent authorities and the general public to determine the clear and precise subject matter of the protection granted to the owner.*"

With the elimination of graphic representation, the Spanish Patent and Trademark Office (SPTO) has recognized new types of trademarks, which join the traditional ones: (i) Figurative trademarks, composed exclusively of words, letters or numbers in standard characters; obviously, without being accompanied by graphic elements or colours. (ii) Figurative trademarks, which, in addition to including only graphic elements,

may incorporate the words, letters or numbers, but with non-standard stylization or arrangement, with or without graphic elements or colour. (iii) Three-dimensional trademarks, consisting of or including a three-dimensional shape, including the shape of the product, its presentation, or the packaging. A container, primary packaging or packing with differentiating characteristics could constitute a very necessary resource for protection as a trademark in the agri-food sector, in order to prevent it from being copied by unauthorized third parties. Among the new types of non-traditional trademarks recognized by the SPTO are Position, Pattern, Colour, Movement, Multimedia, Holographic, Touch and Sound trademarks. In the case of the latter, they can now be represented by an audio file (JPEG and MP3) containing a reproduction of the sound.

The Positional Trademark is the one that identifies the specific way in which the trademark is placed or appears on the product. They can be composed of graphic signs or by joining them to words, letters, or numbers, such as, for example, the way a figurative trademark is placed on a shoe, either on its heel or on its side. The trademark must be represented by a reproduction that properly identifies the position of the sign, as well as its size or proportion in relation to the corresponding goods. In relation to the other elements appearing in the picture, it must be indicated that no protection is claimed. In the case of the wine industry, for example, the way in which a certain attribute or type of label is placed on a bottle could be protected, if it meets the requirement of distinctiveness.

Pattern trademarks are signs exclusively made up of a set of elements that are periodically repeated in a two-dimensional way, such as the repetition of a logo or any graphic symbol to be included in an oil bottle or its packaging. The way to represent this type of trademarks is by means of a reproduction in which the repeated pattern is included.

In relation to Colour trademarks, there has long been a debate over if a colour per se could be protected as a trademark, as it meant granting a single owner the exclusive right to use it and *ius prohibendi*. However, since 1999, OHIM, now the European Intellectual Property Office (EUIPO), granted registration of the colour violet associated with the Milka trademark, in favour of Kraft Foods Schweiz Holding GmbH, to identify goods in class 30 (chocolate) of the International Classification of Goods and Services. They classify within this type of trademarks, those composed exclusively of a single colour without contours, or by a combination of colours without contours. In the analysis for its granting, it will necessarily be necessary to take into account what is called "Secondary Meaning", that is, that the repeated





use of the colour together with the trademark has given rise to the recognition of its distinctive character. It should be mentioned in this connection that colour trademarks must be represented graphically by means of an internationally recognised identification code, as is the case with Pantone.

Movement trademarks are distinguished by the fact that they are composed of a movement or a change in the position of the elements of the trademark; they are trademarks used in audio-visual media of all kinds, from the cinema, television, social networks or a screen in a shopping centre. These types of trademarks can be represented by JPEG and MP4 files, or by a sequence of still images. An example would be the instantaneous way in which the Vodafone logo appears.



Like the Movement trademark, the Multimedia brand has also increased its presence on the market as a result of technological advances and reaches the consumer through audio-visual media. It consists of a combination of images and sounds, which are represented by MP4 files.

The Hologram brand, on the other hand, is composed of holographic features, and is represented by video files (JPEG or MP4) or a graphic or photographic reproduction that contains the necessary views to sufficiently identify the holographic effect in its entirety. This type of trademark is becoming increasingly important, especially in the fight against counterfeiting, and can be incorporated into agro-industrial products.

Finally, it should be mentioned that the SPTO also recognizes the Tactile trademark, which consists of the texture of a product, which of course has a distinctive character. In this type of trademarks, the "Secondary Meaning" mentioned for the Colour trademark may also be considered. The Tactile trademark can be represented in any form, based on the use of generally available technology, if it is possible to reproduce it in the registration in a clear, precise, autonomous, intelligible, durable, and objective manner. This type of trademark could also be of interest to the agri-food industry, in order to differentiate in the market, for example, bottles of oil or wine, with characteristic textures.

As can be seen, non-traditional trademarks arise with the aim of providing companies with new resources to protect their distinctive signs in the marketplace. Therefore, many of these types of new brands can support the work of the agri-food sector in enhancing its products in an increasingly competitive market. To that end, not only is the creativity of each producer or businessperson sufficient; due protection of the sign is also required for it to enjoy exclusive exploitation and, in turn, the ability to prohibit third parties from attempting to use it without their consent.

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