

## The implementation in Spain of Regulation EU 1169/2011 and the sanction models adopted: a brief overview

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### 1.- Introduction

Spain is a decentralised State. Regulation and control of food presentation is mainly a competence of the Autonomous Communities, of which there are seventeen in Spain plus two Autonomous Cities. Central Government remains competent to coordinate, to issue basic legislation and to control imported products. Furthermore, the regulation and control of food information aims to protect different legal interests, affecting consumer protection, fair competition, food safety and agricultural quality. These are matters which are not always under the control of one sole authority or whose infringements are not always governed by the same piece of legislation. Therefore there is neither one single authority nor one single piece of legislation governing the control of the application of Regulation (EU) 1169/2011 on the provision of food information to consumers (FIC Regulation) in Spain. Moreover, because of different territorial and material competences, these sometimes overlap.

The following pieces of legislation complement and develop FIC Regulation in Spain:

- i) *RD 126/2015 de 27 de Febrero*, on non pre-packed foods, foods packed on the sales premises at the consumer's request or pre-packed for direct sale, which regulates how to provide information on allergens in these cases and what information has to be provided in the case of distant sale and other matters.
- ii) *RD 1334/1999* on food labelling, which is the implementation in Spain of repealed Directives on food labelling, and which is still in force as

regards batch number which is a mandatory particular of food labelling in Spain

- iii) Furthermore, there are several quality standards ruling mandatory particulars and legal names for some products, such as Meat products and Iberian meat products; *RD 474/2014* and *RD 4/2014*, Table Olives; *RD 679/2016*, Edible oils *RD 308/1983*, etc..

### 2.- Infringements and Penalties

Infringements of the FIC Regulation are normally prosecuted under administrative law, including several pieces of legislation protecting consumer interests, food safety and food quality. Infringements can also be the subject of private law since they can be considered unfair competition. More rarely these infringements could be the subject of criminal law if the infringement consists of a fraud with relevant economic impact.

The following administrative sanctions and pieces of legislation are applicable to FIC Regulation infringements in Spain:

At *National level*, infringements of FIC Law could fall under the scope of:

- a) Consumers Protection Act; *RDL 1/2007 Ley General para la Defensa de Consumidores y Usuarios*.

Depending on the nature of the infringement, it could be considered serious, sanctioned with a fine between 3,005.07 to 15,025.30 Euros, or very serious, sanctioned with a fine between 15,025.30 to 601,012 Euros

- b) Food Safety and Nutrition Act; *Ley 17/2011 de Seguridad Alimentaria y Nutrición*.

Depending on the impact on public health, the infringement can be sanctioned with a fine of up to 5,000 Euros or up to 20,000 Euros, as per article 50.1.b),

- c) Food Quality Act; *Ley 28/2015 de Calidad Alimentaria*.

Depending on the nature of the food fraud, it can be sanctioned with a fine of 4,001 to 150,000 Euros, as per articles 14.9 or 14.13,

- d) Agri-food Fraud Regulation; *RD 1945/83; arti-*

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Depending on the nature of the infringement, it could be considered serious, sanctioned with a fine between 601.02 to 15,025.30 Euros, or very serious, sanctioned with a fine of between 15,025.31 to 601,012.1

At *Regional level* infringements of FIC Regulation can fall under scope of several pieces of legislation, for example;

a) In Madrid; they are generally sanctioned by *Ley 11/1998 de protección del consumidor en Madrid* (Consumer protection) with a fine from 15,025.31 to 601,012.10 Euros

b) Andalusia; they are generally sanctioned by *Ley 2/2011 de calidad agroalimentaria de Andalucía* (Agri-food quality), with a fine from 3,000 to 50,000 Euros

c) Valencia; they are generally sanctioned by *Ley 1/2011 Estatuto de los Consumidores y Usuarios de la Comunidad de Valencia* (Consumer protection) with a fine from 15,025.31 to 601,012.10 Euros

d) Catalonia; they are generally sanctioned by *Ley 22/2010, Código de Consumo de Cataluña* (Consumer) with a fine of 10,000 to 100,000 Euros

e) Navarra; they are generally sanctioned by *Ley Foral 7/2016 de defensa de Consumidores y Usuarios* (Consumer) with a fine from 3,000 to 15,000 Euros.

Both in national and regional legislations, additional sanctions such as closure, destruction of the product, publication of sanctions, etc. can be imposed.

## 3.- Some relevant legal issues

### 3.1. The question of the competent administrative authority to prosecute FIC Regulation infringements in Spain.

Most FBOs distribute their products in more than one region, generally all over Spain, that is to say, the market is Spain as a whole. Furthermore, some FBOs have premises, offices and factories

in different parts of Spain and sometimes the legal domicile of the company is also in a different location. This creates a problem of territorial competence, since only one administrative proceeding and sanction is possible for one infringement, due to the principle of *non bis in idem*, applicable to administrative law. In other words, if the infringement is detected in Madrid but the company manufacturing the product is in Catalonia, or if the factory in Catalonia is owned by a company whose legal domicile is in Andalusia, which authority is competent and which legislation is applicable? The one where the product is manufactured? The one where the legal domicile is based? Or the one where the product is sold and where consumers have to be protected?

There is no simple answer to this, and in practical terms it is my experience that criteria are not always clear nor uniform from one regional authority to another. In order to resolve this situation, *Ley 20/2013 de Garantía de Unidad del Mercado* (Act to guarantee a single market within Spain), was enacted. Its Article 21 establishes that the competent authority is the corresponding to the place of the FBO's legal domicile, in cases where the infringement relates to requirements applicable to the product itself. However, this article of the Law does not establish a clear preference of one authority over another and in fact some Courts have adjudicated that competence to control products on the market resides with the regional authority where the product is sold (Judgement of the Andalusian Superior Court of 8 March 2018, rec.1116/2015), while on other occasions the criteria of the Court have been rather to ascertain where the decision to which the infringement can be traced was taken, if the infringement is the result of a decision taken by the headquarters or by a branch (Judgement of the Madrid Superior Court of 23 May 2012). In any case, none of these judgements are case law in Spain and the criteria are not as clear as legal certainty would require.

### 3.2. When the manufacturer is different from the

*owner of the brand, who is to be considered responsible for an infringement?*

According to article 8.1 of FIC Regulation, the FBO responsible for the food information shall be the operator under whose name or business name the food is marketed, or its importer in the EU. Furthermore, article 9 of Spanish RD 1945/83 considers the person whose name is on the label is responsible for any infringement related to food presentation and labelling (in pre-packaged foods). The producer can also be blamed if it acted in agreement with the owner of the brand. A similar liability is established by article 17 of Ley 28/2015 on food quality.

However, in practice, authorities prosecute both the owner of the brand and producers indistinctly, when these are different companies, and Courts tend to consider any one of them liable and put the blame of the infringement on the fact itself and not on culpability, which is contrary to the main principles of sanctioning law. An exception to this approach can be found in a Judgement of the Court of Cordoba (number 209/2018 of 3 October). No clear case law has been established and the criteria set by the ECJ in the Lidl Italy ruling of 26 November 2016 (C-315/15) appear to support a broad interpretation of the concept of responsibility in the case of infringements of this kind.

#### *4.- Infringements of FIC Regulation under private law*

Finally, under private Law, infringements of FIC regulation can also fall under the scope of unfair competition (misleading presentation and advertising is considered unfair competition, as per articles 3.e of Ley 34/1998 and 5.1. b of Ley 3/1991) and cases are sometimes brought before the Jury of AUTOCONTROL (Spanish advertising stan-

dards agency) which has taken several decisions on the matter, such as the Resolution of 2 November 2013 “*Vivesoy Vidactiva y Vivesoy Pielvital*”, where it was considered misleading to present voluntary information in such a way to limit space for mandatory particulars<sup>1</sup>. Although AUTOCONTROL decisions have very limited legal value (they do not have the status of an arbitration award) their moral value is important and are in general followed by the food and advertising industries.

#### **ABSTRACT**

*Spain is a decentralised State and the FIC Regulation is enforced, mainly, via regional legislation and penalties, generally fines, vary from one region to another. To determine the territorial legislation applicable in cases where the product is sold in a place different to where it is produced, criteria have been established by Spanish Act Ley 20/2013 de Garantía de Unidad del Mercado. However, conflicting interpretations on territorial competences are not uncommon. Apart from administrative infringements, non-compliance with the FIC Regulation can be considered unfair competition, which is prosecuted under private law and, often, under voluntary schemes similar to (but not with the legal status of) arbitration, such as that of the advertising standards control body AUTOCONTROL.*

*La Spagna è uno Stato decentralizzato e il Regolamento (UE) n. 1169/2011 viene applicato principalmente attraverso la legislazione regionale. Le sanzioni, generalmente pecuniarie, variano da una regione all'altra. La Ley 20/2013 de Garantía de Unidad del Mercado ha stabilito i criteri da seguire per determinare la legislazione ter-*

(<sup>1</sup>) However a Court in Navarra in a Judgement of 5 April 2017 considered that adding an adjective to the legal name of a product- a mandatory particular- is covered by commercial freedom of speech.

*ritoriale applicabile nei casi in cui il prodotto è venduto in un luogo diverso da quello in cui è prodotto. Non sono tuttavia rare interpretazioni contrastanti in tema di competenze territoriali. Il mancato rispetto del Regolamento (UE) n. 1169/2011 può inoltre essere considerato come manifesta-*

*zione di concorrenza sleale, perseguita ai sensi del diritto privato e, spesso, nell'ambito di schemi volontari simili a quelli dell'arbitrato (pur non avendo lo status giuridico di questo), come quello dell'organismo di controllo della pubblicità denominato AUTOCONTROL.*