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# Legal regime on food contracts in Spain: Freedom of agreements and mandatory contractual conditions

## 1. The tribute to Professor Roman Budzinowski

I have the pleasure and honor to participate in the tribute to Professor Roman Budzinowski, on the occasion of the 50<sup>th</sup> anniversary of his scientific and academic career. I have had the opportunity to meet the professor on several times, including at the international Congresses on agricultural law at the Faculty of Law and Administration of the Adam Mickiewicz University in Poznań.

These events were organised within the framework of academic organisations to which I belong and in which I have participated for more than two decades: the UMAU and the CEDR. I was able to verify the intense involvement of Professor Budzinowski in these Congresses, his good work and his magnificent ability to achieve the success of such scientific meetings.

The constant presence of Professor Budzinowski as an agricultural law expert in Poland is unquestionable. Proof of this is the school and his younger disciples who follow his example in the study and development of the agrarian discipline. For all these reasons, I am pleased with the initiative taken by his students, colleagues and friends in this academic tribute, to which I join with this contribution about agricultural contracts in Spain. Congratulations Professor Budzinowski.

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## 2. Law 12/2013 on measures to improve the functioning of the food chain: The scope of application and the trading relations between food chain operators

We must start with the provisions of Article 2.1 of Law 12/2013 on measures to improve the functioning of the food chain, regarding the scope of application.<sup>1</sup> The Law applies to “commercial relations between operators established in Spain involved in the food chain from production to distribution of agricultural and food products. They also apply to commercial relations between any of the operators involved in the food chain in a situation when one is established in Spain and the other in another Member State and the legislation of that Member State is not applicable.”

For the purposes of these trading relations, “agricultural and food products” are considered to be “products listed in Annex I of the Treaty on the Functioning of the European Union, and also any substance or product intended to be ingested by human beings or with a reasonable probability of being so, whether or not they have been wholly or partially processed. This includes beverages, chewing gum and any substance, including water, voluntarily incorporated into food during its processing, preparation or treatment” (Article 5.e).

It is appropriate to delimitate the concepts of “commercial relations” and “operators.”

On the one hand, the Law seems to use without distinction the concepts “relationships,” “operations” or “commercial transactions” whenever it refers to the negotiations and agreements that take place between certain subjects or companies operating in the food chain and that culminate in the signing of food contracts whose object is agricultural or food products.

On the other hand, in this specific area, “operator” of the food chain is considered “the natural or legal person in the food sector, including a group, central or joint purchase or sale company, that carries out some economic activity in the scope of the food chain.” Likewise, the “primary producer” is defined as a “natural or legal person whose activity is carried out in agricultural, livestock, forestry or fishing production” (Article 5.c) and d) of Law 12/2013).

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<sup>1</sup> A. Sánchez Hernández, *Las relaciones contractuales en la Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*, in: G. Doménech Martínez, F. Millán Salas, F. González Botija (eds.), *Temas actuales de derecho agroalimentario*, Valencia 2016, pp. 2–4.

Final consumers will not have food chain operator status, since they are not constituted as a food company, nor do they regularly and professionally engage in any lucrative economic activity linked to the food sector.

Consequently, the aforementioned commercial relationships that develop within the framework of the food chain include any economic transaction of purchase and sale of agricultural or food products between the various operators integrated in the subsectors of primary production, processing and distribution of such products.

The Law defines the “food sector” in Article 5.b) as “the set of agricultural, livestock, forestry and fishing productive sectors, as well as those for the processing and distribution of their products.”<sup>2</sup>

Continuing with section 3 of Article 2 of Law 12/2013, it also applies to commercial operations carried out between operators of the agri-food chain in the processes of packaging, transformation or stockpiling for subsequent commercialisation, and in any case, purchases of live animals, feed and all raw materials and ingredients used for animal feed.

From such a definition follows the intention of the Law to include, on the one hand, those operations that we could qualify as related or accessory to other main ones within the food chain (thus, for example, the packaging and storage of products have an accessory and prior nature regarding the subsequent marketing operation). And in a negative sense “the Law does not apply to any other purchase than those mentioned and made by farmers or ranchers to acquire the remaining agri-food inputs, such as machinery, pesticides, fertilizers or any other input than those expressly mentioned.”<sup>3</sup> On the other hand, any contractual operation linked to the livestock production sector is accepted within the framework of the Law. And in particular, operations related to such products (live animals, for example for breeding and fattening, feed, raw materials, ingredients ...) will always have a place in the broad concept of food inputs to the extent that the resulting final product has as destination human food.

For the purposes and regulatory interest of Law 12/2013, commercial operations or transactions between operators of the food chain could be obligatory carried out through the figure of the contract. In particular, the Law contemplates the figure of the so-called “food contract.”

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<sup>2</sup> Legal relations in agribusiness sector have been studied by M.J. Cazorla González, *Relaciones contractuales en la cadena alimentaria y su incidencia en la competitividad de los mercados*, “Revista de Derecho Agrario y Alimentario” 2013, No 62, pp. 14 ff.

<sup>3</sup> This is how it is expressed by A. Sánchez Hernández, *Las relaciones contractuales...*, pp. 2–3.

As established in Article 2.4 “The scope of application of chapter I of title II of this law (it refers to food contracts) is limited to the commercial relations of the operators that carry out commercial transactions whose price is higher than the amount set in the first paragraph of Article 7.1 of Law 7/2012, of October 29, modifying tax and budgetary regulations and adapting financial regulations for the intensification of actions in the prevention and fight against fraud.”

Therefore, for a private contractual business relation between food chain operators to be subject to the requirements, Law 12/2013 imposes on a food contract (including its written formalisation), a prior conditionality of an economic nature, this is, a minimum monetary value of the contract to be included. Certainly this value of the contract (price), which stands at 1,000 euros (Article 7.1 of Law 7/2012), operates as a kind of a “cut-off limit,” excluding from the food contract standard model all and any transaction or sales contract whose price does not exceed the amount established by the Law (1,000 euros).

Operations to which Law 12/2013 does not apply, as freely undertaken by the parties, may or may not be formalised in a document or take any other valid and legally admitted form (such as the verbal form ...), following the principle of Article 1278 of the Civil Code that establishes freedom of form as a general rule in private or civil contracts.

In a different vein, when configuring – this time in a negative sense – the scope of Law 12/2013, its Articles reveal certain activities and commercial relations excluded for different reasons.

First of all, transport, hotel and restaurant activities are outside the concept and scope of the food chain. Specifically, all transport activities are excluded, as are the services of hotel and restaurant companies with a turnover of less than ten million euros. Also excluded are companies rendering accommodation with a turnover of less than 50 million euros.

Therefore, although the activity of these companies could have a more or less direct or ancillary relation with the transactions and/or operators of the food chain (thus, a bar or a hotel will be able to acquire products from a farmer or rancher to serve their clients or guests), it is automatically excluded by the combined effect of Articles 2.1 and 5.a) of Law 12/2013.

The aforementioned legal exclusion could be based on the fact that such entrepreneurs, due to the activity they carry out, are materially outside the orbit of the food chain. In fact, they belong to economic sectors (such as hotels and restaurants, more typical of the service sector) that do not fit into any subsector of the food supply chain (since they neither produce agricul-

tural raw materials, nor industrially process food, nor distribute it in the market). In the case of transport, it does not play its own and exclusive role in the food chain (since a company itself can transport food, but also other non-food products, or other types of cargo or goods).

Secondly, product deliveries made to agricultural cooperatives and other associative entities by their partners will not be considered as a commercial relation and, therefore, will always be excluded from the scope of the application of Law 12/2013. To apply this exemption is mandatory that partners are obliged to make such deliveries by the statutes of the cooperative or association (Article 2.2).

This second reason for the exclusion of the applicability of Law 12/2013 is justified by the special relation between farmer's members and the cooperative in which they are integrated. Such an associative or contractual linkage of adhesion to the agricultural cooperative naturally generates the duty of each cooperative member (for marketing purposes) to deliver all or a part his own production to the agricultural cooperative to which the member belongs. In such deliveries, the product price is usually not determined and is paid direct to the farmer. Normally, a settlement with each partner is made later, at the end of the agricultural season, and it correspond with the result that sets the amount each partner is going to receive. Of course, the "expenses" incurred by farmers are discounted, such as the purchases of ...). The cooperative goal consists of concentrating the supply (putting together the farmer's production), and so, through collective bargaining, is able to obtain better contractual and price conditions in the sale of agricultural and food products.

Finally, as indicated in Article 5.c) in fine "final consumers will not have the status of operators in the food chain." Therefore, when excluding consumers from the food chain, all those operations or contracts where one of the parties adopts the legal status of "final food consumer" will be left out of the application of Law 12/2013. In fact, the concept of consumer, his guardianship and acquired rights, as well as the contracts concluded with consumers and users (consumer contracts), whether for food products or others, are ruled by their own specialised regulations. Among others, by the Royal Legislative Decree 1/2007 of 16 November, approving the revised text of the General Law for the defense of consumers and users and other complementary laws. Certainly, transactions between operators within the food supply chain have commercial or mercantile nature. Both parties are companies or professionals of a certain economic subsector and they act for profit. For this reason, contracts celebrated between food companies and final

consumers (consumer contracts) directly are out of the scope of applicability of Law 12/2013, because that commercial nature is not present.

### 3. Food contract legal regime

#### 3.1. Concept and legal nature: Types of food contract

Article 5.f) of Law 12/2013 contains the legal definition of a “Food Contract.” Pursuant to its provision one of the parties is obliged to sell agricultural or food products to the other party, for a certain price, whether it is a single sale or a continuous supply. Those that take place with final consumers are excepted.<sup>4</sup>

The subjective element of the food contract (the contracting parties) is clearly established by the Law: only operators who carry out some economic activity in the food supply chain can enter into this type of contract. They may be natural or legal persons, but in any case must be companies or professionals engaged in the production, processing and distribution of agricultural or food products.

Regarding the qualification of the legal nature of the food contract, we can affirm that we are dealing with a private, civil and agri-food contract of a special nature. In the first place, its specialty is derived from the legal instrument that regulates it. Law 12/2013 is a regulation with specific status, outside the Civil Code, which establishes a contracting regime ad hoc for certain commercial relations within the food chain. Second, the specialty is derived from the parties involved in the conclusion of the contract, because all of them are members of a certain strategic and complex economic sector – the agri-food sector – characterised by the obtaining, elaboration, processing and distribution of agricultural or food supplies, live animals or feed, intended for human or animal supply and consumption. And precisely

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<sup>4</sup> To read more on this subject, A. Sánchez Hernández, *Los contratos alimentarios en la Ley de la cadena alimentaria (Referencia a la normativa y doctrina italiana “dei contratti di cessione dei prodotti agricola e agroalimentari”)*, “Actualidad Civil” 2015, No 3, pp. 1–46; T. Rodríguez Cachón, *Relaciones contractuales de la cadena alimentaria: Estudio desde el análisis económico del Derecho*, Madrid 2020, pp. 40–54; J.L. Palma Fernández, *Los nuevos contratos alimentarios: análisis de la ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*, “Revista CESCO de Derecho de Consumo” 2013, No 7, pp. 240–245. In the same way, P. Amat Llombart, *Mejoras en el funcionamiento de la cadena agroalimentaria en la Unión Europea y en España a partir del régimen jurídico de negociación y contratación: el contrato alimentario y el contrato tipo agroalimentario*, “Revista de Derecho Agrario y Alimentario” 2015, No 31, pp. 33–41.

the specialty of the food contract also stands out for its objective element, that is, the goods that are the object of commercial traffic, in reference to agricultural or food products, many of which are perishable in the short term.

From the joint and systematic reading of the Preamble to Law 12/2013 and its Article 5, it can be concluded that under the generic category of “food contracts” three types of contracts are outlined.

Indeed, the Preamble announces Chapter I, Title II, which regulates the “food contracts that are signed between the operators of the food chain,” and after it states that they may consist of a “supply contract, sale contract or integration contract.”

For its part, Article 5.f), when defining food contract, indicates that it may be either a “sale” or a “continuous supply.” Finally, Article 5.g) directly qualifies the “integration contract” as a “food contract modality.”

In conclusion, we can determine the existence of the following three types of food contract.

As a first modality, we find the traditional sale contract. The references to it in the Articles of Law 12/2013 are constant. Thus, the main one is contained in the aforementioned Article 5.f) when defining food contract. Also in Article 2.3, which mentions “purchases of live animals, feed and all raw materials and ingredients used for animal feed.” And finally, Article 5.c) points out to “central or joint company dedicated to purchases or sales.” Regarding the legal regime applicable to such food contracts, in addition to specific regulations of Law 12/2013, applicable general rules established in the Civil Code must be also respected in any case. Likewise, where appropriate, regional civil legislation (foral civil law) that rules special agrarian sales relations could be applied,<sup>5</sup> as well customs of the place (customary law), if they exist and are accredited.

The second type of food contract is the supply contract. However, Law 12/2013 does not specifically establish the characteristics of this contract, because the Law just states it consists of the obligation to deliver agricultural or food products by one of the parties to the other as a “continuous supply.” Hence the character of continuity in time of the product deliveries, which on the other hand also gives this contractual modality specialty. The supply contract can be defined as a contract by which one party (supplier) undertakes to deliver to the other (purchaser, the supplied party), in exchange for a unit

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<sup>5</sup> To cite an example, that of the Valencian Community, in whose Law 3/2013, of July 26, on contracts and other agrarian legal relations, Title I, Articles 1 to 25, contemplates the “Special Modalities of the contract of sale,” including the specialties of the sale by eye or estimated, as well as the sale by weight or *per arrovat*.

price that can be paid periodically or on a case-by-case basis, movable things (such as inputs, agricultural raw materials or food) that must be subject to successive deliveries, at the time and quantity established in a determined or determinable way. The supply contract does not appear to be ruled in Spanish private law, but it is regulated in public administrative Law. Thus, in Law 9/2017 of 8 November on public sector contracts, regarding a supply contract it is provided that (Article 16): “Supplier is obliged to deliver a plurality of goods (movable property) successively and for unit price without the total amount being defined exactly at the time of signing the contract, since deliveries are subordinate to the needs of the purchaser (the supplied party).” This contract can be configured as a collaboration contract between companies, being of a commercial nature when the supply is made between merchants. But in our case, suppliers are agricultural producers, and therefore in Spain subject to civil law, since their sales by definition are excluded from the sales of commercial nature (Article 325 of the Commercial Code: “The following shall not be deemed commercial: 2.º The sales made by the owners and farmers or ranchers of the fruits or products of their crops or livestock”). Hence we must conclude that a supply contract as a type of food contract concluded within the framework of commercial relations in the food chain, has the status of a civil contract (being in turn a special agrarian contract). It will be governed by the particularities contained in Law 12/2013 and by the agreements freely signed between the parties.

And finally, as a third type of food contract, the so-called integration contract is presented.<sup>6</sup> In some detail, Law 12/2013 defines it in Article 5.g) as a modality of a food contract in which one of the parties (integrator), is obliged to the other party (integrated), to provide all or part of the products, raw materials and inputs necessary for the production object of the contract, as well as, where appropriate, to exercise technical direction and take charge of production at the end of the production cycle. And the integrated party is obliged to provide land, spaces and facilities, as well as the complementary means and services necessary to complete the production. Finally, once the production is obtained, the integrated party must deliver it to the integrator. Such contracts are also known in the doctrine as “agro-industrial contracts.”<sup>7</sup>

<sup>6</sup> A. Luna Serrano, *Colaboración intersectorial y contratos de integración agroalimentarios*, in: P. Amat Llobart (ed.), *Derecho agrario y alimentario español y de la Unión Europea*, Valencia 2007, pp. 363–370.

<sup>7</sup> J.M. Caballero Lozano, *Los contratos agroindustriales: Reflexiones en torno a su naturaleza jurídica a la luz de la experiencia italiana*, “Revista de Derecho Privado” 1997, No 81, pp. 19–51; G. Doménech Martínez, *La aparcería asociativa y los contratos agroindustriales en la Ley de Arrendamientos Rústicos*, “Revista de Derecho Agrario y Alimentario” 2004,



### **3.2. The food contract content: The principle of freedom of agreement and the mandatory minimum contractual conditions**

Article 9.2 of Law 12/2013 establishes the general criterion applicable to food contracts: freedom of contract when configuring and concluding them. Thus, it establishes that the “content and scope of the contract terms and conditions will be freely agreed upon by the parties, taking into account the guiding principles set in Article 4 of this Law.” So Article 4 is the one that, among others, includes the principle of freedom of contract.

But those legal references to the contract freedom of agreements are to some extent repetitive and unnecessary, since they just signify a reflection of Article 1255 of the Civil Code regarding private contracts: “The contracting parties may establish the pacts, clauses and conditions that they consider convenient, provided that they are not contrary to the laws, morals, or public order.”

In order to achieve the purposes of Law 12/2013 (more transparency in contracts, more balance and fair reciprocity between the parties, as well as strengthen the producer sector, among others), other aspects of greater importance are the obligation that food contracts are concluded in writing (Article 8) and must necessarily include in their content various mandatory elements and minimum contractual conditions (Article 9).

Indeed, written food contracts and their mandatory minimum content, constitute two of the important novelties introduced by Law 12/2013. As indicated in the Preamble, “the obligation is established to expressly incorporate in these written contracts the essential elements thereof (identification of the parties, purpose, price, payment conditions, delivery of products, rights and obligations, duration and causes and effects of extinction) freely agreed by the parties in accordance with the guiding principles of this Law.”

We must point out that it does not consist of a compulsory or normative contract in which the Law determines to the extreme the obligatory content the parties should fulfill, since the freedom of agreement principle is still fully in force. Rather, it is intended to achieve a certain level of transparency and legal certainty for the parties involved in commercial relations in the food supply chain. In particular, we consider that the legislator is committed

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No 42, pp. 79–86; idem, *Los contratos de integración agroindustrial*, Buenos Aires 2010; M.D. Llombart Bosch, *Los contratos de integración agroindustrial: integración agroindustrial un posible modelo para conseguir en la Unión Europea, un derecho contractual más armonizado y uniforme en materias agrarias*, “Revista General Informática de Derecho” 2006, No 1.

to eradicating, in practice, the fairly widespread use in the agri-food sector of simple verbal agreements between producers (farmers or ranchers) and buyers (industry, distribution companies...). The damage that this type of practice causes to the interests of the weakest party (the producer/seller/supplier), consists in being forced to accept unwritten contracts, transactions in which the conditions, prices or terms of delivery are not specified, in short, agreements in which the execution of the obligatory content is often left to the discretion of the buyer (price uncertainty, way of payments or payment periods, etc.).

Thus, Article 9.1 of Law 12/2013, literally provides that food contracts will contain at least the following points:

a) Identification of the contracting parties.

b) Purpose of the contract, indicating, where appropriate, the categories and references contracted.

c) Price of the food contract, with express indication of all payments, including applicable discounts, which will be determined in a fixed or variable amount. It will be determined based solely on objective factors, verifiable, non-manipulable and expressly established in the contract.

The price of the food contract that a primary producer or a group of these has to receive must be, in any case, higher than the total costs assumed by the producer or the actual cost of production, which will include all the costs assumed to carry out their activity. Among others, the cost of seeds and nursery plants, fertilizers, phytosanitary products, pesticides, fuels and energy, machinery, repairs, irrigation costs, animal feed, veterinary expenses, amortisations, interest on loans and financial services, contracted jobs and wage labor or labor provided by the producer himself or by members of his family unit.

The determination of the effective cost will have to be made taking as a reference the whole of the marketed production for all or part of the economic or productive cycle, which will be put in in the way in which the supplier considers that it best adjusts to the quality and characteristics of the products that are the object of each contract.

d) Payment terms.

e) Conditions of delivery and availability of the products.

f) Rights and obligations of the contracting parties.

g) Information that parties must provide each other, in accordance with Article 13 of the Law.

In relation to this requirement, we can add that Article 13.1 of Law 12/2013 establishes the duty to put in writing the information that the par-

ties must provide for the effective fulfillment of their respective contractual obligations, as well as the delivery period of said information, which in any case must be provided and justified in objective reasons related to the object of the contract.

h) Duration of the contract, with express indication of the date of its entry into force, as well as the conditions for its renewal and modification.

i) Causes, formalisation and effects of the contract termination.

j) (deleted).

k) Conciliation and conflict resolution, with express mention in the contract of the procedure that the parties will use to resolve the differences that may exist between them in the interpretation or execution of the contract, indicating either the arbitration court or the courts to which possible controversies would be submitted.

Contractual penalties for non-conformities, incidents or any other duly documented circumstance, which must be proportionate and balanced for both parties.

l) Exceptions due to force majeure, in accordance with the provisions of Communication C (88) 1696 of the Commission regarding “force majeure” in European agricultural law, and in Article 1105 of the Civil Code.

As a first conclusion of general scope, we can affirm that the fact that Law 12/2013 forces the parties to carry out their contracts in such a way that at least they contain the essential elements of the private agreement they intend to conclude, it may involve a step towards rebalancing bargaining positions between suppliers (producers) and buyers (industry and distribution) inside the food supply chain. In such a way, operators are provided with an instrument that provides greater legal security to the transactions. By formally documenting the contract in writing, its content can be known, the proof and accreditation of the existing legal relation between the parties is guaranteed, it also permits the interpretation and execution of the agreed obligations and services, the potential presence of unfair trading practices or terms can be verified (they violate the good faith in business principle), etc. However, this does not mean that Law 12/2013 imposes on the parties the specific content of each contractual term to be included in the contract. Up to here comes the force of the Law that provides for the principle of the freedom of contract.

A second and more specific conclusion is the one that attends to the configuration of food contracts price. In this issue the Law dares to take a further step. The Law not only requires the parties to put the price in writing, but also limits the parties' freedom to determine the price, since its determination

is subject to certain conditions. Thus, it is noteworthy that in contracts concluded by an operator in the primary producer sector (farmer, rancher, etc.) who sells to a first buyer, it is mandatory that the selling price at least covers “the effective cost of production.” The purpose of this measure abounds in what Article 12 ter of Law 12/2013 calls “avoiding the destruction of value in the food chain.” This means the farmer, in the first sale of his products, should at least receive a price which amount covers his production costs. In this way, one of the mandatory factors to determine the price of the contract must be the “effective cost of production of the product that is the object of the contract, calculated taking into account the production costs of the operator actually incurred, assumed or similar. It even goes so far as to describe the specific parameters to calculate said cost of production, either indicating the inputs to be valued and other specific production costs, or by referring to the data on effective costs of agricultural holdings. In short, we are faced with the legal response to the permanent farmers and ranchers demand regarding agricultural prices they have been receiving for decades when selling their products, and that sometimes barely covered the real costs of production.

### 3.3. Food contracts formal requirements: Consequences

Law 12/2013 establishes two types of formal requirements imposed on food chain operators.<sup>8</sup> On the one hand, requirements for written documentation of the contract, and on the other hand, the obligation of temporary preservation of certain documents.

Regarding the formalistic requirement of written documentation of commercial operations, the Law provides two possibilities: the written formalisation of the food contracts themselves, and the documentation by official

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<sup>8</sup> A. Carrasco Perera, B. Lozano Cutanda, *¿Qué consecuencias tendrá para los operadores la ley de mejora de la cadena alimentaria?*, “Análisis GA&P” marzo 2013, pp. 1–5; E. Muñoz Espada, *Hacia unas nuevas relaciones entre el Registro mercantil y la actividad agraria*, Madrid 2020. This author justifies the need for a reorganisation of agricultural administrative registrations – multiple and dispersed – as a means or support for a better structured, more profitable and efficient agricultural and agri-food sector, as a new type of information and management that represents a value marketability and market positioning for agricultural companies. In this regard, she analyzes relevant strategies for the modernisation of all the management that integrates the agricultural business activity, especially to favor cross-border commercial and business relations. Specifically, she proposes the use of the Mercantile Registration as a harmonisation tool and as a binding instrument, invoking its value in the sense of providing security to legal traffic.

invoice of certain cash sales operations for which it will not be mandatory to conclude a food contract.

In effect – as stated in the Preamble of the Law – regarding food contracts “the most significant novelty, to guarantee legal security and equity in commercial relations, is the establishment of the obligation to formalise them in writing...”<sup>9</sup> Article 8.1 expressly confirms this requirement: “Food contracts must be formalised in writing.”

Consequently, any contract regarding operations within the food chain, fulfilling legal requirements of subjective nature (contracting parties), objective nature (agricultural or food supplies, animals ...) and price requirements (more than a thousand euros), can be legally qualified as a “food contract.” Then it must necessarily take a written form at the time of its conclusion.

Talking about the moment in which the written form of the food contract must appear, the Law 12/2013 indicates that the written formalisation of the contract must be carried out before the performance of contracting obligations (Article 8.1). In good logic, legal certainty imposes the conclusion and perfection of food contracts in written documentary form before the beginning of the execution of their typical effects, consisting of the performance of reciprocal services whose main result is the delivery of certain agricultural or food products in exchange for the payment of the previously agreed price.

And finally, as regards the technical and legal value to be assigned to the mandatory food contract written form, according to Article 8.2 of Law 12/2013 “writing requirement in no case supposes a requirement for the contract existence and validity.” Preamble of the Law has also confirmed this in the same sense.

Thus, the formal requirement established by the Law does not cover the character of *ad solemnitatem* legal form. That is, we are not facing a necessary form for the constitution of the food contract (it is not a substantial form), as it is not essential for its existence and validity. So food contracts may exist and will be fully valid and effective despite not having completed the written form in its conclusion. Therefore, the formal requirement stated in Article 8.1 of Law 12/2013 has a purely *ad probationem* character, serving as a means of contract proof and a way of proving between the parties and before third parties its existence and its mandatory content. But the absence

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<sup>9</sup> Through the formalisation of contracts established in Article 8, transparency is gained in commercial relations and greater equity is guaranteed in them, compensating for the vulnerability factors of the agricultural sector: atomisation, territorial dispersion, seasonality, price and product volatility and perishable products with a short commercial life. As indicated by A. Sánchez Hernández, *Las relaciones contractuales...*, p. 4.

of such a writing form requirement will not affect the validity or effectiveness of the contract, nor will cause the voidance of the contract. However, the legal requirement of the written form of the food contract contributes to a higher level of legal certainty for the parties in the framework of the commercial relation, especially for the primary producer, usually the weakest part of the operation, and many times in a situation of imbalance vis-à-vis the buyer or even economically dependent on the buyer. In addition, the existence of a written contract can foresee or help avoid unfair trading practices, abusive or disproportionate terms or conditions to the detriment of the weakest part of the contract.

Now it remains to be determined whether a breach of the requirement of a written form of a food contract produces some other type of consequence, for example, in the field of administrative responsibility, eventually constituting an offense punishable by the competent public authority. In fact, the original text of Article 23 of Law 12/2013, opening the chapter on offences and sanctions in the matter of food contracting, established in its section 1.a) that it was a minor infraction “not to formalise by written form the food contracts referred to in this Law.” Such conduct would have effected in a fine of up to 3,000 euros (Article 24.1.a). Well, as a result of the subsequent modifications of Law 12/2013<sup>10</sup> in 2020 and 2021 this minor offence has been elevated in degree, becoming a serious offence according to Article 23.2.b), for which the offender could be punished with a fine between 3,001 euros and 100,000 euros.

Continuing with the written form formal requirement of food chain commercial operations, the Law refers to other transactions carried out through cash payments that do not require the conclusion of a food contract, but at least the identification of the parties as food chain operators and a record of the operation through a formal invoice,

We refer to the provision of Article 8.3 of Law 12/2013: “In relations between food chain operators when the price payment is made in cash in exchange of a delivery of food products, it will not be necessary to sign a food contract, but the parties will have the obligation to identify as operators and document the commercial relations by issuing the corresponding invoice with the requirements established in Royal Decree 1619/2012, of November 30, which passes the Regulation on billing obligations.”

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<sup>10</sup> Royal Decree-Law 5/2020, of 25 February, by which certain urgent measures are adopted in the field of agriculture and food, ratified on this point by Law 8/2020, of 16 December on certain urgent measures in the field of agriculture and food and by Law 16/2021 of 14 December, which modifies Law 12/2013.

Thus, since the parties are in such specific contracting circumstances, the formal obligation is reduced to issuing an invoice in legal conditions (obligation corresponding the selling party). As a proof of the sale, that invoice will be delivered to the buyer at the time of the product delivery and once the cash payment is done.

Turning now to the second requirement of a formal nature in the matter of food contracts, arises the obligation of temporary preservation of certain documents (basically accounting).

Legal provision stated in Article 11 of Law 12/2013 establishes the following:

First, food chain operators must keep all correspondence, documentation and supporting documents, in electronic or paper format, related to the food contracts they conclude within the framework of this law, for a period of four years.

And secondly, electronic auctions organisers will be obliged to maintain for four years a documentary or electronic file of all the auctions carried out, including information on the identity of the participants, their offers and the formalisation of the food contract.

It is certainly remarkable that the satisfactory fulfillment of this custody duty, as well as the temporary preservation of the business and contractual documentation of the operations and transactions carried out within the food chain, will provide greater transparency and security to the agri-food system as a whole. At the same time it will facilitate, if necessary, the control and inspection functions of the competent administrative authorities in charge of ensuring correct compliance with the current legislation in this matter.<sup>11</sup> For these purposes, it should be remembered that the breach of the obligations relating to documents preservation involves a minor offense, punishable by a fine of between 250 euros and 3,000 euros (Article 23.1.c) in relation to Article 24.1.a) of Law 12/2013).

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<sup>11</sup> In this area, Royal Decree 66/2015, of February 6, rules. It regulates the control system to be applied by the Food Information and Control Agency, provided for in Law 12/2013, on measures to improve the operation of the food chain. Its scope of action affects the verification of irregularities that are revealed in the exercise of its functions or as a result of processed complaints and that entail breaches of the provisions of Law 12/2013 (Article 2). Specifically, the inspection bodies may verify that the operators of the food chain comply with the obligations established in Law 12/2013 (Article 10.2.c), recording in the inspection minutes the facts, actions, incidents and/or offenses detected. Such minutes will have the character of a public document and, unless the contrary is proven, will prove the facts that are collected in them (Article 19) within the subsequent sanctioning procedure.

### 3.4. Food contracts through electronic auctions

According to Article 10.1 of Law 12/2013 “food chain operators may carry out contract offers to the public in order to purchase or sell food products under the terms established by the regulations on information society among their participants. Electronic auctions organisation will be subject to the transparency, free access and non-discrimination principles.”

Indeed, this Article 10 is entitled “Carrying out electronic auctions.” whose specific regulatory regime necessarily refers to Law 34/2002 of 11 July on information society services and electronic commerce.

Both the explanatory preamble of Law 34/2002 and its Annex (dedicated to definitions), points that it includes a broad concept of “information society services,” because in addition to the electronically contracting of goods and services, it includes the organisation and management of auctions by electronic means or on line markets and shopping centres.

Article 10.2 of Law 12/2013 continues stating that “auction organisers will make public general access conditions, possible participation costs and award mechanisms.”

What is relevant is that the auction (whether electronic or face-to-face) implies a system and format for trading goods and products whose purpose is the conclusion of sale contracts. For this reason, it is established in Article 11.3 of Law 12/2013 that “the organisers of each auction will make public, after the award, the identification of the successful bidder. There will be an obligation imposed on the organiser to buy or sell and on the winner to sell or buy the entire awarded product, according to the general conditions of access and unless there is a mention of a price of reserve, below which the purchase or sale would not be made.”

Let us remember that the organisers of electronic auctions will be obliged to maintain a documentary or electronic archive of all the auctions carried out for four years, including information on the identity of the bidders, their offers and the “formalisation of the food contract” (Article 11.3).

We consider that, in the case of an operation managed by electronic auction, the logical and normal situation is that, after the award of the auctioned product to the highest bidder, the purchase operation is formalised by means of an electronic contract, that is, a food contract concluded in electronic way.

The electronic contract is defined as any transaction in which the offer and acceptance are transmitted by means of electronic data processing and storage equipment, connected to a telecommunications network. Thus, Articles 23 to 29 of the aforementioned Law 34/2002 would be applicable.



Electronic contracts are not special or different from other contracts, nor do they refer only to online or digital goods/services. An electronic contract is a normal private contract (civil, commercial or consumer contract) but concluded through the use of electronic means (for example, internet, web sites, email, electronic signature...), and therefore certain additional requirements of information, terms, form and obligations are necessary.

In relation to food products auctions, we can conclude that the operation will fall within the scope of so-called “indirect electronic commerce.” It is one that includes transactions carried out by electronic means related to tangible goods (food), so that the delivery of the purchased product cannot take place online, but rather requires the subsequent physical or material delivery of the contract object (food), and therefore the execution of this type of contract is necessarily deferred in time.

### 3.5. Food contracts registration

As Article 11 bis of Law 12/2013 states, the Ministry of Agriculture, Fisheries and Food will have a digital registry in which the food contracts signed with primary producers and their groups, and their modifications, will be registered.

So in view of this mandatory provision, those operators who buy from primary producers and their groups, will be obliged to register each food contract carried out and its modifications. The register must be done before the delivery of the product, using the electronic means that will in future be provided by further regulation to be passed.

Finally, in compliance with control public competencies, the Food Information and Control Agency and other competent authorities will have the power to access said registry to carry out the pertinent checks within the scope of their powers, fulfilling personal data protection regulations and competence law.

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## LEGAL REGIME ON FOOD CONTRACTS IN SPAIN: FREEDOM OF AGREEMENTS AND MANDATORY CONTRACTUAL CONDITIONS

### Summary

This article examines the main measures adopted by Spanish law 12/2013 on improving the functioning of the food chain, recently amended. The starting point of the deliberations was the correct determination of the type of commercial and legal relations between chain operators, to which the discussed legislation applies. Next, the legal regime on the food contract which is mandatory for most transactions between suppliers and buyers of agricultural and food products was analysed. This involved the examination of the concept, the nature and types of food contracts. The Spanish legislation is halfway between the recognition of the freedom of agreements concluded by parties and the imposition of certain mandatory

requirements on parties entering into contracts. Food operators must be aware of the formal requirements imposed on them in private contracts (regarding both their content and form), the main aspects of which have been analysed in the article.

**Keywords:** food supply chain, food supply contract, unfair trade practices, agricultural enterprises, mandatory contract conditions

## REGIME GIURIDICO RIGUARDANTE I CONTRATTI ALIMENTARI IN SPAGNA: LIBERTÀ CONTRATTUALE E CONDIZIONI CONTRATTUALI OBBLIGATORIE

### Riassunto

L'articolo si basa sull'analisi della legge spagnola 12/2013 in materia di misure volte a migliorare il funzionamento della filiera alimentare, aggiornata di recente al fine di renderla conforme alla Direttiva 2019/633 in materia di pratiche commerciali sleali nei rapporti tra imprese nella filiera agricola e alimentare. In primo luogo, vengono analizzati il campo di applicazione della legge e le relazioni commerciali tra gli operatori della filiera alimentare. Di seguito, la questione principale diventano le soluzioni giuridiche riguardanti i contratti di fornitura di generi alimentari, inclusi il concetto, la natura giuridica e le tipologie. Quindi, l'Autore ha analizzato anche il contenuto della regolazione dei suddetti contratti in linea con il principio di libertà contrattuale, ma tenendo conto di alcune condizioni contrattuali minime obbligatorie, stabilite dalla legge. Infine, vengono studiati i requisiti formali specifici relativi all'adempimento del contratto, le aste elettroniche e la registrazione.

**Parole chiave:** filiera alimentare, contratto di fornitura di generi alimentari, pratiche commerciali sleali, imprese agricole, condizioni contrattuali obbligatorie