

Food

Retail sales at a loss in the food chain

This document analyses the reform of the regulation of retail sales at a loss in the food chain, currently passing through Parliament.

ÁNGEL GARCÍA VIDAL

Professor of Corporate & Commercial Law, Universidad de Santiago de Compostela.
Academic Counsel (external advisor), Gómez-Acebo & Pombo

1. The starting point

- 1.1. As is well known, the Court of Justice held - in its Judgment of 19 October 2017, in Case C-295/16, *Europamur* - that the prohibition on selling at a loss laid down by the Spanish Retail Trade Act did not comply with the Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market), insofar as it contained a general prohibition on offering for sale or selling goods at a

loss, with exceptions to that prohibition based on criteria not appearing in the directive itself.

For this reason, Royal Decree-law 20/2018, of 7 December, amended the Retail Trade Act to provide that, despite the general principle of free pricing, sales to the public at a loss may not be made if these are deemed unfair, understanding that they are so in a number of cases: where the sale at a loss is liable to mislead consumers about the pricing of other goods or services in the same establishment, where it has the effect of discredit-

ing the image of another product or establishment, where it is part of a strategy aimed at removing a competitor or a group of competitors from the market, or where it forms part of a commercial practice containing false information about the price or the manner in which the price is calculated - or about the existence of a specific price advantage - which deceives or is likely to deceive the average consumer and has caused him to take a decision to make a purchase which he would not otherwise have made.

- 1.2 Later, Royal Decree-law 5/2020 of 25 February adopting certain urgent measures in the field of agriculture and food, the content of which subsequently gave rise to Act 8/2020, was adopted. Royal Decree-law 5/2020 introduced, in Article 12 *ter* of the Measures to Improve the Functioning of the Food Chain Act 12/2013 (the “Food Chain Act”), a new abusive practice of “destruction of value in the food chain” according to which, “in order to avoid the destruction of value in the food chain, each operator in the food chain shall pay the immediately preceding operator a price equal to or higher than the actual cost of production of such product actually incurred or borne by that operator. Proof shall be furnished in accordance with legally admissible evidence.”

This regulation lays down a prohibition on certain sales at a loss. But, strikingly, instead of being configured as such a prohibition, it is set out as an obligation on the buyer to pay a price equal to or higher than the actual cost of production. The prohibition affects

all links in the chain, except the last one, i.e. sales to consumers, among other things, in order to comply with the case law of the Court of Justice in its aforementioned judgment of 19 October 2017, *Europamur*. Consequently, only wholesale sales are affected, which is an exception to the general rule that admits sales at a loss in both wholesale and retail sales (Art. 14 and 6th additional provision of the Retail Trade Act 7/1996).

Therefore, at present, a food chain operator who enters into a contract with an end consumer can set a price lower than the cost of production or purchase of the product. But what this operator cannot do is to pass on the loss to the operators preceding him in the food chain. This is provided in the final paragraph of Article 12 *ter* of the Food Chain Act when it states that “the operator who makes the final sale of the product to the consumer may not in any case pass on to any of the previous operators his business risk arising from his commercial policy in terms of prices offered to the public”.

2. The process of amending the Food Chain Act

On the occasion of the bill amending the Food Chain Act to incorporate - after the deadline, as is all too often the case - Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, the aim has been to strengthen the prohibition on selling at a loss in the food chain. This is stated in the text approved on 29 September by the lower House of Parliament’s Agriculture, Fisheries and Food

Committee with Legislative Powers (*Official Journal of the Spanish Parliament, lower House of Parliament*, No. A-36-5, of 20 October 2021) and sent to the upper House, where it is currently at.

Thus, according to the current text of the Food Chain Act, it is possible to purchase products from foreign operators who sell at a loss as they are not subject to the prohibition of Article 12 *ter*, which is not a public policy rule (as highlighted by Ángel CARRASCO PERERA and Blanca LOZANO CUTANDA in “¿Qué consecuencias tendrá para los operadores la ley de mejora de la cadena alimentaria?”, *Análisis GA&P*, March 2013, p. 4). And for this reason it is also possible for two national operators to agree on the application of a law other than Spanish law, under Article 3 of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), leaving without effect the prohibition of Article 12 *ter* of the Food Chain Act.

To remedy this situation, the text approved in the lower House changes the scope of application of the law (Art. 2) to make it applicable not only to commercial relations between operators established in Spain, but also to commercial relations in which one operator is established in Spain and another in a Member State of the European Union when the legislation of another Member State does not apply. And, in relation to cases in which one of the parties is established in a third country, it provides that “regardless of the applicable legislation, when one of the parties is established in Spain and the other in a non-EU Member State, the prohibitions contained in this Act and the relevant sanctions regime will always be applicable”. However, this regulation only partially solves the problem,

because if the application of the legislation of another European Union State is agreed, the prohibition of the destruction of value in Article 12 *ter* of the Food Chain Act would not be applicable.

Similarly, another of the major shortcomings of the current regulation of Article 12 *ter* of the aforementioned statute that is not solved in the text approved by the lower House has to do with proving the actual cost of the products. According to the current rule, each operator in the food chain “shall pay the immediately preceding operator a price equal to or higher than the actual cost of production of such product actually incurred or borne by that operator”, and “proof shall be furnished in accordance with legally admissible evidence”. The latter is a hollow provision - because it is obvious - which does not solve the fundamental problem of determining who has to provide such proof and before whom, because the rule is open to several interpretations and has generated quite a few discussions (for example, if the proof must be provided by the seller before the buyer, it is worth asking whether he must prove it with documents or whether, on the contrary, a mere statement by the seller that the agreed price covers his production or acquisition costs is sufficient).

On the other hand, although it was not initially included in the bill currently being passed through Parliament, several amendments were presented in the lower House to extend the prohibition on sales at a loss also to contracts with consumers. And so, in the text approved by the lower House, a new paragraph has been added to Article 12 *ter* of the Food Chain Act, which prohibits retail sales at a loss. It is thus indicated - in the second paragraph

- that, “to protect the marketing capacity of primary producers, operators who make the final sale of food or food products to consumers, may not apply or offer a retail price lower than the actual purchase price of the same”.

In my opinion, there are several problems with this regulation:

Firstly, it is highly questionable whether the case law laid down by the Court of Justice in its Judgment of 19 October 2017, *Europamur*, is respected because, as the Court of Justice already stressed in its Order of 7 March 2013 (C-343/12, *Euronics Belgium*) and reiterates in the *Europamur* judgment, selling at a loss cannot be prohibited in all circumstances, but only following a specific analysis that makes it possible to verify its unfair nature. The competent authorities must therefore be able to “determine, having regard to the facts of each particular case, whether the commercial transaction at issue is ‘unfair’ in the light of the criteria set out in Articles 5 to 9 of” the Unfair Commercial Practices Directive.

Moreover, the new regulation only introduces as an exception to the prohibition on retail sales at a loss the case of perishable goods (“Sales at a loss to the public of perishable food or foodstuffs which are close to their unusable date shall not be considered unfair, provided that consumers are clearly

informed of this circumstance”). Leaving aside that there may be other reasons that justify selling at a loss, it is striking that the exception for perishable products is not extended to wholesale sales, an area in which the legislator does not provide for any exception, ignoring the requests of certain sectors, which gave rise to various parliamentary amendments that have not succeeded in the lower House. It is very relevant, in this sense, the position of the Association of Organisations of Banana Producers of the Canary Islands, which has denounced the Spanish State before the European Commission for non-compliance with, among other European texts, the Treaty on the Functioning of the European Union, the Unfair Commercial Practices Directive and the Agri-Food Chain Directive. Faced with these demands from the sector, the Government has stated that it is against introducing any exceptions in general and in relation to the banana sector in particular, although it has clarified that, “if a continuous supply contract for one year were to be made, it would not be necessary for each consignment to be above the actual cost, but for all deliveries taken as a whole to have a value that would cover the actual cost” (Answer - dated 31 May 2021 - from the Government to question 184/30802 put in the lower House by several members [*Official Journal of the Spanish Parliament, lower House of Parliament*, no. D-291 of 14 June 2021]).