Comité européen de droit rural – European Council for Rural Law – Europäische Gesellschaft für Agrarrecht und das Recht des ländlichen Raums

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**Congrès européen de droit rural – 11–14 septembre 2013**
**Lucerne (Suisse)**

**European Congress on Rural Law – 11–14 September 2013**
**Lucerne (Switzerland)**

**Europäischer Agrarrechtskongress – 11.-14. September 2013**
**Luzern (Schweiz)**

organisé sous la direction du C.E.D.R. par la Société Suisse de Droit Agraire et l'Université de Lucerne – organised under the direction of the C.E.D.R. by the Swiss Society for Rural Law and the University of Lucerne – organisiert unter der Leitung des C.E.D.R. durch die Schweizerische Gesellschaft für Agrarrecht und die Universität Luzern

**Commission II**

# Cadre juridique du droit de l'environnement pour la production agricole **– Legal framework of environmental Law for agricultural production –** Umweltrechtliche Rahmenbedingungen für die landwirtschaftliche Produktion

## National report for Spain

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# PART I. THE NATIONAL LEGAL STRUCTURE

## 1. Integration of agricultural production in the constitutional framework

Before the adoption of the Spanish Constitution of 1978 (SC), we must mention the Decree 118/1973, of 12 January, which approves the law on reform and development of agriculture (LRDA), grouping all the standards in force on agricultural structures under a single legal text. This law is still in force in Spain.

The law of 1973 put great emphasis on the need to use rural land in accordance with their nature and with subordination to the needs of the national community.

In fact, article 2 of the LRDA restricted the right of private ownership of rural properties on the basis of the implementation of its social function.

The social function of the property required to exploit the land with the most appropriate criteria and according to best agricultural destination. This should not harm profitability for the owner, but in any case the national interest.

It also required the transformation and improvement of the rural properties to achieve the most appropriate "exploitation of natural resources".

Moreover, the SC of 1978 recognizes freedom of enterprise in the framework of the market economy. The public authorities must ensure and protect the exercise of this right and defend the productivity of enterprises. The only limits that can moderate the free enterprise are the demands of the national economy and planning (art. 38).

The SC pays special attention to the modernization and development of the agriculture, livestock and fishing, as strategic economic sectors. In fact, Governments are obligated to take them into account in a particular way (art. 130).

It also recognizes the right to private property, but stating the social function to delimit its content, in accordance with the law (art. 33).

If we implement this legal theory to the agricultural sector, it means that the Spanish constitutional system protects the freedom of establishment of

productive agricultural holdings, protecting the private initiative, ownership and the benefit of their owners.

On the other hand, it introduces certain parameters of a public nature agricultural economic activity in order to guide or limit such activity. Thus the general management of the national economy can impose certain criteria of agricultural planning, and also the social function of the property can limit the exercise of agricultural activity, whenever there is a special law that this provided for it (for example the LRDA of 1973).

## 2. The environment and the constitutional system

Title I of the SC, relating to the "fundamental rights and duties", in its third chapter entitled "guiding principles of social and economic policy", incorporates for the first time in Spain article 45 on protection of the environment and natural resources.

Paragraph first states that "everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it".

Therefore it is configured as a right and duty of all citizens.

The "right to the environment" implies the need for a «suitable environment» for the correct development of people lives. This leads us to the need to implement measures of protection and improvement of all resources and elements of the environment.

And as "duty of preserving the environment" involves the obligation of all to protect it and use it in a rational and balanced way.

This duty is imposed to all the activities developed by the man, and also agricultural activities or affecting natural resources.

Environment, in the common heritage of the Spaniards, 'must' be kept by all, in the sense of the modern of the principle of sustainable development idea: economic, environmental and social.

The second section requires public authorities to ensure "the rational use of all natural resources".

Again appears the sustainability in the idea of 'rationality' when using resources containing for the benefit of man and nature.

This rational use has a double purpose:

1. Protect and improve the quality of life. This objective focuses on the quality of life of citizens, the protection of the environment in which they develop their existence. Thus the protection of the environment is a means to a certain goal: the service of man. The law should protect the environment as essential to protect the life and existence of the citizen.

2 Defend and restore the environment. This is a goal itself. I.e., the environment must be protected by its own relevance. We should protect the environment of the human activities that may loss or destroy it. In this case, the man and his activity is the main enemy of the environment.

The collective solidarity of citizens is essential to achieve both goals.

Finally, the third section deals with responsibility for infringing the right-duty to the environment.

Establishes a criminal liability (sanctioned by the criminal code before the most serious criminal offenses), an administrative responsibility (sanctioning with deprivation of rights of activity (licenses) or economic fines, for violating environmental protection regulations), and a civil responsibility (aimed at repairing the damage caused).

So we contemplate a "guiding principle", which has merited special protection by the constituent Assembly, that is materialized through a set of laws and rules specially dedicated to it, without forgetting its function as a general principle of law directed to guide and interpret (inform) the rest of rules of the Spanish legal system.

Article 45 can act as a parameter of constitutionality of laws or regulations which violated their sense and legal content. It will also act as a limit to other rights or protected goods, such as private property or the right to engage in a business activity. And finally, it can serve to legitimize the Declaration of public property.

**3. Structure of the competent bodies in the field. Competencies**

The territorial organization of the Spanish State revolves around three main administrative structures with different legislative competence and skills management to act on the environment, on the natural-rural space and on Agriculture: the central State, the autonomous communities (regions) and local authorities. However, core competencies and areas of environmental decision-making fall on the State and the autonomous communities (AACC).

On the basis of article 149.1.23rd of the SC, the State has exclusive jurisdiction with regard to the *basic legislation on protection of the environment, without prejudice to the powers of the autonomous communities to establish additional rules of protection*.

The character of the basic regulation should be on the establishment of minimum that must in any case be respected; in addition the AACC may intensify to existing levels of protection in its territory.

Currently the powers at the State level in the field of environment and agriculture belong to the Ministry of agriculture, food and environment (MAFE).

In addition to the specific competence of the State in the field of environment, we must not forget other competence, whose regulation may affect environmental material reality: civil law (liability for environmental damage); criminal law (ecological crime); tax law ("green" taxes); regime of zones of mountain, natural areas and other provisions whose object is a specific element of the environment, as water or the atmosphere, etc.; regime of certain human activities that may conflict with the environment (agriculture and livestock, industry, mining, urban development, transport, tourism, etc.).

On the other hand, own SC provides in its article 148.1: the *autonomous communities may assume competence in the following areas:... 9th. Management in the field of protection of the environment*. As a result, together with legislative competences should be considered executive functions (to implement a law that already exists), because in this area the management corresponds essentially to the autonomous communities, and to a lesser extent to local bodies.

At the level of Local Administration, we have as initial reference article 140 of the SC to *guarantee the autonomy of municipalities*. But law 7/1985, of 2 April, regulating the bases of local government, sets the regulation that has enabled environment in favor of local powers. In facto article 25 of law 7/1985

determines that *in any case the municipality powers shall be exercised, in accordance with the legislation of the State and the autonomous communities, in the following areas:... f) protection of the environment*.

## PART II. REGULATION AND CONTROL OF AGRICULTURAL PRODUCTION

### 4. State legal system of agricultural producers activity and responsibility

From the point of view of private law, productive agricultural activity is an activity of free business exercise.

Limitations and controls on agricultural activity may result in special regulations relating to certain production systems (GMO or organic agriculture), food security, either derived from the protective legislation of the environment (environmental liability, waste and pollution with agricultural origin) and rural areas (protection of sustainable development of rural areas).

In terms of agricultural production of genetically modified organisms (GMOs), law 9/2003, of 25 April, establishes the legal regime of the contained use, deliberate release and marketing of GMOs. It has been developed by Royal Decree 178/2004, of 30 January.

The purpose of these special rules is avoiding any risk or reducing damage for human health or the environment arising from these activities.

In the field of organic farming, the Royal Decree 1852/1993 of 22 October, on organic farming and its indication on agricultural products and foodstuffs, with referral to the European legislation on the subject (currently the Regulation EC 834/2007), establishes the conditions and production requirements to qualify and label the final product as organic. Among these requirements the producer must comply obligations relating with the protection of the environment.

In terms of environmental regulations with influence on agricultural production, we can cite the following provisions:

1. Law 25/1982, of 30 June, about agriculture in mountain areas.

It seeks the establishment of a special legal regime for agriculture in mountain areas in order to enable its social and economic development, especially in its aspects of farming, maintaining an adequate population level and *according to the conservation and restoration of the physical environment* as their people habitat.

The application of the law will take effect through «programs of management and promotion of agricultural resources of mountain». Such programs may include actions and "management, recovery, use and defense" measures (such as defense, conservation, restoration of the physical environment, landscape and protected natural areas; guidelines which should satisfy the use of agricultural land for the persistence of renewable natural resources; the soil conservation, agricultural and forestry to keep its production capacity, fighting erosion and the effects of heavy rain and snow avalanches; protection of flora, fauna, rock formations and waters; maintenance and enlargement of the areas forested, with the reintroduction of native species...). We must underline that high mountain areas will benefit from special protective measures.

2. Law 43/2003, 21 November, on mountains.

Its purpose is the conservation and protection of forests in Spanish, to promote its restoration, improvement, sustainability and rational use, relying on the collective solidarity and territorial cohesion.

The law differentiates between public mountains and private. The management of private mountains will be adjusted to the corresponding instrument of management or forestry planning, whose implementation will be supervised by the forestry body of the autonomous region.

The owner of the mountain will be in all cases the owner of forest resources produced on it. But the exploitation of forest resources will be carried out in accordance with prescriptions for mountains managing, laid down in forest resources management plans.

Wood and timber exploitations will be regulated by the forestry body of the autonomous region. In mountains not managed by that forestry body, those exploitations are subject to certain basic conditions (if any management plan exists, a prior notice is needed; if that plan does not exist, a prior administrative authorization is needed).

The law provides awareness programs for the prevention of forest fires, for promoting social participation and promoting stewardship of the population in the protection of the mountain.

3. Royal Decree legislative 2/2008 of 20 June, about land.

Public policies related to the regulation, management, occupation, transformation and use of land (both rural and agricultural land) must encourage the rational use of natural resources, promoting the effectiveness of the measures for the conservation and improvement of the nature, flora and fauna and the cultural heritage and landscape protection, and rural environment protection.

Article 9 deals with the content of the right of ownership of land, citing the duties and obligations of owners.

Specifically in rural land it is imposed the duty of preserving it. It means to maintain the land and plant mass in conditions to avoid risks of erosion, fire, flood, for security or public health or damage to third parties or to the public interest, including the environmental interest; preventing the land, water or air pollution and the undue pollutant emissions in other goods and, where appropriate, recover them.

Focusing on article 13, lands which are in "rural land area" will be used in accordance with their nature. They must be destined to agricultural, livestock, forestry or hunting use, or to any other linked to the rational use of natural resources, within the limits set by laws and the territorial and urban planning.

Where there are environmental, cultural, historical, archaeological, scientific and landscape values protected by law, the use of rural land will always respect the preservation of these values.

4. Law 45/2007, of 13 December, on sustainable development of rural areas.

One of the objectives of the law is supporting actions to promote sufficient agricultural activity and compatible with sustainable rural development. “Professional farmers” will have a preferential consideration; owners of “territorial holdings” will have a priority attention. Also the establishment of proper environmental planning, particularly to protect rural areas of greatest environmental value, is expected.

Deserve special attention the measures in favor of promoting the production and use of renewable energy, and its relationship with the adaptation of activities

and uses to the effects of climate change. Also, measures for promoting efficiency, savings and the proper use of water, singularly modernizing irrigation, have a special relevance.

According to article 2, the goals are: promoting continued and diversified economic activity in rural areas; maintaining agricultural, livestock, forestry and fisheries activities; and promoting the creation and maintenance of employment and income in other sectors, mainly in the rural areas considered priority.

To that goal, article 16 introduces the so-called «territorial agriculture» through the so called «territorial contract of rural zone» (implemented by Royal Decree 1336/2011). It is a contract to be signed between public authorities and the owners of farms who guide and encourage his activity in favor of a sustainable development of rural areas.

Territorial contracts are conceived as an instrument of support to the policy of sustainable rural development, intending to guide and encourage agricultural activities towards multi-functionality and the generation of "positive externalities", which effectively contribute to improving the economic, social and environmental aspects that shape the sustainability of rural areas, all this under the application of a territorial approach.

Among such aspects beneficial to society, are cited: maintain traditional farming systems of high natural or cultural value; conserving and restoring environmental quality, land, water, natural heritage and wild native biodiversity and agricultural genetic diversity of territorial base, the rural landscape and cultural heritage; and ultimately, contribute to the achievement of the objectives of conservation of the Nature 2000 network spaces or other spaces or protected areas.

## 5. Legal distinction between traditional farms and agro-industrial holdings in relation to the control of environmental impact

The main distinction we can find is in the revised text of the law of environmental impact assessment (EIA), passed by Royal Legislative Decree 1/2008 of 11 January.

The law aims to establish the legal regime applicable to the «environmental impact assessment of projects», consistent in carrying out works, installations or any other activity included in annexes I and II, whether they are public or private projects.

Projects of annex I must always and in any case pass the EIA. With regard to the sector of agriculture, forestry, aquaculture and livestock, affects to this projects:

a. First reforestation of more than 50 hectares, when they involve risks of serious negative ecological transformations.

b. Trees cut with purpose of changing to another type of land use, when it is not subject to management plans and affecting one area larger than 20 hectares. Harvesting of tree crops exploited to turn less than 50 years, is not included in this section.

c. Projects for using uncultivated land or semi-natural areas to intensive agriculture, involving the occupation of an area of 100 hectares or more than 50 hectares in the case of land where the average slope is equal to or greater than 20%.

d. Projects of water resources management for agriculture, including irrigation or drainage land projects, when they affect one area larger than 100 hectares. Consolidation and improvement of irrigation projects are not included.

e. Intensive livestock facilities that exceed the following capabilities:

1. 40,000 places for chickens and other birds.

2. 55,000 places for chickens.

3. 2,000 places for fattening pigs.

4. 750 places for sows of breeding.

5. 2,000 places for sheep and goats.

6. 300 places for cattle of milk.

7. 600 places for beef fattening.

8. 20,000 seats for rabbits.

Annex II projects or projects that may affect the areas of the Nature 2000 network, only will be subjected to the EIA when the Environment Agency in each case so decides.

With regard to the sector of agriculture, forestry, aquaculture and livestock, it affects to:

a. Land consolidation projects (except those included in annex I).

b. First reforestation when they involve risks of serious negative ecological transformations (projects not included in annex I).

c. Projects of water resources management for agriculture, including projects of irrigation or drainage of lands, when they affect one area larger than 10 hectares (projects not included in annex I), either projects of consolidation and improvement of irrigation systems of more than 100 hectares.

d. Projects for semi-natural areas with intensive agricultural exploitation not included in annex I.

e. Facilities for intensive aquaculture having a capacity exceeding 500 tonnes per year.

## 6. The general environmental rules and principles concerning agricultural production

First of all, it is implemented the general principle of "previous assessment of the potential environmental impacts" caused by agricultural activity. As we have seen, certain agricultural or agro-industrial companies whose production potential exceeds certain legal levels, must undergo mandatory EIA, by requirement of the Royal Legislative Decree 1/2008 of 11 January.

The EIA is an effective instrument in Spain for the avoidance of damage to the environment and natural resources, through the consideration of environmental aspects in certain projects and activities, either public or private.

The previous assessment is an instrument to incorporate environmental considerations into sectorial policies (such as the agrarian), and to ensure a more durable, just and healthy sustainable development enabling to meet the great challenges of sustainability, such as the rational use of natural resources, prevention and reduction of pollution, technological innovation and social cohesion.

Secondly, it should be noted that the "general principle of sustainable development" has been welcomed in various special State laws, particularly in laws of environmental content and protection of natural resources and biodiversity.

Finally, the Spanish regulation aims to promote sustainable development in its three dimensions: economic, social and environmental. By what matters here, it aims to achieve a high level of protection of the environment and to contribute to include environmental aspects in the development of agricultural, forestry and livestock activities.

For example, in law 34/2007 of 15 November, on protection of the atmosphere and air quality, there are included particular targets to achieve and maintain a high level protection of people and the environment from air pollution, in a manner compatible with sustainable development.

The law seeks to promote public administrations to incorporate provisions relating to air quality and the protection of the atmosphere in the planning, definition, implementation and development of the various sectorial policies, struggling to ensure a sustainable development.

In its article 4.3 you can read: "… it will be promoted the integration of provisions relating to the protection of the atmosphere in the various sectorial policies as a key point to achieve sustainable development".

In its article 4.4: "with a view to achieving sustainable development in the field of protection of the atmosphere and air quality, there will be promoted and disseminated the most effective modalities for the development, application and diffusion of technologies, know-how, rational environmental practices and processes".

And in the article 22: "... design and implementation of legal, economic, social and institutional instruments that contribute to sustainable development".

On the other hand, we will quote the law 42/2007, of December 13, of natural heritage and biodiversity.

Can be read in its preamble: "From the perspective of the use of the natural heritage, the inspiring principles focus: to help drive improvement processes in the «sustainable development» associated with protected natural areas; in the promotion of the orderly use of resources to ensure the sustainable use of the natural heritage; and in the integration of the requirements of conservation,

sustainable use, improvement and restoration of natural heritage and biodiversity into sectorial policies".

Article 2 contains the principles that inspired the law, among them "the contribution of the improvement processes in the sustainability of the development associated with natural or semi-natural areas".

Continuing with the sectorial regulations, law 43/2003, 21 November, on mountains states that "the management, conservation and sustainable development of all types of forests are fundamental to economic and social development, to the protection of the environment and the support systems of life on the planet. Forests are part of sustainable development".

This law aims to ensure the conservation and protection of the Spanish mountains and forests, promoting its restoration, improvement, sustainability and rational use, relying on the collective solidarity and territorial cohesion.

In particular, article 32 defines “sustainable forest management” as "adaptation to the Spanish mountains of criteria and indicators of sustainability, their evaluation and monitoring, in accordance with the criteria laid down in international resolutions and conventions to which Spain is a party".

Regarding the more specific application of the principle of sustainable development in rural areas and in agriculture, it is the law 45/2007, of December 13, of sustainable development of rural areas, which welcomes it fully and applying it in their plans, strategies and concrete measures.

From the preamble of such important law 45/2007, we highlight the following:

All rural policy should seek the achievement of greater territorial integration of rural areas, facilitating a relationship of complementarity between the urban areas and the rural areas, and promoting sustainable development in rural areas.

The basic aim of the law is to regulate and establish measures to promote the achievement of a sustainable development of rural areas, through the action of the General State administration and the measures concerted with other public administrations (regions). Its overall objectives are simultaneously economic, social and environmental.

This is a law of promotion of sustainable development in rural areas, which aims to promote public actions and encourage private initiatives of rural development for the simultaneous achievement of economic, social and

environmental objectives. The future of rural areas needs a model of sustainable development.

And already within the articles of the law, we can cite the following precepts:

Article 1.1, which specifies the “objective of the Law”, intended to regulate and establish measures to encourage «sustainable development of rural areas».

Article 2, collecting the more specific "objectives" of the law:

Article 2.1. General objectives of this law are:

(a) Maintain and extend the economic base of the rural areas through the preservation of competitive and multifunctional activities and the diversification of its economy with the addition of new activities consistent with a 'sustainable development'.

(c) To conserve and recover the heritage and natural and cultural resources of the rural environment through public and private actions that allows compatible use with a 'sustainable development'.

Article 4 of the Law is very clarifying: "The programming of the action of public authorities in relation to rural areas pursues its adaptation to the 'principle of sustainable development'...".

Law 45/2007, within the framework of the general actions for sustainable rural development, dedicated article 16 to encourage support for what is called "territorial agriculture".

Public administrations, in the field of their respective competencies, will promote the maintenance and improvement of agricultural and forestry activity, adequate and compatible with a 'sustainable development of rural areas', particularly in priority rural areas or mountain agriculture areas...

To contribute to the achievement of these goals, it will be regulated and encouraged the signing of «territorial contracts of rural area».

The territorial contract is the instrument that establishes the commitments set to be signed between public authorities and the owners of farms who guide and encourage his activity in favor of a 'sustainable development of the rural environment'.

Finally, article 24 provides: "In order to enhance the development and implementation of renewable energy, the program may include measures which have as their purpose:

a) The production of energy from biomass and biofuels, encouraging energy crops that meet sustainability criteria and prevention, reuse and recycling (in this order of priority) of waste, encouraging energy recovery for the not reusable or recyclable".

Finally, other two general environmental principles of full application to the agricultural sector are the 'precautionary principle' (or 'prevention') and the 'polluter pays principle'.

Its application is essential for the correct approach to a policy of sustainable development of productive or non-productive activities, above all those which have an impact on rural areas and agricultural development.

I think that it should be a greater emphasis on the implementation of the precautionary principle, as it allows public authorities to act 'before' environmental damage have occurred; i.e., in the presence of certain (more or less) imminent threatens to natural elements or resources or to environment. This enables the adoption of corrective measures previously to the negative environmental impact. That will prevent and even avoid such impact and damages, keeping the threatened natural resource in good condition and avoiding expensive repair measures to recover the environment, which in case of environmental damage will surely be applied.

In short, there is no better conservation policy that the prevention policy against environmental damage.

On the other hand, the “polluter pays principle”, in my opinion, must play a double role in the framework of the protection of the environment in relation to agricultural production.

The first and most important function is to act as a "disincentive" to the potential environment polluting persons, companies and sectors. This implies that the application of the principle should get a lowering effect on the use of agricultural production systems, energies or products «not clean», not friendly with the conservation of the environment or directly pollutants.

Therefore the «polluter pays principle» should promote, on the one hand, high economic sanctions to companies or sectors that employ such polluting systems. Fear of economic sanctions should create a reaction to these companies, in the

way of modifying their production system or activity, so that it complies with legally required environmental sustainability parameters.

But on the other hand, this principle means that the person producer or the damage should undertake all the consequences of his polluter action. Especially he will have to repair the damage caused, by returning natural resources to the previous state, paying for it.

The most current application in Spain of the analyzed principles, occurred by law 26/2007, 23 October, on environmental liability. The Law represents the transposition of Directive 2004/35/EC, of 21 April, on environmental liability with regard to the prevention and remedying of environmental damage.

**7. / 8. The environmental impact of the subsidies of the CAP on agriculture and forestry. The safeguarding of biodiversity**

a) The environmental redefinition of agricultural activity based on CAP direct payments regulation

Regulation 73/2009 on direct payments to agriculture is one of the basic pillars for the creation of agricultural activity and the very concept of agriculture. Regulation 73/2009 defines *agricultural activity* as "production, rearing or growing of agricultural products including harvesting, milking, breeding of animals and the keeping of animals for agricultural purposes, *or maintaining the land in good agricultural and environmental condition* in accordance with article 6".

This definition contains a 'new' expression of the farming activity with great impact in Spain. The regulation qualifies as *agricultural activity* the simple "maintenance of land in good agricultural and environmental condition", alluding to one of the cross-compliance requirements, needed to receive direct payments of the CAP.

In Spanish law (article 2.1 in connection with the 2.5, *in fine* of law 19/1995 for the modernization of agricultural holdings), the activities of farmers related to the conservation of the countryside and the protection of the environment, were classified as "complementary activities" to agriculture. They were not considered as agricultural activities in own, main and strict sense. These activities are included in the law to be taken into account to qualify the farmer as a professional.

But regulation 73/2009 (article 2.c) contains a double alternative for farmers to get the single payment: a) on the one hand, to develop the traditional productive farming (farming crops, breeding animals...); b) or on the other hand, to carry out an "agri-environmental activity": the simple maintenance of land in good agricultural and environmental condition.

Now it is not mandatory to "produce" or obtain agricultural products. The farmer can choose not continue producing, because it is enough to get the single payment "by maintaining the lands" in acceptable environmental conditions.

In the end, agricultural activity extends his concept to one of the requirements of *cross-compliance*, necessary for granting direct payments. Article 6 of regulation 73/2009 is very clarifying abut this: "Member States shall ensure that all agricultural land, *especially which are no longer used for production*, are maintained in good agricultural and environmental condition...".

In Spain, "environmental conditionality" linked to the single payment (which constitutes a new "form" of main agricultural activity), has been regulated at the State level through Royal Decree 486/2009, of 3 April. It establishes the statutory management requirements and the good agricultural and environmental condition to be met by farmers receiving direct payments within the framework of the CAP.

In conclusion, the simple activity qualified as "agri-environmental" carried out on farms, or in other words, the non-productive agricultural activity developed by farmers in applying the criteria of *conditionality for granting direct payments aid the single payment,* should consider for all purposes the main agricultural activity, although it consists of non-exploitation of the land or not farming it. In short, it will be enough by applying several actions or measures with positive effects on the environment, in particular concerning the land use and conservation, the use of water in irrigation, and the reduction of certain agricultural waste.

b) The "environmental" cross-compliance (eco-conditionality) of Community subsidies to agriculture in the single payment scheme

Regulation 73/2009 promotes an agriculture that is aware of its responsibilities with the guardianship and protection of the environment. Therefore, the granting of single payment is linked to many environmental requirements. Thus reaffirms the "cross-compliance" composed by: a) statutory management requirements; b) good agricultural and environmental condition.

In terms of the *statutory management requirements*, it is mandatory to comply with State and community regulations quoted in Annex I of Royal Decree 486/2009, affecting different areas of action such as the "environment" (environmental policy): 1. Dir. 79/409, on conservation of wild birds; 2 Dir. 80/68, for the protection of groundwater against pollution; 3. Dir. 86/278, on protection of the environment and in particular lands in the use of the sewage sludge in agriculture; 4 Dir. 91/676, on protection of waters against pollution caused by nitrates; 5 Dir. 92/43, of conservation of natural habitats and of wild fauna and flora.

Such directives have been transposed into the Spanish legal system, in order to conserve and protect certain areas and natural resources: a) Law 42/2007 on natural heritage and biodiversity; b) Royal Decree 849/1986, of 11 April, which passes the regulation on public water domain; c) Royal Decree 1310/1990 of October 29, on use of purification sludge on agriculture; d) Royal Decree 261/1996, of 16 February on protection of waters against pollution caused by nitrates from agricultural sources.

Regard to the *good agricultural and environmental condition,* State Members should ensure that farmers keep these conditions in all agricultural land, especially in those that are no long used for production. Annex II of the Royal Decree 486/2009 develops the catalogue of "good conditions" to apply to the beneficiary agricultural holding of CAP subsidies. The objectives to be achieved are: prevent erosion; maintain organic matter of lands; avoid compaction by keeping the structure of lands; ensure minimal maintenance of agricultural surfaces and avoid the deterioration of habitats.

In the end, cross-compliance is an obligation and an incentive for farmers to help the agricultural sector to comply with the principles of sustainable development, especially in its environmental perspective.

In Spain we can highlight a noteworthy legal phenomenon underway since 2005. We can qualify it as "regionalization of cross-compliance requirements". On the one hand, Regulation 73/2009 (art. 6.1) allows States to define these minimum requirements "at national or regional level". On the other hand, the Spanish political and territorial structure is organized through autonomous communities, with broad regulatory powers. Thus, much of the autonomous communities have regulated and defined at the regional level their own "statutory management requirements" and "good agricultural and environmental condition".

The justification of such a phenomenon can be explained easily. The Royal Decree 486/2009 develops the good agricultural and environmental conditions

under the criteria of minimum, in terms of requirement levels for the entire national territory. And this allows the autonomous communities to adapt these requirements to different local conditions of each region.

c) Consolidation of the environmental element in relation to CAP rural development supports

Spain has been passing detailed rules on implementation of various rural development subsidies.

First of all we must quote the support to "investments in agricultural holdings" as well as support for “young farmers" beginning in agriculture. Both have been regulated at the State level by the Royal Decree 613/2001 of 8 June, on improvement and modernization of production structures of agricultural holdings.

In those two types of subsidies, it is set the duty to meet «minimum standards in environment», in accordance with community and national rules for beneficiaries.

But the Royal Decree 613/2001 is not explicit about what are such 'minimum standards', and so the State or the autonomous communities will have to complete this aspect. The only reference to that legal and binding minimum environmental standard is found in Annex I of Royal Decree 708/2002, of July 19, laying down supplementary measures to the Rural Development Program of the CAP. This Annex I apply expressly to other kind of subsidies for rural development, and that means that it also can be applicable to subsidies laid down in Royal Decree 613/2001.

In any case, the minimum standards should apply before the end of the investment period. A reasonable time frame is also given to the young farmer who opens his first agricultural holding to meet minimum environmental standards, where it had not yet implemented them on his farm: two years from the beginning date.

Secondly, we can go on to supports on promotion of "early retirement from farming", passed by Royal Decree 5/2001, January 12. Subsidies are applied to farmers and farm workers between 55 and 65 years old.

In this case neither the European legislation nor the Spanish require the fulfillment of minimum standards on environment. But in Spain it is stated that "the lands ceded both to agricultural or not agricultural assignees, whatever its destination, shall be used in conditions compatible with the maintenance or

improvement of the environment and rural areas" (art. 8.3 Royal Decree 5/2001). Therefore in this case, "environmental cross-compliance" does not affect the beneficiary of the support, but it affects the one that gets the lands in order to continue their exploitation to agricultural uses or even to non-agricultural uses. These non-agricultural uses are assimilated to the practice of forestry or the creation of ecological reserves, in a manner compatible with protection or improvement of the quality of the environment and the countryside.

Third, it should be mention subsidies consisting in certain compensation for "less-favoured areas and areas with specific environmental constraints", regulated by Royal Decree 3482/2000, of 29 December, on compensatory indemnity in certain less-favoured areas.

Farmers and beneficiaries of support must "commit themselves formally to practice sustainable agriculture using methods and good agricultural practice standard, set out in Annex I, appropriate to the local agricultural features, compatible with the environment, maintenance of the countryside and the landscape". This obligation extends to agricultural holdings applying for the economic compensation.

And now, the definition of these good agricultural practices: "practices implemented by a responsible farmer in his holding, including compliance with environmental requirements and those practices expressly defined by the Ministry of agriculture for the performances in less-favoured areas contained in Annex I".

The original Annex I of Royal Decree 3482/2000 was replaced two years later by the Annex I of Royal Decree 708/2002 on follow-up to the program of Rural Development, cited above.

Then, the Royal Decree 585/2006 of 12 may carried out a distinction between primary and secondary good farming practice. The autonomous communities may modify the classification of good agricultural practices, cataloguing some of the secondary practices as primary, when necessary.

In fourth we can mention the support to the "use of agricultural production methods which are compatible with the environment". Under Community law they are called "agri-environmental supports". Regulated in Spain by Royal Decree 4/2001 of 12 January (deeply modified by Real Decree 708/2002).

The environmental requirement is: "the farmers who develop an agri-environmental commitment in relation to a part of the holding, must respect in

all their holding (as a minimum) the usual good farming practice set out in Annex I of the present Royal Decree". Good agricultural practices are "those that apply a responsible farmer on his farm and that include compliance with environmental requirements, as well as those that come expressly contained in Annex I of Royal Decree".

According to Annex I of Royal Decree 708/2002, the "usual good farming practice" are the normal techniques of farming that would responsibly apply a farmer in the area where pursuing his activity. These good practices are enforceable for the granting of support in less favoured areas and agri-environmental measures premiums.

Given the great diversity of agricultural lands and the climate in Spain, the autonomous communities, according to the peculiarities of the different agro-climatic areas, may establish other beneficial practices for the environment, whose observance will be complementary to practices set in Annex I.

In view of the contents of Annex I, we can distinguish in one hand the "good agricultural practices" *strictu sensu*, which are specific for the agricultural sector and with technical character[1], and on the other hand the so-called "minimum environmental standards", consisting of certain environmental legal provisions -laws and Royal Decrees[2]- that the beneficiaries must respect "in addition".

Finally, we can mention that Annex I of Royal Decree 708/2002 applies in all the national territory except in Navarra and the Basque country, in view of their specific tax regimes. Thus Navarra regulated by statutory order of August 21, 2000 the "usual good farming practice for granting certain rural development subsidies, part-financed by the EAGGF guarantee section". Such agricultural practices[3] consist in conditions or previous and necessary requirements to take into account for granting the support, and apply both to compensatory allowances in less-favoured areas (article 14.2 of the Regulation 1257/1999) as to the agri-environment (articles 22 and 23 of that Regulation).

In conclusion, we can highlight the almost complete identity between «minimum environmental standards», necessary for granting rural development subsidies (Annex I of Royal Decree 708/2002), with the environmental requirements of «cross compliance» fro granting the single payment. This is indicative of the high level of existing homogeneity in terms of the legal-environmental minimum standard required in general to the farmers to be creditors of all kinds of support from the two pillars of the CAP.

# PART III. SPECIFIC ENVIRONMENTAL RULES FOR AGRICULTURAL PRODUCTION

## 9. The agricultural production within the framework of environmental protection against pollution

The Spanish legal system has an important set of special environmental laws, of a sectorial character, aimed at the protection and guardianship of certain elements, ecosystems, areas and natural resources, as well as responsible for the prevention and control of waste and pollution.

In this legislation, we can find various provisions that affect the exercise of agriculture, livestock and forestry, committing it to the best defense of the environment and natural resources. Such rules may affect the business model that applies to the development of agriculture, taking into account the great connection possessing such activities with ecological and environmental elements. It should take into account that those activities are developed primarily in rural areas, that they occupy basically rural lands, using and consuming scarce and fragile resources such as water, and which can generate harmful pollutants waste to the receiving environment.

Thus we can quote the law 34/2007, on 15 November, on air quality and protection of the atmosphere. It aims to establish bases in the field of prevention, monitoring and reduction of air pollution, in order to avoid or minimize the damage that may arise for people, the environment and other goods of any kind (art. 1).

The application of this law shall be based on the precautionary principle, the preventive action principle, the correction of pollution at source and the polluter pays principle.

«Pollution» is defined as the presence in the atmosphere of materials, substances or forms of energy involving serious discomfort, risk or harm to the security or health of persons, the environment and other property of any nature.

All *sources of the pollutants* related in Annex I and all the *activities potentially polluting the atmosphere* listed in Annex IV, whether they are public or private, shall be controlled by law.

As well, in that Annex IV, paragraph 10, entitled "Agriculture", various agricultural, livestock and agro-industrial activities likely to pollute the atmosphere are listed:

(a) Crops with or without fertilizers.

(b) Burning in the open field of stubble, straw, etc.

(c) Livestock.

(d) Manure management regarding organic compounds.

(e) The use of pesticides and limestone.

(f) Manure management regarding nitrogen compounds.

Regarding the obligations of owners of factories or plants where the atmosphere potentially polluting activities are carried out, it is mandatory to respect the emission limit values in cases where regulations are established. In addition, when there is an imminent threat of significant damage, due to air pollution from the owner´s factory, the necessary preventive measures shall take without delay and without any requirement. Anyway, when it has caused atmospheric pollution, it will also be adopted new damage avoidance measures without delay and without any previous requirement.

On the other hand, we can mention the law 16/2002, of July 1, on integrated prevention and control of pollution. Its purpose is to prevent, reduce and control pollution of the atmosphere, water and land, to achieve a high protection of the environment as a whole (art. 1).

The law applies to public and private companies or factories where any of the industrial activities of Annex are going on. In section 9 there are cited various "agri-food industries and livestock farms" (slaughterhouse, manufacture of foodstuffs from animal or vegetable raw, treatment and processing of milk, intensive breeding of poultry or pigs).

Such activities and factories shall obtain an "integrated environmental authorization" for its building, assembly, exploitation or transfer (art. 9).

### 10. Mandatory licenses for the location of production units

In general terms, the agricultural activity in Spain is not obligated by licenses or special authorizations.

As productive private activity, the holder of the exploitation, whether physical or legal person, develops agricultural activity once it is registered for tax purposes (taxes statement) and registered in the social security (labour effects).

However, agricultural holdings needing to perform certain works, production units, constructions, etc. for the proper exploitation of the land, will need to obtain the appropriate specific licenses for each project.

In addition, if such projects are included in Annex I or II of the Royal Legislative Decree 1/2008, of 11 January, on environmental impact assessment, they must undergo the mandatory EIA. This requirement is mandatory within the ordinary procedure for obtaining the license or authorization by the competent authority (usually a local or regional level) to carry out the project.

## PART IV. MECHANISM OF ENVIRONMENTAL LAW

### 11. Existing measures

1. The Directive on nitrates 91/676/EEC is been transposed into Spanish system by the Royal Decree 261/1996, of 12 February, on *measures for protection against the water pollution caused by nitrates from agricultural sources*.

According to the Royal Decree, water pollution caused by intensive agricultural production is an increasingly charged phenomenon, which manifests itself especially in an increase in the concentration of nitrates in surface water and groundwater, as well as the eutrophication of reservoirs, estuaries and coastal waters. In fact, between diffuse sources which contribute to the pollution of waters, the most important currently is excessive or inadequate application of nitrogen fertilizers in agriculture.

The specific regulation (arts. 3 and 4 of the Royal Decree) on the one hand, commands the competent public authorities (the State and the autonomous communities) to determine the *bodies of water* affected by pollution, or at risk

of being polluted, by nitrates of agricultural origin; and on the other hand, to design certain *vulnerable areas*, i.e. surfaces which runoff or leakage affects or may cause the pollution by nitrates in water.

In vulnerable areas, the autonomous communities shall establish action programs (arts. 6 and 7) with the aim of preventing and reducing this pollution. These programs shall contain, on a mandatory basis, unless the measures listed in Annex 2, and also measures incorporated in the *codes of good agricultural practices,* prepared by the respective autonomous communities. Those codes are usually of voluntary application. The amount of manure applied to the land each year, including manure of the animals in each farm or livestock unit, will not exceed specific amounts per hectare laid down in the Annex 3 of the Royal Decree.

2. In the field of regulation of the use of fertilizers in agriculture, article 19.3 of the law 45/2007 foresaw the adoption of a National Plan on agricultural and livestock environmental quality. To this date only a draft was done but still not approved officially. The plan will contain different sections related to the sustainable use and the reduction of pesticides, fertilizers, as well as measures for the management of waste in agriculture and livestock.

In terms of the regulations in force, we must mention the Royal Decree 824/2005, of 8 July, on fertilizer products.

According to it, "agricultural land is a valuable and limited resource whose current agronomic potential is due to the work carried out by man for centuries. The irreversible degradation of this resource involves not only destroying the most precious farmers good, but mortgaged the agricultural opportunities of future generations. For this reason, the land protection is a priority objective, and so the use of good fertilizers is important, to ensure the land fertility and agronomic value, present and future"; the law regulates “the use of new ingredients in the production of fertilizer products, so to avoid their possible harmful effects on water, land, flora, fauna and human beings." Arises the possibility of "prohibit the circulation and sale of fertilizers potentially dangerous for health and the environment".

The main environmental prevention and control measures are:

- In general terms, it is only authorized to make fertilizer products with ingredients specified and included in Annex I.

- Requirements of packaging, labeling, processing, internal quality controls…

- It is not allowed to market fertilizer products that are not included in any of the types of Annex I of Regulation 2003/2003 or in any of the types of Annex I of the Royal Decree, and which do not satisfy the quality and other requirements laid down in the Decree.

- Registration of fertilizer products in the Agriculture General Direction of the Ministry of agriculture, food and environment, at least two months prior to the date that it intends to start marketing a new product. The registration is valid for 10 years.

- Traceability of fertilizer products.

3. The use, treatment or disposal of the manure and slurry from livestock holdings, currently constitutes a factor that demands the attention of the Spanish agricultural sector, especially in some areas of high livestock concentration.

The first option is the use of manure as organic fertilizer, within the limits that allow Community legislation (Directive 91/676/EEC, "Nitrates Directive"). In most of the Spanish territory, there are no difficulties to act in that way, achieving a benefit for farmers and agricultural land. The problem is in the so-called «areas of high concentration of farms».

For vulnerable areas or high livestock concentration, supplementary procedures such as the anaerobic bio-digestion or elimination, reduction-recovery treatments shall be implemented.

In this regard we must mention the "Slurry Bio-digestion Plan". The Plan aims at the reduction of emissions of greenhouse gases from slurry applying treatments based on the anaerobic digestion process. This process allows the collection and quantification of biogas, and its subsequent energy recovery or disposal by burning. For this purpose, specific supports are regulated (RD 949/2009 on State subsidies to encourage the application of the technical processes of Slurry Bio-digestion Plan).

## 12. Regulations on nuisances to neighborhood (smell, dirt, pesticides, insects)

The Decree 2414/1961, of November 30, contains the regulation on annoying, unhealthy, harmful and dangerous activities, in force in the autonomous communities that do not have a specific regional law.

There are defined as «annoying» the activities constituting a discomfort by producing noise, vibration, smoke, gases, odors, mists or dusts in suspension, or by eliminating substances.

Certain requirements are needed to obtain licenses for activities qualified as "annoying". In that sense, fireplaces, vehicles and other activities that may produce smoke, dust or noise, must provide inexcusably the necessary corrective elements to avoid inconvenience to neighborhood.

It is forbidden to establish cowsheds, stables, blocks and cattle pens and birds within the urban core of the localities with more than 10,000 inhabitants and which are not essentially agricultural or livestock.

Production units located within the inner cities have now been removed.

In particular, in the field of noise, law 37/2007 of 17 November, tries to prevent, monitor and reduce noise pollution, to prevent and reduce the damage that may arise to human health, property or the environment.

All acoustic transmitters are included in the law, whether they are public or private. Thus it affects any activity, infrastructure, equipment, machinery or behavior that generates noise pollution.

«Noise» is defined as the presence in the environment of noise and vibration, whatever the acoustic emitter that originate them, involving discomfort, risk or harm to persons, for the development of their activities or to goods of any kind, or that cause significant effects on the environment.

The law provides certain values and limits of noise that can not be overcome. Law expressly does not quote the agricultural or livestock activity, but its producer units, equipment or machinery might be affected by this rule.

The Administration may act by adopting the appropriate measures (environmental assessment, correcting units, acoustic easements...).

## 13. Zones of protection

1. In the field of protection of the coasts, the coastal Law of 1988 (article 6), provides for the possibility to "Works of defense of land threatened by the invasion of the sea or the invasion of sands of the beaches" either by natural or

artificial causes. The owners of threatened land are able to build works of defense. To do that a previous authorization or concession is needed. But they will not be allowed to damage the beach nor the maritime-terrestrial area, nor undermine the legal imitations and corresponding public easements.

The Government may declare some sections of the coast in "situation of severe regression". To do that, it will be necessary to verify a kick on the line from shore, along the length and time interval established by law, according to technical criteria. And provided that it is considered that they can not recover its previous state by natural processes. In those areas, the State may impulse actions of protection, conservation and restoration. Generally, in these areas it will not be granted any new title of occupation, on the basis of a risk of flooding.

In General, the coastal Law sets limitations of ownership over the land adjacent to the shore of the sea, for reasons of protection of the public domain.

In particular, it provides some areas linked to "protection easement", on an extension of 100 meters inland, measured from the interior of the shore of the sea boundary. In this area, crops and plantations can be carried out and no permission is needed.

2. The water law of 2001 includes some interesting definitions: «riverside», the side strips of public riverbed located above the low water level; and «margins», the land bordering the river beds.

The margins have, in all its longitudinal extension:

(a) an area of easement of five meters of width, for public use, which will be regulated by law.

(b) an area of police of 100 meters width, that will condition the land use and the activities that are developed.

Provisional protection works of the margins may be carried out in case of urgent need. The owners of this works will be responsible for any damages that may arise from such works.

On the other hand, for each hydrographic area, there will be at least one record of the areas declared of special protection under specific legislation on the protection of surface water or groundwater, or on conservation of habitats and species directly depending on water.

3. In Spain there are no crops GMO-free zones where this type of agriculture is prohibited. In fact in Spain it grows 90% of BT corn of Europe, more than 100,000 hectares in production currently.

There is a conflict of interests between GMO crops and conventional and organic crops. The preferable solution for it is the implementation of effective policies and measures to achieve the coexistence between crops.

The coexistence is supported by two substantial pillars.

One is derived from the freedom to carry out economic activities. All over Europe must be respected the right of every farmer to implement in his agricultural holding a biotechnological production system and to grow GM varieties without major opposition. There is a complex European authorization system of new plants GM. And it is of course allowed to plant, cultivate and sell GMOs in the European market.

The second pillar attends to the general protection of consumers and users. The appearance on the EU market of new GMO products should not deprive consumers of their legitimate right to the conscious and informed choice when purchasing one or other product. It is necessary an appropriate and comprehensible labeling of marketed GM products, to protect sufficiently the right to the information of all consumers, and to allow the exercise of free choice in any act of consumption.

It is preferable a concept of "coexistence" based on criteria of functionality, based in the nature of the functions performed. There is no sense to find the concept in the freedom of choice for the farmer, because that freedom is already recognized in the EU. But just the exercise of such freedom to grow GM, has created new problems that co-existence must try to solve. Thus, freedom of choice is the cause of co-existence but not its content.

Therefore, what is the function of coexistence? We could consider the maintenance of the *status quo*, i.e., the exercise of other agricultural systems, conventional and/or organic as they are being applied. But it is not a real goal. The growing areas where is introduced the transgenic agriculture must undergo specific measures that do not occur in other non-GMO crop areas.

On the other hand, the main problem is the interaction between the new agricultural system and others, which may result in the so-called "mixture of crops" or "transgenic pollution". The goal of «zero tolerance», i.e. prevent the pollution of other crops 100%, collides with the current legislation, which allows you to trade a crop without label it as GM when "technically

unavoidable" mix and not intentionally does not generate more than 0.9% of GMO presence. So law already has opted for a certain "mix" considered an admissible and tolerable level. Therefore, one can think that coexistence measures function should focus on not to exceed that 0.9% indicated, although the ideal situation is to tend to the zero pollution.

A different problem is that of organic crops (by definition free to 100% GMO), where the limit of 0.9% is not enough. There is a possible collision or incongruity between the same legal rank European rules: different Regulations. In fact, one Regulation allows some mixing with transgenic and another Regulation flatly forbids their presence in certain quality products as organic. The solution must be found in the technical measures (the most effective possible agronomic measures of coexistence; segregation or separation of crops...) and in the responsibility (providing adequate reparation for the damage caused).

To become operational, the coexistence should encourage their voluntary and consensual implementation between stakeholders (biotechnology farmers) and the possible affected (other farmers). Thus the participation of professional, business, territorial organizations, trade union, etc., and the promotion of collective agreements appear as essential.

With respect to the costs and obligations that represent the implementation of coexistence, it seems fair that most of them should fall on GMO farmers, which activity is leading to the risk to the rest of the society (in particular, other affected farmers). The risk is the crop mix, as mentioned. But now, it is required the loyal collaboration of the rest of producers who must be involved in successful implementation of the plans of coexistence.

Despite everything, I believe that the administrative burden in terms of formalities and duties imposed on the farmers of GMOs should be reduced dramatically. Authorized transgenic varieties have passed an exhaustive procedure of test, analysis, control, authorization, etc., so it now only should require measures of monitoring and caution imposed by their own legislation.

On the other hand, it would be advisable to establish a special civil liability regime, adapted to the needs of the agricultural sector, and in particular to the effects of the coexistence of traditional agriculture, organic agriculture and modern agriculture (biotechnological). That regime must identify and classify the causes generating the damage. Responsibility can be based on subjective criteria (to blame for violating the agreed or imposed coexistence measures) or on objective criteria (based on the simple risk that pollution occurs despite correct compliance with the rules of coexistence). It should specify the scope of

the compensation and the modalities (*in natura*, by economic equivalent...), with special attention to the most vulnerable agricultural system: the organic farming. It should articulate simple and agile procedures to determine the liability and the corresponding compensation, without falling into complex, slow, unsafe and unsatisfactory judicial systems.

I deem it is necessary to increase the mechanisms of insurance of civil liability. In Spain an important and extended system to insurance several combined agricultural risks, is successfully implemented since 1978. So my be it could be used this insurance system to cover the new risks that arise from the new agricultural producers (GMO), by creating a line of specific insurance, encouraged and supported by the State and regional administration, as today happens.

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[1] Common agricultural practices are grouped around different areas of action, namely: 1. Conservation of the land and fight against erosion; 2. Alternatives and rotations; 3. Optimization of the use of fossil energy; 4. Efficient use of water; 5. Conservation of biodiversity; 6. Rationalization of fertilizer use; 7. Rational use of herbicides and pesticides; 8. Reduction of pollution of agricultural origin; 9. Other actions.

[2] Minimum environmental standards are basically the same provided for in Annex I of RD 486/2009.

[3] Practices refer to issues relating to: 1. Erosion; 2. Contamination of water, land and air; 3. Proper use of pesticides; 4. Management of waste; 5. Maintenance and promotion of biodiversity; 6. Protection of animal health.