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PROTECTION OF CULTIVATED LAND: RURAL PLANNING LAW AND AGRICULTURAL PROPERTY AND REAL ESTATE LAW

National report SPAIN

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1. IMPORTANCE OF PLANNING INSTRUMENTS TO PROTECT AGRICULTURAL RESOURCES IN SPAIN

According to Article 148.1.3 of the Spanish Constitution, the Autonomous Communities have exclusive jurisdiction over the organization of the territory. They are in charge of legislating and developing their own regulations, as well as the planning instruments in their territory. So Autonomous Communities are responsible for territorial planning, but the Spanish Central Government set up a framework legislation in order to guide regional laws. In addition, the Central Government has important powers in the field of territory planning. It can impose environmental legislation and related legislation that affect the possibilities of land development. It also passes a sectorial Plan for state infrastructures (1), for example, related to transport and energy. However, in accordance with a resolution of the Constitutional Court (2), it has no authority to pass and implement a general state territorial plan.

The Royal Legislative Decree 7/2015 (3), on Land Law and Urban Rehabilitation, is the general regulation that defines, for legal purposes, the basic land situations in Spain. Article 21 of the aforementioned regulation establishes two basic situations in which the soil can be found: rural land or urbanized land. In accordance with article 21.2 and 12.2 of the Land Law (4), "rural land situation" is that kind of land preserved by urban planning of its transformation through urbanization, due to various circumstances and values present in rural areas (landscaping, natural, environmental, agrarian or cultural values, among others). Likewise, as article 13.1 of the Land Law states, lands in rural situation can be used to: *The powers of the property right include those of using, enjoying and disposing of the land in accordance with its nature. Within the limits set by laws and territorial and urban planning, those powers must be devoted to agricultural use, livestock, forestry, hunting or any other linked to rational use of natural resources.*

When urban planning qualifies certain agricultural lands as "rural land", these may be part of an agricultural holding. For this, it will be necessary that territorial planning legislation (autonomic, local ...) considers that these properties meet the legal conditions or show typical agricultural values (production, agricultural activity ...). At the same time, the lands will be excluded from the urban transformation and its conversion into urbanized land (although never definitively).

However, it is of special importance to note the differentiation contained in article 21.2 of Royal Legislative Decree 7/2015, which defines land in a basic rural situation, based on whether it must be preserved from urban development or is susceptible to urbanization. Only the latter is the one that can be affected by an urban transformation action, as provides articles 7 and 18 of the Land Law. So the land in a rural situation but susceptible to urbanization is the only one that could be urbanized. It is a rural land in transition to urbanized land. Royal Legislative Decree 7/2015 limits the cases in which can be transformed the situation of rural land in order to protect rural environments by controlling the buildability.

Meanwhile, Autonomous Communities develop and complement the basic state legislation on land use, setting its own regional planning legislation. So within the limits established by the state law, Autonomous Communities can set their own integral planning system. For example, the Autonomous Communities can establish the requirements of municipal management plans to define land as "*adequate for urban development*", as "*not adequate*" or as "*protected in accordance with its environmental, cultural value, etc.*". They also can define and determine the content of the different planning instruments. So most regions have adopted an hierarchical system: the regional government is responsible for setting a regional plan which is binding on local governments. Depending on the region, regional governments also are responsible for issuing building licences for specific development projects (large - scale projects or particularly sensitive projects, among others).

Finally, we present a number of examples of regional planning: management tools willing to achieve land protection as an agricultural resource.

The first regional example: Law 5/2011, of October 6, on olive grove of Andalusia. It is used as an instrument at the service of an specific crop planning. We are facing a unique regulatory framework, within a certain region. The so-called *Olivar* Management Plan (5) is articulated as the main instrument of coordination and integration of the actions to be developed by the set of participants and stakeholders involved in the territories. This instrument collects crop characteristics, diagnosis, strategies and actions to implement, and finally execution indicators thereof. In turn, this Law contains two types of contracts for better management of olive groves. The first is the Territorial Contract of Rural Area, also contemplated in state Law 45/2007 (6), by which a group of olive farms in certain area, voluntarily, contract with the Administration for certain purposes, mainly of a productive and environmental nature. The second type is the Territorial Exploitation Contract, where the owner of an olive farm undertakes commitments linked to its activity, and the Administration especially give support, compensations and services. In the same way, an own information and decision making support system is set up for the olive sector. Finally, this Law creates an advisory council (the Andalusian Council of *Olivar* (7)), as an advisory body to the Administration. With this regulation, the autonomic ruler aims to increase the values of a typical crop of a región, enabling its development and promotion.

The second example, in Catalonia, is about Law 3/2019, of June 17, on agrarian spaces. This Law regulates planning and management of agricultural spaces, and their conservation and protection. This Law provides for the creation of an agricultural land plan for Catalonia, and also different specific territorial plans on certain areas, according to their needs or deficits. Likewise, among the instruments included in the Law, Chapter VII pays attention to some instruments to recover and preserve the productive capacity of scarce used agricultural spaces (those lands that do not reach at least 50 % of the average physical returns of the farms in the region where they are located). It is provided that such parcels must be inventoried and included in a Register of agricultural

and livestock scarce used parcels. This Register must manage lands declared underused, taking into account the aspects of the declaration, the applications and the rent. However, the Law indicates the conditions that must be fulfilled so that the owner of a parcel that is in a “renting situation” in that Register, can recover the possibility of working it. With this measures, the regional legislator intends to reactivate existing agricultural resources, highlighting the social function of rural property, a principle that forces the land to be exploited.

2. INSTRUMENTS TO FIGHT AGAINST DEGRADATION AND DEVASTATION OF AGRICULTURAL LANDS

Almost 30% of the surface of Spain suffers medium or high erosion processes (soil losses exceeding 10 tons per hectare per year) (8). The average annual loss of soil by erosion in Spain is around 14.2 t / Ha / year (9). These data make clear that this is one of the serious environmental problems that affect the natural environment in Spain.

Desertification is a complex process, as a result of multiple factors. Various specific conditions that characterize large areas of Spain and the Mediterranean región, are associated with desertification processes:

- Semi-arid climate in large areas, seasonal droughts, extreme variability of rainfall and sudden heavy rains.
- Poor soils with a marked tendency to erosion.
- Uneven relief, with steep slopes and very diversified landscapes.
- Losses of forest cover due to repeated forest fires.
- Crisis in traditional agriculture, with the consequent abandonment of land and deterioration of soil and water conservation structures.
- Occasional unsustainable exploitation of underground water resources, chemical contamination and salinization of aquifers.
- Concentration of economic activity in coastal areas as a result of urban growth, industrial activities, tourism and irrigated agriculture, which causes an intense pressure on the natural resources of the coast.

The combination of factors and processes such as aridity, drought, erosion, forest fires, over-exploitation of aquifers, etc., gives rise to the different scenarios typical of desertification in Spain.

The legal instruments, or rather, the action pathways articulated in the agricultural sector in relation to the aforementioned problems, are characterized by focusing the measures through restrictions (protectionist regulation) or incentives (in order to encourage the performance of actions that are intended).

Currently, the restrictions focus both on the cross-compliance measures, and on the introduction of environmental considerations in the Common Market Organizations and in the European Union's support schemes.

The application of cross-compliance requirements to the direct support schemes of the Common Agricultural Policy, through the implementation of

rules stated on Regulation 1307/2013 (10), has made it possible to have a set of environmental requirements, approved by Royal Decree 1078/2014 (11), for the entire national territory, that represent an advance in the fight against desertification. The application of these requirements makes a direct contribution to preventing and mitigating the processes of desertification. In addition, it is of great quantitative importance due to the large area of crops on which the practices should be applied. Cross-compliance requirements include statutory management requirements (referred to 18 legal rules in the field of environment, food safety, animal welfare and plant and animal health), and good agricultural and environmental practices (the obligation to maintain land in good agricultural and environmental conditions refers to a series of rules related to soil protection, maintenance of soil organic matter and its structure, avoiding the deterioration of habitats, as well as water management). Therefore, it represents the "base" or "reference level" for agri-environment measures. It is a tool that ensures that the support granted under the Common Agricultural Policy contributes to promoting sustainable agriculture and, therefore, responds positively to existing concerns.

Likewise, the introduction of environmental considerations in the Common Market Organizations and support schemes, in application of Royal Decree 1078/2014 which develops in Spain Regulation 1307/2013, constitutes a relevant step forward in the fight against desertification in the agricultural sector. So fulfillment of these general requirements involves a social and economic effort for the agricultural sector. Now it is necessary to advance in the integration of environmental considerations into the policy of agricultural markets. To that end there must be established necessary instruments of all types (both institutional, economic and planning) to introduce a greater number of environmental minimum standards in the Common Market Organizations and sectoral support schemes.

Also the Rural Development Policy has introduced various measures and incentives. On the one hand, the so-called "accompanying measures" (support to disadvantaged areas, agri-environmental measures and afforestation of agricultural land, so called agro-environment and climate support). And on the other hand, some measures in the field of the improvement of agrarian structures.

During the programming period 2014-2020, cross-compliance requirements (established by Regulation 1307/2013), applies to the aid provided for in Article 28 of Regulation 1305/2013 (12) (agro-environment and climate support). The development of agro-environmental measures favors the accumulation of organic matter in the soil, offers opportunities for the improvement of soil biodiversity and for the reduction of erosion, and limits its contamination and compaction. These measures are included within the National Action Program against Desertification. In fact and in that area, Spanish Government signed the UN Convention to Combat Desertification.

On the other hand, Royal Legislative Decree 1/2016 (13) introduces a series of provisions intended to avoid the operation of an industrial facility from causing deterioration in the quality of the soil (and groundwater). This regulation

demonstrates the existence of a policy of "zero tolerance" against new cases of pollution, and reinforces the "polluter pays principle". The Integrated Environmental Authorization is the mechanism provided by this regulation. It establishes an environmental condition for the exploitation of the activities and facilities contemplated in Annex I of the Royal Decree, in order to achieve its objectives. That specific authorization will also be necessary to those activities and facilities considered by environmental authorities, always according to basic state legislation and the regional rules.

However, all the measures that are being implemented have been questioned following a report issued by the European Court of Auditors, which questioned the effectiveness of the legislative proposals of the CAP reform in order to pursue climatic and environmental ambitions. The report considered that they do not have the consistency necessary to obtain the best results.

As the Court of Auditors report states (14), the European Commission does not have a clear idea of the problem posed by the growing threat of desertification and land degradation in the EU. The auditors visited five EU Member States affected by desertification (including Spain), and examined whether they are fighting effectively and efficiently the risk of desertification in the EU. It was found that, despite the real and growing threat posed by desertification and land degradation for the EU, the Commission does not have a clear idea of the problem, and that the measures taken to fight desertification are not entirely coherent.

The auditors said that the EU does not have a strategy on desertification and land degradation. There are several strategies, action plans and spending programs in the EU (such as CAP, forestry Strategy, Strategy on adaptation to climate change) relevant to fight desertification, but they do not focus specifically on this question.

EU projects related to desertification are also distributed in different EU policies: rural development, environment and climate action, research and regional policy. They can have a positive impact in the fight against desertification, but there is some concern about their long-term sustainability.

Although the Commission and the Member States collect data on various factors that have an impact on desertification and land degradation, it has not made a comprehensive assessment of soil degradation in the EU, nor has agreed to a methodology about how to do it. There has been limited coordination between Member States and the Commission has not provided practical guidance. Finally, the Commission has not evaluated the progress in commitment to work towards neutral soil degradation in the EU by 2030.

Therefore, the auditors recommend:

- To establish a methodology for assessing the extent of land desertification and degradation in the EU. On this basis, analyze the pertinent data and present them periodically;

- To assess the suitability of existing legal framework for sustainable land use in the EU, including fighting desertification and land degradation;
- To specify how to achieve the EU commitment on neutral soil degradation by 2030, and report periodically on progress;
- To provide guidance to Member States about soil conservation and the achievement of the neutral degradation in the EU, including disseminating of best practices;
- To offer technical support to Member States (when requested) in the development of national action plans to achieve neutral soil degradation by 2030.

European Council, on 16 May 2019, issued its conclusions (15) to the aforementioned report. The Council endorses and makes yours the results obtained, making a series of recommendations to reverse the situation.

In light of the data collected and if we consider the recent report issued by the Court of Auditors, it is clear that existing instruments within the various policies are not reversing the current situation. We share the idea that a legal framework for land and a specific strategy on desertification and land degradation would be necessary, enabling its long-term sustainability, in order to comply with the EU's commitment to neutral land degradation for 2030.

3. SPECIAL REGULATIONS IN THE FIELD OF AGRICULTURAL REAL ESTATE TRADE

Law 19/1995, of 4 July, on modernization of agricultural holdings, has as main purpose to correct imbalances and structural deficiencies that affect the competitiveness of farms. The Law uses the concept of "priority exploitation" (whether family or associative) as the basic reference for action. The "priority exploitation", as agricultural holding model, is defined by subjective criteria linked to the holding owner and other objective criteria, so that globally ensure the economic viability of holdings and justify the possible granting of preferential public support.

One of the problems that condition the future viability of many farms, is its insufficient territorial dimension. That is why the Law establishes measures to stimulate the land markets, to allow easier access to property and leasing. In this way, tax incentives are offered for transfers of rural properties by purchase, succession or donation, in the case of the constitution or consolidation of priority holdings. Special incentives are also provided for the entire transfer of holdings, or when they are passed on for the benefit of young farmers.

One of the most significant fiscal benefits, is that relative to any way of real property transfer to the holder of a priority exploitation or a transfer by a holder of a priority exploitation. The transfer can be: onerous or lucrative; "inter vivos" or "mortis causa"; of a whole farm or a part, etc. This specific transfer can get reductions in the tax base of up to 100% of the value of the goods transferred. Keep in mind that for non-beneficiaries of this reduction (as a general rule), the tax amounts to 8% of the value of the goods.

With regard to land lease, incentives are also provided: an annual financial assistance is granted to owners (landlords) who contract leases of a duration equal to or greater than eight years. It is also required that, through the lease, the holding of the lessee reaches or maintains the condition of priority. The annual support will be maintained for a maximum of eight years while the tenant is the owner of the priority holding and the lease is in force.

Also, in order to prevent the inappropriate division of the farms, the legal mechanism of the “minimum crop unit” is implemented. It is defined as the sufficient surface that should have a farm to carry out the fundamental work of cultivation, using normal production and technical means. It is not allowed or will be invalid the division or segregation of a farm below the extension of the minimum crop unit.

Likewise, the “right of withdrawal on neighboring farms” is foreseen. This right is stated in favor of priority holdings, when dealing with the sale of a farm with an area under twice the minimum crop unit. This right improves the existing one in the Civil Code in favor of neighboring farms, which is limited to the sale of a rustic farm whose capacity does not exceed one hectare.

4. RESTRICTIONS ON PURCHASING AGRICULTURAL PROPERTY (REAL ESTATE) BY FOREIGN PEOPLE

Spanish legislation is governed by the freedom to purchasing and equalize the rights of foreign persons or companies and Spanish people in any acquisition of real estate.

The main limitations are related to money movements controls, and affect any cash flow (within certain sums) detected between Spain and any foreign country, with some specialties in case of tax free countries (Law 19/2003 (16) and Law 36/2006 (17)). However, these limitations only refer the obligation to declare cash flow to the Spanish fiscal authorities, but they do not restrict the right of foreign people or companies to purchase real estate (rural or urban) in Spain.

The only current restrictions affecting foreign citizens who want to purchase real property in Spain, are:

- Royal Decree 664/1999 (18): Foreign investments in Spain must be declared in the registry of the Ministry of Finance (Article 4). For any purchasing of real estate destined to the Consulate or the Embassy, an administrative authorization is required, unless there is a Liberalization Agreement (Third Additional Provision). The authorization will be addressed to the Ministry of Foreign Affairs, and to be granted by the Council of Ministers. This restriction does not apply to EU members.
- Law 8/1975 (19) and Royal Decree 689/1978 (20): These limitations are only applicable to foreign investments of non-EU members. Real

estate in National Defense Interest Areas, can not be purchased without prior authorization from the Ministry of Defense. You can not buy real estate in restricted areas (Spanish isles, Gibraltar Strait, Portugal or France, Cartagena, Galicia and Cádiz Bay), even *mortis causa*, without prior military authorization. However, non-border population centers, urban areas and National Turistic Interest Areas, are not included in these restrictions.

- Royal Decree 374/1989 (21): Any purchasing of real estate in North Africa, even for Spanish investors, requires an authorization from the Council of Ministers.

So, if a foreign citizen intends to buy agricultural real estate in Spain, as a basis, there is no restriction or limitation for purchasing it. The only limitations, both for Spaniards and foreigners, were stated in old agricultural modernization laws, although they did not discriminate between Spaniards and foreigners:

- Family or community Agricultural holdings, created by the former National Institute of Agrarian Reform and Development (IRYDA) (22): If the purchase is made within the next eight years of the previous concession to the owner, an administrative authorization is required. However, nowadays this authorization is very rare.
- Sometimes it may happen that the Administrative Authority, due to fiscal reasons, imposes some restrictions to transfer land properties. These restrictions must be registered in the Property Registration and are imposed on Spanish or foreign buyers (26).
- If the land is under lease, the tenant has a legal preference for purchasing the property. So purchasing conditions must be previously notified to the tenant so that the acquisition can be registered in the Property Registration (24).

5. CURRENT REGULATION TO FIGHT LAND GRABBING

One of the most common methods for measuring land grabbing is the Gini coefficient. It is a coefficient often used by FAO and UNDP in reports on land situation and human development, and is an internationally accepted indicator. This coefficient indicates the equality or inequality in the structure of land ownership, and is interpreted in the following way: the closer to 1 is the value, the higher land grabbing: this means a situation in which the land ownership falls on a few hands, and therefore, there is inequality. On the other hand, if it is a value close to 0, it indicates that the ownership of the land is distributed in a larger number of farms and, therefore, there is a more equitable distribution. According to this indicator, In Spain the last data of 2016 is 0.265.

As indicated in the latest Survey on Agricultural Holdings Structure, in Spain the number of farms decreased by 2.1% compared to 2013 and the

average of agricultural area used per farm was 25.06 Ha, the highest value of the historical series (25).

In view of the data, we do not know that there is a specific regulation in Spain to stop the phenomenon of *land grabbing*.

- (1) Strategic Infrastructure and Transport Plan.
- (2) Sentence 61/1997, of March 20, of the Constitutional Court.
- (3) Royal Legislative Decree 7/2015, of October 30, passing the revised text of the Urban Soil and Rehabilitation Law.
- (4) Royal Legislative Decree 2/2008, of June 20, passing the revised text of the Land Law.
- (5) Decree 103/2015, of March 10, which passes the Master Plan for Olive Crop.
- (6) Law 45/2007, of December 13, on sustainable rural development.
- (7) Decree 71/2012, of March 20, establishing the organization and the legal and operating regime of the Andalusian Council of Olive Crop.
- (8) According to the most recent data from the National Inventory of Soil Erosion, homogeneous geographic information system on erosion processes.
- (9) The last data published in the "Environmental Profile of Spain 2017", report prepared by the General Directorate of Biodiversity and Environmental Quality of the Ministry for Ecological Transition (updated in August 2018) records a loss of 14.16 t / Ha / year.
- (10) Regulation (EU) 1307/2013 of the European Parliament and of the Council of 17 December 2013, laying down rules applicable to direct payments to farmers under the aid schemes included in the CAP and Regulations (EC) 637/2008 and (EC) 73/2009 are repealed.
- (11) Royal Decree 1078/2014, of December 19, which establishes the cross-compliance rules that must be met by beneficiaries receiving direct payments, certain annual rural development premiums, or payments under certain support programs to the vineyard sector.
- (12) Regulation (EU) 1305/2013 of the European Parliament and of the Council of 17 December 2013, on rural development support through the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) 1698/2005.
- (13) Royal Legislative Decree 1/2016, of December 16, passing the revised text of the Law on Integrated Prevention and Control of Pollution that transposes, among others, Directive 2010/75, of November 24, on industrial emissions (integrated pollution prevention and control).
- (14) Special Report 33/2018, submitted under the second subparagraph of Article 287 of the Treaty on the Functioning of the European Union (TFEU), entitled "The fight against desertification in the EU: a growing threat against the which should be acted more intensively", issued by the European Court of Auditors (18/12/2018).
- (15) Council conclusions (May 16, 2019) - Special Report n. 33/2018 of the European Court of Auditors, entitled "The fight against desertification in the EU: a growing threat against which one must act more intensively" (Document ST 9300 2019 INIT).
- (16) Law 19/2003, of July 4, on legal regime of capital movements and economic transactions with foreign countries.
- (17) Law 36/2006, of November 29, on Measures for the Prevention of Tax Fraud.
- (18) Royal Decree 664/1999, of April 23, on foreign investments.
- (19) Law 8/1975, of March 12, on areas and facilities of national defense interest.
- (20) Royal Decree 689/1978, of February 10, passing the regulation of zones and facilities of national defense interest, which develops Law 8/1975, of March 12, on zones and installations of national defense interest.
- (21) Royal Decree 374/1989, of 31 March, passing the Implementing Regulations of Law 8/1975, of 12 March, on areas and facilities of national defense interest.
- (22) Article 343 of Decree 118/1973, of January 12, passing the Agrarian Reform and Development Law.
- (23) Article 9 of Law 19/1995, of July 4, on agricultural holdings modernization.
- (24) Article 27 of Law 19/1995, of July 4, on agricultural holdings modernization.

(25) Data from the publication "Spain in figures 2019" of the National Institute of Statistics.