**Legal Brief 1: Outline answer**

**Part 1: Free movement of goods and Mutual Recognition**

If the Spanish government decides to legislate on this issue, can it adopt a national law which mandates the following:

*All meat products marketed as “Jamón de bellota (acorn ham)” must derive exclusively from animals slaughtered immediately after fattening exclusively with acorns, grass and other natural resources found in oak forests.*

The producers association argues that this provision hinders free movements of goods in the European Union. Are they right? We are not very familiar with EU law, so please care to explain what the legal base is. **(free movement of goods)**

If they are right, how can we improve the draft so that it complies with TFUE? Please argue your position and provide detailed legal base supporting your argument. **(mutual recognition)**

**Issue:**

The team has researched and describes the issue:

* Member State (Spain) is considering to adopt national legislation regulating foods marketed as *jamón de bellota* (acorn ham).
* Only those foods that derive from animals slaughtered immediately after fattening exclusively with acorns, grass and other natural resources found in oak forests can be marketed as *jamon de bellota*.
* The current draft would apply to those foods to be sold in Spain, regardless of their origin.
* Argument in favour from consumer organizations: Traditionally, in Spain, only the ham derived from this kind of fattening has been considered as jamón ibérico. It is a gourmet expensive food product. However, lack of regulation has made it so that other kinds of ham use that name even if they are not derived from porks that have been fattening with acorns in oak forests. Most jamón ibérico are of low quality, do not meet the spanish consumers expectations.
* Argument against from producers: it hinders free movement of goods.

The team identifies the goal of the Spanish regulation:

* General goal is to increase the quality of food products marketed as jamon iberico so that it meets (spanish) consumers expectations. So: protection of consumers interest (not health).
* An argument can also be made on health if a student asks: it is a product that always has some fat, but the lower the quality the more fat it has (see pictures bellow). (In good ibérico, you actually eat the fat.)

Top quality ibérico (see small part of fat, white)



Lower quality ibérico (see more fat, white)



Legal problem: EU food law aims at ensuring consumer protection but also proper functioning of the internal market, via free movement of goods in TFUE. **(a)** Would the Spanish draft provision hinder free movement of goods under TFUE? **(b)** If so, how to modify so it does not?

**Law:**

The team identifies that the product is considered food according to art. 2 GFL. Hence, it is a good.

For question (a), the team identifies the legal framework for free movement of goods properly:

* Article 34 and 35 TFUE focus on measures that may affect specific products due to its origin or destination.
* Article 36 establishes in which situations those measures may still be legal under EU law. It includes national measures “for the protection of health and life of humans.”
* The team has used sources of information such as papers and case law (that help it explain the content of the relevant articles, in particular:
  + What is “free movement of goods”? Title II of TFUE
  + What is a measure of equivalent effect? Articles 34 and 35 TFUE.
  + The team refers to mandatory requirements in Dassonville Case (page 369 of reader), as studied in the lecture: defence of the consumer.
  + What elements are necessary to consider that a national law prevents free movement of goods?
  + What could justify limiting free movement of goods according to TFUE?

For question (b) how to modify the draft so that it does not hinder TFUE? (mutual recognition)

* The team identifies that there is no article that explicitly defines the principle of mutual recognition. It is a principle that is based on case law of the CJEU.
* The team may have identified that there is a regulation on the application of this principle, Regulation (EC) No 764/2008.
* The team refers to relevant case law analysed in the lecture, Cassis de Dijon (there is no valid reason why, provided they have been lawfully produced and marketed in one of the MS, ...it should not be introduced in another MS=principle of mutual recognition)
* The team identifies that the principle applies to products which are not the subject of harmonisation at EU level and which are lawfully marketed in another MS[[1]](#footnote-1).

**Application:**

1. **Free movement of goods:**

The team identifies that it is/not a measure of equivalent effect:

• Argument against possible measure of equivalent effect: Because the measure affects all *jamon de bellota* sold in Spain regardless of origin, it apparently may not hinder free movement of goods.

• Argument for possible measure of equivalent effect: Oak and grass forests such as described may not be that common in other countries. The method of fattening and slaughtering not used in other countries.

The team identifies that it is/not justified under article 36 TFUE:

* Health justification? Classic art.36 TFUE
* Consumer protection in mandatory requirements in Cassis de Dijon (page 369 reader).

Therefore there is/no violation of free movement of goods.

1. **Mutual recognition:** If considered in violation of free movement of goods, how to modify the draft so it complies?

The team identifies that the law could establish that the proposed provision only applies to food products from Spain. It could additionally state that MS are not obliged to comply with it if they could be marketed as “acorn ham” there (for instance, Portugal has its own regulation on this product standard).

**Conclusion:**

No/Yes discrimination by origin, the draft is/not respectful with free movement of goods.

Proposal of new draft:

*Meat products from Spain* marketed as “Jamón de bellota (acorn ham)” must derive exclusively from animals slaughtered immediately after fattening exclusively with acorns, grass and other natural resources found in oak forests.

**Part 2: Article 14 GFL**

The competent authority in Sevilla has just informed us they have identified some batches of manchego cheese that has a strong smell and a dark brown colour. They are uncertain about how to proceed,…should they consider the cheese is unsafe according to the General Food Law?

**Issue:**

The team has researched and describes the issue:

* Description of manchego is set in its *PDO guidelines[[2]](#footnote-2),* some might be relevant to the case:

*Pressed cheese made from milk of ewes of the ‘Manchega’ breed, aged for a minimum of 30 days for cheeses weighing up to 1,5 kg and from 60 days up to a maximum of two years for larger cheeses. ‘Queso Manchego’ can be made with either pasteurised or raw milk.*

*A pressed cheese with a hard rind and a firm and compact paste, a colour that varies from white to ivory-yellow, an intense and persistent aroma, a slightly acidic, strong and flavoursome taste and a buttery, slightly floury texture with low elasticity.*

Suggestion: consider showing them the DOOR database?

* Control staff has identified batches of cheese that have a strong smell and dark brown colour. They need to decide if it fits with safe manchego cheese description.
  + Tip: the crust may be brown, but the inside of the cheese should not. The smell is intense and persistent so odour might not be a problem.
* There is no information regarding where they found the product (at a manufacturers premises or in the market).

Legal problem: Is the cheese is safe according to GFL?

**Law:**

The team identifies the relevant piece of legislation:

* GFL, article 2 “cheese” falls within the definition of “food”
* GFL, article 14, food must be safe. Food is unsafe in injurious to health or unfit for human consumption:
  + - 14.4. In determining whether any food is injurious to health, regard shall be had:

(a) not only to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;

(b) to the probable cumulative toxic effects;

(c) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers

* + 14.5. In determining whether any food is unfit for human

consumption, regard shall be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay.

The team uses sources of information such as case law or papers to describe when a food in considered unsafe. The team analyzes the concept of “unfit for human consumption.” F.i. EU COM guidelines on GFL, that state that:

*The central concept of unfitness is unacceptability. Food can be rendered unfit by reason of contamination, such as that caused by a high level of non-pathogenic microbiological contamination (see Article 14(3) and (5) of the Regulation), by the presence of foreign objects, by unacceptable taste or odor as well as by more obvious detrimental deterioration such as putrefaction or decomposition.*

Additional (authorities are uncertain about how to proceed):

* GFL, art 17.2, MS should enforce food law, monitor and verify compliance
* GFL, art 10, Public information
* The team links this case to the Berger case that is in the reader but has been not been analyzed in the lecture.

**Application:**

The team discusses if the product that is not injurious to health should be considered unfit for human consumption because of its odour or visual aspect:

• Odour might not indicate anything as it is a cheese that has an intense smell.

* Regarding colour, it might be a problem if the colour is not in the crust of the cheese. Manchego is normally cream or light yellow inside. If the authorities are concerned, one might assume the problem is that it is brown on the inside. Does this colour entail that the product is unsafe?
* If students consider that colour is relevant for the consumer to the point to determine its cheese selection, the wrong colour should lead to consider the product unacceptable and therefore **unfit for human consumption**.
* Could the colour be consequence of a problem? Not correctly processed as should have or wrong ingredients?
  + Injurious for human health if the resulting cheese
  + Unfit for human consumption

Additional (authorities uncertain about how to proceed):

* In application of Berger case, authorities may inform the public if reasonable grounds to suspect unsafe (injurious or unfit).
* In application of art. 10, authorities should inform if useful to prevent, reduce or eliminate risk. Hence, if the food is not yet in the market there might be no reasons to inform the public.

**Conclusion:**

The food is/not unsafe because it is/not injurious to health or unfit for human consumption.

Authorities should/not inform the public.

**Annex I - Differences between the real case and the question in the legal brief:**

See the Spanish law and the Courts judgement:

Judgement on Case 169/17:

<http://curia.europa.eu/juris/document/document.jsf?text=bellota&docid=202942&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1958502#ctx1>

Real Decreto 4/2014 por el que se aprueba la norma de calidad para la carne, el jamón, la paleta y la caña de lomo ibérico (in spanish):

<https://www.boe.es/buscar/act.php?id=BOE-A-2014-318&p=20160611&tn=1>

Real Decreto 4/2014 sets a quality standard for meat products that are considered “ibéricos” (Iberian) which are “produced or marketed in Spain.” (art1)

Art.3 of the royal decree provides sales designation of protected products, including “jamón de bellota[[3]](#footnote-3)” (acorn), for those products that, similar to the definition in the legal brief, must derive exclusively from animals slaughtered immediately after fattening exclusively with acorns, grass and other natural resources found in [dehesa] oak forests.

The main question before the CJEU is not about labelling but about animal welfare: Art. 8 of the royal decree establishes that pigs must be fed free-range, in a field with a specific number of square meters of unobstructed floor area available for each pig. It also sets a standard on minimum age of the pig before slaughter, and its weight.

Students could be confused and discuss Directive 2008/120/EC, laying down minimum standards for the protection of pigs, so I changed the question in the case. There were too many variables they could get into.

There is a second issue about labelling “ibérico de cebo.” I changed it to “jamón ibérico” because there is no translation of “de cebo” and to avoid discussion about the origin versus the ethnicity of the pig linked to the term “iberian.”

The royal decree has a provision that states that it does not apply to products marketed lawfully in another Member State, so the CJUE does not consider that the Spanish law is a measure of equivalent effect. It does not consider there is a breach of art. 34 or 35 TFUE.

Still, the Judgement has relevant paragraphs to solve the legal brief:

**About what is a measure of quantitative effect:**

(21) Secondly, it must be noted that any national measure that is capable of hindering, directly or indirectly, actually or potentially, trade within the European Union must be regarded as a measure having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU (see, to that effect, judgments of 18 October 2012, Elenca, C‑385/10, EU:C:2012:634, paragraph 22 and the case-law cited), and of 6 October 2015, Capoda Import-Export, C‑354/14, EU:C:2015:658, paragraph 39 and the case-law cited).

(22) It is clear from the Court’s settled case-law that that provision is intended to apply not only to the actual effects but also to the potential effects of legislation. It cannot be considered inapplicable simply because at the present time there are no actual cases with a connection to another Member State (judgment of 22 October 1998, Commission v France, C‑184/96, EU:C:1998:495, paragraph 17 and the case-law cited).

**About mutual recognition:**

(24) (…) the Court has consistently held that national legislation that subjects goods from other Member States, where they are lawfully manufactured and marketed, to certain conditions in order to be able to use the generic designation commonly used for that product, and which thus in certain cases requires producers to use designations which are unknown to, or less highly regarded by, consumers, does not absolutely preclude the importation into the Member State concerned of products originating in other Member States. Nevertheless, it is likely to make their marketing more difficult and thus impede trade between Member States (judgment of 5 December 2000, Guimont, C‑448/98, EU:C:2000:663, paragraph 26 and the case-law cited).

(28) it cannot be held that Article 34 TFEU precludes national legislation, such as that at issue in the main proceedings, which provides that the sales designation ‘ibérico de cebo’ may be granted only to products that comply with certain conditions imposed by that legislation, since that legislation permits the importation and marketing of products from Member States other than the State that adopted the legislation at issue, under the designations they bear pursuant to the rules of the Member State of origin, even if they are similar, comparable or identical to the designations provided for in the national legislation at issue in the main proceedings.

Operative part: Article 34 TFEU does not preclude national legislation, such as that at issue in the main proceedings, which provides that the sales designation ‘ibérico de cebo’ may be granted only to products that comply with certain conditions imposed by that legislation, since that legislation permits the importation and marketing of products from Member States other than the State that adopted the legislation at issue, under the designations they bear pursuant to the rules of the Member State of origin, even if they are similar, comparable or identical to the designations provided for in the national legislation at issue in the main proceedings.

**Annex II – Original Legal Brief Questions**

**Subject:** Request for legal opinion

**To:** [LegalCounsel@foodconsult.eu](mailto:LegalCounsel@foodconsult.eu)

**From:** Ministry for Food and Agriculture,Government of Spain

Dear advisors,

As you may already know, consumer organizations in Spain are lobbying for a national regulation defining a quality standard for meat products marketed as “Jamón de bellota” (“acorn ham”).

Traditionally, it only comes from free-range pigs which have a specific diet and exercise routine. However, today one may find a lot of products labelled as “Jamón de Bellota” that do not meet that description. Such products are, they say, of lower quality. They argue that there is a need for national legislation establishing a legal definition of “Jamón de bellota,” because it would be the best way to improve the quality of the products available to final consumers.

We have an important meeting on Friday with the Iberian Producers Association, which actually oppose such a measure. We need your advice on my desk by Wednesday at the latest! We’d also like you to attend the meeting on Friday, so that we can discuss any open issues.

If the Spanish government decides to legislate on this issue, can it adopt a national law which mandates the following:

*All meat products marketed as “Jamón de bellota (acorn ham)” must derive exclusively from animals slaughtered immediately after fattening exclusively with acorns, grass and other natural resources found in* *oak forests.*

The producers association argues that this provision hinders free movements of goods in the European Union. Are they right? We are not very familiar with EU law, so please care to explain what the legal base is.

If they are right, how can we improve the draft so that it complies with TFUE? Please argue your position and provide detailed legal base supporting your argument.

Additionally, we wanted your opinion on a second issue. The competent authority in Sevilla has just informed us they have identified some batches of *manchego* cheese that has a strong smell and a dark brown colour. They are uncertain about how to proceed,…should they consider the cheese is unsafe according to the General Food Law?

I would appreciate your opinion on this, the sooner the better and of course not later than Wednesday. Don’t forget to point out the legal base and the arguments that help you reach your conclusions.

Thank you!

Dr Schebesta & Dra Plana

Ministers for Food and Agriculture

1. Art.2 of Reg. 764/2008:

   *For the purposes of this Regulation, a technical rule is any provision of a law, regulation or other administrative provision of a Member State:*

   *which is not the subject of harmonisation at Community level; and*

   *which prohibits the marketing of a product or type of product in the territory of that Member State or compliance with which is compulsory when a product or type of product is marketed in the territory of that Member State, and which lays down either:*

   *the characteristics required of that product or type of product, such as levels of quality, performance or safety, or dimensions, including the requirements applicable to the product or product type as regards the name under which it is sold, terminology, symbols, testing and test methods, packaging, marking or labelling; or*

   *any other requirement which is imposed on the product or type of product for the purposes of protecting consumers or the environment, and which affects the life-cycle of the product after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition, nature or marketing of the product or type of product.* [↑](#footnote-ref-1)
2. Manchego Cheese PDO guidelines: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:255:0010:0015:EN:PDF [↑](#footnote-ref-2)
3. FYI: Normally “de bellota” must go together with the mention of “ibérico,” but this is not in the legal brief because not necessary to solve the case. [↑](#footnote-ref-3)