

TO THE DIRECTORATE-GENERAL OF INTERNAL MARKET, ENTREPRENEURSHIP AND SMEs OF THE EUROPEAN COMMISSION

FRIME, S.A.U. ("FRIME"), an undertaking incorporated in Spain, identified with NIF A-08489320, seated in Mercat del Peix, puesto 80, postal code 08040, Barcelona (Spain), and **MANEL MARTÍNEZ MÉNDEZ**, acting on its name and behalf, appear before the Directorate-General of Internal Market, Entrepreneurship and SMEs of the European Commission ("**DGGROW**" and "**Commission**", respectively) and **STATE**:

1. On 11 November 2022 Spain notified the Commission of a draft Royal Decree governing national commercial designations and designations of preserved and prepared food permitted in Spain applicable to fishery and aquaculture products ("**Draft Royal Decree**").

Spain made this notification pursuant to Article 5 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services ("**Directive**").

2. The Commission allows (and considers it is relevant for) interested parties to submit contributions on notifications made under Article 5 of the Directive. Such contributions are intended to inform the Commission of the risk that adopting a technical regulation (in this case, the Draft Royal Decree) may create obstacles to the free movement of goods within the internal market.
3. FRIME, as one of the main Spanish producers of marinated tuna, is interested in submitting contributions on the Draft Royal Decree, mainly because of the irreparable damage that adopting the Draft Royal Decree with its current wording would cause to FRIME owing to the obstacles that one of its provisions may pose to the free movement of goods.
4. With regard to the Draft Royal Decree, FRIME submits the following

CONTRIBUTIONS

Preliminary comment.- Context and object of these contributions

1. The Draft Royal Decree seeks to (i) establish the commercial designations that may be used in Spain for fishery and aquaculture products included in letters (a), (b), (c) and (e) of Annex I of Regulation (EU) 1379/2013 on the common organisation of markets in fishery and aquaculture products ("**Regulation 1379/2013**"); and (ii) establish the designations of preserved and prepared food that may be used in Spain for fishery and aquaculture products from those listed in letters (h) and (i) of Annex I of Regulation 1379/2013. This is in accordance with Articles 35 of Regulation 1379/2013 and 17 of Regulation (EU) 1169/2011 on the provision of food information to consumers ("**Regulation 1169/2011**").

FRIME does not question in any way whether the adoption of the Draft Royal Decree is necessary or appropriate. However, with the sole purpose of **safeguarding the existence of a market without internal borders, FRIME believes it is essential to inform the Commission that one of the definitions included in one of the final provisions of the Draft Royal Decree constitutes an obstacle to the free movement of goods that could negatively affect FRIME as a major operator in the marinated fish products production market in Spain.** This situation could also affect any other marinated fish producer which, like FRIME, uses the injection marination technique, as well as related industries (such as manufacturers of the injection machines).

Concerning the free movement of goods, which the Directive seeks to safeguard, the first final provision of the Draft Royal Decree amends Royal Decree 1521/1984 of 1 August 1984 approving the technical health regulations on fishery and aquaculture establishments and fishery and aquaculture products intended for human consumption ("**RD 1521/1984**"). Specifically, it amends article 3.1 of RD 1521/1984 on the forms of presenting, preserving and marketing of fishery and aquaculture products.

Paragraph tt) of the first final provision of the Draft Royal Decree includes a definition of the term "marinated" which, as far as FRIME is aware, does not exist in any other Member State. This new definition of the term "marinated" in the Draft Royal Decree reads as follows:

"marinated" or "dressed": a product that has been softened in a mixture of seasonings, spices, vinegar, oil or other liquids applied to the surface or by immersion.

As can be seen, this definition of "marinated" and its synonyms refers to just two of all the techniques available to macerate a product: one concerning the *application to the surface* and the other referring to *immersion*. Nonetheless, no doubt to an excusable error, the definition of "marinated" omits the technique of marination by injection, which is used extensively in the fish processing industry in the European Union in accordance with all food hygiene safeguards. If the Draft Royal Decree is adopted with its current wording, this omission of the injection technique would constitute a unique exception that would only apply in Spain (as opposed to the other Member States which either do not define "marinated" or do not omit the injection technique).

Marinating by injection is the method most widely used in Spain and the European Union to macerate fish because it allows an exact amount of brine to be used, which guarantees consistency in flavour and texture, features which consumers value highly. The main parameters to consider in the quality of the final product when marinating through injection are accuracy in the percentage of brine injected, the retention of the marinade over time and the distribution of the marinade within the fish muscle.

In contrast to the definition of "marinated" in the Draft Royal Decree, article 3, paragraph l) of Spanish Royal Decree 474/2014 of 13 July 2014 approving the quality standards of meat derivatives defines the term "marinated" as *"the treatment of meat by maceration with a mixture of salts, seasonings and spices and, where appropriate, water, fat, wine, oil or other liquids, which may be applied to the surface of the meat, by injection or by immersion"*. As can be seen, unlike in the Draft Royal Decree, the technique of maceration by injection is included in the definition of "marinated" meat.

2. FRIME is a very important operator in the European market for producing tuna loins and portions, a market that has grown exponentially in recent years. FRIME's market share in Europe is over 30%, it owns five fish production and processing plants where the injection technique plays a fundamental role, and also supplies the main food distributors and a wide network of hotels, restaurants and catering companies. Treating FRIME's marinated fish until now as a "processed product" has allowed it to export that product to geographically remote Member States from the factories where the fish is processed, but further growth would be undermined if the definition of "marinated" in the Draft Royal Decree is kept.

Adopting the Draft Royal Decree with its current wording (i.e. with the new definition of "marinated" that omits the injection technique) could deprive European consumers of access in their shops to tuna marinated by injection produced in Spain, a product with a pleasant texture and flavour that fully complies with food hygiene safeguards.

The challenges that the Spanish industry that produces marinated fish by injection would face could leave the door open to powerful Asian competitors entering the market, which would also negatively affect the European and Spanish catering and retail sectors as they would end up offering a marinated fish product that is less valued by the consumer and this would undoubtedly affect their sales. Another sector affected by this definition of "marinated" in the Draft Royal Decree would be the manufacturers of the machines used to inject the marinade as they would lose a large part of their market share.

One. Regulation of the fishery internal market

1. Regulation in the internal market of fishery and aquaculture products

Article 38 of the Treaty on the Functioning of the European Union ("**TFEU**") provides that the internal market extends to the trade in fish products and processed products directly related to them. For the internal market to function correctly, the free movement of goods and the freedom of establishment must be guaranteed so there can be no discrimination between producers or consumers in the Union, as per article 40 TFEU.

The EU regulations on the internal market for fishery and aquaculture products are, in essence, the following:

- (i) Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 ("**Regulation 1379/2013**").
- (ii) Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC ("**Regulation 1380/2013**").
- (iii) Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs ("**Regulation 852/2004**").

- (iv) Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin ("**Regulation 853/2004**").
- (v) Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 ("**Regulation 1169/2011**").

2. Member States cannot adopt national regulations that impede the functioning of the internal market

Article 34(1) of Regulation 1379/2013 provides that "*the products intended for human consumption for which common marketing standards are laid down **may be made available on the Union market only in accordance with those standards***".

This means that Member States **cannot adopt national regulations that restrict the free movement of goods or that impede the correct functioning of the internal market** (as is reflected in Recital 49 of Regulation 1169/2011).

This is also consistent with the objectives of the Common Fisheries Policy, as referred to in Article 2(5) of Regulation 1380/2013, which include the objective to "*provide conditions for economically viable and competitive fishing capture and processing industry and land-based fishing related activity*". It follows then that any national regulation on fishery that hinders the economic viability and competitiveness of that industry would contravene the regulation of the functioning of the internal market.

3. The definition of processed product in EU law

Under EU law there is a definition of processing of food product and a definition of processed product that must be considered in conjunction with the definition of "marinated" in the Draft Royal Decree. We refer to the definitions provided in paragraphs (m) and (o) of Article 2 of Regulation 852/2004, which read as follows:

(m) '**processing**' means *any action that substantially alters the initial product, including heating, smoking, curing, maturing, drying, **marinating**, extraction, extrusion or a combination of those processes;*

(o) '**processed products**' means *foodstuffs resulting from the processing of unprocessed products. These products may contain ingredients that are necessary for their manufacture or to give them specific characteristics.*

The first definition identifies marinating as an action of processing a foodstuff. And the second definition makes it clear that only products considered as processed can contain ingredients that are necessary for their production or that give them specific characteristics. Any substantial alteration of the initial product converts the foodstuff into a processed product, a requirement that is undoubtedly met by marination through injection given that it denaturalises the fish's muscle fibre proteins.

However, there is no definition of “marinated” at an EU level and, therefore, no specific provisions on which maceration techniques allow the product to be identified as “marinated”. We can then infer that in the EU **fish can be marinated by applying to the surface, by immersion or injection**, condiments, spices, vinegar, oil or other liquids, with no further limitation.

Adopting a national regulation like the Draft Royal Decree that omits the injection technique from the definition of “marinated” restricts in Spain the application of the definition, under EU law, of “processed product” and, therefore, prevents a product that has been marinated by injection from containing ingredients that give it specific characteristics. This could entail limitations on the free movement of goods and the freedom of establishment, as discussed *infra*.

This reasoning is consistent with Annex I, paragraph 7 of Regulation 853/2004, which defines “processed fishery products” as “*processed products resulting from the processing of fishery products or from the further processing of such processed products*”.

To avoid their national regulations imposing any restriction on the free movement of goods, **other Member States, exercising good judgement, have removed the definition of “processed product”** from their legislation and have adhered fully to the definitions provided in Regulation 852/2004. For example:

- (i) **France** had a definition of processed product in article 1 of the *Arrêté du 28 décembre 1992 portant réglementation des conditions d'hygiène applicables dans les établissements de manipulation des produits de la pêche*. It then adopted the definition of processed product under Regulation 852/2004 and repealed the previous regulation by adopting the *Arrêté du 18 décembre 2009 relatif aux règles sanitaires applicables aux produits d'origine animale et aux denrées alimentaires en contenant*.
- (ii) **Belgium** acted similarly (*cfr.* article 1.2 of the *Arrêté royal portant réglementation des dénominations des produits de la pêche et de leurs produits transformés*, which will be repealed by the *Projet d'arrêté royal portant réglementation des dénominations des produit de la pêche et des produits de l'aquaculture*).
- (iii) Other Member States, such as **Italy** (*cfr.* *Chiarimenti interpretativi forniti dalla Commissione europea riguardo al coordinamento delle disposizioni di cui al decreto legislativo 27 gennaio 1992, n. 109, con le disposizioni del regolamento (UE) n. 1169/2011, relativo alla fornitura di informazioni sugli alimenti ai consumatori*) or **Ireland** (*cfr.* article 2(1) of Statutory Instrument No. 369/2006 - European Communities (Hygiene Of Foodstuffs) Regulations 2006) have adopted the definitions under Regulation 852/2004 and have not included any definitions that exclude any of the possible marinating techniques.

In Spain, the omission of the injection technique from the definition of “marinated” in the Draft Royal Decree prevents a product that has been marinated using the injection technique from being considered a processed product. This places the producers of fish marinated using the injection technique established in Spain at a disadvantage compared to the rest of the producers from the Union, restricts the free movement of goods and, furthermore, limits the freedom of establishment.

Two. The definition of "marinated" in the Draft Royal Decree restricts the free movement of goods by omitting the injection technique.

1. Free movement of goods

The **free movement of goods** is one of the fundamental principles of the **internal market** and of the TFEU (per Article 28). Articles 34 and 35 of the TFEU provide that quantitative restrictions on imports and exports, as well as any measure which has an equivalent effect, are prohibited between Member States.

With regards to food products, this principle is emphasised in Recital 49 of Regulation 1169/2011, which states that Member States may adopt national measures on matters not specifically harmonised by that Regulation, but that such measures, if adopted, "cannot prohibit, block or restrict the free movement of goods". In this respect, Recital 18 and Articles 33 and 34 of Regulation 1379/2013—which establishes the common organization of the market in fishery and aquaculture products—pronounce in the same sense.

2. Exceptions to the free movement of goods

Article 36 of the TFEU establishes exceptions to the principle of free movement of goods, providing that such restrictions are allowed when any of the following grounds are met: reasons of public order, morality and security, protection of human and animal health and life, preservation of plants, protection of national artistic, historical or archaeological heritage or protection of industrial and commercial property.

In short, Member States, such as Spain, may only adopt restrictions when the requirements established in Article 36 of the TFEU are met.

In connection with food products, the Judgment of the European Court of Justice (the "**ECJ**") "*Cassis de Dijon*" of 20 February 1979 (Case C-120/78) established that national restrictive measures are not permitted when there are common rules that regulate food production and marketing, provided that these common rules pursue a general interest objective listed in Article 36 of the TFEU that prevails over the principle of free movement of goods.

3. The definition of "marinated", which omits the injection technique, restricts the free movement of goods in an unjustified manner.

There is a **common regulatory framework** for the production and marketing of fishery and aquaculture products, consisting of Regulations 1379/2013, 1380/2013, 1169/2011, 852/2004 and 853/2004.

Spain, instead of adhering to this regulatory framework (as the rest of the Member States have done), proposes that the Draft Royal Decree, which is in the process of being passed, contains a definition of "marinated" which, by omitting the injection technique, **restricts the definition of processed product**. And it restricts it because, for instance, while fish marinated by injection in France would be considered a processed product, this same product in Spain could not be classed as marinated, nor would it be considered processed (preventing, in the latter case, for example, that this fish contain ingredients that give it certain characteristics).

The key here is that none of the reasons listed in Article 36 of the TFEU, or any others, that would justify the restriction that the Draft Royal Decree introduces with this definition of "marinated" apply. In fact, Spain has not stated that any such reason exists in the Regulatory Impact Analysis Report (the "RIAR") it sent to the Commission accompanying the Draft Royal Decree. We would like to think, then, that this omission of the injection technique from the definition of "marinated" is an error that can be rectified (we note that in the definition of marinated meat contained in RD 414/2014, the injection technique is expressly acknowledged together with that of immersion and surface application).

4. Conclusion

If the Draft Royal Decree is passed with its current wording, that is to say, with a definition of "marinated" that omits the injection technique, it would limit the free movement of goods since the same product marinated by injection would be considered a processed product in all the Member States except for Spain because the definition of marinated does not include the injection technique. This would cause discrimination between producers and consumers of marinated fish by injection in the Union, something expressly prohibited by Article 40 of the TFEU, and would constitute, we insist, an unjustified restriction on the free movement of goods that would distort competition between producers, since they would have to comply with different regulations depending on whether they operate in Spain or in the rest of the Member States.

Three. Furthermore, the omission of the injection technique from the definition of "marinated" in the Draft Royal Decree would restrict the freedom of establishment

In addition to the above, it should also be pointed out that the Draft Royal Decree, if approved with its current wording, could infringe the principle of freedom of establishment also contemplated in the TFEU.

1. Freedom of establishment and the exceptional possibilities of restricting it.

According to Article 49 of the TFEU, the freedom of establishment includes the right to set up and manage a business in the territory of any Member State. This freedom **is not unlimited and may only be restricted by national measures** if "*they are suitable for securing the accomplishment of the goal which they pursue and do not go beyond what is necessary in order to accomplish that goal*" (Judgement of the ECJ, *Hartlauer*, C-169/07, paragraph 44).

2. The definition of marinated in the Draft Royal Decree that omits the injection technique would constitute a restriction on the freedom of establishment

The absence of a definition of "marinated" at Community level, does not justify that Spain may introduce a difference of treatment for the permitted marinating techniques (Judgement of the ECJ, *VALE*, C-378/10, paragraph 38). Hence, the definition of "marinated", which omits the injection technique in the Draft Royal Decree, would entail a **restriction on the freedom of establishment as defined in Article 49 TFEU.**

This definition of "marinated" that leaves out the injection technique hinders or makes it less attractive for companies from other Member States that use that technique to set up in Spain, since they would not be able to class their products as marinated and, therefore, they could not be considered processed products

or contain ingredients that give them specific characteristics (Judgement of the ECJ, *Commission v. Spain*, C-400/08, paragraph 63).

Thus, this situation would favour those producers who do not use this marinating technique, compared to those who marinate their products by injection: the former could describe their products as marinated on the label, while the same producers established in Spain would not be able to (see, by analogy, Judgement of the ECJ, *Attanasio Group*, C-384/08, paragraph 45). Therefore, the definition of “marinated” that omits the injection technique would entail a restriction of the freedom of establishment as it would affect market access and hinder intra-community trade (Judgement of the ECJ, *Commission v. Italy*, C-518/06, paragraph 64).

3. Absence of justification for the restriction

- (a) **Spain must have demonstrated that the restriction imposed is justified by an overriding reason related to public interest** (*Commission v. Spain*, paragraph 75). The RIAR sent to the Commission does not, however, provide such justification. Nor does it explain why it is necessary to introduce such a definition or, in any event, why it is appropriate to omit the injection technique from the definition of “marinated”. The Draft Royal Decree does not provide an analysis of the appropriateness and proportionality of omitting the injection technique from the definition of “marinated” (Judgement of the ECJ, *Commission v Austria*, C-161/07, paragraph 36).

Therefore, it cannot be understood that there is an overriding reason of general interest in this case, nor that the restriction on the freedom of establishment that the omission of the injection technique from the definition of “marinated” from the Draft Royal Decree would entail is justified (*Commission v. Spain*, paragraph 85).

- (b) The RIAR is silent on this point but, in any case, **those reasons do not exist**. In line with the goals pursued with this Draft Royal Decree and that are indicated in the RIAR, the following should be highlighted:
- (i) The RIAR provides that what is pursued are **purely economic objectives**, which do not constitute an overriding reason related to the public interest (judgment in *C/BA*, C-96/08, paragraph 48).
 - (ii) The RIAR provides that the aim is to adapt national legislation to the EU regulatory framework on food information to consumers. However, omitting the injection technique from the definition of “marinated” does not fall under the umbrella of consumer protection (Judgement of the ECJ, *Commission v. Italy*, C-260/04, paragraph 27) because this **omission does not better protect the consumer**.
- (c) Notwithstanding the fact there is no overriding reason related to public interest (and Spain has failed to give one), with all due respect, the omission of the injection technique from the definition of “marinated” **is not an appropriate way to protect consumers** (judgment in *Duomo Gpa Srl*, C-357/10 to C-359/10, paragraph 42). Omitting a marinating technique is not an appropriate

measure to protect consumers and would discriminate against producers that marinate fish by injection.

Furthermore, the Draft Royal Decree does not explain how it would contribute to achieving the consumer protection goal by preventing a product marinated by injection from being described as “marinated” (see, by analogy, *Hartlauer*, paragraphs 59-61). This is important, because it shows that the definition of “marinated” does not pursue “*consistently and systematically*” (Judgement of the ECJ, *Cilevics and others*, C-391/20, paragraph 75) the goal of consumer protection and shows, in turn, that this is an unintentional omission that can be rectified.

- (d) Finally, **the definition of “marinated” in the Draft Royal Decree is neither necessary nor proportional to achieve consumer protection.** In short, as that definition is neither suitable nor appropriate to achieve that objective, it does not comply with the principle of proportionality (Judgement of the ECJ, *Oteiza Olazábal*, C-100/01, paragraph 43).

4. Conclusion

The definition of “marinated” contained in the Draft Royal Decree would entail, if the current wording is kept, an unjustified restriction on the freedom of establishment (not even justified in the RIAR) since (i) there are no overriding reasons related to the public interest, (ii) omitting the injection technique is not suitable or appropriate to protect consumers, and (iii) such omission is neither necessary nor proportional to achieve such protection.

Finally, it should be emphasised that this party shares, in general terms, the reasons that support the adoption of the Draft Royal Decree and only seeks to question and request that the Commission rule on the omission of the injection technique from the definition of “**marinated**”.

By virtue of the above,

I REQUEST THE DIRECTORATE-GENERAL OF INTERNAL MARKET, ENTREPRENEURSHIP AND SMES OF THE EUROPEAN COMMISSION to accept this document, and in the light of the foregoing comments:

- (i) Issue a detailed opinion on whether the Draft Royal Decree regulating national commercial denominations and denominations of preserved and prepared foods permitted in Spain for fishery and aquaculture products, if adopted with its current wording, would constitute a restriction of the free movement of goods in the fishery sector.
- (ii) Issue a binding act proposing Spain to amend the definition of "marinated" so that the injection technique is not omitted from it.

Barcelona, 9 February 2023

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