

Executive Summary

“Legal report on the organoleptic testing of virgin and extra virgin olive oils”

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Purpose of the report

This legal report is intended to:

- ✓ Gather and analyse a document dossier regarding the main conclusions obtained from the studies, reports and articles considered to be relevant with respect to the application of a tasting panel as part of the organoleptic tests to which the olive oil is subjected.
- ✓ The analysis of the legal consequences of the application of such a panel and its compatibility with the applicable principles set out by Spanish law (legal security, statute-barring of public authority arbitrariness, proportionality, limited nature of discretion).



Document dossier regarding the organoleptic testing of olive oil

Reports, articles and studies analysed

Spanish

- “Comparative study of the reliability of oils by private 2012 virgin olive oil testing”, prepared by the Sub-directorate General for Food and Laboratory Control at the MAGRAMA in December 2012.
- “Comparative study of the reliability of oils by private 2013 virgin olive oil testing”, prepared by the Sub-directorate General for Food and Laboratory Control at the MAGRAMA in December 2013.
- "Comparison Trial Report JUNAN9/10, Study of organoleptic parameters in olive oil" prepared by the Directorate General for Food Industries and Quality at the Agriculture and Fishing Office at the Andalusia Regional Government, dated 26 November 2010.
- Article “Olive oils. There are extras that are not”, prepared by the Consumer and Users Organisation (OCU) in November 2012, published in the magazine “OCU-Compra Maestra”, No. 375, pages 12 to 17.
- “Organoleptic Comparison Study LAA ORG-2B/2014”, organised by the Agro-food Arbitration Laboratory, Sub-Directorate General for Sub-directorate General for Food and Laboratory Control at MAGRAMA, dated 12 February 2015.
- “Technical report on the operation of organoleptic tests by official tasting panels for extra virgin olive oils of Spain”, prepared by PwC in 2013.

Foreign

- “Test indicates that imported “extra virgin” olive oil often fails international and USDA standards”, published by UC-DAVIS Olive Center in July 2010.
- “Evaluation of Extra-Virgin Olive Oil Sold in California”, published by UC-DAVIS Olive Center in April 2011.
- Article “Oils claiming to be something they're not”, published by the Brazilian magazine ProTeste, No. 130, November 2013 and administrative proceedings followed by Cargill Agrícola, S.A. with the Consumer Defense Authority in the State of Janeiro (Brazil).
- Complaint from the Australian Olive Oil distributors to the Australian Consumer and Competition Commission (ACCC) and supplementary information.
- Article published on the Chinese website “Okoe” on 2 July 2015 regarding the analysis of samples from 10 "Extra Virgin" olive oils imported into that country.

Conclusions obtained from the document dossier (I of III)

The MAGRAMA report of December 2012 shows that the minimum agreement of 66% of the private laboratories was not reached with respect to the commercial classification of two of the five samples examined.

According to the MAGRAMA report of December 2013, two of the five samples did not obtain the minimum agreement of 66% (two thirds) in the commercial classification. There were 13 errors that violate the maximum confidence interval of the panel (13.75% of possible serious errors).

The Andalusia Government report detected dispersion in the classification of "Virgin" with respect to M1 and the default classifier. There was a higher dispersion of positive attributes in the S2.

Category according to organiser	Lampante	Virgin	Extra virgin	Lampante	Lampante
Category	Sample 1	Sample 2	Sample 3	Sample 4	Sample 5
Extra virgin	0 (0 %)	0 (0 %)	15 (65 %)	0 (0 %)	0 (0 %)
Virgin	3 (13 %)	10 (43 %)	8 (35 %)	1 (4 %)	3 (13 %)
Lampante	20 (87 %)	13 (57 %)	0 (0 %)	22 (96 %)	20 (13 %)
	Lampante	Lampante	Extra virgin	Lampante	Lampante

Classificatory category	Lampante	Lampante	Extra virgin	Virgin	Virgin
Category	Sample 1	Sample 2	Sample 3	Sample 4	Sample 5
Extra virgin	0 (0 %)	0 (0 %)	14 (87 %)	4 (25 %)	1 (6 %)
Virgin	0 (0 %)	8 (50 %)	2 (13 %)	11 (69 %)	8 (50 %)
Lampante	16 (100 %)	8 (50 %)	0 (0 %)	1 (6 %)	7 (44 %)
	Lampante	Lampante/ Virgin	Extra virgin	Virgin	Virgin

Category according to organiser	Virgin	Virgin
Category	S 1 (30 laboratories)	S2 (29 laboratories)
Extra virgin	10 (33 '33%)	0 (0 %)
Virgin	18 (60 %)	5 (17'24%)
Lampante	2 (6'66 %)	24 (82,75%)
	Virgin	Lampante

	S1	S2
Defect	Nº Labor.	Nº Labor.
Sediment	5	2
Mouldy	7	13
Bitter/Acid/Sour	1	3
Rancid/Musty	1	7
Others	5	4

Conclusions obtained from the document dossier (II of III)

The Organoleptic Comparison Trial performed by the MAGRAMA Agro-food Arbitration Laboratory (February 2015) reveals significant discrepancies in the samples M1 and M5, given that they were classified as “extra virgin” in both cases when, according to the organizer, both samples were “virgin”. Four of the five samples analysed (S1, S3, S4 and S5) show a default classifier that is different from that indicated by the organizer for those samples.

Category according to organiser	Virgin	Lampante	Lampante	Lampante	Virgin
Category	Sample 1	Sample 2	Sample 3	Sample 4	Sample 5
Extra	16 (59 %)	0 (0 %)	0 (0 %)	0 (0 %)	14 (52 %)
Virgin	10 (37 %)	3 (11 %)	1 (4 %)	3 (11 %)	10 (37 %)
Lampante	1 (4 %)	24 (89 %)	26 (96 %)	24 (89 %)	3 (11 %)
	Extra	Lampante	Lampante	Lampante	Extra

Conclusions from the 2013 PwC report:

- ✓ The weighted variability of the results based on the opinion issued by the official panels for the same sample of food-grade virgin olive oil (AOVC) was 27.3%.
- ✓ Sending the same sample of oil at two different times to the same official panel gave rise to a change in the opinion in 11% of cases and in some cases the second sample sent was given a better result than the first sample sent.
- ✓ The average time required by the official panel to send the result of the test was 61 days. In some cases the results given by the official panel took up to four months.
- ✓ There is a significant disparity in the criteria used and required by each of the 15 official panels with respect to: a) Criteria and priorities defined for admitting/rejecting samples; b) Application process; c) Payment process; d) Minimum amount of sample oil required; e) Type of container/presentation required; f) Cost per analysis.

Conclusions obtained from the document dossier (III of III)

The American reports concluded that the organoleptic tests should be accompanied and supported by chemical tests which are more effective than the COI and USDA standards.

The Australian olive oil distributors sustains that the Australian system is more effective when determining the quality of oil storage, but not to determine the quality of the product itself.

The article in the Brazilian magazine ProTeste that revealed that certain imported Spanish oils did not have the category of "extra virgin" for which they were labeled, alleging "indications of consumer fraud" and the notice placed by the Consumer Defense and Protection Authority in the State of Janeiro (PROCON) in several stores in R o de Janeiro and other Brazilian States (such as Pernanbuco) led to a 30% decline in sales.

In accordance with the article on the Chinese website "Okoe.com" of the 10 samples of the "Extra Virgin" oil subjected to analysis, only 1 maintained that classification, 7 were classified as "Virgin" and 2 were classified as "Lampante" after being submitted to an official German tasting panel. According to a Chinese engineer, the causes could be due to poor storage.

Legal considerations

Control over the goal of the standard as a regulated development

In those cases in which there are highly disparate criteria, invalidating or obvious errors or even when the involvement of authorized testers leads to an oil being catalogued simultaneously into two or more oil categories (without a deciding dominant criterion), the purpose of the standard is violated.

Legal certainty

The analysis of the reports and studies included in the dossier shows there is a certain instability in sensory testing, i.e. inconsistency in the judgments issued by the panels that cannot be corrected through contradicting analyses but there is also an absence of certainty in their results, which is the same as insecurity and lack of confidence.

Proportionality

The organoleptic tests give rise to a high level of distortion by inducing a higher error percentage than that which is inherent to any administrative action. It should be verified whether the absence of proportionality in the means employed to attain the goal pursued by the standard could be alleviated or limited by only maintaining the chemical analyses or introducing new more objective analyses or confirming or comparative tests.

Interdiction of arbitrariness

The factual inconsistency or fallibility of sensory tasks that has been occasionally shown could be considered to be a negative indication with respect to satisfactorily surpassing the rationality test that is required by the principle of interdicting arbitrariness. This is especially the case when they do not seem to allow for an "objective" quantification of sensory impressions, in violation of the provisions of Article 1 of Royal Decree 227/2008.

Conclusions (I of III)

➤ These sensory tests not only allow a certain degree of subjectiveness through sensorial technical discretion but also **do not provide the consistency, stability, uniformity and reproducibility that is required from a legal point of view:**

- 1 There is a **disparity of criteria** among the official tasting panels with respect to the commercial classification of olive oil, sensorial classifier defects and the determination of the oil's attributes, i.e., involving all aspects examined in the organoleptic tests.
- 2 The **repetition or comparison** of the organoleptic tests of samples already subjected to a previous test **also gives rise to disparate criteria** with respect to the commercial classification of the olive oil, its sensorial classifier defects and the determination of the oil's attributes.
- 3 The evaluation of the attributes and/or defects and their scoring in many cases is contradictory, although the classification or declassification of the oil coincides with the results.
- 4 When the same sample of oil is sent at different times to the same or a different official panel or private laboratory **there are changes in opinion** which sometimes results in **two different classifications for the same sample of oil**. In some cases, **the second sample sent received a better result** than the first sample.
- 5 Using official panels or private panels does not guarantee a better or worse result, or any uniformity in the classification of the samples.
- 6 The **absence of uniform criteria with respect to the methodology and the conditions** to which an oil sample analysis is subject, as well as with respect to whether or not **the sample is obtained from a product that is already marketed**, may harm the producer by attributing an oil quality defect to that producer that does not always match the quality of the product.

Conclusions (II of III)

7 The application of tests to olive oils once they are in stores, especially in the case of oils that are exported outside of Spain, offers results that **do not always allow the actual quality of the original product to be measured** (prior to export or sale).

8 The **negative results** obtained at the destination store or country **may be due to external factors outside of the producer's control**, such as the transportation and/or storage or marketing conditions that are not optimal, such as excess exposure to light, heat and/or oxygen.

9 The release or publication of results from sensorial panels (through magazines or notices located at retail point-of-sale), in order to contradict and lower the classification of the olive oils that is reflected on the product labels, **has a significant effect on sales** (for example, in Brazil there was a total decline in sales of 30% as a result of a publication that stated that some Spanish brands were not really "extra-virgin" as their labels indicated).

10 **Consumers are very receptive to the information published on the quality of products**, reacting to the classification of products as "fraudulent" or of "low-quality" by buying fewer products from the affected brand. For this reason, the adequate application of current legislation should be monitored and this legislation requires the **observance of the principles of veracity, technical and analytical rigor and compliance with all of the guarantees established by national or EU legislation with respect to analyses** (vid. Law 12/2013 and Royal Decree 538/2015).

Conclusions (III of III)

- ❖ The organoleptic tests **are not reasonable or ideal to attain the goal pursued by Regulation No. 2568/91** (guarantee the purity and quality of products and to uniformly determine, in all Member States of the European Union, the presence of characteristics inherent to the various types of olive oil).
- ❖ **They are also not completely compliant with the general principles of the Law** (particularly the principles of **legal certainty, proportionality and interdiction of arbitrariness** by public authorities).
- ❖ **Possible judicial review**, through the jurisprudence doctrine concerning technical discretion, of the defects observed in the organoleptic tests **is not a sufficient guarantee** for the producers and distributors of olive oil, since they would be required to avail themselves of the Courts of Justice to correct a failure deriving from the inherent fallibility of the organoleptic test.
- ❖ If the organoleptic tests do not offer a guarantee of objectivity, certainty and proportionality, the possibility offered by Regulation No. 2568/91 to **subject them to two additional contradictory analyses** in the event of a discrepancy in the classification obtained, **also does not offer such guarantees.**

As a result of the above, it is evident that **the organoleptic tests currently established within the area of virgin and extra virgin olive oil represent an inappropriate quality control mechanism that violates the most elemental principles of the Spanish legal system, and gravely harms the public and the olive oil industry, frequently generating legal uncertainty and insecurity which, ultimately, discredit the sector and cause serious financial harm to the industry.**