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Draft Commission Notice on the application of the provisions of Article 26(3) of Regulation (EU) No 1169/2011

1 Introduction

Article 26(3) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers (hereinafter the “Regulation”) requires that where the country of origin or the place of provenance of a food is given and where it is not the same as that of its primary ingredient, the country of origin or place of provenance of the primary ingredient in question also be given or, at least, indicated as being different to that of the food.

On 28 May 2018, the Commission adopted Commission Implementing Regulation (EU) 2018/775 (hereinafter the “Implementing Regulation”) which lays down the modalities for the application of this requirement. In particular, the Implementing Regulation clarifies and harmonizes how the origin of the primary ingredient(s) must be labelled.

The purpose of this Commission Notice is to provide guidelines for food business operators and national authorities on the application of the provisions of Article 26(3) of the Regulation. This Notice should be read together with other relevant provisions of the Regulation and of the Implementing Regulation.

The Notice reflects the discussions the Commission’s Health and Food Safety Directorate-General (DG SANTE) held with experts from Member States in the context of the Working Group on Regulation (EU) No 1169/2011 on the provision of food information to consumers.

2 Questions related to the scope of Article 26(3) of the Regulation

The application of Article 26(3) of the Regulation is triggered by two factors: (1) the country of origin or place of provenance of the final food is given and (2) is not the same as that of its primary ingredient. In addition, the Implementing Regulation clarifies that the country of origin or place of provenance of a food can be given “by any means such as statements, pictorial presentation, symbols or terms, referring to places or geographical areas” (Article 1(1) of the Implementing Regulation).

Furthermore, the Implementing Regulation acknowledges that geographical indications protected under Regulation (EU) No 1151/2012, Regulation (EU) No 1308/2013, Regulation (EC) No 110/2008

or Regulation (EU) No 251/2014 or protected pursuant to international agreements as well as registered trade marks when constituting an origin indication, fall under the scope of Article 26(3) of the Regulation. Nevertheless, given the specific character of these indications, the Implementing Regulation does not apply to them, pending the adoption of specific rules concerning the application of Article 26(3) on the matter.

Relevant provisions for this section: Articles 2(2)(g) and 26(3) of the Regulation, recital (8) and Article 1 of the Implementing Regulation.

2.1 Reference to the food business operator

2.1.1 Could a name/ business name and address of the food business operator provided on its label trigger the application of Article 26(3) of the Regulation?

Pursuant to Article 2(2)(g) of the Regulation, the name, business name or address of the food business operator provided on the label shall not constitute an indication of the country of origin or place of provenance of food within the meaning of the Regulation. Therefore, references to intending to identify the legal entity of the food business operator do not trigger, as a rule, the application of Article 26(3) of the Regulation. However, if those references are complemented by an additional statement, logo or any other pictorial symbol, the latter could trigger the application of Article 26(3) of the Regulation.

In addition, any reference to the food business operator should be assessed in the context of all information provided on the label and its entire presentation. In fact, this kind of indication might be considered as an origin indication if it is clearly emphasized on the package and where the promotion of specific origin has been visibly put forward. It is up to the enforcement authorities of the Member States to control these items, taking into account all elements of the labelling and package.

2.2 Brand names

2.2.1 Does the brand names (other than registered trade marks as referred to in Article 1(2) of the Implementing Regulation) including indications of the country of origin or the place of provenance of a food trigger the application of Article 26(3) of the Regulation?

The Implementing Regulation stipulates that its provisions should not apply to registered trade marks where the latter constitute an origin indication, pending the adoption of specific rules concerning the application of Article 26(6) of the Regulation to such indications. At the same time, recital 7 of the Implementing Regulation clarifies that indications of the country of origin or the place of provenance of a food, which are part of registered trade marks as referred to in its Article 1(2), fall within the scope of Article 26(3) of the Regulation. Along the same lines, any other references which comprise geographical indications, including brand names are to be considered as giving the country of origin or place of provenance of a food.

2.3 Name of the food

2.3.1 Are legal names of the food including a geographical indication to be considered as giving the country of origin or place of provenance of a food in the sense of Article 26(3) of the Regulation?

According to Article 17 of the Regulation, the name of the food shall be its legal name and in the absence of it, a customary name, or, if there is no customary name (or if it is not used), a descriptive name.

According to Article 2(2)(n) of the Regulation, "legal name" means the name of a food prescribed in the Union provisions applicable to it or, in the absence of such Union provisions, the name provided for in the laws, regulations and administrative provisions applicable in the Member State in which the food is sold to the final consumer or to mass caterers. Given that legal names are imposed by legal provisions and are not voluntarily chosen by the food business operator, they should not trigger the application of Article 26(3) of the Regulation.

Example: "London gin", "Pastis de Marseille (Regulation (EC) No 110/2008),

"Jambon de Paris" (French Code of cured meat).

2.3.2 Are the customary names of the food including a geographical indication to be considered as giving the country of origin or place of provenance of a food in the sense of Article 26(3) of the Regulation?

Article 2(2)(o) of the Regulation defines "customary name" as a name which is accepted as the name of the food by consumers in the Member State in which that food is sold, without that name needing further explanation.

Pursuant to recital (8) and Article 1(1) of the Implementing Regulation, customary and generic names including geographical terms that literally indicate origin, but whose common understanding is not an indication of origin or place of provenance of the food, is not covered by the Implementing Regulation, i.e. do not trigger the application of Article 26(3) of the Regulation

Therefore, the geographical terms included in the customary or generic names which are not associated by the consumer with the origin indication because of their different common understanding, would not be considered as origin indication. Often such names refer to a geographic place, region or country where the food was originally produced or marketed and with time, became a generic/customary name for a certain category of foods. Given the above, such generic designations and customary names do not trigger the application of Article 26(3) of the Regulation.

Example: Frankfurter sausage,

As the question relates to consumers' understanding within every single Member State and there are significant differences in consumers' perceptions on these aspects amongst the Member States, it is up to the competent national authorities to decide, on a case-by-case basis, which name of a food is

to be considered as giving the origin indication and which name is a generic/customary name clearly understandable to the consumer.

2.4 Different statements on the label

2.4.1 Are statements such as "made in", "produced in" and "product of" followed by a geographical indication to be considered as giving the country of origin or place of provenance of a food?

The statements such as "made in (country)", "manufactured in (country)", "produced in (country)", are strongly associated by consumers with an origin indication and therefore, as a rule, shall be seen as indicating the country of origin or place of provenance of a food. In fact, those terms evidently refer to production or manufacturing processes which, in the case of processed foods, could correspond to the country of origin as defined in the Regulation, i.e. the last substantial transformation of a food.

Similarly, the statement "product of (country)" imply in general for the consumer the indication of the country of origin of a food, in the meaning of Article 26(3) of the Regulation. In addition, this reference could also suggest that including the ingredients of the food in question are coming from the country indicated.

2.4.2 Are statements such as "packed in" or "produced/made by X for Y" followed by the name of the food business operator and its address to be considered as giving the country of origin or place of provenance of a food?

The statement "packed in" clearly indicates the place where a food has been packed and as such, is not likely to imply for the consumer an origin indication in the meaning of Article 26(3) of the Regulation. Consequently, despite that the term in question refers to a geographical area, it is not to be considered as giving the country of origin or place of provenance of a food.

Terms such as "produced by/manufactured by/packed by" (company name followed by address and country)" or "produced by/manufactured by X for Y" make literally reference to the relevant food business operator and, in general, as such are not likely to suggest to the consumer an origin indication of the food.

Nevertheless, the consumer's perception is influenced by all the components of the label, including its presentation. Therefore, the entire packaging must be taken into account when assessing the possible misleading character of the food with regard to its origin.

2.4.3 Are acronyms, pictorials or any other statements added voluntarily with the only purpose to help consumers to find their local language on multilingual labels, to be considered as giving the country of origin or place of provenance of a food?

This kind of indication shall not be considered as an origin indication if it is clearly referring to the different language versions of the food information provided on the label.

2.4.4 Are statements such as "kind", "type", "style", "recipe", "inspired by" "blend" or "à la" including a geographical indication to be considered as giving the country of origin or place of provenance of a food?

The statements such as "kind", "type", "style", "recipe", "inspired by" "blend" or "à la", usually refer to the recipe or specific characteristics of the food or its process and as such, should not be considered as an origin indication.

However, the entire packaging must be taken into account when assessing the possible misleading character of the food with regard to its origin. In this context and in the spirit of Article 7 of the Regulation, the above-mentioned statements should be provided only if it can be justified by the characteristics, nature or production process of the food, as claimed on the label.

2.4.5 Would a national symbol or colours of a flag be considered as giving the country of origin or place of provenance of a food?

From the consumers' perspective, flags and/or maps are identified as the most relevant references to origin labelling. Therefore, in principle, clear and visible flags and/or maps referring to a specific geographical territory should be considered as an origin indication and consequently, trigger the application of Article 26(3) of the Regulation. Other national symbols such as a recognisable national monument, landscape or person may also be perceived by the consumer as an origin indication of a food. However, as their understanding tends to depend on the product and country, those graphics are to be assessed on a case-by-case basis. In this context, Member States should in particular take into account the location of the symbols/graphics, their size, colour, font size and the overall context of labelling of the food, i.e. that the labelling as a whole does not cause confusion to consumers about the origin of the food.

A specific consideration should be given however to the use of pictures and other statements to refer to a national/local event or to a national/local sport team to celebrate the event or the team. In such cases, a case-by-case assessment should be carried out to verify whether indications that refer to a geographical area are likely to mislead consumers by suggesting that the food comes from that geographical area and therefore, trigger the application of Article 26(3) of the Regulation.

2.4.6 Could the Implementing Regulation be triggered by additional statements provided on labels of foods bearing protected geographical indications or trade marks?

Pending the adoption of specific rules, the Implementing Regulation does not apply to protected geographical indications and trade marks as referred to in its Article 1(2). In cases where those foods also bear other visual statements, including statements referring to the same or different geographical origin, they are covered by the provisions of the Implementing Regulation.

3 Identification of the primary ingredient

According to Article 2(2)(q) of the Regulation 'primary ingredient' means an ingredient or ingredients of a food that represents more than 50% of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required.

Relevant provisions for this section: Article 2(2)(q); Article 2(2)(h) and Article 26(3) of the Regulation, Article 2 of the Implementing Regulation.

3.1 How should the primary ingredient in the meaning of Article 2(2)(q) of the Regulation be identified?

For the purpose of Article 26(3) of the Regulation, food business operators are responsible to determine, on the basis of the definition laid down in Article 2(2)(q) of the Regulation, the primary ingredient of the food in question. The definition of the primary ingredient identifies two types of primary ingredients, a) a quantitative one representing more than 50% of the food and b) a qualitative one which is usually associated by the consumers with the name of the food. The elements of the definition need to be considered on case-by-case basis. When identifying the primary ingredient, account should be taken of different characteristics of the food such as the composition, the entire presentation of the label and the consumers' perception with respect to whether the ingredient is associated with the name of the food.

Member States' competent authorities enforce the proper implementation.

3.2 Can a food have more than one primary ingredient? If yes, for the food that contain more than one primary ingredient, should the origin of all primary ingredients be given?

Article 2(2)(q) of the Regulation clearly refers in the definition to 'primary ingredient' as an ingredient (using the singular form of the word) or ingredients (using the plural form of the word) of a food that represent more than 50% of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required. According to this wording, the definition of the 'primary ingredient' as laid down in Article 2(2)(q) explicitly refers to the possibility to have more than one primary ingredient of a food.

In accordance with the requirement of Article 26(3) of the Regulation, it is apparent that, if the food business operator identifies on the basis of the definition at hand more than one primary ingredient, the country of origin or the place of provenance of all these primary ingredients must be indicated.

3.3 Is it possible that the application of the definition of the primary ingredient will result in no primary ingredient of a food?

In relation to the application of Article 26(3) of the Regulation, it has to be assessed whether any ingredient of the food is to be considered as its primary ingredient on the basis of the definition of Article 2(2)(q) of the Regulation. The ingredient(s) of a food is/are not be considered as the primary ingredient of the food in the meaning of Article 2(2)(q) of the Regulation if the definition of the

primary ingredient is not fulfilled, namely where none of the ingredients of the food represents more than 50% of that food, or none of the ingredients are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is not required.

3.4 Does Article 26(3) of the Regulation and consequently the Implementing Act cover single ingredient products?

It is possible that the food is a processed single ingredient product and that its last substantial transformation occurred in a different place than the origin of the raw material or that the same type of ingredient was sourced from different places. This situation would evoke the application of Article 26(3) of the Regulation in case the country of origin or place of provenance of the food is indicated and the country/ies of origin or the place(s) of provenance of the single, and consequently primary ingredient, is not the same as that of the food.

3.5 When it is well known by consumers that the primary ingredient of a food can only be sourced outside EU, should its origin be provided?

The Regulation does not provide any exemption not to indicate the country of origin or the place of provenance of the primary ingredients where this is not the same as that of the food.

3.6 Is it possible for the primary ingredient to be a compound ingredient?

Yes, pursuant to Article 2(2)(h) of the Regulation, "compound ingredient" means an ingredient that is itself the product of more than one ingredient.

4 Geographical levels

To enable consumers to make informed choices, the Implementing Regulation sets out specific rules which apply where the country of origin or the place of provenance of the primary ingredient is given on the basis of Article 26(3) of the Regulation. Those rules aim to ensure that such information is sufficiently precise and meaningful.

For this purpose, Article 2(a) of the Implementing Regulation harmonises the geographical areas to which the origin indication of the primary ingredient must refer.

Relevant provisions for this section: Article 26(3) of the Regulation and Article 2 of the Implementing Regulation.

4.1 Would it be possible to indicate the country of origin or place of provenance of the primary ingredient by referring to different geographical levels (e.g. "EU and Switzerland")?

Article 2 of the Implementing Regulation provides a list of geographical areas to which the indication of the primary ingredient should refer. In order to fulfil the requirements of Article 26(3) of the Regulation, food business operators must choose one of the geographical areas listed in Article 2(a) of the Implementing Regulation. It is apparent from the wording of this provision that the

Implementing Regulation does not provide the possibility to combine different geographical levels listed therein.

Examples:

- "Switzerland "corresponds to a geographical area laid down in Article 2(a)(iv). On the contrary, "EU" corresponds to a geographical area laid down in Article 2(a)(i). The possibility of combining the two is not provided by Article 2(a) of the Implementing Regulation.

It should be also noted that, alternatively, food business operators can indicate by means of a statement laid down in Article 2(b) of the Implementing Regulation, that the country of origin or place of provenance of the primary ingredient is being different to that of the food.

4.2 Would it be possible to declare a list of both Member States and third countries as the country of origin or place of provenance of the primary ingredient(s)?

Article 2(a)(iv) of the Implementing Regulation grants the possibility to declare the Member State(s) or third country(ies) as origin indication of the primary ingredient. However, pursuant to Article 2(a) of the Implementing Regulation, the possibility to make reference to both Member State(s) and third country(ies) is not granted.

4.3 Would it be possible to declare a list of multiple regions or geographical areas within a Member State or within a third country or within several Member States or third countries to indicate the country of origin or place of provenance of the primary ingredient(s)?

Pursuant to Article 2(a)(ii) and (v) of the Implementing Regulation, it is possible to make reference to the region, or any geographical area either within several Member States or within third countries. However, the Implementing Regulation does not provide the possibility to indicate a list of multiple regions or geographical areas within one or several Member States and third countries.

5 Placing and presentation

Information provided with respect to the primary ingredient in accordance with the Regulation should complement the information given to the consumers on the country of origin or place of provenance of the food. They should be easily visible and clearly legible and where appropriate indelible. To achieve this objective, Article 3 of the Implementing Regulation establishes rules on the placing and presentation of the information in question.

5.1 Would it be possible to indicate the country of origin of a primary ingredient by using country codes?

Pursuant to Article 9(1)(i) of the Regulation, it is mandatory to indicate the country of origin or place of provenance for cases laid down in Article 26 of the Regulation. Article 9(2) of the Regulation further requires that particulars indicated on mandatory basis in accordance with Article 9(1) of the Regulation shall be indicated with words and numbers and they may be additionally expressed by means of pictograms or symbols.

It follows from the provision of the Regulation that the country of origin of the primary ingredient must always be indicated by words. Therefore, the use of country codes to express the origin indication of a primary ingredient does not comply with the requirements of Article 26(3) read in conjunction with Article 9 of the Regulation.

5.2 When the product name includes an origin indication and the product name is found on several places of the package, should the indication of the origin of the primary ingredient(s) be indicated for every time the product name is labelled on the product? The same question concerns the graphical indications, as flags.

Article 3(2) of the Implementing Regulation specifies that where the origin indication of the food is given with words, the information on the origin of the primary ingredient(s) has to appear in the same field of vision as the indication of the country of origin or place of provenance of the food. The Implementing Regulation does not provide for flexibility which would allow to indicate the origin of the primary ingredient(s) only once where the origin indication of the final food is provided several times on the labelling.

It follows from the provisions of the Regulation that the origin indication of the primary ingredient(s) must be presented in a clear and visible way for the consumers, always in the same field of vision as the products' origin indication, including flags. Therefore, in case the sale denomination containing an origin indication or flags is repeated on the packaging, the information on the origin of the primary ingredient(s) needs also to be repeated accordingly.

It should be reminded that Article 26(3) of the Regulation concerns the origin information provided on a voluntary basis by the food business operator (or mandatorily on the basis of Article 26(2)(a) of the Regulation). Therefore, if the food business operator deems it necessary to repeat this voluntary information a number of times on the package, then each field of vision should have the origin information of the primary ingredient.

5.3 Does Article 13(3) of the Regulation also apply to the origin indication of the primary ingredient provided in accordance with provisions of the Implementing Regulation?

Article 13 of the Regulation sets out general principles governing the presentation of mandatory food information as listed in Article 9(1) of the Regulation and therefore also to the information on the country of origin or place of provenance where provided for in Article 26 (Article 9(1)(i) of the Regulation). The provisions of Article 13 of the Regulation should apply without prejudice to specific Union provisions applicable to particular categories of foods. This means that those provisions apply in a cumulative way to the EU specific legislations as long as they are not contradictory to them.

The Implementing Regulation lays down specific presentation requirements for origin indication of the primary ingredient. In particular, Article 3 thereof provides that such information has to appear in the same field of vision as the indication of the country of origin or place of provenance of the food and by using a font size which has an x-height of at least 75% of the x-height of the indication of the country of origin or place of provenance of the food. In addition, it is stated that, in any case, the information on origin indication of the primary ingredient has to be provided in a font size which is not smaller than 1,2 mm.

The above-mentioned specific requirements of the Implementing Regulation are to be complemented by the horizontal provisions of Article 13 of the Regulation, which should apply cumulatively.

Consequently, Article 13(3) of the Regulation applies to the information on the origin indication of the primary ingredient provided in accordance with Article 26(3) of the Regulation and the Implementing Act. Therefore, in case of packaging or containers the largest surface of which has an area of less than 80cm², the x-height of the font size referred to in Article 3(2) of the Implementing Regulation shall be equal or greater than 0,9 mm.

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