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Position Paper - Notification 2022/338/A - Austrian Ordinance on Origin Labelling of meat, milk and eggs as a primary ingredient in packaged foods

This draft Ordinance is intended to require the mandatory labelling of origin of beef, pork, chicken and goat meat, milk and milk products such as butter, yoghurt, cream cheese etc. and eggs and egg products such as dry egg used as primary ingredients in packaged foods. Additionally, the origin of such ingredients will have to be proven to the competent authorities during official controls.

This proposal raises a number of serious concerns due to the lack of alignment with EU legislation, issues within the draft itself and the negative consequences that the measure will entail for food manufacturers and the environmental footprint of production. As such it should not be passed.

Part A: Legal issues with EU Law

National measures on such labelling may only be accepted, where they fulfill the requirements in Article 39 of Regulation (EU) No 1169/2011 on the provision of food information to consumers ("FIC-Regulation"). However, as this is not the case, the draft Ordinance should be rejected entirely as it is incompatible with European Law. It is further neither compatible with the basis of free movement of goods pursuant to Article 34 of the Treaty on the Functioning of the European Union ("TFEU"), nor with sectoral food law.

1. Non-Compliance with supposed basis in Article 39 FIC-Regulation

The draft Ordinance does not comply with the requirements set by Art. 39 FIC-Regulation, which requires that Member States may only adopt measures requiring additional mandatory particulars for the purpose of the protection of public health or of consumers, or for the prevention of fraud, or the protection of property rights or the prevention of unfair competition. None of these is applicable in this draft Ordinance.

Further, Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods only where there is also a proven link between certain qualities of the food and its origin or provenance. No valid link has been shown between origin and quality in this draft Ordinance.

These conditions must be met cumulatively for the provision to apply as recently stated by the European Court of Justice in the *Groupe Lactalis* case ¹, which established that a

¹ ECJ, Case C-485/18, *Groupe Lactalis v Premier ministre*, ECLI:EU:C:2020:763.

similar French measure was non-compliant with EU-law. Neither condition was proven by the draft Ordinance.

What the Ordinances argumentation focuses on instead, is that the majority of consumers attach significant value to the provision of that information. However, this is merely an additional factor which needs to be shown when notifying such measures to the Commission, not a singular basis on which such a measure may be based.

As such, the draft Ordinance does not comply with the requirements of Article 39 FIC-Regulation and should not be permitted to be passed.

2. Measures having equivalent effect - Article 34 TFEU

The principle of free movement of goods is the very basis of the EU market. However, the draft Ordinance is not compliant with it. While only being applicable to Austrian products, it would still have a negative impact on products from other EU Member States, as the implication is, that non-native products are of lower quality. This measure would therefore place other EU products at a distinctive disadvantage which would qualify it as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Art. 34 TFEU and cannot be justified on any of the grounds listed in Art. 35 TFEU.

3. No basis within vertical legislation

The notification summary tries to give the impression that the draft Ordinance is simply following the intention of sectoral EU legislation and authorised or even required by it. However, under EU law the obligation to state the origin of the primary ingredient only arises when the country of origin or the place of provenance of a food is provided and it is not the same as that of its primary ingredient or if a specific legislation for individual products such as fresh meat is in place. The draft Ordinance on the other hand, introduces a new general obligation to indicate the origin of all food products, regardless of whether or not the country of origin or place of provenance of a food is given. This very narrow scope was initially chosen, despite the difficulties of ascertaining origin for all ingredients and types of ingredients in processed foods, as it was only triggered by a voluntary action of the producer. If they could not guarantee the source of the ingredient, they did not need to, simply by removing any mention of origin on the product.

However, this new obligation goes far beyond the scope of current EU legislation and forces producers, who do not have the means to guarantee separate storage, sourcing etc. as well as a clear understanding of all their primary ingredients, into an area of legal uncertainty. The draft Ordinance cannot be considered as a simple furtherance of EU law, as indicated in the notification summary, but creates new legal obligations far beyond the intentions of EU law.

Part B: Concerns within the draft

Aside from the serious concerns regarding compliance with EU-law, which should in themselves prevent the passing of the draft ordinance, it also contains serious concerns within its drafting, which would need to be rectified, if it were to be passed against all legal concerns.

It has to be stated, that the draft is unclear and hard to understand in a number of sections and would therefore be difficult to comply with by the food producers it addressees.

1. Disruption of ingredient list

§5 of the draft Ordinance requires that the origin be *“given in the list of ingredients either immediately after the name of the ingredient in question or in a footnote to the list of ingredients.”*

However, a note in the ingredients list is contrary to the requirements of the FIC-Regulation which prohibits the separation of the list of ingredients by any additional information. Compliance with this Ordinance would therefore lead producers to be in breach of EU law. This can therefore not be maintained.

2. Incongruence with origin labeling under Commission Implementing Regulation (EU) 2018/775 ("Implementing Regulation 2018/775")

This draft Ordinance requires, that the origin be labeled in or near the ingredients list, while the Implementing Regulation 2018/775, requires that the origin of primary ingredients be labelled in the same field of vision as any indication of origin for the product. This means, that additional labelling would be required, even if other labelling already identifies the origin of the primary ingredients. This would necessitate a change to all labels e.g. for milk products, even if they already contain the same origin information, which will lead to an enormous amount of wasted packaging material. This is a huge cost factor, but also, it is a major concern with regards to unnecessary waste production, which is not at all in line with the EU's aims to reduce waste and improve environmental impact.

3. Sell off period & transitional period

A sell-off period allowing for all products placed on the market by a specified date to be sold off, could avoid part of the wastefulness concerning packaging and products, which have already been packaged without the necessary labelling but could not be sold off prior to a simple transitional period. It is absolutely necessary that this be included in the draft Ordinance, particularly, as this labelling requirement has no health risks attached and product recalls and the destruction of perfectly safe products would certainly be disproportionate and unsustainable.

In any event we would like to point out that the transitional period will certainly be to short, particularly considering that the entire Austrian market would be required to redo all of their packaging within a very short time frame. Considering the current market situation and already existing shortages of materials, new packaging material may only be available with a delivery period of many months. As such the transitional period should be in line with that set out in Art. 55 FIC-Regulation, rather than unilaterally selected shorter periods.

4. Terminology „primary ingredient

The term „primary ingredient“ in Article 26 FIC-Regulation is a specific definition established for the very clear purpose of Implementing Regulation 2018/775. This term was not intended to be generalized and applied to other purposes. As it stands, this term has already caused a lot of uncertainty amongst producers regarding the manner of application. At the moment, this uncertainty only arises through a voluntary step - the origin labelling of a product - which causes the measure to become applicable. However, to cause an uncertain term to become mandatorily applicable to all food producers, will increase the number of addresses confronted with such legal uncertainty.

The complexity of the assessment of the applicability of the term “primary ingredient” can also be seen by the innumerable hours spent by expert groups throughout the EU including a number of sub-committees of the Codex Alimentarius Austriacus in trying to find a clear interpretation of the term.

5. Foods consisting of a single ingredient

It remains unclear whether foods consisting of a single ingredient fall within the scope of the draft Ordinance. Particularly as these usually do not require a list of ingredients (Art. 19 FIC-Regulation), where the origin should be indicated according to §5 (2) of the draft Ordinance.

Therefore, it should be made clear, that such foods are exempt from the obligation of origin labelling.

In light of the above arguments, as well as the fact, that a draft for a harmonized indication of origin for packaged foods at EU-level is already being worked on, we respectfully ask the European Commission to take any further necessary steps to prevent the adoption of the draft Ordinance and ensure full compliance with EU law.

The Austrian Chamber of Commerce and the Food Industries Association of Austria have also provided statements which set out very detailed analysis of the legal breaches and incompatibilities of this draft Ordinance with EU law. We fully support these position papers and the arguments therein.