

EU legal assessment of the Austrian Ordinance on indications of origin of meat, milk and eggs as a primary ingredient in packaged food (Notification No. 2022/338/A)

(as of 10th June 2022)

I. Mandatory origin labelling for meat, milk and eggs as a primary ingredient in Austria

- 1 On 10 May 2022, the Republic of Austria notified (notification number 2022/338/A) the European Commission (hereinafter referred to as the "Commission") pursuant to 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 (hereinafter referred to as the "FIC Regulation") of a draft **Ordinance** of the Federal Minister for Social Affairs, Health, Care and Consumer Protection on the obligation to indicate the origin of meat, milk and eggs as a primary ingredient in packaged food (hereinafter referred to as the "Ordinance").

1. Indication of the country of origin: Austria, region, federal state

- 2 According to § 3 of the Ordinance, the labelling of packaged food containing meat, milk or egg as a primary ingredient **must** indicate the **origin** of these ingredients. According to § 4 (5) of the Ordinance, the indication of the country of origin "shall be made in accordance with Art. 2 of the Implementing Regulation (EU) 2018/775" (hereinafter referred to as the "Implementing Regulation 2018/775"). Implementing Regulation 2018/775 opens up various options for origin labelling under certain conditions. For example, the geographical frame of reference may be the "EU" or a "Member State" or a "Region", or any other geographical area within a Member State.
- 3 By referring to Art. 2 Implementing Regulation 2018/775, § 4 (5) of the Ordinance gives the legal impression that the Austrian labelling obligation for meat, milk and eggs can be fulfilled by indicating their **national** or **regional origin**. Thus, the explanatory notes to the Ordinance on § 4 attached to the notification declares: "**All geographical areas** according to Art. 2 Implementing Regulation 2018/775 may be used. Thus, the indication of a country, several countries, region(s), federal state(s) (...) is possible".
- 4 **However**, this legal reference in § 4 (5) of the Ordinance to Art. 2 Implementing Regulation 2018/775 is **contrary to the law of the European Union** (hereinafter "Union law"). According to Art. 2 Implementing Regulation 2018/775, a choice between the different geographical options (EU, non-EU, Member State, region) can **only be** considered if the country of origin or place of provenance of a primary ingredient "is not the same as the given country of origin or the given place of provenance of the food". This regulation has an **exhaustive character** and only allows for a corresponding origin labelling to exclude **misleading** consumers.¹ Under Union law, the Austrian Ordinance may therefore not prescribe a choice between national or regional origin labelling for the primary ingredients meat, milk and eggs in other cases.

¹ ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 28.

2. Mandatory labelling of origin for Austrian foodstuffs

- 5 According to § 7 of the Ordinance, the obligation of origin labelling applies in principle to corresponding foodstuffs **from Austria** but not to foodstuffs that are marketable in other EU Member States.² According to § 1, the Ordinance aims to inform consumers about the origin of meat, milk and eggs as primary ingredients in packaged food. According to the explanations also sent with the notification, "**Austrian origin**" is particularly important to consumers.

3. Protectionist objective of the notified Ordinance

- 6 It is also worth mentioning another objective of the Austrian lawmaker, which is neither mentioned in the text of the Ordinance nor the explanatory notes, but which nevertheless determined its drafting. When drafting the Ordinance, the responsible government agencies publicly emphasised that the compulsory origin labelling for food in Austria should above all enable "**domestic products to be given conscious priority in the future**" or "consumers to make (a) clear purchasing decision, **consciously (resorting to) regional products** and thus strengthening our family farms".³ Mandatory origin labelling is seen as an **instrument to promote sales of Austrian agricultural products**.
- 7 It fits in with this that the Austrian government sees the **Austrian "origin of a product" *per se*** as "an essential **characteristic of the quality of this product**", as it emphasises in the explanations of the Ordinance. However, there is no concrete comparison with rules of other Member States or with applicable Union standards for foodstuffs in the explanatory notes. Legally, the obligatory indication of origin in Austria is **not linked to a concrete promise of quality**. The mandatory indication does not only apply to meat, milk and egg products that meet specific quality standards (cf. paras. 37 ff.).

4. Requirements of Union law for national origin labelling

- 8 Union law imposes extremely **strict requirements** on national mandatory origin labelling of foodstuffs. Such indications are often justified, as in the case of the notified Ordinance, based on **consumers' interest** in this information.⁴ However, Advocate General (AG) *Hogan* has described this as a disguised method of ensuring preference for domestic products.⁵
- 9 In the following, it will be shown that the national origin labelling provided in the Ordinance for the primary ingredients meat, milk and eggs is **not compatible with Union law**. It is neither compatible with the prohibition of quantitative restrictions and measures having equivalent effect in Art. 34 TFEU, nor with sectoral food law, nor with Art. 39 FIC Regulation.

² In this respect, it corresponds to the French origin labelling for milk, which the ECJ has declared to be contrary to Union law, see ECJ, Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:763 para. 16. However, the Austrian obligation to label origin also applies in principle to foodstuffs from third countries.

³ Federal Minister of Agriculture Köstinger, Press Release OTS 0155 of 1.4.2021 and Press Release OTS 0148 of 4.5.2022.

⁴ Recital 72 of Regulation (EU) No. 1308/2013; Recital 30 of FIC Regulation (EU) No. 1169/2011.

⁵ GA *Hogan*, Opinion Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:592 para. 3 and 44.

II. Infringement of the free movement of goods

1. Relevance of the free movement of goods despite harmonisation through the FIC Regulation

- 10 According to Art. 38 (1) FIC Regulation, national laws in the areas harmonised by the FIC Regulation "shall not give rise to obstacles to free movement of goods, including discrimination as regards foods from other Member States". Therefore, the legal assessment of national rules of origin must also take into account the **primary law prohibition** of quantitative restrictions and measures having equivalent effect in Art. 34 TFEU. Until the entry into force of the FIC Regulation, national rules on indications of origin were typically assessed under Art. 34 TFEU.⁶
- 11 Since the **FIC Regulation has not fully harmonised the** affixing of mandatory indications of origin for foodstuffs⁷, national requirements for origin labelling must continue to be assessed under Art. 34 TFEU and not only according to Art. 39 FIC Regulation.⁸

2. Measures having equivalent effect under Art. 34 TFEU

- 12 Art. 34 TFEU prohibits "measures having equivalent effect" and covers any state measure "which (is) capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".⁹ However, based on ECJ case law,¹⁰ national laws that only regulate specific "sales modalities" do not qualify as a measure having equivalent effect, provided they are not discriminatory. In contrast, rules to which goods must conform "such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging" are always capable of restricting intra-Union trade in goods, even if they apply indiscriminately.¹¹ They give rise to **additional costs**, making **market access** in the country of destination more difficult.¹²
- 13 National indications of origin are affixed to the food label, so a corresponding labelling requirement is a product-related measure that consistently violates Art. 34 TFEU.¹³ The Commission has pointed out the problems this creates for foodstuffs in terms of **market access** in other Member States and has warned against the misconception that "the additional costs related to origin labelling (...) are just confined to 'the cost of some extra ink for printing'".¹⁴
- 14 Moreover, the **ECJ** has consistently rejected national labels of origin because their "purpose (...) is to enable consumers to distinguish between domestic and imported goods and (...) this enables them to assert any prejudices which they may have

⁶ ECJ, Case 249/81, Commission v. Ireland (Buy Irish), ECLI:EU:C:1982:402 paras. 18 ff. and 23 ff.; Case C-325/00, Commission v. Germany (CMA), ECLI:EU:C:2002:633 paras. 17 ff. and 24 ff.

⁷ But see concerning the situations mentioned in Art. 26 Abs. 2 lit. a) and b) FIC Regulation, EuGH, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 27 ff.

⁸ Cf. in relation to a national requirement for origin marking of materials for footwear, ECJ, Case C-95/14, UNIC, ECLI:EU:C:2015:492 para. 33 on Directive 94/11/EC - although the Court nevertheless uses Art. 34 TFEU to interpret Directive 94/11/EC.

⁹ ECJ, Case 8/74, Dassonville, ECLI:EU:C:1974:82 para. 5.

¹⁰ ECJ, Cases C-267/91 and C-268/91, Keck and Mithouard, ECLI:EU:C:1993:905 paras. 13 ff.

¹¹ ECJ, Cases C-267/91 and C-268/91, Keck and Mithouard, ECLI:EU:C:1993:905 para. 15.

¹² See ECJ, Case C-470/93, Mars, ECLI:EU:C:1995:224 para. 13.

¹³ Cf. ECJ, Case 207/83, Commission v. United Kingdom (Foreign Textiles), ECLI:EU:C:1985:161 para. 18.

¹⁴ Commission, Report to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for meat used as an ingredient from 17.12.2013, COM(2013) 755 final, 9.

against foreign goods".¹⁵ The **stigmatising effect** of national origin labelling concerning imported goods is particularly true for food products. However, to the extent that consumers tend to have greater confidence in food from their own country, especially in terms of safety and quality, these are purely **subjective assessments**. The indication of origin alone does not allow any conclusions about the product characteristics. National requirements to indicate the origin of food products exploit such prejudices. They **typically** work to the disadvantage of imported foodstuffs and are therefore a **discriminatory measure** having equivalent effect within the meaning of Art. 34 TFEU.¹⁶

- 15 Such discrimination of food based on origin also exists if the mandatory origin labelling does not refer to the Member State (e.g. "Austria") but to a **region** or a **province** (e.g. "Tyrol"). According to § 4 (2) of the Ordinance (see the corresponding explanations to the Ordinance: country, region, federal state), regional labelling of the foodstuffs concerned shall also be possible in Austria. Regional preference for individual foodstuffs is also **predominantly** or **typically** to the detriment of foreign products, so there is **indirect discrimination** in cases where regional origin labelling is applied.¹⁷
- 16 This discrimination does not disappear because foodstuffs from other EU Member States are exempt from the mandatory labelling under § 7 of the Ordinance. Admittedly, **only domestic food producers** incur additional costs due to this restriction, which at first glance could be qualified as discrimination against national products that is irrelevant under Union law. However, as the ECJ has emphasised, such **one-sided emphasis** on the national or regional origin of a product also constitutes discrimination against similar foreign products in violation of Art. 34 TFEU. Even if, as is the case here, the obligation to label origin is limited to domestic foodstuffs, consumers are negatively influenced in their purchasing decision concerning imported foodstuffs.¹⁸ They could gain the impression that the **non-origin-labelled products** from other EU Member States **are inferior**, which "facilitates the marketing of goods of domestic origin to the detriment of imported goods".¹⁹
- 17 The Austrian government also intends such an effect. The Ordinance has a **protectionist objective** (cf. paras. 6 and 7 above). The emphasis on the "Austrian origin" of foodstuffs is ultimately an instrument to **promote** Austrian agricultural products at the expense of products from other EU Member States.

3. No justification on consumer protection grounds

- 18 A justification under Union law for this infringement of the free movement of goods cannot be considered either based on the written justifications in Art. 36 TFEU nor based on the unwritten "mandatory requirements".²⁰
- 19 Informing consumers about the properties of foodstuffs is indeed a legitimate interest in terms of the free movement of goods. However, discriminatory national legislation **cannot** be justified on the grounds of consumer protection.²¹ It would also be

¹⁵ Cf. ECJ, Case C-95/14, UNIC, ECLI:EU:C:2015:492 para. 44.

¹⁶ They serve "purely nationalistic - even chauvinistic - instincts on the part of consumers", GA Hogan, Opinion Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:592 paras. 47 and 44; see also ECJ, Case C-95/14, UNIC, ECLI:EU:C:2015:492 para. 44.

¹⁷ Cf. ECJ, Case C-281/98, Angonese, ECLI:EU:2000:296 para. 38 ff.

¹⁸ National origin labelling caters to "purely nationalistic - even chauvinistic - instincts", GA Hogan, Opinion Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:592 paras. 47 and 44.

¹⁹ See ECJ, Cases C-321/94 to C-324/94, Pistre, ECLI:EU:C:1997:229 para. 45.

²⁰ Since ECJ, Case 120/78, Rewe-Zentral-AG (Cassis de Dijon), ECLI:EU:C:1979:42 para. 8.

²¹ ECJ, Case 113/80, Commission v. Ireland (Irish Souvenirs), ECLI:EU:C:1981:139 para. 17 f.; Case 207/83, Commission v. United Kingdom (Foreign Textiles), ECLI:EU:C:1985:161 para. 20 and 22; Cases C-321/94 to C-

questionable what value discriminatory indications of origin on foodstuffs should have. One could argue that national indications of origin contribute to the transparency desired by the consumer. The ECJ has indeed recognised that the **reputation of foodstuffs** among consumers can be linked to their origin. However, it has emphasised that the importance of the origin of food "depends essentially on particular characteristics and more generally on the **quality of the product**".²² Therefore, in addition to health and deception-relevant claims, at best quality-relevant information on foodstuffs has its justification.

- 20 Moreover, it would, in any case, be **disproportionate** to ensure consumer protection through mandatory indications of origin. In the view of the ECJ, rules to ensure that consumers are informed about product characteristics are regularly sufficient for the labelling purposes "of an average **consumer who** is reasonably well-informed and reasonably observant and circumspect".²³ A reasonably well-informed consumer is primarily guided by information on the content, ingredients and properties of a product on the label of a foodstuff.²⁴ In addition to the information on foodstuffs required by the FIC Regulation, which is relevant to health and deception for consumers, only **information pertinent to quality** is justified (see para. 19).²⁵ It is clear to a reasonable consumer that a specific origin does not imply any statement about the quality of a product. Therefore, the ECJ has also clearly spoken out against national origin labels, due to the prohibition under Art. 34 TFEU, which do not reveal any **connection between the origin and the specific product quality** of foodstuffs and are merely intended to promote a general preference for domestic products.²⁶ It also continued this line in its recent *Groupe Lactalis* decision²⁷ (see below para. 36 ff.).
- 21 Ultimately, the origin labelling planned by the Ordinance is also disproportionate because the labelling obligation covers primarily Austrian products. On the other hand, products from other EU Member States containing meat, milk and eggs as a primary ingredient may be marketed **without corresponding origin labelling**. Therefore, Austrian consumers do not learn where these products originate. They are only informed that they do not come from Austria. Due to this differentiation in the labelling of foodstuffs, the Ordinance does not create the transparency for the consumer intended according to its § 1. The Ordinance is therefore **not suitable for** (objectively) understood consumer protection. It is also **not coherent** due to the one-sided information situation it creates.²⁸
- 22 The Austrian Ordinance is therefore **not compatible with the provisions on the free movement of goods** in the result either.

324/94, Pistre, ECLI:EU:C:1997:229 para. 52; GA *Sharpston*, Opinion Case C-95/14, UNIC, ECLI:EU:C:2015:270 para. 54.

²² ECJ, Case C-108/01, Consortio del Prosciutto di Parma, ECLI:EU:C:2003:296 para. 64; Case C-388/95, Belgium v. Spain, ECLI:EU:C:2000:244 para. 56.

²³ On the European consumer model in food law, see e.g. ECJ, Case C-210/96, Gut Springenheide and Tusky, ECLI:EU:C:1998:369 para. 31; Case C-195/14, Teekanne, ECLI:EU:C:2015:361 para. 36.

²⁴ ECJ, Case C-51/94, Commission v. Germany (hollandaise sauce and béarnaise sauce), ECLI:EU:C:1995:352 para. 34.

²⁵ ECJ, Case C-108/01, Consortio del Prosciutto di Parma, ECLI:EU:C:2003:296 para. 64; Case C-388/95, Belgium v. Spain, ECLI:EU:C:2000:244 para. 56.

²⁶ ECJ, Case 207/83, Commission v. United Kingdom, ECLI:EU:C:1985:161 para. 19; Case C-325/00, Commission v. Germany (CMA), ECLI:EU:C:2002:633 para. 25.

²⁷ ECJ, Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:763 para. 41 ff.

²⁸ Cf. on this requirement for the justification of state interventions in the free movement of goods, ECJ, Case C-28/09, Commission v. Austria, ECLI:EU:C:2011:854 paras. 126 and 133 ff.

III No compatibility of the Ordinance with sectoral food law

- 23 The Ordinance tries to give the impression that Austrian origin labelling is **permissible**, based on sectoral Union food law or at least authorised or even required by it. This is relevant insofar as according to Art. 26 (1) and Art. 1 (4) FIC Regulation, **special** Union provisions on mandatory indications of origin for individual foodstuffs (cf. Recital 32 FIC Regulation) take **precedence** over the general Union food law provisions.²⁹

1. Relationship with Implementing Regulation (EU) 2018/775

- 24 The impact assessment and the message text published with the notification of the Austrian Ordinance refer to the fact that it serves the "**continuation** of the Implementing Regulation (EU) 2018/775 for the indication of the country of origin or place of provenance of the primary ingredient of a food". While according to Art. 2 of the Implementing Regulation 2018/775, the origin of the primary ingredient is **only** mandatory to be indicated in the execution of Art. 26 (2) (b) FIC Regulation to prevent consumers from being **misled about the origin of food if the origin of the food** is not identical with the origin of the primary ingredient,³⁰ the Austrian Ordinance "now states a **general obligation to indicate the origin of** beef, pork, sheep, goat and poultry meat, milk and egg as primary ingredients in packaged food".
- 25 This implies that according to the Ordinance, the origin of the products mentioned must also be indicated if there is no risk of misleading consumers. However, it is doubtful whether this legal obligation can be understood as a "continuation" of Implementing Regulation 2018/775. Implementing Regulation 2018/775 does **not authorise** the Member States to adopt such an Ordinance, just as Art. 26 (2) (b) FIC Regulation does not. Instead, the Ordinance **violates the harmonising effect of Implementing Regulation 2018/775** (cf. para. 4 above).

2. Legal situation for meat

a) Beef and veal under Regulation (EC) No. 1760/2000

- 26 According to § 4 (1) of the Ordinance, the origin of beef must be indicated "**in accordance with** Regulation (EC) No. 1760/2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products" (hereinafter: "Regulation 1760/2000"). This wording is misleading. It could also be understood as a mere **declaratory** reference to a possible obligation to label the origin according to Regulation 1760/2000. In other words: **only insofar as** Regulation 1760/2000 establishes an obligation under Union law to label the origin of beef, this should also apply to Austrian beef via § 4 (1) of the Ordinance. However, such an understanding would not do justice to the publicly declared objective of the Austrian lawmaker. The Ordinance claims to emphasise the **Austrian origin of** beef products. It creates the **legal appearance for the food businesses concerned** that such origin labelling is obligatory - even if, according to Regulation 1760/2000, an obligation under Union law to such origin labelling exists only in exceptional cases.

²⁹ See ECJ, Case C-686/17, Prime Champ Germany, ECLI:EU:C:2019:659 para. 69.

³⁰ Furthermore, according to Art. 26 (3) (a) FIC Regulation and the Implementing Regulation 2018/775, a clarification regarding the origin of a primary ingredient must be made if the labelling of a food indicates its origin and this is not identical with the origin of the primary ingredient. Apart from this, however, the indication of the origin of ingredients may not be prescribed (cf. also Art. 9 (1) (i) FIC Regulation).

- 27 In the case of **beef**, according to Art. 13 (5) (a) of Regulation 1760/2000, only the state in which the birth, rearing and/or slaughter of the animals took place *must be* indicated. According to Art. 13 (5) (b) of Regulation 1760/2000, the **country of origin of the meat** *may be* indicated if the birth, rearing and slaughter of the animals from which the meat originates take place **in the same Member State**.
- 28 Regulation 1760/2000 thus allows for a **voluntary** indication of origin in particular cases, simplified labelling. This is also shown in recital 26 of the Regulation, according to which "(i)nformation additional to the information concerning where the animal or animals from which the beef was derived were born, fattened and slaughtered may be provided under the voluntary beef labelling system". **Member States cannot**, therefore, derive from this provision a **right to require** food businesses to indicate the origin of the beef from the state concerned. Consequently, they must justify the introduction of mandatory indications of origin under Art. 34 TFEU and Art. 39 FIC Regulation.
- 29 Apart from that, the labelling provisions in Art. 11 ff. of Regulation 1760/2000 do **not** apply to **beef products** such as beef sausages and meat preparations made from beef, which do not belong to the CN listed in Art. 12 of Regulation 1760/2000. Only for minced meat there are special rules in Art. 14 of Regulation 1760/2000. Nationally binding rules of origin for such products in which beef is used as an ingredient are to be measured against Art. 34 TFEU and Art. 39 FIC Regulation.

b) Pigmeat, sheepmeat, goatmeat and poultry meat under Implementing Regulation (EU) No. 1337/2013

- 30 The approach mentioned above of the Austrian Ordinance, which creates the legal appearance of mandatory origin labelling for Austrian meat as a primary ingredient, also concerns pork, sheep, goat and poultry meat. In this respect, § 4 (2) of the Ordinance stipulates that "the **origin of the meat (...)** must be **indicated in accordance with Art. 5 of the Implementing Regulation (EU) No. 1337/2013** as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry" (hereinafter: "Implementing Regulation 1337/2013"). Here, too, the question arises as to whether § 4 (2) of the Ordinance thus merely refers declaratorily to a possible existing obligation under Union law to label the origin of such types of meat or whether it formulates an independent national requirement of origin. As in the case of beef (cf. para. 26 ff.), the latter is to be assumed; at least a corresponding legal appearance is created for those concerned.
- 31 This is all the more true as, according to Art. 5 of the Implementing Regulation 1337/2013, **there is no** general obligation under Union law to label the origin of pork, sheep, goat and poultry meat. Art. 5 (1) (a) and (b) Implementing Regulation 1337/2013 only prescribe the indication of the state in which rearing, or slaughtering took place. According to Art. 5 (2) Implementing Regulation 1337/2013, instead of the information in (1) (a) and (b) on rearing and slaughtering, the indication "Origin: (name of Member State or third country)" *may also be given* "if the food business operator proves to the satisfaction of the competent authority that the meat (...) has been obtained from animals born, reared and slaughtered in one single Member State". Even more clearly than Regulation 1760/2000, this provision refers to a **right of food business operators who** - as recital 9 of the Regulation points out - may have "commercial interest" in providing such additional information. Art. 5 (2) is thus a rule on **permissible voluntary indications of source** for food business operators (Art. 8 sentence 1 Implementing Regulation 1337/2013). There is no provision for Member

States to enact provisions on mandatory indications of origin. In this respect, the Implementing Regulation provides for **full harmonisation**. However, since the Implementing Regulation 1337/2013 only applies to unprocessed meat, it leaves the Member States with the competence to enact corresponding additional rules for **processed meat**, i.e. sausage or meat as an ingredient in food. Mandatory indications of origin for such products are measured against Art. 34 TFEU and Art. 39 FIC Regulation.

3. Legal situation for milk and eggs

- 32 With regard to **milk**, § 3 (1) (2) of the Ordinance requires the indication of the country of origin of the milk. § 4 (3) of the Ordinance indicates the country in which the animal was milked as the country of origin of the milk. Under § 4 (5) of the Ordinance, a region or federal state, e.g. Tyrol, may also be named instead of the country Austria. There are no special labelling rules under Union law concerning the origin of milk. Therefore, national origin labelling for milk and milk products must be measured against Art. 34 TFEU and Art. 39 FIC Regulation.³¹ It should be noted that the **ECJ** recently interpreted **Union law** in a way with which mandatory origin labelling for French milk was **incompatible**.³² The relevant French provision required milk, which has been "obtained" in a country, to indicate that country as the country of origin. § 3 (1) (2) in conjunction with § 4 (3) of the Austrian Ordinance, which require milk to indicate the country "in which the animal was milked", cannot be upheld under Union law.
- 33 With regard to **eggs, liquid egg, liquid egg white or dried egg**, the compulsory origin labelling according to § 3 (1) (3) in conjunction with § 4 (3) and (5) of the Ordinance corresponds to the legal situation for milk (cf. recital 32 above). Although there are special labelling provisions under Union law for eggs, these do not allow national indications of origin referring to a state or a region. According to Art. 74 and 75 (1) (f), Art. 78 (1) (e) and Annex VII Part VI No. 3 of Regulation (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products and Art. 7 (1), Art. 8 (1), Art. 9 (1) of Regulation (EC) No. 589/2008 as regards marketing standards for eggs as amended by Regulation (EU) 2017/2168 must be marked with a **producer code** which identifies the Member State, farm and house. Moreover, these particular EU marketing standards only refer to eggs, but not to **processed eggs or egg products**. More far-reaching national regulations on the origin of eggs from a Member State or a region, such as those according to § 3 (1) (3) in conjunction with § 4 (3) and (5), do not apply. § 4 (3) and (5) of the Ordinance are to be assessed based on Art. 34 TFEU and Art. 39 FIC Regulation.

IV. Infringement of Art. 39 FIC Regulation (EU) No. 1169/2011

1. Constituent elements of Art. 39 FIC Regulation

- 34 It has already been shown that the origin labelling for meat, milk and eggs as a primary ingredient in packaged food in Austria prescribed by the notified Ordinance violates the prohibition of quantitative restrictions and measures having equivalent effect in Art. 34 TFEU (cf. paras. 12 ff. above). Art. 39 FIC Regulation has **codified** and slightly modified this case law on the free movement of goods. National rules on mandatory indications of origin are **only** permitted under this provision,

³¹ ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 30 ff.

³² ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 35 ff.

(1) if one of the **objective reasons** listed in Art. 39 (1) (a) - (d) FIC Regulation applies, in particular, that of consumer protection,
 (2) if, in accordance with Art. 39 (2) sentence 1 FIC Regulation, the Member State concerned also provides evidence of the **link between a particular quality of the food and its origin**, and
 (3) also demonstrates, in accordance with Art. 39 (2) sentence 2 FIC Regulation, when notifying its measures that most **consumers attach significant importance to this information**.

- 35 It is **doubtful** whether the Austrian lawmaker can even rely on an **objective reason** within Art. 39 (1) FIC Regulation to justify mandatory origin labelling for meat, milk and eggs. As already shown, informing consumers regarding foodstuffs can indeed serve the purpose of consumer protection. However, this does not apply to provisions on consumer information that are **discriminatory** like the notified Ordinance (cf. *supra* para. 19). An application of Art. 39 of the FIC Regulation in favour of the law notified by Austria is also excluded because of the requirements of Art. 39 (2) of the Foodstuffs Directive are not met either, as explained below. The conditions of Art. 39 (1) and (2) FIC regulation must be met **cumulatively** for the provision to apply ("By means of paragraph 1, Member States may introduce measures concerning the mandatory indication of origin [...] only where [...]").

2. No link between quality and origin of the food

- 36 Furthermore, the exception to the rule that indications of origin are inadmissible beyond Art. 26 FIC regulation provided for in Art. 39 FIC Regulation is to be interpreted **restrictively**.³³ It is already clear from the wording of Art. 39 FIC Regulation that indications which **merely** inform consumers **about the national origin of** a foodstuff, as provided for in §§ 3 and 4 of the notified Ordinance, do not meet these requirements. Such indications do not inform the average consumer, who is reasonably well-informed, about the characteristics of a foodstuff because the reputation of the origin of a foodstuff depends for this consumer on the **specific characteristics and quality of the product**.³⁴
- 37 However, the ECJ only recognises as such specific qualities of a foodstuff to which national designations of origin can be linked **objectively** ascertainable and **unique** characteristics of foodstuffs "which distinguish the foods that possess them from similar foods which, due to their different origin or different provenance, do not possess them".³⁵ According to Art. 39 FIC Regulation, the properties and characteristics of foods "resulting from their manufacture or treatment" do not suffice for the proof of quality.³⁶ The ECJ does **not** consider production and processing methods **specific to the origin of food** because - unlike soil characteristics or climatic factors - they are not distinctive locational factors that shape the quality of food in a specific way. Therefore, they can also not provide a permissible connecting factor for national indications of origin.
- 38 The brief **justification** for the Ordinance, which results from the explanatory notes issued in this regard, does not meet these requirements. A more detailed justification is provided by the "Austrian **statement** in the context of the notification procedure on origin labelling of the primary ingredients meat, milk and egg"³⁷ (hereinafter:

³³ Thus ECJ, Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:763 para. 35 ff.

³⁴ ECJ, Case C-108/01, *Consortio del Prosciutto di Parma*, ECLI:EU:C:2003:296 para. 64.

³⁵ ECJ, Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:763 paras. 42 and 50.

³⁶ ECJ, Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:763 para. 49.

³⁷ Retrieved from: https://www.verbrauchergesundheits.gv.at/Lebensmittel/Kennzeichnung/herkunft/Nachweis_Qualitaet_und_Herkunft.pdf?8j7uv4 (on 25.5.2022).

"statement"), which was submitted to the Commission and is intended to provide the evidence required under Art. 39 (2) in conjunction with Art. 45 FIC Regulation (cf. para. 34). This statement merely describes in general terms the production conditions for food in Austria resulting from the **topography** and the **agricultural structure** of the country. These production conditions are then further broken down concerning milk, meat and eggs based on the parameters for feeding and keeping animals.

- 39 The statement already suffers from the fact that it does **not** consider the **case law of the ECJ**³⁸ to provide the proven link required for Art. 39 FIC Regulation but is formulated exclusively on the basis of the Opinion of Advocate General *Hogan*³⁹. According to the statement, "from Austria's point of view, there is a possibility that quality criteria which lie outside the physical, nutritional, organoleptic or taste characteristics can be taken into account in the required proof of the link between quality and origin".⁴⁰ This approach is **methodologically flawed**, because an Opinion formulated by an Advocate General (Art. 252 (2) TFEU) merely contains a non-binding proposal for the ECJ.⁴¹ This is significant here because the ECJ in its judgment on the *Groupe Lactalis* case interpreted the concept of quality in Art. 39 FIC Regulation **more restrictively** than Advocate General *Hogan*. The legally binding requirements formulated by the ECJ for national indications of origin under Art. 39 FIC Regulation are, however, ignored by the Austrian statement. At **no point does the statement** address the ECJ's case law, according to which origin-labelled foodstuffs must have a distinctive product quality that distinguishes them from comparable foodstuffs of other origins in accordance with Art. 39 FIC Regulation.
- 40 Because the authors of the statement are aware of this deficit, they propose a "modern" quality concept for food that considers aspects such as animal welfare and sustainability.⁴² However, by this token, they pursue a **different quality concept than the one prescribed by EU law** under Art. 39 FIC Regulation. The diction of the "modern" quality concept is intended to conceal the fact that the Austrian origin indication is not primarily about promoting animal welfare and sustainability, but about winning consumers over precisely for Austrian food and not for food that is produced in compliance with the same production conditions regardless of its origin. Otherwise, Austria could dispense with national origin labelling and instead prescribe **origin-neutral animal welfare, farming methods and sustainability labelling**.
- 41 Therefore, the information provided by Austria in its statement is also not sufficient for the **proven link** required under ECJ case law pursuant to Art. 39 (2) FIC Regulation. The topography and agricultural structure of Austria do not affect the quality of meat, milk and eggs in such a way that they "differ from similar foodstuffs which, being of a different origin or provenance, do not possess them".⁴³ The opinion also does **not** prove evidence of the connection required by the ECJ between **distinctive locational factors** and the **objective characteristics** of Austrian foodstuffs. It is, moreover, obvious that these unique locational factors do not exist in Austria at all, since comparable topographical and agronomic conditions can also be found in other Member States. Moreover, these conditions are by no means the same everywhere in Austria (cf. for example the differences between Tyrol on the one hand and Burgenland on the other).

³⁸ ECJ, Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:763 para. 35 ff.

³⁹ GA Hogan, Opinion Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:592 para. 45 f.

⁴⁰ Opinion, p. 5 f.

⁴¹ See ECJ, Case C-323/09, *Interflora*, ECLI:EU:C:2011:604 para. 24.

⁴² Opinion, p. 6.

⁴³ This has to be demonstrated according to ECJ, Case C-485/18, *Groupe Lactalis v. Premier ministre*, ECLI:EU:C:2020:763 para. 50, also para 41.

- 42 The statement is also insufficient insofar as it refers to the high requirements for **food safety, the use of antibiotics, plant protection products and GMOs**, and special requirements for **food quality, animal welfare and the use of animal feed** in Austria. First, the Austrian government's exceptionally high food and animal welfare standards are merely claimed and are **not substantiated**. There is also a lack of concrete comparisons with EU standards and legal standards of other Member States. In addition, the requirements mentioned in the statement do not provide Austrian foodstuffs with objective characteristics that make them unmistakably **distinguishable** from foodstuffs of other origins.⁴⁴ The **conditions of production of** meat, milk and eggs that Austria has listed do not count among these objective factors of origin⁴⁵ since they can also be and are practised in other Member States.
- 43 The listing of production conditions for food in Austria is therefore not sufficient to justify the planned origin labelling for meat, milk and eggs as a primary ingredient in packaged food before the Commission according to Art. 39 FIC Regulation.

3. No proof of the essential importance of the information for consumers

- 44 The "explanatory notes" to the Ordinance also point to the alleged consumer expectations in Austria that would justify origin labelling of foodstuffs. However, they do so on the assumption that already "the **origin of a product (...)** represents for the majority of (...) consumers an **essential characteristic of the quality of this product**".
- 45 This assumption is untenable in view of Art. 39 (2) FIC Regulation. Any expectations of Austrian consumers as to the origin of foodstuffs cannot in themselves **replace the proof** of a link between the origin of the foodstuffs and their objective quality required by Art. 39 (2) FIC Regulation. The proof of consumer expectation according to Art. 39 (2) FIC Regulation is only relevant if the Member State has **previously** proven the link between the certain distinctive quality of the food and its origin as required by Art. 39 (1) FIC Regulation.⁴⁶ The FIC Regulation is based on a **normative** concept of consumer protection. Under Union law, consumer expectations are legally relevant based on "**objective**" information and not on "subjective associations" regarding the origin of food.⁴⁷ "Objective" information about the origin of a foodstuff, recognised as legitimate under Art. 39 of the FIC Regulation, is based on a proven link between the **distinctive qualities** of food described above and its origin.⁴⁸ It would also be hard to understand why consumers should have a particular interest in milk, meat and eggs of Austrian origin if these do not differ from similar foods with different origins but are ultimately produced under comparable conditions.⁴⁹
- 46 It follows that the references to the extraordinary confidence of Austrian consumers in the quality of food of Austrian origin are not sufficient for Art. 39 FIC Regulation. As a result, the notified Ordinance is **not compatible with Art. 39 FIC Regulation**, and for this reason, is also contrary to Union law.

V. Overall result

- 47 This legal opinion examined whether mandatory national origin labelling for the primary ingredients milk, meat and eggs in packaged food in Austria is compatible with

⁴⁴ See ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 50.

⁴⁵ ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 49.

⁴⁶ Thus explicitly ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 39.

⁴⁷ ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 para. 44.

⁴⁸ ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 paras. 42 and 45.

⁴⁹ On this criterion, ECJ, Case C-485/18, Groupe Lactalis v. Premier ministre, ECLI:EU:C:2020:763 paras. 41 and 50.

Union law. In summary, it can be stated that this is not the case. In particular, mandatory national origin labelling for such products is not compatible with the free movement of goods under Art. 34 TFEU and Art. 39 FIC Regulation.