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*(Information)*INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
AND AGENCIES

EUROPEAN COMMISSION

COMMISSION NOTICE

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

(2020/C 32/01)

1. INTRODUCTION

Pursuant to 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 ⁽¹⁾ (hereinafter 'the Regulation'), where the country of origin or place of provenance of a food is given and 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 needs also to be declared 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 ⁽²⁾ (hereinafter 'the Implementing Regulation') which lays down the modalities for the application of Article 26(3) of the Regulation. In particular, the Implementing Regulation clarifies and harmonises 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 in conjunction with other relevant provisions of the Regulation and of the Implementing Regulation. In particular this guidance is without prejudice to the prohibition of misleading information to consumers provided for in Article 7 of the Regulation. This Notice clarifies the provisions already contained in the applicable legislation. It does not extend in any way the obligations deriving from such legislation nor introduce any additional requirements on the concerned operators and competent authorities.

This Notice is merely intended to assist citizens, business operators and national competent authorities in the application of Article 26(3) of the Regulation and of the Implementing Regulation. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in this Notice cannot prejudge the position that the European Commission might take before the Union and national Courts.

2. QUESTIONS RELATED TO THE SCOPE OF ARTICLE 26(3) OF
THE REGULATION

Article 26(3) first subparagraph of the Regulation sets out two conditions for the application of specific labelling requirements for primary ingredients: (1) the existence of an indication of the country of origin or place of provenance of the final food; and (2) that such indication of the country of origin or place of provenance of a food is not the same as that of its primary ingredient.

Pursuant to Article 26(3) second subparagraph the specific labelling obligations contained in Article 26(3) first subparagraph apply only to cases falling within the scope of the Implementing Regulation as defined in Article 1 of the Implementing Regulation.

⁽¹⁾ OJ L 304, 22.11.2011, p.18.

⁽²⁾ OJ L 131, 29.5.2018, p. 8.

There are two limitations to the scope of application of the Implementing Regulation:

Firstly, Article 1(1) of the Implementing Regulation specifies 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, except for geographic terms included in customary or generic names where those terms literally indicate origin but whose common understanding is not an indication of country of origin or place of provenance.'

Secondly, Article 1(2) of the Implementing Regulation specifies that 'geographical indications protected under Regulation (EU) No 1151/2012 ⁽³⁾, Regulation (EU) No 1308/2013 ⁽⁴⁾, Regulation (EC) No 110/2008 ⁽⁵⁾ or Regulation (EU) No 251/2014 ⁽⁶⁾ or protected pursuant to international agreements' as well as registered trade marks when constituting an origin indication, do not fall under the scope of the Implementing Regulation. Recital 6 of the Implementing Regulation clarifies with regard to this second exception that, while Article 26(3) of the Regulation in principle must apply also to the cases described by this second exemption, the relevant implementing rules require further examination and will be adopted at a later stage.

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 a label trigger the application of Article 26(3) of the Regulation?*

Pursuant to recital 29 and Article 2(2)(g) of the Regulation, indications related to the name, business name or address of the food business operator provided on the label do not constitute an indication of the country of origin or place of provenance of the food within the meaning of the Regulation. Therefore, any references to the legal entity of the food business operator do not in principle trigger the application of Article 26(3) of the Regulation.

Nevertheless, such indications might be considered misleading, on the basis of Article 7 of the Regulation, with regard to the true country of origin or place of provenance of the food if they are clearly emphasised on the package and where the specific origin or place of provenance has been visibly put forward and that origin is not the same as that of the food's primary ingredient. The competent national authorities should assess such cases by taking into account all information provided on the label and the entire presentation of the product.

2.2. Brand names

2.2.1. *Can brands not protected by a registered trade mark as referred to in Article 1(2) of the Implementing Regulation trigger the application of Article 26(3) of the Regulation?*

Article 1(2) of the Implementing Regulation clarifies that even though the origin indications which are part of registered trade marks fall within the scope of Article 26(3) of the Regulation, the Implementing Regulation shall not apply to such indications pending the adoption of specific rules concerning the application of Article 26(3) to such indications. The EU legislator acknowledged the specific character and objectives of the registered trademarks regulated by specific Union legislation and, therefore, the Commission will further examine how the origin indication of the primary ingredient to be provided by Article 26(3) of the Regulation must be indicated, where required for these indications. Conversely, brands comprising geographical statements which are non-registered trade marks are not part of this temporary exemption and therefore the Implementing Regulation applies to them in addition to the obligations resulting from Article 26(3) of the Regulation.

⁽³⁾ Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ L 343, 14.12.2012, p. 1).

⁽⁴⁾ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).

⁽⁵⁾ Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 (OJ L 39, 13.2.2008, p. 16).

⁽⁶⁾ Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91 (OJ L 84, 20.3.2014, p. 14).

2.3. Name of the food

2.3.1. *Are customary names comprising a geographical statements to be considered as giving the country of origin or place of provenance of a food?*

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, do not fall within the scope of the Implementing Regulation. Often such names refer to a geographic place, region or country where the food in question was originally produced or marketed and with time, became a generic/customary names for a certain category of foods. Provided that such generic designations and customary names do not create the consumer perception of a certain geographic origin of the food in question, their usage does 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 EU, it needs to be considered on a case-by-case basis whether a specific name is clearly understandable to the consumer as a generic/customary name.

2.3.2. *Are legal names comprising a geographical statement to be considered as giving the country of origin or place of provenance of a food?*

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.

In other words, such names are codified customary names, where the legislator considered important to harmonise their use and often the composition of the products they define, in order to ensure that the consumer expectations with the regard to the characteristics of the food sold under specific names are met.

Considering the above, legal names comprising a geographical statement are not to be considered as giving the origin indication within the meaning of Article 26(3) of the Regulation, when Article 26(3) has been already taken into account by the legislator.

2.4. Different statements on the label

2.4.1. *Are terms such as 'made in', 'produced in' and 'product of' followed by a geographical statement 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 associated by consumers with an origin indication within the meaning of Article 26(3) and therefore, in principle, should be seen as indicating the country of origin or place of provenance of a food. In addition, those terms refer to production or manufacturing process, which, in the case of processed foods, could correspond to the meaning of the country of origin for the purposes of the Regulation, as defined in Article 60(2) of the Union Customs Code ⁽⁷⁾ i.e. the last substantial, economically-justified processing or working of a food, resulting in the manufacture of a new product or representing an important stage of manufacture.

Similarly, the statement 'product of (country)' in general implies for the consumer an origin indication within the meaning of Article 26(3) of the Regulation. In addition, the term 'product of' is also likely to suggest to the consumer that the entire food, including its ingredients, is coming from the country indicated on the label.

⁽⁷⁾ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) (OJ L 269, 10.10.2013, p. 1).

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, in general, 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 place, it is not to be considered as giving the country of origin or place of provenance of the food.

Terms such as 'produced by/manufactured by/packed by' (the name of the food business operator followed by its address) or 'produced by/manufactured by X for Y' make literally reference to the relevant food business operator and, in general, are not likely to suggest to the consumer an origin indication of the food. As elaborated in point 2.1.1 of this Notice, indications related to the name, business name or address of the food business operator provided on the label do not constitute an indication of the origin of the country of origin or place of provenance of the food within the meaning of the Regulation.

Nevertheless, the consumers' perception is shaped by the whole of components of the label, including the whole presentation of a product. Therefore, the entire packaging must be taken into account when assessing a 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?*

Such indications should not be considered as an origin indication if they clearly refer 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' or 'à la' including a geographical statement 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' or 'à la' usually refer to the recipe or specific characteristics of the food or its process and, as such, should not in principle be considered as an origin indication.

However, the entire packaging must be taken into account when assessing a possible misleading character of the food with regard to its origin. It is also to be mentioned that, in the spirit of Article 7 of the Regulation, the above-mentioned statements are only justified if the food in question possesses specific characteristics or nature, or has undergone a certain production process which determines the claimed link to the geographical place indicated 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 the 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.

Regarding the brand names, the application of Article 26(3) of the Regulation is outlined in point 2.2.1 of this Notice.

A specific consideration should be given to the use of pictures and other statements which refer to a national/local event or to a national/local sport team to celebrate the event. Given their occasional character, those indications need to be assessed on a case-by-case basis in order to determine whether the application of Article 26(3) is triggered.

2.4.6. *Could additional statements provided on labels of food bearing geographical indications protected under EU law or trade marks trigger the application of Article 26(3) of the Regulation?*

Pending the adoption of specific rules, the Implementing Regulation does not apply to geographical indications protected under EU law and registered trade marks as referred to in its Article 1(2). However, in cases a food also bears other visual statements, including those referring to the same or different geographical places, such statements would fall under the scope of the Implementing Regulation if the conditions of Article 26(3) of the Regulation are met.

2.5. What is the interaction of the provisions of the Implementing Act and the EU legislation on organic foods?

Council Regulation (EC) No 834/2007 ⁽⁸⁾ ('Regulation on organic foods') provides for a general framework of organic production rules, including provisions on the use of terms referring to organic production. In addition, that Regulation sets out conditions for the labelling of organic products and the use of the EU logo and requires that when such logo is used, an indication of the place of provenance where the agriculture raw materials of which the product is composed have been farmed, is provided. Such rules will provide the consumer with an information equivalent to the one aimed by Article 26(3).

According to Article 1(4) of the Regulation, the latter shall apply without prejudice to labelling requirements provided for in specific Union provisions applicable to particular foods. In this context, the provisions of the Regulation on organic foods are to be considered as *lex specialis* and prevail over Article 26(3) of the Regulation. Consequently, whenever the EU organic logo is used, Article 26(3) of the Regulation does not apply.

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 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.

3.1. How the primary ingredient should be identified?

For the purpose of Article 26(3) of the Regulation, food business operators are required to provide information about the primary ingredient(s) of the food in question, on the basis of the definition laid down in Article 2(2)(q) of the Regulation.

The legal definition of the primary ingredient identifies two types of criteria to determine the primary ingredient of food: (a) a quantitative one, according to which the ingredient represents more than 50 % of the food; and (b) a qualitative one, according to which the ingredient is usually associated by the consumers with the name of the food.

When providing information about the primary ingredient(s) of a food, food business operators should take into account various elements. In particular, in addition to quantitative composition of the food, they have to carefully consider its specific characteristics, nature and the entire presentation of the label. They also need to consider the consumers' perception and expectations with regard to the information provided about the food in question. Food business operators should take into consideration whether the origin indication of a particular ingredient is likely to substantially affect consumers' purchasing decisions and whether the absence of such an origin indication would mislead consumers.

It is also to be mentioned that, in the spirit of Article 7 of the Regulation, the information provided with regard to the origin indication of the primary ingredient must not be misleading and in any event should not circumvent the provisions and objectives laid down in Article 26(3) of the Regulation.

Member States' competent authorities enforce the proper implementation of the above provisions of the Regulation.

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

Article 2(2)(q) of the Regulation states in the definition of the 'primary ingredient' that the latter could be an ingredient (using the singular form of the word) or ingredients (using the plural form of the word). According to this wording, it should be concluded that the definition of the 'primary ingredient' provides for the possibility to have more than one primary ingredient of a food.

Furthermore, it is apparent from the provisions of Article 26(3) of the Regulation, 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.

⁽⁸⁾ Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ L 189, 20.7.2007, p. 1).

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

For the purpose of Article 26(3) of the Regulation, it has to be first assessed whether any ingredient of a food is to be considered as its primary ingredient on the basis of the definition laid down in Article 2(2)(q) of the Regulation. This implies that a food will have no primary ingredient in the meaning of the Regulation where none of its ingredients represents more than 50 % of that food, none of its ingredients is usually associated with the name of the food by the consumer and in most cases a quantitative indication is not required.

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

Article 26(3) of the Regulation could cover a processed single ingredient product, where its last substantial transformation occurred in a different place than the origin of the raw material ingredient or where the ingredient was sourced from different places. This situation would lead to 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 of origin or place of provenance of the primary ingredient (single 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 place of provenance of the primary ingredients where this is not the same as that of the food. Therefore, even if the primary ingredient of a food can only be sourced outside EU and the origin indication provided with regard to the final food refers to the EU (or Member State(s)), according to the provisions of Article 26(3) of the Regulation, the origin indication of the primary ingredient in question must be indicated.

3.6. It is possible for the primary ingredient to be a compound ingredient?

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

A compound ingredient falls under the scope of Article 26(3) of the Regulation, if it meets the conditions of the definition of the primary ingredient as laid down in Article 2(2)(q) of the Regulation.

Where the information on the origin of the primary ingredient has to be provided in line with Article 26(3) of the Regulation and the primary ingredient is a compound ingredient, food business operators have to provide an appropriate level of information that best fits to the particular food. In this context, they should take into account the specific nature of the food in question, its composition and manufacturing process, the consumers' understanding, expectation and interest in the origin indication of the primary ingredient of the compound ingredient (place where the primary ingredient of the compound ingredient originates, such as the place of harvest or place of farming), as well as how the ingredients of the compound ingredient are indicated in the list of ingredients.

It is also to be mentioned that, in the spirit of Article 7 of the Regulation, the information provided with regard to the origin indication of the compound ingredient must not be misleading and in any event should not circumvent the provisions and objectives laid down in Article 26(3) of the Regulation.

Member States' competent authorities enforce the proper implementation of the above provisions of the Regulation.

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 place of provenance of the primary ingredient is given on the basis of Article 26(3) of the Regulation. Those rules aim at ensuring that such information is sufficiently precise and meaningful.

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

4.1. Would it be possible to indicate the country of origin or place of provenance of the same 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 for one primary ingredient.

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.

However, food business operators may complete the indications 'EU' and 'non-EU' with additional information as long as it complies with the general requirements established in the Regulation with regard to voluntary food information (Article 36 of the Regulation). In particular, such information should not mislead or confuse. In this context, food business operators may indicate 'Switzerland' as an additional voluntary information complementing the mention 'non-EU'.

Example:

- 'EU and non-EU (Switzerland)'
- 'EU (Spain) and non-EU (Switzerland)'.

4.2. Would it be possible to combine both Member States and third countries in order to indicate the country of origin or place of provenance of the primary ingredient?

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. This implies that operators can choose one of these indications or use both of them.

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 the 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. Furthermore, Article 9(2) of the Regulation requires that particulars indicated on mandatory basis in accordance with Article 9(1) of the Regulation must be indicated with words and numbers and they may be additionally expressed by means of pictograms or symbols.

It follows from the provisions of the Regulation that the country of origin of the primary ingredient must be always indicated by words. In this regard, Member States have to assess whether certain country codes could be considered as words. In particular, a country code could be acceptable so long as there was a reasonable expectation that consumers in the country of marketing would correctly understand it and not be misled. This could be the case for such abbreviations as 'UK', 'USA' or 'EU'.

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 be indicated for every time the product name is labelled on the food? The same question concerns the graphical indications, such as flags

Article 3(2) of the Implementing Regulation specifies that where the origin indication of a food is given with words, the information on the origin of the primary ingredient must 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 only once if the origin indication of the final food is provided several times on the label.

It is apparent from the Regulation that the origin indication of the primary ingredient must be presented in a clear and visible way for the consumers, always in the same field of vision as the product 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.

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 of 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.

The Implementing Regulation lays down specific presentation requirements for the 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 origin indication 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.

Article 13(3) of the Regulation provides for an exemption as regards the required font size of the mandatory particulars in the case of small packages (which have an area of less than 80 cm²). As the provisions of Article 13 of the Regulation apply to the mandatory particulars listed in Article 9(1) of the Regulation, they also apply to the origin indication of the primary ingredient provided in accordance with Article 26(3) of the Regulation. 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 to or greater than 0,9 mm.
