

DECISIONS

COMMISSION DECISION (EU) 2018/702

of 8 May 2018

concerning national provisions notified by Denmark on the addition of nitrite to certain meat products

(notified under document C(2018) 2721)

(Only the Danish text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114(6) thereof,

Whereas:

I. FACTS AND PROCEDURE

- (1) Commission Decision (EU) 2015/826 ⁽¹⁾ approved Danish national provisions on the addition of potassium nitrite (E 249) and sodium nitrite (E 250) (nitrites) to meat products contained in Order No 542 of 27 May 2013 on additives in foodstuffs (*BEK nr. 542 af 27.5.2013 (tilsætningbekendtgørelsen), Offentliggørelsesdato: 31.5.2013, Fødevareministeriet*), which the Kingdom of Denmark notified to the Commission by letter of 25 November 2014, pursuant to Article 114(4) of the Treaty on the Functioning of the European Union (TFEU). These national provisions are approved until 22 May 2018.
- (2) Regulation (EC) No 1333/2008 of the European Parliament and of the Council ⁽²⁾ lays down the levels and other conditions of use of nitrites in meat products.
- (3) According to Decision (EU) 2015/826 Denmark should monitor the situation and collect data on whether the application of the levels laid down in Regulation (EC) No 1333/2008 achieve the required level of protection and if not, whether it would lead to an unacceptable risk to human health.
- (4) By letter of 10 November 2017, Denmark notified the Commission of its intention to maintain national provisions on the use of nitrite additives in meat products that differ from Regulation (EC) No 1333/2008. In support of its notification, Denmark submitted information that includes data on consumption and imports of meat products, exposure to nitrites, analysis of nitrites in meat products, prevalence of botulism and updated risk assessment from the Technical University of Denmark (DTU) National Food Institute.

1. UNION LEGISLATION

1.1. ARTICLE 114(4) AND (6) TFEU

- (5) Article 114(4) TFEU provides that, 'If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.'
- (6) According to Article 114(6) TFEU, the Commission shall, within 6 months of the notification, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

⁽¹⁾ Commission Decision (EU) 2015/826 of 22 May 2015 concerning national provisions notified by Denmark on the addition of nitrite to certain meat products (OJ L 130, 28.5.2015, p. 10).

⁽²⁾ Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives (OJ L 354, 31.12.2008, p. 16).

1.2. REGULATION (EC) No 1333/2008

- (7) Under the general principles of Regulation (EC) No 1333/2008 the approval of a food additive is subject to a reasonable technological need, its acceptability from a health point of view and its use not being misleading for the consumer.
- (8) Annex II to Regulation (EC) No 1333/2008 lays down a Union list of food additives approved for use in foods and their conditions of use. Only food additives included in the Union list may be placed on the market as such and used in foods under the conditions of use specified therein.
- (9) Nitrites have been used in meat products for many decades, inter alia, to secure, in conjunction with other factors, the preservation and microbiological safety of meat products, in particular cured meat products, inhibiting, amongst other things, the multiplication of *Clostridium botulinum*, the bacteria responsible for life-threatening botulism. At the same time, it is recognised that the presence of nitrites in meat products can give rise to the formation of nitrosamines, some of which have been found to be carcinogenic. Legislation in this field must, therefore, strike a balance between the risk of the formation of nitrosamines through the presence of nitrites in meat products, on the one hand, and the protective effects of nitrites against the multiplication of bacteria, in particular those responsible for botulism on the other.
- (10) Regulation (EC) No 1333/2008, Annex II, Part E, food category 8.3: 'Meat products' lays down maximum amounts for potassium nitrite (E 249) and sodium nitrite (E 250) that may be added during manufacture. The maximum added amount is 150 mg/kg for most meat products in general and 100 mg/kg for sterilised meat products. For a few specified cured meat products made traditionally in specific Member States the maximum added amount is 180 mg/kg.
- (11) By way of exception to the general rule, Regulation (EC) No 1333/2008, Annex II, Part E, food category under 8.3.4: 'Traditionally cured meat products with specific provisions concerning nitrites and nitrates' lays down maximum residual levels at the end of the production process for certain specified traditional cured meat products, which are produced through traditional manufacturing methods. There are maximum residual levels of 50 mg/kg, 100 mg/kg and 175 mg/kg applying to different groups of such products, e.g. 175 mg/kg for Wiltshire bacon, dry cured bacon and similar products, and 100 mg/kg for Wiltshire ham and similar products.
- (12) Maximum residual levels are the exceptions to the general rule of applying maximum added amounts. Those levels only apply to specific products which are traditionally manufactured in certain Member States and for which it is not possible to control the ingoing amount of curing salts absorbed by the meat due to the nature of the manufacturing process associated with these products. The production process of these specific products is described in the Regulation to enable identification of 'similar products' and to make clear which products are covered by the different maximum levels.
- (13) The maximum levels in Regulation (EC) No 1333/2008 are based on the opinions from the Scientific Committee for Food (hereinafter 'SCF') of 1990 ⁽¹⁾ and 1995 ⁽²⁾ as well as from the European Food Safety Authority (hereinafter 'EFSA') of 26 November 2003 ⁽³⁾. The maximum amounts that may be added reflect the ranges referred to in these scientific opinions by specifying that up to 100 mg/kg of nitrite are permitted in sterilised meat products and 150 mg/kg in other meat products. Given the vast variety of (cured) meat products and manufacturing methods within the European Union, the Union legislator held that it was not possible to specify the appropriate level of nitrite for each product.

2. NATIONAL PROVISIONS NOTIFIED

- (14) The national provisions notified by Denmark on 10 November 2017 are contained in Order No 1044 of 4 September 2015 on additives in foodstuffs (BEK nr. 1044 af 4.9.2015, *Udskriftsdato*: 25.9.2017, *Fødevareministeriet*). That Order amends Order No 542 of 27 May 2013 which had been previously notified to the Commission and assessed in the context of Decision (EU) 2015/826.

⁽¹⁾ Opinion on nitrates and nitrites expressed on 19 October 1990, European Commission — Reports of the Scientific Committee for Food (twenty-sixth series), p. 21.

⁽²⁾ Opinion on nitrates and nitrite expressed on 22 September 1995, European Commission — Reports of the Scientific Committee for Food (thirty eighth series), p. 1.

⁽³⁾ Opinion of the Scientific Panel on Biological Hazards on a request from the Commission related to the effects of Nitrites/Nitrates on the Microbiological Safety of Meat Products, The EFSA Journal (2003) 14, p. 1.

- (15) Order No 1044 provides that nitrites (E 249 – 250) in meat products may only be used under the conditions specified in Annex 3 thereto. The groups of foodstuffs referred to in that Annex correspond to the food categories listed in Annex II to Regulation (EC) No 1333/2008 on food additives and supersede the usages arising from it:

Foodstuff	Amount of nitrites added (mg/kg)
8.3.1 Non-heat-treated meat products	Total 60 mg/kg. In fermented salamis, however, total 100 mg/kg.
8.3.2 Heat-treated meat products	Total 60 mg/kg. In entirely preserved or semi-preserved products, total 150 mg/kg. In rullepølse (rolled-meat sausage), total 100 mg/kg. In traditional Danish meat balls and liver pâté, 0 mg/kg.
8.3.4 Traditional cured meat products with specific provisions concerning nitrites and nitrates	Total 60 mg/kg. In bacon of the Wiltshire type and related products, total 150 mg/kg. In traditional cured ham (spegeskinke) and related products, 150 mg/kg.

- (16) Thus lower maximum level for nitrites (E 249 and E 250) of 60 mg/kg applies for many types of meat products, whereas the corresponding maximum limits of Regulation (EC) No 1333/2008 are 100 mg/kg or 150 mg/kg.

3. PROCEDURE

- (17) By letter of 10 November 2017, Denmark notified the Commission of its intention to maintain national provisions on the use of nitrite additives in meat products that differ from Regulation (EC) No 1333/2008. In support of its notification, Denmark submitted information that includes data on consumption and imports of meat products, exposure to nitrites, analysis of nitrites in meat products, prevalence of botulism and updated risk assessment from the DTU National Food Institute.
- (18) The Commission published a notice regarding the notification in the *Official Journal of the European Union* ⁽¹⁾ in order to inform interested parties of Denmark's national provisions, as well as the grounds invoked to support the request. By letter of 28 March 2018, the Commission also informed the other Member States on the notification and gave them the opportunity to submit comments thereon within 30 days. The Commission received comments within this deadline from Cyprus.

Cyprus does not oppose to the request of Denmark for maintaining more stringent national rules for the use of nitrites in meat products and acknowledges the Danish position that the requested rules are necessary for safeguarding the public health. Cyprus can accept the request on the condition that these rules would not constitute a trade barrier or a disproportionate obstacle to the functioning of internal market and possible discrimination against products produced in other Member State and traded in Denmark.

4. RE-EVALUATION OF NITRITES

- (19) Commission Regulation (EU) No 257/2010 ⁽²⁾ required EFSA to re-evaluate the safety of potassium nitrite (E 249) and sodium nitrite (E 250) as food additives. For this re-evaluation, EFSA examined the earlier opinions of the SCF and EFSA, where available, the original dossier, data submitted by the interested business operator(s) and/or any other interested party and data made available by the Commission and Member States and identified any relevant literature published since the last evaluation of each food additive.
- (20) The data that was provided by Denmark in support of its previous notification ⁽³⁾ on consumption of meat products, the exposure to nitrites, the prevalence of botulism and the formation of nitrosamines in processed meat products was submitted to EFSA with a request to take this into account in the safety re-evaluation.

⁽¹⁾ OJ C 114, 28.3.2018, p. 11.

⁽²⁾ Commission Regulation (EU) No 257/2010 of 25 March 2010 setting up a programme for the re-evaluation of approved food additives in accordance with Regulation (EC) No 1333/2008 of the European Parliament and of the Council on food additives (OJ L 80, 26.3.2010, p. 19).

⁽³⁾ The notification by Denmark to the Commission by letter of 25 November 2014.

- (21) EFSA delivered a Scientific Opinion on the re-evaluation of potassium nitrite (E 249) and sodium nitrite (E 250) on 15 June 2017 ⁽¹⁾. EFSA derived an Acceptable Daily Intake (ADI) of 0,07 mg nitrite ion/kg bw per day and estimated that the exposure to nitrite resulting from its use as food additive did not exceed this ADI for the general population, except for a slight exceedance in children at the highest percentile. If all sources of dietary nitrite exposure were considered together (food additives, natural presence and contamination), the ADI would be exceeded in infants, toddlers and children at the mean and for all age groups at highest exposure. The contribution of nitrites used as food additives represented approximately 17 % (range 1,5-36,0 %) of the overall exposure.
- (22) Further, EFSA concluded that the exposure to the endogenous nitrosamines was of low concern. As regards the exposure to exogenous nitrosamines EFSA, based on the results of the systematic review conducted to assess the relationship between nitrite added to meat products and the formation of some volatile nitrosamines of highest toxicological concern, concluded that it was not possible to clearly discern these N-nitroso compounds produced from the nitrite added at the legal limits, from those produced already at the food matrix where nitrite has not been added. Therefore, the overall exposure was calculated although it does not relate only to the use of nitrite as food additive. There was some concern for the overall exposure to exogenous nitrosamines at high levels for all age groups except for the elderly.
- (23) Finally, EFSA confirmed evidence to link preformed N-nitrosodimethylamine and colorectal cancers and some evidence to link (i) dietary nitrite and gastric cancers and (ii) the combination of nitrite plus nitrate from processed meat and colorectal cancers.

5. MONITORING BY THE COMMISSION

- (24) In 2014 the Commission finalised a desk study to monitor the implementation by the Member States of the EU rules on nitrites. The study was based on the responses to a questionnaire that was submitted to all Member States. It revealed that with some exceptions, the typical amount of nitrites added to non-sterilised meat products is lower than the EU maximum amount, but higher than the Danish levels. In the report it was concluded that the possibility of reviewing the current maximum levels of nitrites should be further explored.
- (25) The Commission therefore launched an ad hoc study regarding the use of nitrites by industry in different categories of meat products. The study, completed in 2016, concluded that there is a possibility to review the current maximum levels of nitrites authorised in the EU legislation.
- (26) The conclusions of the desk study with the Member States, the ad-hoc study as regards the use of nitrites by industry, the re-evaluation by EFSA and the data reported by Denmark are to be taken into consideration by the Commission in the context of the potential revision of the maximum levels of nitrites under Regulation (EC) No 1333/2008.

II. ASSESSMENT

1. ADMISSIBILITY

- (27) Under Article 114(4) and (6) TFEU a Member State may, after the adoption of a harmonisation measure, maintain its more stringent national provisions on grounds of major needs referred to in Article 36 TFEU, or relating to the protection of the environment or the working environment, provided that it notifies these national provisions to the Commission and the Commission approves these measures.
- (28) The Danish notification relates to national provisions derogating from those of Annex II, Part E to Regulation (EC) No 1333/2008 in relation to potassium nitrite (E 249) and sodium nitrite (E 250). The current Danish provisions already existed in substance at the time these maximum levels were originally laid down in Directive 2006/52/EC of the European Parliament and of the Council ⁽²⁾.
- (29) The Danish Order No 1044 allows the addition of the nitrites to meat products only in so far as specific added amounts are not exceeded. Depending on the products in question these maximum amounts are 0 mg/kg, 60 mg/kg, 100 mg/kg or 150 mg/kg, which are lower for certain products than the ones laid down in Regulation (EC) No 1333/2008. Moreover, unlike Regulation (EC) No 1333/2008, the Danish provisions do not contain any exceptions to the principle of fixing maximum added amounts for nitrites, thereby not permitting the placing on the market of certain traditionally manufactured meat products from other Member States.

⁽¹⁾ EFSA Journal 2017;15(6):4786

⁽²⁾ Directive 2006/52/EC of the European Parliament and of the Council of 5 July 2006 amending Directive 95/2/EC on food additives other than colours and sweeteners and Directive 94/35/EC on sweeteners for use in foodstuffs (OJ L 204, 26.7.2006, p. 10).

- (30) The Danish provisions are therefore more stringent than the provisions of Regulation (EC) No 1333/2008 in so far that they lay down lower maximum added amounts than for several types of products (in many cases 60 mg/kg) and in so far as they do not allow the placing on the market of certain traditional meat products on the basis of maximum residual levels.
- (31) In accordance with Article 114(4) TFEU, the notification was supplemented by a description of the grounds relating to one or more of the major needs referred to in Article 36 TFEU, in this case the protection of health and life of humans. A Memorandum of the Danish Ministry of Environment and Food and an updated risk assessment from the DTU National Food Institute provide additional information on the consumption and imports of meat products, exposure to nitrites, analysis of nitrites in meat products on the Danish market, prevalence of botulism and the formation of nitrosamines in processed meat products.
- (32) In light of the foregoing, the Commission considers that the application submitted by Denmark with a view to obtaining authorisation to maintain its national provisions on the use of nitrites in meat products is admissible under Article 114(4) TFEU.

2. ASSESSMENT OF MERITS

- (33) In accordance with Article 114(4) and (6), first subparagraph, TFEU, the Commission must ascertain that all the conditions enabling a Member State to maintain its national provisions derogating from a Union harmonisation measure provided for in that Article are fulfilled.
- (34) In particular, the Commission has to assess whether or not the national provisions are justified by the major needs referred to in Article 36 TFEU or relating to the protection of the environment or the working environment and do not exceed what is necessary to attain the legitimate objective pursued. In addition, when the Commission considers that the national provisions fulfil the above conditions, it must verify, pursuant to Article 114(6) TFEU, whether or not the national provisions are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.
- (35) It has to be noted that, in the light of the time frame established by Article 114(6) TFEU, the Commission, when examining whether the national measures notified under Article 114(4) TFEU are justified, has to take as a basis the justifications put forward by the notifying Member State. The burden of proof lies with the requesting Member State that seeks to maintain its national measures.
- (36) However, where the Commission is in possession of information in the light of which the Union harmonisation measure from which the notified national provisions derogate may need to be reviewed, it can take such information into consideration in the assessment of the notified national provisions.

2.1. THE POSITION OF DENMARK

- (37) Denmark claims that its legislation ensures a higher level of protection of health and life of humans in that it lays down lower maximum added amounts for nitrites than the ones provided for in Regulation (EC) No 1333/2008, and does not allow the placing on the market of traditional meat products for which no ingoing amounts can be established. Denmark points out that its provisions were laid down in full compliance with the opinions of the SCF made in 1990 and 1995 and also consider the provisions as justified in light of the opinion of EFSA of 26 November 2003 and of the Danish assessment of the most recent EFSA opinion of 15 June 2017.
- (38) According to Denmark, the overall scientific assessment demonstrates that (a) the use of nitrites and nitrates should be reduced as far as possible by using differentiated amounts in line with the technical needs related to different foodstuffs, (b) the use of nitrites and nitrates should be regulated in terms of the amounts that are added rather than the residual amounts, and (c) the necessary preservation is achieved by using the amounts recommended by EFSA (2003). In that respect, Denmark considers that its national provisions systematically follow these recommendations, whereas Regulation (EC) No 1333/2008 does not as far as nitrites are concerned.
- (39) Denmark considers that the concern about using the amounts of nitrites permitted under Regulation (EC) No 1333/2008 relates in particular to the increased risk of the nitrosamines formation. Contrary to the recent EFSA opinion, Denmark considers that the formation of both volatile and non-volatile nitrosamines depends on the amount of nitrites added whilst EFSA acknowledges the link only for the latter. It has been scientifically proven that many volatile nitrosamines are carcinogenic and genotoxic and more recent epidemiological studies refer to the link between the consumption of meat products and the development of various forms of cancer. This lends support to restrictions on the use of nitrites as additives. Denmark also points out that the margin up to the ADI is not large for young children, who have the highest exposure to nitrites under the current intake calculations for the Danish population.

- (40) Denmark also stresses that its national provisions have been in place for many years and have never given rise to problems with the preservation of the products concerned. Moreover, it has a relatively low rate of botulism compared with other EU Member States, and not a single case caused by the consumption of meat products has been recorded since 1980. Denmark notes that no cases of botulism have been recorded in Denmark since 2006. Thus, the Danish provisions on the use of nitrites in meat products are still considered as providing comprehensive protection against food poisoning.
- (41) The Memorandum of the Danish Ministry of Environment and Food provides additional data on the consumption and import of meat products, exposure to nitrites as well as on an analysis of nitrites in meat products on the Danish market.
- (42) According to the Danish authorities, the comparison of the most recent data, i.e. between 2012 and 2014, demonstrates an increase in the consumption of meat products, including cold cuts, which contained added nitrites. This has been in line with the trend observed since 2000 indicating that the Danes are becoming increasingly exposed to nitrites in meat products many of which are covered by the low limit value for nitrites of 60 mg/kg.
- (43) As regards trade, Denmark concludes that, during the period under review, the special Danish rules have not had a negative impact on imports of the selected products to Denmark, showing that imports increased by around 5 % from 2013 to 2016, if the figures for Germany are excluded ⁽¹⁾. Based on the analysis of nitrite in meat products, Denmark claims that nitrite content in products imported to Denmark is no higher than that of Danish products.
- (44) Therefore, Denmark considers it legitimate to maintain the national rules for the use of nitrites in meat products which are more restrictive than the requirements of Regulation (EC) No 1333/2008. According to Denmark, the monitoring carried out in accordance with Decision (EU) 2015/826 demonstrates that the health considerations previously taken into account are still valid. Finally, it contends that the data available show that the Danish provisions do not constitute an obstacle to trade in the products concerned.

2.2. EVALUATION OF DANISH POSITION

2.2.1. *Justification on grounds of major needs referred to in Article 36 TFEU*

- (45) The Danish legislation aims to achieve a higher level of protection of health and life of humans with regard to exposure to nitrites and the possible formation of nitrosamines in meat products, by specifying lower maximum added amounts of nitrite in relation to certain meat products, when compared with the maximum levels provided under Regulation (EC) No 1333/2008 and not allowing the placing on the market of products for which only maximum residual levels can be established.
- (46) When assessing whether the Danish legislation is actually adequate and necessary for achieving this objective, a number of factors need to be taken into account. In particular, two health risks need to be balanced, the presence of nitrosamines in meat products on the one hand, and the microbiological safety of meat products on the other. The latter aspect is more than a mere technological need, but a highly relevant health concern in its own right. While it is recognised that the levels of nitrites in meat products need to be limited, lower levels of nitrite in meat will not automatically lead to a higher protection of human health. The most appropriate level of nitrite depends on a number of factors acknowledged in the relevant opinions of the SCF and EFSA, e.g. the addition of salt, moisture, pH, shelf-life of the product, hygiene, temperature control, etc.
- (47) The Commission has to evaluate the specific choices made by the Danish regulator and the experience made with these rules, which have been in force for a considerable period of time. Through the figures it provided on the occurrence of food poisoning and, in particular, botulism, Denmark has demonstrated that it has achieved satisfactory results with its legislation so far. In general, the data show that the maximum levels specified in the Danish legislation appear to have been sufficient to ensure the microbiological safety of the meat products currently made in Denmark and the production methods currently used in Denmark.
- (48) In contrast to Regulation (EC) No 1333/2008 which lays down maximum residual levels at the end of the production process for certain specified traditional cured meat products, the Danish provisions do not contain any exceptions to the principle of fixing maximum added amounts. This also applies to brine-cured meat

⁽¹⁾ Denmark informed the Commission that there is an error in the Memorandum as regards the import of cured pork meat (bacon) from Germany and that there are no major changes to the import of bacon from Germany to Denmark.

products for which it is usually not possible to control the ingoing amount of curing salts absorbed. According to the data submitted, Denmark monitors the addition of nitrites to brine-cured meat products by taking samples as close as possible to the point of manufacture in order to obtain the most realistic picture of the added quantity of nitrite. However, the results of two inspection campaigns at retail butchers show the Danish limits being exceeded in almost 35 % of the brine-cured samples in 2014 and 19 % in 2016. The Danish authorities therefore provide further guidance to retail butchers on the rules and factors that are significant to the absorption of nitrite during brine curing. This should be further followed up and monitored that Denmark can confirm the compliance and therefore adequacy of the national provisions for these products.

- (49) The Commission notes that the Danish legislation, which is compatible with the relevant scientific opinions of the Union's scientific bodies, is based on a regulation of maximum added values and respects the ranges of added amounts of nitrite referred to in these opinions, i.e. 50-150 mg/kg. At the same time, Denmark has established more specific maximum added amounts for particular groups of meat products, compared with the Regulation, in light of the types of meat products and manufacturing methods prevailing in Denmark.
- (50) In addition, it must be considered that, according to information provided by Denmark, the bulk of the meat products consumed by the Danish population relates to meat products for which there is currently a limit of 60 mg/kg and which would have to be replaced with a limit of 100 or 150 mg/kg. Although Danish manufacturers, like manufacturers in other Member States, would not be obliged to raise the amounts of nitrites currently added to their products to the maximum levels referred to in Regulation (EC) No 1333/2008, an increase of the actual exposure of the Danish population to nitrites cannot be excluded.
- (51) On the basis of the information available at the moment, the Commission considers that the request to maintain the notified measures can be temporarily accepted on grounds of protection of public health in Denmark.

2.2.2. Absence of any arbitrary discrimination, any disguised restriction of trade between Member States or any obstacle to the functioning of the internal market

2.2.2.1. Absence of arbitrary discrimination

- (52) Article 114(6) TFEU obliges the Commission to verify that the envisaged measures are not a means of arbitrary discrimination. According to the jurisprudence of the Court of Justice, in order for there to be no discrimination, similar situations must not be treated in different ways and different situations must not be treated in the same way.
- (53) The Danish national rules apply to both domestic products and products made in other Member States. In the absence of any evidence to the contrary, it can be concluded that the national provisions are not a means of arbitrary discrimination.

2.2.2.2. Absence of a disguised restriction on trade

- (54) National measures which restrict the use of products to a greater extent than a Union Regulation would normally constitute a barrier to trade, in so far as products that are legally placed on the market and used in the rest of the Union are not expected, as a result of the prohibition on use, to be placed on the market in the Member State concerned. The pre-conditions laid down in Article 114(6) TFEU are intended to prevent restrictions based on the criteria set out in paragraphs (4) and (5) thereof from being applied for inappropriate reasons, and constituting in effect economic measures to impede the importation of products from other Member States, that is to say, a means of indirectly protecting national production.
- (55) Given that the Danish rules also impose stricter standards on the addition of nitrites to certain meat products on operators based in other Member States in an otherwise harmonised area, they are liable to constitute a disguised restriction of trade or an obstacle to the functioning of the internal market. It is recognised, however, that Article 114(6) TFEU must be read in the sense that only national measures constituting a disproportionate obstacle to the internal market may not be approved. In this connection, Denmark has submitted figures which indicate that imports of selected meat products from other Member States have increased during the period 1994-2016 and have been stable in the period 2013-2016.
- (56) In the absence of any evidence suggesting that the national provisions constitute in effect a measure intended to protect national production, it can be concluded that they are not a disguised restriction to trade between Member States.

2.2.2.3. Absence of obstacles to the functioning of the internal market

- (57) This condition cannot be interpreted in such a way that it precludes the approval of any national measure likely to affect the functioning of the internal market. Indeed, any national measure derogating from a harmonisation measure aimed at the establishment and operation of the internal market constitutes in substance a measure likely to affect the internal market. Consequently, in order to preserve the useful character of the procedure laid down in Article 114 TFEU, the concept of obstacle to the functioning of the internal market must, in the context of Article 114(6) TFEU, be understood as a disproportionate effect in relation to the pursued objective.
- (58) Given the health benefits invoked by the Danish government in relation to the reduction of exposure to nitrites in meat products and the fact that, on the basis of currently available information, trade does not appear to be affected at all or only to a very limited extent, the Commission considers that the notified Danish rules may temporarily continue to be maintained on grounds relating to the protection of health and life of humans having regard to the fact that they are not disproportionate and do, therefore, not constitute an obstacle to the functioning of the internal market in the sense of Article 114(6) TFEU.
- (59) In the light of this analysis, the Commission considers that the condition relating to the absence of obstacles to the functioning of the internal market is fulfilled.

2.2.3. Limitation in time

- (60) The above conclusions are based on the currently available information and, in particular, on information indicating that Denmark has been able to control botulism despite lower maximum levels of nitrite added to particular types of meat products, while not disrupting trade in a disproportionate fashion.
- (61) Another important factor is the rate of consumption in Denmark of meat products in relation to which the application of Regulation (EC) No 1333/2008 could lead to an increase of the exposure of the Danish population to nitrites and possibly nitrosamines.
- (62) Denmark should monitor the situation and collect data on whether the application of the levels laid down in Regulation (EC) No 1333/2008 achieve the required level of protection and if not, whether it would lead to an unacceptable risk to human health. The data collected should focus in particular on the control of botulism and on the compliance with the Danish national provisions on nitrites, especially for brine-cured meat products. In addition, Denmark should continue collecting data on imports of meat products from other Member States. Denmark is required to report the collected data to the Commission within two years from the date of adoption of the present Decision.

Against this background, the Commission considers that the national provisions, to the extent specified above, can be approved for a limited period of 3 years.

III. CONCLUSION

- (63) In the light of the above considerations, and taking account of comments provided by Cyprus on the notification submitted by the Danish authorities, the Commission is of the opinion that the request by Denmark, received by the Commission on 14 November 2017, for maintaining its national provisions on the addition of nitrites, which are more stringent than those of Regulation (EC) No 1333/2008, can be approved for a period of 3 years from the date of adoption of the present Decision. Denmark should continue to monitor the situation and collect data on whether the application of the levels laid down in Regulation (EC) No 1333/2008 achieve the required level of protection and if not, whether it would lead to an unacceptable risk to human health,

HAS ADOPTED THIS DECISION:

Article 1

The national provisions on the addition of nitrites to meat products contained in Order No 1044 of 4 September 2015 on food additives etc. in foodstuffs (*BEK nr. 1044 af 4.9.2015, Udskriftsdato: 25.9.2017, Fødevareministeriet*), which the Kingdom of Denmark notified to the Commission by letter of 10 November 2017, pursuant to Article 114(4) TFEU, are approved.

Article 2

This Decision shall expire on 8 May 2021.

Article 3

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 8 May 2018.

For the Commission
Vytenis ANDRIUKAITIS
Member of the Commission
