Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 16 July 2020[1]

Case C-485/18

Groupe Lactalis
v
Premier ministre,
Ministre de l'Agriculture et de l'Alimentation,
Garde des Sceaux, ministre de la Justice,
Ministre de l'Économie et des Finances

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling — Regulation (EU) No 1169/2011 — Food information to consumers — Mandatory indication of the country of origin — Article 26 — Scope of harmonisation — Article 3 — National measures requiring additional mandatory particular for specific types or categories of foods — Conditions — National measure providing for the mandatory indication of the national, European or non-European origin of milk)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 26 and of Article 39 of 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.[2]

2. This request was made in the context of a dispute between the company Groupe Lactalis and the French Prime Minister, the Minister for Justice, the Minister for Agriculture and Food and the Minister for the Economy and Finance concerning the legality of Decree No 2016-1137 of 19 August 2016 on the indication of the origin of milk and of milk and meat used as ingredients (JORF 2016, No 194, text No 18) ('the contested decree'). The effect of this decree so far as milk is concerned is that producers are required to indicate the origin of the milk in their labelling of the product.

3. It is perhaps no surprise to observe that the labelling of the country of origin of products has been among the most contentious features of the single market. Quite often, such labelling requirements are simply a disguised method of ensuring that preference is given to national products.[3] There are, however, instances where there is a clear and established link between the provenance of the food in question and its quality. The very existence of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and

1 Original language: English.

2 Amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ 2011 L 304, p. 18).

3 See, e.g., judgment of 17 June 1981, *Commission* v *Ireland* (113/80, EU:C:1981:139).

foodstuffs [4] is in its own way proof of this. The real question in the present case is whether a national measure which imposes such a requirement in the case of milk can be justified under EU law. However, for the reasons I am about to indicate, I do not believe that, in the situation considered by the referring court, that is the case.

4. Before proceeding to a consideration of these issues, it is, however, necessary first to set out the relevant legislative provisions.

II. Legal framework

A. Union law

1. Regulation No 1169/2011

5. According to Article 1(1) of Regulation No 1169/2011, the regulation seeks to provide 'the basis for the assurance of a high level of consumer protection in relation to food information, taking into account the differences in the perception of consumers and their information needs whilst ensuring the smooth functioning of the internal market.'

6. Article 3(1) and (2) of that regulation states that:

'1. The provision of food information shall pursue a high level of protection of consumers' health and interests by providing a basis for final consumers to make informed choices and to make safe use of food, with particular regard to health, economic, environmental, social and ethical considerations.

2. Food information law shall aim to achieve in the Union the free movement of legally produced and marketed food, taking into account, where appropriate, the need to protect the legitimate interests of producers and to promote the production of quality products.

…'

7. Article 9(1)(i) of Regulation No 1169/2011, entitled 'List of mandatory particulars', provides:

'1. In accordance with Articles 10 to 35 and subject to the exceptions contained in this Chapter, indication of the following particulars shall be mandatory:

…

(i) the country of origin or place of provenance where provided for in Article 26;

…'

8. Article 10 of that regulation, headed 'Additional mandatory particulars for specific types or categories of foods', states:

'1. In addition to the particulars listed in Article 9(1), additional mandatory particulars for specific types or categories of foods are laid down in Annex III.

4 OJ 1992 L 208, p. 1.

2. In order to ensure consumer information with respect to specific types or categories of foods and to take account of technical progress, scientific developments, the protection of consumers' health or the safe use of a food, the Commission may amend Annex III by means of delegated acts, in accordance with Article 51.

…'

9. According to Article 26 of Regulation No 1169/2011, headed 'Country of origin or place of provenance':

'1. This Article shall apply without prejudice to labelling requirements provided for in specific Union provisions, in particular Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed and Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

2. Indication of the country of origin or place of provenance shall be mandatory:

(a) where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance;

(b) for meat falling within the Combined Nomenclature ("CN") codes listed in Annex XI. The application of this point shall be subject to the adoption of implementing acts referred to in paragraph 8.

3. Where the country of origin or the place of provenance of a food is given and where it is not the same as that of its primary ingredient:

(a) the country of origin or place of provenance of the primary ingredient in question shall also be given; or

(b) the country of origin or place of provenance of the primary ingredient shall be indicated as being different to that of the food.

The application of this paragraph shall be subject to the adoption of the implementing acts referred to in paragraph 8.

4. Within 5 years from the date of application of point (b) of paragraph 2, the Commission shall submit a report to the European Parliament and the Council to evaluate the mandatory indication of the country of origin or place of provenance for products referred to in that point.

5. By 13 December 2014, the Commission shall submit reports to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for the following foods:

(a) types of meat other than beef and those referred to in point (b) of paragraph 2;

(b) milk;

(c) milk used as an ingredient in dairy products;

(d) unprocessed foods;

(e) single ingredient products;

(f) ingredients that represent more than 50% of a food.

…

7. The reports referred to in paragraphs 5 and 6 shall take into account the need for the consumer to be informed, the feasibility of providing the mandatory indication of the country of origin or place of provenance and an analysis of the costs and benefits of the introduction of such measures, including the legal impact on the internal market and the impact on international trade.

The Commission may accompany those reports with proposals to modify the relevant Union provisions.

8. By 13 December 2013, following impact assessments, the Commission shall adopt implementing acts concerning the application of point (b) of paragraph 2 of this Article and the application of paragraph 3 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 48(2).

…'

10. Chapter VI, entitled 'National Measures', includes among others Article 38 and Article 39.

11. Article 38 is headed 'National measures' and states:

'1. As regards the matters specifically harmonised by this Regulation, Member States may not adopt nor maintain national measures unless authorised by Union law. Those national measures shall not give rise to obstacles to free movement of goods, including discrimination as regards foods from other Member States.

2. Without prejudice to Article 39, Member States may adopt national measures concerning matters not specifically harmonised by this Regulation provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with this Regulation.'

12. Article 39 of Regulation No 1169/2011, entitled 'National measures on additional mandatory particulars', provides:

'1. In addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States may, in accordance with the procedure laid down in Article 45, adopt measures requiring additional mandatory particulars for specific types or categories of foods, justified on grounds of at least one of the following:

(a) the protection of public health;

(b) the protection of consumers;

(c) the prevention of fraud;

(d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition.

2. By means of paragraph 1, Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods only where there is a proven link between certain qualities of the food and its origin or provenance. When notifying such measures to the Commission, Member States shall provide evidence that the majority of consumers attach significant value to the provision of that information.'

B. French law

13. The contested decree entered into force on 17 January 2017 and was to apply until 31 December 2018.

14. Article 1 of that decree includes a point I which reads as follows:

'The labelling of pre-packaged foodstuffs within the meaning of Article 2 of [Regulation No 1169/2011] shall comply with the provisions of this Decree where such foodstuffs contain:

1° milk;

2° as an ingredient, milk used in the milk products mentioned in the list in the Annex;

…

The labelling of prepackaged foodstuffs shall indicate the origin of the ingredients mentioned in items 1 to 3. However, if these ingredients represent a percentage, expressed as a total weight of the ingredients used in the pre-packaged foodstuff, below a threshold, the labelling of such foodstuff shall not be subject to the provisions of this Decree.'

15. Article 3 of that decree provides:

'I. The indication of the origin of the milk or milk used as an ingredient in the milk products referred to in Article 1 shall include the following particulars:

1° "Country of collection: (name of the country in which the milk was collected)";

2° "Country of packaging or processing: (name of the country in which the milk was packaged or processed)".

II. By way of derogation from I, where the milk or milk used as an ingredient in milk products has been collected, packaged or processed in the same country, the indication of origin may take the form: "Origin: (name of the country)".

III. By way of derogation from I and II, where the milk or milk used as an ingredient in milk products has been collected, packaged or processed in one or more Member States of the European Union, the indication of origin may take the form: "Origin: EU".

IV. By way of derogation from I and II, where the milk or milk used as an ingredient in milk products has been collected, packaged or processed in one or more non-EU Member States, the indication of origin may take the form: "Origin: Non-EU".'

16. Article 4, final paragraph of the contested decree states:

'…

For the application of I of Articles 2 and 3, where the indication of origin leads to the indication of more than one Member State of the European Union and non-Member States of the European Union or where the origin is not determined, the indication of the names of the countries may be replaced by the indication "EU or non-EU."'

17. Article 6 of that decree provides that:

'Products legally manufactured or marketed in another Member State of the European Union or in a third country are not subject to the provisions of this decree.'

18. On 24 December 2018, Decree No 2018-1239 on the indication of the origin of milk and milk and meat used as an ingredient (JORF 2018, No 298, Text No 70) extended the application of the contested decree until 31 March 2020.

19. Both that decree and the contested decree were notified, prior to their entry into force, to the European Commission under Article 45 of Regulation No 1169/2011. The Commission did not issue a negative opinion for the purposes of Article 45(3) of Regulation No 1169/2011 in respect of either decree. [5]

III. Facts and request for a preliminary ruling

20. By an application registered on 24 October 2016, Lactalis brought an action before the Conseil d'État (Council of State, France) seeking the annulment of the contested decree. In support of this claim Lactalis relied, inter alia, on two pleas in law alleging that the decree infringed Articles 26, 38 and 39 of Regulation No 1169/2011. The referring court considered that in order to rule upon these two pleas, it is first necessary to determine the interpretation to be given to certain provisions of that regulation, which presents certain difficulties.

21. It is in those circumstances that the Conseil d'État (Council of State) has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 26 of Regulation No 1169/2011 of the European Parliament and of the Council of 25 October 2011, which provides, inter alia, for the Commission to submit reports to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for milk and milk used as an ingredient, be regarded as having specifically harmonised that matter within the meaning of Article 38(1) of that regulation and does it preclude Member States from adopting measures requiring additional mandatory particulars on the basis of Article 39 of that regulation?

(2) In the event that the national measures are justified on grounds of the protection of consumers in the light of Article 39(1), should the two criteria laid down in Article 39(2) concerning, first, the proven link between certain qualities of the food and its origin or provenance and, second, the evidence that the majority of consumers attach significant value to the provision of that information be read in combination, and, in particular, can the examination of the proven link be based solely on subjective elements relating to the value that the majority of consumers attach to the link between certain qualities of the food and its origin or provenance?

5 Both Lactalis and the Commission argue, however, that the draft version of the contested decree notified to the Commission was not identical to the final version.

(3) To the extent to which the qualities of the food appear to include all the factors contributing to the quality of the food, can considerations relating to the resilience of the food to transportation and the risk of deterioration during journeys be taken into account when examining whether there is a proven link between certain qualities of the food and its origin or provenance for the purposes of the application of Article 39(2)?

(4) Does the assessment of the conditions laid down in Article 39 presuppose that the qualities of the food are regarded as being unique on account of its origin or provenance or as being guaranteed by reason of that origin or provenance and, in the latter case, notwithstanding the harmonisation of health and environmental standards applicable within the European Union, can the indication of origin or provenance be more precise than the indications "EU" or "Non-EU"?'

IV. Analysis

A. On the first question

22. By its first question, the referring court asks whether Article 26 of Regulation No 1169/2011, which provides, inter alia, for the Commission to submit reports to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for milk and milk used as an ingredient, is to be interpreted as having specifically harmonised the rules in respect of the indication of the country of origin or place of provenance of milk used as a final product or as an ingredient and whether that provision precludes a Member State from making that indication mandatory by virtue of Article 39 of that regulation.

23. From the outset, it should be noted that, first, the obligation for the Commission, under Article 26(5) of No 1169/2011 to submit reports to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance of milk, cannot prejudge whether or not this regulation has harmonised the rules in respect of the indication of the country of origin or place of provenance of milk. Indeed, the only conclusion that can be drawn from such an obligation is that that indication is not currently mandatory under EU law.

24. Second, one may emphasise the fact that the adoption of a legislative act by the Union in an area of shared competence necessarily entails a certain harmonisation of the national legislation, thereby relieving the Member States of their national competences in accordance with Article 2(2) TFEU. Such harmonisation may, however, provide only minimum standards or cover only certain aspects of the specified domain, so that Member States may continue to rely, for the other aspects of that domain, on their own competences to adopt specific measures.

25. Concerning the harmonisation achieved by Regulation No 1169/2011 with regard to the indication of the country of origin or place of provenance of foods, it should be noted that Article 9 of this regulation lays down a list of mandatory particulars which business operators are obliged to mention on food labels. As well as this list, Article 10 provides a list of additional mandatory particulars that should be mentioned, but only for specific types or categories of food. [6]

26. Among the particulars which are mandatory regardless of types or categories of food involved, Article 9(1)(i) of Regulation No 1169/2011 mentions the country of origin or place of provenance, but only where such a mandatory indication is provided for in Article 26 of that regulation.

6 In that regard, it follows from the situations envisaged in Annex III to Regulation No 1169/2011, to which Article 10 refers, that the concept of 'specific types or categories of food' must be interpreted as including production methods and the composition of foodstuffs.

27. According to Article 26(2) of Regulation No 1169/2011, the indication of the country of origin or place of provenance is mandatory in two cases, namely:

– where failure to indicate this could mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance; [7]

– for meat falling within the Combined Nomenclature ('CN') codes listed in Annex XI, namely fresh, chilled or frozen meat of swine, sheep, goats, or poultry of heading 0105.

28. Although this provision does not specify whether or not it harmonises the national legislation regarding mandatory indication of the country of origin or place of provenance, the *context* in which this provision is inserted sheds light on its scope. In this regard it may be noted that Regulation No 1169/2011 contains a Chapter VI, which is specifically dedicated to national measures.

29. Admittedly, Article 38(2) of that regulation, which is included in that chapter, provides that 'without prejudice to Article 39, Member States may adopt national measures concerning matters not specifically harmonised by this Regulation provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with this Regulation'. However, Article 38(1) states conversely that 'as regards the matters specifically harmonised by this Regulation, Member States may not adopt nor maintain national measures unless authorised by Union law'. Although the exact meaning of the expression 'without prejudice to Article 39' in that context is perhaps not entirely clear, I think that the rules referred to in Article 39 (namely, those governing compulsory particulars on the labels of foodstuffs) are not affected by Article 38(2). [8]

30. It follows, therefore, that Article 38, which serves as an introduction to Chapter VI, merely acknowledges that certain provisions only partially harmonise while other provisions completely harmonise particulars in respect of the labelling of foodstuffs and states the consequences of each situation. The interpretative difficulty which is thus presented is due to the fact that Article 38 does not specify which provisions fall under either of these two situations.

31. By contrast, the provisions of Article 39 of Regulation No 1169/2011 seem to me to be decisive. Indeed, the first paragraph of that article specifically states that Member States may, under certain conditions, adopt measures requiring additional mandatory particulars for specific types or categories of foods. Interpreting this provision as not fully harmonising the conditions under which Member States may adopt additional mandatory particulars would therefore allow national measures overriding Article 39 to be put into effect, thereby entirely undermining the *effet utile* of that provision. It follows that Regulation No 1169/2011 must necessarily be interpreted as preventing Member States from introducing mandatory particulars by relying on their own entirely autonomous national competences.

32. This conclusion is confirmed by the *objective*s pursued by Regulation No 1169/2011. Recitals 6 and 9 of Regulation No 1169/2011 indicate, indeed, that one objective of this regulation was simply to consolidate existing legislation, which resulted from Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating

7 See Article 26(2)(a) of that regulation. Article 26(3) of Regulation No 1169/2011 specifies that where the country of origin or the place of provenance of food is given and where it is not the same as that of its primary ingredient, the country of origin or place of provenance of that primary ingredient shall also be indicated or be indicated as being different to that of the food. The scope of this provision has been specified in Commission Implementing Regulation (EU) 2018/775 of 28 May 2018 laying down rules for the application of Article 26(3) of Regulation No 1169/2011 (OJ 2018 L 131, p. 8). However, in so far as the latter is of a lower-ranking standard, it cannot be taken into account when interpreting the scope of Article 26.

8 In my view, this expression should be understood as simply indicating that, despite the fact that the situations referred to in Article 39 fall within a harmonised field, Member States may nonetheless adopt national measures if they comply with the conditions laid down in that provision.

to the labelling, presentation and advertising of foodstuffs.[9] Since Article 3(1) of that directive stated that 'indication of [particulars to which that provision referred] *alone shall be compulsory* on the labelling of foodstuffs',[10] it can be inferred from those recitals that Regulation No 1169/2011 has, at the very least, retained the principle that Member States no longer enjoy a purely autonomous competence to decide which particulars are to be made mandatory.

33. Moreover, according to recitals 13 and 14 of Regulation No 1169/2011, the purpose of this regulation is in particular to establish 'common definitions, principles, requirements and procedures so as to form a clear framework and a common basis for Union and national measures governing food information … [in order to establish] a *comprehensive* … approach to the information provided to consumers relating to food they consume'.[11] The use of the adjective 'comprehensive' is quite explicit.

34. All of this is, I think, sufficient to illustrate that both the context and the objectives of Article 26 demonstrate that Regulation No 1169/2011 has harmonised the national legislation of the Member States regarding mandatory particulars. This harmonisation is not, however, exhaustive, as Member States remain free to adopt additional mandatory particulars, but *only* under the conditions laid down by that regulation.[12]

35. As regards the mandatory indication of the country of origin or place of provenance, since Article 26(2) of Regulation No 1169/2011 specifies the cases in which, in accordance with Article 9 of that regulation, food business operators must mention that indication on food labels, that provision is accordingly to be interpreted as having harmonised at least the conditions under which certain particulars may be made mandatory. Consequently, the Member States are relieved of their national competence to legislate in respect of such indications according to their own modalities.[13] However, Article 39 of that regulation re-delegates part of the competences that had been pre-empted by virtue of Article 2(2) TFEU by *conferring* competence on Member States to adopt their own mandatory indications, subject to compliance with the conditions laid down in that provision.[14]

36. This conclusion is not called into question by the argument raised by certain parties in the main proceedings, according to which the harmonisation brought about by Regulation No 1169/2011 does not concern the indication of the country of origin or place of provenance, since such an indication would be necessary to ensure the traceability of foodstuffs and their ingredients. Indeed, apart from the fact that I see no ground for such an argument in the wording of Regulation No 1169/2011, the need to ensure traceability of food products is not in itself incompatible with the absence of the mandatory indication of the country of origin or place of provenance of the foods. Indeed,

9 OJ 2000 L 109, p. 29.

10 Emphasis added. The list of particulars mentioned in Article 3(1) of Directive 2000/13 is the same, with a few additions, as the one provided for in Article 9 of Regulation No 1169/2011.

11 Emphasis added.

12 In passing it may be noted that the Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers, COM(2008)40 final, seems to confirm that Regulation No 1169/2011 aims at harmonising the conditions under which certain particulars might be made mandatory. Indeed, that proposal stated that 'non-harmonised rules would impair the internal market, lead to poor information and reduce the level of consumer protection. Existing rules have proven their merits in allowing free circulation of goods and consumer protection' (page 6). Therefore, repealing the 'harmonised rules' was not considered a viable approach. On the contrary, 'both the mandatory or the voluntary indication of the country of origin or place of provenance of food as a marketing tool, should not deceive the consumer and should be based on harmonised criteria' (page 8). Accordingly, 'the proposal harmonises the regulatory framework for the horizontal provisions regarding food labelling and thus contributes to consumer protection by ensuring that consumers receive appropriate information to enable them to make informed, safe, healthy and sustainable choices' (page 10).

13 Since Regulation No 1169/2011 harmonises national rules on compulsory particulars and provides, in Article 45, for a specific procedure when a Member State wishes to provide for other compulsory particulars, I consider that Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (OJ 2008 L 218, p. 21) does not apply in this case.

14 Incidentally, the fact that Regulation No 1169/2011 harmonises the field of compulsory particulars, while leaving to the Member States the possibility of providing for other compulsory particulars, seems to correspond to the wording of Article 1(2) of that regulation, which mentions that '[this regulation] *lays down the means* to guarantee the right of consumers to information and procedures for the provision of food information, taking into account the need to provide sufficient flexibility to respond to future developments and new information requirements'. Emphasis added.

Article 3(15) of the General Food Law Regulation [15] defines traceability as the 'ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution'. Traceability does not thus require the explicit mention of the country of origin or place of provenance on the label, since this can be achieved, for example, by means of an identification code. [16]

37. In the absence of an explicit exclusion of milk from the harmonisation carried out by Regulation No 1169/2011, the latter is to be considered as covering the indication of the country of origin or the place of provenance of milk. Admittedly, Article 26(2)(a) of Regulation No 1169/2011 provides that the indication of the country of origin or place of provenance shall be mandatory where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food. However, that provision cannot be interpreted, as suggested by certain parties, as conferring on Member States the right to require the indication of the country of origin or place of provenance of milk in all circumstances. Indeed, that provision does not empower Member States to adopt general derogating measures. It rather specifies that food business operators are obliged to indicate the country of origin or place of provenance of food where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food. [17] Moreover, it can be inferred from Article 26(5) and (7) of Regulation No 1169/2011, according to which the Commission must examine the feasibility of introducing a mandatory indication of the origin of milk, that, at present, food business operators are not obliged to mention such an indication, except in the case referred to in Article 26(2)(a). [18]

38. In the light of the foregoing, I propose to answer the first question as follows: Article 26 of Regulation No 1169/2011 should be interpreted as having harmonised the conditions under which the indication of the country of origin or place of provenance of milk used as a final product or as an ingredient may be made mandatory by Member States. That provision does not, however, preclude Member States from making that indication mandatory on the basis of Article 39 of that regulation where this is justified by considerations such as the protection of public health, the rights of consumers, the avoidance of fraud or the prevention of unfair competition and where the conditions laid down in that provision are fulfilled.

B. On the second question

39. By its second question, the referring court is asking in essence whether, when a measure requiring the indication of the country of origin or place of provenance is justified under Article 39(1) of Regulation No 1169/2011, the two criteria laid down in paragraph 2 of that article should be read in combination or whether, in particular, the assessment of the first criterion, namely the existence of a 'proven link', may be based solely on subjective elements relating to the importance of the connection which the majority of consumers can establish between the qualities of the food and its origin or provenance.

15 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31 p. 1).

16 See also Article 18(2) of General Food Law Regulation.

17 It is true that Article 26(2)(a) uses the term 'in particular' to specify that the indication of the country of origin is compulsory 'if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance', which implies that the scope of that provision is not limited to the situation where the information accompanying the food or the label is misleading. However, I do not think that it can be inferred from it that such an indication is also mandatory in the absence of any risk of confusion. I rather understand the need for the use of the term 'in particular' in the sense that the misleading information may be linked to the food or the label, but not exclusively. For example, certain trademarks may also induce such confusion.

18 See also the last sentence of recital 32 of Regulation No 1169/2011.

40. According to Article 39(1) of Regulation No 1169/2011, Member States may require mandatory particulars in addition to those referred to in Article 9(1) and in Article 10 of that regulation, subject to the requirements set out in that provision. That provision lays down three conditions for the adoption of national measures imposing those additional particulars, namely that:

– first, the mandatory particulars must concern only certain specific types or categories of foodstuffs;

– second, it can be justified on at least one of the grounds listed in Article 39(1), among which is the need for consumer protection;

– third, the national measure requiring it shall comply with the procedure laid down in Article 45 of that regulation.

41. Finally, where the mandatory particulars concern the indication of the country of origin or place of provenance of the foods, Article 39(2) of Regulation No 1169/2011 specifies, in its first sentence, that 'Member States may introduce measures concerning [such an indication] only where there is a proven link between certain qualities of the food and its origin or provenance' and, in its second sentence, that 'when notifying such measures to the Commission, Member States shall provide evidence that the majority of consumers attach significant value to the provision of that information'.

42. In addition to these three conditions explicitly laid down in Article 39(1), any national measures requiring particulars must also comply with the general principles of food information set out in Chapter II of that regulation and with the general principles of Union law.

43. No recital in the regulation is dedicated to Article 39(2) of Regulation No 1169/2011. However, the way in which that provision is structured already suggests that it lays down two distinct criteria. While one may accept that some elements of the wording or of the context of that provision, as well as certain objectives pursued by that regulation might support the view that the existence of a 'proven link' could be based on subjective elements relating to the importance of the connection which the majority of consumers can establish between the qualities of the food and its origin or provenance, I consider that the better interpretation of this provision is that it refers to purely objective factors.

44. Any other conclusion would ultimately pave the way for the indirect re-introduction of national rules regarding food products which were designed to appeal to purely nationalistic – even chauvinistic – instincts on the part of consumers. Since one of the objects of the internal market project has been to eliminate (where possible) such rules, it is difficult to believe that the Union legislature intended to allow their oblique re-introduction through the mechanism of Article 39(2) of Regulation No 1169/2011. It is against that background that we may nevertheless examine the language of this provision.

45. First, the term 'quality' might refer to a set of properties and features of a product that enable consumers' expectations to be met.[19] Second, the reference made by the second sentence of Article 39(2) of Regulation No 1169/2011 to the opinion of the majority of consumers as evidence to be provided when a Member State notifies such a measure to the Commission, might suggest that this provision merely specifies the time at which evidence must be provided. Third, Regulation No 1169/2011 repeatedly states that consumers shall receive the appropriate information to enable them to make 'informed choices' including those of an environmental or ethical nature.[20] In

19 For example, the ISO 9000:2000 standard defines 'quality' as the ability of a set of intrinsic characteristics to satisfy requirements.

20 See Article 3(1) and recital 4.

particular, Article 4(2) mentions that, 'when considering the need for mandatory food information and to enable consumers to make informed choices, account shall be taken of a widespread need on the part of the majority of consumers for certain information to which they attach significant value or of any generally accepted benefits to the consumer'.[21]

46. For my part, however, I consider that a detailed analysis of the regulation shows that, as I have just stated, the intention of the Union legislator in formulating the first sentence was precisely to rule out the possibility that, in the case of specific measures requiring the indication of the place of origin, their adoption might be based *exclusively* on purely subjective considerations.

47. The definition of the term 'quality', when used in the plural form, generally refers to the intrinsic characteristics or features of the product in question.[22] Here, it is interesting to note that the term used in the French version of Article 39(2) is not 'qualités' but 'propriétés' (properties) which clearly refers to the quality or feature regarded as a characteristic or inherent part of something. In addition, the first sentence of Article 39(2) specifies, regarding the link that must exist between certain qualities of the foodstuff and its origin or provenance, that it must be 'proven', which thereby proceeds on the implicit assumption that those qualities can be objectively ascertained.[23] Finally, it appears from Article 1(1) and from Article 3(2) of Regulation No 1169/2011 that the objectives pursued by Regulation No 1169/2011 are not only to ensure a high level of consumer protection, but also to make sure that freedom of movement is respected in matters of foodstuffs. Yet, even when applied without distinction to domestic and imported food, the mandatory indication of the country of origin or the place of provenance is likely to harm the freedom of movement of products, perhaps even more than any other form of non-discriminatory particulars.[24] Indeed, as the Court held prior to the adoption of that regulation, such requirements 'enable consumers to distinguish between domestic and imported products and that this enables them to assert any prejudices which they may have against foreign products'.[25]

48. All of this means that Article 39(2) should therefore be understood as laying down additional conditions for the adoption of measures requiring the indication of the country of origin or the place of provenance. The object of this provision is indeed to ensure a fair balance between the two objectives pursued by regulation No 1169/2011 of first ensuring that consumers receive appropriate information to enable them to make informed, safe, healthy and sustainable choices and, second, to make sure that the freedom of movement is respected in matters of foodstuffs. These conditions are intended to restrict the justifications that may be put forward in support of such a measure and to impose a stricter link of proportionality between the two.[26]

21 See Article 4(2) and, to this effect, recitals 16 to 18. Since that provision lays down a general principle of food law, I understand it as being addressed to the Member States, when they make use of Article 39, as well as to the Commission, when it makes use of the power delegated to it by the Union legislature in Article 10(2) to amend the list of additional compulsory particulars.

22 This term might be accordingly understood as referring to the physical, nutritional, organoleptic and, in particular, taste-related attributes of a foodstuff.

23 As for Article 4(2), the latter appears in Chapter II of Regulation No 1169/2011, which is devoted, as its title indicates, to the general principles of food information. As this provision lays down a general principle of food information, the rule that it establishes may be subject to exceptions.

24 In so far as national measures imposing an obligation to provide information on the origin or provenance of goods apply without distinction to all goods, they do not constitute direct discrimination but measures which may have an effect equivalent to a quantitative restriction. See, to that effect, judgment of 25 April 1985, *Commission* v *United Kingdom* (207/83, EU:C:1985:161, paragraph 17). In the present case, the contested decree does not apply to products processed outside the Union. However, the Court has ruled that 'the application of … national measure[s], may also have effects on the free movement of goods … even if restricted to domestic producers', since it encourages the purchase by domestic processors of locally produced goods, in this case, milk. See, to that effect, judgment of 7 May 1997, *Pistre and Others* (C-321/94 to C-324/94, EU:C:1997:229, paragraph 45).

25 Judgment of 25 April 1985, *Commission* v *United Kingdom* (207/83, EU:C:1985:161, paragraph 17).

26 For example, while Article 4(2) of Regulation No 1169/2011 provides that, when considering the need for mandatory food information, Member States are only expected to take account either of a widespread need on the part of the majority of consumers for certain information to which they attach significant value or of any generally accepted benefits to the consumer, in the specific case where that mandatory information is the country of origin or the place of provenance, Member States need to also provide evidence that the majority of consumers attach significant value to the provision of that information.

49. Reverting now to the provisions of Article 39, it follows in turn that Article 39(1) sets out the grounds of general interest, which may justify national measures imposing additional particular requirements for a particular category of foodstuffs. However, so far as indications relating to the place of origin are concerned, Article 39(2) imposes two more restrictive conditions, namely, first, the existence of an established link between certain qualities of the food concerned and its origin or provenance and, second, the fact that a majority of consumers attach significant value to the provision of that information. [27]

50. Having regard to the wording, structure and specific objective pursued by Article 39(2), I therefore take the view that the first and the second criteria are distinct and cumulative. [28] In particular, the requirement of the existence of a proven link between the qualities of the food and its origin or provenance cannot be satisfied solely by reference to purely subjective elements relating to the importance of the connection which the majority of consumers attach to this feature.

51. This conclusion is not called into question by the arguments put forward by the French and Italian Governments according to which, if Article 39(2) were to be interpreted as laying down two distinct conditions, that provision would be deprived of any useful effect (*effet utile*), in particular since the only national measures that could meet these two conditions will come up against the exhaustive harmonisation achieved by Regulation No 1151/2012. [29]

52. Admittedly, by interpreting Article 39(2) as requiring not only that there must be a proven link between certain qualities of the food and its origin or provenance, but also that the majority of consumers attach significant importance to that information, the scope of that provision might seem rather limited. However, since that provision only applies to measures requiring the indication of the country of origin or place of provenance, it seems logical that this provision should be interpreted as having a limited scope. Nevertheless, contrary to the argument put forward by some parties, interpreting that provision as laying down two distinct conditions does not deprive this article of any useful effect (*effet utile*). Even though the bar has been set very high, it is not impassable.

53. As for the harmonisation achieved by Regulation No 1151/2012 on quality schemes for agricultural products and foodstuffs, the latter does not preclude the adoption of measures requiring the indication of the country of origin or the place of provenance. Although that regulation provides a uniform and exhaustive system of protection for qualified geographical indications used to designate products for which there is a specific link between their qualities and their geographical origin, [30] that harmonisation only covers the use of certain names to designate products. [31] This is not the case for the mandatory indication of the country of origin or the place of provenance.

54. In the light of the foregoing, I propose to answer the second question in the sense that Article 39(2) should be interpreted as setting out two separate criteria. Accordingly, the assessment of the first criterion relating to the existence of a proven link cannot be based on a purely subjective assessment relating to the importance of the association which the majority of consumers can

27 More precisely, these two conditions aim at preventing that national measures requiring the indication of the country of origin are based on consumers' prejudices relating to the alleged qualities of certain food products coming from certain countries, and at implicitly ruling out the possibility for a Member State to use any feature of the foodstuffs as a pretext for requiring the indication of the country of origin.

28 Admittedly, these two criteria must be read in combination, but only in the sense that not any quality for which there is a proven link with the origin or provenance of the food may justify the mandatory indication of the country of origin or place of provenance of foods, but only those which matter for consumers.

29 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 2012 L 343, p. 1).

30 See, to that effect, judgment of 8 September 2009, *Budějovický Budvar* (C-478/07, EU:C:2009:521, paragraph 114).

31 See, by analogy, the judgment of 8 May 2014, *Assica and Kraft Foods Italia* (C-35/13, EU:C:2014:306, paragraphs 29 to 31).

establish between the qualities of the food and its origin or provenance. Article 39(2) instead requires that the foodstuffs concerned which come from certain countries or places of provenance possess certain objective qualities or features which differentiate them from the same foodstuffs having another origin.

C. On the third question

55. By its third question, the referring court asks whether Article 39(2) of Regulation No 1169/2011 is to be interpreted as meaning that considerations relating to the resilience of the food to transportation and the risk of deterioration during transit may be taken into account when examining whether there is a proven link between certain qualities of that food and its origin or provenance for the purposes of the application of Article 39(2).

1. Admissibility

56. From the outset, it does not appear from the file transmitted to the Court that the French authorities referred to considerations relating to the resilience of milk to transportation to justify the contested decree when it was notified to the Commission prior to its adoption. Furthermore, in its written observations, the French Government put forward another explanation, namely that that decree was adopted 'in order to meet the strong expectation expressed by consumers in favour of labelling milk … after scandals such as that of horse meat being fraudulently used in place of beef' and 'the obligation to indicate origin would improve transparency and traceability along the food supply chain so as to combat food fraud more effectively and restore consumer confidence.'

57. However, it should be observed that questions referred to the Court for a preliminary ruling enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[32]

58. In the present case, the referring court does not appear to rule out the possibility that considerations regarding the resilience of milk to transportation may have been taken into account by the national legislature when it adopted that decree. Since the Court has no jurisdiction to interpret national law – and thus to determine whether the objectives pursued by the contested decree are indeed those envisaged in the question asked – I consider that the question should be regarded as admissible.

2. On the substance

59. In the light of my conclusion in regards to the second question referred, it should be recalled at the outset that Article 39(2) lays down two criteria for the adoption of a national measure requiring the indication of the country of origin or the place of provenance of the food by a Member State. According to the first criterion, such an indication might be adopted only if there is a proven link between certain qualities of the food and its origin or provenance.

60. Regarding the concept of 'qualities', as previously noted, that term refers to the characteristics of something, such as, in agronomy, the physical, nutritional, organoleptic and, in particular, taste-related features of a foodstuff.

32 See, for example, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25.)

61. In so far as Article 39(2) uses the expression 'certain qualities', without specifying what those characteristics may be, I consider that this provision applies to all cases in which a link between any of the characteristics of a foodstuff and its origin or provenance can be identified. In that context, the resilience of the food to its transportation might be considered as one of the qualities of that food. [33]

62. However, in order to fulfil the first criterion laid down in Article 39(2), there needs to be a link between the quality put forward by the referring court in its question, that is to say, the *resilience of the food to its transportation* on the one hand, and its origin or provenance on the other. So far as the latter criterion is concerned, such a quality is not, in general, specific to its origin. Thus, by way of example, in the case of certain specific fruits or vegetables, the production techniques used in cultivation may perhaps have an influence on their ability to withstand transportation. In the case of milk, however, its ability to withstand transport so that its quality is not compromised does not in modern circumstances, at least, vary according to the place of production. One may accordingly presume – certainly in the absence of any evidence to the contrary – that milk produced in France or milk produced in Belgium has the same capacity to withstand its transportation.

63. Admittedly, other qualities of the food, starting with its taste, might be affected by transportation. Since this transportation will take more or less time depending on the origin of the foodstuff, there may therefore be a link between its origin and some of its qualities. However, in order to meet the first criterion laid down in Article 39 – namely, for there to be a proven link between some qualities of that food and its origin or provenance – it must still be established that the transportation of a particular foodstuff presents objective risks to the deterioration of certain of its qualities. In the case of milk, given the second criterion, that alteration needs to affect some of its qualities that a majority of consumers value.

64. Additionally, Member States are required, when acting within the scope of Union law [34] and, therefore, when implementing Article 39 of Regulation No 1169/2011, to comply with the general principles of EU law, including the principle of proportionality. It follows from this that any measures which the Member States may adopt must be appropriate for attaining their objective and must not go beyond what is necessary to achieve that objective. This implies in particular that when there is a choice between several appropriate measures, recourse must be had to the least onerous. [35] Finally, it should be pointed out that national legislation is only appropriate for ensuring attainment of the objective relied upon if it genuinely reflects a concern to attain that objective in a consistent and systematic manner. [36]

65. In the case of milk, even if it is accepted that certain of its qualities might be affected by transportation, this seems to be only true when it is 'fresh' milk (either raw or pasteurised). To the extent that it appears from the file that the contested decree applies without distinction to all types of milk, both 'fresh' and 'UHT' milk, it would appear that it goes beyond what is necessary to achieve the objective put forward by the referring court.

66. If, nevertheless, it can be *scientifically* established that certain qualities, whether physical, nutritional, organoleptic or gustative, of milk, even UHT milk, is likely to be altered by its transportation, and if consumers attach importance to those specific qualities – as explained in the examination of the second question – the considerations relating to the resilience of the food to transportation and the risk of deterioration during transit might be taken into account.

33 Although there are hygiene and safety standards partially harmonised at a European level (maintenance of the cold chain, etc.) which are aimed at preserving some of their properties during transportation, not all foodstuffs have the same resistance to transportation.

34 See, in this sense, judgment of 1 December 2011, *Painer* (C-145/10, EU:C:2011:798, paragraphs 105 and 106).

35 See, for example, judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 165 and the case-law cited).

36 See, for example, judgment of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 52).

67. It is, of course, true that in the case of 'fresh' milk, the issue of its freshness is itself – to a greater or a lesser extent depending on the kind of milk concerned – linked to the distance travelled by the milk from production to market.[37] However, I cannot help observing in this context that Article 3-III of the contested decree provides that in the case of milk which has been produced in any other Member State apart from France the indication of origin may take the form 'Origin: EU'. By contrast, Article 3-IV states that where the milk or milk used as an ingredient in milk products has been collected, packaged or processed in one or more non-EU Member States, the indication of origin may take the form: 'Origin: Non-EU'.

68. In so far as the alternative provided for in those provisions is between the indication – 'France', 'EU' or 'Non-EU' – is insufficiently precise for consumers to assess – even indirectly – the distance travelled by the milk, it would seem that the contested decree is inconsistent with the objective advanced by the French Government by way of justification, namely, a desire to inform consumers about the risk of deterioration of the milk in the course of transit.

69. Specifically, it might be thought that the decree in its present form fails to pass the proportionality test in that it fails to attain the objective of informing consumers of a possible link between lengthy transportation of milk and the qualities of that milk in a consistent and systematic manner.[38] This is all the more so given that, according to Article 6 of that decree, dairy products legally produced in another Member State are not subject to the provisions of this decree. Thus, for example, cheese produced in Italy with German milk and subsequently marketed in France would be not concerned.

70. Since, however, the Court does not have jurisdiction under Article 267 TFEU to apply a rule of EU law to a particular case – and, by extension, to assess the validity of a national law by reference to such a rule – it is for the referring court alone to determine, in the light of any additional explanations put forward by the French Government, if the four conditions mentioned in point 64 of this Opinion are fulfilled.

71. In those circumstances, I propose to answer the third question that Article 39(2) should be interpreted as meaning that considerations relating to the resilience of the food to transportation and the risk of deterioration during transit may be taken into account when examining whether there is a proven link between some qualities of that food and its origin or provenance for the purposes of the application of Article 39(2), if, first, it is established that milk can be spoiled during transport, second, that alteration is likely to affect certain qualities of the milk that a majority of consumers value, third, such a requirement is simpler to implement than any other measure that could have been more directly related to the distance travelled or the time of transportation of the milk and, fourth, the objective of informing consumers of the risks to the qualities of foodstuffs associated with their transportation is pursued by the national measure in a consistent and systematic manner.

37 One may consider that the indication of country or place of origin is not necessarily the most accurate way of informing consumers about the distance travelled by the milk from production to market. If, for example, one takes the case of milk imported from Belgium to France, the distance between the area of production and the place of its consumption or further use may in some circumstances be shorter than in the case of some milk produced elsewhere in France. However, a requirement that the packaging supplies such particulars has the advantage of being simple to implement and probably less costly for business operators than any other alternative, such as a particular more directly related to the distance travelled by the milk, since that distance might vary according to distribution circuit.

38 See, for example, judgment of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 52).

D. On the fourth question

72. By its fourth question, the referring court asks whether the assessment of the criteria laid down in Article 39 of Regulation No 1169/2011 presupposes that the qualities of the food to be regarded as unique by reason of its origin or as guaranteed by reason of that origin and, in the latter case, whether the indication of origin or provenance should be more precise than an indication in the form 'EU' or 'non-EU', notwithstanding the harmonisation of health and environmental standards applicable within the European Union.

73. In that regard, as explained above in the answer to the second question, Article 39(2) lays down two distinct criteria relating, first, to the existence of a proven link between some properties of the food and its origin or provenance and second, to the need for Member States to provide evidence that the majority of consumers attach significant importance to that information.

74. Since the link between certain qualities of the food and its origin must be 'proven', the first criterion requires that foodstuffs with a certain origin usually possess some qualities that are specific to those origins. However, the wording of Article 39(2) neither requires those qualities to be unique in the sense that they should be specific to a unique country, nor is it necessary for the Member State requiring that indication to be one of the countries from which the foodstuffs possess such qualities.

75. However, in order for such a measure to comply with the principle of proportionality, as in essence stated in the second sentence of Article 39(2), not only do the majority of consumers need to attach significant importance to the specific qualities owned by the foods coming from certain countries or places, but they also need to be able to associate those qualities with certain countries or places. Otherwise, the indication of the country or place of origin would not fulfil its function, which is, as set out in Article 3(1) of Regulation No 1169/2011, to provide consumers with a basis on which to make an informed decision.

76. Regarding the degree of certainty which must be attached to the presence of these particular qualities in foodstuffs coming from a particular country or place of provenance, I consider it sufficient that it is established that the particular conditions of production, in particular, technical or climatic conditions which generally apply in the country concerned, are linked to such qualities. Accordingly, I believe that the qualities of the foods coming from a particular group of countries or geographic regions might be specific by reason of their origin without necessarily being guaranteed by reason of that origin.

77. Since those qualities may be the consequence of factors such as the climate, the soil properties or of the applicable production standards the indication of origin or provenance might be more precise than an indication in the form 'EU' or 'non-EU', notwithstanding the harmonisation of health and environmental standards applicable within the European Union.

78. Even where those qualities derive from the applicable production standard, harmonisation may, as in the present case, leave the Member States some discretion to adopt specific measures. Indeed, this harmonisation may not be exhaustive, as the present question suggests, but might only cover health and environmental issues, whereas the national standards applied may pursue other objectives, such as ensuring a certain degree of excellence for the food. In order to encourage a 'race to the top', consumers should be able to identify the origin of a foodstuff featuring a quality to which they attach significant value, when it is well established that certain Member States apply higher production standards.

79. Accordingly, when the particular qualities of the foodstuff are related to climatic factors or to the soil properties or the production standards applied, a Member State may, on the basis of Article 39(2), make it mandatory to indicate the country of origin in order to enable consumers interested in such properties to make an informed choice. However, if it turns out that the qualities of

the food sought by consumers are guaranteed by the application of fully harmonised production standards in the Union, a Member State could not require anything other than the 'EU/non-EU' indication. Indeed, a more precise indication would necessarily be of no use, and thus go beyond what is necessary, contrary to what is required by the principle of proportionality.

80. With regard to milk, even if the question does not relate specifically to that foodstuff, I am not entirely convinced that the harmonisation brought about by Union law fully accounts for all the conditions for milk production, which depends, inter alia, on the feed given to the cows as well as their overall welfare. Indeed, I note, for example, that Regulation No 178/2002, on which Lactalis bases its observations, merely sets out, as Article 1(2) of that regulation mentions, some general principles to be respected by the Member States. Similarly, Article 1(1) of Directive 98/58/EC [39] specifies that the latter only lays down minimum standards for the protection of animals kept for farming purposes. [40] Other statutory instruments, such as Regulation (EC) No 853/2004, [41] provide for the possibility for Member States to adopt derogating measures. [42] Moreover, at the hearing, the Commission confirmed that rules for milk production were not fully harmonised.

81. In the light of the foregoing, I believe that the fourth question should be answered in the sense that Article 39 of Regulation No 1169/2011 only requires that the qualities of the foods coming from a particular group of countries or geographic regions might be specific by reason of their origin without those qualities necessarily being guaranteed by reason of that origin. That provision does not necessarily preclude a Member State from imposing an additional mandatory indication relating to the place of production which is more precise than the mere indication of 'EU'/'non-EU', notwithstanding the harmonisation of health and environmental standards applicable within the European Union.

Conclusion

82. In light of the foregoing considerations, I propose that the Court answer the questions asked by the Conseil d'État (Council of State, France) as follows:

(1) Article 26 of 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 should be interpreted as having harmonised the conditions under which the indication of the country of origin or place of provenance of milk used as a final product or as an ingredient may be made mandatory by Member States. However, that provision does not preclude them from making that indication mandatory on the basis of Article 39 of that regulation where this is justified by considerations such as the protection of public health, the rights of consumers, the avoidance of fraud or the prevention of unfair competition and where the conditions laid down in that provision are fulfilled.

(2) Article 39(2) should be interpreted as setting out two separate criteria. Accordingly, the assessment of the first criterion relating to the existence of a proven link cannot be based on subjective elements relating to the importance of the association which the majority of consumers can establish between the qualities of the food and its origin or provenance, but requires that the

39 Council Directive of 20 July 1998 concerning the protection of animals kept for farming purposes (OJ 1998 L 221, p. 23).

40 Accordingly, I understand these rules as aiming to guarantee that the foodstuffs marketed within the Union have certain minimum qualities, rather than identical qualities.

41 Regulation of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55, and corrigendum OJ 2004 L 226, p. 22).

42 See Article 10(3) of Regulation No 853/2004.

foodstuffs concerned which come from certain countries or places of provenance possess certain objective qualities or features which differentiate them from the same foodstuffs having another origin.

(3) Article 39(2) should be interpreted as meaning that considerations relating to the resilience of the food to transportation and the risk of deterioration during transit may be taken into account when examining whether there is a proven link between some qualities of that food and its origin or provenance for the purposes of the application of Article 39(2), if, first, it is established that milk can be spoiled during transport, second, that alteration is likely to affect certain qualities of the milk that a majority of consumers value, third, such a requirement is simpler to implement than any other measure that could have been more directly related to the distance travelled or the time of transport of the milk and, fourth, the objective of informing consumers of the risks to the qualities of foodstuffs associated with their transportation is pursued by the national measure in a consistent and systematic manner.

(4) Article 39 of Regulation No 1169/2011 only requires that the qualities of the foods coming from a particular group of countries or geographic regions might be specific by reason of their origin without those qualities necessarily being guaranteed by reason of that origin. That provision does not necessarily preclude a Member State from imposing an additional mandatory indication relating to the place of production which is more precise than the mere indication of 'EU' /'non-EU', notwithstanding the harmonisation of health and environmental standards applicable within the European Union.