

Case C-881/19**Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

4 December 2019

Referring court:

Krajský soud v Brně (Česká republika) — Regional Court in Brno (Czech Republic)

Date of the decision to refer:

25 October 2019

Applicant:

Tesco Stores ČR a.s.

Defendant:

Ministry of Agriculture

Background to the main proceedings

The subject of the main proceedings is a dispute in which the applicant challenges the decision of the defendant that, by using the term ‘chocolate powder’ instead of the term ‘powdered chocolate’, as specified in Directive 2000/36/EC,¹ the applicant placed into circulation an inadequately or illegally labelled food, thereby breaching applicable national legal provisions.

Question referred

Should the rule set out in point 2(a) of part E of Annex VII to Regulation [1169/2011] be interpreted such that, with respect to a food intended for an end consumer in the Czech Republic, a compound ingredient listed in point 2(c) of part A of Annex I to Directive [2000/36/EC] may only be listed among the ingredients of the product without a precise specification of its composition if that compound ingredient is labelled precisely in line with the Czech language version of Annex I to Directive 2000/36/EC?

The provisions of primary law cited

Article 9(1)(b) and Article 18(1) and (4) of Regulation (EU) No 1169/2011 and point (2)(a) of part E of Annex VII thereto

Article 3(1) of Directive 2000/36/EC and point 2(c) of part A of Annex I thereto

Relevant national law

Pursuant to Paragraph 11(2)(a), point 3, of *Zákon č. 110/1997* (Law No 110/1997)² an operator of a food enterprise shall remove from circulation, without delay, insufficiently or incorrectly labelled food.

Brief presentation of the facts and main proceedings

- 1 The Státní zemědělská a potravinářská inspekce (inspektorát v Brně) (Czech Agriculture and Food Inspection Authority, Brno Inspectorate) ordered, on 27 May 2016: (i) that the applicant's products³ be recalled from the market, because their ingredients included the term 'chocolate powder', without an itemised list of ingredients being provided for this compound ingredient, as required by Article 9(1)(b) in conjunction with Article 18(1) and (4) of Regulation No 1169/2011⁴ and (ii) that further placement of those products on the market be prohibited.
- 2 On 1 June 2016, the applicant lodged an objection against the measures specified above, which the Czech Agriculture and Food Inspection Authority first granted, on 6 June 2016, revoking those measures. Subsequently, however, the central inspectorate of the Czech Agriculture and Food Inspection Authority reversed that decision of 6 June 2016, by its decisions of 2 February 2017, dismissing the applicant's objection and confirming those measures of 27 May 2016. The applicant's appeal against the decisions of 2 February 2017 was dismissed by the defendant's decisions of 21 April 2017.
- 3 The applicant filed an action against the defendant's decisions of 21 April 2017 before the Krajský soud v Brně (Regional Court in Brno, Czech Republic), which was dismissed by a judgment of 26 February 2019. On the basis of the applicant's administrative appeal on a point of law, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) by its judgment of 11 July 2019 set aside the judgment of the Krajský soud v Brně (Regional Court in Brno) of 26 February 2019 and referred the case back to the court.
- 4 At this stage of the proceedings, the Krajský soud v Brně (Regional Court in Brno) is submitting the above issue to the Court of Justice for a preliminary ruling. Even though it is bound by the legal opinion of the Nejvyšší správní soud (Supreme Administrative Court), it maintains (referring to the judgment of the Court of Justice in Case C-173/09 *Elchinov* and the resolution of the extended

chamber of the Nejvyšší správní soud (Supreme Administrative Court) of 8 July 2008, published under 1723/2008 Coll.NSS), that this fact does not prevent it from exercising the right embodied in Article 267 of the Treaty on the Functioning of the European Union.

Essential arguments of the parties to the main proceedings

- 5 The defendant maintains that, given that point 2(c) of part A of Annex I to Directive 2000/36/EC only defines the term ‘powdered chocolate’, but not ‘chocolate powder’, it is necessary, for the latter term, to provide an itemised list of the ingredients contained.
- 6 The applicant, on the other hand, believes that the exception set out in point 2(a) of part E of Annex VII to Regulation 1169/2011 applies to ‘chocolate powder’, as the contents of the term are identical to that of ‘powdered chocolate’, and synonymous terms must always be interpreted identically, in order not to result in legal uncertainty. Furthermore, all language versions of Directive 2000/36/EC are equally authentic.

Legal opinion of the Supreme Administrative Court

- 7 The Nejvyšší správní soud (Supreme Administrative Court) agrees with the applicant that it was permitted to use the designation ‘chocolate powder’ instead of the designation ‘powdered chocolate’. According to established case-law of the Court of Justice, all language versions of legal acts of the EU are equally binding (see paragraph 18 of the judgment of the Court of Justice of 6 October 1982 in Case C-283/81, *Srl Cilfit and Others v Ministry of Health and Lanificio di Gavardo SpA v Ministry of Health*, paragraph 13 of the judgment of 19 April 2007 in Case C-63/06, *UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos*, and paragraph 24 of the recent judgment of 13 September 2018 in Case C-287/17, *Česká pojišťovna, a. s., v WCZ, spol. s r.o.*). It is therefore necessary to clearly reject the idea that the labelling of chocolate products in the Czech Republic must exclusively be governed by the Czech version of Directive 2000/36/EC, whereas the labelling of such products in other Member States must be governed by their national language versions.
- 8 Such an idea would be in contravention both of the abovementioned case-law and, above all, of the principle of free movement of goods and the very purpose of harmonisation in the labelling of foods as internal market instruments. It is on those principles that Directive 2000/36/EC is indeed based (see recital 7 thereof). The labelling of chocolate products in the EU is fully harmonised (see paragraphs 29 and 45 of the judgment of the Court of Justice of the EU of 25 November 2010 in Case C-47/09, *European Commission v Italian Republic*) and the very purpose of harmonisation is to enable a producer or supplier to use, when importing a product from one Member State to another, the information it is already stating on its product in accordance with Directive 2000/36/EC, merely translating that

information into a language or languages understood by consumers in the Member State in which the products are to be marketed.

- 9 The applicant purchased its products from a supplier or producer that produced them either in Germany, where the German version of the Directive uses the term ‘*Schokoladenpulver*’, or in Poland, where the Polish version uses interchangeably both terms ‘*proszek czekoladowy*’ or ‘*czekolada w proszku*’. The applicant translated verbatim the German or the Polish term into Czech as ‘*čokoládový prášek*’ (chocolate powder), which it used on its products. The purpose of the harmonisation of the labelling of chocolate products is for the applicant to be able to proceed precisely thus.
- 10 An interpretation according to which a supplier or vendor, before starting to sell in the Czech Republic a chocolate product manufactured in another Member State, would first need to bring the labelling of the composition of the product into conformity with the Czech version of Directive 2000/36/EC is contrary to these principles. Such an interpretation would establish the assumption that only the Czech version of the Directive applies in the territory of the Czech Republic, that is, that a sort of a ‘Czech Directive 2000/36/EC’ applies here, which would be in direct contravention of the purpose of harmonisation of labelling and of the equality of language versions of directives, and would reinstate the condition prior to the establishment of an internal market.
- 11 Hence, it is not possible in general to concur with the opinion that individual language versions of the Annex to Directive 2000/36/EC represent the binding labelling of foods for individual Member States. After all, such binding language versions are not referred to in Regulation 1169/2011, which requires in Article 15(1) merely that mandatory food information is to ‘*appear in a language easily understood by the consumers of the Member States where a food is marketed*’. This gives the applicant the option to use the German or Polish name of an ingredient of an imported product that is compliant with Union law, simply translating it into Czech.
- 12 It is true that, in certain Member States, certain food labels are established and a translation to other languages may serve to confuse the consumer. In that case, however, such a divergence must be explicitly specified in all language versions. Regulation 1169/2011 leaves room for such a solution in Article 17(2) and (3). Directive 2000/36/EC uses this possibility in relation to a specific designation of certain products in English, as it takes over the national definition of the term ‘milk chocolate’ in Annex I, part A, point 4(d). That specific national regulation is, however, mentioned in all language versions of the Directive, and not only the English one. If in the Czech Republic purely the term ‘powdered chocolate’ was supposed to be used, for example because the term ‘chocolate powder’ would be confusing for Czech consumers for some reason, it should be stipulated similarly.
- 13 The abovementioned judgment of the Court of Justice of 14 June 2017 in Case C-422/16 merely confirms those conclusions. In Regulation 1308/2013, to which

the case pertained, the Union legislator took a path entirely different from that taken in Directive 2000/36/EC, as it explicitly set out in the Annex to the Regulation trade names for individual types of products which are to be used in individual countries for marketing. The Regional Court quoted paragraph 36 of the judgment, which pertained to the implementing Decision of the Commission 2010/791 listing the products referred to in the second subparagraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007. That Commission Decision, admittedly, also contains a list of products concurrently listing various national names for various dairy products, with respect to which the Court of Justice stated in that paragraph that it contains products which have been identified by the Member States as meeting the criteria laid down in Regulation 1308/2013, and that the names of the products at issue are listed according to their traditional use in the various languages of the Union. Hence, the Court of Justice confirmed only that it is admissible for different languages to use various traditional labels for dairy products which may not necessarily correspond to one another.⁵

- 14 That judgment of the Court of Justice shows that, if various linguistic specifics and various local names traditional in the given Member State are to be taken into account in national languages in the use of harmonised names, this will not follow solely from one specific language version of a provision, but rather, from a multilingual table or list that will be contained in every language version of the provision. If a French producer wanted to import a product to the United Kingdom for which the French part of the table uses the term ‘*crème de riz*’, it cannot simply translate it into English as ‘*rice cream*’ or ‘*rice spray cream*’, as the English part of the table of binding names does not use such terms.
- 15 Hence, the applicant was not obliged to ascertain what name the Czech version of the Directive uses and adapt to it the designation of the ingredients for distribution in the Czech Republic; it sufficed to translate the term into Czech. The term it used, ‘chocolate powder’, corresponded word-for-word to the German and Polish terms used in the Directive, and it cannot be found to be incomprehensible, confusing, or even misleading for the Czech consumer (see the requirements on fair information practices stipulated in Article 7(1) and (2) of Regulation 1169/2011). Proceeding otherwise would mean pure formalism that in no way serves to protect consumers, that would call into question the level of harmonisation attained in the labelling of chocolate products on the internal market of the European Union, would pose a threat to the smooth functioning of the internal market in the sphere of chocolate products (see Article 1(1) of Regulation 1169/2011), and would run contrary to the repeatedly mentioned principle of equality of language versions of Union legal provisions.
- 16 Hence, the present case is one of *acte éclairé* that does not require the submission of the matter to the Court of Justice for a preliminary ruling.

Legal opinion of the Regional Court in Brno

- 17 First and foremost, standard case-law of the Court of Justice pertaining to a resolution of discrepancies between language versions of Union provisions does not apply to the matter at hand, because there is no discrepancy between the language versions of Directive 2000/36/EC.⁶ The language versions fulfil the function of a list of binding names of foods in the relevant official language. The Court infers that fact: (i) from a comparison of different language versions of Directive 2000/36/EC; (ii) from the rule contained in Article 3(1) of Directive 2000/36/EC, according to which the names of food products specified in Annex I are binding; and (iii) from the requirement to provide information about ingredients in a language easily understood by the consumers of the Member State where a food is marketed (see, for example, Article 15(1) of Regulation 1169/2011).
- 18 A comparison of language versions shows that the annex in question clearly lists names typical for the market in the given Member State, many of which cannot be strictly translated (for example, the English term ‘family milk chocolate’ or the suffix ‘vermicelli’ used in many different language versions). In the case of ‘powdered chocolate’, this is evident in particular in the case of the Dutch term ‘gesuikerde cacao’ which, if translated, would most likely correspond to a product defined in Annex I, part A, point 2(d) in the eyes of consumers from other Member States. The fact that different language versions feature a different number of equivalent names for the product specified in Annex I, part A, point 2(c) is absolutely essential in a comparison of language versions. Some language versions use only one name, some two, and the Dutch version even uses three. It is therefore apparent that they are not mere translations — language mutations, but rather, independent lists of binding names in each official language, that is to say, prescribed for products intended for consumers of that particular Member State in which the official language is used.
- 19 Defining binding names of foods is generally (as well as specifically, in Article 3(1) of Directive 2000/36/EC) based on two rules. The first is the obligation to use the prescribed name solely for foods that correspond to the definition set in the given legal provision. The other rule is the obligation to use, for foods that correspond to a definition stipulated in a legal provision, only and exclusively the name under which the food is defined in the legal provision concerned. Essentially, the legal opinion of the Supreme Administrative Court denies this second rule, as it allows for the use of an unspecified range of potential names for a defined food based on the language version and translation option the producer of the food chooses as its label.
- 20 Ultimately, this interpretation may lead to absurd consequences, as in that case it would only be possible with great difficulty to find out what those binding names are. Producers and vendors cannot use them for other products, even though they may not necessarily be aware that such names are included among binding names. At the same time, however, if they are aware of that fact, they can use them as names for compound ingredients without specifying the compositions of such compound ingredients. In that case, of course, consumers may not have any

inkling that an ingredient is a compound ingredient or what specific ingredient it is, since they will not find its definition anywhere unless they identify, by gradually stricter or looser translations into individual official languages of the European Union, the language version of Directive 2000/36/EC which defines the food in the given language. That is the case of the term 'chocolate powder', whose definition is not included in the Czech language version of the Directive.

- 21 Even if a producer were permitted to use translations only from those languages that have a certain relationship to the food product (for example, products that were made in the Member State to whose language version the translation of the compound ingredient used corresponds), such a rule would defy the requirement that clear information about a product's composition be provided to consumers. This would require consumers to first find out the place of production, become acquainted with the applicable language version of Directive 2000/36/EC, and obtain a translation thereof (or, as the case may be, all possible translations). Given that all products defined under point 2 of Annex I, part A, are to a significant extent similar (in principle, they are products falling within a single category), it is definitely not self-evident that a Czech consumer, having become acquainted with Directive 2000/36/EC for that purpose, will identify the term 'chocolate powder' with a product defined as 'powdered chocolate' (rather than, for example 'cocoa powder' or 'sweetened cocoa powder'). He would have to embark on a series of non-trivial considerations, in order to reach the conclusion that it is probably a translation of a term defined in another language version of Directive 2000/36/EC, without having any guarantee, however, that that is indeed the case. Furthermore, it would probably not be evident to producers and vendors which possible names they must avoid in labelling foods other than those defined in the Directive.
- 22 Furthermore, use of names other than binding names misleads not only a well-informed consumer but also a consumer who has no intention of becoming acquainted with Union legislation in greater detail for any reason. Even people who are not familiar with the definition set out in Directive 2000/36/EC can, at the very least, proceed on the assumption that there is a certain legal reason for not specifying the ingredients of a compound ingredient of a specific product, and may believe that the reason is the existence of a legal definition of the compound ingredient concerned [as stipulated in point 2(a) of part E of Annex VII to Regulation 1169/2011]. If, however, a compound ingredient is not defined, such as is the case with 'chocolate powder', its composition may not correspond to the requirements set in point 2(c) of part A of Annex I to Directive 2000/36/EC. In that case, a consumer, convinced that he is consuming a food with an approved content (that is, compliant with certain criteria), may be consuming an entirely different food (for which there are no criteria in legislation). Insisting on adherence to binding names may, indeed, be seen as formalism, but not self-serving formalism.
- 23 Facilitation of the free movement of cocoa and chocolate products cannot be viewed solely from the point of view of the producer or trader, effectively leaving

consumer protection up to an ad hoc assessment of whether a product name may be confused with another. If this aspect sufficed, the rule stipulated in Article 3(1) of Directive 2000/36/EC would be entirely superfluous.

- 24 The Regional Court continues to maintain that the labelling of a food (or an ingredient thereof) that is intended for consumers in a specific Member State must respect the binding names of cocoa and chocolate products specified in the applicable language version of Annex I to Directive 2000/36/EC that corresponds to a language easily understood by consumers of the given Member State. Hence, in the case of foods intended for consumers in the Czech Republic, the binding designation stipulated in the Czech language version of Annex I to Directive 2000/36/EC must be used. Only when such a designation is used for a compound ingredient is it also possible to apply the rule set out in point 2(a) of part E of Annex VII to Regulation 1169/2011 (that is, not to list the ingredients of a compound ingredient).
- 25 In the Court's opinion, the rules stipulated in Article 17(2) and (3) of Regulation 1169/2011 by contrast apply to situations when the content of food products are not fully harmonised and binding names have not been adopted for those products at Union level. That is not the case in respect of the products defined in Directive 2000/36/EC, having regard to Article 3(1) of the Directive. Hence, the exception stipulated in point 4(d) of part A of Annex I to the Directive is not an example of the application of those provisions of Regulation 1169/2011, but rather, an independent legislative exemption for the United Kingdom and Ireland from the rule set out in Article 3(1) of the Directive in relation to the products listed in Annex I, part A, point 4(d) and point 5.
- 26 Even though the non-existence of a table of all the names, which would be identical in all language versions (where the function of a list of binding names in the various official languages used in individual Member States is performed by the specific language version of the Directive), is not the most appropriate legislative solution, it does not constitute grounds for relaxing the rule set out in Article 3(1) of Directive 2000/36/EC and for reducing the standard of consumer protection. It is true that, in this regard, the applicable rules differ from the method of regulation contained in the abovementioned Commission Decision 2010/791/EU. The decision supports the fact, however, that the stipulation of a separate binding sales name for each Member State is no exception in Union food law. The same legislative technique of stipulating binding names for food products, as in the case of Directive 2000/36/EC, was used, for example, in Directive 2001/113,⁷ whose language versions stipulate binding names of defined products for individual official languages.
- 27 For the same reason, the judgment of the Court of Justice of 14 June 2017 in Case C-422/16 does not address the method of regulation set out in Directive 2000/36/EC; nevertheless, it is possible to infer therefrom the consequences of the adoption of a list of binding names of products for individual Member States and hence the impossibility of using synonyms or translations of binding names.

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- ¹ Directive 2000/36/EC relating to cocoa and chocolate products intended for human consumption ('Directive 2000/36/EC').
- ² Zákon č. 110/1997 Sb., o potravinách a tabákových výrobcích a o změně a doplnění některých souvisejících zákonů (Law No 110/1997 on food and tobacco products and amending and supplementing certain related laws), version applicable until 6 September 2016.
- ³ Monte, mléčný dezert čokoládový s lískovými oříšky (chocolate milk dessert with hazelnuts) 220g, Monte mléčný dezert čokoládový (Monte chocolate milk dessert) 100g, and Monte drink mléčný nápoj čokoládový s lískovými oříšky (Monte drink chocolate milk drink with hazelnuts) 200ml.
- ⁴ Regulation No 1169/2011, on the provision of food information to consumers, 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 ('Regulation 1169/2011').
- ⁵ Here, specifically, no English name corresponded to the French term "*crème de riz*", because no term like "*rice cream*" or "*rice spray cream*" was listed in the English part.
- ⁶ Furthermore, the Nejvyšší správní soud (Supreme Administrative Court) does not premise any means of interpretation that would remove such a discrepancy within the framework of a coherent interpretation.
- ⁷ Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption.