

**Case C-595/21**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

27 September 2021

**Referring court:**

Bayerisches Verwaltungsgericht Ansbach (Germany)

**Date of the decision to refer:**

22 September 2021

**Applicant:**

LSI – Germany GmbH

**Defendant:**

Freistaat Bayern

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**Subject matter of the main proceedings**

Food law – Regulation No 1169/2011 – Article 17(5), read in conjunction with point 4 of Part A of Annex VI – Interpretation of the term ‘name of the product’

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Is the term ‘name of the product’ in point 4 of Part A of Annex VI to Regulation (EU) No 1169/2011 to be interpreted as being synonymous with the ‘name of the food’ within the meaning of Article 17(1) to (3) of that regulation?
2. If Question 1 is answered in the negative:

Is the ‘name of the product’ the name under which the food is offered in trade and in advertising and is generally known to consumers, even if it is not the name of the food but the protected name, brand name or fancy name within the meaning of Article 17(4) of Regulation (EU) No 1169/2011?

3. If Question 2 is answered in the affirmative:

Can the ‘name of the product’ also consist of two components, one of which is a generic name or term protected under trade mark law which is not related to the individual food and is supplemented, for each of the individual products, by an additional element (as the second part of the name of the product) which specifies the food in question?

4. If Question 3 is answered in the affirmative:

Which of the two components of the name of the product is to be taken as the basis for the purposes of the additional indication pursuant to point 4(b) of Part A of Annex VI to Regulation (EU) No 1169/2011 where the two components of the name of the product are printed on the packaging in different sizes?

#### **Provisions of European Union law relied on**

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, 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), recital 18, Article 17 and point 4 of Part A of Annex VI

Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1), point 10 of Article 2 and Article 54(1) and (2)(b)

Charter of Fundamental Rights of the European Union, Article 16

#### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The applicant produces the product distributed under the trade name ‘BiFi The Original Turkey’ and places it on the market as a pre-packaged foodstuff via the retail trade. Palm fat and rapeseed oil are used in the production process. ‘BiFi

The Original’ is a word/figurative mark under German trade mark law and a figurative mark under EU law.

- 2 The food control authority objected to the labelling of the food and issued a decision on 7 January 2019 ordering, inter alia:

‘The [applicant] is prohibited from placing the product bearing the name [“]Geflügel-Minisalami mit pflanzlichem Fett und Öl[”] on the market under the product name [“]BiFi 100% Turkey[”] indicated in the principal field of vision without any indications of the ingredients used as a substitute in close proximity to the name of the product using a font size which has an x-height of at least 75% of the name of the product and which is not smaller than the minimum font size required in Article 13(2) [of Regulation No 1169/2011] ... .’

- 3 The applicant brought an action against that decision before the referring court.
- 4 The applicant changed the labelling in the second quarter of 2019. Since then, the declaration in the principal field of vision on the front of the packaging has read ‘BiFi The Original’ and, next to it or below it, depending on the size of the packaging, ‘Turkey’. A picture of a turkey depicted in black appears above the word ‘Turkey’. On the label on the back, the food is referred to as ‘Geflügel-Minisalami mit Palmfett und Rapsöl’ [poultry mini salami with palm fat and rapeseed oil] before the list of ingredients in each case. ‘BiFi’, ‘The Original’ and ‘Turkey’ have different font sizes, with ‘BiFi’ being written in the largest font and ‘The Original’ in the smallest.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 5 The prohibition imposed in the contested decision is based on Article 54(1) and (2)(b) of Regulation No 882/2004. The prerequisite for ordering a prohibition on the placing of a food on the market is ‘non-compliance’ within the meaning of point 10 of Article 2 of Regulation No 882/2004. In the present case, non-compliance with the food-law provision of Article 17(5) of Regulation No 1169/2011, read in conjunction with point 4 of Part A of Annex VI thereto, enters into consideration. The criteria for such non-compliance are met in the case of the food at issue. An average consumer who is reasonably well-informed and reasonably observant and circumspect (see judgment of 16 July 1998, *Gut Springenheide and Tusky*, C-210/96, EU:C:1998:369, paragraph 31) would expect salami to be made with animal fat. In the present case, that animal fat was substituted by vegetable fat (specifically palm fat and rapeseed oil).

### **Questions 1 and 2**

- 6 The decisive factor for the purposes of the specific form taken by the labelling pursuant to Article 17(5) of Regulation No 1169/2011, read in conjunction with point 4 of Part A of Annex VI thereto, is how the term ‘name of the product’ in point 4 of Part A of Annex VI is to be interpreted.

- 7 The applicant takes the view that the ‘name of the product’ is synonymous with the name of the food within the meaning of Article 17(1) of Regulation No 1169/2011. By contrast, the defendant takes the view that the ‘name of the product’ and the name of the food within the meaning of Article 17(1) are in principle two distinct legal concepts. It submits that the ‘name of the product’ can be the name of the food, but can also be a fancy name or a brand name pursuant to Article 17(4) of Regulation No 1169/2011. The referring court takes the view that it is not possible clearly to determine which of those interpretations is correct or how the term is to be interpreted.
- 8 The **wording** is open to both interpretations. If the literal meaning of the term ‘name of the product’ is considered, it refers, on a natural reading, to the designation commonly used to refer to the product in order to distinguish it from others. However, this could be both the name of the food within the meaning of Article 17(1) of Regulation No 1169/2011 and another name under which the food is offered to consumers in trade and in advertising and is generally known to consumers, including a brand name or fancy name within the meaning of Article 17(4) of the regulation.
- 9 The **scheme** of Regulation No 1169/2011 does not provide any clear indications either. Accordingly, on the one hand, Article 17(5) of Regulation No 1169/2011 might militate in favour of understanding the ‘name of the product’ as the ‘name of the food’ within the meaning of Article 17(1) of the regulation, as it states that specific provisions on the name of the food are laid down in Annex VI. On the other hand, it also states that particulars that are to ‘accompany it’, that is to say, in addition to the name of the food, are laid down in Annex VI. By contrast, the heading of Part A of Annex VI, in turn, suggests rather that the name of the product and the name of the food mean the same thing, since it refers to ‘particulars accompanying the name of the food’ to describe the content of Part A: this appears to establish a connection with the name within the meaning of Article 17(1) of the regulation.
- 10 Since the recitals of Regulation No 1169/2011 do not contain any specific statements about point 4 of Part A of Annex VI to that regulation, it is also difficult to make any statements about the **spirit and purpose** of the provision. It cannot be inferred from either Article 17(5) of the regulation or Annex VI thereto that the provision serves to protect consumers from being misled, as is undoubtedly the case with Article 7 of the regulation. By using a protected name, brand mark or fancy name within the meaning of Article 17(4) of Regulation No 1169/2011, the food business operator in a certain way diverts attention from the name of the food within the meaning of Article 17(1), since he or she usually advertises with the name within the meaning of Article 17(5) and that name is more prominent in the minds of consumers than the name of the food within the meaning of Article 17(1) to (3). Therefore, point 4 of Part A of Annex VI to Regulation No 1169/2011 could serve to create transparency and inform the consumer by ensuring, at least in the cases of point 4, that information on substituted components or ingredients appears on the packaging in a size similar

to that of the name pursuant to Article 17(4) of the regulation, thereby guaranteeing that consumers are adequately informed. The question of whether a component or ingredient has been substituted by another component or ingredient is most likely also information in which the majority of consumers have a strong interest within the meaning of recital 18 of the regulation. This would mean that the name of the product is not synonymous with the name of the food within the meaning of Article 17(1) of Regulation No 1169/2011.

### ***Question 3***

- 11 If Question 1 is answered in the negative and Question 2 in the affirmative, the question arises as to what the ‘name of the product’ is in this specific case, since the applicant places a wide variety of products on the market under the trade mark ‘BiFi’, which is supplemented in each case by an additional element designating the food concerned.
- 12 Since, like the rest of Regulation No 1169/2011, point 4 of Part A of Annex VI does not contain any statement as to the meaning of ‘name of the product’, it also does not contain any statement as to whether it is possible for there to be a name of a product composed of a generic term and a clarifying element tailored to the specific product. Furthermore, since point 4 of Part A of Annex VI to Regulation No 1169/2011 requires that, in order for the labelling obligation laid down therein to be triggered, a component or ingredient of the specific food has been substituted, the determination of the name of the product must be based solely on that specific food. If the name under which it is offered in trade and in advertising and is generally known to consumers consists of several components, it is precisely that name that is the name of the product in that specific case. Accordingly, there is good reason to assume that the name of the product can be composed of two or more components.

### ***Question 4***

- 13 If Question 3 is answered in the affirmative, the question further arises as to which part of the name of the product must be taken as the basis for the size of the supplementary indications prescribed in point 4(b) of Part A of Annex VI to Regulation No 1169/2011.
- 14 Various interpretations are conceivable in that respect. On the one hand, the component of the name of the product with the largest font size could be taken into account for that purpose. That interpretation would be the most suitable for achieving the objective of informing the consumer. On the other hand, the font size of the component printed in the smallest font on the packaging of the food could be taken as the basis. An argument militating in favour of that approach would be that the encroachment on the food business operator’s freedom to conduct a business (Article 16 of the Charter of Fundamental Rights of the European Union) as a result of such a labelling obligation would thereby be kept as small as possible. Finally, the font size of the component of the name of the

product which describes the food more precisely and does not constitute a generic name or trade mark could also be taken as the basis.

WORKING DOCUMENT